

Federal Court



Cour fédérale

Date: 20161229

Docket: T-156-16

Citation: 2016 FC 1414

Ottawa, Ontario, December 29, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

JOEL EDWARD MOUSSEAU

Applicant

And

**ATTORNEY GENERAL OF CANADA
REPRESENTING THE CANADIAN ARMED
FORCES AND THE CANADIAN ARMED
FORCES GRIEVANCE BOARD**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Corporal Joel Mousseau (Retired) [Cpl. Mousseau], challenges a decision of the Director General Canadian Forces Grievance Authority [DGCFGA] dated October 29, 2015 that confirmed Cpl. Mousseau's reversion in rank from Master Corporal [MCpl.] to Corporal [Cpl.].

II. Background

[2] In 2001 Cpl. Mousseau volunteered to join the Canadian Armed Forces and in 2014 was serving his twelfth year of service which included two tours to Afghanistan. He planned on retiring after a full career in the military but being diagnosed with Post Traumatic Stress Disorder [PTSD] led him to being medically released. Cpl. Mousseau indicates that the random panic attacks and the PTSD have been aggravated since as he calls it “the unwarranted demotion”. His release from service was not as a MCpl. but as a Cpl. and this decision is what is underlying this judicial review.

[3] His last posting was JPSU (Joint Personnel Support Unit) Det. Edmonton after his medical employment limitations [MEL] had him transferred February 29, 2012 from CFB Wainwright (July 5, 2010) for medical follow-up and treatment . CFB Wainwright was his first posting after his two consecutive tours stationed to Kandahar, Afghanistan –November 5, 2006 to March 6, 2007; February 29, 2008 to September 28, 2008.

[4] On May 10th, 2010, he was appointed to the rank of Acting Lacking Master Corporal. The decision for the reversion or demotion as he calls it was a result of Cpl. Mousseau lacking a required qualification – Armoured Reconnaissance Crew Commander Course or now called Armoured Crew Commander Course [ARCC or ACC] to achieve the substantive rank of MCpl. before he was retired.

[5] Cpl. Mousseau's Commanding Officer in CFB Wainwright after observing him recommended that he seek diagnosis and treatment for what was then diagnosed as PTSD related to his tours in Afghanistan. His PTSD was diagnosed as high to extreme. From 2008 to 2011 no one had recognized his problems, including himself until his Commanding Officer did. On October 25, 2011, Cpl. Mousseau was assigned temporary MEL which prevented him from attending and completing the required ARCC course. The MEL was extended in June and December of 2012.

[6] Cpl. Mousseau had performed his job at a high level and to acclaim including training soldiers but could not take the ARCC course because of his PTSD. Generally the ARCC/ACC courses are offered every six months or when they are needed.

[7] On October 21, 2013, a medical officer recommended that Cpl. Mousseau be assigned a permanent medical category which was approved by the Director of Medical Policy on March 5, 2014.

[8] On May 10, 2014, Cpl. Mousseau was told that he would have to relinquish his rank of Acting Lacking MCpl. so he could be released from the Canadian Forces as a Cpl. after four years as a MCpl.

[9] On May 30, 2014, Cpl. Mousseau's career manager initiated an administrative review of Cpl. Mousseau's rank because in the four years he had been Acting Lacking MCpl. he had not

completed the ARCC. The career manager recommended a reversion back to the substantive rank of Cpl.

[10] On July 17, 2014, the Acting Director Military Careers revoked Cpl. Mousseau's Acting Lacking MCpl. rank, effective August 7, 2014. The Chief of the Defence Staff refused to exercise his discretionary power to award the rank of MCpl. by waiving the requirement of the ARCC course. Cpl. Mousseau grieved the decision to have his rank reverted on August 5, 2014 in accordance with section 29 of the *National Defence Act*, RSC 1985, c N-5.

[11] The abbreviation LdSH (RC) used by Cpl. Mousseau and others throughout the Certified Tribunal Record [CTR] references the Lord Strathcona's Horse (Royal Canadians) which is Armoured Regiment within the Canadian Forces and the Joint Personnel Support Unit is abbreviated as JPSU.

[12] On December 11, 2014 in response to a disclosure package for his grievance file he stated that " ... I feel as if my regiment (LdSH(RC)) abandon myself once I was no longer useful and was "kicked on[sic] final time" , while I was attached posted to JPSU awaiting my permanent posting message. I was demoted officially demoted the Friday [sic] prior to belonging to JPSU det Edm, but was at sick parade following a panic attack over this issue) and on the following Monday [sic] was demoted but not at my regiment. I was NOT demoted at LdSH(RC) I was demoted at JPSU since it was already in place that I was to be demoted. I feel that the demotion was unjust and not warranted for a soldier that is "broken" and was broken performing

his duties. All I am seeking is to be released from the Canadian Forces as a MCpl and to “depart with dignity.” (CTR 178.)

