Federal Court  Cour fédérale

Date: 20100319

Docket: T-1571-08

Citation: 2010 FC 321

Ottawa, Ontario, March 19, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

LT(N) CATHERINE ANN SMITH

Applicant

and

CHIEF OF THE DEFENCE STAFF
AND ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Lt(N) Catherine Ann Smith, the Applicant, applies for judicial review of a decision of Vice Admiral J.A.D. Rouleau, Acting Chief of the Defence Staff (the CDS). The CDS denied the Applicant's grievance of an improper assignment of medical employment limitations and permanent category resulting in the Applicant's release from the Canadian Forces notwithstanding the Canadian Forces Grievance Board (the CFGB) recommendation the grievance be upheld in part.

[2] I have decided to grant the application for judicial review for reasons that follow.

BACKGROUND

[3] Catherine Ann Smith served in the Canadian Forces from March 23, 1990 until her release on September 3, 2002. She held the rank of Lieutenant (Navy) and served as a Nursing Officer at a variety of postings in Canada and a 1994 in-theatre deployment to Croatia.

[4] On October 23 and November 2, 2001, Ms. Smith was examined by her family physician, Dr. C. Brownlee. She was diagnosed with depression, a humeral fracture, rotator cuff tear and microcytic anemia. Dr. Brownlee noted Ms. Smith's previous post-partum depression resolved without medication and Ms. Smith's current depressive symptoms were a result of harassment issues in the workplace. At the time, Ms. Smith had a complaint against her commanding officer for harassment.

[5] Dr. Brownlee described Ms. Smith's Medical Employment Limitations (MEL) as: "Presently [sic] unfit military duty, will need extended sick leave, then reduced work duties and ongoing frequent specialist treatment. May be able to return to sedentary duties in approximately three months." Dr. Brownlee recommended a change of Ms. Smith's MEL to a temporary 6 month category of G5(T6) Occupational 5(T6). (G – geographical, O – occupational, T – temporary).

[6] The Base Surgeon, Major D. Nguyen, wrote "Concur G5: requires specialist service. 05: may require reduced work duties, unable to tolerate the stress of working in any military environment" and changed the recommendation to a permanent MEL.

[7] On November 13, 2001 the Director of Medical Policy (D Med Pol) Dr. Deilgat recorded that Ms. Smith was assigned a permanent MEL because of a chronic medical condition and issued the following limitations:

- requires regular specialist follow-up
- requires daily medication without which after discontinuation of medication for few days the member might suffer a crisis related to the chronic medical problem
- unable lifting overhead, repetitive or forceful use of shoulders against resistance
- to wear prescription lenses as directed
- unable to tolerate the stress of working in any military environment

[8] The last MEL descriptor has been characterized as a 'lethal' MEL since it would likely result in release from the Canadian Forces. On February 19, 2002, the Director Military Career Administration and Resource Management (DMCARM) concluded Ms. Smith's MEL breached the Universality of Service Principle and *bona fide* occupational requirements and decided to release her come September 2002.

[9] Ms. Smith filed a grievance on April 26, 2002 contending, among other claims, that the change of her medical category from temporary to permanent was improper and against the advice of her treating physicians. She also contended the MEL assessed did not reflect her medical status as she did not have a chronic condition. She requested the cancellation of her release from the Canadian Forces.

[10] Before Ms. Smith filed her grievance her treating physicians tried to have the permanent MEL changed. Dr. Brownlee conducted another medical examination on January 30, 2002 and recommended a temporary MEL. Another medical officer, Dr. S. West examined Ms. Smith on March 27, 2002 and also recommended a temporary MEL. Her psychiatrist, Major (Dr.) T. Girvin submitted a favourable report and referred Ms. Smith to another psychiatrist, Dr. Trudel who examined her on several occasions between April and June 2002 and submitted a report stating:

> … In regards to her career limitations, she told me that the memorandum that she got indicated that she was unfit for any military duty in any geographical area. If this is the case, I believe it is an overstatement since, in my opinion, which I shared with her, her only limitations would be that she not be deployed to isolated postings or on UN peacemaking or peacekeeping missions. Otherwise, she can be employed with no limitations.

Dr. Trudel's diagnosis was: "Major depression with mild to moderate symptoms recurrent which presently appears to be in remission".

[11] D Med Pol did not acknowledge the foregoing examinations but, upon inquiry by the Initial Authority hearing Ms. Smith's grievance, engaged a Medical Officer specializing in internal medicine to conduct an independent review. The independent review by Dr. Fisher dated July 30, 2002 specified that Ms. Smith's minimum MEL should be "no isolated or UN postings" and agreed that a permanent medical category was appropriate. Dr. Fisher concluded:

> I conclude that with the multiple medical problems of this patient, she needs MD support at all times, and it is probable that she also needs ongoing specialist follow-up. Her category, therefore, would be a minimum of a G4, but possibly a G5. In terms of occupational factors, in view of her difficulty working at OGH as well as within the Military system, it is unclear to me, how employable she might be, and therefore, I am unable to make recommendations that would be definitive in regard to an O factor. However, she seems to tolerate stress poorly.

[12] On receipt of Dr. Fisher's report, Dr. Sanchagrin, Acting Deputy Chief of Staff, D Med Pol, concluded "that the medical employment limitations assigned to Lt(N) Smith on 13 November 2001 are indeed appropriate."

[13] The Initial Authority on the grievance did not complete its review within the 90 day time limit for a decision and Ms. Smith did not agree to an extension. As a result, her grievance was sent directly to the Canadian Forces Grievance Board (CFGB).

[14] The CFGB issued its decision on April 29, 2006 recommending the CDS uphold Ms. Smith's grievance in part. The CFGB's finding on the main issue before this Court arising with respect to Ms. Smith's medical release is:

> The Board finds that the medical evidence does not support the MEL assigned to the grievor. Furthermore, the Board finds that the medical evidence supports less restrictive MEL.

[15] The CFGB recommended the CDS partially uphold the grievance, specifically:

> The Board recommends that the CDS direct D Med Pol to re-examine and adjust the grievor's medical category and MEL to reflect the medical opinion of Drs.' Trudel and Fisher.
>
> The Board recommends that, upon the re-examination and adjustment of D Med Pol of the medical category and MEL, the CDS direct DMCARM to review the extent of accommodation that would have been available to the grievor in 2002.
>
> The Board recommends that, should DMCARM's review determine that the grievor could have been accommodated, the grievor's file be sent to the DCCL for consideration of compensation.

[16] Following the CFGB findings and recommendations, Ms. Smith's grievance went to the CDS for decision. On July 15, 2006, the CDS issued his decision. He declined to follow the CFGB findings and recommendations and dismissed Ms. Smith's grievance.

DECISION UNDER REVIEW

[17] The CDS accepted the CFGB's summation of the facts relating to Ms. Smith's grievance.

[18] The CDS noted that D Med Pol is the Canadian Forces authority that assigns MEL and PCat. He wrote:

> In November 2001 D Med Pol assigned to you MEL and approved the G5O5 PCat previously assigned by Dr. Nguyen. You had been diagnosed with depression on several occasions by specialists in psychiatry and psychology, including Drs. Kelly, Ellis, Labelle and Girvin during the period from 1991 to 2001. In 1999, Drs. Labelle and Girvin diagnosed you with Major Depression (Recurrent). Although not all the physicians who assessed you agreed that the G5O5 PCat was warranted at the time, the fact remains that D Med Pol is the CF authority for the assignment of MEL and PCats. The Major Depression (Recurrent) diagnoses was subsequently supported in 2002 by Dr. Trudel, a psychiatrist to whom you were referred for a second opinion, and as well, by Dr. Fisher who had been requested by D Med Pol to do an independent review of your case. Based on Dr. Fisher's report, D Med Pol confirmed the appropriateness of the MEL assigned to you.

[19] The CDS, in response to Ms. Smith's allegation that the medical opinions of her attending physicians were not taken into consideration by D Med Pol, stated: "…I find no evidence on your grievance and medical files to corroborate that allegation."

[20] The CDS found Ms. Smith's MEL was in violation of the Universality of Service (U of S) Principle. He found the extent of her MEL precluded her from being "advantageously employed or accommodated" with the Canadian Forces. He wrote:

> The approval for release was made subsequent to a review by three physicians of your complete medical history, which confirmed the MEL assigned in November 2001. I find no evidence in your grievance and medical files to indicate that DMCARM's decision to release you and not offer you accommodation was unreasonable, or incorrect, in light of the MEL and PCat assigned by D Med Pol.

[21] The CDS acknowledged that several of Ms. Smith's treating physicians did not find evidence of chronic depression or did not agree with the severity of the MEL or PCat but stated:

> However, the issue is not whether your depression is chronic, but whether there is likelihood of its recurrence in the future, particularly in light of stressful situations that you may encounter in your life. None of the medical doctors, including specialists, indicated that recurrences would not occur. … D Med Pol weighed the medical evidence and opinions with consideration of your well-being and safety, particularly in regard to operational deployments, and assigned and confirmed your MEL and PCat accordingly.

The CDS found that D Med Pol was correct in the assignment of the MEL and PCat regardless of whether or not Ms. Smith's condition was later noted as being in remission.

[22] The CDS recognized the employment limitations decided by Dr. Trudel and agreed to by Dr. Fisher were less restrictive than the limitations assigned by D Med Pol. He agreed with the Pearls of Wisdom D Med Pol guidelines that the limitations decided by Dr. Trudel "not to be deployed to isolated postings or on UN peacemaking or peacekeeping missions" are associated with a G4 category. The CDS noted the CFGB found the medical evidence in the assessments of Drs. Trudel and Fisher do not support the MEL assigned. The CDS then declared that "without input from

medical doctors knowledgeable with the issues of MEL and medical category assignment, I can only conclude that the CFGB was in no position to find the medical evidence on your files do not support the MEL assigned to you by D Med Pol."

[23] The CDS found the medical personnel involved undertook a fair and objective assessment of the medical evidence in deciding the MEL and the administrative personnel who decided Ms. Smith's MEL was in violation of the U of S Principle both did so objectively. He refused Ms. Smith's grievance.

LEGISLATION

[24] The *National Defence Act*, R.S. 1985, c. N-5 (the *Act*) provides:

Right to grieve	Droit de déposer des griefs
29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.	29. (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.
Final authority	Dernier ressort
29.11 The Chief of the Defence Staff is the final authority in the grievance process.	29.11 Le chef d'état-major de la défense est l'autorité de dernière instance en matière de griefs.
Chief of the Defence Staff not bound	Décision du Comité non

29.13 (1) The Chief of the Defence Staff is not bound by any finding or recommendation of the Grievance Board.

Reasons

(2) If the Chief of the Defence Staff does not act on a finding or recommendation of the Grievance Board, the Chief of the Defence Staff shall include the reasons for not having done so in the decision respecting the disposition of the grievance.

Canadian Forces Grievance Board established

29.16 (1) There is established a board, called the Canadian Forces Grievance Board, consisting of a Chairperson, at least two Vice-Chairpersons and any other members appointed by the Governor in Council that are required to allow it to perform its functions.

Duties and functions

29.2 (1) The Grievance Board shall review every grievance referred to it by the Chief of the Defence Staff and provide its findings and recommendations in writing to the Chief of the Defence Staff and the officer or non-commissioned member who submitted the grievance.

obligatoire

29.13 (1) Le chef d'état-major de la défense n'est pas lié par les conclusions et recommandations du Comité des griefs.

Motifs

(2) S'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.

Constitution du Comité des griefs

29.16 (1) Est constitué le Comité des griefs des Forces canadiennes, composé d'un président, d'au moins deux vice-présidents et des autres membres nécessaires à l'exercice de ses fonctions, tous nommés par le gouverneur en conseil.

Fonctions

29.2 (1) Le Comité des griefs examine les griefs dont il est saisi et transmet, par écrit, ses conclusions et recommandations au chef d'état-major de la défense et au plaignant.

ISSUES

[25] The Applicant submits:

a. the CDS erred in dismissing her grievance by failing to have regard for medical evidence that her medical condition was temporary and did not warrant assessment of a permanent medical category;

b. the CDS erred in finding the Canadian Forces Grievance Board was not in a position to assess the medical evidence with respect to the employment limitation which led to her release from the Canadian Forces, and

c. there was unreasonable delay between the filing of the grievance on April 26, 2002 and the CDS's decision in September 2008 which constituted a denial of natural justice, procedural fairness and abuse of process.

[26] In my view, the first issue that must be addressed is whether the CDS provided sufficient reasons for not accepting the findings or recommendations of the CFGB. I consider this so because Parliament legislated this requirement, subsection 29.13(2) of the *Act*, and because the CFGB decision is the penultimate review before the CDS's own review of the grievance.

[27] The remaining issues to be addressed are those raised by the Applicant's grievance.

[28] Accordingly, the issues in this judicial review are:

a. Did the CDS satisfy the statutory requirement to provide reasons for rejecting the findings and recommendations of the CFGB?

b. Did the CDS err in concluding D Med Pol personnel undertook a fair and objective assessment of the medical evidence in deciding the Applicant's medical employment limitations?

c. Was the delay in the grievance process a denial of natural justice, procedural fairness and/or an abuse of process?

STANDARD OF REVIEW

[29] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*) the Supreme Court of Canada held there are two common law standards of review in Canada: correctness and reasonableness. The Supreme Court also held that where the standard of review has been previously determined, there is no need to conduct a fresh standard of review analysis.

[30] The suficiency of reasons is a question of procedural fairness ordinarily assessed on a standard of correctness, *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29. Subsection 29.13(1) of the *Act* provides that the CDS is not bound by any finding or recommendation by the CFGB. However, subsection 29.13(2) requires that, where the CDS does not act on a finding or recommendation of the CFGB, he shall include reasons for not doing so.

[31] Madam Justice Anne Mactavish considered the issue of sufficiency of reasons with respect to a CDS grievance decision in *Morphy v. Canada (Attorney General)*, 2008 FC 190 (*Morphy*). She found the important questions when reviewing a CDS's reasons are; to what extent the reasons

respond to the central issues raised by the grievance and whether they satisfied the requirements of subsection 29.13(1). She conducted a pragmatic and functional analysis noting that the issues were questions of law, and mixed fact and law, because the legislation requires the CDS to provide reasons. She concluded the approriate standard of review is reasonableness.

[32] More recently, in *Zimmerman v. Canada (Attorney General)*, 2009 FC 1298 (*Zimmerman*), Justice Boivin examined the issue of sufficiency of reasons in a CDS grievance decision in respect of subsection 29.13(2) of the *Act* and concluded on the authority of *Morphy* it was a question of mixed fact and law reviewable under the reasonableness standard.

[33] I agree with my colleagues. Clearly, the CDS must provide reasons when rejecting the CFGB's findings and recommendations and those reasons must relate to the subject matter at hand. However, the CDS may engage in fact finding and interpretation of Canadian Forces regulations and policies that differs from the CFGB's. In this he is due a measure of deference. Accordingly, I conclude assessment of the sufficiency of reasons required by subsection 29.13(2) justifying why the CDS may reject the CFGB's findings and recommendations is reviewable on a standard of reasonableness.

[34] The CDS's findings and decision on the Applicant's substantive grievance with respect to the D Med Pol medical employment limitation assessment involves a review of whether D Med Pol had properly reviewed and assigned the medical employment limitations given the facts before it. This involves an examination of the facts and applicable Canadian Forces policies.

[35] I conclude the CDS's decision on the grievance is therefore a question of fact and mixed fact and law reviewable on the reasonableness standard.

[36] The CDS's decision must be able to withstand a "somewhat probing examination". *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.). It should fit comfortably with the principles of "justification, transparency and intelligibility", *Dunsmuir*, para. 47.

[37] Finally, issues of procedural fairness are reviewed on a standard of correctness. S*ketchley v. Canada (Attorney General)*, 2005 FCA 404.

ANALYSIS

Did the CDS satisfy the statutory requirement to provide reasons for rejecting the findings and recommendations of the CFGB?

[38] The CFGB issued its report April 29, 2006. The CFGB found the Canadian Forces followed all relevant orders and guidelines when assigning a permanent medical category and MEL to the Applicant but it also found that D Med Pol's assignment of the MEL and a G5O5 to the applicant category was not supported by the medical evidence. The CFGB found a less restrictive MEL which would have allowed the Applicant to be accommodated within the Canadian Forces would be more appropriate. The CFGB found the Applicant was not fairly assessed when being considered for accommodation. The CFGB recommended the CDS partially uphold the grievance.

[39] The CFGB conducted an extensive review of the Applicant's medical history since 1999 taking specific note of the various medical examinations, diagnosis and recommendations of the Applicant's treating physicians. It reviewed the process by which the permanent category and medical employment limitations was assigned by D Med Pol to the Applicant. It considered the two separate unsuccessful attempts by the Applicant's physicians to have the Applicant's permanent category and MEL reassessed. The CFGB considered a report from the Patient Advocate on behalf of the Applicant. It took specific note of the report by Dr. Trudel, the psychiatrist who examined the Applicant and wrote in part on June 12, 2002: "In regards to her career limitations, … her only limitations would be that she not be deployed to isolated postings or on UN peacemaking or peacekeeping missions. Otherwise, she can be employed with no limitations."

[40] In its analysis, the CFGB considered the applicable standing medical orders, administrative orders and medical policies. It noted the synopsis prepared by the Canadian Forces Medical Group Headquarters failed to consider the medical opinions made in June and July 2002 concerning mental disorders and assignment of medical categories. The CFGB stated:

> While the Board acknowledges that D Med Pol is responsible for making the final determination with regard to a member's MEL, in this instance, the medical evidence does not support the medical limitation of "unable to tolerate the stress of working in any military environment" and the G5O5 medical category. Both Dr. Trudel and the independent consultant questioned this G5 category, including that the grievor was fit to work in some military environment and that a G4 category would be appropriate. Therefore the Board finds that, based on the medical evidence, D Med Pol should have revised the grievor's MEL and category to reflect the assessments provided by Dr.'s Trudel and Fisher. Such a revision would have amended her MEL to "unable to tolerate the stress of working in any military environment" to "unable to work at isolated postings or on UN peacemaking or peacekeeping operations."

[41] The CFGB considered jurisprudence and noted in a 2005 decision, this Court accepted the Tribunal's conclusion that the Canadian Forces failed to fairly assess an applicant's medical condition which resulting in a MEL and medical category that led to a release from the Canadian Forces. The CFGB went on to conclude that the Applicant was not considered for accommodation given her assigned G5O5 category and MEL.

[42] The CFGB expressed the view that the Applicant was not fairly assessed by the Canadian Forces as the medical evidence does not confirm the necessity for the G5O5 category and related MEL. It added "furthermore, based on the more appropriate G4 category, supported by the most recent medical opinions of Dr.'s Trudel and Fisher, the grievor should have been considered for accommodation within the CF."

[43] Subsection 29.13(2) of the *Act* requires the CDS to explain why he rejected the CFGB's findings and recommendations.

[44] In his decision, the CDS responded to the CFGB's findings and recommendations by declaring: "without input from medical doctors knowledgeable with the issues of MEL and medical category assignment, I can only conclude that the CFGB was in no position to find the medical evidence on your files do not support the MEL assigned to you by D Med Pol."

[45] The CDS accepted CFGB's summary of the facts which included a thorough review of the various medical reports of the Applicant's treating physicians and the medical opinions of Dr.

Trudel and Dr. Fisher, the independent medical consultant engaged by D Med Pol. The CDS does not explain why he rejected the CFGB's conclusions on facts that he accepts.

[46] Further, the CDS's assertion that CFGB is without proper medical input is contrary to the fact that the CFGB relied on D Med Pol's own independent medical expert, Dr. Fisher, who accepted Dr. Trudel's professional psychiatric opinion the more appropriate limitation was the Applicant would be "unable to work at isolated postings or on UN peacemaking or peacekeeping operations."

[47] I find that the CDS has failed to comply with subsection 29.13(2). His explanation for rejecting the CFGB's findings and recommendations ignores the fundamental findings and issues raised by the CFGB. His explanation is not a responsive reason and is therefore unreasonable.

Did the CDS err in concluding D Med Pol personnel undertook a fair and objective assessment of the medical evidence in deciding the Applicant's medical employment limitations?

[48] I now turn to the CDS's review of the D Med Pol's MEL and permanent category assessments.

[49] The Respondent submits high deference should be given to the expertise of D Med Pol which is conversant with all facets of the military context in the assignment of medical employment limitations and subsequent reviews. The Respondent submits, based on *Morphy*, the determination of adequate medical treatment received is outside the expertise of the CDS and therefore the assessment of medical employment limitations is also outside the expertise of the CDS or the CFGB.

Conflicting Medical Evidence and Reports

[50] D Med Pol consistently maintained the original MEL assessment was valid. That assessment, set out in a document titled ADMINISTRATIVE REVIEW (Medical Employment Limitations) (AR/MEL), reads:

> Member has been assigned employment limitations <u>because of a chronic medical condition</u>.
>
> Limitations are:
>
> - requires regular specialist follow-up
> - <u>requires daily medication without which after discontinuation of medication for few days the member might suffer a crisis related to the chronic medical problem</u>
> - unable lifting overhead, repetitive or forceful use of shoulders against resistance
> - to wear prescription lenses as directed
> - <u>unable to tolerate the stress of working in any military environment</u>
>
> (emphasis added)

[51] Ms. Smith's treating and examining physicians have disagreed with this MEL assessment.

[52] The CDS categorically rejected Ms. Smith's claim that the medical opinions of her physicians were not taken into consideration. The CDS stated: "[t]he approval for release was made subsequent to a review by three medical D Med Pol physicians of your complete medical history, which confirmed the MEL assigned in November 2001." The evidence for that statement is contained in a February 19, 2002 communication by DMCARM which in part reads:

> 1. LT(N) SMITH'S REPRESENTATION (REF D) WAS SENT TO D MED POL FOR REVIEW AND THE FOLLOWING CONCLUSIONS WERE PROVIDED TO DMCARM FOR ACTION: QUOTE
> - IN THE ABSENCE OF NEW MEDICAL INFORMATION THAT WAS NOT ALREADY KNOWN TO THIS OFICE, THE MEDICAL LIMITATIONS PROVIDED ON 13 NOV 2001 BY D MED POL REMAIN VALID.
> - THREE PHYSICIANS AT D MED POL HAVE REVIEWED THE CASE, AND MELS WERE FOUND TO BE APPROPRATE AFTER A THOROUGH REVIEW OF HER MEDICAL FILE SINCE ENROLMENT
>
> …
>
> (emphasis added)

[53] The evidence shows that between November 13, 2001 and February 19, 2002 Ms. Smith was examined on December 18, 2002 by her orthopaedic specialist, Dr. Marshall. A report was given by her psychotherapist, Dr. Y. Labelle on January 14, 2002. Another medical examination was conducted by her treating physician, Dr. Brownlee on January 30, 2002. Lastly, an opinion was provided by the psychiatrist, Dr. Girvin dated January 31, 2002. All of these reports would be new medical information and recorded on her medical file. Captain Kluke's evidence is that she was informed by the Medical Records Supervisor that no one from D Med Pol reviewed Ms. Smith's medical file in the weeks preceding the February 19, 2002 DMCARM report.

[54] The CDS accepted the CFGB's summation of the facts as complete. A review of this factual summary does not disclose any evidence that D Med Pol ever considered the medical reports of the Applicant's treating physicians. As this absence of evidence is consistent with the Applicant's allegation, it is necessary for the CDS to address whether the D Med Pol ever considered the more favourable medical reports concerning the Applicant.

[55] The CDS must consider the Applicant's foregoing contrary evidence but does not. Instead he declares there is no evidence on the grievance and medical files to corroborate the allegation that the medical opinions of the Applicant's treating physicians were not taken into consideration by D Med Pol.

CDS's Medical Opinion

[56] The CDS rejected Ms. Smith's contention that she never had the chronic condition that forms the basis of her MEL and PCat. He acknowledged that several doctors indicated they did not find evidence of chronic depression or did not agree with the severity of the MEL or PCat. The CDS then makes two statements:

> However, the issue is not whether your depression is chronic, but whether there is likelihood of its recurrence in the future, particularly in light of stressful situations that you may encounter in your life. None of the medical doctors, including specialists, indicated that recurrences would not occur.
> …
>
> Therefore, after careful review of your grievance and medical files, including all the medical assessments and opinions in your case, I find that D Med Pol was correct in the assignment of your MEL and PCat regardless of whether or not your condition was later noted as being in remission.

[57] Since D Med Pol never changed its finding that the Applicant had a chronic medical condition rather than a recurrent condition, the CDS has taken it upon himself to venture into a medical area in which he has no expertise and offered a medical opinion on the likelihood of recurrence of the Applicant's depression. (*Morphy)*.

Psychiatric Evidence

[58] There is also the matter of medical expertise. The status of the Applicant's mental health and her vulnerability to depression is central to the negative MEL assigned to her by D Med Pol. In this respect, the medical opinion of psychiatrists who are specialists in the area of mental health would ordinarily be preferred.

[59] Dr. Trudel had reported on April 26, 2002 that:

> … I also pointed out that it was further my opinion that she not be deployed to a war zone or an isolated posting since that would probably increase the risk of suffering a relapse. Further she should serve in an area where at least the services of a general practitioner was available. …

And on June 12, 2002, Dr. Trudel added:

> … In regards to her career limitations, she told me that the memorandum that she got indicated that she was unfit for any military duty in any geographical area. If this is the case, I believe it is an overstatement since, in my opinion, which I shared with her, her only limitations, would be that she not be deployed to isolated postings or on UN peacemaking or peacekeeping missions. Otherwise, she can be employed with no limitations.

[60] Dr. Girvin and Dr. Trudel, the two psychiatrists who examined Ms. Smith, found lesser medical employment restrictions would be more appropriate in contrast to those found by D Med Pol medical officers.

[61] The Canadian Forces Medical Order 26-15 states:

> 3(b) Where, after appropriate treatment the member still cannot perform all military duties, the case is to be discussed with a military psychiatrist and permanent employment limitations and an appropriate medical category shall be assigned.

One would expect the CDS would explore whether this prescribed process was followed. The CDS did not address the matter of compliance with the Medical Order 26-15 which directs consultation with a military psychiatrist. The only psychiatrists who provided medical opinions were the two who examined the Applicant and who provided a more favourable MEL than D Med Pol's. Yet, the CDS did not consider whether D Med Pol's had appropriate regard for the opinions of the two treating psychiatrists as per CF Medical Order 26-15.

Consultation and Clarification

[62] D Med Pol issued its "Pearls of Wisdom" as guidelines for assessing medical employment limitations. They stress the need for sufficient information and transparent discussion on conclusions drawn from that information. I take from D Med Pol "Pearls of Wisdom" guidelines:

- if there is controversy, D Med Pol will ask for more information and give due consideration to medical reports;
- D Med Pol recognizes that each case needs to be treated on an individual basis;
- D Med Pol is open to and encourages discussion in cases where issues arise on medical employment limitations.

[63] D Med Pol decided on a 'lethal' MEL for Ms. Smith without referring to the contrary medical assessments by Ms. Smith's treating and examining physicians. There is nothing in the accepted summary that indicates D Med Pol engaged in consultation or clarification with the Applicant's treating physicians.

[64] D Med Pol didn't apply its own policies and directions provided in "Pearls of Wisdom" to address the conflicting medical opinions. Nor did it send the matter back for clarification. It did not engage in discussion on the several occasions when the conflicting medical opinions and recommendations were advanced either by way of new medical reports or reassessments of the MEL recommendations.

[65] The CDS does not explore what medical dialogue or clarification D Med Pol engaged in the face of differing medical opinions from the Applicant's treating physicians.

Independent Medical Opinion

[66] Finally, D Med Pol, being knowledgeable about MEL issues, can be assumed to choose a medical doctor who could provide them with a competent independent medical opinion for an appropriate MEL for the Applicant. D Med Pol reviewed the independent medical opinion but did not accept its final conclusion.

[67] The CDS ignores why D Med Pol asked Dr. Fisher for an independent medical opinion only to reject it once it's in their hands. He, in turn, chooses to reject the finding of the CFGB which relied on Dr. Fisher's conclusion.

[68] The Court considers several principles when asking if a decision is reasonable. A decision maker is presumed to consider all of the evidence before him and is not required to list all the evidence considered, *Ozdemir v. Canada*, 2001 FCA 331 at para. 10. However, the more important

the evidence is to the Applicant's case, the more important it is for the decision maker to consider that evidence. Where important or contradictory evidence is not referred to, it gives rise to an inference that the evidence was not considered, *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425 at para. 17. Finally, the reasonableness of the decision is assessed upon considering the reasons as a whole, *Hristova v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 132 at para. 22. These principles articulate how the Court should approach the review of a decision-maker's reasons. But the overarching requirement of reasonableness outlined in Dunsmuir is decisions should fit comfortably within the principles of, "justification, transparency and intelligibility".

[69] The CDS ignored evidence contradictory to his conclusion. He failed to consider evidence that supports the Applicant's grievance, notably medical reports that challenge D Med Pol's assessment. The CDS ignores D Med Pol's failure to follow Standing Medical Orders and policies governing conflicting medical opinions. The CDS ventured his own medical opinion of the issue of recurrence of the Applicant's depression, an area in which he has no expertise. Finally, the CDS failed to give cogent reasons for not following the CFGB findings and recommendations. These failures undermine the justifiability, transparency and intelligibility of his decision.

[70] I find the CDS' decision to uphold the D Med Pol's MEL assessment of the Applicant is unreasonable.

Was the delay in the grievance process a denial of natural justice, procedural fairness and/or an abuse of process?

[71] Having found the CDS decision to be unreasonable in failing to comply with subsection 29.13(2) of the *Act* and similarly unreasonable on substantive issue on the grievance, I do not consider it necessary to address the issue of procedural fairness arising on delay.

CONCLUSION

[72] The application for judicial review is allowed with costs.

[73] The July 15, 2006 decision of Vice Admiral J.A.D. Rouleau, the Acting Chief of the Defence Staff denying the Applicant's grievance will be quashed.

[74] Ms. Smith was released by the Canadian Forces on September 3, 2002. She advises she is now employed as a nurse by the Cumberland Health Authority in the Emergency Department and Long Term Care unit. In my opinion, it is not possible to adequately reconsider Ms. Smith's grievance by re-processing her grievance because of the significant passage of time and the change of her circumstances.

[75] I adopt the CFGB recommendation in part. The Chief of Defence Staff should refer the grievance to the appropriate authority to determine whether compensation for lost wages, benefits and career opportunities is an appropriate remedy.

[76] The matter is remitted to the Chief of Defence Staff to be re-determined in accordance with these reasons.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, with costs.
2. The decision of Vice Admiral J.A.D. Rouleau, the Acting Chief of the Defence Staff denying the Applicant's grievance of a permanent medical category resulting in the Applicant's medical release from the Canadian Forces is set aside.
3. The matter is remitted to the Chief of Defence Staff to be re-determined in accordance with these reasons.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1571-08
STYLE OF CAUSE:	LT(N) CATHERINE ANN SMITH and CHIEF OF THE DEFENCE STAFF ET AL.
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JULY 16, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN, J.
DATED:	MARCH 19, 2010

APPEARANCES:

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