Federal Court  Cour fédérale

Date: 20160426

Docket: T-447-15

Citation: 2016 FC 468

Ottawa, Ontario, April 26, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ANTHONY SNIEDER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Anthony Snieder, retired and was honourably released from the Royal Canadian Air Force on March 8, 2013. Prior to his retirement, and while serving at the Canadian Forces Flight Training School in Moose Jaw, Saskatchewan, Captain Snieder submitted a harassment complaint in January 2013. This complaint alleged that one of the Applicant's fellow officers, Major Chambers, was spreading false statements about him for the purpose of poisoning his work environment and also was among those members of the command team trying to prevent him from raising safety concerns. Ultimately, this complaint resulted in a letter of

administrative closure dated February 27, 2015, whereby Colonel A. R. Day denied the harassment complaint. The Applicant now applies for judicial review of the decision made by Colonel Day.

I. Background

[2] On January 22, 2013, the Applicant submitted a harassment complaint about Major Chambers to his Commanding Officer, Lt. Col. S. Greenough. Because the Applicant raised concerns about the officers in his chain of command, this complaint, along with the Applicant's redress of grievance about how they had handled the complaint, were eventually sent to Brigadier-General M. P. Galvin who, as the initial authority [IA] under the grievance procedures established under the *National Defence Act*, RSC 1985, c N-5 [*NDA*], issued a decision dated August 1, 2013. General Galvin concluded that the Applicant's harassment complaint had been administered fairly and in accordance with all appropriate Canadian Forces policy and orders and, therefore, denied the grievance.

[3] On October 29, 2013, the Military Grievance External Review Committee [MGERC] found that the IA had improperly focused solely on the initial complaint filed by the Applicant and recommended that redress be granted. Since the grievance raised serious allegations about flight safety concerns which those in the Applicant's chain of command did not want to address, the MGERC also recommended that further investigation be ordered. A year or so later, in a letter dated October 1, 2014, General T. J. Lawson, the Chief of Defence Staff [the CDS], acting as the final authority under the grievance procedures established under the *NDA*, denied the grievance on the basis that the criteria for harassment were not met. General Lawson determined

he did not fully agree with the MGERC's recommendations in large part due to the lack of detail about what, exactly, the alleged harassing statements had been. In particular, he found that the Applicant had provided only two of the four required criteria in his complaint, and did not provide sufficient information about the harassing behaviour. General Lawson also found, contrary to the MGERC, that without sufficient details of the allegedly false statements spread about the Applicant, it could not be decided whether the statements reached the status of improper conduct. As to the flight safety concerns raised by the Applicant, General Lawson noted that any potential flight safety concerns had been addressed because the two flight safety surveys conducted after the Applicant had filed his grievance showed that the 15 Wing had a sound flight safety culture.

[4] Several weeks after the CDS's decision, the Applicant submitted a letter dated November 17, 2014 to the CDS, outlining the four incidents in which the alleged harassment occurred and providing further details. In response to this letter, the CDS advised the Applicant in a letter dated December 11, 2014, that although the grievance was closed, the Applicant's letter had been forwarded to Colonel Day, the officer responsible for control and administration of personnel at the training facility in Moose Jaw. In a letter of administrative closure dated February 27, 2015, Colonel Day determined that, although the complaint should be considered, after review of the Applicant's complaint letters and a situational assessment, the elements of harassment were not met on an individual assessment of each of the incidents. Colonel Day noted that while it may have been warranted for the Applicant's chain of command to be involved to provide closure and a definitive response to the complaint, it was only after the Applicant had provided additional information that a conclusion could be reached concerning the

alleged harassment. Colonel Day further noted that with the parties to the complaint no longer posted to Moose Jaw and the Applicant's retirement, the parties' rights and responsibilities had been met to ensure a safe and harassment free work environment. Lastly, Colonel Day found that he had sufficient information, including feedback from Major Chambers, to determine that an investigation would not be ordered because, despite conflicts in the workplace, the elements of harassment were not met.

[5] Following Colonel Day's decision, the Applicant sent two letters to General Lawson dated March 5 and 7, 2015, requesting a *de novo* review. When the Applicant received no response to this request, he filed his notice of application for judicial review in this Court on March 24, 2015. This application was subsequently amended to clarify the Applicant's request that Colonel Day's decision, rather than that of General Lawson, be reviewed and declared invalid. Although these two decisions are linked, only the decision made by Colonel Day is being judicially reviewed in this application.

II. Issues

[6] Although the parties raise various issues concerning Colonel Day's decision, in my view, there are four main issues to be addressed by the Court on this application for judicial review:

1. Is this application for judicial review moot or an abuse of process?
2. Are there any procedural errors such that Colonel Day's decision should be quashed on the basis it was rendered in a procedurally unfair manner?
3. What is the appropriate and applicable standard of review in respect of Colonel Day's decision?

4. Are there any errors in the substance of Colonel Day's decision such that it should be quashed?

III. Analysis

A. *Is this application for judicial review moot or an abuse of process?*

[7] The Respondent contends that this proceeding is moot because the Applicant is no longer a member of Canadian Forces and because his alleged harasser, Major Chambers (now Lt. Colonel Chambers), is no longer working in Moose Jaw and, as of July 15, 2015, was posted outside of Canada. According to the Respondent, the purpose of the harassment complaint mechanism is to resolve workplace conflict, something which is no longer at issue in this case. Furthermore, the Respondent says that, even though there is no live controversy, the Court must nonetheless consider the second stage of the mootness test emanating from the Supreme Court's decision in *Borowski v Canada (Attorney General)*, 1989 1 SCR 342, 57 DLR (4th) 231 [*Borowski*], and determine whether it should exercise its discretion to hear and decide the case on its merits. Since this case will have no practical effect on the parties' rights, the Respondent submits that judicial economy does not favour the case being heard. The Respondent also states that because this application is of no particular public importance, the Court's refusal to exercise its discretion will not deprive future litigants of a precedent-setting ruling.

[8] The Respondent further contends that this application for judicial review is an abuse of process because the Applicant has initiated criminal complaints with the Canadian Forces National Investigation Service [CFNIS] and no longer has a stake in this matter except to

buttress and further those complaints. According to the Respondent, the CFNIS is an alternate and appropriate forum available to the Applicant to address his concerns and he has already engaged that process.

[9] In *Borowski*, Mr. Justice Sopinka, speaking for a unanimous Supreme Court, remarked (at paras 15-16) that:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[10] Accordingly, in a case where there is "no longer a live controversy or concrete dispute" the case can be determined to be moot (*Borowski* at para 26). Even if a case may be moot because there is no longer a live controversy or concrete dispute, it is nevertheless necessary to determine whether the Court should exercise its discretion to hear and decide the case where the circumstances warrant. Three overriding principles are to be considered in this second step of a mootness analysis: (1) the presence of an adversarial relationship; (2) the need to promote judicial economy; and (3) the need for the court to show a measure of awareness of its proper role as the adjudicative branch of government (*Borowski* at paras 31-40; see also *Harvan v Canada (Citizenship and Immigration)*, 2015 FC 1026 at para 7, 257 ACWS (3d) 923 and *Khalifa v Canada (Citizenship and Immigration)*, 2016 FC 119 at para 18, 263 ACWS (3d) 30). The Court should consider the extent to which each of these principles may be present in a case, and the application of one or two may be overborne by the absence of the third and *vice versa* (see: *Borowski* at para 42).

[11] The Supreme Court in *Borowski* identified several instances where the Court's discretion may be exercised to allow it to hear a case which might otherwise be moot. For example, if: (1) there is still the necessary adversarial relationship between the parties; (2) the Court's decision will have practical effect on the rights of the parties (see *Borowski* at para 35); (3) when the case is recurring but of brief duration, such that important questions might otherwise evade judicial review (see *Borowski* at para 36); or (4) where issues of public importance are at stake such that resolution is in the public interest, although the mere presence of a matter of national importance is insufficient (*Borowski* at paras 37, 39).

[12] In view of *Borowski*, I find that this application for judicial review has been rendered moot, and that there is nothing in the record or in the parties' written and oral submissions which compels me to exercise my discretion to determine the Applicant's application on its merits. There is no longer any live controversy or concrete dispute arising from the Applicant's harassment complaint. The Applicant has been a retired member of the Canadian Forces since March 8, 2013. Lt. Colonel Chambers is no longer working in Moose Jaw, Saskatchewan, and as of July 15, 2015 was posted outside of Canada. The Applicant no longer shares a workplace with his alleged harasser, and there is no evidence whatsoever in the record before the Court that any harassment is ongoing despite the Applicant's retirement.

[13] Although the Respondent concedes and acknowledges that Colonel Day's decision was flawed and unreasonable and should be set aside, even if, upon judicial review, the Court were to agree with the Respondent in this regard, remitting the matter back to Colonel Day or some other responsible officer would serve no practical purpose because the Applicant is no longer an active member of the Canadian Forces serving with Lt. Colonel Chambers, let alone working with him in the same workplace.

[14] This is not an appropriate case for the Court to exercise its discretion to hear and determine the merits of the application for the following reasons.

[15] First, there is no longer an adversarial context concerning the parties involved in the harassment complaint; a decision by the Court on the merits of the application will not have any practical effect on the rights of the parties.

[16] Second, as to judicial economy: although the Respondent did not make a motion prior to the hearing of this matter to have the application dismissed by reason of mootness, an application for judicial review can certainly be dismissed for mootness at the time of the hearing without the necessity of a motion prior to the hearing (see, e.g., *Gladue v Duncan's First Nation*, 2015 FC 1194, 259 ACWS (3d) 5). To the extent that the Court should be mindful of utilizing scarce judicial resources by hearing matters which are otherwise moot, those resources were already expended upon the hearing of this matter. Judicial economy is not really a factor, therefore, in the circumstances of this case.

[17] Third, the issues raised by this application for judicial review cannot be characterized as being of such a nature that they raise important questions which might otherwise evade review by the Court. In this regard, the Court's determination in this case, that the application is moot and the merits should not be determined, must not be taken or interpreted as suggesting that situations of harassment in the Canadian Forces should escape judicial review simply because a complainant may no longer be a member of the Canadian Forces by the time their complaint is dealt with through the grievance process. On the contrary, the facts of this case are such that the incidents of the alleged harassment have simply resolved themselves by events subsequent to initiation of the complaint, notably the fact that the Applicant and Lt. Colonel Chambers no longer share the same workplace.

[18] Lastly, despite the Applicant's arguments and his views to the contrary as expressed at the hearing of this matter, this application does not concern issues of such public importance that resolution of such issues would be in the public interest. Indeed, the evidence before the Court

suggests that the Applicant's concerns have moved beyond the grievance process which was fully exhausted and are now with the CFNIS.

[19] Accordingly, as noted above, this application is moot and this is not an appropriate case for the Court to exercise its discretion to review or determine the substantive issues raised by the parties with respect to Colonel Day's decision.

[20] As to the Respondent's assertion that the Applicant's application constitutes an abuse of this Court's process in a way that brings the administration of justice into disrepute, I find no merit in the Respondent's arguments in this regard. The Applicant's request in his amended notice of application for the Court to refer the matter back to a responsible officer and to direct that such officer "inform appropriate police authorities that a breach of the National Defence Act has been alleged by the applicant," is neither an abuse of the Court's process nor does it bring the administration of justice into disrepute. While this request might have been one which the Court may well have refused had it exercised its discretion to hear the merits of this application, it was not an unreasonable request and was well within the boundaries of what relief the Applicant sought within the context of his judicial review application.

B. *Are there any procedural errors such that Colonel Day's decision should be quashed on the basis it was rendered in a procedurally unfair manner?*

[21] In view of the Court's determination that this application is moot and that this is not an appropriate case for the Court to exercise its discretion to review or determine the substantive

issues raised by Colonel Day's decision, it is not necessary to substantively address this issue or the other issues as stated above.

IV. Conclusion

[22] Despite the Applicant's arguments which he capably advanced on his own behalf, and for the reasons stated above, this application for judicial review is dismissed.

[23] There shall be no order as to costs given the circumstances of this case. The Applicant's application was in no way an abuse of the Court's process, and individuals such as the Applicant should not be dissuaded from bringing forward military harassment cases for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and there is no award of costs.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-447-15
STYLE OF CAUSE:	ANTHONY SNIEDER v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	WINNIPEG, MANITOBA
DATE OF HEARING:	FEBRUARY 15, 2016
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	APRIL 26, 2016

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