Federal Court  Cour fédérale

Date: 20180531

Docket: T-131-17

Citation: 2018 FC 566

Ottawa, Ontario, May 31, 2018

APPLICATION UNDER S. 18.3 OF THE *FEDERAL COURTS ACT*

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

IN THE MATTER OF A REFERENCE BY THE MILITARY GRIEVANCES EXTERNAL REVIEW COMMITTEE UNDER SUBSECTION 18.3(1) OF THE FEDERAL COURTS ACT, RSC 1985, C F-7, REGARDING QUESTIONS OF LAW

JUDGMENT AND REASONS

[1] The Military Grievances External Review Committee has brought a reference to this Court seeking answers to the following seven questions:

1. Does a person enter into a contractual relationship with the Crown upon enrolment in the Canadian Armed Forces [CAF]?

2. Can a person, who subsequently enrols in the CAF, enter into a pre-service and/or a pre-employment contractual relationship with the Crown prior to enrolment in the CAF?

3. Can the Crown and/or the CAF owe a duty of care, for the purposes of the tort of negligent misrepresentation, in respect of representations made to a person before he or she enrols in the CAF?

4. As a matter of law, is the doctrine of estoppel available in the grievance process established under section 29 of the *National Defence Act*, R.S.C. 1985, c. N-5 to prevent the Crown and/or the CAF from collecting an overpayment made to a member of the CAF?

5. In the event that a grievor meets the elements of a cause of action, does the Chief of Defence Staff [CDS] have the express statutory authority to award damages for the grievor as the Final Authority of a grievance?

6. If not, does the CDS have implicit jurisdiction to award damages to a grievor as the Final Authority of a grievance?

7. As a matter of law, are representations made by the CAF to a person who subsequently enrolls in the CAF barred from liability, pursuant to section 8 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50?

I. The Context in which the Questions Arise

[2] The Military Grievances External Review Committee (the Committee) asserts that the above seven questions arise in the context of a grievance filed by a member of the CAF.

[3] The Grievor was a member of the CAF in 2006 and 2007, serving as a Personnel Selection Officer at the rank of Lieutenant until the date of his release. In 2013, the Grievor

rejoined the CAF as an Air Force Logistics Officer. He alleges that prior to his re-enrollment, he was promised that he could rejoin the CAF at the rank of Lieutenant, at an annual salary of $56,652. He further alleges that he was told that he would be eligible for promotion to the rank of Captain in approximately two years. The Grievor says that he relied on these representations in choosing to give up secure government employment and re-enroll in the CAF.

[4] Nearly a year later, the Grievor was advised that an error had been made at the time of his re-enrollment, that he had not been entitled to re-enroll at the rank of Lieutenant, and was only eligible to be enrolled at the rank of Second Lieutenant at a correspondingly lower salary. Consequently, the Grievor's rank was reduced, and he was ordered to repay $2,043.15, the amount by which he had allegedly been overpaid.

[5] The Grievor was further advised that this error affected his eligibility for promotion, and that an additional year of service would be required before he could be promoted to the rank of Captain.

[6] The Grievor then filed a grievance with the Commanding Officer at Canadian Forces Base Bagotville pursuant to subsection 29(1) of the *National Defence Act*, alleging that the CAF failed to respect the offer of employment that had been made to him. Amongst other things, the Grievor sought to have his reduction in rank set aside, and to have the money that he was required to repay returned to him. The grievance was denied by the Chief of Military Personnel, acting as the "initial authority" in the CAF grievance process.

[7] The Grievor then asked that his grievance be considered and determined by the "final authority" in the CAF grievance scheme, namely the Chief of Defence Staff or his delegate. As

the grievance involved a question of pay and benefits, it was first referred to the Committee for review prior to the matter being considered by the CDS, in accordance with the *Queen's Regulations and Orders for the Canadian Forces*, Volume 1, Chapter 7, Article 7.21.

[8] Under section 29.12(1) of the *National Defence Act*, the Committee is required to review every grievance referred to it, and to provide its findings and recommendations to the CDS and the grievor. The CDS is not bound to accept the Committee's findings and recommendations, but he must provide reasons in the event that he decides not to do so: sections 29.13(1) and (2) of the *National Defence Act*.

[9] The Committee states in its Notice of Application that it reviewed the grievance, the documents filed in support of it, the Grievor's submissions, and the Chief of Military Personnel's decision, and that it identified seven questions of law, the answers to which it says are necessary to resolve the grievance. No inquiry has yet been carried out by the Committee with respect to the facts underlying the grievance, nor have any findings or recommendations been made by it pending the determination of this reference. The parties have, however, arrived at an agreed statement of facts with respect to some of the facts giving rise to the grievance, while other facts remain in dispute.

II. The Preliminary Objection

[10] The Attorney General of Canada has raised several preliminary objections to the reference. First, she contends that it would subvert the statutory grievance process if the Court were to answer the questions identified in the Committee's Notice of Application, as it would usurp the jurisdiction of the CDS, whose role it is to finally determine the issues raised by the grievance by engaging in fact-finding and the interpretation of CAF regulations and policies.

[11] The Attorney General also submits that several of the questions submitted by the Committee are not appropriate for determination on a reference, as they are questions of mixed fact and law, rather than purely legal questions. Finally, the Attorney General contends that the reference is premature, submitting that the Court has been asked to answer the questions in a factual vacuum, as neither the Committee nor the CDS have made any factual findings in this matter. Consequently, the Attorney General contends that the Court should decline to answer the questions raised by the Committee, and dismiss the reference.

[12] The Committee acknowledges that it has yet to make any findings of fact as to what representations, if any, were made to the Grievor prior to his re-enrollment in the CAF in 2013. Nor has it considered what, if any, legal consequences should flow from any such representations. The Committee argues, however, that the questions identified in the reference may have to be answered in the context of this grievance, and that even if it turns out not to be necessary to answer all of the questions in this case, the questions are ones that have arisen in the context of other grievances in the past, and may well arise again in the future. Consequently, the Committee says that it would be helpful for it to have the guidance of this Court in relation to these questions.

III. Analysis

[13] In order to decide whether it is appropriate to answer the questions that have been referred to this Court for determination, regard must first be had to the principles governing references such as this.

[14] Subsection 18.3(1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7 provides that

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.	**18.3 (1)** Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

[15] The Attorney General concedes that the Committee is a "federal board, commission or other tribunal". She further concedes that even though the Committee is an advisory body, rather than an adjudicative one, which does not have the power to put an end to disputes, it does nevertheless have the power to refer questions to this Court for determination in the appropriate case: *Information Commissioner of Canada v. Canada (Attorney General)*, 2014 FC 133, [2014] F.C.J. No. 359; *Canada (Information Commissioner) v Canada (Attorney General)*, 2015 FC 405 at para. 6, 447 F.T.R 267.

[16] Jurisprudence dealing with the predecessor to subsection 18.3(1) established four conditions that must be satisfied for a question of law, jurisdiction or procedure to properly be the subject of a reference under the *Federal Courts Act: Immigration Act, Re* (1991), 137 N.R. 64 at p. 65 (F.C.A.), [1991] F.C.J. No. 1155. These are:

1. The issue must be one for which the solution can put an end to the dispute that is before the tribunal;

2. The issue must have been raised in the course of the action before the tribunal that makes the reference;

3. The issue must result from facts that have been proved or admitted before the tribunal; and

4. The issue must be referred to the Court by an order from the tribunal that, in addition to formulating the issue, shall relate the observations of fact that gave rise to the reference.

[17] Under the earlier statutory provision, the reference process was only available to tribunals exercising adjudicative responsibilities. Following amendments to the statute in 1992, references may now also be brought by federal boards, commissions or tribunals that do not exercise judicial or quasi-judicial powers.

[18] There has been some suggestion that the four conditions identified in *Re: Immigration Act* should be approached flexibly, as it may be difficult to apply tests developed in adversarial proceedings in a purely administrative context: *Air Canada* FC, above at paras. 13-14. That said, the Federal Court of Appeal has confirmed the ongoing need for a proper factual foundation to be laid before questions referred to this Court can be answered, regardless of whether the tribunal plays an adjudicative or administrative role: *Air Canada (Re)* (1999), 241 N.R. 157 at paras. 12-13, [1999] F.C.J. No. 670 (*Air Canada* FCA).

[19] Cases decided both before and after the changes to the reference provision in the *Federal Courts Act* have, moreover, reiterated the need for there to be both a live controversy and an undisputed factual record before it will be appropriate for the Court to answer questions posed through the reference process.

