Federal Court Cour fédérale

Date: 20170104

Docket: T-1798-15

Citation: 2017 FC 10

Ottawa, Ontario, January 4, 2017

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

DARREN EDWARD BLAIR

Applicant

and

NATIONAL DEFENCE CANADA (CDS)

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. Darren Edward Blair joined the Canadian Armed Forces [CAF] in 1989 and was a member until his voluntary release in April 2000. He rejoined the CAF in March 2003 and was ultimately released on November 11, 2010, under item 5(f) of Article 15.01 of the Queen's Regulations and Orders for the Canadian Forces [QR&O] as Unsuitable for Further Service due to the misuse of alcohol, following a number of alcohol-related incidents.

[2] He has applied for judicial review of a decision of the Chief of the Defence Staff [Chief], dated August 21, 2016, which denied his grievance and upheld his release from the CAF.

II. Preliminary Matter

[3] In his Notice of Application, the applicant indicates that the reliefs being sought are review and restitution. However, in his Memorandum of Fact and Law, he discusses the award of costs in circumstances where a decision is quashed on judicial review, but then requests damages for his wrongful release and breach of contract, commensurate with his length of service.

[4] The applicant cannot ask this Court, on an application for judicial review, for "restitution" or "damages". Subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7, provides that on an application for judicial review, this Court's power is limited to:

> (a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

[5] In addition to the monetary relief sought, it is unclear from the applicant's Memorandum of Fact and Law whether he seeks to have the decision quashed, set aside and referred back for redetermination, or whether he seeks to be reinstated with the CAF.

III. Facts

[6] In September 1990, the applicant received a recorded warning for "acting in an antagonistic manner to a peer" as a result of an altercation with a bully in his class. The applicant reported the matter and in turn, the alleged bully made an accusation against him. Consequently, both were issued a recorded warning.

[7] In April 1991, the applicant was interviewed by a Base Addictions Counsellor, who recommended that he discontinue his alcohol use, attend Adult Children of Alcoholics on a regular basis, and attend the next Secondary Intervention Workshop.

[8] In July 1991, the applicant received his second recorded warning, for "failure to make rational and responsible personal decisions" for a number of reasons, some of which were determined to be alcohol-related. Then, in November, while treating the applicant after suffering minor injuries from a fight, the treating professional noted the applicant presented with a "strong smell of alcohol". The applicant suffered another injury while drinking in March 1993, when he tried to strike someone with a beer bottle.

[9] In September 1993, the applicant received a third recorded warning, again for the misuse of alcohol.

[10] Four years later, the applicant was assessed for the misuse of alcohol. As a result, he was placed on counselling and probation. He submitted a grievance against this remedial measure and the counselling and probation was subsequently overturned and removed from his file.

[11] In 1999, the applicant volunteered to seek treatment for problems with alcohol after a number of negative alcohol-related interactions while on duty in Puerto Rico.

[12] In April, the applicant discussed a potential voluntary release from the CAF with his supervisor. The supervisor explained that if the applicant was to apply for re-enrollment in the CAF, it should be conditional on dealing with his misuse of alcohol. He was subsequently voluntarily released from the CAF. He applied to re-enroll in the CAF a few years later, for which he had to submit proof that he did "not suffer any complications as a result of alcohol abuse".

[13] In the years that followed, the applicant had a number of alcohol-related incidents while in the CAF:

- In 2007, while under the influence of alcohol, he verbally abused a Corporal.
- In 2009, he was arrested for drunkenness contrary to paragraph 97(2)(*b*) of the *National Defence Act*, RSC 1985, c N-5.
- In 2010, he was alleged to have been drunk and assaulting/abusing subordinates while on training.

[14] As a result, the applicant was removed from training and sent back to his unit. He was again sent for a medical assessment in relation to alcohol.

[15] In May 2010, the applicant was issued a Notice of Intent to Recommend Release under item 5(f) of Article 15.01 of the QR&O as Unsuitable for Further Service due to the continued misuse of alcohol.

