

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160524

Docket: A-302-15

Citation: 2016 FCA 157

**CORAM: NADON J.A.
RENNIE J.A.
GLEASON J.A.**

BETWEEN:

JASYN EVERETT WALSH

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on April 20, 2016.

Judgment delivered at Ottawa, Ontario, on May 24, 2016.

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

**RENNIE J.A.
GLEASON J.A.**

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REASONS FOR JUDGMENT

NADON J.A.

[1] The appellant, Jason Everett Walsh, seeks to set aside the judgment of Mr. Justice de Montigny of the Federal Court (as he then was) (the Judge) dated June 22, 2015 (2015 FC 775) which dismissed the appellant's judicial review application of a decision made by the Chief of the Defence Staff (CDS) dated March 17, 2014 in which the CDS concluded that the appellant's release from the Canadian Armed Forces (CAF) "was a reasonable outcome of the nature of [his] repeated misconduct" (page 12 of the decision). In other words, the appellant's grievance from the decision to release him from the CAF was denied.

[2] I need not repeat the facts as they are well summarized in the Judge's reasons (the reasons). Suffice it to say that the appellant, a master seaman, was released from the CAF on account of three separate acts of sexual misconduct, that he filed a grievance with respect to his release and that the grievance was ultimately dismissed by the CDS following a *de novo* review of the grievance.

[3] The appellant says, both in his written and oral arguments, that he raised seven issues before the Judge and that the Judge erred in regard thereto. The seven issues raised by the appellant before the Judge are as follows and can be found at paragraph 2 of his memorandum of fact and law:

- (1) Does a *de novo* review cure a serious breach of procedural fairness?
- (2) Is a member's release from the CF declared void *ab initio* if the process followed leading to the release is found to have had significant procedural fairness issues?
- (3) Did the CDS fail to provide adequate reasons as to why he did not accept the findings and recommendations (F&R) of the Committee?
- (4) Did the CDS properly and fully consider all of the major points advanced by the Appellant throughout the military grievance process?
- (5) Did the CDS properly release the Appellant from the CF after [he] set aside the original decision from the Director Military Careers and Administration (DMCA)?

- (6) Did the CDS understand, or have an evidentiary basis to reject, the medical opinion concerning the Appellant's prescribed use of Paxil and his continued service in the CAF?
- (7) Does the unexplained delay from the CDS to adjudicate the grievance in a timely manner lead to a breach in procedural fairness and/or lead to an abuse of process?

[4] In his written arguments before us, at paragraph 3, the appellant says that another issue must be decided by this Court, namely whether because the Judge failed to consider most of the issues raised by him and that the Judge, in effect, adopted the respondent's version of the facts, there exists a reasonable apprehension of bias on the Judge's part. However, to his credit, the appellant did not raise nor address this issue in his oral arguments before us and, as a result, we heard no submissions from the Attorney General on this point. Consequently, I will not address this issue in these reasons.

[5] Notwithstanding the appellant's forceful and well-argued appeal, I have not been persuaded that there is any basis for us to intervene. I would further add that, for the reasons given by the Judge, the appeal ought to be dismissed.

[6] I am of the view, like the Judge, that the decision of the CDS, when all relevant circumstances are taken into consideration, is not one that can be qualified as unreasonable.

[7] Contrary to the appellant's submissions, the Judge gave full consideration to the issues raised by the appellant and the arguments put forward by him in regard to these issues. Suffice it to read the Judge's reasons to be convinced of that proposition.

[8] After setting out the relevant facts (paragraphs 3 to 17 of the reasons), the Judge turned to the CDS' decision and examined it closely (paragraphs 18 to 27 of the reasons). The Judge then turned to the issues raised by the appellant pertaining to the reasonableness of the CDS' decision and to the issue of procedural fairness.

[9] After briefly setting out the appellant's grounds of complaint against the CDS' decision, the Judge explained the legislative and policy framework applicable to the appellant's grievance. The Judge then indicated the standard pursuant to which he would review the CDS' decision, namely the standard of reasonableness. However, with regard to the questions pertaining to procedural fairness, the Judge said he would apply the standard of correctness. There can be no doubt that the Judge properly identified the applicable standards.

[10] The Judge then proceeded to address the question of whether the CDS' decision was reasonable. In so doing, he turned to the specific points raised by the appellant in regard thereto. More particularly, the Judge considered the appellant's arguments concerning the adequacy of the CDS' reasons in disregarding the recommendation made by the Military Grievances External Review Committee (the Committee) that he should not be released. The Judge also considered the question of whether the CDS had taken into account those medical opinions which, according to the appellant, supported the view that he was treatable and that his participation in

rehabilitation programs prior to his release had been very positive. The Judge further considered the appellant's submissions that the CDS had not properly explained why the chosen sanction had been release from the CAF and not, as recommended by the Committee, counseling and probation.

[11] The Judge found that the appellant's arguments were without merit. At paragraphs 37 to 48, he sets out his rationale for dismissing the appellant's arguments concerning the reasonableness of the CDS' decision.

[12] The Judge makes it clear that, in his view, the CDS did consider all relevant medical opinions on file in reaching his conclusion. The Judge also makes it clear that he was satisfied that the CDS had properly explained in his reasons why he could not agree with the Committee's recommendation, adding that the CDS' reasons were "perfectly intelligible" both in regard to the Committee's ultimate recommendation and in regard to those areas where he disagreed with the Committee.

[13] The Judge then said that the CDS had also satisfactorily explained why a *de novo* hearing could cure a breach of procedural fairness.

[14] After commenting that the CDS' decision to release the appellant from the CAF might be seen to be harsh, the Judge held that it could not be said that the decision was "unintelligible and for which there is no basis in the evidence" (paragraph 43 of the reasons). The Judge then made the following remarks at paragraph 43 of his reasons which I totally endorse:

The Final Authority is given a broad discretion when considering and determining grievances, especially when identifying the remedies appropriate under the circumstances, because of his in-depth knowledge of the military environment and operations. These kinds of decisions are owed a high degree of deference, and I have not been convinced that the course of action chosen (release instead of counselling and probation) is not one of the “possible, acceptable outcomes which are defensible in respect of the facts and law”.

[15] The Judge then addressed the appellant’s argument that the CDS had not considered his submissions to the effect that his usefulness to the CAF had not been affected by his psychological/medical condition. In making this argument, the appellant made comparisons with other cases where although the sexual misconduct at issue was definitely more serious than his, the offender had not been released but sent to counseling and probation.

[16] First, the Judge said that he was satisfied that the CDS had addressed all of the appellant’s submissions, adding that there could be no doubt that the appellant’s repeated sexual misconduct was at the heart of the CDS’ determination that he was unsuitable for service in the CAF. The Judge also indicated that it was clear that the CDS had determined that the appellant’s acts of sexual misconduct were clearly within his control and that he was responsible for his actions.

[17] The Judge also pointed out that in endorsing the appellant’s release from the CAF, the CDS had concluded, based on medical opinions, that withdrawal from Paxil, which the appellant had previously taken for some time, did not explain or justify his conduct in September of 2009 when his last act of sexual misconduct occurred.

[18] The Judge then explained why the CDS' refusal to consider other causes involving sexual misconduct did not constitute an error on his part. The Judge made the point that in the context of administrative review, it was trite law that each case turned on its own facts and that each decision maker had to make his determination on the basis of the facts before him and the relevant legal provisions.

[19] In concluding on the reasonableness of the CDS' decision, the Judge held that he could not intervene because all of the appellant's submissions had been considered and that a reasonable explanation had been given as to why the CDS was not prepared to overturn the decision to release him from the CAF.

[20] The Judge was also of the opinion that the CDS' decision had been made in accordance with the legislation applicable to the appellant's grievance and the decision to release him.

[21] The Judge also made clear the fact that in judicial review proceedings his role was limited to reviewing the legality of the decision in accordance with the applicable principles set out in the jurisprudence. Consequently, he did not have the power to second guess the determination and findings made by the CDS in reaching his conclusion.

[22] The Judge then turned to the issue of procedural fairness (paragraphs 49 to 54 of the reasons). He began by noting that the Committee had held that because of flaws in the administrative review process, the appellant's right to procedural fairness had been breached.

Hence, in the Committee's view, the Grievance Process could not remedy these breaches of his rights.

[23] As I have already indicated, the CDS did not agree with the Committee's view on this issue. Relying on this Court's decision in *McBride v. Canada (National Defence)*, 2012 FCA 181, 431 N.R. 383; affirming *McBride v. Canada (Attorney General) et al*, 2011 FC 1019, [2011] F.C.J. No 1250 (QL), the CDS held that a *de novo* hearing cured a breach of procedural fairness.

[24] At paragraphs 50 and 51 of his reasons, the Judge deals with this issue and explains why he cannot accept the appellant's submissions, concluding that "when considered as a whole, the Administrative Review Process was fair". I can find no reason to disagree with the Judge's conclusion on this issue.

[25] The Judge then addressed the appellant's argument that the long delay taken to determine his grievance constituted a breach of procedural fairness and/or an abuse of process which necessarily led to the setting aside of the CDS' decision.

[26] After stating that it was undeniable that the time taken to deal with the appellant's grievance was "unfortunate" and that the CDS had recognized in his decision that there was no real excuse for the four years which had elapsed, the Judge, after referring to the Supreme Court's decision in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 at paragraphs 121 and 122, concluded that the evidence before him did not

show, in the words of the Supreme Court, that the delay was “so oppressive as to taint the proceedings” (paragraph 121 of *Blencoe*).

[27] The Judge also remarked that in the light of the evidence, he could not conclude that the prejudice caused to the appellant was such so as “to compromise the fairness of the determination of his grievance” (paragraph 54 of the reasons). Thus, in the Judge’s opinion, notwithstanding the inconvenience of the delay which had not been satisfactorily explained by the CDS, no breach of procedural fairness requiring that the CDS’ decision be set aside had occurred. Again, I see no basis on which I could interfere with the Judge’s decision.

[28] I therefore conclude that the Judge made no reviewable error in concluding that the impugned decision was reasonable and that no breach of procedural fairness had tainted the grievance process. Accordingly, there is no basis for intervention on our part.

[29] For these reasons, I would dismiss the appeal. However, in the circumstances of the case, I would not make any order as to costs.

"M Nadon"

J.A.

“I agree.

Donald J. Rennie J.A.”

“I agree.

Mary J.L. Gleason J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-302-15

(APPEAL FROM A JUDGMENT OF THE HONOURABLE MR. JUSTICE DE MONTIGNY DATED JUNE 22, 2015, DOCKET NUMBER T-1205-14)

STYLE OF CAUSE:

JASYN EVERETT WALSH v. ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING:

VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING:

APRIL 20, 2016

REASONS FOR JUDGMENT BY:

NADON J.A.

CONCURRED IN BY:

[RENNIE, GLEASON J.J.A.]

DATED:

MAY 24, 2016

APPEARANCES:

Jasyn Everett Walsh

ON HIS OWN BEHALF

Helen Park

FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney
Deputy Attorney General of Canada

FOR THE RESPONDENT