Federal Court Cour fédérale

Date: 20211012

Docket: T-957-21

Citation: 2021 FC 1061

Fredericton, New Brunswick, October 12, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

DANY FORTIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

Overview

[1] The amended judicial review application (application) filed by Major-General Dany Fortin (MGen Fortin) raises issues about the circumstances leading to his removal from the position of Vice President Logistics and Operations with the Public Health Agency of Canada (PHAC). In this position, he was leading Canada's COVID-19 vaccine distribution. MGen Fortin alleges that on May 14, 2021, a decision was made by the Minister of Health, the Minster of National Defence, the Prime Minister of Canada, and the Clerk of the Privy Council Office

(PCO) to remove him from this position prior to the October 31, 2021 end date. He alleges that the decision was not made by the Acting Chief of Defence Staff (ACDS) of the Canadian Armed Forces (CAF) - then Lieutenant-General Wayne Eyre (LGen Eyre), being the only person in the chain of command with authority to do so - rather, he alleges it was made by political actors and was prompted by a change in the “political calculus”.

[2] In response to MGen Fortin’s application, the Attorney General (AG) filed a Motion to strike the application on the ground that the issues he raises must first be addressed through the internal CAF grievance process provided for by section 29 of the *National Defence Act*, RSC, 1985, c N-5 (NDA). MGen Fortin has not filed a grievance.

[3] In his application, MGen Fortin asks to be reinstated to the position he held with PHAC, or a position commensurate with his rank of Major-General. Alternatively, he asks this Court to remit the matter to the ACDS for re-determination. Given the time-sensitive nature of the reinstatement remedy sought, the application and the Motion proceeded on an expedited basis and were heard on September 28 and 29, 2021. Submissions on the AG’s Motion to strike were made first, followed by full submissions on the application.

[4] Having fully considered this matter, I am granting the AG’s Motion. At all times, including while serving with PHAC, MGen Fortin was an officer in the Regular Force component of the CAF. Therefore, it is clear that the issues raised in the application are service-related matters and the allegations of political interference are not “exceptional circumstances”

that would allow MGen Fortin to bypass the grievance process and seek a preliminary remedy in this Court.

[5] Accordingly, as MGen Fortin has not yet availed himself of the CAF grievance process on these issues, the Court will not consider the merits of his application as it has been brought prematurely. The AG's Motion to strike is granted.

Relevant Facts

[6] In considering the Motion to strike, the Court accepts the facts alleged in the application as being true (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at para 52 [*JP Morgan*]). The following facts are drawn from the application materials.

[7] In October 2020, PHAC requested assistance from the CAF for the COVID-19 vaccine roll-out strategy. On November 27, 2020, MGen Fortin was seconded to work with PHAC (as part of Operation VECTOR) in the role of Vice President Logistics and Operations.

[8] On February 25, 2021, PHAC requested that the CAF support, including the position filled by MGen Fortin, be extended until October 31, 2021. The request was approved by the Minister of National Defence on the advice of the LGen Eyre, who was then the Acting Chief of Defence Staff (ACDS).

[9] On March 17, 2021, ACDS LGen Eyre informed MGen Fortin that the Canadian Forces National Investigation Service (CFNIS) had launched an investigation into an allegation of sexual misconduct.

[10] On March 18, 2021, MGen Fortin informed Iain Stewart – the President of PHAC – of the allegation. Though Mr. Stewart indicated that there would be no change in his position initially, Mr. Stewart advised that the Minister of Health's Office and the Prime Minister's Office might change their minds later. Mr. Stewart advised MGen Fortin that he should prepare himself "for the moment when they determine that you need to be let go" and that he should "keep [his] bags packed".

[11] On April 19, 2021, a CFNIS investigator advised MGen Fortin that he was being investigated for one instance of sexual misconduct dating back over 30 years.

[12] On May 11, 2021, ACDS LGen Eyre signed a Performance Report, recommending MGen Fortin for immediate promotion.

[13] On May 13, 2021, Mr. Stewart told MGen Fortin that the Ministers of Health and National Defence wanted him removed from his position at PHAC. Mr. Stewart also told him to "take a sick day tomorrow". That evening, ACDS LGen Eyre called MGen Fortin and indicated they would work on a transition the next day. ACDS LGen Eyre also indicated that the PCO had said he would have to be removed.

[14] On May 14, 2021, MGen Fortin was advised by the ACDS that his secondment to PHAC was terminated, and that a statement would be released to the public. MGen Fortin did not receive any written confirmation of the decision, but understands the decision to have been made jointly by the Minister of Health, the Minister of National Defence, the Prime Minister, and the Clerk of the Privy Council Office.

[15] MGen Fortin states that since May 14, 2021, he has been without assignment at the CAF and he claims that he has been *de facto* relieved from the performance of military duty.

[16] The CFNIS investigation into the sexual misconduct allegation involving MGen Fortin was subsequently referred to the Director of Criminal and Penal Prosecutions of Quebec on May 19, 2021.

Issue

[17] On the Motion, the issue is whether the application should be struck for having been brought prematurely. In other words, does MGen Fortin first have to proceed with an internal grievance prior to seeking the intervention of the Court?

Analysis

Legal Test

[18] In considering the Motion to strike, the following from *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 at paras 31-32 (Stratas J.A.) outlines the applicable principles:

> Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
>
> This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway […] Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker’s findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience […] Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge […].

[19] The Court will only strike an application where there is a fatal flaw striking at the root of this Court’s power to entertain the application (*JP Morgan* at para 47). In undertaking this analysis, the Court must gain “a realistic appreciation” of the “essential character” of the application (*JP Morgan* at para 50).

[20] MGen Fortin alleges that the facts, as outlined above, establish that political decision-makers interfered with the powers and functions of the ACDS and prevented the ACDS from reassigning him to another position commensurate with his rank. In his application, he raises issues of the unreasonableness of the decision (paras 39-40); harm to his reputation (paras 41, 43, 44); improper interference with the military chain of command (para 42); and breach of procedural fairness (para 46, 47).

[21] By way of relief, in the application MGen Fortin seeks an order quashing the decision (para 1), and reinstatement to his secondment at PHAC and/or a position commensurate with his rank (para 2). In the alternative, he seeks an order referring the matter to the ACDS for a forthwith re-determination consistent with the Court's reasons (para 3).

[22] In considering if the application is premature, the Court must ask: (a) is there recourse elsewhere, now or later; (b) is the recourse adequate and effective; and, (c) are the circumstances of the sort of unusual or exceptional circumstances recognized by the case law or analogous thereto (*Picard v Canada (Attorney General)*, 2019 CanLII 97266 (FC) at para 24 [*Picard*]; *JP Morgan* at para 91).

[23] I will address these factors below.

(a) Recourse - CAF Grievance Process

[24] Section 29(1) of the NDA states:

Right to grieve	**Droit de déposer des griefs**

29 (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.	**29 (1)** Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

[25] The breadth of grievances contemplated by this provision were discussed in *Jones v Canada*, (1994) 87 FTR 190 at paras 9, 10 [*Jones*] and reiterated in *Bernath v Canada*, 2005 FC 1232 at para 35 [*Bernath*] as follows:

> … it's the broadest possible wording [of section 29 of the Act] that accommodates any and every wording, phrasing, expression of injustice, unfairness, discrimination, what-not. It covers everything. It leaves nothing out. It's exhaustively comprehensive […] there is no equivalent provision in any other statute of Canada in terms of the scope of the wrongs, real , alleged, imagined wrongs that a person can get redress for anything. That is the difference between the civilian and the military person.

[26] Considering the broad coverage afforded by section 29(1) of the NDA, the allegation that political decision-makers interfered with the powers and functions of the ACDS would, in my view, constitute an "act or omission" of the ACDS within the meaning of this provision. Relatedly, I note section 18(2) of the NDA states: "Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff". This provision makes it clear that the CDS (the ACDS in these circumstances) is the appropriate authority when the CAF is carrying out the directions of the Government of Canada. If this legislative mandate was not respected, as

claimed by MGen Fortin, or if there was a failure or omission of the ACDS to follow this mandate, these failures can and should be addressed through section 29(1) of the NDA.

[27] The grievance process itself is outlined in the *Queen's Regulations and Orders* (QR&O) and provides for two levels of grievance. At the first level, a grievance is filed with the initial authority (IA). The grievance can then be escalated to the final authority (FA), being the Chief of Defence Staff (QR&O ss. 7.14, 7.16; NDA s. 29.11).

[28] In MGen Fortin's case, because the issue is an "act or omission" of the ACDS in failing to make a decision, or in making a decision based upon political influence, the grievance process requires that the CDS refer the grievance to the Military Grievances External Review Committee (Grievances Committee). This is outlined at paragraph 7.21(e) of the QR&O as follows:

> **7.21 – TYPES OF GRIEVANCES TO BE REFERRED TO GRIEVANCES COMMITTEE**
>
> For the purposes of subsection 29.12(1) of the National Defence Act, the final authority shall refer to the Grievances Committee any grievance relating to one or more of the following matters:
>
> (e) any decision, act or omission of the Chief of the Defence Staff in respect of a particular officer or non-commissioned member.

[29] The duties and functions of the Grievances Committee are outlined at sections 29.2(1) and 29.2(2) of the NDA as follows:

Duties and functions	**Fonctions**
29.2 (1) The Grievances Committee shall review every grievance referred to it by the Chief of the Defence Staff and provide its findings and	**29.2 (1)** Le Comité des griefs examine les griefs dont il est saisi et transmet, par écrit, ses conclusions et recommandations au chef

recommendations in writing to the Chief of the Defence Staff and the officer or non-commissioned member who submitted the grievance.	d'état-major de la défense et au plaignant.
Duty to act expeditiously	**Obligation d'agir avec célérité**
(2) The Grievances Committee shall deal with all matters before it as informally and expeditiously as the circumstances and the considerations of fairness permit.	**(2)** Dans la mesure où les circonstances et l'équité le permettent, il agit avec célérité et sans formalisme**.**

[30] Section 29.21 provides that the Grievances Committee has the power to summon the attendance of witnesses, compel them to give evidence under oath, and produce any necessary documents.

[31] Accordingly, any grievance filed by MGen Fortin would, in accordance with paragraph 7.21(e) of the QR&O be referred to the Grievances Committee. The Grievances Committee provides its findings and recommendations to the CDS, who, while not bound to follow the recommendations, must provide reasons for departing from them (NDA, s. 29.13). It is this decision of the CDS following the grievance process that is subject to judicial review before the Federal Court (NDA, s. 29.15).

[32] The time within which to file a grievance is addressed in section 7.06 of the QR&O and provides a 3-month period to file a grievance from a decision, act or omission. However, there is discretion to allow grievances to be filed beyond 3-months. On the timing issue, I would note that in pursuing his application in this Court, MGen Fortin has demonstrated an intention to seek

redress and he has acted without delay. Accordingly, I am confident that any grievance he files will be considered even if filed after 3 months. In any event, if either the IA or FA refuse to hear the grievance due to delay, reasons in writing must be provided (QR&O, s. 7.06(3)) and this would be subject to judicial review.

[33] Based on the foregoing, I am satisfied that MGen Fortin has recourse through the CAF grievance process for the issues raised in his application.

(b) Is the Recourse Adequate and Effective

[34] MGen Fortin argues that the grievance process cannot provide an adequate remedy because the political actors who made the decision are outside the CAF chain of command. He also argues that the extraordinary nature of his termination and the resulting damage to his reputation cannot be adequately redressed through the grievance process.

[35] MGen Fortin relies upon cases where the Federal Court has allowed judicial review applications to proceed despite the availability of the grievance process. In *Gayler v Canada (Director Personnel Careers Administration Other Ranks, National Defence Headquarters)*, [1994] 1 FC 801 [*Gayler*], the applicant was advised by a Colonel acting under the authority of the Chief of the Defence Staff, that she was placed on counselling and probation for 12 months, and subject to urinalysis testing. She sought judicial review prior to exhausting the internal grievance process, which would have started with a complaint to her commanding officer. The Court held this was not a bar to judicial review, noting at para 14:

> If the commanding officer does not redress the complaint, the applicant is required to pursue the complaint through several levels of authority: (1) the Formation Commander; (2) the officer commanding the command; (3) the Chief of the Defence Staff; (4) the Minister; and (5) the Governor in Council. However, both counsel have confirmed that only the Chief of Defence Staff has the authority to overturn the decision made on his behalf. The lower levels of administration only have the power to make a recommendation to the Chief of Defence Staff.

[36] The reasoning in *Gayler* is explained in *Brown v Canada (Attorney General)*, [1998] 148 FTR 50 at para 25 [*Brown*] as follows: "The pertinent aspect of *Gayler* […] is that delay, through a meaningless set of appeals up the chain of command, may be sufficient to induce the Court to exercise its discretion to hear an application notwithstanding the result would be to bypass the military grievance procedure […]".

[37] A similar finding was made in *Loiselle v Canada (Attorney General)*, 1998 CanLII 8810 (FC), where the applicant's request for a voluntary release and transfer was ultimately denied by an Assistant Deputy Minister on behalf of the Minister of National Defence. The court allowed the judicial review application to proceed holding: "[Caption Loiselle] has, for all intents and purposes, a decision, albeit an informal one, made by the Minister of National Defence and communicated to him by a Lieutenant General Kinsman, Assistant Deputy Minister for Personnel and for the Department of National Defence. To force Captain Loiselle to go through the military grievance procedure would be an expensive, time consuming and meaningless exercise" (at para 18).

[38] The Courts in *Gayler* and *Loiselle* allowed the applications to proceed recognizing that the grievance process at that time required the applicants to proceed through a series of lower

levels of reconsideration before reaching the person with authority – who had essentially already made the decision. However, the grievance process has since changed and in any event, the process available to MGen Fortin is different. Pursuant to 7.21(e) of the QR&O because his grievance relates to an "act or omission" of the ACDS, it would be referred directly to the Grievances Committee. The Grievances Committee provides its findings and recommendations to the CDS. Considering that MGen Fortin's grievance would be referred to the Grievances Committee directly, and considering that he would not be required to go through a number of lower levels of reconsideration first, the process available to him cannot be characterized as "meaningless" as was found in *Gayler* and *Loiselle*.

[39] Although MGen Fortin characterizes his circumstances as being "outside" the purview of the CAF, there are a number of court decisions that demonstrate the broad range of matters that have been found to fall within the scope of the grievance process, including:

- decisions denying voluntary release (*Bast v Canada (Attorney General)*, [1998] 156 FTR 99, *Brown*);
- challenges to release from the CAF (*Donoghue v Canada (Minister of National Defence)*, 2004 FC 733, *Moodie v Canada (National Defence)*, 2008 FC 1233 [*Moodie*]);
- alleged breaches of statutory and fiduciary duties, breach of constitutional rights, and negligence in the context of being denied consideration for CAF positions (*Sandiford v Canada*, 2007 FC 225);
- challenges related to career progression and selection processes (*Graham v Canada*, 2007 FC 210);

- alleged *Charter* breaches and tortious conduct related to CAF employment (*Kleckner v Canada (Attorney General)*, 2017 ONSC 322);
- refusing to allow a member to revoke his voluntary release from active service and claims of harassment and discrimination (*Chua v Canada (Canadian Forces)*, 2014 FC 285).

[40] Overall, I conclude that the grievance process as outlined in the NDA and the QR&O provides the proper avenue through which MGen Fortin can and should seek recourse. It is broad enough to address the circumstances of his removal from the PHAC position, the alleged political interference, the alleged failure of the ACDS to make a decision, and the failure of the CAF to reassign him to a position commensurate with his rank.

[41] In terms of the effectiveness of the grievance process, MGen Fortin argues that it is time-consuming and not expeditious. He refers to the April 30, 2021 report of Justice Fish (Fish Report) who describes the CAF grievance system as "broken", and states:

> There were at least 1304 outstanding grievances in the CAF in mid-2020, almost equally divided between the Initial Authority and Final Authority levels. At least 200 were more than three years old, including 11 that dated back six to 10 years. As of February 21, 2021, the number of outstanding grievances had risen to 1350: 654 at the Initial Authority level, 696 at the Final Authority level.

[42] However, the Fish Report also notes a CDS Directive issued on March 3, 2021, which recognizes the unacceptable delays in the grievance process, and proposes an action plan to remedy the problem. Though Justice Fish expressed concern about "whether aspirational goals set out in the CDS Directive can be achieved without allocating additional resources", Justice

Fish also wrote: "I am persuaded that the current leadership of the CAF has the will to materially improve its deep-rooted system of justice."

[43] Although the expeditiousness of the alternative remedy is a factor this Court must weigh, arguments that the grievance process is time-consuming are not, on their own, sufficient. In a number of decisions, Courts have rejected arguments of delay in the absence of direct evidence that the grievance process is excessively slow (*Rose v Canada (Attorney General)*, 2011 FC 1495 at paras 28-30; *Picard* at paras 41-45; *Xanthopoulous v Canada (Attorney General)*, 2020 FC 401 at para 21, 24). In *Picard*, for example, the applicant relied on statistical evidence to argue that the RCMP internal appeal process would be excessively slow. However, the Court noted there was no evidence the applicant had made inquiries of the estimated timeline of his appeal (at para 41). Therefore, the Court held the evidence was insufficient to establish the RCMP appeal procedure was inadequate (at para 44).