[13] The initial Authority Grievance decision dated February 3, 2015 by the Director General Military Careers in Edmonton upheld the reversion of rank. On September 9, 2015 the Military Grievance External Review Committee [Grievance Committee] denied the grievance.

[14] On October 29th, 2015, the DGCFGA reviewed Cpl. Mousseau’s grievance coming to a determination that he had been treated fairly and that his reversion to rank of Cpl. should stand. The Grievance Committee is a discretionary referral body created under the *National Defence Act*. Its purpose is to review military grievances referred to it and provide impartial findings and recommendations.

[15] The Grievance Committee’s findings were sent to the DGCFGA and Cpl. Mousseau on September 9, 2015 in order that Cpl. Mousseau could respond to any concerns raised by the Grievance Committee. Cpl. Mousseau provided written responses to the Grievance Committee’s findings on October 5, 2015 which were submitted to the GDCFGA.

[16] After reviewing the applicable factual background, the DGCFGA proceeded to assess Cpl. Mousseau’s case *de novo*. The DGCFGA came to this determination based on recommendations from the Grievance Committee. The DGCFGA points out that Cpl. Mousseau’s branch could have, but chose not to, revoke his acting rank immediately once medical limitations precluded his attendance on the required ARCC course (Canadian Forces

Administrative Order 49-4 subparagraph 14c, [“CFAO 49-4”]). Despite this, they allowed him to remain Acting Lacking MCpl. for a total of four years from the date he was first designated.

[17] The DGCFGA dismissed Cpl. Mousseau’s suggestion that other serving members had been allowed to retain their rank despite being released medically. The DGCFGA points out that every case in administrative matters must be decided on its own merits. The Director General accepted the findings of the Grievance Committee and reverted Cpl. Mousseaus’s rank.

III. Issue

[18] The issue to be determined is whether the DGCFGA’s decision to revert his rank to Cpl. was unreasonable?

IV. Standard of Review

[19] The Federal Court of Appeal has said that the standard of review for decisions regarding a final grievance of a Canadian Armed Forces decision is reasonableness (*Zimmerman v Canada (Attorney General)*, 2011 FCA 43 at para 21).

[20] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9). This decision is not reasonable and I will grant it for the following reasons.

V. Analysis

[21] Over the course of the hearing Cpl. Mousseau, acting on his own behalf argued a number of issues such as the fact that the requirements to be Acting Lacking MCpl. in the Career Manager's brief 2014-2015 changed and at one point in time when he was acting the ARCC course was not a requirement to retain the MCpl. rank.

[22] Cpl. Mousseau contended that the reversion in rank policy for the Armoured Corps-D Mil C until 2013 was that a member was promoted Acting Lacking after their PLQ-L and then had four years to complete their ACC to be substantive rank. Cpl. Mousseau said that in the old system on slide 5 of the Career Managers Brief page five (5) that you need PLQ to get your leaf and then ARCC to retain it. But under the new system for 2014-2015 to be a MCpl. you only need the PLQ-L (Leadership Qualification) and only if you then wished to progress in rank do you need the ARCC. His position is that he falls under the new system as his permanent medical category assignment happened in 2014 so he does not even need the ARCC to retain his MCpl. when he was retired.

[23] As well the issue arose of whether even though the Director General stated they were doing the grievance on a *de novo* basis whether the Director General really considered the case on a *de novo* basis or just rubber stamped the lower level grievances. Finally, arguments were made by Cpl. Mousseau that his demotion was a violation the *Canadian Human Rights Act*, RSC, 1985, c H-6, on grounds of discrimination because of his disability.

[24] Cpl. Mousseau presented that it is an earned appointment and he was demoted off the old system which was on how many spots were open for that rank. The Respondent fundamentally disagrees that Cpl. Mousseau was demoted as he was just reverted to his previous rank and that was done as he had not completed the ARCC course which was one of the requirements to be a MCpl.

[25] The determinative issue is whether the Chief of Defence staff discretion in 11.02 of the *Queen's Regulations and Orders* for the Canadian Forces [QR & O] was exercised reasonably. And for that reason I will limit my reasons to this issue.

[26] The DGCFGA has the delegated authority from the Chief of the Defence Staff pursuant to subsection 29(14) of the *National Defence Act* to be the final authority on grievance process.

[27] The QR & O state that:

“In any particular instance or in any given circumstances, the Chief of the Defence Staff may direct that the requirement to meet promotion standards be waived.”

[28] The DGCFGA is to make a *de novo* determination after receiving the Grievance Committee recommendations and findings for the DGCFGA's consideration. The Grievance Committee on these facts recommended that the grievance be denied.

[29] The Chief of Staff is not bound by the recommendation (s 29.13) of the Grievance Committee but must give reasons if they are not in agreement. The DGCFGA did note in their

reasons that he accepted their findings and accepted the grievance Committee's findings "as if they were my own." The DGCFGA's reasons mirror the Committee's reasons and analysis.

[30] In the recommendation of the Grievance Committee they indicated that the Chief of Defence Staff when exercising their discretion to waive promotion criteria that the reason to do so must be unique and compelling so that all peers are treated equally.

[31] The Respondent at the hearing repeated this argument that the reasons to grant the rank without the artillery course (ARCC/ACC) must be "unique and compelling" so that members are not treated differently. The Respondent said the injury was one year into the acting and the DGCFGA exercised their discretion reasonably by not granting the waiver of the course requirement to Cpl. Mousseau and reverting him back to Cpl.

[32] For the reasons below I find the exercise not to grant discretionary relief to be unreasonable.

[33] Cpl. Mousseau confirmed that because of the PTSD diagnosis he had to be retired as he no longer met the Minimum Operational Standards related to Universality of Service (s 33.1) but that the reversion of his rank after acting in the capacity for four years was not reasonable and certainly was a hurtful exercise.

[34] The QR & O of the Canadian Forces 11.02(2) grant this discretion to be used in any particular instance or circumstances. Contrary to the Respondent's argument the article does not

say it must be unique and compelling to grant the exemption. In the Grievance Committee's reasons it states that when the Chief of Defence Staff exercised their discretion to waive some aspects of promotion criteria in other cases they determined it must be unique and compelling. The distinction in this case does not matter as this decision is unreasonable if the discretion was exercised in any particular circumstances as set out in the QR & O or if it was exercised only in unique and compelling circumstances that the Respondent states is the test.

[35] To achieve the rank of MCpl. the soldier must have Primary Leadership Course (PLQ), environmental and occupational qualifications. The occupational qualification is the ARCC course. This is the course that Cpl. Mousseau was not able to complete and what he sought the Chief of Staff to waive the requirements as provided in the QR & O in these circumstances.

[36] The ACC course inevitably involves "loud bangs" as the understanding is that artillery is involved. The MEL paperwork for years 2009-2011 (CTR 125-127) indicates that Cpl. Mousseau can be employed with limitations. Cpl. Mousseau indicates that one of the limitations is that he cannot be around loud bangs and on other documentation it says he cannot safely handle and effectively operate a personal weapon. With the diagnosis of high to extreme PTSD, clearly he could not take the course that involved "loud bangs" but his work performances indicated he was an excellent teacher and soldier.

[37] It seems a bit of a "Catch 22" to say that the soldier on MEL for PTSD must be exposed to the very thing that is a trigger to the PTSD though he had been doing an exemplary job of

teaching other soldiers without the artillery course (ARCC). To not have the course increases the anxiety because University then demoted him.

[38] It is understood that the understanding of PTSD within our Armed Forces has progressed rapidly lately. In fairness to the decision maker the evidence and procedures for dealing with PTSD that can now be marshalled may not have been available or before them at the time.

[39] Cpl. Mousseau did not retain outside counsel or obtain any assistance to deal with the process when he was suffering high to extreme PTSD and may not have been his best advocate at the time given his medical condition. The difficulty of this situation is somewhat acknowledged in the August 21, 2014 decision of the Acting Director Military Careers Administration (CTR 109) “Under the new career transition support policy, the C[anadian] F[orces] Health Services completed a needs assessment and you were deemed as severely ill or injured with complex transitional needs.” This was stated after noting that he chose not to submit any representation after this particular disclosure. Very difficult for anyone, let alone when you are this ill to make these kind of life decisions and then go through the Canadian Forces levels of grievances representing himself before the Federal Court.

[40] Evidence of Cpl. Mousseau’s performance of his position while in an Acting Lacking MCpl. was provided in his Annual Personal Evaluation Reports in the CTR dating from June 25, 2007 on an annual basis through to May 26, 2014. A review of this Personnel Evaluation Reports indicates generally someone very good at their job. The 2009 and 2010 Report indicated that he “demonstrates outstanding potential for promotion to MCpl” under the Potential for Promotion to

Next Rank- Section 5 and in Section 6- May 25, 2010 says “Cpl Mousseau is an exceptionally dedicated, professional, and knowledgeable soldier who is performing ahead of his peers. He is a natural leader and was ranked in the top third of Cpls in LdSH (RC). Cpl Mousseau should be promoted to the rank of MCpl and be employed as troop NCO upon completion of his Mod 6 PLQ.”

[41] The DGCFGA had all of these performance reports before them in doing the *de novo* review though choose not to address any of this in their reasons even though the Director General was making the determination if Cpl. Mousseau’s situation was “unique or compelling” reasons to waive the requirement for the course. It is unreasonable to do a *de novo* determination to decide whether to waive a requirement and yet not address if Cpl. Mousseau had been performing at a high level the job associated with the rank before his MEL.

[42] Cpl. Mousseau argued that how can they now say he was not qualified to train people, as the people he trained have now moved up and trained others; if so, the decision to revert his rank mean that they now have to revert the people he trained and the members that they trained.

[43] It was unreasonable not to grant him the waiver because he could not complete the one remaining criteria because of his PTSD which was a course with “loud bangs” of artillery yet he continued to perform the job associated with that rank to the standards expected without the course for the year until his PTSD was diagnosed and he was put on MEL.

[44] Cpl. Mousseau argued it was unreasonable that other soldiers when they retired in the same situation as he was in did have requirements waived for substantive promotion to MCpl. and yet the DGCFGA did not waive his requirement. The specific information concerning other members in his regiment having the discretion being exercised to have them retain their rank when retired was provided by Cpl. Mousseau in response to the disclosure of the Career Managers Brief.

[45] In the reasons of the DGCFGA in response to Cpl. Mousseau's argument he should be treated the same, the DGCFGA said regarding other member's treatment that every case is determined on its merits and that "... leads me only one direction that is that you were treated fairly and in accordance with the rules and regulations."

[46] Of course each case will be determined on the facts of that case but in exercising their discretion fairness in treatment must enter into the determination. Given Cpl. Mousseau had provided specific examples, I would expect more analysis by the DGCFGA of how Cpl. Mousseau was being treated the same. Of course the other soldiers' privacy would have to be respected but there is nothing substantive to indicate why he was being treated differently from similar situated soldiers. This is especially important given his medical condition and that the demotion clearly had exacerbated his medical condition. Care in explaining the reasons for others retaining their acting rank although released medically and the DGCFGA's reasons why he would not grant Cpl. Mousseau the same is essential on these facts. Just saying in response "...leads me in only one direction" is lacking in transparency and clarity that is necessary for a decision to be reasonable.

VI. Conclusion

[47] The course that was a requirement (without deciding the peripheral issue of exactly when it was or wasn't a requirement) was to do with armoured vehicles and explosives which was directly related to the PTSD diagnosis after Cpl. Mousseau's tours in Afghanistan. During the time Cpl. Mousseau trained soldiers in his acting capacity his performance reviews indicate he was very good at his job and his evidence is he went on to then teach others. It was an unreasonable decision given the evidence of his particular situation and the lack of transparency of why he was not treated the same as others in similar situations that were retired without the course or reversion of the rank.

[48] In granting the judicial review there is a need for new evidence to be filed before a new decision maker because of the progress in the understanding of this medical condition as the case is to be determined on a *de novo* basis.

[49] In the written submissions a variety of relief was sought some of which are not available on a judicial review such as damages or reinstatement of rank that I am not prepared to grant as a remedy.

[50] The Respondent sought costs at the lower range and to follow success. Cpl. Mousseau represented himself in this matter and when prompted at the hearing asked that I not award costs against him as it would be a financial burden. The Respondent was not successful but given

Cpl. Mousseau has represented himself, this is a situation where I will not award costs and each party will bear their own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and sent back to be re-determined by a different decision maker with the Applicant being able to file new evidence;
2. No costs are awarded.

"Glennys L. McVeigh"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-156-16

STYLE OF CAUSE: JOEL EDWARD MOUSSEAU v ATTORNEY
GENERAL OF CANADA REPRESENTING THE
CANADIAN ARMED FORCES AND THE CANADIAN
ARMED FORCES GRIEVANCE BOARD

PLACE OF HEARING: EDMONTON, ALBERTA

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