Federal Court Cour fédérale

Date: 20150429

Docket: T-1599-14

Citation: 2015 FC 542

Ottawa, Ontario, April 29, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

PETER TATICEK

Applicant

and

CANADA BORDER SERVICES AGENCY

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Peter Taticek (the Applicant) has brought an application for judicial review of a final-level grievance decision made on June 18, 2014 by Louis-Paul Normand, Acting Vice President of the Canada Border Services Agency (CBSA) Information, Science and Technology Branch. Mr. Normand denied the Applicant's grievance on the basis that the Respondent had acted

reasonably and in accordance with the Terms of Settlement agreed between the Applicant and the Respondent on April 1, 2009.

[2] For the reasons that follow, the application for judicial review is allowed and the matter is remitted to the Respondent to craft the appropriate remedy.

II. Facts

[3] This is the second time that the underlying dispute has reached this Court. In *Taticek v Canada (Border Services Agency)*, 2014 FC 281 (the first proceeding), Justice Strickland explained the circumstances as follows:

> 2. [O]n December 30, 2008, [the Applicant] filed a complaint with the Public Service Staffing Tribunal (PSST) regarding an internally advertised appointment process, conducted under the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 (the PSEA), for a Team Leader position at the CS-03 group and level. The Applicant alleged that the President of the CBSA abused his authority by extending an acting appointment for the CS-03 Team Leader position thereby providing the incumbent actor with an unfair advantage in gaining experience in the position.
>
> 3. The parties participated in mediation with respect to the complaint which resulted in the execution of a document entitled "Terms of Settlement" (settlement agreement) dated April 1, 2009, which stated that it constituted a "full and final settlement of the specific issues and conditions associated with the complaint of the Complainant." Further, that the parties acknowledged that all aspects of the matter had been resolved to their satisfaction in accordance with its terms. The second article of the settlement agreement is at issue and reads as follows:
>
> > 2. to staff any current vacant ~~acting~~ PL [*sic*] positions using the upcoming acting CS-03 selection process and then from the upcoming

> indeterminate CS-03 selection process based on the essential and asset qualifications for each of the positions. [Article 2]
>
> 4. The crossing out by hand of the world "acting" was initialled by each party. The Applicant withdrew his complaint subsequent to the signing of the settlement agreement.
>
> 5. Some time thereafter, CBSA deployed an employee from the Canada Revenue Agency into a vacant CS-03 position and filled two other vacant CS-03 positions by way of internal deployments. In response, the Applicant filed two grievances, later consolidated, alleging that the deployments were in breach of the settlement agreement. The Applicant sought to have CBSA comply with the settlement agreement, correct the contraventions and take any other measures necessary to remedy the situation.

[4] The decision under review in the first proceeding was described by Justice Strickland as follows:

> 7. On March 29, 2012, a final level grievance consultation was held by Ms. Rachel Stanford, a senior labour relations advisor of CBSA, which resulted in Ms. Stanford preparing a "Final Level Grievance Précis" (Précis) containing her analysis of the grievance. Her analysis is summarized below:
>
> > The settlement agreement dealt with a staffing issue regarding a pool of candidates that no longer exist[s] as it expired in fall of 2010;
> >
> > There was a misunderstanding as to the interpretation of the settlement agreement. Management believed the subject term only applied to promotional appointments or acting positions of over four months. The Applicant and the union believed that "any" vacant positions were to be staffed by using the existing pools and that this included all acting, short or long term, as well as indeterminate appointments;
> >
> > The PSST would not review the situation because the complaint had been withdrawn and the file closed. Further, there was no provision under the

> PSEA to file a new complaint on the basis of a mediation or settlement not being respected as outlined in the Howarth decision;
>
> As the settlement was not clear on what type of appointments or staffing actions were to be used for these positions, "it would appear that it was an unfortunate misunderstanding" between the Applicant and management.

8. Ms. Stanford recommended that the grievances be denied.

9. On June 29, 2012, Ms. Therriault-Power, Vice President of the Human Resources Branch of CBSA, issued a "Reply to Grievance" which denied the grievances on the basis of the following:

> It is my understanding that the memorandum of settlement was interpreted by management to apply only to indeterminate promotional appointments. As the settlement was unclear on what type of appointments or staffing actions were to be used for these positions, I am of the opinion that it was an unfortunate misunderstanding between yourself and management. As such your grievances are denied.

In addition, the remedy you are seeking cannot be implemented, as such, no further corrective action will be forthcoming.

[5] Justice Strickland found in favour of the Applicant in the previous proceeding based on the following analysis:

> 55. In my view, "any current vacant ~~acting~~ PL [sic] position", is worded broadly and on its face, and in the absence of any applicable policy or guidelines to the contrary, could be read to include deployments.
>
> […]
>
> 58. Thus, while management and the Applicant were entitled to their respective subjective beliefs as to what was intended to be achieved by the settlement agreement, evidence of a party's subjective intention is not relevant. The Supreme Court of Canada stated the following in *Eli Lilly*, above:

> The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> […]
>
> 60. [R]ather, the decision-maker should have based her determination on an interpretation of the terms of the settlement agreement and the context in which it was made. Even if the wording was not clear, and for that reason some reliance on extrinsic evidence were permissible, in the absence of any reasons for accepting one party's interpretation over the other, there is no reasonable basis for merely adopting management's interpretation.
>
> 61. Given the foregoing, in my view, this matter should be remitted back on the basis that the decision-maker erred in basing her its [*sic*] decision solely on management's interpretation of the settlement agreement which was not reasonably supported by the record. […] (*Dunsmuir*, above, at para 48; *NLNU v Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 (SCC) at para 14).

[6] The reconsideration of the Applicant's grievance was undertaken by Mr. Normand. He concluded that management's actions were consistent with Article 2:

> Upon review, I find that management's action were reasonable and consistent with the wording of Article 2 in the TOS. I note that management met with you, and your union representative, and shared their understanding that the purpose of the TOS was to provide you with a fair opportunity for promotion. This included adding language to the settlement agreement regarding the upcoming CS-03 processes, to allow you to be considered for all promotional appointments that could be staffed through those impending processes.
>
> I also note that upon learning of your position that management has failed to comply with the terms of the settlement agreement, management met with you, and your union representative, to

> discuss your concerns. Management noted your concerns and endeavoured to explain and share with you, and your union representative, the reasons for their actions.
>
> While it is regrettable that you disagree with management's position, I am satisfied that management has respected the meaning and spirit of the TOS. I see no reason to intervene and must deny your grievances.

[7] Mr. Normand's decision was supported by an internal memorandum, or précis, prepared by a CBSA senior labour relations advisor. In the previous proceeding, Justice Strickland concluded that an internal memorandum of this nature may be considered a part of the reasons:

> 44. [A] précis or an internal memorandum with recommendations to the decision-maker may serve as reasons (*Wanis v Canadian Food Inspection Agency*, 2013 FC 963 at para 21; *Miller v Canada (Solicitor General)*, 2006 FC 912, [2007] 3 FCR 438 at para 62). In this case, the Précis was relied on by the decision-maker in coming to her decision and, accordingly, its contents should be considered as part of the reasons for the final Decision.

[8] The internal memorandum prepared for Mr. Normand in the present proceeding included the following observations:

> In management's view, Ms. Billey's December 2009 emails provide a clear illustration of their understanding of the TOS and Article 2. They saw the document as an avenue to provide Mr. Taticek with a fair opportunity for promotion, not as a vehicle to limit their flexibility to staff positions. In their view, the agreement only applied to promotional appointments and acting over four months, short-term acting and deployments did not apply […].
>
> Mr. Taticek's reasoning, although passionate and in his point of view, principled, is unreasonable and his view of the implications of Article 2 is self-serving. While self-interest alone does not translate into unreasonableness, his position needs to be viewed

> through the lens of mediation, the purpose of which was to achieve a mutually acceptable resolution between the parties […] concerning his PSST complaint. On a balance of probabilities, it is more likely than not, that had Ms. Billey, participating in mediation with the assistance of a staffing representative, been aware of Mr. Taticek's position, she would not have signed the TOS.
>
> With the assistance of a resourcing representative, it is, more likely than not, that she signed with the TOS with the view of maximizing the avenues for Mr. Taticek (along) to receive a fair opportunity for promotion. […].

[9] According to the internal memorandum provided to Mr. Normand in the present proceeding:

> Management's view is more reasonable and should be afforded greater deference because it is more aligned with the PSEA and Regulations. Under the PSEA, short-term acting (acting assignments under 4 months) and deployments are not promotions. They are another form of staffing available to management.

III. Issues

[10] The issues raised in this application for judicial review are similar to those considered by Justice Strickland in the previous proceeding:

A. What is the appropriate standard of review?

B. Did Mr. Normand commit a reviewable error warranting the intervention of this Court in deciding not to allow the grievances?

C. If the application for judicial review is allowed, what is the appropriate remedy?

IV. Analysis

A. *What is the appropriate standard of review?*

[11] Justice Strickland held in the previous proceeding that management's interpretation of the Terms of Settlement was subject to review by this Court against a standard of reasonableness:

> 33. In my view, while there are factors that would support a correctness standard such as the informal nature of the grievance process in the present case and the fact that it is not independent of the employer, weighing these factors and applying a contextual analysis points to reasonableness as the appropriate standard of review […].

[12] I agree with this conclusion. I note that neither party in this proceeding takes issue with the standard of review applied by Justice Strickland in the previous proceeding.

B. *Did Mr. Normand commit a reviewable error warranting the intervention of this Court in deciding not to allow the grievances?*

[13] In the previous proceeding, Justice Strickland stated as follows:

> 37. [T]he golden rule of contract interpretation is that the "literal meaning must be given to the language of the contract, unless this would result in absurdity." Context can be admitted to show the purpose for which the contractual provision at issue was included, not to vary the meaning of the words of a written contract (Gerald H. L. Fridman, *The Law of Contract in Canada* at

> 437-438). Evidence of one party's subjective intention is not relevant and extrinsic evidence should not be considered when the contract is clear and unambiguous (*Eli Lilly & Co v Novopharm Ltd*, [1998] 2 SCR 129 (SCC) at paras 54-59 [*Eli Lilly*]).

[14] In the present proceeding, the Respondent relies upon the affidavit of the Applicant's manager Diane Billey, who maintains that "my intent in agreeing to paragraph 2 of the Settlement Agreement was that it would apply only to acting appointments of four months of longer and to promotional appointments". Ms. Billey does not say that her intention was communicated to the Applicant or his representative before the Terms of Settlement were concluded. Rather, she says that her understanding of Article 2 was confirmed "in an email dated December 16, 2009," *i.e.*, approximately eight months after the Terms of Settlement were concluded on April 1, 2009.

[15] The Applicant has filed the Affidavit of Philip Wang, who attended the mediation on behalf of the Professional Institute of the Public Service of Canada (PIPSC) in its capacity as the Applicant's bargaining agent. Mr. Wang deposes as follows:

> 7. I can confirm that at no point during the settlement discussions leading up to the signing of the Settlement Agreement did either employer representative suggest that the terms of settlement were limited to providing Mr. Taticek with a fair opportunity for promotion. I can also confirm that neither employer representative suggested that the terms of settlement were restricted to promotional appointments.
>
> 8. In my view, the Settlement Agreement is clear on its face. It applies to all staffing of CS-03 positions, including by way of acting appointments and deployments. At no time were Mr. Taticek and I led to believe any differently during the settlement negotiations leading up to the signing of the Settlement Agreement.

[16] Neither of these affidavits was before Mr. Normand when he reconsidered the Applicant's grievance, but they merely confirm what the record already demonstrates: to the extent that the Respondent intended Article 2 of the Terms of Settlement to convey anything beyond the plain meaning of its words, this was never communicated to the Applicant.

[17] In the previous proceeding, Justice Strickland found that the words "any current vacant acting PL [sic] position" are sufficiently broad on their face to include deployments. The Respondent does not dispute that the positions ultimately staffed by deployment were vacant positions within the scope of Article 2. Pursuant to the Terms of Settlement, the Respondent agreed to staff these positions "using the upcoming acting CS-03 selection process and then from the upcoming indeterminate CS-03 selection process based on the essential and asset qualifications for each of the positions." Simply put, the Respondent did not abide by this commitment.

[18] In granting the previous application for judicial review, Justice Strickland acknowledged the possibility that the plain language of the Terms of Settlement might be tempered by "any applicable policy or guidelines to the contrary". The provisions of the PSEA referred to by the Respondent do not contradict the Terms of Settlement. It is true that the PSEA affords the Respondent a high degree of flexibility in its choice of staffing actions. However, in this case, the Respondent voluntarily restricted its flexibility by agreeing to the Terms of Settlement. The Respondent does not say that the PSEA precludes any limitation of discretion by voluntary agreement; indeed, the Respondent's own interpretation of the Terms of Settlement entails some restriction on management's flexibility in staffing the vacant positions. Counsel for the

Respondent described the choice of words in Article 2 as "unfortunate", but that does not alter their meaning.

[19] Ultimately, the present application for judicial review must be allowed on substantially the same grounds as the previous application. The Respondent's reconsideration of the Applicant's grievance did not follow the direction provided by Justice Strickland. There was no real attempt to interpret the Terms of Settlement and the context in which they were agreed. No reasonable basis was offered for adopting management's interpretation beyond an acceptance of management's subjective intention. This was a reviewable error warranting the intervention of this Court.

C. *What is the appropriate remedy?*

[20] I do not think it is appropriate to refer this matter to the CBSA to permit another opportunity to interpret and apply the Terms of Settlement in a reasonable manner. The standard of review applied by this Court is that of reasonableness. However, subject to Justice Strickland's caveat regarding policies or guidelines to the contrary (which do not arise here), there is no reasonable interpretation of Article 2 of the Terms of Settlement that would permit the Respondent to disregard its plain meaning and staff the vacant positions by deployment instead of by the specified selection processes. By staffing the vacant positions by deployment, the Respondent has clearly breached the Terms of Settlement.

[21] In the previous proceeding, Justice Strickland said the following about the remedies that may be available to the Applicant in the event of a successful application for judicial review:

> 67. While it is impossible to know if the Applicant would have been the successful candidate, the final-level decision maker has the ability to award damages for the "loss opportunity" to obtain one of the three positions sought (*OPSEU v Ontario (Ministry of Community, Family & Children's Services)*, [2004] OGSBA No 192 (Ont Grievance SB) (Crown Employees Grievance Settlement Board) at paras 14-21; *Alberta Health Services v AUPE*, [2011] AGAA No 43 (Alta Arb) (Sims, QC) at paras 37-47; *OPSEU v Ontario (St Lawrence Parks Commission)*, [2010] OGSBA No 113 (Ont Grievance SB) (Herlich) at paras 14-27; *Grande Yellowhead Regional Division No 35 v CUPE, Local 1357*, [2010] AGAA No 47 (Alta Arb) (Tettensor) at paras 16-21). Arbitral jurisprudence has awarded damages for lost opportunity to obtain a promotion in accordance with the common law damages for lost opportunity (*Chaplin v Hicks*, [1911] 2 KB 786 (Eng CA) and the law of damages for lost opportunity has been applied in Canadian courts (*Eastwalsh Homes Ltd v Anatal Development Ltd*, [1993] OJ No 676 (Ont CA) at para 42).
>
> […]
>
> 76. [G]iven that I have found that this matter should be remitted back for reconsideration, it is up to the decision-maker, if necessary, at that time, to craft an appropriate remedy (*Backx*, above, at para 25).

[22] The Respondent is best placed to determine how to remedy its breach of the Terms of Settlement. This could be through an award of damages or the provision of opportunities that are comparable to those contemplated by the Terms of Settlement. The parties may choose to agree to something else. That is their prerogative.

[23] This litigation might not have been necessary if the Respondent had adhered more closely to the decision of Justice Strickland in the previous proceeding. The Applicant is entitled to his costs in accordance with Column IV of Tariff B.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed with costs in accordance with Column IV of Tariff B.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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