Federal Court  Cour fédérale

Date: 20130529

Docket: T-1031-12

Citation: 2013 FC 571

Ottawa, Ontario, May 29, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

SUB-LIEUTENANT J.H. HARRIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Sub-Lieutenant Julie Harris, seeks judicial review of a decision of the Chief of the Defence Staff [CDS] of the National Defence, dated April 17, 2012, denying her grievance regarding negative responses from Canadian Forces [CF] personnel to an online survey of Cadets that she intended to undertake as part of her academic thesis research.

[2] The applicant asserts that the CF could not interfere in independent academic research on the basis that they did not agree with the subject or the methodology of the research and, more importantly, that the Cadet corps chain of command acted inappropriately vis-à-vis the applicant,

causing harm to her personal and professional reputation. Before this Court, the applicant argues that the final authority determination of her grievance by the CDS should be set aside on the grounds that the latter:

a. failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe, pursuant to paragraph 18.1(4)(b) of the *Federal Courts Act*, RSC 1985, c F-7 [Act], and/or,
b. based his decision on an erroneous finding of fact without regard to the material before it, pursuant to paragraph 18.1(4)(d) of the Act.

[3] For the following reasons, I find that this application for judicial review of the impugned decision of the CDS cannot succeed.

Background

[4] The applicant is a member of the Canadian Forces Reserve Force, a former Cadet and a former Cadet Instructor.

[5] In February 2009, she decided to undertake a survey of Cadets as part of her thesis research for a Masters of Business Administration programme at the University of Liverpool. The purpose of the research was to assess the psychographic profile of a typical Cadet in Ontario as defined in section 46 of the *National Defence Act*, RSC, 1985, c N-5 [NDA]. As the applicant has envisaged it at first, the research could eventually be used by the CF in marketing the Cadets Canada program to Canadian Youth.

[6] On February 18, 2009, the applicant sent a draft proposal to Lieutenant Commander [LCdr] Marcotte, Director General, Reserves and Cadets Public Affaires Coordinator, asking whether the

CF would like to contribute to the success of her survey as she believed a "beneficial relationship could be reached."

[7] The initial response to the proposal was favourable, but full approval was conditional upon further query. On February 24, 2009, LCdr Marcotte sought guidance from Colonel [Col] Fletcher, Director, Cadets and Junior Rangers, regarding the applicant's survey. On February 26, Col Fletcher replied to LCdr Marcotte, stating that he supported the project "in principle" but required more information from the applicant.

[8] Based on this initial reply, the applicant emailed her proposed survey to her supervisor at the University of Liverpool on March 28, 2009 and submitted her MBA Dissertation Proposal Proforma on April 4, 2009. She also sent a copy of her proposal to LCdr Marcotte on March 31, 2009. The dissertation proposal was signed electronically by the applicant's supervisor on April 5, 2009.

[9] On March 31, 2009, the applicant asked for fortress data on Cadet units, stating that she had the approval of LCdr Marcotte and Col Fletcher for her project. On April 3, 2009, the applicant and the assigned officer of the Regional Cadet Support Unit, Captain Harris, were advised by Captain Banaszkiewicz, Chief Reserves and Cadets, of the necessity to obtain approval of the Social Science Research Review Board [SSRRB]. The applicant was also advised of the SSRRB approval process, timelines and required forms. Furthermore, although LCdr Marcotte consistently stated that he supported the applicant's project, on April 4, 2009, he advised the applicant that the survey could not proceed until a formal approval was obtained.

[10] The applicant initially took issue with the requirement to have her project approved by the SSRRB, stating that the proper authority could be given by Col Fletcher. However, on April 5, 2009, she completed the SSRRB forms, whereby she accepted "personal responsibility for compliance with any procedures and policies within the SSRRB and the CF under the supervision of DCdts PAO Coordinator or other delegated authority."

[11] On April 8, 2009, the SSRRB rejected the applicant's proposal, noting that "there are serious ethical and technical concerns with regard to the survey tool that involve both the use of parental consent and the methodology being employed." The specific areas of concerns were identified in the decision of June Bowser, Director General Military Personnel Research and Analysis, and the applicant was offered the opportunity to revise the proposed survey and resubmit it for approval.

[12] In addition, the applicant received an email from Mike Walker, Public Opinion Research Manager of the Department of National Defence, suggesting that because the research involved the surveying of minors, the applicant should consult the Market Research and Intelligence Association guidelines.

[13] The applicant submitted a modified version of the survey to the SSRRB for its consideration on April 16, 2009.

