

CITATION: Challans v. Timms-Fryer, 2017 ONSC 1300
DIVISIONAL COURT FILE NO.: 151/16
DATE: 20170227

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
SACHS, NORDHEIMER & SPIES JJ.**

BETWEEN:

ANDREW CHALLANS

Applicant

– and –

JUSTIN BRODIE TIMMS-FRYER,
AMHERSTBURG POLICE SERVICE,
OFFICE OF THE INDEPENDENT
POLICE REVIEW DIRECTOR and
ONTARIO CIVILIAN POLICE
COMMISSION

Respondents

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)
) *A. Bradie*, for the applicant
)
)

)
)
) J. Timms-Fryer in person
)

) *I. Johnstone & A. Sinclair*, for the
) respondent, Amherstburg Police Service
)

) *M. Saksznajder*, for the respondent, Office of
) the Independent Police Review Director
)

) *B. Cowan*, for the respondent, Ontario
) Civilian Police Commission
)

) **HEARD at Toronto:** February 16, 2017
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NORDHEIMER J.:

[1] This is an application for judicial review of a decision of the Ontario Civilian Police Commission (“OCPC”) dated October 3, 2015, that allowed an appeal from the decision of a Hearing Officer, conducting a discipline hearing, pursuant to the *Police Services Act*, R.S.O. 1990, c. P.15, that dismissed certain charges against the applicant.¹ The OCPC ordered that a new hearing be held. After hearing from the applicant, and from the Amherstburg Police Service, which

¹ *Timms-Fryer and Amherstburg Police Service and Challans*, 2015 CanLII 69340 (ON CPC)

supported the applicant's position, the court dismissed the application with reasons to follow. I now provide those reasons.

[2] I should, at the outset, note that the respondent, Justin Brodie Timms-Fryer, appeared in person at the hearing. However, prior to the hearing, counsel on behalf of Mr. Timms-Fryer had advised the parties and the court, by letter, that he would not be filing any material, and that Mr. Timms-Fryer agreed with, and adopted, the submissions made by the Office of the Independent Police Review Director ("OIPRD").

[3] The applicant is a police officer with the Amherstburg Police Service. On December 20, 2010, Mr. Timms-Fryer and his friends were driving home after an evening out. Mr. Timms-Fryer was in the front passenger seat. As they were driving, the vehicle was pulled over by the applicant. An interaction ensued between the applicant and Mr. Timms-Fryer, at the conclusion of which Mr. Timms-Fryer was charged with assaulting police and resisting arrest. Mr. Timms-Fryer was subsequently acquitted of those charges.

[4] Mr. Timms-Fryer made a complaint to the OIPRD regarding the conduct of the applicant. The OIPRD conducted an investigation into Mr. Timms-Fryer's complaint, following which a disciplinary hearing was directed. The Notice of Hearing alleged that the applicant unlawfully arrested Mr. Timms-Fryer, that he used unnecessary force against Mr. Timms-Fryer, that he acted in manner prejudicial to discipline, and that he used profane, abusive or insulting language.

[5] A Hearing Officer was appointed and a hearing was convened on November 6, 2012. The hearing proceeded over eight days, from late 2012 through to the end of 2013. Mr. Timms-Fryer was present at the hearing, but he was not represented by counsel. On May 12, 2014, the Hearing Officer rendered his decision in which he found the applicant not guilty of all of the charges.

[6] Mr. Timms-Fryer appealed the decision of the Hearing Officer to the OCPC, raising several grounds of appeal. On October 3, 2015, the OCPC released its decision allowing the appeal. The OCPC found that the Hearing Officer had failed to provide a minimum level of assistance to Mr. Timms-Fryer, as an unrepresented party, throughout the hearing, with the consequence that it precluded him from participating meaningfully in the proceedings. The OCPC found this to be a

breach of natural justice and procedural fairness, and determined that the only remedy was to order a new hearing.

[7] The conclusion of the OCPC, that the Hearing Officer had failed to provide a minimum level of assistance to Mr. Timms-Fryer, was based on the following:

- (i) the Hearing Officer did not confirm that Mr. Timms-Fryer was aware that he was entitled to be represented by counsel at the proceedings, or that he was waiving his right to legal representation;
- (ii) the Hearing Officer did not explain the roles of the parties at the proceeding or the process that would be followed, including the right of each party to call witnesses, introduce evidence, object to evidence adduced, cross-examine witnesses, and make submissions on all motions as well as at the end of the hearing;
- (iii) the Hearing Officer did not explain his role in the proceedings or explain the process that he intended to follow in terms of the conduct of the hearing;
- (iv) the Hearing Officer did not confirm that Mr. Timms-Fryer understood the process and his role in that process;
- (v) the Hearing officer did not invite Mr. Timms-Fryer to cross-examine any of the witnesses called at the hearing, save and except when the applicant gave evidence, but, even then, the Hearing Officer refused to give Mr. Timms-Fryer a reasonable amount of time to prepare any questions he might have wished to ask;
- (vi) the Hearing Officer did not ask Mr. Timms-Fryer whether he wished to call any witnesses or otherwise adduce any evidence; and
- (vii) the Hearing Officer failed to give Mr. Timms-Fryer a meaningful opportunity to make submissions at the conclusion of the evidence.

[8] The applicant offers two responses to the OCPC's conclusion. The first response involves the applicant's assertion that the OCPC erred in dismissing the motion, brought by the Amherstburg Police Service, to put fresh evidence before the OCPC regarding events that had happened "off the record" involving Mr. Timms-Fryer. In that regard, the Amherstburg Police Service had attempted to place before the OCPC three affidavits: one from the lawyer who had acted as the prosecutor at the hearing; one from the Hearing Officer himself; and one from the Chief of the Amherstburg Police Service, who had attended the hearing.

[9] The OCPC dismissed the Amherstburg Police Service's motion to adduce this fresh evidence. They concluded that the issue regarding procedural fairness could be determined on the basis of the record of the hearing. It should be noted that the OCPC had earlier dismissed a motion by Mr. Timms-Fryer, who also wished to put an affidavit before the OCPC regarding the same issue, a request that both the applicant, and the OIPRD, had opposed.

[10] I cannot find any fault in the conclusion, that the OCPC reached, regarding the motion to adduce fresh evidence. The proposed evidence failed to satisfy the very high hurdle for the admission of such evidence, that was established in *Re Keeprite Workers' Independent Union et al. and Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.) where Morden J.A. said, at p. 521:

Having just completed the exercise of examining, in this fashion, the evidence that was before the arbitrator I would express the view, which is in agreement with that of Pennell, J., that the practice of admitting affidavits of this kind should be very exceptional, it being emphasized that they are admissible only to the extent that they show jurisdictional error. I would think that the occasions for the legitimate use of affidavit evidence to demonstrate the exacting jurisdictional test of a complete absence of evidence on an essential point would, indeed, be rare.

[11] There is a reason why hearings, such as the one here, are conducted "on the record". It is to avoid disputes, later on, regarding what occurred before the tribunal or court, including when the proceeding is the subject of an appeal. It is to avoid the spectacle of warring affidavits being filed, as to what occurred outside of the formal proceedings, of the type that both Mr. Timms-Fryer, and the Amherstburg Police Service, attempted to file in this case. If any of the discussions occurred involving Mr. Timms-Fryer, as are alleged in these affidavits, then the contents of those discussions ought to have been repeated by counsel on the record, so that everyone had the opportunity to confirm, or refute, the contents of those discussions. None of that occurred in this case.

[12] The OCPC was correct to reject those proffered affidavits, and decide the issue on the record that was before it. I would also note, in passing, that the affidavit of the Hearing Officer would be inadmissible in any event. It would amount to what Stratas J.A. described as "an after-the-fact attempt to bootstrap his decision, something that is not permitted" – *Stemijon Investments Ltd. v. Canada (Attorney General)*, [2011] F.C.J. No. 1503 (C.A.) at para. 41.

[13] The second response is that the applicant, while acknowledging that the failings I have set out above in paragraph 7 are revealed on the record, contends that those failings ought not to have led the OCPC to order a fresh hearing, unless Mr. Timms-Fryer could establish actual prejudice to him arising from these failings. I am unaware of any authority that holds that a party, in the position of Mr. Timms-Fryer, must show actual prejudice arising from his denial of natural justice and procedural fairness, and neither the applicant, nor the Amherstburg Police Service, could point to any such authority. The applicant's contention is also contrary to the conclusion reached in *Figueiras v. York (Regional Municipality) Police Services Board*, [2013] O.J. No. 5911 (Div. Ct.) where this court said, at para. 51:

We also reject the notion that to establish a breach of duty of procedural fairness, an Applicant is obligated to provide the court with evidence of what he or she would have done if that obligation had not been breached.

[14] There is a reason why actual prejudice is not required to be shown, and that is because it would often be an impossible burden to meet. As the OCPC held in this case, it would amount to nothing more than speculation to attempt to determine what evidence might have been revealed, or what result might have been obtained, if Mr. Timms-Fryer had been given the opportunity to ask questions of the various witnesses, or to make submissions at the conclusion of the case.

[15] In any event, a breach of natural justice and procedural fairness carries with it inherent prejudice. It denies the party a meaningful role in the proceeding which is, after all, the purpose behind providing persons with procedural fairness. That purpose was set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 where L'Heureux-Dubé J. said, at para. 22:

I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[16] In that regard, it is important to remember that Mr. Timms-Fryer was a party to these proceedings. He was not just an observer. Section 83(3) of the *Police Services Act* expressly

makes a member of the public, who makes a complaint regarding a police officer, a party to the hearing in which the officer's conduct is to be examined. Mr. Timms-Fryer was, therefore, entitled to all of the same procedural rights as was counsel for the applicant.

[17] The reason for this is to ensure transparency in the complaints process, and to provide any member of the public, who makes a complaint that results in a hearing, with the assurance that his/her complaint has been fully and fairly adjudicated. As this court also said in *Figueiras v. York (Regional Municipality) Police Services Board*, at para. 43:

In a statutory regime that has transparency and public accountability as its fundamental purpose and where, in the legislation, there is no distinction between the procedural rights afforded to the officer and the procedural rights afforded to the complainant, natural justice and procedural fairness require that the complainant be afforded the same opportunities as the officer.

[18] In its decision, the OCPC set out, at para. 37, the minimum obligations that it found rested on a Hearing Officer in these circumstances:

A minimum level of assistance, to ensure meaningful participation by the unrepresented public complainant, would have required the Hearing Officer to do the following, on the record:

- Confirm whether the public complainant was aware that he was entitled to be represented by legal counsel at the proceedings and whether he was waiving the right to legal representation.
- Explain the roles of the parties at the proceeding and the process that would be followed. This would include the right of each party, including the public complainant, to call witnesses, introduce evidence, object to evidence adduced, cross-examine witnesses, and make submissions on all motions and at the end of the hearing.
- Explain the role of the adjudicator in the proceedings, including his role in relation to the unrepresented public complainant.
- Confirm that the public complainant understands the process and his role in it.
- Ask the public complainant, at the appropriate time, if he would like to call any witnesses.

- Ask the public complainant, at the appropriate time, if he would like to question each of the witnesses of the prosecution and the defence.
- Ask the public complainant if he would like to make submissions on all motions and at the end of the hearing

[19] I agree with the OCPC that these are the minimum requirements that must be met by a Hearing Officer when dealing with an unrepresented complainant. The Hearing Officer, in this case, failed to fulfill any of those requirements. The decision of the OCPC to order a fresh hearing, in those circumstances, was a reasonable one. Indeed, I would say it was the correct one.

[20] It is for these reasons that the application for judicial review was dismissed. Neither the OIPRD or the OCPC sought costs. Mr. Timms-Fryer was unrepresented and, as I earlier noted, simply adopted the submissions of the OIPRD. Consequently, he would not be entitled to any costs. Therefore, no order as to costs was made.


NORDHEIMER J.

I agree 
SACHS J.

I agree 
SPIES J.

Date of Release: February 27, 2017

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REASONS FOR JUDGMENT

NORDHEIMER J.

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