Federal Court  Cour fédérale

Date: 20091026

Docket: T-443-09

Citation: 2009 FC 1092

Ottawa, Ontario, October 26, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

CHARLES HUDON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision by the Director General of the Canadian Forces Grievance Administration ("Grievance Authority"), on behalf of the Chief of the Defence Staff ("CDS"), dated February 16, 2009, refusing to consider the applicant's grievance at the second and final level on the basis that the grievance was filed out of time without reasonable cause.

Factual background

[2] The applicant is a member of the Canadian Forces. He filed a grievance under section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5 (the Act) in 2006 (see also article 7.01 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O)). The initial authority did not grant him the redress sought at the first level of the grievance consideration procedure, and the applicant received notice of that determination on June 24, 2008.

[3] The applicant then had 90 days from receipt of the determination of the initial authority (QR&O at paragraph 7.10(2)), that is, until September 22, 2008, to submit his grievance to the CDS, the final authority on grievances under section 29.11 of the Act.

[4] Section 29.14 of the Act gives the CDS the authority to delegate any of the CDS's powers, duties or functions as final authority in the grievance process to the Grievance Authority, except in respect of grievances that are referred to the Canadian Forces Grievance Board in accordance with the QR&O, Volume 1, Chapter 7.

[5] The Grievance Authority received the applicant's grievance on November 21, 2008, nearly two months after the prescribed time limit had expired, and it was of the opinion that the applicant's arguments did not contain any new explanations that might persuade the CDS that it would be in the interests of justice to consider the out-of-time grievance under paragraph 7.10(4) of the QR&O. The Grievance Authority notified the applicant of the reasons for the determination in a letter dated February 16, 2009. Unhappy with the Grievance Authority's determination, the applicant applied for judicial review of that decision.

Impugned decision

[6] In a determination dated February 16, 2009, the Grievance Authority states that it considered the applicant's grievance dated June 20, 2006, concerning administrative and police investigations of him.

[7] The Grievance Authority then noted that on September 16, 2008, and October 22, 2008, counsel for the applicant requested extensions of the time limit prescribed under paragraph 7.10(2) of the QR&O. It explained that there was no authority to extend the time limits prescribed by regulation (QR&O at paragraphs 7.02(1) and (2)) before they expired and that there was no discretion in this regard.

[8] It should be noted that the initial authority's determination, rendered by Lieutenant-General Leslie on June 14, 2008, was received by the applicant on June 24, 2008. Consequently, the applicant's right to submit his grievance to the CDS expired on September 22, 2008. The applicant's grievance was submitted to the CDS on November 17, 2008, nearly two months after the 90-day period expired. The authority responsible for handling the grievance must therefore consider the reasons given by the applicant to explain the delay and determine if it is in the interests of justice to accept the out-of-time grievance (QR&O at paragraph 7.10(4)).

[9] The reason given by counsel for the applicant to justify the delay in submitting said grievance is related to the workload at the law firm representing the applicant. The Grievance Authority concluded that a careful reading of the file did not allow it to identify any exceptional

circumstances that would have prevented the applicant from filing his submissions within the prescribed time limits.

[10] The applicant's application for redress was therefore rejected, since the grievance was submitted to the CDS out of time without reasonable cause.

Issues

[11] The applicant submitted a series of questions that the respondent recast. In my view, the relevant questions in this case are the following:

1. Which standard of review is applicable to the Grievance Authority's determination?
2. Was the Grievance Authority's determination capricious, perverse or unsupported by the evidence?
3. Did the Grievance Authority breach a principle of natural justice or procedural fairness? More specifically, did the decision-maker give reasons for the decision, and did the applicant have a legitimate expectation that the decision-maker was going to extend the time limit?

Relevant legislation

[12] The following sections of the *National Defence Act*, R.S.C. 1985, c. N-5, are relevant:

Right to grieve **29.** (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which	Droit de déposer des griefs **29.** (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où

no other process for redress is provided under this Act is entitled to submit a grievance.	aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.
Final authority **29.11** The Chief of the Defence Staff is the final authority in the grievance process.	Dernier ressort **29.11** Le chef d'état-major de la défense est l'autorité de dernière instance en matière de griefs.
Delegation **29.14** The Chief of the Defence Staff may delegate to any officer any of the Chief of the Defence Staff's powers, duties or functions as final authority in the grievance process, except (a) the duty to act as final authority in respect of a grievance that must be referred to the Grievance Board; and (b) the power to delegate under this section.	Délégation **29.14** Le chef d'état-major de la défense peut déléguer à tout officier le pouvoir de décision définitive que lui confère l'article 29.11, sauf pour les griefs qui doivent être soumis au Comité des griefs; il ne peut toutefois déléguer le pouvoir de délégation que lui confère le présent article.
Decision is final **29.15** A decision of a final authority in the grievance process is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or to review by any court.	Décision définitive **29.15** Les décisions du chef d'état-major de la défense ou de son délégataire sont définitives et exécutoires et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, ne sont pas susceptibles d'appel ou de révision en justice.

[13] The following articles of the Queen's Regulations and Orders are also relevant:

7.01 RIGHT TO GRIEVE (1) Subsections 29(1) and (2) of the *National Defence Act*	7.01 – DROIT DE DÉPOSER DES GRIEFS (1) Les paragraphes 29(1) et (2) de la *Loi sur la défense*

provide:
"29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.

(2) There is no right to grieve in respect of
(*a*) a decision of a court martial or the Court Martial Appeal Court;
(*b*) a decision of a board, commission, court or tribunal established other than under this Act; or
(*c*) a matter or case prescribed by the Governor in Council in regulations."

(2) There is no right to grieve in respect of a decision made under the Code of Service Discipline.

(3) The right to grieve does not preclude a member from making an oral complaint to the commanding officer prior to submitting a grievance.

7.10 – SUBMISSION TO CHIEF OF THE DEFENCE STAFF

(1) Where a member has submitted a grievance under article 7.01 (*Right to Grieve*) and the decision of the initial authority does not afford the

nationale prescrivent :
« 29. (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

(2) Ne peuvent toutefois faire l'objet d'un grief :
a) les décisions d'une cour martiale ou de la Cour d'appel de la cour martiale ;
b) les décisions d'un tribunal, office ou organisme créé en vertu d'une autre loi;
c) les questions ou les cas exclus par règlement du gouverneur en conseil. »

(2) Ne peuvent faire l'objet d'un grief les décisions prises aux termes du code de discipline militaire.

(3) Rien n'empêche un militaire de se plaindre verbalement à son commandant avant d'exercer son droit de déposer un grief.

7.10 – DÉPÔT DU GRIEF DEVANT LE CHEF D'ÉTAT-MAJOR DE LA DÉFENSE

(1) Si un militaire qui a déposé un grief aux termes de l'article 7.01 (*Droit de déposer des griefs*) est d'avis que la décision de l'autorité initiale ne lui

redress that, in the opinion of the member, is warranted, the member may submit the grievance to the Chief of the Defence Staff for consideration and determination.	accorde pas le redressement qui semble justifié, il peut porter son grief devant le chef d'état-major de la défense pour qu'il l'étudie et en décide.
(2) The grievance must be in writing, signed by the grievor and submitted to the Chief of Defence Staff within 90 days of receipt by the grievor of the determination of the initial authority.	(2) Le grief est fait par écrit et signé par le plaignant, puis déposé devant le chef d'état-major de la défense dans les 90 jours qui suivent la réception de la décision de l'autorité initiale.
(3) A member who submits a grievance after the expiration of the period referred to in paragraph (2) must submit reasons for the delay.	(3) Le militaire qui dépose son grief après l'expiration de ce délai doit soumettre par écrit les raisons du retard.
(4) The Chief of the Defence Staff or an officer to whom final authority has been delegated may consider a grievance that is submitted after the expiration of the period referred to in paragraph (2) if satisfied that it would be in the interests of justice to do so. If not satisfied, the Chief of the Defence Staff, or the officer to whom final authority has been delegated, shall provide reasons in writing to the grievor.	(4) Le chef d'état-major de la défense ou l'officier ayant le pouvoir de décision définitive peut connaître d'un grief déposé en retard s'il est dans l'intérêt de la justice de le faire. Il doit toutefois motiver par écrit son refus au militaire.

Analysis

1. Which standard of review is applicable to the Grievance Authority's determination?

[14] This application raises the question of whether the manner in which the Grievance Authority's determination was made is acceptable under the acts and regulations in force.

[15] In the case at bar, the Court is of the opinion that the Grievance Authority's determination is a question of mixed law and fact and that the applicable standard of review is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). In *Chainnigh v. Canada (Attorney General)*, 2008 FC 69, 322 F.T.R. 302 at paragraph 21, this Court noted that a certain degree of deference was owed with respect to factual determinations and the exercise of discretion by the CDS. In *Armstrong v. Canada (Attorney General)* 2006 FC 505, 291 F.T.R. 49 at paragraph 37, Justice Layden-Stevenson noted the following:

> Balancing the factors, I conclude that for findings of fact, the applicable standard of review is that set out in the *Federal Courts Act*, that is, they are reviewable only if they are erroneous, made in a perverse or capricious manner or without regard to the evidence. This is equivalent to patent unreasonableness. In all other respects, the decision of the CDS (in this case the Grievance Authority) is subject to review on a standard of reasonableness. See: *McManus v. Canada (Attorney General)*, [2005] F.C.J. No. 1571, 2005 FC 1281 at paras. 14-20.

[16] Furthermore, questions relating to procedural fairness are questions of law and therefore subject to the correctness standard of review (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539 at paragraph 100; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at paragraph 65).

2. Was the Grievance Authority's determination capricious, perverse or unsupported by the evidence?

[17] Under subsection 29(1) of the Act, any officer or non-commissioned member is entitled to submit a grievance if no other process of redress is open to him or her. As part of his duties, the Act

and the QR&O give the CDS the power to dispose of a grievance and any other relevant issue. Section 29.11 of the Act provides that the CDS is the final authority in the grievance process. The decision of the CDS is final and binding (section 29.15 of the Act). The CDS is the Canadian Forces officer who is "charged with the control and administration of the Canadian Forces" (subsection 18(1) of the Act).

[18] The applicant submits that the Grievance Authority's determination prevented the CDS from exercising his powers, given that the applicant was deprived of his right to have his grievance considered and reviewed by the CDS. The applicant also takes the view that the Grievance Authority's determination was made in an arbitrary manner and is abusive and contrary to the spirit and to its responsibility to the members of the Canadian Forces.

[19] Furthermore, the applicant submits that the extension request was filed before the original time limit expired in order to preserve the applicant's rights, and he points out that his counsel contacted the office of the Grievance Authority in that regard, again to preserve the applicant's rights.

[20] The respondent, on the other hand, submits that the CDS does not have jurisdiction to determine a member's grievance submitted out of time, unless the CDS is of the opinion that it is in the interests of justice to do so. The respondent points out that the applicant submitted his grievance to the CDS approximately two months after the expiration of the relevant time limit. In the respondent's view, the applicant's reason for his delay, a heavy workload, cannot in itself excuse the applicant's failure to comply with the time limit.

[21] At the hearing, it clearly emerged that this issue centres on an interpretation of paragraph 7.10(4) of the QR&O. Paragraph 7.10(4) reads as follows:

7.10 – SUBMISSION TO THE CHIEF OF DEFENCE STAFF (4) The Chief of the Defence Staff or an officer to whom final authority has been delegated may consider a grievance that is submitted after the expiration of the period referred to in paragraph (2) if satisfied that it would be in the interests of justice to do so. If not satisfied, the Chief of the Defence Staff, or the officer to whom final authority has been delegated, shall provide reasons in writing to the grievor.	7.10 – DÉPÔT DU GRIEF DEVANT LE CHEF D'ÉTAT-MAJOR DE LA DÉFENSE (4) Le chef d'état-major de la défense ou l'officier ayant le pouvoir de décision définitive peut connaître d'un grief déposé en retard s'il est dans l'intérêt de la justice de le faire. Il doit toutefois motiver par écrit son refus au militaire.

[22] This provision clearly indicates that the Grievance Authority may accept a grievance submitted after the expiration of the time limit if it is of the opinion that it is in the interests of justice to do so. As noted above, the applicant raised the heavy workload of his counsel's law firm as the reason for his lateness.

