

Federal Court



Cour fédérale

Date: 20121025

Docket: T-1489-11

Citation: 2012 FC 1243

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 25, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

LOUIS DUFOUR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Louis Dufour (Mr. Dufour) filed the present application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of the Service Pension Board [SPB] rendered on August 16, 2011, under the *Canadian Forces Superannuation Act*,

RSC 1985, c C-17 [CFSA]. In its decision, the SPB reversed a previous decision, dated April 17, 2000, on the reason for Mr. Dufour's retirement.

[2] For the following reasons, the Court dismisses the application for judicial review filed by Mr. Dufour.

II. Facts

[3] Mr. Dufour was a member of the Regular Force of the Canadian Forces [CF] during the period from September 6, 1988, and March 7, 2000, the day on which he was released from the CF for Reason 5(f) of Chapter 15 of the *Queen's Regulations and Orders* [QR&Os], namely, that he was "Unsuitable for Further Service".

[4] On November 19, 2007, Colonel F. Bariteau, Director of Military Careers Administration and Resource Management, under the authority delegated by the Chief of the Defence Staff, dismissed Mr. Dufour's request that the reason for his release be amended to "Medical" (Reason 3 of the QR&Os).

[5] Mr. Dufour applied for judicial review of that decision before the Federal Court in Docket T-76-08.

[6] In his decision dated September 22, 2008, Justice de Montigny, of the Federal Court, found that Mr. Dufour had not been given the basic explanations required to properly understand the reasons for the refusal to amend the reasons for his release from the CF.

[7] Justice de Montigny therefore allowed the application for judicial review and ordered that Mr. Dufour's record be returned to the CF for a fresh administrative review of the reasons for his release and a new decision with reasons.

[8] On January 21, 2010, the delegate of the Chief of the Defence Staff, in this case, Colonel G.P. Potter, Director of Military Careers Administration, acted on Justice de Montigny's decision. He issued a new decision following a fresh administrative review of Mr. Dufour's record.

[9] Colonel Potter upheld the decision to release Mr. Dufour for Reason 5(f). He found that Mr. Dufour's medical condition, at the time of his release, did not prevent him from serving in the CF. Consequently, Mr. Dufour's release was not based on medical reasons, but rather Mr. Dufour's unsuitability for further service (Reason 5(f)).

[10] Mr. Dufour received this decision in January 2010, but he did not challenge it through an application for judicial review. Instead, he filed a motion on December 8, 2010 (Docket T-76-08), in which he submitted that the respondent had failed to follow the order issued by Justice de Montigny. Mr. Dufour wanted the Court to impose the implementation of this decision.

[11] Prothonotary Rosa Aronovitch dismissed the motion on January 31, 2011, on the ground that Colonel Potter's decision complied with the order made in the decision of Justice de Motigny.

[12] Mr. Dufour appealed the Prothonotary's decision but did not follow up on his appeal, and the file was adjourned *sine die*.

[13] Mr. Dufour also took steps to have the reason for his retirement for the purposes of the CFSA reconsidered by the SPB. On April 17, 2000, the SPB had already issued a decision establishing that the applicant's retirement was not based on disability under paragraph 16(1)(d) (previously paragraph 18(1)(b)) of the CFSA.

[14] On August 16, 2011, the SPB allowed the request for reconsideration of its decision dated April 17, 2000, and amended the reason for Mr. Dufour's retirement. Mr. Dufour now falls under paragraph 16(1)(d) of the CFSA (disability). He is therefore entitled to an immediate indexed medical pension.

[15] On September 15, 2011, Mr. Dufour filed an application for judicial review of the SPB's decision dated August 16, 2011.

III. Legislation

[16] The relevant provisions from the *Canadian Forces Superannuation Act*, RSC 1985, c C-17 [CFSA], the *National Defence Act*, RSC 1985, c N-5, the *Queen's Regulations and Orders for the Canadian Forces* [QR&Os] and the *Federal Courts Act*, RSC 1985, c F-7, are reproduced in the annex to the present decision.

IV. Issue and standard of review

A. Issue

- *Does the SPB have the jurisdiction to grant the remedy sought by Mr. Dufour?*

B. Standard of review

[17] It is trite law that the standard of review applicable to the issue of jurisdiction is that of correctness. See *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 59 [*Dunsmuir*].

V. Parties' positions

A. Position of Mr. Dufour

[18] Mr. Dufour submits that the decision made by the SPB on August 16, 2011, is binding on Colonel G.P. Potter, Director of Military Careers Administration. Colonel Potter should therefore amend the reason for his release from "Unsuitable for Further Service (Reason 5(f) of the QR&Os) to "medical grounds" (Reason 3(b) of the QR&Os). He is asking the SPB to amend Colonel Potter's decision or to refer it to [TRANSLATION] "the appropriate authority" to do so.

B. Respondent's position

[19] The respondent submits, first, that the SPB does not have the jurisdiction to amend the reason for Mr. Dufour's release. The exclusive jurisdiction of the SPB is limited to determining the reason for the retirement of regular members of the CF for the purposes of the CFSA under subsections 49(2) and 49(3) of the CFSA.

[20] Only the Chief of the Defence Staff or his delegate has jurisdiction to release a member and determine the official reason for his or her release from the CF under Chapter 15 of the QR&Os (see QR&Os, Chapter 15, Reason 3(b)). The respondent is relying on *Glavine v Canada (Attorney General)*, [2000] FCJ No 359, 185 FTR 175 at paragraph 18, in which the Honourable Justice MacKay writes as follows:

[18] The decision to release a non-commissioned officer, as Mr. Glavine was, is vested in the Chief of the Defence Staff or his

designate. . . The authority is delegated by the Chief of the Defence Staff to various officers depending upon the release item applicable, and in this case, for the release under item 3(b) the authority was the “DPCA [Director Personnel Career Administration] upon recommendation from Career Review Board (Medical)”.

[21] The respondent submits three other reasons for concluding that Mr. Dufour’s application for judicial review should be dismissed. First, he argues that Mr. Dufour cannot challenge the decision dated January 21, 2010, confirming his release from the CF in 2000 for Reason 5(f) since this is not the decision being challenged by the present application for judicial review. The respondent is relying on the Supreme Court of Canada’s judgments in *Wilson v The Queen*, [1983] 2 SCR 594, and *R v Litchfield*, [1993] 4 SCR 333, in support of his position that collateral attacks are not allowed since they undermine the orderly and functional administration of justice. The respondent also relies on the rule against collateral attack described in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paragraph 20 [*Danyluk*].

[22] Lastly, he submits that, under subsection 18.1(2) of the *Federal Courts Act*, Mr. Dufour is out of time since he should have filed his application for judicial review no later than February 21, 2010, if he wanted to challenge the decision rendered by Colonel Potter on January 21, 2010.

IV. Analysis

[23] It is important to recall this Court’s powers in judicial review of federal boards, commissions or other tribunals. The Court’s jurisdiction is provided at subsection 18.1(3) of the

Federal Courts Act. The Court cannot order a federal board, commission or other tribunal to make a particular determination on the merit of a request. It also cannot substitute its own decision for that of the federal board, commission or other tribunal. In *Dunsmuir*, above, at paragraph 28, the Supreme Court stated the following in this regard:

[28] By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

[24] In short, when this principle is applied to the case before the Court, the Court must conclude that even if the SPB had the discretion to change the reason for Mr. Dufour's release from "Unsuitable for Further Service" to "medical grounds", in the context of a judicial review, this Court cannot compel it to do so. It is clear that the CFSA does not contain any provisions allowing the SPB to impose its decision on the Chief of the Defence Staff, who alone has the power to determine the reasons for the retirement of a member of the Forces under section 18 of the *National Defence Act*, RSC 1985, c N-5, and chapters 1 and 15 of the QR&Os.

[25] Furthermore, the Court wishes to emphasize that the SPB's jurisdiction is limited to determining the reason for the release of a Regular Force member solely for the purposes of the CFSA.

[26] The application for judicial review filed by Mr. Dufour of a decision of the SPB dated August 16, 2011, seeks rather to challenge the decision of Colonel Potter, Director of Military

Careers Administration, dated January 21, 2010. The rule set out in *Danyluk*, above at paragraph 20, prohibits collateral attacks.

[27] In addition, the Court notes that, under subsection 18.1(2) of the *Federal Courts Act*, Mr. Dufour is unfortunately out of time to challenge the decision rendered by Colonel Potter on January 21, 2010, confirming his release from the Canadian Forces for Reason 5(f) (the applicant's unsuitability for further service). Mr. Dufour should have filed an application for judicial review of Colonel Potter's decision no later than February 21, 2010. He failed to do so.

[28] The Court understands the position of Mr. Dufour, a man of honour who feels that Reason 5(f) for his release, namely, Unsuitable for Further Service, undermines his integrity. Mr. Dufour sensibly points out that the SPB eventually recognized the true reason for his release from the armed forces, namely, medical grounds. He therefore wonders why the Chief of the Defence Staff would not do the same. Unfortunately, he is now out of time for challenging by judicial review the decision made by Colonel Potter on January 21, 2010, under the Defence Staff designation. Over the last few years, Mr. Dufour has spent most of his efforts on having his rights to a pension recognized. He was finally successful.

[29] The role of this Court is limited to enforcing the Act, which, in the present matter, does not permit us to allow Mr. Dufour's application for judicial review for the reasons set out in the preceding paragraphs. The Court nonetheless finds that it could be in Mr. Dufour's interest to seek an alternative dispute resolution and to use the services offered by the Canadian Forces Ombudsman.

ORDER

For these reasons, **THE COURT DISMISSES** the application for judicial review filed by Mr. Dufour, without costs.

“André F.J. Scott”

Judge

Certified true translation
Johanna Kratz, Translator

Annex

Canadian Forces Superannuation Act,
RSC 1985, c C-17

16. (1) A contributor who ceases to be a member of the regular force and who has to their credit two or more years of pensionable service is entitled to an immediate annuity if

(d) they are disabled and have to their credit not less than 10 years of pensionable service

49 (2) It is the duty of the Service Pension Board to determine, in the case of any contributor who is retired from the regular force, the reason for the retirement, and the Board shall, on the making of the determination, certify in writing the reason for that retirement as determined by the Board.

(3) No payment shall be made of any annuity or other benefit under this Act to a contributor who is retired from the regular force except on certification in writing by the Service Pension Board of the reason for the retirement as determined by the Board, and on the certification thereof the contributor shall be presumed, in the absence of evidence to the contrary, to have been retired from the regular force for that reason.

National Defence Act, RSC 1985, c N-5

Appointment, rank and duties of Chief of Defence Staff

18. (1) The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe

Loi sur la pension de retraite des Forces canadiennes, LRC 1985, c C-17

16. (1) Le contributeur qui cesse d'être membre de la force régulière et qui compte à son crédit au moins deux années de service ouvrant droit à pension a droit à une annuité immédiate si, selon le cas :

d) il est invalide et compte à son crédit au moins dix années de service ouvrant droit à pension

49 (2) Le Conseil des pensions militaires a pour mission d'établir, dans le cas de tout contributeur retraité de la force régulière, la raison de sa retraite de la force régulière, et, dès qu'il a ainsi établi cette raison, il la certifie par écrit, telle que l'a déterminée le Conseil.

(3) Il ne peut être versé aucune annuité ou autre prestation selon la présente loi à un contributeur retraité de la force régulière, sauf sur certification écrite, par le Conseil des pensions militaires, de la raison de cette retraite, ainsi que l'a établie le Conseil, et, sur certification de cette raison, le contributeur est présumé, en l'absence de preuve contraire, avoir été retraité de la force régulière pour cette raison.

Loi sur la défense nationale, LRC c N-5

Fonctions du chef d'état-major de la défense

18. (1) Le gouverneur en conseil peut élever au poste de chef d'état-major de la défense un officier dont il fixe le grade. Sous l'autorité du ministre et sous réserve

and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.

des règlements, cet officier assure la direction et la gestion des Forces canadiennes.

Responsibility and channels of communication

Voie hiérarchique pour les ordres et directives

(2) Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff.

(2) Sauf ordre contraire du gouverneur en conseil, tous les ordres et directives adressés aux Forces canadiennes pour donner effet aux décisions et instructions du gouvernement fédéral ou du ministre émanent, directement ou indirectement, du chef d'état-major de la défense.

Obligation to serve

Obligation de servir

23. (1) The enrolment of a person binds the person to serve in the Canadian Forces until the person is, in accordance with regulations, lawfully released.

23. (1) Toute personne enrôlée dans les Forces canadiennes est obligée d'y servir jusqu'à ce qu'elle en soit légalement libérée, en conformité avec les règlements.

Oaths and declarations on enrolment

Serment lors de l'enrôlement

(2) Oaths and declarations required on enrolment shall be taken and subscribed before commissioned officers or justices of the peace and shall be in such forms as may be prescribed in regulations.

(2) Les serments et déclarations requis pour l'enrôlement sont prêtés ou souscrits devant des officiers commissionnés ou des juges de paix, selon les formules réglementaires.

Queen's Regulations and Orders (QR&Os)
Volume 1 - Administration

Ordonnances et règlements royaux applicables aux Forces canadiennes (ORFC)

QR&Os: Volume I - Chapter 15 Release

Volume I - Chapitre 15
Libération

Section 1 – General

15.01 - RELEASE OF OFFICERS AND
NON-COMMISSIONED MEMBERS

(3) The authority to approve a release is:

- a. the Governor General, in the case of an officer other than an officer cadet; or
- b. the Chief of the Defence Staff or such officer as he may designate, in the case of an officer cadet or non-commissioned member.

TABLE TO ARTICLE 15.01

Reasons for Release

Item 3(b) On medical grounds, being disabled and unfit to perform his duties in his present trade or employment, and not otherwise advantageously employable under existing service policy.

Item 5(f) Unsuitable for Further Service.

Applies to the release of an officer or non-commissioned member who, either wholly or chiefly because of factors within his control, develops personal weakness or behaviour or has domestic or other personal problems that seriously impair his usefulness to or impose an excessive administrative burden on the Canadian Forces.

Section 1 – Généralités

15.01 - LIBÉRATION DES OFFICIERS
ET MILITAIRES DU RANG

(3) Les personnes suivantes peuvent autoriser la libération :

- a. le gouverneur général, dans le cas d'un officier autre qu'un élève-officier;
- b. le chef d'état-major de la défense ou tout officier désigné par lui, dans le cas d'un élève-officier ou d'un militaire du rang.

TABLEAU AJOUTÉ À L'ARTICLE
15.01

Motifs de libération

Numéro 3b) Lorsque du point de vue médical le sujet est invalide et inapte à remplir les fonctions de sa présente spécialité ou de son présent emploi, et qu'il ne peut pas être employé à profit de quelque façon que ce soit en vertu des présentes politiques des forces armées.

Numéro 5f) Inapte à continuer son service militaire.

S'applique à la libération d'un officier ou militaire du rang qui, soit entièrement soit principalement à cause de facteurs en son pouvoir, manifeste des faiblesses personnelles ou un comportement ou a des problèmes de famille ou personnels qui compromettent grandement son utilité ou imposent un fardeau excessif à l'administration des Forces canadiennes.

*Federal Courts Act, RSC 1985, c F-7**Loi sur les Cours fédérales, LRC 1985, c F-7*

Time limitation

18.1(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

Délai de présentation

18.1(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1489-11

STYLE OF CAUSE: LOUIS DUFOUR
v
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: September 4, 2012

**REASONS FOR ORDER
AND ORDER:** SCOTT J.

DATED: October 25, 2012

APPEARANCES:

Louis Dufour

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Vincent Veilleux

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Louis Dufour
Notre-Dame de Lourdes, Joliette,
Quebec

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Myles J. Kirvan
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT