Federal Court  Cour fédérale

Date: 20180528

Docket: T-1395-17

Citation: 2018 FC 548

Ottawa, Ontario, May 28, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

CAPTAIN (RET'D) JOSEPH WEINER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Captain (ret'd) Joseph Weiner, seeks judicial review of a decision of the Chief of the Defence Staff of Canada [CDS], in his capacity as the Final Authority in the Canadian Forces' grievance process, denying the Applicant's request for retroactive payment of certain travel allowances. The application for judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1983, c F-7.

[2] For the reasons that follow, I find that the decision of the CDS was not reasonable. Consequently, this application for judicial review is granted.

II. Background

[3] The Applicant was a Class "B" Reserve Services member of the Canadian Forces [CF] from 1989 until his retirement in March 2011. During the relevant time period, he lived in Kitchener, Ontario and commuted daily to his place of duty in downtown Toronto. The distance between the Applicant's residence and his workplace in Toronto was approximately 105 km.

[4] From April 1995 to June 2005, the CF policy regarding travel allowances was the *Travel and Removal Policy* (TR POL) 009/95. Pursuant to the policy, members who had been engaged on Class "B" Reserve service prior to February 24, 1992 were deemed to accept responsibility for all costs associated with travel to and from their place of employment. Such members, including the Applicant, were not eligible to receive a Transportation Assistance Allowance [TAA]. Despite TR POL 009/95, the Applicant received TAA payments from 1995 to 1997.

[5] In October 1997, the Director Compensation and Benefits Administration [DCBA] approved a "move authorization" for the Applicant. The move authorization entitled the Applicant to a CF paid move to a home in close proximity to his Toronto workplace. In lieu of a physical move, the Applicant applied for a Special Commuting Assistance Allowance [SCAA] and maintained his residence in Kitchener.

[6] On March 4, 1998, the Applicant signed a memo waiving his rights to relocation benefits associated with a physical move to Toronto in return for receipt of the SCAA. Attached to the memo were the terms and conditions of the SCAA set out in the DCBA October 1997 approval. One of the terms of the approval stated that the SCAA was authorized for the duration of the posting. However, the cost of the SCAA over the period of the anticipated tour length (indicated as 3-4 years) had to be cost effective when compared to the costs involved in a physical move.

[7] On March 25, 2003, the DCBA suspended the TAA for Class "B" members. While the Applicant was receiving a SCAA and not a TAA at that time, his SCAA was terminated.

[8] TR POL 009/95 was cancelled effective June 1, 2005. On November 16, 2007, Canadian Forces General Message (CANFORGEN) 168/07 announced that the March 2003 decision suspending the TAA was quashed. All eligible Class "B" Reserve members would continue to receive the TAA and could submit retroactive claims for periods during which receipt of the TAA was restricted.

[9] In March 2008, the Applicant submitted 60 retroactive monthly claims for TAA covering the period of April 2003 to March 2008.

[10] Having received no decision regarding his claims for retroactive payment of the TAA, the Applicant filed his grievance on March 4, 2011 just prior to his retirement. The grievance is structured as four related grievances, two of which are the subject matter of this application for judicial review. The Applicant grieved the cessation of his SCAA in 2003 and the refusal to pay

him the TAA from 2003. As redress, the Applicant sought either payment to him of the TAA from March 23, 2003 to the date of his release from the CF in 2011 or payment of the SCAA for the same period.

[11] On March 10, 2011, the DCBA informed the Applicant's unit that the Applicant should not receive further SCAA as he had already received the equivalent of a cost move through sums previously paid to him pursuant to the March 4, 1998 agreement.

III. Grievance Process

[12] The CF grievance process is governed by section 29 of the *National Defence Act*, RSC 1985, c N-5, and Chapter 7 of the *Queens Regulations and Orders for the Canadian Forces* [Regulations]. The Regulations contemplate two levels of authority for the grievance process, the Initial Authority [IA], often the commanding officer of the grievor, and the Final Authority, namely the CDS or an assigned delegate.

[13] On August 3, 2012, the Applicant was informed that his grievance had been forwarded to the Director General Compensation and Benefits for review. The Applicant was asked if he would agree to an extension to September 2013 of the permitted time for review by the IA. The Applicant refused and opted to have the grievance forward directly to the CDS for final review.

IV. Recommendations of the Military Grievances External Review Committee

[14] Pursuant to the *National Defence Act* and the Regulations, certain CF grievances must be referred to the Military Grievances External Review Committee [Committee] for review before a final decision is taken by the Final Authority. The Final Authority is not obligated to follow the recommendations of the Committee. However, if the Final Authority does not accept the recommendations, he or she is required to provide reasons for not having done so.

[15] The Applicant's grievance was submitted to the Committee on November 27, 2012. The Committee recommended to the CDS that the Applicant's grievance be allowed and that he be granted retroactive SCAA for the period from April 2003 to February 2011. Alternatively, if the Applicant was not entitled to claim the SCAA, the Committee concluded that he should have been eligible for the TAA during the same period.

V. Decision under review

[16] The decision of the CDS under review in this application is dated August 3, 2017.

[17] The CDS found that the DCBA October 1997 approval granting the Applicant the SCAA included clear instructions to the Applicant that he would be required to waive his right to future relocation benefits and, critically, that the approval was contingent on the cost effectiveness of the SCAA benefit in comparison to the cost of physically moving closer to the Applicant's Toronto workplace.

[18] The CDS rejected the Applicant's assertion that he was not made aware of the financial constraints governing his grant of SCAA as he signed the March 4, 1998 memo and the DCBA October 1997 approval was attached to the signed memo. The fact that the Applicant may have ignored the terms of the approval document was irrelevant.

[19] The CDS also found that the DCBA's October 1997 grant of the Applicant's SCAA in lieu of a cost move was made in error. The approval referred to TR POL 009/95, which did not apply to Applicant. Therefore, the Applicant was deemed to have accepted responsibility for all costs associated with his unit location in Toronto.

[20] With respect to the Applicant's claim for TAA, the CDS referred to section 2 of the Compensation and Benefits Instructions [CBI] 209.045 – Post Living Differential which sets out the TAA. In concluding that the Applicant was not eligible to receive retroactive TAA payments, the CDS relied primarily on the requirement in paragraph 2(a) of CBI 209.045 that a member not have been moved to their place of duty at public expense. He stated at page 12 of the decision:

> As per the information disclosed to you, all personnel are expected to arrive at their place of duty at the appointed time at their own expense. This is reiterated in numerous CAF, Department of National Defence and Government of Canada directives. In your case, you waived your relocation benefits in 1998 in order to claim and receive the SCAA for a period of 3-4 years, although you received the SCAA for at least five years. There is absolutely no doubt in my mind that, although you have not moved to your place of duty, you accepted and received the equivalent of such a move at public expense, as through the SCAA you received over an approximate period of five years. Therefore, I find that you were not eligible to receive TAA from 2003 to 2011.

[21] The CDS acknowledged that the Committee made a different determination of the Applicant's eligibility for the SCAA. The CDS provided fulsome reasons for his divergence from the Committee's recommendations in accordance with paragraph 29.13(2)(a) of the *National Defence Act*. He stated that the Committee erred by referencing TR POL 009/95, which on its terms did not apply to the Applicant as a reservist engaged prior to February 24, 1992. The CDS also disagreed with the Committee that the Applicant was not made aware that he was switching from a TAA to a SCAA in 1998.

VI. Issues

[22] The two issues before the Court are:

A. Was the denial by the CDS of the Applicant's claim for retroactive payments of TAA reasonable?

B. Was the conclusion of the CDS that the Applicant was not entitled to SCAA during the period of April 2003 to February 2011 reasonable?

VII. Standard of Review

[23] The parties agree that the standard of review by this Court of a decision of the CDS as the Final Authority in the CF grievance process is reasonableness. The parties cite *Rompré v Canada (Attorney General)*, 2012 FC 101 at paragraphs 21-25 [*Rompré*]:

> [21] The respondent submits, and I share his opinion, that the CDS's decision should be reviewed on the standard of reasonableness.
>
> [22] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*), at paragraph 62, the Supreme Court indicated that the first step in analyzing the standard of review consists in verifying "whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with

> regard to a particular category of question". In this case, the CDS is the most senior officer in the CF and he is charged with control and administration of the CF. For grievances and, more particularly, when appropriate remedies must be determined, he has significant discretion. The issues he had to decide in this case are questions of mixed fact and law that fall under his expertise and his specific knowledge of the military environment.
>
> [23] Our Court has already determined that it must show deference to such issues, which had to be reviewed on the standard of reasonableness […]
>
> [24] In *Dunsmuir*, above, the Supreme Court set out the analytical framework for the Court when it is reviewing a decision according to the reasonableness standard:
>
> > [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
> >
> > [Emphasis in original.]

[24] The Court in *Rompré* then cited the decision of the Supreme Court of Canada [SCC] in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 13, and the SCC's emphasis on the need for deference by the courts in reviewing the decisions of specialized tribunals.

[25] The reasonableness standard for review of decisions of the Final Authority in the CF grievance process was more recently confirmed by the Federal Court of Appeal in *Walsh v Canada (Attorney General)*, 2016 FCA 157 at paragraph 14:

> [14] After commenting that the CDS' decision to release the appellant from the CAF might be seen to be harsh, the Judge held that it could not be said that the decision was "unintelligible and for which there is no basis in the evidence" (paragraph 43 of the reasons). The Judge then made the following remarks at paragraph 43 of his reasons which I totally endorse:
>
> > The Final Authority is given a broad discretion when considering and determining grievances, especially when identifying the remedies appropriate under the circumstances, because of his in-depth knowledge of the military environment and operations. These kinds of decisions are owed a high degree of deference, and I have not been convinced that the course of action chosen (release instead of counselling and probation) is not one of the "possible, acceptable outcomes which are defensible in respect of the facts and law".

VIII. Analysis

A. *Was the denial by the CDS of the Applicant's claim for retroactive payments of the TAA reasonable?*

(1) Applicant's submissions

[26] The Applicant submits that the SCAA and TAA are exclusive and independent benefits, a fact recognized by the CDS in his decision. As a result, the CDS erred in offsetting the Applicant's entitlement to TAA by the SCAA payments he received in 1998-2003. The Applicant notes that there are no limits placed on the amount of payments receivable as TAA. He states that the Applicant qualified for the TAA and it was unreasonable for the CDS to deny him

the TAA by offsetting the TAA against the SCAA received, an offset which is not contemplated by the applicable regulation.

(2) Respondent's submissions

[27] In his written submissions, the Respondent states that there is no merit in the Applicant's argument that the CDS was required to analyze the Applicant's eligibility for the TAA from 2003 to 2011. The Respondent argues that the only relevant policy is TR POL 009/95 which provided that the Applicant was never entitled to a commuting allowance. Once the CDS determined that the Applicant was not entitled to the SCAA, "there was no obligation upon the CDS to form any further conclusion as to whether TAA or any other remedy was available". The fact that the CDS' decision addresses the Applicant's entitlement to a TAA does not amount to a reviewable error.

[28] In oral submissions, counsel for the Respondent argues that it was reasonable for the CDS to conclude that the Applicant received a benefit in electing to receive the SCAA in lieu of a cost move to Toronto in 1997-1998. He states that a successful claim by the Applicant for TAA for the period of 2003-2011 would amount to double dipping.

(3) Analysis

[29] I disagree with the Respondent's submission that the Applicant's eligibility for the TAA is not relevant in this proceeding. This application arises out of the denial by the CDS of the Applicant's 2011 grievance. The grievance was filed because the Applicant was due to retire and

had received no decision from the CF regarding his filing in March 2008 of 60 retroactive claims for TAA. In his grievance, the Applicant clearly identifies his eligibility for both the TAA and the SCAA as in dispute and the CDS addresses the Applicant's TAA claim in the decision under review. The fact that a significant portion of the CDS' decision focusses on the Applicant's eligibility for SCAA payments does not alter the fact that the Applicant's initial claim was for the TAA or that the basis for one of the Applicant's four grievances was his TAA claim.

[30] Effective February 2003, a revised version of CBI 209.045 (Transportation Allowance) was put in place. The eligibility conditions for the TAA were set out in article 2 of CBI 209.045 as follows:

> (2) (Travel assistance) An officer or non-commissioned member of the Reserve Force on Class "A" or "B" Reserve Service who performs training or duty may be paid transportation based on distance traveled, if
>
> > (a) the member has not been moved to their place of training or duty at public expense; and
> >
> > (b) the member lives 16 kilometers or more from their place of training or duty; and
> >
> > (c) transportation cannot be provided from Government sources, or adequate public transport is not available.

[31] As stated above, the CDS relied on paragraph 2(a) in denying the Applicant's claim for retroactive TAA. Although the Applicant had not been moved to Toronto at public expense, the CDS found that he had received an equivalent benefit in his receipt of the SCAA over five years. In addition to the reasoning of the CDS cited at paragraph 20 of this judgment, the CDS stated at pages 18-19 of his decision:

> In order to receive TAA, the first condition was that the member had not been moved to a new place of duty at public expense. In 1998, you signed a memo waiving all entitlements to relocation benefits associated with a cost move to the new place of duty. It was clearly stated in the first paragraph of the DCBA message, attached to your memo, authorization was granted "to pay the mbr SCA in lieu of a cost move to Toronto". Therefore, I find that the intent of the policy found in CBI 209.045 could not reasonably be that a member could waive the entitlements to relocation to receive an allowance such as SCAA and, then, receive a similar allowance such as TAA when no longer eligible to receive SCAA.

[32] I understand the reasoning and conclusion of the CDS in offsetting the SCAA payments received by the Applicant against requirement of paragraph 2(a) of CBI 209.045. However, I find that the conclusion does not fall within the range of acceptable and defensible solutions that the Applicant could expect from a review of his eligibility for the TAA. I find that the decision of the CDS was not reasonable.

[33] The Applicant received the TAA from 1995 to 1997 in error. He was clearly not entitled to the TAA on the terms of TR POL 009/95 in force at that time. He was subsequently granted SCAA based on an authorized move. The terms and conditions of the grant of SCAA made no reference to the TAA or to any waiver of benefits by the Applicant other than the benefits associated with a CF paid move. The Applicant's SCAA was terminated at the same time the TAA for other Class "B" Reservists was terminated. No reason was provided for the termination. Shortly after the TAA was reinstated for Class "B" Reservists in 2007, the Applicant applied for retroactive payments of the TAA based on CANFORGEN 168/07 and in accordance with the eligibility conditions of CBI 209.045.

[34] CBI 209.045 governed the availability of the TAA to the Applicant during the relevant time period. Paragraph 2(a) of CBI 209.045 contemplates a physical move of the member to his or her workplace after which the member would be responsible for their own transportation costs. As the Applicant stated in his March 2011 grievance, the essential element of paragraph 2(a) is the physical move of the member to the place of duty at public expense. The Applicant did not move to Toronto at public expense. He maintained his residence in Kitchener and commuted to work for many years with the knowledge of the DCBA and his superiors. As a result, paragraph 2(a) does not apply to the Appellant's situation. CBI 209.045 makes no reference to any offset of SCAA (or other transportation or move benefit) against eligibility for the TAA. When applying for retroactive TAA benefits in 2008, the Applicant would have no way of knowing that his eligibility would be assessed against his prior receipt of the SCAA.

[35] The TAA and the SCAA are separate benefits, available to members of the CF based on different rules and conditions. They have each been in existence for many years and have been the subject of numerous amendments and condition changes, as reflected in the history of the two benefits set forth in the CDS decision and in the record. If the CF intended that members accessing SCAA benefits would not be eligible for the TAA, an amendment to paragraph 2(a) of CBI 209.045 or a restriction elsewhere in the policy to this effect would have been straightforward.

[36] In concluding that the CDS' decision was unreasonable, I am fully mindful of the requirement for significant deference to the findings and decision of the CDS as the Final Authority in the CF grievance process. I have considered whether the CDS' decision on this

issue is transparent and intelligible and whether the conclusion reached by the CDS falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* at paragraph 47; *Rompré* at paragraph 24). In my opinion, the CDS decision is intelligible. The CDS set forth his reasoning and conclusions clearly and in detail. The decision does not, however, fall within the range of possible and defensible outcomes.

[37] The requirement for deference by the Court to decisions of the CDS in the CF grievance process is predicated on the fact that the CDS has specific, technical expertise regarding the functioning of the CF, particularly in the determination of appropriate sanction or remedies. The Courts in both *Rompré* and *Walsh* were focussed on the remedies at issue in the respective cases. In *Rompré*, the member brought an application for judicial review of a decision of the CDS in a set of three grievances, all of which stemmed from the member's accidental discharges of his weapon while on deployment in Kabul, Afghanistan. The CDS granted several of the remedies requested by the member concerning the removal of adverse entries in his personnel record but refused three of the requested remedies. Two of the three refused remedies also involved the member's personnel record. The Federal Court found that the CDS' decision was reasonable as there was more than one solution available to the CDS in assessing the member's grievances. The CDS gave detailed and technical reasons for his decision not to withdraw one letter from the member's personnel record and for his decision not to require a rewritten report to be placed in the record.

[38] In *Walsh*, the Federal Court of Appeal upheld a decision of Mr. Justice de Montigny, then of the Federal Court. Justice de Montigny had dismissed an application for judicial review by a

CF member who had been released from the Forces due to sexual misconduct. Justice de Montigny found that the CDS considered all of the member's submissions and evidence and, while the result may appear harsh to the Court, the CDS provided a reasonable explanation as to why the member's release would not be overturned. The CDS sufficiently explained why a lesser sanction (placing the Applicant on counselling and probation) was not the chosen course of action.

[39] The decisions of the CDS in *Rompré* and *Walsh* involved remedies imposed on a CF member arising out of incidents central to each member's conduct within the CF. In other words, the conduct in question, and the remedies flowing from the conduct, raised issues and remedies directly within the specific expertise of the CDS as the most senior officer in the CF. As the Court in *Rompré* stated (at paragraph 49), the discretion of the CDS "is especially important when determining the remedies he deems appropriate under the circumstances because of his in-depth knowledge of the military environment and its operations". The cases also involved fact patterns for which there were a number of different remedies or sanctions available to the CDS. The CDS was required to consider the career implications of the presence of negative letters in a member's personnel file in *Rompré* and the issue of appropriate sanction, and parity of sanction, in the case of sexual misconduct by the member in *Walsh*. The CDS selected remedies in each case which were rational and defensible on the facts before him and on the law.

[40] In the present case, deference must be accorded to the CDS due to his knowledge of the policy framework within which all CF members work. However, the principle of deference does not require the Court to maintain a decision which is contrary to the terms and conditions of

applicable policy. Absent any law or CF policy to the contrary, the provisions of CBI 209.045 governed the determination of the Applicant's eligibility for the TAA. The Applicant was eligible for the TAA on the terms of the policy. He was given no notice that his prior receipt of the SCAA was an issue. The addition to CBI 209-045, almost 10 years after the filing of the Applicant's TAA claims in 2008, of an implied eligibility condition is neither transparent nor justifiable.

[41] The decision of the CDS in this case was binary, either the Applicant was eligible for the TAA or he was not. This is not a case of the CDS selecting an appropriate remedy from among a number of reasonable outcomes. The CDS provided no independent support in the decision for his conclusion regarding the intent of CBI 209.045 and his offset of the Applicant's SCAA payments against his eligibility for the TAA. The Respondent identified no CF policy, communiqué or other publication in support of the CDS' conclusion in either written submissions or oral argument. The result reached by the CDS was not defensible on the facts and applicable law and policies before him.

[42] I note that the CDS addressed the issue of availability of adequate public transportation (paragraph 2(c) of CBI 209.045) in his analysis of the Applicant's eligibility for SCAA. The CDS was addressing CBI 209.28, which contained a parallel provision to paragraph 2(c) of CBI 209.045. The CDS stated that Toronto is a worksite well-served by public transit and, therefore, the Applicant was not eligible for the SCAA. Paragraph 2(c) of CBI 209.045 provides that the TAA is not available to a member if adequate public transit to the member's place of duty is available. The CDS' statement regarding the availability of public transit in Toronto

disregards the fact that the Applicant lived in Kitchener. Whether the use of public transit by the Applicant from Kitchener to downtown Toronto during the period in question was feasible was not addressed by the CDS. Further, an analysis in 2018 of the availability of adequate public transportation to the Applicant during the period of 2003 to 2011 is not fair to the Applicant. Any such analysis should have been carried out by the CF in a timely manner upon receipt of the Applicant's claims in 2008, at a time when the Applicant could have better marshalled his evidence and, in the event of an adverse decision, determined whether to continue his commute.

B. *Was the conclusion of the CDS that the Applicant was not entitled to SCAA during the period of April 2003 to February 2011 reasonable?*

(1) Applicant's submissions

[43] The Applicant submits that his SCAA was improperly terminated on March 25, 2003. The Applicant argues that he waived all entitlement to relocation benefits in 1998 in order to receive the SCAA which was to continue for the duration of his posting. He states that any "determination concerning cost effectiveness would necessarily have to be made before any SCAA is authorized". The Applicant's counsel emphasized this point during his oral submissions. The Applicant also submits that the CDS' use of historical cost tables and figures after the fact to justify the 2003 termination of the Applicant's SCAA was not within the range of possible outcomes available to the CDS.

(2) Respondent's submissions

[44] The Respondent submits that the issue before the CDS was whether the Applicant was entitled to SCAA from April 2003 to February 2011. The Respondent states that the key documents are the DCBA's October 1997 approval of the Applicant's SCAA in lieu of a move and the March 4, 1998 memo signed by the Applicant and attached to which were the terms of the DCBA's approval. In particular, the approval stated that the cost of the SCAA over the anticipated tour length of 3-4 years must be cost effective in comparison to the costs involved in a physical move. The Respondent argues that a reasonable interpretation of this exchange leads to the conclusion that the SCAA would be paid to the Applicant until 2002 at the latest and that the parties understood and agreed to this result.

(3) Analysis

[45] I have found that the decision of the CDS regarding the Applicant's eligibility for the TAA from April 2003 to February 2011 was unreasonable. Therefore, it is not necessary for the Court to address the decision of the CDS regarding the Applicant's entitlement to continuing SCAA during the same period. This matter will be referred back to the CDS or his delegate, as appropriate, for redetermination on the basis of the Court's conclusion regarding the Applicant's eligibility for the TAA.

JUDGMENT in T-1395-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is referred back to the Chief of the Defence Staff of Canada [CDS] or his delegate, as appropriate, for redetermination; and

2. Costs are awarded in the lump sum of $1,000, calculated with reference to column III of the table to Tariff B, to be payable forthwith by the Respondent to the Applicant.

"Elizabeth Walker"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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