Date: 20080718

Docket: T-1184-05

Citation: 2008 FC 886

Ottawa, Ontario, July 18, 2008

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

ROGER JOHN DOCKSTADER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT AMENDING THE STYLE OF CAUSE

[1] The Applicant was a member of the Cadet Instructor Cadre of the Canadian Forces and was a Major and the Commanding Officer (CO) of 800 Black Forest Air Cadet Squadron in Mississauga (the Squadron).

[2] This application is for judicial review of the Chief of Defence Staff's (CDS) decision of May 31, 2005 (the CDS Decision) dismissing the Applicant's grievances with respect to two decisions made by his Regional Cadet Officer (RCO).

[3] The first was the RCO's decision of March 9, 2001, to relieve the Applicant of his military duties pending the outcome of a Canadian Forces National Investigation Service (NIS) Investigation (the Investigation). The grievance of this decision was filed on March 20, 2001 and it alleged *inter alia* that the Applicant was not given reasons for the decision or an opportunity to make representations in accordance with *Queen's Regulations and Orders for the Canadian Forces*, subsection 101.08(5).

[4] The second decision was the RCO's refusal on October 31, 2001 to return the Applicant to active duty as CO of the Squadron, offering him instead the opportunity to resign voluntarily or be transferred to the Supplementary Reserve.

THE INVESTIGATION

[5] The Investigation began in early March 2001 and the report thereon (the NIS Report) was dated August 24, 2001. The Investigation was prompted, in part, by a complaint about a sexual assault made by a female cadet who was a minor at the time of the alleged incident. However, the NIS recommended no action because the complainant was not prepared to proceed.

[6] The NIS also considered a complaint which alleged that the Applicant had not dealt appropriately with a cadet's accusations against another officer. However, that complainant also elected not to proceed with her complaint so no action was recommended.

[7] In addition, the Investigation dealt with allegations of fraud in the amount of approximately $4000.00 resulting from forged requests for reimbursement for meal expenditures claimed in connection with three cadet outings (an annual inspection, a ski trip and a gliding trip). The NIS interviewed thirty-two cadets with the following results: thirty denied that their apparent signatures on meal claims submitted after the inspection outing were actually their signatures, seventeen similar denials were made regarding meal claims on the ski trip and six denials were made with respect to the gliding trip.

[8] As well, names of cadets who had not yet joined the Squadron appeared as signatures on the claims for meals during the annual inspection and numerous cadets named in the meal claims said that they had not participated in the outings.

[9] Accordingly, the NIS was able to conclude that fraud by forgery had occurred while the Applicant was CO. However, although the Applicant was a suspect, the NIS did not have sufficient evidence to reach a conclusion about the identity of the guilty party. On the advice of counsel, the Applicant refused to speak to the NIS investigators and although several witnesses said that a Captain Rulton had been responsible for the meal claims, he was deceased by the time of the Investigation.

[10] For all these reasons, NIS concluded that there was insufficient evidence to lay charges.

[11] While the Investigation was underway and while the Applicant was relieved of his duties, a new CO was appointed for the Squadron and given a four-year term (the New CO). He began to serve sometime in August of 2001 and was an immediate success in his new role. This is reflected in the letter from the Squadron Sponsoring Committee (the Sponsors) of December 18, 2001 which indicated that its initial support for the Applicant had "fully eroded" after waning for some time. The Sponsors included Legion members and cadets' parents.

[12] The reality was that, by the time the NIS Report was released, the Applicant's position as CO of the Squadron was occupied by the New CO. Even if the Applicant had been returned to active duty, his assignment would have changed. However, the RCO had decided that he would not return to active duty with cadets.

[13] In an email dated September 28, 2001, (the Email) the RCO said the following about the Applicant's prospects after the NIS Report was released:

> As to ref B, I will be meeting with MGen Daigle and the JAG probably next week and, the plan is for the Gen to reinstate Maj Dockstater. However, I want to ensure that the Major does not have a job opportunity with cadets anymore. As to the financial review it will be conducted by CFRETS HQ staff.

[14] On October 12, 2001, the Applicant was sent a letter by the Commander Canadian Forces Recruiting, Education and Training System advising that his relief from the performance of military duty was cancelled. This meant he was available to return to duty. However, by letter dated October 31, 2001, the RCO advised the Applicant that he would not be returned to duty. He said in part:

> The investigation conducted by the Canadian Forces Investigative Service (CFNIS) … into various allegations, determined that there was insufficient evidence to support any formal charges being laid against you. Accordingly, at Ref A [Comd CFRETS letter of October 12, 2001] your relief from military duty was rescinded.
>
> However, in considering all aspects of the issues involved, it is evident that during your tenure of command of 800 RC (Air) CS, nominal rolls were submitted with forged signatures. This together with other aspects of your performance, demeanour and sense of responsibility as a Commanding Officer have undermined the reputation of the cadet movement. I find these shortcomings to be inconsistent with those required of a senior CIC officer in a position of trust and authority.
>
> **My paramount concern is the safety and well being of the cadets and to ensure that all participants in the cadet programme, both civilian and military, have total confidence in all officers appointed to positions of responsibility and control**. **With these concerns foremost in my mind, I must advise you that currently there is no suitable position to which you may be appointed and that this situation will exist for an indefinite period.**
>
> [emphasis added by Grievance Board]

[15] In my view, this decision conveyed that the Applicant would never be considered for a position with the Squadron or any other cadet corps.

