Federal Court of Appeal

Cour d'appel fédérale

Date: 20201006

Docket: A-218-19

Citation: 2020 FCA 166

CORAM: **GAUTHIER J.A.**
GLEASON J.A.
LEBLANC J.A.

BETWEEN:

MAJOR JOHN BEDDOWS

Appellant

and

CANADA (ATTORNEY GENERAL)

Respondent

Heard at Ottawa, Ontario, on September 28, 2020.

Judgment delivered at Ottawa, Ontario, on October 6, 2020.

REASONS FOR JUDGMENT BY: GLEASON J.A.
LEBLANC J.A.

CONCURRED IN BY: GAUTHIER J.A.

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REASONS FOR JUDGMENT

GLEASON and LEBLANC JJ.A.

[1] This appeal is from a judgment of Justice Boswell of the Federal Court (the Application Judge) (*Beddows v. Canada (Attorney General)*, 2019 FC 671, 305 A.C.W.S. (3d) 759 (*Beddows 2019*)) dismissing an application for judicial review from a decision of the Chief of the Defence Staff (CDS), dated July 3, 2018. In that decision, the CDS denied a grievance submitted by the appellant under section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5 (the Act) on the

ground that the matter raised therein – a request for the reimbursement of the legal fees and costs the appellant incurred in relation to a prior grievance – was not the proper subject of a grievance.

[2] To provide some context for these reasons, it is useful to start with a brief review of some of the procedural history. The appellant is a member of the Canadian Armed Forces. In November 2012, he was deployed to Afghanistan as an intelligence officer. About six months into his posting, he was repatriated to Canada due, at least in part, to certain allegations and complaints which were ultimately either proved unfounded or not pursued.

[3] On May 26, 2014, the appellant filed a grievance challenging the repatriation order (the 2014 Grievance). The 2014 Grievance was denied because it had not been filed within the time limits prescribed by the Act and Chapter 7 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). That decision was overturned by the Federal Court on October 21, 2015, and the matter was sent back to the Final Authority of the grievance process for reconsideration with a direction that the appellant's explanations for the late filing of his grievance be accepted. The appellant was awarded costs in the amount of $2,000.00.

[4] On November 23, 2016, in *Canada (Attorney General) v. Beddows*, 2016 FCA 294, 273 A.C.W.S. (3d) 537 (*Beddows 2016*), this Court allowed an appeal from the foregoing judgment of the Federal Court. While this Court agreed with the Federal Court's determination that the Final Authority's decision was unreasonable, it found that the Federal Court had erred in its selection of remedy and thus remitted the matter back for reconsideration without any direction as to whether to accept the appellant's explanation for the late filing of the 2014

Grievance. In addition, this Court declined to award either party their costs and overturned the $2000.00 costs award of the Federal Court, with the result that each party bore its own costs before both the Federal Court and this Court (*Beddows 2016* at para. 53).

[5] On February 17, 2017, the appellant filed the grievance that is the subject of the present appeal (the 2017 Grievance). In the said grievance, he requested, "as a result of the unreasonable decision made by the Final Authority" in relation to the 2014 Grievance:

> […] re-imbursement of all legal fees and costs associated with [his] successful appeal to the Federal Court for a Judicial Order in [his] favour, and subsequent appearance as Respondent at the Federal Court of Appeal to obtain their Judicial Order in [his] favour in the amount of $19 216.95, and that Ref I [DAOD 2017-1, Military Grievance Process], section 12 be changed to authorize re-imbursement of a grievor's legal expenses on receipt of a Judicial Order from the Federal Court, the Federal Court of Appeal, or the Supreme Court of Canada in their favour.

[6] As indicated at the outset of these reasons, the 2017 Grievance was denied on the grounds that the appellant had exercised his rights to challenge the 2014 Grievance to the fullest extent, as allowed by the Act, and that, as a result, the decision regarding the 2014 Grievance could not be the subject of a further grievance (Appeal Book, at pp. 37-39).

[7] The Application Judge, being satisfied that the CDS's decision denying the 2017 Grievance was reasonable, refused to interfere with it. In particular, he pointed out that there was "no law, policy or other instrument which grants the Canadian Forces the power or discretion to pay for legal expenses incurred as a result of a grievance that precipitated judicial review proceedings" (*Beddows 2019* at para. 32). Then, he held that since our Court had determined, in *Beddows 2016*, that a costs award was not appropriate, any consideration of costs was *res*

judicata and could not be reviewed again by the Federal Court. He also agreed with the respondent that the 2017 Grievance amounted to a collateral attack on the 2014 Grievance and did not, as a result, raise a grievable issue (*Beddows 2019* at paras. 33 and 36).

[8] Finally, the Application Judge refused to consider two issues the appellant had raised at the hearing without prior notice (the New Issues), one concerning the alleged deficiencies in the certified tribunal record and the other concerning the fact that the 2017 Grievance had not been referred to the Military Grievances External Review Committee (the Review Committee) by the CDS, which the appellant asserted violated subsection 29.12(1) of the Act and infringed his rights to procedural fairness. Costs in a lump sum amount of $500.00 were awarded to the respondent.

[9] The appellant submits that the decision of the Application Judge should be set aside for several reasons. First, he contends that the Application Judge ought to have considered the New Issues and that his refusal to do so justifies this Court's intervention. On a somewhat related point, he argues that CDS, acting as the Final Authority with regard to the 2017 Grievance, was biased as he not only unreasonably rejected the 2014 Grievance as the Initial Authority, but was also the instructing client to the Department of Justice in the subsequent proceedings before the Federal Court and this Court. Third, he submits that section 29 of the Act places no limitations on what can be grieved and that the Application Judge therefore erred in holding that the matter raised in the 2017 Grievance was not grievable. Finally, the appellant argues that the CDS committed a reviewable error by failing to provide adequate reasons in denying the 2017 Grievance and by relying, inappropriately, on Treasury Board policies in doing so.

[10] One of the appellant's allegations – that of the alleged bias flowing from the role of the current CDS in the 2014 Grievance and as instructing authority – must be dismissed at the outset as the appellant raised this issue for the first time before this Court. It is well settled that allegations of bias are serious allegations that must be raised at the earliest possible opportunity (*Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892, 117 N.R. 191). In *International Relief Fund for the Afflicted and Needy (Canada) v. Canada (National Revenue)*, 2013 FCA 178, 449 N.R. 95 at para. 19, Justice Stratas of this Court cautioned that "[o]ne cannot discover facts that might indicate impermissible bias on the part of the administrative decision-maker, remain silent on the matter of bias, await the outcome of the administrative decision, and then, if the decision is adverse, claim on appeal that the decision-maker was biased." Thus, the appellant's bias arguments cannot be entertained.

[11] The remaining issues raised by the appellant are subject to two different standards of review. The challenge to the decision of the Application Judge to decline to consider the New Issues attracts the appellate standard of review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. As a discretionary decision, the Federal Court's determination on this point can only be set aside if it is shown to have been vitiated by a palpable and overriding error as this Court held in *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at paras. 28 and 79 (see also *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at paras. 72-74). A palpable error is one that is obvious or readily apparent and an overriding one is one that affects the outcome.

[12] The remaining issues engage the standard of review applicable to judicial review appeals, set out in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47, whereby this Court determines if the Federal Court selected the appropriate standard and, if so, whether it applied the standard correctly. Thus, we are required to effectively "step into the shoes" of the Federal Court and to re-conduct the judicial review inquiry. Our focus in respect of these issues is therefore on the decision of the CDS.

[13] Here, the Application Judge appropriately chose to apply the reasonableness standard to the decision of the CDS on the 2017 Grievance, as grievance decisions involving members of the Canadian Armed Forces are to be judicially reviewed in accordance with that standard, as held by this Court in *W*alsh v. Canada (Attorney General), 2016 FCA 157, 484 N.R. 49 at para. 9, which remains good authority following the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*). Indeed, both parties concur that the applicable standard of review of the CDS's decision herein is reasonableness.

[14] Turning to the merits of the appellant's arguments, despite his able submissions we see no basis to interfere with the judgment below.

[15] As concerns the Application Judge's decision to decline to entertain the New Issues, we find that it was well within his discretion to do so since they were raised by the appellant during the hearing before the Federal Court without prior notice. Remedies which a court may grant on

judicial review being, in essence, discretionary, it is well established that a reviewing court has the discretion to not consider an issue raised for the first time by a party on judicial review, where doing so would be inappropriate (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 22, quoting from *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129 at para. 30). This could be the case where, absent special circumstances, arguments that were not raised in the Memorandum of Fact and Law are presented for the first time on oral argument (*Del Mundo v. Canada (Citizenship and Immigration)*, 2017 FC 754, 282 A.C.W.S. (3d) 149 at paras. 12-13).

[16] Here, the Application Judge found that the appellant had ample time to alert the respondent about the New Issues, but failed to do so. He concluded that it would therefore be inappropriate to consider them in these circumstances. We see no palpable and overriding error in the Application Judge's exercise of his discretion on this point.

[17] In light of the foregoing, there is no need to address the status of the explanatory notes in the QR&O, which the appellant helpfully provided further detail on in his September 29, 2020 letter to the Court in relation to the issue regarding the non-referral of the 2017 Grievance by the CDS to the Review Committee.

[18] As concerns the reasonableness of the decision of the CDS, the central inquiry is whether the CDS reasonably found that the issues raised in the 2017 Grievance were not grievable because the appellant was in essence grieving the previous decision not to accept the 2014

Grievance. The appellant's main contention is that subsection 29(1) of the Act places no limitations on what can be grieved and that, therefore, the 2017 Grievance should have been considered on its merits.

[19] We disagree as we believe that the CDS's conclusion is amply supported by the tenor of the appellant's grievance and the particulars he provided as well as by the relevant provisions in the Act.

[20] As noted, in his grievance, the appellant alleged that he was aggrieved by the unreasonable decision made in respect of his 2014 Grievance. In response to the request to particularize the specific act by which he was aggrieved, the appellant stated in his reply letter of November 29, 2017 that he was "aggrieved by the unreasonable administrative decision of the [CDS] […] to refuse to accept [the 2014 Grievance] for consideration." There was therefore ample basis for the CDS to have concluded that the 2017 Grievance sought redress for the refusal of the 2014 Grievance.

[21] The Act supports the reasonableness of the CDS's determination that one cannot grieve a refusal of a previous grievance. Subsection 29(1) of the Act contains its own limitations by providing that a matter for which another process for redress exists under the Act is not grievable. Here, the CDS reasonably concluded that the available process for redressing the 2014 Grievance was the 2014 grievance process, itself, the subsequent judicial review application and the appeal, which led to the reconsideration of the 2014 Grievance refusal.

[22] Perhaps more importantly, subsection 29(1) cannot be read in isolation. According to the modern approach to statutory interpretation, it must be read in context, harmoniously with the scheme and object of the Act and the intention of Parliament (see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 221 N.R. 241 at para. 21 quoting Elmer Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87). In particular, it must be read in conjunction with section 29.15 of the Act, which provides that:

Decision is final	Décision définitive
29.15 A decision of a final authority in the grievance process is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or to review by any court.	29.15 Les décisions du chef d’état-major de la défense ou de son délégataire sont définitives et exécutoires et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, ne sont pas susceptibles d’appel ou de révision en justice.

[23] The CDS relied upon section 29.15 of the Act in making his decision. This provision strongly supports the conclusion that the denial of the 2014 Grievance cannot give rise to a fresh grievance. As pointed out by the respondent, the final and binding decision to dismiss a grievance cannot form the basis of a fresh grievance (and subsequent judicial review), depending on the outcome of the first judicial review process. Section 29.15 does not allow that. Indeed, to hold otherwise would open the door to endless rounds of grievances, seeking to overturn prior final grievance determinations.

[24] We are therefore satisfied that the CDS’s decision dismissing the 2017 Grievance as not grievable was, in the circumstances of this case and on the sole basis described above, reasonable.

[25] As for the appellant's contention that the CDS committed a reviewable error by failing to provide adequate reasons in denying the 2017 Grievance, it has, with respect, no merit. Reasons for decisions in the administrative justice context need not be perfect; as long as they allow the reviewing court to understand why the decision-maker made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the court will normally refrain from interfering with the decision (*Vavilov* at para. 91, quoting from *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16). This threshold has been met. There is similarly no merit in the appellant's argument that the CDS inappropriately relied on Treasury Board policies in dismissing the 2017 Grievance, as we fail to see any reference to such policies in the impugned decision.

[26] One last point. At the hearing of this appeal, the appellant insisted there was a separate component to the 2017 Grievance, that of the unreasonable delay in having the 2014 Grievance determined. He claims that this delay in determining the 2014 Grievance contravenes section 29.11 of the Act, which requires the CDS to deal with a grievance as expeditiously as the circumstances and the considerations of fairness permit. This is why, he says, he is asking that this Court make an order directing the Final Authority to issue a letter of determination of the 2014 Grievance within 90 days of this Court's judgment in the present appeal.

[27] The appellant acknowledged at the hearing that he did not seek such a remedy in the 2017 Grievance. It is therefore not open to this Court to grant the appellant the order he seeks; nor

would it be appropriate for this Court to provide its views on the meaning of the term “expeditiously” found at section 29.11 of the Act.

[28] That said, we note that the 2014 Grievance has been examined by the Review Committee which has made a series of recommendations favourable to the appellant to the Final Authority. The Committee’s report is dated February 21, 2018, more than two years ago, and no decision has yet been made by the Final Authority. While there might be valid reasons explaining why a final decision with respect to the 2014 Grievance is still pending, this delay, at first blush, does raise legitimate concerns.

[29] For all these reasons, we propose to dismiss the appeal. During the hearing the respondent appropriately abandoned its request for costs. We would accordingly dismiss this appeal without costs.

“Mary J.L. Gleason”
J.A.

“René LeBlanc”
J.A.

“I agree.
Johanne Gauthier J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	GAUTHIER J.A.
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