Federal Court Cour fédérale

Date: 20220630

Docket: T-1812-21

Citation: 2022 FC 968

Toronto, Ontario, June 30, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

DUNCAN BOWES CD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a June 12, 2021 decision [Decision] of the Final Authority [FA] with the Canadian Forces Grievance Authority, rejecting a grievance filed by the Applicant pursuant to the *National Defence Act*, RSC 1985, c N-5 [NDA]. The Applicant grieved a nomination from his Chain of Command [CoC] posting him to a new temporary assignment.

[2] For the reasons set out below, I find the Decision was reasonable and there has been no breach of procedural fairness. The application for judicial review is accordingly dismissed.

I. Background

[3] The Applicant, Duncan Bowes CD, is a member of the Canadian Armed Forces [CAF]. In June 2010, he entered into a Statement of Understanding [SOU] (revised in April 2015) to accept "Class B service" for the period between July 31, 2017 and July 31, 2020 at HMCS Chippawa in Winnipeg, Manitoba. One of the terms of the SOU was an understanding that during the service period he might be required to perform service anywhere in or outside Canada. He was also subject to a Personnel Development Review [PDR] that stated that he might be tasked to carry out "other duties" as required.

[4] In February 2019, the Applicant's CoC was required to assign two members from HMCS Chippawa to serve as instructors for a Basic Military Qualification [BMQ] course that was to run from May 6, 2019 to September 15, 2019 at Camp Vimy, located at the Canadian Forces Base in Valcartier, Quebec.

[5] In March 2019, the Applicant was informed that he had been nominated for one of the positions as one of three potential qualified candidates. At the time, the Applicant was the Facility Manager and Training Coordinator at HMCS Chippawa.

[6] The Applicant disputed the posting, asserting that the remaining candidate, the second of the unit's two recruiters, should be nominated instead of him. His Coxswain [PO1] informed the

Applicant that the unit recruiter was unavailable as he would be attending a course and was busy with planning and organizing another CAF national level attraction event. The absence of the unit recruiter over the summer was also considered to be too detrimental to the unit. The Applicant submitted a request to his Executive Officer to discuss the nomination. The request was denied and the Applicant was ordered by his PO1 to take the post. He ultimately opted to voluntarily cease service when his posting was not changed.

[7] The Applicant grieved the nomination for the post. He disputed the unavailability of the unit recruiter and the reason for his nomination. He also identified a number of personal reasons that he argued were not considered in making the nomination. The Applicant requested that the post be shortened or cancelled, that the unit recruiter be required to take the post, to be informed of who made the nomination, and for the reinstatement of his contract, should it be terminated. He also separately initiated a harassment complaint against the PO1.

[8] The grievance was initially made to the Applicant's Commanding Officer, who referred the grievance to the Director General Canadian Forces Grievance Authority [IA]. After receiving further submissions from the Applicant, on October 28, 2019 the IA refused the grievance [IA Decision]. The IA determined that the posting was supported by the Applicant's PDR and was logical and reasonable as the unit's other recruiter had already been tasked to be a BMQ instructor at Camp Vimy and sending the second recruiter would leave the unit without someone in this role.

[9] On November 6, 2019, the Applicant referred the IA Decision to the FA who referred the matter to the Military Grievance External Review Committee [MGERC] before making its determination.

[10] Prior to the MGERC's recommendations, the Applicant informally requested that further allegations be added to his grievance, alleging harassment, constructive termination and favoritism by the PO1 towards the unit recruiter.

[11] In its report, the MGERC declined to conduct an analysis or make findings on these allegations, determining them to be unsubstantiated on the evidence. The MGERC concluded that the Applicant was not aggrieved. The MGERC found that HMCS Chippawa had been given a lawful order to assign two of its members to Camp Vimy and was obliged to comply. It found the decision to select the Applicant for one of the positions was reasonable. The Applicant's PDR and SOU set out his obligation to perform other duties assigned by his CoC anywhere in Canada. He was therefore liable to be selected for one of the positions. The Applicant's CoC had explained the reasons why he was selected, and was not obliged to take into account the Applicant's preferences in the circumstances.

[12] The FA agreed with the MGERC, concluding that HMCS Chippawa was obliged to assign two of its members to Camp Vimy and that the PO1 was authorized to command the Applicant to take the post. The FA found that the command was not inconsistent with the Applicant's PDR and SOU and that the Applicant was obliged to obey the command and in not

doing so, had voluntarily ceased his employment. The FA concluded the Applicant had been treated fairly and denied the grievance.

II. Issues and Standard of Review

[13] There are two issues raised by this application:

1. Was the FA's Decision reasonable?
2. Was there a breach of procedural fairness?

[14] The standard of review of a decision of the FA is reasonableness: *Bond-Castelli v Canada (Attorney General)*, 2020 FC 1155 at paras 29-31. None of the situations that rebut the presumption of a reasonableness review for administrative decisions is present: *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17.

[15] A reasonable decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision is reasonable if, when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 85, 91-95, 99-100.

[16] The standard of review for questions of procedural fairness is best reflected by the correctness standard, although they are not strictly speaking subject to a standard of review analysis. Instead, such questions are to be reviewed from the perspective of whether the procedure followed by the decision-maker was fair and just: *Canadian Pacific Railway Company*

v Canada (AG), 2018 FCA 69 at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Sangha v Canada (Citizenship and Immigration)*, 2020 FC 95 at para 13.

III. Analysis

A. *Was the FA's Decision Reasonable?*

[17] The Applicant argues that the Decision was unreasonable as it failed to consider his arguments of harassment and favoritism and did not find that he had been constructively dismissed. He asserts that the FA did not acknowledge the determination of his separate harassment complaint despite this issuing in advance of the Decision. While the harassment complaint was not determined in his favour, the Applicant asserts that the determination indicates that there was some evidence of workplace conflict and that the denial of his request to speak to his Executive Officer about his Valcartier assignment was inappropriate. He asserts that this determination should have been addressed in the FA's Decision.

[18] The Respondent argues that the Decision was reasonable and was made within the operational requirements of the CAF. It asserts that the Applicant's various complaints do not address the decision under review and have not been raised in an appropriate forum. It contends that the Applicant has failed to outline how the FA could have made its decision differently without harming the recruiting goals of the CAF.

[19] The allegations of harassment, favoritism and constructive dismissal were not part of the original grievance before the IA. After the grievance was referred to the MGERC, the Applicant

sought to informally include these allegations by way of correspondence to the MGERC on April 28, 2020. The additional submissions included allegations that the Applicant had not been given fair or transparent treatment by his PO1 who he alleged had shown favoritism for the unit recruiter. The Applicant indicated that he had twice requested permission to speak to his Executive Officer regarding the posting at Valcartier but in each case, the request was denied.

[20] The MGERC acknowledged the Applicant's additional correspondence and indicated that the correspondence would be added to the grievance file. In its findings and recommendations, the MGERC noted that the Applicant had not provided evidence to support the basis for the allegations. It stated that it would not be conducting an analysis or making findings on the allegations.

[21] The Applicant reiterated the same arguments in correspondence in response to the MGERC's recommendations and findings.

[22] The FA did not comment on these arguments further in the Decision.

[23] Section 29.13 of the NDA (and section 7.23 of the *Queen's Regulations and Orders for the Canadian Forces*) provides that the Chief of Defence Staff, acting as the final authority, shall provide reasons for his or her decision in respect of a grievance if they do not act on a finding or recommendation of the MGERC. However, the MGERC expressly stated that it would not make any finding on the allegations of harassment, favoritism and constructive dismissal as these allegations were not substantiated. There was no obligation on the FA to provide reasons on

these arguments. As stated in the Decision the matter grieved was that the Applicant "should not have received orders to be tasked away from [his] unit as a Basic Military Qualification (BMQ) instructor."

[24] The harassment allegation and asserted allegation that there was procedural unfairness because the Applicant was not afforded the opportunity to speak to the Executive Officer about the nomination were the subject of a separate decision by the Western Region Captain dated January 30, 2020. That decision found that the alleged actions did not meet the criteria necessary to constitute harassment under the relevant policies. The decision stated that the Applicant could grieve the matter to the IA if he was unsatisfied with the outcome. The Captain also found that the denial of the Applicant's personal request to speak to his Executive Officer regarding the temporary duty at Valcartier was inappropriate and that it would be addressed with the Applicant's Commanding Officer by separate correspondence. There was no basis for the FA to consider these issues in the current grievance.

[25] Further, in my view, the Applicant has not demonstrated any error with the FA's reasoning as it relates to the circumstances around the Applicant leaving his employment. The Applicant cites subsection 29(c) of the *Department of Employment and Social Development Act*, SC 2005, c 34 and provides a quote which is from subsection 29(c) of the *Employment Insurance Act*, SC 1996, c 23. This legislation is not applicable as it pertains to an employee's entitlement to employment insurance benefits in situations where they have voluntarily ceased employment. Such benefits are not at play here.

[26] The Applicant also cites a policy document that outlines the definition of constructive dismissal under the *Canada Labour Code*, RSC 1985, c L-2 (815-1-IPG-033). The definition refers to situations where the employer "has failed to comply with the contract of employment" or "unilaterally changed the terms of employment".

[27] In this case, the Applicant explicitly agreed to undertake service anywhere in Canada and engage in duties as ordered by his CoC in his SOU. As stated by the FA:

> ...I note that giving you such a task did not contravene the terms of the SOU you voluntarily signed and that the SOU, in fact, anticipated the potential for tasks such as the one you received.
>
> I therefore find that your CoC gave you a lawful order when they tasked you from 6 May to 15 September 2019 as a BMQ instructor. The task assigned to you was temporary in nature and, when it had been completed, you were to return to your unit to complete the remainder of your Class B employment as per your SOU. Primary Reserve service is in and of itself voluntary in nature and subject to your consent. Given that you did not agree to perform the task your SOU allowed for and demonstrated your disagreement when you voluntarily ceased your Class B service, I do not find that your unit caused you to cease your employment.

[28] Although the FA did not directly address the legislation cited by the Applicant, it responded to the substance of the Applicant's concern by identifying the SOU and explaining that the task fell within the meaning of the agreement made with the Applicant. The FA reasonably concluded that the Applicant voluntarily chose to leave his employment and that the Applicant's unit did not cause the Applicant to cease his employment.

[29] The Applicant's further arguments are not persuasive and amount to nothing more than a disagreement with the outcome of the Decision, which is not a reviewable ground for judicial review: *Njomo v Canada (Citizenship and Immigration)*, 2021 FC 1402 at para 35.

[30] Something more is required to establish that a decision is unreasonable. That something more has not been established here.

B. *Was there a Breach of Procedural Fairness?*

[31] The Applicant acknowledged in oral argument that he did not consider the grievance process to be procedurally unfair. His dispute on procedural unfairness relates solely to his allegations of favoritism and mistreatment by his PO1.

[32] Although the Applicant was initially denied the opportunity to make submissions to his CoC, he was given full opportunity to make submissions throughout the grievance procedure, and took advantage of those opportunities including obtaining various extensions of time. The Applicant has not established any unfairness with the procedure followed by the decision-maker.

[33] The application for judicial review is accordingly dismissed.

[34] As the Applicant was self-represented, there shall be no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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