[16] The RCO also gave the Applicant a choice – he could take his release or transfer to the Supplementary Reserve. Eventually, the Applicant took the transfer.

THE GRIEVANCE BOARD

[17] The Grievance Board (the Board) concluded in its decision of March 29, 2005 that when he was relieved of duty in March 2001, the Applicant was told that the Investigation was underway but was not given any notice of the nature of the allegations against him. This breached the requirements of procedural fairness which required as a minimum, notice of intention to remove the Applicant from command, disclosure of the information relied on and time to respond.

[18] However, the Board found that the decision to relieve the Applicant of duty in the face of the Investigation was reasonable because the allegations were serious and the welfare of cadets had to be considered.

[19] Further the Board concluded that, when the Applicant was denied the opportunity to return to duty after his suspension was lifted, the RCO unfairly failed to disclose several other allegations that he considered when he made his decision and that the RCO's decision was not supported by any evidence. The Board recommended that efforts be made to return the Applicant to active duty.

THE CDS DECISION

[20] The Board's findings and recommendations were not binding on the CDS and, in this case, they were disregarded in part.

[21] The CDS agreed with the Board that the RCO's initial decision to relieve the Applicant from duty was reasonable and he did not comment on the Board's conclusion that the failure to disclose the allegations being investigated in a timely manner had been unfair.

[22] With regard to the RCO's second decision, the CDS disagreed with the Board. He said that the RCO was entitled to refuse to return the Applicant to duty as CO of the Squadron but that he should have notified him of all his reasons.

[23] The CDS Decision concluded on this topic as follows:

> … I am also satisfied that despite the procedural errors made by the RCO when he decided not to return you to your position as CO 800 Sqn, there is no other decision that could have been made given the fraudulent activity under your command, your decision not to assist the investigation into the fraud and the lack of confidence of the sponsoring committee.

[24] I note here that the CDS Decision did not address the broader aspects of the RCO's second decision – that in addition to not returning to the Squadron, the Applicant would never again serve as an officer in a Cadet squadron.

[25] The CDS Decision also mentioned that the Applicant's failure to assist the NIS during the Investigation on the advice of his lawyer was a matter that the RCO was entitled to consider in reaching his decision not to return the Applicant to active duty.

[26] Lastly, the CDS Decision criticized the Applicant for failing to assist the Canadian Forces by commenting on the fraud after the Investigation had been closed. This opportunity presented itself on July 14, 2004 when the Board disclosed the NIS Report to the Applicant. However, he twice declined to make submissions when asked by the Board and also declined in the course of the review by the CDS.

MATTERS NOT IN ISSUE

[27] There is no issue that there was widespread forgery of signatures on meal claims (the Fraud) and that this Fraud occurred while the Applicant was in command of the Squadron. There is also no issue that the Applicant was responsible to ensure that the financial administration of the Squadron was conducted in an ethical manner.

[28] Further, there is no issue that the cadet program is a joint venture between the Department of National Defence and the Sponsors and that a CO cannot function effectively without the Sponsors' support.

THE ISSUES

[29] The Applicant abandoned his constitutional arguments during submissions.

[30] The remaining issues were whether:

1. The CDS erred in not considering the impact of two periods of delay on the Applicant.
2. The CDS erred in failing to refer to the RCO's email of September 28, 2001.
3. The CDS erred when it drew an adverse inference based on the Applicant's failure to assist NIS and the Canadian Forces in their efforts to identify the person responsible for the Fraud.

STANDARD OF REVIEW

[31] As a starting point, it is necessary to characterize the issues. In my view, the first two issues relate to procedural fairness and the third raises questions of law.

[32] Procedural fairness issues do not attract deference. Further, the particular questions of law in the case are sufficiently outside the specialized area of expertise of the CDS to warrant the application of correctness as the standard of review (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 55).

[33] In reaching this conclusion, I am mindful of the Respondent's submission that the questions in Issue 3 are mixed questions of law and fact which, according to the comprehensive analysis undertaken by Madam Justice Layden-Stevenson in *Armstrong v. Canada (Attorney General)*, 2006 FC 505 should be reviewed on a standard of reasonableness. While I agree with her conclusions in that case, I do not accept the Respondent's submission about the nature of Issue 3. In my view, there

is no factual component in Issue 3. The evidence that the Applicant never helped NIS or the Canadian Forces identify the forger was uncontradicted.

DISCUSSION

Issue 1

[34] The first delay is said to be the period between the release of the NIS Report on August 28, 2001 and the RCO's decision of October 31, 2001 not to return the Applicant to duty. The submission is that the delay was prejudicial because, if the RCO had acted immediately after the NIS Report was issued, he could have returned he to duty as CO of the Squadron in early September at a time when he still would have had the Sponsors' support.

[35] In my view, this submission is not persuasive for two reasons. First, by August 28, 2001, the New CO had assumed command of the Squadron for a four-year term. There was no position open as CO of the Squadron in early September. Further, the Applicant took no issue with the propriety of the appointment of the New CO. He did suggest in oral submissions that perhaps the New CO should have been appointed on an "acting" basis but I was shown no authority to indicate that an officer who is relieved of duty can only be replaced by an officer in an "acting" position.

[36] Further, had the CO's position been open, there is no clear evidence to suggest what the Sponsors' attitude to the Applicant's return as CO would have been at the end of August 2001. It is

true, as the Applicant suggests, that the Sponsors would have had less time to become enthusiastic about the New CO but I am not prepared to assume that they would have supported the Applicant particularly as their letter of December 18, 2001 said that support for him had been "waning" for some time.

[37] The second period of delay ran from March 2001 when the first grievance was filed until March 29, 2005 when the Board issued its decision. The evidence shows that the Board had an 800 case backlog at the time and that it decided its cases in the order in which grievances were received. This administrative delay was most unfortunate but it was not unfair in the legal sense in the absence of evidence of prejudice.

[38] In *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 S.C.R. 307 at paragraph 121, the Supreme Court of Canada noted that, in cases of administrative delay, prejudice means that a party's ability to receive a fair hearing is somehow compromised. There is no evidence of such prejudice in this case.

[39] For these reasons, I have concluded that the delays described above did not amount to breaches of the requirements of procedural fairness and that the CDS therefore did not err in failing to consider their impact.

Issue 2 The Email

[40] The Board referred to the Email of September 28, 2001 in which the RCO said that he did not want the Applicant returned to duty with cadets. However, as the Applicant submits, the CDS did not refer to the Email. This oversight reveals a serious defect in the CDS Decision. It focused on whether the Applicant could return as CO of the Squadron but did not deal with what amounted to a permanent refusal to return the Applicant to any active duty with cadets in any location. This decision effectively ended the Applicant's career as a cadet instructor.

[41] In view of the language of the Email and of the letter of October 31, 2001 quoted above, it was not open to the CDS to say:

> Similar to other cadet corps COs who complete their term as CO, other employment opportunities for you were extremely limited. The RCO indicated this in his letter to you, and stated that there was no suitable position available for you at the time or for the foreseeable future. Without a position in which to be employed, you were, as in the case of other Cos, required to transfer to the Supp Res or to take your release.
>
> As a member of the Supp Res, you remain eligible to apply for a transfer back to the Cadet Instructor's List (CIL) or to another subcomponent of the Reserve Force whenever an appropriate vacancy becomes available.
>
> [my emphasis]

[42] This statement ignored the RCO's actual language. He spoke of there being no suitable position for an "indefinite period" not for the "foreseeable future" and, in view of the Email, there was absolutely no prospect that the Applicant could successfully apply for a transfer from the Supplementary Reserve to a position as a cadet instructor.

Issue 3 Failure to Provide Assistance in Uncovering the Reason for the Fraud

3(a) The Investigation

[43] Counsel for the Respondent agreed that the CDS erred when he concluded that the RCO was entitled to draw an adverse inference from the Applicant's exercise of his right to remain silent during the Investigation.

3(b) The Post Investigation Situation

[44] However, the Respondent says that the Applicant's right to silence ended when the Investigation closed and that the CDS correctly concluded that the RCO was entitled to draw an adverse inference when the Applicant failed to comment on the Fraud when asked to do so by the Board and the CDS.

[45] This submission relies on a series of awards made by arbitrators in the employment law context in which they concluded that, in the face of *prima facie* evidence of wrong doing, an employee bears an onus to assist his employer's investigation.

[46] Transposed to this case, this proposition would mean that, once the NIS closed its Investigation, the Applicant became obliged to assist the Canadian Forces in their efforts to identify the person who committed the Fraud.

[47] The problem with this submission is that if the Applicant cooperated and, for example, confessed to having forged the meal claims, there would have been no bar to NIS reopening its Investigation and recommending criminal charges. In such circumstances, the right to silence would be rendered meaningless. For this reason, I have concluded that the CDS erred in law when he drew an adverse inference based on the Applicant's failure to assist once the Investigation was complete.

JUDGMENT

FOR ALL THESE REASONS, THIS COURT ORDERS AND ADJUDGES that:

- The application is allowed with costs.
- The CDS's Decision is hereby quashed and the matter is referred back for reconsideration.
- In the reconsideration, the CDS is directed to consider, *inter alia*, the propriety of the RCO's decision to end the Applicant's career as a cadet instructor and is directed to disregard the Applicant's failure to cooperate with the Investigation and subsequent inquiries by the Canadian Forces, the Board and the CDS about the Fraud.

"Sandra J. Simpson"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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