Federal Court

Cour fédérale

Date: 20110315

Docket: T-751-10

Citation: 2011 FC 311

Ottawa, Ontario, March 15, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

VIRGINIA JAKUTAVICIUS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the final level grievance reply of the Director General, HR Enterprise Services, Human Resources and Skills Development Canada (HRSDC), dated April 12, 2010. The decision denied a grievance by the applicant alleging that the actions of her employer, HRSDC, throughout the parties' dispute over the classification of an acting position she occupied from April 1998 to May 2000 (the combined position), amounted to bad faith.

Background

[2] The applicant filed a series of grievances with HRSDC relating to the classification of the combined position. Her grievances and their resolution travelled a long and winding road over many years and unresolved issues still remain. This judicial review application relates to a grievance filed by the applicant alleging that the respondent's actions throughout the dispute amounted to bad faith. Because of the disposition I have reached in this application, and the brief reasons given by the decision maker, it is necessary to set out in some detail the history of the parties' interactions.

[3] Ms. Jakutavicius has been employed with the Government of Canada for over 20 years and she remains employed with HRSDC. In the spring of 1998, she occupied the position of Chief, Coordination and Briefing, which was classified at the PM-06 level. Ms. Jakutavicius was asked by her supervisor, Mr. Yves Poisson, to assume the role of Acting Director, Federal-Provincial and Client Relations. She began serving in this role in April 1998. The responsibilities of the new role were to be in addition to those of her substantive position.

[4] In her affidavit, Ms. Jakutavicius explains the situation that ensued as follows. She raised concerns regarding the appropriate classification and compensation for her new role in the combined position. Mr. Poisson explained that the positions would be officially combined once the incumbent resigned, and that a classification review would take place at that time. For the time being, it was agreed that the applicant would receive overtime compensation for her excess work.

Ms. Jakutavicius was not required to obtain pre-authorization for her overtime, but she provided explanatory notes for all the overtime she worked of her own accord.

[5] Ms. Jakutavicius worked in the combined position without incident for approximately 22 months. She says she did not file a classification grievance during this period because of the understanding that a classification review would take place when the incumbent resigned. In 2000 problems began to arise between Ms. Jakutavicius and her employer.

Overtime Dispute

[6] In January 2000, Ms. Jakutavicius worked overtime hours in preparation for a meeting to be held in early February. She states in her affidavit that on February 7, 2000, Mr. Poisson advised her that because of orders from Assistant Deputy Minister Warren Edmondson, he could not approve payment for the overtime hours she had worked in January. Mr. Poisson recommended that Ms. Jakutavicius address this issue with Mr. Edmondson, which she did on February 18, 2000. Mr. Edmondson approved Ms. Jakutavicius' January 2000 overtime hours but indicated that from that point forward she would have to obtain pre-authorization for overtime hours. Ms. Jakutavicius also says that at this meeting Mr. Edmondson confirmed that her combined position would be submitted for classification review.

[7] This pre-authorization requirement for overtime was put in place even though Ms. Jakutavicius continued to perform the duties of the combined position. She later objected to the imposition of this requirement because she believed that she was operating at a Director level, and Directors are not normally subject to such a requirement.

"Dismantling" of Combined Position

[8] The applicant states that on May 19, 2000, she received formal notification, by way of a branch-wide email from Mr. Edmondson, that the Coordination and Cabinet Briefing Unit would be reporting to the Assistant Deputy Minister's Office as of May 23, 2000. She says that the coordination and briefing functions had up until that point been within her responsibilities. Ms. Jakutavicius says that the email announcement "came as a betrayal and as a disillusionment to me as it demonstrated that management had no intention of carrying out the classification review as promised, but would deal with the situation by dismantling the responsibilities of the combined role" and that it "demonstrated a deceitful and callous disregard towards my personal dignity and professional reputation."

Initial Grievances: Classification Grievance 1 and Overtime Grievance

[9] Ms. Jakutavicius submitted a grievance to management on June 23, 2000, regarding its failure to refer the combined position to a classification review. The grievance complained that the position she occupied from April 1998 to May 2000, was not properly classified. Another grievance filed at the same time challenged HRSDC's requirement that she obtain pre-authorization for overtime. Ms. Jakutavicius' overtime grievance was denied at the final level.

[10] Ms. Jakutavicius states that in August 2000, the dismantling of her combined position originally announced in May 2000 was implemented. She believes that the timing was in retaliation for her filing of a third level grievance with respect to her overtime grievance.

Decision not to Proceed with Classification Review

[11] Following the third level grievance hearing on the classification grievance Ms. Jakutavicius agreed with management that it would refer the combined position to a classification review and she would hold her classification grievance in abeyance pending the review.

[12] Ms. Jakutavicius hired a consultant to prepare a job description for the combined position and submitted the description to management on October 15, 2001. On May 24, 2002, she learned that HRSDC had not approved the job description she submitted and that therefore a classification review for the combined position would not be undertaken. Ms. Jakutavicius subsequently learned, in June 2002, that Mr. Poisson had provided written comments dated December 18, 2001, regarding the combined position, and that the comments had been considered by HRSDC before making its decision not to refer the combined position to a classification review. On September 30, 2002, she wrote to Mr. Denis Trottier, Corporate Staff Relations Consultant, expressing her concerns regarding the failure to provide her with a copy of Mr. Poisson's letter and an opportunity to rebut his comments.

[13] In her affidavit, Ms. Jakutavicius expresses her view that there were unnecessary and lengthy delays and a lack of transparency and fairness on the part of management in deciding not to refer her position to a classification review. She also says that it was grossly unfair for management to fail to provide her with Mr. Poisson's letter and an opportunity to respond prior to making its decision. Ms. Jakutavicius believes this conduct was retaliation for her insistence on conducting a classification review even though the combined position had been dismantled.

[14] Given the respondent's decision not to undertake a classification review, Ms. Jakutavicius reactivated her classification review grievance and proceeded through the grievance process. The final level grievance decision was rendered on May 6, 2003. The decision denied the grievance on the basis of timeliness.

Judicial Review of Classification Grievance 1

[15] Ms. Jakutavicius missed the deadline for filing an application for judicial review of the response to her grievance due to incorrect advice she received from her union representative. She brought a motion in Federal Court seeking an extension of time. Her motion was dismissed by Justice Gauthier, but the Federal Court of Appeal allowed her appeal and extended the time for filing an application for judicial review: *Jakutavicius v Canada (Attorney General)*, 2004 FCA 289. Ms. Jakutavicius then filed an application for judicial review which was allowed on consent, and the grievance was sent back to HRSDC for re-determination. The respondent subsequently agreed to refer the combined position for classification review.

Classification Review

[16] Ms. Jakutavicius and HRSDC agreed on a work description for the combined position on November 15, 2005. On December 5, 2005, the respondent's counsel sent the applicant a letter advising her that the work description would be forwarded for a classification review, and also alerting her to the possibility that if the position were reclassified at the EX level she would have to reimburse all overtime pay and the bilingual bonus she received during her tenure in the combined position because employees at the EX level do not have these entitlements.

[17] By the spring of 2006 Ms. Jakutavicius had not received any communication relating to the status of the classification review and her counsel wrote a series of letters dated March 24, 2006, May 8, 2006, June 13, 2006 and August 14, 2006 expressing concerns regarding the delay, expressing his client's belief that the delay was not being incurred in good faith, and, in the final letter, advising that Ms. Jakutavicius was prepared to bring a contempt motion in the Federal Court if there were further delays. The record includes an internal email from the respondent sent on August 16, 2005, just after this last letter from counsel, where a manager notes that "[a]pparently, this matter has become increasingly urgent …"

[18] Further correspondence was sent to the respondent on September 7, 2006 and October 12, 2006. On September 25, 2006, the respondent sent the applicant's counsel a letter referring to a number of earlier telephone conversations between counsel for the applicant and the respondent in which applicant's counsel was informed that a decision had not yet been reached, that the classification review process can be lengthy, that the respondent was actively working on a determination, and that the applicant would be informed as soon as a determination was reached. The respondent estimated that a decision would be made by mid-November 2006, one year after the description for the position had been agreed upon by both parties.

[19] On November 21, 2006, Ms. Jakutavicius was informed that the classification review committee had evaluated the combined position and determined that it should be classified at the PM-06 level. Contrary to the respondent's classification grievance policy and procedure, Ms. Jakutavicius was not provided with an opportunity to make submissions to the committee prior to this decision being made. The committee did, however, meet with representatives of HRSDC.

Classification Grievance 2

[20] Ms. Jakutavicius grieved the classification review committee's finding on the basis that the committee took an inordinate amount of time and failed to follow the required process in arriving at its decision by failing to consult her.

[21] As a result of this grievance a new classification grievance committee was formed, which included two members external to Ms. Jakutavicius' department. Ms. Jakutavicius was given an opportunity to make a presentation to the committee, which she did.

[22] The committee ultimately determined that the combined position should be classified at the EX-01 level, as originally requested by Ms. Jakutavicius, and the committee informed her of this decision by way of letter dated June 29, 2007.

Reconciliation Dispute

[23] Ms. Jakutavicius signed a letter of offer for the combined position at the EX-01 level on September 28, 2007. The respondent proceeded to conduct a financial reconciliation between the salary and benefits payable to Ms. Jakutavicius under the PM-06 position and under the EX-01 position. The reconciliation ultimately indicated that Ms. Jakutavicius owed the respondent a refund of payments she had received while serving in the combined position because under the "EX" classification she was not entitled to overtime pay or a bilingual bonus. The sum Ms. Jakutavicius had received for overtime pay and bilingual bonus was greater than the difference in salary between the PM-06 and EX-01 positions. On February 12, 2008, the applicant was provided

with a first rendition of the reconciliation. She identified errors with the reconciliation and a revised reconciliation was provided by the respondent in July 2008. Further revisions were required and Ms. Jakutavicius was not provided with a final copy of the reconciliation until March 11, 2010. Ms. Jakutavicius and the respondent are still disputing whether or not she is entitled to a reimbursement of union dues paid while serving in the combined position.

Demand for Compensation and Bad Faith Grievance

[24] On February 3, 2009, Ms. Jakutavicius' counsel sent the respondent a letter outlining the delay in dealing with his client's classification review, her ultimate "victory," and the injuries she suffered, which allegedly included damage to her reputation, lost opportunities for career advancement, a loss of privacy, and diminished quality of life due to stress. Ms. Jakutavicius' counsel offered to settle the entire matter on the following terms: (i) payment of $38,000.00 as a reimbursement of legal fees, (ii) payment of $13,500.00 as general damages, and (iii) a letter confirming the classification of the combined position. The applicant's counsel warned that if this offer was rejected, the applicant would file a grievance alleging bad faith conduct by the respondent throughout the entire matter and further cautioned that, if the grievance was denied, the applicant would launch an application for judicial review in the Federal Court. The respondent did not agree to the terms of settlement outlined by the applicant, which Ms. Jakutavicius says is further evidence of the respondent's bad faith conduct.

[25] On April 2, 2009, Ms. Jakutavicius filed a grievance regarding the respondent's "systemic failure to act in good faith" in addressing the classification of the combined position. The second level grievance hearing was held on October 16, 2009. Ms. Jakutavicius' current supervisor, Mr.

Stephen Johnson, heard the grievance despite the applicant's concern that this would affect their working relationship. The grievance was denied on January 7, 2010. The applicant proceeded to a final level hearing which denied her grievance on April 12, 2010. It is this decision which is the subject of this judicial review.

Decision Under Review

[26] The decision denying Ms. Jakutavicius' bad faith grievance was made by Ms. Maureen Grant, Director General, HR Enterprise Services, HRSDC. Ms. Grant noted that since there was no hearing at the final level, she carefully reviewed the information available, including the 17 pages of submissions provided by Ms. Jakutavicius and the presentation submitted by her counsel. Although the grievance concerned a period of some 10 years, Ms. Grant's entire decision is quite brief. It is as follows:

> This letter is in response to your final level grievance submitted April 6, 2009. You grieve the Department's systemic failure to act in good faith in addressing the classification of your position in the combined role of Director, Federal/Provincial and Client Relations / Coordination and Briefing, which you performed from April 1998 to May 2000 in the Labour Program of the former Human Resources Development Canada.
>
> Since there was no grievance hearing at the final level, I have carefully reviewed the information available to me and considered the presentation submitted by your Legal counsel at the 2nd level, and am now in a position to give you my response. Although I am sympathetic to your situation, I must point out that you have used the recourse available to you in 2000 and 2006 to resolve the classification issue and you were successful. Also, I am aware that after you signed your letter of offer in 2007, negotiations took place to reconcile the financial entitlements between the PM-06 and EX-01 classifications and that this issue was not resolved to your satisfaction. I cannot conclude that the Department failed to act in good faith based on your success through past grievance procedure.
>
> For these reasons your grievance is denied. [emphasis added]

Issue

[27] The parties raised a number of issues; however, there is only one issue that requires the Court's attention: does the decision exhibit the justification, transparency and intelligibility of a reasonable decision?

Analysis

[28] The applicant has not alleged that her right to procedural fairness was breached because the reasons for the decision are inadequate. Rather, she submits that the decision is unreasonable in light of the three features of reasonable decisions, "justification, transparency and intelligibility," identified by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9.

[29] In *Dunsmuir*, the Supreme Court, in collapsing the two former standards of patent unreasonableness and reasonableness *simpliciter* into a new single standard of reasonableness, described this new reasonableness standard as follows:

> 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. [emphasis added] [para. 47]

[30] This expression of the reasonableness standard clearly directs the reviewing court to consider not only the ultimate decision reached, but also to consider the process used to reach the decision and, of particular importance here, to consider the reasons articulated for the decision.

[31] The reasons provided for a decision may fulfill the requirements of procedural fairness in the sense that the reasons meet the goals of focusing the decision maker on the relevant factors and evidence, providing parties with the assurance that their representations have been considered, allowing parties to effectuate any right of appeal or judicial review they might have and allowing reviewing bodies to determine whether the decision maker erred, and providing guidance to others who are subject to the decision maker's jurisdiction: *VIA Rail Canada v National Transportation Agency*, [2001] 2 F.C. 25 (CA), at paras. 17-21. Yet the same reasons which meet procedural muster may render the decision unreasonable as a matter of substantive review. It is in this context that one examines, based on the reasons provided, the justification, transparency and intelligibility of the decision. Justification requires a decision maker to focus on relevant factors and evidence. Transparency requires a decision maker to clearly state the basis for the decision reached. Intelligibility requires a decision maker to reach a result that clearly follows from the reasons provided.

[32] When the decision under review is examined from the perspective of the reasons provided for it, I find that it is neither justified nor intelligible, although it is transparent. It is transparent in that the decision maker clearly sets out the basis for the decision she reached; namely, that the applicant was successful in her classification grievance.

[33] The decision under review is not justified because the decision maker has focused on only one fact: that the applicant was successful in her classification grievance. She has failed to consider any of the many other facts that were put before her by the applicant. She has not stated in her reasons any of the history between the parties as is set out herein nor has she stated that none of it is relevant and provided an explanation for that view. She has completely failed to engage with any of the evidence in this case. If the decision maker was of the view that none of those facts were relevant, and had stated so in her decision, with reasons, then the decision might be found to be justified. Given the lengthy historical factual background to the grievance, a decision that makes reference to only one consideration, the grievor's ultimate success, without either finding irrelevant or otherwise weighing the myriad of facts relied upon by the grievor, cannot be said to be a decision that exhibits the characteristic of justification.

[34] Most critically, the decision under review is not an intelligible decision because the conclusion does not follow from the reasons provided. At the hearing of this application, the respondent candidly acknowledged, quite appropriately, that a grievor may be able to establish bad faith on the part of their employer relating to the matter grieved despite having succeeded in having the grievance upheld. Given that the ultimate success of a grievor does not automatically prove good faith on the part of an employer, success in the grievance process cannot serve as the sole reason for denying a grievance alleging bad faith when there are so many facts relating to how it was handled that were not addressed. One must examine all of the facts surrounding the handling of the grievance. Here, the sole reason provided for the finding of good faith does not logically lead to the conclusion reached. It is not an intelligible decision – it is unreasonable and for this reason it must be set aside.

[35] The applicant's grievance alleging bad faith on the part of her employer must be remitted back for re-determination. It may be that the grievance procedures of the employer require that the person who made this decision do so again as Ms. Grant may occupy the only position authorized to make the decision. However, if it is possible under the procedures in place to have someone other than Ms. Grant adjudicate at the final level of the grievance procedure, then it is appropriate that it be done. I add, but do not so order, that it would be appropriate, given the nature of the grievance and the time that has passed, that the decision maker be someone independent of HRSDC and that the decision be rendered as promptly as possible.

[36] The parties are in agreement that it is appropriate that the successful party be awarded costs of $4,000.00. I agree.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that:

1. This application is allowed and the decision rendered by Ms. Grant dated April 12, 2010, is quashed;
2. The grievance of the applicant alleging bad faith on the part of her employer is to be redetermined by a person other than Ms. Grant, if possible;
3. The applicant is awarded her costs of this application fixed at $4,000.00, inclusive of fees, disbursements and taxes.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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