Federal Court  Cour fédérale

Date: 20070926

Docket: T-1485-06

Citation: 2007 FC 966

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 26, 2007

PRESENT: The Honourable Orville Frenette

BETWEEN:

PIERRE GIRARD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Pierre Girard (the applicant) filed an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 (FCA), of a decision by Clovis Dorval (the decision-maker), Assistant Director, Audit Division, Eastern Quebec Tax Services Office of the Canada Revenue Agency (CRA). In a letter dated July 14, 2006, the decision-maker dismissed the applicant's application for review on the grounds that he was not treated arbitrarily during selection process #2005-3745-QUÉ-1206-1002 in regard to his competencies in *Teamwork and Cooperation* (TEC).

THE FACTS

[2] As a long-time CRA employee, the applicant applied to an AU-03 competition for a Tax Auditor position, in selection process #2005-3745-QUÉ-1206-1002, on July 14, 2006.

[3] On October 28, 2005, the applicant filed his Portfolio of Competencies with the names of three references, naming Roger Doucet as a validator. Bernard Lamy (the evaluator) reviewed the applicant's competencies and then, at random, chose to contact Roger Doucet, one of three references proposed by the applicant, in order to validate the information in his Portfolio of Competencies.

[4] Mr. Doucet refused to validate the applicant's comments with respect to his *Teamwork and Cooperation* competencies. In his affidavit, solemnly affirmed on November 6, 2006, Mr. Doucet states the following at paragraph 4:

> [TRANSLATION]
>
> As it appears from these comments, I refused to validate the *Teamwork and Cooperation* competency for Mr. Girard for the following reasons:
>
> a. The method described by Mr. Girard originated in policy 83-19 issued on September 30, 1983, by the Policy and Systems Branch and was therefore not at all innovative;
>
> b. Since the summer of 2003, a directive allowed its use under exceptional conditions;
>
> c. Mr. Girard did not propose to me that he would formally present this "method" to the other team members;

d. I asked him several times to present a topic at annual meetings, and he always refused, saying that he was not comfortable;

e. Mr. Girard did not recommend that team members be referred to him who would face a situation where the "method" could be used. Rather, it was me who encouraged him to share his knowledge during the technical meeting;

f. There was no comment noted regarding his contribution to the team during the performance assessment and the previous assessments except in 2002, when he was paired with another employee.

[5] Faced with this refusal to confirm, Mr. Lamy wrote in his report dated November 14, 2005, that the TAC competency was [TRANSLATION] "not demonstrated". Accordingly, the applicant did not meet one of the necessary conditions for the position and his application was excluded from the competition.

[6] Dissatisfied with the results of this assessment, the applicant, alleging that the decision was arbitrary, first requested individual feedback, then a review of the decision, which both resulted in the original decision being upheld. Having exhausted all of the internal recourse, the applicant filed this application for judicial review and alleges that the decision-maker made an arbitrary assessment of his competencies. He requests that his request for a review be referred to a different manager to be reassessed.

ISSUE

[7] The points raised by the applicant can be summarized as follows:

1. Were the decision-maker's reasons adequate?

2. Was the decision of decision-maker Clovis Dorval arbitrary and therefore unreasonable?

[8] For the following reason, both of these questions are answered in the negative; this application will therefore be dismissed.

ANALYSIS

I - Preliminary issue: The admissibility of decision-maker Clovis Dorval's affidavit

[9] Before addressing the substantive issue, the Court will examine the applicant's preliminary issue according to which the decision-maker Clovis Dorval's affidavit, filed by the respondent is inadmissible.

[10] According to the jurisprudence, decision-makers or tribunal members have a duty of impartiality and should not go down into the partisan arena by filing affidavits in support of one party or another in the context of an application for judicial review (see *Graphic Communications Union, Local 41M v. Ottawa Citizen, a Division of Southam Inc.*, [1999] O.J. No. 4712 (Ont. Div. Ct.) at paragraph 13 and *Maurice v. Canada (Treasury Board)*, [2004] F.C.J. No. 1165 at paragraph 17).

[11] However, as the applicant points out, there are many exceptions to this general rule, including when the decision-maker's affidavit would be desirable. For example: the decision-

maker's affidavit would be considered indispensable to clarify procedural aspects; the reasons for the decision are in note form, or the decision-maker's jurisdiction is at issue. The applicant submits that none of these exceptions to the rule applies in this case.

[12] Having reviewed the decision-maker's affidavit, it is my opinion that the affidavit is admissible since it was properly made. Moreover, the affidavit is consistent with the exception intended to clarify procedural aspects. In the third and fourth paragraphs of his affidavit, Mr. Dorval set out facts that gave an overview of the procedure followed during the review of the original decision. In fact, the affidavit informs us that, first, he arranged a meeting with the applicant. Then, he listened to the recordings of the interview between the applicant and Mr. Lamy. Finally, he proceeded to review all of the relevant document before making the decision contained in the letter dated July 14, 2006. Here are paragraphs 3 and 4 of that affidavit:

> [TRANSLATION]
>
> 3. In the context of the review, I met with Mr. Girard on June 15, 2006, in order to find out the grounds that support, in his opinion, a finding to the effect that the process was conducted in an arbitrary manner.
>
> 4. After listening to the recordings of Pierre Girard's interview with Mr. Lamy, meeting Mr. Girard, and examining all of the relevant documents, I found, in a letter addressed to Mr. Girard dated July 14, 2006, that nothing in the proceeding supported Mr. Girard's allegations to the effect that he was subject to arbitrary treatment.

[13] The Court therefore accepts Mr. Dorval's affidavit since it clarifies the procedural aspects that the parties were not aware of. It should be noted that the letter dated July 14, 2006, and the

spirit of that affidavit indicate a concern for transparency rather than partisan support to show that the decision-maker was correct on the merits.

THE STANDARD OF REVIEW

[14] The pragmatic and functional approach requires that Parliament's intent is assessed through the four contextual factors identified by the Supreme Court in the following decisions: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.R. 226. These factors are: the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal or the decision-maker in regard to the issue and the nature of the issue raised. In *Anderson v. Canada (Customs and Revenue Agency)*, [2003] F.C.J. No. 924, my colleague Dawson J. chose the standard of the patently unreasonable decision with regard to the application for judicial review of a long-time employee of the Customs and Revenue Agency (CCRA), who had sought, unsuccessfully, a Team Leader position.

II- Collections (PM-04)

[15] Dawson J. dismissed the application for judicial review, deciding that the employee had been treated fairly. In a more recent decision, *Beaulieu v. Canada (Attorney General)*, 2006 FC 1308, de Montigny J. opted for the reasonableness simpliciter standard in a dispute that involved the CCRA, regarding the applicant's application for an AU-2 Auditor/Inspector position. The application for judicial review was dismissed for the sole reason that the selection board's decision, rejecting Mr. Beaulieu's application, was not arbitrary.

ARE THE DECISION-MAKER'S REASONS ADEQUATE IN THIS CASE?

[16] The applicant alleges that the review confirming the original decision is only two pages long and its content is limited to a definition of the word [TRANSLATION] "arbitrary" while remaining silent on the reasons and even the review process itself. He also submits that these reasons are inadequate and violate the principle of procedural fairness and warrant the intervention of this Court.

[17] In support of this proposition, the applicant refers the Court to the decision of our colleague Mr. Justice Simon Noël in *Vennat v. Canada (Attorney General)*, [2006] F.C.J. No. 1251 at paragraphs 90 and 93, which read as follows:

> 90 The courts tend to consider that such reasons are insufficient. Referring to several decisions, Professor Garant aptly summarizes the evolution of the requirement for reasons in his book *Droit administratif*, 5th ed., Cowansville, Éditions Yvon Blais, 2004, at pages 825 to 832. He explains certain principles for assessing the sufficiency of reasons, at pages 829 and 830:
>
> > The Federal Court of Appeal confirms that this obligation does not suggest that the decision be disclosed in minute detail.
> >
> > . . .
> >
> > This reasoning can be expressed in general terms in accordance with the administrative nature of the decisions and the extent of the decision-maker's discretionary power. It can be brief without being incomplete or capricious; the decision may be "brief and technical"... without being 'bereft of reasons'".

> Nevertheless, an administrative tribunal cannot simply write that the evidence is insufficient. . . . The reasoning must be "sufficient and intelligible", even if it is somewhat convoluted and if the decision must be considered as a whole; "a decision will be considered intelligible if the decision maker, considering all of the evidence in assessing the facts, develops a logical reasoning using the facts at issue".
>
> . . .
>
> A decision that does not involve any analysis of the evidence will be considered as being without reasons.
>
> . . .
>
> When a court dismisses inconsistent evidence outright, it must "give at least some reasons for that choice". [References omitted.]

> 93 In fact, there is nothing in the dismissal order or in the letter which could be characterized as analysis or reasoning, and the reasons do not make any mention of the position submitted by the applicant. The reader sees nothing other than findings in the Order in Council and the letter, namely the loss of confidence and the determination that the applicant's conduct is incompatible with his continued appointment. There should have been at least some degree of reasoning or analysis. The applicant was not informed of the reasons for dismissing the written and oral arguments submitted.

[18] Although I entirely agree with these paragraphs, they must be read in the context of the *Vennat* decision, the circumstances of which are clearly distinguished from the facts in this case. First, Noël J. was called to decide the content of a letter of dismissal from the President of a public institution who bestowed on himself the authority of holding office with good behaviour

without adequate explanation. It was therefore indispensable to provide in-depth explanations. On the other hand, this case does not involve the termination of an employee but rather this employee's ineligibility for the selection process.

[19] Then, in the *Vennat* decision, as my colleague Noël J. points out, the decision-maker was the Governor in Council, who holds executive power. This is not judicial or quasi-judicial. This case involves the review of a decision made in the context of a selection process that is subject to specific procedural guidelines.

[20] Finally, the applicant invites the Court to consider paragraphs 90 and 93 of the *Vennat* judgment, while in the current circumstances, paragraphs 91 and 92 instruct us as follows:

> 91 Even though useful for clarification, these guidelines need not necessarily be strictly applied to the Governor in Council when she decides to dismiss a public office holder appointed during good behaviour. The respondent directed the Court's attention to the following passage from the decision in *Knight v. Indian Head School Div. No. 19*, above, at page 685:
>
> > In the same vein, the duty to give reasons need not involve a full and complete disclosure by the administrative body of all of its reasons for dismissing the employee, but rather the communication of the broad grounds revealing the general substance of the reason for dismissal. [Reference omitted.]
>
> [92] The Governor in Council's obligation to give reasons should not be the same as the obligation imposed on judicial or quasi-judicial tribunals. That said, there is nevertheless an obligation to give reasons, namely, the obligation to inform the affected individual of the reasons for the removal while considering the position that this person submitted. In this case, the reasons given to the applicant by the Governor in Council do not

> appear to me to fulfil that obligation to adequately inform the applicant of the reasons for the decisions. I have no other choice, under such circumstances, but to find that the Governor in Council's obligation to give reasons for the decision was breached in this case.

[21] In this case, the nature of the Decision Review simply required the decision-maker to respect the directives in Annex "L" of CRA's *Directive on Recourse for Assessment and Staffing*, which, as the respondent points out, establishes and governs the review of staffing decisions.

[22] In fact, Annex "L" of CRA's *Directive on Recourse for Assessment and Staffing* is a detailed document that gives directives for the review of a decision, including the delay and the content of the written reasons. The relevant passages of this Directive read as follows:

(b) Procedure for the review of decisions	**b) Processus de révision de la décision**
The person responsible for rendering a review decision:	La personne autorisée responsable de l'activité de dotation:
. . .	[. . .]
Issue the decision in writing with 20 working days of the receipt of the request for Decision Review, subject to operational requirements in the preferred official language of the employee. The written decision is not a record of everything that was said and done during the review, but rather a record of the findings.	Rendra la décision dans les 20 jours ouvrables suivant la réception de la demande de révision, dans la langue officielle choisie par l'employé, compte tenu des besoins opérationnels. La décision écrite n'est pas une transcription de tout ce qui s'est dit ou fait durant la révision, mais plutôt un compte-rendu des conclusions.
. . .	[. . .]

[23] For all of these reasons, I note that the decision-maker did not breach his duty in his written decision dated July 14, 2006.

WAS THE DECISION-MAKER'S DECISION REASONABLE?

III- The standard of review

[24] The detailed review of the four factors of the pragmatic and functional analysis referred to by the parties' counsel was used to determine the standard of review that applies in this case. Since it is a question of mixed fact and law, the standard of review of reasonableness was adopted.

[25] This is the standard of review that was adopted under identical circumstances, by my colleague Mr. Justice Yves de Montigny in *Beaulieu v. Canada (Attorney General)*, 2006 FC 1308. After analyzing the four factors, de Montigny J. states this at paragraph 36:

> Having weighed these various factors, I have come to the conclusion that the standard of review applicable to the decision made by Mr. Paquin is that of reasonableness simpliciter. This means that the Court must not interfere unless the decision for review is not supported by any reasons which can stand up to a somewhat probing examination. As Iacobucci J. stated in Law *Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraphs 55 and 56:
>
> > **55** A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing

> examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> **56** This does not mean that every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.

[26] The applicant argues that the debate should be based on the standard of correctness, relying on the following decisions: *Canada (Attorney General) v. Boucher*, 2005 FCA 77; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, paragraphs 90 and 91. The facts of these cases are not akin to those of this case.

[27] The standard to apply here is that of reasonableness simpliciter, as established above in *Beaulieu*.

[28] The applicant alleges that the decision-maker did not respect a number of his rights. First, the applicant alleges that the decision-maker arbitrarily chose a reference. The decision-maker simply chose one reference of the three individuals proposed by the applicant in his

Portfolio of Competency. The respondent dismisses this argument on the basis that the evaluator, Mr. Lamy, had full discretion to choose a reference. He did not have a particular reason for choosing Mr. Doucet as a reference to verify the competencies declared by the applicant.

[29] Having carefully reviewed all of the documents, I note that the process was not arbitrary. In fact, in the Notice of Job Opportunity in the Applicant's Record, vol. 1 tab A, we can read, among other things, the following with regard to the candidates' experience, at page 3 of 8:

> [TRANSLATION]
>
> **In your application, please provide the contact information (name and telephone number) of an individual who is able to corroborate your experience.**
> (Emphasis in original.)

[30] The same request is made on page 6 of 8, just before the section entitled [TRANSLATION] ASSESSMENT STANDARDS, namely:

> [TRANSLATION]
>
> **In your application, please provide the contact information (name and telephone number) of an individual who is able to corroborate your experience.**
> (Emphasis in original.)

[31] It is apparent from this information that the candidates were invited on two occasions to provide the contact information of one person and not of three individuals as the applicant suggests. The fact that the applicant submitted the names of three individuals instead of just one who is able to corroborate his experience gave the decision-maker unfettered choice, which is not at all arbitrary.

[32] In fact, what is arbitrary about Mr. Lamy's choice? According to the documents in the record, Mr. Lamy chose Mr. Doucet to "validate" the experience offered by the applicant. Mr. Doucet's name was provided by the applicant. Moreover, Mr. Doucet, the person responsible for the applicant's validation, had done positive assessments for the applicant in the past; there was therefore no reason to believe that Mr. Doucet would refuse to validate Mr. Girard's statements. It does not state anywhere in the Directive that the applicant was required to name more than one individual to validate the assessment.

[33] Yet, it appears from the documents that Mr. Doucet, whose position is described as [TRANSLATION] "Team Coordinator", was able to determine the TAC and the experience described by the applicant in his Portfolio of Competency in this specific area, in this case, teamwork and cooperation. In these circumstances, I can only find that it was reasonable that the decision-maker did not see anything arbitrary in the original decision. In arriving at the finding in the Review, the procedure described in the decision-maker's affidavit was not arbitrary or unreasonable.

THE DECISION-MAKER FAILED TO PROVIDE ADEQUATE REASONS TO SUPPORT HIS DECISION

[34] Bear in mind that the CCRA directives regarding the selection process for this position are elaborated in #2005-3745-QUÉ-1206-1002. They set out the various selection criteria for

advertised positions and the selection process for the choice of eligible and qualified candidates.

For the desired position, the selection process directives, are at page 6, as follows:

> [TRANSLATION]
>
> **ASSESSMENT STANDARD**
>
> **Different methods could be used to assess your application, including:**
>
> - Standardized test(s)
> - Written exam(s)
> - Interview(s)
> - Verification of references
> - Performance management report for the employee
>
> (Emphasis in original.)

On Page 7 of these Directives, the specific competencies are listed, namely:

> [TRANSLATION]
>
> **BEHAVIOURAL COMPETENCIES**
>
> Teamwork and Cooperation- Level 2 -3 (TBI tool)
> Effective Interactive Communication - Level 2 -3 (TBI tool)
> (Emphasis in original.)

[35] The decision-maker did not recommend the applicant for the requirement "Teamwork and Cooperation" and the reasons for this assessment are elaborated in detail by Roger Doucet. The validator Clovis Dorval, in his decision dated July 14, 2007 (the subject of this application for judicial review), rendered his decision in a two-page letter dated July 14, 2006, addressed to Mr. Girard. He wrote:

> [TRANSLATION]
>
> In order to render an informed decision, I reviewed all of the relevant documentation, I listened to the recording of the parties

> from the targeted behavioural interview related to the competency in question and I met with you on July 15, 2006, so that you could share your comments.
>
> After all of that, I had no reason to believe that you were subjected to arbitrary treatment and, consequently, I do not recommend any corrective action.

Mr. Dorval signed the letter as Assistant Director, Audit Division, Eastern Quebec Tax Services Office. Based on this, I find that he had adequate authority to act as decision-maker in this matter.

SHOULD HE HAVE ESTABLISHED MORE CONCRETE REASONS AS THE APPLICANT ALLEGES?

[36] The record demonstrates that the applicant was perfectly aware of the developments in this case and the reasons why he did not qualify under the "Teamwork and Cooperation" requirement. He exhausted all of his internal grievance recourse. He had the opportunity to argue all of his grievances at the interview with decision-maker Clovis Dorval. The fact that the same decision-maker Roger Doucet, had already validated him in the past in another selection process, has no bearing on the case at bar.

[37] In administrative law, it is well established today that decision-makers must identify the reasons underlying their decisions. This is necessary in particular for appeal and judicial review purposes. The reasons must be intelligible and sufficient, and assess the arguments of the parties to the dispute, see: *Administrative Law,* 3rd ed., Professor David Mullan, Carswell, at pages 282

to 287; *Droit administrative,* Professor Patrice Garant, 5th ed., Édition Blais Inc. Cowansville, 2004, at pages 825to 832.

[38] The adequacy of the reasons is assessed based on the circumstances of each case, see: *Via Rail Canada Inc. v. National Transport Agency*, [2001] 2 FC 25 (FCA); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. The decision *Kindler v. Canada (Minister of Justice)*, [1987] 2 F.C. 145, affirmed at [1999] 2 S.C.R. 779 (Supreme Court of Canada). *Kindler* was an application for judicial review from a decision by the Minister of Justice ordering the removal of a defendant to the United States, pursuant to the *Extradition Act* between Canada and the United States, as an individual convicted of murder.

[39] *Inter alia*, the applicant-appellant argued that the Minister had not elaborated the reasons for his unfavourable decision. Rouleau J. of the Federal Court had held that the decision-maker's duty was to provide adequate reasons to justify his decision. Indeed, he recognized that the Minister was not required to give reasons for every "conceivable factor" and that the failure to state all of the reasons does not mean that they were not considered.

ANALYSE

[40] In this case, the applicant benefitted from a first decision and an internal review of his application during which the reasons for the refusal to validate the event submitted for the competency "Teamwork and Cooperation" were clearly explained to him.

[41] Decision-maker Clovis Dorval's decision echoed the same theme and the applicant was interviewed by the decision-maker and had the opportunity to share his complaints. The decision rendered was brief but covered all of the issues raised. It satisfied the Directive for the reviewer in staffing matters. See page 9 of Annex L, where it is stated:

> . . . The written decision is not a record of everything that was said or done during the review, but rather a record of the findings. (Emphasis added.)

[42] Finally, the applicant raised the fact that the reviewer chose to verify just one reference instead of three. It could have been argued that he should have consulted all three references but, in my opinion, the failure to do so is not a breach that is serious enough to warrant a judicial intervention. When we consider all of the facts in this case and the decision-maker's reasons, it must be concluded that he gave reasons for his decision that were adequate to satisfy his duty of fairness. He was not required to explain in detail all of the considerations that led to his decision. See *Ozdemir v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1646; *Kindler v. Canada (Minister of Justice)*, [1987] 2 F.C. 154 and [1989] FC 492, affirmed at [1991] 2 S.C.R. 779. To summarize, the applicant was not treated arbitrarily and his grievances are without merit.

[43] Although I am sympathetic to the applicant's other grievances, he has not persuaded me that the decision or the way it was made is unreasonable.

[44] The applicant wanted costs in any event. I cannot allow his request in the circumstances.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

[1] The application for judicial review be dismissed;

[2] Each party assume its own costs.

"Orville Frenette"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-1485-06**
STYLE OF CAUSE:	**PIERRE GIRARD v. THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Ottawa, Ontario
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