Federal Court  Cour fédérale

Date: 20160712

Docket: T-983-15

Citation: 2016 FC 770

St. John's, Newfoundland and Labrador, July 12, 2016

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

CAPTAIN DAVID SIMMS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] Captain David Simms (the "Applicant") seeks judicial review of a decision of Colonel J.R.F. Milo, Director General Canadian Forces Grievance Authority (the "Director General"). In that decision, the Director General refused the Applicant's grievance, on the ground that it was submitted outside the time limit established in subsection 7.06(1) of the *Queen's Regulations and Orders for the Canadian Forces* (the "QR&Os").

[2] In his application for judicial review the Applicant seeks the following relief:

> An Order that the DGCFGA accept the grievance as filed by the Applicant on or about the 18th of December, 2014 for adjudication on its merits, pursuant to section 18.1(3)(a) of the *Federal Courts Act*;
>
> An Order setting aside the decision of the DGCFGA to reject the grievance filed by the Applicant on the basis that it is outside of the time limit to submit grievance, pursuant to section 18.1(3)(b) of the *Federal Courts Act*, and
>
> The Applicant's costs in the within application.

II. THE PARTIES

[3] The Applicant is a member of the Canadian Armed Forces (the "CAF").

[4] Pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 (the "Rules"), the Attorney General of Canada is the Respondent (the "Respondent") in this application.

[5] The Director General was acting as the final authority in the grievance process in accordance with powers delegated to him by the Chief of the Defence Staff, pursuant to section 29.14 of the *National Defence Act*, R.S.C. 1985, c. N-5 (the "Act").

III. PROCEDURAL HISTORY

[6] The Applicant filed his Notice of Application on June 12, 2015.

[7] Following the hearing of this application on January 22, 2016, a Direction was issued on March 31, 2016 inviting the parties to address an issue that arose in the course of the hearing, that is the interpretation of the words "in the interests of justice to do so" as found in subsection 7.06(3) of the QR&Os.

[8] The Applicant filed further submissions on April 14, 2016. The Respondent filed submissions on April 28, 2016. The Applicant submitted reply submissions on May 4, 2016.

IV. THE EVIDENCE

[9] The evidence in this matter consists of the Certified Tribunal Record, the affidavit of the Applicant sworn July 24, 2015, and the affidavit of Chief Warrant Officer Jean Lavoie, sworn August 13, 2015, Staff Officer at the final authority level of the Canadian Forces Grievance Authority.

V. BACKGROUND

[10] The facts described below are taken from the affidavits filed on behalf of the parties and the Certified Tribunal Record.

[11] The Applicant enlisted in the CAF in August 1992. In 2014, he served as the Combat Operations Centre Officer in 3 Wing Bagotville, Québec, a position he had held for the previous three years.

[12] The CAF conduct annual reviews of personnel through Personnel Evaluation Reports ("PER"). According to the CAF Personnel Appraisal System Regulations and Directives, PERs must be completed and communicated to the PER Processing Centre by June 1st each year.

[13] A member of the CAF may challenge his or her PER by submitting a grievance pursuant to section 29 of the Act. The grievance process is set out in Chapter 7 of the QR&Os.

[14] Effective June 1, 2014, subsection 7.06(1) of the QR&Os was amended to shorten the time period for the submission of a grievance from six months to three months from the date the member knew or ought reasonably to have known of the decision which forms the basis of the grievance. The subsection was amended by Order in Council P.C. 2014-0575.

[15] In May 2013, the Applicant made several requests for his PER for the 2012/2013 fiscal year. He received that PER on August 22, 2013 with a rating of "Ready" for promotion.

[16] The Applicant filed a grievance relating to the 2012/2013 PER, challenging the rating of "Ready" for promotion to the rank of Major on February 22, 2014. This grievance was unresolved at the time the within judicial review was heard.

[17] The Applicant received his 2013/2014 PER from Major D. B. Patrick on July 4, 2014. He again received a rating of "Ready" for promotion.

