

Federal Court



Cour fédérale

Date: 20150519

Docket: T-1775-14

Citation: 2015 FC 645

Ottawa, Ontario, May 19, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

ISMAIL GULTEPE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Ismail Gultepe, seeks judicial review of a decision of the Deputy Minister of Environment Canada to accept the recommendation of an Independent Review Panel which concluded that a decision of the Career Progression Committee (CPC) refusing the applicant's request for promotion should be upheld.

[2] For the reasons provided below, I have concluded that this application should be granted.

II. Facts

[3] The applicant is a researcher with Environment Canada. Promotions for such researchers are determined using an incumbent-based process which is defined in a document entitled “Career Progression Management Framework for Federal Researchers” (the Framework). This incumbent-based process is different from the process used to grant promotions of other members of the Federal civil service. Pursuant to the Framework, requests for promotion are considered by peers in accordance with detailed criteria defined therein.

[4] In the present case, the applicant’s request for promotion was initially considered by the Atmospheric Science and Technology Directorate Committee which decided not to recommend promotion. At the applicant’s request, the CPC then considered the applicant’s request for promotion. As indicated above, the CPC denied the promotion.

[5] To address cases in which a request for promotion has been denied, a researcher may make a complaint using an Independent Recourse Mechanism (IRM) which is defined in Annex B of the Framework. Under the IRM, a reviewer or a review panel is appointed. In this case, a review panel of three members (the Review Panel) was appointed.

[6] Pursuant to section 3.4 of the IRM:

The reviewer/panel shall not replicate the role of the CPC. The reviewer’s/panel’s purpose is to review the recourse case, with regard to the process used by the CPC to assess the candidate’s

readiness for promotion and the alleged ground(s) of the complaint.

[7] Grounds for recourse under the IRM are defined in section 2.2. Among these is “abuse of authority”. Abuse of authority encompasses several things, including cases in which “there is an improper result (including unreasonable, discriminatory or retroactive administrative actions)”.

Section 2.2 goes on to state as follows:

Abuse of authority is more than simply errors or omissions; however, when a delegate acts on inadequate material and/or takes action which are [sic], for example, unreasonable or discriminatory, these actions may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

[8] Section 3.5 of the IRM provides as follows:

Within seventy-five (75) calendar days from their appointment, the Reviewer(s) will either confirm to the Deputy Head [the Deputy Minister] or their delegate the appropriateness of the process used by the original career progression committee, or, identify the issue(s) that may have negatively affected the decision of the career progression committee. The Reviewer(s) may then recommend to the Deputy Head that a new career progression committee (with a majority of the members not having been members of the original committee) re-examine the case. The Reviewer(s) may not recommend that career progression be granted.

[9] In the present case, the applicant made a request for recourse under the IRM and supported it with a memo detailing three grounds, including a complaint that there was an abuse of authority by the CPC.

III. Impugned Decision

[10] The impugned decision was made by the Deputy Minister. However, that decision was based on the findings and recommendations of the Review Panel which were accepted by the Deputy Minister. Accordingly, the reasons provided by the Review Panel are relevant to this judicial review.

[11] Many aspects of the Review Panel's reasons, and the process by which it reached its conclusions, were challenged by the applicant. For the purposes of the present judicial review, I need not address all of these. It is sufficient to address the Review Panel's statements concerning the scope of its mandate.

[12] In several places in its reasons, the Review Panel stated that its mandate was limited to issues of process, and did not permit consideration of substantive aspects of the CPC's analysis.

It is difficult to criticize the way the Review Panel initially described its mandate:

Our role as Independent Review Panel has been, variously, to assess the appropriateness of the process used by the [CPC], to identify issue(s) that may have affected negatively the decision of the [CPC] and, after forming consensus, make written recommendations to you, the Deputy Minister. Of note, our role has not been to conduct an independent review of Dr. Gultepe's promotion material and assess what SE-RES level he merits.

[13] However, subsequent statements by the Review Panel concerning limits on the scope of its mandate are broader. In two separate places in its reasons, the Review Panel stated that it was "expressly charged to review only process". The Review Panel also stated that "the

determinations of the CPC reside outside our mandate as a Panel assessing the fairness of the process used by the CPC.” On all these occasions, these statements were relied upon as a reason not to review the CPC’s assessment of documents and representations that were before it in the context of the applicant’s request for promotion.

IV. Analysis

[14] The mandate of the Review Panel is defined by the IRM. Though it is true that its mandate does not extend to replicating the role of the CPC (3.4), the Review Panel is tasked with considering whether the CPC’s analysis has given rise to an improper result (2.2). The Review Panel is expressly required to identify any issues that may have negatively affected the CPC’s decision (3.5).

[15] In my view, the Review Panel fell into error when it declined to consider some of the applicant’s arguments on the basis that it is “expressly charged to review only process”. Though the parties disagree as to the standard of review of the Review Panel’s determination of the scope of its mandate, I need not decide the point because, in my view, the Review Panel’s conclusion on the limits of its mandate was both incorrect and unreasonable. Several aspects of the IRM indicate that the Review Panel must consider substantive aspects of the CPC’s analysis. One of these arises where the Review Panel must decide whether an aspect of that analysis has been unreasonable, resulting in an improper result, thus constituting abuse of authority.

[16] I am particularly troubled by the Review Panel’s erroneous characterization of the scope of its mandate in light of two communications on that very issue made to it by Geneviève

Charlebois, the department resource process coordinator. Ms. Charlebois is an employee of Environment Canada, but is tasked to provide resource assistance for the Review Panel. In the first of Ms. Charlebois' communications, she advised the Review Panel to "keep in mind that the panel's mandate is to look at process and not content". In the second of the communications, four days later, Ms. Charlebois stated as follows:

I would like to take this opportunity to remind you of the panel's mandate [which] is to ensure that the CPC procedures were fair, transparent and accessible for the complainant. How the dossier was put together, and who participated to the creation of the dossier, is outside your mandate.

[17] Neither of Ms. Charlebois' communications was shared with the applicant until after the impugned decision had been made.

[18] In my view, both of these statements incorrectly understate the true breadth of the Review Panel's mandate. It is also arguable that the Review Panel adopted these statements when it stated that that it is "expressly charged to review only process".

[19] The applicant argues that Ms. Charlebois' communications constituted advocacy and interfered with the independence of the Review Panel. I need not decide that issue. However, I would expect that a resource person in Ms. Charlebois' position should restrict their comments, including those concerning the scope of the tribunal's mandate, to issues that are not controversial. Clearly, that is not the case here. I would also expect that, in the event that such a resource person does make comments on controversial issues and without the applicant's knowledge, then the respondent would not expect such statements, when adopted by the tribunal, to be given deference.

V. Conclusion

[20] The present application should be granted and the decision of the Deputy Minister set aside.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is granted with costs.
2. The Deputy Minister's decision is quashed and the matter is remitted to a newly constituted Independent Review Panel for reconsideration in accordance with the reasons of this Court.

“George R. Locke”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1775-14

STYLE OF CAUSE: ISMAIL GULTEPE v ATTORNEY GENERAL OF CANADA

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DATED: MAY 19, 2015

APPEARANCES:

Mr. Christopher Rootham
Ms. Alison McEwen

FOR THE APPLICANT

Mr. Joshua Alcock

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne LLP
Barristers and Solicitors
Ottawa, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT