Federal Court of Appeal | Cour d'appel fédérale

Date: 20120613

Docket: A-242-11

Citation: 2012 FCA 175

CORAM: **SHARLOW J.A.**
PELLETIER J.A.
MAINVILLE J.A.

BETWEEN:

MASTER WARRANT OFFICER LINDA L. MEGGESON

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on May 16, 2012.

Judgment delivered at Ottawa, Ontario, on June 13, 2012.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: SHARLOW J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] This is an appeal from a judgment of Pinard J. of the Federal Court (the "application judge") cited as 2011 FC 600 which dismissed an application for judicial review of a decision of the Chief of the Defence Staff dated June 21, 2010 granting partial relief following a grievance challenging the appellant's early repatriation to Canada subsequent to her deployment to the Sinai Peninsula in Egypt.

[2] The appellant raises two grounds of appeal: (a) the application judge erred in concluding that the relief of a potential deployment granted by the Chief of the Defence Staff was reasonable

since the appellant is, for medical reasons, permanently unfit for such a deployment; and (b) the application judge also erred in refusing to direct that the judicial review application be treated and proceeded with as an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[3] For the reasons set out below, I do not accept the appellant's arguments on the first ground of appeal, but I would grant the appeal on the second ground and would thus direct, subject to conditions, that the application be treated and proceeded with as an action.

The grievance dispute

[4] The appellant has been a member of the Canadian Forces since 1977. In July 2006, she began serving as Master Warrant Officer on a one-year tour of duty as the Vehicle Fleet Management Coordinator of the Multinational Force and Observers in Egypt, and was assigned secondary duties as the Contingent Sergeant Major.

[5] In early October 2006, a few months following her deployment to Egypt, the appellant was unilaterally repatriated to Canada. She submitted a grievance through her chain of command pursuant to section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5. The grievance was forwarded to the Canadian Forces Grievance Board, which issued its findings and recommendations in December 2009.

[6] The Chief of the Defence Staff, acting as the final authority in the grievance process pursuant to section 29.11 of the *National Defence Act*, followed, by and large, the recommendations of that Board. He concluded that procedural fairness had been disregarded in the process leading to the appellant's repatriation to Canada, and that the officer who ordered her unilateral repatriation did so without proper authority.

[7] Though the appellant had requested, *inter alia*, financial compensation for the loss of the benefits she would have obtained during the remaining months of her deployment to Egypt, the Chief of the Defence Staff ruled that he had no authority in the grievance process to award any form of financial compensation for services that were not rendered to the Canadian Forces, including *ex gratia* payments. He informed the appellant that any requests for financial compensation should be submitted to the Director Claims and Civil Litigation of the Department of National Defence as claims against the Crown.

[8] The Chief of the Defence Staff did, however, grant some relief to the appellant. He directed that a personnel report be removed from her file, that certain expenses related to her relocation be reimbursed, and that she be considered for a posting if another operational deployment opportunity appropriate to her qualifications and experience arose.

The Federal Court judgment

[9] The appellant challenged this decision before the Federal Court by way of a judicial review application. She represented herself throughout the Federal Court proceedings. The appellant

submitted that the relief granted by the Chief of the Defence Staff was inadequate and unreasonable. She raised two principal arguments in support of that submission.

[10] First, she argued that considering her for another deployment was an unenforceable form of relief. Following her return from Egypt, the appellant had been found to have temporary medical restrictions which precluded her from another deployment. These temporary restrictions subsequently became permanent medical restrictions at some time prior to the final decision on her grievance. The appellant thus submitted that the offer of another potential deployment was unreasonable in the light of both her disqualification from deployment for medical reasons and the refusal of the Canadian Forces to provide her with a medical waiver.

[11] Second, she argued that her monetary compensation claims should have been directly forwarded by the Chief of the Defence Staff to the Director Claims and Civil Litigation of the Department of National Defence with a recommendation that they be favourably looked upon and granted.

[12] The appellant consequently requested that the Federal Court issue various orders ensuring that she be deployed to her former position in Egypt or, in the alternative, that she be paid the allowances and benefits she was deprived of as a result of her premature repatriation from Egypt. She also sought, as an alternative remedy, an order directing that the application for judicial review be continued as an action for damages.

[13] Applying a standard of reasonableness to the grievance decision, the application judge ruled that the Chief of the Defence Staff was not bound to take into account the fact that the appellant was medically unfit for deployment. The application judge found that such information was not before the Chief of the Defence Staff when he determined the appropriate relief. The application judge also found that the appellant had been given an opportunity to submit this information to the grievance authorities prior to the final decision on her grievance, but that she had failed to avail herself of this opportunity. He consequently concluded that (a) there was nothing to indicate that the relief granted was unreasonable in the circumstances of the case , and (b) there was no legal basis upon which the Federal Court could order her redeployment in spite of her medical condition.

[14] The application judge also ruled that the Chief of the Defence Staff had correctly determined that he had no authority to grant the monetary compensation sought by the appellant through the grievance process. The application judge further refused to either (a) order the Chief of the Defence Staff to forward the monetary claims to the Director Claims and Civil Litigation of the Department of National Defence with a favourable recommendation, or (b) direct that the application for judicial review be treated and proceeded with as an action for damages. The basis for these refusals were set out as follows at paragraph 24 of the application judge's reasons:

> First, it is incumbent upon the applicant herself, not the [Chief of the Defence Staff], to submit a substantiated claim, as was suggested in the decision, to [the Director Claims and Civil Litigation]. 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.

Was the relief granted reasonable?

[15] The first ground of appeal challenges the reasonableness of the relief granted by the Chief of the Defence Staff. The appellant argues that the application judge erred in concluding that there was no evidence on the record suggesting that she was unfit for future deployment. Consequently, taking into account the available medical evidence, a potential deployment was an unreasonable form of relief.

[16] It is not disputed that the Canadian Forces Grievance Board was aware that the appellant was classified for geographical and occupational medical purposes with temporary medical limitations. These limitations were however subsequently found to be permanent. It is however disputed whether that Board knew or should have known that the appellant was subsequently found to have permanent medical limitations that would disqualify her from operational deployment.

[17] The appellant notes that the Canadian Forces Grievance Board sought and obtained from her a written consent allowing it access to her personnel and medical records. She concludes from this that the Board, when recommending a potential deployment, was not in a position to ignore the medical information confirming that she had been found permanently unfit for an operational deployment.

[18] I do not accept the appellant's arguments on this ground of appeal.

[19] First, the fact that the grievance authorities were aware that the appellant was subject to temporary limitations does not render unreasonable the relief granted to her. Temporary limitations are meant to last only for a limited time, and a possible deployment was thus a potentially effective remedy. In these circumstances, such a remedy falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] Second, though the Canadian Forces Grievance Board could have carried out a more thorough and updated analysis of the appellant's medical classification prior to issuing its relief recommendation, the fact remains that the appellant had an opportunity to correct any perceived deficiency in the recommended remedy based on her medical classification, and failed to avail herself of this opportunity.

[21] The Canadian Forces Grievance Board issued to the appellant its findings and recommendations on December 1, 2009. In its covering letter, it notified the appellant that she could provide comments and pertinent documents which would be submitted to and considered by the Chief of the Defence Staff prior to his final decision on the grievance:

> After reviewing the [findings and recommendations], you may wish to provide comments and/or other pertinent documents to [the Director General Canadian Forces Grievance Authority] for consideration by the [final authority]. If so, it is requested that you indicate your intentions using the enclosed form which, you must complete, sign and forward to [the Director General Canadian Forces Grievance Authority] within 21 calendar days from receipt of this letter…
>
> (Appeal Book at p. 667)

[22] The appellant did provide additional comments to the Director General Canadian Forces Grievance Authority on January 9, 2010, none of which pertained to the effect of her permanent medical restrictions on the proposed potential operational deployment opportunity. Though the appellant had, by that date, been assigned permanent medical limitations that would disqualify her from operational deployment, she did not mention this fact, nor did she question the proposed deployment opportunity on this basis. The appellant made comments regarding her health only when discussing her monetary compensation claims, cryptically noting that the Board's report "seems to have missed addressing the negative effect on my health and well being sent to the board and is included in my file" (Appeal Book at p. 694).

[23] This contrasts with the appellant's clear comments to the Canadian Forces Grievance Authority shortly after the release of the final decision of the Chief of the Defence Staff. Indeed, in an email dated August 11, 2011 the appellant raised for the first time the impacts of her medical limitations on deployment opportunities:

> The CDS [Chief of the Defence Staff] directed that I be considered for a tasking if another operational deployment opportunity appropriate to my qualifications and experience arises. Please also note that there are no further conditions attached to the CDS's offer. Therefore I presume from reading the CDS's decision that waivers will be provided in all areas required including medical fitness in order for the CDS's direction to be implemented. I therefore seek your confirmation that the CDS's direction will be implemented in this fashion.
>
> I have approached the Career Manager to see what tours would be suggested. Presently, I am on a Medical Category which would preclude me from DAG Green for Operational deployment. I would consider any operational deployment that the CM may suggest with my preference to return to my former position in Egypt, OP CALUMET if my Medical status is not an issue or would be waived.
>
> (Appeal Book at pp. 300-301)

[24] Had the appellant made these comments in a timely manner prior to the final decision on her grievance, she might have pursued her arguments concerning the unreasonableness of the remedy which was granted to her. However, she chose to raise her medical limitations only after the final decision had been issued, and for the purpose of obtaining an *ex post facto* waiver of these limitations.

[25] In the circumstances of this case, and taking into account the appellant's failure to raise her medical limitations in a timely fashion, I can find no reviewable error in the application judge's ruling that the relief granted was reasonable.

Did the application judge err in refusing to direct that the application be treated and proceeded with as an action?

[26] Subsection 18.4(2) of the *Federal Courts Act* reads as follows:

18.4 (2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.	18.4 (2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

[27] The applicant sought, *inter alia*, the following relief in her notice of application for judicial review in the Federal Court:

> The Applicant makes an application for:
> …
> (b) An order directing the [Chief of the Defence Staff] to unconditionally reinstate the Applicant to her former position.

> (c) In the alternative, an order that the [Chief of the Defence Staff] 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.
> …
> (e) In the alternative, an order permitting this application for judicial review to be continued as an action for damages.
>
> (Appeal Book at pp. 19-20), emphasis added)

[28] The appellant was thus seeking to protect her claim for damages resulting from her unilateral repatriation to Canada in the event the application judge concluded that she could not obtain lost allowances and benefits through the grievance process. In other words, if the Federal Court concluded that the Chief of the Defence Staff had correctly declined jurisdiction to award her the lost allowances and benefits she claimed through the grievance process, then she was seeking an opportunity to pursue her monetary claims before the Federal Court by asking that her application be treated as an action.

[29] The application judge declined to direct that the judicial review application be treated as an action. This discretionary decision may be reviewed on appeal only insofar as the application judge has misdirected himself as to the applicable law (for instance, if he has followed a wrong principle, has failed to take into consideration relevant factors or, conversely, has taken into consideration inappropriate factors), or has made a palpable error in his assessment of the facts: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371, 2003 SCC 71 at para. 43, referring approvingly to *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at pp. 814-815.

[30] The issue is important for the parties, since they both agree that should the appellant initiate now a new action seeking monetary compensation, a controversy would arise as to whether such an action was precluded by time limitations.

[31] The Federal Court may direct that a judicial review application be treated and proceeded with as an action in order to avoid the procedural restrictions and constraints resulting from the summary and expeditious nature of a judicial review proceeding: *Association des crabiers acadiens Inc. v. Canada (Attorney General),* 2009 FCA 357, 402 N.R. 123 ("*Association des crabiers acadiens*") at para. 38. For example, it is possible to treat a judicial review application as an action when the application does not provide appropriate procedural safeguards where declaratory relief is sought: *Haig v. Canada*, [1992] 3 F.C 611 (C.A.) at p. 618, aff'd on other grounds [1993] 2 S.C.R. 995; or when the facts underlying the application cannot be properly determined through affidavit evidence: *Macinnis v. Canada (Attorney General),* [1994] 2 F.C. 464 (C.A.) at pp. 470-471.

[32] Subsection 18.4(2) of the *Federal Courts Act* places no limits on the considerations which may be taken into account in deciding whether or not to direct that a judicial review application be treated and proceeded with as an action: *Drapeau v. Canada (Minister of National Defence)* (1995), 179 N.R. 398 (F.C.A.) at para. 1 ("*Drapeau*"); *Hinton v. Canada (Minister of Citizenship and Immigration),* 2008 FCA 215, [2009] 1 F.C.R. 476 ("*Hinton*") at para. 44. Thus, the desirability to facilitate access to justice and to avoid unnecessary costs and delays may be taken into account: *Drapeau* at para. 1; *Association des crabiers acadiens* at para. 39.

[33] This Court has accordingly decided that an application for judicial review may be treated as an action where it is necessary to alleviate the inadequacies of the relief available on judicial review. Hence, our Court has found that while damages cannot normally be awarded on an application for judicial review, once the application is treated as an action, monetary remedies can nevertheless be awarded within that proceeding: *Hinton* at paras. 45 to 50; *Shubenacadie Indian Band v. Canada (Attorney General) et al.* 2001 FCT 181, 202 F.T.R. 30 (T.D.) at para. 4, aff'd [2002] FCA 255.

[34] As noted by Binnie J. in *Canada (Attorney General)) v. Telezone Inc*., [2010] 3 S.C.R. 585 ("*Telezone*") at para. 52, the remedies available on an application for judicial review pursuant to the *Federal Courts Act* are traditional administrative law remedies and declaratory and injunctive relief in the administrative law context, and these remedies do not include an award of damages. Moreover, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality, since subsection 18(3) of the *Federal Courts Act* specifically provides hat the administrative law remedies set out in subsection 18(1) of that act "may be obtained only on an application for judicial review made under section 18.1".

[35] Since the administrative law remedies of paragraph 18(1)(*a*) of the *Federal Courts Act* are under the exclusive jurisdiction of the Federal Court, were it not for subsection 18.4(2), litigants would be obliged to institute two distinct proceedings when seeking both administrative law remedies and monetary remedies against the Crown. The important, useful and practical effect of subsection 18.4(2) of the *Federal Courts Act* is thus to allow administrative law remedies and

monetary remedies to be pursued simultaneously against the Crown in the same proceeding before the Federal Court.

[36] Much of the past jurisprudence concerning subsection 18.4(2) was developed in the shadow of this Court's decision in *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, which held that in order to protect from erosion the Federal Court's exclusive jurisdiction over judicial review of federal boards, commissions and tribunals, an action for damages against the Crown could not proceed until the decision of the federal authority supporting the claim had been set aside through judicial review proceedings under the *Federal Courts Act*: see *Hinton* and *Association des crabiers acadiens*.

[37] Now that the *Grenier* principle has been overruled by the Supreme Court of Canada in a series of recent decisions (see *Telezone*; and *Canada (Attorney General) v. McArthur*, [2010] 3 S.C.R. 626, *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, [2010] 3 S.C.R. 639; *Nu-Pharm Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 648; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, [2010] 3 S.C.R. 657; *Manuge v. Canada*, [2010] 3 S.C.R. 672), a broad approach to the treatment of applications as actions pursuant to subsection 18.4(2) of the *Federal Courts Act* is appropriate in order to promote and facilitate access to justice and avoid unnecessary costs, delays and uncertainties for the litigants who are seeking various types of relief against the federal Crown.

[38] As noted by Binnie J. in *Telezone* at paragraph 32, "[t]he enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives." A broad interpretation of subsection 18.4(2) of the *Federal Courts Act* promotes those objectives.

[39] In this case, the appellant was seeking both administrative law remedies which would have allowed her to obtain the monetary relief she sought through the grievance process available to her under the *National Defence Act*, and, in the alternative, she sought a monetary award of damages in the event her administrative law arguments did not succeed. Faced with such requests, the application judge decided to hear and adjudicate the merits of the administrative law issues, while simultaneously discarding the request to pursue the proceedings as an action. In the particular context of this case, the application judge erred in proceeding as he did.

[40] The proper course in such circumstances was to adjourn the hearing of the judicial review application and to direct the appellant to submit within a specified timeframe a motion requesting that the application be treated and proceeded with as an action, failing which her monetary claims would be deemed abandoned within the framework of the application.

[41] Since the application judge has now decided the administrative law issues raised by the application, a special and unusual appellate remedy will be required in order to provide the appellant

with an opportunity to pursue at this late stage her monetary claims against the Crown within the framework of her application for judicial review.

Conclusions

[42] I would therefore allow the appeal, set aside the judgment of the Federal Court, and replace it with a judgment that reads as follows:

i. The application for an order setting aside or varying the decision of the Chief of the Defence Staff dated June 21, 2010 is dismissed.

ii. The request for a direction that the application be treated and proceeded with as an action pursuant to subsection 18.4(2) of the *Federal Courts Act* is allowed in relation to the applicant's claim for lost allowances and benefits resulting from her early unilateral repatriation from Egypt, or for damages in lieu thereof.

iii. The procedure for the hearing of the monetary claim will be determined by the Federal Court.

iv. The matter of costs in the Federal Court is deferred until the final disposition of the application.

[43] In the light of the mixed result, there should be no order as to costs in this appeal.

[44] As a closing comment, nothing in these reasons should be construed as sustaining the validity of the appellant's claims to any form of monetary compensation resulting from her unilateral repatriation from Egypt.

"Robert M. Mainville"

J.A.

"I agree.
K. Sharlow J.A."

"I agree.
J.D. Denis Pelletier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-242-11
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE PINARD DATED MAY 30, 2011.	
STYLE OF CAUSE:	Master Warrant Officer Linda L. Meggeson v. Attorney General of Canada
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 16, 2012
REASONS FOR JUDGMENT BY:	MAINVILLE J.A
CONCURRED IN BY:	SHARLOW J.A. PELLETIER J.A.
DATED:	June 13, 2012

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