

Federal Court



Cour fédérale

Date: 20151103

Docket: T-112-15

Citation: 2015 FC 1242

Toronto, Ontario, November 3, 2015

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

R.S. FLAMAN

Applicant

and

**DIRECTOR GENERAL CANADIAN FORCES
GRIEVANCE AUTHORITY**

Respondent

JUDGMENT AND REASONS

[1] By the present Application, pursuant to the *National Defense Act*, RSC 1985, cN-5, s. 29.15 (*Act*), the Applicant (Ms. Flaman) challenges the December 2, 2014 decision of the Final Authority of the Canadian Forces, Director General J.R.F. Malo, (Director General) dismissing her grievance with respect to the imposed terms of her voluntary transfer from the Reserve Force to the Regular Force in 2011.

[2] No issues arise from the statutory and regulatory procedure applied to Ms. Flaman's grievance. In the present Application, the issues for determination are whether, as a matter of substance, the Director General's decision is reasonable (*Zimmerman v Canada (Attorney General)*, 2011 FCA 43 at paragraph 21), and whether, as a matter of fairness, the Director General breached a duty of fairness owed to Ms. Flaman (*Dunsmuir v New Brunswick*, 2008 SCC 9).

I. The Transfer Scenario Leading to the Grievance

[3] The basic undisputed facts of the transfer scenario leading to Ms. Flaman's grievance are as follows: in February 2011, while serving as a lieutenant-commander ("LCdr") in the Reserve Force ("Res F"), Ms. Flaman submitted an application for a component transfer ("CT") to the Regular Force (Reg F) in the Maritime Surface and Sub-Surface ("MARS") occupation; in April 2011, she submitted a second CT application for the Training Development ("TDev") occupation and advised that her first choice was MARS; on June 7, 2011, by way of email correspondence, she modified the two previous applications and ranked her choices as TDev and MARS respectively; on July 6, 2011, the Director Military Careers ("D Mil C") approved her CT to her first choice, Reg F TDev LCdr, effective July 20, 2011, and Ms. Flaman accepted the offer the same day by email; however, on August 15, 2011, Ms. Flaman was informed via email that a mistake had been made, and her rank had been changed from LCdr to Lt(N) [the lower rank of Lieutenant Navy] in accordance with the applicable policy and regulations. (Certified Tribunal Record (CTR), Affidavit of Roberta McIntee, Respondent's Record, Volume 1 of 2, pp. 1 to 7).

[4] On October 10, 2012, Ms. Flaman filed a grievance with respect to the decision-making on her transfer request (see: CTR, pp. 158-161).

II. The Grievance

[5] During the course of the hearing of the present Application, Ms. Flaman confirmed that her grievance is focussed on a single issue of substance and an issue of fairness, both maintained throughout the grievance process. As a matter of substance, the central point of the grievance arises from the determination of the change in Ms. Flaman's rank upon her transfer. As a matter of fairness, the grievance addresses the fact that, upon being given notice of her change in rank, Ms. Flaman was not provided with an opportunity to reconsider her transfer from the Reserve Force to the Regular Force.

[6] According to the statutory and regulatory requirements, the grievance was considered twice before it reached the Director General for final decision: first on June 28, 2013, by the Director General Military Careers acting as the Initial Authority; and second, by the Military Grievances External Review Committee ("External Review Committee") acting in an advisory capacity to the Director General.

[7] During the course of the hearing of the present Application, Counsel for the Respondent agreed that, in addition to the External Review Committee's recommendation, the entire grievance record, including the decision of the Initial Authority, was before the Director General for consideration, and was considered, in reaching the decision under review.

A. *Decision-Making on the Substantive Issue*

[8] In the course of decision-making on her grievance, Ms. Flaman argued that a Prior Learning Assessment Recognition (PLAR) and a Review of Previous Experience were not conducted with respect to her transfer as required by s. 4.3 of Canadian Forces Military Personnel Instruction 03/08. Ms. Flaman did not raise this issue directly in the grievance filed on October 10, 2012, but did so in her supplemental submissions dated May 9, 2013 where she made the following request:

With respect to reference B, no evidence to date has been disclosed pertaining to the Prior Learning Assessment (PLA) or Review of Previous Experience (RPE) as it applied to my file and the results thereof. PLA and RPE have been mentioned as to their [sic] necessary to complete in reference C, however the results are not on the file. These results determine the outcome of the ETP as this information is combined to complete the message of offer to specifically “determine benefits (e.g. rank, pay, etc)” as stated in Section 4.5 of reference B. Request this documentation be included in the file prior to submission to the [Initial Authority].

[Emphasis added]

(CTR, p. 78, para. 3)

In the course of the hearing of the present Application, Ms. Flaman confirmed that she has not received a confirmation that her request was met, or indeed, whether the assessments were ever conducted.

