Federal Court Cour fédérale

Date: 20221214

Docket: T-720-21

Citation: 2022 FC 1717

Toronto, Ontario, December 14, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

ALEXANDER INNES

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a March 10, 2021 decision [Decision] of the Final Authority [FA] with the Canadian Forces Grievance Authority, rejecting a grievance filed by the Applicant under the *National Defence Act*, RSC 1985, c N-5 [NDA].

[2] The grievance sought the reinstatement of certain allowances the Applicant had been entitled to as a member of the Canadian Armed Forces [CAF]. The Initial Authority [IA] reinstated the Applicant's entitlement to three allowances. The IA then rescinded that decision,

determining the Applicant was entitled to two of the allowances, but not the third. The FA granted the Applicant an additional month of the third allowance, but rejected his ongoing entitlement and ordered the recovery of prior payments made to the Applicant.

[3] The Respondent concedes that the Decision is unreasonable; however, the parties raise two other issues. The first is whether the IA had jurisdiction to rescind its own decision and the FA jurisdiction to deal with the new decision. The second is what remedy should be awarded if the Court finds the Decision to be unreasonable – namely, whether the matter should be sent back to the FA for redetermination or whether the Court should direct that the grievance be allowed.

[4] As set out further below, while I agree that the Decision of the FA was unreasonable as it did not deal with all of the Applicant's arguments, I do not consider the outcome to be so inevitable so as to support a directed determination. Rather, it is my view that the matter should be sent back to the FA for redetermination, including for determination of the issue of the IA's jurisdiction to rescind its own decision.

I. Background

[5] The Applicant, Alexander Innes, was a member of the CAF for approximately 30 years. He spent the majority of his service as a Special Operations Assaulter in Joint Task Force 2 where he completed six operational tours and participated in other special operations. During these engagements, Mr. Innes suffered a number of service-related medical issues.

[6] Throughout his service, Mr. Innes received various allowances from the CAF. As of January 2017, these allowances included, amongst others, a Level 3 Special Operations Allowance [SOA].

[7] An SOA is a type of environmental allowance provided to special operations personnel of the CAF whose military duties involve exposure to extreme environmental conditions. The SOA aims to compensate special operations personnel for the risk, hardship and readiness that is associated with their service and to provide an incentive to attract and retain qualified operations personnel. There are three tiers of SOA with defined criteria based on a CAF member's position.

[8] The SOA is governed by The Compensation and Benefit Instructions for the Canadian Forces [CBI], Chapter 205 – Allowances for Officers and Non-Commercial Members. The CBI was amended on September 1, 2017 to clarify situations which make a member ineligible to receive certain allowances.

[9] In addition to the CBI, the Commander of the Canadian Special Operations Forces Command [CANSOFCOM] issued the Commander's Directive 70-09 – Allowances [Directive], which provides instructions for the administration of allowances for members of CANSOFCOM.

[10] On August 30, 2017, a Notification of Change of Medical Employment Limitations [MEL] made on January 30, 2017 was approved, concluding that Mr. Innes had employment limitations due to a medical condition.

[11] As a result of the MEL, Mr. Innes received a series of notices indicating that he would be losing one or more of his allowances. In the last notice, received on October 18, 2017, Mr. Innes was informed that he would be losing, amongst other allowances, his Level 3 SOA.

[12] On January 8, 2018, Mr. Innes submitted a grievance regarding the removal of his allowances. He sought the repayment of the amounts clawed back by the CAF, the reinstatement of his Level 3 SOA and other allowances, written assurances that he would not lose allowances due to medical release and 60 days written notice before any allowances would be removed in future.

[13] On November 22, 2018, the Acting Director General Compensation and Benefits, acting as the IA, granted the grievance in part [Initial IA Decision]. Among other findings, the IA found that Mr. Innes's MEL prevented him from qualifying for a Level 3 SOA, but that his duties were consistent with Level 2 SOA requirements. The IA granted Mr. Innes the Level 2 SOA from September 1, 2017 onwards.

[14] On August 27, 2019, the newly appointed Director General Compensation and Benefits [DGCB], now acting as the IA, partly rescinded the Initial IA Decision. Applying Annex A of the Directive, which was not applied by the Acting Director General, the IA found that although Mr. Innes fulfilled the duties to qualify for a Level 2 SOA, he did not meet the qualifications and standards of a Level 2 SOA because he was not deployable operationally and could not complete a physical fitness test. The IA concluded Mr. Innes was disentitled to the Level 2 SOA as of

August 1, 2017 and that the CAF was ethically bound to recover the overpayment of the SOA [Second IA Decision].

[15] On September 30, 2019, Mr. Innes grieved the Second IA Decision to the FA who referred the grievance to the Military Grievance External Review Committee [MGERC]. The MGERC concluded that Mr. Innes was disentitled to the Level 2 SOA as of August 30, 2017, but recommended that he be entitled to the Level 2 SOA until that date.

