Federal Court  Cour fédérale

Date: 20091130

Docket: T-1564-08

Citation: 2009 FC 1217

Ottawa, Ontario, November 30, 2009

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ANTHONY MOODIE

Applicant

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA
AS REPRESENTED BY THE MINISTER
OF NATIONAL DEFENCE

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in respect of a decision of the Chief of Defence Staff (CDS) dated August 7, 2008, where the CDS did not grant the redress sought by the Applicant. The CDS determined that the Major who issued a Verbal Warning to the Applicant had authority to do so and that the Major did not abuse his authority when he issued the Verbal Warning, recalled the Applicant back from an attached posting, cancelled the Applicant's annual leave, did not support a medical claim and sought advice from the local Assistant Judge Advocate General regarding issues involving the Applicant.

I. Background

[2] The Applicant served in the Canadian Armed Forces between 1995 and 2005. At the time of his release from service, he was ranked as a second Lieutenant. In 2002, he enrolled in the Regular Forces as a Land Force Logistics Officer and was posted on a permanent basis to the Canadian Forces School of Administration and Logistics (CFSAL). His Commanding Officer (CO) was Major Lemelin (the Major).

[3] The Applicant was attach-posted to the 32 Canadian Brigade Group Headquarters (32 CBG HQ) to gain training as a Land Logistics Officer. The attach-posting commenced in March 2003. On June 2, 2004, the Applicant was required to return back to CFSAL. On June 7, 2004, he was posted at Post Recruit Education Training Centre (PRETC) at Canadian Forces Base Borden (CFB Borden).

[4] In September 2003, the Applicant was informed he would be required to attend the Common Army Phase (CAP) training set for May 31, 2004, in Gagetown. On May 3, 2004, the Applicant requested and was granted leave effective for June 7, 2004. No explanation was given by either party as to why this leave was requested or why it was granted if the Applicant was scheduled to attend the CAP program at this time. On May 28, 2004, the Applicant saw a Medical Officer and was asked to return to the clinic on May 31, 2004, the day he was scheduled to commence his CAP. The Applicant informed the Chief Clerk, a Sergeant at 32 CBG HQ, that the Applicant would not be

attending the CAP course at Gagetown. On May 31, 2004, the Applicant went for the follow up appointment with the Medical Officer who referred the Applicant to a specialist and placed him on sick leave for a period of two weeks.

[5] On June 1, 2004, 32 CBG HQ learned that the Applicant had been placed on sick leave and had not attended the CAP. On June 4, 2004, the Applicant requested that the Medical Officer cancel his sick leave. The sick leave was cancelled and the Applicant was advised by his chain of command that he would be posted at PRETC at CFB Borden.

[6] On June 29, 2004, the Applicant was given a Verbal Warning (VW) by the Major. As set out in a written record of the VW, it was issued because the Applicant had shown improper judgment in that he failed to advise his chain of command of his intentions with regard to attending his CAP.

[7] On September 30, 2004, the Applicant submitted an application for Redress and Grievance pursuant to section 29 of the *National Defence Act*, R.S. 1985, C. N-5 (NDA). In this application for Redress and Grievance, the Applicant stated that the Major had acted contrary to existing guidelines, that the Major's actions constituted an abuse of authority, that the Major had no administrative control over him during the relevant period of time, and that the VW should be rescinded.

A. *The Legislative Scheme*

[8] The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) sets out the command and reporting structure in the Canadian Armed Forces. Under article 3.20, command is exercised by the senior officer present. Article 19.015 provides that an officer shall obey lawful commands and orders of a superior officer as defined in article 1.02. Articles 4.01 and 4.02 provide that an officer is responsible to their immediate superior for the proper and efficient performance of their duties.

[9] The *Canadian Forces Administrative Order* (CFAO) 26-07, sets out the administrative measures designed to raise inadequate performance or conduct to an acceptable standard. The CFAO sets out provisions for Recorded Warnings (RW) and Counselling and Probation (C&P), and these are to be used as the second last attempt to salvage a member's career. While the CFAO does not directly set out a provision for the issuance of VW, they do state that a RW should not be issued unless the member has been verbally warned and given guidance on the deficiency.

[10] A member of the Canadian Armed Forces may be attach-posted to perform a duty outside their normal unit for a period normally less than one year. As set out in chapter 7 of the *Administrative Procedural Manual,* A-PM-245, an individual on attached-posting continues to fill their position at their place of permanent duty with their parent unit.

[11] Section 29 of the NDA sets out the grievance procedure within the Canadian Armed Forces. When an officer had been aggrieved by a decision, act or omission in the administration of the affairs of the Canadian Forces, they have the right to submit, under certain conditions, a grievance in the manner and in accordance with the prescribed regulations.

[12] This grievance process can be summarized as follows:

(a) Within six months of the day the member knew or ought to have known about the injustice, the grievor must submit the grievance to their CO;

(b) Upon receipt, the CO must determine if they could act as the Initial Authority in the matter. In the affirmative, the Initial Authority has 60 days to consider and determine the grievance, ensuring that procedural fairness principles are respected;

(c) If the CO cannot act as the Initial Authority, the CO has 10 days to forward the grievance to the appropriate Initial Authority, who in turn has 60 days to consider and determine the grievance, also ensuring that procedural fairness principles are respected;

(d) Upon receiving the Initial Authority decision, the Applicant has 90 days from receipt to elect to have the grievance forwarded to the CDS, the Final Authority for the Canadian Armed Forces grievance process;

(e) In this case, as the matter grieved is abuse of authority, the CDS is obligated to refer the grievance to the Canadian Forces Grievance Board (CFGB) in accordance with the QR&O article 7.12 for review;

(f) The CDS is then precluding from delegating their powers, duties and functions as a Final Authority and must personally consider and determine the grievance;

(g) The CDS is not bound by the CFGB's findings; and

(h) The CDS decision is final and bindings and not subject to appeal or review by any court, except for judicial review under the *Federal Court Act*, R.S.C. 1985, c.F-7.

B. *The Decision*

[13] Following the grievance process as set out above, the Applicant's grievance had been considered prior to the CDS decision.

[14] The Initial Authority denied the Applicant's Redress and Grievance on February 17, 2005. The Initial Authority determined that the VW was warranted and given in accordance with the established administrative process. The Initial Authority stated that the VW was warranted as the Applicant had not contacted the CFSAL nor his chain of command on the afternoon of May 28, 2004, with regard to attending his CAP and that informing the Chief Clerk, a subordinate, was unacceptable. The Initial Authority explained that there was no abuse of authority as CFSAL was the Applicant's parent unit and retained responsibility for his career administration during his attach-posting.

[15] Not satisfied with this decision, the Applicant referred his grievance to the CFGB. On January 29, 2007, the CFGB upheld the decision of the Initial Authority and affirmed that the

issuance of the VW was reasonable. The CFGB found that the Major had the authority to issue the VW as the Applicant remained part of the CBSAL. The CFGB did find that while the VW was warranted, it should not have been issued in the format of a RW. However, this did not disturb their recommendation that the Chief of Staff deny the grievance.

[16] Once it received the file in the normal course, the Canadian Forces Grievance Authority contacted the Applicant to let him know that the file was being forwarded for determination by the CDS and asked if he had any additional information. The Applicant asked if the file included a "tape recording" that he felt was very relevant. The Officer at the Grievance Authority who was in charge of the file informed the Applicant that there was no tape recording, but if the Applicant forwarded the tape it would be included in the material considered by the CDS. The Applicant emailed the Officer and stated he was under no obligation to provide the tape and refused to do so.

[17] The CDS rendered his decision on August 7, 2008. The CDS upheld the decision of the Initial Authority and concurred with the reasons of the CFGB. In the decision, the CDS referred to the fact that the Applicant had been given an opportunity to provide the tape recorded message and refused to do so.

II. Standard of Review

[18] The decision of the CDS will be reviewed under a standard of reasonableness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190). I come to this conclusion after considering

the following: the fact that decisions of the CDS are final and binding, except for judicial review under the *Federal Courts Act*, R.S.C. 1985, c. F-7; that the CDS is charged with control and administration of the Canadian Forces and is interpreting its own statute; that the statutory scheme provided the CDS with discretionary power in his determination of such grievances, and that the issues to be addressed are predominantly those of fact or mixed fact and law.

[19] Issues of procedural fairness will be reviewed on a standard of correctness (see *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, 2630 D.L.R. (4th) 113).

III. Issues

[20] The issues raised by the Applicant can be set out as such:

A. *The Alleged Breach of Procedural Fairness*

[21] The Applicant alleges that the Respondent breached procedural fairness as the Major did not have the authority to issue the VW as an application was pending in the Federal Court at the relevant time. He also alleges the CFGB breached procedural fairness when the taped message was not part of the evidence considered.

[22] Under article 7.16 of the QR&O, grievances are suspended if a claim is brought by the grievor under an Act of Parliament. In this case, the Applicant had an action pending in the Federal

Court (Court File No. T-1248-07). This action was struck on May 20, 2008. No Appeal was filed in the requisite time period. On July 25, 2008, the Applicant made an application to the Federal Court to extend the time to file a Notice of Motion to Appeal the decision striking out his action. The CDS rendered his decision on August 7, 2008. The Motion to extend the time was allowed on August 26, 2008. Though the timing of events is worth noting, at the time of the decision by the CDS the Applicant did not have an action or claim in the Federal Court. There was no error.

[23] In his email of May 27, 2007, the Officer at the Grievance Authority provided the Applicant with an opportunity to provide the allegedly missing tape recording and the Applicant was warned that if the tape was not provided by a specified date that the Applicant's file would be considered and determined by the Final Authority without it. The Applicant refused and the file was considered without the tape recording. There was no error of procedural fairness on the part of the Respondent.

[24] I note that the Applicant has provided an allegedly "certified" transcription of the tape recording for this hearing. As it was not before the CDS at the time of the decision, it will not be considered (see *PPSC Enterprises Ltd. v. Minister of National Revenue*, 2007 FC 784, [2007] F.C.J. No. 1031 at paragraph 16; *334156 Alberta Ltd. v. Minister of National Revenue*, 2006 FC 1133, 300 F.T.R. 74 at paragraph 16).

B. *Attach-postings and Verbal Warnings*

[25] The Applicant argues that the Major abused his authority as a senior officer when he issued the VW. When a member of the Canadian Armed Forces is attach-posted they are away from their parent unit for a temporary period of time, but continue to fill their position at the parent unit (see article 1.02 (b) and (c) of the QR&O and the *Administrative Procedural Manual*, above). Therefore, the parent unit still retains control over the member.

[26] A VW is considered to be the first step in the line of progressive discipline (*Forster v. MacDonald*, 108 D.L.R. (4th) 690, [1994] 3 W.W.R. 364 (ABQB)). While there is no regulation or policy that provides who can issue a VW, there is with regard to who can administer the more stringent punishments of Recorder Warnings and Counselling and Probation. Under the Canadian Forces Administrative Order 26-17, the RW can be issued by a member's supervisor, commanding officer or higher authority and a C&P by a commanding officer or higher authority. Based on the fact that a Commanding Officer can issue the more severe disciplines of RW and C&P, it follows that the commanding officer is able to issue a VW.

[27] The CFGB held, and the CDS concurred, that the VW was warranted as the Applicant had not advised any of his superiors that he would not be arriving in Gagetown for CAP training as required and that his explanation was deficient. However, the CDS also concurred with the CFGB that the VW should have been issued in a simpler format. The CFGB found that the VW had not

been placed on the Applicant's file and there was no evidence that it had an adverse effect on his career.

[28] In this case, the Major was ranked as a higher authority to the Applicant in the Applicant's parent unit. It was reasonable for the CDS to find that the Major had acted within his authority when he issued the VW, despite the fact that the format of the VW could have been simplified.

[29] In the decision of August 7, 2007, the CDS concurred with the findings of the CFGB that there was no abuse of authority when the Major refused to support the Applicant's medical claim, recalled the Applicant from his annual leave, and sought advice from the local Assistant Judge Advocate General regarding issues to which the Applicant was involved. This was reasonable.

C. *Other Administrative Issues*

[30] The CFGB found that there was no evidence that the Major had delayed or obstructed the Applicant's medical claim, that the Major was regaining proper administrative control over the Applicant in cancelling his annual leave, and that it was reasonable for the Major to take advantage of having a legal officer in each region to provide legal advice. In addition, the CFGB found that the Major did not abuse his authority when he recalled the Applicant as the Major was taking the necessary steps to gain administrative control over the Applicant based on the situation and time constraints. It was reasonable for the CDS to concur with these findings.

[31] The decision of the CDS was reasonable in light of the relevant legislative scheme and based on the record properly before him. There were no breaches of procedural fairness. There is no basis for this Court to interfere with the decision.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is dismissed; and

2. there is no Order as to costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1564-08**
STYLE OF CAUSE:	**MOODIE** **v.** **HER MAJESTY THE QUEEN ET AL.**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**NOVEMBER 2, 2009**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
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