Federal Court  Cour fédérale

Date: 20120612

Docket: T-1132-11

Citation: 2012 FC 720

Toronto, Ontario, June 12, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

JOHN FISCHER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, brought under section 18.1 of the *Federal Courts Act*, RSC, 1995, c F-7, in which Mr. Fischer seeks to set aside the decision of a Classification Grievance Committee [the Committee], agreed to by the nominee of the Deputy Head of Environment Canada on June 22, 2011. In the decision in question, the Committee recommended to the Deputy Head of Environment Canada that Mr. Fischer's classification grievance should be rejected. In so doing, the Committee agreed that one of the factors which Mr. Fischer sought to have upgraded should be upgraded, but, without notice to Mr. Fischer, determined that another factor should be downgraded. (Both the employer and Mr. Fischer concurred that the factor in question

should be maintained, and it was therefore not the subject of debate before the Committee.) As is more fully detailed below, the decision of the Committee turned on the decision to downgrade the factor in question.

[2] In this application for judicial review, Mr. Fischer alleges that the Committee committed a breach of procedural fairness and violated his legitimate expectations in failing to provide specific notice that it was considering the downgrading and in failing to provide him with a specific opportunity to make submissions in respect of the factor that was downgraded. Mr. Fischer argues in the alternative that the decision of the Committee was unreasonable.

[3] This case raises an issue regarding the scope of disclosure required by a classification grievance committee which has not previously been addressed by this Court. To place the issue in context, it is useful to briefly review the statutory scheme governing classification in the federal public service and the facts giving rise to this application.

The Statutory Background

[4] In the federal government, unlike the situation which typically prevails in the unionized environments in the private sector, classification of employees is a unilateral management right (subject, however, to the requirements of the *Canadian Human Rights Act*, RSC, 1985, c H-6 in matters related to pay equity). The *Financial Administration Act*, RSC, 1985, c F-11 [FAA] grants jurisdiction to the Treasury Board over personnel management in the federal public service generally (under para 7(1)(e)) and over classification of positions and employees specifically (under para 11.1(1)(b)). The Treasury Board is empowered to develop its own rules and procedures (FAA

at subsection 5(4)). Pursuant to section 7 of the *Public Service Labour Relations Act,* SC 2003, c 22, s 2 [PSLRA], classification issues may not be the subject of collective bargaining by public service unions. Thus, the Treasury Board, which acts as the employer of most federal public servants, has the ability to unilaterally promulgate classification levels and frameworks and it has done so through the adoption of formalized, written classification standards.

[5] Under section 208 of the PSLRA, public servants may file grievances in respect of a number of items, including in respect of "any occurrence or matter" affecting their terms and conditions of employment. This includes disputes regarding the classification attributed to their positions. Such grievances, however, are not referable to adjudication before the Public Service Labour Relations Board or any other independent third-party tribunal. Rather, they are subject to determination by the employer, in accordance with the *Classification Grievance Policy* and *Classification Grievance Procedure*, established by Treasury Board.

[6] The *Classification Grievance Polic*y and *Classification Grievance Procedure* provide that classification grievances will be reviewed by a classification grievance committee, composed of three individuals, knowledgeable in classification techniques and the application of the federal government's classification standards, who were not involved in the classification decision being grieved and who are not in a position of potential conflict of interest. The *Grievance Procedure* contemplates that the affected employee will be afforded the opportunity to make written and oral submissions to the grievance committee and that the committee may seek out additional information from management, which it must share with the affected employee. Both the *Classification Grievance Policy* and *Classification Grievance Procedure* specifically provide that the

classification grievance committee will hold its deliberations *in camera* and will review all aspects of a classification decision, regardless of whether or not they are being challenged in the grievance. The *Policy* stipulates in this regard: “All aspects of the decision being grieved, i.e., group and sub-group allocation, level and ratings (where applicable) accorded to all factors, must be examined even though, in some instances, not all are being challenged.” A similar direction is contained in the *Procedure*. A classification grievance committee, therefore, is under a duty to conduct a full review of all aspects of the classification attributed to a grieved position.

[7] The *Classification Grievance Procedure* contemplates that the classification grievance committee will issue a report, making a recommendation on the classification of the grieved position and containing a justification for the recommendation, and that the report will be submitted to the Deputy Head of the portion of the public service where the grievor works, for the Deputy Head’s approval or non-acceptance. There is no appeal from a decision of a Deputy Head in classification grievance matters, but a judicial review application is available to this Court under section 18.1 of the FCA.

The Factual Background

[8] Mr. Fischer is employed in the federal public service at Environment Canada in the position of Environmental Assessment Coordinator. He is a member of the bargaining unit represented by the Professional Institute of the Public Service of Canada [PIPSC]. His position of Environmental Assessment Coordinator was classified by the employer as falling within the Physical Sciences and Professional category (PC) at the PC-02 level.

[9] The classification standard applicable to Mr. Fischer's position is the Classification Standard for the Physical Sciences – Science and Professional Category [the PC Classification Standard]. The PC Classification Standard contains five levels (PC-01 to PC-05), and the assignment of a position to a classification level is governed by five different factors. These are: 1 – Kind of Assignments; 2 – Complexity of the Work; 3 – Professional Responsibility; 4 – Managerial Responsibility; and 5 – Impact of Recommendations and Activities. Each factor, in turn, has a number of sub-elements.

[10] Under the PC Classification Standard, those rating positions are required to evaluate each sub-element in each factor and assign it a rating from 1 to 5. This is accomplished, in part, through the comparison of the work of the position being evaluated to that described in certain bench-mark positions, which form part of the PC Classification Standard. The ratings assigned to each sub-element, in turn, determine the rating assigned to each factor, with the degree for the factor being determined by the preponderance of ratings given for each of the sub-elements that comprise the factor. Where there is no preponderance, the PC Classification Standard requires that the raters compare the overall intensity of the requirements of the position for the factor with respect to the characteristics of that factor in the bench-mark positions and assign to the position being evaluated "the factor degree that best equates, on the whole, to the bench-mark positions".

[11] After the factors are each rated at a degree from 1 to 5, the PC Classification Standard requires that, next, the position be rated based on the preponderance of ratings given for each of the five factors.

[12] Mr. Fischer's position has historically been classified at the PC-02 level under the PC Classification Standard. Due to certain changes in his job functions, he applied to have his position re-evaluated in late 2009, after a revamped work description was prepared and agreed to between himself and the employer. On March 15, 2010, the employer issued its classification decision, with an effective date of November 1, 2004. In that decision, the employer maintained its overall rating at the PC-02 level, and maintained the ratings and rationale for each factor that had previously pertained.

[13] On March 17, 2010, Mr. Fischer filed a classification grievance, which was ultimately referred to the Committee, in accordance with Treasury Board's *Classification Grievance Policy* and *Classification Grievance Procedure*. The Committee was chaired by a certified classification specialist, and its other two members possessed experience in federal government classification matters.

[14] In accordance with the *Classification Grievance Policy* and *Classification Grievance Procedure*, the Committee held a hearing, and invited Mr. Fischer and a representative from PIPSC to make a presentation to the Committee. They did so, filing a detailed written brief and over 1000 pages of supporting documentation. The hearing took over six hours to complete. At the outset of the hearing, the Committee Chair advised Mr. Fischer and his union representative that, in accordance with the Treasury Board's *Classification Grievance Policy* and *Classification Grievance Procedure*, the Committee would review all aspects of Mr. Fischer's position, and that the process could result in the upgrading, downgrading or confirmation of the group and level of his position.

[15] Mr. Fischer's union representative presented on his behalf and argued that the ratings given under two factors –Kind of Assignments and Impact of Recommendations and Activities – should be upgraded from Degree 2 to Degree 3. She concurred with employer's ratings of the remaining three factors, including the Professional Responsibility factor, which the employer had rated at Degree 3. The submissions (both verbally and in writing) on behalf of Mr. Fischer were confined to evidence and argument regarding the two factors being challenged. At the end of the presentation, the PIPSC representative concluded by reading from the written presentation, stating, "The Institute reserves the right to … provide representation on any elements we have not addressed in today's presentation which may result in the committee considering a downgrade, prior to a final and binding decision being rendered". The Committee did not respond one way or the other to this purported reservation of rights.

[16] Following the hearing, in accordance with the Treasury Board's *Classification Grievance Procedure*, the Committee sought clarification from management on several different points. It did so by way of e-mail, and provided copies of its questions and responses received from management to Mr. Fischer's representative. Mr. Fischer was afforded an opportunity to provide responding submissions, and he and PIPSC did so, filing an approximately 400 additional pages of materials with the Committee.

[17] The respondent argues that these inquires should have put Mr. Fischer and PIPSC on notice that the Committee was examining the Professional Responsibility factor (and thus might well make changes to it) because several of the questions posed by the Committee related to sub-elements that are measured by the Professional Responsibility factor. These included several inquiries regarding

whether it was Mr. Fischer or his superiors who possessed the responsibility for making several different types of decisions. As counsel for the respondent candidly conceded during the hearing, however, these inquiries are also relevant to one of the factors that Mr. Fischer had put in issue, namely, the Kind of Assignments factor. Accordingly, there was nothing in the inquiries made by the Committee which could reasonably have led Mr. Fischer or his bargaining agent to anticipate that the Committee might be considering downgrading the Professional Responsibility factor from the Degree 3 that both management and Mr. Fischer concurred was appropriate. Indeed, the fact that they did not anticipate that this might occur is borne out by the 400 pages of submissions they filed subsequent to the inquiries, which nowhere addressed the Professional Responsibility factor.

[18] In its decision, the Committee accepted that one of the factors being challenged by Mr. Fischer – Kind of Assignments – should be upgraded from a Degree 2 to a Degree 3. It did not agree that the other challenged factor – Impact of Recommendations and Activities – should be upgraded. The Committee, however, went on to conclude that the Professional Responsibility factor should be downgraded from Degree 3 to Degree 2. As noted, Mr. Fischer and the employer had agreed that this factor should remain unchanged at Degree 3 and no submissions were made in respect of it by Mr. Fischer or PIPSC as they did not appreciate that it was in play.

[19] The PIPSC representative who acted on Mr. Fischer’s behalf in the classification grievance filed an affidavit in support of Mr. Fischer's application for judicial review, in which she indicated that these sorts of unilateral decisions by a classification grievance committee to change a factor that the parties had agreed upon occur rarely, and that in her experience (and that of another colleague),

when this has occurred, the classification grievance committee has sought additional representations from the parties on the factor they were considering changing, prior to finalizing its decision.

[20] The recommendation of the Committee turned on its downgrading of the Professional Responsibility factor. If it had not been downgraded, the Committee would have recommended an upgrade to Mr. Fischer' position from a PC-02 to a PC-03 level.

[21] The classification grievance committee issued its recommendation on June 17, 2011, and on June 22, 2011 the nominee for the Deputy Head of Environment Canada accepted it, without amendment. Accordingly, Mr. Fischer's classification grievance was dismissed and he remained classified at the PC-02 level.

Was there a Breach of Procedural Fairness?

[22] As noted, this case is the first time this Court has been called upon to address the issue of whether or not a classification grievance committee must disclose a potential downgrade that it is considering, in circumstances where the grievor could not reasonably anticipate that the downgrade might be in play, but where it has disclosed all the evidence upon which it is making its decision. Previous cases involved situations where an unanticipated downgrade was considered by the committee, where the committee also received evidence relevant to the downgrade, and where it did not disclose either the possibility of the downgrade or the evidence relevant to it to the grievor. In those circumstances, both this Court and the Federal Court of Appeal have found there to be a breach of procedural fairness (*Bulat v Canada (Treasury Board)*, [2000] FCJ No 148, 252 NR 182 (FCA) at para 10; *Chong v Canada (Treasury Board)*, [1999] FCJ No 176, 236 NR 371 (FCA)

[*Chong II*] at para 14; *Hale v Canada (Treasury Board)*, [1996] 3 FC 3, [1996] FCJ No 685 (TD) at para 20). In addition, in *Maurice v Canada (Treasury Board)*, 2004 FC 941 at para 35, 267 FTR 107 [*Maurice*], Justice Gauthier quashed the decision of a classification grievance committee, where it failed to disclose that it intended to refuse to consider a key piece of evidence for technical reasons, related to the fact that the copy filed with the committee had not been formally signed.

[23] The applicant argues that, while there are no cases directly on point, analogies may be drawn to other situations or contexts, which hold that procedural fairness requires that a party be afforded an opportunity to address an issue which is central to the conclusions of a decision-maker, and that the party receive and be afforded the opportunity to comment on all material evidence (citing *Danakas v Canada (War Veterans Allowance Board)*, [1985] FCJ No 32, 59 NR 309 at para 6 [*Danakas*]; *Canada (Attorney General) v McKenna*, [1999] 1 FC 401, 47 Imm LR (2d) 21 at para 7 [*McKenna*]; *Canada (Attorney General) v Garg*, 2004 FCA 410 at paras 7-8, 329 NR 188 [*Garg*]; *Hale* at para 20; *Bulat* at para 10; *Lapointe v Canada (Treasury Board)*, 2004 FC 244 at para 32, 247 FTR 243; and *Chong II* at para 13). Counsel for the applicant also argues that if the procedure adopted by the Committee is allowed to stand, the result will be increased complexity in classification grievances as grievors will inevitably address all issues of potential relevance in their initial submissions, even where the employer and the employee are in concurrence with the result on a particular factor, because if a grievor fails to do so he or she would have no opportunity to make submissions on a point that might later become determinative.

[24] Counsel for the respondent, on the other hand, asserts that although this case is one of first impression, the decided authority on the scope of procedural fairness in classification grievances

should result in rejection of this application because it is firmly established that the procedure before a grievance committee is non-adversarial and that the content of the duty of fairness owed by the committee lies at the lower end of the spectrum (citing in this regard *Utovac v Canada (Treasury Board)*, 2006 FC 643 at paras 13, 16 and 19, [2006] FCJ No 833; *Chong v Canada (Attorney General)*, [1995] FCJ No 1600, 59 ACWS (3d) 1124 at paras 39-40 [*Chong I*]; *Chong II* at para 12; *Maurice* at para 31; *Julien v Canada (Attorney General)*, 2008 FC 115 at para 27, [2008] FCJ No 140; and *Bulat* at para 9). Accordingly, the respondent asserts that all that procedural fairness requires is that the grievor be provided with information that is crucial to the dispute, an opportunity to respond and that a right of reply is limited to contradictory information or new facts that may influence the committee's decision but does not extend to the right to make arguments regarding a potential outcome that the committee is considering. In short, according to counsel for the respondent, the classification grievance process is a fact-finding one, and all that needs to be disclosed are the facts upon which the committee will base its decision. Contrary to the position adopted by the applicant, counsel for the respondent asserts that if this judicial review application is granted, the classification grievance process will be unduly lengthened, as parties would need to be afforded additional opportunities to make submissions throughout the deliberation process, which could engender additional inquiries by a classification grievance committee.

[25] In my view, in the circumstances of this case, the requirements of procedural fairness did require that the Committee disclose that it was considering downgrading the Professional Responsibility factor and did require that it afford the parties the opportunity to make submissions on the potential downgrade prior to rendering its decision. While it is certainly true that the content of the duty of fairness, in the context of classification grievances in the federal public service, falls

"somewhere in the lower zone of the spectrum" (*Chong II* at para 12), in my view, even the minimal requirements of procedural fairness were not respected here. Mr. Fischer is not seeking the right to call *viva voce* evidence, cross-examine witnesses or other trappings of a full-blown adversarial hearing; rather, he is seeking the minimal right to be aware of and be afforded an opportunity to make arguments regarding the determinative issue in his grievance. As Justice Evans noted at para 10 in *Bulat*, which dealt both with a failure to disclose an unanticipated point being an issue and a failure to disclose evidence the classification grievance committee collected in respect of that point:

> […] this case does not turn on the precise location on the procedural spectrum of the content of the duty that the Committee owed to the appellant. An elementary incident of the duty of fairness is that the individual adversely affected should have an adequate opportunity to address an issue that the Committee regarded as central to the disposition of the grievance, but which the grievor did not realise was in dispute and therefore could not have been reasonably expected to anticipate, and to address.

[26] In my view, these comments apply equally here.

[27] In addition, similar failures to disclose central issues relied upon by other tribunals have been found by the Federal Court of Appeal to constitute breaches of procedural fairness (see *Danakas*, *McKenna* and *Garg*). While these other tribunals are distinguishable from a classification grievance committee in that their processes are more adversarial and involve hearings more similar to those before a court, the Court's decisions do not turn on the nature of the process before the tribunal but, rather, on the need to ensure the fundamental right of an individual to know the case to be met and to be afforded an opportunity to respond to central issues. Indeed, in my view, this fundamental right, which is the cornerstone of the *audi alteram partem* rule, must be respected in any case where an important interest of an individual is at stake. Important interests *are* at stake in

classification grievances, as the outcome will affect grievors' remuneration and pensions for as long as they remain in the positions which are the subject of the grievance.

[28] As already noted, Mr. Fischer had no reasonable basis to believe that the Professional Responsibility factor might be an issue, because he and his employer both agreed that it should be rated at Degree 3 and nothing the Committee said, nor any of the questions it asked, put him on notice that the point might be an issue. The general statements contained in the Treasury Board's *Classification Grievance Policy* and *Classification Grievance Procedure* or made by the Chair of the Committee at the outset of the hearing were insufficient notice of the issue. Such general statements were found by Justice Reed in *Hale* to "not [be] sufficient notice … to allow the applicant a meaningful participation in the decision making process" (at para 26).

[29] As for implications flowing from this decision, in my view, requiring disclosure of an unanticipated issue, in circumstances where the decision of the classification grievance committee is likely to turn on it, and providing the parties an opportunity to make submissions in respect of the issue, will not pose an undue administrative burden on the process. In *Bulat*, Justice Evans noted at para 17 that:

> [I]t would not have been onerous for the Committee to disclose to [the applicant] management's position and to allow him to respond to it… Nor would it have turned the classification grievance process into a formal adjudication.

These comments apply with equal force in the circumstances of the present case. In addition, in my view, there is considerable force in the applicant's argument that allowing grievances to be disposed of based on factors that are not discussed nor reasonably anticipated as relevant by the parties would increase the complexity and length of the process as it is likely that parties would be forced to

address all the conceivable issues in every grievance, even when several of the factors might not ever be in issue. Thus, to the extent the implications of this decision are a relevant consideration, they militate strongly in favour of allowing the application.

[30] Accordingly, for these reasons, in the circumstances of this case, the Committee violated the principles of procedural fairness in basing its decision on the downgrade of the Professional Responsibility factor and in not disclosing the fact that it might downgrade the factor to Mr. Fischer, who had no reason to believe it might be in play. The Committee's decision must therefore be set aside. In light of this determination, it is not necessary to address the arguments made by the applicant regarding the doctrine of legitimate expectations nor regarding the alleged unreasonableness of the recommendation of the Committee.

Remedy and Costs

[31] Counsel for Mr. Fischer argued that the appropriate remedy would be to set aside only the portion of the decision on the Professional Responsibility factor, and remit the matter of the rating of that factor to a differently constituted classification grievance committee for recommendation and thereafter decision by the Deputy Head of Environment Canada (or the Deputy's nominee). Counsel for the respondent, on the other hand, argued that in light of the duty of classification grievance committees to engage in a holistic review of the position and all facets of the classification standard, if I were to allow this application for judicial review, I should set aside the entire decision and remit the entire grievance for reconsideration by a freshly constituted classification grievance committee. In my view, the approach suggested by the respondent is the correct one, and is in accordance with

the intent of the Treasury Board's *Classification Grievance Policy* and *Classification Grievance Procedure*.

[32] In terms of costs, the parties agreed that the appropriate amount was the all-inclusive sum of $3000.00, and I find this amount to be reasonable in the circumstances of this case.

[33] Accordingly, the decision of the Committee, agreed to by the nominee of the Deputy Head of Environment Canada on June 22, 2011 will be set aside, with costs in the amount of $3000.00, and Mr. Fischer's grievance will be remitted to differently constituted classification grievance committee for fresh consideration.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted, with costs to the applicant in the all-inclusive amount of $3000.00;

2. The decision of the Committee, agreed to by the nominee of the Deputy Head of Environment Canada on June 22, 2011, is set aside; and

3. Mr. Fischer's classification grievance shall be remitted to a differently constituted classification grievance committee for fresh consideration.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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