[9] In response to Ms. Flaman’s May 9, 2013 request, the Initial Authority in its decision dated June 28, 2013 states the following opinion:

With respect to the rank change, the CT policy does not provide rank protection in your case because you were not transferring into the same occupation and hence had not reached the Occupational

Functional Point. [...] and that the CT rank of lieutenant (Navy) was consistent with policy and practice for unskilled candidates requiring occupational training. Hence, while this was not presented to you in advance, I am confident your qualifications and experience were reviewed and you received the maximum rank permissible in accordance with the policy detailed in Military Personnel Instruction 03/08.

[Emphasis added]

(CTR, p. 76, para. 4)

Ms. Flaman disagreed with the emphasized statement and, as a result, in her October 4, 2013 request for referral to the Director General for a final decision, she reiterated her request:

Of further note, the Prior Learning Assessment and Recognition (PLAR) and Review of Previous Experience (RPE) results have yet to be disclosed. A previous request has been answered with a statement in which DGMC reports being “*confident that your qualifications and experience were reviewed.*” However, the disclosure remains outstanding. Request these results be disclosed and utilized in consideration and determination of this redress [...]

[Emphasis added]

(CTR, p. 70, para. 4)

On June 21, 2014, to maintain her position that disclosure had not been made to her as of that date, she again made the point directly to the Director General (CTR, p. 12).

[10] In answer to Ms. Flaman’s efforts to have her qualifications concern directly addressed, the Director General responded as follows:

...In accordance with Section 4.7 (Rank Protection on CT to Reg F) of Canadian Forces Military Personnel Instruction (CF Mil Pers Instr) 03/08 (Canadian Forces Component Transfer and Component Transfer Career Programs), which was in effect at that time, there are three criteria that must be met before a member may be considered for rank protection. Unfortunately, you did not meet two of these criteria: you did not possess occupational functional

point status (no Prior Learning Assessment Review could have changed that reality) and there was no position in the target military occupational structure identification code available at the targeted rank. The instruction also provides that Directorate Military Careers 7 may make exceptions for those who have special skills or competencies, but a member may not be given a rank higher than Lt(N)/Capt. Therefore, I find that the decision to change the initial decision was in accordance with policy and regulations.

[Emphasis added]

(CTR, p. 3)

In support of the Director General's decision, Counsel for the Respondent argues that, while the assessments requested by Ms. Flaman may not have been conducted in a formal way as required according to her argument, nevertheless, her qualifications were considered. I find that this is a reasonable assessment of the evidence on the record. The Director General in the passage just quoted does tangentially address the issue raised by Ms. Flaman and, in doing so, renders it irrelevant by operation of another qualifications feature. No argument has been raised that the Director General's opinion is not supported in fact and law.

[11] As a result, I find that the Director General's decision is not made in substantive error, and, therefore, I find that it is reasonable.

B. *Decision-Making on the Fairness Issue*

(1) The Initial Authority

[12] As a matter of fairness, Ms. Flaman's grievance is based on the fact that she was not provided with an opportunity to reconsider her transfer request from the Reserve Force to the

Regular Force. The Initial Authority understood this fact, and effectively found that Ms. Flaman had been unfairly treated. However, the finding of unfairness did not result in a change to the rank imposed:

On 15 August 2011, D Mil C 7, after realizing that a mistake had been made, issued a message amending your rank from lieutenant-commander to lieutenant (Navy). I agree that you should have been contacted in advance and provided an explanation as to why the change was being made. This would have given you the opportunity to re-visit your decision for CT. These actions did not occur and I apologize for that. Rest assured, I will direct that D Mil C put procedures in place to ensure members receive a clear explanation for decisions taken in such circumstances.

[...]

In my review of all the available information, I conclude that the decision to amend your rank was appropriate and policy compliant. Consequently, I cannot grant you redress. The manner in which you were notified of the mistake, however, was inappropriate and I offer my sincere apologies. As explained above, I will direct that D Mil C take corrective action to ensure that such situations not happen again.

[Emphasis added]

(CTR, pp. 76 - 77)

(2) The External Review Committee

[13] At the second stage of the decision-making on the grievance, the External Review Committee exhibited that it understood Ms. Flaman's fairness concern. This was accomplished by, in the recommendation to the Director General, repeating the Initial Authority's concern that Ms. Flaman should have been given the opportunity to revisit her decision (CTR, p. 42). However, the External Review Committee's analysis of Ms. Flaman's fairness concern placed responsibility upon her, with the result that her concern was effectively negated:

The grievor acknowledged that she understood why her rank had been changed when she responded to an email from the CDA on 15 August 2011. It was explained to her that an error had been committed and that she was not eligible to retain her rank of LCdr. Although the IA apologized to the grievor directing D Mil C to establish procedures to ensure such situations do not re-occur, this explanation should have been given to the grievor prior to her CT.

Having said this, I note that her allegation that no reasoning was given to her regarding the rank change is not borne out by the facts. When she was informed about this change on 15 August, 2011, the grievor still had the option to request to return to the Reserve Force as a MARS officer. It was her decision to apply for a transfer to the Regular Force and as it remained within her purview to seek a transfer back to the Reserve Force. She did not have to wait for an offer to do so.

Therefore, I find that the grievor was aware of the change in rank as of 15 August 2011 and that nothing precluded her from requesting to return to the Reserve Force in her former rank and occupation at that time.

[Emphasis added]

(CTR, pp. 46 – 47)

[14] In the result, the External Review Committee recommended to the Director General that Ms. Flaman's grievance be denied.

(3) The Director General

[15] For the Director General's consideration, Ms. Flaman made an impassioned plea for consideration of the shame that she has suffered as a result of her loss of rank in the transfer:

The last three years have presented several challenges with regards to my reduction in rank from Lieutenant Commander (LCdr) to Lieutenant (Navy). First, I was asked if I accepted the offer and did so "with honour" as noted in my original email of acceptance included in reference C. Secondly, I did nothing wrong to warrant

such a public shaming. Unfortunately, I have received many comments and questions as to my wrongdoings likening my reduction in rank to the three cases presented above. Those who review my personnel file see the enrolment documentation states LCdr and they ask what I did wrong. Coincidentally, the original enrolment documentation is a reminder in perpetuity. I have been publically [sic] shamed by this reduction, something worn and an unjust reminder every single day of my CAF career for the last three years. I went from the duties and responsibilities commensurate of a Commandant at a CAF training establishment to locking doors.

For such an esteemed organization, I find it unsettling that a member could be treated in this unjust and dishonourable manner. Furthermore, this public shaming was not warranted. Perhaps these additional comments will serve to explain more fully the reasoning as to why I feel aggrieved by all of the decisions to reduce my rank, reduce my seniority and remove me from the Joint Command programme.

(CTR, p.9)

The Director General acknowledged Ms. Flaman's plea by quoting it in the decision rendered and by making the following comment and statement about its impact:

It is unfortunate that events unfolded in this manner, but the fact remains that, once the error was identified, it was conveyed to you. I note that DGMC issued direction to his staff to ensure that this type of error never occurs again. While the timing of this was inopportune, the policy was properly applied.

(CTR, p. 4)

As a result of Ms. Flaman's negative experience, I consider the Director General's confirmation that rectification action has been taken is vitally important to ensure that fairness is provided to other members of the Forces who might apply for a similar transfer.

[16] In rendering the decision under review, by the following paragraph, the Director General relied upon his understanding of the External Review Committee's opinion to reach a conclusion on Ms. Flaman's fairness argument in line with the placing of responsibility on her as the External Review Committee had done:

Additionally, as noted by the Committee, when you were informed of your rank change, you [sic] [could have] component transferred back to the Res F if you wished. You elected not to pursue that option.

[Emphasis added]

(CTR, pp. 4 - 5)

C. *Analysis of the decision-making*

[17] It is clear that the Initial Authority's fairness opinion did not make an impression on the External Review Committee or the Director General. In my opinion, upon the first identification by the Initial Authority that Ms. Flaman was treated unfairly by the failure to give her the opportunity to reconsider her transfer request from the Reserve Force to the Regular Force, a duty arose to rectify the situation by providing her with the opportunity. Instead of rectification, both the External Review Committee and, in turn, the Director General attributed knowledge to Ms. Flaman that she knew that she could act on her own motion to make the reconsideration request, and having chosen not to do so, the option was no longer in existence. In my opinion, there is no evidence on the record to substantiate this attribution of knowledge.

[18] I find that the Initial Authority's opinion that Ms. Flaman should have been given the opportunity, put in place a question as to where the responsibility lay to provide a

reconsideration of Ms. Flaman's transfer request. The fact that Ms. Flaman continued to repeat the complaint that she was not presented with the option should have alerted the External Review Committee to recommend to the Director General to act to ensure that Ms. Flaman would know that she could act on her own motion. There is no evidence that any such instruction was given before the decision-making took place.

[19] In my opinion, to be fair to Ms. Flaman, the Director General was required to seriously take the Initial Authority's opinion into consideration and, having done so, to provide Ms. Flaman with the opportunity she requested.

III. Result

[20] I find that the Director General breached a duty of fairness owed to Ms. Flaman by failing to provide her with the opportunity to reconsider her transfer request from the Reserve Force to the Regular Force.

[21] As a result, I find that the Director General's decision must be set aside. Ms. Flaman does not request a reconsideration because, on the date of the present decision, she is no longer a member of the Canadian Forces.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside.

I award costs of the present Application to the Applicant in the lump sum of \$3000.00 payable forthwith.

“Douglas R. Campbell”
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-112-15

STYLE OF CAUSE: R.S. FLAMAN v DIRECTOR GENERAL CANADIAN
FORCES GRIEVANCE AUTHORITY

PLACE OF HEARING: TORONTO, ONTARIO

DATES OF HEARING: OCTOBER 19 AND 26, 2015

JUDGMENT AND REASONS: CAMPBELL J.

DATED: NOVEMBER 3, 2015

APPEARANCES:

R.S. Flaman

FOR THE APPLICANT
(ON HER OWN BEHALF)

Victoria Yankou

FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of
Canada

FOR THE RESPONDENT