Federal Court  Cour fédérale

Date: 20200507

Docket: T-1438-17

Citation: 2020 FC 598

Ottawa, Ontario, May 7, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

CAPTAIN ÉLIANE ROBERT

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

JUDGMENT AND REASONS

[1] Before this Court, Captain Éliane Robert is challenging the outcome of the grievance she filed with respect to her date of promotion to the rank of captain in the Canadian Armed Forces. This challenge takes the form of an application for judicial review of the decision made by the Chief of Staff of the Armed Forces. This is the final level at which a grievance may be disposed of. It is therefore the decision for which judicial review is sought.

I. Facts

[2] Once the case has been trimmed of unnecessary dates and endless acronyms, it involves applying the relevant regulations and directives to different dates during a military career to determine whether the date of promotion to the rank of captain is appropriate. The applicant enrolled in the Canadian Armed Forces on December 18, 2007. She chose to become a pilot when she enrolled. She completed her Basic Military Officer Qualification (BMOQ) between January 7, 2008, and April 25, 2008. From August 5, 2008, to June 5, 2009, Captain Robert attended developmental training for her second language. The record is unclear as to the circumstances of her posting after the end of her language training, but it is understood that she was posted to 1 Canadian Air Division in Winnipeg.

[3] Given the difficulty to receive the required training to become a pilot, Captain Robert asked to be transferred to another military trade. She felt that since she already had a bachelor's degree in counselling and guidance science from Laval University, a transfer to a personnel selection (PSel) position would be appropriate. Her wish was granted. The transfer was effective May 18, 2010, and Captain Robert was promoted to the rank to lieutenant on the same day.

[4] Between May 18, 2010, and the beginning of her BMOQ on January 7, 2008, Captain Robert held the rank of second lieutenant. She was therefore promoted on the day of her transfer, May 18, 2010. She was posted to Canadian Forces Base Valcartier in August 2010.

[5] The applicant completed her mandatory military training for the personnel selection position from September 2010 to June 30, 2011 (basic qualification for PSel). Little is known about this training. Clearly, training was required for the occupational qualification (OQ) when the applicant moved from the pilot military occupation to the PSel occupation, which is the new group to which she applied for a transfer. This training lasted nine months and allowed the applicant to reach the functional level for her new military position. The documentation required to certify the successful completion of the basic qualification was completed on August 8, 2011.

[6] Captain Robert was promoted to the rank of lieutenant on May 18, 2010, which means that her entry into the promotion zone (EPZ), as the military calls it, for the rank of captain would be three years later, on May 18, 2013. This means that a person who enters such a promotion zone can be promoted as of that date to the next higher rank, which in this case is the rank of captain. Members move up from the rank of lieutenant to captain in the branch of the Armed Forces in which the applicant had enrolled.

[7] As stated above, Captain Robert disputes her EPZ date. She now claims that her promotion should have been on a date other than May 18, 2013; the grievance referred to the date of June 30, 2011, the date on which her mandatory military training for the PSel position was completed. This is the reference date in this case since it is the date on which the grievance is based. Other dates referred to later are irrelevant. A reviewing court, on judicial review, plays a role that differs from that of an administrative tribunal and considers only the legality of the decision rendered. It cannot consider changes to an applicant’s case that were not before the administrative tribunal whose decision is being reviewed, because the reviewing court would

then re-examine the merits of the grievance (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263, 479 NR 189).

II. Grievance

[8] The grievance in this case was filed by Captain Robert on August 20, 2013. It was entitled [TRANSLATION] "Request for Review: Date of Entry into the Promotion Zone to the Rank of Captain". In her grievance, the applicant requests that her promotion date be changed to June 30, 2011, rather than May 18, 2013. At page 1 of the grievance (certified tribunal record, p 474), it states as follows: [TRANSLATION] "Based on calculations made in November 2011, my promotion date should have been effective June 30, 2011, rather than May 2013". The next three pages present Captain Robert's career path where it is states that [TRANSLATION] "I finally completed my PSel training course from 14 Sep to 26 Oct 2010 and completed my qualification in June 2011". As indicated above, the basic qualification for PSel was completed on June 30, 2011. It therefore appears that Captain Robert's grievance conflated the date of her promotion to the rank of captain with the date she completed her basic training in her new military trade.

[9] Subsequently, the grievance refers to the *Commissioning and Promotion Policy – Officers – Regular Force.* These are the Canadian Forces Administrative Orders (CFAO), and the one at issue in this case is CFAO 11-6, adopted pursuant to article 11.02 of the *Queen's Regulations and Orders* for the Canadian Forces (QR&O). This is the document that applies to determine promotions of regular force officers. No one appears to dispute that CFAO 11-6 is central to this case. Indeed, much of the applicant's argument seeks to rely on the specific

provisions contained therein. However, Captain Robert has an interpretation that differs significantly from what the military decision makers have agreed.

[10] Captain Robert referred to a series of provisions in her August 20, 2013 grievance. These are paragraphs 14, 29, 30 and 31, as well as various paragraphs found in Annex A, of CFAO 11-6. Excerpts from paragraphs 2, 15, 16, 17, 18 and 20 are presented. I note that paragraphs are often only partially cited, but much more significantly, there is no detailed explanation in the grievance as to what Captain Robert is trying to demonstrate in support of her argument that her promotion date to captain should have been June 30, 2011.

[11] The only explanation is as follows:

> [TRANSLATION]
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> 6. . . . [M]y seniority should have been calculated from my date of enrolment since, according to the directive, all officers with the OQ retain seniority in their rank when moving from one military occupational classification [MOC] to another. However, since this is a voluntary reassignment request, my seniority of more than 2 years should have been recognized at the time I obtained my PSel qualification.
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> 7. Therefore, since I was qualified to transfer from my MOC and my trade transfer is not because of a failure, my seniority should have been considered and my EZP date amended accordingly to comply with QR&O [*sic*] 11-6. Therefore, in light of the information submitted in this grievance, I request that this matter be resolved, as it should have been reviewed in June 2011. . . .

As we can see, this argument is based on a truncated reading of CFAO 11-6. In the end, it is understood that the applicant stated that she was eligible for the rank of captain on the day that she completed her training to become a PSel Officer (her basic training), rather than three years

after acquiring the rank of lieutenant, on May 18, 2010 (leading to her eligibility on May 18, 2013, and not June 30, 2011).

[12] The explanation given in the grievance is not clear, nor is the applicant's factum. At the hearing, the applicant's counsel was still unable to enlighten the Court on her argument. Additional notes were therefore requested from the parties in order to explain their respective claims. They were received in October 2019.

III. Responses to grievance

[13] Grievances are submitted to two authorities within the armed forces. In the first instance, it will be considered and will receive a response from the initial authority (IA). In this case, Brigadier General Joyce was the IA for military career grievances. He was the Director General Military Careers.

A. *Initial authority*

[14] The IA stated at the outset that the grievance relates to a promotion date which, according to the applicant, should be June 30, 2011. Having reviewed all aspects of the grievance submitted, the IA concluded that the promotion date of May 18, 2013, should not be changed in principle. It takes three years in rank to become eligible for promotion to the next rank; Captain Robert was promoted to the rank of lieutenant on May 18, 2010. Furthermore, the IA considered that, pursuant to Annex B, Appendix 1 to CFAO 11-6, the applicant should have been credited a

period of 110 days, corresponding to the period spent to obtain her BMOQ (January 7 to April 25, 2008). This changes the promotion date from May 18, 2013, to January 28, 2013.

[15] The IA stated that paragraph 31 of CFAO 11-6 cannot apply to the applicant's case, as she claims. This paragraph applies to the case of an officer who moves from one MOC to another when he or she already has the appropriate OQ. The applicant does not meet this requirement. The Brigadier General noted in his decision that Captain Robert did not complete her OQ until June 30, 2011, which would demonstrate that she did not already possess the OQ to join her new MOC (PSel). Captain Robert also mentioned her master's degree, which she said related to her new MOC. Further studies for a master's degree are not credited because they are not related to the applicant's occupation. The IA referred to Annex B to CFAO 11-6 where it is stated that a year or two may be credited "depending on the applicability of the degree". A table of applicable degrees in this case established that master's degrees in psychology, industrial relations or sociology qualified. The applicant's degree in organizational development was not an applicable degree since, according to the Brigadier General, it falls within the scope of public administration. As a result, once credited for a period of 110 days, the EPZ date was set at January 28, 2013, rather than May 18, 2013, as originally decided.

B. *Final authority*

[16] The case was brought to the second level, which is referred to as the final authority (FA). Under the *National Defence Act*, RSC, 1985, c N-5, it is stated that "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 circumstances and the considerations of fairness permit" (section 29.11).

[17] It is this decision for which judicial review is sought. The decision was rendered on August 17, 2017. It states that the grievance was the subject of a discretionary referral to a Grievances External Review Committee (pursuant to article 7.20 of the QR&O). The decision maker (the Chief of the Defence Staff delegates final authority in these matters to the Director General Canadian Forces Grievance Authority) stated that it had reviewed the file, including the findings and recommendations of the Military Grievance External Review Committee (MGERC) and the comments made by Captain Robert throughout the process. There appear to have been a number of them, which did not clarify matters. The MGERC had recommended that the grievance be denied, but a *de novo* review of the FA concluded that Captain Robert should be credited with additional time. It changed the promotion zone from May 18, 2013, to March 8, 2012. In the decision, the FA explains how it arrived at this result.

[18] The FA provided a detailed chronology of the stages in Captain Robert's career. It identified what I believe is at the heart of the dispute before the Court.

[19] The FA disagrees with the applicant's claim that she was qualified for the PSel occupation as soon as she was transferred [or enrolled] because her bachelor's degree in counselling and guidance science was the prerequisite qualification. However, Captain Robert was not qualified as a PSel; she only became qualified when she completed her basic training on June 30, 2011 (she had started on September 14, 2010). She did not receive her OQ until that date. Any argument based on the notion that the applicant already had the OQ is therefore based on an erroneous premise, according to the FA.

[20] Accordingly, the FA agreed with the IA and credited Captain Robert with 110 days in recognition of her BMOQ training, that is, the period from January 7, 2008, to April 25, 2008. However, the period that she was in second language training had not been credited. Acknowledging that this is not prerequisite training specific to the chosen military occupation (PSel occupation), the FA noted that Defence Administrative Order Directive 5039-7 (Second Official Language Training and Education for CF Members) encourages this training and states that this skill is universal to all MOCs. The FA therefore concluded that the entire period spent on language training would be credited, for a total of 362 days, in addition to the 110 days credited for basic training.

[21] Thus, the initial date of May 18, 2010, the date Captain Robert was promoted to the rank of lieutenant, becomes March 8, 2009. As a result, the date of eligibility for promotion to the higher rank of captain becomes March 8, 2012, not May 18, 2013. However, it will not be June 30, 2011. As a result of the adjustments made, the applicant's promotion to the rank of Lieutenant was retroactively changed from May 18, 2010, to March 8, 2009. The period of three years in rank began on that date.

IV. Argument and analysis of grievance

[22] It was not easy to try to identify the applicant's argument because the relevant dates change as the argument progresses. In the end, it is based on a misreading, the FA states, of CFAO 11-6. The real issue on judicial review is whether the decision rendered on the grievance is a lawful decision according to the relevant standard of review (*Delios v Canada (Attorney General)*, 2015 FCA 117, 472 NR 171 [*Delios*]). It is therefore necessary to return to the relevant

texts to see whether the decision meets the appropriate standard of review. It is CFAO 11-6 that forms the basis of the applicant's argument, and in particular paragraphs 29, 30 and 31. The applicant relies on paragraph 31. Instead, the FA refers to paragraph 30 as the one that applies to the applicant's case. To begin, I will reproduce them below:

PROMOTION ON MOC TRANSFER	PROMOTION À LA SUITE D'UN CHANGEMENT DE GPM
29. A MOC qualified officer will retain seniority in rank when transferred from one MOC to another, except for the purpose of determining when an officer enters the promotion zone. DPCAO will adjust the EPZ date based on paragraphs 30 and 31.	29. Tout officier QGP conserve l'ancienneté dans son grade lorsqu'il passe d'un GPM à un autre, sauf pour ce qui est de l'établissement de la date à laquelle il entrera dans la zone de promotion. Le DACO détermine la date d'entrée dans la zone de promotion selon les modalités prévues aux paragraphes 30 et 31 ci-après.
30. When an officer is required to undergo training for transfer to another MOC promotion status is as follows:	30. Lorsqu'un officier est tenu de recevoir de l'instruction en prévision de son passage à un autre GPM, sa situation est la suivante:
a. a second-lieutenant remains eligible for promotion to lieutenant in accordance with Annex A or B; and	a. un sous-lieutenant demeure admissible à une promotion au grade de lieutenant en conformité avec l'annexe A ou B; et
b. an officer, other than those officers governed by Military Dental Training Plan (MDTP), Military Medical Training Plan (MMTP) and Military Legal Training Plan (MLTP) in the rank of Lieutenant or above will -	b. tout officier, autre qu'un participant au Programs de formation - Dentistes militaires (PFDM), au Programme de formation - Médecins militaires (PFMM) et au Programme de formation - Avocats militaires (PFAM) du grade de lieutenant ou d'un grade supérieur:
(1) remain eligible for promotion in the officer's current MOC	(1) demeure admissible à une promotion dans son GPM

until the effective date of transfer, and

(2) subsequent to the effective date of transfer if eligible for promotion in accordance with paragraph 4, be considered for promotion by the first merit board assessing officers' in the officer's new MOC which convenes after -

(a) the successful completion of MOC qualification training in the new MOC, and

(b) the submission of a PER based on the officer's performance in the new MOC, and

c. an office; governed by MDTP, MLTP, and MMTP is not eligible for promotion while undergoing training for transfer to a new MOC and will remain ineligible for promotion until the cessation of training.

31. When an officer is transferred to another MOC in which the member is MOC qualified, the EPZ date will be adjusted to permit merit listing in the new MOC by a merit board that sits subsequent to the MOC transfer and the submission of a PER, based on the officer's performance in the new MOC.

actuel jusqu'à la date effective de sa mutation;

(2) après sa date effective de mutation et s'il est admissible à une promotion en conformité avec l'alinéa 4, sa candidature sera analysée par le premier conseil de promotion au mérite du GPM auquel appartient cet officier qui se réunira après:

(a) que ce dernier aura terminé avec succès l'instruction lui permettant de répondre aux exigences de son nouveau GPM;

(b) la présentation d'un RAP fondé sur son rendement dans son nouveau GPM;

c. tout officier participant au PME-DENT, au PMEM et au PMED n'est pas admissible à une promotion tant qu'il n'a pas terminé la formation lui permettant de passer à un nouveau GPM.

31. Lorsqu'un officier passé à un GPM dont il possède déjà la QGP, sa date d'entrée dans la zone de promotion est redressée afin que son nom puisse être inscrit dans la liste de promotion au mérite de son nouveau GPM par un conseil de promotion au mérite qui siège après le changement de GPM et la présentation d'un RAP fondé sur son rendement dans le nouveau groupe.

[Emphasis added.]

[23] While not transparent, these provisions seem to me to be relatively clear. They seek to cover the cases of promotion where there has been a change in MOC, as was the case here. What rules apply to promotions in such circumstances?

[24] The applicant argues that paragraph 29 states that an officer does not lose seniority in rank when changing MOCs. What the applicant fails to note is that this rule applies "except for the purpose of determining when an officer enters the promotion zone". This opens the door to paragraph 30, which refers specifically to the case where training is required to move to another MOC. That is the case here.

[25] We have seen that the FA concluded that Captain Robert was not [TRANSLATION] "PSel qualified" when she chose a new military occupation. Her bachelor's degree in counselling and guidance science was not sufficient for the OQ; she needed the training she received from September 2010 to June 30, 2011. Only then were [TRANSLATION] "you qualified in your new occupation". This means that paragraph 30 applies.

[26] However, the applicant never demonstrates how the FA's understanding would be unreasonable or incorrect. In fact, she does not clearly identify the applicable standard of review and the impact that such a standard should have on her burden. The applicant argues that the decision is unreasonable (Memorandum of Fact and Law, para 29), but does not appear to recognize the impact of the standard to be applied. Instead, she seems to be leaning towards a review on the merits. In fact, she argues as if the reviewing court could substitute its opinion for that of the FA, as if the standard of review is that of correctness.

[27] The standard of correctness leaves no room for the deference to which the administrative decision maker is entitled when the standard is that of reasonableness. The presumption that the applicable standard of review is that of reasonableness has been strongly affirmed by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Indeed, cases where the presumption can be rebutted appear to be quite rare (*Vavilov*, para 17). Clearly, none of them apply in this case. The applicant therefore had the burden of proving that the decision is unreasonable (*Vavilov*, para 100) in the public law sense. Failing to make such a demonstration, the application for judicial review must be dismissed.

[28] This recent case law merely confirms the statements from the Federal Court of Appeal and this Court that FA decisions are reviewable on a standard of reasonableness (*McBride v Canada (National Defence)*, 2012 FCA 181, at para 32; *Morose v Canada (Attorney General)*, 2015 FC 1112, at para 24; *Walsh v Canada (Attorney General)*, 2015 FC 775, para 34). The applicant was therefore required to show not that she disagreed with the FA's interpretation, or that her interpretation was superior, but rather that the decision was unreasonable.

[29] The applicant allegedly sought to avoid the application of paragraph 30. Her entire case rests on her argument that paragraph 31 applies to her. She states, rather than demonstrates, that she had the OQ (Memorandum of Fact and Law, paras 40 and 41), thereby arguing that it is paragraph 31 of the CFAO 11-6 that applies to her case. However, everyone agrees that the applicant has received training. Holding a bachelor's degree in counselling and guidance science is certainly useful and may constitute a prerequisite qualification, the FA states, but it does not meet the basic qualification for the military profession of PSel.

[30] The applicant states in her grievance that she [TRANSLATION] “completed [her] PSel training course from Sept 14 to Oct 26, 2010, and completed [her] qualification in June 2011”, which seems to concede that qualification for her new military trade required training. The request for voluntary reassignment was consistent with her field of study and was an area of interest to her. She believed that her bachelor’s degree fulfilled the required qualifications. The applicant does not appear to recognize that her qualification was a function of her training for the position. This is not the view of two decision makers (the IA and the FA), nor is it the view of the MGERC from whom the opinion was sought. The evidence on the record indicates that training took place.

[31] In my opinion, the applicant has not shown in her grievance how her reading of paragraphs 29 to 31 demonstrates that the decision does not meet the standard of reasonableness. Paragraph 30 applies where the officer is required to “undergo training for transfer to another MOC”. This is the case here, where the basic qualification is only acquired after nine months of training. The French version refers to “recevoir de l’instruction [sic]”.

[32] Thus, paragraph 29 is careful not to provide that seniority in rank from one military occupation to another is maintained, “except for the purpose of determining the date when an officer enters the promotion zone”. This part of the paragraph cannot be omitted. Paragraph 30 provides for the case where an officer “is required to undergo training for transfer to another” military trade. This appears to be the applicant’s situation.

[33] The basic qualification for the PSel MOC was clearly not met on the sole basis of a bachelor's degree in counselling and guidance science, since a nine-month training course had to be taken. The decision to apply paragraph 30 is justified and coherent. It is absolutely intelligible and transparent.

[34] Captain Robert instead invokes paragraph 31 because, she states, she was moving to a new MOC for which she was qualified. This is not consistent with the fact that she had to receive training in order to be able to perform the new function. When paragraphs 29, 30 and 31 are read together, in their context, in order to make sense of the mechanism put in place, it can be seen that an attempt has been made to cover and differentiate between cases that require training and those that do not, having established beforehand that seniority is preserved when changing trades, but not for promotion purposes. It does not seem surprising that the intention behind paragraphs 29 and 30 is that a member should spend a certain period of time in a position for which training must be provided, prior to moving to the promotion zone.

[35] The applicant cannot simply rely on the introductory words of paragraph 29 of CFAO 11-6 to claim that she retains her seniority in her rank when she moves from one MOC to another and thus develop a theory that she could become a captain without ever having worked in her chosen MOC. The retention of seniority "except for the purpose of determining the date when an officer enters the promotion zone" is not a fluke. Paragraph 13 of CFAO 10-1 (officer transfer – military occupation) provides the same exception.

[36] The interpretation advocated by the respondent, that an officer is qualified in his or her MOC when he or she has completed the required training, is certainly reasonable. As the respondent notes in paragraph 9 of its supplementary notes, [TRANSLATION] "the applicant was never qualified in the pilot occupation, was not qualified in the personnel selection occupation at the time of her transfer and only became qualified in that occupation on June 30, 2011, when she completed the required training as set out in the applicable Manual". I might add that the interpretation sought by the applicant does not seem to me to take into account the principle set out in paragraph 14 of the CFAO 11-6: "an officer enters the promotion zone upon completion of a specified time in the rank for the officer MOC". Thus, seniority is required in the MOC itself, not just in the rank. The same paragraph also states that the EPZ date is adjusted by, among other things, "MOC training failure" and "MOC transfer".

[37] For her argument to succeed, the applicant had to not only eliminate many provisions from the text she cited, namely CFAO 11-6 (see also the definition of "entry into the promotion zone date", s 2), but she also had to prove that paragraph 31 applies to her. To do so, she must show that she moved from a MOC for which she had obviously not completed the OQ (no one claims that she was a pilot) to another MOC for which training (or "instruction" as written in the French version) was provided, and which she did not receive until June 2011. The only reason given for her situation being related to paragraph 31 is that she had a bachelor's degree in counselling and guidance science. As previously stated, a military trade requires more than that, which is the reason for the training provided to and attended by the applicant, who herself stated in her August 23, 2013 grievance that she completed her qualification in June 2011. If the

applicant wanted to claim to have the OQ for the new MOC, she had to demonstrate this. According to the evidence on the record, this was not at all established.

[38] In this case, the applicant has not discharged her burden to show that the FA's decision, that she did not obtain her basic qualification for the PSel MOC before June 30, 2011, is a decision that does not meet the requirements of reasonableness. OQ in the military context is not necessarily acquired solely on the basis of a general bachelor's degree.

[39] In one of the different permutations of promotion dates that the applicant has claimed over time, the applicant states that December 18, 2010, barely three years after her enrolment, is the date she should have been promoted to the rank of captain. According to this permutation, the beginning of her promotion zone for the rank of captain is the date on which she enrolled, even before she was second lieutenant or promoted to the rank of lieutenant. This shows the fluidity of her interpretation.

[40] In her supplementary notes of October 2019, the applicant applies her reading of certain provisions to the facts of this case. Apart from the fact that this interpretation no longer corresponds to the grievance, which cannot be of much use to this Court, two observations must be made. First, once again, it should be noted that her argument is based on her belief that she had the OQ from the day of her transfer, May 18, 2010. It must be understood that she believed that she could work in the PSel MOC on the sole basis of her bachelor's degree in counselling and guidance science. The applicant does not explain this belief, which is therefore more of an opinion than a fact. She states that she holds an OQ (supplementary notes, para 24); she states

that she is not required to [TRANSLATION] “receive additional training in preparation for transfer to another MOC” (supplementary notes, para 25); and since she already holds an OQ, it should be paragraph 31 of CFAO 11-6 that applies to her. Not only is this inconsistent with the evidence, but it also reconfirms the mistaken belief that paragraph 29 can be read without considering its second part.

