

Federal Court of Appeal



Cour d'appel fédérale

Date: 20150615

**Docket: A-293-14
A-292-14**

Citation: 2015 FCA 145

**CORAM: NOËL C.J.
SCOTT J.A.
BOIVIN J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

NABIL RIFAI

Respondent

Heard at Montréal, Quebec, on June 15, 2015.

Judgment delivered from the Bench at Montréal, Quebec, on June 15, 2015.

**REASONS FOR JUDGMENT OF THE
COURT BY:**

BOIVIN J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Montréal, Quebec, on June 15, 2015.)

BOIVIN J.A.

[1] We are of the opinion that the appeal should be allowed in both dockets.

[2] Although the applicable standard of review in this case is reasonableness, as the Federal Court judge acknowledges in his reasons, he did not afford the administrative decision any deference.

[3] With regard to the decision concerning the remedial grievance [A-293-14], it is important to note that according to section 29.13 of the *National Defence Act*, R.S.C. 1985, c. N-5 [the Act], and the case law, the Chief of the Defence Staff [CDS] is not bound by the recommendations of the Committee and may render a decision *de novo*. For example, a breach of procedural fairness in issuing a remedial measure in the Canadian Forces can thus be corrected (*McBride v. Canada (Minister of National Defence)*, 2012 FCA 181 at paragraphs 41-45; *Schmidt v. Canada (Attorney General)*, 2011 FC 356 at paragraphs 16-20.

[4] Although the judge referred to the recognized principle, he departed from it in his reasons. The judge therefore erred in law in deciding that the Committee, which he inappropriately characterized as a “Tribunal”, had decision-making authority. This mistaken approach jeopardized the judicial review. Finally, replacing a remedial measure relating to performance with one relating to conduct falls within the discretion and expertise of the CDS. In this case, the CDS provided reasons for his decision (see subsection 29.13(2) of the Act), and having regard to the record as a whole, the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[5] With regard to the Federal Court's decision on the release grievance [A-292-14], we are of the opinion that in dismissing the application for judicial review conditionally, subject to an unsolicited condition precedent, and in interfering with a possible future grievance proceeding that at this point is a matter of pure speculation, the judge made a jurisdictional error by exceeding the limits of subsection 18.1(3) of the *Federal Courts Act*.

[6] Consequently, in docket A-293-14, the appeal will be allowed. The judgment of the Federal Court judge will be set aside, and rendering the judgment that should have been rendered, the application for judicial review of the decision of the CDS will be dismissed, with costs both here and below.

[7] In docket A-292-14, the appeal will be allowed. The Federal Court judge's conditional dismissal of the application for judicial review and the conditional orders he made will be set aside, and rendering the judgment that should have been rendered, the application for judicial review will be dismissed, without costs.

“Richard Boivin”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS: A-293-14 and A-292-14

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. NABIL RIFAI

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: JUNE 15, 2015

REASONS FOR JUDGMENT OF THE COURT BY: NOËL C.J.
SCOTT J.A.
BOIVIN J.A.

DELIVERED FROM THE BENCH BY: BOIVIN J.A.

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