Date: 20080512

Docket: T-1113-07

Citation: 2008 FC 596

Ottawa, Ontario, May 12, 2008

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CHARLENE COX

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Charlene Cox, the Applicant, applies for judicial review pursuant to Section 18.1 of the *Federal Courts Act* R.S.C. 1985, c. F-7, of a decision, dated May 9, 2007, of Mr. William McDowell, Associate Deputy Minister ("ADM") at the Department of Justice.

BACKGROUND

[2] The Applicant is a paralegal employed by the Department of Justice in the Aboriginal Law Section in British Columbia. She was dissatisfied with her Performance Review Employee

Appraisal Report ("PREA Report") dated July 6, 2006, for the period of April 1, 2005 to March 31, 2006 and filed a grievance pursuant to section 208 of the *Public Service Labour Relations Act*, S.C. 2002, c.22. She was successful at the second level of the grievance procedure. The Senior Regional Director allowed the grievance in part noting that firstly, the interim PREA Report was not provided to the Applicant in a timely manner, and secondly the report did not contain narrative comments about the Applicant's performance for the entire year. As a result, these first interim and final PREA Reports were removed from her personnel file.

[3] A second PREA Report was conducted and completed on December 13, 2006. The Applicant received, as in her previous PREA Report, an overall global rating of 2 on a 4 point scale, with 2 being an unsatisfactory rating.

[4] The Applicant took issue with the second PREA Report at a mediation session conducted on December 15, 2006 which had been convened to attempt to resolve workplace issues. As a result of the mediation, a Memorandum of Understanding ("MOU") was signed between the parties. Article 5 of that MOU provides that the parties are to:

> review and amend the most recent draft review and global rating so that it objectively, fairly and accurately reflects her work performance review period.

The performance review was subsequently revised to incorporate a more positive tone in reference to the Applicant, together with some additional commentary, but the global rating remained at 2.

[5] The Applicant reactivated her grievance which was brought before the ADM. After receiving written and oral submissions, the ADM denied the grievance.

DECISION UNDER REVIEW

[6] The ADM considered the Applicant's submissions on the MOU agreement. He stated (Applicant's Record at 169):

> I have found no information in the document you provided that prevents the employer from assessing performance against work objectives that are mutually established by a supervisor, in this case Mr. Christoff and yourself at the outset of the review period.

[7] The ADM went on to hold that he found no evidence that the outcome of the PREA process was a result of malice harboured against the Applicant. The ADM was satisfied that the Applicant's supervisor provided appropriate feedback and support throughout the review period. He concluded by noting that he was not in a position to evaluate the Applicant's work and would not substitute his own opinion for that of her supervisor. In result, the grievance was denied.

STANDARD OF REVIEW

[8] Counsel for the Applicant thoroughly addressed the issue of the standard of review in light of the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9. She indicated that the Supreme Court of Canada in *Dunsmuir* held that there were only two standards of review, correctness and reasonableness; and that, in determining a standard of review, the Court should consider whether prior jurisprudence had determined the appropriate standard of review for a

particular question. If not, then an analysis was to be undertaken to determine the standard of review.

[9] Counsel for the Applicant submitted that prior jurisprudence on the standard of review had come to varied conclusions. In *Canada (Attorney General) v. Assh* (2006), 274 D.L.R. (4th) 633 (F.C.A.), a case which involved a conflict of interest issue, the standard of review was held to be correctness. In *Desloges v. Canada (Attorney General)*, 2007 FC 60, a case involving the judicial review of an Associate Deputy Minister's decision to dismiss a grievance for the reason of timeliness, the standard of review was held to be patently unreasonable and the decision to dismiss the grievance on its merits was held to be reasonableness *simpliciter*. In *Dubé v. Canada (Attorney General)*, 2006 FC 796, the applicants' grievance that the Associate Deputy Minister failed to give them recall priority was also reviewed on the standard of reasonableness *simpliciter*.

[10] Counsel continued with a standard of review analysis to determine the standard of review concluding, after considering the factors of a weak privative clause (*Assh*, above at para. 35; *Vaughan v. Canada*, 2003 FCA 76 at paras. 125-130; aff'd 2005 SCC 11); the low level of deference to be afforded to the ADM with respect to the interpretation of contracts (*Assh*, above at paras. 42, 44); the purpose of the governing legislation and the grievance process (*Dubé*, above, at para. 30); and the nature of the question being one of mixed fact and law, that the standard of review in the case at bar is reasonableness.

[11] Counsel for the Respondent agreed. I also agree that the standard of review is reasonableness.

ANALYSIS

[12] The Applicant submits that the ADM's decision was made without regard to the material before him in two respects. First, the plain language of Article 5 of the MOU provides that:

> [The Applicant and the Acting Director agree to] review and amend the most recent draft performance review and global rating so that it objectively, fairly and accurately reflects a work performance review (emphasis by Applicant).

[13] The Applicant submits that the plain language of Article 5 requires an amendment to the global rating which the ADM ignored.

[14] Second, the Applicant also argues that the ADM ignored evidence that the Applicant's final PREA Report did not "objectively, fairly and accurately reflect her work performance over the period". The Applicant submits that Article 5 of the MOU implies a mutual acknowledgement by the parties that the Applicant's PREA Report and global rating was not an objective, fair or accurate reflection of her work performance during the period in question.

[15] The Applicant submits that the ADM's decision to ignore the plain language of the MOU and the evidence was unreasonable.

[16] The Respondent submits that the ADM did consider the MOU agreement, contending that the language of the MOU is clear that the parties agreed to review the Applicant's performance in an objective, fair and accurate way, but that there was no agreement to a particular rating or an agreement to predetermine the results of the review.

[17] In my view, the PREA Report and global rating was to be revisited so that it objectively, fairly and accurately reflected the work of the Applicant. The MOU is an agreement to a process and not an agreement to an outcome. If, as a result of the review, changes were required, those changes would be made. If the changes were such that the global rating should be changed then it could be, but always subject to the requirement that the PREA Report objectively, fairly and accurately reflected the Applicant's work performance.

[18] I find the evidence discloses that the ADM did consider the plain language of the MOU with specific reference to Article 5. The ADM's interpretation of the MOU and his conclusion that the PREA process was properly undertaken with respect to the Applicant is within the range of reasonable outcomes. The evidence before the ADM supported the PREA performance review and the global rating. I do not find the ADM's decision to be unreasonable.

Conclusion

[19] The application is to be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. There are no costs to be awarded.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1113-07
STYLE OF CAUSE:	CHARLENE COX v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
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APPEARANCES:

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