Federal Court of Appeal | Cour d'appel fédérale

Date: 20180425

Docket: A-5-17

Citation: 2018 FCA 82

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

LOREN MURRAY PEARSON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on April 24, 2018.

Judgment delivered at Ottawa, Ontario, on April 25, 2018.

REASONS FOR JUDGMENT BY: GAUTHIER J.A.

CONCURRED IN BY: STRATAS J.A.
NEAR J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20180426

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STRATAS J.A.
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BETWEEN:

LOREN MURRAY PEARSON

Appellant

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] Loren Murray Pearson appeals a decision of McDonald J. of the Federal Court (2016 FC 1340) dismissing his application for judicial review of a decision of the Chief of Defence Staff, acting as Final Authority (the FA) under section 29.11 of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA) and section 7.08 of the *Queen's Regulation and Orders for the Canadian Forces* (QR&O). The FA denied two grievances filed with respect to the conduct of the Administrative

Review (AR) and the appellant's release from the Canadian Armed Forces (CAF). The AR and the release followed allegations that he sexually assaulted a subordinate female colleague.

[2] It is not necessary to describe in detail the events that gave rise to the AR and the release. There was considerable amount of documentation before the FA (more than 800 pages) and the Appeal Book (AB) before us does not contain all this documentation.

[3] It is sufficient to briefly describe the two very distinct types of processes that resulted from the appellant's conduct in June 2011 in order to put the arguments of the appellant in their proper context.

[4] At the time of the allegations of sexual misconduct, the appellant was a Combat System Engineer Officer with the rank of Lieutenant (Navy). He had been deployed in the South Pacific on a training mission on board the HMCS Ottawa. He was repatriated to Canada immediately after the allegations of sexual misconduct and was assigned to work with the Canadian fleet Pacific Headquarters in Esquimalt and later on to the Director General Maritime Equipment Program Management in Ottawa.

[5] As a result of the allegations of misconduct, two distinct processes were commenced against the appellant. First, the Director, Military Careers Administration (DMCA) initiated an AR to determine what administrative action should be taken (Defence Administrative Orders and Directives (DAOD), 5019-2, AR). Second, the appellant was charged with "sexual assault, drunkenness and conduct to the prejudice of good order and discipline" before a Standing Court

Martial (SCM) on February 9, 2012 (sections 97, 129, 130 of the NDA, section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46).

[6] The appellant pleaded guilty to the less serious offence of assault and to the charge of conduct to the prejudice of good order and discipline and the prosecutor withdrew the drunkenness charge. On April 26, 2012, the SCM sentenced him to an $8,000.00 fine and a severe reprimand (*R. v. Pearson*, 2012 CM 1004). In this decision, the SCM noted that the most important mitigating factor it considered was the admission of guilt (see paragraph 23(a)). The appellant appealed from his sentence before the Court Martial Appeal Court (CMAC).

[7] We have no other information about this process other than the fact that the appellant was duly represented by legal counsel until at least October 25, 2012.

[8] There is also little information as to what steps were taken, if any, in the AR between the time it was initiated in the summer of 2011 and April 26, 2012 when the SCM issued its decision.

[9] On June 4, 2012, the appellant requested and obtained a copy of the letter that is at the centre of most of the arguments he presented before the Federal Court and in his memorandum of fact and law on appeal, such as breach of his Charter rights, breach of procedural fairness, and negligent and malicious conduct on the part of those involved in the AR. This is a letter from Commander J. C. Allsopp, Commanding Officer of the HMCS Ottawa dated August 31, 2013. It contains brief comments on the appellant's performance while under his command. This letter,

which has been referred to as a letter of introduction, is substantially reproduced at paragraph 8 of the Federal Court decision. In response to arguments by the appellant that this letter revealed evidence that he was suffering from mental illness or stress, both the FA and the Federal Court disagreed.

[10] It is not disputed that this letter does not say much more than what was already included in the divisional notes completed during the period the appellant was posted on the HMCS Ottawa, and to which the appellant already had access.

[11] On June 5, 2012 and August 8, 2012, the DMCA sent two AR disclosure packages to the appellant. The first package included a copy of the introduction letter. It is in the context of those disclosures that the appellant also argued before the FA that he was not treated fairly because he was given insufficient time to file his submissions concerning those documents. However, as noted by the FA, although the long extensions of time the appellant had sought (that is up to October 23, 2012) were denied, he was given a *de facto* extension giving him much more time than the 15 days the applicable regulations provide.

[12] On August 28, 2012 the appellant filed the first grievance that was ultimately before the FA. He submitted that various individuals employed their authority incorrectly and that such negligent actions led to the delay in his mental health care, interfered with his personal and professional life and undermined his defence before the SCM.

[13] The AR concluded in September 2012. The DMCA found that there was clear and convincing evidence that the appellant had engaged in misconduct and breached the CAF sexual misconduct policy. The DMCA concluded that "the appellant is to be released" from the CAF under item 5(f) of the QR&O as soon as possible, and no later than October 21, 2012. This date was later amended to October 25, 2012, to coincide with the end of the appellant's term of employment at the time.

[14] On October 23, 2012, the appellant submitted the second grievance that was the subject of the FA decision judicially reviewed by the Federal Court. After October 25, 2012, the appellant no longer provided services to the CAF.

[15] On April 5, 2013, the appellant abandoned the appeal before the CMAC about two hours into the hearing. It is not disputed that at the time, the letter of introduction was available and that it was discussed in the course of the appellant's submissions.

[16] The appellant, who represents himself in this appeal, raised many issues in his memorandum of fact and law. One was his attempt in the Federal Court to convert his application into an action. However, at the hearing, he acknowledged that he had not challenged the Federal Court's refusal to do so. Therefore, this issue is not before us.

[17] In the hearing of this appeal, the appellant advised that his main arguments were that the FA should have conducted a more thorough investigation as to whether his release had been

properly authorized and should have concluded that his release was defective because it was not approved by the Governor General before May 23, 2013.

[18] According to the appellant, whether or not his conduct justified a release is no longer his main focus. Rather, he now asks this Court to decide how he should be compensated for his loss as a result of the fact that he was still a member of the CAF between October 26, 2012 and May 23, 2013. In his view, such compensation should include regular pay, as well as an adjustment of all his other benefits like his pension. Therefore, I will address this issue first.

[19] The appellant relies on the fact that the FA decided, in the context of another grievance filed on October 15, 2012, that he was entitled to severance pay because the Governor General had not approved his release until May 23, 2013. According to the appellant, because the FA ought to be aware of this decision to which the appellant alluded to in his submissions on the grievances at issue before us, the FA should have investigated the matter further. The appellant also argued that the FA should have applied the same reasoning to award him his salary and other benefits for that period. I cannot agree.

[20] In this earlier decision dated October 24, 2014, the FA's conclusion was based on the fact that the only provision allowing for a forfeiture of severance pay (section 204.40(7) in the Compensation and Benefit Instructions (CBI)) applied to a member of the CAF that had been released under 5(f) only if the release was approved before the said member ended his "eligible service" (October 25, 2012). As the approval expressly referred to in the CBI was that of the Governor General (section 15.01 of QR&O), this provision could not apply to the appellant.

[21] In its Findings and Recommendations dealing with this other grievance (AB tab 4 (22)), the Committee clearly stated that the appellant's "eligible service" extended up to the date of his release which was, according to it, October 25, 2012. Thus, in my view, one cannot make the inference that the appellant is urging on us.

[22] Furthermore, the provisions applicable to severance pay appear to be different and distinct from those applicable to "regular pay". This is readily apparent from the position taken by the Legal Advisor of the DND in the other application filed by the appellant in respect of said Legal Advisor's refusal to settle his claim for "regular pay". As it appears from this Court decision in respect of this other application (2017 FCA 191), DND's position was that, pursuant to section 208.31 of the QR&O, the appellant is not entitled to a salary because he actually ceased to serve on October 25, 2005.

[23] Thus, I am not prepared to conclude that the simple reference to the grievance decided on October 24, 2014 was sufficient to put in play the issue of the appellant's entitlement to regular pay and other benefits before May 23, 2013, in the matters before the FA in the present proceedings. I note that even if I had come to a different conclusion, this Court would only have granted the usual remedy applicable to such cases: returning the matter for consideration by the FA.

[24] Turning now briefly to the appellant's other arguments, I have carefully reviewed all the material before us, including the transcript of the hearing before the Federal Court, and I am satisfied that the Federal Court applied the appropriate standard of review to the issues before it,

and that it correctly applied those standard when it concluded that the FA made no reviewable error. The decision of the FA was reasonable.

[25] There is little for me to add to what was already mentioned by the FA and the Federal Court with respect to the alleged breaches of procedural fairness during the AR. Even assuming that any such breach occurred during that process, which I doubt, they were cured by the *de novo* process before the FA. This last process was fair as the appellant had a full opportunity to present all of his arguments and had access to all relevant material in order to make full answer and defence. Contrary to what the appellant argued before us, the FA was entitled to consider the letter of introduction disclosed in the course of the AR. In any event, the FA's reasons show that this letter did not play any material role in the FA's conclusion that the imposition of a release was justified.

[26] I also find that the FA and the Federal Court properly concluded that the content of the letter of introduction does not support arguments advanced by the appellant concerning his change in plea, the credibility of Commander Allsopp and negligence in failing to recognize his mental state.

[27] It also was reasonable for the FA to note that the appellant cannot avoid the consequences of his earlier decisions to plead guilty to lower charges in the SCM and then to abandon his appeal of the SCM decision.

[28] Even if the appellant insists that he is only challenging the validity of the AR, a number of the appellant's arguments collaterally attack — if not directly attack — the validity of the SCM decision. Before the FA, the appellant asked the FA to reimburse him the fine of $8,000.00 adjudged by the SCM and to remove from his record the severe reprimand which was part of his sentence. But the FA properly rejected this. It did not have jurisdiction to review the validity of the SCM decision. The SCM decision was final.

[29] Finally, in this Court, the appellant brought forward a novel legal argument based on the honour of the Crown. It was not raised before the FA or the Federal Court. He asked that we exercise our discretion to consider this argument on appeal because it would really serve as a useful precedent. I decline to do so. It would be wrong to do so on this limited record.

[30] There is no need to comment on any of the other arguments raised by the appellant other than to say that they were all considered and that none warrant our intervention.

[31] In light of the foregoing, I propose that this appeal be dismissed with costs set at $2,000.00, all inclusive.

"Johanne Gauthier"

J.A.

"I agree
David Stratas J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE HONOURABLE MADAM JUSTICE McDONALD DATED DECEMBER 7, 2016, NO. T-80-16

DOCKET:	A-5-17
STYLE OF CAUSE:	LOREN MURRAY PEARSON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 24, 2018
REASONS FOR JUDGMENT BY:	GAUTHIER J.A.
CONCURRED IN BY:	STRATAS J.A. NEAR J.A.
DATED:	APRIL 25, 2018

APPEARANCES:

Loren Murray Pearson	ON HIS OWN BEHALF
Elizabeth Richards	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT