Federal Court  Cour fédérale

Date: 20120618

Docket: T-1810-11

Citation: 2012 FC 750

Ottawa, Ontario, June 18, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

CAPTAIN KIMBERLY Y. FAWCETT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of the Director General, Canadian Forces Grievance Authority [DGCFGA], dated September 23, 2011, denying the redress sought by the applicant in a grievance submitted pursuant to section 29 of *National Defence Act*, RSC, 1985, c N-5 (*NDA*). For the reasons that follow the application is granted.

Facts

[2] The applicant, Captain Kimberly Y. Fawcett, currently serves in the Canadian Forces as an Air Logistics Officer. She joined the Canadian Forces on December 18, 1996. Her husband, Major Curtis Smith, is also a member of the Canadian Forces.

[3] In February 2006, both the applicant and her husband were serving in high readiness units of the Canadian Forces in Kingston, Ontario. The applicant returned from maternity leave on February 6, 2006. Upon her return she was ordered to prepare a Family Care Plan (FCP) pursuant to Defence Administrative Order and Directive 5044-1 and Canadian Forces Joint Support Group [CFJSG] Standing Order 35-1. Through negotiations with their respective supervisors, the applicant and her husband crafted an FCP that would accommodate their daycare needs and their own readiness requirements for the Canadian Forces. The usual schedule was for her husband to drop their son off at daycare in the morning, while the applicant would pick their son up in the afternoon.

[4] On February 20, 2006, the applicant's husband was contacted by his unit and ordered to arrive at work early the next day to complete high readiness training for an imminent deployment. As a result, the applicant contacted her supervisor on the morning of February 21, 2006, to inform him that she would be activating her FCP and therefore would arrive at work later than usual, to which the supervisor agreed.

[5] While driving her son to daycare that morning, Captain Fawcett and her son suffered a catastrophic motor vehicle accident. Her son was killed and she suffered serious injuries, ultimately requiring amputation of her right leg above the knee.

[6] The applicant applied to the Department of Veterans Affairs for disability benefits in June 2006, and that application was denied on October 6, 2006. The applicant received a copy of the Summary Investigation into her accident which was accompanied by a cover letter from

Commander CFJSG, Colonel C.C. Thurrott (Commander Thurrott). The Summary Investigation found that the applicant was on duty at the time of the accident but Commander Thurrott disagreed with that finding. The applicant states that she chose not to pursue this matter further at the time, but rather to focus on her rehabilitation.

[7] After learning from a colleague, and from her Pension Advocate, that significant weight is placed on the Summary Investigation in determining duty status, the applicant decided to file a grievance regarding the Summary Investigation. The applicant submitted her grievance on June 2, 2009.

[8] It is common ground between the parties that the grievance was initially determined by the improper authority. The applicant received a decision in September 2009 from the Director General, Personnel and Family Support (DGPFS). However, the DGPFS could not act as the Initial Authority (IA) for the grievance because, pursuant to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 7.06, an IA must be a military officer. Despite a considerable amount of correspondence among the applicant's superiors over several months the proper IA was never identified. The applicant was asked whether she would like to restart the process at the IA level, or forward her grievance to the Final Authority (FA). She chose the latter.

[9] The grievance was referred to the Canadian Forces Grievance Board (Grievance Board) for an independent review and recommendation. The Grievance Board recommended that the applicant's grievance be denied on October 7, 2010. The applicant submitted additional

information and commentary in response to this recommendation before the DGCFGA issued its decision on September 23, 2011.

Decision Under Review

[10] The DGCFGA noted that the applicant's grievance was in relation to whether she was on duty at the time of her accident, whether her injuries were attributable to military service, and whether she had received a fair process.

Duty Status

[11] The DGCFGA noted that the relevant policy in determining whether the applicant was on duty was Canadian Forces Administrative Order (CFAO) 24-6, which states in part: "…as a general rule a member is considered to be on duty:…d. when he is at a specific place, or doing a specific act, because of a military order;…".

[12] The DGCFGA found that the applicant was not on duty at the time of the accident. The DGCFGA held that the FCP is not a military order, but rather is a management tool for the Canadian Forces to ensure its members are available for duty despite family obligations. He noted that the Canadian Forces do not dictate the contents of an FCP or how any care of dependents is carried out; rather, the Canadian Forces only requires that an FCP is in place.

[13] The DGCFGA further found that the fact the applicant called her supervisor to indicate that she would be late is consistent with the conclusion that she was not on duty or executing an order by

driving her son to daycare. The DGCFGA also rejected the applicant's submission that members of the Canadian Forces are always on duty.

Whether the Injuries were Attributable to Military Service

[14] The DGCFGA noted that paragraph 30 of CFAO 24-6 states: "As a general rule 'attributable to military service' is interpreted as meaning arose out of or was directly connected with service." The DGCFGA noted that this wording is the same as section 21(2)(a) of the *Pension Act*, RSC, 1985, c P-6, and thus the interpretation of that provision by the courts is helpful in this analysis.

[15] The DGCFGA found that the relevant question is one of causal connection and proximity; the accident must be proximate enough to the applicant's military service to meet the requirements of CFAO 24-6. The DGCFGA quoted from *Amos v Insurance Corp of British Columbia*, [1995] 3 SCR 405, para 21, which held that the phrase "arising out of" should be given a liberal interpretation.

[16] The DGCFGA found that the applicant's grievance was analogous to *McTague v Canada (Attorney General)*, [2000] 1 FC 647, in which a member was seriously injured crossing the street to go to a restaurant while on duty. The Court in that case found that the member was not required to eat at a particular restaurant, and the dinner served no 'business' purpose, and therefore the Board's conclusion was reasonable.

[17] The DGCFGA noted that the Grievance Board had cited *Frye v Canada (Attorney General)*, 2004 FC 986, in its recommendation. In that case, the Federal Court had found, based on interpreting the French and English versions of the provision together, that the proper test was whether an accident was "directly connected with" service, rather than "arose out of" service. The DGCFGA went on to note that the Federal Court of Appeal (FCA) had overturned the Federal Court decision in that case, finding that the broader test ("arose out of") is consistent with the intention of the legislation. However, the DGCFGA found this did not alter the Grievance Board's conclusion.

[18] Finally, the DGCFGA cited *Fournier v Canada (Attorney General)*, 2005 FC 453, in which a member was injured during a motor vehicle accident while on a meal break. The DGCFGA applied the factors articulated in that case to the applicant's grievance: the applicant was taking her child to daycare; the Canadian Forces had no control over her choice of daycare, the chosen route, or the FCP; and the applicant was driving her own vehicle. The DGCFGA therefore concluded that the applicant's injuries did not arise out of military service.

Process Issues

[19] The DGCFGA noted the Grievance Board's conclusion that the applicant had not been prejudiced by the fact that there was no valid decision at the IA level, and then stated:

> I acknowledge that, due to the errors in process, you may have been prejudiced because the CMP did not adjudicate your grievance. That said, I am of the view that any deficiencies in the process have been corrected since you have had the opportunity to respond to the disclosure of information on your file and you are being provided with an additional review by the [Grievance Board], disclosure of their findings and recommendations, and an adjudication by the FA with consideration of all the facts provided.

> Accordingly, I am satisfied that you have been treated in a fair and equitable manner in comparison to other CF members in similar circumstances.

[20] The redress sought by the applicant was therefore denied.

Standard of Review and Issues

[21] This application raises the following issues:

a. Did the DGCFGA err in finding no breach of procedural fairness?

b. Did the DGCFGA err in finding that the applicant's injuries were not attributable to military service?

c. Did the DGCFGA err in finding that the applicant was not on duty?

[22] As the parties agree, questions of procedural fairness attract a standard of review of correctness, while the questions of whether the injuries were attributable to service and whether the applicant was on duty are to be reviewed on a standard of reasonableness; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

Analysis

Did the DGCFGA err in finding no breach of procedural fairness?

[23] The applicant argues that she was denied a valid decision on her grievance at the IA level, which prejudiced her because the proper IA decision-maker, the CMP, indicated in a cover letter attached to her grievance that he found the grievance to be well-founded.

[24] The proper process is for the grievor to submit his or her grievance to the IA (generally a commanding officer), who issues a decision. If the grievor is not satisfied with the result, he or she

can refer the grievance to the FA for a second, independent decision. If a favourable decision is reached by the IA, there is of course no need for further recourse to the FA.

[25] The DGCFGA acknowledged that there was no valid decision at the IA level because the purported decision-maker was not a military officer. The DGCFGA further found that the applicant may have been prejudiced by this procedural error, but this error was subsequently corrected because the applicant was given the opportunity to respond to all the information in the file and to review the findings of the Grievance Board.

[26] In my view, this analysis is erroneous. The fact that the applicant was able to participate fully in the subsequent decision by the FA does not rectify the error that deprived her of a decision at the IA level. In other words, the applicant was entitled under this procedure to an IA decision, and was denied one. The right to participate in the decision at the FA level does not correct this error because there would have been no need for a decision at the FA level if the IA decision had been favourable.

[27] The respondent submits that the procedural error was cured when the applicant was offered the choice of either restarting the process at the IA level, or proceeding to the FA level. The respondent argues that since the applicant chose the FA option, it is not now open to her to claim that she was prejudiced by the absence of an IA decision.

[28] However, I agree with the applicant that her choice to restart the grievance with the (still unidentified) IA or continue to the FA cannot be fairly called an informed choice. After several

months trying to get an answer regarding the identity of the IA, no answer had been forthcoming. Her decision was based on the considerable delay that had already transpired, and remaining uncertainty caused by the initial breach of fairness. Therefore she cannot be found to have clearly waived her right to procedural fairness, which in my view included a right to a decision at the IA level. Thus, the application for judicial review must be granted.

Did the DGCFGA err in finding that the applicant's injuries were not attributable to military service?

[29] While the application must be granted because of the breach of procedural fairness, I further find that the DGCFGA's analysis of whether the injuries were attributable to military service was unreasonable. The DGCFGA identified the correct test in this analysis: whether the injuries arose out of or were directly connected to service. The DGCFGA also rightly noted that the Supreme Court of Canada has given the phrase "arose out of" a broad and liberal interpretation (*Amos*, above). However, the DGCFGA did not follow the appropriate precedents in applying a broad and liberal interpretation.

[30] The DGCFGA relied extensively on the Federal Court decision in *Frye*. However, the FCA overturned that decision for applying too narrow a test for whether an accident was attributable to service. The DGCFGA acknowledged that the FCA had reversed the Federal Court and noted therefore that the FCA's reasons "provide more appropriate guidance on this point." However, the DGCFGA found, without any further analysis, that this reversal would not alter his conclusion.

[31] I would emphasize that *Frye* was the only case at the FCA level cited by the DGCFGA, and therefore ought to have been given close attention and considerable weight in the analysis. Also, the

Federal Court decisions relied upon by the DGCFGA were issued prior to the FCA decision in *Frye*. The DGCFGA's failure to follow the *Frye* decision, particularly given its similarities to this case, renders his decision unreasonable.

[32] In *Frye*, the applicant's husband had been on deployment fighting forest fires and he left camp in breach of curfew at the end of the day to go for a swim. On his way back to camp, he tried to hop a fence, fell onto a highway and was struck and killed. The Veterans Review and Appeal Board (VRAB) found that the death was not attributable to military service because at the time the member died, he was engaged in recreational activity rather than service. The FCA set aside the conclusion of the VRAB, finding its approach contrary to the broad and liberal interpretation required:

> [31] The Board seems thus to have treated recreational activities and military service as mutually exclusive categories, so that, since the Corporal Berger's death occurred while engaging in recreational activity, it did not arise out of military service. In so reasoning, the Board failed to look at all the circumstances in order to determine whether, while linked to recreational activity, Corporal Berger's death was not also sufficiently causally linked to military service that his death could be said to have arisen out of military service. This narrow approach to the phrase "arose out of or directly connected with" is not consistent with the liberal and generous interpretative approach to the Act that is required by law.

[33] Also, of particular relevance to this case, the FCA found that the Board unreasonably ignored the link between the member's activities at the time of his death and the military policy that was in place regarding recreation:

> [34] In this context, [the VRAB] should have given weight to the statement of the Commanding Officer, Lieutenant-Colonel Leslie, to the effect that, in order to ensure that soldiers did not become overly fatigued as a result of the arduous, dangerous and dirty nature of

> fighting forest fires for long hours, he had authorized the establishment of a recreation and relaxation policy.

[34] In my view, this is analogous to the policy regarding the FCP; the Canadian Forces instituted the FCP policy to maximize the deployability and operational readiness of its members. This, according to the guiding precedent in *Frye*, was a relevant factor that should have been given weight, but was not. The DGCFGA found that the Canadian Forces had no control over the content of the applicant's FCP; however, the same could equally be said in *Frye*; the Canadian Forces did not control the type of recreation engaged in by the member, or where he engaged in it. Thus, the DGCFGA failed to consider all the circumstances in determining whether the applicant's injuries were attributable to military service, and therefore the application must be granted.

[35] I would note that the respondent has questioned whether the applicant was in fact acting pursuant to her FCP at the time of the accident. However, her evidence that she was implementing her FCP is uncontradicted and at all levels of the process it appears to have been accepted that she was implementing her FCP; her grievance was denied because the FCP was considered not to be a military order. In my view, therefore, it is not open to the respondent to raise this line of argument at this stage.

[36] Therefore, the DGCFGA's decision should be set aside and the matter referred back to the Initial Authority for reconsideration. It is not necessary to consider the final ground of review advanced by the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is referred back to the Initial Authority for reconsideration. Costs to the applicant.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1810-11
STYLE OF CAUSE:	**CAPTAIN KIMBERLY Y. FAWCETT v ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Ottawa
DATE OF HEARING:	May 29, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	RENNIE J.
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