[14] The SSRB reviewed the revised proposed survey in a meeting held on April 23, 2009, and again refused approval, as the SSRB determined that the applicant had failed to adequately address

its concerns from the initial review, such as the issue of parental consent. The SSRRB also questioned the scientific methodology employed for designing the survey, such as the fact that rural and francophone communities were not included in the data collection locations, which impacted the validity and utility of the results of the survey for CF marketing strategy purposes. Consequently, the SSRRB advised the applicant that it was not prepared to support the research as it was structured and invited the applicant to speak with the SSRRB in person regarding its concerns.

[15] However, the applicant did not wait for the response of the SSRRB regarding her revised proposal. As academic deadlines for the submission of her proposal approached, she posted the survey on a public online forum, using a survey website owned and based in the United States. It is not disputed that the survey was uploaded on the internet on or before April 22, 2009. The applicant also posted several messages on a Cadet Facebook page and other social media websites targeted to Cadets, identifying herself as "Lt(N) Harris" and soliciting the Cadets' participation in the survey.

[16] On April 30, 2009, the existence of the survey came to the attention of the Cadet Detachment Commander of the Eastern Ontario area. On May 6, 2009, the chair of the SSRRB, Dr. Farley, advised Col Fetcher of the SSRRB's concerns regarding the survey, primarily due to the lack of parental consent and the fact that the U.S.-based website where the survey was posted and its collected data were not governed by the Canadian privacy laws. It was further recommended that actions be taken to stop the dissemination of the unauthorized survey to the Cadets.

[17] Accordingly, on May 7, 2009, the following actions were taken:

i. Col Fetcher requested to have the survey removed from the Cadet Facebook page, he strongly recommended that directions be sent to the Cadets not to participate in the survey and suggested that the applicant's chain of command be advised for potential disciplinary action;

ii. Commander Mullaly distributed an email to the same effect to members of the Office of the Chief of Military Personnel, the Office of the Vice Chief of Defence Staff [VCDS] and the Office of the Department of National Defence Canadian Forces Legal Advisor, and subsequently sent the email throughout the CF;

iii. A Routine Order signed by Major Sainsbury, identifying the applicant by her name and rank, was sent throughout the chain of command, suggesting to direct the Cadets not to participate in the survey. A further undated Routine Order was also sent advising that the survey contravened a CANFORGEN (a CDS general order to the CF) and posed a risk to Cadets, the Cadet programme and the Department, without however specifying the risk;

iv. An email from Lieutenant Colonel Tom McNeil was circulated outlining his opinion that the applicant should be considered for "administrative action";

v. June Bowser of the SSRRB emailed the applicant's academic advisor at the University of Liverpool, outlining the SSRRB's ethical and technical concerns with regard to the survey being posted on the internet, and requesting that actions be taken to prevent further dissemination of the survey;

vi. An email exchange between Captain Jean and Commodore Bennett outlined that a disciplinary investigation had been initiated against the applicant and that disciplinary action would follow;

Internal CF Grievance Procedure

[18] On July 27, 2009, the applicant submitted a grievance with the CF, stating that the above-mentioned punitive measures taken by the SSRRB were out of proportion and unjustified, and caused her damages, including harm to her personal and professional reputation. The applicant sought a letter of apology from the VCDS, a letter of regrets to the University of Liverpool, damages in the amount of $4,000.00 for her legal expenses and compensation, and suitable compensation with the amount to be determined at a later date to compensate for damages to the applicant's reputation and her ability to find continuous employment within the CF.

Initial Authority Decision

[19] On March 25, 2010, Commodore MacIsaac, Director General Reserves and Cadets, issued the initial authority decision in which he essentially made the following findings:

- The requirement to submit the survey proposal to the SSRRB was unrelated to any financial or administrative support requested from or offered by the CF, and the fact that the proposal was previously reviewed by two leading researchers that the applicant consulted before posting her survey online could not take precedence over or replace the SSRRB process;
- Contrary to what the applicant contended, the results of the SSRRB review, resulting in the public censorship of the applicant's survey, were sent out throughout the Cadet community only once it was discovered that the applicant had posted her survey on the internet. Therefore, the results of the review were not made public before May 6 and 7, 2009, and no protected emails were forwarded unclassified;

- The applicant adjusted some aspects of her survey following the first SSRRB rejection but elected not to attend the SSRRB meeting that was offered to expedite the approval process;
- The required adjustments and corrections were not incorporated in the published survey to the satisfaction of the SSRRB;
- The applicant took "personal responsibility for compliance with any procedures and policies within the SSRRB and the CF under the supervision of DCdts PAO Coordinator or other delegated authority," but she later disregarded the approval process by posting her survey on the internet without first obtaining final approval;
- The online survey software used for posting the survey (the SurveyMonkey) retained the right to all data collected, thus removing any control the applicant may have had on the future use of the data. Furthermore, despite the website's assertions regarding its privacy policy, the website was owned and operated outside of Canadian jurisdiction and did not need to comply with Canadian privacy legislation;
- Given the applicant's use of her rank and connection to the CF on the Cadet-World Forum website, and the applicant's statement on this website that the results would benefit the Cadet programme, there was a real possibility that persons considering the survey would associate it with the CF;
- Most of the comments made in the impugned emails of Col Armstrong, Commander Mullaly and Commander Rolfe, which the applicant found to be castigatory measures against her, were "statements of fact, or recommendations for possible follow-up actions. While these remarks were valid and justifiable, they were more properly intended for a limited audience and should have been handled in a manner consistent

with that intent. More caution about sharing of background detail could have been exercised when e-mails were forwarded." Although better email discretion could have been exercised, the Cadet corps chain of command had acted within their authority and in the best interest of the Cadets as members of the organization under their control and supervision. Furthermore, there was no evidence that any of them acted at any time with the desire to discredit the applicant and it could not be said that the applicant's rights as a citizen were infringed, given that she voluntarily used her rank and name when publishing her survey online;

- Finally, as regards Ms. Bowser's May 7, 2009 email to the applicant's academic supervisor, Commodore MacIsaac found that all comments contained in the email were based on chronological events and expert review of the survey, and that the applicant failed to identify any specific false statements therein. Commodore MacIsaac also noted that "communications with academic supervisors with respect to the work of students is common practice in academia and among consumers of student research, and prior consent or knowledge is not required."

[20] Commodore MacIsaac concluded that (a) a letter of apology as the applicant requested could not be envisaged but, to grant redress in part, he issued an email to the directors asking them to remind all their personnel "to be conscious of the content of their e-mails and to exercise better discretion when forwarding e-mails which may be sensitive or contain personal information"; (b) no letter of regrets regarding the communication with the applicant's University was warranted; (c) in application of article 2.10 of the CF Grievance Manual, grievors should engage legal counsel at their own expense and *ex gratia* payments for claims supported by an invoice can only be

authorized by the Deputy Minister; (d) the compensation the applicant requested was not within the decision-maker's authority and not the subject of the internal grievance, but rather was a claim against the Crown. In addition, no evidence was provided in support of the losses that the applicant allegedly suffered, such as her loss of ability to find continuous employment within the CF.

CFGB Decision

[21] The applicant's grievance was then referred to the Canadian Forces Grievance Board [CFGB], pursuant to the grievance process set out in section 29 of the NDA and section 7 of the *Queen's Regulations and Orders* for the Canadian Forces (effective January 1, 2006).

[22] On September 28, 2011, the CFGB recommended that the applicant's grievance be denied. As a preliminary matter, the CFGB determined that the applicant had no right to grieve under section 29 of the NDA given her contention that she had acted as a private citizen in posting the survey online and the lack of evidence demonstrating any effect on her military career or future employability.

[23] On the merits of the grievance, the CFGB found that the applicant overstated her case in claiming that many junior officers across the country have seen the email thread of notifications against her and threats involving the military. Therefore, the CFGB considered that the steps taken by CF authorities were in the best interests of the Cadets and that there was insufficient evidence to establish that the intention or result of the impugned emails was the besmirchment of the applicant's reputation.

[24] The CFGB further determined that *ex gratia* payment or other financial compensation was not authorized under the grievance system and that an order for letters of apology and regret was not warranted in the circumstances. Rather, such an order could equate to a violation of freedom of expression within the CF.

Final Authority Decision

[25] At the Final Authority level, the CDS denied the applicant's grievance, finding that:

- the applicant's position was one of a commissioned member of the Reserve Force rather than that of a private citizen. Therefore, using a military rank at any time in relation to the survey she proposed to administer to Cadets gave her the standing and the right to access the CF grievance process as military member, even if the survey was intended for non-CF endeavour;
- although some of the communications within the CF in reaction to the applicant's action were "poorly-worded," the general response and communications about a serving military member met the "reasonable and prudent" standard of care owed to the Cadets for whom the CF was responsible;
- the applicant had failed to provide substantiation for her allegations of harm to her reputation and employment prospects within the CF;
- the CF owed the highest standard of care to the Cadets in the circumstances. It was consistent with the SSRRB's mandate to conduct technical and ethical reviews of the research protocol of prospective opinion and information gathering social science research within the CF, including surveys and questionnaires, to identify an area of concern regarding the minors for whom they are responsible and ask the applicant to

make changes to the survey. Although there was "room for some question regarding whether [the applicant was] legally obliged to comply with the requests of the SSRRB, the fact remained that she initially agreed to do so but later reneged on this promise without notice" and without properly weighing and understanding the risks of her decision to proceed without the required approval;

- given the possible consequences to the Cadets and the CF, "it was essential that the Director of Cadets and those involved in the SSRRB process take swift and decisive action to inform the target audience that the survey was not endorsed by the CF";
- Furthermore, there was no evidence of a violation of the applicant's privacy since the survey was available to anyone who wished to visit the website upon which it was posted, while the CF response was sent to specific recipients, namely those who were responsible for the Cadets;
- Finally, there was no evidence on the grievance to prove the alleged loss of reputation;

[26] In respect of the remedies, the CDS confirmed the CFGB's findings that (i) apologies or regrets were not warranted and could violate the principle of freedom of speech; (ii) the communication with the applicant's university was justified and the requested remedy was not appropriate; (iii) the payment of legal expenses was not allowable under the Treasury Board's *Policy on the Indemnification and Legal Assistance for Crown Servants*; and (iv) a guarantee of (long-term or continuous) employment with the CF would be contrary to the public service's employment principles of transparency and merit-based hiring.

Issues and Appropriate Standard of Review

[27] As stated earlier, the applicant is of the view that the CDS failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe, pursuant to paragraph 18.1(4)(b) of the Act, and/or the CDS based its decision on an erroneous finding of fact without regard for the material before it, pursuant to paragraph 18.1(4)(d) of the Act. However, both in her written submissions and during the hearing before the Court, the applicant presented no arguments regarding the CDS's failure to observe a principle of natural justice or the duty of procedural fairness, and no such issue raises on the face of the final grievance decision under review. The applicant submitted written observations at every level of the grievance procedure; she was represented by counsel and was provided with reasons for the rejection of her grievance.

[28] In addition, it is not for this Court to rule on the question as raised by the applicant, namely whether it is "reasonable for the Canadian Forces to interfere in independent University Research because they do not agree with the subject or methodology of the research."

[29] Therefore, the sole issue to be addressed in this application for judicial review is whether the decision of the CDS that the response of the CF to the applicant's actions was "reasonable and justifiable" in light of their duty of care owed to the Cadets was reasonable.

[30] Section 29.15 of the NDA provides that the "decision of a final authority in the grievance process is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or to review by any court." Furthermore, under the NDA grievance procedure, the CDS is charged with interpreting and applying the policies and rules that it has made and for which

it is responsible. Accordingly, the jurisprudence has established that "the standard of review for the merits of a grievance escalated to the CDS is reasonableness when there has been a decision or when the CDS has refused to hear the grievance": *Snieder v Canada (Attorney General)*, 2013 FC 218 at para 20; see also *Vézina v Canada (National Defence, Chief of the defence staff)*, 2012 FC 625 at para 18; *Rompré v Canada (Attorney General)*, 2012 FC 101 at paras 21-25; *Zimmerman v Canada (Attorney General)*, 2011 FCA 43, at paras 19-21; *Codrin v Canada (Attorney General)*, 2011 FC 100 at paras 40-42; *Birks v Canada (Attorney General*), 2010 FC 1018 at para 25.

Review of the Impugned Decision

[31] The applicant's main argument in this application for judicial review is one that was raised before the CDS. The applicant essentially argues that she pursued graduate studies as a civilian and not as a member of the CF, that she was not enrolled in Class B or Class C service, and therefore, like every other CF reserve officer, she was entitled to hold other employment, attend civilian universities and have liberties without the CF interfering in her personal affairs.

[32] In short, the applicant is of the view that although the SSRRB had already intervened in her research project, she was still entitled to withdraw from collaborating with the CF and continue with her research independently. In the applicant's submission, once she withdrew from collaborating with the CF, they had no business interfering with her research project, especially given her due diligence in ensuring that the survey met ethical standards by having two independent experts in public opinion research opine on whether or not her survey was ethical, before posting it on the SurveyMonkey website. The applicant adds that it is absurd to suggest that the SSRRB should have approved the research methodologies employed in her survey.

[33] In fact, the SSRRB opined on the ethical and technical aspects of the survey that it found problematic. It is clear, however, that the technical or methodological concerns were not material to the outcome of the grievance. These were a matter of concern to the SSRRB during the approval process because the applicant contended that her research potentially had a positive and practical outcome for the CF in administering the Cadets Canada program.

[34] On the other hand, the defendant argues that the reasons provided by the CDS are more specifically focused on the *duty* of care owed to the Cadets that was incumbent on the Cadet corps chain of command and whether the impugned actions of the CF authorities were justifiable under the applicable *standard* of care. In fact, the standard of care imposed by the law on the CF has been held to be no lower than that of a "reasonable and prudent parent" (see *Awan v Canada (Attorney General)*, 2010 BCSC 942 at paras 32-33 and *WW v Canada (Attorney General)*, 2002 BCSC 1164 at paras 39-40). Given the finding that the CF owed the *highest* standard of care to the Cadets that it has under its supervision and control (a finding with which the applicant did not take issue before this Court), and that the requirement of parental consent was not adequately addressed in the revised project, it was reasonable for the CDS to conclude that the impugned communications constituted a reasonable and justifiable response to the actions of the applicant in view of minimizing the potential harmful consequences that could arise as a result of the unapproved survey.

[35] In the circumstances, it was open to the CDS to find that whether the applicant was legally obliged to comply with the requests of the SSRRB was not material. Once the CF and the SSRRB were seized of the matter, they could have been held liable for having approved or having failed to

properly exercise their authority with respect to the administration of the survey. It is important to note that in the initial SSRRB review, Ms. Bowser clearly stated that "although cadets are not CF personnel, the DND/CF is responsible through the VCDS to administer and manager the Cadets Canada Programme." Furthermore, it was not insignificant that the applicant accepted personal responsibility to comply with any procedures and policies within the SSRRB and the CF under the supervision of the Director of the Cadets programme or other delegated authority and it was reasonable for the CDS to take this fact into account in deciding whether the applicant was bound by the approval process.

[36] The CDS recognized, as lower grievance decision-makers noted, that the impugned emails of CF directors could and should have been more diligently worded.

[37] The Court agrees that if the impugned emails were simply intended to protect the Cadets from taking part in the survey, the internal communications contained comments and remarks that could be considered inappropriate and disproportionate, just as the email sent to the applicant's supervisor at the University of Liverpool could be considered useless, in view of the objective pursued.

[38] However, in light of the fact that partial redress was granted at the outcome of the Initial Authority decision, this finding is insufficient for the Court to come to the conclusion that the Final Authority decision does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, or otherwise lacks justification, transparency and intelligibility (*Dunsmuir v New Brunswic*k, 2008 SCC 9 at para 47).

[39] Firstly, while I agree with the applicant that if the CF support was no longer required, she did not have to obtain any approval from the SSRRB, I agree with the respondent that the CF could intervene with the Cadet corps chain of command to fulfill their obligation of protecting the Cadets if it had any concerns regarding privacy or parental consent.

[40] Secondly, the CDS rightfully observed that the applicant failed to provide evidence of any effect on her personal and professional reputation and the future of her career, or any other losses that she may have suffered. In addition to the fact that, from a practical point of view, no remedy could reasonably be granted to the applicant, as a public servant, to guarantee long-term or continuous employment with the CF.

[41] Thirdly, the CDS reasonably found that the damages sought by the applicant, including the legal expenses of the underlying grievance, could not be afforded as an administrative redress. The applicant does not take issue with CDS' finding that such expenses are not covered under the Treasury Board's *Policy on the Indemnification and Legal Assistance for Crown Servants*, effective June 1, 2011. In addition, although the matter is not specifically in dispute before me, it is worth noting that in an action for damages on the basis of an alleged breach of the plaintiff's section 7 *Charter* rights, Justice Noël of this Court held that the CF grievance resolution process has not been designed and structured to address *Charter* issues or the issue of relief under section 24 of the *Charter*. He further stated that "it seems that the legislative intent in relation to the grievance process was to settle problems in labour relations matters. However, this process was not designed to replace the actions, claims or complaints proceedings provided for in statutes other than the

National Defence Act. Under the grievance process, need we recall, the decision-maker does not have the power to award *any* monetary relief whatever" (*Bernath v Canada*, 2007 FC 104 at para 73, aff'd in *Canada v Bernath*, 2007 FCA 400).

[42] For all these reasons, I am of the opinion that the application for judicial review brought by the applicant should be dismissed. Costs shall follow the event.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, with costs.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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