Date: 20070313

Docket: T-1072-06

Citation: 2007 FC 281

Ottawa, Ontario, March 13, 2007

Present: The Honourable Mr. Justice Harrington

BETWEEN:

CLAUDE BISSONNETTE

Applicant

and

HER MAJESTY THE QUEEN and
ATTORNEY GENERAL OF CANADA and
CANADIAN FORCES GRIEVANCE AUTHORITY
(DEPARTMENT OF NATIONAL DEFENCE)

Respondents

REASONS FOR ORDER AND ORDER

[1] Corporal Bissonnette is a member of the Reserve Force of the Canadian Forces. By definition, the reserve services he provides are temporary in nature. When the events underlying this application occurred, Mr. Bissonnette was a Class "B" reservist at the Land Force Quebec Area Training Centre (LFQA TC) in Valcartier, Quebec. This application for judicial review relates to a claim for financial compensation following the cancellation of an agreement concerning reserve services that had been offered to the applicant.

[2] From January 14 to March 31, 2002, Corporal Bissonnette was deployed at Valcartier as a Class “B” reservist at the LFQA TC. Subsequently, specifically on March 22, 2002, this employment was extended to May 5, 2002. On May 8, 2002, Corporal Bissonnette returned to his employment unit, the 28th Service Battalion (28 Svc Bn), a reserve unit located in Ottawa; he still serves in this unit at the Canadian Forces Base in Petawawa. Last, on June 13, 2002, he began the QL 5 training course, which continued until October 4, 2002.

[3] On the strength of a written agreement that his employment would last for one year, until March 31, 2003, Corporal Bissonnette decided to terminate the employment relationship he still had with his civilian employer, the Ottawa Commissionaires. In fact, the employment that had been expected to last one year ended before the agreed time period had elapsed. In short, his file was mismanaged.

[4] Accordingly, he availed himself of the dispute mechanism prescribed by the Act, i.e. the grievance process set out in the *National Defence Act*, R.S.C. 1985, c. N-5. This resulted in the decision of Colonel Wauthier, then Director General, Canadian Forces Grievance Authority (DGCFGA), dated October 3, 2005, which only granted the applicant partial financial compensation. In fact, the recommended compensation is the equivalent of 37 days, whereas the applicant was seeking almost a year’s worth, i.e. financial compensation equivalent to 329 days of work. This is an application for judicial review of Colonel Wauthier’s decision.

[5] Corporal Bissonnette contends that he was the victim of an injustice, and that, based on moral precepts, which are very important to the morale of the troops, when someone gives their

word, he or she must stand by it at all times. Although it seems clear that the file was mismanaged, a link must be established between the "fault" committed and the "damage" suffered. Although the Court can appreciate the frustration Corporal Bissonnette feels towards the Canadian Forces, which applied internal legal rules, *inter alia*, that the agreement signed by the parties was void because the offer of service had not been posted publicly prior to it being signed and that, in any event, the nature of the service was temporary in nature and could end at any time. In his decision, Colonel Wauthier awarded 37 days of financial compensation in lieu of notice. This decision is fair and does not require the intervention of this Court.

ISSUES

[6] The issues are:

a. The nature of the relationship between a soldier and Her Majesty;

b. The applicable standard of review.

The nature of the relationship between a soldier and Her Majesty

[7] Section 15 of the Act distinguishes between the regular force of the Canadian Forces, which consists of officers and non-commissioned members who are enrolled for continuing, full-time military service, and the reserve force of the Canadian Forces, which also consists of officers and non-commissioned members, the difference being that members of the reserve force are only recognized as serving on a continuing, full-time basis when they are on active service. Based on recognized legal principles involving Her Majesty in national defence matters, Corporal Bissonnette is not an employee in the legal sense. As Mr. Justice Marceau stated in *Gallant v. The Queen in*

Right of Canada (1978), 91 D.L.R. (3d) 695, at paragraph 4:

> Both English and Canadian Courts have always considered, and have repeated whenever the occasion arose, that the Crown is in no way contractually bound to the members of the Armed Forces, that a person who joins the Forces enters into a unilateral commitment in return for which the Queen assumes no obligations, and that relations between the Queen and Her military personnel, such as, in no way give rise to a remedy in the civil Courts. This principle of common law Courts not interfering in relations between the Crown and the military, the existence of which was clearly and definitely confirmed in England in the oft-cited case of *Mitchell v. The Queen*, [1896] 1 Q.B.121.

[8] These principles were echoed by the Federal Court of Appeal in *Sylvestre v. R.*, [1986] 3 F.C. 51. Corporal Bissonnette cannot legitimately commence a civil action in damages in this proceeding.

[9] When a member of the Canadian Forces believes that he or she has suffered an injustice, the member can only commence an action through the grievance process, such as was done here. Section 29.15 of the Act provides as follows:

29.15 A decision of a final authority in the grievance process is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or to review by any court.	29.15 Les décisions du chef d'état-major de la défense ou de son délégataire sont définitives et exécutoires et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, ne sont pas susceptibles d'appel ou de révision en justice.

[10] This leads directly to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. For the benefit of Corporal Bissonnette, who is representing himself in this proceeding, I believe it is appropriate to reproduce subsections 3 and 4 of this section of the Act:

18.1(3) On an application for	18.1(3) Sur présentation d'une

judicial review, the Federal Court may

(*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.

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the

demande de contrôle judiciaire, la Cour fédérale peut:

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou

record;	non au vu du dossier;
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(*e*) acted, or failed to act, by reason of fraud or perjured evidence; or	*e*) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;
(*f*) acted in any other way that was contrary to law.	*f*) a agi de toute autre façon contraire à la loi.

[11] If Corporal Bissonnette had been a lawyer and if, in this case, there had been a binding contract between the parties concerning their mutual relationship, he would have sensibly pointed out that this case is none other than the sound application of the case law, as conveyed in the reflections of an enlightened man, Lord Denning, in *Smith v. River Douglas Catchment Board*, [1949] 2 K.B. 500, at page 514, [1949] 2 All ER 179, at page 188:

… a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it…	[…] l'individu qui consciemment fait la promesse de respecter ce qui a été convenu, qu'il s'agisse d'une obligation entérinée ou celle faisant état d'une contrepartie valable, doit tenir parole; la Cour y veillera […] [our translation]

STANDARD OF REVIEW

[12] The Supreme Court of Canada has established that a pragmatic and functional analysis should be adopted in each case to determine the appropriate standard of review, as confirmed in *Dr Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247. Madam Justice Layden-Stevenson undertook such an analysis in *Armstrong v. Canada (Attorney General)*, 2006 FC 505, [2006] F.C.J. No. 625 (QL) involving the *National Defence Act*, where she wrote at paragraph 37:

> Balancing the factors, I conclude that for findings of fact, the applicable standard of review is that set out in the *Federal Courts Act*, that is, they are reviewable only if they are erroneous, made in a perverse or capricious manner or without regard to the evidence. This is equivalent to patent unreasonableness. In all other respects, the decision of the CDS (in this case the Grievance Authority) is subject to review on a standard of reasonableness. See: *McManus v. Canada(Attorney General)* 2005 FC 1281 at paras. 14-20.

[13] I concur with my colleague's reasons. I would add that, perhaps because of the recognized expertise of the decision-maker in this case, the DGCFGA, its interpretation of the applicable rules on this subject is reviewable on the reasonableness *simpliciter* standard, not the correctness standard; see *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609. However, even if the correctness standard were applied here, the disputed decision would not require the intervention of this Court.

ANALYSIS

[14] From January 14, 2002, to March 31, 2002, Corporal Bissonnette served at LFQU TC in Valcartier, Quebec. His employment was then extended to May 5, 2002. On March 22, 2002, the deputy commanding officer at LFQA TC in Valcartier wrote the following letter setting out the

agreement between the parties:

> [TRANSLATION]
>
> March 22, 2002
>
> To whom it may concern
>
> **CONFIRMATION OF EMPLOYMENT**
>
> 1. This letter confirms that Mr. Bissonnette will be employed at the Land Force Quebec Area Training Centre from March 30 02 to March 31 03. . . .

[15] At that time, as well as being a reservist, Corporal Bissonnette worked for the National Capital Region section of the Canadian Corps of Commissionaires. He had asked his superiors at LFQA TA to put the above letter in writing and to send it to his civilian employer, Commissionaires Ottawa, so that he could obtain a leave without pay. Unfortunately, this was not granted to him. From then on, because Corporal Bissonnette continued to serve at the LFQA TA, his civilian employment with the Canadian Corps of Commissionaires ceased.

[16] In principle, the agreement acknowledging an offer of service for the deployment of reservist services that was to end on March 31, 2003, as confirmed by the above letter dated March 22, 2002, depended on the funds that the Canadian Forces expected to receive and on the expected deployment of a new force that would be required to maintain the work force related to armament. In addition, I must point out that the offer of service establishing the position that Corporal Bissonnette was to fill until March 31, 2003, should have been publicly posted at the outset. This was not done.

[17] Lieutenant-Colonel Holland recommended to the commanding officer of the brigade that Corporal Bissonnette be compensated for a loss in salary from June 5, 2002, to March 30, 2003, for the periods of time where he was not assigned to a service, military or civilian. However, Colonel D. Lafleur believed that the appropriate financial compensation should be limited to seven days.

[18] Then, as a decision-maker in his position as the Director General of the Canadian Forces Grievance Authority, Colonel Wauthier reiterated the conditions and terms applicable to the administration of Class "B" reserve services. At the same time, he pointed out in his reasons that Corporal Bissonnette had taken on new positions within the Canadian Forces with the 28 Svc Bn subsequent to May 5, 2002. He came to the following conclusion:

> [TRANSLATION]
>
> In April 2002, you were offered a class "B" reserve service for the period from May 6 to August 30, 2002. This offer was not renewed six days before it ended mainly because of administrative anomalies outside of your control. However, you obtained a class "B" reserve service from June 13 to October 4, 2002, to take your QL 5 course. Therefore, in my opinion, you suffered an injustice and possibly a loss of income for the period from May 6 to June 12, 2002.

[19] It is worth nothing that the services of a class "B" reservist, like those of Corporal Bissonnette while serving at the LFQA TC, can be interrupted if a situation occurs that is set out in Appendix B of the NDHQ *Instruction − ADM(PER) 2/93 Administration of Class A, Class B and Class C Reserve Service,* including the following:

> TERMINATION OF CL B RES SVC
>
> 22. The service of a member on Cl B Res Svc, excluding cases of injury, disease or illness:
>
> b. may be ceased at any time if 30 days written notice, or less if mutually agreed, is given (assuming 30 days or more remain

> on the current period of service) to the member by the employing unit. Notice of termination for unacceptable performance or disciplinary related reasons must be approved by the original Cl B Res Svc approving authority
>
> [Emphasis added.]

[20] Considering that the service of a class "B" reservist may end at any time once the Canadian Forces has issued a 30-day notice of termination, and that financial compensation in excess of 30 days was recommended for Corporal Bissonnette, it appears that Colonel Wauthier's decision does not require the intervention of this Court.

COSTS

[21] At the hearing, counsel for the respondents advised the Court that he had not been requested to waive costs. He suggested that costs be awarded, that a lump sum of $1,000 would be appropriate and well below the real costs if they were assessed. Since the parties agree that on an assessment the costs would certainly exceed $1,000, a person could recognize that the errors made by certain decision-makers in determining issues that are before them, would have the effect of encouraging applications for judicial review. I believe it is preferable that each party bear their own costs.

ORDER

THE COURT ORDERS that this application for judicial review be dismissed without costs.

"Sean Harrington"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1072-06
STYLE OF CAUSE:	CLAUDE BISSONNETTE v. HER MAJESTY THE QUEEN and ATTORNEY GENERAL OF CANADA and CANADIAN FORCES GRIEVANCE AUTHORITY (DEPARTMENT OF NATIONAL DEFENCE)
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REASONS FOR ORDER AND ORDER BY:	THE HONOURABLE MR. JUSTICE HARRINGTON
DATED:	March 13, 2007

APPEARANCES:

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Alexandre Kaufman	FOR THE RESPONDENTS

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