Federal Court  Cour fédérale

Date: February 20, 2014

Docket: T-2279-12

Citation: 2014 FC 165

Ottawa, Ontario, February 20, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

DEBORAH HAIRE, HARJINDER DHESY, FANNY JANG, RICHARD MALONE, RANDY ZURIN, NELLY NG, CHELLIAH VENUGOPAL, ANNA YU, ANNA MICHIELI, ANDY HENDERSON, PAMELA CHEUNG, HELEN YI, YULIA HIDAJAT

Applicants

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] In consequence of an internal staffing recourse decision, the applicants were placed into a pool of candidates eligible for promotion. All were ultimately promoted to more senior auditing positions in the Canadian Revenue Agency (the Agency). In the ordinary course, this would not prompt a judicial review application. In the unusual circumstances of this case, however, the

applicants say that they would have been appointed earlier, but for the Agency's earlier error in disqualifying them from the competitive process.

[2] I conclude in favour of the applicants. The recourse decision should be remitted for reconsideration because it lacks a reasonable explanation for the denial of retroactive compensation in light of the late appointment of the applicants.

BACKGROUND

[3] In 2007 the thirteen applicants in this judicial review application were eliminated from a tiered selection process for appointment to a pool of candidates at the AU-04 (auditor) level. The selection process was "tiered" in that applicants would progress through various screens by completing competency exams in order to reach the final tier: the pool of candidates eligible for appointment.

[4] The applicants commenced judicial review proceedings to set aside the decision, and on June 20, 2011, in *Ahmad v Canada Revenue Agency*, 2011 FC 954, Justice David Near (now of the Court of Appeal), found that the internal recourse procedure given to the excluded candidates breached various components of procedural fairness, including an opportunity to be heard and a duty to give reasons. The recourse decision was quashed and the matter remitted to the Agency for reconsideration.

[5] As a consequence of that decision, on April 2, 2012, the Chief of Appeals advised that the applicants would be reassessed. A sample of the Response to Request for Decision Review sent to the applicants reads:

> As a result of this finding of arbitrary treatment, your PoTC will be reassessed as originally submitted by a different group of Technical Competency Assessors, with consideration given to the concern noted in the Decision Review process.

[6] I note that the Agency's commitment was to review the candidates' applications "as originally submitted."

[7] On April 15, 2012 (roughly two years after the date they say they would have been appointed to a position), the applicants were appointed to a pool of candidates qualified for placement to an AU-04 position. The letter of offer read, in part:

> Since you now meet all assessment standards established for the AU-04 positions associated with selection process 2007-6368-ONT-1213-3268, you have now been found qualified and are eligible for placement consideration. You will be notified of any placement decisions in a separate communication, at a later date.

[8] The applicants seek to set this decision aside. The applicants say that, but for the flawed selection process, they would have been not only qualified, but would have been appointed to the AU-04 position years earlier. Now, however, they must wait until an AU-04 position becomes available, and must then be ranked high enough within the pool of qualified applicants to be appointed.

[9] Put in terms of judicial review, the applicants say that the failure to appoint them to a position, retroactive to the date on which all other successful candidates were appointed, renders the decision unreasonable because the corrective action is unresponsive to their grievance.

ANALYSIS

Standard of Review

[10] The first step in assessing the standard of review is "ascertain[ing] whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62, [2008] 1 SCR 190.

[11] The nature and extent of the recourse remedy offered to the applicants – a retroactive appointment decision – is a discretionary decision to be assessed on a standard of reasonableness. The decision of the Court of Appeal in *Macklai v Canada Revenue Agency*, 2011 FCA 49 at para 7 makes this clear.

The Decision is Unreasonable

Denying Retroactive Compensation without an Explanation is Unreasonable

[12] Retroactive compensation is central to the meaningfulness of the remedy in question because the principal harm suffered is a delay in appointment. Consequently, the denial of retroactive compensation without an adequate explanation for that denial is unreasonable.

[13] It is unreasonable for the Agency to provide, without justification, a remedy that is not responsive to the substance of the applicants' complaint. As the Supreme Court held in *Dunsmuir*

at para 47: "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". Justice Jocelyne Gagné, with reference to that same passage in *Dunsmuir*, held that a "final level grievance decision" that is "not responsive to the applicant's claim and does not provide him with any meaningful remedy" is unreasonable: *Backx v Canada (Canada Food Inspection Agency)*, 2013 FC 139 at para 24. For these applicants, without a justifiable, transparent, and intelligible explanation for denying retroactive appointment, the decision is unreasonable.

[14] A review of the facts in *Backx* is in order to provide substance to what a "meaningful" and "responsive" remedy looks like. In that case, the Canadian Food Inspection Agency (CFIA) held a competition to staff a Veterinarian-in-Charge position within the Meat Hygiene stream. Dr. Backx did not apply for this job because his job experience and his interests did not relate to Meat Hygiene. However, the CFIA subsequently used the Eligibility List generated in that competition to staff a veterinarian vacancy relating to Animal Health. Backx grieved. The CFIA denied the applicant's grievance. This decision was quashed on judicial review before this Court and the matter was referred back for re-determination: *Backx v Canada (Canadian Food Inspection Agency)*, 2010 FC 480. Justice John O'Keefe of this Court found that the decision-maker failed to address the lack of similarity in the positions, which was the applicant's primary ground for his grievance, and held that the CFIA's decision did not display the required justification, transparency and intelligibility in the decision-making process.

[15] A new final level decision-maker was appointed to hear the *Backx* grievance. This time, the applicant's grievance was allowed but the CFIA refused to grant the remedy sought by Dr. Backx, finding that "the appointment made to the Animal Health District Office was valid and could not be revoked." Rather, the CFIA offered the applicant the opportunity to be assessed against the requirements in an ongoing selection process which was intended to create a pool of qualified candidates who would be eligible for vacancies as they arose.

[16] In considering the reasonableness of the decision, Gagné J ruled:

> The applicant's arguments with this respect are well-founded. As per *Dunsmuir*, above, at para 47, a review for reasonableness "inquires into the qualities that make a decision reasonable, referring to both the process of articulating the reasons and the outcome" and these qualities include "the existence of justification, transparency and intelligibility within the decision-making process." I agree with the applicant that the outcome of the final level grievance decision is unreasonable, notably because it is not responsive to the applicant's claim and does not provide him with any meaningful remedy.
>
> There is nothing to suggest that the CFIA's offer remedied the applicant's loss of opportunity in any way, nor that the CFIA took reasonable steps to provide the applicant's with a suitable remedy in his particular circumstances. Although it is open to the CFIA to choose how to remedy the loss suffered by the applicant as it sees fit, it must do so in a reasonable and meaningful manner (emphasis added).
>
> [Emphasis added]

[17] The remedy granted by the Agency, like that in *Backx*, is not responsive to the applicants' concerns. The recourse decision and appointment letters are silent on the question of retroactivity, in circumstances where the applicants would have been appointed earlier. Not all administrative action or discretionary decisions must be accompanied by reasons, and, if reasons are required, they need not necessarily be exacting and elaborate. However, they must, at a minimum, indicate that

the decision-maker has turned his or her mind to relevant considerations. In this context, the failure to address the question of retroactivity is fatal to its reasonableness. The decision is therefore set aside, and the respondent directed to reconsider its decision in light of these reasons. The Court will not prescribe the nature of the remedy save to say that the reasons must address the rationale for not making the appointments retroactive, and that those reasons must be consistent with the Agency's human resources policy framework which extols the virtues of transparency and fairness.

Denied Retroactive Compensation had to be Explained because the Applicants would have been Promoted Earlier

[18] My conclusion above with respect to reasonableness is linked to the fact that the applicants would have been appointed earlier had they not been improperly disqualified. This fact distinguishes the case at hand from previous cases in which appointments without retroactive pay have been found to be reasonable.

[19] For example, in *Macklai*, Nadon JA held that it was reasonable for the Agency to appoint Macklai without retroactive pay because he might not have been appointed earlier. However, *Macklai* is distinguishable from the set of facts before me in two respects.

[20] First, in *Macklai*, the Court of Appeal reiterates, on three occasions in the course of a succinct judgment, the complete absence of an evidentiary foundation with respect to the probability of an earlier appointment. Nadon JA opines, with respect to the probability of Macklai's earlier appointment, that there was "absolutely no evidence" (besides the appellant's later appointment) supporting the claim (at para 3), that "no evidence was adduced" sufficiently comparing Macklai to the other candidates (at para 5), and that "[o]n the record before us, there is simply no way for us to

reach a conclusion on this point" (at para 6). Implicit in these statements is that the decision might have been unreasonable if there had been evidence establishing the likelihood of Macklai's earlier appointment.

[21] Second, and more importantly, the Court of Appeal's primary basis for dismissing Macklai's appeal was that he might not have been appointed earlier (see paras 5-7). The disputed hiring decision involved four eligible candidates vying for three positions. As a consequence, it was certain that one candidate would be denied an appointment and the Court of Appeal heard no evidence in support or in opposition to whether that candidate would have been Macklai. Retroactivity was not needed for a meaningful remedy in *Macklai* because there was no evidence supporting the claim that he would have been appointed earlier in the first place.

[22] Neither of these points from *Macklai* apply to the case before me. In this case, there was an abundance of evidence regarding the probability of an earlier appointment for the applicants. In fact, a majority of the appellant's argument and evidence centred on this. As I explain below, all of the applicants would have been appointed earlier but for the Agency's errors in the staffing process.

The Applicants would have been Promoted Earlier

[23] I find that on a balance of probabilities, all 13 of the applicants would have been promoted on January 26, 2009 (the Offer Date). Further, it is certain that all of the applicants would have been promoted by, at the latest, April 1, 2010.

[24] In support of this conclusion, I note that the Agency's letter of offer stated that "all candidates in the qualified pool established for this selection process are receiving a letter of offer." Justice Near held, it will be remembered, that they had been unfairly excluded from the pool. The fact that "all candidates in the qualified pool" were offered positions demonstrates that possessing the relevant qualifications was sufficient for an appointment. That alone suggests that, had the applicants been fairly assessed, they too would have received offers of appointment.

[25] This preliminary observation aside, even adopting a *worst case scenario* set of assumptions for the applicants, their appointment on the Offer Date was, on a balance of probabilities, more than likely. To establish the worst case scenario, assume that the Agency ideally wanted to appoint 79 auditors and that in a ranking of the eligible candidates the applicants all ranked at the bottom. Even with these two highly prejudicial assumptions (neither of which is borne out in the evidence), it is still likely that the applicants would have been appointed on the Offer Date.

[26] First, there is no doubt that seven of the applicants would have been appointed on the Offer Date. The Agency sent its offer to 79 candidates and only 72 accepted. Therefore, a minimum of 7 of the 13 applicants would have been selected to fill the 79 spots initially sought out by the Agency. I note parenthetically, that restricting the number of certainly successful applicants to 7 is predicated on the prejudicial assumptions that the Agency was only willing to hire exactly 79 auditors and not one more, and that the applicants all ranked at the bottom.

[27] Second, even if the ideal number of appointments was only 79, to appoint fewer candidates than were qualified would have forced the Agency to undergo a cumbersome ranking process which

it would otherwise avoid by appointing all qualified candidates. The ranking would have been cumbersome because the qualification exams were pass/fail and could therefore not be used as an objective metric for comparing candidates. The affidavit evidence of the applicants indicates that the Agency wanted to avoid this time consuming and unproductive process of ranking such a large pool of eligible candidates. As a consequence, even if appointing an additional 6 candidates marginally exceeded the demand for work available to auditors, it would have still been significantly easier on management to simply appoint the additional 6 auditors. No evidence or argument was raised to the contrary on this point by the respondents.

[28] I merely elaborate on these worst case scenario assumptions to bolster the factual conclusion that all of the applicants would have been appointed on the Offer Date. To be clear, there is no evidentiary foundation supporting the assumption that the applicants would have ranked at the bottom. Further, it is unsound, for the reasons the Agency itself expressed, to assume that the Agency only wished to appoint exactly 79 auditors. The exercise of ranking 79 candidates, and justifying that ranking to exclude 6, was highly problematic. As I observed at the outset, the recipients of the offer ("all candidates in the qualified pool") suggest that the agency wanted to *exhaust* the pool of qualified candidates.

[29] In any event, lest there be any doubt in the matter, an additional 18 AU-04 positions in the International Tax area were to be staffed in a parallel process. The Agency committed to staff those positions "using existing pools" and stated that appointments would have been effective on April 1, 2010. The affidavit evidence establishes that there were no other existing pools in either relevant region (Headquarters or Ontario) from which appointments could be made. Consequently, even in

the worst case scenario (only 79 spots, applicants all ranked last) and with the added assumption that the Agency would have been willing to perform a cumbersome ranking, the remaining 6 applicants would have certainly been appointed by April 1, 2010, given the 18 additional positions in the International Tax area.

[30] In sum, far from being a case where there was little to no evidence about whether the applicants might or might not have been promoted, these applicants would have been placed into the pool earlier but for their exclusion. In the worst case scenario, at least 7 of the applicants would have been promoted by the Offer Date, and the remaining applicants would have been promoted by April 1, 2010. Given the financial and career consequences of this, the issue of date of appointment was a highly pertinent consideration in the recourse review.

Arguments to the Contrary

[31] Two arguments advanced by the respondent need to be addressed. The first is that the applicants are seeking damages by way of judicial review and therefore the application should be dismissed. This is manifestly not the case. In their Notice of Application the applicants seek:

> An Order remitting the matter to a different representative of the Canada Revenue Agency for a new decision on corrective measures […].

[32] Secondly, arguments based on *Canada (Attorney General) v TeleZone Inc.*, 2010 SCC 62, [2010] 3 SCR 585 are irrelevant distractions. To the extent that reference is made by the applicants to losses, they simply inform the nature and the extent of the reasons required to meet the *Dunsmuir* criteria of transparency, justification and intelligibility. If the applicants seek damages, they are free to commence an action in this Court which has jurisdiction to hear such a claim.

[33] This, in turn leads to the principle ground on which the respondent seeks to fit the decision into the *Dunsmuir* criteria. The respondent focuses on the letter of August 15, 2012 and in particular the word "now" in the paragraph, which I repeat:

> Since you *now* meet all assessment standards established for the AU-04 positions associated with selection process 2007-6368-ONT-1213-3268, you have *now* been found qualified and are eligible for placement consideration. You will be notified of any placement decisions in a separate communication, at a later date. [Emphasis added]

[34] The essence of the respondent's argument is that since the applicants only passed the third and final phase of assessment on August 15, 2012, they can only be appointed as of that date. The rationale for the decision, it is argued, lies in the word "now."

[35] This is not a compelling rationale. It is an obvious statement of fact which belies the context behind the applicants' "late" qualification. The reason why the applicants were only able to demonstrate that they met the assessment standards "now" was because they had been unfairly precluded from doing so earlier. The competency exams were written as each candidate progressed through the various tiers of the selection process. Failing to qualify for the final pool because of not writing an exam which corresponds to a tier in the selection process from which you have been wrongfully denied access to is not a rational basis for denying retroactive compensation. It is not disputed that the applicants were only placed into the AU-04 pool following the recourse and reassessment directed by the decision of Justice Near. There is nothing in the letter or recourse decision which suggests, that the decision-maker turned his or her mind to the question of retroactivity, which was integral to the applicants.

[36] There is an inherent tension in public law between the requirement that remedies be effective and the discretion of decision-makers to choose between a range of reasonable remedies. The Court will not prescribe the precise nature of the remedy, save to say that any remedy should take into account three points: First, the *Dunsmuir* criteria are directed to the provision of explanations and rationale, not conclusions. Second, for the Agency's decision to deny retroactive appointment to cross the *Dunsmuir* threshold (if that is in fact the decision it takes), it would have to justify that decision in light of the Agency's human resources policy commitment to transparency and fairness. Third, the decision should consider what is appropriate corrective action assuming that the applicants and their applications as "originally submitted" were accorded the procedural fairness to which they where entitled.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application is granted. The recourse decision is remitted to a different decision-maker for reconsideration in light of these reasons. Costs to the applicants in the amount of $2,500.00.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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