Federal Court  Cour fédérale

Date: 20211222

Docket: T-264-21

Citation: 2021 FC 1458

Ottawa, Ontario, December 22, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

BARON PHILLIP JULIUS HORDO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This matter revolves around the complex policies, instructions and formulae that apply to determine rank and pay when a non-commissioned member of the Reserve Force, or a reservist, transfers to the Regular Force. The Applicant grieved his assigned rank and pay upon his transfer. The Chief of Defence Staff, (then) General J.H. Vance, as the Final Authority in the grievance process, partially allowed the grievance [FA Decision]. The Applicant seeks judicial

review of the FA Decision regarding the payment increments [PI], incentive credits [IC] and time credit for promotion [TCP] that were denied. He questions the reasonableness of the FA Decision, and asserts inequitable treatment in breach of section 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*].

[2] At the outset of the hearing of this matter, the Applicant advised the Court that the Treasury Board had resolved the issue regarding the PI allotted to him, based on qualifying service, and that the increase was backdated to November 11, 2016 (the significance of this date is explained below) and has been implemented already. Only the treatment of the IC and TCP, therefore, remains in issue in this judicial review.

[3] Having considered the record in this matter and the parties' written and oral submissions, I am satisfied that, on the issue of the IC and TCP, the challenged decision was transparent, intelligible and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 15. Further, the Applicant here has failed to establish sufficient grounds under section 15 of the *Charter*. For the more detailed reasons that follow, I therefore dismiss the Applicant's judicial review application.

[4] See Annex "A" for relevant provisions.

II. Background

[5] The Applicant, (now) Captain Baron Hordo, joined the Canadian Armed Forces [CAF], Reserve Force component, in November 2009, as an infantry soldier at the rank of Private. Prior

to his enrollment, the Applicant completed a Bachelor of Fine Arts and completed four of six courses for a Masters of Fine Arts. In November 2011, he was promoted to the rank of Corporal, and subsequently obtained a Bachelor of Aviation Technology from Seneca College in June 2013.

[6] By January 2014, the Applicant successfully completed the pilot training programs, and later that year, he obtained his Primary Leadership Qualification [PLQ]. In December 2015, he was appointed to the rank of Master Corporal, and in early 2016, he requested to enter the Regular Force component in the pilot occupation through a component transfer [CT]. As a part of the CT, a Prior Learning and Assessment Recognition [PLAR] was conducted and he was granted a training bypass for the Phase 1 Pilot Course.

[7] The Applicant's CT to the Regular Force as a Direct Entry Officer [DEO] was approved in October 2016, and confirmed in his transfer offer. The rank granted upon CT was that of Private based on pay protection followed by an appointment to Officer Cadet with immediate commissioning as a Second Lieutenant. The offer granted the Applicant pay as a Second Lieutenant at level D of Table B to Compensation and Benefits Instructions [CBI] 204.211, based on his previous non-commissioned member [NCM] service, and PI 1 for his academic credentials. He was granted a bypass for the Basic Military Officer Qualification [BMOQ], in addition to the Phase 1 Pilot Course.

[8] On November 9, 2016, the Director Military Careers Policy and Grievances [DMCPG] informed the Applicant of an error in his offer; the PI he would receive upon being

commissioned was reduced from 1 to Basic. The following day, the Applicant component transferred to the Regular Force at the rank of Private under the DEO. The Applicant then was appointed to the rank of Officer Cadet on November 11, 2016 and immediately commissioned to the rank of Second Lieutenant. (I note the Applicant disputes whether he in fact was appointed to the rank of Officer Cadet.) The Applicant later was promoted to rank of Lieutenant in November 2017 and to the rank of Captain in December 2019.

[9] In the meantime, the Applicant grieved his assigned rank and pay upon transfer to the Initial Authority [IA] in February 2017. Seeking higher PI, the Applicant also claimed entitlement to IC and TCP for time saved because of the training bypass. The IA determined that the Applicant was entitled to PI 1, instead of PI Basic, but that his IC and Entry Promotion Zone (EPZ) complied with existing policies.

