

Federal Court



Cour fédérale

Date: 20200220

Docket: T-1030-19

Citation: 2020 FC 278

Ottawa, Ontario, February 20, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

BASHIR ABDI

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Bashir Abdi was a member of the Canadian Armed Forces [CAF] from May 2007 to June 2014. On August 8, 2013, the CAF refused Mr. Abdi's request for leave during the Muslim holiday Eid al-Fitr. He was given only a short time to attend morning prayers. However, the service Mr. Abdi hoped to attend was full. He decided to attend the subsequent service. He

attempted to contact his commanding officer and asked for a message to be conveyed to him, but apparently without success.

[2] When Mr. Abdi reported for duty approximately an hour late, he was charged with absence without leave [AWOL], as defined in s 90(2) of the *National Defence Act*, RSC, 1985, c N-5 [NDA]. Following a summary trial, Mr. Abdi was found guilty and fined \$80.00. He later received a recorded warning regarding the incident [2013 AWOL Incident].

[3] Mr. Abdi filed an internal complaint in respect of the 2013 AWOL Incident. An investigation by the CAF concluded that the refusal of his leave for Eid al-Fitr constituted harassment and discrimination.

[4] Mr. Abdi also complained to the Canadian Human Rights Commission [CHRC]. The CHRC referred his complaint to the Canadian Human Rights Tribunal, but it was settled in advance of a hearing. The minutes of settlement are confidential, but both parties agree that the provisions dealing with liability and release may be made public.

[5] Quite apart from the 2013 AWOL Incident, Mr. Abdi encountered several difficulties in his career with the CAF. He was dissatisfied with his placement in the Geomatics Technician training course [Geo Tech], and asked to be transferred. He received unsatisfactory performance reviews and was disciplined for his absences. He eventually withdrew from Geo Tech, despite having been advised that this could jeopardize his career and lead to his release from the CAF.

Mr. Abdi was subsequently recommended for release. His release was expedited and finalized in June 2014.

[6] Mr. Abdi filed two grievances under s 29 of the NDA. The first grievance concerned the denial of his request to be transferred from Geo Tech. The second concerned his release from the CAF.

[7] The grievances were held in abeyance pending determination of Mr. Abdi's human rights complaint. Following the execution of the minutes of settlement, the grievances were referred to the Chief of Defence Staff [CDS] in his capacity as final authority under s 29.11 of the NDA. The CDS dismissed both of Mr. Abdi's grievances on May 16, 2019.

[8] Mr. Abdi seeks judicial review of the CDS' decision to dismiss his two grievances. He says that the minutes of settlement only resolved his claims for financial compensation. He maintains that the minutes of settlement specifically permitted him to proceed with his grievances insofar as he was seeking non-monetary relief, including in connection with the 2013 AWOL Incident.

[9] The CDS found that all matters connected with the 2013 AWOL Incident were resolved by the minutes of settlement and declined to consider them further. Nevertheless, he declared the recorded warning issued to Mr. Abdi in respect of the 2013 AWOL Incident to be "null and void", and directed that it be removed from Mr. Abdi's personnel file.

[10] The CDS' decision to dismiss Mr. Abdi's grievances is subject to review by this Court against the standard of reasonableness. This is a deferential standard.

[11] For the reasons that follow, I conclude that it was open to the CDS to find that the minutes of settlement prevented Mr. Abdi from pursuing monetary and non-monetary relief in respect of the 2013 AWOL Incident and any other allegations of racist, differential and adverse treatment while he was a CAF member. The decision of the CDS falls within the range of acceptable outcomes that are defensible in respect of the facts and law. It is therefore reasonable.

[12] The application for judicial review is dismissed.

II. Decision under Review

[13] The CDS dismissed both of Mr. Abdi's grievances, finding that he was treated fairly in accordance with applicable rules, regulations and policies.

[14] With respect to Mr. Abdi's grievance regarding the CAF's refusal of his request for a Voluntary Occupational Transfer – Untrained [VOT-U] from Geo Tech, the CDS said the following:

In rendering my decision, I have considered the fact that your early career history was satisfactory and that you showed you had the aptitude to become a productive military member. I note that you had many accomplishments: you had obtained a university degree, you spoke many languages and you had performed community service. However, you also had valid and documented shortcomings, including low potential, a poor work ethic and limited effectiveness spanning across many performance

assessments from different organizations and supervisors, proving that your shortcomings were not anomalous. I find that during your work placements, you were given the opportunity to demonstrate your full capabilities, abilities and potential; unfortunately, you did not take advantage of those opportunities.

In summary, there is an abundance of consistent information in your file from multiple sources and organizations to the effect that you exhibited many shortcomings that are not conducive to pursuing a military career. This includes, but is not limited to, being unable to complete basic CAF tasks with or without supervision, possessing a poor work ethic, and lacking military bearing. Furthermore, as a result of the [Maritime Surface and Sub-Surface Officer training], you were found to possess low potential as an officer. I therefore conclude that your behaviour, poor performance and work habits appear to be consistent from place to place. I have no reason to believe that your instructors and supervisors were not completely truthful in their assessments and recommendations. Based on your documented history of poor performance, poor work ethic and lack of military bearing, I find that you have shown an overall unsuitability for a career in the CAF. Consequently, I deny your request for VOT-U.

[15] With respect to Mr. Abdi's grievance regarding his release from the CAF, the CDS said the following:

[...] on two occasions, you chose to withdraw from [Geo Tech] and await the outcome of the VOT-U. Both times, you were made aware that withdrawal from the course could lead to your release from the CAF.

Ultimately, you chose to withdraw from [Geo Tech] fully informed that such a withdrawal could lead to a release from the CAF. Since I found that you have shown an overall unsuitability for a career in the CAF, that you withdrew from training knowing that a VOT-U denial could lead to release and that you are untrained, I find that releasing you is appropriate.

[16] The CDS held that the minutes of settlement precluded further consideration of the 2013 AWOL Incident and any other allegations of racist, differential and adverse treatment while Mr. Abdi was a member of the CAF:

You filed a complaint with the CHRC concerning discrimination related to religious accommodation. As a result, on 30 November 2018, the CHRC approved the terms of the settlement agreed to between yourself and the CAF. In accordance with the agreement, you acknowledged that the settlement was full and final compensation for the matters concerning the 2013 AWOL incident and your allegations of racist, differential and adverse treatment while you were a member of the CAF. As such, I will not comment on these issues further as part of this grievance determination.

III. Issue

[17] The sole issue raised by this application for judicial review is whether the CDS' refusal to consider Mr. Abdi's request for non-monetary relief in connection with the 2013 AWOL Incident was reasonable.

IV. Standard of Review

[18] The decision of the CDS is subject to review by this Court against the standard of reasonableness. The Court will intervene only if it is "satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether it falls within the range

of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Analysis

[19] Mr. Abdi argues that the CDS' decision was unreasonable because he expressly refused to consider a central issue in his grievances, namely his request for two non-monetary forms of relief arising from the 2013 AWOL Incident (citing *Bossé v Canada (Attorney General)*, 2015 FC 1143 at para 47 and *Lafrenière v Canada, (Director General Canadian Forces Grievance Authority)*, 2016 FC 767 at para 68).

[20] The two forms of non-monetary relief sought by Mr. Abdi were:

- (a) a letter of regret from the CAF to be placed on his personnel file outlining that his treatment was unfair, unwarranted, and not in keeping with the CAF ethos and values; and
- (b) the removal of the AWOL charge dated 15 August 2013 from his personnel file and assurance that it was not used in making any decision concerning his career.

[21] The Attorney General of Canada says that the CAF's admission that the 2013 AWOL Incident constituted discrimination and the removal of the recorded warning from Mr. Abdi's personnel file may be considered expressions of regret. The CDS did not make use of the 2013 AWOL Incident in deciding the grievances.

[22] The Attorney General also maintains that the CDS had no jurisdiction to expunge the conviction arising from the 2013 AWOL Incident from Mr. Abdi's file, because a conviction could not be challenged by way of grievance. It could only be defended or reviewed (*Queen's Regulations and Orders for the Canadian Forces* [QR&O], s 108.45; NDA ss 249(3)-(4); *Thurrott v Canada (Attorney General)*, 2018 FC 577). Counsel for the Attorney General informed the Court at the hearing of this application that, in any event, Mr. Abdi's conviction was removed from his personnel record by operation of statute following his release from the CAF. No authority or evidence was provided to support this assertion.

[23] The minutes of settlement state in paragraphs 4 and 5:

4. Subject to paragraph 5, the Complainant acknowledges that this settlement is in full and final compensation for the matters alleged in the Complaint and forever releases and discharges the Crown, The Canadian Armed Forces, their employees, officers, agents and servants from all claims, grievances, complaints and actions of whatever kind or nature that the Complainant had, now has or may hereafter have arising out of or connected to the Complaint or matters alleged in the Complaint, including his release from the Canadian Forces.

