Federal Court Cour fédérale

**Date: 20180329**

**Docket: T-2095-16**

**Citation: 2018 FC 354**

**Ottawa, Ontario, March 29, 2018**

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

**BETWEEN:**

**DONNA BLOIS**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Ms. Blois, pursuant to s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, applies for judicial review of a decision of Robert Orr, Assistant Deputy Minister, Operations, Immigration, Refugees and Citizenship Canada dated November 4, 2016, denying the Applicant's grievance presented pursuant to s 208 of what was then the *Public Service Labour Relations Act,* SC 2003, c 22, s 2 at the final level.

[2] For the reasons that follow, the application is dismissed.

## II. Background

[3] The Applicant, Donna Blois, has worked for the Department of Justice since 1996. In March of 2013, she started a position with Employment and Social Development Canada ("ESDC"). In January of 2015, Ms. Blois accepted a two-year secondment as Director of ATIP Operations with ESDC. A term of this secondment was that Ms. Blois would be remunerated at the LP-02 rate of pay.

[4] The Respondent describes a secondment as a temporary move of an employee to another department or agency in the core public administration and other organizations for which Treasury Board is the employer while a deployment is a transfer of an employee from one position to another. The effect of a deployment is a permanent change in the employee's substantive position.

[5] On September 22, 2015 Mr. Lu Fernandes, the Director General of the Passport Program Integrity Branch at the department of Immigration, Refugees and Citizenship ("IRCC") offered Ms. Blois a position as the Director of Passport Integrity Modernization. This position was classified as EX-01, roughly $13,000 less than her salary at ESDC. Ms. Blois deposes that she told Mr. Fernandes that she would be interested in the position if IRCC could match her current LP-02 salary – in other words, if they could guarantee salary protection.

[6] Ms. Blois deposes that on September 22, 2015 Mr. Fernandes called and informed her that, having consulted with the human resources group, her position would be salary protected.

[7] An email dated October 8, 2015 from Mr. Fernandes to Ms. Blois informs that he “had a quick chat with my boss [yesterday]…He’s asked to see a resume as he would have to make a case with the [Deputy Minister].”

[8] Ms. Blois deposes that on October 13, 2015 Mr. Fernandes called her and said that he had received the necessary approvals to bring her into IRCC, but that the deployment paperwork was taking longer than anticipated.

[9] An email dated October 16, 2015 from Mr. Fernandes to Ms. Blois includes a note that “[w]e will then await the [Deputy Minister] sign off on the deployment to follow.”

[10] Ms. Blois deposes that once she had confirmation that she would be deployed to IRCC with salary protection, she provided notice that she would be leaving her position at ESDC.

### A. *The Secondment Agreements*

[11] Ms. Blois agreed to join IRCC on secondment until her EX Special Deployment was approved. She was offered and accepted three successive secondment agreements spanning October 26, 2016 through March 31, 2016.

[12] All three secondment agreements stated that they were initiated while IRCC moved forward with deployment and that Ms. Blois' "salary [was] to continue at her current remuneration as approved by [Assistant Deputy Minister] Mr. Robert Orr."

[13] In an email dated November 20, 2015, Mr. Fernandes wrote to Mark McCombs at ESDC describing a misunderstanding at IRCC: "[o]ur plan to deploy [Ms. Blois] has run into HR process issues (advice provided regarding redeployment changed). HR is now advising that the most expedient way to retain Donna is to have a longer term secondment to the end of the project (end of March 2017)." Mr. McCombs replied that he "can't agree to secondment till [sic] 2017. Based on Donna's deployment, as we agreed, I have made an offer (which has been accepted) to fill Donna's position on a permanent basis."

[14] In December of 2015, a memorandum was sent to the Deputy Minister's office seeking approval for the deployment of Ms. Blois for the position of Director, Passport Modernization Initiative, Program Integrity Branch, and Operations Sector with salary protection. The memorandum explained that Ms. Blois' salary was at the top rate of the LP-02 position at $137,886, whereas the maximum rate of pay for the EX-01 occupational group was $124,300. The Memorandum concluded that "…The program Integrity Branch does not have an EX-02 position nor does it have the need to create one. However, Ms. Blois has the competencies, breadth and depth of experience required to fulfill the mandate of the Passport Modernization Initiative."

[15] At the end of December, Mr. Fernandes emailed Ms. Blois to inform her that the Deputy Minister had rejected her deployment.

B. *Salary Protection Denied*

[16] On January 22, 2016 Ms. Blois was informed by Mr. Fernandes that her deployment to IRCC would only go through if she accepted a decrease in salary to the EX-01 range. Mr. Fernandes told Ms. Blois that if she did not accept this offer, her secondment would be terminated within two weeks.

[17] An email from Mr. Fernandes to Ms. Blois on January 22, 2016 stated "I'm very sorry about how this has turned out. It wasn't what I thought would happen and certainly not my understanding prior to your arrival."

C. *Request for Reconsideration*

[18] On February 3, 2016 Ms. Blois wrote to the ADM to request deployment with salary protection. On February 23, 2016 Ms. Blois was informed by Mr. Fernandes that her request would not be brought forward to the Deputy Minister and that her secondment would conclude at the end of March 2016.

[19] On March 11, 2016, Ms. Blois received a letter from the ADM confirming that her request for redeployment with salary protection would not be reconsidered and that at the end of March she would have to return to her substantive position at the Department of Justice.

[20] Shortly thereafter, Ms. Blois presented a grievance pursuant to s 208 of what was then the *Public Service Labour Relations Act*. In the affidavit that Ms. Blois submitted with her grievance, she deposed that "[a]t no time was I informed that salary protection needed to be approved by the Deputy Minister. I believed that Mr. Orr had the authority to approve my salary protected deployment and the secondment agreement stated that Mr. Orr had approved my salary protection."

[21] In her grievance, Ms. Blois requested: (1) that the agreement to deploy her to the salary protected EX-01 position of Director of Passport Integrity Modernization at IRCC be fulfilled; (2) compensation for legal fees; and (3) compensation for monetary losses, including loss of benefits and/or sick leave resulting from the Employer's actions.

[22] A final level grievance hearing was held in June of 2016 before the ADM, Robert Orr. In November of that year, Ms. Blois was informed that her grievance was denied. In the decision letter, Mr. Orr reasoned that the evidence did not support Ms. Blois' assertion that she was promised salary protection. Mr. Orr highlighted that Mr. Fernandes wrote to Ms. Blois on two separate occasions (October 8, 2015 and October 16, 2015) before she arrived at IRCC stating that the Deputy Minister would have to approve the deployment. Mr. Orr concluded that there was "no evidence to support your view that a promise of a deployment to an EX position with salary protection was ever made to you. While there is no dispute that there was an intent to deploy you, the fact remains that this would be subject to the Deputy Minister's approval. In the end, a decision was made not to proceed with the proposed staffing action."

D. *Ms. Blois' current employment situation*

[23] Ms. Blois deposes that on March 24, 2016 she began a leave of absence for medical reasons. She deposes that this leave was the result of stress that she was under at IRCC due to the decision not to deploy her permanently with salary protection.

[24] Between April 1 and June 26, 2016, Ms. Blois obtained a position at the LP-02 level. On June 27, 2016 Ms. Blois began a secondment with ESDC at the EX-01 level as Director, Integrity Policy and Program Intelligence, Temporary Foreign Worker Program. This secondment is scheduled to end March 30, 2018 and is salary protected at the LP-02 level.

[25] Ms. Blois deposes that since October 26, 2015 (the day she transferred to IRCC) she has not received a salary below her substantive position. She asserts, however, that because of IRCC's actions, she was required to take 13 weeks off work due to illness, 4 – 6 weeks of which were unpaid.

III. Issues

[26] The Applicant, Ms. Blois, submits three issues for determination: (1) the applicable standard of review; (2) whether procedural fairness was breached; and (3) whether the ADM erred in denying the Applicant's grievance.

## IV. Arguments & Analysis

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

[27] The Applicant submits that the standard of review analysis does not apply to questions of procedural fairness; instead the question is whether the decision-maker satisfied the level of fairness required in all the circumstances (*Canada (Attorney General) v Sketchley*, 2005 FCA 404 at paras 52-53). The Respondent submits that the standard of review governing procedural fairness is not settled, however, on either standard the ADM did not err.

[28] On the merits, the Applicant asserts that a final level grievance decision that involves the application of common law legal principles is reviewable on a standard of correctness (*Khalid v Canada (National Research Council)*, 2013 FC 438 at paras 35-39). The Respondent asserts that a final level grievance is reviewed on the standard of reasonableness (*Hagel v Canada (Attorney General)*, 2009 FC 329 at para 27; aff'd in 2009 FCA 364; *Kohlenberg v Attorney General of Canada*, 2017 FC 414 at para 18; *Girard v Canada (Human Resources and Skills Development)*, 2013 FC 489 at para 16).

[29] In regards to procedural fairness, correctness has generally been established as the standard of review (*Mission Institution v. Khela*, 2014 SCC 24 at para 79; *Hagel v. Canada (Attorney General)*, 2009 FC 329 at para 28), although the Federal Court of Appeal has commented that it is currently in dispute (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 at paras 11, 22). In this case, for the reasons below, I find that on either standard Ms. Blois' right to procedural fairness was not breached.

[30] While I appreciate that the current state of the law as to the standard of review governing a final level grievance decision is continuing to develop, it is my view that recent appellate jurisprudence points toward a reasonableness standard: *Canada* (*Attorney General) v Gatien,* 2016 FCA 3; *Nor-Man Regional Health Authority Inc. v Manitoba Association of Health Care Professionals*, 2011 SCC 59.

