Federal Court  Cour fédérale

Date: 20220725

Docket: T-1044-22

Citation: 2022 FC 1106

Toronto, Ontario, July 25, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

SHANNON JONES

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE CHIEF OF DEFENCE STAFF

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application under s 18 of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*] for a "temporary injunction" to stay the effect of a decision made on April 8, 2022 [Decision], by the Director Military Careers Administration [DMCA] of the Canadian Armed Forces [CAF], to release the Applicant Corporal Shannon Jones from service, until determination of her grievance through the CAF grievance process.

[2] Corporal Jones is set to be released from service on July 30, 2022 because of her failure to follow orders to comply with directives of the CAF relating to COVID-19 vaccination.

[3] For the reasons that follow, I find that the Applicant has not satisfied the elements of the tripartite test for an interlocutory injunction. Accordingly, the application is dismissed.

II. Background

[4] Corporal Jones is a Meteorological Technician posted to the Maritime Forces Pacific Headquarters, based out of Esquimalt. She has served as a member of the CAF since 2018 and was fast-tracked to Corporal in April 2021 after only 3 years of service.

[5] In 2021, the CAF implemented three directives [Directives] requiring their members to be vaccinated against COVID-19. Corporal Jones sought an exemption from the Directives on religious grounds. Her application for an exemption was refused on November 29, 2021.

[6] After the rejection, Corporal Jones was subject to various administrative measures that culminated in a recommendation by the DMCA for her to be released from service under Item 5(f) of article 15.01 of the *Queens Regulations & Orders* [QR&O] because of her "continued refusal to obey a lawful order." The release date was subsequently extended to July 30, 2022.

[7] Item 5(f) refers to the "service completed" release category where the release is based on the CAF member being "Unsuitable for Further Service":

Because of factors within the officer or non-commissioned member's control, develops personal weakness or behaviour or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces.	Officier ou militaire du rang qui, en raison de facteurs en son contrôle, manifeste des lacunes personnelles ou a des problèmes personnels ou familiaux qui compromettent grandement son utilité ou imposent un fardeau excessif à l'administration des Forces canadiennes.

[8] An officer released under Item 5(f) is considered to be "Honourably Released". They require special authority from the Chief of Defense Staff [CDS] before they can be re-enrolled.

[9] Corporal Jones grieved the denial of her application for religious accommodation. That grievance is currently pending before the Military Grievances External Review Committee [MGERC]. The MGERC is an independent body that will provide non-binding recommendations to the CDS who is the final authority [FA] that will ultimately decide the grievance.

[10] The Applicant asserts that there is no administrative means under the QR&O or *National Defence Act*, RSC, 1985, c N-5 [NDA] to allow her to stay her release pending determination of her grievance by the FA. Accordingly, she seeks a temporary injunction from this Court.

III. Issues

[11] The three-part conjunctive test for a temporary or interlocutory injunction is well established. In order to obtain an injunction, the Court must be satisfied that:

1) there is a serious issue to be tried;

2) the Applicant would suffer irreparable harm if the injunction is not granted; and,

3) the balance of convenience favours granting the injunction.

RJR-MacDonald Inc v Canada (Attorney General), [1994] 1 SCR 311 [*RJR-MacDonald*] at p 334; *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Google*] at para 25.

[12] The fundamental question is whether it is just and equitable to grant an injunction in the circumstances of the case: *Google* at para 25.

[13] The sole issue on this application is whether the Applicant has satisfied this conjunctive test such that a temporary injunction should be granted.

IV. Analysis

A. *Serious Issue*

[14] The Applicant raises three arguments as to why there is a serious issue to be tried. First, she asserts that she has been denied procedural fairness. She contends that her release has been fast-tracked while her grievance has been delayed due to insufficient resources at the MGERC. Second, she asserts that it is inevitable that the Directives will be changed to remove the vaccine mandate in view of changes to provincial COVID-19 protocols. Third, she takes issue with the manner in which her religious exemption was considered. She contends that her religious beliefs

should be sufficient to satisfy the religious exemption. She argues in her written materials that a religious accommodation is justified under the *Charter*.

[15] The Respondent argues as a preliminary matter that the application cannot succeed as it has not been brought correctly. It notes that the request is for a "temporary injunction" in the context of an application for judicial review brought under section 18 of the *Federal Courts Act*, but there is no decision that has been challenged before this Court. The Respondent argues that the question of "serious issue" cannot therefore be addressed; the issue of controversy pertains to a matter that is still pending before the MGERC and the application is accordingly premature.

