Federal Court  Cour fédérale

Date: 20210603

Docket: T-1061-20

Citation: 2021 FC 531

Ottawa, Ontario, June 3, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

LUCAS DENNEBOOM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Master Bombardier Denneboom is a musician in the Canadian Forces. When he enrolled at the rank of Corporal (or Bombardier in the artillery), the policy of the Music Branch was that Corporals would effectively be promoted to the rank of Sergeant after six months. Shortly afterwards, however, a new policy was adopted, with the result that MBdr. Denneboom's promotion to Sergeant was significantly delayed. Given the date of his enrollment, MBdr. Denneboom was not covered by the new policy's grandfathering provision.

[2] MBdr. Denneboom filed a grievance. The Military Grievances External Review Committee recommended that it be allowed, but the Final Authority disagreed and rejected it. MBdr. Denneboom seeks judicial review of this decision.

[3] I am allowing MBdr. Denneboom's application. The Final Authority's decision is unreasonable because it disregards important aspects of the evidence and fails to explain adequately why it departs from the recommendations of the Committee. Specifically, the Final Authority's finding that the grandfathering provision was the result of careful consideration is neither supported by the evidence nor by the Committee's recommendations. Moreover, the Final Authority did not provide a coherent justification for its refusal to grant an "acting/lacking" promotion to MBdr. Denneboom.

I. Background

A. *Ranking Policy for the Musician Occupation*

[4] The Canadian Forces have adopted policies regarding the ranking and promotion of its members. Until 2016, members of the musician occupation of the Regular Force benefited from a separate promotion policy, different from the one applicable to the majority of non-commissioned members of the Canadian Forces. That separate policy was known as the *Canadian Forces Administrative Order 9-8* [CFAO 9-8].

[5] Contrary to most other occupations, the working rank of the musician occupation was that of Sergeant, at which "the bulk of the occupational positions reside and journeyman work

[was] carried out." Thus, while musicians were hired at the rank of Corporal, they were in practice automatically promoted from Corporal to Sergeant once they had met the relevant criteria. Amongst other qualifications, the aspiring Sergeants had to receive leadership training in the form of a Primary Leadership Qualification [PLQ]. They also had to serve as Corporal for six months and obtain a recommendation letter from their commanding officer. Promotion to Sergeant was thus not based on merit, nor any competitive process, but on the completion of set criteria.

[6] While the issue was not fully canvassed in this application, it appears that this separate policy was justified by the fact that, contrary to other occupations, musicians were expected to be fully trained upon hiring, and by the desire to provide an additional incentive to recruitment. This situation, however, was considered unsatisfactory. In 2013, the Music Branch began a study aimed at establishing a new ranking policy.

[7] On November 7, 2016, the *Military Employment Structure Implementation Plan* [the MESIP] was approved and set to come into force on November 30, 2016. The MESIP repealed the previous policy on rank structure and subjected musicians to the *Canadian Forces Administrative Order 49-4* [CFAO 49-4], the standard promotion policy for non-commissioned members. It introduced the rank of Master Corporal between the ranks of Corporal and Sergeant. It also changed the number of positions within the Music Branch at each rank. In particular, it created positions at the Corporal and Master Corporal ranks and significantly reduced the number of Sergeant positions.

[8] The transition from the old to the new system was organized as follows. An exception to this new rank structure was made for musicians who had joined the Regular Force before 2014. This grandfathering provision would ensure they were still subjected to the previous promotion criteria of CFAO 9-8. By all accounts, this cut-off date was chosen because musicians enrolled prior to January 2014 would not have been aware of the policy changes. While the policy effectively lowered the working rank from Sergeant to Corporal, the MESIP did not seek to demote Sergeants who had already been promoted through the previous policy.

[9] The practical result is that musicians who do not benefit from the grandfathering position will have to wait an extended period of time, possibly up to ten years, before there is a vacancy at the rank of Sergeant.

B. *MBdr. Denneboom's Enrollment*

[10] MBdr. Denneboom was a part-time reserve musician of the Canada Forces Primary Reserve during the summers of 2013 to 2015. On February 4, 2016, he interviewed for a full-time position in the Regular Forces, through what is known as a "component transfer." During his interview, he was informed of a study being conducted that had the potential to affect the rank structure of the musician occupation within the Regular Force. He asked if he would be personally impacted by the study if he joined the Branch. His interviewers told him they were unable to provide further information on the potential implementation date of the new policy nor on any of its resulting impacts. However, they informed him that he could not be guaranteed a promotion to the rank of Sergeant within six months, as was stipulated by the promotion policy at the time. On this understanding, MBdr. Denneboom accepted a full-time position as a

Corporal within the Music Branch, in the Royal Canadian Artillery Band, located in Edmonton, Alberta.

[11] On April 29, 2016, his first day with the Regular Force, MBdr. Denneboom immediately requested to be enrolled in the formal courses required for promotion pursuant to CFAO 9-8. In the Canadian Forces, members need to be nominated by their Career Manager for the courses they have requested. They are then placed on a waiting list. The process is entirely outside of a member's control. Nevertheless, MBdr. Denneboom regularly contacted his chain of command to ensure that his request for nomination had been forwarded to the Career Manager. He was particularly concerned with his request for the PLQ, since he was aware that musicians were generally afforded a low priority for enrollment to this course and could spend many months on the waiting list. MBdr. Denneboom was finally nominated for the PLQ on September 27, 2016, five months after his initial request.

[12] While waiting to be enrolled in the PLQ, MBdr. Denneboom completed the remaining requirements for the Sergeant promotion. As of October 29, 2016, apart from the PLQ, MBdr. Denneboom had met all the requirements.

[13] Around November 18, 2016, MBdr. Denneboom learned of the new promotion policy. He immediately requested to be enrolled in the PLQ, in the hopes that he could join the course before the policy came into effect, to no avail. On December 15, 2016, MBdr. Denneboom again wrote to the Music Branch Leadership, requesting to be enrolled in the PLQ and promoted to Sergeant pursuant to the old policy. His request was denied on September 27, 2017.

C. *MBdr. Denneboom's Grievance*

[14] On October 7, 2017, MBdr. Denneboom filed a military grievance against the unfair treatment of musicians who were in the process of completing their training when the new policy came into force. He argued that he was entitled to an "Acting/Lacking" promotion, a common practice of promoting members who have attained six months of service and completed all relevant criteria except for the PLQ, as of the date of completion of either their six-month term or of the other criteria. As redress, he requested to be enrolled in the PLQ, promoted to Sergeant retroactively as of October 29, 2016, under the former promotion policy, and to receive back pay to that date.

[15] Military grievances are subjected to a two-step process, composed of an Initial Authority and a Final Authority: *National Defence Act*, RSC 1985, c N-5 [the Act]; *Queen's Regulations and Orders for the Canadian Forces* [QR&O], Chapter 7. On March 30, 2018, the Director General Military Careers, acting as Initial Authority, dismissed the grievance. He found that, since MBdr. Denneboom had not been "course loaded" prior to the coming into force of the MESIP, his promotion had been fairly denied in accordance with policy.

[16] MBdr. Denneboom then asked that his grievance be forwarded to the Final Authority. Before it reached this decisive step, the grievance was sent as a discretionary referral to the Military Grievances External Review Committee [the Committee], whose mission is to review the grievance and to make findings and recommendations to the Final Authority: s. 29.2 of the Act.

[17] The Committee found that MBdr. Denneboom had been aggrieved. It surveyed the procedural history of the MESIP and found that the grandfathering provision had been set arbitrarily and was not the result of a proper analysis; that the communication of the MESIP to the members and their chain of command had been uneven and inconsistent; that the implementation date did not give sufficient time for affected members to prepare for the coming into force of the policy; and that several of MBdr. Denneboom's colleagues in the same situation had received a promotion, a further indication of the uneven application of the MESIP. It further recognized that Acting/Lacking promotions were a common practice and that MBdr. Denneboom would have been eligible to one as of October 29, 2016.

[18] The Committee recommended that redress for MBdr. Denneboom's grievance be granted either by amending the grandfathering provision of the MESIP so that musicians in his situation be included or by retroactively promoting him to Sergeant (Acting/Lacking). Additionally, the Committee recommended that a review be conducted of all musician files where the members had completed their courses with the exception of the PLQ, and had six months in rank as Corporal, prior to November 30, 2016, and that such members be afforded the same treatment.

[19] MBdr. Denneboom's grievance was then submitted to Captain (Navy) William Quinn, who acts as the Final Authority, pursuant to a delegation from the Chief of the Defence Staff under section 29.14 of the Act.

[20] On July 6, 2020, the Final Authority denied MBdr. Denneboom's grievance. He found that MBdr. Denneboom had been treated in accordance with the policies applicable to his

specific situation; that those policies, including their effect, were well considered; and that the grandfathering clause of the MESIP was reasonable and justified. Contrary to the findings of the Committee, he concluded that MBdr. Denneboom could not have been promoted as an "Acting/Lacking" Sergeant on November 29, 2016, as there were no vacant positions at the rank of Sergeant. He found that his situation was not identical to the situation of his colleagues who had received a promotion. He also reasoned that MBdr. Denneboom had not been treated unfairly because he had agreed to a position within the Regular Force in full awareness of the impending policy changes.

[21] MBdr. Denneboom now seeks judicial review of this decision.

[22] It bears noting that MBdr. Denneboom is not the only member of the Canadian Forces affected by the situation. The Committee's decision refers to three other similar grievances and notes that 14 members are affected. Cpl. Jaffary is the author of one of these grievances. He is also seeking judicial review of a negative decision of the Final Authority. I heard his application together with MBdr. Denneboom's and I am issuing judgment concurrently: *Jaffray v Canada (Attorney General)*, 2021 FC 532.

II. Analysis

[23] MBdr. Denneboom's main argument is that the Final Authority failed to engage with the essential findings of the Committee and misapprehended the facts of his grievance, especially as they pertain to the unfairness of the grandfathering provision, the uneven application of the new

policy and his eligibility for an Acting/Lacking promotion. He further submits that Capt (N) Quinn lacked the jurisdiction to act as Final Authority in this matter.

[24] Both parties agree that the substantive issues are to be assessed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[25] I find that the Final Authority's decision is unreasonable and must be quashed. Before providing my reasons for reaching this conclusion, I will explain why I do not agree with MBdr. Denneboom's argument that Capt (N) Quinn lacked jurisdiction over his grievance.

A. *The Final Authority's Jurisdiction*

[26] The Chief of the Defence Staff is the Final Authority for the grievance process, but may delegate this authority to subordinate officers pursuant to section 29.14 of the Act. In November 2017, Gen. Vance, then Chief of the Defence Staff, delegated his authority to Capt. (N) Quinn, subject to a number of exceptions, including any grievance "about a recovery or denial of a financial benefit or benefits in excess of $10,000." MBdr. Denneboom argues that, because his grievance pertains to the denial of a promotion, the redress he may be awarded in terms of back pay will well exceed the sum of $10,000, thus removing his grievance from Capt. (N) Quinn's jurisdiction.

[27] I cannot agree. Most grievances, if allowed, will entail financial consequences that, if projected far enough into the future, will easily exceed $10,000. Thus, in my view, a grievance

"about a recovery or denial of a financial benefit" is one where the main target is the denial of the benefit. This does not include a promotion grievance. MBdr. Denneboom argues that the language of the relevant exclusion must be compared to that of another exclusion pertaining to grievances "in which serious professional misconduct (harassment of a sexual nature, discrimination or abuse of authority) is a central issue." Thus, according to him, the denial of a benefit need not be the "central issue" of his grievance. I disagree. The phrase "a central issue" (with the indefinite article) conveys the idea that the issues mentioned need not be the main cause of action invoked, even though they play an important role in the case. I am unable to draw any conclusion from this difference in language. Thus, Capt. (N) Quinn had jurisdiction to decide MBdr. Denneboom's grievance.

B. *Reasonableness of Decision*

[28] This brings me to the reasonableness of the Final Authority's decision. According to the Supreme Court of Canada, "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": *Vavilov*, at paragraph 85. "These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt": *ibid* at paragraph 90. The Court listed the most important constraints, including the evidence before the decision-maker, its governing statutory scheme, other legislation and common law and the principles of statutory interpretation: *ibid* at paragraphs 108-135.

[29] Here, the Act establishes an additional constraint. Section 29.12 provides that the Final Authority may, and in certain cases must, refer a matter to the Committee before making a

decision. Section 29.13 states that the Final Authority is not bound by the recommendations of the Committee. If, however, the Final Authority intends to depart from these recommendations, it must provide reasons. No such requirement applies if the Final Authority is in agreement with the Committee.

[30] In establishing this system, Parliament intended to increase the independence and impartiality of the Canadian Forces' grievance process, while recognizing that the specific context of the military, in particular issues of operational effectiveness, is an overriding factor in certain cases: Rory G Fowler, "The Canadian Forces Grievance Process: How Adequate an Alternative Remedy Is It?" (2014) 27 Can. J. Admin L. & Practice 277 at 285-286. Similar mechanisms are used in other contexts to integrate external considerations in decision-making processes, for example with respect to resource co-management in land claims agreements: see, for example, *Makivik Corporation v Quebec (Attorney General)*, 2014 QCCA 1455 at paragraph 71; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paragraph 18, [2017] 2 SCR 576.

[31] It follows that the decision of the Committee establishes a substantial constraint on the Final Authority. The latter's decision must not only be justifiable based on the facts of the case and the applicable law. The Final Authority must also explain why it does not agree with the Committee's recommendation. This requires an additional layer of justification. In *Zimmerman v Canada (Attorney General)*, 2011 FCA 43 at paragraph 27, the Federal Court of Appeal found that a decision of the Final Authority was unreasonable for failing to grapple with the recommendations of the Committee:

> Finally, as noted in paragraph 16 above, the Chief of the Defence Staff did not contest the essential underpinnings of the Canadian

> Forces Grievance Board's recommendation that the grievance should be upheld. He did not contest the factual findings of the Canadian Forces Grievance Board. He even agreed with the Board's finding that the promotion process lacked transparency. Other than raising the issue of lack of available information, he did not criticize the Canadian Forces Grievance Board's recommendation that the grievance should be upheld. In light of this, and given the evidentiary record before him, it was not open to him to dismiss Commander Zimmerman's complaints about the promotion process.

[32] The Federal Court of Appeal dealt with a similar mechanism in *Wilkinson v Canada (Attorney General),* 2020 FCA 223. Classification grievances in the public service must be considered by an external committee before a decision is made by the relevant deputy head. The deputy head must provide reasons for departing from the committee's recommendations. The Court stated, at paragraph 20:

> In terms of a judicial review of the Deputy Head's decision, the make up of the Committee and the onus placed on the Deputy Head to justify non-acceptance of the Committee's recommendation suggest that the Deputy Head is not altogether free to substitute his decision for the Committee's. He must show how he disagrees with the Committee's fact-finding or its reasoning. A reviewing court, such as the Federal Court or this Court on appeal from the Federal Court, should review the Deputy Head's rationale for rejecting the Committee's reasons with these constraints in mind. Thus, if the Deputy Head's reasons for not accepting the Committee's recommendations are not tied to the reasons given by the Committee, his decision will be unreasonable. Similarly, if the Deputy Head misapprehends the Committee's recommendation and rejects it on the basis of something the Committee did not say or decide, his decision will be unreasonable.