[18] The Applicant's 2013/2014 PER was signed by Major Patrick and Lieutenant Colonel D.J. Pletz on May 20, 2014. His four peers at 3 Wing Bagotville received their PERs in the month of May, 2014.

[19] The Applicant deposed in his affidavit that, in his opinion, his PER was intentionally delayed by Major Patrick and other officers within 3 Wing Bagotville.

[20] In July 2014, the Applicant received a new posting to 5 Wing Goose Bay, Newfoundland and Labrador. He was on leave from July 19, 2014 to July 31, 2014 to move his family to Happy Valley-Goose Bay. He was "in transit" with his family from August 1, 2014 to August 21, 2014 and on relocation leave from August 19, to August 25, 2014.

[21] The Applicant began his new posting in September 2014.

[22] On December 18, 2014, the Applicant filed a grievance challenging several aspects of his 2013/2014 PER. He sought the upgrade of a number of Performance Assessment Factors from "Exceeded Standard" to "Mastered"; the upgrade of several Potential Factors to "Outstanding"; and the upgrade of the Promotion Recommendation from "Ready" to "Immediate".

[23] The grievance was filed beyond the three month time limit established by the June 2014 amendment to subsection 7.06(1) of the QR&Os. The Applicant acknowledged that the submissions were late under the amended QR&Os but asked that they be considered in the interests of justice, pursuant to subsection 7.06(3) of the QR&Os, noting that the failure to do so

may cause adverse implications for his career. He also said the move to Happy Valley-Goose Bay contributed to the delay in submitting his grievance.

[24] In his grievance, the Applicant detailed problems he experienced since 2012 with leadership in 3 Wing Bagotville. He noted that he received his 2012/2013 PER after June 1 the previous year, that is in 2013. He said that his supervisor had threatened his career, and failed to conduct the required personnel development sessions and evaluations in a timely fashion. The Applicant stated that he had been singled out and treated in an unfair manner.

[25] The Initial Authority rejected the grievance on February 17, 2015, on the ground that it had been submitted outside the three month time limit set out in subsection 7.06(1) of the QR&Os and it was not in the interests of justice to accept the grievance.

[26] The Applicant appealed the Initial Authority's decision on March 4, 2015.

VI. THE DECISION UNDER REVIEW

[27] By letter dated May 7, 2015, the Director General upheld the decision of the Initial Authority rejecting the Applicant's grievance, on the basis that it was not submitted within the timeline set out in subsection 7.06(1) of the QR&Os and it was not in the interests of justice to consider it.

[28] The Director General found that July 4, 2014 was the date that the Applicant knew of or ought reasonably to have known of the PER. He found that the date the PER was signed was irrelevant to his determination to accept or reject the grievance.

VII. SUBMISSIONS

A. *Applicant's Submissions*

[29] The Applicant submits that the determination of his grievance is a question of mixed fact and law and is reviewable on the standard of reasonableness; see the decision in *Hudon v. Canada (Attorney General)* (2009), 364 F.T.R. 49 at paragraph 15.

[30] The Applicant argues that the amendment to subsection 7.06(1) of the QR&Os took effect on June 1, 2014, the same day as the deadline for the communication of the PERs to CAF members. He submits the intention was to have members grieving the 2013-2014 PER subject to the six month deadline.

[31] The Applicant says the Director General erred by failing to consider the circumstances of the grievance and its late submission.

[32] He argues that the Director General also failed to consider that had his PER been received on time, that is before June 1, 2014, he would have benefited from the six month deadline. He further submits that the Director General did not give sufficient consideration to the merits of the grievance and his reasons for the delay in submitting it.

[33] In the alternative, the Applicant submits that there is ambiguity in the CAF grievance process. The document entitled *Defence Administrative Orders and Directives 2017-1* at paragraph 3.18 provides that the time limit to submit a grievance is six months.

[34] The Applicant contends that the discrepancy between the time limit in the *Defence Administrative Orders and Directives* and the QR&Os should be resolved in his favour. He also argues that the Director General's decision is unreasonable because it did not refer to the time limit set out in the *Defence Administrative Orders and Directives*.

[35] In his further submissions addressing the meaning of the words "interests of justice", the Applicant argues that these words mean what is fair and right in a matter, relying upon the definition in *Black's Law Dictionary*.

[36] He distinguishes his case from the decisions in *Hudon*, *supra* and *Leblanc v. Canada (Attorney General)*, 2010 FC 785, where this Court found that the interests of justice do not require acceptance of a late grievance where the delay was caused by the workload of the applicant or his counsel, or a delay in receiving disclosure.

[37] The Applicant relies upon Federal Court and Federal Court of Appeal jurisprudence developed for the extensions of time by the Pension Appeal Board, the Social Security Tribunal, and the Canada Employment Insurance Commission. He submits that Courts have treated requests for an authority to use their discretion to allow an extension as analogous to the Court's

consideration of an extension of time pursuant to section 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[38] He argues that, in interpreting subsection 7.06(3) of the QR&Os, this Court should consider the four factors referenced at paragraph 26 in the decision in *X (Re)* (2014), 464 N.R. 133 (F.C.A.) as follows:

> 1. whether there is an arguable case;
> 2. whether there are special circumstances to justify the delay;
> 3. whether the delay is excessive; and
> 4. whether the Respondent will be prejudiced if the extension is granted.

B. *Respondent's Submissions*

[39] The Respondent submits that the Director General's decision involves both a question of mixed fact and law and is discretionary, and should be reviewed on the standard of reasonableness; see *Hudon*, *supra* at paragraph 15 and *Harris v. Canada (Attorney General)*, 2013 FCA 278 at paragraph 3.

[40] The Respondent argues that the Director General conducted an independent analysis of all the material before him and reasonably refused to accept the late grievance.

[41] She submits that the burden is on the Applicant to satisfy the Director General that it is in the interests of justice to extend the time limit; see the decision in *Hudon*, *supra* at paragraphs 30 and 31.

[42] The Respondent argues that the Applicant's delay was caused by his workload at his new posting. She submits that this reason was rejected by the Court in *Leblanc*, *supra*.

[43] The Respondent states that the Applicant has no justification for submitting his grievance outside the time limit, and points to the fact that the Applicant was contemplating this grievance since March 2014. She argues that the timing of the Applicant's receipt of his PER is irrelevant to the consideration of the reasons for the delay in filing the grievance. She says the Applicant should have grieved the timing of his receipt of the PER if he was dissatisfied.

[44] Finally, the Respondent submits that, since there is no allegation that the Applicant relied upon the time limit set out in the *Defence Administrative Orders and Directives*, it is disingenuous to "capitalize" on the contradiction between that document and the QR&Os.

[45] In her Further Submissions, filed on April 28, 2016, the Respondent argues that the words "in the interests of justice" are a broad phrase and must be considered in light of the statutory context in which it arises. She submits that time limits ensure that the grievance system works effectively and that the exercise of discretion under subsection 7.06(3) of the QR&Os is exceptional; see the decision in *Leblanc*, *supra* at paragraph 30.

VIII. DISCUSSION

[46] The first issue to be addressed is the applicable standard of review. The choice of the standard of review depends upon the nature of the decision under review.

[47] The decision under review was made pursuant to subsection 7.06(3) of the QR&Os and involves the exercise of discretion by the Director General to determine whether to consider a grievance filed outside the time limit set out in subsection 7.06(1).

[48] The Applicant describes the decision as one of mixed fact and law, reviewable on the standard of reasonableness. The Respondent likewise characterizes the decision as one of mixed fact and law, to be reviewed on the standard of reasonableness.

[49] In my opinion, the nature of the decision is, more aptly, a discretionary decision. According to the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at 854-855, such a decision is reviewable on the standard of reasonableness.

[50] A discretionary decision is entitled to significant deference by a reviewing Court. A Court must be satisfied that the discretion was exercised reasonably and within the boundaries set out by the relevant legislation; see the decision in *Baker*, *supra* at 855.

[51] The reasonableness standard requires the decision be justifiable, transparent, intelligible and fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47.

[52] Section 7.06 of the QR&Os is key to this proceeding and provides as follows:

(1) A grievance shall be submitted within three months after the day on which the grievor knew or ought reasonably to have known of the decision, act or omission in respect of which the grievance is submitted.	(1) Tout grief doit être déposé dans les trois mois qui suivent la date à laquelle le plaignant a pris ou devrait raisonnablement avoir pris connaissance de la décision, de l'acte ou de l'omission qui fait l'objet du grief.
(2) A grievor who submits a grievance after the expiration of the time limit set out in paragraph (1) shall include in the grievance reasons for the delay.	(2) Le plaignant qui dépose son grief après l'expiration du délai prévu à l'alinéa (1) doit y inclure les raisons du retard.
(3) The initial authority or, in the case of a grievance to which Section 2 does not apply, the final authority may consider a grievance that is submitted after the expiration of the time limit if satisfied it is in the interests of justice to do so. If not satisfied, the grievor shall be provided reasons in writing.	(3) L'autorité initiale ou, dans le cas d'un grief qui n'est pas visé par la section 2, l'autorité de dernière instance peut étudier le grief déposé en retard si elle est convaincue qu'il est dans l'intérêt de la justice de le faire. Dans le cas contraire, les motifs de la décision doivent être transmis par écrit au plaignant.
(4) Despite paragraph (1), if the day on which the grievor knew or ought reasonably to have known of the decision, act or omission in respect of which the grievance is submitted is before 1 June 2014, the grievance shall be	(4) Malgré l'alinéa (1), si la date à laquelle le plaignant a pris ou aurait dû raisonnablement avoir pris connaissance de la décision, de l'acte ou de l'omission faisant l'objet du grief est antérieure au 1er juin 2014, le

submitted within six months after the day that the grievor knew or ought reasonably to have known of the decision, act or omission in respect of which the grievance is submitted.	grief doit être déposé dans les six mois qui suivent la date à laquelle le plaignant a pris ou aurait dû avoir raisonnablement pris connaissance de la décision, de l'acte ou de l'omission faisant l'objet du grief.

[53] The explanatory note below follows section 7.06:

If the delay is caused by a circumstance which is unforeseen, unexpected or beyond the grievor's control, the initial authority or, in the case of a grievance to which Section 2 does not apply, the final authority should normally be satisfied that it is in the interests of justice to consider the grievance if it is submitted within a reasonable period of time after the circumstance occurs.	Si le retard résulte d'un évènement imprévu, inattendu ou qui échappe au contrôle du plaignant, l'autorité initiale ou, dans le cas d'un grief qui n'est pas visé par la section 2, l'autorité de dernière instance devrait normalement être convaincue qu'il est dans l'intérêt de la justice d'étudier le grief, pour autant qu'il ait été déposé dans un délai raisonnable après l'évènement en question.

[54] The issue before me is whether the Director General reasonably exercised his discretion to not consider the Applicant’s grievance. That assessment requires an interpretation of the phrase “in the interests of justice”.

[55] As noted by both parties, the phrase is very broad, encompassing the interests of persons affected by the decision and should be assessed in its statutory context.

[56] According to the *Black's Law Dictionary* (10th ed. 2014), the phrase "interests of justice" means "the proper view of what is fair and right in a matter in which the decision-maker has been granted discretion".

[57] In the decision in *R. v. Bernardo (P.K.)* (1997), 105 O.A.C. 244 at paragraph 16, the Ontario Court of Appeal held that the phrase "the interests of justice" used in the *Criminal Code*, R.S.C., 1985, c. C-46:

> … takes its meaning from the context in which it is used and signals the existence of a judicial discretion to be exercised on a case-by-case basis. The interests of justice encompass broad based societal concerns and the more specific interests of a particular accused.

[58] The phrase "in the interests of justice" must be analysed in its statutory context. Justice Boivin (as he then was) at paragraph 30 of *Hudon*, *supra*, described an earlier version of the statutory scheme as follows:

> … To ensure that the system works effectively, the Governor in Council chose to subject Forces members to a set time limit for submitting their grievances to the CDS (QR&O at paragraph 7.10(2)). Similarly, the Governor in Council determined that the CDS would not have jurisdiction to consider grievances submitted after the expiration of the prescribed period (QR&O at paragraphs 7.10(1), (2) and (4)). However, the Governor in Council did provide for an exception, such that the CDS may consider a grievance submitted after the expiration of the prescribed period if the member can satisfy the CDS that it is in the interests of justice to do so (QR&O at paragraphs 7.10(3) and (4)). In the case at bar, the burden was therefore on the applicant to satisfy the Grievance Authority of this.

[59] In my opinion, the explanatory note that follows subsection 7.06(3) of the QR&Os is analogous to marginal notes in other legislation. Such notes may aid in the interpretation of a statutory provision but do not have the force of law; see the decisions in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at 556-557 and *R. v. Boland* (1995), CMAC-374.

[60] The exercise of discretion by the Director General was not limited to the circumstances set out in the note, that is where the delay was caused by a circumstance which is unforeseen, unexpected or beyond the grievor's control and the grievance was submitted within a reasonable period of time after the circumstance occurs.

[61] In my opinion, the exercise of discretion "in the interests of justice" requires the decision be fair, particularly because of the importance of the grievance to the Applicant personally, that is his career advancement by way of promotion. Factors to consider when assessing fairness include the prejudice suffered by both parties, the merits of the grievance and the cause for the delay; see the decisions in *Hudon, supra* and *Brownlee v. Brownlee*, [1986] B.C.J. No. 158 (B.C.C.A.).

[62] Justice Lambert in *Brownlee, supra* at page 3 said that these factors:

> … are really aspects of the balancing of the interests of justice. The question of whether prejudice would be suffered by the respondent if the appeal were permitted to go ahead must be balanced against the prejudice that would be suffered by the prospective appellant if the extension were not granted.

[63] He further observed that "[t]he purpose of the provision [to allow for an extension of time] is to permit justice to be done."

[64] I note that the duty of procedural fairness, at issue in *Baker*, is not at issue here. However, the interests of justice surely must require consideration of the impact of the decision upon an applicant. That impact is related to the potential prejudice what may be suffered by an applicant.

[65] I will now assess the facts in the present case against the factors identified in both *Hudon*, *supra* and *Brownlee*, *supra*.

[66] In my opinion, the Applicant was prejudiced by the late delivery of the PER to him. Had the PER been communicated by June 1, 2014, as required by the CAF Personnel Appraisal System Regulations and Directives, the Applicant would have had six months to submit his grievance. The timing of the delivery of his PER was beyond the Applicant's control and negatively impacted him by reducing the time otherwise available to submit a grievance.

[67] The Respondent argues that the CAF's interest in the effective processing of a grievance in the military environment is a relevant factor. She submits that the Director General has the necessary expertise and knowledge of that environment to determine if the interests of the CAF would be affected by the consideration of a late grievance.

[68] In my opinion, the interests of the CAF must be weighed against the prejudice to the Applicant caused by the delay in giving him his PER, taking into account the importance of the Applicant's access to the grievance process.

[69] I am not persuaded that the CAF would suffer any prejudice from the Director General's consideration of the grievance.

[70] Contrary to the Respondent's submissions, the merits of the underlying grievance are a relevant factor when determining whether to accept a late grievance. It cannot be in the interests of justice to consider a grievance that has no merit. The Director General erred by failing to assess the merits of the Applicant's grievance.

[71] I also note that the underlying grievance raises issues of harassment and retaliatory action in the CAF. In my opinion, the CAF have an interest in investigating and assessing the validity of these allegations.

[72] In my opinion, the Director General failed to reasonably assess "the interests of justice" in the Applicant's circumstances. The decision does not meet the standard of reasonableness referred to above.

[73] In the result, this application for judicial review is allowed and the matter is remitted for redetermination.

[74] The Applicant seeks his costs upon this application. I see no basis to depart from the general rule that costs follow the event. I refer to Rule 400 of the Rules and in the exercise of my discretion, the Applicant shall have his costs in accordance with Column III, Tariff B of the Rules.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted for redetermination. The Applicant shall have his costs in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98-106.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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