Federal Court  Cour fédérale

Date: 20160208

Docket: T-358-15

Citation: 2016 FC 153

Ottawa, Ontario, February 8, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JOHN SIDNEY NATHAN MacPHAIL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, John Sidney Nathan MacPhail, is a Chief Petty Officer, 2nd Class, with the Canadian Forces [CF] and is currently posted in Halifax. On February 1, 2013, the meal and incidental portions of the separation expense benefits which he had been receiving were cancelled upon implementation of a policy decision made by the Treasury Board [TB]. The Applicant filed a grievance asking for restoration of these benefits for the duration of his posting. However, on January 15, 2015, the Chief of Defence Staff [CDS] denied the Applicant's

grievance. The Applicant now asks this Court pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, to set aside the CDS's decision and restore the lost benefits.

I. Background

[2] On July 27, 2011, the Applicant was posted to HMCS Toronto in Halifax from Moncton, New Brunswick. Before the Applicant decided to accept an imposed restriction [IR] posting to Halifax, he and his wife considered their family's financial situation. The IR posting came with separation expense [SE] benefits which included incidental and meal allowances. However, in July 2012, while onboard HMCS Charlottetown, the Applicant learned the SE benefits would be changing, such that the incidental and meal allowances would no longer be paid beginning September 1, 2012 (this implementation date was subsequently extended to February 1, 2013). In a grievance memorandum to his commanding officer dated August 18, 2012, the Applicant indicated that loss of these allowances was unfair and would cause significant financial difficulty for his family; he also requested that he be granted the benefits for the remainder of his IR posting. The Applicant's commanding officer determined that the grievance should go to the Canadian Forces Grievance Authority. Subsequently, on April 10, 2013, the Acting Director General Compensation and Benefits, who acted as the Initial Authority [the IA], decided that because the policy change was determined by the TB, the Applicant's loss of benefits could not be remedied through the grievance process.

[3] Following denial of his grievance at the initial stage, the Applicant requested on July 30, 2013, that his grievance be considered by the CDS as the final authority in the grievance process for members of the CF. The Director General of the Canadian Forces Grievance Authority

acknowledged receipt of the grievance on September 9, 2013, and in turn forwarded it to the Military Grievances External Review Committee [the Committee]. The Committee's findings were provided to the Applicant in a letter dated March 7, 2014. In recommending that the grievance be denied, the Committee considered the policy implemented by the TB and whether the notice of the change given to the Applicant was reasonable. Although the Committee noted that the February implementation date did not give the Applicant sufficient time to mitigate the financial loss, the Committee nevertheless recommended the grievance be denied because the implementation date had been approved by the TB and there was no right to the SE benefits.

II. The Chief of Defence Staff's Decision

[4] In a letter dated January 15, 2015, the CDS denied the Applicant's grievance. The CDS outlined the grievance, the Applicant's arguments, and the redress the Applicant sought. The CDS noted that he had considered the Committee's findings and recommendations, that the Applicant had provided comments on such findings and recommendations, and that he had considered the case *de novo*. In rendering his decision, the CDS further noted that the Committee had found that the reduction of the benefits was approved by the TB and applied to the Applicant when the policy change became effective. The CDS agreed with the Committee in this regard, stating:

> I must agree with the Committee that your SE benefits were properly reduced as per approved TB policy, on 1 February 2013. Indeed, it is the TB who retains jurisdiction to deal with all financial matters for which it is responsible in accordance with the National Defence Act (NDA), article 35(2) (Reimbursements and Allowances). The new SE benefits were approved by TB. I have no authority to amend them. [footnote omitted]

[5] The CDS also expressed agreement with the Committee that the Applicant did not automatically accrue SE benefits for the duration of his IR posting, nor had he entered into a contract with the Crown because the relationship between the Applicant and the CF is not bound by contract law. In the CDS's view, although the Applicant may have found the change in policy caused difficulties in adjusting his budget, he had been treated fairly and the six months' prior notice for individuals to adjust to the change was reasonable. The CDS observed further that while the IA had wrongly rejected the Applicant's grievance on the basis of the matter being prescribed by TB regulations, he was nonetheless satisfied that the matter had been resolved and no further action was warranted.

III. Issues

[6] The parties raise various specific issues, but in my view there are three that warrant the Court's consideration:

1. What is the appropriate standard of review?
2. Is the CDS's decision reasonable?
3. Was the Applicant denied procedural fairness?

IV. Analysis

A. *What is the appropriate standard of review?*

[7] Whether any rules of procedural fairness were breached in handling the Applicant's grievance is an issue subject to the correctness standard of review (see: *Mission Institution v*

Khela, 2014 SCC 24 at para 79, [2014] 1 SCR 502; also see *Smith v Canada (National Defence)*, 2010 FC 321, at paras 34-37, 363 FTR 186).

[8] It is well established in the case law that grievance decisions involving members of the CF deal with questions of fact or questions of mixed fact and law and, as such, are to be judicially reviewed in accordance with the reasonableness standard (see: e.g., *Bossé v Canada*, 2015 FC 1143 at para 25, 259 ACWS (3d) 686; *Bourassa c Canada (Ministère de la Défense Nationale)*, 2014 FC 936 at para 40, 249 ACWS (3d) 788; *Harris v Canada (Attorney General)*, 2013 FCA 278, [2013] FCJ No 1312 (affirming *Harris v Canada (Attorney General)*, 2013 FC 571 at para 30, [2013] FCJ No 595); *Babineau v Canada (Attorney General)*, 2014 CF 398 at para 22, [2014] FCJ No 440; *Osterroth v Canada (Canadian Forces, Chief of Staff)*, 2014 FC 438 at para 18, [2014] FCJ No 483; *Moodie v Canada (Attorney General)*, 2014 FC 433 at para 44, [2014] FCJ No 447; *Lampron v Canada (Attorney General)*, 2012 FC 825 at para 27, [2012] FCJ No 1713; *Rompré v Canada (Attorney General)*, 2012 FC 101 at paras 22-23, [2012] FCJ No 117).

[9] Accordingly, although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is inaccurate or not material" (*James v Canada (Attorney General)* 2015 FC 965 at para 86, 257 ACWS (3d) 113), it should not interfere if the CDS's decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable

outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

B. *Was the CDS's decision reasonable?*

[10] In addressing this issue, it should be noted at the outset that the judicial review of the CDS's decision does not and cannot encompass questions as to whether the TB's policy decision was fair or reasonable or whether the policy's impact upon the Applicant was just or unjust. On the contrary, in reviewing the CDS's decision, the Court is tasked only with assessing whether the CDS's decision was reasonable in accordance with the principles noted above and whether it was rendered in a procedurally fair manner. Simply put, the Court does not have the power or authority to determine whether termination of the Applicant's meal and incidental allowances was just or unjust.

[11] The policy decision implemented in February 2013 which precipitated the Applicant's grievance clearly provides that members of the CF will no longer receive meal or incidental allowances as part of their SE benefits. In the TB's *Compensation and Benefits Instructions* [CBI], Chapter 208.997, it is clear that the meal and incidental provisions previously contained in CBI, Chapter 209.997, have been rescinded and repealed by the TB effective February 1, 2013. Furthermore, there are no grandfathering or transitional provisions in the CBI in respect of the terminated allowances.

[12] In response to the Applicant's grievance, the CDS determined that the Applicant is bound by the new policy, that the TB had the power and jurisdiction to make the change, and that the

policy change was implemented in a procedurally fair way with six months' prior notice. In my view, it was reasonable for the CDS to find that the Applicant was bound by the new policy. The CDS's reasons for his decision are transparent, intelligible and justifiable and, as a whole, his decision falls within the range of acceptable possible outcomes and the Court should not interfere.

[13] The TB is given clear authority to establish rates of pay and benefits for members of the CF pursuant to section 35 of the *National Defence Act*, RSC 1985, c N-5 [*NDA*], which provides:

Treasury Board to establish	Taux et modalités de versement
35. (1) The rates and conditions of issue of pay of officers and non-commissioned members, other than military judges, shall be established by the Treasury Board.	**35.** (1) Les taux et conditions de versement de la solde des officiers et militaires du rang, autres que les juges militaires, sont établis par le Conseil du Trésor.
Reimbursements and allowances	Indemnités
(2) The payments that may be made to officers and non-commissioned members by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their service shall be determined and regulated by the Treasury Board.	(2) Les indemnités payables aux officiers et militaires du rang au titre soit des frais de déplacement ou autres, soit des dépenses ou conditions inhérentes au service sont fixées et régies par le Conseil du Trésor.

[14] There is no discretion granted to the CDS in either the *NDA* or the *Queen's Regulations and Orders for the Canadian Forces* to authorize or pay the meal and incidental allowances which were repealed by the TB effective February 1, 2013.

[15] The CDS reasonably determined that the TB has the jurisdiction to make the change to the SE benefits, and that he had no authority to amend the new SE benefits approved by the TB. The CDS's decision is entitled to deference by the Court, and the CDS did not overlook material evidence or take into account evidence that is inaccurate or not material. Although a longer adjustment period or maintenance of the SE benefits would undoubtedly have been preferred by the Applicant, and even though the CDS's decision may not be one the Court may have made, that does not make the CDS's decision unreasonable. There was no evidence before the CDS that the procedure for implementing the TB's policy and the choice of date selection was unfair, thus making the CDS's decision – that in his opinion six months was fair notice – reasonable.

[16] In addition, the CDS's determination that the Applicant's employment relationship was not bound by contract law is not only a reasonable one but a correct one as well. In *Codrin v Canada (Attorney General)*, 2011 FC 100, 379 FTR 302, Mr. Codrin alleged that, upon recruitment as an officer cadet, he had been promised a certain pay rate. However, after being commissioned in the rank of second lieutenant, it was determined that the pay rate stated in the enrollment message which had authorized Mr. Codrin's enrollment in the training program was incorrect, and his pay was therefore adjusted in line with policy. In upholding the CDS's denial of Mr. Codrin's grievance, the Court stated as follows:

> [57] The legal principle that a member of the CF does not have a contractual relationship with the Crown has been repeated for over

> a century. The principle first appeared in the jurisprudence in *Mitchell v. R*, [1896] 1 Q.B. 121. Lord Esher M.R. held in that case at page 122:
>
> > … all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract.
>
> [58] This has been reiterated in more recent jurisprudence in *Pilon v. Canada* (1996), 119 F.T.R. 269, [1996] F.C.J. No. 1200, at paragraph 7:
>
> > …members of the military serve at the pleasure of the Queen and do not, therefore, have a contractual relationship with the Crown.
>
> [59] The CDS stated in his decision that he could not make a determination about a purported breach of contract or violation of labour laws in the grievance before him because members of the CF are not in a contractual employment relationship with the Crown. The determination that contract law did not apply to the grievance was reasonable and correct in law.

C. *Was the Applicant denied procedural fairness?*

[17] The Applicant argues his grievance at the IA level was improperly denied because of the IA's determination that, since the policy change was made by the TB, his loss of benefits could not be remedied through the grievance process. However, it is the CDS's decision, not that of the IA, which is the subject matter of this application for judicial review. The CDS explicitly mentions the IA decision after he conducted his *de novo* review, stating that: "I agree that the IA erred in rejecting your grievance. However, I am satisfied that this particular issue has been resolved and that no further action is warranted." This determination by the CDS, that any procedural fairness issues at the lower level were resolved, was not an error.

[18] Case law has established that a *de novo* hearing, as the CDS clearly was conducting in this case, can cure earlier breaches of procedural fairness if the procedures and outcome as a whole were fair (see: e.g., *Walsh v Canada (Attorney General)*, 2015 FC 775 at paras 41, 51, 256 ACWS (3d) 107 [*Walsh*]; *Schmidt v Canada (Attorney General)*, 2011 FC 356 at paras 16-20, 23, 386 FTR 286; *McBride v. Canada (Minister of National Defence)*, 2012 FCA 181 at paragraphs 41-45, 431 NR 383; and *Canada (Attorney General) v Rifai*, 2015 FCA 145 at para 3, 256 ACWS (3d) 834). In *Walsh*, the Court held (at para 51) that the procedure as a whole was fair because Mr. Walsh had been given the opportunity at every step of the grievance process to make submissions, the CDS had considered those submissions and addressed them, and the CDS noted any prior shortcomings in any previous decision when conducting the *de novo* review. As in *Walsh*, the Applicant here had ample opportunity to provide submissions which were considered by the CDS, including those on the impact to the Applicant's family; the CDS in this case conducted a *de novo* review, setting aside any previous decision, while acknowledging the problem with the IA's decision.

[19] The Applicant suggests that his commanding officer was wrong in determining he could not deal with the grievance. However, even if that may have been the case, any procedural defect in this regard was rectified by the fact the CDS conducted a procedurally fair *de novo* review in deciding the Applicant's grievance.

[20] The Applicant asserts that he was denied a comprehensive and transparent adjudication of his grievance because the Committee was denied access to TB and Department of National Defence information about how the implementation date was determined. There is, however, no

right to this information by the Applicant. It was the Committee, not the Applicant, which requested this information. The Committee decided not to contest the denied information requests, and its decision not to do so is not the subject matter of this judicial review. It would be an undue burden for the grievance process applicable to members of the CF to require that the Committee challenge all refusals of information requests before the CDS's grievance decision can be procedurally fair. The CDS found, based on the information before him, that the implementation was done fairly and the six-month adjustment period was reasonable and appropriate.

[21] The Applicant argues that he is prevented from joining with other members of the CF affected by termination of the SE benefits because they could be subject to the mutiny provisions in the *NDA* and that this inability to do so is somehow unfair. If the Applicant's reading of the mutiny provisions is correct, this might be a problem, and would limit the Applicant's ability to band together with other members of the CT to reverse the changes to the SE benefits. However, the Applicant has not been charged with mutiny. Moreover, to classify such collective efforts by the Applicant and other members of the CF to reinstate the terminated allowances as "mutiny" would require an unduly generous reading and interpretation of the words "insubordination" and "resistance" as used in the definition of "mutiny" in subsection 2(1) of the *NDA*.

[22] The procedures followed in this case were open and transparent, and the Applicant was aware of the case he had to meet. The Applicant was not denied procedural fairness in the rendering of the CDS's decision denying his grievance.

V. Conclusion

[23] For the reasons stated above, the Applicant's application for judicial review is dismissed. There is no award of costs.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no award of costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

John Sidney Nathan MacPhail	FOR THE APPLICANT (ON HIS OWN BEHALF)
Melissa Chan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT