T-1029-95

BETWEEN:

KENNETH G. HALE,

Applicant,

and -

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by the TREASURY BOARD,

Respondent.

REASONS FOR ORDER

REED **J.**

The issue in this case is the content of the duty of fairness as it applies to a deputy minister's decision dismissing an employee's classification grievance. The decision is that of the Deputy Minister of Natural Resources Canada. The decision in question was made by the Deputy Minister's nominee, Mr. Moodie, on February 28, 1995. It approved a recommendation by the Classification Grievance Committee that the applicant's grievance be dismissed.

A representative of the applicant's bargaining agent (the Public Service Alliance of Canada) wrote to Mr. Moodie on March 17, 1995, asking that he review the decision which had been taken because, among other things, the Committee had changed the wording used to describe the working conditions of the position the applicant held. The letter stated that this was a change from what had been described by the applicant's supervisor and the changes had not been discussed with local management, or the incumbent of

the position, or his bargaining agent. A letter in response, dated April 5, 1995, was received from another Deputy Minister's nominee, A. Piscina. It expressed satisfaction with both the work of the Grievance Committee and the appropriateness of the classification level that had been assigned. The letter noted that the Committee had had "the benefit of a technical expert who spoke on the kind, frequency, intensity and duration of attention, concentration and mental-sensory co-ordination required for this type of position, as well as other aspects of the work".

Counsel for the applicant argues that a breach of the duty of fairness occurred. He argues that it was a breach for the Committee to have consulted an expert on an aspect of the classification assessment that the applicant did not know was in dispute and, then, rely on the information obtained to downgrade the level of the job, without giving the applicant and his union representative a chance to comment thereon. Counsel for the respondent argues that employees and their union representatives know that when a classification grievance is filed, all aspects of the assessment are open for reconsideration and that this is set out in the *Treasury Board Manual,* in the chapter dealing with the procedure applicable to such grievances. It is argued that there was no breach of fairness.

It is first necessary to describe the factual situation in more detail. The applicant works as a technical illustrator for the Atlantic Geoscience Centre in Dartmouth, Nova Scotia. In the public service, the requirements and duties of a position are set out in a ' Job Description' . The description is prepared by what I will call local management. The accuracy of that description can be verified by a desk audit and this was done in this case. Once an accurate description is decided upon, the job is then classified by reference to the requirements of the job, as being at a certain level. The object of this classification procedure is to try to ensure that individuals doing

jobs of roughly similar nature, complexity, responsibility etc. receive roughly similar compensation. The higher the occupational classification level of a job, the greater the amount of pay received.

In the present case, the Job Description carries a date of October 19, 1994. On November 4, 1994, the job was classified at a DD-04 level. The job was assessed under six headings and points were assessed with respect to each: knowledge (179), technical responsibility (80), accuracy and quality (46), contacts (27), conditions of work (120) and supervision (15). The job was thus assessed at 467 points. This placed it within the DD-04 level. On November 30, 1994, the applicant filed a grievance requesting that the position be reclassified to the DD-05 or GT-03 group. The submissions filed on his behalf argued that the points which had been awarded for knowledge and technical responsibility were too low, that these should be increased to 216 and 120 respectively.

A hearing before the Classification Grievance Committee took place on February 6, 1995, in Ottawa. The applicant's representative was invited to make representations and then required to leave the room. This is in keeping with the Grievance Committee's usual procedure. As noted, a decision issued from the Minister's nominee, on February 28, 1995, approving the Committee's recommendation that the grievance be dismissed. The Committee rejected the arguments concerning an increase in the points to be awarded for knowledge. The Committee accepted the applicant's arguments with respect to the under-evaluation of the job insofar as technical responsibility is concerned. It assessed that component of the job at 120 points, instead of the 80 that the initial classification assessment had given. The Committee, however, reduced the points accorded for conditions of work. It assessed that component at 60 points rather than 120. Thus the job was assessed at 447 points and within the DD-04 level. This gave rise to the

correspondence described above, which sought a review of the decision because the applicant had not had an opportunity to make representations in response to the expert evidence, which the Committee had relied upon in reaching its decision respecting the conditions of work.

It is trite law that the content of the duty of fairness varies with the nature of the decision in issue. In *Martineau* v. *Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, this was made clear. The Court held that the rules would vary depending upon the nature of the interests affected by the decision and the nature of the process involved'. See also *Knight* v. *Board of ducation of Indian Head School Division*, [1990] 1 S.C.R. 653 at 669. The *Knight* case is unusual because it concerned a contract of employment which was terminable on three months notice without cause. The Court held that, even in that circumstance, a duty of fairness was owed before the applicant could be dismissed. Madame Justice L'Heureux-Dube stated that the existence of a duty of fairness depended upon: the effect of the decision on the individuals's rights; the nature of the decision in question; the relationship existing between the decision maker and the individual concerned. She found that in the situation in question a minimal duty of fairness was owed and this required that the individual be told the cause for termination of his employment and given an opportunity to respond. In the text by Blake, *Administrative Law* (Butterworths, 1992) at pages 9 - 17, the following factors are identified as ones that the courts consider in assessing the standard of fairness required: (1) what is the effect of the decision; (2) what is the nature of the decision; (3) what it the tribunal's mandate; (4) is there an opportunity for a later remedy for any errors to be corrected; (5) are there statutory rules relevant to the procedure to be followed.

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1. See pages 618 - 619, 621 - 622, 624.

With respect to the nature of the interests involved in the present case, if the job position which the applicant fills is classified at a **DD-04** level, the pay range is $31,008.00 to $37,568.00. If his job is classified at the DD-05 level, the range is $36,281.00 to $41,259.00. Thus, a decision can mean a difference of about $5,000.00 a year in the applicant's annual salary, and that amount becomes part of his base salary for subsequent years. The Public Service Alliance also has an interest in seeing that the job is properly classified. The Alliance, as the bargaining agent for the applicant and other public servants, bargains with Treasury Board representatives for the level of compensation that public servants will be paid. The bargaining takes place by reference to the various specific classification levels. Counsel argues that, if after pay levels have been set, as a result of the bargaining process, the employer can arbitrarily determine the classification level for any job, a mockery is made of the compensation bargaining process. The decision by the Grievance Committee, and the adoption by the Deputy Minister's nominee thereof, has significant monetary consequences for the applicant. That the process of classification be fair is also of concern to the applicant's bargaining agent (and thus to the applicant), to protect the integrity of the bargaining process as it relates to compensation.

Counsel for the respondent seemed to argue, either that the rules of fairness were not applicable in the present case or, at least, that the content thereof was very minimal because the applicant had no "right" to have the job he held reclassified upwards. It is important to recall the analysis in the *Martineau* decision. In that case the Supreme Court noted that there was an unfortunate tendency in analyzing judicial review situations, and what is required with respect thereto, "to treat rights in the narrow legal sense'. The Court stated that a person who is affected by a decision, whether he has some

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2. At page 618.

right *or some interest or some legitimate expectation,* is entitled to have the decision, which affects him, made in accordance with the duty of faimess3.

I turn then to the applicable statutory provisions and the procedure which has been prescribed by Treasury Board for use in making these decisions. Subsection 7(1) of the *Financial Administration Act,* R.S.C. 1985, c. F-11, makes the Treasury Board responsible for the management of the public service:

> 7.(1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to
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> (a) general administrative policy in the public service of Canada;
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> (b) the organization of the public service of Canada or any portion thereof, and the determination and control of establishments therein;
>
> (e) personnel management in the public service of Canada, including the determination of the terms and conditions of employment of persons employed therein;

Part of Treasury Board's responsibility includes providing for the classification of positions and employees. Paragraph 11(2)(c) of the *Financial Administration Act* states:

> ... the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, ...
>
> (c) provide for the classification of positions and employees in the public service;

Subsection 12(1) provides:

> 12. (1) The Treasury Board may authorize the deputy head of a department or the chief executive officer of any portion of the public service to exercise and perform, in such manner and subject to such terms and conditions as the Treasury Board directs, any of the powers and functions of the Treasury Board in relation to personnel management in the

3. At page 619.

> public service and may, from time to time as it sees fit, revise or rescind and reinstate the authority so granted.

The policies and procedures for managing the public service, as established by Treasury Board, are set out in the *Treasury Board Manual.* The Manual contains a list of the various classification designations which are used (e.g., the abbreviation DD refers to the occupation of "Drafting and Illustration/Dessin et illustration"). Nine levels within that designation are set out (DD-01 to DD-09). A DD-04 job is identified as one that is assessed at 421 - 500 points; a DD-05 level job is one that is assessed at 501 - 580 points.

The objective of the classification system is described by Treasury Board in the Manual as being to ensure equitable compensation for public servants:

> [The system's objective is] to ensure that the relation value of all jobs in the Public Service is established in an equitable, consistent and effective manner and provides a basis for the compensation of public servants.

The Manual also explains that the Job Description of a position will provide the basis for its classification:

> 2.1. The job description is the basic document for classifying and evaluation a position. It is to be initiated by the manager and must describe the duties, responsibilities, and other characteristics of the work actually being performed or if the position is vacant, the duties to be performed. The job description must contain the type of information needed to enable the job to be allocated to a particular category and occupational group, and evaluated against the standard for that group.

If an employee thinks that the position which he or she holds has been misclassified because the points assessed do not reflect the requirements of the position, the employee may grieve that classification decision. Section 91 of the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35, provides that an employee has the right to grieve matters affecting his or her terms of employment. Some such grievances may go to third party

arbitration. A classification grievance is not one of these (see generally sections 92 and 96 of the *Public Service Staff Relations Act).* The procedure for dealing with a classification grievance is established by Treasury Board and is set out in the Manual. The purpose of the procedure is described as being:

> To provide a redress process for employees who are dissatisfied with the classification of the duties they perform as assigned by the Employer.

It is also stated that:

> All classification grievances received will be thoroughly reviewed by qualified persons who were not involved in any way in the making of the classification decision being grieved. They will make a recommendation to the deputy head or the nominee of the deputy head whose decision will be final and binding.4

(underlining added)

The *Treasury Board Manual* explains how a classification grievance committee is to be formed, what format a grievance must take, the time *limits* for the filing of a grievance and the making of a decision thereon. The Manual also sets out, in Appendix **B, to Chapter 4, the procedure to be followed by a. grievance committee. Relevant portions thereof read:**

> **F. COMMHTEE PROCEDURE**
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> 1. The classification grievance process is not intended to be an adversarial system; it provides for a meeting to be convened during which information will be presented and sought, allowing committee members to make a recommendation to the deputy head or nominee.
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> 2. The chairperson is responsible for ensuring that committee members and, in particular, the grievor are reminded of the committee's role and of the grievance procedure. It is very important that the grievor and his or her representative are made aware that *all aspects of the classification of the grieved position will be reviewed by the committee. The decision rendered will be final and binding and could result in the upgrading confirmation or downgrading of the grievor's position.* The chairperson should explain the respective roles of the committee members and outline the procedure the committee will follow, as indicated below:

4. See also subsection 96(3) of the *Public Service Staff Relations Act.*

a. presentation of arguments by or on behalf of the grievor;

b. information provided by management;

c. committee deliberations;

d. committee report; and

e. final and binding decision by the deputy head or nominee.

3. The chairperson must clearly understand the substance and all the details of the grievance including details of the position being grieved to provide precise and first hand explanations and information to the committee members with respect to departmental relativities. The chairperson is responsible for controlling the conduct of the meeting.

G. PRESENTATION BY THE GRIEVOR AND/OR HIS OR HER REPRESENTATIVE

1. The grievor, his or her representative, or both, shall be given the opportunity to make a presentation (in person or in writing) to the grievance committee before a recommendation is made with respect to classifying the grieved position. Once that presentation is completed, they must withdraw from the meeting.

