Federal Court  Cour fédérale

Date: 20240503

Dockets: T-252-22
T-93-23

Citation: 2024 FC 670

Ottawa, Ontario, May 03, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

STEPHANIE MALKO STREET

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant filed complaints under the recourse procedures of Canada Revenue Agency ("CRA"), alleging that she was arbitrarily assessed during a CRA staffing competition. Her complaints led to two decisions, which she now challenges in judicial review applications in this Court.

[2] The applicant submitted that the two decisions should be set aside as unreasonable, applying the principles described in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 SCR 653. The applicant also submitted that she was deprived of procedural fairness in one recourse process.

[3] For the reasons that follow, these applications for judicial review will be dismissed.

I. Facts and Events Leading to this Application

A. *CRA's Recourse Procedures*

[4] By statute, CRA is required to develop a program governing staffing, including the appointment of, and recourse for, employees: *Canada Revenue Agency Act*, S.C. 1999, c. 17, subsection 54(1). CRA's *Procedures for recourse on staffing (Staffing program),* Version 2.0 dated June 12, 2019 (the "Recourse Procedures"), describe three different types of recourse for an employee who believes they were treated arbitrarily following a staffing decision or voluntary assessment:

- Individual feedback ("IF"),
- Decision review ("DR"), and
- Independent third-party review ("ITPR").

[5] The Recourse Procedures provide that the purpose of recourse, whether by IF, DR or ITPR, is "to address an employee's concerns of arbitrary treatment as a result of a staffing decision or voluntary assessment". The Recourse Procedures define "arbitrary" as:

> In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale or established policy; not the result of a reasoning applied to relevant considerations; discriminatory, that is, as listed as the prohibited grounds of discrimination in the Canadian Human Rights Act.

[6] If a CRA employee has a complaint about arbitrariness, the first step is IF. If the employee is not satisfied, the employee may proceed to DR, or alternatively, in some cases, to ITPR.

[7] DR is a review of an employee's concerns of arbitrary treatment on the original staffing decision or voluntary assessment. It does not concern the process or results of the IF. A manager called a "Decision Reviewer" conducts the DR.

[8] ITPR is also a review of an employee's concerns of arbitrary treatment. It is conducted by an independent third-party reviewer (i.e., someone outside CRA). ITPR is available to address complaints about arbitrary treatment in permanent appointments.

[9] The two decisions at issue here are a DR decision and an ITPR decision.

B. ***The Applicant applies for a Team Leader Position***

[10] On or around November 2019, the applicant applied for promotion to a permanent position as a Team Leader, Client Services at the CRA's Hamilton Niagara Contract Centre. Ultimately, she was not one of the successful candidates.

[11] During the staffing process, the CRA Staffing Board assessed each of the candidates for the Team Leader position using a locally developed tool ("LDT").

[12] In December 2019, the applicant completed the LDT assessment. In January 2020, the applicant received her results. She met the staffing requirements and was placed in a pool of candidates. At that time, she was not selected for a term or temporary appointment but did receive an acting appointment from February to May 2020, which was extended to March 2021, and from March 2021 to May 2022.

[13] On January 3, 2020, the applicant was advised that she had the right to recourse if she believed she had been treated arbitrarily in the assessment.

C. *The applicant's Assessment Complaint*

[14] In January 2020, the applicant requested IF related to her assessment (the "Assessment Complaint"). In her IF Request Form, she stated: "I do not know if I have been treated arbitrarily and am consequently requesting feedback". Later in January, she asked the manager conducting the IF for her assessment materials, including Board notes or opinions on her answers, prior to an IF meeting. CRA could not immediately fulfill this request because the staffing process was not complete – not everyone had completed the LDT assessment. The applicant opted to postpone her IF session until she could receive the assessment materials.

[15] In May 2020, the CRA put all staffing recourse requests on hold due to the COVID-19 pandemic.

[16] In April 2021, the last LDT assessment was completed.

[17] On July 5, 2021, CRA's Staffing Board notified the applicant of permanent promotion appointments selected from the pool of assessed candidates. The applicant was not selected.

[18] On July 7, 2021, the applicant advised the Staffing Board of the outstanding recourse on her LDT assessment that had not been completed.

[19] In July 2021, the manager assigned to provide the applicant with IF provided the applicant with her marking grid and as requested, the interview questions and notes taken by the assessors of her interview.

[20] By email to the manager on August 18, 2021, the applicant identified sixteen instances where she felt she had been denied marks in the LDT assessment process.

[21] The manager in the IF process determined that there had been no arbitrary treatment in the marks awarded to the applicant, but that she should have received two additional marks for her answer to one question. That raised her score on the LDT assessment from 145 to 147 out of 180 possible marks. This made her close to the lowest score of other candidates who had received permanent appointments.

[22] In September and again in mid-October 2021, the manager sent the applicant the IF Request Form that contained the manager's determination. Unfortunately, the manager did not complete the IF form correctly, so the IF was not completed until October 26, 2021.

[23] On October 19, 2021, the applicant filed a written request for DR of her Assessment Complaint and requested information for that DR. In her DR Request Form, the applicant alleged that:

- The Staffing Board did not follow the Recourse Procedures, because IF was not completed in a timely manner. Her IF request had not been addressed until she reminded the Board about it. Despite the applicant's outstanding IF, CRA had made the permanent appointments. These actions were arbitrary treatment because they occurred in an unreasonable manner and were "not based on rationale or established policy".
- The Board also exceeded the timeline to send the completed IF Request Form to her within 30 calendar days. The initially completed IF Request Form did not follow 5.9.13 of the Recourse Procedures, specifically, the Board did not indicate the correct date that IF was completed, the subsequent recourse available, the deadline to submit subsequent request for recourse, nor to whom the subsequent request for recourse was to be directed.
- "All of the delays, red tape, & unreasonable deferrals feel like an attempt by the Board to make this candidate give up & abandon their right to recourse".
- The applicant raised marking discrepancies in the assessment process and advised that the only way to determine whether there was arbitrary treatment was for her

> to have access to the anonymous marking grids and interview notes of the top 10 candidates to compare against her own.

[24] During the DR process, the applicant received the marking grids of the top 10 candidates for the staffing position.

[25] By email sent on December 20, 2021, the applicant sent the Decision Reviewer her position on the DR on several issues, only some of which are material to this proceeding. That email included an attachment entitled “Decision Review Cross Candidate Analysis Arguments”, which comprised approximately 10 pages of arguments related to her answers and the marks she received in the LDT assessment compared with other candidates’ (anonymized) answers and marks.

[26] As permitted in the Recourse Procedures, the Decision Reviewer requested a fact-finding report, which another manager completed by early January 2022 (the “Fact-Finding Report”). The Certified Tribunal Record did not include the communications between the two managers that led to the Fact-Finding Report.

[27] By email on January 7, 2022, the Decision Reviewer sent the Fact-Finding Report to the applicant, in advance of a DR meeting on January 12, 2022.

D. ***The DR Decision***

[28] On January 12, 2022, at 7:40AM, the Decision Reviewer signed the DR Decision, which was contained in the applicant's DR Request Form. The DR Decision included reasons prepared by the Decision Reviewer.

[29] Also on January 12, by email sent at 8:45AM, the applicant provided her comments on the Fact-Finding Report to the Decision Reviewer. The applicant and the Decision Reviewer met later the same day. At that meeting, they discussed the applicant's complaint, and she received the DR Decision.

[30] The applicant and the Decision Reviewer exchanged additional emails in January and February 2022. On February 2, 2022, the Decision Reviewer provided a substantive response to the "High level summary of findings" in the applicant's "Decision Review Cross Candidate Analysis Arguments". They had a further exchange of information by email after that.

[31] The applicant applied for judicial review of the DR Decision in Court File No. T-252-22.

E. ***The applicant's Appointment Complaint***

[32] As noted above, by July 2021 the applicant's DR process for the Assessment Complaint had not yet been completed. On July 5, 2021, the Staffing Board advised the applicant of permanent promotion appointments and that she was not selected.

[33] On July 7, 2021, the applicant submitted a written IF Request form related to the permanent appointment process (the **"Appointment Complaint"**). She stated that the "Hiring Manager/Selection Board failed to properly assess me against the appointment criteria, thus I have been treated arbitrarily". The applicant also requested information:

- her assessment results for standardized assessments;
- her assessments results for locally developed tools, including the questions, her answers, the answer key and the rating guide;
- notes taken during the interview by the interviewers;
- reference checks;
- where she ranked against the candidates that were appointed with regards to the LDT assessment and experience;
- where she ranked against all candidates in the pool with regards to the LDT assessment and experience;
- how experience was calculated;
- which Employment Equity gaps were identified to be filled, and what criteria was used to fill them;
- what bilingual needs were identified and how many bilingual appointments were made;
- a written explanation as to why permanent appointments were made while there were still "multiple outstanding IFs" for the staffing process; and
- a written statement explaining what corrective measures would be implemented to ensure no future IF processes go unaddressed.

[34] While the applicant did not receive all the information she requested, there is no issue in this proceeding related to the completeness of the disclosure to her.

[35] CRA assigned a manager to conduct the IF related to the applicant's Appointment Complaint. (This manager was a different person than the manager who conducted the DR and the manager who prepared the Fact-Finding Report.) On August 27, 2021, the manager determined, on behalf of the Staffing Board, that no arbitrary treatment had occurred and no corrective measure or change in decision was required.

[36] On August 30, 2021, the applicant submitted a request for ITPR concerning her Appointment Complaint. An independent third-party reviewer (the "ITP Reviewer") was assigned for the Appointment Complaint ITPR. The parties agreed to pause the ITPR process related to the Appointment Complaint until the completion of the DR process for the Assessment Complaint. As noted above, the DR Decision occurred on January 12, 2022.

F. ***The ITPR Decision***

[37] After the DR Decision on the Assessment Complaint, the issue before the ITP Reviewer on the Appointment Complaint ITPR was narrowed to whether the Staffing Board acted in an arbitrary manner when "they improperly scored the [applicant's] LDT assessment". The applicant's written submissions in the ITPR process expressly referred to her "final DR cross candidate analysis arguments", i.e., her arguments made to the manager during the DR of the Assessment Complaint.

[38] CRA took the position that the ITP Reviewer had no jurisdiction to decide the ITPR for the Appointment Complaint because the applicant already had sufficient and comprehensive recourse for all concerns related to her LDT assessment through the IF and DR related to her Assessment Complaint. The applicant disagreed. The parties filed written submissions to the ITP Reviewer.

[39] By decision dated December 12, 2022 (the "ITPR Decision"), the ITP Reviewer concluded that he had no jurisdiction and dismissed the ITPR.

[40] The applicant applied for judicial review of the ITPR Decision in Court File No. T-93-22.

II. Legal Principles Applicable to the Court's Review

A. *Review of Substantive Decisions*

[41] As both parties submitted, the standard of review of both substantive decisions is the presumptive standard of reasonableness: *Vavilov,* at paras 16, 23, 25; *Priest v. Canada (Attorney General),* 2022 FC 1598, at paras 21, 41-48. The onus is on the applicant to demonstrate that a decision is unreasonable: *Vavilov*, at paras 75 and 100.

[42] *Vavilov* contemplates that a reviewing court may set aside an administrative decision if the applicant demonstrates that it was unreasonable because it was not transparent, intelligible and justified in relation to the facts and law that constrained the decision maker. Reasonableness review entails a disciplined, but robust, evaluation of administrative decisions. A reviewing court does not consider whether the decision maker's decision was correct, or what the court would do

if it were deciding the matter itself. Nor does the court reassess or reweigh the evidence. The focus is on the decision-making process used by the decision maker. The Court may intervene if the decision maker failed to respect the legal constraints affecting the decision, or if the decision maker fundamentally misapprehended the evidence, failed to account for critical evidence in the record that runs counter to a material conclusion, or ignored material evidence. See *Vavilov,* esp. at paras 12-15, 83-85, 99-106, 125-128, 194; *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21, at paras 8, 62-64; *Amer v. Shaw Communications Canada Inc.,* 2023 FCA 237, at paras 60, 64.

[43] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The concept of responsive reasons is inherently bound up with this principle because reasons are the primary mechanism by which decision makers demonstrate that they have actually listened to the parties. However, the written reasons given by a decision maker "must not be assessed against a standard of perfection", and need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred": *Mason,* at para 61, quoting *Vavilov,* at para 91. If a decision maker fails to provide a responsive justification for the decision – that is, there has been a significant failure to account for or meaningfully grapple with a party's key issues or central arguments – a reviewing court may lose confidence in the reasonableness of the decision owing to concerns about justification and transparency: *Vavilov,* at paras 127-128; *Mason,* at paras 10, 86, 97-98, 118; *Canada (Attorney General) v. Rushwan,* 2023 FCA 118, at para 35; *Barrs v. Canada (National Revenue),* 2022 FCA 147, at para 38; *Walker v. Canada (Attorney General),* 2020 FCA 44, at paras 9-10.

[44] The reviewing court must read the reasons "holistically and contextually", in light of the record before the decision maker and with due sensitivity to the administrative regime in which the reasons were given: *Mason*, at paras 61, 91; *Vavilov*, esp. at paras 94, 97, 103.

[45] A reviewing court's review must also be mindful of the impact of the decision on the affected individual. The principle of "responsive justification" means that "[w]here the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes": *Mason*, at paras 76, 81; *Vavilov*, at para 133

[46] Not all errors or concerns about a decision will warrant the reviewing court's intervention. To intervene, the court must be satisfied that there are "sufficiently serious shortcomings" in the decision such that it does not exhibit sufficient justification, intelligibility and transparency. The problem must be sufficiently central or significant to render the decision unreasonable: *Vavilov*, at para 100.

B. ***Review for Procedural Fairness***

[47] If a procedural fairness question arises on an application for judicial review, the Court determines whether the procedure used by the decision maker was fair, having regard to all the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected. While technically no standard of review applies, the Court's review exercise is akin to correctness: *Hussey v. Bell Mobility Inc*, 2022 FCA 95, at para 24; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA

196, [2021] 1 FCR 271, at para 35; *Canadian Pacific Railway Company v. Canada (Attorney General),* 2018 FCA 69, [2019] 1 FCR 121, at paras 54-55.

III. The applicant's challenges to the DR Decision

A. *Was the DR Decision Unreasonable?*

[48] The DR Decision concerned the applicant's Assessment Complaint. The applicant contended that the DR Decision was unreasonable because it failed to grapple with her detailed arguments concerning the inconsistency between her marks and those awarded to other candidates at the assessment stage of the staffing competition. The applicant submitted that the DR Decision adopted the conclusions of the Fact-Finding Report but failed to provide any reasons specifically addressing her detailed arguments, which she identified by analyzing the scoring grids and interview notes. The applicant argued that, having identified specific instances in which she received different marks for essentially the same answers, she was reasonably entitled to a decision that grappled with those specific arguments regarding the marks awarded to her and to others. She submitted that the decision did not do so, but instead "casually dismiss[ed] them without detailed reasons". The applicant noted *Vavilov*'s guidance regarding the need for responsive reasons and relied on *Priest.* The applicant also referred to this Court's cases reviewing decisions of the Canadian Human Rights Commission (citing *Herbert v. Canada (Attorney General),* 2008 FC 969, at para 26; *Egan v. Canada (Attorney General)*, 2008 FC 649, at paras 13-15; *Dupuis v. Canada (Attorney General)*, 2010 FC 511, at paras 16, 22; *Banda v. Canada (Attorney General)*, 2019 FC 791, at para 80).

[49] In my view, the DR Decision is reasonable in that it provided an adequate and responsive justification for its determination on the issue raised by the applicant.

[50] The reasons for the DR Decision did not ignore a central argument or position advanced by a person affected by the decision. Instead, the DR Decision provided the following substantive and reasoned response to the applicant's position:

> … based on the sampling reviewed, there does not appear to be instances where other candidates received marks for responses that the candidate made where they did not receive marks for the same responses. Overall, the review determined that the candidate at times missed opportunities to add details that would have led to additional marks being awarded, chose examples for their answers that did not fully demonstrate the ability being assessed, or failed to provide complete information regarding their thought process or future actions when answering the questions. These gaps between the candidate's responses and the 'ideal' responses envisioned by the marking grid were what led to the candidate losing marks relative to other candidates.

[51] It is true that this analysis did not address every individual argument advanced by the applicant, nor did it specifically respond to the allegedly "glaring" examples of inconsistent marking identified by the applicant in her submissions to this Court. However, the legal standard is not perfect reasons, and a decision maker is not required to address every point made: *Mason*, at para 61; *Vavilov*, at para 91. In my view, the passage above meaningfully grappled with the applicant's submissions. I note that the Recourse Procedures required a decision reviewer to address the employee's concerns and reasons they feel they were treated arbitrarily, as identified in the DR Request Form, which occurred in relation to the applicant's concerns about marking discrepancies in the assessment process.

[52] In *Priest,* the applicant argued that the IF decision maker did not deal with the essence of his claim related to adverse effect discrimination based on age: *Priest,* at paras 53-54, 75. Pentney J. concluded that there had been no consideration of the concept of adverse effect discrimination, which was the most important aspect of his claim: at paras 76, 86, 88. My colleague emphasized that the applicant had provided a specific and detailed argument on adverse effect discrimination, so that the IF discussion was not the "usual type" of IF discussion: at paras 82, 89. The way the applicant's submissions were framed and explained "called for a corresponding detailed and specific explanation of the outcome": at para 89.

[53] The present case is somewhat analogous to *Priest,* but different in a critical respect. The common point in both cases is that the applicant provided detailed submissions to the decision maker. However, in *Priest,* the decision maker did not address the most important position advanced by Mr Priest, whereas the DR Decision in the present case did so: see *Priest,* at paras 15, 76, 86, 88. I do not believe that Justice Pentney's use of the word "corresponding" requires all decision makers to provide reasoning that answers a party's submissions point-by-point. I note in this context that the marking discrepancy issues raised in this proceeding were not the only issues – or even all the important issues – addressed in the DR Decision.

[54] I agree that the general judicial review principles concerning responsive justification that apply in the present context of CRA staffing recourse decisions also apply to screening decisions of the Canadian Human Rights Commission: see *Zavarella v. Canada (Attorney General),* 2024 FC 87, at paras 38-39, 89-94, 108, and *Tyler v. Canada (Attorney General),* 2023 FC 257, at paras 32, 37, 42. However, this Court's cases reviewing CHRC screening decisions do not assist

the applicant, given the different administrative contexts (including the requirements in the Recourse Procedures), the nature of the substantive issues in the present case, and most importantly, the existence of reasoning in this case that is responsive in substance to the applicant's allegations: see *Zavarella*, esp. at paras 92-94; *Tyler*, esp. at para 42.

[55] To the extent that the applicant's position is related to the factual assessment made by the DR Decision or the Fact-Finding Report, it is axiomatic that on a judicial review application, the Court may not come to its own view about the merits of the applicant's allegations related to the marks and then measure the DR Decision against that view, and may not reweigh or reassess the factual evidence unless the decision maker fundamentally misapprehended or ignored evidence material to its decision. See *Vavilov*, at paras 83, 125-126; *Amer*, at para 61; *Delios v. Canada (Attorney General)*, 2015 FCA 117, at para 28. The applicant has not shown that the Court should intervene owing to a fundamental misapprehension in the DR Decision of her position on marking discrepancies.

[56] I appreciate that the Certified Tribunal Record did not include the Decision Reviewer's communications with the manager who prepared the Fact-Finding Report. The Decision Reviewer adopted the findings in the Fact-Finding Report on this issue, and the applicant has not shown that it was unreasonable to do so. The applicant did not argue that the Fact-Finding Report fell outside of the Recourse Procedures.

[57] I conclude that the applicant has not shown that the DR Decision related to the Assessment Complaint was unreasonable.

B. ***Was the applicant deprived of procedural fairness in relation to the DR Decision?***

[58] The applicant argued that the Decision Reviewer relied on the Fact-Finding Report without considering her responding comments, as the Decision Reviewer told her that she did not review or address them until after she made the DR Decision. The applicant submitted that while the procedural fairness owed falls to the middle-lower end of the spectrum, the Decision Reviewer was still obligated to give the applicant a meaningful right to be heard by reviewing and addressing her submissions regarding the Fact-Finding Report before rendering her decision.

[59] The applicant did not allege that the process did not comply with any specific procedural requirements in the Recourse Procedures.

[60] The applicant relied upon *Ahmad v. Canada Revenue Agency*, 2011 FC 954, in which this Court stated at paragraph 72:

> **[A]ll Applicants should have the right to discuss directly with the Decision Reviewer, either in-person or by writing, the contents of the Fact-Finding Report. The Applicants must either be able to see the contents of the report during the course of the meeting with the Decision Reviewer, or if the Decision Review is to proceed by writing, a copy of the Report must be disclosed to the Applicant so <u>that the Applicant may prepare written submissions for the Decision Reviewer's consideration</u>.** It follows, therefore, that in any of the cases where the Applicants did not have the opportunity to see and discuss the Fact-Finding Report or see the Fact-Finding Report and prepare written submissions, the Applicants were denied procedural fairness. Clearly, it is not fair for the Fact-Finding Report to be available in some instances, but not in others.
>
> [Bolding added; underlining in the applicant's submissions].

[61] The respondent argued that the process was procedurally fair. The applicant provided her submissions on the Fact-Finding Report at 8:45 am on January 12, 2022, the day the DR meeting was scheduled. The respondent argued that *Ahmed* described two ways in which a complainant may discuss the contents of a Fact-Finding Reports directly with the Decision Reviewer: 1) where the applicant sees the content of the report during the DR meeting; or 2) if the DR proceeds in writing, where the applicant receives a copy of the report so they can prepare written submissions for consideration by the DR reviewer. According to the respondent, the applicant in this case benefitted from a hybrid because she received the Fact-Finding Report in advance but also had the opportunity to meet with the Decision Reviewer on the day the DR Decision. The respondent stressed that, given "the short notice the Decision Reviewer had of these additional comments, and that the [Recourse] Procedures do not provide any specific guidance on this situation, the Decision Reviewer's choice of process met the standard for procedural fairness, which is both inherently flexible and minimal where promotions are concerned".

[62] As a factual matter, the DR process unfolded, in relevant part, as follows. After filing her Assessment Complaint, the applicant received marking grids and responses for the top ten candidates. She analyzed them and submitted her position in writing by email on December 20, 2021. The Fact-Finding Report assessed that position. The Decision Reviewer provided the Fact-Finding Report to the applicant on January 6, 2022, prior to the DR meeting on January 12. The Decision Reviewer signed the DR Decision on the morning of December 12, before she received the applicant's response to the Fact-Finding Report about an hour later. The applicant's response on this issue was that she assumed that the Fact-Finding Report did not take into account her cross-candidate analysis arguments submitted on December 20, 2021. She asked that the

Decision Reviewer look at that document and "advise accordingly." The DR meeting occurred later that day. From emails dated January 25 and February 2, 2022, the applicant asked during that meeting whether the Decision Reviewer "found any errors with the marking" of the candidates (to which the Decision Reviewer gave a substantive response), and they discussed at least one specific instance of inconsistent marking raised by the applicant. During the meeting, the Decision Reviewer agreed to provide responses to the applicant in writing, concerning the applicant's response to the Fact-Finding Report. Through the February 2 email, the Decision Reviewer discussed the applicant's concerns raised at their January 12 meeting and provided substantive responses to the applicant's "High level summary of findings" in her December 20 "Decision Review Cross Candidate Analysis Arguments". The applicant responded within hours on February 2 and the Decision Reviewer responded again by email on February 9, 2022.

[63] In these circumstances, I find that the applicant had a meaningful opportunity to be heard – a "full and fair" chance to advance her case in the DR process: *Canadian Pacific Railway,* at paras 41 and 56; *Taseko Mines Limited v. Canada (Environment),* 2019 FCA 320, at paras 30-31. She received relevant information that she requested during the DR (the adequacy of which was not doubted on this application). Using that information, the applicant made detailed submissions in writing prior to the DR Decision by email on December 20, which one manager assessed in a Fact-Finding Report. The Decision Reviewer provided that report to her by email on January 7, and then agreed with that assessment by adopting it in her reasons in the DR Decision signed early on January 12. At the January 12 DR meeting, the applicant had the opportunity to raise, and did raise, issues related to the alleged marking discrepancies, to which the Decision Reviewer responded at that time. The process continued after the DR meeting, with additional

emails and responses to the applicant's concerns into February. This process was fair to the applicant: she was able to articulate her specific concerns about potential arbitrariness in the marking process in writing (on December 20), had disclosure of the Fact-Finding Report that analyzed those concerns (on January 7), and an opportunity to discuss them with the Decision Reviewer orally (on January 12). She received substantive responses to those concerns in writing in the DR Decision and in the subsequent email exchanges on February 2 and 9, 2022.

[64] The fact that the Decision Reviewer confirmed that she had not reviewed the applicant's response to the Fact-Finding Report (between its delivery by email on 8:45AM and the meeting later on January 12) does not show procedural unfairness or any prejudicial effect on the applicant or her position on marking discrepancies in her assessment. The DR Decision was signed before the applicant's 8:45 a.m. response. Her response did not raise any new concerns about marking discrepancies that she had not raised on December 20, nor any specific criticisms of the Fact-Finding Report on this issue. Instead, her response to the Fact-Finding Report simply assumed that her December 20 cross-candidate analysis had not been considered. I have already concluded the DR Decision, which adopted the Fact-Finding Report on the issue of marking discrepancies, provided a responsive justification to her concerns raised in that analysis. In addition, a few hours after she submitted her response to the Fact-Finding Report, the applicant raised marking discrepancies orally during the DR meeting. She has not identified separate concerns about the Decision Reviewer's responses provided during that meeting. The applicant's position resolves to a technical point that the Decision Reviewer had not reviewed all the information she submitted before the January 12 meeting, which did not prejudice her in advancing her position at DR.

[65] The applicant impugned the DR Decision because it adopted, *verbatim,* the Fact-Finding Report on this issue. However, the applicant did not identify any provision in the Recourse Procedures, nor any legal principle or decided case law, that prevented the Decision Reviewer from doing so. The applicant argued that the Decision Reviewer had an obligation to conduct her "own" review, in addition to and separate from the Fact-Finding Report, but did not point to any direct evidence about what work the Decision Reviewer had or had not done before finalizing the DR Decision on January 12. The Decision Reviewer was apparently able to respond to the applicant's concerns about marking discrepancies at their January 12 meeting. (The record does not contain any notes taken at the meeting.)

[66] For these reasons, I conclude that the process leading to the DR Decision related to the applicant's Assessment Complaint was procedurally fair to her. The circumstances also imply that the Court does not need to intervene to grant an order, either because there was no prejudicial effect on the applicant or because the circumstances do not warrant a remedy: *Taseko Mines,* at paras 62-64.

IV. Was the ITPR Decision Unreasonable?

[67] In the ITPR Decision, the ITP Reviewer found that the issue was whether he had jurisdiction:

> … to review the content of the Locally Developed Tool (LDT) as well as the other candidates. In essence, the issue raised by the Requestor is to determine the correctness of the LDT marks received in the staffing process and, therefore, conclude if the Requestor's LDT assessment was properly done.

[68] In this Court, the applicant did not challenge this characterization of the jurisdiction issue. The applicant did challenge the reasoning in the ITPR Decision, arguing that it contained errors of law based on this Court's decision in *Sargeant v. Canada (Attorney General)*, 2002 FCT 1043.

[69] The reasons in the ITPR Decision began by quoting section 5.11.33 of the Recourse Procedures:

> 5.11.33 The ITPR reviewer must …
>
> […]
>
> • Examine only staffing decisions related to appointment; prerequisite and assessment decisions are not subject to ITPR;
>
> […]

[70] The ITPR Decision stated that the applicant alleged that she was "improperly scored at the LDT assessment" which went "directly to assessment decisions" of CRA, which appeared to be "beyond the scope of the jurisdiction that is conferred upon me by the ITPR process."

[71] The applicant argued in the ITPR (as she did in this Court) that the LDT was properly before the ITP Reviewer, as the LDT marks were "the sole tool to decide who would be the successful candidates in addition of having sought recourse at the assessment stage of their LDT". The ITPR Decision distinguished *Sargeant* from the applicant's circumstances because there was not "any element of surprise or, moreover, [a] lack of access of 'meaningful recourse'." Rather,

> … [i]n this matter, the evidence before me shows that the [applicant] had sufficient redress related to their LDT assessment

> through the staffing recourse mechanism that was afforded at the assessment stage.
>
> In this matter, the [applicant] was given access to individual feedback in addition to a decision review for the assessment stage of the assessment recourse. Furthermore, the [applicant] received disclosure from the Respondent [CRA] during the assessment recourse stage of the staffing process, including anonymized copies of the 10 scored candidates.
>
> As such, I agree with the Respondent's submission that the [applicant] has already exercised their right to the maximum recourse mechanism according to the CRA's Procedures for Recourse on Staffing and had, therefore, a meaningful opportunity to present their case.
>
> That being said, I understand that the [applicant] feels that their LDT score should warrant more marks when analyzed and examined in light of the other candidates. However, this goes strictly to assessment decision and, as mentioned, the [applicant] had opportunities to review this with the Requestor [*sic*: Respondent], via other recourse.

[72] The ITPR Decision found that the issues raised by the applicant for ITPR were related to an "assessment decision for which meaningful recourse was available to address them". There was no link between the placement criteria and the assessment or prerequisite stages for which no meaningful recourse was available. Therefore, based on section 5.11.33 of the Recourse Procedures, the ITPR Decision found no jurisdiction to examine the issue raised by the applicant. The ITPR Decision therefore dismissed the ITPR.

[73] The applicant argued that the ITPR Decision was unreasonable because it relied on an overly narrow interpretation of *Sargeant.* The applicant urged, based on *Sargeant* and *Qui v. Canada (Revenue Agency),* 2018 FC 392, that the ITPR process can address allegations related to an assessment if the assessment forms the sole basis for the permanent appointment.

Alternatively, the applicant argued that the ITPR Decision failed to consider the applicant's unique circumstances – that her request for recourse was improperly handled because CRA did not complete her request for IF before making permanent appointments, despite having 18 months to do so. According to the applicant, ITPR was the appropriate venue to challenge the inconsistent application of assessment standards that formed the basis of the permanent appointments.

[74] I do not agree with the applicant. First, the ITPR Decision began with the relevant provision of the Recourse Procedures, which clearly required the ITP Reviewer ("must") to examine "only" staffing decisions related to appointments, and not assessment decisions. As he recognized in his reasons, the ITP Reviewer's jurisdiction was circumscribed by the statutorily required Recourse Procedures.

[75] Second, the ITPR Decision found that the applicant's position in the ITPR was that she was improperly scored at the assessment stage (in her LDT score). The applicant did not challenge this finding, which reflected the parties' written submissions on the jurisdiction issue and what was remitted to ITPR (an email dated September 14, 2022, confirmed the content of the applicant's complaint).

[76] Third, the ITPR Decision accurately set out the two parties' positions on the jurisdiction issue. The applicant did not argue otherwise. The ITPR Decision confirmed the applicant's position that when one or more of the assessment tools is directly used to decide the successful candidates, the Court's decision in *Sargeant* gave the reviewer the authority to review the

assessments used to decide on the candidates who were appointed in the selection process; and that her score on the LDT at the assessment stage was the sole tool used to decide who was to be appointed, so the LDT and its marking were subject to review at the ITPR.

[77] Fourth, the ITPR Decision did not err in interpreting or applying the applicable case law, including *Sargeant*. I do not agree with the applicant's submission that *Sargeant* stands for the proposition that the ITPR process can address allegations related to an assessment if the assessment forms the sole basis for the permanent appointment, without more. This argument refers to one aspect of the reasoning of Dawson J., to the exclusion of several points that were critical to her analysis and the outcome of that case, including:

a) a factual linkage existed between the assessment and the placement stages in *Sargeant,* which was important to Justice Dawson's analysis but recognized only to a limited extent by the ITP reviewer in that case (*Sargeant,* at paras 33, 35);
b) it was relevant at the ITPR stage in *Sargeant* whether assessment standards were consistently applied, as inconsistent application of the assessment criteria would result in a decision which would be arbitrary within the definition in the then-applicable recourse procedures (*Sargeant,* at para 38);
c) the applicants needed document production (the assessment results) in *Sargeant* because to deny it would prevent meaningful recourse in the ITPR related to the placement (i.e., appointment) decision. That is, a full and fair presentation of the applicants' case at the ITPR required access to information from the assessment stage as that related to the assessment scores given to each candidate (*Sargeant,* at para 39);

d) by finding that the documents relating to the assessment of other employees were not relevant, the reviewer in *Sargeant* precluded consideration of whether the standards at the assessment stage were consistently applied. This substantially deprived the applicants of access to effective recourse (*Sargeant,* at para 40); and

e) Dawson J found that the respondent employer's argument that the applicants could have sought recourse at the assessment stage was not persuasive because the applicants had no way of knowing that the results at the assessment stage would be used at the placement stage and no way of obtaining the other candidates' results during the assessment stage, given the CRA policies in place at the time (*Sargeant,* at paras 41-43, as summarized by Kane J. in *Qui*, at para 76).

[78] In *Qui,* after summarizing the essential analysis in *Sargeant* (at para 76), Justice Kane found an ITPR decision to be reasonable. In that case, the applicants were informed that the scores at the assessment stage could be used at the placement stage and had an opportunity to obtain the other candidates' results if they had pursued DR at the assessment stage. The applicants' concerns were discoverable and to some extent discovered at the assessment stage and they failed to pursue judicial review at the assessment stage. There was no denial of meaningful recourse. See *Qui,* at paras 77, 81-82. Ultimately, Justice Kane concluded that it was reasonable for the ITP reviewer to find that the allegations related to the assessment stage and could have been fully pursued at that stage and, as a result, there was no jurisdiction for ITPR: *Qui,* at para 87.

[79] In my view, *Sargeant* and *Qui* did not constrain the ITP Reviewer to conduct a different analysis than he did. Nor did the ITP Reviewer apply an overly narrow interpretation of *Sargeant.* The reviewer found that the evidence showed that the applicant had already received sufficient redress related to her LDT assessment through the recourse mechanisms she pursued at the assessment stage, including through IF, disclosure from CRA during the assessment process, and the DR process that led to the DR Decision. She had therefore already exercised her right to "the maximum recourse mechanism" under the Recourse Procedures and therefore had a meaningful opportunity to present her case. The issues she raised for ITPR were therefore related to the assessment process, for which meaningful recourse had occurred, and section 5.11.33 prevented the ITP Reviewer from examining those issues.

[80] On this basis, it was reasonable for the ITP Reviewer to distinguish *Sargeant*, as had Justice Kane in *Qui.* Indeed, this case is different from both *Sargeant* and *Qui* in that the applicant here actually had disclosure of other candidates' scores, an opportunity to analyze and make submissions on potential marking inconsistencies amongst candidates during the assessment, and DR during the recourse for her Assessment Complaint, all before the ITPR Decision. By contrast, the issue in *Sargeant* was disclosure of other candidates' scores in order to pursue recourse based on potential inconsistency in scoring (disclosure received in the present case and inconsistencies already assessed). In *Qui* the applicants had only had an opportunity for recourse and had not pursued it (recourse completed in this case). See *Sargeant,* at paras 1, 21-23, 34, 38-40; *Qui,* at paras 81-82.

[81] There is no basis to impugn the ITPR Decision based on the ITP Reviewer's reference to an absence of an "element of surprise" that distinguished the present case from *Sargeant*. That phrase presumably refers to Justice Dawson's statements that there was "nothing to alert the applicants that there was anything about which to seek recourse" and that there was "nothing to alert the applicants that a test score at this stage would be relevant or determinative at a later stage": *Sargeant*, at paras 42-43. The present case is clearly different, as the reviewer recognized. The applicant had pursued her arguments about marking discrepancies during recourse of her Assessment Complaint through IF and DR, and could not be surprised if CRA argued that she could not make the same arguments on marking discrepancies again in IPTR (repeating the same arguments she made in the DR of her Assessment Complaint). Indeed, that is precisely what she proposed to do at ITPR, using the Decision Review Cross Candidate Analysis Arguments analysis she had submitted prior to the DR Decision.

[82] The applicant submitted that the ITPR Decision did not appreciate her "unique circumstances". To the extent that this argument asks this Court to step in by reviewing the merits, the invitation must be declined. I do not agree that the applicant did not receive meaningful recourse in relation to her position on discrepancies in marking, for the reasons already provided in relation to the applicant's challenges to the DR Decision.

[83] I observe that if arbitrary treatment is found under the Recourse Procedures, the remedies available at IF, DR and ITPR all include (under sections 5.9.14, 5.10.22 and 5.11.45 respectively):

> If arbitrary treatment is identified, the manager, in consultation with human resources, must implement corrective measures in

> accordance with these procedures. Corrective measures can include cancelling the staffing process and revoking appointments.
>
> [Emphasis added.]

[84] I appreciate that CRA made its appointment decisions without completing the applicant's recourse related to her Assessment Complaint as the Recourse Procedures contemplate. The applicant argued that doing so was improper and could be open to abuse by the employer. However, the DR Reviewer in this case recognized and acknowledged the oversight and the delays in the IF and DR processes for the applicant, and found that the reasons proffered did not fully account for the significant delay and that the process would have to be improved to ensure it does not happen again. The DR Reviewer also found that the applicant was not deprived of her recourse rights nor was there any indication of intent to deprive her of her rights. These conclusions were not challenged in this proceeding. In addition, even if the applicant is correct that the employer could deliberately delay recourse at the assessment level in the future, it does not lead to a remedy for the applicant in this case. CRA is constrained to follow its Recourse Procedures and will be open to future complaints of arbitrariness if the circumstances warrant – including under the "done capriciously" part of the definition of "arbitrary" in the Recourse Procedures.

[85] Accordingly, I conclude that the applicant has not demonstrated that the ITPR Decision was unreasonable.

V. Conclusion

[86] For these reasons, the application will be dismissed.

[87] The parties advised after the hearing that they had agreed to a quantum of $3,000 in costs to the successful party. In the exercise of the Court's discretion under Rule 400 of the *Federal Courts Rules*, costs will be fixed in that all-inclusive amount.

JUDGMENT in T-252-22 & T-93-23

THIS COURT'S JUDGMENT is that:

1. The applications are dismissed.
2. The applicant shall pay to the respondent costs in the amount of $3,000, all-inclusive.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-252-22 & T-93-23
STYLE OF CAUSE:	STEPHANIE MALKO STREET v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 15, 2024
REASONS FOR JUDGMENT AND JUDGMENT:	A.D. LITTLE J.
DATED:	MAI 3, 2024

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