Federal Court Cour fédérale

Date: 20111019

Docket: T-1713-10

Citation: 2011 FC 1180

Ottawa, Ontario, October 19, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

DR. SUSAN TAINSH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Chief of Defence Staff (CDS) made under section 29 of the *National Defence Act*, RSC 1985, c N-5, dated September 7, 2010. The CDS denied the Applicant's grievance on her release from the Canadian Forces for irregular enrolment based on an undisclosed medical condition that rendered her unfit for service.

I. Facts

[2] Dr. Susan Tainsh (the Applicant) entered the recruitment process for the Canadian Forces (CF) to serve as a Medical Officer, or Internist, in 2004. She was required to disclose her medical history, including recent surgery for breast cancer and follow-up therapy. She also claims to have described psychiatric treatment to cope with an adjustment disorder associated with the breast cancer.

[3] During her pre-enrolment physical, the Applicant claims that she made Warrant Officer Boutet aware of the prescription medications she was taking, including small doses of clonazepam to help with insomnia caused by chemotherapy. Clonazepam is a benzodiazepine drug used primarily in the treatment of seizure disorders and panic attacks. There is, however, no record of clonazepam in Boutet's subsequent report (although there were other errors found among the medications he listed). The Applicant's psychiatrist, Dr. Pulman, provided additional information regarding her psychotherapy but did not mention the prescription for clonazepam. Dr. Pulman later indicated that he did not think it was relevant at the time.

[4] Despite her medical history, the Applicant was enrolled in the CF on June 16, 2005. She was granted a waiver of the minimum enrolment standard and permitted to attend the Basic Chaplains Course rather than the more demanding Basic Officer Training Course.

[5] On August 16, 2006, prior to attending a military conference in Switzerland, the Applicant consulted the General Duties Medical Officer, Dr. Brownlee. She was concerned that she would have difficulty sleeping due to jet lag and requested a sleep aid. Dr. Brownlee prescribed Imovane.

[6] When the Applicant returned on September 2, 2005, she again met with Dr. Brownlee and was prescribed a further course of Imovane to assist with insomnia during her basic training at CFB Borden. Dr. Brownlee noted the Applicant's past use of clonazepam and that she had been experiencing three weeks of withdrawal symptoms after stopping the drug prior to starting her position with the CF. Dr. Brownlee recognized the need for caution in prescribing Imovane. Use of Imovane has been known to cause exceptional and severe withdrawal symptoms in patients who have previously taken another benzodiazepine drug, such as clonazepam.

[7] On September 7, 2005, the first day of basic training, the Applicant sought medical assistance complaining that she was reacting strangely to medication. She underwent an emergency assessment by Mental Health Services. Psychiatrist, Dr. Ewing noted that she presented with an onset of anxiety disorder and possible atypical withdrawal secondary to clonazepam. His notes also questioned whether the Applicant was experiencing a drug dependency disorder. Dr. Ewing later confirmed a diagnosis of post-acute benzodiazepine withdrawal symptoms, exacerbated by a brief trial on Imovane.

[8] On September 8, 2005, the Base Surgeon at CFB Borden, Major Newnham completed a Notification of Change in Medical Employment Limitations (MELs) report. He did not examine the Applicant and relied on the initial consultation by Dr. Ewing. Major Newnham recommended that

the Applicant's permanent medical category (PCat) be changed and issued the following specific limitations: (a) requires specialist medical follow-up more frequently than every 6 months, (b) requires daily medication, and (c) unfit for work in a military operational environment.

[9] In October 2005, Dr. Tainsh was advised she would be released on the basis of fraudulent enrolment because she was aware of a prior medical condition and chose not to disclose it. This was later revised to reflect "irregular enrolment" under item 5(e), Chapter 15 of the *Queen's Regulations and Orders* (QR&O).

[10] On September 12, 2005, Director of Medical Policy, Major Garand invoked an Administrative Review (AR/MEL) of the decision to assign the MELs to the Applicant. This process is used to evaluate the career administrative action required when a CF member has a medical condition that no longer meets the requirements of the CF. The Applicant was provided with documentary disclosure and given the opportunity to submit written representations (and she did so on at least two occasions).

[11] In the interim, the Applicant successfully discontinued all benzodiazepine use by February 1, 2006 with the assistance of Dr. Brownlee and another psychiatrist, Dr. Watson. Dr. Brownlee suggested that the MELs assigned to the Applicant should no longer apply and she should be put on a temporary category to be able to return to her previous medical status. Similarly, Dr. Watson submitted a report recommending that the Applicant's medical category be changed to temporary and confirming that she had suffered an unusual withdrawal reaction brought on by Imovane.

[12] Regardless, the AR/MEL Process concluded on July 25, 2006 with the release of the Applicant from the CF based on irregular enrolment.

[13] On August 26, 2006, the Applicant filed a grievance against this decision. The Canadian Forces Grievance Board (CFGB) provided a series of findings and recommendations. It found that the last MEL assigned to the Applicant was not justified. It had not been established that she was dependant on clonazepam prior to enrolment. Her condition was treatable and not permanent. Moreover, the Applicant's medical condition did not justify a release for irregular enrolment. The CFGB recommended that the CDS uphold the grievance and facilitate the Applicant's re-enrolment. However, the CFGB's findings and recommendations are not binding on the CDS, the final authority in the grievance process.

II. Decision of the CDS

[14] The CDS determined that the Applicant's release from the CF under item 5(e) of the QR&O was proper and justified. In the course of his analysis, the CDS noted that he could not find medical evidence to support the CFGB's findings and claimed to rely on medical experts advising him. He suggested that there was no actual evidence to confirm that there was "no dependency" to clonazepam prior to enrolment. The CDS stated:

> I must conclude that there was an undisclosed medical condition present before enrolment. Was the omission committed knowingly? That cannot be ascertained. However, between October 2004 and June 2005, you had many medical appointments with Dr. Pulman. This leaves me to conclude that it is most likely that your pre-enrolment record did not reflect your true condition.

[15] Furthermore, the CDS found it was reasonable to conclude that the Applicant was unfit for service. Even if the dependency was treatable, the CDS noted that the MELs were properly assigned given "many medical issues" in the Applicant's case that had not been addressed sufficiently by the CFGB. As a Medical Officer, the Applicant was subject to the universality of service principles requiring her to be capable of employment in an operational environment worldwide. She could not be deployed because of her need to access medical treatment. As the CDS informed the Applicant, there was "sufficient information on file to reasonably conclude that the sum of the pre-existing condition and issues, known or not by you or the CF at the time of your enrolment and during the months that followed, necessitated your release." For example, the CDS suggested that anxiety disorder should have been given more serious consideration prior to her enrolment.

III. Relevant Provisions

[16] The following provisions of the *National Defence Act* describe the roles and responsibilities of the CDS in the grievance process:

Final authority	Dernier ressort
29.11 The Chief of the Defence Staff is the final authority in the grievance process.	29.11 Le chef d'état-major de la défense est l'autorité de dernière instance en matière de griefs.
Chief of the Defence Staff not bound	Décision du Comité non obligatoire
29.13 (1) The Chief of the Defence Staff is not bound by	29.13 (1) Le chef d'état-major de la défense n'est pas lié par

any finding or recommendation of the Grievance Board.	les conclusions et recommandations du Comité des griefs.
<u>Reasons</u>	<u>Motifs</u>
(2) If the Chief of the Defence Staff does not act on a finding or recommendation of the Grievance Board, the Chief of the Defence Staff shall include the reasons for not having done so in the decision respecting the disposition of the grievance.	(2) S'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.

[17] This Act also stipulates the requirements of all military personnel:

<u>Liability in case of regular force</u>	<u>Obligation de la force régulière</u>
33. (1) The regular force, all units and other elements thereof and all officers and non-commissioned members thereof are at all times liable to perform any lawful duty.	33. (1) La force régulière, ses unités et autres éléments, ainsi que tous ses officiers et militaires du rang, sont en permanence soumis à l'obligation de service légitime.

[18] The QR&O at Chapter 15.01(1) state that:

<u>15.01 – Release Of Officers And Non-Commissioned Members</u>	<u>15.01 – Libération Des Officiers Et Militaires Du Rang</u>
(1) An officer or non-commissioned member may be released, during his service, only in accordance with this article and the table hereto	(1) Un officier ou militaire du rang ne peut être libéré au cours de son service militaire qu'en conformité du présent article et du tableau s'y rapportant.

[19] Item 5(e) of this table defines Irregular Enrolment as applying "to the release of an officer or non-commissioned member by reason of an irregular enrolment other than Item 1(d)." Item 1(d) only applies in cases of a lack of inherent ability or aptitude to meet military classification, someone who is unable adapt to military life, or a person who develops personal weaknesses or has domestic or other personal problems that seriously impair his/her usefulness to or imposes an excessive administrative burden on the CF.

