Federal Court Cour fédérale

**Date: 20150721**

**Docket: T-1902-14**

**Citation: 2015 FC 887**

**Ottawa, Ontario, July 21, 2015**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**CATHIE McCREADY AND LIDIA JOVAN**

**Applicants**

**and**

**CANADA REVENUE AGENCY**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction and Background

[1] Ms. Jovan and Ms. McCready were unsuccessful candidates in a job competition conducted by the Canada Revenue Agency [CRA] in early 2014. They each sought individual feedback and asked for a decision review, but the outcome remained the same.

[2] The Applicants now apply for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, alleging that the selection process was unfair since other candidates were given more time to prepare for the interview than they were. They ask the Court to set aside the decision reviews and order that the matter be re-determined by someone else at the CRA. They also want $3,000.00 in costs. Their applications were originally filed separately, but were consolidated on December 4, 2014.

[3] The job competition in question was to staff positions as AU-04 large file auditors, and the hiring process had two major components: first, a written exam to test each candidate's knowledge and ability related to the job; and second, an interview to evaluate each candidate's ability to demonstrate initiative and cooperation in a team.

[4] The Applicants, who were auditors employed by the CRA at the AU-03 level at the time, each participated in the hiring process and successfully passed the knowledge exam. When they attended their respective interviews, they were each given an instruction sheet that said they would have 45 minutes to "prepare an oral presentation" about how they would react to several scenarios and 60 minutes to "deliver" the presentation. This sheet also stated that: "You may refer to your notes throughout your presentation. The selection board will not review or mark any of your written material—only what is communicated orally during your presentation."

[5] Each Applicant used all of the allotted 45 minutes to prepare their presentation before delivering it to a staffing board composed of three people, one of whom was Richard Rytwinski. He advised every candidate that the presentation time belonged to them and they could refer to

the interview problems and their notes. At the end of the presentation, Mr. Rytwinski said all candidates were asked whether they had anything else to add, and he testifies that the board "did not prompt any candidates to provide more answers, take more time or refer to their notes." Nevertheless, some candidates consulted their notes and gave additional answers before ending the interview. Other candidates, including Ms. Jovan and Ms. McCready, did not do so. In total, Ms. Jovan took 19 minutes to deliver her presentation, while Ms. McCready took 15 minutes.

[6] Both Applicants failed the interview. The threshold was 60%; Ms. Jovan received 38% and Ms. McCready received 54%. Consequently, each Applicant sought recourse under the "Procedures for recourse on staffing (Staffing Program)", version 1.0 (18 September 2013) [Recourse Policy], which the CRA has implemented pursuant to subsection 54(1) of the *Canada Revenue Agency Act*, SC 1999, c 17. Section 4.2 of the Recourse Policy states that the "purpose of recourse is to address an employee's concerns of arbitrary treatment as a result of a staffing decision or voluntary assessment." For purposes of the Recourse Policy, "arbitrary" is defined in section 4.2.1 as being:

> In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale or established policy; not the result of a reasoning applied to relevant considerations; discriminatory, i.e. as listed as the prohibited grounds of discrimination in the [*Canadian Human Rights Act*, RSC 1985, c H-6].

[7] The Recourse Policy sets out three types of recourse: individual feedback; decision review; and independent third-party review. Individual feedback is "a review of an employee's concerns of arbitrary treatment" by the manager responsible for the staffing decision. If that process does not alleviate a candidate's concerns, he or she may be able to request a decision

review from someone else within the CRA, which has the same objective as individual feedback but is slightly more formal. Independent third-party review is not pertinent to this case since it is reserved for people who are eligible for permanent promotions but are not selected.

[8] Both Applicants asked for individual feedback from Mr. Rytwinski. However, these reviews improved the Applicants' respective presentation marks by only 2%, which was still insufficient for either of them to pass the interview stage. Accordingly, Ms. Jovan then asked for a decision review, in which she alleged that candidates had used some of their presentation time to "re-read/review the questions and prepare additional responses." Ms. Jovan complained that was arbitrary since she was "denied the opportunity to display [her] abilities because other candidates had extra time to prepare." Ms. Jovan also told Ms. McCready about her complaint during the recourse process. Ms. McCready asked for a decision review too; she primarily challenged the marks she received for her answers at the interview, and also asked the decision reviewer to "please see Lidia Jovan's 'request for Decision Review' for further details."

## II. The Decision Reviews

[9] On August 5, 2014, the decision reviewer [Reviewer] rejected Ms. McCready's request for additional marks, instead finding that Ms. McCready was "given appropriate marks for the responses that [she] presented during the interview." The Reviewer also supplied the fact-finder's notes detailing the positions of both Ms. McCready and the Board and explaining why the additional marks requested by Ms. McCready were not awarded. The Reviewer did not expressly acknowledge or consider any complaint about the use of presentation time with respect to Ms. McCready.

[10] On August 8, 2014, the same Reviewer declined to interfere with the results of Ms. Jovan's interview. After receiving information from a fact-finder who summarized the positions of the parties, the Reviewer responded to Ms. Jovan's request for a review as follows:

> From the review of all the information at my disposal, I find that the instructions were clear that the candidate could refer to the notes throughout the presentation. You had the question, notes and the paper available to you during the interview. All candidates received the same instructions. You were asked at the end of your 19 minute presentation if you wanted to say or add anything else. Your response was no.
>
> I did not find any evidence that you [received] a different set of instructions or treated [*sic*] differently from any other candidate.

## III. Issues

[11] The Applicants raise the following issues:

1. What is the appropriate standard of review?
2. Is it a breach of procedural fairness, or otherwise unreasonable, for the CRA to have allowed some candidates to use a portion of their interview time for additional preparation time, despite the instructions to all candidates that preparation time was limited to the 45 minutes immediately prior to the interview?

[12] The Respondent disputes the Applicants' characterization of the second issue above and submits that the only issue is whether the Reviewer reasonably found no arbitrary error in either of the Applicants' cases.

[13] I agree with the Respondent's characterization of the issue. A breach of procedural fairness occurs when a person affected by the decision under review is denied whatever rights they had to participate in the decision-making process (see *Federal Courts Act*, s 18.1(4)(b); Donald J.M. Brown & the Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (updated December 2014), vol 2 (Toronto: Carswell, 1998), ch 7 at 2-3; *Gerus v Canada (AG)*, 2008 FC 1344 at paragraphs 13, 23 and 38, 337 FTR 256 [*Gerus*]).

[14] The Applicants, however, make no complaints about the procedure employed by the Reviewer in responding to their requests. Rather, they target only events from the selection process itself, which relate squarely to the question that the Reviewer was tasked to answer: were the Applicants treated arbitrarily? While it may be tempting to see arbitrariness as simply the flip-side of fairness (*Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311 at 324, 88 DLR (3d) 671), the Applicants' phrasing of the issue loses sight of the fact that the selection process itself is not directly under review.

[15] The Respondent also raises an issue about the propriety of Ms. McCready's argument that other candidates in the selection process were permitted to consult their notes before ending the interview.

[16] Accordingly, the following issues will be addressed sequentially below:

1. Can Ms. McCready's complaint relating to extra time be considered?
2. What is the standard of review?
3. Did the Reviewer err in concluding that the selection process was not arbitrary?

4. Should costs be awarded?

## IV. Analysis

### A. *Can Ms. McCready's complaint relating to extra time be considered?*

[17] The Respondent argues that Ms. McCready should not be allowed to argue that other candidates in the selection process were permitted to consult their notes before ending the interview. The Respondent contends that she never raised this issue with the Reviewer, and asks the Court to exercise its "discretion not to consider an issue raised for the first time on judicial review" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paragraph 22, [2011] 3 SCR 654 [*Alberta Teachers*]).

[18] However, Ms. McCready wrote the following on her review request: "[i]n addition, please see Lidia Jovan's 'request for Decision Review' for further details." This obviously refers to the concerns about extra preparation time, since that was the only issue advanced by Ms. Jovan. Also, Ms. McCready states the following in her affidavit:

> 12. At Decision Review, one of the arguments I advanced in support of my allegation that I had been treated in an arbitrary manner was that other candidates had been given extra preparation time for their presentation. During my meeting with the decision-maker, I brought the information I received from Ms. Jovan and Richard Rytwinski to the decision-maker's attention.

[19] The Respondent has not cross-examined Ms. McCready about that statement and did not present any evidence to contradict her. Unchallenged sworn testimony is presumed to be true (*Larkman v Canada (AG)*, 2013 FC 787 at paragraph 81, 436 FTR 181, aff'd 2014 FCA 299 at

paragraphs 15 and 18, [2015] 2 CNLR 240). Furthermore, Ms. McCready's evidence on this point is admissible since it discloses information that was before the decision-maker but is not otherwise evident from the record (*Tippet-Richardson Ltd v Lobbe*, 2013 FC 1258 at paragraphs 41-45; *Leahy v Canada (Citizenship and Immigration)*, 2012 FCA 227 at paragraph 145, [2014] 1 FCR 766). Where the record is not formal enough that every relevant conversation is transcribed, as is the case here, an affidavit is a suitable way to bring such information to the Court's attention. Consequently, Ms. McCready has established that she did complain about the inappropriate use of presentation time at the decision review. *Alberta Teachers* therefore does not apply, and there is no barrier to considering Ms. McCready's arguments in this regard.

B. *What is the standard of review?*

[20] The Applicants argue that the standard of review is correctness (citing e.g. *Gerus* at paragraph 14; *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79, [2014] 1 SCR 502). However, for the reasons given above, I agree with the Respondent that the Applicants' complaint is not an issue of procedural fairness. Investigating how an employee was treated is a question of fact and deciding whether that treatment was arbitrary is a question of mixed fact and law. The reasonableness standard of review applies to such questions (*Gerus* at paragraph 16; *Ahmad v Canada (Revenue Agency)*, 2011 FC 954 at paragraph 20, 398 FTR 1 [*Ahmad*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 53, [2008] 1 SCR 190 [*Dunsmuir*]).

[21] Thus, the Court should not intervene so long as the Reviewer's reasons, read in the context of the record, explain why the decision was made and permit the Court to determine whether the conclusions are defensible in respect of the facts and the law (*Newfoundland and*

*Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 15-16, [2011] 3 SCR 708; *Dunsmuir* at paragraph 47).

C. *Did the Reviewer err in concluding that the selection process was not arbitrary?*

[22] The Applicants submit that candidates in a selection process must be treated consistently, and everyone should be expected to follow the same instructions for any tests (citing e.g. *Ahmad* at paragraph 47; *Stratford (City) v CUPE, Local 1385*, 1996 CarswellOnt 6980 at paragraphs 45-46 (WL Can)). They contend that this did not happen.

[23] The instructions indicated that candidates had 45 minutes to prepare their oral presentations, and 60 minutes to deliver them. Nevertheless, the Applicants submit that Ms. Jovan's uncontradicted evidence proves that some candidates were permitted to ignore those instructions and use portions of their presentation time to further prepare. In their view, none of the Reviewer's reasons justify that inconsistency. Even though all candidates were told that they could consult their notes during the presentation, the Applicants argue that is fundamentally different from using additional time to review the scenarios and prepare additional answers. Moreover, they say it was no answer to observe that all candidates were given the same instructions and asked the same questions, since the breach arose because some candidates were arbitrarily permitted to ignore those instructions. The candidates who broke the rules had an advantage over those candidates who obeyed them, and the Applicants therefore submit that the process was arbitrary.

[24] The Respondent argues that a staffing board cannot control how candidates respond to the instructions they are given, and that the process is consistent so long as the same instructions were given to everyone. It draws an analogy to *Pynn v Commissioner of the Correctional Service of Canada*, 2014 PSST 15 [*Pynn*], where the Public Service Staffing Tribunal dismissed a complaint that interview instructions were ambiguous. In the same way here, the Respondent says the Reviewer found that the instructions were not ambiguous and were given to every candidate, and it was therefore reasonable to decide that the selection process was not arbitrary.

[25] In addition, the Respondent submits that there is no reliable evidence which could disturb the Reviewer's assessment that the selection process was not arbitrary. Ms. Jovan's testimony about what Mr. Rytwinski told her is inconsistent with what he says in his own affidavits, and the Respondent argues that Mr. Rytwinski's evidence is more reliable since he was present for the other interviews and his statements are corroborated by the other board members. In any event, all that Ms. Jovan's statements could prove was that some other candidates consulted their notes, which they were entitled to do. The Respondent says the Applicants received the same instructions and had the same opportunity; they just did not take it.

[26] The Applicants' reliance on their "unchallenged" testimony and the Respondent's submissions about its weight are misguided. This is an application for judicial review, and the general rule is that "the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the [decision-maker]" (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paragraph 19, 428 NR 297 [*Association*]). Although not all of the affidavit evidence violates

this rule, the disputed portions of both parties' affidavits offer evidence about what happened at the interview and the individual feedback stage of the process, and they do not indicate that they told the Reviewer about it in the same words. This evidence is not strictly admissible.

[27] This irregularity is mostly harmless though. The affidavits supply a convenient narrative which is essentially consistent with the fact-finder's summary of the parties' positions. The parties' dispute about the affidavits is irrelevant because the Court is neither required nor permitted to choose between the affiants' stories where they conflict (*Association* at paragraphs 17 and 19). That has already been done as part of the decision review, and the Court must defer to that assessment so long as it was reasonable.

[28] Here, the findings accepted by the Reviewer indicate that all candidates were told they had 45 minutes to prepare and 60 minutes to present, and they could refer to their notes and interview problems throughout the presentation. They all had paper and a pen, and they were all "allowed to write down additional notes at any time during the interview, even though they were not specifically advised that they could do so" (emphasis omitted). There was also "no evidence that the candidate [Ms. Jovan] was provided with a different set of instructions or treated differently from any other candidates." Given this context, the Reviewer concluded that the instructions clearly did not prevent candidates from reviewing the problems or their notes during their presentations. Other candidates were thus not permitted to break the rules; Ms. Jovan simply misunderstood the rules.

[29] I am not convinced that the Reviewer's conclusion on this point was so wrong that it could not even "be the subject of reasonable disagreement by reasonable people" (*Canada (AG) v Kane*, 2012 SCC 64 at paragraph 10, [2012] 3 SCR 398). I also agree with the Respondent's argument that an employer "cannot control how candidates in its staffing processes exercise their judgment in responding to instructions in an interview" (see *Pynn* at paragraphs 30-39). The selection board did not test anyone inconsistently (*Ahmad* at paragraph 47), and it was therefore reasonable for the Reviewer to find that Ms. Jovan was not treated arbitrarily. Accordingly, there is no reason for the Court to intervene. The Reviewer's reasons cogently explain why the decisions were made and her conclusions are defensible in respect of the facts and the law.

[30] Before leaving this issue, it should be noted that the Reviewer did not explicitly address the argument about presentation time with respect to Ms. McCready. She did complain about it though, and it can be a reviewable error for a decision-maker to ignore an important issue (*Turner v Canada (AG)*, 2012 FCA 159 at paragraphs 41-42, 431 NR 237 [*Turner*]).

[31] However, the Applicants have not advanced any argument based on *Turner*. Ms. McCready's submission depended entirely on the details of Ms. Jovan's request for decision review, whose complaint was reasonably denied by the same Reviewer just three days after she denied Ms. McCready's review. There is no reason to expect a different result were the McCready decision review to be re-determined. Any error in failing to consider the extra time issue explicitly in the McCready decision is therefore immaterial, and it would be appropriate to withhold relief even had the issue been raised (*Mobil Oil Canada Ltd v Canada-Newfoundland*

*Offshore Petroleum Board*, [1994] 1 SCR 202 at 228, 111 DLR (4th) 1; *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at paragraph 52, [2010] 1 SCR 6).

D. *Should costs be awarded?*

[32] The Applicants asked for their costs and proposed a sum of $3,000.00 in their written arguments. The Respondent asked for costs at the hearing of this matter; also in the amount of $3,000.00. I see no reason to depart from the usual rule that costs follow the result and, accordingly, award the Respondent costs fixed in the lump sum of $3,000.00 (all inclusive).

V. Conclusion

[33] In the result, therefore, this consolidated application for judicial review is dismissed and costs are awarded to the Respondent in the lump sum of $3,000.00 (all inclusive).

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the consolidated application for judicial review is dismissed, and that the Respondent shall have its costs in the amount of $3000.00 (all inclusive) in respect of the consolidated application.

"Keith M. Boswell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **STYLE OF CAUSE:** | CATHIE McCREADY AND LIDIA JOVAN v CANADA REVENUE AGENCY |
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