COURT OF APPEAL FOR ONTARIO

CITATION: J.N. v. Durham Regional Police Service, 2012 ONCA 428
DATE: 20120621
DOCKET: C53887

Weiler, Blair and Rouleau JJ.A.

BETWEEN

J.N.

Applicant (Respondent)

and

The Durham Regional Police Service and
The Durham Regional Police Services Board

Respondents (Appellants)

David Migicovsky, for the appellants

Jonathan Shime and Megan Schwartzentruber, for the respondent

Charlotte Kanya-Forstner, Janet E. Minor and Sara Weinrib, for the intervener Attorney General of Ontario

David Rose and Stacey Nichols, for the intervener Canadian Civil Liberties Association

Heard: May 15, 2012

On appeal from the judgment of Justice J.P.L. McDermot of the Superior Court of Justice dated May 10, 2011, with reasons reported at 2011 ONSC 2892, 106 O.R. (3d) 346.

BY THE COURT:

Facts

Background

[1] The respondent J.N. was required to obtain a police records check as part of an application for a media relations position with the Durham Catholic District School Board. J.N. submitted a Criminal Information Request ("CIR"), which included a Vulnerable Persons Search, to the Durham Regional Police Service (the "DRPS").

[2] The CIR form made it clear that the results of the search would "include all charges dealt with in court, including those where no convictions have been registered." J.N. was surprised to learn when the results were received, however, that the CIR included a reference to a withdrawn assault charge that she had faced several years earlier. The charge had arisen in the context of a family dispute involving J.N. and her siblings respecting the care of their father, with whom J.N. had been living and for whom she had been providing care-giving services. The siblings alleged that she had assaulted their father by striking him on the leg. J.N. denied the allegation, and on September 25, 2008, the charge was withdrawn at the request of the Crown, presumably for lack of evidence to support it.

Procedural Steps Taken by J.N.

[3] When J.N. received the CIR she took a number of steps to attempt to have the reference to the withdrawn charge removed from it.

[4] First, both she and her counsel wrote to the DRPS, requesting that reference to the withdrawn charge be removed. Unlike a number of other police services in Ontario,[1] the DRPS had an informal process in place by which this type of request would be received and considered by an *ad hoc* Committee. The process was governed by a Directive that permitted individuals to appeal the contents of their CIR and to make written submissions to the Committee, which would then make a decision in writing. The Directive provided that there was no further appeal from a decision of the Committee.

[5] J.N.'s request was denied.

[6] J.N. was unaware of the existence of the Directive when she made her original submissions. The DRPS letter refusing the request for review referred to the Directive but did not include a copy of it. Her counsel therefore wrote to the DRPS on May 19, 2009, asking for a copy of the Directive and requesting a reconsideration of the decision not to remove the reference to the withdrawn charge from J.N.'s CIR. In these submissions, counsel relied heavily on the decision at first instance in *Tadros v. Peel Regional Police Service* (2007), 87 O.R. (3d) 563 (S.C.). In that decision, the Superior Court had granted an injunction prohibiting the Peel Regional Police Service from disclosing information regarding withdrawn charges relating to Mr. Tadros.

---

[1] Susan Cardwell, the Manager of the Records Department for the DRPS, indicated in her affidavit that neither the Ottawa nor the Waterloo Police Service have an appeal process in place. She further indicated that the Toronto and the Peel Police Service have appeal processes in place, but that no specific criteria for review are listed.

[7] Although the Directive did not provide for an appeal, the DRPS treated J.N.'s request for a reconsideration as a complaint to the Chief of Police under the former s. 61 of the *Police Services Act,* R.S.O. 1990, c. P.15, relating to the "policies of or services provided by" the DRPS. On July 8, 2009, the Chief responded through his delegate, rejecting the "appeal" and providing written reasons for doing so. In those reasons the delegate noted that this Court had reversed the judge of first instance in the *Tadros* case: see *Tadros v. Peel Regional Police*, 2009 ONCA 442, 97 O.R. (3d) 212.

[8] On August 14, 2009, J.N. requested that the Chief's decision be reviewed by the Durham Regional Police Services Board, pursuant to the appeal procedures provided in the *Police Services Act*. The Board issued a decision on September 15, 2009, taking the position that its power to review was of a broader "policy and service" nature, and that it could not interfere with the results of the DRPS decision because the inclusion of the information on J.N.'s CIR raised issues of an "operational" rather than a policy nature. The Board indicated as well that it had reviewed the process for handling CIR requests and was satisfied that it struck a reasonable balance between protecting the vulnerable and respecting the privacy of applicants.

<u>J.N.'s Response</u>

[9] J.N. did not seek judicial review of any of these decisions. Instead, she brought an application before a judge of the Superior Court on February 24, 2010,

seeking an order in the form of an equitable remedy requiring that the reference to the withdrawn charge be removed from her CIR. She argued that the DRPS and the Board had violated a common law duty of fairness owed to her as well as her rights under s. 7 of the *Canadian Charter of Rights and Freedoms* by failing to provide an adequate process and effective remedy to remove the withdrawn charge from her CIR.

The Application Below

[10] The application judge quashed the decision of the DRPS refusing to remove the reference to the withdrawn assault charge. In addition, he ordered that J.N.'s CIR, and all of her future CIRs, be issued without reference to the withdrawn charge.

[11] The DRPS has since complied with that order.

Analysis

[12] The appellants submit that the appeal must be allowed because the application judge did not have jurisdiction to quash the decision of the *ad hoc* Committee, the Chief of Police, or the Board. They also argue that the application judge made errors in his analysis of the statutory scheme and duty of procedural fairness, as well as his determination that the respondent's right to security of the person under s. 7 of the *Charter* was infringed. We agree that the appeal must be allowed on the jurisdictional ground, and will not deal, therefore, with the appellants'

additional arguments, except to the extent necessary to understand the context for the jurisdictional decision.

[13] In the court below, J.N. raised a number of complaints about the process that evolved before the DRPS. Among them are the following: she did not have a copy of the Directive when she made her first request because no copy was available on the police service website and she did not know it existed; when she did obtain a copy it did not contain any guidelines as to the criteria to be considered by the *ad hoc* Committee upon receipt of a request to remove an entry in a CIR; there was nothing in the Directive to affirm that the Committee had taken into account the various factors that the DRPS affidavit indicated were to be taken into account by the Committee; she had a legitimate expectation that there would be a fair process in existence whereby discretion could be exercised to remove the reference of a non-conviction registration and no such process affording her procedural fairness and protection existed; she was never given the option of a public hearing under the *Police Services Act*; the Chief of Police did not follow the proper procedure under the Act, did not give proper reasons, and misconstrued the decision of this Court in *Tadros* which, while it dealt with the right of the police to retain non-conviction information and to distribute it with the consent of the applicant, did not deal with whether there must be a process for seeking removal of a non-conviction registration.

[14] In addition, J.N. contended that her rights under both ss.7 and 11(d) of the *Charter* – the rights to liberty and security of the person, and the right to be presumed innocent until proven guilty, respectively – were violated.

[15] Whether the legal effect of the *Tadros* decision, and the principles underlying it, mean that the law requires police services to put in place a process whereby an applicant may seek to have a non-conviction entry removed from his or her CIR and, if so, what the nature of the process is to be, are important questions that a court may well have to determine at some point. Respectfully, however, the application judge did not have the jurisdiction to address them in the forum in which they were presented to him.

[16] In Ontario, the procedure for attacking decisions of public administrative bodies is by way of judicial review under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1. Under ss. 6 and 7 of that Act, in the absence of urgency (not a factor here), an application for judicial review is to be made to the Divisional Court. The application judge here was not sitting as a judge of the Divisional Court; he was hearing an application purporting to be brought under rule 14.05(3)(g.1) of the *Rules of Civil Procedure* – a proceeding by application where the relief claimed is for a remedy under the *Canadian Charter of Rights and Freedoms*. In our view, the rule 14.05 application procedure was not open to J.N. in these circumstances because the substance of her claim is for judicial review of the administrative decision of a public statutory body: see *Bard v. Longevity Acrylics Inc.*, [2004] O.J.

No. 3597 (C.A.); *Canada Post Corp. v. C.U.P.W.* (1989), 70 O.R. (2d) 394 (H.C.J.), at pp. 397-398; *Koumoudouros v. Municipality of Metropolitan Toronto* (1982), 37 O.R. (2d) (H.C.J.), at p. 659. A court must have jurisdiction independent of rule 14.05 before it can consider the appropriate vehicle for bringing the matter forward, whether it be by action or application: see *Canada Post Corp*., at p. 397; *Halpern v. Toronto (City) Clerk*, [2000] O.J. No. 3213 (S.C.), at para. 10.

[17] Counsel for J.N. candidly concedes that if he were seeking to attack the decision of the Chief of Police or of the Board under the *Police Services Act*, he would have been required to do so by way of application for judicial review before the Divisional Court. He argues that he was not launching such an attack, however; instead, he was seeking to set aside the decision of the *ad hoc* Committee, a decision of a non-statutory body.

[18] There are several problems with this submission. First, we do not accept that the *ad hoc* Committee is a non-statutory body. It may not be a body created by statute or regulation itself; but it is an informal decision-making body created by the DRPS, which is a statutory body, and its decisions are those of that statutory body. The decision affects J.N.'s legal rights and privileges with respect to the retention of her non-conviction information by the police services and in that sense involves the exercise of a "statutory power of decision" by the *ad hoc* Committee: *Judicial Review Procedure Act*, at s. 1. Secondly, even if the *ad hoc* Committee is not a statutory body, its decisions are those of a public administrative authority affecting

J.N.'s rights, privileges and interests, and they are therefore subject to the common law principles of procedural fairness: see *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Knight v. Indian Head School Divisions No.19*, [1990] 1 S.C.R. 653, at p. 668-69.

[19] In either of these scenarios, the decision is in essence an administrative decision of the type that is subject to judicial review.

[20] In addition, however – those scenarios aside – it seems to us that the decision of the *ad hoc* Committee has become moot. It has been overtaken by, and subsumed in, the process under the *Police Services Act* and the decisions of the Chief of Police and the Board in that regard. As noted, it is conceded that these decisions must be the subject of judicial review.

[21] That J.N. sought to raise *Charter* issues in support of her arguments that the decisions should be quashed does not alter these factors. Many administrative decisions invoke *Charter* considerations, which are dealt with in the context of the judicial review process. In Ontario, there is a legislative scheme for the review of administrative decisions, and it is not permissible to circumvent that process by dressing up what is, in substance, a review of a decision of an administrative tribunal as a rule 14.05 application. In essence, that is what occurred here.

[22] In fairness to J.N., and to the application judge, the jurisdictional question that we have determined is dispositive of the appeal was not raised by the appellants before the application judge. J.N. sought to found the court's jurisdiction in s. 96(3)

of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and the inherent jurisdiction of the court. Section 96(3) states:

> Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided.

[23] Neither s. 96(3) nor inherent jurisdiction can trump the clear statutory scheme set out for judicial review in the *Judicial Review Procedure Act*, however. An application for judicial review must be heard by the Divisional Court.

[24] J.N. argues that the appellants ought not to be able to raise the argument for the first time on appeal, relying on a well-accepted line of jurisprudence to the effect that issues ought not to be asserted for the first time at this level. That line of jurisprudence cannot assist J.N., however, because the problem that must be addressed is whether the court below had jurisdiction to determine the issues in the first place.

[25] Some may view this approach as technical and as a failure by this Court to address what are admittedly important issues. The law has long been clear, however, that jurisdiction is fundamental to a court or tribunal's authority to deal with a matter. Jurisdiction is not optional, cannot be conferred by consent, cured by attornment, or assumed voluntarily just because there is an interesting and significant issue to be considered: see *McArthur v. Canada (A.G.)*, 2008 ONCA 892, 94 O.R. (3d) 19, at para. 3, aff'd 2010 SCC 63, [2010] 3 S.C.R. 626;

Rothgiesser v. Rothgiesser (2000), 46 O.R. (3d) 577 (C.A.), at paras. 18-19 and 33-39.

Disposition

[26] We would accordingly allow the appeal and set aside the order of the application judge.

[27] In our view, this is a case where the parties should bear their own costs. Accordingly, there will be no order as to costs.

"K.M. Weiler J.A."
"R.A. Blair J.A."
"Paul Rouleau J.A."

Released: June 21, 2012