Federal Court  Cour fédérale

Date: 20110323

Docket: T-883-10

Citation: 2011 FC 356

Ottawa, Ontario, March 23, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CAPTAIN (N) JOHN FREDERICK SCHMIDT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On July 29, 2008, the Applicant, Captain (N) John Frederick Schmidt, was permanently removed as the Base Commander of CFB Borden and served with a recorded warning by Major-General J. P. Y. D. Gosselin. This action was the result of an incident in the Officer's Mess on the evening of July 7, 2008 where Captain Schmidt was reported to have acted inappropriately towards two junior female officers. Captain Schmidt maintains and the Attorney General concedes that the initial decision by Major-General Gosselin to remove him from command was tainted by procedural unfairness. Captain Schmidt argues on this application for judicial review that the subsequent determination of his grievance by the Chief of Defence Staff (CDS) also removing him from his

command was compromised by the underlying procedural unfairness and should, therefore, be set aside.

Background

[2] Captain Schmidt was posted to CFB Borden as Base Commander on February 1, 2008. On July 8 of that year he informed Major-General Gosselin, the Commander of the Canadian Defence Academy, that on the previous evening he had reportedly behaved inappropriately towards two female students from the Canadian Forces School of Administration and Logistics. He acknowledged that he had been under the influence of alcohol and had little recollection of what had taken place.

[3] Major-General Gosselin immediately appointed Brigadier-General D. Fraser to conduct an investigation and to make recommendations about Captain Schmidt's suitability to continue as Base Commander. He asked for an interim report by July 18, 2008 and a final report by August 15, 2008.

[4] Brigadier-General Fraser's interim report of July 16, 2008 disclosed that his investigation involved interviews with 15 individuals including the two affected student officers. The witnesses reported to Brigadier-General Fraser that on the night in question Captain Schmidt appeared to be drunk. The two female complainants claimed that Captain Schmidt had made unwanted advances including invitations to come home with him. The students expressed shock, disappointment and embarrassment over the incident. Captain Schmidt claimed to have little memory of what had occurred.

[5] Brigadier-General Fraser's interim report stated that a more detailed investigation was not required and he characterized Captain Schmidt's behaviour as harassment albeit "isolated". Nevertheless he recommended that Captain Schmidt be removed from command for the following reasons:

> - *While Capt(N) Schmidt is capable of command and has the continuing support of the senior staff he has irrevocably damaged the trust with the junior officers at CFSAL including affected students. Institutional credibility must be maintained in the eyes of all parties - the senior staff, junior officers and outsiders. The perspectives between the Borden senior staff and CFSAL junior officer staff/students are diametrically opposed as to the issue about trust. In all of this Capt(N) Schmidt is a decent and honest individual who is passionate about what he is doing. He made a significant and apparently isolated mistake. To maintain institutional credibility Capt(N) Schmidt must be seen to be held accountable in the eyes of all parties.*

[6] Major-General Gosselin did not wait for a final report from Brigadier-General Fraser. Instead, on July 16, 2008 he informed Captain Schmidt of the results of the interim investigation and the recommendation for his removal from command. On July 21, 2008 Captain Schmidt was told that he could resign his command or be formally removed. On July 31, 2008 Major-General Gosselin wrote to Captain Schmidt outlining the basis for the decision to effect his removal as Base Commander of CFB Borden. The letter stated:

> 1. This letter is to confirm the discussions we have had between 16 and 29 July 2008, and provide in writing the reasons for your removal of command on 29 July 2008.
>
> 2. While at the Base Borden Officers' Mess on the evening of 7 July 2008, and while under the influence of alcohol, you inappropriately invited a junior female officer to come to your home with you. Shortly after, you inappropriately put your arm around the waist of a second junior officer and invited her as well. This conduct

contravened DAOD 5012-0 *Harassment Prevention and Resolution* (Ref B).

3. Considering this misconduct, and the importance and authority of your position as both Commander CF Support Training Group and Base Commander Borden, I have lost confidence in your ability to effectively exercise the functions of command, and in consultation with the Commander, Military Personnel Command, I have decided to remove you from command effective 29 July 2008.

