Cour fédérale Federal Court

**Date: 20220322**

**Docket: T-857-21**

**Citation: 2022 FC 384**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, March 22, 2022**

**PRESENT: The Associate Chief Justice Gagné**

**BETWEEN:**

**RENÉ POIRIER**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

[1] For the second time, Mr. René Poirier is seeking judicial review of a decision rendered by the Director Grievance Authority [Director], as the final authority in the Canadian Forces [Forces] grievance process. The Director denied Mr. Poirier's grievance after finding that he had been treated fairly and in accordance with applicable rules, regulations and policies when he was demoted and reclassified to the position of electrical distribution technician.

[2] By judgment in *Poirier v Canada (Attorney General)*, 2020 FC 850, I set aside an initial decision of the Director and sent the file back to him for reconsideration. For the facts of the case and the chronology of events, I refer the reader to paragraphs 2 to 28 of that first decision.

[3] I then noted that the applicant, representing himself, made several arguments in support of his application, some relevant and supported by the evidence, others not. I concluded, however, that the Director had committed a determinative error in failing to consider medical evidence contrary to one of his conclusions. My rationale for the Court's intervention is as follows:

> [35] The Director relied on two key grounds in denying the applicant's grievance:
>
> 1. He concluded that the grievance was unfounded because, after a review of the applicant's medical file, the Director Medical Policy of the Forces maintained his permanent medical category at H1.
>
> 2. In light of this fact, the Director examined the 2006 Course Report and concluded that the applicant was having problems that did not stem solely from the situations related to radio communication.
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> [36] The first problem I see with these reasons is that the Director completely ignored the [TRANSLATION] "operational factor" component of the medical report, which resulted in a reservation expressed by Dr. Ricard in his July 3, 2015 email (the content of which is reproduced at paragraph 17 of these reasons) as well as a change in medical category from O2 to O3 on August 22, 2018 (together with comments reproduced at paragraph 25 of these reasons).
>
> [37] The Director admitted that he largely relied on the findings and recommendations of the Military Grievance External Review Committee. However, the Committee's report was issued on April 26, 2018, while the applicant's medical classification was not modified until August 22, 2018. As stated above, the applicant was

informed of this in September, and he immediately contacted the Director's office so that the Director would take it into account in his final decision, which was not rendered until March 19, 2019.

[38] The first version of the Certified Tribunal Record filed with the Court in May 2019 does not contain that document. An addendum to the record, containing the new medical classification and the applicant's email, was produced in July 2019, however. This unequivocally confirms that the Director had this information when he issued his final decision.

[39] It is well known that an administrative decision maker does not have to set out all of the evidence filed by the parties (*Vavilov* at para 128). However, when one of the decision maker's main findings tends to contradict an overlooked piece of evidence, it should be questioned whether that piece of evidence was given due consideration.

[40] In this case, in denying the applicant's grievance, the Director first relied on the fact that the Director Medical Policy maintained his H1 classification. As stated above, the auditory acuity factor was not the only one to be considered. The Director should also have considered the operational factor represented by the letter O or, if he considered it irrelevant, justified why the July 2015 warning and the new permanent category assigned in August 2018 had no impact on his decision. The lack of such an explanation makes his decision internally irrational.

[41] The second problem I see with the Director's reasons is that it is difficult to know what the result of his analysis of the 2006 Course Report would have been, had he considered the applicant's new medical category (O3) and the comments accompanying it. They indicate that Mr. Poirier [TRANSLATION] "should not be employed in positions where he will routinely be exposed to loud noise (firing range, near machinery, close proximity to aircraft engines, etc.) except for operational or training requirement".

[42] Not having the Director's military expertise, the Court can only speculate as to what exactly this means and what impact such a recommendation, made in August 2018 after the need to reassess the operational factor was raised in July 2015, may have on the Director's analysis.

[43] The Court is also forced to speculate regarding the Director's basis for finding that the applicant had problems that did not stem solely from situations related to radio communications. This

> certainly suggests that the problems were partially due to situations related to the radio.
>
> [44] That said, since the Director partially based his decision on the fact that the applicant's medical category was maintained by the Director Medical Policy of the Forces without mentioning that it was actually modified following a recommendation made in 2015, this suggests that he did not take this modification into account in his analysis of the applicant's grievance.
>
> [45] It follows that the Director's decision is not justified in relation to the facts that constrained him. It is also not internally coherent because it requires the Court to speculate on the impact of this evidence on the Director's findings.