[16] On January 28, 2021, Mr. Innes provided further submissions in response to the recommendations by the MGERC in which he argued that the recommendation to reinstate the Level 2 SOA from August 1, 2017 to August 30, 2017 only, and not after September 1, 2017, was unreasonable, amounted to a judicially reviewable error of law and constituted procedural unfairness. The crux of the Applicant's argument was that the MGERC did not consider that, despite having a permanent medical category with a MEL, he was still authorized to carry out Level 2 SOA duties and that he completed this work. As stated by Mr. Innes:

> At the heart of this matter is that on 22 November 2018, Director General Compensation and Benefits (DGCB) clearly and explicitly stated that I was entitled to Special Operations Allowance level 2 (SOA2) from 1 Sept 2017 onwards. Since 01 Sept 2017 I had been continuously employed on duties consistent with SOA2 and within my Medical Employment Limitations. Based on DGCB's decision, my chain of command continued to employ me on SOA2 duties and I fulfilled the requirements of these duties to the satisfaction of my superiors. It should be noted that I did not actually have any choice in this matter; as a member of the CAF, I was duty bound to carry out the SOA2 tasks assigned to me. I performed SOA2 duties and therefore was paid at the SOA2 level for work which I have completed. [...] The fact that DGCB decided, in retrospect, that they erred and that I shouldn't have been assigned those duties or paid at the SOA2 level does not alter the fact that the work was performed and therefore the allowance must be paid.

[17] On March 10, 2021, the FA issued their Decision. The FA agreed with the MGERC and found that Mr. Innes was entitled to be repaid the amount of the Level 2 SOA for the period between August 1 and August 30, 2017, but that he was not entitled to the Level 2 SOA from September 1, 2017 onwards. In reaching the Decision, the FA did not comment on the arguments raised by the Applicant in his January 28, 2021 submissions.

II. Issues

[18] As set out earlier, the Respondent has conceded that the Decision is unreasonable. It asserts at paragraphs 46 and 47 of its memorandum of fact and law that:

> 46. The reasons provided by the Final Authority do not adequately explain why the Applicant was not entitled to the SOA as of September 1, 2017, what the minimum standard for the three tiers of SOA under the Directive are and whether the Applicant met these standards. Moreover, the reasons do not adequately identify which amended CBI provisions disentitled the Applicant to the SOA.
>
> 47. In addition, neither the Final Authority, nor the MGERC fully address the Initial Authority's finding that the Applicant's medical employment limitations allowed him to perform duties consistent with those for which the SOA is provided. In addition, relevant evidence provided by the Applicant and included in the Certified Tribunal Record was not completely addressed by the Final Authority, including the Applicant's submissions to the Final Authority that his medical employment limitations did not prevent him from performing duties consistent with the SOA Category 2. These omissions constitute reviewable errors and warrant the exercise of this Court's discretion to remit the grievance back to the Final Authority for redetermination. [footnotes excluded]

[19] I accept these concessions by the Respondent and upon considering the record filed and the Decision, I agree that the Decision should be found unreasonable as noted. It provides insufficient justification for its outcome and fails to fully consider the Applicant's evidence and arguments regarding his entitlement to the Level 2 SOA, including that his MEL did not prevent

him from performing duties consistent with the Level 2 SOA. The FA does not engage with the Applicant's argument that the CAF cannot recover an allowance paid to him for work already completed.

[20] There are two further issues that are raised on this application:

1. Did the IA have jurisdiction to reconsider its Initial IA Decision and did the FA have jurisdiction to make the Decision?

2. If the Decision is held unreasonable, should the Decision be remitted back for redetermination by the FA?

III. Analysis

A. *Did the IA have jurisdiction to reconsider its Initial IA Decision and did the FA have jurisdiction to make the Decision?*

[21] As a preliminary matter, I note that the issue of whether the newly appointed IA acted outside his jurisdiction by rescinding the Initial IA Decision was not directly raised or dealt with by the FA. Although the Respondent asserts that it is open to the Court to consider this issue, the Court nevertheless retains discretion to decide whether or not it should be decided on this judicial review: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers' Association*] at para 22; *Eadie v MTS Inc*, 2015 FCA 173 at para 59.

[22] As set out in *Alberta Teachers' Association* at paragraphs 24-25:

> [24] There are a number of rationales justifying the general rule. One fundamental concern is that the legislature has entrusted the determination of the issue to the administrative tribunal (*Legal Oil & Gas Ltd.*, at paras. 12-13). As this Court explained in *Dunsmuir*, "[c]ourts . . . must be sensitive . . . to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures" (para. 27). Accordingly, courts should respect the legislative choice of the tribunal as the first instance decision maker by giving the tribunal the opportunity to deal with the issue first and to make its views known.
>
> [25] This is particularly true where the issue raised for the first time on judicial review relates to the tribunal's specialized functions or expertise. When it does, the Court should be especially careful not to overlook the loss of the benefit of the tribunal's views inherent in allowing the issue to be raised. (See *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 89, *per* Abella J.)

[23] To the extent the issue is considered by this court now it must be considered as a new issue. However, as set out further below, it is my view that this issue is significantly intertwined with the issue of the Applicant's entitlement to the Level 2 SOA and as such, that it should be determined by the FA along with the issues noted earlier.

[24] As a general rule, the doctrine of *functus officio* holds that a tribunal having reached a final decision in respect of a matter cannot revisit that decision because an error is later discovered, unless the error is minor: *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 861, 62 DLR (4^{th}) 577. However, as stated in *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at paragraph 3, "the principle of functus officio does not strictly apply in non-adjudicative administrative proceedings ... in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision."

[25] In *Khizar v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 641 at paragraph 29, the Court considered the doctrine of *functus officio* in an immigration setting, where the Respondent in that case acknowledged that a Border Service Officer had erred in his decision and later cancelled the decision. In applying the doctrine, the Court stated that the unfairness to an individual in reopening a final decision must be weighed against the harm that might result if the administrative decision maker were prevented from fulfilling its mandate.

[26] The Respondent asserts that the IA had jurisdiction to rescind the Initial IA Decision in order to correct an error in that decision. It asserts that the IA was not *functus officio* when she rendered her decision and that the statutory framework and public interest favours the ability of the IA to correct an overpayment to a CAF member.

[27] Mr. Innes asserts that the doctrine should be applied in his favour as the unfairness to him outweighs any public interest in favour of the Respondent. He asserts that the public interest includes a financial responsibility to discharge debts owed for work performed.

[28] The Respondent argues that when considering the doctrine of *functus officio*, one must consider that public funds were used to pay for the SOA. The accountability to the public of those public funds is the cornerstone of the public harm asserted. It argues that it is crucial that public funds are administered in accordance with accepted policies and the statutory framework in place, which in this case favours correction for any errors made.

[29] Pursuant to subsection 35(2) of the NDA, Treasury Board is responsible for regulating the payments that may be made to officers and non-commissioned members, including through allowances in respect of conditions arising out of their service.

[30] Subsection 155(3) of the *Financial Administration Act*, RSC, 1985 c F-11 provides that the Receiver General "may recover any over-payment made out of the Consolidated Revenue Fund on account of salary, wages, pay or pay and allowances out of any sum of money that may be due or payable by Her Majesty in right of Canada to the person to whom the over-payment was made."

[31] Article 201.05(2) of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O], states that an accounting officer is personally responsible for any payment made by him or by his direction, and that he is required to seek recovery of the amount of any overpayment from the payee. The requirement applies to payments made contrary to regulations, or otherwise without authorization, or through error of the accounting officer or his subordinates. An "accounting officer" is defined in section 1.02 of the QR&O as an officer that is responsible for the receipt, custody, control and distribution of, and accounting for, public funds. This would include the DGCB who was acting as the IA for the Second IA Decision.

[32] Article 203.04 of the QR&O provides that it is the duty of every officer to be acquainted with the allowances to which the officer may be entitled and as to the conditions governing their issue. If payment in excess of the entitlement due is accepted, the officer is required to refund the amount of the overpayment to the accounting officer.

[33] Mr. Innes asserts that he repeatedly relied on representations from CAF representatives regarding his eligibility for the SOA, receiving contradictory information on multiple occasions. He asserts that as he completed the duties that qualified him for the Level 2 SOA he should be entitled to retain the payment of this allowance. He asserts that any jurisdictional argument that relies on an overpayment of the allowance cannot succeed as there was no overpayment.

[34] In my view, the issue of whether the IA had jurisdiction to rescind its earlier decision is intimately linked with the issue of the Applicant's entitlement to the Level 2 SOA, which was not fully considered by the FA in its Decision in view of the failure of the FA to deal with all of the Applicant's evidence and arguments. As such, it is my view that this Court should not exercise its discretion to decide this issue now. Rather, the issue of whether the IA had jurisdiction to rescind the Initial IA Decision should be considered by the FA with the benefit of its full consideration of the entitlement issue and its expertise as to the underlying statutory scheme.

[35] I note that prior to the IA Decision, the newly appointed DGCB wrote to the Applicant to advise that an error had been made in the Initial IA Decision and that it would be partially rescinded to void the portion of the decision that granted the Level 2 SOA from September 1, 2017 onward. The IA gave the Applicant an opportunity to make written submissions before a decision would be rendered, which the Applicant did on July 22, 2019. In its submissions, the Applicant took issue with the IA "[r]escinding a decision months after it was rendered based on a review of information that should reasonably have been included in the original analysis."

[36] While acknowledging these arguments, the DGCB issued the Second IA Decision in which it confirmed the rescindment and the recovery of the Level 2 SOA as of August 1, 2017. On September 30, 2019, the Applicant referred his grievance and the Second IA Decision to the FA in accordance with subsection 7.18(1) of the QR&O. There can be no issue that the FA had jurisdiction as the final authority to consider the grievance pursuant to sections 7.18, 7.19 and 7.24 of the QR&O and section 29.11 of the NDA and that its decision is final and binding (section 29.15 of the NDA).

[37] In my view the issue of whether the IA had jurisdiction to rescind the Initial IA Decision should be considered by the FA as part of its analysis of the Applicant's grievance.

B. *Should the Decision be remitted back for redetermination by the FA?*

[38] In view of the Respondent's concession that the Decision is unreasonable, the parties agree that the FA's Decision should be quashed. However, Mr. Innes argues that instead of sending this matter back for redetermination, the Court should direct that his grievance be allowed. He argues that the CAF is estopped from obtaining recovery of the Level 2 SOA as this relates to work that was already done and paid for. Mr. Innes says he relied on CAF's statements of his entitlement, including through the Initial IA Decision, and that the CAF bears the responsibility for the errors and decisions leading to the payment of the Level 2 SOA so he cannot be held responsible for these errors. He contends that there is no loss to recover as he performed the duties consistent with the Level 2 SOA.

[39] The Respondent argues that this case is not appropriate for the Court to direct that Mr. Innes' grievance be allowed. Allowance entitlement is a factually infused question of policy, and this is not an exceptional situation where there is only one reasonable outcome open to the decision-maker. Therefore, the matter should be remitted to the FA for redetermination.

[40] The general rule is that when a matter is quashed, it should be remitted to the decision-maker for redetermination subject to limited exceptions. As stated in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraphs 141-142:

> [141] ... where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.
>
> [142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, 1999 CanLII 642 (SCC), [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern

> for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

[41] I agree with the Respondent, none of these limited exceptions apply here.

[42] The issue of whether the Applicant is entitled to the Level 2 SOA raises questions of fact and policy that will require a detailed review of the Applicant's circumstances and applicable CAF policies and directives. I do not agree that the doctrine of estoppel applies in this context to force a directed verdict, particularly in view of my finding on the first issue. Although estoppel may be available against the Crown in certain instances, it is not available where it would "work a contrary result to that set out in a statute" or would "tie the hands of the legislature in future": *Vallelunga v Canada*, 2016 FC 1329 at paras 9-12.

[43] In cases where the issues are highly factual and policy infused, the Court has been hesitant to conclude that there is only one inevitable outcome that would allow it to exercise its discretion to issue a directed verdict: *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 45; *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14. This is particularly so where the situation would benefit from the significant specialized expertise of the FA: *Birks v Canada (Attorney General)*, 2010 FC 1018 at para 4; *Stemmler v Canada (Attorney General)*, 2016 FC 1299 at para 30; *Bond-Castelli v Canada (Attorney*

General), 2020 FC 1155 at para 31. Indeed, the Court has remitted matters for redetermination before dealing with the entitlement to pay in the military setting: *Hamilton v Canada (Attorney General)*, 2016 FC 930.

[44] In view of the deficiencies conceded by the Respondent in its submissions and noted in these reasons, in my view the FA has sufficient guidance to redetermine the grievance in a manner that will be fair and balanced to the parties and in a manner that will fully address the estoppel argument in the context of the statutory analysis that will be required to consider the substance of the grievance.

[45] For all of these reasons, I will refer the matter back to the FA for redetermination.

IV. Costs

[46] In view of the concession that the Decision was unreasonable, it is my view that the Applicant should be entitled to the reimbursement of his disbursements associated with filing the materials in the application. While the Applicant argued that he should be entitled to a nominal amount of costs for lost opportunity and time and for legal consultation he says he obtained with respect to the matter, he remained unrepresented in the proceeding. As such, there is no entitlement to counsel fees. The reimbursement of his disbursements shall be limited to the filing fees associated with the application.

JUDGMENT IN T-720-21

THIS COURT'S JUDGMENT is that

1. The decision of the Final Authority is quashed and the matter is remitted back to the Final Authority with the Canadian Forces Grievance Authority for redetermination in accordance with these Reasons.

2. The Applicant shall be entitled to recovery of his disbursements associated with the filing fees for this application.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-720-21
STYLE OF CAUSE:	ALEXANDER INNES v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 14, 2022
JUDGMENT AND REASONS:	FURLANETTO J.
DATED:	DECEMBER 14, 2022

APPEARANCES:

Alexander Innes	ON HIS OWN BEHALF
Julie Chung	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT