



[2022] 2 F.C.R. D-21

ARMED FORCES

Judicial review of Acting Chief of Defence Staff (A/CDS) decision as Final Authority (FA) with respect to grievance filed by applicant — Applicant, now retired from Canadian Armed Forces (CAF), posted to Afghanistan in 2012 as senior Intelligence Officer with Canadian Task Force — Subsequently repatriated from Afghanistan prior to scheduled end of posting based on report from Commanding Officer (CO), which referred to negative ratings based on events occurring in theatre, allegations of sexual harassment, weapons offence — Applicant filing grievance, claiming process unfair, repatriation unjustified — Grievance referred to Military Grievance External Review Committee (MGERC) — MGERC issuing report finding allegations in grievance well founded, recommending variety of remedial steps — That report referred to A/CDS, whose decision largely mirrored that of MGERC — In essence, A/CDS finding applicant's repatriation unfair, that CO and others generated several negative reports against applicant in order to build case to justify repatriation, that proper process not followed regarding: management of applicant's performance, repatriation decision, handling of sexual harassment complaint — Applicant not happy with that decision, seeking judicial review on basis, *inter alia*, process not fair, several of findings made (or not made) by A/CDS not consistent with evidence in record — Applicant also questioning whether A/CDS had legal authority to act as FA in his case — Specifically, applicant of view CAF should be required to take necessary steps to fully, finally clear his name, restore his reputation, undo some of harm caused, hold those responsible accountable for their actions — Whether decision unreasonable — Applicant arguing CO acted with malice and that investigation should have been launched into his conduct — However, not Court's role to make such finding on judicial review — Rather, question is whether A/CDS's decision not to order investigation is unreasonable — Decision reflects engagement with the facts, in light of law, and reasoning is explained in logical manner — A/CDS considered, weighed evidence — FA accorded wide latitude in this context — For these reasons, A/CDS's decision not to order investigation not unreasonable — While it took eight years to deal with applicant's grievance, insofar as law is concerned, delay in administrative proceedings does not, in itself, make them unfair — Only when one side is prejudiced in ability to participate in proceeding, for example by difficulty in gathering or presenting evidence, that delay may be relied on to quash decision — In this case, applicant did not assert he suffered this type of prejudice — His arguments related more to merits of decision — Thus had to be assessed under reasonableness framework — A/CDS's decision to take passage of time into account in assessing appropriate forms of redress not unreasonable — By the time A/CDS examining matter, could not unwind history, would not have been appropriate to ignore fact that long time had passed since incidents in question, that Canada's mission in Afghanistan had come to an end, and that applicant had retired from CAF — These facts relevant to A/CDS's decision, and he explained how, why he considered them in making decision — For these reasons, delay in this case did not cause denial of procedural fairness, nor was it unreasonable for A/CDS to take passage of time, intervening events into account in fashioning remedy — With regards to failure of A/CDS to provide complete redress, two fatal omissions in decision had to be re-examined — Analysis, rationale for most aspects of redress decision explained in generally clear, logical manner, with exception of financial compensation, apology letter — Except for these two elements, decision on redress was reasonable — From very outset of process, applicant was clear: he wanted to publicly clear his name, and he wanted to be compensated for tangible financial losses he suffered as a consequence of unjustified decision to repatriate him early from his deployment — However, analysis portion of decision silent on apology or means by which some financial recompense could be provided — Complete failure to discuss

apology, possibility of ex gratia payment to provide some financial compensation rendered decision unreasonable — Absence of any discussion of these two central aspects of applicant's grievance was sufficiently serious to warrant quashing decision, sending it back for reconsideration, but only with respect to these two specific points — On issue of procedural fairness, this was not denied to him — He had ample opportunity to know nature of case being put before decision maker, and he had opportunity to make submissions before A/CDS took final decision — Finally, on issue of whether A/CDS had legal authority to make decision, applicant argued there was no indication CDS was incapacitated as that term usually understood to involve either physical or psychological incapacity and that in light of this, pre-conditions for exercise of authority by Minister of National Defence under *National Defence Act*, R.S.C., 1985, c. N-5 (NDA), s. 18.2 not satisfied — This argument rejected — No limiting words or definitions of terms "absence or incapacity" set out in NDA — No basis on record herein to go behind this appointment or otherwise question exercise of authority by A/CDS in making decision as FA — Application allowed in part.

BEDDOWS V. CANADA (ATTORNEY GENERAL) (T-1683-21, 2023 FC 919, Pentney J., reasons for judgment dated July 4, 2023, 58 pp.)