Federal Court Cour fédérale

Date: 20230818

Docket: T-1401-22

Citation: 2023 FC 1119

Ottawa, Ontario, August 18, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

EHSAN ZABIHISEASAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Ehsan Zabihiseasan, is seeking judicial review of the decision of the Final Authority [FA] of the Canadian Armed Forces [CAF], namely General Wayne Eyre as Chief of the Defence Staff [CDS], to uphold the Applicant's release from the CAF under category 5(f) of the *Queen's Regulations and Orders* [QR&O] [Decision].

[2] The release of the Applicant is the result of an alleged sexual assault leading to an Administrative Review under the *Defence Administrative Orders and Directives* [DAOD] 5019-2 – Administrative Review [DAOD 5019-2]; and a subsequent sexual harassment complaint leading to a second and distinct investigation [Harassment Investigation] under DAOD 5012-0 – Harassment Prevention and Resolution [DAOD 5012-0]. Following the Administrative Review and the Harassment Investigation, the Director Military Careers Administration [DMCA], whose responsibility is to determine whether a member remains fit for continued service in the CAF, determined that the Applicant should be released from the CAF. The Applicant then filed a grievance of his dismissal up to the FA, who upheld his dismissal.

[3] For the following reasons, the judicial review is dismissed.

II. Background facts

[4] The Applicant is a first-generation immigrant from Iran. Intending to contribute to Canadian society, he joined the CAF on February 27, 2017. By May 26, 2017, the Applicant had completed the basic Military Qualification course and was posted to the 3rd Canadian Division Training Center in Wainwright, Alberta.

[5] On or about June 26, 2017, the Applicant is alleged to have sexually assaulted another CAF member [Complainant]. The allegation is that he kissed and restrained the Complainant without her consent, and despite her persistent refusal. This event triggered three different proceedings: i) criminal charges were filed against the Applicant; ii) an Administrative Review under DAOD 5019-2 was initiated; and iii) the Complainant filed an official sexual harassment complaint, which led to the Harassment Investigation under DAOD 5012-0.

[6] On July 5, 2017, the Applicant was arrested and was later charged with sexual assault pursuant to section 130 of the *National Defence Act*, RSC 1985, c N-5 [NDA] and section 271 of the *Criminal Code*, RSC 1985, c C-46. He was released the following day with conditions. In May 2018, the criminal charges were withdrawn because the threshold for a reasonable prospect of conviction had not been met.

[7] These criminal charges and allegations led to an Administrative Review under DAOD 5019-2. That Administrative Review was triggered by the Applicant's Commanding Officer [CO], in December 2017 – before the criminal charges were withdrawn. The Administrative Review was conducted by the DMCA, who is responsible for determining whether a member is fit for continued service in the CAF.

[8] In April 2018, the Applicant was transferred to the 3rd Battalion Princess Patricia's Canadian Light Infantry in Edmonton, Alberta. A new CO, Lieutenant Colonel Prohar [LtCol Prohar], was in charge.

[9] As stated, the criminal charges were withdrawn in May 2018. As a result, in June 2018, LtCol Prohar informed the Applicant that the conditions of his release from custody following his arrest of July 2017 no longer applied.

[10] The Applicant states that in his letter, LtCol Prohar informed him that all investigations in relation to the events were now closed and that no other disciplinary measure would be imposed. That is not accurate. The letter from LtCol Prohar only states that the conditions for release in the context of the Applicant's arrest (and subsequent criminal charges), were withdrawn:

> Removal of release conditions – Private Ehsan Zabihiseasan
> 00010-01 INFMN
>
> References: A. QR&O 110.04 (1)
>
> …
>
> 1. The disciplinary matter related to ref B has been fully resolved. All release conditions are to be removed immediately for Private E. Zabihiseasan.
>
> 2. If you have any questions regarding this matter, please contact my Adjutant, [name omitted] at CSN 528-5103.
>
> (signed by D.D. Prohar)

[11] In June 2018, after the criminal charges were withdrawn, the Complainant filed a formal harassment complaint, which led to the Harassment Investigation. The Complainant's CO, Lieutenant Colonel Roy [LtCol Roy], pursued the investigation under DAOD 5012-0, which followed its own independent course. LtCol Roy sent a letter to the Applicant informing him of the harassment complaint and permitting him to respond to the allegations.

[12] Therefore, as of June 2018, there were two distinct proceedings that were underway simultaneously in relation to the Applicant's alleged sexual harassment of the Complainant: i) the DMCA was conducting its Administrative Review under DAOD 5019-2; and ii) the Harassment Investigation triggered by the Complainant and pursued by LtCol Roy under DAOD 5012-0. As discussed, the criminal charges had been withdrawn.

[13] In July 2018, the Applicant responded to LtCol Roy and the sexual harassment allegations, and submitted that the allegations were false and racially motivated. In his response, the Applicant did not contest LtCol Roy's power to conduct the Harassment Investigation as a "responsible officer" under DAOD 5012-0. This will be relevant later in my decision.

[14] In October 2018, LtCol Roy hired Ms. Jennifer White, an experienced workplace investigator, to continue the Harassment Investigation, interview witnesses, and produce a report.

[15] Ms. White interviewed the Complainant who alleged that the Applicant sexually assaulted her by kissing her without consent and then restraining her while attempting to grope her. Ms. White also interviewed the Applicant, who denied the allegations. Additionally, Ms. White interviewed four witnesses, all of whom had either received messages from the Complainant or had seen the Complainant and the Applicant in the common room on the night in question (but who were not direct witnesses to the alleged assault).

[16] On December 7, 2018, Ms. White issued a draft Harassment Investigation report and sent a copy to the Applicant to allow him to make representations on its contents. The draft report contained a summary of the harassment complaint, a description of the allegation, as well as background information and evidence from the Complainant, the Applicant, and the witnesses. Reply evidence from the Complainant and the Applicant was also included. An analysis of the evidence with respect to the credibility of the allegation was included in the draft report.

[17] Appendices to the draft report included the investigation Terms of Reference; the Complainant's harassment complaint dated June 18, 2018; and the Applicant's July 9, 2018 response to the harassment complaint, among others.

[18] On December 19, 2018, the DMCA issued its first synopsis as part of the Administrative Review under DAOD 5019-2. The synopsis indicated that, at that point, the DMCA was of the view that on a balance of probabilities, it was more likely than not that the Applicant had assaulted the victim, and that three possible outcomes were available: 1) release from the CAF

under 2(a) of the QR&O; 2) release from the CAF under 5(f) of the QR&O; or 3) retention in the CAF with remedial measures.