[23] On September 16, 2008, about a week before the applicant's time limit for submitting his grievance to the CDS was set to expire, Michel Drapeau, one of the applicant's lawyers in this file, wrote to the CDS to have the time limit extended to October 24, 2008. The letter did not give any reasons for the need to extend the time limit.

[24] On October 17, 2008, a representative of the Director General Canadian Forces Grievance Authority, Major Marc Cormier, had a telephone conversation with Ms. Zorica Guzina, another

lawyer acting for the applicant in this file; during this conversation, the issue of allowing the grievance to be submitted after the expiration of the time limit was discussed.

[25] Ms. Guzina then wrote to the CDS on October 22, 2008, to ask for another extension of the time limit for submitting her client's grievance, this time to November 17, 2008. This letter, unlike the letter dated September 16, 2008, contained an explanation to the effect that the firm's workload would prevent it from submitting the grievance before October 22, 2008.

[26] The sole reason given by the applicant for his delay is therefore the heavy workload of his counsel's law firm. However, counsel was well aware of the 90-day time limit under paragraph 7.10(4) of the QR&O. Moreover, in the letter to the CDS dated September 16, 2008, Mr. Drapeau, one of the applicant's lawyers, stated the following: [TRANSLATION] "However, as you know, we have 90 days from the date of receipt to submit our application to you, which allows us up until September 22, 2008, to submit our answer".

[27] The evidence on record shows that this nearly two-month delay did not result from an event that was unforeseen, unexpected or beyond their control. In this Court's opinion, granting an extension of time solely on the ground that the firm's heavy workload caused the delay in question, without any other explanation, is not in the interests of justice. If extensions were to be granted for this reason alone, the mechanism under article 7.10 of the QR&O would be quickly short-circuited and rendered meaningless.

[28] It is certainly conceivable that a heavy workload combined with other factors that could not be foreseen or were beyond counsel's control could be taken into account, but such is not the case here. Indeed, more often than not, factors that are beyond counsel's ability to foresee or control will result in an excessive workload, not the other way around.

[29] In this respect, the Court is in full agreement with the words of Justice Reed on this issue in *Chin v. Canada (M.E.I.),* (1993), 69 F.T.R. 77, 43 A.C.W.S. (3d) 1141 at paragraph 10:

> It is too easy a justification for non-compliance with the rules for counsel to say the delay was not in any way caused by my client and if an extension is not granted my client will be prejudiced. I come back again to the question of fairness. It is unfair for some counsel to be proceeding on the basis that barring unforseen [*sic*] events the time limits must be met and for others to be assuming that all they need do is plead overwork, or some other controllable event, and they will be granted at least one extension of time. In the absence of an explicit rule providing for the latter I proceed on the basis that the former is what is required.

[30] Furthermore, under subsection 29(3) of the Act, Parliament granted the Governor in Council the power to set the conditions for submitting a grievance. To ensure that the system works effectively, the Governor in Council chose to subject Forces members to a set time limit for submitting their grievances to the CDS (QR&O at paragraph 7.10(2)). Similarly, the Governor in Council determined that the CDS would not have jurisdiction to consider grievances submitted after the expiration of the prescribed period (QR&O at paragraphs 7.10(1), (2) and (4)). However, the Governor in Council did provide for an exception, such that the CDS may consider a grievance submitted after the expiration of the prescribed period if the member can satisfy the CDS that it is in the interests of justice to do so (QR&O at paragraphs 7.10(3) and (4)). In the case at bar, the burden was therefore on the applicant to satisfy the Grievance Authority of this.

[31] This Court is of the opinion that the applicant has not discharged his burden and has not offered any valid reason to support his request for an extension of the time limit. The Grievance Authority's decision was reasonable in the circumstances, and this Court's intervention is unwarranted.

[32] Before concluding on this issue, the Court notes that at the hearing, the applicant made submissions to the Court that did not appear in the written submissions. The respondent objected to these new submissions. The Court heard the applicant's arguments in part and took them under advisement, given the important issues facing the applicant.

[33] The applicant thus tried to make a connection between the time elapsed between the grievance at the first level and the refusal to accept the grievance at the second level because of the delay, arguing that the time that the military authorities spent processing the grievance justified granting an extension in exchange. The applicant also made a technical argument to the effect that his intention to ask for an extension was sufficient to preserve his rights and allowed him to make submissions at a later date. Finally, the applicant stated that his grievance had been submitted and that it was therefore unnecessary to resubmit it. After hearing the applicant, and in light of the circumstances, the Court cannot agree with this complementary argument and rejects it entirely. On the one hand, the Court's reading of article 7.10 of the QR&O, as described above, is at odds with the applicant's convoluted interpretation of that provision; on the other hand, the evidence on record, more specifically, the letter dated September 16, 2008, clearly indicates that the applicant understood that the entire grievance had to be submitted within the 90-day time limit prescribed by article 7.10 of the QR&O. He did not do so and gave no reasonable explanation for the delay.

3. Did the Grievance Authority breach a principle of natural justice or procedural fairness? More specifically, did the decision-maker give reasons for the decision, and did the applicant have a legitimate expectation that the decision-maker was going to extend the time limit?

[34] The applicant submits that the Grievance Authority's determination, given its significant impact on the applicant's rights and the repercussions for his career and reputation, breached the principles of natural justice and procedural fairness and, moreover, did not include any justification or reasons. The applicant is also of the opinion that, further to the preliminary discussions between his counsel and the Grievance Authority, he had a legitimate expectation that his request for an extension would be accepted by the Grievance Authority.

[35] Contrary to what the applicant claims, the respondent submits that the Grievance Authority did not fail to give reasons for its decision. According to the respondent, the decision was neither capricious nor abusive, and the applicant had failed to show that he was entitled to expect that the time limit would be extended.

[36] The Court notes that paragraph 7.10(4) of the QR&O provides that if an extension of the time limit is refused, the reasons for that refusal must be provided in writing. However, having read the decision by the Grievance Authority, the Court is of the opinion that the three-page decision provides sufficient reasons. First of all, the Grievance Authority noted that it did not have discretion to extend a time limit. It then referred to article 7.10 of the QR&O, explaining that the grievance must be submitted within 90 days and that in this case, the applicant submitted the grievance after the expiration of that period. That said, the Grief Authority notes in its decision that it must consider the reasons for the delay; however, having examined the matter, it concludes that a heavy workload is not sufficient reason and that it is therefore not in the interests of justice to grant an

extension of time. It can hardly be argued that the Grievance Authority did not give intelligible reasons for its decision or that its decision was capricious or abusive.

[37] The applicant argued that further to the discussions that took place between Ms. Guzina and Major Cormier, the applicant had a legitimate expectation that the time limit would be extended. Although the applicant would have liked to receive an extension from the Grievance Authority, the evidence on the record does not support the conclusion that, during the said telephone conversation, Major Cormier (representing the Director General Canadian Forces Grievance Authority) made any statements creating any expectations whatsoever (*Baker v. Canada (Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817 at para. 26). What is more, this allegation by the applicant relies on a paragraph in an affidavit by a person other than Ms. Guzina who had no personal knowledge of the telephone conversation between Major Cormier and Ms. Guzina. For this reason, the Court gives little weight to this allegation.

[38] In refusing to consider the applicant's grievance at the second and final level, the Grievance Authority therefore did not breach the principles of natural justice or procedural fairness. It correctly concluded that the grievance had been submitted out of time without reasonable cause.

[39] In conclusion, the Court notes that article 7.10 of the QR&O is clear. The Grievance Authority does not have discretion to agree to hear a grievance submitted out of time unless it is in the interests of justice to do so. In this case, the applicant wanted an extension of time simply because of a heavy workload and offered no other explanation for the delay. The Grievance Authority gave

sufficient reasons for its decision not to grant an extension of time on that sole basis. The intervention of this Court is unwarranted.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed.

"Richard Boivin"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-443-09
STYLE OF CAUSE:	CHARLES HUDON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 14, 2009
REASONS FOR JUDGMENT BY:	BOIVIN J.
DATED:	October 26, 2009

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