Federal Court  Cour fédérale

Date: 20111118

Docket: T-871-10

Citation: 2011 FC 1327

Ottawa, Ontario, November 18, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MONICA AGARD, SABINA BROUWERS, SHIRAZ ISMAIL, NORMAN MURRY, HALA SALEH, PIETRO VALENTYNE, JESSICA YATEMAN, ET AL

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicants in this application for judicial review are all federal public servants employed as Case Management Officers (CMOs) of the Immigration and Refugee Board of Canada (IRB). Within the federal public service scheme of employee classification, CMOs are

classified as PM-01 level employees. Since at least 2002, the CMOs have been fighting to have their position reclassified upwards.

[2] In this judicial review application, the Applicants seek to overturn the decision of Mr. Simon Coakeley, Executive Director of the IRB, acting as Deputy Head of the IRB. In that decision, dated May 11, 2010, Mr. Coakeley accepted the recommendation of a Classification Grievance Committee (CGC) that the classification of the Applicants (and others) would remain at the PM-01 level.

II. Issues

[3] Although the Applicants initially raised a number of issues, the only issue argued before me was whether the decision should be set aside on the basis that the membership and actions of Mr. Jean-Claude Pelchat as the Chairperson of CGC raises a reasonable apprehension of bias.

[4] If I conclude that the participation of Mr. Pelchat on the CGC, or his actions on the CGC, gave rise to an apprehension of bias, it would taint the decision of Mr. Coakeley and the matter would be sent back for re-determination by a newly-constituted CGC.

III. Background

[5] Public service employees are paid according to the classification of their positions. The classification of public service employees is comprised of two parts: a job description setting out

the job content, and a classification based on the job description. At the first step, the duties and responsibilities of a position are defined. In the second step, the various components of the job description are assessed using a variety of comparators and benchmarks. In this application, we are dealing with the grievance of the classification part of the process.

[6] Disputes can – and do – arise with respect to either the job description or the comparative assessment involved in classification. In this case, in a decision made in or around September 2005 (the Classification Decision), a Classification Committee, established by the employer to evaluate the CMO positions, determined that the CMOs should be classified at a PM-01 level. According to the unchallenged affidavit of Mr. Jonathan Salois, 86 CMOs (including the Applicants in this case) individually brought grievances of the Classification Decision, with respect to both the job description and the classification of the positions. The classification grievances were held in abeyance to allow for the resolution of the job description grievances.

[7] The grievances with respect to the CMO job description were dealt with and ultimately resolved (albeit not to the satisfaction of the Applicants) in accordance with the *Staff Relations Grievance Process*. A final level "Reply to Grievance" was issued by the Chairperson of the IRB on December 17, 2007, to each of the grievors. The Applicants' bargaining agent determined that it would not pursue the grievance of the CMO job description to adjudication under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [PSLRA]. At that point, the job description was "final and binding" (pursuant to the operation of ss 209(1), (2) and 214 of the PSLRA) and the grievance of the classification itself could proceed.

[8] Grievances concerning classification are dealt with under the Treasury Board's *Policy on Classification Grievances* [Policy].

[9] The composition of a classification grievance committee is mandated by *Appendix B - Classification Grievance Process* of the Policy and by the Treasury Board's *Classification Grievance Procedure* at section V.C [Procedure]. These documents provide that a classification grievance committee must be composed of:

1. a chairperson who is an accredited classification specialist;

2. a Treasury Board Secretariat grievance officer (with certain exceptions); and

3. a person from within or outside the department, preferably a line manager with experience in applying the classification standard(s) being used and knowledgeable of the type of work being grieved.

[10] The Policy and Procedure provide that all committee members must meet the following criteria:

- they did not participate in the classification decision of the position being grieved;

- they are neither supervising the position in question nor in a position of potential conflict of interest; and

- they are knowledgeable about classification techniques and experienced in the use of the relevant classification standard(s).

(These documents can be found at:

http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12099&section=text#appB and at

http://www.tbs-sct.gc.ca/gui/prog-eng.asp).

[11] The three CGC members for these particular grievances were:

- Mr. Pelchat, Senior Classification Project Manager for the IRB;

- Mr. Dennis Boyd, Chief, Classification and Organization, Courts Administration Service; and

- Ms. Angela MacQuarrie, Analyst, Classification Grievances, Treasury Board of Canada Secretariat.

[12] Hearings into the classification grievances were held before the CGC on December 17, 2009 and February 11, 2010.

IV. Analysis

[13] The Applicants assert that the experience of the Chairperson of the CGC and his actions give rise to a reasonable apprehension of bias. This allegation appears to be based on two arguments:

1. the CGC manifested a "closed mind" to their submissions on the job content dispute; and

2. the CGC was not sufficiently separate from the employer, given the fact that the Chairperson, Mr. Pelchat, was working through a subcontractor on classification related matters at the time of the classification of the CMO position. In the Applicants' view, Mr. Pelchat "has galvanized an interest around classification matters relating to the IRB and has … seated himself in close financial and organizational nexus with the employer".

[14] The test for reasonable apprehension of bias is well-established in the jurisprudence and is consistently cited as the following, taken from the dissent of Justice de Grandpré in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716 [*Committee for Justice*]:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude Would he think that

> it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[15] The first allegation that Mr. Pelchat exhibited a "closed mind" to the grievors' submissions on job content is easily dismissed. The CGC's failure to reconsider the job content issue cannot give rise to a reasonable apprehension of bias for the simple reason that the CGC was neither required nor permitted to reconsider that issue. Pursuant to s 214 of the PSLRA, the decisions taken in December 2007 on the job description grievances were final and binding. Section 214 states that:

If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken on it.	Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.

[16] The second part of the bias allegation relates specifically to the Chairperson, Mr. Pelchat's previous work for the IRB in staffing issues. As acknowledged by the Applicants, Mr. Pelchat's prior work with the IRB does not automatically mean that he has either a bias or a conflict of interest (see e.g. *Wewaykum Indian Band v* Canada, 2003 SCC 45, [2003] 2 SCR 259 [*Wewaykum*]).

[17] As confirmed by the Supreme Court in *Vaughan v Canada*, 2005 SCC 11, [2005] 1 SCR 146, Parliament did not intend the grievance procedure to be independent of the employer. The

Treasury Board's Policy is also instructive. At *Appendix B - Classification Grievance Process*, under the heading "Grievance committees", the Policy provides that "[i]f the grievance concerns a position for which the department has classification authority, an accredited classification officer (normally from the department in which the grievance occurs) must chair the committee …" [Emphasis added]. The Policy thus contemplates that a chairperson will have some relationship with the grieved position.

[18] In assessing whether the prior involvement of Mr. Pelchat rises to the level of an apprehension of bias, I turn to the undisputed evidence in his affidavit. There, Mr. Pelchat states that he has worked either as a consultant, a casual or a term employee of the IRB since 2003, and that he was a term employee in a Senior Classification Project Manager position at the time of the Classification Grievance Hearing. Mr. Pelchat states that, in 2005, he was a consultant for a company that had a contract with the IRB and that he participated in the review of selected positions under the Classification strategy. Mr. Pelchat states that he was never asked to work on the CMO work description or to provide any input regarding the CMO position. Mr. Pelchat further reports that he did not become an IRB employee until the summer of 2008.

[19] The Applicants allege that Mr. Pelchat's work as a subcontractor was part of a broader systemic review under which the CMO position was assessed within the IRB, in which he would have necessarily had some exposure to the CMO positions. The problem with this argument is that I have no evidence that this was the situation. Mr. Pelchat was not examined on his affidavit and his statements must, absent contrary evidence, be accepted as true. There is no evidence that Mr. Pelchat's work on other classification reviews "coloured" his view of the CMO positions.

Moreover, the Policy and Procedure do not appear to prohibit this situation, as they only provide that a committee member must not have participated "in the classification decision of the position being grieved" (Procedure, above at V.C at para 2(a) [Emphasis added]).

[20] The Applicants' bias allegations appear to be based on Mr. Pelchat's "interest around classification matters relating to the IRB" and the fact that he has been remunerated by the IRB for his work in this area as both an employee and a contractor. The Applicants have not clearly defined Mr. Pelchat's allegedly conflicting interest, and none is apparent from the evidence. Moreover, the fact that all committee members must be knowledgeable about classification techniques and experienced in the use of the relevant classification standards suggests that the relationship alleged by the Applicants does not create a conflict of interest.

[21] Similarly, although the Applicants allege that Mr. Pelchat has a pecuniary interest giving rise to bias, they do not appear to allege that he had any pecuniary interest in the outcome of their grievance. Rather, the facts they present suggest that Mr. Pelchat had a pecuniary interest in working for the IRB. This is certainly not enough to create an apprehension of bias.

[22] In conclusion, I refer to the teachings of the Supreme Court that the grounds for apprehension of bias must be substantial (see *Wewaykum*, above at para 76, endorsing the comments of Justice de Grandpré in *Committee for Justice*, above at 395). In the case before me, I cannot conclude that the grounds are substantial. Although well-qualified in the area of classification and experienced in the organization of the IRB, Mr. Pelchat never worked directly on the CMO positions. Stated in terms of the test for apprehension of bias, an informed person,

viewing the matter realistically and practically – and having thought the matter through – would not think that it is more likely than not that Mr. Pelchat, whether consciously or unconsciously, would not decide fairly.

[23] For these reasons, the application for judicial review will be dismissed.

[24] The parties agreed that, in any event, the costs of this matter should be fixed at $4500. I believe that this is a reasonable award of costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. costs, fixed in the amount of $4500, including all disbursements and tax, are awarded to the Respondent.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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