Federal Court  Cour fédérale

Date: 20171127

Docket: T-2187-16

Citation: 2017 FC 1071

Ottawa, Ontario, November 27, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

CAPTAIN KIMBERLY Y. FAWCETT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] On February 21, 2006, Captain Kimberly Fawcett, a member of the Canadian Forces [CF] was involved in a tragic motor vehicle accident while taking her son to daycare on the way to work. The accident resulted in the death of her son and Captain Fawcett losing her right leg above the knee. She seeks judicial review of the November 7, 2016 decision of the Chief of Defence Staff [CDS] concluding that she was not on duty at the time of the accident and that the injuries sustained were not attributable to military service. Captain Fawcett argues that because she and her husband were serving in high readiness units, and because she was taking

her son to daycare pursuant to a CF Family Care Plan [FCP], she was on duty and acting pursuant to a CF order at the time of the accident.

[2] For the reasons that follow, I conclude that Captain Fawcett's unique circumstances were reasonably considered by the CDS but were not found to support her argument that she was engaged in military service at the time of the accident. Considering the deference owed to the CDS decision, this is a reasonable conclusion and therefore this judicial review is dismissed. I decline to award costs.

I. Background

[3] At the time of the accident in 2006, Captain Fawcett was a Planning Officer with the Canadian Forces Joint Support Group [CFJSG] in Kingston, ON. Both Captain Fawcett and her husband were serving in high readiness units in the CF. After completing her maternity leave on February 6, 2006, Captain Fawcett returned to work and completed a FCP pursuant to Defence Administrative Order and Directive 5044-1 (Families) [DAOD 5044-1].

[4] On February 20, 2006, Captain Fawcett's husband was notified that he had to report to work early on the morning of February 21, 2006 for training for imminent deployment. Captain Fawcett therefore assumed responsibility for taking their son to daycare on the day of the accident. Captain Fawcett states that she notified her supervisor that she was "activating her FCP" and would be late arriving at work. She states that her supervisor agreed. Unfortunately, while taking her son to daycare on the way to work, Captain Fawcett was involved in the motor vehicle accident referenced above.

[5] The CF Summary Investigation [SI] of the accident completed on May 8, 2006 found that Captain Fawcett was on duty at the time of the accident, because the travel to daycare and work were required to enable her to perform her work duties. However, the SI concluded that her injuries were not attributable to military service.

[6] Captain Fawcett's application for disability benefits was denied by Veterans Affairs Canada [VAC] in October 2006 as VAC concluded that Captain Fawcett's injuries were not attributable to military service.

[7] When she returned to work, Captain Fawcett was advised by her Pension Advocate and another official that VAC places significant weight on the SI report in determining pension eligibility. Captain Fawcett filed a grievance on June 2, 2009 in relation to the SI, alleging that she was on duty at the time of the accident and therefore the injuries she sustained were attributable to military service. The Chief of Military Personnel [CMP] wrote a letter in support of Captain Fawcett's claim.

[8] Once a grievance is filed, section 29 of the *National Defence Act*, RSC 1985, c N-5 and article 7 of the *Queen's Regulations and Orders for the Canadian Forces* [*QR&O*] outline two levels of decision-making. The first level, the Initial Authority [IA], is the commanding officer, or the commander or officer appointed as the Director General or above at National Defence Headquarters. The second level, the Final Authority [FA], is the CDS or his delegate. On August 6, 2009, the Commander of Canadian Operational Support Command determined that the IA for the grievance was the Director Support Casualty Management.

[9] However, on September 21, 2009 the Director General, Personnel and Family Support [DGPFS] apparently acted as IA and notified Captain Fawcett that her application was out of time and therefore treated it as an administrative matter, not an official grievance. The DGPFS did not support the application.

[10] On May 6, 2010, Captain Fawcett was notified that the DGPFS was not the appropriate IA as he rendered his decision as a civilian, and grievances must be determined by military personnel (*QR&O*, article 7.06).

[11] At this point, Captain Fawcett, rather than electing to have the claim re-determined by an appropriate IA, had the claim forwarded to the FA. Subsequently, the FA, the Director General, Canadian Forces Grievance Authority acting on delegation from the CDS, denied the claim.

[12] The initial decision by the FA was quashed by this Court on a judicial review for reasons of procedural fairness (see: *Fawcett v Canada (Attorney General)*, 2012 FC 750).

[13] On April 16, 2015, the FA again denied Captain Fawcett's claim and this Court again remitted the matter for reconsideration before the FA because of deficiencies in the record.

[14] The third consideration by the FA is the decision now under review.

II. CDS Decision Under Review

[15] The decision under review is the November 7, 2016 FA decision of the CDS. In the decision the CDS notes that he had two issues to determine: (1) whether Captain Fawcett was on duty at the time of the accident, and (2) whether the injuries sustained during the accident were attributable to military service.

[16] The CDS rejected Captain Fawcett's submissions that since she was required to have a FCP in place she was executing the plan and therefore on military duty when she dropped her son off at daycare. The CDS considered the historical reasons for the requirement of a FCP. He noted that the content of the FCP is determined by the individual completing the FCP. The CDS therefore concluded that the FCP did not constitute a "regulated military duty" but rather a "contingency plan." The fact that Captain Fawcett received permission to come to work late because of her husband's attendance at training for imminent deployment did not constitute the execution of the FCP. According to the CDS, the FCP is only triggered when members are taken away from their family to attend to military duties.

[17] The CDS also rejected Captain Fawcett's argument that she had a "unit" FCP with her husband, which was activated on the day of her accident. The CDS concluded that such a "unit" FCP does not exist in accordance with CF regulations.

[18] The CDS considered the decision in *Cole v Canada (Attorney General)*, 2015 FCA 119 [*Cole*] which sets out the test for the determination of "attributable to military service." Though

Cole concerned the issue of pension benefits, the CDS noted that the same language is used to describe "attributable to military service" in both the *Pension Act* and the CF Administrative Order 24-6 *Investigation of Injuries and Death* [CFAO 24-6]. However, the CDS noted that no provision exists under CFAO 24-6 requiring that its provisions be "liberally construed and interpreted," unlike the *Pension Act* which contains this interpretive directive.

[19] With respect to the "attributable to military service" requirement, the CDS reiterated his finding that personal factors, and not military service, were the cause of Captain Fawcett's injuries.

III. Issues

[20] Captain Fawcett raises the following issues with the CDS decision:

A. Did the CDS properly consider the impact of the FCP?

B. Is the finding that Captain Fawcett was not on duty at the time of the accident reasonable?

C. Is the finding that Captain Fawcett's injury was not attributable to military service reasonable?

IV. Standard of Review

[21] The parties agree that the standard of review of the CDS decision is reasonableness.

[22] In this context however, the reasonableness standard is applied even more deferentially because of the highly specialized nature of the grievance process within the CF (*François v Canada (Attorney General)*, 2017 FC 154 at para 32; *Higgins v Canada (Attorney General)*, 2016 FC 32 at paras 75-77).

[23] Captain Fawcett did not raise any issues of procedural fairness.

V. Analysis

A. *Did the CDS properly consider the impact of the FCP?*

[24] Captain Fawcett argues that the CDS failed to properly consider the unique circumstances of her family situation when he was considering the FCP.

[25] The FCP is provided for in DAOD 5044-1. It exists to assist service members with planning for family care needs in the event of an absence for duty reasons. The FCP Declaration, at issue in this case, consists of two parts.

[26] Completion of Part I of the FCP is mandatory. DAOD 5044-1 requires that *all* members complete Part I of the form, which states that the CF member has a FCP in place, and has established it "in good-faith". However, DAOD 5044-1 expressly notes that Part II of the form "may also be completed at the option of a member to provide information to unit authorities concerning the member's FCP."

[27] Although DAOD 5044-1 notes that it is only mandatory to complete Part I, Captain Fawcett argues that because her unit and her husband's unit were in "high readiness" states, she was effectively required to complete Part II of the FCP. She points to CFJSG Standing Order 35-1 (Family Care Plan) [the Standing Order], which defines the FCP in the context of Captain Fawcett's unit at the time of the accident. The Standing Order provides:

> The overall purpose of this direction is to maximize deployability. Many CF personnel have not passed their DAG due to family care issues. The CF is attempting to ensure that plans are made, with a view to allow personnel to proceed on duty without unnecessary delays.

[28] Captain Fawcett further notes that there are repercussions for not completing the FCP, according to DAOD 5044-1.

[29] She argues that the combined effect of the high readiness requirements of her and her husband's units, along with the repercussions of not completing a FCP, makes the FCP tantamount to a CF order. In her circumstances she argues that the FCP was triggered because her husband was training for imminent deployment and she assumed the FCP obligations.

[30] Captain Fawcett's argument misapprehends the nature of the FCP described above. Part I of the FCP is the only part to which penalties attach. Specifically, DAOD 5044-1 notes that disciplinary action can be taken if a member does not in *good-faith* take into account family circumstances in the preparation of the FCP.

[31] This, however, is separate from the *execution* of the FCP and the content of Part II. A commanding officer cannot tell a member to execute the FCP, nor can a commanding officer

dictate the content of Part II of the FCP. In fact, DAOD 5044-1 notes that while a member may seek advice on the preparation of the FCP, the form submitted by the member may be reviewed by authorities "for completeness only." There are no penalties which attach to the completion or failure to complete Part II of the FCP.

[32] Accordingly, the operative content of Captain Fawcett's FCP is Part II, which contains information dictated by Captain Fawcett's particular family circumstances, and not dictated by the CF. By contrast, the only component of the FCP to which military repercussions may attach for failure to complete is Part I, which is simply a declaration that there is a FCP is in place.

[33] The provision relied upon by Captain Fawcett in the Standing Order does not contradict the fundamental purpose of the FCP set out in DAOD 5044-1. While Captain Fawcett and her husband were in high-readiness units, that does not change the nature of the FCP as a contingency plan, the operative content of which is defined by CF members themselves.

[34] The situation might be different if either Captain Fawcett or her husband were in fact deployed. However, that was not a consideration for the CDS, and based upon the circumstances, the CDS reasonably concluded that the fact that both she and her husband were in high readiness status was not sufficient to trigger the FCP.

[35] Therefore, the conclusion by the CDS that "no military-business purpose was served" when Captain Fawcett was excused from her duties was a reasonable conclusion.

B. *Is the finding that Captain Fawcett was not on duty at the time of the accident reasonable?*

[36] Captain Fawcett's arguments with respect to being on duty at the time of the accident are tied to her argument that the FCP was a CF order. She argues that since she was executing her FCP at the time of the accident, she was on duty. She argues that the CDS finding that she was not "on duty" at the time of the accident is not reasonable.

[37] Whether Captain Fawcett was on duty at the time of the accident involves an interpretation of DAOD 5044-1 and CFAO 24-6, which defines the concept of duty.

[38] The relevant provision of CFAO 24-6 provides as follows at section 28:

> Duty. In some cases difficulty may be encountered in determining whether the injured person was on duty. The best policy is to place a wide interpretation on the meaning of the word "duty." Any attempt to define this word is likely to be unduly restrictive or so nebulous as to be of little value. Without restricting the foregoing, as a general rule a member is considered to be on duty:
>
> […]
>
> d. when he is at a specific place, or doing a specific act, because of a military order;

[39] The CDS reviewed DAOD 5044-1 in light of this definition of duty by considering its text, context, and purpose. This was an appropriate approach to the interpretation of the relevant policies and directives in light of their statutory context (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at paras 32-34).

[40] The CDS considered the background to the establishment of the FCP as described in the *Standing Committee on National Defence and Veterans Affairs Report* [the Report]. The Report notes the purpose of the FCP is to address "what happens when military personnel have to deploy on very short notice at any time of the day." However, the Report specifically notes that family needs on a routine day are not the purpose of the FCP.

[41] Accordingly, the CDS concluded that the FCP was not applicable to the circumstances where Captain Fawcett was dropping her son off at daycare, but had not been called away from family for military duty.

[42] This is a reasonable conclusion in light of the basis upon which the FCP requirement was established. In the circumstances, Captain Fawcett was not at a place or doing an act because she was so directed by the military. Rather, she was in fact away from military duty at the time of the accident.

[43] The CDS did not err by concluding that Captain Fawcett sought and received permission to be away from *duty for family reasons*, whereas the FCP only governs absences from *family for duty reasons*.

[44] The CDS' conclusion that Captain Fawcett was exercising a parental responsibility outside of the confines of a military order or duty was based on a reasonable interpretation of the relevant directives and legislation.

C. *Is the finding that Captain Fawcett's injury was not attributable to military service reasonable?*

[45] Captain Fawcett argues that the CDS unreasonably attributed personal factors to the analysis of her activity on the morning of the accident. She argues that the CDS should have considered the fact that she and her husband were in high readiness units, meaning the CF exercised a high degree of control over their lives. This fact, coupled with the FCP requirement, she argues, provides the nexus to conclude that she was engaged in "military service" at the time of the accident. She argues that the CDS took an unreasonably narrow or restrictive interpretive approach.

[46] The relevant provision of CFAO 24-6 dealing with attributability states as follows:

> 30. Attributability. As a general rule "attributable to military service" is interpreted as meaning "arose out of or was directly connected with service"… While most injuries that occur while on duty are attributable to military service, the one does not necessarily follow the other. For instance, if a member was injured while on duty as a direct result of his improper conduct, it should not be considered attributable to military service. On the other hand, an injury might occur while not on duty but the circumstances make it attributable. For instance, if a member was injured not while on duty but as a result of the dangerous condition of military quarters, it could be considered attributable to service.

[47] The CDS acknowledged that there are two concepts within this definition, namely: "directly connected with military service" and "arose out of military service." In both instances he concluded that the meaning cannot be stretched to capture the concept of parental responsibilities equating military service.

[48] The CDS considered the decisions in *Cole* and *Canada (Attorney General) v Frye*, 2005 FCA 264 [*Frye*] in assessing attributability. However, the CDS distinguished both *Frye* and *Cole*. Those cases were decided under the *Pension Act*, which requires that its terms be interpreted liberally. As noted above, no such requirement exists under CFAO 24-6.

[49] Captain Fawcett disagrees, and points to s.27 of CFAO 24-6, which provides that:

> 27. Findings. …While the Canadian Pension Commission is not bound to follow the findings of the investigations, and makes its own decision based on the evidence, the Commission will often be assisted by the opinions of military authorities, especially in doubtful cases. Section 85 of the *Pension Act* requires the Commission to resolve "all reasonable inferences and presumptions in favour of the applicant." The remarks of military authorities may well be considered as establishing a basis of reasonable inference or presumption.

[50] However, this provision does not impose a requirement to liberally interpret CFAO 24-6; rather, it contemplates that the remarks of military authorities may assist an applicant under the *Pension Act.* While Captain Fawcett may ultimately seek to establish entitlement to a disability award, her substantive claim in this case is governed by military directives, notably CFAO 24-6.

[51] Therefore, the CDS' interpretation of CFAO 24-6 as different from the *Pension Act* was not an error. Given the deference owed to the CDS, his conclusion that Captain Fawcett's discharge of her parental responsibilities was not attributable to military service was reasonable, especially since the FCP does not constitute a military order or duty.

[52] Overall, the CDS considered the appropriate legislation, directives and case law in reaching his conclusion. Captain Fawcett has pointed to no other reviewable error in the assessment of the evidence by the CDS. Therefore, the CDS finding is within the range of possible outcomes and on a reasonableness review there is no basis for this court to intervene.

VI. Conclusion

[53] While Captain Fawcett makes very able and persuasive arguments, because of the high level of deference owed to the findings of the CDS, there is also a high threshold to meet to demonstrate that the CDS decision is unreasonable. Unfortunately, Captain Fawcett has not met that threshold. This judicial review is therefore dismissed. However, considering the lengthy administrative history to this judicial review, not occasioned through any fault of Captain Fawcett, I decline to award costs.

JUDGMENT in T-2187-16

THIS COURT'S JUDGMENT is that this judicial review is dismissed without costs.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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