Federal Court  Cour fédérale

Date: 20130920

Docket: T-1498-12

Citation: 2013 FC 963

Ottawa, Ontario, September 20, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SAMIR WANIS

Applicant

and

CANADIAN FOOD INSPECTION AGENCY AND DR. MEIDRYM HEBDA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Dr. Samir Wanis is a veterinarian employed by the Canadian Food Inspection Agency (CFIA or Agency). In December 2011, Dr. Meidrym Hebda was appointed to a veterinarian position, at the VM-02 level, in Sarnia, Ontario. Dr. Wanis, believing that he should have been appointed to that position, grieved the appointment of Dr. Hebda. His grievance was dismissed at the first, the second and the final level. In this application for judicial review, Dr. Wanis seeks to

overturn the Final Level Grievance Decision (Final Decision) made July 5, 2012 by Mr. Stephen Baker, Vice President, Operations of the CFIA (VP Baker).

II. Issues

[2] The overarching issue in this judicial review is whether VP Baker erred by dismissing the grievance of Dr. Wanis. This gives rise to the subsidiary question of whether the appointment of Dr. Hebda to the VM-02 position in Sarnia, without competition and in spite of the existence of a staffing pool (described below), was reasonable or correct (depending on the proper standard of review).

[3] For the reasons that follow, I have concluded that the application should be dismissed.

III. Background

[4] The CFIA has been established as a separate agency under the *Public Service Labour Relations Act*, SC 2003, c 22, pursuant to s. 12 of the *Canadian Food Inspection Agency Act*, SC 1997, c 6, s 12 [*CFIA Act*]). As a separate agency, the CFIA has certain rights vis-à-vis the management of the organization, including the authority to manage its own staffing procedures. Under the umbrella of its broad mandate, the CFIA has developed and put in place a number of staffing policies. This mandate and the policies of the Agency gave rise to the subject matter of this application for judicial review.

[5] This particular staffing matter began with a Job Opportunity Advertisement posted by the CFIA to the Public Service Website on March 24, 2010. In this posting, CFIA initiated selection process number 09-ICA-OB-INT-NE-1418 (staffing process 1418 or SP 1418) through which it sought to fill District Veterinarian, Veterinarian in Charge: VM-02 positions at various locations in Ontario. The stated intent of the Staffing Process 1418 was to establish a Staffing Pool "which may be used to staff similar positions . . . in various locations". No particular position was identified.

[6] Dr. Wanis applied for inclusion in the staffing pool (the 1418 pool) and, by e-mail dated June 25, 2010, was advised that he met all of the requirements for entry. In this notification, Dr. Wanis was also informed that he would be notified should he be considered for an appointment. The 1418 pool was to be valid from June 25, 2010 to June 25, 2011.

[7] By e-mail dated March 7, 2011, all of the successful candidates in the 1418 pool were asked whether they were interested in a VM-02 position in the Sarnia District Office. Dr Wanis responded positively on March 16, 2011.

[8] A new staffing process 11-ICA-INT-IND-SOUTH-750 (SP 750) was initiated for the position of District Veterinarian in Sarnia, Ontario. The intent of SP 750 was to establish a pool of qualified candidates for the sole purpose of staffing positions in Sarnia, Ontario. As reflected in an e-mail dated May 31, 2011, from the Selection Board Chair, Mr. Tom Doyle, the result of SP 750 was a second pool (the 750 pool), valid from May 31, 2011 to May 30, 2012. Dr. Wanis was placed in the 750 pool. The e-mail also advised Dr. Wanis that, from this pool, Dr. Rajesh

Sangwan was appointed to the position of District Veterinarian, at the VM-02 level in Sarnia, Ontario. Apparently, only two persons were included in the 750 pool—Dr. Wanis and Dr. Sangwan. For the appointment of Dr. Sangwan, geographic location was evidently not an appointment criterion. The Agency would have borne the costs of relocating Dr. Sangwan from Brantford to Sarnia in order to take the post.

[9] Some time between May 31, 2011 and July 11, 2011, Dr. Sangwan declined the position in Sarnia. In an e-mail dated July 12, 2011, Mr. Doyle advised Dr. Wanis that Dr. Sangwan confirmed his refusal on July 11. The record contains further e-mails between Mr. Doyle and Dr. Wanis in which Dr. Wanis expresses continued interest in the VM-02 position in Sarnia and Mr. Doyle keeps Dr. Wanis informed of the process.

[10] The CFIA initiated a new staffing process 11-ICA-ON-WOS-IND-SOUTH-1832 (SP 1832) subject to the criterion that the candidates live within 40 kilometres of the Sarnia facilities. SP 1832 did not require solicitation of applications. In December 2011, Dr. Meidrym Hebda was appointed to the VM-02 position in Sarnia. Dr. Hebda, a VM-01 in Sarnia, had been performing the duties of a VM-02 position for more than one year, and had worked at the CFIA in animal health for four years. At some point prior to his appointment, Dr. Hebda qualified in a staffing pool for VM-02 positions in the Atlantic. Membership in this pool allowed him to be appointed directly to the VM-02 position in Sarnia.

IV. The Grievance

[11] On January 18, 2012, Dr. Wanis filed a grievance (the First Level Grievance) with respect to the decision to appoint Dr. Hebda. He called the choice to bypass the 750 pool arbitrary, a violation of the CFIA Staffing Policy and Values, and a breach of the CFIA's duty of good faith. In the alternative, Dr. Wanis asserted that the decision to limit staffing of the position to people working or residing within 40 kilometres of the Sarnia facility violated CFIA Staffing Policy and Values, procedural fairness and natural justice.

[12] In a decision dated February 24, 2012, the first-level grievance was denied.

[13] Dr. Wanis proceeded to the second level grievance, with a hearing on March 12, 2012. In a decision dated March 14, 2012, the second-level decision maker, Associate Executive Director Ron Ramdeholl, denied the second-level grievance. In his decision, Mr. Ramdeholl quoted from the Staffing Accountability Policy, stating that a delegated manager may make appointments without a competition when he or she determines it is in the best interests of the agency. In his reasons, Mr. Ramdeholl detailed the following:

- the changing service window at Sarnia, from 24 hours per day to 8 hours per day;

- the lack of relocation costs in Dr. Hebda's appointment; and

- the potential loss of knowledge were Dr. Hebda to leave the facility for another VM-02 position elsewhere.

[14] In sum, Mr. Ramdeholl determined that the hire of Dr. Hebda was in the best interests of the Agency.

[15] For purposes of the final level grievance, Dr. Wanis's union representative made written and oral written submissions on his behalf at a hearing held on April 30, 2012. Dr. Wanis participated by teleconference. VP Baker also had before him copies of a number of relevant documents, one of which was a memorandum or précis (Final Level Grievance Précis) from Ms. Tammy Jeffry, a Labour Relations Advisor with CFIA. The Final Level Grievance Précis summarized the underlying facts, set out an analysis and provided the recommendation that the grievance be denied. In the Final Decision, VP Baker stated the following reasons for dismissing the grievance:

> Your argument that your qualification in a local VM 02 pool should give you priority consideration in staffing is not founded in good management practice. In fact, you were qualified in a VM 02 pool, and were offered an opportunity to be promoted from that pool which you declined. Dr. Hebda was deemed fully qualified through a valid VM-02 selection process and therefore met all the required qualifications in order to fulfill the vacant position in Sarnia, Ontario. He was in the position, acting in the job and performing well. I find that his appointment satisfied the CFIA'S staffing values of competency, openness and fairness.

[16] The essence of this decision, when read in the context of the entire record, is that the appointment of Dr. Hebda to the position, without competition and in spite of the existence of the 750 pool, was warranted. As a result the grievance of Dr. Wanis was dismissed.

V. Standard of Review

[17] The parties disagree on the applicable standard of review.

[18] Dr. Wanis asserts that VP Baker was determining a question of law. Specifically, can the CFIA abandon a valid selection process in favour of a direct appointment, or did it have a legal obligation to hire Dr. Wanis from the 750 pool? Citing a number of decisions of the Federal Court of Appeal, Dr. Wanis submits that such a question of law should be reviewed on a correctness standard (*Assh v Canada (Attorney General)*, 2006 FCA 358, [2007] 4 FCR 46 [*Assh*]; *Johal v Canada Revenue Agency*, 2009 FCA 276, 312 DLR (4th) 663 [*Johal*]; *Appleby-Ostroff v Canada (A.G.)*, 2011 FCA 84, 417 NR 250 [*Appleby-Ostroff*]). I do not agree.

[19] The question before VP Baker was whether the hiring of Dr. Hebda and the cancellation of SP 750 were in accordance with the legislative requirements and the staffing policies of the CFIA. This required VP Baker to interpret the relevant statutory provisions of the Agency's home statute and its own internal policies. In my view, this is a matter that is reviewable on a standard of reasonableness. No overarching legal question of general importance exists that would warrant application of the correctness standard.

[20] The role of the court on review of a decision on a reasonableness standard is to determine of whether "the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 [*Dunsmuir*]). Further, a reasonable decision will display "justification,

transparency and intelligibility within the decision-making process" (*Dunsmuir*, above at para 47).

VI. Analysis

[21] I begin by observing that the explicit reasons preferred in the Final Decision are cryptic. The term "good management practice" falls far short of providing the intelligibility required for a reasonable decision. However, while the direct focus of this judicial review is the Final Decision, the jurisprudence teaches that the Court should not consider the Final Decision in isolation. As stated by Justice Evans in *Assh*, above at para 19, "it is appropriate to consider the reasons given at all three levels of the grievance in order to obtain a complete picture of the basis of the decision under review". In addition, the jurisprudence also establishes that an internal memorandum with recommendations to the decision maker may serve as reasons (see, for example, *Miller v Canada (Solicitor General)*, 2006 FC 912, [2007] 3 FCR 438 at para 62). In this case, the Final Level Grievance Précis was obviously relied on by VP Baker in coming to his decision; its contents should be considered as part of the reasons for the Final Decision.

[22] Dr. Wanis argues that the Agency had a legal obligation to complete SP 750, by appointing him to the VM-02 position in Sarnia immediately upon the refusal of the offer by Dr. Sangwan. In spite of the capable submissions of counsel for Dr. Wanis, I do not agree.

[23] The first problem with the position of Dr. Wanis is that such obligation is not reflected in the Staffing Accountability Policy, effective August 15, 2007 (Policy). Under that Policy,

managers are delegated, by the President of the CFIA, to appoint employees in accordance with a number of general requirements, including the CFIA's statutory obligations, staffing policies and values, existing practices and procedures, and "good judgment and reasonableness". The Policy reflects the discretion of managers to staff positions, indicating that a manager "should consider appointing an individual from an existing eligibility list, staffing pool or inventory" [emphasis added]. Where it is not in the best interests of the CFIA to staff a position from an existing pool, a manager may initiate a staffing process. Finally, when it is in the best interests of the Agency to make an appointment without a solicitation of applications, he or she may do so. Not only is there nothing in the Policy prohibiting the CFIA from staffing the position as it did, the Policy explicitly recognizes the ability of a manager to appoint Dr. Hebda without competition, even where a staffing pool exists.

[24] In this case, the CFIA appears to have followed its Policy closely through a number of steps:

1. When the CFIA was of the view that it could reasonably pay for the relocation of a qualified employee, it initiated SP 750, with the aim of establishing a staffing pool. It determined that it would appoint Dr. Sangwan from the resulting 750 pool to the VM-02 position.

2. After Dr. Sangwan declined the position, budgetary concerns led to a determination that staffing from the pool would not be in the best interests of the Agency, as any appointments from the 750 pool would incur relocation costs.

3. The Agency determined that, due to the unique characteristics of Dr. Hebda and the needs of the Agency, it was in the best interests of the CFIA to appoint Dr. Hebda without "solicitation of applications".

[25] Dr. Wanis urges this Court to adopt the principles espoused in the grievance arbitration decision in *United Nurses of Alberta, Local 207 v Peace Country Health*, [2005] AGAA No 50 [*Peace Country Health*].

[26] The issue before the arbitrator in *Peace Country Health* was whether the cancellation of a job posting of certain positions, subsequently filled by other means, was in violation of the collective agreement. In concluding that the employer did not have the authority to cancel the original posting, the arbitrator stated his understanding of the relevant law (at para 36):

> The most central [broad principle], it appears, is that once a job posting procedure is commenced, it must be completed – through to naming a successful candidate – unless the employer has demonstrated sound and practical reasons for terminating the process. (*CUPE v Woodstock* [2001] NBLAA No. 17; *Foothills Provincial General Hospital v AUPE*, 76 LAC (4th) 371).

[27] The arbitrator continues with an explanation of the justification "to protect the posting process" as follows (at paras 39, 41):

> The Union might understandably be concerned with the possibility of abuse of an unrestricted management right to terminate a posting after having determined that a vacancy existed and after applications have been received from employees to fill the vacancy. The concern would be that if management, for some reason, did not wish to give the job to a particular qualified applicant, or the most senior qualified applicant, management might be tempted to simply terminate the posting.
>
> . . .

> A review of the case law demonstrates that this risk is foremost in the minds of arbitrators, and used as a justification to protect the posting process, even in those cases where the good faith of the company is not in question. It is the apprehension, or potential, of abuse that is compelling and the desire to protect the integrity of the posting process. . . .

[28] One disturbing effect of this and other similar adjudicator decisions is that the employer is presumed to be acting in bad faith whenever a competition is cancelled. Rather than requiring the employee to present any evidence of bad faith or abuse, the burden is on the employer to satisfy the arbitrator that there was no bad faith and that there were compelling management reasons for its decision to cancel. There may be reason to impose such an obligation in some cases, but I do not see its application to the facts before me.

[29] An obvious problem presented by the use of this authority is that it is not binding on this —or any—Court. No judicial authority was cited for this "central" principle. The second problem is that the arbitration decision was made in the context of the interpretation of a collective agreement rather than in the interpretation of governing legislation and existing internal policies. In the case before me, we are dealing with a clear and unqualified statutory authority and a set of internally generated staffing policies, making it difficult to apply the findings of an arbitrator to the decision of the Agency to hire Dr. Hebda outside the 750 Staffing Process.

[30] I am also concerned that the "principles" that might be drawn from the cited line of arbitration decisions may not necessarily be consistent with existing Supreme Court of Canada jurisprudence.

[31] The Agency's authority in hiring matters is set out in s. 7 of the *CFIA Act*. This provision gives the President of the CFIA the authority to appoint employees, set terms and conditions of employment, classify positions and assign duties. In other words, Parliament has given broad discretion to the President in staffing matters. Pursuant to this statutory authority, the CFIA has put in place a number of staffing policies or guidelines and makes, likely on a daily basis, staffing decisions, including the Policy referred to above. The effect of accepting Dr. Wanis's view of the law would be to restrict the President's discretion.

[32] To ensure the proper administration of a complex organization, such broad discretion is desirable and necessary. That does not mean that the discretion is without limits. In *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689, Justice Rand stated that, in administrative bodies and positions, there is no such thing as absolute and unqualified discretion. No statutory provision can include unlimited discretionary power without express language. Good faith is implied when exercising discretion. Without this good faith, the decision can be undone (*Duplessis* at p. 140, 143).

[33] In the context of such broad statutory discretion, the oft-quoted words of Justice McIntyre in *Maple Lodge Farms Limited v Canada*, [1982] 2 SCR 2, 137 DLR (3d) 558 remain relevant:

> In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. . . . Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where

> reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere. [Emphasis added.]

[34] Application of this guidance to the facts before this court leads me to conclude that the Final Decision should stand unless it can be demonstrated that:

1. the Agency acted in bad faith;

2. the Agency did not act fairly in the hiring of Dr. Hebda; or

3. the Agency relied on irrelevant or extraneous considerations.

(a) *Bad Faith*

[35] The CFIA must act in good faith towards its employees. There is no evidence before me that the CFIA acted in bad faith in cancelling SP 750 and hiring Dr. Hebda without competition. Indeed, the record sets out a number of reasons why it was in the Agency's best interests to not hire from the 750 pool and to hire Dr. Hebda without competition.

[36] As the record amply demonstrates, budgetary concerns of the Agency were serious and compelling. Beginning with an e-mail on August 3, 2011, Mr. Doyle candidly describes the financial problems facing the CFIA. In particular, on September 9, 2011, Mr. Doyle advised Dr. Wanis that "with our financial situation we have to make sure we have the money for any

relocation resulting from transfers or offers". This was clearly a major—and reasonable—factor leading to a decision to hire a person who would not require the additional expense of relocation.

[37] A second reason evident from the record was the employment record of Dr. Hebda. Dr. Hebda had been a veterinary officer with the Agency for four years at this particular location. He had "spent numerous extended periods as A/District Veterinarian and has competently handled all issues dealing with CFIA staff in that office". Prior to his appointment, Dr. Hebda had become qualified for a VM-02 position. At that point, why would the Agency not wish to hire an employee who was well known, qualified to do the work and satisfactorily working in the post?

[38] Dr. Wanis argues that, even if the Agency had no legal obligation to complete SP 750, it had a duty of fairness to offer him the VM-02 position as soon as Dr. Sangwan declined the position on July 11. Dr. Wanis points to no provision in the applicable legislation or policies that would impose such a requirement on the CFIA. In my view, no such obligation exists. It must be open to the CFIA to review its own staffing needs at all times, including when a desired candidate declines an offer of employment; the above-cited Policy reflects this authority.

[39] In sum, the combination of factors in place at the time of the hiring of Dr. Hebda demonstrates that the decision to hire Dr. Hebda instead of hiring from the 750 pool was made in good faith.

(b) *Fairness*

[40] With respect to procedural fairness, I note that Dr. Wanis was able to grieve Dr. Hebda's appointment through three grievance levels. There is no indication that he was prevented from bringing any materials or information to the attention of the Agency or from knowing the case against him. The chain of e-mails contained in the record demonstrates that communications between the Agency and Dr. Wanis were consistent and open. There was no breach of procedural fairness.

(c) *Irrelevant Considerations*

[41] Dr. Wanis argues that VP Baker took into account irrelevant considerations when he stated that "you [Dr. Wanis] were qualified in a VM 02 pool, and were offered an opportunity to be promoted from that pool which you declined". I agree with Dr. Wanis that whether or not he had been offered or refused another VM-02 position from either the 1418 pool or the 750 pool is an irrelevant consideration to the narrow question of whether he ought to have been appointed to the VM-02 position in Sarnia. However, when read in the entire context of the paragraph, it is evident that the intent of this statement was to demonstrate that the CFIA had respected the operation of the staffing process. VP Baker was not identifying Dr. Wanis's refusal to take another offer as a reason for not appointing Dr. Wanis to the Sarnia VM 02 position. Rather, the remark addresses some of Dr. Wanis's allegations that he was not treated fairly. In such circumstances, the comment is not irrelevant or extraneous. It is merely a statement of fact that demonstrates that Dr. Wanis was treated fairly over the course of the various staffing processes.

VII. Conclusion

[42] In summary, the issue before me in this application for judicial review involves the exercise of the broad discretion of the CFIA in staffing vacancies in its organization. It also relates to the rights of Dr. Wanis as an employee placed in a staffing pool. Did the placement of Dr. Wanis in the 750 pool give rise to a legal obligation on CFIA to offer him the VM-02 position in Sarnia upon Dr. Sangwan's refusal to take the position? In my view, the placement of Dr. Wanis in the 750 pool did not impose an obligation on the CFIA to offer him the Sarnia position when it was refused by Dr. Sangwan. Moreover, the budgetary restrictions on the CFIA, coupled with the existence of a qualified veterinarian who was capably performing the requirements of the job, provided the CFIA with ample justification for effectively terminating SP 750 and appointing Dr. Hebda to a newly-created position. The Final Decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" and displays the "justification, transparency and intelligibility within the decision-making process" of a reasonable decision (*Dunsmuir*, above at para 47).

[43] As the successful party, the Respondents are entitled to their costs. I have no evidence that Dr. Hebda incurred any costs. The CFIA seeks a lump sum of $3,000 in costs. I will award $3,000, inclusive of all taxes and disbursements, to the CFIA.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. costs in the lump sum of $3,000, inclusive of taxes and disbursements, are awarded to the CFIA.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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