

Federal Court



Cour fédérale

Date: 20210603

Docket: T-919-20

Citation: 2021 FC 532

Ottawa, Ontario, June 3, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

MATTHEW JAFFRAY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Corporal Jaffray is a musician in the Canadian Forces. When he enrolled at the rank of Corporal, the policy of the Music Branch was that Corporals would effectively be promoted to the rank of Sergeant after six months. Shortly afterwards, however, a new policy was adopted, with the result that Cpl. Jaffray's promotion to Sergeant was significantly delayed. Given the date of his enrollment, Cpl. Jaffray was not covered by the new policy's grandfathering provision.

[2] Cpl. Jaffray filed a grievance. The Military Grievances External Review Committee recommended that it be allowed, but the Final Authority disagreed and rejected it. Cpl. Jaffray seeks judicial review of this decision.

[3] I am allowing Cpl. Jaffray's application, for reasons similar to those given in *Denneboom v Canada (Attorney General)*, 2021 FC 531 [*Denneboom*]. Both applications deal with grievances denied by the Final Authority in relation to the adoption of the Music Branch's new ranking policy. They were heard jointly. Despite minor factual differences, the Committee and the Final Authority each gave similar reasons in both cases. The main factual distinction between the two cases is that Cpl. Jaffray was seemingly unaware of the new policy until two years after its implementation. This distinction was not material to the analysis of the Committee nor that of the Final Authority.

[4] Since the substantive issues raised by both applications are virtually identical, I have elected to treat them jointly in *Denneboom*. The facts specific to Cpl. Jaffray's grievance are detailed below. They are followed by a short discussion of the impact of a member's level of awareness of the policy on the reasonableness of the Final Authority's decision.

I. Background

A. *Ranking Policy for the Musician Occupation*

[5] The Canadian Forces have adopted policies regarding the ranking and promotion of its members. Until 2016, members of the musician occupation of the Regular Force benefited from

a separate promotion policy, different from the one applicable to the majority of non-commissioned members of the Canadian Forces. That separate policy was known as the *Canadian Forces Administrative Order 9-8* [CFAO 9-8].

[6] Contrary to most other occupations, the working rank of the musician occupation was that of Sergeant, at which “the bulk of the occupational positions reside and journeyman work [was] carried out.” Thus, while musicians were hired at the rank of Corporal, they were in practice automatically promoted from Corporal to Sergeant once they had met the relevant criteria. Amongst other qualifications, the aspiring Sergeants had to receive leadership training in the form of a Primary Leadership Qualification [PLQ]. They also had to serve as Corporal for six months and obtain a recommendation letter from their commanding officer. Promotion to Sergeant was thus not based on merit, nor any competitive process, but on the completion of set criteria.

[7] While the issue was not fully canvassed in this application, it appears that this separate policy was justified by the fact that, contrary to other occupations, musicians were expected to be fully trained upon hiring, and by the desire to provide an additional incentive to recruitment. This situation, however, was considered unsatisfactory. In 2013, the Music Branch began a study aimed at establishing a new ranking policy.

[8] On November 7, 2016, the *Military Employment Structure Implementation Plan* [the MESIP] was approved and set to come into force on November 30, 2016. The MESIP repealed the previous policy on rank structure and subjected musicians to the *Canadian Forces*

Administrative Order 49-4 [CFAO 49-4], the standard promotion policy for non-commissioned members. It introduced the rank of Master Corporal between the ranks of Corporal and Sergeant. It also changed the number of positions within the Music Branch at each rank. In particular, it created positions at the Corporal and Master Corporal ranks and significantly reduced the number of Sergeant positions.

[9] The transition from the old to the new system was organized as follows. An exception to this new rank structure was made for musicians who had joined the Regular Force before 2014. This grandfathering provision would ensure they were still subjected to the previous promotion criteria of CFAO 9-8. By all accounts, this cut-off date was chosen because musicians enrolled prior to January 2014 would not have been aware of the policy changes. While the policy effectively lowered the working rank from Sergeant to Corporal, the MESIP did not seek to demote Sergeants who had already been promoted through the previous policy.

[10] The practical result is that musicians who do not benefit from the grandfathering position will have to wait an extended period of time, possibly up to ten years, before there is a vacancy at the rank of Sergeant.

B. *Cpl. Jaffray's Enrollment*

[11] Cpl. Jaffray is a professional musician. In the fall of 2014, he came across an advertisement for a position as oboe player in the Canadian Forces. The website stated that a Sergeant promotion would be granted following the completion of all required training and six months in rank. The rank of Sergeant was also described as the base working rank for musicians

in the Regular Force. Cpl. Jaffray also claims that he was told during his interview that he would be promoted to a certain rank within six months. Thus, he decided to leave a partially completed doctoral program in oboe performance and joined the Canadian Forces as a musician on September 2, 2015. He was promoted to Corporal on September 5.

[12] While completing his course-load, Cpl. Jaffray inquired about delays to his registration to the PLQ. In the Canadian Forces, members need to be nominated by their Career Manager for the courses they have requested. They are then placed on a waiting list. The process is entirely outside of a member's control and can be the subject of significant delays. According to Cpl. Jaffray, his Band Sergeant Major told him multiple times that those delays were normal and that he should focus on the back pay he would receive once he had been promoted to Sergeant. There was no mention of an impending change in the promotion policy.

[13] As of September 30, 2016, Cpl. Jaffray was meeting all relevant criteria, except for the PLQ. At this point in time, Cpl. Jaffray still had no concern that the promotion policy under which he had joined the Canadian Armed Forces would soon be replaced.

[14] On February 13, 2017, Cpl. Jaffray met with his Career Manager, who assured him he would be enrolled in the PLQ and that his career progression "looked good". There was no mention of any upcoming change in the ranking policy. In April 2017, he received a Performance Evaluation Report recommending that he be immediately promoted to Sergeant.

[15] On October 13, 2017, Cpl. Jaffray's Band Sergeant-Major required assistance from the Course Manager to enroll him and other members on any available PLQ course. Cpl. Jaffray and his colleagues had been waiting since May 2017. They were finally enrolled on February 6, 2018.

[16] At last, on February 27, 2018, Cpl. Jaffray was informed by his Band Sergeant-Major that he would be impacted by the introduction of a new ranking policy. Thus, he would not be eligible for the Sergeant position he had relied on.

C. *Cpl. Jaffray's Grievance*

[17] On April 27, 2018, Cpl. Jaffray filed a military grievance, arguing that he had been treated unfairly following the implementation of the MESIP. He claimed to have been unaware of the policy changes prior to his meeting with his Band-Sergeant Major and provided evidence that members hired during the same period as him had been unjustly promoted under the old policy. As redress, he requested to be promoted to Sergeant retroactively as of March 3, 2016, under the former promotion policy, and to receive back pay to that date.

[18] Military grievances are subjected to a two-step process, composed of an Initial Authority and a Final Authority: *National Defence Act*, RSC 1985, c N-5 [the Act]; *Queen's Regulations and Orders for the Canadian Forces* [QR&O], Chapter 7. On June 27, 2018, the Director General Military Careers, acting as Initial Authority, dismissed the grievance, because it exceeded the time limits set by section 7.18 of the QR&O. The Initial Authority argued that Cpl. Jaffray should have filed his grievance within three-month of the implementation of the MESIP.

[19] Cpl. Jaffray requested that his grievance be forwarded to the Final Authority on July 25, 2018. In his representations, he argued that he could not have filed a grievance within the three-months of the MESIP's implementation, since he had never been made aware of the policy changes prior to February 2018. Cpl. Jaffray provided statements from his direct supervisors affirming that they themselves had not been aware of the change in rank structure. He also filed promotional material from the Music Branch advertising the six-month promotion timeline, which were still available online as of July 2018.

[20] Prior to reaching the Final Authority, the grievance was sent as a discretionary referral to the Military Grievances External Review Committee [the Committee], whose mission is to review the grievance and to make findings and recommendations to the Final Authority: s. 29.2 of the Act.

[21] The Committee found that Cpl. Jaffray had been aggrieved, for the reasons stated in *Denneboom*, at paragraph 17. It found that Cpl. Jaffray could have been eligible to an Acting/Lacking promotion as of March 5, 2016. An Acting/Lacking promotion is a common practice of promoting members who have attained six months of service and completed all relevant criteria except for the PLQ, as of the date of completion of either their six-month term or of the other criteria.

[22] The Committee recommended that redress for Cpl. Jaffray's grievance be granted either by amending the Grandfathering Provision of the MESIP so that musicians in his situation be included or by retroactively promoting him to Sergeant (Acting/Lacking). Additionally, the

Committee recommended that a review be conducted of all musician files where the members had completed their courses with the exception of the PLQ, and had six months in rank as Corporal, prior to November 30, 2016, and that such members be afforded the same treatment.

[23] Cpl. Jaffray's grievance was then submitted to Captain (Navy) William Quinn, who acts as the Final Authority, pursuant to a delegation from the Chief of the Defence Staff under section 29.14 of the Act.

[24] On May 27, 2020, the Final Authority denied Cpl. Jaffray's grievance. The Final Authority found that he had been treated in accordance with the policies applicable to his specific situation; that those policies, including their effect, were well considered; and that the grandfathering clause of the MESIP was reasonable and justified. He found that Cpl. Jaffray's situation was not identical to the situation of his colleagues who had received a promotion and that he had not been unnecessarily delayed to the PLQ course. He also reasoned that any issue relating to the communication of the MESIP had been mitigated by the fact that two Canadian Forces General Messages had been issued in relation to the new policy in 2017. He did not make further comments on Cpl. Jaffray's claims that he had been unaware of the policy until February 2018.

[25] Cpl. Jaffray now seeks judicial review of this decision.

II. Analysis

[26] Like MBdr. Denneboom, Cpl. Jaffray argues that the Final Authority failed to engage with the findings of the Committee and to provide reasons for departing from them. Further, he contends that the Final Authority's decision was unreasonable because it breached his legitimate expectations that the Canadian Forces would respect the terms of his employment and follow the promotion policy under which he was recruited.

[27] For the reasons I have stated in *Denneboom*, at paragraphs 28 to 40 and 46 to 48, I find that the Final Authority's decision is unreasonable and must be quashed. I refer the reader to those paragraphs, since the grievances and arguments for disputing the Final Authority's conclusions are overwhelmingly similar, except for one factual distinction that bears no weight on the decision. Likewise, I need not comment on Cpl. Jaffray's argument based on legitimate expectations, because the impugned decision contains significant flaws already canvassed in *Denneboom*.

[28] The main difference between the situations of both members is that Cpl. Jaffray was seemingly unaware of the new policy until February 2018, while MBdr. Denneboom had been informed at his interview of impending policy changes. The difference between their cases may be useful to illustrate the discrepancy in the communication of the policy to new recruits; it is, however, immaterial to the Final Authority's decision. Neither the Committee nor the Final Authority commented on this specific point. The Committee did not consider Cpl. Jaffray's lack

of awareness as a separate ground for his grievance, but rather as an indication that communication of the MESIP was uneven and lacked consistency across locations.

[29] As for the Final Authority, its determination with respect to the communication of the MESIP was substantially similar in both cases regardless of each applicant's actual degree of awareness. In *Denneboom*, at paragraph 38, the Final Authority found that any error in the communication of the ranking policy was mitigated by the fact that the applicant had been personally informed at his interview. In Cpl. Jaffray's case, the Final Authority relied on the publication of two Canadian Forces General messages to support the assertion that communication of the MESIP had been adequate. The Final Authority succinctly dealt with the issue of communication in the following paragraphs:

Communication of the MES IP. You contend that the communication that preceded the implementation of the MES IP lacked transparency, was inconsistent amongst units and was not clearly disseminated in advance. You argue that, although it was known that changes were forthcoming, there was no clear understanding of what these changes were.

The Branch could not have communicated changes until they were established and approved, but members were made aware that changes with probable impacts on their promotion were imminent. I recognize that recruitment material reflecting the former Standard Operating Procedures (SOPs) continued to circulate after changes were made, however, this was mitigated by the fact that upon implementation of the MES IP, two [Canadian Forces General messages] were issued announcing the amendments to the occupation; one in January and another one in April 2017.

[30] The fact that Cpl. Jaffray was unaware of the policy changes was not considered by the Final Authority. In any event, as I mentioned in *Denneboom*, at paragraph 39, awareness would

not have disentitled him from seeking redress for the way in which policy changes were implemented.

[31] I am therefore satisfied that the reasons provided at paragraphs 28 to 40 and 46 to 48 of *Denneboom* are sufficient to dispose of Cpl. Jaffray's application.

III. Remedies

[32] As I find that the Final Authority's decision is unreasonable, I am granting Cpl. Jaffray's application for judicial review, with costs. The decision is set aside and returned for a new determination.

JUDGMENT in T-919-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision made by the Final Authority on May 27, 2020 regarding the applicant is quashed.
3. The matter is returned to the Final Authority for reconsideration.
4. Costs are awarded to the applicant.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-919-20

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