

Federal Court



Cour fédérale

Date: 20120411

Docket: T-697-11

Citation: 2012 FC 408

Ottawa, Ontario, April 11, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

GORDON DOYLE

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
(THE CHIEF OF DEFENCE STAFF)**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Chief of Defence Staff (CDS), dated March 28, 2011, that denied Gordon Doyle's request for an extension of time to complete his Intended Place of Residence (IPR) and receive relocation benefits.

[2] The Applicant raised several allegations of breaches of procedural fairness and unreasonableness of the decision in light of the Canadian Forces (CF) policy on relocation benefits. The Respondent agreed that this Court ought to quash the decision of the CDS but has provided

submissions as to the appropriate decision-maker to whom the matter should be referred and in opposition to the Applicant's request for a directed verdict.

[3] I will therefore allow this application and consider the appropriate remedy in more detail below.

I. Background

[4] A former officer of the CF, the Applicant, Gordon Doyle, requested an extension of time to use his relocation benefits due to exceptional circumstances in a letter to the CDS on February 1, 2011.

[5] Before receiving the formal decision from the CDS, the Applicant was provided with an imminent ruling by Major Farrell. On March 24 and 25, he sent additional information for consideration.

[6] On March 28, 2011, however, the CDS denied his request stating:

As much as I would like to create a program specifically suited to your situation, thereby enabling an extension to an IPR beyond three years, I am unable.

All relocation benefits are approved by the Treasury Board (TB) and administered through the CF Integrated Relocation Program. Although your relocation has not commenced, at this time we are bound by the TB approved policy and are unable to do any more from within the military system. I note that your file indicates that you have until 11 August 2011, to select and move to an IPR. I encourage you to utilize your support system and resources in your

current location without delay to assist you in securing a relocation prior to the expiration of your IPR benefits.

[7] In response, the Applicant commenced these proceedings for judicial review and made an additional request for documents from the Respondent under section 13 of the *Privacy Act*, RSC 1985, c P-21.

II. Legislative and Policy Framework

[8] Section 35 of the *National Defence Act*, RSC 1985, c N-5 provides that the Treasury Board Secretariat (TBS) regulates the rates and conditions of pay as well as payments made by members of the CF by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their service. The TBS approved relocation policy for CF members is contained in the *Canadian Forced Integrated Relocation Program Directive* (Relocation Directive).

[9] Section 2.1.01 of the Relocation Directive, Active Posting Season (APS) 2008 designates authority for relocation benefits as follows:

Treasury Board Secretariat (TBS), has authority to:

- approve reimbursement of all or part of the expenses reasonably incurred that are directly related to the CF member's relocation but are either an exceptional circumstance or are not clearly provided for in this policy.

**Director of Compensation and Benefits Administration (DCBA),
has authority to:**

- approve reimbursement of all or part of the expenses reasonably incurred that are directly related to the CF member's relocation but are not specifically provided for in this policy.

**Director Relocation Business Management (DRBM) has the
authority to:**

- approve reimbursement or recovery of all or part of the expenses reasonably incurred that are directly related to the CF Member's relocation that are provided for in this policy or as authorized by TBS or DCBA.

**Base Commanders (BComd) or the Base Administration
Officers
(BAdmO) have the authority to:**

- render decisions on entitlements specified within the CFIRP policy.

[10] Assigned responsibilities include:

DCBA is responsible for:

- monitoring the administration of the CFIRP; and
- proposing changes to the policy to Treasury Board Secretariat (TBS) as required.

BComd/BAdmOs are responsible to:

- ensure validated information and supporting documentation is provided to CF members for their transmission to the service provider to ensure proper reimbursement.

**Service provider is responsible for assisting CF members by
providing:**

- program information in an understandable format;
- qualified assistance for each step of their move; and

- the appropriate references regarding payment of relocation expenses.

Base CF Relocation Coordinators are responsible for:

- providing guidance to CF members regarding any policy clarification and liaise with the service provider on relocation issues; and
- considering requests for reimbursement that fall within the intent of the policy and when necessary forward requests to approving authority.

CF members are responsible for:

- contacting the service provider within 21 days after receiving their posting instruction;
- requesting confirmation in writing of the information given by the service provider;
- forwarding to the CF Relocation Coordinator requests for adjudication; understanding their relocation benefits, conditions, and limitations as expenses, resulting from misinterpretation or mistakes will not necessarily be reimbursable;
- considering the information provided, asking for additional clarification, and making timely decisions regarding benefits; and
- ensuring a door-to-door move, by coordinating the:
 - disposal of accommodation,
 - acquisition of accommodation,
 - occupancy date of new accommodation,
 - report for duty date,
 - shipment of HG&E, and
 - travel to new location.

[11] Under Chapter 14, section 14.1.02 of the Relocation Directive, APS 2008, a CF member was given three years after their release date to complete a move to an IPR as follows:

In all circumstances, the overall maximum three-year period after the release date, including the election and the exercising of all IPR election benefits (including actual completion of the move), cannot be exceeded except in exceptional circumstances with DCBA approval.

[12] In Relocation Directive APS 2009, however, the timeframe to claim relocation benefits was shortened to two years after the release date. It provides:

DCBA may exercise Ministerial authority to extend the two year time limitation for a period of up to one year when factors beyond CF members control prevent them from electing their IPR and completing their move to IPR.

[13] CF IRP 2009 Clarification Bulletin 3 made clear that this new timeframe in Relocation Direction, APS 2009 would be grandfathered in by stating:

CF members whose effective date of release is between 1 Apr 00 and 31 Mar 09 and whose entitlement has not expired shall remain entitled to fully exercise their IPR move within three years of their release date.

[14] Since the Applicant's release date was in August 2008, the Respondent admits that the three-year timeframe and possibility of an extension in exceptional circumstances established under Relocation Directive, APS 2008 applies to the Applicant.

[15] Also relevant is section 1.3.02 of the Relocation Directive. APS 2008 that allows CF members to seek recourse for relocation benefits:

Requests may be submitted to DCBA through the CF Relocation Coordinator when CF members:

- have incurred reasonable expenses resulting from exceptional circumstances or demands not covered by the relocation policy and require Treasury Board Secretariat (TBS) authority; or
- do not agree with the application or the interpretation of the CFIRP policy by the service provider.

All requests shall include the following information:

- a written description of the decision/situation that generated the request and all supporting facts known to the CF member;
- the rationale supporting the request, with a clear statement of the full benefits sought; i.e. what benefits the CF member feels he/she should be entitled to; and
- all pertinent supporting documents such as invoices, medical statements, Relocation Consultant's statements, reports, etc.

III. Issues

[16] The Applicant initially raised the following issues for consideration:

- Did the CDS breach the requirements of the duty of procedural fairness?
- Did the CDS err in not referring the Applicant's request to the TBS for a ruling?
- Which year of the CF IRP Directive applies to the Applicant?
- Did the CDS err in interpreting that the extension of time provision did not exist?
- Was the decision of the CDS to deny the Applicant's request reasonable?

[17] Given the Respondent's position that the decision of the CDS should be quashed, however, only two issues related to the appropriate remedy remain before this Court:

- (a) Assuming the Applicant's matter is sent back for re-determination, who is the relevant decision-maker?
- (b) Should a directed verdict be issued in this instance?

IV. Analysis

[18] The Applicant requested that the matter be referred back to the CDS. He also asked this Court to be specific in its reasons and perhaps even make a ruling that his situation constituted “exceptional circumstances” under section 14.1.02 of the Relocation Directive, APS 2008 and warranted an extension of time. He insists that this specificity is required because he has concerns, based on remarks made by Lieutenant Colonel Jones with the Director of Compensation and Benefits Administration (DCBA) that there would be a reasonable apprehension of bias.

[19] It is clear to the Court that the remarks made by Lieutenant Colonel Jones were ill-advised, unprofessional and reflect poorly upon both him and the CF.

[20] Despite the Applicant’s concerns, however, this Court “has no power to substitute its view of the facts for that of the decision-maker, or to make independent findings of fact where the decision-maker made none” (*Callaghan v Canada (Chief Electoral Officer)*, 2011 FCA 74, [2011] FCJ no 199 at para 124). Similarly, *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31, [2002] FCJ no 91 at paras 13-14, stressed that “the role of the Court with respect to a tribunal’s findings of fact is strictly circumscribed.” As regards the notion of a directed verdict, *Rafuse* elaborated:

[14] While the directions that the Court may issue when setting aside a tribunal’s decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding.

[21] A determination as to whether the Applicant's situation constitutes "exceptional circumstances" for an extension of time is highly discretionary and fact-based. This Court would therefore not be justified in exercising the exceptional power of a directed verdict.

[22] I must also agree with the Respondent that the appropriate decision-maker in this instance is the DCBA as opposed to the CDS. The responsibility for administrative decision-making related to relocation benefits is delegated by way of section 14.1.02 of the Relocation Direction, APS 2008. The DCBA can approve a request to exceed the three-year period after the release date in "exceptional circumstances." This decision has yet to be raised directly with or made by the DCBA.

[23] The possibility of an extension for the Applicant must therefore be duly considered by the DCBA before any additional steps are taken by the CDS or this Court. It is worth noting that the Applicant could have proceeded in this manner from the outset.

V. Conclusion

[24] For these reasons, the application for judicial review is allowed and the decision of the CDS is quashed. The issue of the Applicant's entitlement to an extension for relocation benefits based on "exceptional circumstances" is referred back to the appropriate decision-maker, the DCBA, for re-determination.

[25] The Court finds that pursuant to the APS 2008 Relocation Directive there is no time limit imposed as to the possible length of such an extension.

[26] There will be no order as to costs.

JUDGMENT

THIS COURT’S JUDGMENT is that this application for judicial review is allowed and the decision of the Chief of Defence Staff is quashed. The issue of the Applicant’s entitlement to an extension for relocation benefits based on “exceptional circumstances” is referred back to the appropriate decision-maker, the Director of Compensation and Benefits Administration. The Court finds that pursuant to the APS 2008 Relocation Directive there is no time limit imposed as to the possible length of such an extension. There is no order as to costs.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-697-11
STYLE OF CAUSE: DOYLE v AGC

PLACE OF HEARING: OTTAWA
DATE OF HEARING: FEBRUARY 14, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: APRIL 11, 2012

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