[10] In August 2017, the Applicant sought to have his grievance determined by the FA, further to Article 7.20 of the *Queen's Regulations and Orders* [*QR&O*] Volume 1 – Administration. As a result, the grievance was referred to the Military Grievances External Review Committee [MGERC], which conducted an independent review of the Applicant's grievance, and presented its findings and recommendations to the FA who then conducted a *de novo* review. Although not bound by the MGERC's findings and recommendations, the FA essentially agreed with the MGERC's analysis, with a few modifications.

[11] In the FA Decision dated December 14, 2020, the FA notes that his decision can be based only on policies in effect at the time of the event grieved by the Applicant. The FA recognizes

that there is a significant policy gap regarding reservists with a post-secondary degree(s) who CT to the Regular Force and then are commissioned. The FA explains that as a result of this gap, he instructed that DEO is the appropriate plan for Reserve Force NCMs with a university degree who CT to officer occupations (as occurred in the Applicant's case) until an appropriate plan is adopted. The FA also observes that when a reservist transfers to the Regular Force, their qualifying reserve military experience and training is assessed in comparison to Regular Force members but that not all reservists have similar experience and training as their Regular Force peers at the same rank. This means that in many cases the reservist's new rank in the Regular Force may be lower than their rank held as a reservist. The FA notes, however, that pay level and increment adjustments are made to ensure that pay protection is maintained.

[12] The FA finds that based on the military value of the Applicant's skills and experience, it is reasonable to grant rank protection (i.e. the Applicant's NCM Regular Force rank on transfer on November 10, 2016) at the rank of Corporal - Cpl(5B), with PI 2 and IC 221. While the Applicant acknowledges this is the correct amount of qualifying service, he believes pay protection should be at Master Corporal (MCpl P1 4), the rank he held prior to his CT, regardless of qualifying service.

[13] The FA concludes, however, that further to Compensation and Benefits Instructions [CBI] 204.04(2), the Applicant's NCM rank protection upon CT (MCpl PI 4) has no bearing on the final rank determination because of his immediate commissioning under the DEO plan following his CT and his occupation change to pilot. The reason the FA provides is that under CBI 204.015(4)(c), qualifying service for pay does not include any service prior to the date of a

promotion to a higher substantive rank. Additional PIs and IC, therefore, cannot be given for his previous service because he was promoted, under the DEO plan, to a higher substantive rank (i.e. from Officer Cadet to Second Lieutenant).

[14] The FA notes that the IA exceptionally granted the Applicant an additional PI based on his four-year bachelor degree because the Annex B to the Military Occupation List Incentives and Allowances, was under review to include the Applicant's pay level assigned upon his CT. The FA concludes that he must apply the same logic and award the Applicant an additional PI based on the completed year of his graduate degree. The FA is not prepared, however, to award the Applicant additional TCP towards EPZ corresponding to the time required to complete the qualifications and training for which he was granted bypass in respect of the BMOQ and the Phase 1 Pilot Course. The FA gives two reasons.

[15] The first reason is that the Applicant's former service, academic qualifications and previous experience were taken into account in the DEO plan, under which the Applicant was granted pay at Level D of Table B in accordance with CBI 204.211(9.1), and in the additional PIs granted by the IA and the FA. The second reason is that a training bypass does not provide service experience in an occupation as a commissioned officer.

[16] The FA thus finds that the Applicant did not have time in rank in the current officer occupation that can be adjusted toward his EPZ to the next rank. The FA concludes by reiterating the need to address the policy gap because the Applicant's case is not unique, amends the Applicant's NCM Regular Force rank on transfer on November 10, 2016 to Cpl(5B), PI 2 and IC

221, and changes the Applicant's final rank and pay on commissioning on November 11, 2016 to Second Lieutenant, PI 2 and IC 1.

III. Analysis

(1) *Reasonableness of the FA Decision*

[17] I am not persuaded that the FA Decision is unreasonable regarding the denial of the IC and TCP the Applicant seeks.

[18] While the fact that the Treasury Board has resolved the issue regarding the PI allotted to the Applicant, based on qualifying service, potentially undermines the reasonableness of the FA Decision somewhat in my view, the Treasury Board decision and the basis or rationale for it are not in evidence.

[19] The Applicant argues that he never was an Officer Cadet and points to CBI 204.015(5) as support for his assertion that upon CT he was deemed to be a Second Lieutenant. This paragraph provides:

> An officer or non-commissioned member who is promoted to a higher rank effective the date of the member's enrolment or the day following enrolment is, for the purpose of pay increment increases, deemed to have been enrolled in the rank to which the member was promoted.

[20] The Applicant also points to an email exchange in February 2021 starting with a request for clarification on "Rate of Pay Promotion" pertaining to the Applicant which states "Member

was never and [*sic*] OCdt." The request does not describe the basis on which this statement was made or the source of the information, and apart from an email address, does not provide any additional information about who made the request. The response, which appears to have been made by a CAF Human Resources Manager, opens by noting the CDS (i.e. the FA) has ruled on the case and the decision is final. The response further explains:

> Once the member has CT'd to the Reg F as an NCM they are immediately appointed to OCdt, or in this member's case, immediately commissioned as 2Lt. Upon commissioning the member is paid using the appropriate CBI for the entry plan, using the rank they were granted based on qualifying service upon CT – the rank in the Reserve Force is not a factor.
>
> [Emphasis in original.]

[21] This email exchange, however, occurred after the FA's decision and thus, was not before the FA for consideration, and in any event, does little in my view to support the Applicant's position that he never was appointed an Officer Cadet under the DEO plan. Rather, I find the above explanation, on its face, is meant to elucidate the FA Decision and thus, unsurprisingly is consistent with it.

[22] Regarding the issue of IC and TCP, the Applicant seeks time credit reflecting the training time saved because of military and civilian qualifications, for which he was granted bypass of the BMOQ and the Phase 1 Pilot Course, and that permitted him to be promoted to a higher rank sooner. He points in this regard to the reference to "special qualifications" in section 22 of the Canadian Forces Administrative Orders [CFAO] 11-6 (Commissioning and promotion policy – Officers – Regular Force) reproduced in the FA Decision, and immediately below, as follows:

> 22. An Applicant who possesses special qualifications gained through civilian or former military training or experience, shall be

> enrolled in the rank of officer cadet and may immediately be commissioned in the rank of second lieutenant and promoted to such rank or granted such acting rank as is authorized by NDHQ.

[23] The Applicant argues that section 22 does not require previous officer experience, which was the rationale the FA relied on to deny time credit. Nor, in my view, does section 22 state anything about whether an applicant is entitled to time credit for possessing special qualifications. Instead, I find this section supports that the Applicant was enrolled as an Officer Cadet before being commissioned in the rank of Second Lieutenant.

[24] I further find it reasonably was open to the FA to hold that a training bypass was not the equivalent of service experience in an occupation as a commissioned officer, and thus, the Applicant did not have time in rank in the current officer occupation (i.e. Second Lieutenant) that could be adjusted towards his EPZ to the next rank. In other words, the issue the FA considered is not so much about whether the Applicant had special qualifications (which the Applicant submits, with time credit, should have permitted him to achieve the rank of Captain, and higher pay, one year sooner), but rather, about the amount of time served as a commissioned officer at the rank of Second Lieutenant before being promoted to Captain.

[25] This Court previously has held that decisions of the FA are entitled to significant deference on judicial review because of their expertise and the complexity of the grievance process in the military context: *Higgins v Canada (Attorney General)*, 2016 FC 32 at para 77; *Bossé v Canada (Attorney General)*, 2015 FC 1143 at para 28.

[26] Further, as the Supreme Court of Canada instructs, “a [reviewing] court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the ‘correct’ solution to the problem”: *Vavilov*, above at para 83.