## I. Impugned decision

[4] In his second decision, the Director repeats the sequence of events, but this time he explains the basis on which he concluded that the applicant had experienced problems that did not arise solely from situations related to radio communication. This is his statement:

> [TRANSLATION]
>
> On January 10, 2005, you began Forward Observation Officer (FOO) training and were removed from the course for not meeting the standard. The course report states that you had difficulty during one of the performance objectives (conducting fire plans, in the indirect fire trainer (IFT)), as well as during live fire. In his remarks, the Commandant of the Canadian School of Artillery has recommended that you attend the course again.
>
> On March 15, 2006, you began your second attempt at FOO training and on June 2, 2006, you were removed from that training since you had not met the standard. The course report states that your greatest deficiencies are in the areas of command and control, tactical problem solving and maintaining situational awareness. In his remarks, the Commandant of the Field Artillery School stated "Capt Poirier's performance did not meet the required standard. Capt Poirier was removed from the course because of major leadership difficulties, specifically because of his deficiencies in command and control and tactical problem solving. Capt Poirier is not recommended for another course. It is further recommended

> that his commanding officer re-evaluate his future employment with the Regiment".

[5] The Director goes on to mention the opportunity offered to the applicant to continue his career as an officer in the Forces in one of the identified programs and the fact that the applicant chose to apply to the Military Chaplain Training Plan. The Director states that in doing so, the applicant benefited from four years of subsidized theological studies at Laval University, which he was unable to complete within the prescribed time.

[6] The Director explains that following failing the chaplain training, the applicant was mistakenly reassigned to an artillery officer position, as he was still undergoing a compulsory occupational transfer out of that group. And since more than five years had passed since the last occupational transfer process, a new one was ordered.

[7] The personnel selection officer who conducted the occupational transfer process determined that the applicant no longer met the academic requirements for the officer entry plan, so the applicant decided to continue his career as a non-commissioned member. He was offered a position as an electrical distribution technician, which he accepted.

[8] The Director then focuses on the three occupational transfers that the applicant underwent (the first occurred in 2000 after he failed his entry-level training as an air navigator) and their impact on the applicant's salary protection. He explains that occupational transfer is not a right for a member who is unable to continue in the program for which he or she enrolled, but rather a

retention initiative within the Forces. This occupational transfer must therefore meet the needs of the Forces. The absence of an available position may therefore lead to release.

[9] The Director rejects the applicant's argument that since he failed his chaplain training, he still had his position as an artillery officer and that, as such, he was only transferred twice, once in 2000 and again after his academic failure. The Director states that having failed mandatory training for the position of artillery officer on two occasions in 2005 and 2006, for the above-mentioned reasons, the applicant could no longer be employed in that capacity.

[10] And it was only as a result of this third occupational transfer, for reasons entirely unrelated to his presbycusis discovered in 2014, that the applicant lost his officer title and, thus, his salary protection.

[11] Regarding the applicant's medical condition, the Director acknowledges the audiologist's comments that this condition discovered in 2014 could explain the problems encountered in 2005 and 2006 but adds that he is unable to conclude, on a balance of probabilities, that there is a causal link between this medical condition diagnosed in 2014 and the failures in 2005 and 2006. There is no mention in the applicant's file that he complained of hearing problems at the time, and the Director is of the opinion that had he done so, his supervisor would have ordered an examination.

[12] However, for the Director, that is not the issue. What caused the applicant to lose his officer position was his academic failure, which led to his third compulsory occupational

transfer, and the fact that there were only two options available to him at that time: a non-commissioned position or release from the Forces.

[13] The Director therefore rejects the applicant's argument that if his second occupational transfer (from artillery officer to chaplain) had been for medical reasons, he would have been entitled to salary protection (page 14 of the decision):

> [TRANSLATION]
>
> As demonstrated in CBI 204.03 - Pay on Occupational Transfer, when a member demonstrates an inability to meet the military or academic training standards related to his or her trade group, this inability is considered a voluntary occupational transfer for pay purposes. Since your third compulsory occupational transfer was initiated as a result of your failure to complete the MCTP, you were not entitled to salary protection. Therefore, I conclude that you were treated fairly and in accordance with the policies in effect.

[14] Since it was this third occupational transfer that caused the applicant to lose his officer status, as well as the associated salary, his grievance was denied.

## II. Issue and standard of review

[15] The only issue raised by this application for judicial review is whether the Director erred in denying the applicant's grievance.

[16] The standard of review applicable to the analysis of the handling of a military grievance by the final authority of the Forces is the standard of reasonableness (see *Snieder v Canada*

*(Attorney General)*, 2013 FC 218 at para 20; see also *Beddows v Canada (Attorney General)*, 2019 FC 671 at para 17).

[17] This choice of standard has remained in place since the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[18] In reviewing a decision for reasonableness, the Court must examine the reasons provided by the decision maker with respectful attention and seek to understand the chain of reasoning that leads to the conclusions reached. To be reasonable, a decision must be based on an analysis that is internally coherent, rational and justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

## III. Analysis

[19] The Director's second decision is much more detailed and comprehensive than the first and is, in my opinion, quite airtight.

[20] First, the Director adequately addresses the concerns raised in my previous decision; he explains what allows him to give little weight to the medical evidence, given the applicant's weaknesses identified in 2005 and 2006, the fact that they have no apparent connection to the hearing problems diagnosed in 2014, and the fact that the applicant's training record shows no indication that he complained of hearing problems as the reason for his failures.

[21] The applicant dropped out of theology school in February 2011 and was transferred to a career military position in July 2012, and it was not until November 2016 that he requested to change the reason for his second occupational transfer, which occurred in August 2006.

[22] But above all, the Director repeats the full history of the applicant's military career and he clearly demonstrates the lack of a causal link between the reason for his second occupational transfer (medical or other) and the consequences of his third occupational transfer (the loss of his salary protection). In other words, even if the applicant had been transferred for medical reasons in 2006, he would have lost his salary protection in 2012 as a result of his academic failure. Thus, the reason for the 2006 occupational transfer had no impact on the applicant's military career.

[23] In addition, the third occupational transfer was made according to the policies in effect in 2012 within the Forces. In order to gain access to an officer position, a candidate at that time was required to have a university degree, which the applicant did not have. As the Director states, the applicant was not grandfathered into the entry requirements from when he joined the Forces in 1998, as he was no longer in his entry plan (air navigator). The rule that applies to everyone is that when a candidate changes occupations, he or she must meet the conditions of employment at the time, not those that existed previously.

[24] The Director, therefore, considered all of the applicant's medical and academic factors, as well as the Forces' enrollment policy, before concluding that the applicant's second occupational

transfer had been made in accordance with applicable policies. In my view, he committed no error that requires the Court's intervention.

[25] The Director's decision bears the hallmarks reasonableness. He has acted within his specialized field of expertise and the reasons he provides are rational, comprehensive and intelligible. His decision is justifiable, transparent and intelligible, and it is one of the possible acceptable outcomes that can be justified in relation to the facts and the law.

## IV. Conclusion

[26] Since the applicant has not successfully argued that the Director erred in his analysis of the evidence or that his reasons are insufficient or incomprehensible, the application for judicial review is dismissed with costs in the amount of $750.

**JUDGMENT in T-857-21**

**THE COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed.

2. Costs in the total amount of $750 are awarded to the respondent.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Janna Balkwill

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | T-857-21 |
| **STYLE OF CAUSE:** | RENÉ POIRIER v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HELD VIA VIDEOCONFERENCE |
| **DATE OF HEARING:** | NOVEMBER 30, 2021 |
| **JUDGMENT AND REASONS:** | GAGNÉ ACJ |
| **DATED:** | MARCH 22, 2022 |

**APPEARANCES:**

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|---|---|
| René Poirier | FOR THE APPLICANT (REPRESENTING HIMSELF) |
| Ami Assignon | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Halifax, Nouvelle-Écosse | FOR THE RESPONDENT |