IL MANAGEMENT INFORMATION

1. A management representative familiar with the work of the grieved position should be available to respond to questions the committee members may have with respect to the position. The management representative ***is not pamitted*** to argue for or against the decision which led to the grievance, attempt to influence the committee members, participate in the committee deliberations or be present when the grievor, his or her representative or both, make a presentation to the committee.

L ADDITIONAL INFORMATION

1. If deemed necessary, the committee may call upon other persons to provide additional information and/or conduct an on-site visit.

It is not contested that Treasury Board has authority to establish the terms and conditions, including classification levels, for employees in public service. It is not contested that it has authority to establish policy in this area, including the procedure for the handling of classification grievances. It is contended, however, that the implementation of the procedure which is established must be fair. This is particularly so given the fact that the

decision which is made is final and binding. There is no mechanism for review of the decision.

Counsel for the applicant argues that whether or not the *Treasury Board Manual* describes the grievance procedure *as* "non-adversarial" is not significant. The process does, in fact, involve the resolution of a dispute concerning certain facts and the conclusions to be drawn therefrom. It is a situation in which the employee is taking one position and ' management' or the employer' is taking another. The employee's union representative comes before the committee, in much the same role he or she fulfils in other grievance procedures, to argue on behalf of the employee. I note that the *Treasury Board Manual,* itself describes the objective of the grievance procedure as being to provide "a redress process for employees who are dissatisfied with the classification of the duties they perform as assigned by the Employer" (emphasis added). I cannot accept that Treasury Board's characterization of the process as non-adversarial can be used as a ground for justifying the Committee's non-disclosure to the applicant. It is important to look at the substance of the dispute and the process, not at how one party, or those who established that process characterize it. There is nothing in the procedure established by Treasury Board that prevents the grievance committees from according employees the type of disclosure that the applicant seeks and from allowing him an opportunity to respond.

Counsel for the applicant argues that the nature of the decision, the decision making process, and the relationship between the decision maker and the employee indicate that more not less content should be given to the duty of fairness. He notes, as is clear from what has been said above, that a classification decision has important financial consequences for the applicant. Secondly, that it is Treasury Board that bargains with the union to set salary levels. Treasury Board is the "employer". The Deputy Minister exercises

authority delegated to him by Treasury Board. It is Treasury Board that establishes the rules of procedure to be used by the Grievance Committee. A representative of Treasury Board sits on the Grievance Committee and Treasury Board determines how that Committee is to be composed. There is no appeal of the decision which the Deputy Minister's nominee makes, on the recommendation of the Grievance Committee. Thus counsel argues that where management is both adverse in interest to the applicant and the final decision maker, greater care should be taken to ensure that a fair procedure is followed than might otherwise be the case. It seems to me there may be merit in that argument but I do not need to rely on it.

As noted, counsel for the applicant is not arguing that Treasury Board does not have authority to set the terms and conditions of employment for public servants. Nor does he argue that the Treasury Board does not have authority to establish rules of procedure for dealing with grievances. He does not argue that a classification grievance committee is not entitled to consider all aspects of a classification which is brought before it, including those not raised by the grievor. He does not argue that an oral hearing is required, that there is any right of cross-examination, or that the applicant or his representative should be allowed to stay in the hearing room after the applicant's presentation is heard. He argues, however, that when the committee decides to review an aspect of the classification assessment, which the employee did not think was in dispute, and decides to elicit and rely on evidence with respect thereto about which the employee had no notice or information, fairness requires that that information be disclosed to the employee and he be given an opportunity to comment thereon. I agree with that position.

The decision *S.E.P.Q.A.* v. *Canada (C.H.RC.),* [1989] 2 S.C.R. 879, provides a useful analogy. The decision under review in that case related

to a complaint that gender based discrimination existed and the complainant was not being paid equal pay for equal work. A decision was made by the Canadian Human Rights Commission, on the recommendation of a Commission investigator, that the applicant's complaint not be proceeded with further. The investigator obtained information from the applicant/complainant and from her employer. On the basis of that information, the investigator made his recommendation to the Commission. The Supreme Court noted in rendering its decision that while the Commission was not obliged to comply with the rules of natural justice, which apply to judicial or quasi-judicial tribunals, it was required to comply with the duty of fairness'. Chief Justice Lamer, speaking for a majority of the Court, went on to state that this had been done in the case before the Court because the investigator had informed the applicant of the substance of the evidence he had obtained from the employer and which he put before the Commission as the basis of this recommendation. In addition, the applicant had been given an opportunity to respond thereto, in writing, before the Commission made its decision. See also *Mercier* v. *Canadian Human Rights Commission* (1994), 167 N.R. 241 (F.C.A.). I fail to see why, in the case at bar, a similar disclosure to the applicant of the expert evidence and an opportunity to respond thereto should not have been given.

I was referred to two decisions which seem to take a different approach: *Tanack* v. *Her Majesty the Queen* (T-1379-95, May 3, 1996) and *Chong* v. *Canada (Attorney General)* (1995), 104 F.T.R. 253. In *Tanack* the applicant was not represented by counsel. The analysis relevant to the present case is based upon that set out in the *Chong* decision.

In *Chong*, while a description was given of the nature of the applicant's interest and the Grievance Committee's procedure, much of the

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5. At page 899.

latter is, strictly speaking, *dicta* since the decision under review was quashed because the Committee had ignored evidence before it and not on a procedural fairness ground. Secondly, the alleged procedural defect in that case (not giving the individual access to all the information the Committee had before it) would seem to have been inconsequential. A description of the information which was not disclosed is found at page 265 of the decision. It is characterized as having been the "clarification of certain discrete aspects of the position ...". The conclusion that Mr. Justice McKeown then draws is "I would not have returned this matter to the committee if the lack of information on management's responses in the reasons was the only error made by the committee". It seems to me that the main reason no breach was found, as a result of a failure to disclose the information, was that this failure was not significant.

More importantly, the *Chong* decision, at 264 - 265, relied upon the decision in *Quebec (Attorney General)* v. *Canada (National Energy Board),* [1994] 1 S.C.R. 159. A passage, at page 182, of that decision was quoted. It described the issue to be decided as being whether the disclosure to the appellants had been such as to allow them to participate in a meaningful way:

> **...** the issue is whether the Board provided to the appellants disclosure sufficient for their meaningful participation in the hearing, such that they were treated fairly in all the circumstances ...

This is the test which was applied in *Chong* and it is also applicable here.

Applying that test leads to the conclusion that, in the present case, the duty of fairness was not met. I note, by way of explanation, that counsel for the respondent argued that the duty of fairness does not apply (or in its most minimal sense does not require the disclosure sought) because there is no case against the applicant that he has to meet. This is not a phrasing of the relevant condition that I find helpful. That phrasing seems to me to relate back to counsel for the respondent's argument that the applicant

does not have a "right" to reclassification. In my view, a more appropriate way of phrasing the question is the way it was done in the *Quebec case, supra:* was sufficient information disclosed to allow for a meaningful participation by the person affected. I do not know how that test can be said to be met when information is obtained from an expert, on an aspect of the classification that the applicant was not aware the employer disputed, and this is not disclosed to the applicant, nor is he given an opportunity to comment thereon.

Counsel for the respondent argues that the applicant and his representative knew that all aspects of the classification assessment would be looked at by the Committee. They are told, in the Manual, that this *will* occur. This is not sufficient notice, however, to allow the applicant a meaningful participation in the decision making process. The applicant is not able to participate meaningfully if he has no knowledge of significant evidence which the Committee has before it.

For the reasons given the decision in question will be quashed and the matter referred back for reconsideration and redetermination.

OTTAWA, Ontario.
May 23, 1996.

B. Reed
Judge

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-1029-95

STYLE OF CAUSE: KENNETH G. HALE v. **HER** MAJESTY THE QUEEN

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: 13-MAY-1996

REASONS FOR ORDER OF THE HONOURABLE MADAME JUSTICE REED

DATED: 23-MAY-1996

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