

Federal Court



Cour fédérale

Date: 20230814

Docket: T-1231-22

Citation: 2023 FC 1103

Ottawa, Ontario, August 14, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

KRISTOPHER HOFFMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Corporal Kristopher Hoffman, seeks judicial review of a decision by a Final Authority in the Canadian Forces grievance process. Corporal Hoffman had commenced two grievances in respect of remedial measures imposed on him for misconduct. The parties agree albeit for slightly different reasons, that the Final Authority's decision is unreasonable. Consequently, the issue in the present application for judicial review is the appropriate remedy.

[2] The Respondent submits that the appropriate remedy is for the matter to be redetermined by the Final Authority. Corporal Hoffman submits that this Court should not only quash the Final Authority's decision but also quash the remedial measures that the Final Authority failed to correct.

[3] For the reasons that follow, this application for judicial review is allowed. The matter is remitted to the Final Authority for redetermination by a different decision maker. Despite the able submissions of counsel for Corporal Hoffman, I do not find that it is appropriate for this Court to quash the remedial measures.

II. Background

[4] Corporal Kristopher Hoffman is a non-commissioned member in the Regular Force component of the Canadian Forces. On two separate occasions, remedial measures were imposed on Corporal Hoffman for misconduct. The first incidents concerned his interactions with a female Canadian Forces member [2016 Incidents]. The second incidents concerned his interactions with five female members of a cadet squadron, all of whom were minors at the time [2018 Incidents].

[5] The remedial measures imposed on Corporal Hoffman are those established under the Defence Administrative Orders and Directives [DAOD] 5019-4. The remedial measures available, in order of severity, are: (1) Initial Counselling; (2) Recorded Warning; and (3) Counselling and Probation. Following the 2016 and 2018 Incidents, the remedial measures of Counselling and Probation were imposed in 2016 and 2019, respectively.

[6] On October 26, 2020, Corporal Hoffman grieved the two Counselling and Probation measures in grievances MG213376 and MG213373 [Grievances]. The Canadian Forces' grievance process is comprised of a two-step process, an Initial Authority followed by a Final Authority (*National Defence Act*, RSC 1985, c N-5 [the Act]; *Queen's Regulations and Orders for the Canadian Forces*, Chapter 7). The Final Authority is the Chief of the Defence Staff or their delegate (Act at ss 29.11 and 29.14).

[7] Following the decisions of the Initial Authority, Corporal Hoffman requested that the Final Authority determine his Grievances. Prior to a final determination, the Final Authority referred Corporal Hoffman's Grievances to the Military Grievances External Review Committee [MGERC]. The MGERC was established in 1998 "as a means of reinforcing confidence in the adjudication of grievances through an arm's-length analysis" (Rory G Fowler, "The Canadian Forces Grievance Process: How Adequate an Alternative Remedy Is It?" (2014) 27 Can. J. Admin L. & Practice 277 at 285-286 [Fowler]). It does not determine grievances (Fowler at 286), rather its mandate is to review the grievances referred to it and provide its findings and recommendations in writing to the Final Authority (Act at ss 29.2(1)).

[8] The MGERC issued its findings and recommendations on October 25, 2021. While the Final Authority is not bound by the recommendations of the MGERC, the Final Authority must provide reasons if they do not act on a finding or recommendation of the MGERC (Act at s 29.13).

[9] The Final Authority reviewed the findings of MGERC and considered the submissions from Corporal Hoffman. On May 4, 2022, the Final Authority issued his decision granting in part Corporal Hoffman's Grievances [Decision]. The Final Authority decided to follow the MGERC's recommendations. The Final Authority concluded that there were errors in the earlier process that had denied Corporal Hoffman procedural fairness, but that they had been remedied through a review of the matter by a higher authority. The Final Authority further concluded that the remedial measure arising out of the 2016 Incidents would be downgraded to a Recorded Warning but that the remedial measure arising out of the 2018 Incidents would be upheld as Counselling and Probation.

[10] On June 14, 2022, Corporal Hoffman filed an application for judicial review of the Decision seeking an order quashing both of the original Counselling and Probation measures dated May 31, 2016 and December 6, 2019, and in the alternative, an order remitting the Grievances back to the Final Authority.

III. Analysis

[11] As noted above, the parties agree that the Decision failed to meet the standard of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov]. I note the concession by the Respondent that there was no evidence before the Final Authority to support the finding that Corporal Hoffman made use of personal information he had obtained through his work to contact the affected person in the 2016 Incidents. Having considered the record and the submissions of both parties on the issue of reasonableness, I agree that the Decision is unreasonable.

[12] Corporal Hoffman submits that this Court has the discretion to quash not only the Decision, but also the remedial measures that the Final Authority failed to correct. Corporal Hoffman pleads that there have been numerous procedural and substantive shortcomings throughout the process that the Final Authority ignored and failed to address. Corporal Hoffman states that the Final Authority ought to have recognized that the only reasonable outcome was to quash the fundamentally flawed initial process and initial decisions. Given that, in Corporal Hoffman's view, the remedial measures were excessive, unreasonable, unfair, and used as an improper substitute for a fair, impartial and transparent process - the only reasonable outcome in the present circumstances is for this Court to quash the impugned remedial measures.

[13] Corporal Hoffman highlights that contrary to many other statutory tribunals, the Final Authority in the context of the Canadian Forces' grievance process is not a purpose-made tribunal but rather is the Chief of the Defence Staff or their delegate (Act at ss 29.11 and 29.14), and thus these additional functions and duties are imposed on Canadian Forces' officers with existing duties (Fowler at 284-285). He states that this an important point for context as there has been a continuous failure of leadership from the time the remedial measures were first imposed up until the Decision.

[14] Corporal Hoffman further submits that there are three factors that present challenges in the present case, namely: (1) the nature of the Crown-soldier relationship; (2) the discretionary nature of public law remedies; and (3) specific failings throughout the grievance process, including consistent closed-minded decision-making and abuse of process.

[15] As to the first factor, the Crown-soldier relationship, Corporal Hoffman highlights that the members of the Canadian Forces are not in a contractual relationship with the Crown, rather it is an asymmetric public-law relationship in which the Crown assumes no obligations and the protection of rights and interests is largely procedural (Fowler at 288-289). Corporal Hoffman submits that the grievance process is controlled entirely by the chain of command, analogous to the grievor's employer, and the other external influence on the process is the MGERC.

[16] As to the second factor, the discretionary nature of public law remedies, Corporal Hoffman submits that while this Court has limited discretion to supervise the executive's exercise of prerogative powers, the present case concerns the exercise of statutory duties, powers and functions. As such, acceding to Corporal Hoffman's request to review the Grievances and the initial remedial measures is a proper exercise of judicial discretion.

[17] As to the third factor, the specific failures of the statutory decision makers, Corporal Hoffman pleads that they can be grouped into two categories: (a) consistent closed-minded decision-making; and (b) abuse of process. With respect to the notion of being closed-minded and in response to a question from the Court during the hearing, counsel for Corporal Hoffman explained that this is distinct from bias in that the decision makers did not accept their role, failed to turn their minds to the issues, ignored the evidence before them, and simply adopted conclusions without considering the arguments made by Corporal Hoffman. By ignoring his arguments, Corporal Hoffman submits that both MGERC and the Final Authority failed to correct the deficiencies in the initial decision-making process that resulted in the unsustainable remedial measures.

[18] With respect to abuse of process, Corporal Hoffman submits that even though he was accused of harassment and improper conduct, the Canadian Forces failed to employ the adjudicative mechanisms created to address those types of allegations, namely the Code of Service Discipline and the Canadian Forces Harassment Prevention and Resolution Policy. These mechanisms would have enabled Corporal Hoffman to take part in a quasi-adjudicative process that would have permitted him to test the allegations against him, including by cross-examination of witnesses.

[19] Corporal Hoffman submits that he had a legitimate expectation that the Canadian Forces would use the adjudicative mechanisms at their disposal rather than the non-adjudicative remedial measures which were ultimately used. In declining to proceed by way of the Code of Service Discipline, Corporal Hoffman pleads that the chain of command acted with impunity and demonstrated a disregard for the rule of law. The administrative process, in Corporal Hoffman's view, was not designed to adjudicate contested facts or conduct investigations. To summarize, Corporal Hoffman submits that the administrative process does not, in the context of this asymmetrical relationship, permit him to test the evidence against him. By going back to square one, he can then start off on the right foot.

[20] The Respondent submits that there is no basis for quashing the original remedial measures. The Respondent highlights that on redetermination, the Final Authority has the authority to conduct a *de novo* process, summon witnesses and compel the production of documents.

[21] The Respondent pleads that there is equally no basis to conclude that Corporal Hoffman had a legitimate expectation that the Code of Service Discipline process would be used. This Court, in the Respondent's view, should defer to the knowledge and expertise of the Canadian Forces decision-makers in their choices of processes to deal with allegations of misconduct where the investigation did not reveal criminal wrongdoing.

[22] The Respondent states that, contrary to the submissions of Corporal Hoffman, the Decision actually demonstrated open-mindedness as Corporal Hoffman was partially successful, given the reference to luring was removed in relation to the 2018 Incidents, the reference to the messages being of a sexual nature in relation to the 2016 Incidents was removed, and the remedial measure arising out of the 2016 Incidents was downgraded to a Recorded Warning.

[23] I have carefully reviewed the extensive record, and considered the arguments advanced in the parties' memoranda and at the hearing, and am not persuaded that it is appropriate in the present circumstances to order that the remedial measures be quashed. It is ultimately for the Final Authority on redetermination to decide whether the relief sought by Corporal Hoffman in his Grievances, namely that the two Counselling and Probation measures be quashed, should be granted.

[24] I am mindful that the Supreme Court of Canada in *Vavilov* stated that, as a general rule, the courts should respect the legislature's intention to entrust the matter to the administrative decision maker, albeit there are scenarios where declining to remit the matter would serve no useful purpose as a particular outcome is inevitable (at para 142). Directing a particular result is

an exceptional power that should only be exercised in the clearest of cases, which will rarely be the case where the issue in dispute is essentially factual in nature (*Burlacu v Canada (Attorney General)*, 2022 FC 1467 at para 40; *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14).

[25] The Federal Court of Appeal has instructed that a court may require a specific verdict of an administrative organization to which a file is being returned, but this power must only be used in the most clear-cut cases, such as when there is only one possible outcome (*Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 17). Once the assessment of evidence may affect the outcome, it is better to let the administrative decision maker render a decision, even though the decision may need to be reviewed for reasonableness again (*ibid*). It is clear, in the matter at hand, that the assessment of the evidence by the Final Authority will be determinative of the outcome, and thus the outcome is not inevitable.

[26] I am mindful of the factors raised by Corporal Hoffman as to why, in the present context of the Canadian Forces, it is appropriate to wipe the slate clean and quash the initial remedial measures. That being said, I am not satisfied that the factors raised are sufficient to warrant this Court's intervention in the manner in which Corporal Hoffman suggests. In particular, I have not been persuaded that the Canadian Forces were precluded from reviewing the allegations against Corporal Hoffman using the administrative process or that they were required to proceed by way of the Code of Service Discipline. Nor have I been persuaded that the administrative decision makers were precluded from imposing the most severe remedial measures from the outset.

[27] Corporal Hoffman argues that the chain of command asserted that his alleged misconduct was so severe that it warranted the highest form of remedial measure, yet although the allegations were investigated as a disciplinary misconduct, they did not give rise to charges under the Code of Service Discipline.

[28] The Respondent highlighted during the hearing that section 4.6 of DAOD 5019-4 (Progression of Measures) provides that an initiating authority may select a remedial measure without progressing from Initial Counselling through to Counselling and Probation. Furthermore, a review of DAOD 5019-4 confirms that remedial measures are available for, *inter alia*, sexual misconduct and any other conduct or performance deficiency.

[29] Given the foregoing, I do not find there is a basis upon which to conclude that Corporal Hoffman had a legitimate expectation that the Canadian Forces would proceed by way of the Code of Service Discipline and/or the Canadian Forces Harassment Prevention and Resolution Policy. Nor do I find that, for this reason, there has been an abuse of process.

[30] Finally, with respect to Corporal Hoffman's submissions on a pattern of closed-minded decision-making, while there have been a number of issues during the administrative process, I am not satisfied they rise to the level of warranting a directed verdict on the part of this Court. While the Decision is unreasonable, I am not prepared to presume that upon redetermination this matter will not be approached with an open mind. Moreover, as argued by the Respondent, the Decision did evidence an open-mindedness in that the Final Authority upheld Corporal Hoffman's Grievance.

IV. Conclusion

[31] For the foregoing reasons, this application for judicial review is allowed. I have not, however, been persuaded that Corporal Hoffman is entitled to have a directed verdict declaring the remedial measures quashed.

[32] Given the Respondent's consent to a redetermination, I agree with the Respondent that each party shall bear its own costs.

JUDGMENT in T-1231-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is allowed.
2. The matter is remitted back to the Final Authority for redetermination by a different decision maker.
3. Each party shall bear its own costs.

"Vanessa Rochester"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1231-22

STYLE OF CAUSE: KRISTOPHER HOFFMAN v ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 8, 2023

JUDGMENT AND REASONS: ROCHESTER J.

DATED: AUGUST 14, 2023

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