[41] Second, and in the same vein, the applicant accepts that she has completed her OQ and is fit to work in her MOC following her training. In fact, in paragraph 32 of her supplementary notes, she states that she was not assigned to a PSel Officer position until September 30, 2011, [TRANSLATION] “one month after her qualification in her current MOC”, not before.

[42] But what continues to be lacking is an explanation as to why the decision of the FA is unreasonable, as alleged. Put another way, the role of the reviewing court is not to select a version but rather to determine whether the decision rendered is reasonable. The standard of reasonableness cannot be transformed into that of correctness (*Delios*, above).

[43] The applicant is trying to make the rest of the provisions of the CFAO disappear by applying paragraph 31 of CFAO 11-6 and subparagraph 3f. of Annex A to the same document. This reading ignores the training required to enter a MOC and treats seniority (3 years from the time of entry in the Armed Forces) without taking into account article 29 of CFAO 11-6 and paragraph 13 of CFAO 10-1, which, it should be recalled, specifically provides that seniority in a rank is retained when transferring to another MOC, “except for the purpose of determining when an officer enters the promotion zone”. These paragraphs are consistent with paragraph 14 of

CFAO 11-6 which provides that an officer “enters the promotion zone upon completion of a specified time in the rank for the officer MOC”. The applicant’s approach ignores any form of seniority in a MOC, a principle found in the relevant instruments. Moreover, she actually claims to have been a lieutenant since her original enlistment in January 2008 rather than a second lieutenant.

[44] Such a reading, that amputates certain texts and takes no account whatsoever of the context and general structure of the promotion system, can only be unreasonable. Without even having been able to work in her new military trade, the applicant claims she was entitled to a promotion to the rank of captain on the day her training was completed on June 30, 2011, or even earlier, according to certain permutations that were not before even the administrative decision maker. If this is the only possible result, according to the applicant’s reading, it would be inconsistent since paragraph 14 of CFAO 11-6 specifically provides for the requirement of seniority in her MOC.

[45] On the contrary, the FA’s decision does not lead to any absurdity. Its starting point is not the same as the applicant’s, in that the qualification for the MOC is not acquired until the training has been completed. According to the FA, qualification for the MOC is the deciding factor, which is only possible once the training has been given and received. This is consistent with the general scheme of the promotion system but, more specifically, the applicant has not shown that this interpretation is unreasonable because it is not justified, transparent or intelligible. That said, with respect, it is rather the version offered by the applicant that is neither transparent nor intelligible and is not justified in terms of the general scheme of CFAO 11-6 and CFAO 10-1.

V. Procedural fairness

[46] The applicant stated in her memorandum of fact and law that the analysis that was favourable to her was allegedly withheld from her at the time of disclosure. Neither in her factum, in her supplementary notes, nor at the hearing did the applicant articulate her claim. At most, she stated that the FA was biased because someone offered him an analysis that he allegedly did not follow. This analysis allegedly came from an analyst who favoured the applicant. It is also alleged that another officer's case would have resulted in a different decision. The details are missing.

[47] The respondent strongly opposes any allegation of a breach of procedural fairness. I agree with the respondent that the applicant provided a large quantity of documents in bulk, without analysis or presentation of any argument. Counsel for the respondent states that she cannot respond to an allegation that is not articulated or even made. Many of these documents are emails exchanged about CFAO 11-6. There appears to be a great deal of advice circulating within the military on this matter. Other emails are between the applicant and an analyst, in 2016 and 2017, who allegedly worked on the grievance on behalf of the FA and who, surprisingly, provided the applicant with a draft decision that apparently contained his recommendations that were not followed.

[48] The mere fact that there is a divergence of views within the military is not surprising. This is often the case in large organizations. It should be noted that the MGERC was mandated to review Captain Robert's grievance. In a 14-page documented decision, the MGERC

recommended that the grievance be dismissed in its entirety, and that the EPZ [TRANSLATION] "for the rank of Captain for the grievor should have been set at January 28, 2014 in order to be consistent with the standards and policies in effect in the CAF" (page 14 of 14). The opinions differ greatly. Indeed, even the applicant appears to have varied over time between various dates, as I stated earlier, as the supplementary notes deviate from the grievance by arriving at a different promotion date that corresponds to three years after her enlistment on December 18, 2007. The issue is whether the interpretation of the FA is reasonable.

[49] At the hearing, counsel for the applicant withdrew her allegation of breach of procedural fairness. It was very late. He explained that he was trying to avoid the objection that new evidence is not allowed on judicial review. It is understood that the lawyer wanted to demonstrate that there were differing views within the military, including the person reviewing the file for the purpose of making a recommendation to the FA.

[50] The applicant's counsel seemed to believe that the opinion of one analyst was of particular importance. Yet the IA, the MGERC and the FA were unanimous on the fundamental interpretation to be given to the instruments. After reading the text of this other analysis, I cannot conclude that it is any more persuasive. The use of snippets taken here and there is not persuasive if it does not take into account the provisions read in context, in terms of the general scheme of the instruments under review, seeking to extract the meaning that is consistent with the texts and the context (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27). An interpretation that would lead to absurdity, such as an interpretation that does not take into account the principle that a military officer must have acquired experience in his or her military trade, would

seem to me to not be transparent, intelligible, or justified, which are the qualities of reasonableness. This is not the case for the decision under review because it fulfills those requirements. In my opinion, the decision under review meets the requirements of *Vavilov*, as follows:

> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.
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> [86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.
>
> [Italics in original.]

The decision is reasonable, and the Court must show some deference.

VI. Conclusion

[51] The role of a reviewing court is not to determine the merits of the decision, but rather to determine whether the decision falls within the realm of reasonableness, recognizing that there is not always a single solution. The reviewing court must avoid becoming a court other than one that reviews the legality of decisions of administrative tribunals (*Vavilov*, para 83). Decision-making authority has been conferred on a body other than a court of law, and this is a choice that must be respected (*Vavilov*, para 14). As the majority in *Vavilov* states, "in conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (para 15).

[52] The first obligation of a person who wants to challenge a decision on judicial review is to show that it is unreasonable. In this case, the applicant failed in her undertaking; moreover, it is her reading of the paragraphs she relied on that, in my opinion, leads to absurdity. It would have been possible to conclude that two versions are reasonable. Even if this were the case, it would not mean that the FA's version should be dismissed on judicial review. But this choice does not even arise in this case since the alternative offered does not hold water.

[53] If the findings and recommendations of the MGERC are to be believed, the FA's response is more generous than necessary on a strict interpretation. The applicant has not applied for judicial review of that decision in this regard, and the FA's decision remains intact.

[54] Finally, the allegation of a breach of procedural fairness is unfounded. At most, the applicant is putting forward evidence that there are different views on the issue within the Canadian Forces. As will be seen, even the applicant has proposed different promotion dates over time. The existence of other analyses in no way affects the fairness of the process followed. In any event, the allegation was formally withdrawn.

[55] Therefore, the application for judicial review is dismissed. The respondent sought its costs and is entitled to them. The application for judicial review is therefore dismissed with costs.

JUDGMENT in T-1438-17

THIS COURT'S JUDGMENT is as follows**:**

1. The application for judicial review is dismissed with costs.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1438-17
STYLE OF CAUSE:	CAPTAIN ÉLIANE ROBERT v CANADA (ATTORNEY GENERAL)
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	SEPTEMBER 3, 2019
JUDGMENT AND REASONS:	ROY J.
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