

Federal Court



Cour fédérale

Date: 20230210

Docket: T-2674-22

Citation: 2023 FC 205

Ottawa, Ontario, February 10, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

KRISTOPHER HOFFMAN

**Applicant/
Moving Party**

and

ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Corporal Kristopher Hoffman, is a non-commissioned member of the Canadian Forces. He enrolled in the Regular Force in 2012 and continues to serve as a Material Management Technician.

[2] On two separate occasions, remedial measures were imposed on Corporal Hoffman for misconduct. Corporal Hoffman submitted two grievances under the statutory grievance process, challenging the remedial measures. The two grievances were determined by the final authority [Final Authority] on May 4, 2022. The decision of the Final Authority is currently the subject of an application for judicial review in Court File T-1231-22.

[3] Corporal Hoffman is currently the subject of an Administrative Review for misconduct, which was initiated in order to establish whether Corporal Hoffman demonstrated inappropriate conduct or a professional deficiency that would call into question the viability of his continued service. The events giving rise to the remedial measures are included among the factors being considered in the Administrative Review process. Corporal Hoffman submitted a grievance contesting the timing and fairness of the Administrative Review, which has yet to be determined. In parallel, he brought the present application for judicial review in respect of the decision to proceed with the Administrative Review.

[4] Corporal Hoffman seeks an interlocutory injunction prohibiting the Director Military Careers Administration [DMCA] from proceeding with the Administrative Review until such time as his three grievances are resolved and there is no further related litigation pending before the Federal Court.

[5] Corporal Hoffman submits that the Administrative Review is premature in light of it being predicated in large part on the allegations and processes that he is disputing in the grievance process. He highlights the nature of the Crown-soldier relationship, as being an

asymmetrical relationship in which the protection of his rights is largely procedural, there are very few substantive remedies, and decision-making, including the statutory grievance process, is marked by broad discretion, a lack of independence, and judicial deference. He pleads that the decisions that he is in the process of grieving, along with the grievance process to date, have been both unfair and unreasonable.

[6] Corporal Hoffman submits that he satisfies the three-part test set forth by the Supreme Court of Canada in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. Relying on *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 [*Google*], he pleads that it would be just and equitable in the circumstances of the present case to permit him to exhaust his remedies under the *National Defence Act*, RSC 1985, c N-5 [NDA], before proceeding with the Administrative Review.

[7] The Respondent submits that Corporal Hoffman has failed to satisfy the three-part test and there are no extraordinary circumstances that could justify the Court's intervention in an ongoing administrative process. The Respondent pleads, relying on *Dugré v Canada (Attorney General)*, 2021 FCA 8 [*Dugré*], that the non-availability of interlocutory relief in the context of an administrative process is next to absolute. The Respondent submits that irreparable harm has not been established, given that the Administrative Review is in process, and as such, any harm that could arise is unknown and speculative.

[8] For the reasons that follow, and despite the able submissions of counsel for Corporal Hoffman, this motion for an interlocutory injunction prohibiting DMCA from proceeding with

the Administrative Review of Corporal Hoffman is dismissed. I have not been satisfied that Corporal Hoffman has met the three-part test set out in *RJR-MacDonald*. In the present circumstances, I am unable to conclude that this is an exceptional situation such that it would be just and equitable for the Court to intervene in the Canadian Forces' ongoing administrative process.

II. Issue

[9] The sole issue in the present motion is whether Corporal Hoffman has satisfied the three-part conjunctive test set out in *RJR-MacDonald*, such that an interlocutory injunction should be granted.

III. Analysis

[10] In order to succeed on his motion for an interlocutory injunction, Corporal Hoffman must satisfy the well-known three-part test set out in *RJR-MacDonald*, namely that: (1) there is a serious issue to be tried (that is, the underlying application for judicial review raises a serious issue); (2) he would suffer irreparable harm if the injunction is not granted; and (3) the balance of convenience favours granting the injunction (*RJR-MacDonald* at p 334).

[11] The test is conjunctive, meaning that, to be entitled to relief, an applicant must satisfy all three elements of the test (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 14 [*Janssen*]). None of the three branches can be seen as an “optional extra” (*Janssen* at para 19),

and the “failure of any of the three elements of the test is fatal” (*Western Oilfield Equipment Rentals Ltd v M-I LLC*, 2020 FCA 3 at para 7).

[12] However, the three elements of the test are flexible, interrelated and not watertight compartments (*Monsanto v Canada (Health)*, 2020 FC 1053 at para 50 [*Monsanto*]). The elements should not be assessed in complete isolation from one another. Strength in one factor may compensate for weakness in another (*Monsanto* at para 50). One must recall that an interlocutory injunction is an equitable relief and consequently, “a degree of flexibility must be preserved in order to ensure that the remedy can be effective when it is needed to prevent a risk of imminent harm pending a ruling on the merits of the dispute” (*Richardson v Seventh-day Adventist Church*, 2021 FC 609 at para 30).

[13] The Supreme Court of Canada has confirmed that the fundamental question when applying the three-part test is “whether the granting of an injunction is just and equitable in all of the circumstances of the case”, which “will necessarily be context-specific” (*Google* at para 25).

[14] In the circumstances of the present case, I find the determinative issue to be that Corporal Hoffman has not provided clear and non-speculative evidence that irreparable harm will follow if the injunction is not granted. I have considered the oral and written submissions of the parties and the evidence provided, and concluded that there is insufficient strength in Corporal Hoffman’s position with respect to the other elements of the test to compensate for the weakness in his position on irreparable harm.

[15] In order to satisfy the second element of the three-part test, the onus is on Corporal Hoffman to demonstrate through clear and convincing evidence that irreparable harm will occur if the injunction is not granted. This must be established based on clear and non-speculative evidence at a convincing level of particularity demonstrating a real probability that unavoidable irreparable harm will result (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31 [*Glooscap*]; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7 [*US Steel*]). Irreparable harm must consist of more than a series of possibilities and cannot be based on assertions, speculations, assumptions or hypotheticals (*Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427 at paras 14-15; *Glooscap* at para 31). When seeking to demonstrate irreparable harm, it is not sufficient to demonstrate that irreparable harm is “likely” to be suffered (*US Steel* at para 7).

[16] The notion of irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which “either cannot be quantified in monetary terms or which cannot be cured” (*RJR-MacDonald* at p 341).

[17] Corporal Hoffman has raised a number of valid concerns surrounding his ability to be reinstated and compensated should he be unfairly or unreasonably released from the Canadian Forces. While the *Strengthening Military Justice in the Defence of Canada Act*, SC 2013, c 24, introduced a provision that would permit the Chief of the Defence Staff to cancel a release or transfer if they are satisfied that the release or transfer was improper, the provision has not come into force and the grounds for reinstatement under subsection 30(4) of the NDA remain narrow and would not apply in the present case.

[18] With respect to compensation, as a member of the Canadian Forces, Corporal Hoffman is precluded from bringing an action for wrongful dismissal (*Gallant v The Queen in Right of Canada*, 1978 CanLII 2084 (FC), 91 DLR (3d) 695; *Donoghue v Canada (Minister of National Defence)*, 2004 FC 733 at para 35). The *Canadian Forces Grievance Process Ex Gratia Payments Order*, PC 2012-0861, provides the Chief of the Defence Staff with the authority to make *-ex gratia* payments to a member in respect of whom a final decision is made under the grievance process, however, there are a number of requirements, including a maximum limit of \$100,000 (*Stemmler v Canada (Attorney General)*, 2016 FC 1299 at paras 18-19).

[19] Nevertheless, what is ultimately fatal to the present motion is the speculative nature of the harm on the basis that the Administrative Review is still in progress. It would therefore not be appropriate for this Court to predict the outcome and prevent the Administrative Review from proceeding.

[20] I am mindful of Corporal Hoffman's submissions that the outcome is not speculative on the following basis. On May 14, 2021, Corporal Hoffman was provided with a Notice of Intent to Recommend Release, to which he submitted his objections, including that it was premature given he was in the process of contesting the remedial measures. Corporal Hoffman's commanding officer requested an Administrative Review in support of the recommendation for compulsory release. DMCA proceeded with the Administrative Review and issued a decision on November 25, 2021. DMCA concluded that "when viewed collectively, the allegations demonstrate a consistent pattern of inappropriate, harassing behaviour."

[21] On December 1, 2021, DMCA directed that Corporal Hoffman be released from the Canadian Forces [Release Decision]. The release was initially scheduled for January 15, 2022, but later postponed to March 22, 2022. On February 3, 2022, DMCA suspended the Release Decision in order to review additional evidence that was not reviewed prior to the decision of November 25, 2021. The Administrative Review, therefore, was reopened and continued. Corporal Hoffman again objected to the use of the process in light of the unresolved grievances.

[22] On December 15, 2022, Corporal Hoffman received disclosure and a second synopsis in relation to the Administrative Review, along with an opportunity to present submissions in response. Corporal Hoffman again presented his objections to the Administrative Review on the basis that it was premature and an abuse of process. His submissions in response are due on February 15, 2023.

[23] Corporal Hoffman submits that the harm is not speculative on a number of grounds. He submits that we know what the outcome is as the Release Decision was not cancelled, it was only suspended. Furthermore, in the pending judicial review in Court File T-1231-22, the Respondent has conceded that the decision dated May 4, 2022, by the Final Authority is unreasonable, and the remaining issue is what remedy is appropriate. Corporal Hoffman therefore submits that it is known that the Administrative Review relies on an evidentiary basis that remains in dispute.

[24] In addition, Corporal Hoffman highlights that his grievance contesting the decision to conduct an Administrative Review, which he submitted on December 7, 2021, stagnated before the Initial Authority, until he requested that it be referred to the Final Authority on January 9,

2023. He submits that DMCA ignored that the grievance directly impugned the conduct of the Administrative Review and has disregarded his challenge to the merits of an Administrative Review that he alleges is based on “untested and unproven allegations”.

[25] Corporal Hoffman submits that the harm he faces is being obliged to participate in the Administrative Review, where his deadline to provide evidence and submissions is imminent, when several relevant factors and issues remain unresolved in the ongoing grievance process that he is obliged to use. This, in his submission, is not speculative.

[26] The Respondent submits that this is the legal regime, and it is not for the Court to intervene and change the way the regime works. If the legislature wished to permit members of the Canadian Forces to stay release decisions until their grievances are resolved, the legislature would have done so as they did with the Royal Canadian Mounted Police [RCMP].

[27] The Respondent argues that if the injunction is not granted, the Administrative Review will simply continue, on the basis of a new record, and a decision will ultimately be rendered. It would be premature and unprecedented to stop the process in its tracks and presuppose an outcome or a closed mind on the part of the decision maker. The Respondent pleads that any harm is unknown and speculative and relies on *Letnes v Canada (Attorney General)*, 2020 FC 636 [*Letnes*], where Justice Denis Gascon considered the concerns of an RCMP officer who was subject to a discharge process that he felt was a foregone conclusion. Justice Gascon concluded that “the situation that will exist when the harm claimed by Cpl. Letnes eventually occurs has not

yet crystallized, and the nature or the extent of any harm may change between now and the moment where the harm would occur” (*Letnes* at para 68).

[28] The Respondent pleads that if the outcome of the Administrative Review is not favourable then Corporal Hoffman can follow the administrative process and grieve the outcome, which includes a process by which the matter may be considered by an independent body and a *do novo* review by a Final Authority. Such a process includes a greater ability to test the evidence against him. As such, any harm to Corporal Hoffman’s procedural rights is not, in the Respondent’s view, irreparable. Moreover, if the Release Decision is reinstated or a new one is issued, at that point, should Corporal Hoffman see fit, he may then bring a motion for an injunction.

[29] Corporal Hoffman acknowledges that a release decision is not yet effective, but submits that it would not be appropriate to wait for two reasons: (i) it would be a waste of judicial resources to have to return to the Court when such a decision is rendered; and (ii) it ignores the existing irreparable harm of having the Administrative Review proceed without all the relevant evidence and the resulting violence that is being done to the process.

[30] The difficulty with Corporal Hoffman’s position is that the Administrative Review is in fact in progress and has yet to conclude. Once a decision is rendered in the Administrative Review, and depending on the decision, then the Release Decision may be reinstated. At this juncture, the outcome, and thus the harm, is speculative. Moreover, Corporal Hoffman has not argued that he would in any way be impeded or precluded from returning to the Federal Court to

seek injunctive relief should the Administrative Review not be decided in his favour and should DMCA then issue an order directing his compulsory release from the Canadian Forces. While the efficient use of judicial resources remains a concern for the Court generally, this is not a factor that would assist Corporal Hoffman in demonstrating irreparable harm in the context of the three-part test as set out in *RJR MacDonald*.

[31] I also agree with the Respondent that any harm suffered by the Administrative Review proceeding while the grievances are pending is not irreparable. As pled by the Respondent, a grievance mechanism exists to address any deficiencies in the Administrative Review. I am cognizant of the challenges that Corporal Hoffman has faced to date in terms of the administrative and grievances processes, however, that does not warrant this Court taking the extraordinary step of preventing an ongoing administrative process from proceeding. The Federal Court of Appeal has recently confirmed that a Court should only interfere in an ongoing administrative process in “exceptional circumstances” and that such “circumstances are very rare and require that the consequences of an interlocutory decision be so ‘immediate and radical’ that they call into question the rule of law” (*Dugré* at para 35). Indeed, the Federal Court of Appeal describes the non-availability of interlocutory relief as “next to absolute” (*Dugré* at para 37).

[32] Consequently, this is not an appropriate case to exercise my discretion in favour of Corporal Hoffman by supplanting the administrative process and preventing DMCA from proceeding with the Administrative Review. It would not be just and equitable to grant injunctive relief given the guidance from the Federal Court of Appeal and the recourses available to

Corporal Hoffman, namely the grievance process, where any resulting final decision will remain subject to the scrutiny of this Court.

IV. Conclusion

[33] For the foregoing reasons, I conclude that Corporal Hoffman has failed to satisfy the three-part conjunctive test set out in *RJR-MacDonald*. Consequently, his motion for an interlocutory injunction is hereby dismissed.

[34] The Respondent seeks costs. Considering the circumstances of the present matter, and my discretion pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, costs in the amount of \$750.00 are hereby awarded to the Respondent.

ORDER in T-2674-22

THIS COURT ORDERS that:

1. The Applicant's motion for interlocutory injunction is dismissed; and
2. Costs in the amount of \$750.00 are awarded to the Respondent.

“Vanessa Rochester”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2674-22

STYLE OF CAUSE: KRISTOPHER HOFFMAN v ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 8, 2023

ORDER AND REASONS: ROCHESTER J.

DATED: FEBRUARY 10, 2023

APPEARANCES:

Rory Fowler FOR THE APPLICANT/MOVING PARTY

Kevin Palframan FOR THE RESPONDENT

SOLICITORS OF RECORD:

Law Office of Rory G. Fowler FOR THE APPLICANT/MOVING PARTY
Kingston, Ontario

Attorney General of Canada FOR THE RESPONDENT
Ottawa, Ontario