Federal Court  Cour fédérale

Date: 20110930

Docket: T-2132-09

Citation: 2011 FC 954

Ottawa, Ontario, September 30, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

NAZAR AHMAD, HAMIDUL AMEEN, PAMELA CHEUNG, HARJINDER DHESY, NORINE GOODMAN, DEBORAH HAIRE, ANDY HENDERSON, YULIA HIDIJAT, FANNY JANG, JULIAN LEBOFSKY, RICHARD MALONE, ANNA MICHIELI, CHRISTINE NG, NELLY NG, INDRAJIT ROY, SUSAN TIERNEY, CHELLIAH VENOGOPAL, SALIM VIRJI, FRANK WONG, HELEN YI, ANNA YU, AND RANDY ZURIN

Applicants

and

CANADA REVENUE AGENCY

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review comprises 22 consolidated applications for judicial review concerning decisions made by Paul Loo in his capacity as a Decision Reviewer at the

Canadian Revenue Agency (CRA). The Applicants allege that they were treated arbitrarily during a selection process, but in each case the Decision Reviewer found no evidence of arbitrary treatment and declined to order corrective measures. The Applicants now argue that the Decision Reviewer's decisions are deficient in number of ways and ask that the decisions be set aside and referred back to a different decision reviewer to be decided in accordance with the reasons of this Court.

[2] Based on the reasons that follow, this application is allowed in part.

I. Background

A. *Factual Background*

[3] The Applicants participated in Selection Process Number 2007-6368-ONT-1213-3268 which was posted on July 30, 2007. This competition was to staff 66 newly-created AU-04 positions (Large Case File Auditors, Senior Tax Avoidance Auditors, and Senior International Tax Auditors) in the Ontario region.

[4] The need to fill these positions was the result of an agreement between the Government of Ontario and the Government of Canada as the administration of corporate tax in Ontario devolved from the Ontario Ministry of Revenue to the CRA. Government of Ontario employees were to become CRA employees. Due to the concerns of the Applicants' union, the Professional Institute of the Public Service of Canada (PIPSC), the CRA promised to appoint an existing CRA employee to an AU-04 position for every appointment of a provincial employee to an AU-04 position.

[5] The competition was tiered, meaning that candidates needed to achieve threshold results in one tier in order to advance to the next. If a candidate successfully completed all tiers, he or she would be placed in a pool of qualified candidates.

[6] This competition consisted of three tiers, as follows:

Tier 1:

1) Writing Skills Test, Level 3 (to be assessed by way of a multiple choice test)

Tier 2:

1) Client Service Orientation, Level 2 (to be assessed by way of a Competency Based Organizational Questionnaire)
2) Effective Interactive Communication, Level 2 (to be assessed by way of a Competency Based Behavioural Questionnaire)
3) Teamwork and Cooperation, Level 2 (to be assessed by way of a Competency Based Behavioural Questionnaire)
4) Legislation, Policy and Procedures, Level 3 (to be assessed by way of a Portfolio of Technical Competencies)
5) Auditing, Level 3 (to be assessed by way of a Portfolio of Technical Competencies)

Tier 3:

1) Analytical Thinking, Level 3 (to be assessed by way of a targeted behavioural interview, unless a candidate specifically requested by September 13, 2007 that they be assessed using a Portfolio of Competencies)

[7] A "Portfolio of Technical Competencies" (PoTC) is a standardized evaluation tool that requires candidates to describe in writing an example of a situation where he or she demonstrated the competency in question. In this selection process a PoTC was used to assess candidates' knowledge of Legislation, Policy and Procedures (LPP) and Auditing (AUD).

[8] The Competencies are defined in the CRA's Competency Catalogue. Only general standards are associated with each level. The level 3 which applied to all competencies is defined as:

> **Demonstrates solid capability and good working knowledge**, and independently undertakes a full range of typical challenges.
>
> [Emphasis in the original]

[9] In order to assist candidates prepare their writing samples for the PoTC, "Just in Time" information sessions (JIT sessions) were held by Technical Competency Assessors (TCAs) in various CRA offices. A TCA is accredited by CRA senior management based on technical expertise and experience, and is trained to assess candidates in a competition. These JIT sessions were meant to provide candidates with an opportunity to ask questions and discuss examples with the aim of ensuring that candidates understood the expectations for the PoTCs. There is a

discrepancy in the parties' materials as to exactly what information was passed on by the TCAs at these sessions.

[10] Once the Applicants submitted their PoTCs, they were independently assessed by two TCAs and both results were calibrated to produce a final score. This is the usual practice at the CRA.

[11] According to the Respondent's materials, during the summer of 2008, PIPSC put pressure on the CRA to complete the AU-04 selection process. Because of high failure rates on the technical competencies, senior management was concerned that the selection process would not yield a sufficient number of candidates to satisfy the matching commitment. In order to increase the pool of qualified candidates, the CRA decided to allow candidates who had failed the Writing Skills Test to re-write it. The CRA decided that it would not be practical to allow candidates who had failed the PoTC components to resubmit examples because that would prove to be too costly, too timely and inefficient.

[12] The Applicants were among those who did not achieve the required results on the technical competencies and thus were not placed in the AU-04 pool. The Applicants failed to achieve a Level 3 on one or more of the LPP, AUD and Analytical Thinking (AT) competencies.

[13] The Applicants all exercised the available recourse options pursuant to the CRA's Directive on Recourse for Assessment and Staffing. For candidates wishing to challenge his or her treatment in the assessment stage of an internal selection process, this consists of "Individual Feedback", followed by "Decision Review". The goal of these mechanisms is to determine if candidates have been treated arbitrarily. "Arbitrary" is defined in the Directive 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 i.e., as listed as the prohibited grounds of discrimination in the *Canadian Human Rights Act*.

[14] Individual Feedback was provided by the TCAs who had assessed the competency in question. Their role was to meet with the candidate and explain the basis upon which the assessment was made. If dissatisfied with the results of Individual Feedback, the candidate was able to request Decision Review, which was to be conducted either verbally or in writing.

[15] Prior to Decision Review, a Fact-Finder was appointed by the Decision Reviewer to gather relevant facts. A Fact-Finding Report was provided to the Decision Reviewer for each Applicant.

B. *Impugned Decisions*

[16] Decision Review meetings took place between March 2009 and November 2009. In each case, the Decision Reviewer concluded that the Applicants were not treated in an arbitrary manner and he did not order any corrective action.

II. Issues

[17] The Applicants submit that this application raises 8 issues:

(a) Did the Decision Reviewer fail to provide sufficient reasons?

(b) Did the Decision Reviewer wrongfully decline jurisdiction over many of the Applicants' allegations?

(c) Did the Decision Reviewer render an unreasonable decision in addressing the allegation that the CRA did not ensure consistency in rating competencies?

(d) Did the Decision Reviewer render an unreasonable decision in permitting the CRA to change the selection process to allow excluded candidates to re-write the Writing Skills Test, without providing a similar re-testing opportunity in relation to the other technical competencies?

(e) Did the Decision Reviewer render an unreasonable decision in permitting the CRA to change the definition of the Analytical Thinking competency part way through the selection process without communicating this change to all candidates?

(f) Did the Decision Reviewer err in failing to provide an opportunity for all Applicants to meet with the Decision Reviewer prior to rendering his Decisions?

(g) Were the Applicants deprived of their rights to disclosure?

(h) In addition to the above allegations, did the Decision Reviewer err in addressing the particular allegations made by Ms. Haire, Mr. Roy, Ms. Jang, Ms. Tierney and Ms. Yi?

[18] The Respondent suggests, and I agree, that the above allegations all fall into three main categories:

(a) Was the decision that the Applicants were not treated arbitrarily during the selection process reasonable?

(b) Did the Decision Reviewer err in determining that certain allegations fell outside the scope of Decision Review?

(c) Was the Applicants' right to procedural fairness breached during Decision Review?

[19] Having reviewed all of the affidavits of the Applicants, I believe the allegations are best summarized as below:

Allegation	Applicant
The competencies were not marked in a fair, consistent and objective manner.	All 22 Applicants: 1. Nazar Ahmad 2. Hamidu Ameen 3. Pamela Cheung 4. Harjinder Dhesy 5. Norine Goodman 6. Deborah Haire 7. Andy Henderson 8. Yulia Hidijat 9. Fanny Jang 10. Julian Lebofsky 11. Richard Malone 12. Anna Michieli 13. Christine Ng 14. Nelly Ng 15. Indrajit Roy 16. Susan Tierney 17. Chelliah Venogopal 18. Salim Virji 19. Frank Wong 20. Helen Yi 21. Anna Yu 22. Randy Zurin

CRA made changes mid-process that resulted in arbitrary treatment: candidates who failed the Writing Skills Test were permitted to re-write, but those who failed the PoTC were not	1. Norine Goodman 2. Richard Malone 3. Christine Ng 4. Nelly Ng 5. Randy Zurin
The change to the definition of Analytical Thinking was not communicated to all candidates	1. Yulia Hidijat 2. Helen Yi
The Decision Reviewer wrongly concluded that certain complaints fell outside the scope of Decision Review	1. Norine Goodman 2. Fanny Jang 3. Richard Malone 4. Christine Ng 5. Nelly Ng 6. Susan Tierney 7. Salim Virji 8. Helen Yi 9. Anna Yu 10. Randy Zurin
The Decision Reviewer failed to give the Applicant an adequate opportunity to be heard	1. Deborah Haire 2. Andrew Henderson 3. Fanny Jang 4. Julian Lebofsky 5. Susan Tierney
The Decision Reviewer failed to give adequate reasons for his decision	All 22 Applicants
The Applicants were not afforded adequate disclosure	No access to Fact-Finder Report: 1. Nazar Ahmad 2. Hamidu Ameen 3. Pamela Cheung 4. Harjinder Dhesy 5. Deborah Haire 6. Andy Henderson 7. Yulia Hidijat 8. Fanny Jang 9. Julian Lebofsky 10. Anna Michieli 11. Nelly Ng 12. Indrajit Roy 13. Susan Tierney 14. Chelliah Venogopal

	15. Salim Virji 16. Frank Wong 17. Helen Yi 18. Anna Yu No access to Assessment Worksheet prior to Decision Review meeting: All of the above Applicants, as well as Norine Goodman, Richard Malone and Randy Zurin.
TCAs biased against people working in appeals	1. Andy Henderson
Decision Reviewer exhibited bias	1. Helen Yi
Candidates were treated differently	1. Deborah Haire
3rd TCA was consulted	1. Harjinder Dhesy
Fact-finder did not complete his report	1. Harjinder Dhesy

III. Standard of Review

[20] The content of the decision of a Decision Reviewer is reviewable on a standard of reasonableness. As Justice Leonard Mandamin explained in *Wloch v Canada (Revenue Agency)*, 2010 FC 743 at para 21:

> [21] […] at issue is whether the reviewer considered the appropriate factors in arriving at his decision. The Decision Reviewer must review the facts and determine if the action offended the directive against arbitrary treatment. I concluded in *Gerus v Canada (Attorney General)*, 2008 FC 1344 at paras 15, 16 that the content of a Decision Review is a mixed question of fact and law that should be reviewed on the standard of reasonableness. […]

[21] As set out in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the reasonableness standard requires the existence of justification, transparency, and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

[22] Questions of procedural fairness are reviewed against the standard of correctness (*Ng v Canada (Attorney General)*, 2008 FC 1298, 338 FTR 298 at para 28).

[23] The Applicant argues that the question of jurisdiction should be reviewed on the correctness standard. As it is a question of policy and/or discretion, and the interpretation of the CRA's own Directive, I agree with the Respondent that the question of jurisdiction should also be decided on the reasonableness standard. The Supreme Court of Canada indicated in *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] SCJ No 18 (QL) that increased deference is called for when the legislation being interpreted is intended to resolve and balance competing policy objectives for the interests of various groups (see *Professional Institute of the Public Service of Canada v Canada (Customs and Revenue Agency)*, 2004 FC 507, 251 FTR 56 at para 82)

IV. Argument and Analysis

Did the Decision Reviewer Wrongfully Decline Jurisdiction Over Many of the Applicants' Allegations?

[24] The main dispute between the parties centers on a disagreement over the role of the Decision Reviewer. The Applicants argue that many of their allegations were wrongfully ignored because the Decision Reviewer claimed that they were not within his purview on Decision Review. The Applicants have identified four specific allegations that the Decision Reviewer declined to address:

1) The CRA provided misleading examples of acceptable PoTC submissions;
2) The PoTC word limit was unfair;
3) The CRA continued to use the PoTC assessment tool, despite being aware that this tool did not adequately evaluate the competencies in question; and
4) The TCAs did not have the required expertise.

[25] In response to these issues, the Decision Reviewer took the position that, "these concerns do not specifically relate to any arbitrary treatment with respect to your assessment and will not be addressed as they fall outside the purview of the Decision Review process." The Applicants argue that the Decision Reviewer erred in refusing to take jurisdiction over these issues.

[26] The Respondent takes the position that the above concerns involve assessment methodologies and the general administration of the selection process and therefore fall outside the scope of Decision Review. The Respondent argues that the Decision Reviewer reasonably

concluded that he did not have the jurisdiction to deal with these complaints as his review is limited to determining whether candidates were treated in an arbitrary manner. This involves ensuring that the chosen evaluation criteria has been consistently and appropriately applied, but, the Respondent submits, it is not the Decision Reviewer's role to undermine or disregard established guidelines.

[27] I reviewed the Directive to get a better sense of the intended jurisdiction of the Decision Reviewer and the scope of Decision Review. The Directive on Recourse for Assessment and Staffing instructs that Decision Review should focus on how the individual was treated in the process, and not the evaluation of other candidates or employees (Directive para 4.1, Respondent's Record vol 1, tab 3). The review "must be limited to circumstances that are directly related to the stage in question of the…internal selection process," (para 4.3). Once again, the CRA defines "arbitrary" as:

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

[28] In terms of the kinds of corrective measures the Decision Reviewer can order, there in not much detail other than para 9.2.15's imperative to, "limit corrective measures to those actions required to correct the error made during that…stage of the internal selection process."

[29] Many of the disputed allegations concern the policies that were applied to the selection process as a whole – criticisms regarding the tools chosen to assess competencies and how these PoTCs were marked – and other established practices of the CRA, not specifically related to this selection process – the qualifications of the TCAs for instance.

[30] I accept that the CRA was under some pressure and accept that Parliament has granted the CRA the authority to design and administer staffing procedures. I also accept that certain discretionary decisions will need to be made during a staffing process, especially a large and complex one – words, which by all accounts, describe this particular competition. As such, I share the view of the Respondent.

[31] These allegations are outside of the scope of Decision Review. It is not the role of the Decision Reviewer to undertake a complete review of every challenge an Applicant may bring with respect to the design and administration of the CRA staffing process. This is not to say that these issues do not present valid concerns seemingly shared by numerous CRA employees that CRA management might choose to consider and address in some way at some point in the future. Only that I do not see how these wide-sweeping concerns essentially regarding established CRA policies can be addressed either by the Federal Court on judicial review of a decision emanating from the Decision Review process, or by a Decision Reviewer during Decision Review. By the time this file reaches the Federal Court, years have passed and two levels of review have taken place, by bodies with more subject-matter expertise than the Court. The Decision Reviewer and this Court are, by legislation, limited in their powers upon review.

[32] In my view the Decision Reviewer acted reasonably in not addressing discretionary matters related to the design of the competition. Nonetheless, I will examine the Applicants' claims in turn. Specifically the Applicants find fault with the Decision Reviewer's refusal to address:

Misleading Examples Were Provided to the Applicants

[33] The Applicants submit that when they attended the Just-in-Time sessions they were under the impression that the examples discussed would warrant a Level 3 rating for the LPP and AUD competencies. The Applicants argue that they relied on these examples in preparing their own submissions to their detriment, as it became apparent during the recourse process that the JIT examples were overly simplistic and did not meet the competency guidelines to attain a Level 3. The Applicants claim they were mislead, and thus treated unreasonably.

[34] The Respondent's material indicates that the TCA's running the sessions did not indicate what level could be achieved with the examples. This is contrary to the affidavit evidence filed by 14 of the Applicants.

[35] The Decision Reviewer found that this concern fell outside of his jurisdiction. Although what the Applicants label as a "fundamental misrepresentation" is disconcerting, this is a case of the general being over-ruled by the specific. In each case the Decision Reviewer found that the TCAs had reasonably assessed the Applicants' PoTCs. All candidates were exposed to the same examples at the JIT sessions through a standardized power-point presentation, although the evidence on how the examples were described is contradictory. All Applicants also thought their submissions exceeded the quality of the examples. Again, the Decision Reviewer is limited to focusing on how the individual was treated in the process.

[36] Specifically, Fanny Jang claimed to have relied on the representations of the TCA at the JIT that a “no-change” assessment was an acceptable example for her PoTC. However, during Individual Feedback she was told that using a no-change assessment as an example was not a good idea for the LPP competency. Ms. Jang argues that it was unreasonable for the TCAs to initially tell her that a no-change submission was acceptable and then criticize her submission on that basis.

[37] The Respondent argues that Ms. Jang’s submission did not receive a Level 3 rating for reasons unrelated to the fact that it was a no-change assessment. The TCA found that she failed to support her final position with legislation. Having found that determination to be reasonable, the Decision Reviewer was not required to determine whether or not any mis-information had been given to Ms. Jang at the JIT session, since it was immaterial to the outcome. I adopt the Respondent’s position on this point, and see no reason to doubt the assertion, whether provided at the JIT session or not, that a legislatively supported no-change assessment could warrant a Level 3 rating.

Portfolio Word Limit Unfair

[38] Several Applicants claimed that the 800 PoTC word limit was unfair because it was only sufficient for candidates working in departments dealing with less complex transactions. I find the Decision Reviewer was reasonable in refusing to address this issue. All candidates were subject to the same word limit, and any institutional bias that the limit may camouflage, is beyond the scope of Decision Review.

Continued Use of the PoTC Assessment Tool

[39] The Applicants submit that the CRA was aware that the PoTC assessment tool did not properly evaluate an auditor's knowledge and understanding of tax law, nor did the standardized test for the LPP competency recognize the varying degrees of knowledge of tax legislation. This was conceded in a document prepared by the CRA's Working Group on Technical Competencies (see exhibit L to the Bittman affidavit, Applicants' Record, vol 2, tab 3L). The Applicants submit that the CRA acted unreasonably in deciding to use a standardized assessment tool that it knew was flawed. The Applicants argue that the Decision Reviewer had the jurisdiction to address this issue.

[40] Again, I disagree with the Applicants' submissions. The Decision Reviewer is mandated to focus on how the individual was treated in the process, not the flawed design of the process as a whole. Para 9.2.8 does require the Decision Reviewer to inform the Resourcing Standards and Assessment Services of all Decision Review cases relating to standardized assessment tools for statistical purposes. This suggests that the CRA intends to deal with issues with standardized assessment tools, but outside of the Decision Review process.

TCAs Did Not Have the Required Expertise

[41] The Applicants submit that the TCAs did not have the technical experience necessary to properly evaluate their submissions. All TCAs were qualified as per the CRA's policy. Although the Applicants argue that the CRA's guidelines are not sufficiently stringent to ensure that the TCAs possess the technical knowledge required to assess issues addressing complex tax issues, this is not an issue that can be addressed or resolved through Decision Review. The definition of arbitrary includes, "not based on rationale or established policy." As the fact-finder wrote in one report, "it is a necessary and reasonable assumption that TCAs are properly trained and qualified to conduct the assessments". The Decision Reviewer reasonably declined to take jurisdiction over the matter.

Conclusion to Jurisdiction Question

[42] Pursuant to sections 53 and 54 of the *Canada Revenue Agency Act*, (SC 1999, c 17) the CRA has exclusive authority to appoint any employee it considers necessary for the proper conduct of its business and the ability to develop a program governing staffing and recourse. The Applicants essentially complain that without the jurisdiction to address the Applicants' claims, the recourse process becomes meaningless. The Applicants point to the fact that approximately 84 substantive appointments were made in January 2009 even though the Applicants had not yet completed recourse. A CRA Staffing Bulletin warns against such practice, as making appointments pending completion of recourse gives the perception that recourse is not meaningful.

[43] The Applicants may have valid concerns, but this Court needs to respect the authority delegated to the CRA to govern its own staffing procedures. Of course these procedures must conform to the principles of procedural fairness, but aside from that, the CRA has been afforded the leeway and discretion to act as it deems necessary. The Staffing Bulletin referred to also notes that manager's may establish a pool prior to recourse being complete, but that they must assess the impact of their decision and be cognizant of any associated risks. Absent proof to the contrary, I can only assume that management undertook such an analysis before deciding to proceed as it did in this competition, a decision which is within its scope of delegated authority.

Was the Decision that the Applicants Were Not Treated Arbitrarily During the Selection Process Reasonable?

[44] The Decision Reviewer came to the conclusion that none of the Applicants were treated arbitrarily. The Applicants disagree with this conclusion and submit as evidence of arbitrary treatment: 1) the lack of consistency in rating competencies between offices and the time when the competencies were evaluated; 2) that candidates excluded from the competition were allowed to re-write the Writing Skills Test, but candidates were not provided a re-testing opportunity in relation to other technical competencies; 3) the definition of the Analytical Thinking competency was changed part way through the selection process but not communicated to all candidates; 4) in certain cases the fact-finding report concluded that there was arbitrary treatment but this was not addressed by the Decision Reviewer.

Lack of Consistency

[45] The Applicants submit that the CRA failed to implement any kind of control procedure to ensure that making between teams, or even within the same team due to the length of the process, remained consistent throughout the selection process. The Applicants argue that this failure is illustrated through the differing pass rates between offices. The pass rate for the CRA's Toronto Centre office was significantly higher than for the other offices in the greater Toronto area. In one of her reports the fact-finder noted that, "the assessments made by the teams were not reviewed to ensure consistency of marking between teams. The candidates may well have fulfilled the criteria of "significant analysis" by a different team," (Applicants' Record, vol 3 tab 9e). The Applicants submit that the Decision Reviewer refused to adequately address the issue, responding only that, "The TCAs are selected and accredited based on specific criteria developed by CRA's Human Resources Branch," (see for example Henderson decision, Applicants' Record, vol 3 tab 10l). The Applicants submit that the CRA has an obligation to consider whether assessment standards were applied consistently, and that this obligation was shirked.

[46] From the Respondent's materials, I understand that the CRA has taken the position that evidence of this concern is related to the allegations that the PoTC is a flawed instrument and that the TCAs were not adequately qualified and failed to consistently apply the selection standards. The Respondent submits that the Decision Reviewer's decision that the Applicants were not treated arbitrarily despite this allegation is reasonable. The TCAs were all CRA certified and trained. The selection process was carried out as per CRA policy. The Decision Reviewer found that all of the Applicants were given an opportunity to discuss their concerns regarding the PoTC and marking

schemes in great detail with the TCA. The Decision Reviewer's sole job was to determine if the Applicants had been treated arbitrarily, not substitute his opinion for that of the TCA or engage in a statistical analysis of the entire selection process.

[47] Once again, I agree with the Respondent on this point. The Decision Reviewer is not mandated to conduct a *de novo*, substantive review of the Applicants' PoTC submissions. More than anything, he has a procedural role, and is to ensure that individuals are not treated arbitrarily in the selection process. He is not an ombudsman tasked with evaluating the design of the entire procedure. All PoTCs were marked in accordance with CRA policy. The Applicants submit that the CRA has an obligation to ensure consistency in marking against standards. This is indeed true (see *Sargeant v Canada (Customs and Revenue Agency)*, 2002 FCT 1043, 225 FTR 184 at para 38). In my view, having two TCAs mark submissions against set criteria, calibrating the scores, and then allowing for the review of these decisions is exactly the fruit of that obligation. Absent some kind of clear and convincing indication that there was a pattern of inconsistency, the Decision Reviewer's decision is reasonable.

[48] Decision Review is focused on the treatment of the individual within the process and is not designed to cast aspersion on potential flaws of the process as a whole. Ms. Ng's claim that a colleague used a less complicated section of the *Income Tax Act*, (RSC, 1985, c 1 (5th Supp)) than she did in her PoTC but received a better score, is not the kind of allegation that Decision Review was intended to deal with. However, the fact that the Decision Reviewer in some cases failed to comment on the fact-finding report suggesting inconsistency is of some concern, and will be addressed later in these reasons.

Candidates Were Allowed to Re-write the Writing Skills Test, but Were Not Allowed to Re-submit PoTCs

[49] According to the Respondent, pressure from the Applicants' union to fill the required number of AU-04 positions resulted in the decision to allow candidates who had failed the Writing Skills Test to re-write the test, despite the fact that the 180 day re-test period had not expired. The Applicants argue that this decision was unfair to candidates who had failed either the AUD or LPP competencies, because there was no similar opportunity to acquire the required levels and re-enter the competition.

[50] The Respondent argues that this was an internal, discretionary measure taken to ensure that the matching appointments were completed in an efficient and timely manner. Moreover, this decision was consistent with the CRA Staffing Program and the Staffing Principles relating to efficiency, adaptability and productiveness.

[51] Tier 1 of the competition required candidates to achieve a Level 3 on the Writing Skills Test. This was assessed by way of a multiple choice test. This test is apparently very easy to administer and requires few resources in the way of time and man-power. An additional consideration was that the group who had failed the test was relatively small. Allowing a re-write of the test would potentially increase the pool of candidates without causing undue delays.

[52] Though the decision to allow the re-write was unusual, I do not agree that it resulted in the arbitrary or unreasonable treatment of the Applicants. The Writing Skills Test was used as an

assessment of a different tier of the competition. I cannot see how allowing additional candidates to continue onto to tier 2, where they would be measured against the same criteria as the Applicants, disadvantaged the Applicants. If some candidates had been allowed to resubmit their PoTCs in an effort to fulfill the tier 3 requirements, and some had not, that would have been arbitrary treatment. That would have been unfair. I am not persuaded that the Decision Reviewer erred by failing to order corrective action in response to this allegation. When a selection process is lengthy, the vagaries of time may lead to differing experiences for different candidates, despite the best efforts of the CRA.

The Definition of the Analytical Thinking Competency was Changed Part Way Through the Selection Process

[53] The CRA changed the definition of the Analytical Thinking competency on September 29, 2008, subsequent to the JIT sessions and the circulation of an information sheet concerning the assessment of Analytical Thinking through a Targeted Behavioural Interview, referring readers to the then current definition. Two of the Applicants, Ms. Hidijat and Ms. Yi relied on the old definition when preparing their submissions. According to Ms. Hidijat's affidavit, some candidates who chose to use the Portfolio of Competencies assessment option received an e-mail advising that the definition had changed, and granting them an extension of time to prepare their submissions. Candidates who chose the Behavioural Interview assessment option, such as Ms. Hidijat, were not notified of the change. The Applicants argue that this is arbitrary treatment. The Decision Reviewer only responded that, "this practice was applied consistently to candidates that elected to be assessed by TBI" (Hidijat decision, Applicants' Record, vol 3 tab 11n).

[54] I am of the view that the CRA was able to change the definition as to what constitutes Analytical Thinking mid-stream, but the failure to equally bring this change to the attention of all candidates, led to a failure to provide procedural fairness in certain specific situations. As a result, I agree with the Applicants that the Decision Reviewer's response was unreasonable. To suggest that there was no unfairness because an entire subset of candidates, those who chose to be assessed via interview, was similarly disadvantaged is not reasonable. As the Applicants argue, if some candidates are given notice that their submissions will be assessed against a new definition, all candidates must be given the same notice. If some candidates are given an extension of time, all must be given an extension of time to alter their submissions.

[55] The Respondent only submits that all CRA employees were informed of the change by way of a Staffing Bulletin issued on September 29, 2008, and that it is the responsibility of all CRA employees to keep themselves informed and up to date with policy changes that may have an impact on their career. The Respondent, however, does not seem to refute that certain candidates who elected to submit a portfolio were given explicit notice and a correlating extension of time. The fact-finder spoke to Jack Dempsey, the Board Chair, who explained that it was unnecessary to inform the candidates who were being assessed by way of an interview of the change, because they are not assessed on the "Summary of Event Statement" that they must prepare for the interview, but only on their responses during the interview. On the other hand, the portfolio candidates were required to submit a template, and the template changed when the definition changed. I do not find this explanation compelling. Such inconsistencies lend themselves to an appearance of arbitrary treatment which is best avoided. That some candidates were given notice and some were not is

arbitrary, and it was not reasonable for the Decision Reviewer to fail to recognize this, and deal with it more thoroughly in the course of his decision.

Were the Applicants Denied Procedural Fairness?

[56] The Applicants claim that their right to procedural fairness was breached in three ways: 1) the reasons provided by the Decision Reviewer were inadequate; 2) the Decision Reviewer did not afford all Applicants the opportunity to meet with him prior to rendering his decisions; and 3) the Applicants were deprived of their right to disclosure.

[57] In *Ng*, above, Justice John O'Keefe applied the factors laid out by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 to the CRA's Decision Review process. He concluded, and I accept, that the content of the duty of procedural fairness owed to the employee in this context falls within the middle to lower end of the spectrum (at para 31). However, even taking into account all of the contextual background of this staffing process and the Decision Review process, it is clear to me that in some instances the decisions of the Decision Reviewer with respect to some of the Applicants fell short of what is required to fulfill even a mid –to-lower level of procedural fairness.

Were the Reasons Adequate?

[58] The Applicants submit that the Decision Reviewer failed to provide adequate reasons for his decision to reject their claims of arbitrary treatment. Despite the Applicants' detailed submissions, the Decision Reviewer only provided a terse decision with no meaningful analysis of the Applicants' claims. The Decision Reviewer seemed to accept the conclusions of the TCAs without independently evaluating the reasonableness of their findings. The Applicants argue that this approach rendered the recourse process futile and illusory.

[59] The Respondent argues that adequacy of reasons needs to be considered in the context of, "the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured," (*Baker*, above, para 44). While the Directive on Recourse requires the Decision Reviewer to "make the final decision in writing and ensure that it is recorded in the staffing file or the employee's competency profile," (Directive para 9.2.6), it does not mandate that detailed written reasons be provided. The Respondent, therefore, takes the position that the Decision Reviewer's written decision was adequate in each case given the significant volume of requests for Decision Review, and the administrative restraints associated with responding to each complaint as efficiently and timely as possible.

[60] While I accept that the Decision Reviewer is under certain administrative constraints, and Parliament has given the CRA the authority to set out procedures in order to make these decisions in an efficient fashion, he is still obliged to provide reasons that assure the Applicants that he considered their submissions and allows them to decide whether to exercise judicial review

(*Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, [2007] 1 FCR 490). In order to pass the scrutiny of judicial review, the reasons must be found to render the decision justified, transparent and intelligible and enable the Court to conduct a meaningful review.

[61] It is necessary to view each set of reasons in light of the conclusions I have come to elsewhere in this decision, and with reference to the specific nature of the Applicant's complaints to come to an overall conclusion as to whether the reasons were adequate to fulfill their purpose. The decisions were pro forma for the most part, however, it is clear to me that in most cases the Decision Reviewer engaged with the Applicant's specific set of allegations and attempted to explain his reasoning. I find that most of the reasons adequately fulfill their purpose, and allowed the Applicants to decide whether to exercise their right to have the decision judicially reviewed.

[62] I am troubled in some instances with the adequacy of reasons provided to the Applicants. I am of the opinion that in some cases, the reasons were deficient. The Decision Reviewer's role is to provide another level of review, not to sign-off on a decision that was adequately explained to a candidate at the earlier instance. I am most concerned with the decisions pertaining to the allegations of Deborah Haire, Indrajit Roy, Susan Tierney and Anna Yu. In these three cases the fact-finder prepared a report containing a preliminary finding of arbitrary treatment. The Decision Reviewer did not acknowledge or address this preliminary finding in his reasons. Although, I agree with the Respondent that that Decision Reviewer is not obliged to accept the fact-finder's conclusions, he or she is required to explain the reasons for his or her own conclusion.

[63] The Respondent argues that the role of the fact-finder is to gather facts, but not to interpret these facts. The Respondent says the fact-finder over-stepped her role when she made preliminary findings. With respect, I do not see any support for this contention in the Directive. Para 9.2.1 allows a Decision Reviewer to appoint a fact-finder to gather facts on his or her behalf, however, the provision notes that the Decision reviewer remains responsible for making the final decision in the review. The fact-finder plays a pivotal role in the process. The Decision Reviewer is free to disagree with the assessment of the fact-finder, but, after these comments are entered onto the record, the Decision Reviewer must explain why he or she is rejecting them (*Girouard v Canada (Royal Canadian Mounted Police)*, 201 FTR 219, 105 ACWS (3d) 680 at para 25). If the Decision Reviewer fails to do this, his reasons risk being found wanting.

Was the Decision Reviewer Required to Meet with the Applicants?

[64] Five Applicants claim that they were denied the opportunity to meet with the Decision Reviewer and present their case (Haire, Henderson, Jang, Lebofsky and Tierney). The Directive required the Decision Reviewer to conduct the Decision Review meeting with the candidate, but gives the Decision Reviewer the choice of whether to do it verbally (in person or by telephone) or in writing (by letter or e-mail).

[65] From what I gather, the Respondent takes the position that all of the Applicants were given a fair opportunity to be heard and at a minimum, got to meet with a fact-finder who gathered information and accepted submissions on behalf of the decision-maker. It seems as though the Respondent does not dispute that some Applicants did not meet with the Decision Reviewer.

[66] If this is the case, the Respondent has breached its recourse policy; employees must be given an opportunity to present their views at the Decision Review meeting (*Gerus v Canada (Attorney General)*, 2008 FC 1344, 337 FTR 256 at para 29). A policy which the Applicants legitimately expected would be followed. Moreover, it seems disingenuous on the one hand for the Respondent to argue that the fact-finder over-stepped her role when she made preliminary findings, but argue on the other that the Applicants did not need to meet with the Decision Reviewer because they met with the fact-finder. As the Applicants submit, the Respondent has committed a reviewable error in failing to abide by its own procedures (*Gilchrist v Canada (Treasury Board)*, 2005 FC 1322, 281 FTR 135 at para 13).

Did the Decision Reviewer Meet his Disclosure Obligation?

[67] The Applicants submit that they were not provided with the Assessment Worksheet (Marking Guide, with notes) during Individual Feedback in violation of the CRA's own policy on disclosure and despite having specifically requested this information. 13 of the Applicants claim that they were not provided with any access to the Assessment Worksheet during Decision Review either. The Applicants argue that this amounts to a breach of procedural fairness in that they did not have a "meaningful ability to know of evidence relevant to [their] complaint" upon which the Decision Reviewer relied (*Forsch v Canada (Canadian Food Inspection Agency)*, 2004 FC 513, 251 FTR 95 at para 29). Furthermore, the Applicants submit that the CRA breached its continuing disclosure obligation by failing to provide some Applicants with access to their Individual Feedback Report and the Fact-Finding Report.

[68] The Respondent takes the position that as a standardized assessment tool, the Assessment Worksheet is shielded from disclosure. Disclosing standardized assessment tools risks compromising the integrity of the selection process. The Respondent submits that although the Worksheet was not disclosed prior to the Individual Feedback sessions, the contents of the document was discussed with the Applicants either during that session or at the Decision Review stage and so the Applicants were aware of the contents of the worksheets and were able to ask questions and raise concerns regarding their assessment.

[69] While the Respondent correctly submits that the Directive on Recourse protects the disclosure of information that would compromise the security of standardized assessment tools, the CRA has confirmed that it is internal policy to allow candidates to view the assessment worksheets during recourse in the presence of an authorized person "to get meaningful information on their decision, as to the criteria used by them, and on the requirements [the candidate] did not meet in order to improve your performance for the future..." (Applicants' Record vol 2 pg 190). All of these materials, the Assessors Worksheet, the Individual Feedback Report and the Fact-Finding Report were all before the Decision Reviewer. The Applicants ought to have had an opportunity to know the contents of these documents, and respond to them (*Ng*, above, at paras 33 and 36). In my view, this does not necessarily require providing Applicants with a copy of the documents.

[70] In the present matter, I accept that the CRA acted properly in exercising its discretion in deciding not to provide a copy of the individual Assessment Worksheets to each Applicant and found that each Applicant received sufficient disclosure during the Individual Feedback sessions

with the TCAs. However, the Applicants should have been able to view the contents of the Assessment Worksheets during Individual Feedback and prior to Decision Review. It would be important for the Applicants to access the information contained therein in order to establish arbitrary treatment. Justice O'Keefe stated in *Ng*, above, that the CRA's recourse program vests the decision-maker with "the discretion to ensure that disclosure is provided where necessary to ensure that procedural fairness is not violated," (at para 35). Although the contents of the reports would have necessarily been generally discussed as the subject-matter of Individual Feedback, the internal policy seems quite clear that candidates should be able to "view" the worksheets in the presence of an authorized person. A general discussion does not suffice. It follows that those Applicants who were unable to view their Assessment Worksheet suffered a violation of their right to procedural fairness.

[71] Further, I find that the CRA acted properly in declining to provide a copy of the Individual Feedback Report that was prepared subsequent to the Individual Feedback meetings. I take the position that the Applicants were provided with adequate disclosure given that the results of the session were communicated to them at the end of the session. I accept that the Applicants suffered no prejudice as evidenced by all of the Applicants exercising their right to seek a further review through the decision review process within the seven day time limit imposed by the CRA staffing resolution process.

[72] It is clear to me that all 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 that the Applicant may prepare written submissions for the Decision Reviewer's consideration. 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.

Conclusion

[73] Applying the above conclusions to the applications, the following applications are allowed:

[74] Yulia Hidijat and Helen Yi, because they were not informed of the change to the definition of Analytical Thinking;

[75] Deborah Haire, Andrew Henderson, Fanny Jang, Julian Lebofsky, and Susan Tierney because they were not given the opportunity to be heard by the Decision Reviewer;

[76] Deborah Haire, Indrajit Roy, Susan Tierney and Anna Yu because the Decision Reviewer failed to provide adequate reasons, specifically in failing to account for the preliminary finding of arbitrary treatment;

[77] Nazar Ahmad, Hamidu Ameen, Pamela Cheung, Harjinder Dhesy, Deborah Haire, Andy Henderson, Yulia Hidijat, Fanny Jang, Julian Lebofsky, Anna Michieli, Nelly Ng,

Indrajit Roy, Susan Tierney, Chelliah Venogopal, Salim Virji, Frank Wong, Helen Yi and Anna Yu because they were not provided with access to the fact-finder report;

[78] Norine Goodman, Richard Malone and Randy Zurin because they were not provided with access to the Assessment Worksheet prior to the Decision Review meeting.

V. Conclusion

[79] In consideration of the above conclusions, this application for judicial review is allowed in part. Due to the fact that nearly all of the Applicants succeeded on judicial review, they shall be awarded their costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed in part. Costs are awarded to the Applicants.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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