4. In making my decision, I have relied on the investigation conducted by BGen David Fraser (Ref C), and considered the factors that you brought forward to me in our discussions between 16 July 2008, the day I advised you of my intent to remove you from command, and our meeting on the morning of 29 July 2008. I have concluded that the following factors preclude you from exercising effective command of both CFSTG and CFB Borden:

a. professional misconduct in harassing junior officers attending courses at one of the largest military schools under your direct command;

b. personal conduct which raises concerns about your ability to effectively lead personnel at CFSTG and CFB Borden;

c. a serious error in judgement in allowing yourself to be intoxicated to the point where you did not extricate yourself from a potentially troubling situation;

d. a loss of confidence in your ability to continue to perform your duties impartially, especially in future administrative and disciplinary cases of a similar nature; and

e. a permanent severance of trust that is essential for a chain of command to be - effective.

5. While I greatly deplore the events that took place on the evening of 7 July, and consider this incident most unfortunate for all, I appreciate your forthrightness in reporting the incident to me immediately after you were informed of the allegations, in accepting responsibility for your actions, and in offering to resign from command should it be determined you had acted inappropriately on that evening.

> 6. I thank you for your dedicated work in the past seven months and your attempts to revitalize the formation and the base. You will be assigned to a new position within the next few days.

[7] On October 31, 2008, Captain Schmidt launched a grievance from Major-General Gosselin's decision alleging an absence of procedural fairness, including the following deficiencies:

> *(a) Notice of the intention to make a decision should be given to the person whose career may be affected.*
>
> This would include Annex A of ref D. It should be noted that this was never provided nor any accompanying documentation.
>
> *(b) The person whose career may be affected should be sufficiently informed of the superior's concerns and/or the allegations against his interest to allow that person to properly address the issues. This would normally include disclosure of the grounds of concern as well as relevant information, which will be relied upon in making the decision.*
>
> Ref A clearly indicates that MGen Gosselin relied upon the informal report of BGen Fraser. At no time has this report been disclosed or provided to me so that I could properly respond to MGen Gosselin or, indeed, call any witnesses who may have been available. I do not even know the specific allegations of these unknown officers.
>
> *(c) The person whose career may be affected should be given a reasonable time to prepare a response and an opportunity to make representations to his superior.*
>
> At Ref D, para 6, the clear and concise instruction with respect to procedural fairness is set out in detail. As well, para 6 dictates that. . . "As a matter of policy, removal from command should, except in exceptional circumstances, be temporary, with a decision to continue or cease that removal coming at a later date when all of the information is known and full procedural fairness can be accommodated." This was

> not done - there were no exigent circumstances that would have allowed for the hasty and wrongful decision.

[8] In the ordinary course Captain Schmidt's grievance would have initially been considered by his commanding officer. That option was not available and the grievance was submitted to the Canadian Forces Grievance Authority (Grievance Authority) for review and recommendation to the CDS for final determination.

[9] On August 20, 2009 the complete grievance file was disclosed to Captain Schmidt through his legal counsel, David Bright Q.C. At that time, Captain Schmidt was invited to submit his comments and copies of pertinent documents in support of his grievance. He was also told that earlier breaches of procedural fairness may be amenable to cure by the Grievance Authority citing as authority *Parisé v Canada*, 265 NR 117, 190 FTR 240 (FCA).

[10] On October 9, 2009 Mr. Bright responded in a very limited way to the substance of the allegations against Captain Schmidt. He acknowledged that Captain Schmidt was under the influence of alcohol at the time and had little recollection of the events. Mr. Bright's letter characterized the focus of the grievance in the following way:

> In any event, the thrust of the Grievance is not with respect to whether or not Captain(N) Schmidt accepted responsibility for his actions (there must surely be an assumption that any officer holding the Queen's Commission would so do) but rather the total lack of administrative fairness in assessing a significant punishment against him.

[11] On November 20, 2009 the Grievance Authority disclosed its grievance synopsis to Captain Schmidt. That document stated that Captain Schmidt had not contested the substantive findings of Brigadier-General Fraser and recommended, subject to Captain Schmidt's further representations, that the grievance be denied. Mr. Bright responded to this report on January 4, 2010. Although Mr. Bright disputed the suggestion that Captain Schmidt accepted Brigadier-General Fraser's findings, the only points of substance he raised involved an issue of probable "witness contamination" and a suggestion that "these complainants may have made similar accusations against other senior officers in the past". Neither of these points was supported by any evidence. The remaining concerns had to do with Major-General Gosselin's handling of the matter including a question about the appropriateness of the penalties he had imposed.

[12] On April 16, 2010 the CDS denied Captain Schmidt's grievance. Although the CDS set aside Major-General Gosselin's decision on the basis of fairness concerns, he nevertheless went on to hold that the removal of Captain Schmidt from command and the placement of a recorded warning on his personnel file were justified. It is from this decision that this application arises.

Issue

[13] Were the acknowledged procedural lapses in the process leading to Major-General Gosselin's initial decision to remove Captain Schmidt from his command remedied or overcome by the subsequent grievance review conducted by the CDS?

Analysis

[14] The issue raised on this application is one of procedural fairness which requires a review on the basis of correctness: see *Smith v Canada (Chief of Defence Staff)*, 2010 FC 321, 363 FTR 186 at para 37.

[15] The parties to this application agree that breaches of procedural fairness surrounding an administrative decision may, in some cases, be overcome by a fair process of appellate review. They disagree as to whether the Canadian Forces' (CF) grievance procedure employed here met the requisite standard.

[16] The question of whether an administrative appeal may cure procedural lapses or unfairness arising in a subordinate adjudication has been judicially considered on a number of occasions. A recent decision of the British Columbia Court Appeal in *Taiga Works Wilderness Equipment Ltd. v British Columbia (Director of Employment Standards)*, 2010 BCCA 97, 3 BCLR (5th) 103 offers a thorough review of a previous authorities on point, which it summarized as follows:

> 36 The above review of the jurisprudence demonstrates that *Cardinal* does not stand for the broad proposition put forward by the employer that an appellate tribunal has no power to cure breaches of the rules of natural justice and procedural fairness. It is apparent from *Supermarchés Jean Labrecque Inc.* and *Mobil Oil* that the Supreme Court of Canada accepted that *Harelkin* (and *King*) and *Cardinal* can stand side by side. The fact that the Supreme Court of Canada mentioned both *Harelkin* and *Cardinal* with approval means that *Cardinal* cannot be taken to have overruled the proposition established by *Harelkin* (and *King*) that a breach of the rules of natural justice or procedural fairness can be cured by an appellate tribunal in appropriate circumstances.
>
> 37 I think it is fair to say that *Cardinal* stands for the proposition that a breach of the rules of natural justice or procedural fairness cannot be overlooked on the basis that the reviewing court or

> appellate tribunal is of the view the result would have been the same had no breach occurred. As demonstrated by the post-*Cardinal* authorities to which I have referred, *Harelkin* and *King* continue to stand for the proposition that appellate tribunals can, in appropriate circumstances, cure breaches of natural justice or procedural fairness by an underlying tribunal. The question then becomes how one should determine whether such breaches have been properly cured.
>
> 38 As did Huddart J.A. in *International Union of Operating Engineers* and Berger J.A. in *Stewart*, I prefer the approach advocated by de Smith, Woolf and Jowell in *Judicial Review of Administrative Action*. One should review the proceedings before the initial tribunal and the appellate tribunal, and determine whether the procedure as a whole satisfies the requirements of fairness. One should consider all of the circumstances, including the factors listed by de Smith, Woolf and Jowell.

[17] The five factors identified by de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th ed. (London: Sweet & Maxwell, 1995) and noted above are the following:

(a) the gravity of the error committed at first instance;

(b) the likelihood that the prejudicial effects of the error may also have permeated the rehearing;

(c) the seriousness of the consequence for the individual;

(d) the width of the powers of the appellate body; and

(e) whether the appellate decision is reached only on the basis of the material before the original decision-maker or by way of a rehearing *de novo*.

It seems to me that, with the exception of item (c) above, the underlying concern is whether the subsequent process for review affords to the affected party a full and independent consideration of the case without being contaminated by the unfairness of what occurred below. Accordingly, where the authority of an appellate body is somehow constrained or where the burden shifts to the

aggrieved party to obtain appellate relief, it is unlikely that a previous grave procedural defect will be overcome. In such a situation nothing less than a fair first stage consideration will usually be required. Conversely, where there is a right to a full and fair *de novo* review with no narrowing of the available relief, many procedural deficiencies affecting a first stage decision will be cured.

Were the Acknowledged Procedural Lapses in the Process Leading to Major-General Gosselin's Initial Decision to Remove Captain Schmidt From His Command Remedied or Overcome by the Subsequent Grievance Review Conducted by the CDS?

[18] Mr. Bright argues that the grievance process adopted by the CDS did not afford the necessary degree of independent and open assessment of the evidence and arguments to be considered a true *de novo* hearing. He asserts that the record considered by the CDS was effectively the same record compiled by the first stage decision-maker and that this compromised the outcome of the grievance. This is not an argument that I am able to accept.

[19] It is clear from the record that the CDS considered his grievance authority to be *de novo* and he communicated that understanding to Captain Schmidt. The CDS took this view on the strength of the Federal Court of Appeal decision in *Parisé*, above. *Parisé* was a case involving an allegation against a CF member of cheating on an examination. Following an internal review, the member was expelled from the training course and returned to his unit. As in this case, the initial decision was made without appropriate regard for procedural fairness. The member brought a grievance but was unsuccessful in obtaining redress. On judicial review the decision was set aside on fairness grounds. On appeal, however, the grievance decision was reinstated. Notwithstanding the procedural flaws that were evident around the initial decision, the Federal Court of Appeal noted that full compliance with the rules of procedural fairness had been observed throughout the three

subsequent grievance stages. It is at least implicit in this decision that the Court found that the CF grievance process was sufficiently robust and independent that it could - and did in that case - remedy any procedural defects that had arisen earlier.

[20] From my own review of the CF grievance procedure, I am satisfied that it does afford to a grievor recourse to a true *de novo* assessment of the case. I am also satisfied that in this case the CDS did conduct a *de novo* review of Captain Schmidt's grievance and that the process was not compromised in any way by any of the procedural deficiencies that were identified in the underlying process.

[21] The right of an officer or non-commissioned member to grieve any decision, act or omission in the administration of the affairs of the CF is created by s 29 of the *National Defence Act*, RS, 1985, c N-5 (Act). There are a few stated limitations to the right to grieve but the scope for recourse is a large one. Subsection 29(5) of the Act specifically recognizes that "any error discovered as a result of an investigation of a grievance may be corrected". This provision affords the grievance authority the unfettered ability to correct errors made in any subordinate decision-making process subject to a grievance.

[22] The above statutory provisions have been supplemented by Administrative Order CFAO 19-32 (Redress of Grievance) which provides for an investigation when one is necessary to properly assess the merits of a grievance. Article 13 of that Order stipulates that the member seeking redress must be provided with full disclosure of the material to be reviewed by the redress authority. The member is then given the right of response to the record produced (Article 21) which may cause a

further investigation and additional disclosure (Article 25). These provisions clearly contemplate the initiation of a process for grievance adjudication that is separate from the process followed at the initial decision-making stage and for the construction of a different evidentiary record. The CDS also enjoys an unfettered remedial authority under ss 29(5) of the Act.

[23] In his decision, the CDS accepted that the initial decision taken by Major-General Gosselin was compromised by procedural lapses and he set that decision aside. He then proceeded to review the evidentiary record concerning the substance of the allegations against Captain Schmidt and reached the following conclusions:

> *Removal from Command.* In reviewing your case anew, I must first determine, based on the information on file surrounding the events of 7 July 2008 and the conclusion of the administrative investigation conducted by Brigadier-GeneraI Fraser, if removing you from command was appropriate and reasonable.
>
> It is normally a loss of confidence in the person's ability to effectively exercise command that results in their removal from command. There is no rule to determine how much latitude will be given to a subordinate or how tolerant a superior should be. Command is a privilege and commanding officers (COs) are entrusted with immense powers and obligations in their duties.
>
> One's moral ability to command must be determined on a case-by-case issue. No universal template can be applied. Every situation must be reviewed for its own merit and each decision must be principled and reasoned. Depending on the situation, administrative measures such as recorded warnings or counselling and probations may prove to be more appropriate. In other situations, removal of command or, in some rare cases, release may be the only alternative.
>
> Here is an extract of the CDS guidance to CO:
>
> > … Every decision that you take as a CO that involves other people will have an ethical dimension to it. Almost every decision impacts other people, so the ethical dimension of the CO's role is pervasive. As CO you have been entrusted with the leadership of

> some of Canada's finest men and women. They deserve leadership with integrity. Integrity involves carrying out your responsibilities at all times by showing respect for the human dignity of people. It means treating them with fairness.

I note from both your representations that you never once contested the specific content of the administrative investigation. Your contentions were limited to the breach in procedural fairness and the fact that some of the witnesses interviewed were also under the influence of alcohol at the time of the events on 7 July 2008 and that their statements should have been taken under oath.

I do not agree that, because the witnesses' statements were not taken under oath, they should not be given consideration. There is no provision in the Harassment Investigator Manual to take witness statement under oath and that alcohol consumption invalidates such statement. You also contend that witness contamination may have occurred and that the complainants may have made similar accusations against senior officers in the past. Since these contentions are not supported by facts, I will not consider them.

By not challenging the specific statements within the administrative investigation, I conclude that, on a balance of probability, your conduct on the evening of 7 July 2008, as laid out in the investigation report, did occur. More specifically, I find that you consumed alcohol to the point where you were no longer able to apply correct judgement and acted inappropriately towards female junior officers. By your conduct on that evening, you also allowed yourself to be in a situation where, in front of subordinates, your actions brought discredit to your rank, your position and the CF. The fact that formal harassment complaints were never laid is irrelevant.

Consequently, I find that your unprofessional conduct at the Officer's Mess on 7 July 2008 breached the trust bestowed upon you by Her Majesty the Queen and that the reasons provided by MGen Gosselin in the removal from command letter were sound, accurate and justified. Consequently, based on the information on file, I agree with the original decision to remove you from command and direct that this decision be permanent. I also find that reinstating you in a command position of your choice at this time would not be in the best interests of the CF.

[Footnotes omitted]

[24] It is evident from these reasons that the CDS understood the need to come to an independent conclusion concerning Captain Schmidt's fitness for command on the basis of the record before him.

[25] I agree with Ms. McManus that the investigatory record considered by the CDS was different than the record that had been considered by Major-General Gosselin. Among other things, it included further submissions from Major-General Gosselin, from Captain Schmidt and from Brigadier-General Fraser.

[26] There is no doubt that with respect to the substance of the allegations against Captain Schmidt, the evidence before Major-General Gosselin did not materially differ from that put to the CDS; but this does not support an argument that the admitted unfairness at the time of the initial decision somehow permeated the grievance process. Ms. McManus is correct that Captain Schmidt was repeatedly extended the opportunity to add to the grievance record on matters of substance and each time, he made a decision not to do so. It was equally open to Captain Schmidt to ask that the CDS supplement the grievance record by expanding the scope of his investigation but no such request was made. Captain Schmidt effectively chose to limit his intervention to complaints about the unfairness of the process below and argued, as a point of law, that it was "impossible…to put the genie back in the bottle". To the extent that he touched at all on matters of substance it was, as the CDS observed, limited to unsubstantiated or speculative concerns.