IV. Procedural Background

[16] Following the Notice of Intent to Recommend Release, the applicant's Commanding Officer recommended to the Director Military Careers Administration [Director] that he be released. The Director then ordered an Administrative Review, which recommended that the applicant be released. In response to submissions from the applicant, the Commanding Officer changed his recommendation from release to counselling and probation. In spite of this recommendation, on September 29, 2010, the Director approved the applicant's release.

[17] The applicant filed a grievance concerning his release. The grievance was denied by the Initial Authority, the Acting Director General Military Careers, on May 30, 2011. The applicant requested that his grievance be referred to the Final Authority.

[18] The applicant provided representations to the Canadian Forces Grievance Board, which found that breaches to procedural fairness occurred in the Administrative Review process. It concluded that these breaches could not be cured by a *de novo* hearing. Therefore, the Director General Canadian Forces Grievance Authority [Director General] recommended that the Final Authority set aside the Initial Authority's decision as well as the decision of the Director and quash the Administrative Review. Further, it recommended that the Final Authority conduct a *de*

novo review of the grievance. The applicant submitted additional representations, and the decision presently under review was rendered on August 21, 2015.

V. Impugned Decision

[19] On August 21, 2015, the Chief determined that the applicant's release was in accordance with the applicable rules, regulations, and policies, and refused the redress sought. Based on the evidence before him, the Chief concluded that the applicant's release under item 5(f) was reasonable and justified, given his conduct throughout the course of his career with the CAF.

A. *Procedural Fairness*

[20] Regarding the issue of procedural fairness, the Chief noted that there were two incidents that occurred in the process of the applicant's release that breached the principle of procedural fairness:

> - The Progress Review Board considered allegations against the applicant without informing him of the allegations and providing him with an opportunity to respond.
> - The Director did not include sufficient justification in support of his decision and he improperly considered a remedial measure that had been previously grieved and overturned.

[21] The Chief concluded that the Canadian Forces Grievance Board was wrong to recommend that the release be set aside on the basis of *Dunsmuir v New Brunswick*, 2008 SCC 9, which they interpreted as directing that if a decision was tainted by a lack of procedural fairness in the process of reaching its decision, the grievor should be returned to the position they were in at the time of the grieved matter.

[22] The Chief explained in his decision that the Canadian Forces Grievance Board did not have the benefit of relying on *McBride v Canada (National Defence)*, 2012 FCA 181, in which the confusion that arose from *Dunsmuir* was clarified. The Chief stated that in *McBride*, the court explained that any procedural unfairness that occurred in the decision-making process could be cured if the four cornerstones of procedural fairness are applied in the *de novo* review of the entire case.

[23] Therefore, the Chief stated that he conducted a *de novo* review of the applicant's file without considering the improper evidence, and provided sufficient justifications, such that the past procedural unfairness had been cured.

B. *Release under item 5(f)*

[24] The Chief had to determine whether the decision to release the applicant under item 5(f) was appropriate in the circumstances.

[25] First, he explained that in the grievance, the applicant confused "dependence on alcohol" with "misuse of alcohol". The applicant alleged that there was no evidence to support the assertion that he was dependent on alcohol. However, the allegation against him concerned the misuse of alcohol. The Chief found that there were multiple examples in support of this allegation and that the issue was repeatedly brought to the applicant's attention.

[26] The Chief further states that there are numerous examples of his unacceptable conduct while under the influence of alcohol, belligerence, misuse of alcohol, and arrests for

drunkenness. Specifically, the Chief considers the applicant’s four referrals for assessment for alcohol abuse.

[27] The Chief states that the decision to make such referrals is not taken lightly, and to see four on the applicant’s file is indicative that successive chains of command identified, and were concerned by, the seriousness of his misuse of alcohol. The Chief adds that in spite of the applicant’s submission to the Canadian Forces Grievance Board that his conduct and performance were above standard throughout his career, even outstanding performance cannot rescue poor conduct, as the potential outcomes of the latter far outweigh the operational benefit of the former.

[28] The Chief disagrees with the Commanding Officer’s decision to rescind his recommendation for the applicant’s release when the counselling and probation was struck down. In his view, “[a]dministrative actions are initiated under regulations, orders, instructions or policies. In addition to the remedial measures set out in this DAOD, administrative actions include: […] release or recommendation for release, as applicable” (DAOD 5019-4, Remedial Measures, s 3.10(f)). DAOD 5019-4 provides for the following: “[a]n initiating authority may, in exceptional circumstances, initiate an administrative action other than a remedial measure in the absence of any previous remedial measures initiated in respect of the CAF member” (DAOD 5019-4, Remedial Measures, s 4.7).

[29] Finally, the Chief states that under no circumstances should a member with the applicant’s record be permitted to continue in the CAF, without a clear indication of

improvement, for such a length of time without more serious action being taken. The fact that the counselling and probation was quashed did not render the applicant's release unreasonable.

VI. Issues

[30] This application for judicial review raises the following issues:

A. *Whether previous breaches of procedural fairness were cured by a* de novo *review?*

B. *Whether the decision of the Chief to uphold the applicant's release is reasonable?*

VII. Standard of Review

[31] The standard of review for decisions of the Chief is reasonableness, as they involve questions of mixed fact and law (*Higgins v Canada (Attorney General)*, 2016 FC 32 at para 52; *Canada (Attorney General) v Rifai*, 2015 FCA 145 at para 2). Issues raising procedural fairness concerns are reviewable pursuant to the standard of correctness (*Higgins*, above at para 58; *McBride*, above at para 32).

VIII. Analysis

A. *Whether previous breaches of procedural fairness were cured by a* de novo *review?*

[32] The applicant was self-represented when he filed his Memorandum of Fact and Law, but he was represented by counsel at the hearing.

[33] Counsel for the applicant argued a breach of procedural fairness resides in the fact that the applicant was not afforded a fair opportunity to provide submissions at every step of the administrative process. It also resides in the fact that the applicant was not provided with a well-explained determination of his grievance. Despite acknowledging that a breach of procedural fairness could be cured by a *de novo* hearing, he stated that because the information that was ordered to be expunged from the applicant's file was not redacted so that the Chief could not have access to it, the latter did not hold a true *de novo* hearing.

[34] Counsel heavily relied on the Military Grievances External Review Committee's [Committee] Findings and Recommendations of February 9, 2012. Based on past procedural fairness breaches by the Director, the Committee recommended that the applicant's grievance be allowed and that he not be released from the CAF. The Committee found that as a result of this breach of procedural fairness, the decision to release the applicant was void *ab initio*, but that it was "open to the [Chief] to conduct a procedurally fair review of the circumstances and any decision taken will be effective the date of the [Chief's] new […] decision" (Certified Tribunal Record, p 144). As to the reasonableness of the Director's decision, the Committee suggested that some facts not be considered as they were either not proven or not relevant. It also suggested that the Progress Review Board's findings not be considered as the applicant was not offered the possibility to review the evidence and present his observations.

[35] First, the Chief is not bound by the Committee's recommendations (*National Defence Act*, s 29.13(1); *Walsh v Canada (Attorney General)*, 2015 FC 775 at para 32). In my view, it

was open to the Chief to rely on *McBride*. In that case, the Federal Court of Appeal found that the procedural unfairness that had occurred was cured by the *de novo* consideration by the Chief.

[36] *McBride* has been followed in several cases involving decisions of the Chief, and of particular importance, in *Walsh*, where the Federal Court upheld the Chief's approach to the matter and stated that "a *de novo* review will be sufficient to cure a breach of procedural fairness when the procedure, considered as a whole, was fair" (*Walsh*, above at para 51).

[37] The applicant made submissions at all stages of the grievance process and several steps were taken to allow the applicant to understand the case against him and be able to provide submissions. The Certified Tribunal Record includes several legal opinions provided to the applicant along with documents created by the applicant. He was clearly able to set out his position to the Chief.

[38] Since the applicant was given several opportunities to understand the case against him and make representations, and as the Chief conducted a *de novo* review and did not consider the counselling and probation or other inappropriate procedures, any procedural defects were cured and there is no issue of procedural fairness sufficient to justify setting aside the Chief's decision on this application for judicial review.

B. *Whether the decision of the Chief to uphold the applicant's release was reasonable?*

[39] The applicant's Memorandum of Fact and Law does not contain legal arguments addressing the reasonableness of the decision. In essence, he disagrees with the Chief's decision

to uphold his release. He argues that he did not breach DAOD-5019-7 of the Direction that defines “Alcohol Misconduct”. He also argues that a release can only take place if there is a previous counselling and probation, and that since the counselling and probation in his case was removed, he should not have been released. Finally, he alleges that he was released based on false accusations, assumptions, and rumours. Therefore, he submits that the decision to uphold his release was unreasonable.

[40] At the hearing, counsel for the applicant emphasized the applicant’s long and successful career in the CAF and the fact that in his decision, the Chief merely relied on allegations of misuse of alcohol that were not proven.

[41] The onus was on the applicant to show that the Chief’s decision is unreasonable. In my view, he has not done so. In view of the evidence that was properly before the Chief, the decision to uphold the applicant’s release was within the range of possible, acceptable outcomes which are defensible in respect to the facts and law (*Dunsmuir*, above at para 47).

[42] First, the applicant’s argument that he did not breach the provision regarding “Alcohol Misconduct” is irrelevant, as the applicant was not released for a dependence on alcohol. The applicant was released pursuant to item 5(f) of Article 15.01 of the QR&O’s as “Unsuitable for Further Service”. DAOD-5019-7 merely sets out the standards of behaviour and the ways in which issues surrounding alcohol should be dealt with, and it was reasonable for the Chief to find that the applicant had, on numerous occasions, violated these standards.

[43] Second, it was also reasonable for the Chief to find that a release is not limited to circumstances where a previous counselling and probation was issued. The Chief had the discretion to release the applicant in the absence of a previous counselling and probation if he had demonstrated a conduct or performance deficiency. The DAOD-5019-4, Remedial Measures clearly state that "[a]n initiating authority may, in exceptional circumstances, initiate an administrative action other than a remedial measure in the absence of any previous remedial measures initiated in respect of the CAF member" (DAOD 5019-4, Remedial Measures, s 4.7). An initiating authority may review the member's personnel record and determine that other administrative action is warranted. What is important is not the number of measures, but rather the overall character of the CAF member's service.

[44] Therefore, the Chief could uphold the applicant's release even though the counselling and probation was set aside because he had three previous recorded warnings and the overall character of his service showed continued and longstanding behavioural problems that more often than not involved alcohol.

[45] Contrary to the applicant's view, the Chief did not consider or rely upon mere allegations or rumours. I find that the Chief took into account the record and representations of the applicant. He considered and weighed the applicant's history with the CAF, as well as the documented incidents involving alcohol, and came to the conclusion that this consisted of misuse of alcohol.

[46] In particular, the applicant had three recorded warnings and would have had a fourth one had he not been voluntarily released. He was sent for medical assessments on four occasions as a

result of his issues with alcohol and he was only allowed back as a member of the CAF on the condition that he demonstrates that he did not have medical problems as a result of his alcohol consumption. After his return, he had incidents on three separate occasions, which showed that his behaviour – when coupled with alcohol – was likely becoming an administrative burden to the CAF.

[47] I find that the Chief's decision to uphold the applicant's release from the CAF is therefore reasonable.

IX. Conclusion

[48] In light of the above, this application for judicial review should be dismissed. Costs should be granted to the respondent in the amount of $500, inclusive of all disbursements and interest.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's application for judicial review is dismissed;

2. Costs are granted to the respondent in the amount of $500, inclusive of all disbursements and interest.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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