[20] Unlike the Supreme Court of Canada, the Federal Courts cannot provide advisory opinions on questions referred to them: *Re Public Service Staff Relations Board* (1973), 38 D.L.R. (3d) 437 (F.C.A.), [1973] F.C. 604, per Jackett C.J., concurring; In *re Canadian Arctic Gas Pipeline Ltd. et al*, [1976] 2 F.C. 20 at para. 5, reversed on other grounds [1978] 1 S.C.R. 369. See also section 53 of the *Supreme Court of Canada Act*, R.S.C. 1985, c. S-26, as amended.

[21] Indeed, in *National Energy Board (Re)*, [1988] 2 F.C. 196, 48 D.L.R. (4th) 596, the Federal Court of Appeal made it clear that not only must possible answers to questions posed in a reference be able to put an end to the dispute before a tribunal, the reference process "does not contemplate determination of a question of law expressed in academic terms": at p. 204, citing *Reference re Public Service Staff Relations Act*, above at para. 12. See also *Martin Service Station Ltd. v. Minister of National Revenue*, [1974] 1 F.C. 398, at p. 400 (F.C.A.), affirmed [1976] S.C.J. No. 101, [1977] 2 S.C.R. 996; *Canada (Labour Relations Board) (Re)* (F.C.A.), [1989] F.C.J. No. 239.

[22] That is, this Court is not to answer academic questions of law, or engage in speculation as its role is "to determine as opposed merely to consider": *Alberta (Attorney General) et al. v. Westcoast Energy Inc.* (1997), 208 N.R. 154 at para. 16 (F.C.A.), [1997] F.C.J. No. 77; *Abegweit First Nation Band Council (Re)*, 2016 FC 750 at para. 14, [2016] F.C.J. No. 717.

[23] This is so, even if the tribunal bringing the reference genuinely wants answers to questions that confront it on a regular basis. As this Court observed in *Abegweit First Nation Band Council (Re)*, "subsection 18.3(1) of the *Federal Courts Act* does not allow federal boards, commissions or tribunals to seek determinations of a question of law simply because they would

like clarity on an issue". This is because the reference process "is only intended to resolve questions that stem from an actual, pending proceeding": both quotes at para.16.

[24] In the absence of any factual findings having been made by the Committee, it is not yet clear which, if any, of the seven questions identified in the reference will actually arise in this case. Depending on the Committee's findings, it is entirely possible that at least some of the questions may turn out to be academic.

[25] A second problem is that the Court does not have the factual foundation necessary to answer at least some of the questions raised by the Committee.

[26] As the Federal Court of Appeal observed in *Immigration Act* (*Re)*, one of the conditions that must be satisfied before a Court will answer questions posed in a reference is that "[t]he issue must result from facts that have been proved or admitted before the tribunal". Another such condition is that in addition to formulating the issue or issues for determination, the tribunal must "relate the observations of fact that gave rise to the reference".

[27] Indeed, as the Federal Court of Appeal observed in *Reference re Public Service Staff Relations Act*, it is the obligation of the tribunal seeking answers to questions on a reference to put before the Court "such findings of fact, or other material, as that tribunal would base itself on if it were determining the question or issue of law itself": above at para. 12. See also *Martin Service Station Ltd.*, above at para. 4.

[28] There is, however, no agreement as to the central facts in this case. All we have are bare allegations that remain unproven at this time.

[29] The statement of facts agreed to by the parties simply notes that the Grievor *alleges* that certain representations were made to him prior to his re-enrollment in the CAF, and that he relied on those representations to his detriment. No finding has, however, been made by the Committee as to whether any such representations were in fact made to the Grievor, nor has it determined who made the representations or what the content of those representations may have been, or the context in which they were made. The Committee has also not yet determined whether it was reasonable for the Grievor to have relied upon any representations that may have been made to him.

[30] The difficulties created by this situation are illustrated by considering the Committee's second question, which is "[c]an a person, who subsequently enrolls in the CAF, enter into a pre-service and/or a pre-employment contractual relationship with the Crown prior to enrollment in the CAF?" The Attorney General does not dispute that members of the CAF can potentially enter into some types of contracts with the Crown prior to their enrolment, because enrolment in the CAF does not "retroactively deprive a person of the legal ability to contract". There is thus no dispute between the parties as to whether a member of the CAF can *ever* enter into a contact with the CAF prior to enrollment. Where the parties disagree is as to whether, *on the facts of this case*, a contractual relationship was established between the Grievor and the CAF prior to his re-enrollment.

[31] Similar problems arise in relation to the Committee's third question, which was"[c]an the Crown and/or the CAF owe a duty of care, for the purposes of the tort of negligent misrepresentation, in respect of representations made to a person before he or she enrolls in the CAF?"

[32] While the existence of a duty of care may involve a question of law, the answer to the question is highly dependent on all of the surrounding facts and circumstances. In particular, consideration must be given to whether the facts of the case disclose a relationship of such proximity that failure to take reasonable care might foreseeably cause loss or harm to the plaintiff: *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2018 ONCA 407 at para. 40, [2018] O.J. No. 2417.

[33] The Committee has not provided the Court with the findings of fact on which it would base its answers to these and other questions identified in the Notice of Application, were it to answer the questions itself. In the absence of any such factual findings having been made by the Committee, it also cannot be said that the questions are ones that would have been ready for determination by the Committee, had they not been referred to this Court: *Martin Service Station Ltd.*, above at para. 6.

[34] I acknowledge that the Federal Court of Appeal has held that this Court should "not lightly second-guess a tribunal's decision as to what it finds necessary for its decision": *Canada Post Corp. (Re)* (1989), 59 D.L.R. (4th) 234 at p. 239 (F.C.A.), [1989] F.C.J. No. 239. While I understand that the questions posed by the Committee are ones that evidently recur and that the Committee wishes to have the guidance of this Court on these questions, that does not provide me with a sufficient basis on which to embark on the analysis required to answer the questions that have been referred to this Court for determination.

[35] Although it cites no jurisprudence to support this argument, the Committee contends that the allegations contained in the grievance should be presumed to be true for the purpose of the

reference, as would be the case on a motion to strike a pleading. However, the Federal Court of Appeal has made it clear that this Court's jurisdiction on a reference does not extend to answering questions based upon disputed facts: *Canada (Indian and Northern Affairs) v. Sinclair*, 2003 FCA 265 at para. 5, [2004] 3 F.C.R. 236; See also *Section 4 of the Patented Medicines (Notice of Compliance) Regulations (Re)*, 2002 FCT 1000 at paras. 30 and 34, 225 F.T.R. 55.

[36] Indeed, as the Court observed in *Air Canada* FCA, "in order for the reference procedure to work properly there must be no real argument between the parties as to the material facts that will form the basis for the answers the Court is asked to give": above at para. 13. That is not the case here.

[37] Moreover, as the Federal Court of Appeal observed in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332, it is only at the end of an administrative process that a reviewing court will have all of an administrative decision-maker's findings, which findings "may be suffused with expertise, legitimate policy judgments and valuable regulatory experience": at para. 32. While these comments were admittedly made in a different context, the point is equally true in this case. Before this Court can answer the questions raised by the Committee, it is important that the Committee first do its job and make the necessary factual findings, bringing to bear its expertise in the unique and highly-specialized military context in which the grievance arises.

[38] Given that the questions referred to this Court for determination lack a proper factual basis on which they can be answered, it follows that the application should be dismissed:

Abegweit First Nation Band Council (Re), above at para. 21; *Air Canada* FCA, above; *Sinclair*, above at para. 5.

[39] In light of this conclusion, it is not necessary to address the Attorney General's alternate argument that allowing the Committee to pursue the reference process would circumvent the statutory scheme governing the military grievance process. This argument is better addressed in a concrete context, once the Committee has made the necessary findings as to the facts underlying the grievance in question.

IV. Conclusion

[40] For these reasons, the reference is dismissed. I see no reasons why costs on the ordinary scale should not follow the event.

[41] This decision is made without prejudice to the right of the Committee to bring a fresh reference application, once it has completed its investigation and made the findings of fact that would be necessary for it to answer any questions that it may seek to refer to this Court. It will be open to the Attorney General to raise whatever concerns that she may have with respect to a further reference in the context of that proceeding.

JUDGMENT IN T-131-17

THIS COURT'S JUDGMENT is that the reference is dismissed, with costs.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-131-17
STYLE OF CAUSE:	IN THE MATTER OF A REFERENCE BY THE MILITARY GRIEVANCES EXTERNAL REVIEW COMMITTEE UNDER SUBSECTION 18.3(1) OF THE FEDERAL COURTS ACT, RSC 1985, C F-7, REGARDING QUESTIONS OF LAW
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