Federal Court  Cour fédérale

Date: 20150818

Docket: T-2024-14

Citation: 2015 FC 983

Toronto, Ontario, August 18, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SCOTT ANDREW SHANNON

Applicant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL DEFENCE AND THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Scott Andrew Shannon (the "Applicant") seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985 c. F-7 of a decision made by General T.J. Lawson of the Office of the Chief of Defence Staff (the "CDS"). In that decision, dated July 29, 2014, the CDS

dismissed the Applicant's grievance complaint against a change in his medical category**,** which change led to his medical release from the Canadian Forces ("CF").

[2] The Applicant alleges that he has been discriminated against on the basis of a medical disability, contrary to both the *Canadian Human Rights Act*, R.S.C. 1985 c. H-6 (the "Act") and the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* , being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter").

[3] Pursuant to Rule 303(2) of the Federal Courts Rules, SOR/98-106 (the "Rules"), the Attorney General of Canada is named as a Respondent.

[4] In this application for judicial review, the Applicant seeks $750,000.00 compensation, together with any additional damages awarded by the Court, as well as an Order reversing the decision dismissing his grievance.

II. BACKGROUND

[5] The Applicant joined the CF in 1999. He worked as a military police officer and was elevated to the rank of Sergeant in 2008.

[6] The Applicant served two overseas terms in Afghanistan, in 2004 and 2006.

[7] After completing his second overseas tour, the Applicant was diagnosed with several illnesses, including hypertension and high cholesterol in 2006, anxiety disorder in 2007, and a

myocardial infarction ("MI") and diabetes in 2010. In March 2013, the Applicant required stent implantation for blocked coronary arteries.

[8] Following the MI in May 2010, the Director of Medical Policy ("D Med Pol") assigned the Applicant a temporary medical category for an initial period of six (6) months. A second and third temporary medical category was approved by D Med Pol in December, 2010 and July, 2011, respectively.

[9] A June 2010 follow-up appointment to the Applicant's MI showed a normal cardiovascular examination, but noted significant cardiac risk factors. Follow up appointments in September 2010 and October 2011 also showed normal test results. After the October 2011 appointment, the Applicant's attending physician concluded that the Applicant's risk of future MIs was low.

[10] On October 16, 2012, Dr. Gregson, a civilian physician retained by D Med Pol assigned the Applicant the following permanent medical category: Visual Acuity ("V") – 1; Colour Vision ("CV") - 1; Hearing ("H") - 1; Geographical Factor ("G") - 4; Occupational Factor ("O") - 2; and Air Factor ("A") -5. The minimal medical standard for military police is: V3-CV2-H3-G3-O2-A5.

[11] In addition to the permanent medical category, Dr. Gregson assigned the Applicant the following Medical Employment Limitations ("MELs"): that the Applicant required medical follow-up every six (6) months; that he required medical screening before being deployed; that

he had a chronic medical condition with a 20-50% risk of recurrence over a period of ten years; and, that in the event of recurrence, he would require significant medical attention within 60 minutes.

[12] Dr. Gregson concluded that the MELs meant the Applicant was at high risk for non-compliance with the Universality of Service Principle ("UOS"). That principle is codified by subsection 33(1) of the *National Defence Act*, R.S.C. 1985 c. N-5 ("the National Defence Act"), and requires soldiers to be physically fit, employable and deployable for general operational duties.

[13] Deployability means members must be able to perform their duties in a variety of geographic locations on short notice. To be deployable, an individual cannot have an MEL that would preclude deployment; see Defence Administrative Orders and Directives ("DAOD") 5023-1.

[14] After the assignment of the MELs and change to the Applicant's permanent medical category was made, an administrative review process was commenced, this resulted in a recommendation that the Applicant be medically released pursuant to Article 15.01(3)(b) of the *Queen's Regulations and Orders* ("QR&O").

[15] In response to this recommendation, the Applicant submitted a grievance complaint on February 20, 2013 requesting as relief that his medical category be reduced to G3, that the last

two MELs be removed from his file, and that his risk assessment be reduced from "High" to "Low."

[16] By letter dated June 6, 2013 the Applicant advised that he would be medically released no later than December, 2013. The Applicant elected early release, and was released on August 13, 2013.

[17] By letter dated September 14, 2013 the Applicant requested that his grievance be transferred to the Director General Canadian Forces Grievance Authority for final determination. In that letter, he alleged that he had been treated in a discriminatory manner. His file was referred to the Military Grievances External Review Committee ("MGERC") on November 19, 2013.

[18] On March 26, 2014, MGERC issued a report of its findings and recommended dismissing the grievance. In reaching this conclusion, the MGERC relied on a report dated January 14, 2014 from D Med Pol which found that the Applicant had severe cardiovascular disease ("CAD"), and a 30% risk of recurrence over a period of 10 years. This report noted that while the exact nature of the Applicant's medical condition had not been previously disclosed to the Applicant, it was disclosed in the MGERC report.

III. DECISION UNDER REVIEW

[19] The CDS issued its decision on July 29, 2014, dismissing the Applicant's grievance. As the Final Authority, pursuant to section 29.11 of the National Defence Act, the CDS considered the grievance complaint *de novo.*

[20] The CDS identified the determinative issues as the validity of the MELs, whether medical release was warranted, and whether the Applicant was unfairly denied transition support services. The CDS observed that the validity of the MELs would be determinative of the outcome of the grievance.

[21] The CDS considered the medical evidence, including the fact that the Applicant had severe CAD with a 30% risk of recurrence over 10 years. It accepted D Med Pol's assessment and concluded that the MELs did not meet minimum operational standards and did not comply with the UOS principle.

[22] The CDS noted that the Applicant's geographical factor of 4 had remained unchanged since October 2012, and that this change was made to reflect the Applicant's need for immediate medical support within 60 minutes if the Applicant experienced another cardiovascular event. It also noted that the Applicant had been given time to treat his medical condition when his temporary medical categories were assigned.

[23] Concerning the Applicant's transition to civilian life, the CDS concluded that the Applicant had not been denied reasonable medical support, that his transitional needs were not complex, and that he did not require extensive medical coordination to transition into civilian life. As such, the Applicant could be release in the normal six (6) month period provided for medical release.

[24] Finally, the CDS rejected the Applicant's claim for pay and compensation until 2019, noting that members of the CAF serve at the pleasure of the Crown and do not have an employment contract. It found that the Applicant's medical release was in accordance with CAF policy.

[25] CDS concluded that in light of the Applicant's health issues, the needs of the CAF, and the Applicant's civilian employment prospects, the decision to medically release the Applicant was reasonable.

IV. ISSUES

[26] This Application for Judicial Review raises the following issues:

1) What is the applicable standard of review?

2) Did the CDS breach procedural fairness by failing to disclose to the Applicant the exact nature of his medical condition that formed the basis of the recommendation that he be medically released?

3) Did the CAF discriminate against the Applicant on the basis of a medical disability, contrary to the Act and the Charter?

4) Did the CDS err in his assessment of the evidence in deciding to dismiss the Applicant's grievance?

V. SUBMISSIONS

(a) *Applicant's Submissions*

[27] The Applicant argues that the failure to disclose the exact nature of the medical condition, that was determined to be in violation of the UOS principle, until five months after the Applicant was medically released gave rise to a breach of procedural fairness.

[28] Relative to the question of discrimination, the Applicant submits that he has established a prima facie case of discrimination on the basis of a medical disability, and that the Respondent has failed to adduce evidence demonstrating that accommodation of his disability would cause undue hardship.

[29] In support of his argument about discrimination, the Applicant relies on a decision by the Canadian Human Rights Tribunal in *Irvine v. Canada*, 2001 CanLii 3421, which held that CF members should have the opportunity to demonstrate their ability to serve by performing the actual military tasks required of them. The Applicant argues that he is capable of performing the tasks required of him.

[30] Finally, the Applicant submits that CDS erred in assessing the evidence before him by failing to consider the results of his Battle Fitness Test. The Applicant passed this test in October 2012. The Applicant claims that the CDS also failed to consider his other normal tests including three exercise stress tests and an echocardiogram.

(b) *Respondent's Submissions*

[31] The Respondent submits that issues of procedural fairness are reviewable on the standard of correctness, and that the CDS's decision to dismiss the grievance is reviewable on the standard of reasonableness**;** see the decisions in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at paragraphs 46-47, and *Smith v. Canada (National Defence)*, (2010) 363 F.T.R. 186 at paragraphs 29-36, respectively.

[32] On the issue of a breach of procedural fairness, the Respondent concedes that the exact nature of the medical condition was not initially disclosed to the Applicant. However, this information was subsequently disclosed in the MGERC report. The Respondent submits that the CDS performed a *de novo* review of the material, and that this corrected the earlier breach of procedural fairness.

[33] In this regard, the Respondent relies on the decision in *McBride v. Canada (Minister of National Defence)*, (2012) 431 N.R. 38 at paragraphs 43-45, leave to appeal to the Supreme Court of Canada denied, [2012] S.C.C.A. 368.

[34] In response to the issue of discrimination, the Respondent argues that *Irvine v. Canada*, (2005) 268 F.T.R. 201, relied on by the Applicant, is no longer applicable after the Act was amended to include subsection 15(9). That subsection provides that the requirement in subsection 15(2) that an employer accommodate up to the point of undue hardship, is subject to

the principle of UOS. Further, the UOS principle is a bona fide occupational requirement; see the decision in *Best v. Attorney General of Canada,* (2011) 382 F.T.R. 256 at paragraph 26.

[35] Finally, the Respondent submits that the decision of the CDS was reasonable, and that the evidence was reasonably assessed. D Med Pol has expertise in assessing whether a medical condition will affect the ability to perform core military tasks. It was reasonable for MGERC and CDS to rely on D Med Pol's report. That the CDS preferred D Med Pol's evidence over the reports submitted by the Applicant's civilian physician is not a reviewable error; see the decision in *McBride, supra.*

VI. DISCUSSION AND DISPOSITION

[36] The first question to be addressed is the appropriate standard of review.

[37] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Sketchley, supra* at paragraphs 46-47. The decision of the CDS to dismiss the grievance is reviewable on the standard of reasonableness; see the decision in *Smith, supra* at paragraph 35.

[38] The Applicant claims that there was a breach of procedural fairness arising from the failure to disclose the precise nature of the medical condition that was found to be in violation of the UOS principle, until several months after he was medically released.

[39] The non-disclosure may have been a breach of procedural fairness but that breach was cured when the information was subsequently disclosed to the Applicant. He suffered no injury in this regard and was in possession of the information in order to fully pursue his grievance. As noted by the Federal Court of Appeal in *McBride*, *supra*, at paragraph 45 the original breach of procedural fairness was cured when the CDS proceeded to determine the matter on a *de novo* basis. There is no current breach of procedural fairness and no reviewable error that would justify judicial intervention.

[40] The next issue is whether the decision meets the standard of reasonableness. According to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47, the standard requires that a decision be justifiable, transparent and intelligible, falling within a range of possible acceptable outcomes that are defensible in respect of the facts and law.

[41] The Applicant's main argument is that the CDS unlawfully discriminated against him on the basis of his medical disability. In this regard, he relies on the decision of the Canadian Human Rights Tribunal, *Irvine v. Canada*, 2001 CanLII 3421 (CHRT). He also alleges that there was discrimination contrary to section 15 of the Charter.

[42] The Applicant argues that the decisions of the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("Meiorin") and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia*

(Council of Human Rights), [1999] 3 S.C.R. 868 ("Grismer") overtake the amendment to the Act. These submissions cannot succeed.

[43] The jurisprudence relied on by the Applicant, in support of his claim of discrimination, has been overtaken by an amendment to the Act. In 1998, the Act was amended to provide that a bona fide occupational requirement of employment and the duty to accommodate are subject to the principle of UOS. The relevant provisions of section 15 of the Act are set out below:

15. (1) It is not a discriminatory practice if (a) any refusal, exclusion, expulsion, suspension, limitation, specification preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;	15. (1) Ne constituent pas des actes discriminatoires a) les refus, exclusions, expulsions, suspensions, restrictions, conditions ou préférences de l'employeur qui démontre qu'ils découlent d'exigences professionnelles justifiées;
(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.	(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

(9) Subsection (2) is subject to the principle of universality of service under which members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform.	(9) Le paragraphe (2) s'applique sous réserve de l'obligation de service imposée aux membres des Forces canadiennes, c'est-à-dire celle d'accomplir en permanence et en toutes circonstances les fonctions auxquelles ils peuvent être tenus.

[44] The effect of this amendment was discussed in *Best*, *supra* at paragraphs 26 and 27 as follows:

> [26] Furthermore, notwithstanding the applicant's assertion that the Commission failed to review bona fide occupational requirements, as set out in British Columbia (Public Service Employee Relations Commission) v B.C.G.E.U. ("Meiorin"), [1999] 3 S.C.R. 3 at paras 71 and 72, subsection 15(9) of the CHRA provides that the Universality of Service policy is a bona fide occupational requirement and is thus an exception to the requirement under subsection 15(2) CHRA to establish that accommodation would result in undue hardship:
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> | | |
> |---|---|
> | 15. (9) Subsection (2) is subject to the principle of universality of service under which members of the Canadian Forces must at all times and under any circumstances perform any functions that they may be required to perform. | 15. (9) Le paragraphe (2) s'applique sous réserve de l'obligation de service imposée aux membres des Forces canadiennes, c'est-à-dire celle d'accomplir en permanence et en toutes circonstances les fonctions auxquelles ils peuvent être tenus. |
>
> [27] The above provision means that the policy itself cannot be challenged as discriminatory. However, the application of the policy can be. To this end, the investigator confirmed that the policy was adopted for a purpose rationally connected to the performance of the job, that the policy is based on an honest and good faith belief that is necessary for fulfillment of that legitimate work-related purpose, and that the policy is necessary to achieve the legitimate work-related purpose.

[45] I note that in *Best*, *supra*, the Court was conducting a judicial review of a decision of the Canadian Human Rights Commission not to deal with a complaint of alleged discrimination on the basis of disability. That is not the situation in the present case where the subject of the judicial review application is a decision of the CDS, but the decision in *Best*, *supra* illustrates the operation of the amendment.

[46] Further, the decision in *Best*, *supra*, specifically recognizes the UOS policy as a bona fide occupational requirement and accordingly, an exception to the requirement of subsection 15(2) of the Act that an employer must show that accommodation of a disability would cause undue hardship.

[47] There is no basis in law to support the Applicant's claim of discrimination under the Act.

[48] The Applicant also raised the subject of discrimination contrary to section 15 of the Charter. In my opinion, there is insufficient evidence to ground a claim of discrimination contrary to the Charter. As noted by the Supreme Court of Canada in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at 361-362:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. …

[49] Finally, there remains the question of the reasonableness of the decision. The Applicant argues that the CDS ignored medical evidence that was favourable to him and consequently, the decision to dismiss his grievance is unreasonable.

[50] Having regard to the material that was submitted to the CDS and the detailed reasons in his decision, I am not persuaded that the CDS ignored any medical evidence.

[51] On judicial review, the Court does not reweigh the evidence that was before the decision maker; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 61. Its role is limited to determining that the relevant evidence was fairly assessed; see *Best*, *supra* at paragraph 29 where the Court said the following:

> [29] In the case of a judicial review of an application of the Universality of Service policy, the Court is not entitled to reassess the medical reports and reach its own conclusions. The Court must simply determine that a fair assessment of all the available medical evidence was undertaken (*Irvine v Canada (Canadian Armed Forces*), 2005 FCA 432 at paras 2 to 5). …

[52] I am satisfied that all the evidence was considered and assessed, including the evidence that the Applicant provided from his personal physician. The CDS was entitled to prefer the reports and opinion of D Med Pol over the reports provided by external physicians.

[53] In this case, the medical evidence was relevant. The CDS fairly weighed the medical evidence. He reasonably gave greater weight to the evidence of D Med Pol which has expertise in assessing health conditions and risks in the context of the needs of the Armed Forces.

[54] The 95% likelihood of survival cited by the Applicant is not the relevant statistic to be considered. Rather, the focus is upon the likelihood of a future cardiac event. According to the Medical Risk Matrix, where there is a 20-50% likelihood of recurrence of a medical event that

will require treatment within one hour, that is likely not only to cause serious medical consequences for the affected individual but may also jeopardize the mission.

[55] In light of the medical reports as well as the relevant policies of the CF, the CDS reasonably concluded that the MEL was valid, that it violated the UOS principle and that it was in the best interests of both the Applicant and the CF that the Applicant be medically released.

[56] In the result, the decision of the CDS meets the reasonableness standard because it is justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that is defensible in view of the facts and the law.

[57] There was no existing breach of procedural fairness or any other error that would justify judicial intervention and this application for judicial review is dismissed.

[58] I will briefly address the Applicant's request for an award of compensation in the amount of $750,000.00 and the Respondent's request for costs.

[59] This Court has no jurisdiction to award damages in an application for judicial review; see the decision in *Lussier v. Collin*, [1985] 1 F.C. 124 (F.C.A).

[60] There remains the issue of costs. The Respondent, both in his written submissions and at the hearing, requested costs. The Applicant did not specifically address the issue of costs being awarded against him.

[61] The parties can make brief written submissions on costs, such submissions to be served and filed within five (5) days of this judgment. The submissions should address whether costs should be awarded, and if so in what amount.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed. The parties can make brief written submissions on costs, such submission to be served and filed within five (5) days of this judgment. The submissions should address whether costs should be awarded, and if so in what amount.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2024-14
STYLE OF CAUSE:	SCOTT ANDREW SHANNON v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL DEFENCE AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	FEBRUARY 16, 2015
JUDGMENT AND REASONS	HENEGHAN J.
DATED:	AUGUST 18, 2015

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