Federal Court

Cour fédérale

Date: 20151006

Docket: T-323-15

Citation: 2015 FC 1143

Ottawa, Ontario, October 6, 2015

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

FRANÇOIS R. BOSSÉ

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. François R. Bossé, seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision dated January 22, 2015, by Colonel J.R.F. Malo, in his capacity as the final authority [FA] in the Canadian Forces [CF] grievance process. In his decision, Colonel J.R.F. Malo rejected the Applicant's grievance of March 25, 2013, and refused to grant the redress sought by the Applicant.

I. Factual background

[2] The Applicant joined the CF in the Reserve Force on October 29, 2004, as an Infantryman. He transferred to the Regular Force on June 24, 2005, and commenced training to become an Officer in the Maritime Surface and Subsurface occupation.

[3] In November 2010, the Applicant suffered a service-related knee injury that became recurrent in nature. In light of his persistent injury, in October 2012, an administrative review was initiated to determine whether the Applicant was fit to continue serving with the CF. On October 23, 2012, the administrative review concluded that the Applicant's continued employment in the CF was no longer possible and that a release should be considered as the only possible course of action.

[4] The following month, the Applicant's Commanding Officer [CO] became aware that the Applicant was playing squash recreationally and as a result a Unit Disciplinary Investigation [UDI] was initiated in mid-November 2012. The basis of the UDI was that by playing squash in his spare time, the Applicant may have aggravated his knee injury.

[5] On November 19, 2012, the Applicant's release from the CF on medical grounds was approved by the Director Military Careers and Administration [DMCA]. The DMCA indicated that the Applicant's retirement leave was to commence on June 12, 2013, or earlier if requested.

[6] On February 7, 2013, the Applicant submitted an application to his CO, requesting to participate in the Vocational Rehabilitation Program for Serving Members [VRPSM]. The Applicant's VRPSM plan included two (2) phases: 1) job shadowing with SNC-Lavalin in Victoria, British Columbia, from February 2013 to April 2013; and 2) pursuing a graduate diploma in management at HEC in Montréal, Québec, from May 2013 to June 2013.

[7] On February 14, 2013, the Transition Advisor at the Director Casualty Support Management confirmed that the Applicant was eligible for the VRPSM, subject to his CO's approval.

[8] By letter dated March 12, 2013, SNC-Lavalin confirmed that it was prepared, under the terms of the CF VRPSM, to provide on the job training to the Applicant from March 13, 2013 to April 26, 2013. However, discussions between the Applicant and SNC-Lavalin regarding the Applicant's internship had started as early as December 2012.

[9] On March 15, 2013, the Applicant sought to amend his release date from June 13, 2013, to April 26, 2013, and then later to April 24, 2013. His request for an earlier release was approved on March 19, 2013.

[10] The Applicant's request for VRPSM was denied on March 21, 2013. The handwritten denial, which is found on the March 12, 2013 letter from SNC-Lavalin, states that the Applicant's "request is denied. This out of area VRPSM is unsupportable given his release date

of 26 Apr 13". An earlier handwritten note dated March 18, 2013, found on the same letter, reads:

> "Cmdt
> Sir, member has been briefed that his VRPSM would likely be denied based on his request for an earlier release date, and his ongoing administration that would result in him having to pay his own way back to Gagetown for issue of charges etc.
> For your consideration SIR,
> [signature]
> J.A. Phillips
> CAPT
> BC HQ
> 18 Mar 13"

[11] The Applicant was medically released from the CF on April 30, 2013.

[12] On March 25, 2013, the Applicant filed a grievance to his CO, in his capacity as the Initial Authority [IA] in the grievance process, challenging the decision to deny his VRPSM request. Specifically, the Applicant argued that: 1) it was his right to request an earlier release date of his convenience and that the right to an earlier release date did not run in conflict with the regulations of the VRPSM policies; and 2) the possible laying of charges should be a separate and independent procedure entirely and should not interfere with his request for VRPSM.

[13] On July 10, 2013, the Applicant was provided with a disclosure package, which contained the information upon which the IA would make its decision. The package included a grievance synopsis, which recommended that the Applicant's grievance be denied. On August 19, 2013, the Applicant availed himself of the opportunity to make representations in support of his grievance. The Applicant's grievance was denied by the IA on September 9, 2013.

[14] On October 10, 2013, the Applicant requested that his grievance be submitted to the FA for adjudication. On February 3, 2014, his grievance was referred on a discretionary basis to the Military Grievances External Review Committee [MGERC] for findings and recommendations and on May 13, 2014, the MGERC recommended that the grievance be denied.

[15] On January 22, 2015, the FA denied the Applicant's grievance.

II. Decision under review

[16] The FA determined that the decision to deny the Applicant's VRPSM request fell within a range of reasonable outcomes. He also determined that the Applicant had been treated fairly in accordance with the applicable rules, regulations and policies and that he was not prepared to grant the redress sought by the Applicant. He concluded that the Applicant's VRPSM timeline was not achievable as it did not incorporate the time required for his release process.

[17] In reaching his decision, the FA referred to CANFORGEN 151/07, which enables medically releasing CF members to pursue vocational rehabilitation training up to six (6) months immediately prior to their medical release. He also referred to the *Aide-memoire for CF members and the Chain of Command on the VRPSM* [VRPSM Aide-memoire], which sets out that medically releasing CF members should be provided with the best possible support to assist them in their transition to civilian life. He specified that the VRPSM is not a right or entitlement and that it requires a comprehensive plan which must be prepared prior to proceeding with a request. He further added that: 1) the CO must be satisfied that the plan is reasonable and realistic; 2) the training must take place up to a maximum of six (6) months prior to the release date or the start

of the retirement leave date; and 3) the VRPSM location will be considered as the member will be required to perform routine administrative clearance activities during their remaining time in service.

[18] The FA then proceeded to review the Applicant's VRPSM plan. The FA first noted that at the time of the Applicant's VRPSM request, he did not meet the required training qualifications. However, the FA recognized that there was confirmation in the Applicant's file that he had been deemed eligible to apply for the VRPSM program on February 13, 2013, and for that reason, he agreed with the MGERC that the Applicant was eligible to apply for the program. The FA then reviewed the dates identified in the Applicant's VRPSM. He stated that the Applicant's VRPSM application was submitted on February 9, 2013, and that the inclusive period of the plan was to begin on February 18, 2013, and end on June 13, 2013. He also referred to Part B of the Applicant's VRPSM and pointed out that the timeline therein indicated that the plan was to begin February 4, 2013, which was five (5) days before the Applicant had even applied for VRPSM.

[19] After carefully reviewing the Applicant's file, the FA found that although the Applicant may have been prepared to start working with SNC-Lavalin in February 2013, SNC-Lavalin was only prepared to employ the Applicant as of March 2013. He also noted that the Applicant's VRPSM plan did not take into consideration the time required to conduct the release administrative process, which according to the release section of the Applicant's home base in New Brunswick, could take up to four (4) weeks. The FA agreed with the IA that the denial of

the VRPSM was reasonable since the Applicant's VRPSM plan was flawed and could not have worked within the timeframe requested.

[20] With respect to the change in release date, the FA noted that on March 15, 2013, the Applicant requested an earlier release date of April 24, 2013, and that it wasn't until March 21, 2013, that the chain of command denied the VRPSM request. While the FA considered the Applicant's explanation that he changed his release date because he had been told by his chain of command that his VRPSM request would not be approved, he determined that this did not change the fact that a decision on his VRPSM request had not been made at that point in time. In the end, the FA concluded that the lack of time to complete administrative duties and the issues related to the start date of employment complicated the Applicant's VRPSM plan and as a result, the decision to deny the VRPSM request fell within a range of reasonable outcomes.

III. Legislative and Regulatory Framework

[21] The relevant procedures and guiding principles of the CF grievance process are outlined in sections 29 to 29.15 of the *National Defence Act*, RSC 1985, c N-5 [NDA] and article 7 of the *Queen's Regulations and Orders* [QR&Os]. The CF grievance process has two (2) levels of grievance authority: the IA and the FA.

[22] An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the CF, for which no other process for redress is provided under the NDA, is entitled to submit a grievance. The grievance must be submitted in writing to the individual's CO, who will act as the IA for the grievance. If the CO is unable to act

as the IA, the grievance will then be sent to the commander or officer holding the appointment of Director General, or above, at National Defence Headquarters, who is responsible to deal with the matter that is the subject of the grievance. If the grievance relates to a personal decision, act or omission of an officer who is the IA, then that officer must refer the grievance to the next superior officer who has the responsibility to deal with the subject-matter of the grievance, and that superior officer will act as the IA.

[23] If the grievor disagrees with the decision of the IA, he may submit it to the Chief of Defence Staff [CDS] as FA for consideration and determination. Certain types of grievances must be referred by the CDS to the MGERC for its findings and recommendations, which are non-binding on the CDS. If the CDS does not act on the findings and recommendations of the MGERC, he must provide written reasons for his decision. Although the CDS is the FA in the grievance process, he may delegate, with certain exceptions, any of his powers, duties and functions as FA in the grievance process to an officer who is directly responsible to him. With the exception of judicial review to this Court, a decision of the FA in the grievance process is final and binding.

IV. Issues and appropriate standard of review

[24] The issue to be determined in this application is whether the FA's decision rejecting the Applicant's grievance was reasonable.

[25] Both the Applicant and the Respondent agree that the standard of review regarding the merits of the FA's decision is reasonableness. I agree. The decision under review raises questions

of fact, discretion and policy, as well as questions of mixed law and fact, which are reviewable on the reasonableness standard as per *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 51, [2008] 1 SCR 190 [*Dunsmuir*]. Moreover, an exhaustive analysis to determine the applicable standard of review is not required, given that case law has already established that decisions of the FA in the CF grievance process that deal with questions of fact or mixed fact and law are reviewable on the standard of reasonableness (see *Dunsmuir*, at paragraph 57; *Bourassa v Canada (Department of National Defence)*, 2014 FC 936 at paragraphs 39 and 40 [*Bourassa*]; *Harris v Canada (Attorney General)*, 2013 FCA 278, [2013] FCJ No 1312 (affirming *Harris v Canada (Attorney General)*, 2013 FC 571 at paragraph 30, [2013] FCJ No 595); *Babineau v Canada (Attorney General)*, 2014 FC 398 at paragraph 22, [2014] FCJ No 440; *Osterroth v Canada (Canadian Forces, Chief of Defence Staff)*, 2014 FC 438 at paragraph 18, [2014] FCJ No 483; *Moodie v Canada (Attorney General)*, 2014 FC 433 at paragraph 44, [2014] FCJ No 447; *Lampron v Canada (Attorney General)*, 2012 FC 825 at paragraph 27, [2012] FCJ No 1713; *Rompré v Canada (Attorney General)*, 2012 FC 101 at paragraphs 22 and 23, [2012] FCJ No 117; *Zimmerman v Canada (Attorney General)*, 2011 FCA 43 at paragraph 21, [2011] FCJ No 163 [*Zimmerman*]).

[26] Applying the analytical framework required of a Court that is reviewing a decision based on the standard of reasonableness, as set out by the Supreme Court of Canada at paragraph 47 of *Dunsmuir*, I must determine whether the FA's decision meets the criteria of "justification, transparency and intelligibility within the decision-making process" and whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[27] The Applicant argued that a lower degree of deference should be given to the FA's decision because it was made by an officer who holds a senior rank four (4) ranks lower than the CDS. While acknowledging that section 29.14 of the NDA expressly permits the CDS to delegate his powers, duties and functions as FA in the grievance process, the Applicant submitted that Colonel J.R.F. Malo's level of expertise and authority in the CF administration is not equivalent to that of the CDS, and consequently, the level of deference in this case should be moderate to low. The Applicant did not provide any case law to support a lower level of deference, or any evidence to demonstrate Colonel J.R.F. Malo's lower level of expertise. The Respondent on the other hand, provided a copy of the appointment order dated November 15, 2012, wherein the CDS delegated to Colonel J.R.F. Malo, under section 29.14 of the NDA, his powers, duties and functions as the FA in the grievance process.

[28] In my view, the delegation of powers to Colonel J.R.F. Malo suggests that he possesses the requisite level of expertise and authority to render decisions as the FA in the CF grievance process. Furthermore, I note that in *Bourassa,* cited above, Bédard J. does not appear to have afforded less deference to a decision that was also made by Colonel J.R.F. Malo as FA in the CF grievance process. Consequently, I am not persuaded that the FA's decision merits a lower level of deference in the circumstances of this case.

V. Analysis

[29] In his decision dated January 22, 2015, the FA determined that the Applicant had been treated fairly and that his request for VRPSM was denied as a result of him changing his release date. Specifically, the FA concluded that the Applicant had not taken into consideration the time

required to complete the release administrative process, and secondly, the timeline in the VRPSM plan was not achievable.

A. *Time required to complete the release administrative process*

[30] It is clear from the written submissions of the parties that there is confusion regarding the nature of the "release administrative process" referred to by the FA in his decision.

[31] In his memorandum of fact and law, the Applicant submits that the FA's conclusion that there was insufficient time to process the Applicant's VRPSM request is without foundation and does not fall within the range of possible outcomes. The Applicant states that the time required to process a VRPSM request is thirty days and that it is clear that his VRPSM request adhered to this timeframe. The VRPSM request was submitted to the Applicant's CO on February 7, 2013, with an anticipated start date of March 13, 2013. Therefore a total of thirty-four (34) days was allotted to process the VRPSM request, leaving no reason why it could not have been administered within the requisite thirty (30) days. He further rejects the argument that the FA's decision could be justified based on his temporary relocation to British Columbia, since the regulations specifically provide that VRPSM plans may involve travel inside Canada. Finally, the Applicant also argues that there was a clerical error in his original VRPSM application which listed the start date of his job-shadowing with SNC-Lavalin in Victoria, British Columbia to be February 4, 2013. The correct date should have been March 4, 2013. The Applicant believes that he has been heavily penalized as a result of this clerical error.

[32] In oral submissions, the Applicant shifted his argument and conceded that the "release process" cited by the FA in its decision referred to the time required to release a CF member, not to process a VRPSM request. However, he argued that as the Applicant left more than four (4) weeks between the date he requested an earlier release date, and the early release date itself, this provided sufficient time to complete all of his release procedures. He submitted that no fault can be attributed to the Applicant for the release not being processed within the requisite thirty (30) days.

[33] The Respondent submits in his memorandum of fact and law that the Applicant's VRPSM request was denied on the basis that the plan failed to incorporate the time required to process the release of the Applicant from the CF and not because of the lack of time to process the VRPSM request as suggested by the Applicant in his memorandum of fact and law. According to the Respondent, when the Applicant requested on March 15, 2013, an early release date of April 24, 2013, the Applicant's timeline became unfeasible since the release process from the CF could take up to four (4) weeks. In oral submissions the Respondent claimed that the release administrative process must be done in person at the CF member's home base.

[34] I agree that the "release administrative process" referred to by the FA was in fact the process to release a member from the CF. This interpretation is supported by an email from Kelly Osmond, Petty Officer 2nd Class, on October 6, 2014, in response to a question regarding the amount of time required to complete the release process at the Applicant's home base in New Brunswick. She wrote that one needed "30 days to process a [member] out fully. That would include 2 [r]elease appointments, 2 medical appointments and a whole host of base clearances.

This would be the shortest amount of time that we could get someone released" (Certified Tribunal Record [CTR], page 19). This interpretation is also supported by the MGERC report which stated that in addition to his internship, the Applicant "needed to complete several administrative procedures prior to his release" (CTR, page 59). According to the MGERC member's calculations, approximately ten (10) days were needed for release clearance procedures, possibly two (2) additional days for the pending administrative actions, in addition to the days needed to expend his annual leave. In the MGERC member's view, the Applicant "required fourteen (14) to sixteen (16) working days prior to April 26, 2013 in order to fulfill the necessary requirements of his release. In considering these requirements, plus travel days between Victoria and Gagetown, as well as the two (2) statutory holidays for Easter, only six (6) working days remained for the grievor's internship."

[35] I now turn to the question of whether the FA's conclusion regarding the time required for completing the release process was reasonable. According to the evidence, the minimum amount of time required to complete the release process is thirty (30) days. In the Applicant's case, there was approximately a month and a half between his request for an earlier release (March 15, 2013) and the proposed earlier release date (April 24, 2013). The FA found this to be insufficient to complete all the required clearance procedures. He also rejected the Applicant's argument that he only changed his release date after a meeting where he was told by two (2) individuals in his chain of command that he was not eligible for VRPSM and that his request would be evaluated on its merits after the disciplinary investigation was completed. In the FA's view, the reason for changing the release date did not change the fact that a decision had not yet been made on the Applicant's VRPSM request.

[36] CANFORGEN 151/07 provides that: 1) the VRPSM was introduced to enable medically releasing CF members to commence vocational rehabilitation training for up to six (6) months immediately prior to their release with the approval of their CO (s. 2); and 2) COs are encouraged to actively support medically releasing members in their efforts to effect a seamless transition from CF to civilian employment (s. 7). In addition, the VRPSM Aide-memoire provides that prior to release, an eligible member may request, subject to the CO's approval, a move to his/her intended place of residence and/or a change of release base if it is beneficial to the VR training plan. Given the purpose of the VRPSM and the possibility for a CF member to request a change in venue, I question whether it would have been possible for the Applicant to conduct the administrative processes required for his release from another base either in, or closer to British Columbia, or even electronically, in order to eliminate the need for him to travel to his home base in New Brunswick. If accommodation measures could have been taken, the release procedures could have been completed within the minimum thirty (30) day timeframe.

[37] In the absence of any evidence to demonstrate that 1) accommodation measures could have been taken, 2) the Applicant requested these measures and was refused, or 3) that the Respondent had the obligation to suggest modifications to the VRPSM instead of rejecting it, I must conclude that the FA's determination that the Applicant's timeline did not take into account sufficient time to complete the release process from the CF was reasonable and fell within the range of possible and acceptable outcomes. Furthermore, based on all the evidence before me, I am of the opinion that the clerical error highlighted by the Applicant was not determinative.

B. *Possible laying of charges*

[38] The Applicant submits that it was unreasonable for the FA not to address the issue of the possible laying of charges in his reasons given that it was listed as a grievance issue and as a reason for denying the VRPSM. Furthermore, he argues that at the time his release message was issued, he was the subject of a bogus UDI initiated by his Battery Commander, who was also the person who denied his VRPSM. He alleges that were it not for this disciplinary investigation being initiated, there would have been no other justifiable reason to deny his VRPSM.

[39] The Respondent argues that the Applicant's argument is without merit and that the issue of the possible laying of charges was considered by the FA through the findings of the MGERC.

[40] My review of the CTR leads me to the following observations.

[41] First, the Applicant's letter dated March 15, 2013, requesting an earlier release date has a handwritten annotation which indicates that the Applicant has been briefed that he may be required to return to Gagetown for "charge-laying" and that it will be his responsibility to pay for these trips. The "issue of charges" re-appears in the handwritten annotation dated March 18, 2013, on the "Letter of Intent to Provide On-Job-training" from SNC-Lavalin, quoted above. Three (3) days later, on March 21, 2013, the Applicant's VRPSM request was denied.

[42] Second, the Applicant's grievance letter states that the Applicant considers the possible laying of charges to be a separate and independent procedure entirely and that it should not interfere with his request for VRPSM (CTR, page 150).

[43] Third, the IA's decision dated September 9, 2013, acknowledges that disciplinary and administrative procedures are in fact entirely separate and independent from the VRPSM but adds that outstanding disciplinary or administrative measures are a consideration for the CO when determining the feasibility of a VRPSM plan (CTR, page 130).

[44] Fourth, in its findings and recommendations dated May 13, 2014, the MGERC found that there was no evidence that the possible laying of charges was a factor considered by the CO, as alleged by the Applicant (CTR, page 59).

[45] Finally, when asked to provide further clarification for the purpose of completing the Applicant's file prior to it being submitted to the FA, the Applicant provided greater details of his grievance regarding the alleged influence of his disciplinary charges on his VRPSM refusal (CTR, pages 9-18).

[46] The Applicant clearly raised the issue of whether the possible laying of charges was a basis for his VRPSM refusal as one of the grounds of his grievance. The issue appeared in the documentation prior to the grievance being filed and in the decisions that followed thereafter. However, the FA's decision is silent on the issue.

[47] It is true that a decision-maker need not deal with every issue raised by the parties. While it is possible that the FA considered the issue in making his decision, the fact remains that one of two (2) issues raised by the Applicant in his grievance is simply not addressed or dealt with by the FA in his decision (see *Zimmerman*, at paragraph 25; *Morphy v Canada (Attorney General),* 2008 FC 190, at paragraphs 74, 75, 78, 323 FTR 275). I am unable to determine whether the issue was considered or whether it was forgotten. The Applicant is entitled to know whether or not the possible laying of charges played a role in the decision to deny his VRPSM request. The issue was obviously central enough for both the IA and the MGERC to address it in their decisions. Accordingly, I find that the FA should have addressed the issue in his decision and that his failure to do so did not fall within the range of outcomes acceptable on the facts and the law.

VI. Conclusion

[48] Given my finding that the FA's decision should have addressed the issue raised by the Applicant in his grievance in respect to the possible laying of charges and that the failure to do so does not fall within the range of outcomes acceptable on the facts and the law, I find the FA's decision to be unreasonable.

[49] As a consequence, the application for judicial review is allowed with costs to the Applicant in the amount of $2,500.00.

[50] The January 22, 2015 decision of Colonel J.R.F. Malo is set aside, and the matter is remitted to the Chief of Defence Staff to be re-determined in accordance with these reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed with costs to the Applicant in the amount of $2,500.00. The January 22, 2015 decision of Colonel J.R.F. Malo is set aside, and the matter is remitted to the Chief of Defence Staff to be re-determined in accordance with these reasons.

"Sylvie E. Roussel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-323-15
STYLE OF CAUSE:	FRANÇOIS R. BOSSÉ v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 21, 2015
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	October 6, 2015

APPEARANCES:

JOSHUA M. JUNEAU MICHEL DRAPEAU	FOR THE APPLICANT
PHILIPPE LACASSE	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MICHEL DRAPEAU LAW OFFICE Barristers and Solicitors Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT