Federal Court  Cour fédérale

Date: 20130305

Docket: T-249-12

Citation: 2013 FC 218

Ottawa, Ontario, March 5, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

ANTHONY SNIEDER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, Captain Anthony Snieder, sought judicial review in January 2012, pursuant to the *Federal Courts Act*, RSC 1985, c F-7, section 18.1(3)(*a*), of the fact that the Chief of Defence Staff (CDS) had not made a decision concerning a set of four linked military grievances which he had submitted in January and February 2011. Captain Snieder represented himself in this application.

[2] To provide context, it should be noted that the former Chief Justice of Canada observed in *The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts, as required under section 96 of Statutes of Canada 1998, c.35* (3 September 2003), online: http://www.cfgb-cgfc.gc.ca/documents/LamerReport_e.pdf) [the Lamer Report] that:

> During the course of my review of the operation of Bill C-25, it became increasingly clear to me that the Canadian Forces grievance process is not working properly. This conclusion is the result of an examination of the grievance process and its performance triggered by many complaints made to me by CF members at the bases that I visited and in the submissions made to me. While the introduction of the Grievance Board has increased the perception of an impartial grievance process, the lengthy period between the initiation of a grievance and a decision by the final authority, the CDS, gives cause for serious concern. [. . .] Soldiers are not second class citizens. They are entitled to be treated with respect, and in the case of the grievance process, in a procedurally fair manner. (page 86)

[3] Two of the Lamer Report recommendations were:

> (74) I recommend that going forward, there be a time limit of 12 months for a decision respecting a grievance from the date that a grievance is submitted to a commanding officer to the date of a decision by the Chief of Defence Staff or his delegate (under my proposed modified grievance system). This 12 month time limit would apply to all grievances, excepting those that must be personally adjudicated by the Chief of Defence Staff because they fall within the guidelines to be established by the Chief of Defence Staff. If the one year time limit is not met, subject to the exception for grievances that the Chief of Defence Staff must personally adjudicate, a grievor should be entitled to apply to the Federal Court for such relief as that court may deem appropriate. The grievor should also be entitled to his/her costs on a solicitor client basis, regardless of the outcome of the case. (page 103)

and

> (75) I recommend that the *National Defence Act* be amended to include an obligation on the Chief of Defence Staff and the person that he may designate to act as his delegate as final authority to deal with all matters before them as informally and expeditiously as the circumstances of fairness permit. (page 103)

[4] A one-year limit had not been implemented as of the time Capt. Snieder's grievance was submitted.

[5] Recently, the Honourable Patrick J. LeSage, retired Chief Justice of the Ontario Superior Court of Justice, observed in his *Report of the Second Independent Review Authority to The Honourable Peter G. MacKay Minister of National Defence* (December 2011), online: http://www.forces.gc.ca/site/reports-rapports/patrick-lesage/_pdf/DND-Final-English-Report.pdf [the LeSage Report] that:

> Unfortunately, many of the same concerns were raised by CF members at the bases I visited in the summer of 2011 and also in the submissions forwarded to me, now eight years after the Lamer Report. (page 54)
>
> . . .
>
> [F]urther consideration must be given to address the continuing delays in the system. While much progress has been made, I believe further steps must be taken. Additional resources and a streamlining of the process should permit achievement of the Lamer recommendation that grievances be resolved within a one year time limit recommended in the Lamer report. [. . .] I believe that many grievances can and should be resolved in a much shorter period of time. (page 56)

[6] The LeSage Report recommended:

> Recommendation 38:
> There should be a time limit of one year for a decision respecting a grievance from the date the grievance is submitted to the date of a decision by the CDS or his delegate. I also recommend the grievor be regularly advised of the status of their grievance. (page 57)

BACKGROUND:

[7] On July 14, 2010, Captain Snieder, who was then living in Honolulu, Hawaii, accepted an offer of re-enrolment from the Canadian Forces as a pilot from the Canadian Forces Recruitment Centre in Toronto, Ontario. He had previously served in the military but had then worked as a civilian airline pilot for a number of years. Before he took the oath, Capt. Snieder had the recruiter in Toronto go over the written offer line by line as it lacked clarity. He states that the recruiter

assured him three times that his relocation package, as described in the offer, was fully authorized and funded. He was then posted to Moose Jaw, Saskatchewan.

[8] It is not disputed by the respondent that Captain Snieder was misinformed about the elements of the relocation package by the recruiter.

[9] On September 1, 2010, the Canadian Forces Relocation Adjudication Section of the Director Compensation and Benefits Administration issued a direction on Capt. Snieder's relocation package, denying him a posting allowance for travelling from Toronto to Moose Jaw, the real estate incentive relating to his principal residence in Hawaii, travel expenses for two trips made to undergo an interview and medical examination in Toronto, and moving costs exceeding those of a move from Toronto to Moose Jaw. Capt. Snieder calculates that this made a difference of over $25,000 to his relocation benefits.

[10] As Captain Snieder put it in his submissions, had he received accurate information at the time the offer to enrol was extended he could have made an informed choice whether to accept it or not. Once he was enrolled he was subject to the *National Defence Act*, RSC 1985, c N-5, Part III: *Code of Service Discipline* and could not refuse to report to the base at Moose Jaw.

[11] Captain Snieder grieved the decision to deny him the four expected benefits. His four separate complaints were submitted in January and February 2011 and were consolidated into one file, 11-S-61155.

[12] On May 3, 2011, the file was referred to the Grievance Board. In June and July, the Board disclosed all documents in the file for the applicant's review and he provided comments and additional representations. His final submission of comments and additional documents was made on November 14, 2011.

[13] On December 15, 2011 the grievance analyst had completed her review and advised the applicant that the file was being provided to the Director General Canadian Forces Grievance Authority for review in preparation for a Final Authority decision by the Chief of Defence Staff.

[14] On January 27, 2011, Capt. Snieder applied for judicial review by the Federal Court. His grievance was suspended pending the outcome of the judicial review, in accordance with *Queen's Regulations and Orders*, article 7.16 (1). A judicial review hearing was scheduled for February 27, 2013 at Regina, Saskatchewan.

[15] The Court was advised late on February 25th that the CDS had rendered a decision on Friday, February 22, 2013. It transpired that Capt. Snieder had requested on September 26, 2012 that the procedural fairness question of timeliness be separated from the substance of his complaints, and the grievance board, after initially relying upon the suspension under article 7.16 (1), had changed its position and agreed to proceed.

[16] In the February 22, 2013 decision, the CDS upheld the grievance concerning travel expenses for the interview and medical examination. He denied the grievance concerning the refusal of a posting allowance from Toronto to Moose Jaw, finding that Capt. Snieder was never "posted to"

Toronto, only enrolled there. He denied the grievance relating to the real estate incentive, finding that the policy applied only to a "principal residence" and that this was defined as "a dwelling in Canada", which did not include Capt. Snieder's residence in Honolulu. In addition, he had no evidence that Capt. Snieder had been specifically promised the incentive. Finally, he agreed that the evidence showed that Capt. Snieder had been incorrectly informed that he would receive a fully funded move from Hawaii to Moose Jaw and that this had played a part in Capt. Snieder's re-enrolment decision. However, the CDS concluded, he did not have the financial authority to grant redress. Instead he forwarded that grievance to the Directorate of Civil Claims and Litigation of the Canadian Forces Legal Advisor for assessment in accordance with Treasury Board policy on *ex gratia* payments.

[17] The applicant's request for an order compelling the CDS to render a decision on the merits was therefore moot by the time of the hearing of this application. Nonetheless, Captain Snieder argued that there was still a live issue, that being whether he had received procedural fairness.

[18] The test for mootness, as reiterated recently by this Court in *Spidel v Canada (Attorney General)*, 2012 FC 1440 at para 15, is:

> **15** The following two-part test for mootness was established by the Supreme Court in *Borowski v Canada (Attorney General)*, [1989] 1 S.C.R. 342:
>
> a) Has the "tangible and concrete" dispute between the parties disappeared?
> b) Ought the Court to exercise its discretion to hear the matter in any event?

[19] I found that the tangible and concrete dispute as to the procedural fairness of the open-ended grievance timeline had not disappeared and would likely arise again. Accordingly, I exercised my discretion to hear the matter.

STANDARD OF REVIEW:

[20] The standard of review for the merits of a grievance escalated to the CDS is reasonableness when there has been a decision or when the CDS has refused to hear the grievance (*Zimmerman v Canada (Attorney General)*, 2011 FCA 43, at paras 19-21; *Codrin v Canada (Attorney General)*, 2011 FC 100 at paras 40-42; *Birks v Canada (Attorney General)*, 2010 FC 1018 at para 25). However, the issue raised here is one of procedural fairness, specifically undue delay. The standard of review is therefore correctness (*McBride v Canada (Minister of National Defence)*, 2012 FCA 181 at para 32).

ISSUES:

[21] The applicant stated that the procedural fairness issues were whether the CDS had delayed exercising his jurisdiction in the present case and whether it was acceptable in general that there was no fixed time limit for ruling on grievances. He sought either an order giving the CDS a specific timeline for ruling on his personal grievance or an order that his grievance be presented to the Federal Court, and he also sought an order providing a timeline for deciding on all Canadian Forces grievances. The two issues presented to the Court were therefore:

a. Did the Chief of the Defence Staff unreasonably delay exercising his jurisdiction in the present case?

b. Does the Federal Court have jurisdiction to impose a time limit on military grievances?

A. Did the Chief of the Defence Staff unreasonably delay exercising his jurisdiction in the present case?

[22] The applicant argued that the facts complained of had occurred in September 2010 and that he had submitted a grievance as of January 2011, within the six month time-frame permitted by the *National Defence Act*, yet by January 2012 he had received no decision. He noted that the Lamer Report had stated that "a one year time limit from the date that a grievance is submitted to a commanding officer is sufficient". The Lamer Report had also recommended that if this one year limit was not met, the griever have automatic recourse to the Federal Court, with legal representation at Canadian Forces expense, and be entitled to costs regardless of the outcome of the case.

[23] The respondent argued that the grievance file was only sent to the office of the Director General Canadian Forces Grievance Authority on December 15, 2011. From that date until the filing of a Notice of Application at the Federal Court was only 43 days, a period which included the Christmas holidays. The respondent added that the applicant was partly responsible for any delay, since he had provided four separate additional submissions between August and November 2011, each of which had to be considered before the grievance analyst could produce a report for the CDS.

[24] The respondent further argued that there was no evidence that the applicant had demanded that the CDS rule on his grievance and no evidence that the CDS had refused to rule. In fact, the applicant had frustrated the grievance procedure by bringing an application for judicial review, which automatically suspended his grievance. Although it agreed that the CDS had a duty to the

applicant to act, pursuant to *Queens' Regulations and Orders* article 7.14, the applicant had not established that the CDS had a duty to act by January 27, 2012.

[25] I agree with Capt. Snieder that it is unreasonable in the context of the military to expect a subordinate officer to demand that the CDS rule on his grievance. I understand that from his perspective, the time for a final determination of his grievance began running from the moment that the file was referred to the Grievance Board.

[26] I find that Capt. Snieder waited a month and a half from the time the file reached the level of the CDS for a final determination, although it had then been a year since he submitted the first of the four grievances which were consolidated into 11-S-61155, and sixteen months since the event grieved had occurred.

[27] The tripartite test for an unreasonable delay was reviewed by this Court in *Liang v Canada (MCI)*, 2012 FC 758 at para 26:

> (1) the delay in question has been longer than the nature of the process required, *prima facie*;
> (2) the applicant and his counsel are not responsible for the delay; and
> (3) the authority responsible for the delay has not provided satisfactory justification.

[28] I find that the applicant has not made out a *prima facie* case that the nature of the grievance process routinely allows for decisions by the CDS in less than 43 days.

B. Does the Federal Court have jurisdiction to impose a time limit on military grievances?

[29] The applicant pointed out that the Lamer Report had recommended that "clear time limits be established for a grievance to proceed through the grievance process". An applicant is barred from accessing judicial review of a decision by the CDS on a grievance until that decision is made. He argued that this represented procedural unfairness.

[30] The respondent argued that the request that the court impose a timeline on all grievances was essentially a request for the court to rewrite the regulations. Furthermore, the text of Chapter 7 of the *Queen's Regulations and Orders* demonstrated that Parliament had chosen not to impose such a one-year time limit; there were time limits imposed on a commanding officer and an initial authority, but the CDS was exempt from timelines when acting as either initial authority or final authority in a grievance.

[31] I find that the respondent is correct. This court does not have the jurisdiction to impose a time limit on the CDS. That conclusion should not be taken as an indication that the court believes that the systemic problems identified by the Right Honourable Antonio Lamer and the Honourable Patrick LeSage are acceptable but rather that they are issues to be addressed by Parliament and the Executive, not the judiciary.

[32] Given the above findings, the application is denied. The parties shall bear their own costs.

ORDER

THIS COURT ORDERS that:

1. the application for judicial review is denied;

2. there is no award of costs.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-249-12
STYLE OF CAUSE:	ANTHONY SNIEDER and THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Regina, Saskatchewan
DATE OF HEARING:	February 27, 2013
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	March 5, 2013

APPEARANCES:

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