COURT OF APPEAL FOR ONTARIO

CITATION: Jacobs v. Ottawa (Police Service), 2016 ONCA 345
DATE: 20160510
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Laskin, Hourigan and Brown JJ.A.

BETWEEN

Constable Kevin Jacobs

Appellant

and

Ottawa Police Service (Chief of Police)
Mark Krupa (Public Complainant)
Ontario Civilian Police Commission

Respondents

and

Police Association of Ontario

Intervenor

W. Mark Wallace and Elizabeth Warren, for the appellant, Constable Kevin Jacobs

Ian J. Roland and Michael Fenrick, for the intervenor, Police Association of Ontario

Eric Granger and Lawrence Greenspon, for the respondent, Mark Krupa

Christiane F. Huneault, for the respondents Ottawa Police Service

Benson Cowan and Kathryn Chung, for the respondent, Ontario Civilian Police Commission

Heard: April 11, 2016

On appeal from the decision of the Divisional Court of the Superior Court of Justice (P.T. Matlow, T.R. Lofchik and M. Donohue JJ.), dated May 27, 2015, with reasons reported at 2015 ONSC 2240.

Hourigan J.A.:

[1] The appellant, Constable Kevin Jacobs, is a police officer employed by the respondent Ottawa Police Service. He was found guilty of misconduct under the *Police Services Act*, R.S.O. 1990, c. P.15 (the "*PSA*"), resulting from the arrest of the respondent, Mark Krupa. The respondent, the Ontario Civilian Police Commission (the "Commission"), affirmed the hearing officer's finding of guilt, and the appellant's judicial review application to the Divisional Court was dismissed.

[2] The discrete issue for determination on this appeal is the standard of proof applicable to a finding of misconduct under s. 84(1) of the *PSA*, which provides:

> If at the conclusion of a hearing under subsection 66 (3), 68 (5) or 76 (9) held by the chief of police, misconduct as defined in section 80 or unsatisfactory work performance is proved on clear and convincing evidence, the chief of police shall take any action described in section 85.

[3] The appellant and the intervenor, Police Association of Ontario, submit that s. 84(1) mandates a standard of proof that lies somewhere between a balance of probabilities and proof beyond a reasonable doubt, and that the hearing officer,

the Commission, and the Divisional Court erred in finding that the standard of proof is a balance of probabilities.

[4] The respondents take the position that the standard of proof for a finding of police misconduct is a balance of probabilities. They submit that "clear and convincing evidence" describes the quality of evidence generally required to meet the balance of probabilities standard in professional discipline matters and that this quality of evidence applies equally to police officers prosecuted under the *PSA.*

[5] In reaching its conclusion that the standard of proof in disciplinary hearings under the *PSA* is a balance of probabilities, the Divisional Court held that the existence of an intermediate standard of proof was rejected by the Supreme Court of Canada in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, and that it was bound by this decision. The Divisional Court declined to follow the Supreme Court's decision in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, on the basis that the court did not undertake any analysis of whether a higher standard of proof applied to disciplinary proceedings under the *PSA* or refer to any jurisprudence.

[6] In my view, the Divisional Court erred in relying on *McDougall* and in distinguishing the Supreme Court's remarks in *Penner*.

[7] In *McDougall*, the Supreme Court considered the civil standard of proof at common law in a civil claim alleging sexual assault. The main issue on appeal was whether a majority of the British Columbia Court of Appeal erred in finding that the trial judge misapplied the standard of proof in civil cases where allegations of morally blameworthy conduct have been made. *McDougall* did not purport to establish a universal standard applicable to statutory standards of proof. It is well-settled that it is within the authority of a legislature to create a standard of proof specific to a particular statute: *Stetler v. Agriculture, Food and Rural Affairs Appeal* (2005), 76 O.R. (3d) 321 (C.A.), at para. 79, leave to appeal refused (2006), 219 O.A.C. 400 (note) (S.C.C.). In my view, therefore, the Divisional Court erred in relying on *McDougall*.

[8] The Divisional Court also erred in declining to follow the Supreme Court's decision in *Penner*. There, the appellant made a complaint against two police officers under the *PSA* in relation to his arrest for disruptive behaviour in a courtroom. He also brought a civil action for damages arising from the same incident against the police officers, among others. The police officers were found not guilty of misconduct under the *PSA* and the Divisional Court ultimately upheld that finding. The respondents then filed a motion to dismiss the civil action on the basis of issue estoppel, taking the position that the disciplinary hearing finally determined the issues underpinning the civil action. That motion was successful in the Superior Court. This court dismissed an appeal of the motion judge's order.

[9] On further appeal to the Supreme Court, a majority of the court held that it would be unfair to apply the discretionary remedy of estoppel to bar the appellant's civil action because the appellant could not have reasonably contemplated that the officers' acquittal at the disciplinary hearing would be conclusive of the outcome of his civil action. As part of its analysis, the court addressed, at para. 60, the different standards of proof in civil actions and *PSA* hearings:

> As the Court of Appeal recognized, because the *PSA* requires that misconduct by a police officer be "proved on clear and convincing evidence" (s.64(10)), it follows that such a conclusion might, depending upon the nature of the factual findings, properly preclude relitigation of the issue of liability in a civil action where the balance of probabilities — a lower standard of proof — would apply. However, this cannot be said in the case of an acquittal. The prosecutor's failure to prove the charges by "clear and convincing evidence" does not necessarily mean that those same allegations could not be established on a balance of probabilities. Given the different standards of proof, there would have been no reason for a complainant to expect that issue estoppel would apply if the officers were acquitted…Thus, the parties could not reasonably have contemplated that the acquittal of the officers at the disciplinary hearing would be determinative of the outcome of Mr. Penner's civil action.

[10] *Penner* was binding authority on the Divisional Court and it erred in distinguishing it on the basis that all parties in that case accepted that clear and convincing evidence was a higher standard of proof. In fact, a review of the written record and the oral submissions in the Supreme Court shows that there

was no agreement on the appropriate standard of proof. Although counsel for the respondents consistently argued that the higher clear and convincing evidence standard was immaterial in the circumstances of the case, counsel for the intervenor, Canadian Police Association, argued that it was artificial to discuss a third standard in the light of the recent *McDougall* decision. In his reply, counsel for the appellant agreed that there was only one standard of proof in civil matters, citing the *McDougall* decision as conflating the standard of proof. Counsel thus retreated from the position taken in his factum that clear and convincing evidence is a higher standard of proof than a balance of probabilities. That concession, that *McDougall* determined that clear and convincing evidence is a standard within the balance of probabilities, was clearly rejected by the Supreme Court.

[11] I also cannot accede to the respondents' submission that the court's statement in *Penner* regarding the standard of proof under the *PSA* is *obiter dicta*. At para. 47, the court held that the parties' reasonable expectations regarding the scope and effect of the administrative proceedings are shaped by the text and purpose of the legislative scheme. Therefore, the finding on the standard of proof was central to the court's analysis of the reasonable expectations of the parties, which was the basis on which a majority of the court overturned the decision below.

[12] Counsel for the respondents fairly concede that if the Supreme Court determined the issue of the standard of proof under the *PSA* in *Penner*, the

appeal must be allowed and it is unnecessary to engage in a statutory interpretation of s. 84(1). In my view, we are bound by the Supreme Court's statement in *Penner* that the standard of proof in *PSA* hearings is a higher standard of clear and convincing evidence and not a balance of probabilities.

[13] I would grant the appeal and set aside the order of the Divisional Court dismissing the appellant's application for judicial review to quash the decision of the Commission. The matter is remitted to the Commission for further consideration in accordance with these reasons.

[14] If the parties are unable to agree as to costs, they may make brief written submissions.

Released: May 10, 2016 "DB"

"C. W. Hourigan J.A."

"I agree John Laskin J.A."

"I agree David Brown J.A."