Federal Court  Cour fédérale

Date: 20110530

Docket: T-1310-10

Citation: 2011 FC 600

Ottawa, Ontario, this 30th day of May 2011

Present: The Honourable Mr. Justice Pinard

BETWEEN:

MASTER WARRANT OFFICER LINDA L. MEGGESON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Chief of the Defence Staff ("CDS"), brought pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, by Master Warrant Officer ("MWO") Linda L. Meggeson (the "applicant"). The decision was in respect of an application for a redress of grievance submitted by the applicant pursuant to section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5.

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[2] The applicant has been a serving member of the Canadian Forces ("CF") Regular Force since October 13, 1977. In July 2006, she was serving as MWO on a one-year tour of duty as the Vehicle Fleet Management Coordinator of the Multinational Force and Observers ("MFO") in Egypt under Operation Calumet. There were 28 CF members serving in the MFO, who were designated as Task Force El Gorah ("TFEG") by Canadian Expeditionary Force Command ("CEFCOM"), who has overall command of the mission. The applicant was assigned secondary duties as the Contingent Sergeant Major.

[3] On October 5, 2006, the Commander of TFEG, Colonel P.G. Abbott, ordered the applicant's immediate repatriation to Canada. In a brief interview with the applicant prior to her departure, Col. Abbott said that he had a "dysfunctional command team". The applicant alleges that she was given no prior warning or expression of dissatisfaction with her performance and no specifics as to why she was being repatriated.

[4] The applicant submitted an application for redress of grievance through her chain of command to the Director General Canadian Forces Grievance Authority ("DGCFGA") on May 23, 2007. DGCFGA confirmed receipt of the application on January 8, 2008 and forwarded the file to the Canadian Forces Grievance Board ("CFGB") as a mandatory referral on January 10. The CFGB requested the applicant's consent to access her personnel and medical records, which she granted. The applicant submitted supplementary documentation as requested on May 11, 2009. On September 20, 2009, the applicant submitted comments and additional documentation.

[5] The CFGB issued its findings and recommendations on December 1, 2009, and provided the applicant with the opportunity to provide comments and other pertinent documents to DGCFGA for further consideration by the Final Authority at CDS; the applicant submitted her comments on January 9, 2010.

[6] The CDS decision was issued on June 21, 2010, and received by the applicant on July 15, 2010. The decision partially grants the application for redress of grievance.

[7] Since her repatriation, the applicant has developed a chronic medical condition. On July 22, 2009, the CF assigned the applicant Medical Employment Limitations ("MEL") which would normally disqualify the applicant from an operational deployment. The applicant states that upon receiving the CDS decision she sought confirmation that her MEL would not preclude her from the CDS remedy of another deployment, but to date the DGCFGA has not responded to the applicant's request, nor has she been offered another deployment.

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[8] The CDS noted that the applicant's grievance alleged that her repatriation was unwarranted and carried out in an inappropriate manner, that the abruptness of her repatriation resulted in relocation difficulties, that her 2006 Theatre Personnel Evaluation Report ("PER") did not accurately reflect her accomplishments, and that the actions of one of her superiors may have constituted a possible abuse of authority.

[9] The CDS noted that repatriation can have serious career repercussions and such action should only be taken after procedural fairness has been afforded. The CDS found that the applicant was not formally advised of her alleged shortcomings, was not provided with the opportunity to overcome them, and was not afforded procedural fairness in the repatriation decision. She was not given a reasonable opportunity to present her response to the Task Force Commander's stated concerns, and was not given an opportunity to make representations to the decision maker (CEFCOM). Col. Abbott did not have the authority to unilaterally repatriate the applicant. The CDS directed that the applicant be considered for another deployment opportunity appropriate to her qualifications and experience when one arises. However, the CDS found that the applicant was not entitled to the requested deployment-related allowances for lost pay for the nine months that she was not in Operation Calumet as anticipated. These entitlements were designed to compensate for the loss of amenities while on deployment, and it was not appropriate to extend them to those not actually subjected to in-theatre privations. The CDS found that it did not have the authority to provide the applicant with compensation for services not rendered to the CF.

[10] The CDS found that the PER was unfair, biased and contained inaccurate information, and found that it should be expunged from the applicant's record. The applicant's Personnel Development Review ("PDR") should have addressed any perceived shortcomings in her performance; it did not do so. The PER was also given to the applicant after she had left the theatre, giving her no opportunity to comment on it. This provided a sufficient appearance of bias. The CDS found that the applicant's career manager had stated that she was already merit-listed for the 2007 promotion year and the adjustment caused by the disregarded PER would make no difference to her promotion potential. There was no need to convene a supplementary Merit Board for 2007 to 2010.

[11] The CDS found that the applicant should be reimbursed for the expenses she incurred from October 12-16, 2006 while she was being relocated.

[12] The CDS noted that harassment allegations are to be tendered to the immediate supervisor, or to the next superior in the chain of command. The applicant had never filed a formal harassment complaint, so the CDS did not address the alleged abuse of authority.

[13] The CDS found that the applicant had not provided any substantiation of the allegation that she lost income as the result of health issues resulting from these events. The CDS noted that it did not have the authority to grant monetary compensation in the grievance process and that the applicant should submit a claim against the Crown.

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[14] The applicant submits that the issues raised in this application deal with procedural fairness, and are therefore subject to the standard of review of correctness (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 (C.A.), at paras 53 and 57; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras 45 and 47).

[15] The respondent argues, and I agree, that the issue is not one of procedural fairness, as the CDS found that procedural fairness had been breached and neither party disputes this finding. The issue is rather one of the appropriate remedy. The respondent contends that the authority of the CDS to order a particular remedy is discretionary and should be afforded deference (*Zimmerman v.*

Attorney General, 2011 FCA 43 at para 21; *Smith v. Chief of Defence Staff et al.*, 2010 FC 321, 363 F.T.R. 186). I find that the applicable standard of review is therefore reasonableness.

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[16] The applicant submits that the Federal Court of Appeal has held that the favoured legal remedy in cases of wrongful dismissal is reinstatement (*Opaskwayak Cree Nation v. Booth*, 2009 FC 225 at paras 38-39, aff'd 2010 FCA 299). The applicant states that she is aware that the CDS' offer of redress, namely an operational deployment, is an appropriate legal remedy, and states that she accepted the offer, but argues that the CF has failed to implement the CDS' direction and remedy. The applicant appears to imply that the CF should order her deployment in spite of her medical restrictions.

[17] The respondent argues that the CDS' remedy of redeployment was reasonable in light of the information before the CDS at the time, which, the respondent argues, did not include information regarding the applicant's medical conditions. The respondent argues that as the purpose of judicial review is to determine whether the tribunal committed a reviewable error on the basis of the material before it when it made its decision, the applicant should not be permitted to argue that the CDS should have taken into consideration medical issues raised after the fact (*Ontario Assn. of Architects v. Assn. of Architectural Technologists of Ontario*, 2002 FCA 218, [2003] 1 F.C. 331 (C.A.)). The respondent takes note of the applicant's argument that the CDS ought to have been aware of her medical issues at the time of the decision because she had given access to her medical files, but argues that the onus was on the applicant to include with the grievance a copy of any

relevant documents, and to submit further documents before the CDS made its final decision. The applicant did not submit any specific evidence of her medical restrictions despite having the opportunity to do so between their imposition on July 22, 2009 and the June 21, 2010 decision date. Her comments from January 9, 2010, did not make mention of her permanent medical restrictions, nor did they take issue with the CFGB recommendation of a possible future deployment. She did mention her restrictions in an email to a member of DGCFGA on August 11, 2010 (see Exhibit S of the applicant's affidavit) but it does not appear that it was mentioned specifically to the CFGB or to the CDS.

[18] The respondent argues that the documents submitted by the applicant in her record for this judicial review that were not before the CFGB or the CDS, such as the Medical Employment Limitations, should not be considered in this review as they constitute extrinsic evidence that was not before the tribunal. I agree; the decision of the tribunal is only to be reviewed on the basis of the material which was before it, and the MEL does not appear in the tribunal record.

[19] The respondent argues that as there was no evidence on the record suggesting that the applicant would be unfit for deployment, the decision to offer a remedy of future deployment was reasonable.

[20] I am in agreement with the respondent's position. The CDS could not take into account information that it did not have, and the applicant was given the opportunity to submit this information on at least two occasions after receiving notification of her medical restrictions (on September 30, 2009, and January 9, 2010). The CDS determined that the appropriate remedy would

be for the applicant to be considered for redeployment in accordance with her qualifications and experience, as the opportunity arose. There is nothing to indicate that this decision was unreasonable in the circumstances of the case and in light of the information before the CDS.

[21] The applicant has not provided any legal basis for her implication that this Court should order her redeployment in spite of her medical condition. I do not see any basis on which this Court could make that order.

[22] In the alternative, the applicant seeks monetary compensation, which the CDS correctly indicated he had no authority to grant. In this respect, the CDS stated the following, in his decision, at pages 4/8 and 6/8:

> As redress, you have requested financial compensation for lost pay for the nine months that you were not in OP CALUMET as anticipated. The CFGB explained that you were not entitled to those deployment related allowances, as you were no longer deployed. I agree. The theatre related entitlements are designed to compensate for the loss of amenities and conveniences while on deployment. It is not appropriate, in my view, to extend these benefits to those who are not actually subject to the in-theatre privations the theatre entitlements anticipate. In any case, I do not have the authority to provide you with any compensation for services that were not rendered to the CF. Should you still feel you have a case for financial compensation, you can submit a claim to the Director Claims and Civil Litigation (DCCL) at the following address: . . .
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> […]
>
> You have also provided information regarding the effects of these and subsequent events on your health. In your submission of 9 January 2010, you note that the CFGB did not address health and well-being issues that you included under the heading "Compensation for Lost Income". However, you have not provided any substantiation that you lost income as the result of the health issues you have documented. If, as I infer, you are requesting

> damages, it is important that you know that I do not have the authority to grant monetary compensation or ex gratia payments as FA in the grievance process. That authority lies with DCCL and you must submit a claim against the Crown.

[23] At the hearing before me, the applicant admitted that she had not made any such claim to DCCL or against the Crown after the impugned decision was made. She explained that she still hopes that she can be deployed in spite of her medical condition. If not, as stated in her application for judicial review, she asks in the alternative for

> (c) . . . an order that the CDS forward the Applicant's file to the Director Claims and Civil Litigation (DCCL) along with his recommendation that the Applicant be paid all the allowances and benefits she was deprived from receiving as of the date of her unauthorized removal from her duties until she would have completed her one year tour.
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> […]
>
> (e) . . . an order permitting this application for judicial review to be continued as an action for damages.

[24] First, it is incumbent upon the applicant herself, not the CDS, to submit a substantiated claim, as was suggested in the decision, to DCCL. Second, absent extraordinary circumstances, it is too late for this Court, at the hearing of the application for judicial review, to allow the request that the application be treated and proceeded with as an action pursuant to subsection 18.4(2) of the *Federal Courts Act*. Such a request should and could have been made at a much earlier stage of the application for judicial review.

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[25] For the above mentioned reasons, in spite of all the sympathy I have for the applicant, her application for judicial review is dismissed, without costs.

JUDGMENT

The application for judicial review is dismissed, without costs.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1310-10
STYLE OF CAUSE:	MASTER WARRANT OFFICER LINDA L. MEGGESON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 3, 2011
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APPEARANCES:

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