Federal Court		Cour fédérale

Date: 20100513

Docket: T-789-09

Citation: 2010 FC 528

Ottawa, Ontario, May 13, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

AL MACKLAI

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review of a decision of the assistant director of the respondent's Scientific Research and Experimental Development Program, dated April 20, 2009. In that decision, the assistant director denied the applicant's request that the applicant's appointment to a higher position be made retroactive to July 4, 2006.

[2] The applicant requests:

1. An order setting aside the decision of Mr. Khan;

2. An order remitting the matter back to a different representative of the respondent and requiring the respondent to make the applicant's appointment to the position of senior financial reviewer retroactive to July 4, 2006; and

3. Costs of this application.

Introduction

[3] The Canada Revenue Agency (the Agency or CRA) is responsible for the administration of Federal Government tax programs as well as the delivery of economic and social benefits. Pursuant to the *Canada Revenue Agency Act*, S.C. 1999, c. 17 (the Act), the CRA is a body corporate and is a separate agency under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, (see subsection 4(1) and section 50 of the Act).

[4] Parliament has given the CRA broad responsibilities over the management of its human resources (see subsection 51(1) of the Act). Section 53 of the Act also grants the CRA the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business. Then, pursuant to section 54, the CRA is responsible for developing and administering a program governing staffing.

[5] The Agency's current staffing program contains the Directive on Recourse for Assessment and Staffing (the recourse directive). The recourse directive sets out in detail the parameters of the recourse scheme developed pursuant to the Act and includes provision for the independent third

party review (ITPR) of CRA staffing decisions, including selection process decisions. The recourse directive, however, requires independent third party reviewers to limit corrective measures to those actions required to correct the errors made during the selection process.

Background

[6] The applicant is a financial reviewer (AU-03) with the CRA. He applied for a promotion to the position of senior financial reviewer (AU-04), but was unsuccessful in the selection process. The successful candidates in the process were appointed to the AU-04 level on July 4, 2006.

[7] The applicant complained about the selection process and engaged the recourse directive. The staffing decision was then referred to ITPR, where the applicant obtained a favourable decision. An independent third-party reviewer (the reviewer), ordered the CRA to correct an error in the selection process and recommended that the appointments made under the process be rescinded and that the process be conducted *de novo*, "in a manner that more closely reflects the Agency's Staffing Principles".

[8] The CRA decided not to fully comply with the reviewer's order. Instead, the CRA reassessed the candidates and subsequently the applicant's supervisor offered the applicant a position at the AU-04 level in a letter dated March 25, 2009. The applicant accepted the offer immediately, but had misgivings about the effective date of his appointment. He requested that he be paid retroactively to July 4, 2006 (the date that the other placements were originally made). The

applicant referred to the fact that the Agency in similar cases had provided aggrieved employees with retroactive pay.

The Decision under Review

[9] On April 6, 2009, a steward with the Professional Institute of the Public Service of Canada, met with the applicant's supervisor regarding the applicant's request for retroactive pay. The applicant's supervisor informed the steward that prior to March 25, 2009, the applicant had not performed the duties of an AU-04 and that the applicant could not be paid for work at the AU-04 level which he had not performed. In response to the steward's claim that other employees had been paid retroactively, the applicant's supervisor indicated that he was of the view that he should focus on the facts of the applicant's case.

Issues

[10] The issues are as follows:

1. What is the standard of review?
2. Was the decision of the applicant's supervisor reasonable?

Applicant's Written Submissions

[11] The applicant submits that the standard of review should be correctness. Whether retroactive pay is appropriate is a question of law and questions of law on staffing matters attract the standard of correctness because the decision maker has no expertise. The question was akin to an assessment of damages question, because the matter arose in the wake of the reviewer's determination that the staffing exercise had been carried out improperly. The fact that the decision is made by an individual not independent from the employer and the lack of a privative clause also suggest that correctness is the appropriate standard.

[12] The applicant points out that both in the law of contract and tort, damages are meant to put the injured person in the position they would have been had the breach or tort not occurred. In this instance, the applicant should have been appointed to the AU-04 position originally and thus should have received retroactive pay. Indeed, this is the standard practice in labour arbitration where it is determined that a grievor should have been promoted. There is no discretion concerning remedy once it is determined that a grievor ought to have been appointed. The length of the retroactive period is not a relevant consideration. Given that the CRA never explained on what basis it ultimately offered the applicant the appointment, the applicant and Court are left to assume that it was on the basis that the applicant would have been successful in the original competition.

[13] The applicant further submits that the Agency's staffing program is governed and guided by eight staffing principles including the principles of fairness and transparency. If retroactive

compensation is not required, the Agency would have no incentive to implement corrective measures in a timely manner and this would result in unfairness. In light of the principle of fairness and the arbitral jurisprudence, the CRA's concern that the applicant had not performed the work of an AU-04 was unreasonable. In light of the principle of transparency, employees have a legitimate expectation that like cases will be decided alike. Here, the CRA has openly refused to consider past internal precedents. Regardless of the standard of review, the decision of the applicant's supervisor was unreasonable.

Respondent's Written Submissions

[14] The Agency takes the position that the standard of review is reasonableness. The question before the applicant's supervisor was a question of fact and policy that involved the exercise of discretion. A standard of review analysis is not necessary as this Court has already determined that the reasonableness standard should apply to questions of this type.

[15] Even on a standard of review analysis, the appropriate standard should be reasonableness says the Agency. First, while there is no privative clause or right of appeal, the recourse directive provides that recourse is not available following the implementation of corrective measures. Analysis of the purpose of tribunal reveals that through the enabling legislation, Parliament has given the CRA a significant degree of autonomy with respect to a wide variety of labour relations issues, including employee recourse issues which necessarily include the implementation of corrective measures. As stated, the nature of the question before the applicant's supervisor involved

the exercise of discretion in the particular facts of the case. Finally, the applicant's supervisor's position as a CRA manager responsible for all aspects of human resources in his office, suggest that he has relative expertise in deciding what was a human resources matter.

[16] The supervisor's decision not to pay the applicant as an AU-04 for the period July 4, 2006 to March 25, 2009 was based on the particular facts of the situation. In particular, it was based on the substantive differences between work done at the AU-03 and AU-04 levels and the fact that the applicant had not done the work of an AU-04. The supervisor's decision was, at a minimum, within the range of acceptable outcomes.

[17] Furthermore, it was the correct decision. An ITPR reviewer, upon determining that there was an error in the selection process, can only order that the procedural errors be fixed but cannot order how they must be fixed. It is open to the CRA to determine how to address the error. Here, the reviewer ordered the CRA to address the error, but only recommended rescinding the appointments and conducting the process *de novo*. The Agency was adverse to the idea of rescinding the appointments of the successful candidates who had been working at the AU-04 level for some time, to conduct a *de novo* selection process which at best would only have provided the applicant with a possibility of being appointed. Instead, the CRA reassessed the candidates and subsequently offered the applicant an AU-04 position. Now, the applicant seeks an order requiring the Agency to appoint him retroactively to July 4, 2006, which goes well beyond what could have been ordered by a reviewer and would undermine Parliament's intention and the scheme created by the CRA.

Analysis and Decision

[18] **Issue 1**

What is the standard of review?

The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL), revolutionized the approach to determining the appropriate standard upon which to review administrative decisions.

[19] With the goals of efficiency and certainty in mind, the *Dunsmuir* Court taught, in particular, that a full standard of review analysis would not always be required if the appropriate standard was readily apparent:

> 62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[20] In the above passage, the Court indicated that the key factor to analyze when determining whether the jurisprudence had resolved the standard of review is the nature of the question. Indeed, the *Dunsmuir* Court identified certain types of questions which will be automatic determinants of the appropriate standard. At paragraph 51, the Court stated:

> …As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of

> reasonableness while many legal issues attract a standard of correctness….

Then again at paragraph 53:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically….

[21] I am satisfied that the question before the applicant's supervisor was one that involved the exercise of his discretion in his capacity as a manager and was dependent on the facts of the applicant's particular case. Despite the applicant's assertions, his supervisor was not dealing with a question of law or jurisdiction, nor was his decision precedent setting. In my view, the standard of reasonableness should apply.

[22] The applicant has characterized the question as a legal one because it involved principles similar to those used in the assessment of damages in breach of contract or tort cases. I cannot agree. While the applicant may be able to draw some similarities between his situation and a tort or contract plaintiff, the fact remains that this was not a decision involving tort or contract law. Nor is it a fact situation evoking adherence to the law of labour arbitration. None of that case law is relevant in the present context, given the particular legislative scheme provided for under the Act and the detailed staffing program including the recourse directive developed by the CRA in discharging its obligations under the Act.

[23] Nor was the question a legal one because it involved interpretation of the employee's *de facto* contract of employment as was the case in *Appleby-Ostroff v. Attorney General of Canada*, 2010 FC 479**.** The recourse directive, even if it became part of the applicant's terms and conditions of employment, did not address the precise question at issue, the awarding of retroactive pay.

[24] Finally, the recourse directive was solely within the sphere of management and human resources expertise and did not involve subject matter for which the courts have relative expertise as was the case in *Canada (Attorney General) v. Assh*, 2006 FCA 358, [2007] 4 F.C.R. 46, 274 D.L.R. (4th) 633, regarding the interpretation of a conflicts of interest code.

[25] I also note that though no case has dealt with the precise question before this CRA manager, in *Barry Gerus v. Canada (Attorney General)*, 2008 FC 1344, [2008] F.C.J. No. 1717, this Court considered an application for judicial review in connection with a decision of a CRA manager rejecting the applicant's application for preferred status, a designation under the staffing program. Since the question before the manager was one of fact and policy, the Court concluded that the reasonableness standard ought to apply (see *Barry Gerus* above, at paragraph 16).

[26] **Issue 2**

Was Mr. Khan's decision reasonable?

In my view, given the legislative scheme of the Act and the authority to determine matters relating to human resources, a discretionary decision of a CRA manager is not the type of decision for which this Court ought to substitute its own opinion for that which was made at the operational

level. There may be cases where a manifestly unjust decision will require this Court to engage in micromanagement of the CRA, but there are no such circumstances here.

[27] In terms which I believe are particularly apt in the present case, the *Dunsmuir* Court described the reasonableness standard as follows:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[28] Peering into the oral decision of the applicant's supervisor, his reasons seem abundantly transparent. His primary reason for not awarding retroactive pay to the applicant was that the applicant had not performed the work. This is a fact which makes the decision of the applicant's supervisor reasonable. A managerial decision regarding whether to award a benefit in a notably low procedural fairness environment, need not require any more in the way of reasons. It is enough that the applicant's supervisor clearly turned his mind to the particular facts of the applicant's situation. At minimum, the decision of the applicant's supervisor was one possible acceptable outcome for which I would not choose to intervene in.

[29] The applicant, of course, does not frame the issue this way and proceeds on the implicit assumption that he had a legal right to retroactive pay for which the CRA had no discretion whether or not to award. While I have already stated my disagreement with this characterization of the type of question at issue in my analysis of the standard of review, I will now elaborate on the reasons why I find this assumption to be flawed.

[30] The applicant's demand for retroactive pay arose in the context of the implementation of the reviewer's decision relating to the selection process. Article 7 of the recourse directive sets out the corrective measures that may be ordered or recommended where recourse is sought by an employee. With respect to ITPRs in staffing decisions, paragraph 7.4 of the recourse directive provides as follows:

> 7.4 The corrective measures that the Independent Third Party Reviewer may prescribe are limited to:
>
> (a) Ordering the Authorized Person that an error in the internal selection process or staffing action be corrected. The ITPR Reviewer has no authority to order the Authorized Person as to how the error should be corrected;
>
> (b) Recommending the revocation of the employee's appointment, if required;
>
> (c) Recommending that another Authorized Person be involved in the decision.

[31] With respect to staffing decisions, it is the ITPR reviewer's job to identify errors made in the selection process, if any, but under paragraph 7.4, a reviewer may only issue an order requiring that an error be corrected. In other words, the reviewer can only order that procedural errors in a selection process be corrected. A reviewer cannot order how such errors should be corrected and to

that extent, is prohibited from ordering a substantive result (see *Canada (Attorney General) v. Beall*, 2007 FC 630, 314 F.T.R. 159 at paragraphs 19 to 21, *Canada (Attorney General) v. Gagnon*, 2006 FC 216, [2006] F.C.J. No. 270 at paragraph 21, aff'd 2007 FCA 164).

[32] In the present case, the reviewer identified several errors in the selection process and ordered their correction. It was her recommendation that the appointments which had been made pursuant to the process be rescinded and the process conducted *de novo*. As stated above though, it is within the CRA's purview to determine how to address the errors. Had those recommendations been followed, the applicant would have only gained a possibility of being appointed in a new process and no possibility of any retroactive pay. Instead, the applicant was offered the result which would have been the optimum outcome and he accepted the appointment to the AU-04 position.

[33] Now the applicant seeks an order requiring the Agency to appoint him retroactively to July 4, 2006. I agree with the respondent that such an order goes well beyond what he could have obtained pursuant to ITPR and the recourse directive which the Agency developed and administers pursuant to section 54 of the Act.

[34] In its decision in *Beall* above, this Court declared that the ITPR reviewer's decision that Ms. Beall be appointed retroactively was unlawful and exceeded his jurisdiction under the Agency's staffing program (see paragraphs 18 and 19).

[35] Ordering retroactive pay to July 4, 2006, where under the recourse regime created by the CRA, an ITPR reviewer could not make such an order, would appear to be contrary to Parliament's intention to provide the CRA with the responsibility to establish and administer a staffing and recourse program. Though the applicant did not challenge the legitimacy of the CRA's staffing program or any of its provisions, such an order would undermine that scheme by encouraging employees who had been successful in the ITPR process to seek additional relief not provided for under the scheme.

[36] The CRA's staffing program does contemplate and even allows for awards of retroactive pay by ITPR reviewers in situations involving non-disciplinary termination or demotion. Such a situation was the subject of this Court's decision in *Sherman v. Canada (Customs and Revenue Agency)*, 2005 FC 173, [2005] F.C.J. No. 209 (QL). In any event, the applicant has not challenged the staffing program or any provision in the recourse directive in respect of the jurisdiction of ITPR reviewers.

[37] Thus, there was no legal right to retroactive pay in the applicant's situation and no reason to treat such a decision as anything different from what it would be in the normal course of employment; a discretionary decision by management.

[38] While the applicant brings up the CRA's staffing principles of fairness and transparency, those principles cannot be contorted into a legal right to pay for work not done. In any event, I find

that the applicant was treated fairly and with transparency in the implementation of the reviewer's order.

[39] As a final matter, the applicant relies on the decision in *Vera Gerus v. Canada (Revenue Agency)*, 2009 FC 55, [2009] F.C.J. No. 90 (QL), a case involving the CRA's failure to give effect to Ms. Gerus' preferred status.

[40] Section 2 of the CRA's Preferred Status Directive creates certain mandatory requirements with respect to employees who have preferred status. It, in part, provides:

> 2.1 To be considered for appointment, individuals with Preferred Status must meet the minimum requirements of the position to be filled including requirements for education, official languages and security.
>
> 2.2 In order to maximize permanent placement opportunities for individuals with Preferred Status, Authorized Persons, with the assistance of Human Resources, are responsible for ensuring that individuals with Preferred Status are considered for permanent vacancies prior to initiating staffing with or without selection process. Authorized Persons are also responsible for advising individuals with Preferred Status of the outcome, and for granting, upon request, the recourse rights specified in this Directive to those who are not placed.
>
> 2.3 Authorized Persons must consider individuals with Preferred Status as part of the area of selection when they conduct a selection process. Such individuals must already be living at a reasonable commuting distance to the location of the position being staffed (even those whose substantive position is in another location or region) and must meet the minimum requirements of that position. Individuals with Preferred Status must also be fully qualified to be included in the pool.
>
> 2.3.1 If individuals with Preferred Status qualify as a result of such a selection process, and if there substantive positions are already at the

> same group and level or equivalent level as the position to be filled, these individuals must be considered in priority over other qualified candidates and will be appointed as a result of their Preferred Status.

[41] While Ms. Gerus, who had preferred status, was awaiting appointment, certain positions were filled without giving Ms. Gerus notice or an opportunity to submit an application for consideration. In the final decision available under the recourse directive, the Agency advised her that she had been considered for the positions but that she did not meet the minimum requirements. On judicial review, this Court overturned the decision criticizing the Agency's interpretation of the term "minimum requirements" in relation to Ms. Gerus' rights as an individual with preferred status stating:

> 25 The decision under review, the letter of January 25, 2008 states that the Applicant "did not meet the minimum requirements". This is clearly an error. It is an unreasonable interpretation of the Program. The Applicant met the "minimum requirements" - she did not however have "full qualifications". The decision does not address the fact that certain positions were filled without a selection process whereby the Applicant's lack of "full qualifications" would have been irrelevant. The decision is unreasonable and will be set aside.

[42] When the matter was returned to the Agency for redetermination, the decision was made to appoint Ms. Gerus retroactively to a CS-02 position.

[43] In my view, *Vera Gerus* above, presented a very different situation than the present case. Here, the applicant had no right under the staffing program to retroactive pay as Ms. Gerus did due to preferential appointment in her case. Further, the disposition of the *Vera Gerus* case seems to

reaffirm that decisions to appoint an individual retroactively are discretionary decisions made by CRA management based on the facts of each case before them.

[44] For the preceding reasons, I would dismiss this application for judicial review with costs to the respondent.

JUDGMENT

[45] **IT IS ORDERED that** the application for judicial review is dismissed with costs to the respondent.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Canada Revenue Agency Act, S.C. 1999, c. 17

50. The Agency is a separate agency under the Public Service Labour Relations Act.	50. L'Agence est un organisme distinct au sens de la Loi sur les relations de travail dans la fonction publique.
51.(1) The Agency may, in the exercise of its responsibilities in relation to human resources management,	51.(1) L'Agence peut, dans l'exercice de ses attributions en matière de gestion des ressources humaines :
(a) determine its requirements with respect to human resources and provide for the allocation and effective utilization of human resources;	a) déterminer les effectifs qui lui sont nécessaires et assurer leur répartition et leur bonne utilisation;
(b) determine requirements for the training and development of its personnel and fix the terms and conditions on which that training and development may be carried out;	b) déterminer les besoins en matière de formation et perfectionnement de son personnel et en fixer les conditions de mise en oeuvre;
(c) provide for the classification of Agency positions and employees;	c) assurer la classification des postes et des employés;
(d) determine and regulate the pay to which persons employed by the Agency are entitled for services rendered, the hours of work and leave of those persons and any related matters;	d) déterminer et réglementer les traitements auxquels ont droit ses employés, leurs horaires et leurs congés, ainsi que les questions connexes;
(e) provide for the awards that may be made to persons employed by the Agency for outstanding performance of	e) prévoir les primes susceptibles d'être accordées aux employés pour résultats exceptionnels ou réalisations

their duties, for other meritorious achievement in relation to those duties and for inventions or practical suggestions for improvements;

méritoires dans l’exercice de leurs fonctions, ainsi que pour des inventions ou des idées pratiques d’amélioration;

(f) establish standards of discipline for its employees and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct and the circumstances and manner in which and the authority by which or by whom those penalties may be applied or may be varied or rescinded in whole or in part;

f) établir des normes de discipline et fixer les sanctions pécuniaires et autres, y compris le licenciement et la suspension, susceptibles d’être infligées pour manquement à la discipline ou inconduite et préciser dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces sanctions peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

(g) provide for the termination of employment or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed by the Agency and establish the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;

g) prévoir, pour des motifs autres qu’un manquement à la discipline ou une inconduite, le licenciement ou la rétrogradation à un poste situé dans une échelle de traitement comportant un plafond inférieur et préciser dans quelles circonstances, de quelle manière, par qui et en vertu de quels pouvoirs ces mesures peuvent être appliquées, modifiées ou annulées, en tout ou en partie;

(h) determine and regulate the payments that may be made to Agency employees by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their employment; and

h) déterminer et réglementer les indemnités à verser aux employés soit pour des frais de déplacement ou autres, soit pour des dépenses ou en raison de circonstances liées à leur emploi;

(i) provide for any other matters that the Agency considers necessary for effective personnel management, including terms and conditions of employment not otherwise specifically provided for in this subsection.

i) prendre les autres mesures qu'elle juge nécessaires à la bonne gestion de son personnel, notamment en ce qui touche les conditions de travail non prévues de façon expresse par le présent paragraphe.

(2) The Commissioner must apply the penalties, including termination of employment and suspension, under paragraph (1)(f) and provide for termination or demotion under paragraph (1)(g) on behalf of the Agency.

(2) Le commissaire, pour le compte de l'Agence, inflige les sanctions, y compris le licenciement et la suspension, visées à l'alinéa (1) f) et procède au licenciement ou à la rétrogradation visés à l'alinéa (1) g).

. . .

. . .

53.(1) The Agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business.

53.(1) L'Agence a compétence exclusive pour nommer le personnel qu'elle estime nécessaire à l'exercice de ses activités.

(2) The Commissioner must exercise the appointment authority under subsection (1) on behalf of the Agency.

(2) Les attributions prévues au paragraphe (1) sont exercées par le commissaire pour le compte de l'Agence.

54.(1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.

54.(1) L'Agence élabore un programme de dotation en personnel régissant notamment les nominations et les recours offerts aux employés.

(2) No collective agreement may deal with matters governed by the staffing program.

(2) Sont exclues du champ des conventions collectives toutes les matières régies par le programme de dotation en personnel.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Steven Welchner	FOR THE APPLICANT
John Syme	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office Professional Corporation Ottawa, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT