

Federal Court



Cour fédérale

Date: 20171101

Docket: T-329-17

Citation: 2017 FC 975

Ottawa, Ontario, November 1, 2017

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MAJOR (RET'D) KENNETH KING

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This judicial review concerns a decision by the Chief of the Defence Staff [CDS] dismissing the Applicant's grievance.

The grievance was over the funds paid by the military reimbursing the Applicant for educational expenses incurred while on a posting to Wales, United Kingdom.

II. Background

[2] The facts are relatively straightforward. The Applicant, a pilot, was posted to Wales for three years. His wife and children accompanied him.

[3] His children went to an English-speaking private school, as instruction in the local schools was in Welsh. The annual tuition was paid by the Applicant at the start of the school year and reimbursed by the Canadian Armed Forces [CAF].

[4] The educational entitlement above was provided for in Chapter 10 of the *Compensation and Benefits Instructions for the Canadian Forces* [CBI]. For the purposes of this litigation, a key provision is CBI 10.12.03(1):

10.12.03(1) (Education of dependent children) A member is entitled to an education allowance, an allowance for education travel and a family reunion travel allowance in accordance with the terms and conditions set out in FSD 2, 30, 34, 35, 51 and 70, respectively, subject to MFSI 10.21.04 (*Verification*).

10.12.03(1) (Éducation des enfants à charge) Un militaire a droit à une indemnité scolaire, au remboursement des frais de déplacement à des fins éducatives et à une indemnité de déplacement pour réunion de famille conformément aux modalités et conditions que prévoient respectivement le DES 2, 30, 34, 35, 51 et 70, sous réserve de le DSME 10.12.04 (*Vérification*).

[5] The reference to FSD is to the Treasury Board approved entitlements for Public Service employees set out in the *Foreign Service Directives*, which are incorporated by reference into the military's CBI. FSD 34.1.6 is particularly relevant:

34.1.6 Entitlements under this directive are available any time after the date on which an employee is officially notified in writing of an impending posting and continue to be available until the end of the last academic year that commenced while the employee was stationed abroad, subject to the provisions of Section 34.8 and to limitations specified in subsection 34.10.1.

34.1.6 Les indemnités prévues dans la présente directive peuvent être versées n'importe quand après la date à laquelle le fonctionnaire est officiellement informé par écrit de son affectation imminente à une mission, jusqu'à la fin de la dernière année scolaire ayant commencé pendant son service à l'étranger, sous réserve de l'article 34.8 et des restrictions du paragraphe 34.10.1.

[6] The Applicant gave notice on December 7, 2014, approximately eight months before his service obligation was to terminate in August 2015, that he intended to retire early from outside Canada.

[7] He was notified shortly thereafter that the CAF intended to recover “fees and funds paid to you for your dependent children” and that he should pursue a refund for the next term’s tuition fees.

[8] When the Applicant informed the school on January 9, 2015, of his intent to withdraw his children, he was informed that there would be no refund of the summer term because the school required one term’s advance notice. The winter term had already commenced by January 9, 2015.

[9] The Applicant’s request that the CAF approve his tuition entitlement until the end of the academic year was denied, and he was told that as a result of CBI 10.2.07 and FSD 34, “[a]ll

Foreign Service entitlements . . . shall cease upon release and entitlements will be reviewed, pro-rated and/or recovered accordingly.” CBI 10.2.07 states as follows:

10.2.07 – RELEASE
OUTSIDE CANADA

If a member elects to remain outside Canada on release, the allowances and benefits in this chapter shall cease as of the last day of the month in which the member begins retirement leave, under article 16.18 - *Retirement Leave* of the QR&O or if the member takes a cash-out of leave, the day of the member’s release.

10.2.07 – LIBÉRATION À
L’EXTÉRIEUR DU CANADA

Si un militaire choisit de rester à l’extérieur du Canada au moment de sa libération, les indemnités et avantages auxquels il a droit en vertu du présent chapitre cessent le dernier jour du mois au cours duquel le militaire commence son congé de fin de service en vertu de l’article 16.18 - *Congé de fin de service* des ORFC ou si le militaire choisit une indemnité forfaitaire de congé, le jour de sa libération.

[10] The Applicant was released from the CAF in Wales, as requested, in March 2015. The CAF then recovered from the Applicant the tuition for the remaining school year, from April to July, that it had earlier reimbursed to the Applicant. This recovery occurred through a deduction of the Applicant’s severance payments.

[11] The Applicant grieved this recovery. The final stage of the grievance was to the CDS.

[12] The CDS rejected the grievance noting that the Applicant’s retirement was his choice, that as of March 2015 he ceased to be a CAF member, and his educational entitlement had ceased at the end of March. As he had retired, the Applicant no longer met the FSD criteria for entitlement of being an “employee serving abroad”. Therefore, it was appropriate to recover the remaining education reimbursement.

III. Analysis

[13] The Applicant has argued that the standard of review is correctness, in part because the decision required an interpretation of a provision of the FSD, which is a Treasury Board approved policy produced by the National Joint Council, not by the CAF.

[14] The Supreme Court of Canada, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] 3 SCR 654, held that review of a decision based on a decision maker's "home statute" is presumptively subject to the reasonableness standard of review.

[15] In the present case, this reasonableness standard is even clearer. The CDS was dealing with the CAF's own policy, including provisions of the FSD, incorporated by reference.

[16] Justice Gascon in *François v Canada (Attorney General)*, 2017 FC 154 at para 33, 277 ACWS (3d) 96, made it clear that the application of CAF policy fell squarely within the CDS' area of expertise and is therefore governed by the reasonableness standard. Justice Boswell found similarly in *MacPhail v Canada (Attorney General)*, 2016 FC 153 at para 8, 264 ACWS (3d) 117.

I see no good reason to depart from this jurisprudence. The applicable standard of review is reasonableness.

[17] The Applicant bases his challenge on the grounds that there is a conflict between FSD 34.1.6 which, when read in conjunction with CBI 10.12.03(1), gives an entitlement to an education allowance, and CBI 10.2.07, which cuts off entitlements upon release outside Canada.

[18] Given this so-called conflict, the Applicant argues that conflicts of laws principles such as the “limited exception” rule and the “*contra proferentem*” rule along with notions of prejudice and unfairness should be used to resolve the conflict in favour of the Applicant.

[19] Legislation and near legislation must be read harmoniously, in context with the whole. Principles of statutory interpretation require that “[t]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at 41, quoting E Driedger, *Construction of Statutes* (2nd ed 1983) at 87).

[20] In my view, there is no conflict to be resolved. CBI 10.12.03(1) grants an education allowance in accordance with FSD 34. FSD 34.1.6 provides that such an allowance is available and continues until the last academic year “while the employee was stationed abroad”.

[21] CBI 10.2.07 rounds out the entitlement scheme by specifically addressing the situation of a member who chooses to retire and remain abroad. The entitlement ceases at the end of the month the retirement begins.

[22] In terms of structure, CBI 10.2.07, directed at a retiring CAF member outside Canada, is more specific than the FSD 34, which is an entitlement that applies generally to all Crown employees.

[23] The CDS reasonably concluded that according to CBI 10.2.07, the Applicant ceased to be entitled to the education allowance at the end of the month in which he retired.

[24] That decision was a reasonable interpretation of the entitlement scheme and fell within a range of acceptance outcomes.

IV. Conclusion

[25] For these reasons, I would dismiss this judicial review. In view of the amount involved and that there appeared to be no precedent for this interpretation of the CBI, no costs will be awarded.

JUDGMENT in T-329-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
without costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-329-17

STYLE OF CAUSE: MAJOR (RET'D) KENNETH KING v CANADA
(ATTORNEY GENERAL)

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