[27] Captain Schmidt argues that the CDS ought to have bifurcated the grievance process to deal first with the issue of fairness and then to have invited further submissions and evidence on matters

of substance. The problem with this argument is that Captain Schmidt did not ask the CDS to adopt such an approach and the CDS made it abundantly clear that he intended to deal with both issues at once. Nothing prevented Captain Schmidt from taking issue with any of the evidence that had been marshalled by the CDS; it is not open to him to complain later that the unfairness that was evident early on somehow compromised his right to a fair hearing before the CDS.

[28] I agree with Ms. McManus that this situation is indistinguishable from those cases where a party fails to exhaust internal opportunities for recourse and instead complains on judicial review that a duty of fairness was breached in an initial adjudication: see *Lewis v Canada Employment and Immigration Commission*, [1986] 1 FC 70, 60 NR 14 (FCA). Captain Schmidt cannot now complain about the inadequacy of the substantive grievance record before the CDS when he failed to make any serious effort to shape it. As the CDS observed, Captain Schmidt's silence on the merits of the allegations against him can best be explained on the basis that he had nothing to say beyond the generalized and somewhat culpable admissions he had already made. In this context the concerns expressed in argument about delay and the cogency of evidence are hypothetical and, in any event, should have been made first to the CDS.

The Gravity of the Errors Below and the Seriousness of the Implications of the Decision for Captain Schmidt.

[29] With respect to the concern about the gravity of the error made by Major-General Gosselin there can be no doubt that Captain Schmidt was denied procedural fairness. Indeed, as the CDS noted, this decision was made before the investigation was complete and without full disclosure to Captain Schmidt. This is tempered somewhat by the fact that Captain Schmidt had been given

considerable information about the events which led to his removal from command and, in fact, he had self-reported the matter to his commanding officer. Captain Schmidt was also afforded the opportunity to respond to the allegations made against him by the aggrieved parties but he was largely unable to do so because of his admitted consumption of alcohol at the time in question.

[30] There can also be no doubt that Major-General Gosselin's decision carried serious negative implications for Captain Schmidt. He was removed from an important command position and received a written reprimand. On the other hand, the process that was adopted by the CF was remedial in nature and not disciplinary. Had the disciplinary process been invoked, the potential for demotion or full release from the CF would have arisen. In the result, Captain Schmidt has been able to continue his career in the CF without any loss in rank.

[31] In my view these considerations are not sufficiently compelling to justify a finding on judicial review that Captain Schmidt is entitled to a fresh first level decision. He has had the benefit of a full, fair and independent *de novo* review of the case by the CDS that is sufficient in these circumstances to remedy the deficiencies that arose at the time of Major-General Gosselin's decision.

[32] Notwithstanding the capable submissions by Mr. Bright, this application must be dismissed with costs payable by the Applicant to the Respondent in the amount of $2,500.00 inclusive of disbursements.

[33] Counsel for the Attorney General points out correctly that the only proper Respondent to this application is the Attorney General of Canada and the style of cause is amended accordingly.

JUDGMENT

THIS COURT'S JUDGMENT is that application for judicial review is dismissed with costs payable by the Applicant to the Respondent in the amount of $2,500.00.

THIS COURT'S FURTHER JUDGMENT is that the style of cause in this proceeding shall be amended to substitute the Attorney General of Canada for the Respondents as previously named.

" R. L. Barnes "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-883-10
STYLE OF CAUSE:	SCHMIDT v CANADA (ATTORNEY GENERAL) ET AL.
PLACE OF HEARING:	Halifax, NS
DATE OF HEARING:	February 17, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	BARNES J.
DATED:	March 23, 2011

APPEARANCES:

David J. Bright, Q.C. Lauren Randall	FOR THE APPLICANT
M. Kathleen McManus	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Boyne Clarke Barristers and Solicitors Dartmouth, NS	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Halifax, NS	FOR THE RESPONDENT