Federal Court  Cour fédérale

Date: 20170208

Docket: T-1592-14

Citation: 2017 FC 154

Ottawa, Ontario, February 8, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

RODRIGUE FRANÇOIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Captain (Retired) Rodrigue François, joined the Canadian Armed Forces [CAF] in January 2001, initially training to be an Electrical Mechanical Engineer [EME] before being reassigned to become an Aerospace Engineer. Further to multiple evaluation reports singling out performance problems relating to initiative, problem solving, reliability, communications and leadership, Capt. François was subject to various remedial measures

leading to an Administrative Review [AR] process intended to determine the appropriate administrative action to overcome his professional deficiencies. In August 2012, the Director of Military Careers [DMC] rendered a decision in the AR process, recommending an assessment of Capt. François for a compulsory occupation transfer. The AR decision further stated that, if the transfer would not work out, Capt. François would be released from the CAF.

[2] In September 2012, Capt. François grieved the AR decision on the basis that the process was procedurally unfair and that the DMC omitted to provide sufficient reasons for his decision. Capt. François also contended in his grievance that the CAF failed to provide him, as a Francophone working in an Anglophone environment, with the necessary tools to properly execute his assigned tasks. In August 2013, Capt. François was released from the CAF on the grounds of being "not advantageously employable".

[3] Capt. François' grievance was ultimately reviewed by the Chief of the Defence Staff [CDS], General T.J. Lawson, in his capacity as the final authority [FA] in the CAF grievance process. In a final decision rendered on May 26, 2014, the CDS set aside the AR decision as he determined that Capt. François had been aggrieved due to a breach in procedural fairness during the AR process. However, further to his own *de novo* review of the case, the CDS maintained the release of Capt. François and concluded that the CAF had provided Capt. François with the necessary tools and constructive work environment to properly execute his assigned tasks [the CDS Decision].

[4] Capt. François has applied to this Court to seek judicial review of the CDS Decision. He argues that, in his decision, the CDS committed numerous errors. In particular, Capt. François claims that the CDS erroneously found that the CAF did not breach the requirements of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) [the OLA], that he was offered sufficient English language training, and that he lacked leadership and other skills. He further argues that the CDS failed to consider relevant evidence and the totality of his circumstances. Capt. François submits that the CDS Decision is therefore unreasonable. He seeks an order from this Court setting aside the CDS Decision and directing the FA to address the alleged breaches of his rights committed by the CAF in violation of the OLA, or referring the matter back for redetermination.

[5] The sole issue to be determined in this application is whether the CDS Decision partially rejecting Capt. François' grievance and confirming his release from the CAF was reasonable.

[6] For the reasons that follow, I must dismiss Capt. François' application. I cannot conclude that the CDS Decision on Capt. François' grievance was unreasonable or that the reasons supporting the conclusions are inadequate. The Decision was responsive to the evidence and the outcome is defensible based on the facts and the law. I find that it has the required attributes of justification, transparency and intelligibility and that it does not fall outside the range of possible, acceptable outcomes available to the CDS. There are therefore no sufficient grounds to justify this Court's intervention.

II. Background

A. *The factual context*

[7] Capt. François enrolled in the CAF in January 2001 to become an officer in the EME occupation. Since he failed to successfully complete his EME training, Capt. François was compulsorily reassigned to the Aerospace Engineer occupation in December 2004. He finished his qualification in this new occupation, and was promoted to the rank of captain in May 2007.

[8] From April to September 2003, Capt. François completed 948 hours of English training and obtained a "BBB" profile on the Public Service Commission [PSC] second language evaluation test. Between May and December 2009, Capt. François also attended two other English writing courses of 60 hours each. In February 2011, Capt. François obtained a "CBB" profile on the PSC second language evaluation test.

[9] Starting in 2007, Capt. François was evaluated in writing every year by his supervisors. In his Personnel Evaluation Report [PER] for 2007/2008, Capt. François' supervisor indicated that he performed at an acceptable standard and his promotion recommendation stated that he was "[d]eveloping". His PER for 2008/2009 reported that his reliability "needs improvement" and that his written communication skills were "unacceptable". His promotion recommendation was negative. Among other things, his supervisor indicated that Capt. François showed "very limited progress during this reporting period", that his development was "marginal for an officer who possesse[d] two years of […] experience", and that he "hesitate[d] to act without clear

direction, lack[ed] accuracy in the completion of his staff work, and demonstrate[d] little initiative to assume added […] responsibilities".

[10] In May 2009, Capt. François was provided with "Initial Counselling" as a remedial measure for his performance deficiency, with a six-month monitoring period. In January 2010, Capt. François further received a "Recorded Warning" as another remedial measure for his performance deficiency, with a five-month monitoring period.

[11] Capt. François' PER for 2009/2010 indicated that he needed improvements in team building, leading change, problem solving, initiative, verbal communication, written communication, applying job knowledge and skills, and reliability. His promotion recommendation was again negative. Among other things, his PER mentioned that he "failed to take charge and displayed an unwillingness to lead the discussions, and showed no vision or creativity towards the resolution of pressing technical issues", as well as being "[u]nable to communicate effectively, [as] he consistently had difficulty conveying clear, concise and straightforward written or oral responses". Overall, Capt. François' performance was qualified as "well below that expected of a third-year Capt", and it was mentioned that he did "not demonstrate the minimum skills and potential required to progress within [his] occupation".

[12] In July 2010, Capt. François received a "Notice of Intent to Place on Counselling and Probation". He submitted written representations before the final decision, indicating that he did not want such a measure and stressing the fact that his performance deficiency was caused by a language barrier. In October 2010, he was placed on counselling and probation for continued

performance deficiency with a probation period of six months. The six-month probation period was extended for an additional three months in April 2011.

[13] Capt. François' PER for 2010/2011 stated that he needed improvements in problem solving, decision making, effectiveness, initiative, applying job knowledge and skills, and reliability. His promotion recommendation remained negative. The evaluator noted that "[d]espite being heavily mentored and subjected to continuous PDR [personnel development review] sessions, he lacked the requisite skills and knowledge required of the assigned job". Examples of his shortcomings included that "[h]is leadership ability [was] questionable at best and routinely ends in confusion, as witnessed when he asked his staff to submit leave passes with arbitrary dates". It was also indicated that "Capt. François' performance has been marginal during the reporting period, as he has consistently performed well below what is expected from a Capt. of his time in rank".

[14] Capt. François' PER for 2011/2012 indicated that he needed improvements in leading change, problem solving, decision making, effectiveness, initiative, applying job knowledge and skills, and reliability. His promotion recommendation was again negative, for the fourth year in a row. It was mentioned, among other things, that his work "lacked accuracy and generated additional work for his supervisor". His evaluator mentioned that his "performance and demonstrated potential have been marginal during this reporting period" and that "[d]espite the administrative measures taken to date, he has failed to overcome his performance deficiency".

[15] Considering that after eight months of counselling and probation, Capt. François continued “to display poor problem solving and decision making skills”, lacked “understanding of his areas of responsibility”, and failed “to apply acquired knowledge and skills”, it was recommended in July 2011 that an AR be conducted. The AR process is a mechanism intended to determine the appropriate administrative action to be taken when professional deficiencies are noted and call into question the viability of a CAF member’s continued service, and when these deficiencies cannot be addressed through remedial measures.

[16] Capt. François provided written submissions in May 2012, where he complained that he was not provided with adequate linguistic tools to succeed in an English-speaking environment, which explained his performance deficiencies, and that the CAF therefore breached its obligations under the OLA. In August 2012, the DMC rendered a decision in the AR process. The DMC recommended that Capt. François be assessed for a compulsory occupation transfer to a non-commissioned member occupation. The DMC also decided that if Capt. François was to be found unsuitable for transfer or if the transfer was to be refused, he would be released from the CAF.

[17] In September 2012, Capt. François grieved the AR decision on the basis that the process was procedurally unfair and that the DMC failed to provide sufficient reasons. He requested a complete review of the AR decision, including consideration of all of his submissions during the AR process. He also complained that the CAF had failed to provide him, as a Francophone working in an Anglophone environment, with the necessary tools and constructive environment to properly execute his work. The Initial Authority [IA] noted that Capt. François had not

received all of the materials that were before the DMC during the AR process, but that the breach would be cured by full disclosure in the grievance process. In February 2013, the grievance was forwarded directly to the FA without a decision from the IA because it was unable to make a decision within the set timeline.

[18] Before considering Capt. François' grievance, the CDS, acting as the FA, referred the matter to the Military Grievance External Review Committee [the Committee] for a recommendation. In June 2013, the Committee's synopsis concluded that the DMC decision was reasonable, but that the failure to provide full disclosure and reasons was procedurally unfair. However, the Committee concluded that the breach would be cured by full disclosure during the FA grievance process.

[19] Capt. François was invited to make submissions to the Committee, which he did in August 2013. At that point in time, he was also released from the CAF on the grounds of being "not advantageously employable". Capt. François submitted additional documents regarding his linguistic work environment in October 2013.

[20] In March 2014, the Committee provided Capt. François and the CDS with its findings and recommendations. In its report, the Committee concluded that Capt. François' procedural rights were breached by the failure to provide full disclosure and, therefore, a *de novo* review of the case was required; that Capt. François received extensive second language training and significant support; that Capt. François was in a bilingual environment with Francophone supervisors and peers, even though most training documents he used were in English; that Capt.

François did not prove that a language barrier caused his performance deficiencies; that the CAF complied with its obligations under the OLA and the CAF language policies; and that the release of Capt. François was appropriate and reasonable. The Committee recommended that the original AR decision be set aside and that Capt. François be released by the CDS, effective to the date on which the CDS would render his decision on the grievance.

[21] After considering the matter *de novo*, the CDS rendered his decision in May 2014, confirming Capt. François' release from the CAF. The CDS did not change the August 2013 date of release of Capt. François.

B. *The CDS Decision*

[22] In his decision, the CDS started by describing the matter grieved by Capt. François, namely the AR decision issued by the DMC. In his grievance, Capt. François contended that the documents were not disclosed properly, that the DMC failed to provide sufficient reasons and that the CAF omitted to provide him with the necessary tools and constructive work environment to properly execute his tasks.

[23] The CDS then found that Capt. François was aggrieved due to a breach in procedural fairness during the AR process, caused by the DMC's failure to disclose all the information that was considered before him as well as the reasoning underlying the AR decision. However, the CDS observed that this breach was cured by setting the AR decision aside and conducting the *de novo* review he had undertaken.

[24] After reviewing the evidence on file, the CDS concluded that Capt. François' release was valid. The CDS found that Capt. François' release was a reasonable outcome in light of Capt. François' performance deficiencies, and that the CAF did fulfill its obligations under the OLA and the CAF language policy. More specifically, the CDS found as follows:

> A. Contrary to what the Committee recommended, the release date should not be changed, because a new release date would compensate Capt. François for services he did not render;
>
> B. Capt. François' deficiency was well documented and the remedial measures were administered correctly;
>
> C. No breach of the OLA arose, as Capt. François received reasonable language training, the majority of his supervisors were Francophones and he was given the flexibility to speak and brief in French;
>
> D. With a "CBB" second language profile, Capt. François possessed the necessary tools to overcome the challenges of translating from English the highly technical manuals generated by US-based companies;
>
> E. Despite Capt. François' allegations that he had issues with language, communication skills were only one of several concerns and weaknesses that resulted in his performance deficiency. Other areas of weakness identified for Capt. François included initiative, problem solving, reliability and applying job knowledge and skills. The decision to release Capt. François was based on the combined performance deficiency displayed in all those areas.

[25] Therefore, the CDS determined that the decision to release Capt. François from the CAF, dated August 2013, was acceptable and that it should be upheld. The CDS also found that Capt. François was provided with the necessary tools and constructive work environment conducive to properly execute his assigned tasks. That said, the CDS partially granted the redress sought by Capt. François by setting aside the original AR decision due to the breach of procedural fairness

and conducting his own *de novo* review of Capt. François' case.

C. *The legislative and regulatory framework*

[26] The AR process within the CAF is governed by the Defence Administrative Orders and Directive (DAOD) 5019-2 – *Administrative Review* [DAOD 5019]. The relevant procedures and guiding principles of the CAF grievance process are established by sections 29 to 29.15 of the *National Defence Act*, RSC 1985, c N-5 [the NDA]. The CAF grievance process has two levels of grievance authority: the IA and the FA.

[27] The following provisions of the NDA are relevant:

Grievances	**Griefs**
Right to grieve	**Droit de déposer des griefs**
29 (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.	**29 (1)** Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.
Final authority	**Dernier ressort**
29.11 The Chief of the Defence Staff is the final authority in the grievance process and shall deal with all matters as informally and expeditiously as the	**29.11** Le chef d'état-major de la défense est l'autorité de dernière instance en matière de griefs. Dans la mesure où les circonstances et l'équité le permettent, il agit avec célérité

circumstances and the considerations of fairness permit.

et sans formalisme.

Referral to Grievances Committee

29.12 (1) The Chief of the Defence Staff shall refer every grievance that is of a type prescribed in regulations made by the Governor in Council, and every grievance submitted by a military judge, to the Grievances Committee for its findings and recommendations before the Chief of the Defence Staff considers and determines the grievance. The Chief of the Defence Staff may refer any other grievance to the Grievances Committee.

Renvoi au Comité des griefs

29.12 (1) Avant d'étudier et de régler tout grief d'une catégorie prévue par règlement du gouverneur en conseil ou tout grief déposé par le juge militaire, le chef d'état-major de la défense le soumet au Comité des griefs pour que celui-ci lui formule ses conclusions et recommandations. Il peut également renvoyer tout autre grief à ce comité.

Chief of the Defence Staff not bound

29.13 (1) The Chief of the Defence Staff is not bound by any finding or recommendation of the Grievances Committee.

Décision du Comité non obligatoire

29.13 (1) Le chef d'état-major de la défense n'est pas lié par les conclusions et recommandations du Comité des griefs.

Decision is final

29.15 A decision of a final authority in the grievance process is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or to review by any court.

Décision définitive

29.15 Les décisions du chef d'état-major de la défense ou de son délégataire sont définitives et exécutoires et, sous réserve du contrôle judiciaire prévu par la *Loi sur les Cours fédérales*, ne sont pas susceptibles d'appel ou de révision en justice.

[28] Turning to the CAF grievance process, in *Bossé v Canada (Attorney General)*, 2015 FC 1143 [*Bossé*] at paras 22-23, Madame Justice Roussel summarized the various steps of the process as follows:

> [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 [CAF], 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.

[29] This reflects the grievance process followed in Capt. François' case.

[30] The following provisions of the OLA are also relevant:

Language of Work	**Langue de travail**
Rights relating to language of work	**Droits en matière de langue de travail**
34 English and French are the languages of work in all federal institutions, and officers and employees of all federal institutions have the right to use either official language in accordance with this Part.	**34** Le français et l'anglais sont les langues de travail des institutions fédérales. Leurs agents ont donc le droit d'utiliser, conformément à la présente partie, l'une ou l'autre.
Duties of government	**Obligations des institutions fédérales**
35 (1) Every federal institution has the duty to ensure that	**35 (1)** Il incombe aux institutions fédérales de veiller à ce que :
(a) within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed, work environments of the institution are conducive to the effective use of both official languages and accommodate the use of either official language by its officers and employees	**a)** dans la région de la capitale nationale et dans les régions ou secteurs du Canada ou lieux à l'étranger désignés, leur milieu de travail soit propice à l'usage effectif des deux langues officielles tout en permettant à leur personnel d'utiliser l'une ou l'autre

[31] Finally, the Defence Administrative Orders and Directive (DAOD) 5039-0 – *Official Languages* [DAOD 5039] contains the CAF language policy. The DAOD 5039 provides that, among other things, the CAF must ensure that equality of status for the use of English and French prevails, that in bilingual units, the work environment is conducive to the effective use of both official languages, and that Francophones and Anglophones have equal opportunity for employment and career advancement. It must be noted that the Defence Administrative Orders

and Directive (DAOD) 5039-7 – *Second Official Language Education and Training for CF Members* provides that such training is important for CAF members to meet the language requirements of their duties and functions, and is based on the CAF operational requirements.

D. *The standard of review*

[32] The standard of review applicable in the context of decisions of the CDS acting as the final authority in the CAF grievance process is reasonableness (*Moodie v Canada (Attorney General)*, 2015 FCA 87 at para 51; *Zimmerman v Canada (Attorney General)*, 2011 FCA 43 [*Zimmerman*] at para 21; *Stemmler v Canada (Attorney General)*, 2016 FC 1299 [*Stemmler*] at paras 30-31; *MacPhail v Canada (Attorney General)*, 2016 FC 153 at paras 8-9; *Bossé* at para 25). Moreover, the grievance process in the CAF is very peculiar and the CDS is highly specialized in rendering decisions of this nature in the military context, which entitles the CDS to a high degree of deference from this Court (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 13; *Stemmler* at para 30; *Higgins v Canada (Attorney General)*, 2016 FC 32 [*Higgins*] at paras 75-77). In such a context, "a wide margin of appreciation" must be given to the CDS (*Higgins* at para 77).

[33] The issues before the CDS involved the application of the CAF language policy and Capt. François' suitability for service in the CAF in light of his performance evaluations. Both of these fall squarely within the CDS' area of expertise and are therefore governed by the reasonableness standard.

[34] When reviewing a decision on the standard of reasonableness, the analysis is concerned "with the existence of justification, transparency and intelligibility within the decision-making process", and the decision-maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47). It is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland Nurses* at para 17).

III. Analysis

[35] The sole issue to be determined is whether the CDS Decision is reasonable.

[36] Capt. François contends that the CDS erred in finding that he was provided with the proper working tools and sufficient language training; that his work environment with a majority of Francophone supervisors was sufficient to offset the CAF's breaches of the OLA requirements; and that the decision to release him from the CAF was based on a combined performance deficiency. Capt. François further submits that the CDS failed to consider the relevant evidence and the totality of his circumstances.

[37] Capt. François adds that he made several representations to his superiors about the challenges he faced as a French-speaking person in an Anglophone working environment. He claims that the CAF language policy requires the CAF to offer a work environment "conducive to the effective use of both official languages" and provides that "Francophones and Anglophones have equal opportunity for employment and career advancement" (DAOD 5039 at subsection 3.4). He pleads that the CAF failed to implement these measures in his case.

[38] I disagree.

A. ***Capt. François' language rights***

[39] My review of the CDS Decision and of the evidence on the record first persuades me that, contrary to what Capt. François alleges, the CDS reasonably found that the CAF had met its obligations under the OLA and the CAF language policy. In other words, Capt. François' language rights were not breached.

[40] The CDS indicated in his decision that he fully agreed with the Committee's findings with regard to the obligations under the OLA, and to the fact that the CAF complied with its obligations. The Committee, in its report, mentioned that even though Capt. François received extensive language training, the evidence demonstrated that he was placed in a bilingual working environment which provided him with the opportunity to communicate in the language of his choice. Moreover, the Committee's report emphasized that Capt. François "received numerous and ample tools, training, counselling and support in the language of his choice", which was often English, and that Capt. François' choices, such as receiving counselling, training and

documents in English, as well as filing his grievance in English, weakened his OLA argument. As a result, the CDS completely agreed with the Committee that no breach of the OLA or of the CAF language policy occurred.

[41] Indeed, the record contains ample evidence showing that the CAF met its obligations described in the DAOD 5039, to ensure that "in bilingual units, the work environment is conducive to the effective use of both languages" and that "Francophones and Anglophone have equal opportunity for employment and career advancement" within the CAF. To support its conclusions, the CDS extensively canvassed the facts and the law and provided a detailed analysis in his decision. In particular, he noted the following facts:

A. Capt. François initially received full-time English training for 948 hours in 2003, and graduated with a "BBB" second language profile;

B. Capt. François benefited from two other 60-hours courses in English writing in 2009;

C. Capt. François' second language profile improved to "CBB" in 2011;

D. Capt. François was employed in sections supervised by several levels of bilingual Francophones for the four years prior to his release;

E. Capt. François' sole employment in the year leading up to the AR process was as an assistant to a Francophone, supporting a Francophone company in Mirabel, Québec;

F. Capt. François was always able to speak and brief in the language of his choice;

G. Capt. François had to work with some technical materials provided by the United States that were only available in English, but he possessed the necessary tools to overcome this, considering that his second language profile rated his English written comprehension as a "C";

H. Capt. François' challenges associated with communication skills were only one of several areas of noted weakness.

[42] In light of this evidence, I agree with the Attorney General that the CDS reasonably concluded that Capt. François was provided with the necessary tools to perform and to be effective in an environment conducive to the effective use of both official languages. It bears underscoring that the CDS did address the issue of Capt. François' linguistic rights in detail in his decision, adopting the Committee's view on the issue and explaining how the CAF fulfilled its obligations under the OLA and the DAOD 5039.

[43] The application and implementation of the DAOD 5039 is in the heartland of the CDS' expertise, and Capt. François has failed to identify any unreasonable aspect in the CDS' treatment and assessment of this policy instrument.

B. ***Capt. François' performance deficiency***

[44] Furthermore, I find no support in the evidence or in the CDS Decision for Capt. François' assertion that his performance in areas other than language was not an issue. On the contrary, both the Decision and the record reflect quite the opposite. The CDS referred specifically to the multiple performance evaluations of Capt. François and to the documents arising from the remedial measures. This documentary evidence is abundantly filled with examples of Capt. François' performance deficiencies in a vast number of areas other than language. The scale and extent of Capt. François' shortcomings were measured in large and significant increments, year after year. As a result, there is absolutely no basis on which the CDS or this Court could

disregard the clear and consistent evidence that Capt. François' performance deficiency was not solely attributable to language difficulties.

[45] A cursory review of the various PERs prepared since 2007 reveals a recurring conclusion that Capt. François' combined performance deficiency rendered him unsuitable for service in the CAF. This conclusion was shared by his direct supervisors, by the DMC after conducting an AR, by the Committee after its *de novo* review, and finally by the CDS following his own *de novo* review of Capt. François' case.

[46] This evidence on the record was consistent and the concerns with Capt. François' performance were repeated year after year, with little or no sign of improvement. At each stage of the administrative proceedings, a unanimous conclusion emerged: Capt. François' shortcomings and weaknesses reached far beyond communication and language skills and touched upon reliance, problem solving, lack of leadership abilities, deficient skills and knowledge, and overall poor performance. Year after year, Capt. François was not recommended for promotion. Capt. François' problems were not primarily caused by language barriers or weak communication skills; in fact, in some respect, his language skills improved in certain areas but the other performance indicators did not move in tandem, despite the fact that Capt. François worked in a bilingual environment and under the supervision of Francophones.

[47] The CDS found that Capt. François' performance deficiency was caused by a combination of multiple factors, and included weakness with respect to initiative, problem solving, reliability and applying job knowledge and skills. The evidence is filled with examples

reflecting this recurring performance deficiency, clearly identifiable from the numerous PERs on file. The CDS Decision is therefore entirely reasonable and falls well within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

[48] Capt. François essentially puts forward that the Decision is unreasonable because the CDS, according to him, erred in his assessment of the evidence presented. When distilled, Capt. François" arguments simply amount to an invitation to reweigh the evidence assessed by the CDS. However, in conducting a reasonableness review of factual findings, it is not the role of this Court to do so or to reassess the relative importance given by the decision-maker to any relevant factor or piece of evidence. If the findings provide sufficient justification and rationality in light of the totality of the evidence before the decision-maker, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland Nurses* at para 17). This is especially true in a case like this where a high degree of deference is owed to the specialized expertise of the CDS in administering the applicable statutory provisions in the military context. As the Supreme Court often reminded, deference is in order where a decision-maker acts within its specialized area of expertise (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 46).

[49] In the present case, there is no doubt, in my view, that the Decision is reasonable as it is justifiable, transparent and intelligible. I cannot detect any reviewable error in the CDS Decision. In its reasons, the CDS made a complete and thorough review of the assertions raised by Capt. François. The CDS made several references to Capt. François' evaluation reports and to the evidence regarding the remedial measures, to support his conclusions that Capt. François failed

to meet the standard expected of a CAF officer equipped with his qualifications. A decision by the CDS relating to the AR process within the CAF and to the release of an officer because of performance deficiencies is a decision "thoroughly suffused by facts, policies, discretion, subjective appreciation and expertise", and the CDS therefore benefits from a wide margin of appreciation within the range of acceptable and rational solutions (*Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 137). There is nothing on the record before me that allows me to conclude that the CDS Decision falls outside of that range.

[50] Moreover, the CDS found that Capt. François' assertion that he was working in an Anglophone environment was incorrect and not borne by the evidence. True, the technical materials that Capt. François was working with were only available in English, but it was reasonable to find, given the evidence and the circumstances, that Capt. François possessed the necessary tools and skills to overcome that challenge. Also, his supervisors were Francophones and Capt. François could always brief in the language of his choice. Once again, these findings of fact are reasonable.