[19] It is important to specify that, while they were conducted simultaneously, this Administrative Review procedure was distinct from the Harassment Investigation. Moreover, the draft Harassment Investigation report, sent to the Applicant for comments on December 7, 2018, was not provided to the DMCA before the issuance of the first Administrative Review synopsis, which was sent to the Applicant for comments on December 19, 2018.

[20] The Applicant, through counsel, responded to Ms. White's draft Harassment Investigation report and to the DMCA's first Administrative Review synopsis (Certified Tribunal Record [CTR] at pp 424-425). The Applicant argued that the allegations were unreliable and that a release from the CAF was a disproportionate remedy with respect to the alleged sexual harassment complaint.

[21] On January 15, 2019, after reviewing various witness statements, Ms. White issued her final Harassment Investigation report, concluding that the events occurred and that they constituted harassment in contravention of the DAOD 5012-0.

[22] The Applicant responded to the final Harassment Investigation report and argued that he was innocent, that the report presented inconsistencies, and that the Complainant's allegations were racially motivated.

[23] On or about February 1, 2019, following the findings made by Ms. White in the final Harassment Investigation report, LtCol Roy, who had initiated the Harassment Investigation and hired Ms. White to conduct the investigation and produce the report, issued his letter of closure

on the sexual harassment complaint. LtCol Roy found that he was satisfied that, on a balance of probabilities, the Applicant had harassed the Complainant. Notably, LtCol Roy did not recommend that the Applicant be released from the CAF, but did recommend that the final Harassment Investigation report be sent to the DMCA so that it would be taken into account in the ongoing Administrative Review.

[24] On February 7, 2019, the DMCA issued a second synopsis as part of the Administrative Review, maintaining its initial view held as of December 2018, and determining that the Applicant should be released from the CAF under item 5(f) of the QR&O. The Administrative Review found that the Applicant did assault the Complainant and that this assault was sexual in nature, and therefore the Applicant had breached DAOD 5019-5 – Sexual Misconduct and Sexual Disorders (replaced by DAOD 9005-1 – Sexual Misconduct Response) [DAOD 5019-5].

[25] On May 22, 2019, the DMCA issued its Administrative Review decision and found that on a balance of probabilities, the Complainant's version of the events was more plausible than the Applicant's. Weighing the aggravating and mitigating factors, the DMCA directed that the Applicant be released from the CAF under item 5(f) of the QR&O.

A. *The grievance to the Initial Authority and the consideration by the Final Authority*

[26] Pursuant to section 29(1) of the NDA, the Applicant, as a CAF member, is able to submit a grievance when aggrieved by a decision, act, or omission in the administration of the affairs of the CAF for which there is no other process for redress under the Act.

[27] The Initial Authority [IA] is the first level of review for the grievance. The Final Authority is the CDS or a delegate, who can then review the IA's decision if the griever is dissatisfied with the IA's decision.

[28] In some instances and pursuant to section 29.16 of the NDA, the Final Authority will refer a grievance to the Military Grievances External Review Committee [Committee]. The Committee is an external, independent, arm's length body mandated under the Act to investigate and review grievances referred to it by the CDS. The CDS is not bound by those recommendations and findings, but must provide reasons if they do not act pursuant to a finding or recommendation of the Committee (sections 29.13, 29.16(1), 29.2 of the NDA; *Higgins v Canada (Attorney General)*, 2016 FC 32 [*Higgins*] at paras 19-20).

[29] Pursuant to section 29.15 of the NDA, the decision made by the Final Authority is final and binding except for judicial review (*Higgins* at para 20).

[30] On or about June 19, 2019, the Applicant commenced the grievance process available to him against the DMCA's Administrative Review decision, as set out in the NDA, chapter 7 of the QR&O (Grievances), and the DAOD 2017-1 – Military Grievance Process [DAOD 2017-1].

[31] In support of his grievance, the Applicant argued that there were inconsistencies in the witnesses' evidence, that the Complainant was unreliable, and that release under 5(f) of the QR&O was a disproportionate outcome. The Applicant also argued that the Complainant was motivated by racism or prejudice against the Applicant's culture.

(1) The Decision of the Initial Authority

[32] On January 17, 2020, the decision to release the Applicant was upheld. Brigadier General Thomson, as the IA, determined that the decision made by the DMCA on the Administrative Review was reasonable.

[33] Brigadier General Thomson indicated that a CAF member who engages in sexual misconduct is liable to administrative action, including release, since this behaviour destroys basic social and military values within the CAF. He then found that the release was reasonable and proportional considering that the Applicant's actions on the night of June 26, 2017, reflected poorly on the CAF and had left a lasting effect on the Complainant.

[34] On the issue of the Complainant's alleged racist motives, Brigadier General Thomson acknowledged that the Complainant had indeed made some derogatory comments by text after the incident. However, he held that they could be explained by the fact that the Complainant was in an emotional state after the misconduct, and therefore there was no evidence to support the Applicant's claim of racism.

[35] In his analysis, Brigadier General Thomson weighed the evidence and found it compelling that, during her interview, the Complainant consistently recalled "sensory details" from the night of June 26, 2017.

[36] Brigadier General Thomson also noted in his decision that item 5(f) of the QR&O was the category that best justified the Applicant's release.

(2) The Decision of the Final Authority

[37] In February 2020, the Applicant requested that his grievance be forwarded to the Canadian Forces Grievance Authority for FA consideration.

[38] On February 19, 2020, the grievance was referred by the FA to the Committee. In March 2021, the Committee recommended that the FA not grant the grievance and found that the Administrative Review was fair, as the evidence supported the allegation that the Applicant had engaged in sexual misconduct. The Applicant responded to the Committee's recommendation to dismiss the grievance and argued that there had been no additional complaints against him since the alleged misconduct and acknowledged that sexual misconduct had no place in the CAF.

[39] On April 14, 2022, the FA agreed with the Committee's analysis and issued his Decision dismissing the Applicant's grievance.

[40] The FA considered the Applicant's case *de novo*. He noted that he "reviewed the Committee's findings and recommendations," and that their analysis of the issue was "thorough and comprehensive" and "fully addresse[d] the issues raised in [the grievance]." The FA determined that the Applicant had been treated fairly in accordance with the applicable rules, regulations, and policies and therefore could not grant the redress sought by the Applicant.

[41] In his decision making process, the FA considered, amongst other things, the Complainant's disturbing account of how the Applicant physically forced himself on her as well as the final Harassment Investigation report. The FA noted that he had placed significant weight on the final Harassment Investigation report considering that the investigator had a lot of

experience. The FA found that the evidence in this report was sufficiently cogent and convincing to conclude that the Applicant had, on a balance of probabilities, committed sexual misconduct.

[42] The FA took into consideration sections 3.1 and 3.5 of DAOD 5019-5 to determine that a member who engages in sexual misconduct is liable to administrative action, including release. The FA also considered the fact that the Applicant had only been a CAF member for approximately three months, and had signed a statement acknowledging that he had read his unit's policy regarding harassment and sexual misconduct only one month before the sexual misconduct occurred.

[43] The FA found that the Applicant's release from the CAF was an appropriate outcome given that the Applicant had violated sexual misconduct and ethics policies, including DAOD 5019-5 and the *Code of Values and Ethics*. The FA also noted that instead of carrying the notation "dismissed with disgrace for misconduct" and "released for misconduct," which had historically been assigned to people released due to sexual misconduct within CAF, the Applicant's notation under 5(f) of the QR&O only carried "honourable release."

[44] The category of "honourable release" applies to the release of members who, because of factors within their control, develop a personal weakness or behaviour that seriously impairs their usefulness to the CAF. In this case, the FA found that the Applicant's conduct seriously compromised his usefulness to the CAF as he breached the CAF policies and contravened the *Code of Values and Ethics.*

[45] The FA further found that any alleged racist behaviour on behalf of the Complainant did not mitigate the Applicant's behaviour, particularly given that the allegation of racism occurred

after the misconduct. Nevertheless, the FA noted his concerns regarding the evidence of racist conduct on the part of the Complainant at the end of the Decision, and will treat it separately.

III. Issues and standard of review

[46] The Applicant raises two issues for judicial review:

1. The FA breached his right to procedural fairness;

2. The Decision is unreasonable.

[47] However, the Respondent raises a preliminary issue of whether the Applicant's affidavit is admissible.

[48] On the procedural fairness issue, as recently stated in *Caron v Canada (Attorney General)*, 2022 FCA 196 at paragraph 5, allegations of breaches of procedural fairness are reviewed according to the standard of correctness: "When engaging in a procedural fairness analysis, [the] Court must assess the procedures and safeguards required, and, if they have not been met, the Court must intervene" (see also *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*Canadian Pacific*] at paras 33-34).

[49] As reiterated in *Canadian Pacific* at paragraph 54, the role of the reviewing court on procedural fairness issues is simply to determine whether the procedure that was followed was fair, having regard to the particular circumstances of the case: "The ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond" (at para 56).

[50] On the issue of the standard applicable to the merits of the FA's Decision, both parties agree that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 23). As stated by the Supreme Court of Canada in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67:

> [28] In *Vavilov*, this Court held that "[r]easonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law" (para. 82). The Court affirmed that "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies" (para. 86 (emphasis in original)).

[51] In *Walsh v Canada (Attorney General)*, 2016 FCA 157 [*Walsh*], which involved a CDS decision to release a member of the CAF, the Federal Court of Appeal endorsed Justice de Montigny's reasons that:

> [14] …
>
> > The Final Authority is given a broad discretion when considering and determining grievances, especially when identifying the remedies appropriate under the circumstances, because of his in-depth knowledge of the military environment and operations. These kinds of decisions are owed a high degree of deference, and I have not been convinced that the course of action chosen (release instead of counselling and probation) is not one of the "possible, acceptable outcomes which are defensible in respect of the facts and law".

[52] The context of the proceedings in which a decision is rendered is also important in order to understand a decision maker's reasons and to determine if the decision is reasonable. The submissions of the parties before the decision maker are particularly important (*Vavilov* at paras 94, 106, 127, 128). An opposing party may have made a concession leading the decision maker

to adjudicate on a particular issue, or failed to have made an argument, which explains why the decision maker remained silent on an issue. In fact, "this may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not […] a failure of justification, intelligibility or transparency" (*Vavilov* at para 94).

[53] Further, it is important to note that, as a general rule, new arguments cannot be brought before a reviewing court. In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*], the Supreme Court of Canada held:

> A. *Judicial Review of an Issue That Was Not Raised Before the Tribunal*
>
> [22] The ATA sought judicial review of the adjudicator's decision. Without raising the point before the Commissioner or the adjudicator or even in the originating notice for judicial review, the ATA raised the timelines issue for the first time in argument. The ATA was indeed entitled to seek judicial review. However, it did not have a right to require the court to consider this issue. Just as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so: see, e.g., *Canadian Pacific Ltd. v. Matsqui Indian Band*, 1995 CanLII 145 (SCC), [1995] 1 S.C.R. 3, *per* Lamer C.J., at para. 30: "[T]he relief which a court may grant by way of judicial review is, in essence, discretionary. This [long-standing general] principle flows from the fact that the prerogative writs are extraordinary [and discretionary] remedies."
>
> [23] Generally, this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal (*Toussaint v. Canada Labour Relations Board* (1993), 160 N.R. 396 (F.C.A.), at para. 5, citing *Poirier v. Canada (Minister of Veterans Affairs)*, 1989 CanLII 5208 (FCA), [1989] 3 F.C. 233 (C.A.), at p. 247; *Shubenacadie Indian Band v. Canada (Human Rights Commission)*, 1997 CanLII 6370 (FC), [1998] 2 F.C. 198 (T.D.), at paras. 40-43; *Legal Oil & Gas Ltd. v. Surface Rights Board*, 2001 ABCA 160, 303 A.R. 8, at

> para. 12; *United Nurses of Alberta, Local 160 v. Chinook Regional Health Authority*, 2002 ABCA 246, 317 A.R. 385, at para. 4).
>
> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)
>
> [26] Moreover, raising an issue for the first time on judicial review may unfairly prejudice the opposing party and may deny the court the adequate evidentiary record required to consider the issue (*Waters v. British Columbia (Director of Employment Standards)*, 2004 BCSC 1570, 40 C.L.R. (3d) 84, at paras. 31 and 37, citing *Alberta v. Nilsson*, 2002 ABCA 283, 320 A.R. 88, at para. 172, and J. Sopinka and M. A. Gelowitz, *The Conduct of an Appeal* (2nd ed. 2000), at pp. 63-68; *A.C. Concrete Forming Ltd. v. Residential Low Rise Forming Contractors Assn. of Metropolitan Toronto and Vicinity*, 2009 ONCA 292, 306 D.L.R. (4th) 251, at para. 10 (*per* Gillese J.A.)).
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> [Emphasis added.]

[54] In *Sigma Risk Management Inc v Canada (Attorney General)*, 2022 FCA 88, the Federal Court of Appeal recently held that a reviewing court should not hear new arguments that should have been brought and considered first by the administrative decision maker:

> [6] Sigma takes issue with the fact that Public Works waited until January 25, 2021 to advise them of their right to file a complaint

> with the Tribunal. However, they did not raise this argument before the Tribunal. That alone is sufficient to dispose of the argument, as a reviewing court is loathe to hear new arguments on judicial review that could have, but were not, raised before the administrative decision-maker: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 23.

[55] As discussed below, the Applicant is relying on new evidence, and new arguments, that were never presented to the IA or FA in the grievance process, nor in any other representations made by the Applicant in response to the various proceedings. For the reasons noted below, raising these issues for the first time in judicial review denies the Court the adequate evidentiary record required. Moreover, in some cases, the arguments relate squarely to the specialized nature of the CAF grievance process and discipline procedures. Raising new arguments on these specialized issues at this time precludes the Court from having the benefit of the IA and FA's views on them, as it should on judicial review.

IV. Preliminary issue – the admissibility of the Applicant's affidavit

A. *The content of the affidavit*

[56] The Applicant filed an affidavit that includes a variety of new evidence, allegations, and arguments. The Applicant intends to rely on that new evidence to bring new arguments in judicial review not presented before the IA or FA in their decision making process.

[57] The Respondent objects to the admissibility of the affidavit.

[58] The Applicant's affidavit states that:

1. The Applicant was unable to find the contract between Whiteworks Solutions, Inc. [Whiteworks], the company hired by LtCol Roy to complete the Harassment Investigation, and the Government of Canada, the Department of National Defense, or the CAF through the Government of Canada websites. He made an Access to Information and Privacy [ATIP] request but was never able to obtain the contract (paras 7-8 of affidavit);
2. According to a search of corporate records, Whiteworks is not designated for investigations or any type of legal work. It is a corporation owned by a person named Jennifer White since 2009 for trucking services (para 9 of affidavit);
3. In September 2018, just before Ms. White was hired to conduct this investigation, her CV was modified to show Jennifer White Professional Corporation operating as Whiteworks Solutions, Inc. (para 10 of affidavit);
4. On July 24, 2019, Ms. White allegedly filed to close Whiteworks. This occurred after the Applicant had submitted a formal grievance and had filed an injunction application, which was later withdrawn (para 11 of the affidavit);
5. A code in the Terms of Reference attached to the draft Harassment Investigation report indicates that payment for the Harassment Investigation was made by the CO of the Canadian Forces Joint Signal Regiment, which is the same CO as the Complainant. The Applicant further states that according to CAF policy, the CO is not authorized to pay for any item or service over $5,000 and that similar contracts for harassment investigations in the public service have been known to cost more than $20,000 (para 12 of the affidavit);
6. The statements provided by the Complainant and by others in the Harassment Investigation report, as well as the detailed description of the alleged incident, are

inconsistent. The Applicant states that it would have been impossible to physically act according to what the Complainant alleges (para 14 of the affidavit);

7. The report relies on statements made by Major Brennan who brought her own sexual misconduct claims against General Vance (para 15 of the affidavit);
8. Text messages between the Complainant and witnesses before and after the alleged incident, which would have shown signs of collusion, were not preserved (para 16 of the affidavit);
9. On June 11, 2018, the Applicant's CO, LtCol Prohar who had the authority to end the investigation, issued a letter stating that the matter was fully resolved and closed (para 18 of the affidavit);
10. On or about February 1, 2019, the Applicant received a letter from LtCol Roy that remedial measures such as the attendance of a course pertaining to respect within the CAF, a review of DAOD 5019-5, and the necessity of issuing an apology to the Complainant were recommended. The Applicant expected those measures but not to be under further investigation for the possibility of release (para 19 of the affidavit);
11. LtCol Roy did not have the authority to countermand LtCol Prohar's decision (para 20 of the affidavit);
12. While denying committing the misconduct, the Applicant believes that the initial recommendations for remedial measures should have been carried out as they were more in line with the alleged misconduct (para 21 of the affidavit).

B. *The Respondent's arguments on the inadmissibility of the affidavit*

[59] The Respondent objects to the admissibility of the Applicant's affidavit. The Respondent submits that in his affidavit, the Applicant raises convoluted and highly speculative arguments that the Administrative Review and Harassment Investigation were improperly initiated and that the CAF improperly retained a harassment investigator who must have been biased because they were actually running a trucking company.

[60] The Respondent submits that the affidavit is improper on judicial review (*Wojcik v Canada (Attorney General)*, 2020 FC 958 at paras 21-28; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Association of Universities*]) and that it raises new evidence that was not put before the decision maker but that was available at the time. Moreover, the Respondent submits that to the extent that the evidence is new, it does not meet the four criteria set out in *Palmer v The Queen*, 1979 CanLII 8 (SCC),[1980] 1 SCR 759 [*Palmer*].

[61] The Respondent also submits that the evidence included in the affidavit is unreliable as there are scant details about the allegations (dates and names of websites searched, date of the ATIP request, etc.). For example, the Respondent notes that exhibit F to the Applicant's affidavit, the corporate records of Whiteworks Solutions, Inc., is misleading and unreliable as the online materials that are contained within this exhibit are not part of the corporate registry search.

[62] The Respondent further adds that most of the new evidence, such as the contracting process, is irrelevant to the circumstances of the Applicant's sexual misconduct and to the

administrative proceedings that followed. For example, there is no allegation that the investigator is incompetent, and if the Applicant had issues with the way the investigator was hired, he could have raised them when the Terms of Reference as well as the draft and final Harassment Investigation reports were provided to him. Alternatively, the Applicant could have made arguments on the issue before the IA.

[63] The Respondent also argues that the Applicant's affidavit is improperly argumentative as it includes arguments regarding: i) the CAF's authority to engage and pay for the harassment investigator; ii) the reliability of the harassment investigator's final report; iii) the appropriate remedial measures in response to the sexual misconduct findings; and iv) vague unsupported allegations of harm to future career prospects. The Respondent argues that the Applicant's affidavit does not comply with Rule 81 of the *Federal Court Rules*, SOR/98-106 and the general purpose of affidavit evidence, which is to adduce facts relevant to the dispute without gloss, opinion, or argument (relying on *Canada (Attorney General) v Quadrini*, 2010 FCA 47 [*Quadrini*] at para 18).

C. *Analysis*

[64] As a general rule, the evidentiary record before a court on judicial review is normally restricted to the evidentiary record that was before the administrative decision maker. In *Association of Universities*, Justice Stratas noted three exceptions allowing affidavit evidence on judicial review (at para 20):

> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review. Care must be taken to ensure that the affidavit does not go further

> and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider.…
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness. For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.
>
> [Citations omitted.]

[65] In addition, evidence proffered by affidavit on judicial review is subject to specific rules. As Justice Gascon recently stated in *Choudhry v Attorney General of Canada*, 2023 FC 1085 [*Choudhry*] at paragraph 39:

> […] Section 81 of the Rules provides that the alleged facts contained in an affidavit shall be confined to facts within the deponent's personal knowledge and must be delivered "without gloss or explanation" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 [*Quadrini*] at para 18). Moreover, the Court may strike or disregard all or parts of affidavits where they are abusive or clearly irrelevant, or where they contain opinions, arguments, or legal conclusions (*Quadrini* at para 18; *Cadostin v Canada (Attorney General)*, 2020 FC 183 [*Cadostin*] at para 36). The general rule is that lay witnesses may not give opinion evidence but may only testify to facts within their knowledge, observation, and experience (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*] at para 14; *Toronto Real Estate Board v Commissioner of Competition*, 2017 FCA 236 at para 78). The main rationale for excluding lay witness opinion evidence is that it is generally not helpful to the decision maker and may be misleading (*White Burgess* at para 14). […]

[66] In this case, the Applicant appears to include some new evidence to argue a breach of procedural fairness or a reasonable apprehension of bias. That evidence could meet one exception discussed in *Association of Universities*. However, as held by the Federal Court of Appeal in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paragraph 26, if the applicant had the opportunity to raise the procedural fairness issue before the decision maker, they cannot raise it on judicial review for the first time (see also *Choudhry* at para 41). For the reasons below, the Court will not consider some of the affidavit evidence or the new arguments that are raised by the Applicant (*Alberta Teachers* at paras 25-26).

[67] Moreover, it is clear that some paragraphs of the Applicant's affidavit contain improper opinions, arguments, and legal conclusions regarding the issues before the Court and go much farther than the exceptions noted above in relation to the admissibility of that evidence. Those paragraphs were not properly included in the Applicant's affidavit and they cannot be considered by the Court in this Judgment.

[68] Those paragraphs do not otherwise meet any of the recognized exceptions to the general rule that judicial reviews proceed based on the record that was before the decision maker. The affidavit is argumentative in relation to evidence that was already contained in the record, but on issues that the Applicant failed to raise prior to this judicial review.

[69] Indeed, the Applicant was in possession of most of the evidence that is included in the affidavit before the impugned decision was made; that evidence is not "new" in the sense that it was part of the record before the IA or the FA. The Applicant never raised before the IA or the FA any issue regarding procedural fairness or bias as now framed in his affidavit, despite having the opportunity to provide additional evidence and making his new arguments at that time.

[70] More importantly, the new arguments require evidence that was not presented prior to this application for judicial review. The Court could also have benefitted from the decision maker's expertise in relation to some of the evidence and arguments now raised, as well as evidence that may have been filed by the Respondent in reply.

[71] While there is some "new evidence" contained in the affidavit, it could have been obtained and adduced before the grievance process, and the evidence as a whole is not sufficiently relevant, decisive, reliable, or credible to this judicial review (*Palmer* at p 775).

[72] In the circumstances, the Court may strike the impugned paragraphs or give them no weight or probative value (*Choudhry* at para 41 citing *CBS Canada Holdings Co v Canada*, 2017 FCA 65 at para 17; *Cadostin v Canada (Attorney General), 2020 FC 183* at para 36; *Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at paras 30-31). Because it is impossible in the circumstances to require the Applicant to file a new affidavit, the Court will not strike out the affidavit because it does contain some admissible information. I will therefore exercise my discretion to give no weight or probative value to the inadmissible information, without striking the affidavit (*Choudhry* at para 44 citing *Zurita Vallejos v Canada (Citizenship and Immigration)*, 2009 FC 289 at paras 16-17). In any event, the evidence adduced would not be sufficient to demonstrate a breach of procedural fairness or raise a reasonable apprehension of bias.

[73] Consequently, applying the principles noted above, the Court rules that paragraphs 1-6, 17, 19, 22-24 of the Applicant's affidavit are admissible evidence. All other paragraphs are not admissible because the evidence was not before the decision maker, raise new arguments that

ought to have been made before the IA or FA, contain opinions, arguments, or legal conclusions, and are not reliable, decisive or material on judicial review.

V. Procedural fairness

A. *Parties positions*

(1) Applicant's position

[74] The Applicant submits that the well-known factors of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 were not respected. As his case involved determining whether he would be able to pursue a career with the RCMP or other public agencies, the applicable process ought, in his view, to have resembled judicial decision-making. In other words, because the decision would have important impacts on his future career prospects, the decision maker ought to have been more careful.

[75] The Applicant contends that he had a legitimate expectation that the decision made by LtCol Prohar would be the final decision. As his decision was allegedly overruled by LtCol Roy, an officer of equal rank, it appears to the Applicant to be a politically motivated action.

[76] Indeed, he submits that the Harassment Investigation was not initiated by his CO (LtCol Prohar), but by the Complainant's CO (LtCol Roy), who acted outside of his authority to directly engage, instruct, and pay for the investigator's services. The Applicant's submission in this regard is that when he was under his command, LtCol Prohar decided not to pursue any further investigations. Therefore, as a commander of equal rank, LtCol Roy could not overrule LtCol Prohar and initiate the Harassment Investigation.

[77] The Applicant further points out that there is an apprehension of bias by the investigator against the Applicant, which speaks to the credibility of her opinions in the Harassment Investigation reports. In support of his argument, the Applicant refers to the Terms of Reference for the Harassment Investigation and raises several issues.

[78] First, the Terms of Reference note a "call-up" allegedly between LtCol Roy and Ms. White, but there is no document or transcript of that communication. The Applicant argues that LtCol Roy's direct communication with a contractor brings questions of undue influence to the investigation, which is in violation of the Terms of Reference.

[79] Second, the Terms of Reference indicate that the expenses related to the contract will be paid under a specific account. The Applicant alleges that this account belongs to LtCol Roy's unit, and that LtCol Roy's use of his unit's funds to defray the costs of an investigation is in breach of the QR&O. During the hearing, the Applicant submitted that members of the CAF are not allowed to have private dealings such as the one that occurred in this case.

[80] Third, the Applicant notes that Ms. White was hired through a firm called "QMR Staffing Solutions Incorporated," as can be seen on the Terms of Reference. However, in December 2018, Ms. White provided the Applicant with her draft Harassment Investigation report for comments, and that draft report indicated on the front page that Ms. White worked with the office of "Whiteworks Solutions, Inc." and not "QMR Staffing Solutions Incorporated."

[81] Fourth, the Applicant filed affidavit evidence that "Whiteworks Solutions, Inc." is a corporation involved in the trucking industry and not involved in investigative or legal services. According to the Applicant, as a trucking company, Whiteworks was not incorporated as a

business offering investigation services for sexual misconduct cases and was dissolved in the summer of 2019 when the Applicant hired legal counsel who started questioning the validity of the report.

[82] For the Applicant, all of these discrepancies raise sufficient issues as to create a reasonable apprehension of bias. According to the Applicant, these facts demonstrate that LtCol Roy made every attempt possible to ensure that the Applicant would be found responsible for the sexual assault against the Complainant and be discharged from the CAF. The Applicant claims that there was, at minimum, "a thought process about the desired outcome of the investigation. To find the means to have the Applicant released from the CAF as soon as possible under a release category that would harm his future employment opportunities with such agencies at [*sic*] the RCMP" (Applicant's factum at para 39).

(2) Respondent's position

[83] The Respondent submits that the requisite level of procedural fairness in processing the Applicant's grievance was met. The Respondent argues that the duty of procedural fairness is governed by paragraphs 8.13-8.24 of the DAOD 2017-1. These paragraphs provide that the griever has the right to: a) be given notice of the key issues and potential consequences of any decision to be made by the redress authority; b) be provided with all the relevant documents and information to be considered by a redress authority; c) be provided with an opportunity to provide representations on the documents and information; and d) receive a well explained, timely, reasonable, and impartial determination of the grievance.

[84] The Respondent submits that all the relevant materials that were involved in the decision making process were sent to the Applicant for comments, including the draft and final Harassment Investigation reports and the final DMCA Administrative Review synopsis.

[85] Moreover, the Applicant was able to be fully engaged and submit his representations in the IA and FA processes, which were disclosed to the Applicant with notice throughout the grievance process. The Applicant availed himself of the opportunity to review those materials and to make submissions at each instance.

[86] The Respondent further submits that the Applicant makes speculative allegations of bias without any real justification. Relying on the case of *Canadian Arab Federation v Canada (Citizenship and Immigration),* 2013 FC 1283 [*Canadian Arab Federation*] at paragraph 75, the Respondent argues that the Applicant has not met the high onus of establishing that any of his submissions were futile and that the investigator, or the IA or FA, had a closed mind. In fact, the investigator's report is thorough, comprehensive, and does not indicate any signs of bias or that the findings were predetermined.

[87] The Respondent argues that allegations of impropriety, if any, should have been made at the earliest opportunity. In this case, the Applicant was in possession of the Terms of Reference and all the material facts necessary to make the substantive arguments he is now making on procedural fairness and bias. However, because he did not raise his concerns before the IA and FA, or at any time during the process, he cannot now argue a breach of procedural fairness for the first time.

B. *Analysis*

[88] The Court concludes that in this case, the Applicant was able to know the case to meet, and was provided with and in fact availed himself of several opportunities to provide his submissions to the decision makers. There is no breach of procedural fairness.

[89] As stated above, some of the evidence filed by the Applicant in his affidavit is not admissible. Nevertheless, in my view and for the following reasons, even if this evidence was admitted, it is not sufficiently credible or reliable to demonstrate a reasonable apprehension of bias or that the investigator, the IA, or the FA had a closed mind.

[90] The Applicant, without specifically pleading it with appropriate case law or reliable evidence, alleges that the actions taken by all the individuals involved, whether taken individually or together, demonstrate a reasonable apprehension of bias or a closed mind. The applicable test for a reasonable apprehension of bias is well known and was discussed by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25, citing *Committee for Justice and Liberty v National Energy Board* (1976), [1978] 1 SCR 369 at p 394, per Justice de Grandpré (dissenting):

> [20] The test for a reasonable apprehension of bias is undisputed and was first articulated by this Court as follows:
>
> > . . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]

[91] The Applicant's position that there is a reasonable apprehension of bias is based on a web of allegations that are either unsubstantiated or plainly wrong. The Applicant has also not been able to meet the high onus of demonstrating that the all participants in the proceedings had a closed mind (*Canadian Arab Federation* at para 75).

[92] At the outset, as discussed above, it is important to note that the Applicant was subject to three different proceedings, all of them in relation to the same set of facts, but all distinct and triggered by different processes. The first one was the criminal investigation and subsequent charges. That investigation followed its course and the criminal charges were withdrawn. The second was the DMCA Administrative Review under DAOD 5019-2. And third, after the criminal charges were withdrawn, the Complainant filed a harassment complaint to the CAF that was pursued under DAOD 5012-0. This culminated in the Harassment Investigation report. Only the second and third proceedings are important for the purposes of this application for judicial review.

[93] The Applicant confuses the different inquiries and proceedings that were conducted. First, he alleges that LtCol Prohar, his CO, issued a letter stating that all investigations in relation to the events were now closed and that no other disciplinary measure would be imposed. From this, the Applicant alleges that LtCol Roy, of the same rank as LtCol Prohar, could not overrule LtCol Prohar and instigate the Harassment Investigation.

[94] However, that allegation is plainly false. The letter issued by LtCol Prohar was in relation to the withdrawal of the criminal charges and nothing else. It merely mentions that the conditions for his release had been lifted, as well as the disciplinary issues related to the criminal charges.

The letter does not shield or inform the Applicant as to any other related and potentially future investigations.

[95] LtCol Roy triggered the Harassment Investigation following the Complainant's formal sexual harassment complaint. This was a different proceeding than that of the criminal charges for which LtCol Prohar had sent a letter to the Applicant. In triggering the Harassment Investigation, LtCol Roy was not at all overruling an officer of equal rank, as alleged by the Applicant. Rather, LtCol Roy was a "responsible officer" and could start the investigation under DAOD 5012-0 because he was the CO of the Complainant (all COs may start an investigation under DAOD 5012-0 in relation to such matters). As a result, because LtCol Prohar did not make any decision to "close" the matter, and LtCol Roy did not "overrule" anyone in conducting the Harassment Investigation, this allegation is irrelevant to the matter. It bears to be repeated, however, that when LtCol Roy issued his letter of closure of the Harassment Investigation, in February 2019, he did not recommend that the Applicant be released from the CAF.

[96] The Applicant also argued that LtCol Roy did not have the power to start the Harassment Investigation because he was not an "initiating authority" pursuant to DAOD 5019-4 – Remedial Measures. Under that DAOD, the "initiating authority" that may conduct investigations must be the individual's CO, and LtCol Roy was the Complainant's CO, not the Applicant's. That argument cannot be sustained.

[97] In a letter to the Applicant dated June 2018, informing him of the sexual harassment complaint and allowing him to respond, LtCol Roy clearly identified that he was conducting the Harassment Investigation under DAOD 5012-0 and that he was the "responsible officer" for that purpose. At no time did LtCol Roy rely on any other power to do so. In his response to the sexual

harassment complaint dated July 9, 2018, the Applicant did not contest LtCol Roy's authority to conduct an investigation under DAOD 5012-0, though he had the opportunity to do so. The Applicant again did not raise that argument in his response to the draft Harassment Investigation report. Finally, the Applicant could have made that argument in his grievance process, before the IA and later, to the FA, but he did not. While both the IA and FA are experts in the area and could have ruled on the matter, the Applicant failed to make any submissions on that issue.

[98] In any event, LtCol Roy's interpretation of his powers to conduct an investigation under DAOD 5012-0 is reasonable in light of the text of DAOD 5012-0, the evidence, and the arguments presented. The parties did not propose any interpretation of DAOD 5012-0 that would suggest that a CO is not a "responsible officer" under DAOD 5012-0 and does not have the power to conduct an investigation on an allegation of sexual harassment. Rather, in his representations initiating his grievance before the IA, on June 19, 2019, the Applicant himself appears to concede LtCol Roy's power under DAOD 5012-0 as a "responsible officer," and requested that the DMCA decision to release him under 5(f) of the QR&O be substituted with LtCol Roy's remedial recommendations in his closure letter (CTR at pp 352, 358).

[99] The DMCA Administrative Review is the proceeding that resulted in the Applicant's ultimate release from the CAF under 5(f) of the QR&O. Neither LtCol Prohar nor LtCol Roy actively participated in that review. Interestingly, the DMCA had, in the first synopsis of the Administrative Review submitted to the Applicant for comments on or about December 17, 2018, already signalled that release under 5(f) of the QR&O was the most likely scenario. The Harassment Investigation report was not completed at that time and was not in the possession of the DMCA. None of the issues relating to the potential bias of Ms. White, how the contract was

executed with LtCol Roy, nor that LtCol Roy could have overruled LtCol Prohar, have any link with the Administrative Review.

[100] Again, even if the Court admitted the affidavit evidence discussed above, and for the following reasons, the evidence itself is not sufficient nor has the necessary credibility to raise a reasonable apprehension of bias or a breach of procedural fairness.

[101] In the affidavit, the Applicant notes that the Terms of Reference indicate that there was a telephone call between the investigator and someone from the CAF, and he presumes that the person was LtCol Roy (see Terms of Reference dated October 25, 2018 – CTR at p 158). However, there is no evidence that LtCol Roy did make that call or that the call was inappropriate, and such call on its own does not raise a reasonable apprehension of bias. The Applicant's new argument on this basis precludes this Court from a complete evidentiary record to consider the matter (*Alberta Teachers* at para 26).

[102] The Applicant also raises an issue on how the investigator was paid. The Terms of Reference do mention codes to charge for payments (referred to as "FINCODEs"), but there is no evidence that those codes come from LtCol Roy's unit or that even if this was the case, that somehow that would be inappropriate. Moreover, because the IA and FA are experts in these matters, they would have been in a better position than this Court to assess and weigh the Applicant's evidence and arguments on this issue, had it been raised in due course. In any event, even if LtCol Roy erred by paying the investigator out of his unit's funds that on its own does not taint the investigation itself with bad faith, bias, or procedural unfairness.

[103] The Applicant then submits that Whiteworks is incorporated to operate in the trucking industry, that Ms. White changed her CV, and that Whiteworks then closed. This evidence is neither reliable, relevant, nor capable of affecting the result of this judicial review. Indeed, the Applicant does not allege that Ms. White is not a competent investigator. To the contrary, the Applicant filed in evidence Ms. White's curriculum vitae demonstrating that she is an experienced and competent investigator, as well as a member of the Law Society of Ontario who has been working in the harassment field for over 20 years. On the other hand, the evidence on the actual corporate status of Whiteworks is incomplete and unreliable. Therefore, the evidence is not sufficient to raise a reasonable apprehension of bias against Ms. White's work.

[104] Moreover, on the corporate status of Whiteworks, the Applicant was in a position to note that Ms. White was hired to perform the investigation through another entity, QMR Staffing Solutions Incorporated, when he received the draft Harassment Investigation report on December 7, 2018. The Applicant was therefore able to argue that this change in corporate affiliation raised a reasonable apprehension of bias. Had he raised the argument in due course, it is possible that the investigator would have provided a reasonable explanation. In any event, the evidence is not conclusive because it has no impact on Ms. White's qualifications to conduct the Harassment Investigation, which is not contested.

[105] I therefore agree with the Respondent that if the Applicant had any issues with the process, he ought to have raised them during his grievance process before the IA and the FA. The Applicant was in possession of the necessary information and had ample opportunities to do so.

[106] Altogether, none of the evidence and arguments raised by the Applicant in his affidavit are sufficient, on their own or collectively, to raise a reasonable apprehension of bias, collusion, or demonstrate a closed mind, of Ms. White, LtCol Roy, or any other decision maker, to ensure that the Applicant would be released from the CAF.

[107] The Applicant was discharged as a result of the Administrative Review conducted by the DMCA, and not because of LtCol Roy. None of the allegations raised by the Applicant in his affidavit, whether admissible or not, have any impact on the fairness of the Administrative Review decision, which is the one that in the end resulted in the Applicant's release.

[108] Consequently, the allegations of breach of procedural fairness, or of a reasonable apprehension of bias, are dismissed.

VI. The FA's decision was reasonable

A. *Parties' positions*

(1) Applicant's position

[109] On the reasonableness of the substantive decision, the Applicant argues that the Decision was neither justified nor transparent as it was made with an improper purpose and a predetermined outcome. The shortcomings in the reasons for the Decision are in his view, "sufficiently central or significant to render the decision unreasonable."

[110] The Applicant alleges that the FA incorrectly weighed the evidence, putting great weight on the investigator's findings rather than looking at the evidence in the report with fresh eyes. He

points out that the evidence was inconsistent and, in some cases, was hearsay and a second-hand account of the alleged incident from people who were not present at the time.

[111] The Applicant submits that the FA did not consider that he had already committed to remedial measures, and failed to consider the racist comments that were made against him. He further submits that the fact that there was only a single allegation against him is a significant factor that should have been considered to allow him to keep his position. He did not pose any risk to workplace safety nor did he have any disciplinary concerns or actions on his record.

(2) Respondent's position

[112] The Respondent submits that the FA reasonably determined that the Applicant was not suitable for further service and should be released under category 5(f) of the QR&O.

[113] The Respondent submits that an Administrative Review is required for all instances of misconduct (and always required for any allegation of sexual misconduct). The purpose of the Administrative Review was therefore to determine whether the Applicant was suitable for further service with the CAF.

[114] The Respondent further alleges that the Applicant is now asking this Court to reweigh the evidence and substitute its views in place of the FA, which had the role of assessing the evidence on the record and to weigh it accordingly. Disagreeing with the decision maker's considerations and conclusions does not establish a reviewable error and the Court should not accept the Applicant's invitation to reweigh the evidence (*Weldeab v Canada (Citizenship and Immigration)*, 2021 FC 161 at para 15; *Cabrera v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 958 at para 19).

[115] The Respondent submits that sexual misconduct is among the most serious forms of workplace misconduct and that, consequently, the employment relationship between the Applicant and the CAF may simply be beyond repair. He also underlines that even though it may have been an isolated incident, it does not support confidence or assurance of a workplace free of such incidents.

[116] The Respondent argues that the Applicant conflates the criminal proceedings and confuses the burden or proof. The fact that the criminal proceedings did not result in a conviction does not mean that the Applicant was necessarily immunized from any kind of administrative repercussions from the alleged sexual misconduct, including release from the CAF.

[117] The Respondent submits that when rendering its decision, the FA took into consideration the fact that the Applicant had seriously compromised his usefulness to the CAF by breaching sexual misconduct policies, contravening the *Code of Values and Ethics*, not respecting personal dignity, and harming another CAF member.

B. *Analysis*

[118] In my view, the FA issued a lengthy decision, noting all the factual and legal elements, including the racist comments that were made against the Applicant by the Complainant. The FA considered the Applicant's grievance and determined that he had been treated fairly in accordance with the applicable rules, regulations, and policies.

[119] In conducting his *de novo* analysis, the FA reviewed the Committee's findings and recommendations, as well as the information contained in the entire grievance file (including the

Applicant's submissions throughout the different levels of the proceedings), and agreed with the Committee's analysis.

[120] The FA also acknowledged that the final Harassment Investigation report played a significant part in his decision making process. Indeed, he conducted a thorough review of the report and attributed great weight to it because it had been conducted by a professional investigator with many years of experience.

[121] The FA also considered that the Applicant vehemently denied the allegations and submitted that the derogatory comments made by the Complainant demonstrated a racist motivation. The FA still found that the racist comments were not a mitigating factor to his alleged conduct as they occurred after the events of sexual harassment.

[122] After having reviewed the evidence, record, and arguments, the FA agreed with the investigator's findings that, despite some inconsistencies in the Complainant's evidence, the evidence was sufficiently cogent and convincing to conclude that on a balance of probabilities, the Applicant had committed sexual misconduct.

[123] To decide the appropriate consequences, the FA used DAOD 5019-2, DAOD 5019-5 (ss 3.1, 3.5 and 4.9), QR&O article 15.01, and the *Code of Values and Ethics* to guide his determination and conclude that release was the appropriate action to take in this case. The FA also considered that the Applicant had only been a CAF member for approximately three months when the sexual misconduct occurred and that the misconduct occurred only one month after the Applicant signed a statement acknowledging that he had read his unit's policy regarding harassment and sexual misconduct.

[124] The FA's conclusions on his assessment of the evidence is justified, intelligible, and transparent (*Vavilov* at paras 15, 86, 95, 98); and therefore reasonable in the circumstances. In my view, the Applicant is asking this Court to re-weigh the evidence and arguments (see for example paras 16-19, 43, 49-52, 64 of the Applicant's written representations), which is not the role of the Court on judicial review (*Vavilov* at para 125).

VII. Change style of cause

[125] Pursuant to Rule 303(1) of the *Federal Courts Rules*, SOR/98-106 the Attorney General of Canada is the proper respondent on this judicial review.

[126] The style of cause will be amended, replacing The King in Right of Canada with the Attorney General of Canada as the named Respondent.

VIII. Conclusion

[127] Based on the evidence and the arguments made by the parties throughout the proceedings, including the Harassment Investigation, the Administrative Review, the grievance process, and this judicial review, the FA's Decision is reasonable. The decision to release the Applicant from the CAF under 5(f) of the QR&O is one of the "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Vavilov* at para 86; *Walsh* at para 14). There is also no breach of procedural fairness nor a reasonable apprehension of bias.

[128] The application for judicial review is dismissed.

[129] In light of the outcome of the application, costs shall be awarded to the Respondent in accordance with the middle of column III of Tariff B.

JUDGMENT in T-1401-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to replace the King in Right of Canada with the Attorney General of Canada as the named respondent.

2. This application for judicial review is dismissed, with costs.

3. Costs shall be awarded to the Respondent in accordance with the middle of column III of Tariff B.

"Guy Régimbald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1401-22
STYLE OF CAUSE:	EHSAN ZABIHISEASAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	EDMONTON, ALBERTA
DATE OF HEARING:	FEBRUARY 22, 2023
JUDGMENT AND REASONS:	RÉGIMBALD J.
DATED:	AUGUST 18, 2023

APPEARANCES:

Catherine Christensen	FOR THE APPLICANT
Keelan Sinnott	FOR THE RESPONDENT

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