

Federal Court



Cour fédérale

Date: 20220603

Docket: T-273-21

Citation: 2022 FC 821

St. John's, Newfoundland and Labrador, June 3, 2022

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

PATRICK LAWLOR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND JUDGMENT

I. INTRODUCTION

[1] Mr. Patrick Lawlor (the “Applicant”) seeks judicial review of the Decision of Mr. Peter Hooey, the senior official designated for classification grievances pursuant to section A.2.21 of the Classification Directive (the “Senior Official”). In that Decision, the Senior Official accepted the recommendation of a classification grievance committee (the “Committee”) that the Applicant’s position remain classified at the AS-04 level.

II. THE PARTIES

[2] The Applicant is a civilian employee of the Royal Canadian Navy (the “RCN”), a part of the Canadian Armed Forces.

[3] Pursuant to Rule 303(2) of the *Federal Courts Rules*, S.O.R./ 98-106 (the “Rules”), the Attorney General of Canada is the Respondent (the “Respondent”) to this application for Judicial Review.

III. BACKGROUND

[4] The following facts and details come from the affidavits filed by the parties and from the Certified Tribunal Record (the “CTR”).

[5] The CTR was prepared by Ms. Vanessa Fuller, Senior Human Resources Advisor, Civilian Classification and Organization (DCCO), Department of National Defence, Government of Canada. The CTR includes the following Certificate that was signed on March 17, 2021:

I, the undersigned, Vanessa Fuller, Senior Human Resources Officer, Civilian Classification and Organization (DCCO), Department of National Defence, Government of Canada, do hereby certify that the materials enclosed and listed in the attached index below constitute all relevant materials which were in the file before the final-level decision maker for the above matter, pursuant to Rule 317 of the *Federal Courts Rules*.

[6] The CTR consists of the following documents:

- Benchmark Jobs Used by the Classification Grievance Committee (CGC);
- Correspondence between the CGC and Management and responses by the grievors;
- Correspondence with Commander Stewart;
- Breakdown of Positions Classified Using Standard Job Description #59677;
- Classification Grievance Committee Documentation, including 10 attachments;
- Policy on People Management;
- Directive on Classification Grievances;
- Classification Standard Administrative Services (AS); and
- Conversation Record and Delivery Log.

[7] The Certificate records that the Respondent objected to the production of the following, requested by the Applicant:

Provide a listing showing the quantity of personnel with each following Standard Job Descriptions #60012, #59757, #60018 within each of the 21 sub organizations such [sic] the Royal Canadian Navy, Canadian Army, Adm(Mat), ADM(IE), and the remaining L1 sub-organizations) [sic] within Department of National Defence. [emphasis in original]

[8] The Respondent took the position that this material should not be produced since it was not before the Committee and is not relevant to the application for judicial review.

[9] The Applicant filed one affidavit, that is his affidavit, sworn on March 30, 2021.

[10] The Respondent did not file an affidavit in response to the application for judicial review, but relies upon the affidavit of Ms. Fuller that was filed in support of its motion to strike certain paragraphs of the Applicant's affidavit. By an Order dated July 27, 2021, Prothonotary Ayles (as she then was) dismissed the motion of the Respondent and ordered that the motion to strike be decided by the application's judge.

[11] On February 15, 2010, the Applicant was hired as a civilian with the RCN in the position of a Risk Analyst, classified as AS-04, standard job description #59696. In 2011, the position took on new duties, including information risk management.

[12] In 2018, Commander Jason Stewart, the Applicant's manager, requested reclassification of the Applicant's position, going back to 2011. Commander Stewart recommended the retroactive reclassification of the Applicant to AS-05 level, relying on the Department of National Defence ("DND") Standard Job Description #59677 as a comparative job description ("comparator job description").

[13] In November 2019, Classification Officer Tom Egan reviewed the Applicant's work description. He recommended that the classification remain at the AS-04 level (the "First Evaluation"). He provided his opinion by means of an email dated November 12, 2019.

[14] In the same email, Mr. Egan observed that both the Applicant and his superior, were awarded the same number of points for the "Knowledge- Experience" factor.

[15] Mr. Egan adjusted the Applicant's Knowledge- Experience factor downward, from 519 points to 492 points, to avoid the situation where the Applicant, a subordinate, had the same number of points as his supervisor. This adjustment is referred to by Mr. Egan as the "compression issue".

[16] The following factors and sub-elements were considered in the assessment of the Applicant:

- Knowledge (Education, Experience, Continuing Study);
- Decision Making (Scope for Decisions, Impact of Decisions);
- Responsibility for Contacts (Nature of Contacts, Persons Contacted); and
- Supervision (Numbers Supervised, Level of Employees Supervised).

[17] RCN Director Captain (N) Jeff Hutchinson disagreed with the recommendation of the Classification Officer to maintain the AS-04 classification and asked for a review of the compression issue. Pursuant to the Directorate Civilian Classification and Organization Directive of Classification Disagreements and Impasses, this request was assigned to another officer, Ms. Lauren Mulligan.

[18] Ms. Mulligan reviewed the Applicant's file in January 2020. In a report, she recommended that the classification remain the same (the "Second Evaluation").

[19] On May 4, 2020, management accepted Ms. Mulligan's recommendation.

[20] On June 12, 2020, the Applicant filed a Classification Grievance pursuant to paragraph 208(1)(b) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the “FPSLRA”). As corrective action, he requested “that my position be reclassified”.

[21] Prior to the hearing, the Applicant submitted a Rebuttal Report to the Committee, setting out his concerns with the Second Evaluation. In this Rebuttal Report, he complained that several statements in the Second Evaluation were “inaccurate”.

[22] The Committee then contacted management representatives, identified by the Applicant, requesting further information.

[23] Following the hearing, the Committee made the following recommendation to the Senior Official:

It is the consensus of the Classification Grievance Committee members that the grieved positions #143425, #181764, #188161, Strategic Planning Analyst warrant a classification at the AS-04 group and level. Therefore, it is the recommendation of the Committee that the grieved positions be classified at the AS-04 group and level with an effective date of 01 September 2011.

[24] The Senior Official approved the Committee’s recommendation and adopted its reasons as his own. The Decision was communicated to the Applicant by letter dated January 19, 2021.

IV. STATUTORY SCHEME

[25] The exclusive authority to classify positions within the core public administration, pursuant to paragraph 11.1(1)(b) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, lies with the Treasury Board of Canada Secretariat (the “Treasury Board”).

[26] The Treasury Board delegates authority to Deputy Heads in the core administration service to classify positions within the public service.

[27] Positions in the public service are evaluated and classified in accordance with a Classification Standard (the “Standard”).

[28] All positions in the public service belong to a particular occupational group. Each occupational group has a specific Standard, such as the Administrative Services Classification Standard (the “AS Standard”). The work and responsibilities of a position are assessed against specific factors for that occupational group in the respective Standard. Points are awarded accordingly. The classification level of a position is determined based upon the total number of points awarded.

[29] The Applicant’s position, as a Risk Analyst, falls within the Administrative Services group.

[30] Each occupational group's Standard includes Benchmark positions. These positions are used to illustrate what each factor requires to garner a certain number of points.

[31] If unsatisfied with a position's classification, an employee can file a Classification Grievance, pursuant to paragraph 208(1)(b) of the FPSLRA, *supra*.

[32] Grievances are assessed by a classification grievance committee ("CGC") in accordance with Appendix B of the *Directive on Classification Grievances* (the "Classification Directive"). Pursuant to A.2.13 of the Directive, a CGC is composed of three members.

[33] Further to A.2.21 of the Classification Directive, the CGC makes a recommendation to the Deputy Head, or where responsibilities have been delegated, to the senior official designated for classification grievances. The Deputy Head or the senior official has the discretion to approve or reject the CGC's recommendation.

[34] If the senior official rejects the recommendation, the decision must be personally approved by the Deputy Head and communicated to the grievor, with reasons.

[35] If unsatisfied with the outcome of the grievance decision, the grievor has the right of judicial review, pursuant to subsection 209(1) of the FPSLRA, *supra*.

V. PRELIMINARY ISSUE

[36] The first matter to be discussed is the Respondent's motion to strike parts of the Applicant's Affidavit that was sworn on March 30, 2021.

[37] I agree with the general arguments of the Respondent that upon judicial review, only the material that was before the decision maker is the material that should be before the Court; see the decision in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency* (2012), 428 N.R. 297.

[38] The exceptions to this rule, identified in *Association of Universities and Colleges of Canada, supra* do not apply.

[39] In the exercise of my discretion, it was decided that the paragraphs, including certain exhibits, to which the Respondent objected would not be considered, "to the extent that they purport to go beyond what is in the tribunal record."

VI. SUBMISSIONS

i. The Applicant's Submissions

[40] The Applicant argues that the Committee breached his right to procedural fairness by rewriting part of the comparative job description and by failing to provide him with "new information".

[41] The Applicant also submits that the Committee unreasonably analyzed the Knowledge and Decision Making factors, thereby leading to an unreasonable decision.

[42] The Applicant further argues that the reduction of points for the Knowledge - Experience factor in the First Evaluation was unauthorized and done in the absence of any policy or other guideline.

[43] Otherwise, the Applicant argues that the Decision is unreasonable since the Committee did not follow the 6-step process for classification, outlined in the AS Standard. In particular, he notes that the Committee went beyond the process set out in Step 4 by comparing the overall job summary of the Benchmark position to his position.

ii. The Respondent's Submissions

[44] The Respondent argues that the procedural fairness requirements in respect of a classification grievance lie on the lower end of the scale and in any event, no breach of procedural fairness occurred. Further, and in the alternative, he submits that the Decision is reasonable, in light of the relevant statutory scheme.

VII. DISCUSSION AND DISPOSITION

A. *Standard of Review*

[45] The Applicant raises issues of procedural fairness and the unreasonableness of the Decision. Each issue requires consideration of the applicable standard of review.

[46] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339.

[47] The merits of the Decision are reviewable on the standard of reasonableness, following the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.).

[48] In considering reasonableness, the Court is to ask if the decision under review “bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on that decision”; see *Vavilov, supra* at paragraph 99.

B. *Procedural Fairness*

[49] The Applicant alleges that the process followed in determining his request for reclassification of his position was made in breach of his right to procedural fairness. He argues that the Committee improperly rewrote the comparator job description by adding the article “the”, thereby putting the focus on the whole department.

[50] In support of this argument, the Applicant relies on the decisions in *Majdan v. Canada (Attorney General)*, 2011 FC 1465, and *Allard v. Canada (Attorney General)* (2012), 417 F.T.R. 1, among others.

[51] I am not persuaded by this submission. The authorities relied upon by the Applicant can be distinguished on the facts.

[52] I agree with the position of the Respondent, that the introduction of the definite article “the” to the comparator job description while entering it into the internal software program did not change the job description and did not change the job. The inclusion of the word “the” did not give rise to a breach of procedural fairness.

[53] The Applicant also submits that the failure of the Committee to provide “new information” received from Commander Stewart resulted in a breach of procedural fairness.

[54] In an email dated September 24, 2020, the Committee asked Commander Jamie Hopkins to answer questions related to the Applicant’s grieved position. In his response, Commander Hopkins said that he consulted with Commander Stewart who was more familiar with the Applicant’s job.

[55] According to an email dated November 5, 2020, the Committee contacted Commander Stewart directly and asked if he would answer some questions.

[56] By email dated November 6, 2020, Commander Stewart said that he would be “Happy to respond and will provide a more fulsome response”. Although the Committee followed up by emails dated November 17, 2020 and December 7, 2020, Commander Stewart did not forward any information.

[57] The Applicant submits that Commander Stewart's email on November 6, 2020, where he indicated a willingness to respond, was "new information" that should have been provided to him. Relying on *Majdan, supra*, the Applicant asserts that the Committee's failure to disclose this "new information" was a breach of procedural fairness.

[58] In the present case, no new information was provided to the Committee. There is no information to be assessed for relevance or otherwise.

[59] This situation is unlike that in *Majdan, supra* where a CGC received new substantive information, determined that it was not relevant, and did not disclose it to the grievor.

[60] In these circumstances, I am not persuaded that the Applicant suffered a breach of procedural fairness.

[61] There was also discussion about the "compression issue", that is the downward adjustment of the Applicant's Knowledge- Experience factor in the First Evaluation. The Applicant notes that this process is not outlined in any policy.

[62] However, the "compression" of this factor only occurred as part of the First Evaluation. There was no "compression issue" in the Second Evaluation or in the Committee's evaluation. In my opinion, this issue is not determinative on this application for judicial review.

C. *Reasonableness*

[63] The Applicant also submits that the Decision is unreasonable because the Committee failed to follow the 6-step process outlined in the AS Standard for the classification of jobs allocated to the Administrative Services Group.

[64] The AS Standard says the following about Step 4:

The description of the factor in each of the bench-mark positions exemplifying the degree tentatively established is compared with the description of the factor in the position being rated. Comparisons are also made with descriptions of the factor in bench-mark positions for the degrees above and below the one tentatively established.

[65] The Applicant argues that the Committee went beyond the process set out in Step 4. In addition to comparing his Knowledge and Decision Making factors to the same Benchmark factors, it also compared the overall job summary of the Benchmark position with the Applicant's position.

[66] The summary of the Benchmark position provides that the employee works under the direction of a Director. The Applicant, in his current position, does not work under a Director.

[67] The Committee found that due to this fact, the Applicant could not be awarded the same number of points associated with this factor, in the Benchmark position.

[68] The Respondent submits that in addition to the “factor-factor” comparison, the Benchmark position must be read in its entirety, pursuant to the “Notes to Raters” in the AS Standard. These “Notes to Raters” say:

...The degree of the Experience element tentatively selected is to be confirmed by direct comparison of the position being rated with the duties and specifications of the bench-mark positions.

[69] The Respondent relies on this provision to argue that the Committee reasonably found that the Applicant’s job description does not match the Benchmark position because the latter requires that the employee report to a Director.

[70] I am not persuaded by these submissions.

[71] In my opinion, the Committee unreasonably compared the Applicant’s overall job summary to the overall summary of the Benchmark position. Contrary to what the Respondent argues, the “Notes to Raters” do not direct a comparison of an individual factor to the Benchmark summary. This comparison is not addressed in the 6-step classification process and in my opinion, the Committee’s adoption of this extra “consideration” is unreasonable.

VIII. Remedy

[72] If successful upon this application, the Applicant seeks the following relief:

- An order allowing this application for judicial review and setting aside the decision of DND-2020-00015, dated 19 January 2021;

- An order directing a new Classification Grievance Committee be formed to address the Applicant’s grievance; and
- Such further and other relief as the Applicant may request and this Honourable Court may permit.

[73] For his part, the Respondent submits that if the application for judicial review is granted, the matter should be returned to the Committee.

[74] The Respondent relies upon paragraphs 139 to 142 of the decision in *Vavilov, supra* in support of this argument.

[75] I disagree with the position of the Respondent.

[76] In the first place, the usual remedy upon a successful application for judicial review is an order or judgment setting aside the challenged decision. I refer to paragraph 18.1(3)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7:

18.1(3) Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

...

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to

Pouvoirs de la Cour fédérale

(3) Sur présentation d’une demande de contrôle judiciaire, la Cour fédérale peut :

...

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu’elle estime appropriées, ou prohiber ou

be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

[77] Second, contrary to the submissions of the Respondent, the Committee made no “decision” here. It made a recommendation that, when accepted by the authorized person, became the “decision” of the Senior Official.

[78] At paragraph 141 of *Vavilov, supra*, the Supreme Court of Canada said the following:

Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[79] I disagree with the Respondent’s interpretation of this paragraph. In my opinion, the appropriate remedy here is a Judgment setting aside the Decision and remitting the matter to a new CGC.

[80] The interests of fairness require that the matter be remitted to “fresh eyes” for re-determination.

IX. Costs

[81] The Applicant did not seek costs in his written submissions. However, pursuant to Rule 400(1) of the Rules, the Court enjoys full discretion in the matter of costs.

[82] The Applicant was successful in this application and in my opinion, a modest award of costs is justified. In the exercise of my discretion, I award costs in the amount of \$750.00, inclusive of disbursements and HST.

X. Conclusion

[83] In the result, the application for judicial review is allowed, the Decision will be set aside and remitted to a differently constituted CGC, with costs to the Applicant in the amount of \$750.00.

JUDGMENT in T-273-21

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the Decision is set aside and remitted to a differently constituted classification grievance committee. In the exercise of my discretion, costs are awarded in the amount of \$750.00, inclusive of disbursements and HST.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-273-21

STYLE OF CAUSE: PATRICK LAWLOR v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE
BETWEEN HALIFAX, NOVA SCOTIA, OTTAWA,
ONTARIO AND ST. JOHN'S, NEWFOUNDLAND
AND LABRADOR

DATE OF HEARING: DECEMBER 6, 2021

REASONS AND JUDGMENT: HENEGHAN J.

DATED: JUNE 3, 2022

APPEARANCES:

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(ON HIS OWN BEHALF)

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