

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20180302**

**Docket: A-36-16**

**Citation: 2018 FCA 49**

**CORAM: PELLETIER J.A.  
BOIVIN J.A.  
DE MONTIGNY J.A.**

**BETWEEN:**

**CORPORAL JOHN JOSEPH HIGGINS**

**Appellant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Fredericton, New Brunswick, on February 27, 2018.

Judgment delivered at Fredericton, New Brunswick, on March 2, 2018.

**REASONS FOR JUDGMENT BY:**

**BOIVIN J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
DE MONTIGNY J.A.**

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**BETWEEN:**

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**REASONS FOR JUDGMENT**

**BOIVIN J.A.**

[1] Corporal Higgins (the Appellant) appeals from a judgment of Elliott J. of the Federal Court (the Federal Court Judge) dated January 8, 2016 (2016 FC 32). The Federal Court Judge dismissed the Appellant's application for judicial review of a decision rendered on September 22, 2014 by Colonel Malo of the Canadian Armed Forces (the CAF) in respect of a grievance filed by the Appellant on December 5, 2011.

[2] The Appellant is a corporal in the CAF. At the time of the incidents that gave rise to this appeal, he was an officer in charge of non-military cadets. Between March 2010 and August 2011, he was ordered on nine occasions not to contact cadets outside of official activities. The Appellant failed to correct his behaviour and was suspended from 40 (Snowbird) Royal Canadian Air Cadets Squadron on August 30, 2011.

[3] On September 6, 2011, the Appellant filed a complaint in which he alleged harassment and an abuse of authority by two individuals in his chain of command. An investigation was conducted into this complaint, following which, it was determined to be unfounded. The Appellant therefore filed a grievance to the Initial Authority (IA) level on December 5, 2011.

[4] In his grievance, the Appellant requested, among other things, (i) that the investigative report into his harassment complaint be removed from his file since the investigation was tainted with procedural unfairness; (ii) that documentation relating to initial counselling (IC) similarly be removed from his file; (iii) that a letter of apology be presented to him; and (iv) that disciplinary action be taken against officers who had allegedly disseminated personal information about him to others.

[5] A decision was rendered at the IA level, by Brigadier-General Galvin, on July 11, 2012. In that decision, Brigadier-General Galvin found that the Appellant had “not established to [his] satisfaction that [he] was grieved”, and accordingly refused to grant any of the redress sought (IA Decision at para. 40; Appeal Book, p. 127).

[6] The Appellant then sought to bring his grievance to the Final Authority (FA) level. In the process, the grievance was first referred to the Canadian Forces Grievance Board (CFGB), an external and independent body mandated under the *National Defence Act*, R.S.C., 1985, c. N-5, to investigate and review grievances that are referred to it by the Chief of Defence Staff. The CFGB recommended that the FA, in this instance being the Chief of Defence Staff's delegate, Colonel Malo, partially uphold the grievance by removing the references to the earlier investigation and the IC from the Appellant's record, and that he issues a Recorded Warning (RW) instead. The CFGB noted that one allegation against the Appellant, namely that he had served alcohol to a minor, had not been properly investigated and that the CAF may want to consider opening a new investigation.

[7] On September 22, 2014, Colonel Malo rendered his decision (the FA Decision) on the basis of a *de novo* review. Colonel Malo canvassed four (4) issues in his decision: (i) whether the Appellant's suspension was appropriate; (ii) whether the investigation into his complaint was conducted properly; (iii) whether the Appellant's procedural fairness rights were breached; and (iv) whether the remedial measure issued by his chain of command was justified and legal.

[8] Colonel Malo upheld the Appellant's grievance in part, following the CFGB's recommendations. He ordered that a RW be issued on the Appellant's file and that the possibility of a new investigation be considered with respect to the allegation that the Appellant provided alcohol to a minor.

[9] The Appellant sought judicial review of the FA Decision before the Federal Court. The Federal Court Judge dismissed the Appellant's application for judicial review and provided comprehensive reasons for so doing.

[10] In his Notice of Appeal and his written representations, the Appellant essentially claims that the proceedings were procedurally unfair. He does not expressly challenge the Federal Court Judge's finding that the FA Decision was reasonable, although it appears that he disagrees with that conclusion.

[11] At the hearing before our Court, the Appellant confirmed that two out of four issues raised within this matter have been resolved to his satisfaction. With respect to the allegation that he had provided alcohol to a minor, it was found that there was no basis to proceed with an investigation into the allegation. With respect to documents related to a harassment claim filed by him that were incorrectly included in his unit personnel file, these documents have been removed. As a result, the two remaining issues that the Appellant is raising before our Court are (i) whether to overturn the decision of the Federal Court Judge in order to remove the RW from his file; and (ii) whether to award costs.

[12] When seized of an appeal from an application for judicial review disposed of by the Federal Court, this Court must step into the shoes of the Federal Court and concentrate on the administrative decision in question (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 46 [*Agraira*]).

[13] This Court must therefore focus its analysis on the FA Decision and determine whether, in reviewing it, the Federal Court Judge identified the appropriate standard of review and applied it correctly (*Agraira* at para. 47).

[14] In this appeal, the Appellant strongly disagreed with the issuance of a RW. However, I am of the view that this conclusion reached by Colonel Malo is reasonable. Indeed, Colonel Malo mentioned that the Appellant was advised on nine occasions with respect to his conduct deficiencies involving cadets. While Colonel Malo understood that a RW was a serious administrative measure, he also added that it was not intended as punishment.

[15] A review of the FA Decision also shows that Colonel Malo considered each issue raised by the Appellant. It also demonstrates that he explained his reasons for his conclusions on each issue, and for imposing the remedial measures that he imposed. In other words, the FA Decision allows the reader to understand the decision and why it was reached (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16). In that respect, and on the basis of the record and the evidence considered, it was reasonable for Colonel Malo to conclude the way he did.

[16] The proceedings as a whole were also fair. In terms of the requisite level of disclosure, it is clear that it was provided to the Appellant. I do not accept the Appellant's argument that he was entitled to the level of disclosure outlined in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 [*Stinchcombe*]. *Stinchcombe* was a criminal case, whereas the present proceedings are

administrative in nature. Rather, the level of procedural fairness required is set out by Defence Administrative Order and Directive 2017-1 on the Military Grievance Process. That Directive requires (i) that the Appellant be able to participate in the proceedings, including the ability to comment on materials in the record; (ii) that he receives relevant documentation considered by Colonel Malo; and (iii) that he receives an impartial decision on his grievance. As correctly noted by the Judge, the proceedings complied with these requirements.

[17] Moreover, to the extent that the Appellant's procedural fairness rights were breached in the earlier investigation, it is well established that a *de novo* review, such as the one conducted by Colonel Malo, can cure a prior procedural fairness defect: *McBride v. Canada (National Defence)*, 2012 FCA 181, 431 N.R. 383 at paras. 41-42 [*McBride*]; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at para. 82; *Canada (Attorney General) v. McBain*, 2017 FCA 204, [2017] F.C.J. No. 924 (QL) at para. 10; *Taiga Works Wilderness Equipment Ltd. v. British Columbia (Director of Employment Standards)*, 2010 BCCA 97, 316 D.L.R. (4th) 719 at paras. 3 and 28. The relevant question is whether the proceedings, taken as a whole, were fair (*McBride* at para. 44). In this case, the Appellant was provided with full disclosure of the documentation considered by Colonel Malo and had numerous opportunities to make comments. The Appellant's argument that he was denied procedural fairness therefore fails.

[18] The Appellant also alleged that certain comments made by the Federal Court Judge, more particularly related to the deference she owed to the Chief of Defence Staff (Federal Court

Judge's reasons at para. 54), give rise to a reasonable apprehension of bias. The Appellant's allegations are unsupported by the evidence and devoid of any merit.

[19] Accordingly, I am satisfied that the Federal Court Judge chose the correct standards of review in reviewing the FA Decision and that she did not err in applying the reasonableness standard nor in finding that there was no procedural unfairness.

[20] For these reasons, I would dismiss the appeal with costs.

“Richard Boivin”

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J.A.

“I agree  
J.D. Denis Pelletier J.A.”

“I agree  
Yves de Montigny J.A.”



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**(APPEAL FROM A JUDGMENT OF THE FEDERAL COURT (ELLIOTT J.) DATED  
JANUARY 8, 2016, DOCKET NO. T-2361-14)**

**DOCKET:** A-36-16

**STYLE OF CAUSE:** CORPORAL JOHN JOSEPH  
HIGGINS v. ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** FREDERICTON, NEW  
BRUNSWICK

**DATE OF HEARING:** FEBRUARY 27, 2018

**REASONS FOR JUDGMENT BY:** BOIVIN J.A.

**CONCURRED IN BY:** PELLETIER J.A.  
DE MONTIGNY J.A.

**DATED:** MARCH 2, 2018

**APPEARANCES:**

Corporal John Joseph Higgins FOR THE APPELLANT  
(SELF-REPRESENTED)

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**SOLICITORS OF RECORD:**

Nathalie G. Drouin FOR THE RESPONDENT  
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