5. Paragraph 4 does not apply to the Complainant's existing grievances numbered 5080-1-14-A-92689 and 5080-1-15-A-95219 in respect of any non-monetary relief that he may seek in those grievances. The Complainant acknowledges that he is not seeking monetary relief through grievances 5080-1-14-A-92689 and 5080-1-15-A-95219, including lost wages or back-pay of any kind, and that the terms of paragraph 4 would apply to any monetary relief arising out of or connected to the Complaint or matters alleged in the Complaint, including his release from the Canadian Forces. The Complainant also acknowledges that paragraph 4 applies in respect of any allegations of racist, differential or adverse treatment while a member of the Canadian Forces.

[24] Mr. Abdi says that paragraphs 4 and 5 had the effect of precluding him from seeking financial compensation in his ongoing grievances, but explicitly preserved his right to pursue non-monetary relief, including with respect to the 2013 AWOL Incident. He notes that in paragraph 3 of the minutes of settlement, the CAF made an admission of liability only with respect to the 2013 AWOL Incident. The preamble to the minutes of settlement confirmed that the CAF “admitted that Mr. Abdi’s treatment in connection with the Absent Without Leave (AWOL) incident in August, 2013 was discriminatory”.

[25] The Attorney General says that paragraph 4 was a full and final release of all claims for compensation arising from the 2013 AWOL Incident, whether monetary or non-monetary. Paragraph 5 created an exception that permitted Mr. Abdi to continue pursuing non-monetary relief in both his grievances, but only to the extent that these did not involve allegations of racist, differential or adverse treatment. The 2013 AWOL Incident clearly involved allegations of racist, differential or adverse treatment. Accordingly, Mr. Abdi was prohibited from seeking non-monetary relief in relation to that incident.

[26] While I acknowledge that the release provisions of the minutes of settlement are potentially ambiguous, I prefer the interpretation advanced by the Attorney General. “Compensation” in paragraph 4 is unqualified, and may reasonably be understood to encompass both monetary and non-monetary relief. The preamble to the minutes of settlement refers to “remedies ... including financial compensation”. This suggests that “compensation” in general is broader than “financial compensation” in particular.

[27] Furthermore, if paragraph 4 were limited to financial compensation then paragraph 5 would be unnecessary. The minutes of settlement would simply release the Crown from claims for financial compensation, and permit Mr. Abdi to pursue all forms of non-monetary relief sought in his grievances, whether in relation to the 2013 AWOL Incident or otherwise.

[28] Instead, paragraph 4 is made subject to paragraph 5. By virtue of paragraph 5, claims for non-monetary relief are excepted from the general release of claims for compensation, provided they do not concern allegations of racist, differential or adverse treatment while Mr. Abdi was a member of the CAF. Paragraph 4 is not “for greater certainty”, but specifically identifies the forms of non-monetary relief that are not encompassed by the general release of claims for compensation in paragraph 5. Furthermore, the interpretation urged on the Court by Mr. Abdi would render the final sentence of paragraph 5 redundant.

[29] The CDS did not engage in the interpretative exercise described above. He stated only that “the settlement was full and final compensation for the matters concerning the 2013 AWOL incident and your allegations of racist, differential and adverse treatment while you were a member of the CAF”. However, the written reasons given by administrative bodies need not be comprehensive or deploy legal techniques. It will suffice if the reviewing court understands why a decision was made, and can determine if it is justified by the reasons in light of the record, history and context of the proceedings (*Vavilov* at paras 91-98). In my view, it was open to the CDS to interpret the minutes of settlement in the way that he did.

[30] The language of the minutes of settlement supports the CDS' conclusion that Mr. Abdi was precluded from pursuing all forms of compensation, both monetary and non-monetary, arising from the 2013 AWOL Incident or any other allegations of racist, differential and adverse treatment while he served with the CAF. Despite the able submissions of Mr. Juneau on Mr. Abdi's behalf, I conclude that the CDS' decision falls within the range of acceptable outcomes that are defensible in respect of the facts and law. It would therefore be inappropriate for this Court to intervene.

VI. Conclusion

[31] The application for judicial review is dismissed.

[32] The Attorney General seeks costs. Given the CAF's admission that its treatment of Mr. Abdi in the 2013 AWOL Incident was discriminatory, and the confusing language in the minutes of settlement respecting his ability to continue pursuing non-monetary relief in respect of that incident, I exercise my discretion not to award costs against Mr. Abdi.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no award of costs.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1030-19

STYLE OF CAUSE: BASHIR ABDI v CANADA (ATTORNEY GENERAL)

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