Date: 20081110

Docket: T-2037-07

Citation: 2008 FC 1254

Ottawa, Ontario, November 10, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DENNIS G. GABRIEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Dennis G. Gabriel (the "Applicant") seeks judicial review of the decision of the Honourable Peter G. MacKay, Minister of National Defence, dated October 24, 2007, denying the Applicant's request for a Canadian Forces board of inquiry into his 1997 grievance (the "Grievance").

[2] The Applicant asserts that the Minister misapprehended the facts. In doing so, the Applicant says the Minister did not have regard to:

i. The Canadian Forces not appointing an assisting officer for the Applicant when requested and not acknowledging and investigating the Applicant's Grievance in a timely manner; and

ii. The Canadian Forces, at the local level, not following the Canadian Forces Rules and Regulations and not fully investigating his Grievance.

[3] For reasons that follow, I find that this application for judicial review of the Minister's decision cannot succeed, and is denied.

BACKGROUND

[4] The Applicant enrolled in the Canadian Forces in February 1971. He attained the rank of Captain and in 1995 he assumed a position of Social Work Officer at Canadian Forces Base (CFB) Halifax.

[5] The Applicant and another Captain were the two senior officers in the Halifax Formation Social Work Office. The Applicant says he was given to understand by Major Pinch, the superior officer, that he would be the senior officer, but no such order was forthcoming. Conflicts arose in the day to day operations between the two Captains. The Applicant found the "role ambiguity" stressful but performed his duties such that he received positive reviews for his performance.

[6] On March 14, 1997, as a result of a social work staff meeting, the Applicant and the other Captain agreed to put their conflict issue before their superior officers, Chief Social Work Officers Lt.-Col. MacLellan and Major Pinch. They agreed to abide by whatever recommendations that Lt.-Col. MacLellan made to the Chief of Ambulatory Care, Formation Health Services Unit, CFB

Halifax. On March 24, 1997, the Applicant and the other Captain met with Major Pinch; Lt.-Col. MacLellan was not in attendance. On April 2, 1997, the Major recommended that the other Captain be named as department head. In response to the Applicant's proposal that a resolution be found without naming a senior position, the Major agreed to hold off the recommendation for one week. However, if no resolution was reached between the two Captains, the recommendation would be forwarded to the Chief of Ambulatory Care, CFB Halifax.

[7] The Applicant did not agree with these developments and requested an assisting officer for preparation of a grievance complaint. The Canadian Forces did not appoint an assisting officer and the Applicant filed a grievance in April 1997. In his application for redress of grievance, he referred to the problems of having two Captains in the Social Work Office; the stress he felt was due to the conduct of the other Captain and his disagreement with the Major's decision to recommend the other Captain as senior social worker/department head. In his opinion he was subjected to personal harassment. He sought appointment as senior Captain as redress.

[8] During the same period as the filing of his grievance, the Applicant had sought psychological counselling and had made a request for special consideration for release from the Canadian Forces. The Major appointed the other Captain as senior officer on July 22, 1997. The Applicant secured his release from the Canadian Forces effective September 1997. In January1998, in response to the Applicant's concerns regarding difficulties in two Captain offices, the Military Occupation Classification (MOC) Social Work of the Canadian Forces adopted a formula for designating the senior social worker where there are two Captains in an office.

[9] In January 1999, the Applicant began work as a civilian social worker for the Canadian Forces at CFB Greenwood. In June 2000, the Applicant re-enlisted with the Canadian Forces.

[10] The Applicant's grievance was suspended upon his release from the Canadian Forces in 1997. After his re-enlistment he again took up his request for an investigation into his grievance. As part of the renewal of his earlier redress for grievance application, he contended that he left under a "constructive dismissal process".

[11] The Applicant brought his grievance to the attention of the Department of National Defence/Canadian Forces Ombudsman. The Ombudsman declined to accept the complaint because the incidents giving rise to the grievance predated the 1998 creation of the Ombudsman's Office. In February 2002, the Ombudsman investigator recommended the matter not be further investigated since the issues identified were specific and individual with no facts or circumstances in the public interest or in the interest of current DND/CF members.

[12] In August 2003, the Applicant's spouse wrote to her Member of Parliament requesting a board of inquiry into her husband's grievance, a request the MP forwarded to the Minister. In February 2004, the Applicant's spouse wrote to the Minister with the same request. The Minister responded by noting that the military grievance procedure was governed by section 29 of the *National Defence Act*, R.S., 1985, c. N-5 (the "Act") and the accompanying *Queen's Regulations and Orders for the Canadian Forces* ("*Regulations and Orders"*). The Minister declined to appoint a board of inquiry but stated that since the internal military grievance procedure had not been

exhausted he was referring the Applicant's grievance to the Commander Canadian Forces Medical Group, in her capacity as Initial Authority (IA), for consideration and determination.

[13] On September 14, 2004, the Canadian Forces acknowledged receipt of the Applicant's redress for grievance.

[14] The Applicant had changed his application for redress as a result of the passage of time. He now requested:

a. An immediate unrestricted promotion to Major, retroactive and pay benefits to 1995;
b. For CF pension purposes, full credit for the time he was released from the CF, Sept 1997 to June 2000. Thus giving him 33 years of pensionable service;
c. Written assurance that regardless of any current medical challenges, that he be accommodated within his profession and remain at 14 Wing Greenwood for the duration of his CF Career until the Compulsory Retirement Age;
d. A letter of apology from the primary person who did not exercise leadership required; and
e. Consideration for awarding to the Applicant both the Canada 125 and Queen's Jubilee medals.

[15] In response to a request to clarify his desired remedies, the Applicant requested $5 million as settlement of the harassment issue. The Applicant indicated that he would consider any written offer presented.

[16] Section 29(1) of the Act provides that an Officer or non-commissioned member who has been aggrieved by any decision, act or commission in the administration of the affairs of the Canadian Forces for which no other process or redress is provided under the Act is entitled to submit a grievance. The commanding officer to whom a grievance is submitted examines the grievance and decides if he or she is able to act as the IA in respect of the grievance. If the commanding officer is not able to act as the IA, the grievance is forwarded to the commander who is responsible to deal with the subject of the grievance. In this instance, the IA who addressed the Applicant's grievance was Vice-Admiral G.E. Jarvis, the Assistant Deputy Minister (Human Resources – Military).

[17] By this time the Applicant had retired from the Canadian Forces, but continued the grievance process. A Canadian Forces investigator contacted a number of individuals identified by the Applicant about the work environment at the Formation Social Work Office between 1995 and 1997 and conducted a file analysis. On June 24, 2005, after receipt of the investigator's report, the IA issued his decision. The IA acknowledged the administrative lapse that caused the matter to be unresolved since 1997. On the matter of redress of the grievance, the IA concluded:

a. Since promotions within the Canadian Forces were regulated by policy and merit based, the Applicant could not be promoted outside the limits of the promotion policy;

b. Because there were no provisions to compensate Canadian Forces while not on active service, the Applicant's pension could not be credited for the time he was released;

c. Because the Applicant was by then no longer a member of the Canadian Forces, the request to remain at 14 Wing Greenwood was no longer relevant and, in any event, members of the Canadian Forces had to be ready to meet service requirements so postings at one location for the duration of service could not be assured;

d. On the substantive issue of workplace discord, the IA stated that the situation could have been more assertively addressed by the chain of command and such intervention could have lessened the Applicant's anxiety in the workplace. However, given the time lapse that occurred it would not be fruitful to commence an investigation.

e. With regard to the medals requested, the IA noted that the programs for both medals were now closed and no more medals were being given out.

[18] The IA indicated that there was no authority to grant financial compensation for the Applicant's perceived hardship as a result of the situation at the Formation Social Work Office.

[19] Finally, the IA indicated that, in order to expedite the review process, the decision, together with the Applicant's grievance, would be forwarded to the Chief of Defence Staff (CDS) for review and consideration as the final adjudicative authority.

[20] Where the IA does not grant the redress sought, a griever may submit the grievance to the Chief of Defence Staff (CDS) for consideration and decision. 7.10(1) Chapter 7 – Grievances – Volume 1 of the *Regulations and Orders***.** When the grievance concerns harassment, as it did in this case, the CDS must refer the grievance to the Canadian Forces Grievance Board (the "CFGB"). The CFGB must consider every grievance referred to it, it may receive any information it sees fit whether or not the evidence is admissible in a court of law, and it provides recommendations in writing to the CDS and the griever.

[21] The CFGB decided the issues it had to consider were:

a. Whether the Applicant was the victim of alleged harassment;
b. Whether the Applicant was "constructively dismissed" from the Canadian Forces; and
c. Whether the Applicant should be compensated for the alleged harassment he suffered.

[22] In its consideration of the issue of harassment, the CFGB considered CFAO 19-39 (Harassment), the directive in effect at the time in question. The CFGB concluded that the Applicant took no action with regard to the alleged harassment he claims he endured. He did not make a harassment complaint and hence did not activate the internal procedure for dealing with the alleged harassment. The CFGB also concluded the Applicant did not offer any specific evidence or information with regard to harassment other than he and the other Captain did not get along.

[23] The CFGB did decide that there was an onus on the superior officers to take action if there was a situation of harassment arising from section 39 of CFAO 19-39. That section provides that, if the superior believes unacceptable conduct has occurred, the superior shall take action even if the member does not request the situation be dealt with as a complaint. The CFGB concluded that the Applicant's superior did not act to resolve the difficulties until after the Applicant submitted a grievance and requested a voluntary release in 1997.

[24] The CFGB's view was that it would not serve a useful purpose to commence a harassment investigation because many of the individuals involved were no longer available.

[25] Finally, the CFGB noted the grievance process was in abeyance between 1997 and 2001 – 2002, the hiatus between the Applicant's release and the renewal of his grievance. The CFGB observed that this abeyance contributed to the delay in the resolution of the grievance process.

[26] While the CFGB did not identify the appointment of the other Captain as an issue, it observed that there was no evidence on file that the appointment of the other Captain as department head was done improperly or unlawfully.

[27] The CFGB addressed the question of "constructive dismissal" from a legal perspective. It observed that a relationship between a member of the Canadian Forces and the Crown was not based on contract but rather on the prerogative of the Crown over its military forces. The relationship was akin to a unilateral contract whereby the Crown may dictate the terms of service

without the consent of members. The doctrine of constructive dismissal, in the CFGB's view, had no application.

[28] Finally, the CFGB noted that the appropriate authority to deal with the Applicant's request for financial compensation was the Director of Claims and Civil Litigation. The CFGB recommended the CDS deny the Applicant's grievance.

[29] The CDS must consider a grievance upon receipt of the CFGB report. The CDS is not bound by any CFGB finding or recommendation but must provide reasons in writing for not accepting a finding or accepting a recommendation. The CDS is the final authority (FA) in the grievance process and the FA decision is final and binding except for judicial review under the *Federal Court Act* pursuant to section 29.15 of the *National Defence Act.*

[30] The CDS considered the grievance for redress dated April 1997, in particular the Applicant's claim for harassment and constructive dismissal from the Canadian Forces. The CDS reviewed the Applicant's original grievance and the Applicant's representations made in the course of the grievance process. The CDS also reviewed the comments of the Applicant's superior officers in the chain of command, comments which had been disclosed to the Applicant.

[31] The CDS accepted the findings and recommendation with the exception of the CFGB's finding that the superior officers did not act to resolve the discord between the Applicant and the other Captain. The CDS stated "An inability to get along does not equate to harassment". The CDS

further noted that the superior officers' expectation that two professionals could arrive at an equitable distribution of responsibilities without designation of a specific lead was reasonable.

[32] The CDS stated he did not have jurisdiction within the grievance process to grant the Applicant's request for financial compensation. He referred the Applicant to the Director Claims and Civil Litigation but indicated that he would not support any claim by the Applicant for compensation.

[33] The Applicant did not apply for judicial review of the CDS's decision of May 31, 2006. Instead, with the assistance of several Members of Parliament, he renewed his request that the Minister convene a board of inquiry to look into his grievance.

THE DECISION UNDER REVIEW

[34] On October 24, 2007, the Honourable Peter MacKay, Minister of National Defence responded to the Applicant's request for a board of inquiry.

[35] The Minister began by noting the reforms to the Canadian Forces grievance process brought into effect on June 15, 2000, through amendments to the *Act* and the *Regulations and Orders*. The reforms were designed to expedite grievance resolution by eliminating decision making layers and establishing an independent external CFGB to provide findings and recommendations to the CDS. One notable change was eliminating the role of the Minister as final authority in the grievance process.

[36] The Minister was satisfied the issues raised by the Applicant in the Grievance were thoroughly investigated and that all avenues of grievance in the Canadian Forces to deal with the Applicant's concerns had been exhausted.

[37] The Minister believed the military grievance process assembled all relevant facts in the Applicant's case and that a board of inquiry would not provide any insight beyond the information considered in the Canadian Forces adjudication of the Applicant's grievance. The Minister declined to convene a board of inquiry.

[38] The Applicant filed for judicial review of the Minister's decision of October 24, 2007. The Applicant seeks the following orders as remedies:

a. An order upholding the Applicant's request for a full CF Board of Inquiry, resulting in confirmation that the Grievance be granted, or in the alternative,
b. An order directing that the matter is resolved by referral to a credible civilian authority, as directed by the Court, for investigation and determination.

STANDARD OF REVIEW

[39] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada concluded that questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness. Supreme Court Justices Bastarache and Lebel wrote at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness:

> certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[40] In respect of factual determinations, in addition to a deferential standard of reasonableness for factual determination, the *Federal Courts Act* provides:

18.1(4) the Federal Court may grant relief under subsection (3) if it is satisfied the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(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;

[41] Accordingly, factual conclusions drawn by the Minister in arriving at his decision require the application of a deferential standard of reasonableness. Alternatively, the statutory standard set out in section 18(4)(d) of the *Federal Courts Act* may apply.

[42] Turning to the question of the nature of the Minister's decision, the *National Defence Act* provides, in section 45(1) as follows:

45(1) The Minister, and such other authorities as the Minister may prescribe or appoint for that purpose, may, where it is expedient that the Minister or any such other authority should be informed on any matter connected with the government, discipline, administration or functions of the Canadian Forces or affecting any officer or non-commissioned member, convene a board of inquiry for the purpose of investigating and reporting on that matter.	**45(1)** Le ministre, de même que toute autre autorité nommée ou désignée par lui à cette fin, peut, dans les cas où il lui importe d'être renseigné sur toute question relative à la direction, la discipline, l'administration ou aux fonctions des Forces canadiennes ou concernant un officier ou militaire du rang quelconque, charger une commission d'enquête d'examiner la question et d'en faire rapport.

[43] The language of the provision, specifically the words: "The Minister … may … convene a board of inquiry…" indicates that the decision is in the Minister's discretion.

[44] The Minister's decision on whether to convene a board of inquiry, being a discretionary decision also attracts a deferential standard of reasonableness. *Dunsmuir* at para. 47.

ANALYSIS

[45] The Applicant was self represented. He has assembled a thorough factual compilation of documentary evidence which has been of assistance to the Court in gaining an understanding of the chronology of events in this matter.

[46] The Applicant applied for judicial review of the Minister's decision not to convene a board of inquiry. The Applicant submits that the Minister misapprehended the facts. He submits that the grounds for his application are that the Canadian Forces did not appoint an assisting officer for the Applicant when requested and did not acknowledge and investigate the Applicant's Grievance in a timely manner. He also submits, as grounds, that the Canadian Forces did not follow the *Regulations and Orders* at the local level and did not fully investigate his Grievance.

[47] The Applicant's submissions are directed at disputing findings of fact and conclusions made in the course of the Canadian Forces grievance process which concluded with the decision of the CDS on May 31, 2006. The Applicant disagrees with the findings of fact and the decision of the CDS denying his application for redress of his grievance.

[48] The Applicant was not appointed an assisting officer as initially requested. However, nothing in the Record indicates that he renewed his request for an assisting officer when his application for redress of grievance was addressed in 2004 under the 2000 revised Canadian Forces grievance process.

[49] The Applicant also says that his application was not dealt with in a timely manner. The oversight for not addressing the complaint was acknowledged in the decision of the IA and appears to be undisputed for the period 2001 to 2004. However, once his application was taken up after 2004, it was addressed in an expeditious manner.

[50] The Applicant disputes the findings and conclusions of the CDS. Section 29.15 of the Act states that a decision of a final authority, in this instance the CDS, is final and binding except for judicial review in Federal Court:

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.

[51] The Applicant did not apply for judicial review of the CDS decision. Since the decision of the CDS was final, the Minister is entitled to rely on the findings of fact in the CDS decision.

[52] The Applicant does not identify any substantive factual error in the CDS's or the CFGB's findings. He merely disagrees with those findings. Nor does the Applicant demonstrate that the CDS made his decision other than in good faith. Absent proof of substantive factual error or a failure to decide in good faith, the Minister is entitled to rely on the final factual findings arrived at in the Canadian Forces grievance process.

[53] Since the Minister had before him the unchallenged factual information that had been collected throughout the grievance process I find that the Minister did not base his decision on a misapprehension of facts.

[54] The Minister has statutory discretion to convene a board of inquiry where it is expedient that the Minister should be informed of any matter. In this instance, the Minister had available to him the final results of the Canadian Forces grievance process commenced at his predecessor's request in 2004. That grievance inquiry involved analysis of the relevant files, statements from witnesses identified by the Applicant, and disclosure to the Applicant. The Applicant was afforded opportunity to comment and make submissions during the inquiry process.

[55] I find the Minister's conclusion that the military grievance process had collected all relevant facts and that a board of inquiry would not provide any further insight to be reasonable.

[56] Finding as I have the application for judicial review is dismissed.

COSTS

[57] I accept that the Applicant had a deep attachment to the Canadian Forces. He was emotionally impacted by the events that underlie this judicial review. He did not have the benefit of an assisting officer at the onset of this matter when it would have been most beneficial for him. He was self represented throughout. In these circumstances I do not consider this to be a case for making a costs order.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. There will be no order for costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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