Date: 20090828

Docket: T-135-09

Citation: 2009 FC 862

Ottawa, Ontario, August 28, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CALVIN SANDIFORD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of an alleged decision by the Department of National Defence, dated January 20, 2009, declining to negotiate a settlement of the applicant's claims pursuant to the *Treasury Board Policy on Claims and Ex Gratia Payments*. The respondent contests that the letter to the applicant dated January 20, 2009 contains a "decision" and submits

that this letter merely restates the position of the Director of Claims and Civil Litigation first communicated to the applicant on September 26, 2008.

FACTS

[2] The applicant is a Second Lieutenant with the Canadian Forces. On or about September 19, 2008, the applicant submitted a claim for compensation to the Director of Claims and Civil Litigation of the Department of National Defence, seeking monetary compensation for alleged incidents of negligence, harassment and libel that arose during the applicant's military service.

[3] The Director of Claims and Civil Litigation, Michel Lapierre, responded to the applicant in a detailed letter dated September 26, 2008. Mr. Lapierre declined to negotiate a settlement of the applicant's claims, primarily on the basis that these claims properly fell within the scope of statutory grievance processes which had not been exhausted. The letter stated that the matter should be referred back to the Director General Canadian Forces Grievance Authority (DGCGFA), where the applicant had initially submitted and then suspended a number of grievance claims. The respondent submits that any "decision" made by the Department was contained in this letter, and merely reiterated in subsequent communications.

[4] The applicant responded in a letter dated November 7, 2008, stating that the applicant disagreed with the opinion in the September 26, 2008 letter and that his "exact disagreement [would] be made known to the DCCL in due course."

[5] William Hall, a Claims Paralegal at the Office of the Director of Claims and Civil Litigation, responded to the applicant in an email dated November 10, 2008, advising the applicant

of an additional decision of the Federal Court supporting the position taken in the September 26, 2008 letter.

[6] The applicant sent an email to the Director on January 12, 2009. The applicant stated that his email was a Demand for Settlement. In this email, the applicant took the position that his claims could not be addressed by the grievance process, stating (Applicant's Record, p. 117):

> It is my opinion that there has been negligence, harassment and libel…the effect of these torts transcends the compensation that may be granted under the legislation.

[7] In response to this email, Mr. Hall sent the applicant an email on January 20, 2009. This is the purported decision from which the applicant seeks judicial review.

Decision under review

[8] In his email to the applicant dated January 20, 2009, Mr. Hall indicated that he was responding to the applicant's email of January 12, 2009 at Mr. Lapierre's request. Mr. Hall briefly summarized the applicant's statements in his January 12, 2008 email and then stated (Applicant's Record, Vol. 1, p. 119):

> Careful review of your email above does not provide any alternate theories on which we can revisit our previous position. You do not cite any alternate caselaw or alternate theories of law that would support your arguments. At present I cannot see any benefit to a settlement discussion, as there are no grounds on which such a decision could proceed.

[9] The applicant seeks judicial review of this purported decision.

Treasury Board Policy of Claims and *Ex Gratia* Payments

[10] The authority of the Director of Claims and Civil Litigation to settle claims for compensation on behalf of the Department of National Defence arises out of the *Treasury Board Policy of Claims and Ex Gratia Payments*. [The policy is pursuant to the *Treasury Board Delegation of Powers Order*, SOR/86-1123; the enabling statute is the *Financial Administration Act*, R.S. 1985, c. F-11].

[11] The preface to the policy states that its purpose is to give deputy heads of government departments the authority to "resolve most non-contractual claims and make *ex gratia* payments" (Respondent's Record, Tab 3). Section 5 of the policy states:

5. Policy statement	5. Énoncé de la politique
a. It is government policy to provide for adequate and timely settlement and payment of claims by or against the Crown and against its servants.	a. Le gouvernement a pour politique de faire en sorte que les réclamations faites par l'État ou contre l'État et contre ses fonctionnaires soient réglées et payées adéquatement et rapidement.
b. Deputy heads (which includes heads of agencies) have the authority to resolve claims by and against the Crown when requirements of this policy are met. In particular, Deputy Heads have the authority to:	b. Les administrateurs généraux (y compris les chefs d'organismes) ont le pouvoir de régler les réclamations faites par l'État ou contre l'État quand les exigences de la présente politique sont satisfaites et, plus précisément :
i. accept amounts in settlement of claims by the Crown;	i. d'accepter les montants fixés à titre de règlement dans le cas de réclamations faites par l'État;
ii. recover from servants any amounts owing to the Crown by servants;	

iii. pay amounts in settlement of liability claims against the Crown; and

iv. make ex gratia payments.

c. Any authority in this policy may be exercised by an official designated by the deputy head, except only the deputy head may approve ex gratia payments over $2,000. In the case of the Department of National Defence and the Canadian Forces, the Judge Advocate General may make ex gratia payments for any amount.

ii. de recouvrer auprès des fonctionnaires tous les montants payables à l'État par les fonctionnaires;

iii. de payer le montant du règlement des réclamations faites contre l'État;

iv. de faire des paiements à titre gracieux.

c. Tout pouvoir conféré par la présente politique peut être exercé par un agent désigné par l'administrateur général, mais seul ce dernier peut approuver les paiements à titre gracieux de plus de 2000 $. Pour ce qui est du ministère de la Défense nationale et des Forces canadiennes, le juge-avocat général peut faire des paiements à titre gracieux, quel que soit le montant.

[12] Section 7.3.3 of the policy states:

7.3.3 Liability payment

In deciding whether to make a liability payment, deputy heads shall consider:

a. the legal and other merits of the claim; and

7.3.3 Paiement des indemnités

Pour décider s'il y a lieu de verser des indemnités, les administrateurs généraux tiennent compte :

a. des aspects juridiques et

b. administrative expediency and cost-effectiveness.	des autres valeurs de la réclamation; b. de la rentabilité et de l'opportunité de la mesure sur le plan administratif.

ISSUES

[13] The applicant has raised a number of objections to the purported decision of the Director of Claims and Civil Litigation that all pertain to the reasonableness of the decision. The respondent has raised a preliminary issue as to whether the letter dated January 20, 2009 is a "decision" within the meaning of section 18.1 of the *Federal Courts Act*.

[14] The Court will consider the issues raised in this application as follows:

1. Whether the January 20, 2009 email a "decision, order, act or proceeding" that can be judicially reviewed pursuant to s. 18.1 of the *Federal Courts Act*; and

2. If so, whether it constitutes a reasonable exercise of the Director's discretion under the *Treasury Board Policy*.

STANDARD OF REVIEW

[15] Following the Supreme Court's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, there are two possible standards of review: correctness or reasonableness. At paragraph 62, the Supreme Court held that in conducting a standard of review analysis, the first step is to "ascertain 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." If not, then the Court must proceed to an analysis of the relevant factors in determining the appropriate standard of review.

[16] As there does not appear to be any guidance from the courts regarding the standard of review of decisions under this policy, the Court must engage in a standard of review analysis. The factors to be considered in determining the appropriate standard of review are:

1. the existence of a privative clause;
2. the purpose of the tribunal or decision-making body;
3. the nature of the decision; and
4. special expertise of the decision-maker.

(*Dunsmuir* at para. 64)

[17] There is no privative clause in the policy, which militates towards a more probing examination. However, the Director of Claims and Civil Litigation clearly has expertise in deciding whether negotiating a settlement on behalf of the Department of Justice is desirable based on the requirements of section 7.3.3, and in particular has special expertise in weighing the administrative expediency and cost-effectiveness of doing so as required by subsection 7.3.3(b). In terms of the nature of the decision, a decision declining to negotiate a settlement does not take away any remedy available to the applicant.

[18] The Director's decision as to whether to negotiate a settlement is governed by the *Treasury Board Policy of Claims and Ex Gratia Payments,* which is not law. The respondent submits that it is a discretionary policy and that the Director's decision should be accorded a high degree of deference.

[19] The applicant submits that the appropriate standard of review has been determined to be correctness and has cited *Bernath v. Canada,* 2007 FC 104. *Bernath* was not an application for judicial review. It was an action for damages on the basis of an alleged breach of the plaintiff's section 7 *Charter* rights. That case does not have any relevance to the appropriate standard of review on an application for judicial review of a decision of the DCCL.

[20] Accordingly, the appropriate standard of review is one of reasonableness. In reviewing a decision on a reasonableness standard, the Court must consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, at para. 47).

[21] The applicant submits that the appropriate standard of review has been determined to be correctness and has cited *Bernath v. Canada,* 2007 FC 104. *Bernath* was not an application for judicial review. It was an action for damages on the basis of an alleged breach of the plaintiff's section 7 *Charter* rights. That case does not have any relevance to the appropriate standard of review on an application for judicial review of a decision of the DCCL.

ANALYSIS

Issue No. 1: Whether the January 20, 2008 letter is a "decision" that can be reviewed by this Court under s. 18.1 of the *Federal Courts Act*

[22] The respondent submits that the January 20, 2008 email merely reiterated the conclusions of the detailed letter sent to the applicant on September 26, 2008. The applicant has not made any submissions on this issue.

[23] The Court finds that it is clear from a reading of the two communications that the decision that the applicant is attacking is contained in the September 26, 2008 letter. The decision not to negotiate a settlement with the applicant was made based on the claims made by the applicant. Subsequent communications between the two parties were always initiated by the applicant, who sent various letters and emails indicating that he disagreed with the respondent. The applicant then set out his "position" in his detailed letter of January 12, 2009. However, it does appear that the respondent was aware that the applicant was planning to make further submissions. Mr. Hall's November 10, 2008 letter advised the applicant to consider the decision of the Federal Court in *Moodie v. HMTQ*, 2008 FC 968 in "preparing [his] position" (Respondent's Record, Vol. 1, p. 316).

[24] Nevertheless, I find that the January 20, 2008 letter did not contain a decision. The respondent's September 26, 2008 letter was a detailed, five-page document setting out each of the applicant's claims, addressing the relevant statutory regimes and grievance processes and assessing the potential for settlement. The applicant then sent letters and emails indicating that he disagreed with this decision. The respondent sent short responses reiterating its position.

The applicant then sent his detailed letter of January 12, 2009. In response to this, the respondent sent the letter of January 20, 2009. Again, this was a short, one page letter, stating that the respondent had reviewed the applicant's letter of January 12, 2009, and did not find any reason to deviate from the September 26, 2008 decision. In order to assess the "reasons" for the decision, the Court can only look to the September 26, 2008 letter as the January 20, 2009 letter simply states that the Director's position is unchanged. Finally, while the detailed letter of September 26, 2008 - which was a formal letter that was mailed to the applicant - was signed by the Director, Mr. Lapierre, the short January 20, 2009 email was sent to the applicant by the Claims Paralegal, Mr. Hall.

[25] This Court has held that an applicant cannot extend the date of a decision by writing a letter with the intention of provoking a reply: *Dhaliwal v. Canada (MCI)*, (1995) 56 A.C.W.S. (3d) 393, per McKeown J. at para. 2; *Wong v. Canada (MCI)*, (1995) 55 A.C.W.S. (3d) per Weston J. at para. 4. The Court has also held that a "courtesy response" to a letter from an applicant making further enquiries after a decision is rendered is not itself a decision that can be judicially reviewed. *Kourtchenko v. Canada (MCI)*, (1998) 146 F.T.R. 23 per Reed J. at paras. 14-15.

[26] The applicant did not seek judicial review of the Director's decision of September 26, 2008. His first substantive response to this decision was sent on January 12, 2009 (earlier letters advised the Director that the applicant would explain his disagreement in "due course). By January 12, 2008, the deadline to apply for judicial review of the decision had already passed. The applicant cannot extend the deadline by "responding" to the Director's decision at his own leisurely pace, then seeking judicial review of a short courtesy response letter.

[27] Accordingly, the Court need not consider the reasonableness of the Director's decision. The decision was rendered on September 26, 2008, and the deadline to apply for judicial review of this decision has passed.

[28] The Court notes in *obiter* that the applicant submitted to the Director of Claims and Civil Litigation that has "no statutory power to make any decision either under the *Department of National Defence Act* or any other act." This is ironic since if there is no decision subject to judicial review, this Court has no jurisdiction. On that basis, I would dismiss this application for judicial review which is obviously against the interests of the applicant.

[29] In *obiter*, I find that the authority of the Director of Claims and Civil Litigation to settle claims for compensation on behalf of the Department of National Defence arises out of a policy which does not have the force of law. It is a policy intended to avoid unnecessary legal action. But, if it is decided not to negotiate a settlement for compensation, that decision is not a final decision affecting the rights of the applicant. Rather, the applicant is entitled to pursue his other legal remedies which may include commencing an action in a court of competent jurisdiction.

[30] The applicant asked the Court to make a direction as to which court has jurisdiction to entertain the type of action that might provide compensation for the applicant's alleged causes of action. The Court can make no statement in this regard because it is a complicated matter and because it is not necessary for the purpose of deciding this application for judicial review. There are several statutes which affect the right of military personnel to make claims for damages. The applicant, a lawyer himself, seems to have a good understanding of these statutes and the jurisprudence.

Issue No. 2: Whether the Minister's decision was reasonable

[31] In the event that the alleged decision dated January 20, 2009 was subject to judicial review, the Court will consider whether it was reasonably open to the decision-maker.

[32] The applicant's primary submission is that as he cannot obtain financial compensation for loss and damages through the grievance process, and his only remedy to obtain such compensation is through the respondent. The applicant submits that as a member of the Canadian Forces, he is excluded from the remedies available to ordinary citizens to obtain this type of financial compensation.

[33] The respondent also submits that the "settlement" policy is clearly discretionary and that the language of the policy makes evident that the Director is not under any obligation to negotiate a settlement. The respondent points to section 7.3.3. of the policy, which sets out the criteria to consider "in deciding whether to make a liability payment." I agree with the respondent that this section makes clear that the Director has the discretion to decline to negotiate a settlement. The fact that the applicant may not be able to obtain the financial compensation he seeks through the grievance process does not in any way obligate the respondent to make a liability payment to the applicant.

[34] The applicant has not established that the Director erred or improperly exercised his discretion. The applicant's submissions on the flaws in the grievance process and the differential treatment of soldiers are not germane to the Director's decision. Moreover, I note that the applicant has been before this court in an action against the Crown in *Sandiford v. Canada,* 2007 FC 225,

309 F.T.R. 223. In that case, Justice Layden-Stevenson upheld the decision of the Prothonotary striking out the applicant's claim on the ground that he had not exhausted his statutory remedies. It is clear that the applicant believes that the statutory scheme is flawed and cannot adequately compensate him. However, he cannot circumvent the grievance procedures set out in the statutes for members of the Canadian Forces by seeking recourse to this Court.

[35] In any event, the letter from the Director of Claims and Civil Litigation dated September 26, 2008 addressed to the applicant carefully addresses each alleged claim from the applicant and provides a rational basis for declining to negotiate a settlement with respect to each of the alleged claims. Accordingly, this decision was reasonably open to the Director of Claims and Civil Litigation and this Court, on a reasonableness standard of review, cannot intervene or set aside this decision. The applicant remains entitled to commence any other legal procedure and legal court action to pursue his alleged claims subject to any statutory privative clauses which may be applicable. As discussed above, it is not the role of the Court in this case to review those other avenues of redress and applicable jurisprudence.

LEGAL COSTS

[36] Both parties sought legal costs. The normal rule is that legal costs are awarded to the successful party. Accordingly, this application will be dismissed with legal costs payable by the applicant to the respondent.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed with costs.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CALVIN SANDIFORD v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, BC
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