B. *Did the ADM breach the principles of procedural fairness?*

[31] The Applicant submits that the ADM's decision is marred by two breaches of procedural fairness. First, the ADM relied on material without providing notice to Ms. Blois and without allowing an opportunity to respond to this material. Second, the ADM did not consider evidence requested through the *Privacy Act* which, Ms. Blois asserts, confirms that she was promised permanent deployment.

[32] Specifically, Ms. Blois takes issue with the ADM's reliance on two emails from Mr. Fernandes in October of 2015 in which he states that the deployment awaited the Deputy Minister's approval. She argues that procedural fairness entitled her to notice that these emails would be relied upon and an opportunity to respond to them.

[33] Secondly, Ms. Blois explains that in March of 2016, pursuant to the *Privacy Act,* she requested all records relating to her employment at IRCC, including communication with the Department of Justice however she did not receive the requested information in time for the final level grievance hearing. Ms. Blois asserts that she referred the ADM to this evidence and

submitted that it should be considered. Further, she argues that there was no indication that the ADM obtained and reviewed this evidence prior to making his decision.

[34] The Respondent submits that the intensity of the duty of procedural fairness in a final level grievance falls at the low end of the spectrum (*Hagel v Canada (Attorney General)*, 2009 FC 329 at para 35). Further, with regard to the two emails relied upon by the ADM, the Respondent argues that (a) Ms. Blois was already in possession of the emails in question; (b) Ms. Blois was well aware of IRCC's position that the Deputy Minister retained authority to make the deployment decision; (c) Ms. Blois had the opportunity to make submissions to the ADM and even forwarded an affidavit to that effect explaining her version of events; and (d) as in *Chicoski v Attorney General of Canada*, 2017 FC 772 at para 45, the emails contained no new information, position or reasoning unknown to Ms. Blois.

[35] Concerning the information requested pursuant to the *Privacy Act*, the Respondent submits that the Court should decline the invitation to impose a far-reaching obligation on decision-makers in a final level grievance to hold an investigation and review material listed in a *Privacy Act* request. Instead, as the grievance process does not contemplate such an investigation, the decision maker should be able to decide the matter on the basis of the material put before it by the parties in the grievance proceedings. Further, the Respondent asserts that in the case of promissory estoppel, the onus was on Ms. Blois to furnish the promise she relied upon to her detriment; the ADM was under no obligation to seek out material on her behalf.

[36] I am in agreement with the Respondent that the intensity of the duty of procedural fairness in a final level grievance falls at the low end of the spectrum (*Hagel v Canada (Attorney General)*, 2009 FC 329 at para 35). I am also cognizant that the Preamble of the *Public Service Labour Relations Act,* above, recognizes that employment matters are to be resolved in a manner that is "fair, credible and efficient". Based on the record, I am satisfied that Ms. Blois had a meaningful opportunity to participate and be heard in the grievance proceedings.

[37] The emails in question did not contain additional or new information unknown to the Applicant; this is evident because Ms. Blois was the original recipient of the contested emails. Further, the Applicant's affidavit which she submitted in support of her grievance provided further context for the exchange with Mr. Lu Fernandes and addressed most, if not all, of the matters contained in the October 8th and 16th emails. It was open to the ADM to consider these emails along with the Applicant's affidavit and make his determination on the material before him.

[38] I am also not persuaded that had Ms. Blois been given notice that the ADM intended to rely on these emails it would have changed the outcome of the final level grievance. In the present application, Ms. Blois asserts that, with notice, "she could have explained how [the emails] in no way detracted from her evidence that she was promised a permanent deployment to IRCC with salary protection." However, in making submissions on this point, the Applicant merely points out that the emails are consistent with the timeline she described in her affidavit. Had she made submissions on this point during her grievance hearing, the ADM therefore would have faced the same adjudicative exercise: weighing the evidence holistically to determine

whether or not Ms. Blois' assertion of promissory estoppel could be made out. As a result, even if I had accepted the Applicant's argument that the duty of fairness in the circumstances required that Ms. Blois receive notice that the ADM intended to rely on the emails in question, it is my view that the failure to provide notice would merely be a technical breach which "occasions no substantial wrong or miscarriage of justice": *Canada (Citizenship and Immigration) v Khosa* 2009 SCC 12 at para 43.

[39] Similarly, the information from the *Privacy Act* request was not before the ADM at the time of his decision and the ADM was under no obligation to seek out additional information under these circumstances. The Applicant's affidavit contained very detailed information about various conversations and emails, most of which were corroborated by the material before the ADM.

[40] In light of the above, I find that the Applicant's right to procedural fairness was not breached.

C. *Was the ADM's denial of the Applicant's grievance unreasonable?*

[41] The Applicant argues that IRCC made a clear and unambiguous promise of deployment to an EX-01 position with salary protection. The specific facts which she states constitute the promise are (a) the verbal commitment she received from Mr. Fernandes in a phone call on October 13, 2015 that he had received the necessary approvals to deploy her and (b) the language of the secondment agreements which stated they were initiated while the department moved forward with EX Special Deployment.

[42] The Applicant asserts that the promise was clearly intended to be acted upon by Ms. Blois as she left her position and began working at IRCC on the basis of that promise.

[43] The Applicant states that she relied upon the promise of a permanent deployment and altered her position to her personal and professional detriment. She states that she gave up a two-year salary protected EX-01 position as Director of ATIP Operations at ESDC on the basis of IRCC's promise. Further she asserts that IRCC's actions: (a) delayed achieving her goal of transitioning into the EX stream; (b) harmed her professional reputation when she returned to ESDC after only five months; and (c) caused her to take a stress leave due to IRCC's actions.

[44] Relying on emails which stated that the offer was conditional upon the Deputy Minister's approval, the Respondent argues that there is no evidence to show that a promise for deployment with salary protection was ever made to the Applicant. With respect to the terms of the secondment agreements, the Respondent argues that they are only evidence that EX Special Deployment approval was ongoing.

[45] The Respondent argues that Ms. Blois has failed to show any detriment as a result of the refusal of the DM to deploy her to the EX-01 position with salary protection. Since October 26, 2015 (the date she first transferred to IRCC) Ms. Blois has not received a salary below the salary associated with her substantive position. Further, the Respondent argues that there is no medical evidence which establishes the nexus between the decision not to deploy Ms. Blois and her medical conditions.

[46] Finally, the Respondent argues that even if the Court finds that there was an unequivocal and clear promise made to Ms. Blois and that she relied on it to her detriment, the promise is still unenforceable since it was not made by the proper authority. Only the Deputy Minister was in a position to promise deployment with salary protection; Mr. Fernandes was not empowered to do so pursuant to provisions of the *Directive on Executive Compensation, the Financial Administration Act* and the *Public Service Employment Act*.

[47] I find that the ADM's decision was reasonable and one that falls within the "range of possible, acceptable outcomes that are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). It is clear from the parties' interactions and it was also recognized by the ADM in his decision that there was an intent to deploy Ms. Blois but the record also shows that a formal deployment did not occur. Rather, there was a series of secondment agreements expressing an intention to work toward a formal deployment. These secondment agreements coupled with the two emails from October 2015 did not formalize a deployment. Based on the ambiguous language in the emails and conversations between Ms. Blois and Mr. Fernandes, it was open to the ADM to conclude that there was no clear and unequivocal promise of deployment with salary protection (*Maracle v Travellers Indemnity Co. of Canada* [1991] 2 SCR 50 at para 57; *Salie v Canada*, 2013 FC 122 at paras 89-90). As such, the ADM reasonably declined to give effect to this argument.

[48] This particular case turns on the plain reading and applications of the *Directive on Executive Compensation* [*Directive*]*, issued pursuant to s 6(4.1) of the Financial Administration Act*, RSC 1985, c F-11, and the *Public Service Employment Act,* SC 2003, c 22. Of particular

importance is Appendix "E" to the *Directive*, which makes clear that any deployments are to be approved by the department head, defined as the Deputy Minister. The emails in question referred twice to the fact that approval of the Deputy Minister was required in spite of the intention of the parties to execute a deployment. The emails were part of an exchange that the Applicant was involved in and she had corroborated such emails in her affidavit. This evidence was considered by the ADM along with the secondment agreements.

[49] I understand the parties to agree that the terms "deployment" and "secondment" carry particular meaning in the context of public sector employment and each is formalized though different mechanisms, as outlined in the *Directive*, the *Financial Administration Act* and the *Public Service Employment Act*. The Applicant, a lawyer, is also well versed with these policies and in fact drew several provisions to the attention of the ADM in the adjudication of her grievance. There clearly was a difference of opinion as to the interpretation of such policies. However, based on the ambiguous record of communication between the parties, and the clear language in the *Directive* which establishes that only Deputy Heads may authorize executive deployments, the ADM's decision was reasonable under the circumstances.

[50] For the above reasons, the application is dismissed.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed.

"Paul Favel"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2095-16 |
| **STYLE OF CAUSE:** | DONNA BLOIS V ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 13, 2018 |
| **JUDGMENT AND REASONS:** | FAVEL J. |
| **DATED:** | MARCH 29, 2018 |

**APPEARANCES:**

| | |
|---|---|
| Andrew Raven | FOR THE APPLICANT |
| Simon Deneau<br>Richard Fader | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l.<br>Barristers and Solicitors<br>Ottawa, Ontario | FOR THE APPLICANT |
| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |