

Federal Court



Cour fédérale

Date: 20160516

Docket: T-993-15

Citation: 2016 FC 546

Ottawa, Ontario, May 16, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

SYLVAIN BOUCHER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Sylvain Boucher, is a senior database administrator based in Kingston, Ontario, working for the Department of National Defence. On September 19, 2011, he was provided with his employer's decision classifying his position at the CS-02 level, with an effective date of July 23, 2007. Because he was supervising at least one other employee with a CS-02 classification, the Applicant grieved that his position should be reclassified at a higher level, CS-03, retroactive to July 23, 2007.

[2] However, his grievance dated September 26, 2011, was denied by the Deputy Minister's delegate (the Director General Workplace Management) in a letter dated May 28, 2015, wherein the delegate [the Delegate] approved the recommendation of the Classification Grievance Committee [the Committee] that the grieved position should be classified at the CS-02 level with an effective date of July 23, 2007. The Applicant now applies, pursuant to section 18.1 of the *Federal Courts Act*, R.C.S. 1985, c. F-7, as am, for judicial review of the Delegate's decision and requests an order setting aside such decision and the Committee's report upon which it is based and remitting the matter back to the Committee for reconsideration.

I. Background

[3] The Treasury Board's Classification Standard for computer system administration assesses four main factors in determining the classification of a computer service [CS] position: knowledge; decision making; responsibility for contacts; and supervision. Although the Committee's report [the Report] upon which the Delegate founded her decision assessed all four of these factors, only those relating to knowledge and to supervision were challenged as part of the representations made on the Applicant's behalf to the Committee on December 9, 2014.

[4] As of July 23, 2007, the Applicant's position supervised four subordinate positions (numbers 315671, 251436, 328149, and 800145), each of which was classified as a CS-02 level position and one of which was then vacant. Although one of these positions was later reclassified downward to a CS-01 level and in March 2009 the vacant position filled, by August 19, 2011, the Applicant still supervised three CS-02 subordinates. By the time of the Committee's Report in May 2015, the Applicant continued to supervise two positions classified at the CS-02 level.

The parties do not dispute that subordinate CS-02 positions still report to the Applicant's position.

[5] The Report summarized the submissions and information provided by the parties and also outlined the Committee's deliberations, including its receipt of information emanating from a regional issues study initiated in May 2008 about concerns raised by the Professional Institute of the Public Service of Canada [PIPSC] with respect to the CS classification groups. One of the concerns identified in this study was the existence of instances where some positions reported to another position at the same group and level. Although the chair of the Committee had requested at the hearing on December 9, 2014, that the time for completing the Committee's report be extended to allow sufficient time for completion of the study, the Applicant's representative approved an extension of the due date for the Report only until May 29, 2015. Ultimately, this study was completed a week or so before the hearing of this matter and the completed study [the Study] was not available when the decision under review was made.

[6] For purposes of the Classification Standard, the supervision factor has two interrelated elements or sub-factors: (i) "level of employees supervised"; and (ii) "number of employees supervised". The Applicant challenges the Committee's assessment and determination with respect to the level of employees supervised, which according to the Classification Standard refers to the highest level supervised. In assessing the level of employees supervised, the Classification Standard establishes a point system: for a degree 1 position, which is one that supervises administrative support or junior employees, 15 points are awarded; for a degree 2

position, which is one that supervises intermediate employees in the administrative, foreign service, and other categories, 29 points are awarded.

[7] The Applicant's representative had recommended to the Committee that an increase in points for the supervision factor, based on the level of employees supervised, should be made with respect to the position occupied by the Applicant. Specifically, the Applicant's representative argued that the points awarded for such position should be 29 (degree 2), rather than 15 (degree 1), because the Applicant supervised other CS-02 positions. Had the Committee accepted this recommendation, the overall total of points assigned to the Applicant's position for all factors would have been 460, ten points beyond the range of 301 to 450 points associated with a CS-02 level position.

[8] The Committee, however, rejected the Applicant's submissions in this regard, stating as follows:

PIPSC recommended an increase to the **Level of Employees Supervised** element of the Supervision factor to A2/29 points based on the fact that in 2007, the GP [grieved position] was supervising three CS-02 subordinates positions. The number of employees supervised by the GP is not contested by either party however the element of **Level of Employees Supervised** is. Definition of degree 2 states that the position supervises *intermediate* employees in the administrative and foreign services, or other categories while degree 1 stipulates that the supervision applies to employees in the administrative support category or *junior* employees in other categories. The Committee does not dispute that CS-02 positions might have been put under the grieved position's responsibility however the Committee felt that it had to take into consideration in its deliberations the fact that the CS Group Regional Issues Study was put in place in order to correct organizational issues of that nature. The Committee reached consensus and maintained a degree A1/15 points for this factor taking into consideration the conclusions of the CS Group

Regional Issues Study. This factor will be reviewed in detail in the Evaluation section of the report. [Emphasis in original]

[9] The Committee also rejected submissions by the Applicant's representative that, in view of a generic work description for a CS-03 position, the grieved position should be classified at that level as well. It rejected these submissions primarily because the Applicant did not report to a CS-04 supervisor unlike that for the generic position description.

[10] The Committee then performed an evaluation as to the four main factors as noted above: knowledge; decision making; responsibility for contacts; and supervision. It is not necessary to summarize in these reasons the Committee's evaluation and findings with respect to each of these factors because only the Committee's evaluation of the supervision factor remains at issue in this application for judicial review. In this regard, the Committee did not recommend any change in the number of points awarded to the Applicant's position in respect of the level of supervision, concluding as follows:

The GP is responsible for the on-going supervision of a Database Analyst, a Database Administrator, and a Web Developer. The supervisory responsibilities include: participation in the selection process, the performance assessment, the provision of training, and the provision of discipline of staff when required. The GP is also responsible for assigning work and providing advice and direction. Although the organizational chart indicates that two subordinate positions are or were at one point in time classified at the CS-02 level, the Committee feels that due to the circumstances i.e. the CS Group Regional Issues Study addressing same level reporting relationships, the subordinate positions are not to be considered as intermediate level positions for the purpose of this recommendation.

[11] Thus, the Committee recommended no changes to the overall total of points assigned to the Applicant's position and maintained the CS-02 classification, a classification with which the Delegate agreed and approved on May 28, 2015.

II. Issues and Standard of Review

[12] Despite the parties' formulations of the issues raised by this application, I am of the view that the only issue which needs to be addressed is whether the Delegate's decision was reasonable.

[13] I agree with the parties' submissions that the appropriate standard of review in respect of the Delegate's decision is reasonableness. Case law has established that the applicable standard of review for a classification grievance committee decision is one of reasonableness, and that such a decision is to be afforded a high degree of deference due to the decision-maker's high level of expertise (see, for example: *Tamborriello v Canada (Attorney General)*, 2014 FC 607, 457 FTR 130, at paras 11 to 13; *McEvoy v Canada (Attorney General)*, 2013 FC 685, 435 FTR 69, at para 39; also see *Canada (Attorney General) v Gilbert*, 2009 FCA 76 [*Gilbert*], 388 NR 59, at paras 22 and 23; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 49 [*Dunsmuir*]; and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para 13 [*Newfoundland Nurses*]).

[14] The Court should not interfere, therefore, if the decision is intelligible, transparent, justifiable, and defensible in respect of the facts and the law: *Dunsmuir* at para 47. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its

decision and permit it to determine whether the conclusion is within the range of acceptable outcomes”: *Newfoundland Nurses*, at para 16. The decision must be considered as an organic whole and the Court should not embark upon a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34, [2013] 2 SCR 458, at para 54; see also *Ameni v Canada (Citizenship and Immigration)*, 2016 FC 164, [2016] FCJ No 142, at para 35).

III. The Parties’ Submissions

[15] The parties’ submissions as to the reasonableness of the decision under review can be summarized as follows.

[16] The Applicant submits, amongst other things, that the supervision factor for his position should be assessed based on the Classification Standard and on the highest classification level supervised by the Applicant as of July 23, 2007. According to the Applicant, because he supervised at least one other CS-02 position at that time and has done so continuously since then, the level of supervision involved an intermediate employee and therefore 29 points (degree 2), rather than 15 points (degree 1), should have been awarded by the Committee. The Applicant further contends that, regardless of whether it would have been more appropriate for the CS-02 positions reporting to him to report to a CS-03 supervisor, the fact of the matter is that it is the Applicant who has supervised or is supervising them.

[17] The Applicant also submits that, despite the Study which has now been completed, nothing in the Classification Standard is inconsistent with having an employee report to a

supervisor who is at the same classification level. Had he been awarded the appropriate points for supervising a CS-02 position, the Applicant says this would have resulted in his position being reclassified to the CS-03 level. In the Applicant's view, the Committee's recommendation and the Delegate's approval of it was unreasonable because it was based on concerns raised by the Study, which at the time of the decision had not been completed, and not based on the Classification Standard. In relying on the concerns raised by the Study about same level reporting, the Applicant says the Committee failed to give him full credit for supervising CS-02 employees and to consider that the classification decision must be based on the reporting relationship as of July 23, 2007.

[18] The Respondent argues that since the Committee was denied an extension of time for completing the Report until conclusion of the Study, it was reasonable for the Delegate to approve the Committee's recommendation. In addition, the Respondent states that the Committee is a highly specialized decision-maker with specific expertise which warrants deference by the Court, and also that the Committee clearly explained its analysis and the issues.

[19] According to the Respondent, the Committee could not ignore the outstanding same level reporting issue because the Committee did not know, for certain, the appropriate classification levels of the subordinate positions being considered by the Study. Contrary to the Applicant's position in this regard, the Committee's mandate was not to assess the level of supervision as of July 23, 2007 but, instead, to establish the appropriate classification and evaluate the Applicant's position. The Respondent states that the Committee could not have considered the subordinate

positions as “intermediate” because the classification levels of the positions were not known beyond the one position which had been downgraded.

IV. Is the Decision Reasonable?

[20] For the reasons that follow, I find the Delegate’s decision unreasonable and not within a reasonable range of outcomes.

[21] The Applicant filed his grievance in September 2011 and the Committee convened a hearing on December 9, 2014. The Committee issued its Report in late May 2015; and, on May 28, 2015, the Delegate approved the Committee’s recommendation that the Applicant’s position be evaluated at the CS-02 level effective July 23, 2007. Between the date the grievance was filed and the decision made, therefore, nearly four years had passed.

[22] The Respondent’s argument that it was reasonable for the Delegate to approve the Committee’s recommendation, because the Committee was denied an extension of time for completing the Report until conclusion of the Study, is devoid of any merit. It is disingenuous, considering the passage of time, for the Respondent to argue that because the Applicant would not consent to yet further delay, that the Committee could reasonably find that classifications for two of the subordinate positions were not settled and hence the Applicant was not supervising CS-02 positions. The Respondent notes in its written memorandum that the Study was to be completed by December 2015, a date which essentially would have meant at least a further seven month delay from when the decision was rendered on May 28, 2015. It would also further extend

the time between the Applicant's filing of his grievance and the decision being rendered into more than four years.

[23] Moreover, for the Delegate to adopt the Committee's determination that classification of the subordinate positions was uncertain because they *might* be retroactively changed in response to an uncompleted study is, to say the least, speculative and, consequently, unreasonable. This speculation by the Committee renders the decision neither justifiable nor intelligible, particularly because the Classification Standard clearly and unequivocally states: "level of employee supervised" refers to the highest level supervised." The simple fact of the matter is that, at all relevant times, the Applicant actually supervised at least one intermediate CS-02 position. The Classification Standard clearly delineates what a reasonable decision in this regard would be; given the lack of discretion to deviate from what "level of employee supervised" means, the Committee's evaluation of the supervision factor in this case was clearly unreasonable because it did so based not on the highest level supervised, but on what that level might be following the conclusion of the Study and any resulting reclassifications.

[24] As to the Respondent's argument that the Committee's mandate, contrary to the Applicant's arguments, is not to consider the position as of July 23, 2007 but, rather, to consider the appropriate classification, it is true that its mandate is a broad one in view of section V.A.1 of the Classification Grievance Procedure [the Procedure]. This section states:

The Classification Grievance Committee is responsible for establishing the appropriate classification and evaluating the grieved position based on the duties assigned by management and performed by the employee and the additional information provided by management and by the grievor and/or his or her representative. It must review and analyze all information

presented in a gender neutral way. The classification recommended to the deputy head or nominee must be fair, equitable and consistent with the classification principles.

[25] In addition, section V.J.1 of the Procedure states that the Committee, in its deliberations, is explicitly to take into account the information provided and “review all aspects of the classification decision being grieved and attempt to reach a consensus when evaluating the position.” This broad language suggests that the concerns identified by the Study could possibly be considered by the Committee.

[26] However, even if the Committee was empowered or had the discretion to consider concerns about same level reporting, the outcome of its recommendation was outside the scope of reasonable outcomes because such discretion did not give it discretion to disregard the Classification Standard. The Committee’s acknowledgment that the Applicant supervises CS-02 positions, yet in view of the then pending Study did not supervise “intermediate” employees, is unintelligible in the face of the Classification Standard which dictates that supervision of intermediate employees warrants an assessment and award of 29 points, rather than the 15 points as determined by the Committee. Indeed, this unintelligible determination by the Committee taints the decision as a whole. It makes the decision internally inconsistent and therefore unreasonable because it is based on speculation as to what might occur upon completion of the Study. Since the supervision factor was central to the decision, and because an increase in the points awarded for supervision in respect of the Applicant’s position would be sufficient to increase the Applicant’s position into the CS-03 level, this is sufficient to render the entire decision, viewed holistically, as unreasonable.

V. Disposition

[27] In *Gilbert*, the Federal Court of Appeal observed that:

[23] In deference to the specialised knowledge of Classification Grievance Committees, when the Federal Court determines that a judicial review application ought to be granted with respect to a decision following a Classification Grievance Committee recommendation, it should refer the matter back for re-consideration.

[28] Accordingly, the Delegate's decision is quashed and set aside and the matter remitted back to the decision-maker for reconsideration in accordance with these reasons.

[29] The Applicant has requested, and shall be awarded, his costs of this application fixed in the amount of \$3,000 (inclusive of disbursements and taxes, if any), such costs to be payable forthwith by the Respondent to the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application pursuant to section 18.1 of the *Federal Courts Act*, R.C.S. 1985, c. F-7, as am, is granted;
2. The decision of the Deputy Minister's delegate (the Director General Workplace Management) in a letter dated May 28, 2015, wherein the delegate approved the recommendation of the Classification Grievance Committee that the grieved position should be classified at the CS-02 level with an effective date of July 23, 2007, is quashed and set aside and the matter remitted back to the decision-maker for reconsideration in accordance with these reasons; and
3. The Applicant is awarded his costs of this application fixed in the amount of \$3,000 (inclusive of disbursements and taxes, if any), such costs to be payable forthwith by the Respondent to the Applicant.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-993-15

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