[20] *Canadian Forces Administrative Order 15-2* further elaborates on Item 5(e) as it relates to an undisclosed medical condition at paragraph 29:

> Compulsory release of members who were irregularly enrolled or transferred may be effected under item 1(d) or 5(e), as applicable. In addition to the reasons detailed in the special instructions in the table to QR&O 15.01, release under item 5(e) shall be applied to those members who were enrolled with a medical category that subsequently is found to have been unsatisfactory or who, as a result of an undisclosed medical condition existing prior to enrolment, became unfit during the first three months of paid service and could not successfully be employed by reallocation.

IV. Issues

[21] This application raises the following issues:

(a) Did the CDS provide adequate reasons for not adopting the findings and recommendations of the CFGB as required under subsection 28.13(2) of the *National Defence Act*?

(b) Was it reasonable for the CDS to uphold the Applicant's release from the CF based on irregular enrolment under item 5(e) of the QR&O?

V. Standard of Review

[22] The adequacy of reasons may be regarded as one aspect of procedural fairness and therefore subject to review based on correctness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

[23] This Court held in *Smith v Canada (National Defence)*, 2010 FC 321, 363 FTR 186, that the decisions of the CDS are questions of mixed fact and law reviewable on a standard of reasonableness. As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, reasonableness is “concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. Analysis

Issue A: *Did the CDS Provide Adequate Reasons for not Adopting the Findings and Recommendations of the CFGB as Required Under Subsection 28.13(2) of the National Defence Act?*

[24] In disregarding the findings of the CFGB, the CDS had a statutory duty to provide adequate reasons for doing so. More generally, the Federal Court of Appeal has stressed that reasons “must address the major points in issue” and the “reasoning process followed by the decision maker must be set out” (see *VIA Rail Canada Inc v National Transportation Agency*, [2001] 2 FC 25, [2000] FCJ no 1685 at para 22).

[25] The Applicant submits that the CDS relied almost exclusively on the opinion of medical "authorities" related to the Director of Medical Policy. He did not fully explain why the CFGB finding that there was no chronic medical condition, based primarily on the opinions of Dr. Brownlee and Dr. Watson, was rejected. The Applicant claims that this was central to the recommendations of the CFGB. She highlights that the reasons of the CDS for rejecting findings and recommendations of the CFGB must be responsive to the fundamental findings and issues raised by the CFGB (*Smith*, above, para 65-83).

[26] I agree with the Applicant. The Respondent simply claims that the findings of the CFGB that the Applicant had no prior dependency to clonazepam were dubious and that the CDS was able to reject them outright. However, the extensive analysis by the Respondent of why the CFGB findings were inappropriate underlines that such explanations were not properly given in the initial reasons by the CDS. The Respondent had to supplement the information provided.

[27] In my view, the military was well aware of the Applicant's adjustment disorder and it is disingenuous to conclude, based on the evidence, that there existed an undisclosed condition in order to justify the use of 5(e), irregular enrolment, due to the lack of detail as to the actual medication being used to treat the condition that had been disclosed.

[28] The out of hand rejection by the CDS of the CFGB's conclusion in this regard is problematic and for this reason alone should be sent back for re-consideration. The Applicant and all members of the CF pursuing the grievance process have a procedural entitlement to adequate

reasons. This was expressly recognized by legislation and should not be treated as a mere inconvenience.

Issue B: *Was it Reasonable for the CDS to Uphold the Applicant's Release from the CF Based on Irregular Enrolment under Item 5(e) of the QR&O?*

[29] Given my conclusion with respect to Issue A it is unnecessary to deal extensively with Issue B save to note that there are real questions that must be addressed *de novo* by the CDS as to whether there was, in fact, an undisclosed condition that would warrant the use of 5(e).

VII. Conclusion

[30] Based on inadequate reasons for disregarding the findings and recommendations of the CFGB, this application for judicial review is allowed. The case should be sent for redetermination by the CDS.

[31] Further, this Court finds that there is no evidence of any fraud on the part of the Applicant, nor is there any evidence of the Applicant misleading the CF as to the pre-enrolment medical condition. The Applicant is entitled to her costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. The case is sent back for redetermination by the CDS.

3. The Applicant is entitled to her costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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