[44] In contrast, in *Caruana v Canada (Attorney General)*, 2006 FC 1355 [*Caruana*], the Court permitted the applicant – an inmate at Bath Institution – to bypass the Correctional Service Canada (CSC) grievance process in relation to a Warden's decision to maintain his medium security classification. The applicant grieved the decision to the second level of the CSC grievance procedure. It took more than 8 months after the grievance was filed for the applicant to receive a decision. Rather than proceed onward to the third level of the grievance procedure, the applicant brought an application for judicial review. Given the direct evidence of delay, the Court held "it is not at all surprising that the Applicant chose to come to this Court rather than to

pursue his grievance at the third level […]" (at para 42) and subsequently considered the merits of the application.

[45] Contrary to the facts in *Caruana*, as MGen Fortin has not yet filed a grievance and there is no direct evidence as to the timeliness of the process available for his particular circumstances. Accordingly, his complaints about the process are at this point, purely speculative. As noted by the Court in *Moodie*, "[i]t is simply premature to assume that a remedy could not be provided through the administrative processes when the applicant has failed to take advantage of them" (at para 38).

[46] Ultimately, the issues raised by MGen Fortin relate to his military service, his professional reputation and his military career. The remedies he seeks can be provided within the CAF grievance process. The military context is unique and highly specialized and the issues raised are best considered by the Grievances Committee who has the ability to make recommendations to the ACDS. The ACDS ultimately has the ability to grant the remedies sought by MGen Fortin.

[47] As a final point, I would note the comment of the Supreme Court in *Strickland* where the court states that parties are not guaranteed a perfect alternative remedy, but rather an adequate remedy (at para 59). Here the remedy available to MGen Fortin while perhaps not perfect, is nonetheless adequate.

(c) Are there Exceptional Circumstances?

[48] MGen Fortin argues that there are exceptional circumstances in his case because the political actors who made the decision are outside the CAF chain of command. He argues that the grievance process would effectively immunize the true decision-makers. However, I note that despite the allegations of political interference, MGen Fortin does not seek a remedy against the “political” decision-makers. Rather, he seeks an order quashing the decision and reinstating him to his secondment at PHAC and/or a position commensurate with his rank. In the alternative, he seeks an order referring the matter to the ACDS for a re-determination consistent with the Court’s reasons. These are remedies that can be addressed though the grievance process.

[49] In my view, the high-profile nature of MGen Fortin’s position and the allegations of political interference are not exceptional circumstances that allow him to bypass the internal grievance process. The decision to removal him from the PHAC position was the ACDS decision to make. If that did not happen, the grievance process can address that failure. Similarly, the reinstatement request made by MGen Fortin is more properly considered by the CAF and not by the Courts. MGen Fortin is and has always been a member of the CAF and the essential nature of the issues he raises are clearly service-related matters that should be addressed internally.

[50] In sum, MGen Fortin has not demonstrated that the decision to remove him from his PHAC position cannot be redressed through the CAF grievance process. Therefore, he must avail himself of the grievance process before proceeding on judicial review.

Conclusion

[51] As stated by the Supreme Court of Canada, “while courts have the discretion to hear an application for judicial review prior to the completion of the administrative process and the exhaustion of appeal mechanisms, they should exercise restraint before doing so.” (*Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 22; see also *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paras 35-36).

[52] I conclude that this is an appropriate case for the Court to exercise restraint. MGen Fortin must exhaust the internal grievance process prior to seeking a remedy in this Court.

[53] Accordingly, I am granting the AG’s Motion to strike the application for judicial review.

[54] The parties can make written submissions on costs within ten days of the date of this Order, failing which the Court will set costs.

ORDER IN T-957-21

THIS COURT ORDERS that:

1. The Respondent's Motion is granted;

2. The application for judicial review is struck in its entirety;

3. The parties can make written submissions on costs within ten days of the date of this Order, failing which the Court will set costs.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	DANY FORTIN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 28-29, 2021
ORDER AND REASONS:	MCDONALD J.
DATED:	OCTOBER 12, 2021

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