C. *All evidence considered*

[51] This leads me to make one further observation. Despite his assertion that the CDS failed to consider relevant evidence or the totality of the circumstances, neither Capt. François nor his counsel at the hearing before this Court were able to point to any document or evidence which was not assessed, considered or effectively dealt with by the CDS in his decision.

[52] It is well recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 598 (FCA) at para 1). A failure to mention a particular piece of evidence in a decision does not mean that it was ignored (*Newfoundland Nurses* at para 16). It is only when an administrative tribunal is silent on evidence clearly pointing to an opposite conclusion and squarely contradicting its findings of fact that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its decision (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 17). This is not the case here and no such evidence has even been identified or flagged by Capt. François.

[53] The CDS has acknowledged that Capt. François' procedural rights were not respected in the AR process and that he was aggrieved by this failure. However, this infringement of the duty of fairness has been repaired through the CAF grievance process. In fact, the specific CAF context has been considered by the Federal Court of Appeal in *McBride v Canada (National Defence)*, 2012 FCA 181 [*McBride*] at para 45, and the Court found that a breach of procedural fairness is "cured by these subsequent *de novo* hearings". Similarly, in *Walsh v Canada (Attorney General)*, 2015 FC 775 [*Walsh*], this Court rejected a request that the applicant's release be deemed void *ab initio* on the basis of a violation of procedural fairness. In doing so, the Court observed that the reasons were clear and that the Court had to defer to the FA's "broad discretion when considering and determining grievances" (*Walsh* at para 43). The Court applied

the teachings of the *McBride* decision, and concluded that *de novo* hearings cure any potential breach of procedural fairness (*Walsh* at para 51).

[54] What I have to determine is whether the CDS Decision is reasonable and falls within the range of possible, acceptable outcomes, bearing in mind the high degree of deference that I must show to the CDS and his particular expertise. In my view, the CDS Decision on Capt. François' grievance and release is abundantly clear and intelligible. There is no need for redetermination as the CDS' conclusions on the appropriate remedy are detailed and reasonable. The CDS provided legally sufficient reasons as to why he partly rejected Capt. François' grievance. Furthermore, the reasons given by the CDS allow me to figure out that all circumstances leading to the release of Capt. François were thoroughly reviewed and considered by the CDS.

[55] This is not a situation like in *Zimmerman* where the CDS simply omitted to deal with the grievances raised by the grievor and failed to provide reasons (*Zimmerman* at para 25; *Morphy v Canada (Attorney General)*, 2008 FC 190 at paras 74, 75 and 78). Here, the CDS lived up to his obligation. The reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3). In addition, a judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). The Court should approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151 at para 15). Given the broad discretion granted to

the CDS in considering and determining grievances such as Capt. François' and in identifying the appropriate remedies, this is not a case where this Court should intervene.

IV. Conclusion

[56] For the reasons detailed above, I am not persuaded that the CDS Decision is unreasonable. The conclusions of the CDS represent a reasonable outcome based on the law and the evidence before him. On a standard of reasonableness, it suffices if the decision subject to judicial review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. This is the case here. In addition, the CDS provided adequate reasons that are both extensive and intelligible. My role is not to reassess the events that led to the CDS Decision or to reweigh the evidence before the CDS. My role is to determine if the administrative process leading to the CDS Decision and its outcome were reasonable and procedurally fair. Based on my review of the decision and of the evidence, I cannot say that they were not. Therefore, I must dismiss his application for judicial review.

[57] The Attorney General is seeking costs on this application. Given that the respondent is the successful party in these proceedings, it will be entitled to an award of costs. However, I find that a lump-sum amount of $1,500, disbursements included, is reasonable in this case, having regard to all the circumstances of this matter and upon consideration of Column III of Tariff B as well as the factors set forth in article 400(3) of the *Federal Courts Rules*.

[58] The parties agreed that the name of the applicant is not correctly stated and should be Rodrigue François instead of the reverse. The style of cause will therefore be modified accordingly, including in this judgment and reasons.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. Costs in the amount of $1,500 are awarded to the respondent.

3. The style of cause is modified so that the name of the applicant in this matter be Rodrigue François.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1592-14
STYLE OF CAUSE:	RODRIGUE FRANÇOIS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
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JUDGMENT AND REASONS:	GASCON J.
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