[27] Bearing in mind that a reasonableness review is not about whether the FA was correct, I find that the FA Decision is clear in that it permits the Court to understand the reasons for the FA’s determinations. Further the FA’s reasons exhibit, in my view, “an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”: *Vavilov*, above at para 85. Read holistically, I find that the FA Decision bears the hallmarks of reasonableness – justification, intelligibility and transparency.

(2) *Section 15 of the Charter*

[28] As a preliminary matter, I note that the Applicant raised for the first time in his Memorandum of Fact and Law arguments based on section 2 of the *Charter*. Rule 301(e) of the *Federal Courts Rules*, SOR/98-106, however, requires that a notice of application for judicial review shall set out a complete and concise statement of the grounds intended to be argued, including reference to any statutory provision or rule to be relied on. This Court has held consistently that applicants for judicial review cannot present new grounds in their memoranda of fact and law, even if the respondent is not prejudiced: *Arora v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 24 at para 9; *Williamson v Canada (Attorney General of Canada)*, 2005 FC 954 at para 9; *Spidel v Canada (Attorney General of Canada)*,

2011 FC 601 at para 16. I therefore agree with the Respondent that the ground based on section 2 of the *Charter* is not properly before the Court and, as a result, I decline to consider it.

[29] I also agree with the Respondent that the Applicant has failed to establish sufficient grounds under section 15 of the *Charter* regarding the denial of IC and TCP for officers in his circumstances who bypass career courses. The Applicant refers to other similarly situated CAF members and seeks redress for them too. As another preliminary matter, because the Applicant is the only named applicant in this judicial review application, the Court can consider and determine the outcome of the application only in respect of the Applicant.

[30] In considering whether an impugned administrative decision violates the *Charter*, the reviewing court is "engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right": *Doré v Barreau du Québec*, 2012 SCC 12 at para 6. In other words, the applicable standard of review to the question of whether the FA Decision breaches section 15 of the *Charter* is reasonableness. The Supreme Court declined to reconsider this approach in *Vavilov*, at para 57.

[31] I find, however, that the Applicant here has failed to address the section 15 ground sufficiently in his Memorandum of Fact and Law, or at all in his oral submissions. To succeed on such a ground, claimants must demonstrate a distinction based on an enumerated or analogous ground: *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*] at para 27. This applies equally in cases of alleged adverse impact discrimination, where a seemingly neutral law has a

disproportionate impact on members of a group protected on the basis of an enumerated or analogous ground: *Fraser*, at para 50.

[32] As this Court has recognized in previous jurisprudence, "Section 15 of the *Charter* does not guarantee the right to procedural fairness or access to full and fair justice in the broad sense[; i]t provides constitutional protection against discrimination on a ground prohibited by the *Charter*": *Gligbe v. Canada*, 2017 FC 311 [*Gligbe*] at para 23.

[33] In the matter before me, as with *Gligbe*, the Applicant does not identify the enumerated or analogous ground that is specific to him. Even assuming, with a generous reading of the Notice of Application, that the alleged ground of discrimination is based on the treatment of IC and TCP upon the Applicant's CT from the Reserve Force to the Regular Force under the DEO plan, the allegation does not withstand scrutiny. There are two distinct steps in the analysis - it must be determined whether (1) the law makes a distinction based on an enumerated or analogous ground; and (2) this distinction is discriminatory: *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC).

[34] In my view, the Applicant has failed to establish that his status as a DEO fits within an enumerated or analogous ground of discrimination. As Justice Gagné (as she then was) observed, "an analogous ground must be similar to the enumerated grounds in that it often identifies a basis for stereotypical decision making or a group that has historically suffered discrimination[; i]t must be linked to personal characteristics that are immutable and that are changeable only at unacceptable cost to personal identity": *Gligbe*, above at paras 28-29.

[35] The Supreme Court of Canada has indicated in earlier jurisprudence that the members of the Forces do not, *per se* and in general, constitute a class of persons who may invoke an analogous ground: *R. v Généreux*, 1992 CanLII 117 (SCC) [*Généreux*] at pages 310-311. The Supreme Court recognized, however, that in exceptional circumstances, military personnel can "be the objects of disadvantage or discrimination in a manner that could bring them within the meaning of s. 15 of the *Charter*": *Généreux* at p 311.

[36] In my view, the Applicant has not demonstrated exceptional circumstances. The Applicant was a Reserve Forces member who transferred to the Regular Force through an established transfer and assessment process, the DEO plan. Although this process is not without flaws, as noted by the FA regarding policy gaps, I am not persuaded this rises to an exceptional circumstance as contemplated in *Généreux*.

IV. Conclusion

[37] In view of all the foregoing, I dismiss the Applicant's application for judicial review.

V. Costs

[38] The Respondent seeks costs in the amount of $1,000. Because costs normally follow the event, I see no reason here to depart from this principle. I therefore award the Respondent costs in the amount of $1,000, payable by the Applicant.

JUDGMENT in T-264-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed.

2. The Respondent is awarded $1,000 in costs, payable by the Applicant.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

Canadian Charter of Rights and Freedoms **Part I of the** ***Constitution Act,*** **1982, Schedule B to the** ***Canada Act 1982*** **(UK), 1982, c 11**
Charte canadienne des droits et libertés, **partie I de la** ***Loi constitutionnelle de 1982,*** **constituant l'annexe B de la** ***Loi de 1982 sur le Canada*** **(R-U), 1982, c 11**

Equality before and under law and equal protection and benefit of law

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15 (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Queen's Regulations and Orders for the Canadian Forces
Ordonnances et Règlements Royaux Applicables Aux Forces Canadiennes

7.20 – REFERRAL TO GRIEVANCES COMMITTEE

Section 29.12 of the *National Defence Act* provides:

29.12 (1) The Chief of the Defence Staff shall refer every grievance that is of a type prescribed in regulations made by the Governor in Council, and every grievance submitted by a military judge, to the Grievances Committee for its findings and recommendations before the Chief of the Defence Staff considers and determines the grievance. The Chief of the Defence Staff may refer any other grievance to the Grievances Committee.

(2) When referring a grievance to the Grievances Committee, the Chief of the Defence Staff shall provide the Grievances Committee with a copy of

7.20 – RENVOI AU COMITÉ DES GRIEFS

L'article 29.12 de la Loi sur la défense nationale prescrit :

«29.12 (1) Avant d'étudier et de régler tout grief d'une catégorie prévue par règlement du gouverneur en conseil ou tout grief déposé par le juge militaire, le chef d'état-major de la défense le soumet au Comité des griefs pour que celui-ci lui formule ses conclusions et recommandations. Il peut également renvoyer tout autre grief à ce comité.

(2) Le cas échéant, il lui transmet copie :

(*a*) the written submissions made to each authority in the grievance process by the officer or non-commissioned member presenting the grievance;

(*b*) any decision made by an authority in respect of the grievance; and

(*c*) any other information under the control of the Canadian Forces that is relevant to the grievance.”

a) des argumentations écrites présentées par l’officier ou le militaire du rang à chacune des autorités ayant eu à connaître du grief;

b) des décisions rendues par chacune d’entre elles;

c) des renseignements pertinents placés sous la responsabilité des Forces canadiennes.»

***Federal Courts Rules*, SOR/98-106**
***Règles des Cours fédérales*, DORS/98-106**

Contents of application

301 An application shall be commenced by a notice of application in Form 301, setting out

…

(e) a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on

Avis de demande — forme et contenu

301 La demande est introduite par un avis de demande, établi selon la formule 301, qui contient les renseignements suivants :

…

e) un énoncé complet et concis des motifs invoqués, avec mention de toute disposition législative ou règle applicable

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-264-21
STYLE OF CAUSE:	BARON PHILLIP JULIUS HORDO v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 8, 2021
JUDGMENT AND REASONS:	FUHRER J.
DATED:	DECEMBER 22, 2021

APPEARANCES:

Captain Baron Hordo	FOR THE APPLICANT (ON HIS OWN BEHALF)
Amani Delbani	FOR THE RESPONDENT

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