Federal Court  Cour fédérale

Date: 20200615

Docket: T-1025-19

Citation: 2020 FC 693

Ottawa, Ontario, June 15, 2020

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

ANTHONY SNIEDER

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, former Captain [Capt] Anthony Snieder [Applicant or Capt Snieder], is a retired Officer and pilot of the Royal Canadian Air Force [RCAF]. He served initially from 1983 to 1995, and again from July 14, 2010 until he was honourably released on March 8, 2013. While still an active RCAF member, Capt Snieder filed a harassment complaint dated January 22, 2013 [Complaint] under the Department of National Defence's *DAOD 5012-0, Harassment*

Prevention and Resolution Directive and the *Harassment Prevention and Resolution Guidelines* A-PM-007-000/FP-001 against then-Major [Maj] Chambers. This Complaint passed through the hands of several RCAF Responsible Officers [ROs] because of alleged conflicts of interest. It also was closed and re-opened more than once and eventually was re-assigned to Colonel [Col] Jourdain of the Canadian Army for determination.

[2] On June 13, 2019, Col Jourdain determined the Complaint was unfounded and dismissed it. Capt Snieder now challenges Col Jourdain's dismissal as procedurally unfair and unreasonable, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[3] Though Capt Snieder's Complaint was not handled expeditiously and encountered obstacles not of his making during its 6-year path to Col Jourdain's determination, for the reasons that follow I nonetheless dismiss this judicial review application for mootness.

II. Background

[4] In his Complaint, Capt Snieder alleged Maj Chambers, then a fellow officer at the flight training school in Moose Jaw, Saskatchewan, had harassed him by spreading false statements about him in an attempt to "poison [his] work environment". The Complaint was submitted to Capt Snieder's Commanding Officer [CO] at the time, Lieutenant Colonel [LCol] Greenough. On February 21, 2013 Capt Snieder filed a grievance about how the Complaint was being handled, alleging the RO LCol Greenough was a potential witness and thus had a conflict of interest.

[5] The Grievance ostensibly was considered and dismissed by then Brigadier General [BGen] Galvin under the grievance procedure set out in the *National Defense Act*, RC 1985, c N-5. On review, however, the Military Grievance External Review Committee [MGERC] found on October 29, 2013 that, among other things, BGen Galvin improperly considered only Capt Snieder's original Complaint and thus recommended redress be granted and an investigation be held. The matter was remitted for reconsideration to the Chief of the Defense Staff, General [Gen] Lawson.

[6] On October 1, 2014, Gen Lawson denied the Grievance because of insufficient information on the harassment itself. Gen Lawson agreed, however, that LCol Greenough should not have been named as the RO given the alleged conflict of interest and hence re-opened the Complaint, naming himself as RO. He then conducted an initial Situation Assessment [SA], the contents of which are not before this Court.

[7] On November 17, 2014, Capt Snieder provided Gen Lawson with additional information on four discrete alleged incidents of harassment by or at the behest of Maj Chambers, summarized briefly as follows [Instance or Instances]:

1. **Instance 1 [September 2012]:** He was informed by another officer that he was denied an upgrade to an A2 instructor because Maj Chambers allegedly refused to endorse him, citing he was "too old".

2. **Instance 2 [December 2012]:** He was ordered, allegedly indirectly by Maj Chambers, "to stop mentoring inexperienced QFI's on best safety practices in the performance of their duties as QFI's teaching student pilots".

3. **Instance 3 [December 2012]:** He was the subject of a disparaging public conversation led by Maj Chambers during a dinner where Capt Snieder was honoured with an award as Top Instructor.

4. **Instance 4 [January 2013]:** He was shouted at and further disparaged by an officer [who allegedly was friends with Maj Chambers] in front of others in the public flight instructors' lounge after he agreed with yet another officer that the school was violating flying orders.

[8] Following this letter, Gen Lawson forwarded Capt Snieder's Complaint on December 11, 2014 to the Commander of 15 Wing [Moose Jaw, Saskatchewan], Col Day, to "take appropriate action" as the new RO. Col Day conducted a SA and, on February 27, 2015, concluded the elements of harassment were not met and dismissed the application. Capt Snieder submitted two reconsideration requests to Gen Lawson. As these remained unanswered, Capt Snieder applied for judicial review: *Snieder v Canada (Attorney General)*, 2016 FC 468 [*Snieder*]. Though the Attorney General conceded Col Day's decision was flawed and should be set aside, Justice Boswell found the matter moot as Capt Snieder no longer was an active RCAF member serving with LCol Chambers nor was Capt Snieder working with him in the same workplace: *Snieder* at para 13. [That Capt Snieder's re-enrollment with the RCAF in 2010 was fraught with challenges from the outset can be gleaned from the decision in the earliest of three judicial reviews commenced by Capt Snieder since then: *Snieder v Canada (Attorney General)*, 2013 FC 218. Though Capt Snider was not successful in the latter judicial review, I note that the issue of reimbursable relocation expenses eventually was settled in Capt Snieder's favour.]

[9] Capt Snieder subsequently persuaded new Chief of Defence Staff, Gen Vance, to re-open the matter. It appears Gen Vance agreed to do so in part because Col Day never conducted a proper SA [which Capt Snieder alleged was against Gen Lawson's instructions], and because the Attorney General admitted it was "flawed and unreasonable" and "should be set aside".

[10] On July 20, 2017, Gen Vance ordered a new SA of Capt Snieder's original Complaint to be conducted by the RCAF, with the assistance of the Director General of the Canadian Forces Grievance Authority. This SA was conducted by BGen Howden who, after reviewing the above four discrete incidents of harassment alleged by Capt Snieder, found only Instances 3 and 4 met the criteria for workplace harassment. BGen Howden noted he reviewed Capt Snieder's two letters–dated November 17, 2014 and January 15, 2015—thoroughly. I note that the latter letter is not contained in the CTR nor either party's record in this judicial review. Instances 1 and 2 were not pursued further because BGen Howden found that they involved a proper exercise of authority or normal chain of command [CoC] authority.

[11] Regarding BGen Howden's finding on Instance 1, I note that he commented on the limited number of spaces available concerning the upgrade to A2 instructor in arriving at the conclusion there was a proper exercise of authority. The number of spaces available, however, is no justification for age discrimination if it occurred. Accordingly, it is not clear that this Instance was assessed properly or reasonably by BGen Howden, as the brief chain of analysis provided is illogical on its face. This lack of clarity is exacerbated by the absence of Capt Snieder's January 15, 2015 letter from the Court record.

[12] Based on BGen Howden's SA, Gen Vance requested an external Harassment Investigator [HI], Commissionaires Corporate Investigations [CCI], to conduct a harassment assessment investigation on Instances 3 and 4 of Capt Snieder's Complaint [CCI Report]. CCI interviewed Capt Snieder and other officers, including Maj [now LCol] Chambers. CCI noted that Capt Snieder provided the names of several other direct witnesses, but that they were not interviewed because their relevance to the alleged two incidents could not be substantiated. Regarding Instance 3, CCI concluded there was no evidence (i) of improper conduct by LCol Chambers, as supported by witnesses who had attended the dinner, including one of the witnesses who allegedly informed Capt Snieder of the incident; (ii) any conduct by LCol Chambers would cause offence or harm to Capt Snieder; and (iii) of any action that would constitute harassment. CCI also found there was no evidence to substantiate LCol Chambers was leading the alleged "campaign of hate" against Capt Snieder. Regarding Instance 4, CCI noted that one of the witnesses, an exchange pilot from Hungary, was not available for an interview; another witness indicated LCol Chambers was not present during the argument in the flight instructors' lounge; and a third witness attested he was "unaware of any 'Anti-SNIEDER campaign'". No other witnesses were interviewed. As there was no independent evidence of harassment, CCI concluded the two Instances did not meet the criteria for workplace harassment.

[13] The CCI report was sent to Capt Snieder for comment who, on October 22, 2018, provided his response to the newly-appointed RO, Col Potvin. Among his concerns, Capt Snieder noted the investigator focused only on two Instances in isolation, despite them not being isolated events. The investigator also failed to consider "aggravating or mitigating circumstances" involved, including LCol Chambers' alleged attempts to discredit Capt Snieder

and to disrupt Capt Snieder's efforts to prevent LCol Chambers from creating the dangerous flying culture that eventually existed in Moose Jaw. In addition, Capt Snieder questioned why certain witnesses whose contact information he had provided were not interviewed, and requested that they all be contacted for an interview, asserting that "[a]s the investigation stands, I determine the investigation is unfair and not in compliance with the TB *'Investigation Guide on the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process'* and the Canadian Forces' *'Harassment Prevention and Resolution Instructions"*".

[14] Capt Snieder also contacted Col Potvin to inquire about a possible conflict of interest, as Col Potvin had previously worked with then-Maj Chambers. After consultation, Col Potvin subsequently was replaced as RO by Col Spott on October 29, 2018. That same day, Capt Snieder wrote to General Vance to request the Complaint be handled instead by an officer in the Canadian Army, given the history of cycling ROs and lack of impartiality. In response, Gen Vance directed the Commander of the Canadian Army to appoint an officer to assume the duties of the RO on the Complaint.

[15] On November 15, 2018, Colonel Jourdain was appointed as the RO. Capt Snieder's October 22, 2018 reply to the CCI report was sent to Col Jourdain on November 29, 2018. Col Jourdain followed up with CCI on February 1, 2019, and provided it with a copy of Capt Snieder's observations. Conceding it did not recall seeing Capt Snieder's responding submissions, CCI nonetheless confirmed "there is nothing within [Capt Snieder's submissions] would change [its] opinion with regard to the harassment complaint". CCI confirmed its

assessment that some of Capt Snieder's proposed witnesses were not relevant to the two Instances it was tasked with investigating, and acknowledged some witnesses were interviewed whose names were not supplied.

III. Decision under Review

[16] On June 13, 2019, Col Jourdain issued a Final Decision and closed the Complaint. Col Jourdain began by confirming his impartiality and indicating that the scope of his investigation was limited to Capt Snieder's Complaint [of January 22, 2013] and the subsequent November 17, 2014 letter of supporting information detailing Instances 1-4. Col Jourdain also confirmed he considered not only the CCI Report [produced following BGen Howden's SA] regarding the two Instances investigated, but also Capt Snieder's responding remarks, in his final conclusion which dealt only with the two Instances. Col Jourdain held both Instances investigated by the CCI were unfounded, on a balance of probabilities. Concerning Instance 3, he noted "no witnesses indicated remembering any discussion that could lead to conclude there was harassment against [Capt Snieder]". Concerning Instance 4, he found "LCol (then Maj) Chambers was not present in the argument [and…] [t]herefore, nothing could support that he harassed you".

[17] Col Jourdain explained that following an informal discussion with a further potential witness and with the CCI about two other potential witnesses, he concluded that there was no "value-added" by these witnesses to the issues under investigation "and therefore, no further questioning by the investigators was required". Finally, Col Jourdain held that the evidence of a fourth potential witness to events in Afghanistan in 2009 involving the Maj Chambers "had

nothing to do with the allegations that were the subject of this harassment investigation […and] have been investigated by other agencies and have no links to your harassment complaint".

IV. Issues

[18] This judicial review raises the following preliminary issue:

A. Is this judicial review application moot?

[19] If the answer to the preliminary issue is no, then it falls to the Court to address the following additional issues:

B. What is the applicable standard of review?

C. Was Col Jourdain's final decision procedurally fair?

D. Was Col Jourdain's final decision reasonable?

V. Analysis

A. *Is this judicial review application moot?*

[20] As the Supreme Court of Canada [SCC] held in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 [*Borowski*] at para 15:

> [15] The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.

> … [If] no present live controversy exists which affects the rights to the parties, the case is said to be moot. …

[21] Notwithstanding the absence of a live controversy, the Court nonetheless may exercise its discretion to hear the matter if the circumstances warrant: *Borowski*, above at paras 15-16.

[22] As mentioned above, in concluding the previous judicial review of this matter was moot, Justice Boswell held that there no longer was a "live controversy or concrete dispute" as former Capt Snieder and LCol Chambers no longer shared a workplace and there was no evidence of ongoing harassment despite Capt Snieder's retirement. Accordingly, even though the Attorney General conceded Col Day's decision was flawed and unreasonable, Justice Boswell found it would serve no practical purpose if the matter was remitted for a new investigation: *Snieder*, above at paras 12-13.

[23] In the present judicial review, there is no similar concession regarding Col Jourdain's Final Decision. Though in my view the HI or CCI report and Final Decision were unduly restricted [to Instances 3 and 4 because of BGen Howden's illogical and unreasonable finding regarding Instance 1 in the SA], I find the fundamental facts that resulted in this Court's previous finding of mootness have not changed. Capt Snieder remains retired and no longer shares a workplace with LCol Chambers, nor is there anything on the record that suggests that LCol Chambers has continued to harass him or that Capt Snieder intends to rejoin the RCAF. In other words, "there is no longer an adversarial context concerning the parties involved in the harassment complaint": *Snieder*, above at para 15. Moreover, even in the unlikely event that they were to return to the same workplace in the RCAF, this alone would not be sufficient to

reanimate an otherwise moot issue, especially given that Capt Snieder would have recourse to a similar harassment complaint and grievance system should a similar series of events occur again: *Kozarov v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 185 at paras 4-5.

[24] As noted in *Borowski*, the Court nonetheless retains discretion to determine the matter before it where the circumstances warrant. This requires consideration of three principles, set out in *Borowski*, above at paras 31, 34 and 40:

1) the presence of an adversarial relationship;
2) the need to promote judicial economy; and
3) the need for the Court to show a measure of awareness of its proper role as the adjudicative branch of government.

[25] The Federal Court of Appeal [FCA] recently elaborated on the above principles in *Democracy Watch v Canada (Attorney General)*, 2018 FCA 195 [*Democracy Watch*] at para 14:

> [14] The first factor may support the exercise of the discretion where despite the absence of a concrete dispute, the issues will be fully argued by parties with a stake in the outcome. The second factor includes, where applicable, consideration of whether the case presents a recurring issue, but one that is of short duration or otherwise evasive of court review. The third factor recognizes that the courts' primary task within our constitutional separation of powers is to resolve real disputes. As this Court has stated, "While *Borowski* and cases that apply it do not forbid courts in appropriate circumstances from determining a proceeding after the real dispute has disappeared, this underlying rationale reminds us that the discretion to do so must be exercised prudently and cautiously": *Canada (National Revenue) v. McNally*, 2015 FCA 248 at para. 5.

[26] As noted in 1.3 of the above-mentioned *Harassment Prevention and Resolution Guidelines*, the parties to the Complaint are Capt Snieder as the Complainant and LCol [then Maj] Chambers as the Respondent. I agree wholeheartedly with Justice Boswell that the Court's

determination of mootness "must not be taken or interpreted as suggesting that situations of harassment in the Canadian Forces should not escape judicial scrutiny simply because a complainant may no longer be a member of the Canadian Forces by the time their complaint is dealt with through the [complaint or] grievance process" [nor by reason that the parties no longer share the same workplace]: *Snieder*, above at para 17. Nonetheless, I find similarly there no longer is in fact an adversarial context concerning the parties to the Complaint.

[27] Regarding the issue of judicial economy, the Attorney General similarly did not bring a motion prior to this hearing. I therefore also agree with Justice Boswell's conclusion: "To the extent that the Court should be mindful of utilizing scarce judicial resources by hearing matters which are otherwise moot, those resources were already expended upon the hearing of this matter. Judicial economy is not really a factor, therefore, in the circumstances of this case": *Snieder*, above at para 16.

[28] The third principle –the need of the Court to show a measure of awareness of its proper role as the adjudicative branch of government—also favours dismissal. This Court consistently has taken a cautious approach to hearing otherwise moot points in recognition of this principle, as illustrated by the FCA in *Canada (National Revenue) v McNally*, 2015 FCA 248 at para 5:

> [5] The task of courts within our constitutional separation of powers is to pronounce on legal principles only to resolve a real dispute. Absent a real dispute, the judicial pronouncement of legal principles can smack of gratuitous law-making, something that is reserved exclusively to the legislative branch of government: see the opening words of sections 91 and 92 of the *Constitution Act, 1867*. While *Borowski* and cases that apply it do not forbid courts in appropriate circumstances from determining a proceeding after the real dispute has disappeared, this underlying rationale reminds us that the discretion to do so must be exercised prudently and cautiously.

VI. Conclusion

[29] Having considered the above factors, I decline to exercise my discretion to consider this matter further despite the finding of mootness, and accordingly dismiss this judicial review application.

[30] I find the Applicant, who was self-represented, ably argued his case. In the interests of not dissuading similarly situated individuals from seeking judicial review of the outcome of their harassment claims, I also decline to order any costs in this matter.

JUDGMENT in T-1025-19

THIS COURT'S JUDGMENT is that this judicial review application is dismissed; and no costs are awarded.

"Janet M. Fuhrer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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