Federal Court  Cour fédérale

Date: 20160815

Docket: T-2045-15

Citation: 2016 FC 930

Ottawa, Ontario, August 15, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

LIEUTENANT-COLONEL DONALD JAMES HAMILTON

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Lieutenant-Colonel Donald James Hamilton, who represents himself in this proceeding, has applied for judicial review of a decision of the Director General, Canadian Forces Grievance Authority, dated October 18, 2015, in which Colonel J.R.F. Malo [the Director General] denied the Applicant's grievance regarding the recovery of excess annual leave.

I. Background

[2] The Applicant joined the Canadian Forces [the CF] in 1981 as a Regular Force member. In 2002, he transferred to the Reserve Force and in 2007 he transferred back to the Regular Force. During the process of transferring back to the Regular Force, an administrative error was made when the Applicant's leave entitlement was entered into the human resource management system, such that his years of service in the Reserve Force were mistakenly included in the calculation of his annual leave entitlement. Consequently, commencing in 2009 the Applicant began receiving 30 days of annual leave rather than the 25 days to which he was otherwise entitled based on his years of service in the Regular Force. This state of affairs continued until 2014 when the error was discovered during an annual leave audit and, accordingly, on July 8, 2014, the Applicant was informed that he had to pay back the 25 days of excess leave which, in monetary terms, equated to $8,080.83.

[3] On July 31, 2014, the Applicant filed a grievance requesting that special or annual leave be approved in arrears and that the leave policy be redrafted to remedy the unfairness. However, in a decision dated April 13, 2015, the Director General Compensation and Benefits, acting as the initial authority [the IA] under the grievance procedures established under the *National Defence Act*, RSC 1985, c N-5 [the *Act*], denied the Applicant's grievance. The IA found that the policy was clear and, because the Applicant's years of service in the Reserve Force should not have been included in the 30 day annual leave calculation, he was required to pay back the 25 days of leave in excess of his annual entitlement. The IA further determined that only the Minister of National Defence had authority to change the leave policy.

[4] In a decision dated June 19, 2015, the Military Grievances External Review Committee [MGERC] made a non-binding recommendation that the grievance be allowed. The MGERC noted that, since 2006, it had consistently found the exclusion of Reserve Force years of service from the 30 day annual leave entitlement calculation to be unfair. The MGERC further noted that, although the policy had been amended effective April 1, 2015, it did not apply retroactively, and the Applicant's situation therefore had to be reviewed against the regulations in effect at the time the excess leave was granted. The MGERC found that the applicable policy at the time of the Applicant's grievance was explicit and only Regular Force service applied for the purpose of calculating whether a member of the CF was entitled to 30 days of annual leave. The MGERC recommended that, even though the Applicant was not entitled to 30 days of annual leave, the decision to recover the 25 days of excess leave granted to the Applicant should be cancelled pursuant to paragraph 208.315(a) of the *Queen's Regulations and Orders for the Canadian Forces* [*QR&O*] or, alternatively, that the Applicant should be granted 25 days of special leave to offset the excess leave pursuant to section 16.20 of the *QR&O*.

II. The Director General's Decision

[5] In a decision dated October 28, 2015, the Director General, acting as the final authority under the grievance procedures established under the *Act*, determined after considering the Applicant's grievance *de novo*: that although he understood how it might seem unfair to the Applicant to be required to reimburse the equivalent of 25 days of annual leave, the requirement to reimburse was fair and in accordance with the applicable rules, regulations and policies and, consequently, he could not grant the redress sought by the Applicant.

[6] After reviewing the background of the grievance and the MGERC's recommendations, the Director General noted that, in accordance with the relevant policy at the time, the Applicant was not entitled to the 30 days of annual leave he received. The Director General disagreed with the MGERC's recommendation that he use the powers vested in him pursuant to article 208.315(a) of the *QR&O* to find that the overallotment of leave should not have been forfeited because, in his view, that article did not contain the discretion to not recover the leave. According to the Director General, article 208.315, in combination with articles 208.05 and 203.04 dealing with overpayments, conferred discretion to cancel a direction to forfeit leave granted in error only if the error could be corrected and the CF member was otherwise entitled to the leave in accordance with the regulations and orders. In the Applicant's case, the Director General stated that the overallotment of leave to him was "an overpayment error" and he had received leave to which he was not entitled.

[7] The Director General also disagreed with the MGERC's alternative recommendation that, if the direction to forfeit the leave was not cancelled, special leave of 25 days should be granted to the Applicant pursuant to article 16.20 of the *QR&O*. The Director General rejected this recommendation as well because, if special leave were granted to the Applicant, he would receive a benefit not available to other CF members who had been "subjected to similar errors and/or members who were not granted additional leave in recognition of their service in both the Regular and Reserve Force." The Director General thus concluded that the Applicant had not been seriously disadvantaged by the error and, because he had received a benefit in the form of annual leave to which he was not entitled, the Applicant was required to pay back an amount equivalent to the value of 25 days of leave.

III. Issues

[8] The parties raise various issues with respect to the Director General's decision. In my view though the overarching issues boil down to: (1) whether the decision was rendered in a procedurally fair manner; and (2) whether the decision was reasonable.

IV. Standard of Review

[9] Whether any rules of procedural fairness were breached in handling the Applicant's grievance is an issue subject to the correctness standard of review (see: *Mission Institution v Khela*, 2014 SCC 24 at para. 79, [2014] 1 SCR 502; also see *Smith v Canada (National Defence)*, 2010 FC 321, at paras. 34-37, 363 FTR 186). This requires the Court to determine whether the process followed by the Director General achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 115, [2002] 1 SCR 3). It is, therefore, not so much a question of whether the Director General's decision is correct as it is a question of whether the process followed by him in making his decision was fair (see: *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para. 14, 238 ACWS (3d) 199; and *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para. 35, 249 ACWS (3d) 112).

[10] It is well established in the case law that grievance decisions involving members of the CF deal with questions of fact or questions of mixed fact and law and, as such, are to be judicially reviewed in accordance with the reasonableness standard (see: e.g., *MacPhail v Canada (Attorney General)*, 2016 FC 153 at paras. 8-9; *Bossé v Canada (Attorney General)*,

2015 FC 1143 at para. 25, 259 ACWS (3d) 686; *Bourassa c Canada (Défense nationale)*, 2014 CF 936 at para 40, 249 ACWS (3d) 788; *Harris v Canada (Attorney General)*, 2013 FCA 278, [2013] FCJ No 1312 (affirming *Harris v Canada (Attorney General)*, 2013 FC 571 at para. 30, 433 FTR 181); *Babineau v Canada (Attorney General)*, 2014 FC 398 at para. 22, [2014] FCJ No 440; *Osterroth v Chief of Defence Staff*, 2014 FC 438 at para. 18, [2014] FCJ No 483; *Moodie v Canada (Attorney General)*, 2014 FC 433 at para. 44, [2014] FCJ No 447; *Lampron v Canada (Attorney General)*, 2012 FC 825 at para. 27, [2012] FCJ No 1713; *Rompré v Canada (Attorney General)*, 2012 FC 101 at paras. 22-23, 404 FTR 161).

[11] Accordingly, although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is inaccurate or not material" (*James v Canada (Attorney General)*, 2015 FC 965 at para. 86, 257 ACWS (3d) 113), it should not intervene if the Director General's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16, [2011] 3 SCR 708.

[12] Furthermore, the Director General's decision must be considered as an organic whole and the Court should not embark upon a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34, at para. 54, [2013] 2 SCR 458; see also *Ameni v Canada (Citizenship and Immigration)*, 2016 FC

164, at para. 35, [2016] FCJ No 142 (QL)). Moreover, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para. 59, [2009] 1 SCR 339.

V. Analysis

A. *Was the Director General's Decision Procedurally Unfair?*

[13] The Applicant contends that there was unreasonable delay in making changes to the annual leave policy. This contention, however, is without merit because it is outside the scope of this application for judicial review and, indeed, the annual leave policy was amended in 2015 to include years of service in the Reserve Force when calculating a Regular Force member's entitlement to 30 days of annual leave.

[14] The Applicant further contends that the Director General improperly considered and ignored the MGERC's findings and recommendations. This contention, however, is also without merit. The Director General was required to take these findings and recommendations into consideration. His duty under paragraph 10.5(d) of the *Defence Administrative Orders and Directives 2017-1* [*DAOAD*] was to provide reasons if he chose to not act on a finding or recommendation by the MGERC, and in this case he fulfilled this duty because he explicitly addressed the MGERC's recommendations, stating that he disagreed with them and provided reasons for his disagreement. Even though the Director General's reasons for departing from the MGERC's recommendations may have been brief, they are nonetheless sufficient to show why

he disagreed with such recommendations. Furthermore, the Director General was not required, as the Applicant submitted at the hearing of this matter, to explicitly address in detail in his reasons how the error arose and the fact that the Applicant was required to take the leave that was granted to him.

[15] The Applicant also submits that the Chief of the Defence Staff should have dealt with the grievance because it involved a "systemic" issue beyond the powers delegated to the Director General in the delegation letter dated July 21, 2015. This submission appears to be based, at least in part, on the Director General's main reason for denying the Applicant's request for special leave; that is, it would be giving the Applicant, in the Director General's words, "a benefit that is not available to other members who have been subjected to similar errors and/or members who were not granted additional leave in recognition of their service in both the Regular and Reserve Force." This reasoning suggests that there may have been other individuals with errors similar to that suffered by the Applicant, and if so the Applicant did not have access to that information nor could he therefore have been expected to address submissions on this issue. This is not an issue of procedural fairness though because the Director General's reasoning in this regard is conjectural or speculative inasmuch as the record shows that there was no evidence before him, nor any submitted by the Applicant, that other members had experienced an error similar to that suffered by the Applicant or that other members had not been granted additional leave in recognition of their service in both the Regular Force and the Reserve Force.

[16] In short, I find that the Director General's decision was rendered in a procedurally fair manner and in accordance with the *DAOAD*. The procedures followed in this case were open and

transparent, and the Applicant was aware of the case he had to meet. The Applicant was not denied procedural fairness in the rendering of the Director General's decision denying his grievance.

B. *Was the Director General's Decision Unreasonable?*

[17] The Applicant argues that the Director General has authority to exercise discretion with regard to whether a forfeiture of leave may or may not be imposed. He contends that the Director General erred in interpreting leave approval as being a financial decision and therefore subject to the overpayment regulations.

[18] In his reasons for decision, the Director General noted the mandatory language contained in article 16.14(7) of the *QR&O*:

> (7) If an officer or non-commissioned member has been granted annual leave in any fiscal year that is in excess of the amount authorized under paragraph (4) for that fiscal year, the excess leave shall be dealt with in accordance with article 208.315 (Forfeitures in Respect of Leave). [Emphasis in original]

[19] In view of this article, the Director General then concluded that: "The authority granted by *QR&O 208.315* does not include the discretion to not recover leave which can only be characterized as an overpayment." Article 208.315 states:

208.315 - FORFEITURES IN RESPECT OF LEAVE	**208.315 - SUPPRESSIONS DE SOLDE ET D'INDEMNITÉS À L'ÉGARD D'UN CONGÉ**
Subject to any limitations prescribed by the Chief of the Defence Staff, such officers as	Sous réserve de toutes restrictions prescrites par le chef de l'état-major de la

the Chief of the Defence Staff may designate for the purpose may direct that a forfeiture be imposed upon an officer or non-commissioned member for:	défense, tout officier désigné par ce dernier à cette fin peut ordonner qu'un officier ou militaire du rang soit privé de sa solde et de ses indemnités pour :
(*a*) each day of annual leave granted to him in excess of his entitlement or granted to him otherwise than in accordance with regulations and orders in force from time to time;	*a*) chaque journée de congé annuel accordée qui dépasse la période réglementaire ou qui lui aura été accordée, autrement qu'en conformité des règlements et ordonnances en vigueur de temps à autre;
(*b*) each day of compassionate leave granted to him for apparently urgent reasons and in respect of which he fails to subsequently verify that the alleged compassionate circumstances existed; or	*b*) chaque journée de congé qui lui aura été accordée pour raisons personnelles de nature apparemment urgente, s'il a omis par la suite de vérifier si les raisons personnelles étaient bien fondées; ou
(*c*) each day of any other type of leave granted to him otherwise than in accordance with regulations and orders in force from time to time.	*c*) chaque journée de tout autre genre de congé qui lui aura été accordée, autrement qu'en conformité des règlements et ordonnances en vigueur de temps à autre.

[20] The Director General determined that article 208.315 should not be read in isolation from the obligations to recover overpayments under articles 201.05 and 203.04. Article 201.05 reads as follows:

201.05 - FINANCIAL RESPONSIBILITIES OF ACCOUNTING OFFICERS	**201.05 – RESPONSABILITÉS FINANCIÈRES DES OFFICIERS COMPTABLES**
(1) An accounting officer is	(1) L'officier comptable est

responsible for the receipt, custody, control and disbursement of, and accounting for, public funds.

(2) An accounting officer is personally responsible for any payment made by him or by his direction contrary to regulations, or otherwise without authorization, or through error by himself or his subordinates. He shall be required to seek recovery of the amount of any overpayment from the payee.

(3) When an accounting officer has been held liable for an overpayment and has made good the loss he is entitled to be reimbursed to the extent to which recovery has been made.

(4) Except as otherwise prescribed in orders issued by the Chief of the Defence Staff, an accounting officer shall not accept personal funds for safekeeping.

(5) An accounting officer shall not directly or indirectly derive any pecuniary advantage from his position beyond his authorized pay and allowances. He shall not lend, exchange or otherwise apply public funds for any purpose or in any manner not authorized by proper authority and, in particular, he shall not, except as prescribed in orders issued by the Chief of the Defence Staff, cash personal cheques or

responsable de la réception, de la garde, du contrôle, des dépenses et de la comptabilité des fonds qui lui sont confiés.

(2) L'officier comptable est personnellement responsable de tout paiement effectué contrairement aux règlements, par lui-même ou sous sa direction, ou effectué sans autorisation ou à la suite d'erreurs commises par lui-même ou ses subordonnés. Il doit chercher à recouvrer, de celui qui l'a reçu, tout paiement en trop ainsi effectué.

(3) Lorsqu'un officier comptable a été tenu responsable d'un paiement en trop et a comblé le déficit, il a droit à un remboursement égal à la somme recouvrée.

(4) À moins de directives contraires publiées par le chef de l'état-major de la défense, l'officier comptable ne doit accepter la garde d'aucun fonds personnels.

(5) L'officier comptable ne doit, ni directement ni indirectement, retirer d'avantages pécuniaires de son poste, autres que les soldes et indemnités auxquelles il a droit. Il ne doit ni prêter, ni échanger, ni autrement affecter les fonds publics à aucune fin ni d'aucune façon non autorisée par les autorités compétentes, et il doit surtout s'abstenir de payer des chèques personnels ou d'autres effets négociables, à moins de

other negotiable instruments.	directives contraires publiées par le chef de l'état-major de la défense.

[21] Article 203.04 provides that:

203.04 – OVERPAYMENTS	**203.04 – PLUS-PAYÉS**
(1) It is the duty of every officer or non-commissioned member to be acquainted with the rates of pay, allowances and other financial benefits and reimbursable expenses to which that officer or non-commissioned member may be entitled, and the conditions governing their issue.	(1) Chaque officier ou militaire du rang doit se renseigner sur les tarifs de solde, les indemnités et les autres prestations financières ou frais auxquels il peut avoir droit, ainsi que sur les conditions qui en régissent la distribution.
(2) If an officer or non-commissioned member accepts a payment in excess of the entitlement due, the officer or non-commissioned member shall report and refund the amount of the overpayment to the accounting officer of the base or other unit or element where the officer or non-commissioned member is present.	(2) Si un officier ou un militaire du rang accepte un paiement qui dépasse le montant auquel il a droit, il doit signaler ces paiements et rembourser le montant payé en trop à l'officier comptable de la base ou autre unité ou élément où l'officier ou le militaire du rang est présent.
(3) Refund of the amount of an overpayment shall normally be made by an officer or non-commissioned member in either one lump sum or by monthly deductions in the pay account in amounts not less than the monthly rate at which the overpayment was made. In exceptional circumstances, the Chief of the Defence Staff may extend the period of recovery and authorize a lesser rate of	(3) L'officier ou le militaire du rang doit normalement rembourser un trop-payé en un seul versement ou au moyen de retenues mensuelles effectuées sur son compte de solde, pourvu que ces mensualités ne soient pas inférieures au tarif mensuel auquel le paiement en trop a été effectué. Toutefois, dans des circonstances extraordinaires, le chef de l'état-major de la défense peut

repayment.	étendre la période du recouvrement ou autoriser un taux de remboursement moins élevé.

[22] The Respondent argues that articles 201.05 and 203.04 show there is no discretion under article 208.315 to not recover excess leave and it is clear leave is part of the Applicant's compensation and he received an overpayment in the form of excess leave. In contrast, the Applicant argues that excess leave is not an overpayment payment or a reimbursable benefit and that the Director General erred in interpreting leave approval as being a financial decision and therefore subject to the overpayment regulations.

[23] The reasonableness standard presumptively applies to the Director General's interpretation of those articles of the *QR&O* quoted above (see: *Dunsmuir* at para. 54; *Alberta Teachers' Association*, 2011 SCC 61, at para. 30, [2011] 3 S.C.R. 654 [*Alberta Teachers*]; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, at para. 32, 396 DLR (4th) 1; and *Canadian Human Rights Commission v. Canada (Attorney General)*, 2016 FCA 200, at para. 61, 2016 CarswellNat 3213 [*Human Rights*]). This presumption, however, is displaced where the matter under review concerns: (a) a constitutional question (other than one involving an exercise of discretion which violates the *Charter* or does not respect *Charter* values); (b) a question of general importance to the legal system outside a decision-maker's specialized expertise; or (c) a question about the respective jurisdiction of two or more administrative decision-makers or a "true" question of *vires* (see: *Dunsmuir* at paras. 58-61; *Alberta Teachers* at para. 30; and *Human Rights* at para. 62). In this case, none of these questions arise, so the question to be addressed is not whether the Director General's

interpretation of these articles is correct but, rather, whether it was reasonable for him to conclude that article 208.315 of the *QR&O* did not include the discretion to not recover the excess leave.

[24] In my view, it was not reasonable for the Director General to reject the MGERC's recommendation that the decision to recover the excess leave be cancelled pursuant to article 208.315 because his interpretation of this article ignores and fails to recognize the discretion that is implicit and inherent in the words "may direct" that forfeiture be imposed. This wording is clearly permissive and contemplates a decision not only to direct a forfeiture of leave, as was the case in this case, but also one to direct that there be no forfeiture of leave. The Director General's interpretation of article 208.315 is contrary to the principle of statutory interpretation that use of the word "may" is often a signal that a margin of discretion is given to an administrative decision-maker (see: *Canada (Minister of Public Safety and Emergency Preparedness v Cha*, 2006 FCA 126, at para. 19, [2007] 1 FCR 409), and also contrary to section 11 of the *Interpretation Act*, RSC 1985, c I-21, which stipulates that: "The expression "shall" is to be construed as imperative and the expression "may" as permissive." Even if it may have been reasonable to characterize the excess leave received by the Applicant as a form of overpayment, it was, in my view, nonetheless unreasonable for the Director General to emphasise and import the mandatory or imperative language found in article 16.14(7) of the *QR&O* into his interpretation and analysis of article 208.315.

[25] It was also unreasonable for the Director General to reject the MGERC's recommendation that the Applicant be granted 25 days of special leave pursuant to article 16.20

of the *QR&O* because his reasons for not granting such leave were based on conjecture or speculation. There was no evidence before the Director General as to whether there were other members of the CF who may have been subjected to an error similar to that suffered by the Applicant or who were not granted additional leave in recognition of their service in both the Regular Force and the Reserve Force. A conjecture may be plausible but it is of no legal value and it cannot be a reasonable ground for denying the Applicant's request for special leave because its essence is that it is nothing more than a mere supposition (see: *Amour International Mines d'Or Ltée v. Canada (Attorney General)*, 2010 FC 1070, at paras. 26-27, [2010] FCJ No 1325 (QL)). The Director General's determination not to grant the Applicant special leave pursuant to article 16.20 was unreasonably based on a supposition that if there were other members of the CF like the Applicant, they would be denied a benefit available to the Applicant but not to them.

[26] In short, I find the Director General's decision is not justifiable because it adopts an unreasonable interpretation of article 208.315 of the *QR&O* and because it is based, at least in part as to the request for special leave, upon conjecture and speculation. The decision as a whole is not within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Conclusion

[27] In conclusion, I find that the Director General's decision is unreasonable for the reasons stated above and, consequently, the decision is set aside. The Applicant's application for judicial

review is allowed and the matter is returned for re-determination by a different delegate of the Chief of the Defence Staff in accordance with these reasons.

[28] Having regard to all the circumstances of this matter, and upon consideration of those factors set forth in Rule 400(3) of the *Federal Courts Rules*, SOR/98-106, there shall be no award of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the October 28, 2015 decision of Colonel J.R.F. Malo is quashed and set aside; the matter is remitted for re-determination by a different delegate of the Chief of the Defence Staff in accordance with the reasons for this Judgment; and there is no award of costs.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lieutenant-Colonel Donald James Hamilton	FOR THE APPLICANT (ON HIS OWN BEHALF)
Max Binnie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT