T-905-96

IN THE MATTER of an application pursuant to section 18.1 of the *Federal Court Act*, R.S.C. 1985, c.F-7, as amended, to review an set aside the Decision of Robert Wells, the Deputy Head's Nominee for Classification Grievances, Citizenship and Immigration Canada, dated March 12, 1996, respecting a classification grievance.

BETWEEN:

MICK CHONG, RAY BOWES and
GUDRUN GOSEN

Applicants

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA as represented by TREASURY BOARD, THE ATTORNEY GENERAL FOR CANADA AND THE DEPARTMENT OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR ORDER

JOYAL, J.:

The issues herein date back to September 6, 1994, when a Classification Grievance Committee ("the Committee") recommended that the positions of the above-noted Applicants, employees of the Public Service of Canada, be classified at the PM-03 group and level.

At that time, the Applicants held positions as Intelligence Analysts with Employment and Immigration Canada in the BC/Yukon Region, and were classified as PM-03s. Among other things, they argued before the Committee that their colleagues in the Ontario Region having the same job descriptions and exercising the same functions were enjoying PM-04 status.

On July 27, 1994, a hearing was held in accordance with a Classification Grievance Procedure ("CGP") and in a written report dated August-September 1994, the Committee recommended that the positions of the grievors be classified at the PM-03 level. This recommendation was endorsed by the Deputy Head's Nominee on September 13, 1994.

The grievors then applied for judicial review and on November 30, 1995, my colleague McKeown J. allowed the application and returned the matter to the Committee (See *Chong et al vs. Canada*, (1995) 104 F.T.R. 253). After describing at some length the classification grievance system in the Public Service, and after articulating current jurisprudence on areas of judicial intervention in administrative decisions, McKeown J. noted the following:

1.In the circumstances of the case, the classification scheme required a comparison between the Ontario and the BC/Yukon positions.
2.The only information from the management side was obtained by telephone from Mr. John Kent, which information was not communicated to the Applicants.
3.The Committee's decision did not address or refer to the submission of the grievors, nor did it explain why the BC/Yukon positions should attract a lower classification.
4.Additionally, and in conformity with the Supreme Court decision in *Prassad v. Minister of Employment and Immigration*, (1989) 1 S.C.R. 560, His Lordship found that the decision was an administrative one deserving only a minimal level of "fairness" in its processes.

McKeown J. found, nevertheless, that the process was sufficiently flawed to justify his intervention. He did not attach much importance to most of the complaints itemized by the Applicants, but he did conclude that the Committee had not fulfilled its mandate. In effect, as I understand His Lordship to say, the Committee had rejected the grievances without dealing with comparability with the Ontario situation, an issue squarely put forth by the grievors. Furthermore, His Lordship was evidently troubled by the John Kent factor and instructed the Committee to deal with that also.

The actual text of McKeown J.'s directions is as follows:

> The application is allowed. The matter is returned to the Committee to review the differences between the Ontario position and the BC/Yukon position; the committee shall be entitled to ask further questions of the grievors or management on these positions. It

shall then determine, in accordance with all the evidence, the level at which the applicants' position should be classified. When the committee writes its reasons, it shall review the evidence of Mr. John Kent in accordance with the Classification Grievance Procedure in preparing reasons.

The record indicates that in response to McKeown J.'s order and directions, the Committee ordered that the Ontario Region position be audited, which audit was conducted on January 4 and 5, 1996. The results of this audit were studied by the Committee and on January 10, 1996, it recommended that the Ontario Region position be reclassified downward from the PM-04 level to PM-03. The Deputy Head's Nominee accepted the recommendation and on or about March 12, 1996, these results were communicated to the grievors in the BC/Yukon Region.

It was realized some time later that the Committee might not have responded to the second part of McKeown J.'s order, namely to review the evidence of John Kent in accordance with the CGP in preparing reasons. Accordingly, the Committee met again on May 1, 1996, to review that evidence, following which it added in an Addendum Report:

Taking into account the information provided by Mr. John Kent on the subject positions, the Committee was satisfied that the response provided by Mr. Kent confirmed the Committee's understanding of these duties and tasks.

The Committee concluded that its original recommendation should stand. The Deputy Head's Nominee accepted that conclusion, and on May 8, 1996, the grievors were so notified.

The Court is now seized of a further application for judicial review on the grounds that the Committee's process violated the principles of "fairness" and that the Committee committed a "patently unreasonable" error in fixing two different effective dates for the classification of the BC/Yukon positions and that of the Ontario positions. Specifically, the Applicants allege that:

1. they were not told what information had been communicated to the Committee by Mr. Kent;
2. they were not given an opportunity to respond to the information provided by Mr. Kent;
3. they were not given an opportunity to provide further submissions to the Committee;
4. they were never advised that the Ontario positions would be downgraded; and
5. the Committee did not comply with McKeown J.'s order respecting Mr. Kent's evidence.

In support of the Applicants' view that they were unfairly treated, counsel relies on a long list of cases where tribunal decisions were successfully challenged on those grounds: *Hale v. Canada (Treasury Board)*, (1996) 112 F.T.R. 216; *S.E.P.Q.A. v. Canada (C.H.R.C.)*, (1989) 2 S.C.R. 879; and *Mercier v. Canada*, [1994] 3 F.C. 3 (C.A.).

Counsel for the Applicants relies particularly on the Judgment of Reed J. in the *Hale* case, where the issue also involved the classification grievance process. The grievor, a Technical Illustrator with the Public Service, had sought to have his position reclassified from level DD-04 to DD-05. The Committee agreed with the grievor on some points, but in the end decided against him, based on expert evidence which apparently had not been made known to him. The Court ruled that failure of the Committee to provide the grievor with an opportunity to make representations in response to this expert evidence was a breach of the duty of fairness. The Committee's decision, said the Court, should be quashed and the matter returned for reconsideration and redetermination.

The level of "fairness" as a judicial review issue in the classification grievance process was also discussed in a decision rendered by Pinard J. on May 3, 1996, in *Tanack et al v. Canada (Treasury Board)*, (1996) 112 F.T.R. 182. In that case, a Committee had dealt with an application to upgrade Immigration Appeal Officers in the Department of Citizenship and Immigration. The decision of the Committee was challenged on the grounds that the evidence of management had not been communicated to the grievors and they were therefore refused the opportunity to respond. Pinard J., in dismissing the judicial review application, relied on the analysis of McKeown J. in *Chong* as to the standard of "fairness" to be applied in such proceedings. Pinard J. concluded that there was no duty

incumbent upon the Committee to enter into an adversarial mode by calling the grievors back in to respond to management's observations.

In my respectful view, the promulgated rules for these grievances reflect quite clearly the kind of forum which the process contemplates. Reduced to its simplest form, it calls upon the grievors, in the absence of management, to state their case. It then calls upon management, in the absence of the grievors, to respond to questions from the Committee, after which the latter deliberates and renders its decision or recommendation. Of note, however, is that management is not permitted to argue for or against the decision which led to the grievance, to attempt to influence the Committee or to participate in its deliberations. The Committee reserves the right, of course, to call upon other persons to provide additional information and/or to conduct an on-site visit.

It appears to me that these provisions in the classification grievance process must be read and interpreted within the context of the exclusive management rights conferred on the Respondents by section 11(2)(c) of the *Financial Administration Act*, R.S.C. 1985, c.F-11 as amended, to classify positions and employees in the Public Service, and further, on the specific exclusion from appeal procedures otherwise available under the *Public Service Staff Relations Act*, R.S.C. 1985, c.P-35 as amended.

I conclude that, notwithstanding the submissions of counsel for the Applicants, the scheme is not adversarial, nor does it necessarily open the

door to technical challenges based on procedural fairness, breach of natural justice, or other incidental elements in the evolution of the classification challenge process. In my respectful view, the requirements of fairness in the case at bar are sufficiently minimal that a simple allegation that a party did not hear the evidence, nor was given an opportunity to respond to or cross-examine on it, is not sufficient. In other words, it is not a case where "unfairness" *per se* will give rise to *certiorari*, but where specific lines of prejudice must be pleaded.

I recognize, of course, that in adopting the principles of conduct laid down by the Supreme Court of Canada in cases relating to any administrative process, there is a strong tendency to apply such principles by rote. In my view, in the instance before me, that is not sufficient. There is absolutely no evidence that the allegations of "unfairness" are more than mere allegations bereft of any substance. Any position to the contrary, in my respectful view, flies in the face of the following elements of the case:

1. In accordance with the standard procedure, the grievors made their case before the Committee, including a reference to the fact the Ontario incumbents enjoyed level PM-04. The Committee then presumably obtained from management any pertinent information required. There followed a telephone conversation with Mr. Kent from Toronto, after which, in a detailed analytical appraisal, the Committee dismissed the grievance and confirmed the position at level PM-03.
2. In reviewing its earlier decision, pursuant to McKeown J.'s Order of November 30, 1995, the Committee complied with the requirement of analyzing the

comparability of the BC/Yukon and Ontario positions and reviewing the evidence of Mr. Kent. The Committee fully complied with McKeown J.'s directives, and what it did with respect to the classification of the Ontario incumbents is of no concern to this Court at this time. This Court is simply left with the inference that the action taken in this respect was within the authority of the Committee.

4. It is clear to me that in any event, the grievors were fully aware of the results of their earlier grievance. The re-hearing was fully in accordance with McKeown J.'s Order and did not in any way add or subtract from the Committee's earlier decision which had dismissed the grievances.

Admittedly, the decision of Reed J. in the *Hale* case suggests that more stringent conditions of procedural fairness should apply to the classification grievance procedures. In my respectful view, however, I prefer the more restrained approach evident in the judgment of McKeown J. in *Chong* and of Pinard J. in *Tanack*.

The matter of classification is not a negotiable issue, and as far as this Court is concerned, the processes in that regard should be left to the institution which is statutorily and exclusively endowed by Parliament to deal with it, namely Treasury Board.

Again, one must be careful in making that statement. There are no absolutes. No administrative procedure is ever fool proof and beyond the Court's reach. Too often, however, the application of judicial precedent

becomes a matter of *reductio ad absurdem*. My respectful view is that there must be some demonstrable error or prejudice in a purely administrative process before a Court should intervene by way of judicial review. Perhaps wisdom lies less on precedent and more on a case-by-case approach.

The application for judicial review is hereby dismissed.

L-Marcel Joyal

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J U D G E

O T T A W A , Ontario
June 16, 1997