

**Date: 20080215**

**Docket: T-1823-06**

**Citation: 2008 FC 202**

**Ottawa, Ontario, February 15, 2008**

**PRESENT: The Honourable Madam Justice Mactavish**

**BETWEEN:**

**FRANCE GILBERT**

**Applicant**

**and**

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

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] France Gilbert seeks judicial review of a decision of the Director of the Organization and Classification Directorate of the Royal Canadian Mounted Police, relating to her classification grievance.

[2] After Ms. Gilbert commenced her application for judicial review, her employer purported to rescind the Director's decision, indicating that it would convene a new Classification Grievance Committee to re-hear the grievance. As a consequence, the respondent submits that the Court should decline to hear the application for judicial review, as it is now moot.

[3] Ms. Gilbert submits that her employer had no authority to rescind the Director's decision, and that, as a result the matter is not moot. Moreover, she submits that the Director erred in law in his decision by failing to have regard to the applicable Classification Standard.

[4] For the reasons that follow, I find that the application is not moot, as the employer did not have the power to unilaterally rescind the Director's decision. Moreover, I am satisfied that the Director did err in failing to have regard to the Classification Standard. As a consequence, the application for judicial review will be allowed.

### **Background**

[5] Ms. Gilbert is a strategic planning analyst employed by the RCMP. On June 10, 2004, she filed a classification grievance requesting that her position be classified at the AS-05 level instead of the AS-04 level.

[6] Once a classification grievance is received by the RCMP, the grievance policies and procedures established by the Treasury Board, under the authority of the *Financial Administration Act*, mandate that a Classification Grievance Committee be convened to hear the grievance.

[7] The Committee is then required to assess the position in issue against various factors identified in the applicable Classification Standard. In this case, it is the Administrative Services Classification Standard that is applicable to Ms. Gilbert's position.

[8] The Administrative Services Standard identifies four factors to be used in evaluating positions: knowledge (which is broken down into three sub-categories of education, experience and continuing study), decision making, responsibility for contacts and supervision.

[9] The “Notes to Raters” guidelines provided to members of Classification Grievance Committees assign specific point totals to be awarded to each factor, depending on a number of conditions. The classification level for the position under review is then determined according to the total number of points awarded in accordance with this system.

[10] Ms. Gilbert’s submissions before the Committee related solely to the rating that her position had received for the education element. She argued that the “A” rating that had been assigned to her position for the educational factor was inappropriate, as it indicated that the position required no specialized training.

[11] Ms. Gilbert submitted that her position required that analysts provide expert advice. In order to be able to provide this advice, she argued that analysts required knowledge “beyond what one would be able to acquire through on-the-job experience ... which incorporates the basic principles and theories of a number of different areas such as Sociology, Economics, Political Science, Criminology, Statistics and Business Management”.

[12] Ms. Gilbert and her representative also provided the Committee with information as to the classification of what she said were comparable positions, which had received a “C” rating for the educational factor.

[13] The Committee reviewed Ms. Gilbert’s submissions, as well as those provided by her union. The Committee also considered the submissions that had been made on behalf of the employer. The Committee then found that the level of expertise required by Ms. Gilbert’s position was less than that for a position requiring a professional level of expertise, and was not comparable to the positions relied upon by Ms. Gilbert.

[14] In its analysis, the Committee referred to the guidance offered by the “Notes to Raters”, which form part of the Classification Standard. The Notes provide that a “C” rating should be assigned to a position where the duties of the position:

1. Require university graduation in a specialized field; or
2. Require understanding and appreciation of the principles and concepts of two or more specialized fields for which the knowledge is normally acquired through university training and which are directly associated with the duties performed; or
3. Require systematic study and analysis of complicated general problems and their solution by the application of specialized knowledge acquired through extensive post-secondary school study or training rather than through experience.

[15] The Notes go on to provide that “In positions with duties which meet conditions 2 and 3, the incumbents will not necessarily be university graduates”.

[16] Insofar as Ms. Gilbert’s position was concerned, the Committee found that the position:

[W]as comparable to conditions 2 and 3, requiring an understanding and appreciation of principles and concepts of two or more specialized fields (Business Management, Statistics and Economics to name three) and the systematic study and analysis of complicated general problems (such as identifying issues and trends through environmental scans) and their solution, but did not necessarily require university graduation. On that basis the committee was unable to support a C level rating for the [subject position].

[17] The Committee then rated the knowledge requirement of the position at the second level on the scale, that is at the “B” level.

[18] Ms. Gilbert’s union representative then wrote to the Director of the Organization and Classification Directorate, on September 6, 2006, requesting that he review the Committee’s decision as the nominee of the Deputy Head and the final level grievance authority.

[19] It was argued by Ms. Gilbert’s representative that the Committee had erred in its assessment, as the Notes to Raters clearly specified that a “C” level was to be assigned to a position where the duties of the position met *any* of the three conditions listed. As the Committee had found that Ms.

Gilbert's position met two of the conditions, it followed that the position should have been assigned a "C" level rating.

[20] On September 15, 2006, the Director advised that he was confirming the decision of the Committee. He stated that although one could construe the Committee's decision as confirming that Ms. Gilbert's position met two of the requirements for a "C" rating, after discussing the matter with the Committee, he was satisfied that the Committee had concluded a "B" rating was the appropriate assessment for the position.

[21] The Director further stated that the Committee's conclusion that her position "was comparable to conditions 2 and 3" did not mean that the position conformed in every respect to the conditions for a "C" level rating. According to the Director, two matters may be "comparable", but it did not follow that they are necessarily "equivalent".

[22] It is this decision which underlies Ms. Gilbert's application for judicial review.

### **Post-Decision Developments**

[23] After Ms. Gilbert had commenced her application for judicial review, Guy Bonneville, the Manager of Classification Grievances for the Public Service Human Resources Agency of Canada, instructed counsel to advise Ms. Gilbert that the Director's decision would be set aside and a new hearing ordered.

[24] It is not clear from either counsel's letter or the affidavit that Mr. Bonneville swore in the context of this application who it was that had actually made the decision to rescind the Director's decision. No affidavit was provided by the Director.

[25] A new hearing for Ms. Gilbert's grievance was scheduled for April of 2007, but was postponed at the request of Ms. Gilbert's union representative, pending the result of this application.

### **Is the Application for Judicial Review Moot?**

[26] The respondent argues that the Court should decline to entertain Ms. Gilbert's application for judicial review on the basis that it is now moot. Given that the respondent has already agreed to rescind the decision underlying this application, the respondent says that there is no longer a live controversy between the parties.

[27] Ms. Gilbert argues that the employer is simply trying to deprive her of the benefit of the Classification Grievance Committee's finding that her position met the requirements for an AS-05 classification. She submits that the matter is not moot, as there was no authority for the respondent to purportedly rescind the Director's decision. As a consequence, she says that the decision stands, and is thus susceptible to judicial review.

[28] I agree with Ms. Gilbert that the matter is not moot as the respondent did not have the authority to unilaterally rescind the decision of the Director.

[29] The Director's decision was the final level decision available for this type of grievance, which was governed by the provisions of the since-repealed *Public Service Staff Relations Act*, R.S. 1985 c. P-35.

[30] Subsection 96(3) of the Act provides that:

**96. (3) Where a grievance has been presented up to an including the final level in the grievance process ... the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and no further action under this Act may be taken thereon.** [emphasis added]

**96. (3) Sauf dans le cas d'un grief qui peut être renvoyé à l'arbitrage au titre de l'article 92, la décision rendue au dernier palier de la procédure applicable en la matière est finale et obligatoire, et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief ainsi tranché.**

[31] Decisions made by Classification Grievance Committees and final level authorities are decisions made by "federal boards, commissions or other tribunals" within the meaning of section 2 of the *Federal Courts Act*, R.S., 1985, c. F-7, in the exercise of their statutory authority.

[32] The respondent argues even though subsection 96(3) of the *Public Service Staff Relations Act* makes it clear that decisions made at the final level are final and binding, this language should not be interpreted to preclude the employer from acting promptly and informally to rectify an obvious error.



[33] While this argument is attractive at first blush, I would note that what is in issue here is not the correction of a minor slip in the decision, but its wholesale revocation.

[34] Moreover, the argument has to be considered in light of the respondent's concession that if the employer indeed had the authority to rescind the Director's decision, nothing would prevent the employer from being able to rescind any final level decision with which it did not agree.

[35] If this were so it would, in my view, fundamentally undermine the integrity of the grievance process. It would also mean that final level decisions were final and binding on grievors but not on the employer – a patently untenable result, and one at odds with the clear intent of the legislation.

[36] It is also noteworthy that while some federal employment legislation specifically confers the right on decision-makers to rescind or amend decisions, no such power is conferred on the employer in this case by the *Public Service Staff Relations Act*: see for example, subsection 15(3) of the *Public Service Employment Act*, 2003, c. 22, ss. 12, 13 and subsection 32(3) of the *Royal Canadian Mounted Police Act*, R.S., 1985, c. R-10.

[37] The respondent further submits that a decision to rescind a final level grievance decision is not a “further action” under the *Public Service Staff Relations Act*, but is rather ‘a decision made within the framework of internal processes relating to the classification of positions’.

[38] At the time in issue in this case, classification decisions were subject to the grievance provisions of the *Public Service Staff Relations Act*. Part IV of the Act conferred the right on most non-managerial public servants to grieve matters related to their conditions of employment, including classification decisions. An action purporting to rescind a final level grievance decision made under the Act would clearly be a “further action” taken in respect to the grievance, and would thus be governed by subsection 96(3). To interpret the section otherwise would clearly be contrary to Parliament’s intent that final level grievance decisions be binding on both parties.

[39] In support of its contention that the matter is moot, the respondent also relies on two decisions of this Court: *Utovac v. Canada (Treasury Board)*, 2004 FC 1615 and *Kowallsky v. Canada (Attorney General)*, 2006 FC 1458.

[40] With respect to the *Utovac* decision, the Court’s reasons are very brief, and it does not appear that any of the arguments now being advanced by Ms. Gilbert were put before the Court in that case. As a consequence, I am of the view that the decision is of limited assistance here.

[41] Insofar as the *Kowallsky* decision is concerned, the case is distinguishable on its facts, as it did not involve an attempt by the employer to rescind a final level grievance decision, nor was any consideration given to the effect that subsection 96(3) of the *PSSRA* would have on such an attempt.

[42] In the absence of authority on the part of the respondent to unilaterally rescind the Director's decision, the decision remains in effect. As a consequence, the application for judicial review is not moot, and will be considered by the Court.

[43] Before turning to consider the merits of Ms. Gilbert's application, I would note that the respondent made no submissions in its memorandum of fact and law with respect to the merits of the decision, nor was there any attempt made to defend the decision on its merits at the hearing of Ms. Gilbert's application.

**Did the Director Commit a reviewable Error in Failing to have Regard to the Classification Standard and the Notes to Raters?**

[44] As I am satisfied that the decision under review cannot withstand scrutiny under any standard of review, it is unnecessary to address the standard to be applied to the decision.

[45] A review of the findings of the Classification Grievance Committee confirms that the Committee found that the duties of Ms. Gilbert's position "were comparable" to two of the three conditions identified in the Notes to Raters as necessary for level "C" to be assigned. The Committee did not, however, assign a level "C". The reason given by the Committee for assigning the position a level "C" was that the position did not necessarily require university graduation.

[46] This is clearly an error, as the three criteria listed in the Classification Standard are disjunctive: that is, Committees are directed to assign a level "C" to positions where the duties of

the position require specialized training of the type identified in any one of the three conditions identified in the Notes.

[47] Moreover, the Notes to Raters further specify that “in positions with duties which meet conditions 2 and 3, the incumbents will not necessarily be university graduates”.

[48] In confirming the Committee’s decision, the Director stated that after discussing the matter with the Committee, he was satisfied that the Committee had concluded a “B” rating was the appropriate assessment for the position. That may well be, but it begs the question as to whether it was open to the Committee to assign a “B” level rating in the face of its finding that the position was comparable to two of the three conditions set out in the Classification Standard.

[49] The Director’s second reason for confirming the Committee’s decision was that the Committee’s statement that the position “was comparable to conditions 2 and 3” did not mean that the position conformed in every respect to the conditions for a “C” level rating. According to the Director, two matters may be “comparable”, but it does not follow that they are necessarily “equivalent”.

[50] With respect, the Director was attempting to re-write the Committee’s decision. A review of the Committee’s decision discloses that the basis for the Committee’s decision was not that the position did not meet conditions 2 and 3. A fair reading of the decision indicates that the Committee accepted that this was the case. Rather the reason given for refusing to assign the

position with a “C” level for the knowledge component was that the position “did not necessarily require university graduation”. Indeed, the Committee specifically noted that it was “[o]n that basis [that] the committee was unable to support a C level rating for the [subject position]” [emphasis added].

[51] As a consequence, given the finding of the Classification Grievance Committee that Ms. Gilbert’s position met the requirements of conditions 2 and 3, the decision affirming the decision of the Classification Grievance Committee to award the position a “B” level for the knowledge factor was patently unreasonable. The decision is therefore set aside, with costs.

### **Remedy**

[52] I agree with Ms. Gilbert that as the Classification Grievance Committee has already assessed her position and made its factual findings in that regard, nothing is to be gained by remitting the grievance for a complete reassessment.

[53] Paragraph 18.1(3) of the *Federal Courts Act* empowers the Court to refer matters back for determination in accordance with such directions as it considers appropriate.

[54] In *Turanskaya v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 254, the Federal Court of Appeal discussed this power, holding that:

6 The "directions" which the Trial Division is authorized to give under paragraph 18.1(3)(b) will vary with the circumstances of a particular case. If, for example, issues of fact remain to be resolved it

would be appropriate for the Trial Division to refer a matter back for a new hearing before the same or differently constituted panel depending on the circumstances. That, however, is not the case here. The only issue to be resolved by the Trial Division was whether the Refugee Division had erred in law in determining the respondent not to be a Convention refugee because of her former habitual residence in the Ukraine... The appellant raised no issue before her by way of judicial review with respect to findings of fact. It follows, therefore, that no issue of that kind remains unresolved. We are satisfied, in the circumstances, that [the applications judge] exercised her discretion within the limits of paragraph 18.1(3)(b) by leaving the final determination to the Refugee Division on the basis that, with the error of law corrected, it declare the respondent to be a Convention refugee.

[55] There is no dispute between the parties with respect to the Committee's assessment in relation to the other factors identified in the Classification Standard. Nor is there any question that if the position is assigned a "C" level for the education factor, that the points assigned to the position will require the reclassification of the position to the AS-05 level.

[56] Indeed, the only issue left to be determined in this case is whether Ms. Gilbert's position should be assigned a "C" level rating, based upon the Committee's determination that the duties of the position satisfied two of the three conditions identified in the Notes to Raters as necessary for level "C" to be assigned.

[57] The answer to this question is dictated by the wording of the Notes to Raters, which mandate that a “C” level is to be assigned where the duties of the position satisfy one of the three conditions identified in the standard.

[58] As a consequence, the Court orders that the case should be remitted to the Director of the Organization and Classification Directorate with the direction that Ms. Gilbert’s position be assigned a “C” level for the Education element of the Classification Standard.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES** that:

1. This application for judicial review is allowed, with costs.
2. The case is remitted to the Director of the Organization and Classification Directorate with the direction that Ms. Gilbert's position be assigned a "C" level for the Education factor identified in the Classification Standard.

\_\_\_\_\_  
"Anne Mactavish"

Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1823-06

**STYLE OF CAUSE:** FRANCE GILBERT  
v. HER MAJESTY THE QUEEN  
as represented by TREASURY BOARD

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** February 13, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** Mactavish, J.

**DATED:** February 15, 2008

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