

Federal Court



Cour fédérale

Date: 20161207

Docket: T-80-16

Citation: 2016 FC 1340

Ottawa, Ontario, December 07, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

LOREN MURRAY PEARSON

Applicant

and

(CANADA) ATTORNEY GENERAL

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In June 2011, Loren Murray Pearson was a Lieutenant Commander in the Canadian Armed Forces [CAF]. At that time, while deployed in the South Pacific aboard Her Majesty's Canadian Ship [HMCS] OTTAWA, Mr. Pearson was accused of sexually assaulting a female subordinate. He was immediately returned to Canada to face charges before a Standing Court Marshall [SCM]. Mr. Pearson pled guilty to an assault charge under the *Criminal Code*, RSC, 1985, c C-46[*Criminal Code*]. He also pled guilty to a charge of prejudicing good order or

discipline within the CAF under the *National Defence Act*, RSC 1985, c N-5 [NDA]. As a result of the June 2011 sexual assault incident, Mr. Pearson was discharged from the CAF on October 25, 2012.

[2] Following the sexual assault incident, administrative proceedings were undertaken within the CAF. Mr. Pearson availed himself of various administrative reviews and grievances. The final level of reconsideration within the CAF was by the Chief of Defence Staff [CDS], acting as the Final Authority [FA]. On December 1, 2015, the FA denied Mr. Pearson's grievances relating to the SCM and his discharge from the CAF. This is a review of the FA decision.

[3] For the reasons that follow, this judicial review is dismissed. The decision of the FA is reasonable. If there was any breach of Mr. Pearson's procedural fairness rights, those breaches were remedied by the full review undertaken by the FA. Although Mr. Pearson argues that his section 7 Charter rights were violated, there is no evidence to support this argument. Finally, the request to convert this application into an action is denied.

II. Background

[4] Mr. Pearson is self-represented in this proceeding. He raises issues with virtually every process and all steps taken within the CAF following his sexual misconduct in June 2011. He argues that all actions taken against him are tainted and without legal authority because of the late disclosure to him of a Letter of Introduction written by Commanding Officer J.C. Allsopp on August 31, 2011 [Allsopp letter].

[5] Likewise, Mr. Pearson says that his guilty plea before the SCM was done in error, because the Allsopp letter had not been disclosed to him beforehand. Mr. Pearson had the

Allsopp letter before his appeal was scheduled to be heard by the Court Martial Appeal Court [CMAC]. However, he chose to abandon his appeal. He now argues that the decision to abandon his appeal should also be reconsidered in this judicial review.

[6] As this is a judicial review of the FA decision only, Mr. Pearson's submissions and arguments with respect to the proceedings before the SCM and the CMAC will only be considered in so far as they were addressed by the FA. Beyond that, his various submissions and arguments regarding his guilty plea before the SMC are irrelevant to this proceeding.

[7] The Allsopp letter is the core piece of evidence which Mr. Pearson relies upon to argue that all of the actions taken against him up to and including his discharge from the CAF are flawed. By way of background, this letter was sent on June 29, 2011 by the Director Military Careers Administration [DMCA] to advise the Director Maritime Ship Support [DMSS], where Mr. Pearson was employed, on Mr. Pearson's performance issues. This occurred without Mr. Pearson's knowledge.

[8] As this letter is at the centre of Mr. Pearson's submissions, I have reproduced portions of it below:

2. As the CSEO in OTTAWA, Lt(N) Pearson's performance was strong in some areas and very weak in others. His technical knowledge was very sound, and backed with years of experience as a Tech prior to commissioning. His communication skills and ability to comprehend Command intent, however were weak. His emails and briefs to Command were overly verbose, making it difficult to identify the focal point of his discussion. His management of the department and ability to produce deliverables on time were adversely effected due to his lack of focus on Command's priorities and consistent micro-management of issues that his Chief could have easily dealt with. He displayed a seemingly lack of trust for any senior members in his department to do their jobs.

3. His performance issues truly began to surface leading up to and during WUPs in April 2011. Prior to that time, he had a very strong start and earned an immediate PER from the few short months of observation prefacing the issues noted above.

Throughout the preparations and execution phases of WUPs, his can't-do attitude was a hindrance to the interdepartmental relationships that are vital to succeeding. Sea Training Pacific had some concerns regarding his suitability as a CSEO and his lack of support to Command, but encouraged the Command Team to continue mentoring him through his shortcomings.

4. Throughout WESTPLOY, and OTTAWA'S Train the Sailor trial for Commander MARPAC, Lt(N) Pearson continued to be an obstacle to progress and continually hesitated to 'buy in' to the mission and training deliverables set by COMCANFLTPAC. This overall lack of performance, however, is only one variable to this letter, with the second being the incident while in Pago Pago on 21 June 2011, where he was accused of sexual misconduct against his own [...] in the ship's Wardroom. The allegations were dealt with swiftly, as he was landed within hours of the incident and consequently flown back to Esquimalt. NIS took over the investigation and it is expected that charges will be laid in the near future.

5. In conclusion, Lt(N) Pearson was a weak CSEO for the reasons stated above, and has some very serious career implications, pending the outcome of the NIS investigation. In general, I assess his potential for advancement and promotion to be marginal. DMCA has been notified of the incident, and his case manager is Captain Remi Munger for the Administrative Review that will be conducted in association with the incident, as alcohol was a factor. Therefore, to summarize, charges have not yet been laid but are expected to happen, and DMCA has opened a file on Lt(N) Pearson, but no direction or disclosure packages have been provided to OTTAWA or the member. I anticipate this will all unfold while he is at DMSS[...].

[9] As noted above, the Allsopp letter was not disclosed to Mr. Pearson prior to the SCM. He received it on June 4, 2012 as part of the Administrative Review [AR] disclosure process. Mr. Pearson did however, have the Allsopp letter prior to the CMAC proceedings.

[10] On April 26, 2012, before a SCM, Mr. Pearson plead guilty to assault under s. 266 of the *Criminal Code*, and to prejudicing good order or discipline, under s. 129 of the *NDA*, which contravenes the Defence Administrative Orders and Directives [DAOD] 5012-0 (Harassment Prevention and Resolution). Mr. Pearson was sentenced to a severe reprimand and a fine of \$8,000.00.

[11] In addition to the SCM, an AR process was initiated, which is mandatory for all reported incidents of sexual misconduct by a member of the CAF.

[12] On September 21, 2013, the AR decision-maker concluded that Mr. Pearson's actions "more likely than not" met the definition of sexual misconduct in the DAOD 5019-5 (Sexual Misconduct). The factors considered to arrive to this decision included: the fact that Mr. Pearson had no Medical Employment Limitations [MELs]; the impact on the victim who had sought medical assistance; as well as three letters from Mr. Pearson's commanding team which indicated that he could no longer be trusted in a position of leadership. The DMCA decided that Mr. Pearson would be released from the CAF no later than October 21, 2012, pursuant to item 5(f), Chapter 15.01 of the *Queen's Regulations and Orders for the Canadian Forces [Queen's Regulations]*.

[13] In response to this DMCA decision, Mr. Pearson submitted a grievance of his release.

[14] He also filed two grievances and a harassment complaint against the DMCA analyst for the way in which the AR was directed. The Initial Authority [IA] denied both of these grievances. In response to the harassment complaint, even though a final investigation report on

October 30, 2012, concluded that the analyst had not harassed Mr. Pearson, the DMCA analyst in question was removed from the AR.

[15] Throughout the grievance process, there was an extensive exchange of documents between Mr. Pearson and the IA.

III. Final Authority Decision

[16] Mr. Pearson grieved the IA decisions to the FA. The CDS, General J. H. Vance, was the FA for the grievance. Prior to the FA's consideration, there is a mandatory referral of the grievance to the Military Grievances External Review Committee [Committee]. The Committee is an external, independent, and arms-length legal body mandated under the *NDA* to investigate grievances and report its findings and recommendations to the CDS and Mr. Pearson. Mr. Pearson's grievance was also sent to the Director General of the Canadian Forces Grievance Authority [DGCFGA], who assists the CDS by providing an analysis of the grievance and non-binding recommendations from the Committee. Here, both the Committee and the DGCFGA recommended that the grievance be denied.

[17] On December 1, 2015, the FA released his decision which denied Mr. Pearson's request for redress. The FA concluded that the release decision was justified and that Mr. Pearson was treated fairly and in accordance with the applicable rules, regulations, and policies. The FA found that the release respected the CAF policy and was reasonable based on the loss of confidence in Mr. Pearson's leadership abilities, his guilty plea to assault, the evidence of sexual misconduct, and the absence of evidence of any mental health issues prior to June 2011.

[18] The FA also found that the principles of procedural fairness were followed throughout the AR process. The FA further noted that any alleged breach of procedural fairness was cured by the FA's *de novo* review, where both the Committee and the DGCFGA disclosed all of the documents in their possession to Mr. Pearson and ensured that he had an opportunity to respond.

IV. Issues

[19] The following issues arise:

- (a) Was the review of Mr. Pearson's release from the CAF by the FA reasonable considering the following:
 - i. The late disclosure of the Allsopp letter
 - ii. Was there any evidence of mental health issues prior to June 2011?
 - iii. Was his release from the CAF done with the necessary authority?
- (b) Were Mr. Pearson's procedural fairness rights respected throughout the FA process?
- (c) Should this application be converted to an action?
- (d) Were Mr. Pearson's section 7 Charter rights violated?

V. Standard of Review

[20] According to the Federal Court of Appeal in *Walsh v Canada (Attorney General)*, 2016 FCA 157 at para 21, the role of the Federal Court in reviewing a FA decision is "limited to reviewing the legality of the decision in accordance with the applicable principles set out in the jurisprudence."

[21] Broad deference is accorded to the CDS, given his autonomy and expertise within a highly specialized process and unique organization (*Higgins v Canada (Attorney General)*, 2016 FC 32, at para 77).

[22] Allegations of procedural fairness will be reviewed on the standard of correctness (*Moodie v Canada (Attorney General)*, 2015 FCA 87 at para 50; *Mission Institution v Khela*, 2014 SCC 24 at para 79 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

VI. Analysis

(a) *Was the review of Mr. Pearson's release from the CAF by the FA reasonable considering the following*

i. The late disclosure of the Allsopp letter

[23] Mr. Pearson's main argument is that his release from the CAF under item 5(f), Chapter 15.01, of the *Queen's Regulations*, was premature and not properly approved. He claims that the Approving Authority wrongfully relied on the SCM findings, as well as the three letters from his chain of command, as proof of his guilt. He also contends that his chain of command acted unfairly and unjustly with respect to the use of information and procedures regarding the sexual misconduct allegations. Much of this argument relates to his contention that the late disclosure of the Allsopp letter caused prejudice to the whole process.

[24] With respect to the Allsopp letter, the FA found that it did not provide any new information that could not have been found in other documentation, such as divisional notes, that had been disclosed to Mr. Pearson.

[25] Mr. Pearson alleges that this letter would have impacted the defence he could have mounted to the charges he faced before the SCM. The charges before the SCM related to his conduct with a female subordinate on the HMCS OTTAWA in June 2011. Mr. Pearson appears to be attempting to argue, after the fact, that his conduct on the ship was the result of his

unhealthy state of mind. He says the Allsopp letter proves that he was suffering from a mental illness at the time of the sexual misconduct. However this conclusion cannot be reached based upon a reading of the words and phrases used in that letter. To accept Mr. Pearson's argument, one would have to read meaning and suggestions into the Allsopp letter which are simply not there. This argument is without merit.

[26] Furthermore, if the Allsopp letter was so critical to Mr. Pearson's criminal charges, it is reasonable to assume he would have raised the letter as a defence on his appeal to the CMAC. However, on the day of the CMAC hearing, April 5, 2013, he withdrew his appeal. If the Allsopp letter was so telling of Mr. Pearson's state of mind at the time, he had the opportunity to raise those issues at the CMAC, but he chose not to do so. He cannot now revisit that decision.

[27] Mr. Pearson did have the right to the timely disclosure of relevant information. The Allsopp letter should have been disclosed to him at the first disclosure opportunity during the AR process. However, Mr. Pearson has failed to establish how the late disclosure of this letter to him on June 4, 2012 has impacted his ability to respond to the AR process.

[28] He was given additional time to provide representations following the DMCA's disclosure. In fact, he was given almost three months to provide his representations to DMCA's first and second disclosure. According to the DAOD 5019-2 AR policy, written representations must be sent no later than 15 working days after receipt of the disclosure package. Although his further request for additional time was refused, he still had ample time to make his representations.

[29] He has not shown how the late disclosure faulted his ability to prepare his representations. Therefore, it cannot be said that Mr. Pearson was not properly informed of the case against him. Furthermore, with respect to the FA decision under review, Mr. Pearson had the Allsopp letter well in advance of the FA grievance process.

ii. Was there any evidence of mental health issues prior to June 2011?

[30] During the AR process, Mr. Pearson claims that his actions on June 22, 2011 and June 23, 2011 were due to an undisclosed mental illness. No medical documentation was submitted to support these claims and the internal CAF documents stated that he did not have MELs.

[31] Mr. Pearson raised this argument throughout the grievance process. The FA in its decision considered this argument and found at the time of the sexual misconduct incident in June 2011, Mr. Pearson's status was clear of any MELs and an assessment performed by a medical officer concluded that Mr. Pearson did not suffer from any medical or psychological condition prior to the incident.

[32] While Mr. Pearson alleges that he was suffering from mental health issues since 2009, the medical evidence does not indicate any reported mental health issues prior to the misconduct. Although he says he suffered spousal, alcohol and financial stress prior to the June 2011 incident, professional medical opinion confirmed that Mr. Pearson did not have any documented conditions, nor were there any MELs noted on his file. Therefore, he was deemed fit for service, before this incident.

[33] This submission is without merit.

iii. Was his release from the CAF done with the necessary authority?

[34] Mr. Pearson argues that his release from the CAF was invalid because he was released before the release was officially approved by the Governor General [GG] as required by item 3(a), Chapter 15.01 of the *Queen's Regulations* which did not occur until May 23, 2013.

[35] Central to these submissions is Mr. Pearson's position that he is entitled to salary and benefits for the period between his release date of October 25, 2012, and the date of approval by the GG on May 23, 2013. This issue was addressed in a separate judicial review application brought by Mr. Pearson and reported at *Pearson v Canada (Attorney General)*, 2016 FC 679 [Pearson]. It therefore will not be addressed on this judicial review.

(b) *Were Mr. Pearson's procedural fairness rights respected throughout the FA process?*

[36] Mr. Pearson argues that the late disclosure of the Allsopp letter breached his procedural fairness rights. He also argues that the refusal to grant him the various extensions of time he requested also breached his rights.

[37] However, even if there was a breach of Mr. Pearson's procedural fairness rights at some point during the AR or IA proceedings, it was cured by the FA's *de novo* hearing, where a new decision was rendered. The FA decision was based upon a fresh consideration of Mr. Pearson's entire file, including his submissions, along with the non-binding recommendations from the Committee that his grievances should be dismissed. The jurisprudence establishes that a *de novo* hearing can cure a breach of procedural fairness (*McBride v Canada (National Defence)*, 2012 FCA 181 at paras 26, 43 and 45).

[38] Here I am satisfied that even if there was a breach in this case, it was cured by the fulsome consideration of the issues by the FA.

(c) *Should this application be converted to an action?*

[39] At the hearing, Mr. Pearson suggested that his application should proceed as an action so that he can obtain monetary relief for his wrongful release from the military. The *Federal Court Rules* allow such a conversion where appropriate to avoid a multiplicity of proceedings. However, this is a judicial review of the FA decision. A claim for monetary damages for wrongful release was not made to the FA. Mr. Pearson had made a claim for reimbursement of the \$8,000.00 fine imposed by the SCM, but this claim was withdrawn by Mr. Pearson and not considered by the FA. Furthermore, in a separate judicial review proceeding, Mr. Pearson made an application where he claimed additional salary, pension, and benefits (see *Pearson* at paras 1, 10 and 29).

[40] Therefore, there is no justification to convert this application into an action and the request to do so is denied.

(d) *Were Mr. Pearson's section 7 Charter rights violated?*

[41] Mr. Pearson argues that his section 7 Charter rights were not respected by the FA. However, Mr. Pearson did not provide any detail in his written or in his oral submissions as to how his rights to life, liberty and security of the person were violated. As detailed above, the central focus of his submissions related to the late disclosure of the Allsopp letter. At best, Mr. Pearson had a breach of procedural fairness argument with respect to the timing of the disclosure of this letter. However, that issue was addressed at various stages in the AR process by allowing

Mr. Pearson additional time to respond. Further, any such breach was ultimately corrected in the FA review.

[42] Mr. Pearson has not plead sufficient or any material facts necessary to support a Charter argument (*Shebib v Canada*, 2016 FC 539 at para 21 and *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, at para 21).

[43] Thus, the claim of a section 7 Charter violation is without merit.

VII. Conclusion

[44] The application for judicial review is dismissed. The Attorney General is entitled to costs which I fix at \$2,000.00 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed with costs in the fixed amount of \$2,000.00 inclusive of disbursements.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-80-16

STYLE OF CAUSE: LOREN MURRAY PEARSON v (CANADA)
ATTORNEY GENERAL

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: SEPTEMBER 26, 2016

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