[16] It further argues that even if the Court were to consider the application, critical arguments that are now advanced are not in the notice of application or supported by the evidence. It argues that these omissions are fatal to the Applicant's request.

(1) Prematurity and nature of the application

[17] It is well established that absent exceptional circumstances the Court should not interfere with an ongoing administrative process until it is completed and all available and effective remedies are exhausted: *Canada (Border Services Agency) v CB Powell Limited*, 2010 FCA 61 *CP Powell*] at para 31. As stated by the Supreme Court of Canada in *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at paragraph 36, there are "sound practical and theoretical reasons" why reviewing courts must show restraint and decline to hear a matter when an existing administrative process remains outstanding.

[18] In considering whether an application is premature, the Court must consider whether: a) there is recourse available elsewhere, now or later; b) the recourse is adequate and effective; and c) the circumstances are the sort of unusual or exceptional circumstances recognized by the case law: *Fortin v Canada (Attorney General)*, 2021 FC 1061 [*Fortin*] at para 22.

[19] Exceptional circumstances are rare. Concerns about procedural fairness or bias, the presence of an important constitutional issue, or jurisdictional issues are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted: *CP Powell* at para 33.

[20] The Court should exercise its residual jurisdiction to intervene only where there is a gap and no adequate alternative remedy is available through the appropriate administrative process: *Neri v Canada*, 2021 FC 1443 [*Neri*] at para 52; *Amalgamated Transit Union, Local 113 v Toronto Transit Commission*, 2021 ONSC 7658 at para 39.

[21] The Applicant does not dispute that the grievance process provides appropriate recourse for challenging the Applicant's dismissal. The Court in *Fortin* at paragraph 25, referencing *Bernath v Canada*, 2005 FC 1232 at paragraph 35, commented on the breadth of the grievance procedure contemplated by section 29 of the NDA:

> .... 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.

[22] The Applicant argues that the grievance process will take too long. This timing combined with the imminent nature of her release under what she describes as a punitive release provision (Item 5(f)), in her view, justifies the temporary injunction requested.

[23] As stated by Justice MacDonald in *Fortin* at paragraph 43, "[a]lthough 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." There must be some direct evidence that the grievance process applicable to the applicant is excessively slow.

[24] The evidence of the Respondent's witness, the Acting/Deputy Director, Canadian Forces Grievance Authority is that the average number of days from when a grievance is initiated to when a decision is typically rendered by the FA is about 680 days. The Respondent's evidence is that grievances relating to the vaccine mandate will be prioritized to the extent possible.

[25] In this case, the initial authority stage has been bypassed and the Applicant's grievance is currently pending before the MGERC. The Applicant has received correspondence from the MGERC advising only that "[t]he Committee is currently experiencing a high volume of grievance referrals and as a result, it may be some time before [the] file is assigned to a Senior Grievance Officer and Committee Member for review." There is no further evidence relating to the specific timeline for the Applicant's grievance.

[26] General delay in the grievance process is not enough. The Applicant must still establish that extraordinary circumstances apply to interfere with the ongoing administrative process. No

such circumstances have been shown in this case. The Applicant's argument that her release was fast-tracked and her pending grievance excessively delayed is not supported by the evidence on cross-examination. Nor is there any evidence of any unduly harsh repercussions associated with a release under Item 5(f).

[27] Further, the secondary sources provided by the Applicant are insufficient to establish that the Directives relating to the vaccination mandate are on the cusp of changing and what the scope of any such changes would be. Even if the Directives were to later change, as discussed further below, there are alternative remedies that the Applicant could seek.

[28] In *Neri*, Justice Fuhrer refused a request for a "temporary prohibitive injunction" to restrain the enforcement of the Directives pending the outcome of applications for judicial review challenging their constitutionality. The request was considered to be premature as the Applicants had not exhausted all alternative adequate remedies through the CAF grievance process. In that case, like *Fortin*, however, a grievance had not been initiated.

[29] The Applicant contends that this case is further distinguishable from *Neri* in that here she does not dispute that the grievance process should proceed. She is seeking temporary relief only because of the timing associated with the grievance process. The Applicant argues that this temporary relief is not provided under the NDA and therefore the circumstances here fall into a "gap", for which there is no recourse available under the NDA.

[30] I agree that this creates a distinction from the prior jurisprudence, where the relief sought from the Court on the application was the same as that which was available through the administrative process. However, in my view this distinction is created by an irregularity in the application and does not overcome the prematurity issues that pervade the injunction analysis.

[31] As to the form of the application, this application was brought under section 18, as an application for judicial review. Section 18(1)(a) and 18.1(3)(b) provide that an injunction may be requested as relief on a judicial review. However, the injunction referred to in these provisions is in the nature of a permanent injunction rather than an interlocutory injunction, like in this case, pending determination of the issues in controversy on their merits.

[32] Section 18.2 of the *Federal Courts Act* provides for an interim or interlocutory injunction to be granted pending the final disposition of an application for judicial review. However, I agree with the Respondent, a challenge to an underlying decision must ground an application for judicial review: *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 at para 23. In the absence of a valid application for judicial review, the Court is without jurisdiction to grant the interlocutory relief requested.

[33] Even if I were to characterize the injunction sought as a mandatory injunction with a time limited component, the Court would be without residual jurisdiction to issue the injunction in view of the pending grievance before a different decision-maker. The Decision to release Corporal Jones was made by a different administrator (the DMCA) than the administrative body who will hear the Applicant’s grievance.

[34] This irregularity in the application is apparent when one considers the serious issue analysis. Where an interlocutory injunction is sought, the applicant must establish that there is a serious question to be tried, in the sense that the application is neither frivolous nor vexatious: *R v Canadian Broadcasting Corp,* 2018 SCC 5 [*CBC*] at para 12; *RJR-MacDonald* at 335. This necessitates consideration of the merits of the application: *RJR-MacDonald*, above at page 337; *CBC* at para 12. A more onerous test applies in the case where granting the interlocutory injunctive relief is tantamount to granting the relief sought in the underlying proceeding. The Court must satisfy itself, through a more rigorous review, that the Applicant would likely prevail: *Wojdan v Canada (Attorney General),* 2021 FC 1341 [*Wojdan*] at para 12.

[35] As acknowledged by the Applicant in her memorandum of fact and law (paragraph 44), "[t]he merits of this decision are not at issue in this application and are pending internally through the CAF grievance process."

[36] The Court is unable to evaluate whether there will be a serious issue before the FA when the issues before that authority are not yet fully crystallized and are not before the Court, on this application or otherwise.

[37] Further, as noted by the Respondent, the nature of the arguments on the merits have consistently changed: a number of the arguments that are now raised by the Applicant (*i.e.*, *Charter*) do not form part of the notice of application. As set out in *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244 at paragraph 36, the Court's decision on an application for

judicial review is limited to the grounds of review and the relief set out in the notice of application.

[38] In my view, the Applicant has not made out the serious issue part of the test.

[39] Further, even if the Applicant could get beyond the serious issue part of the analysis, she cannot satisfy the requirements of irreparable harm and balance of convenience.

B. *Irreparable Harm*

[40] Irreparable harm is harm that is clear and non-speculative and that cannot be remedied through an award of damages: *Air Passengers Rights v Canadian Transportation Agency*, 2020 FCA 92 at para 28; *Neri* at paras 11-12.

[41] The only evidence put forward by the Applicant is the statement in her affidavit that if she is released under Item 5(f) she "will be taken away from [her] career trajectory". She fears that if she is released and her grievance subsequently allowed that she will not be considered for re-enrollment into the CAF.

[42] The Respondent's affiant Ann-Marie de Araujo Viana, at paragraph 10 of her affidavit, outlines the actions that may be taken by the FA on a grievance decision, including:

> 10. ...the power to promote, invite a released member to re-enrol (if eligible to do so), rectify a situation where a policy has not been interpreted correctly resulting in a grievor losing entitlement to pay and/or benefits, provide training opportunities, withdraw remedial measures initiated against a member and remove them

> from the member's personnel records, or otherwise deal with matters relating to the administration of the affairs of the CAF.

[43] Defence Administrative Orders and Directives 5002-1, *Enrolment* provides that a CAF member released under item 5(f) must personally obtain special authority from the CDS to be enrolled. Given that the CDS or a delegate would be acting as the FA in this matter, in conjunction with the FA's broad remedial authority, the FA is empowered to invite the Applicant to re-enroll without restriction. There is no suggestion the Applicant would fail to meet any of the other requirements of re-enrolment, apart from the vaccine policy, which would no longer be an issue should she be successful in her grievance.

[44] As noted by the Respondent, a growing list of recent cases have considered and rejected arguments that losing one's employment as a result of a mandatory vaccination policy, and the associated anxiety, psychological stress and emotional harm that goes along with that loss, give rise to irreparable harm: *Neri* at paras 3 and 12; *Lavergne-Poitras v Canada (Attorney General)*, 2021 FC 1232 at paras 7, 83-86; *Wojdan* at paras 32-38. These principles have been applied consistently and warrant no special consideration to employees of the CAF: *Neri* at paras 12 and 66.

[45] The Applicant argues that a release under Item 5(f) is different in that it is damaging to the Applicant's reputation. She asserts that an Item 5(f) release is synonymous to saying that she is "useless" and of no value to the CAF. However, there is no evidence to support this contention.

[46] The Applicant urges the Court to look at the wording of Item 5(f) and to make this inference. These submissions fall far short of what is required to establish irreparable damage to reputation.

[47] Further, I agree with the Respondent that the two cases cited by the Applicant (*Duvall SP (Captain), R* v, 2017 CM 2008 at para 19; *Humphrey B (Ex- Private), R* v, 2011 CM 1009 at para 8) which deal with court martial sentencing are not of assistance. These cases do not relate to the impact of an Item 5(f) release.

[48] As noted in *Newbould v Canada (Attorney General),* 2017 FCA 106 at paragraph 33, an applicant has the burden of showing that there is some factor or element in the surrounding circumstances that takes the case outside the normal run of the administrative proceeding. There is no such evidence in this case. Rather, the evidence indicates that the notation on the CAF member's record of service for a release under Item 5(f) is "Honourably Released". The evidence of the Respondent's witness is that:

> 14. If the Applicant is released pursuant to Item 5(f) and her grievance is successful, a potential outcome is that to the Final Authority invites her to re-enrol, subject to meeting enrolment requirements. Alternatively, if circumstances change so that the Applicant otherwise comes into compliance with the CAF Vaccination Policy Directives, she could become eligible for re-enrolment. If re-enrolled she likely would return at her current rank and not have to repeat most training.

[49] In view of this evidence, there is insufficient basis for the Court to conclude that there would be any irreparable damage to reputation or to create a distinction between this proceeding and the jurisprudence noted above. Irreparable harm has not been established.

C. *Balance of Convenience*

[50] The balance of convenience involves "identify[ing] the party that would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits": *CBC* at para 12.

[51] The harm to the Applicant of losing her employment and any alleged concerns associated with that loss, as well as the suggestion that the vaccine policy may be subject to change, must be balanced against the public interest in maintaining the integrity of the administrative process and the statutory framework, which does not contemplate temporary injunctive relief.

[52] As stated in *Letnes v Canada (Attorney General),* 2020 FC 636 at paragraph 85:

> [85] ... The public interest supports the maintenance of the statutory provisions, regulations and processes, and the efforts of those responsible for carrying them out. When it is established (as is the case here for the RCMP) that a public authority is charged with the duty of protecting the public interest, and that a proceeding or activity is carried and undertaken pursuant to that responsibility, "the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action" (*RJR-MacDonald* at p 346). Put differently, when a public authority is prevented from exercising its statutory powers, it can be said that the public interest, of which the authority is the guardian, suffers irreparable harm.

[53] In light of my findings on the other branches of the *RJR-MacDonald* test and without any concrete evidence before me as to any proposed changes to the vaccine Directives and their timing, in my view, the balance of convenience favours the Respondent. This is particularly so, as it would be open to the Applicant to raise any change in policy that the CAF might adopt with

the CDS in the ongoing grievance procedure even after she is released under Item 5(f). Similarly, the CDS' power to re-enroll the Applicant would be available.

V. Conclusion

[54] On the basis of these findings, I dismiss the Applicant's motion for a temporary or interlocutory injunction to restrain her release until the grievance process is concluded.

VI. Costs

[55] As the Respondent has been successful on the application, it is my view that they are entitled to costs. The Respondent asserts that $4,800 should be awarded, which it says amounts to its fees as calculated at the top end of the middle column of Tariff B, without the recovery of disbursements. It asserts that while it has sympathy for the Applicant, the costs should reflect the fact that the application was not properly constituted.

[56] The Applicant submits that there should be no costs awarded against her, but that if she were successful $4,800 would also be requested.

[57] As this is the final application, in my view some costs are justified. However, I see no reason as to why the top end of column III of Tariff B should be used instead of the middle of the column, especially in view of the streamlined nature of the application. As such, I will award $3,200 payable to the Respondent.

JUDGMENT IN T-1044-22

THIS COURT'S JUDGMENT IS that:

1. The Application is dismissed.

2. Costs are awarded to the Respondent in the amount of $3,200 all inclusive.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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