(1) Unfairness of Grandfathering Provision

[33] The Final Authority's decision is unreasonable for failing to provide adequate justification for departing from the Committee's recommendation with respect to the fairness of the grandfathering provision.

[34] On this issue, the Committee summarized its views as follows:

> In my view, this grandfathering clause was set arbitrarily. Considering the evidence on file concerning the deliberations which led to the MESIP, I find that the clause does not appear to be chosen on a well-reasoned basis; it was not properly communicated to members; it does not appear to be the result of any thorough analysis of the number of members that would be impacted by the MESIP; nor does it seem to consider any alternatives or mitigation strategies.

[35] The Final Authority recorded its disagreement with this recommendation. Its reasons, however, were solely related to the need to establish a new ranking structure for the musician occupation. Nothing pertained specifically to the grandfathering provision. Thus, in spite of discussing the issue for three pages, the Final Authority failed to provide substantive support for the following conclusion:

> Given the large amount of research and the extensive amount of consideration of options, it is clear to me that contrary to the observations of the Committee, the decision regarding grandfathering was well-reasoned, thoroughly analyzed and many alternatives were considered.
>
> […]
>
> For some years, the branch had perpetuated Standard Operating Procedures (SOP) that had resulted in a large number of members who were improperly ranked and paid contrary to the NCMGS. This was, ultimately, improper and unfair to members of other

> branches and contrary to administrative orders and policy. A cut-off for this practice had to be established in the fairest way possible and, in my view, it was.

[36] Yet, the Committee found that the advisory group tasked with designing a new policy did not consider how the transition from the old to the new policy would take place. According to the Committee, "It does not appear that the Music Branch gave much, if any, thought to this issue affecting its own members." The Committee's findings appear to be borne out by the evidence. For example, the minutes of the last meeting of the advisory group do not contain any reference to the transitional period (Applicant's record at 268-273).

[37] Thus, the Final Authority's statements that the grandfathering provision was "thoroughly analyzed" and "established in the fairest way possible" are contrary to the evidence. Moreover, they fail to grapple meaningfully with the findings of the Committee. The Committee gave several reasons for its finding that the grandfathering provision was unfair. The Final Authority does not address these. He simply reiterates the rationale for the new policy and states that there had to be a cut-off. This, however, simply side-steps the real issue.

[38] The Final Authority also disagreed with the Committee's findings with respect to communication of the changes to recruits. The Final Authority commented as follows:

> I acknowledge that recruitment material continued to reflect the former SOP after changes had been made. However, this was mitigated by the fact that members, such as yourself, who sought enrollment or CT were personally informed that the change was imminent and that they could not be guaranteed promotion under the old SOP.

[39] Again, this overlooks the Committee's findings that awareness of the changes was inconsistent across the country and that, in any event, awareness of the impending changes does not disentitle members from a reasonable transition period.

[40] To summarize, the Final Authority's decision with respect to the fairness of the grandfathering provision does not comply with the constraints bearing upon it. Some of its findings are not supported by the evidence and, most importantly, it does not provide an adequate explanation for its rejection of the Committee's recommendations. When it is examined closely, the decision is merely an assertion of the Final Authority's preferred outcome—a bare "no" to the Committee's recommendations. A bare "no" does not fulfil the requirements of paragraph 29.13(2)(a) of the Act.

(2) Eligibility for Acting/Lacking Promotion

[41] The Final Authority's analysis of MBdr. Denneboom's eligibility to an Acting/Lacking promotion is also unreasonable, for similar reasons.

[42] The Final Authority found MBdr. Denneboom ineligible for an Acting/Lacking promotion on a single basis, that is, the unavailability of vacancies at the Sergeant rank, a requirement pursuant to paragraph 2 of Annex C of CFAO 49-4. The MESIP imposes a cap of 38 Sergeants, while there were 173 Sergeants in the Music Branch before its implementation. On this basis, the Final Authority concluded that the excessive number of Sergeants precluded MBdr. Denneboom from being eligible to an Acting/Lacking Sergeant rank.

[43] In doing so, the Final Authority unreasonably applies a promotion policy that had not yet come into force, rather than referring to the one that was applicable to MBdr. Denneboom at the relevant time. The Final Authority does not explain why it chooses to refer to CFAO 49-4, which only applied to the Music Branch as of November 30, 2016, instead of CFAO 9-8. Rather, it points to the fact that the Committee appears to have "omitted inclusion of [the vacancy] requirement in its consideration of [his] grievance". It seems that the Final Authority considers the Committee to have misinterpreted the requirements of CFAO 49-4.

[44] I find that this is not the case. The Committee did not apply CFAO 49-4 in its evaluation of whether MBdr. Denneboom was eligible for an Acting/Lacking promotion. The Final Authority conflates two determinations made by the Committee: the first, regarding MBdr. Denneboom's eligibility, and the second, regarding the appropriate redress for his grievance. In its analysis of MBdr. Denneboom's eligibility, the Committee explicitly mentions that its conclusion is "based on the policies in effect at the time of his CT [component transfer]". This means it applied CFAO 9-8 with respect to the issue of his eligibility. It is solely in its parting remarks on the appropriate redress that it mentions the possibility of relying on a provision of CFAO 49-4 to grant MBdr. Denneboom an Acting/Lacking promotion under the new regime.

[45] To properly assess the relevant criteria, the Final Authority had to consider the policy in force at the time. Under CFAO 9-8, the evidence clearly demonstrates that there were no positions in the Music Branch below the rank of Sergeant. Thus, it was unreasonable to consider that there was an excess number of Sergeants when, by all accounts, it was the working rank of

the musician occupation at the time. In fact, MBdr. Denneboom was already occupying a position of Sergeant, despite having the rank of Corporal (or Bombardier).

(3) Uneven Application of Policy

[46] Mr. Denneboom also argues that the Final Authority's decision is unreasonable because it fails to address evidence of uneven application of the new policy. According to him, other members of the Music Branch hired at the rank of Corporal after January 1, 2014 were promoted to Sergeant. In this regard, the Committee noted that "There is evidence on the other files that several of the grievor's colleagues were at exactly the same point as the grievor in their career progression and were promoted while he was not, which I find was unfair."

[47] Given that I have already found the decision unreasonable on other grounds, I will only comment briefly on this issue. In its analysis, the Final Authority made the following remarks:

> When, as part of their argument, a grievor states that others received what they are seeking I remind them that while some situations related to other individuals might seem similar in nature, they are seldom identical and often have different circumstances.
>
> … the principles of administrative law require me to consider and determine each case based on its own merits. Therefore, I will not comment on the specific situations of the others that you have referenced.

[48] No one denies that each case must be determined on its merits. Where inconsistent treatment is alleged, however, a case cannot be determined on its merits without drawing a comparison with similar cases. The comments quoted above could give rise to the perception that the Final Authority did not have an open mind regarding allegations of inconsistent treatment. If,

upon reconsideration, the Final Authority still disagrees with the recommendation of the Committee, it should provide a more fulsome discussion of the alleged comparators and explain precisely why the Committee was wrong in finding uneven treatment.

III. Remedy

[49] As the Final Authority's decision is unreasonable, I am granting MBdr. Denneboom's application for judicial review.

[50] MBdr. Denneboom asks me to return the matter to the Final Authority, directing him to allow the grievance and to determine the proper remedy. I decline to do so. Nothing warrants departure from the usual rule that where judicial review is granted, the matter is returned to the initial decision-maker for reconsideration. Of course, when making a new decision, the Final Authority must take this judgment into account and must not make the same error twice.

[51] MBdr. Denneboom, who represented himself with great talent in this Court, is not seeking costs. Thus, no costs will be awarded.

JUDGMENT in T-1061-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision made by the Final Authority on July 6, 2020 regarding the applicant is quashed.
3. The matter is returned to the Final Authority for reconsideration.
4. No costs are awarded.

"Sébastien Grammond"
Judge

FEDERAL COURT

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