Federal Court  Cour fédérale

Date: 20160811

Docket: T-1681-15

Citation: 2016 FC 917

Ottawa, Ontario, August 11, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

BRAD GLADMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant (Dr. Gladman) is a Defence Scientist with the Department of National Defence (DND) at the DS-04 level. In January 2015, he requested a promotion to the DS-05 level. His request was denied. He then sought an independent review of that decision through the Independent Recourse Mechanism (IRM) available to research scientists in the Federal Public Service who have been unsuccessful in an application for a promotion. The reviewer

appointed pursuant to the IRM (the Reviewer) concluded that the denial of the promotion sought by Dr. Gladman should remain in effect.

[2] On September 3, 2015, the Deputy Minister of National Defence, relying on the recommendations of the Reviewer, dismissed Dr. Gladman's recourse engaged under the IRM. Dr. Gladman, claiming that this decision is both procedurally unfair and unreasonable, initiated the present judicial review application.

II. Background

[3] The process for granting promotions for DND's Defence Scientists is different from the one normally used within the Federal Public Service. The process is "incumbent-based", as opposed to "position-based" where in order to be promoted, a public servant must apply for a different position and be appointed according to the merit principle. Under the "incumbent-based" process, promotions are granted when the work of the incumbent position holder reaches a certain quality. The process was aptly described by Justice George R. Locke in *Rabbath v Canada (Attorney General)*, 2014 FC 999 [*Rabbath*]:

> [3] Pursuant to both subsection 34(1) of the *Public Service Employment Act* and section 2 of the *Public Service Employment Regulations* (the *Regulations*), the internal appointment process for the Defence Scientist (DS) group is an incumbent-based process. This process includes both a "career progression framework" and an "independent recourse mechanism".
>
> [4] The Deputy Minister has established a career progression framework for the DS group entitled the *Defence Scientific Service Group Salary Administration System*. The Deputy Minister has delegated authority pertaining to the career progression framework to the Assistant Deputy Minister, Science and Technology, who considers the input of the Human Resources Management

Committee (the Committee) to make decisions pertaining to the career progression of the members of the DS group.

[5] The career progression framework provides that each DS is both paid and classified proportionally to his or her state of professional development. In other words, the DSs are promoted as their research work progresses. An effort to obtain a promotion for a DS begins with a Performance Evaluation Report prepared with input from the DS's immediate supervisor and immediate line manager. This report includes a professional development recommendation by the Professional Development Manager as to whether a promotion should be granted. If the DS is not satisfied with the recommendation, he or she may have it considered by the Committee. Based on the state of the DS's professional development, the Committee determines whether the employee should receive a promotion. Such promotion typically includes an increase in salary.

[6] The IRMDS allows an employee who disagrees with the Committee's decision pertaining to, among other things, non-disciplinary denial of promotions and variation of salary increases, to have the decision analyzed by an independent reviewer.

[7] Within 15 days following reception of the Committee's decision the DS may submit a written request for recourse to the IRMDS. The Deputy Minister appoints the independent reviewer(s) within 15 calendar days from the date of the receipt of the DS's request. Within 70 calendar days from the day that the IRMDS was initiated, the independent reviewer makes recommendation(s) to the Deputy Minister. The independent reviewer may either confirm the appropriateness of the process used by the Committee or identify the issue(s) that may have negatively affected the decision of the Committee. The reviewer may recommend to the Deputy Minister that the Committee re-examine the case. However, the reviewer may not recommend that a promotion or salary increase be granted, or that the normal rate of progression of the DS be resumed.

[8] Based on the independent reviewer's recommendation(s), the Deputy Minister makes the final decision. This final decision is communicated to the DS within 30 days after the recommendation(s) of the reviewer has been made to the Deputy Minister.

[4] Dr. Gladman has been employed by DND since 2003. In January 2015, he submitted a draft Performance Evaluation Report (PER) in which he requested to be promoted to the DS-05 level. While his professional development manager initially held the view that he should accumulate a couple of years of evidence of "consistent multi-year evidence of creativity, impact and publications" before requesting a promotion, Dr. Gladman's final PER included a recommendation that he be promoted to the DS-05 level.

[5] The Defence Scientists Career Progression Committee (the Committee or DSCPC) met in February 2015 and reviewed 14 cases for promotion from the DS-04 level to the DS-05 level. The Committee decided not to endorse Dr. Gladman's recommendation for promotion, together with 4 other cases, due to insufficient evidence of the DS-05 level criteria being met. Dr. Gladman was advised of the Committee's decision by letter in April 2015. The accompanying Committee's Minute Sheet noted that "only incremental evidence" relating to the Committee's recommendations from the previous year had been shown and Dr. Gladman was required to demonstrate high impact activities "in a sustained, multi-year fashion" in order to attain the DS-05 level.

[6] As indicated at the outset of these Reasons, Dr. Gladman initiated an IRM to have the Committee's decision reviewed. He contested the denial of promotion on the following grounds:

a. The career progression process used to determine his eligibility for promotion was not applied correctly;

b. The Committee's decision was based on grounds other than the career progression criteria; and

c. There was an abuse of authority by the Committee.

[7] The Reviewer interviewed Dr. Gladman as well as the Acting Chief Scientist CORA, Dr. Solomon, and two members of the Committee, Mr. Tremblay and Mr. Reding. He also reviewed a number of documents provided by DND.

[8] The Reviewer found that the Committee performed its duties professionally and correctly. All three individuals interviewed by the Reviewer indicated that Dr. Gladman's impact expected at the DS-05 level had not been adequately demonstrated. The Reviewer found that the two Committee members interviewed observed that the Committee held a fair discussion regarding Dr. Gladman's request for promotion and that his PER was considered in a manner similar to that of other candidates.

[9] The Reviewer found that the Committee was well aware of the *Defence Scientist Salary Administration System* (DS Salary System) requirements for promotion. He found that Dr. Gladman's claim that the Committee's decision was based on grounds other than the career progression criteria was without merit. Regarding Dr. Gladman's contention that the Committee abused its authority, the Reviewer found that no abuse of authority - such as favouritism, improper conduct, or wrongdoing – had been established.

[10] The Reviewer also found that the statements in the Committee's Minute Sheet regarding "sustained creativity and impacts need to be shown within the context of current client requirements" and "such high impact activities need to be demonstrated in a sustained, multi-year fashion" describe reasonable expectations for a DS-05 scientist.

[11] The Reviewer concluded that the Committee's decision to deny Dr. Gladman's promotion should remain in effect. He recommended that Dr. Gladman be granted an informal discussion regarding his denial for promotion and that management work with him to develop a plan for his career advancement.

[12] The Deputy Minister reviewed and approved the Reviewer's conclusions and recommendations.

[13] Dr. Gladman contends that the Reviewer breached the rules of procedural fairness by not giving him notice of, nor an opportunity to reply to, the evidence obtained by the Reviewer. He also submits that he should have been given an opportunity to make submissions to the Deputy Minister about the Reviewer's recommendations.

[14] Dr. Gladman further argues that the Reviewer erred by dismissing his complaint concerning the Committee's consideration of the "Impact" criterion because the description of that criterion does not indicate that a Defence Scientist must demonstrate a "sustained, multi-year" Impact. He contends that the Committee invented a new criterion of "sustained, multi-year" impact. In this respect, Dr. Gladman submits that the Reviewer's mandate is not to decide what should be the criteria, but to decide whether the Committee correctly applied the existing criteria. He claims that the Reviewer acted unreasonably by turning his mind to whether this new criteria was a "reasonable expectation" for a DS-05 since his role is to determine whether the Committee based its decision on grounds other than those set out in the career progression criteria.

III. Issues and Standard of Review

[15] There are two issues to be determined in this case:

a. Was the decision of the Reviewer procedurally fair; and

b. Was his decision reasonable?

[16] It is not disputed by the parties that the standard of review applicable to the first issue is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43, [2009] 1 SCR 339) whereas the second issue is reviewable on a standard of reasonableness (*Rabbath***,** at para 31, 466 FTR 129; *Hagel v Canada (Attorney General)***,** 2009 FC 329, at para 25). As is well-established, where the standard of reasonableness applies, the role of the Court is to determine whether the impugned 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, at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. This approach recognizes that there may be more than one reasonable outcome and as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to the Court to substitute its own view of a preferable outcome (*Dunsmuir*, at para 47).

[17] The parties also agree that since the ultimate decision-maker, the Deputy Minister, adopted the recommendations set out in the Reviewer's report without providing his own reasons, the reasons set out in the Reviewer's report are considered to be those of the decision-maker (*Saber & Sone Group v Canada (National Revenue)*, 2014 FC 1119, at para 23, 468 FTR

286; *Canada (Attorney General) v Sketchley*, 2005 FCA 404, at para 37; *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, at para 44 [*Baker*]).

IV. Analysis

A. *No Breach of Procedural Fairness*

[18] I find that there was no breach of procedural fairness in this case.

[19] It is trite law that the content of the duty of procedural fairness is flexible and variable and depends on the circumstances of each case (*Baker*, at para 22). Some factors to consider when assessing the minimum degree of participatory rights required include the "nature of the decision being made and the process followed in making it," "the nature of the statutory scheme," "the importance of the decision to the individual or individuals affected" and the legitimate expectations of the individual (*Baker,* at paras 23-26).

[20] In *Potvin v Canada (Attorney General),* 2005 FC 391, 280 FTR 93, this Court found that where a government policy sets out participatory rights within its framework, then the policy has in effect codified "the extent of the requirements of procedural fairness owed in the circumstances" (see also *Thomas v Canada (Attorney General),* 2013 FC 292, at paras 78-79, 430 FTR 1 [*Thomas*]).

[21] Here, I find that the IRM, which is appended to the DS Salary System, codifies the extent of procedural fairness owed in the circumstances of this case.

[22] As stated above, the IRM process is designed to provide an independent review of the process used by the Committee to assess a candidate's readiness for promotion and the alleged grounds of the complaint (IRM, subsection 2.1). As such, the reviewer is not expected to replicate the role of the Committee (IRM, subsection 3.4). The provisions of the IRM reflect these principles. For example, subsection 3.4.2 sets out the procedure for the disclosure of information to be considered by reviewers in the following terms:

a. Each party will provide a list of material to be considered by the recourse reviewer(s) to the Deputy Head's delegate. This should occur within five (5) calendar days after the appointment of a reviewer or review panel;

b. The listed information shall be provided to the recourse reviewer(s). This information should be provided within twenty-five (25) calendar days after receiving the list;

c. The recourse reviewer will distribute the material to each party. This distribution should take place within five (5) calendar days following receipt of all of the material by the reviewer;

d. An initial list of documents that should be accessible to all parties is provided in Annex 3; and

e. Personal notes taken during all deliberation and/or decision-making meetings of DSCPC members may be considered evidence for possible recourse reviews. All such material is to be retained by individual DSCPC members until the deadline for recourse requests has passed. After this deadline has passed, all personal notes may be destroyed.

[23] In this regard, Dr. Gladman argues that he should have been given access to, and an opportunity to refute, any prejudicial information gathered by the Reviewer in the course of his assessment of the complaint, and this, within 5 calendar days following receipt of the information by the Reviewer in accordance with subsection 3.4.2(c) of the IRM. More

specifically, Dr. Gladman submits that he should have been provided with a summary of the substance of the interviews conducted by the Reviewer.

[24] On this point, Dr. Gladman contends that the principles of procedural fairness were breached when the Reviewer failed to disclose to him that he found out during his interview with Mr. Tremblay that Mr. Tremblay decided not to endorse Dr. Gladman's request for a promotion after participating in the Committee's discussion. He claims that Mr. Tremblay's change of position was extremely significant since Mr. Tremblay had initially supported his application and had played a role in drafting his PER. In particular, Mr. Tremblay asked Dr. Gladman to cut down his notes in support of his application to a single page. Moreover, Dr. Gladman argues that he relied on Mr. Tremblay to make his case for a promotion since he could not make the case for himself. He submits that this breach prevented him from knowing the case against him and from having the opportunity to meet it.

[25] In my view, a plain reading of section 3.4.2 of the IRM suggests that the information considered in this section concerns materials that were in existence prior to the appointment of the Reviewer, that is, at the outset of the IRM process. Contrary to Dr. Gladman's submissions, this section does not provide for the disclosure of the interviews conducted by the Reviewer during the course of his review.

[26] Despite the IRM being silent on this point, I am of the view that no such obligation exists in common law either. The nature of the decision to promote an individual was recently

described in the following terms by the Federal Court of Appeal in *Canada (Attorney General) v Boogaard*, 2015 FCA 150 [*Boogaard*]:

> [50] […] the personal importance of the decision to the affected individual must be viewed objectively and in context, especially in light of the nature of the decision under review. The nature of the decision is an important factor in assessing the intensity of review and, thus, deserves much attention in the analysis.
>
> [51] While in this case the promotion is of great importance to the respondent, normally we do not think of people having a "right" to a promotion. Often in promotion decisions, only a few win, many more lose, and the difference between winning and losing can legitimately turn upon fine things, sometimes subjective or subtle things. For example, usually we describe people who have been promoted as "deserving" or "lucky." We do not say that people have been promoted because the employer was legally forced to do it.

[27] There is therefore no inherent right to a promotion. Under the DS Salary System, the Committee is responsible for all decisions pertaining to promotions. Decisions to promote are made by assessing an employee's state of professional development against the performance indicators established for each DS level. Yet, the final decision to grant or deny a promotion is reached by consensus through discussion or, where necessary, by a majority vote. Promotion decisions are "complex, multifaceted decision involving sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon the changing and evolving needs and priorities of the organization" (*Boogaard*, at para 52). Thus, in my view, while it can only promote an individual if he or she has met the DS level being sought, the Committee still retains some discretion when rendering decisions.

[28] Moreover, and more importantly, the process chosen to review the Committee's decision not to promote is non-adversarial in nature and the legislative framework does not create an expectation that if each DS level is met, the individual will automatically receive a promotion.

[29] The IRM states that "[t]he principles of natural justice should apply to the process used for all applications for recourse submitted by researchers. These principles include, among others, the right to procedural fairness, including: the right to be heard, the right to representation, and the right to ask questions and contradict evidence" (IRM, section 2.1).

[30] Dr. Gladman claims that section 2.1 of the IRM heightens the extent of procedural fairness required for the IRM process. I disagree.

[31] I read section 2.1 to mean that the Reviewer must adhere to the principles of natural justice found in common law while carrying out his or her task, which, as we have seen, is largely dependant, in light of the *Baker* factors, on the circumstances of each case. I do not believe that this provision of the IRM was intended to fetter a reviewer's discretion to choose the process to follow while considering a complaint.

[32] Therefore, I am of the opinion that the duty of procedural fairness owed to Dr. Gladman by the Reviewer was at the low end of the spectrum. This is altogether consistent with past decisions rendered by this Court and the Federal Court of Appeal, which have found that applicants are entitled to a minimum level of fairness where a promotion or a change in classification is concerned (see *Begin v Canada (Attorney General)*, 2009 FC 634, at para 9

[*Begin*]; *Chong v Canada (Attorney General)*, 170 DLR (4th) 641, at para 12, 162 FTR 85 [*Chong*]).

[33] This minimum level of fairness was expressed in the following terms in *Hale v Canada (Treasury Board)*, 63 ACWS (3d) 464, 112 FTR 216, with respect to the extent a review committee must disclose evidence to an individual grieving a classification decision:

> [20] […] when the committee decides to review an aspect of the classification assessment, which the employee did not think was in dispute, and decides to elicit and rely on evidence with respect thereto about which the employee had no notice or information, fairness requires that that information be disclosed to the employee and he be given an opportunity to comment thereon.

[34] In *Begin*, the Court found, in the context of a classification grievance, that the principles of fairness are respected where "the complainants had the opportunity to make their arguments relating to the classification of their positions and to be heard, and if there was no restriction on their participation" (at para 9). The Court also found that generally there is no right to reply so long as no new facts are raised (*Begin*, at paras 18-21).

[35] In my view, such a minimum level of fairness does not include the right to summaries of interviews conducted by the Reviewer. While Mr. Tremblay's change in position is certainly new information, it cannot be said that Dr. Gladman was unaware of the importance of Mr. Tremblay's role in drafting the PER. Dr. Gladman made submissions to the Reviewer regarding management having "the "pen" on writing the PER" and that he had provided much more evidence than appeared in the PER submitted to the Committee. The Reviewer reviewed Dr. Gladman's contention that important information was excluded from his 2015 PER, which

allegedly negatively affected his application for promotion and found that a comparison of the draft submitted by the Applicant and the final version approved by Mr. Tremblay revealed mostly minor differences. Further to a review of the record, I agree with the Reviewer's assessment of Dr. Gladman's PER. Moreover, as the Reviewer noted, Dr. Gladman signed the PER without opting to add any comments to the document if he believed that key information was missing.

[36] There is also no merit to Dr. Gladman's argument that he needed a summary of the interviews conducted by the Reviewer in order to "know" the case against him given the fact that he is the one alleging misconduct on the part of the Committee. There was therefore no case for Dr. Gladman to meet other than to satisfy the Reviewer that the Committee's process was flawed on the grounds set out in the IRM process, of which he was – or was expected to be - well aware. In this regard, Dr. Gladman was provided with the opportunity to provide submissions to the Reviewer in writing and during an hour-long interview. I find that in these circumstances, Dr. Gladman had an adequate opportunity to establish his allegations, including the allegation that he relied on his managers, including Mr. Tremblay, in the drafting of his PER.

[37] I believe it is worth reiterating that the IRM process is not an adjudicative or adversarial process where the rights of the person concerned depend on his or her ability to rebut evidence adduced against them (*Baker*, at para 23; *Chong*, at paras 39-40). It is a process allowing those whose promotion request has been denied to have the process used by the Committee reviewed.

[38] I now turn to the issue of whether the duty of fairness owed to Dr. Gladman required that he be given an opportunity to comment on the Reviewer's report.

[39] Dr. Gladman relies on a number of decisions such as *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 [*Cardinal*]; *Syndicat des Employés de Production du Québec et de l'Acadie v Canada (Canadian Human Rights Commission)*, [1989] 2 SCR 879 [*SEPQA*]; *Deschênes v Canada (Attorney General)*, 2009 FC 1126, 188 ACWS (3d) 1112 [*Deschênes*], to argue that there exists an obligation in common law for the Reviewer to provide him with an opportunity to make submissions to the Deputy Minister about the Review Panel's recommendation.

[40] I find that none of these cases have any application in the circumstances of the present case. As indicated above, the nature of the decision in this case warrants a level of procedural fairness that is at the lower end of the spectrum. The cases cited by Dr. Gladman all refer to situations having a great impact on an individual's rights, such as in the context of the decision to segregate inmates in *Cardinal*, and decisions related to discrimination complaints and pay equity in *SEPQA* and *Deschênes.*

[41] In contrast, the degree of procedural fairness owed to Dr. Gladman is, in my view, similar to the degree espoused by a recent decision rendered by the Federal Court of Appeal in *Agnaou v Canada (Attorney General)*, 2015 FCA 29, [*Agnaou*]). This decision was decided in the context of the Deputy Public Sector Integrity Commissioner's (DPSIC) decision to refuse to initiate an investigation into the applicant's claims that he suffered a reprisal. The applicant in that case

alleged that senior officials refused to appoint him to a position because he had made a protected disclosure. In that case, the applicant argued that he had a right to comment on a report prepared by an analyst prior to the DPSIC rendering a decision. The Court of Appeal held that the applicant did not have the right to comment on the report since he was aware of the essential conditions that needed to be met and had been given an opportunity to make representations in this regard upon filing his complaint and in subsequent exchanges with analysts (*Agnaou*, at paras 38-39).

[42] Given the Federal Court of Appeal's decision in *Agnaou*, I find that the Applicant did not have a right to comment on the Reviewer's Report before it was submitted to the Deputy Minister since he was aware of, and made submissions speaking to, the grounds of recourse.

[43] Moreover, I am of the view that the Applicant should not be granted greater participatory rights on the grounds that the Director of General Workplace Management at DND received a copy of the Reviewer's Report before the Deputy Minister did and directed the Reviewer to clarify his report. As indicated by the Federal Court of Appeal in *Agnaou*, so long as the final decision is made by the decision-maker himself and there is no evidence on record indicating otherwise, "[i]t is entirely normal and appropriate for administrative decision-makers to use the services of their staff, including when preparing their reasons" (at paras 46-47).

[44] Given the foregoing, I find that no breach of procedural fairness occurred in this case.

B. ***Decision is Reasonable***

[45] Further to a review of the entire record, including the DND's DS Salary System framework setting out the promotion and salary advancement of Defence Scientists, I am of the view that the Reviewer's decision was reasonable.

[46] Part IV of the DS Salary System sets out guidelines for the promotion and salary advancement of Defence Scientists. These guidelines (the DS Guidelines) indicate, at paragraph 5, that the advancement of Defence Scientists requires an assessment of an employee's state of professional development, which is compared to seven characteristics describing the minimum entry requirements for each of the seven DS levels. The seven characteristics are: Knowledge and Experience; Personal interactions and Communication; Creativity; Productivity; Impact; Recognition; and Responsibilities. For each of these characteristics, there are one or more performance indicators. A Defence Scientist will only advance if he or she has met the entry requirements for the next higher level.

[47] A DS-05 position is meant for mature, experienced officers who have established a recognized reputation and professional competency and leadership in a complex area of science and defence technology. Treasury Board's *Defence Scientist Service Group – Pay Plan*, which applies to level DS-01 to DS-07 employees**,** provides that employees who wish to be promoted to the DS-05 level must have consistently demonstrated the ability to work under direction, to generate original and novel solutions to problems, and to meet scientific and technological objectives that are defined in broad terms.

[48] At issue in the present case is whether the Reviewer reasonably found that the Committee did not base its decision on grounds other than the career progression criteria in finding that the Committee's conclusion that the "Impact" performance indicator be demonstrated in a multi-year fashion "describe reasonable expectations for a DS 5 scientist."

[49] The description under the "Impact" criterion states that a DS-05 level employee has met the DS-05 "Impact" performance indicator where he or she "[h]as made superior impacts on client policy, equipment, engineering, or operational issued, by exploiting the application of technology and/or defence scientific analyses" (DS Guidelines, at para 58).

[50] Dr. Gladman contends that since the performance indicator is silent on whether "Impact" should be assessed on a multi-year fashion, the Committee invented this criterion.

[51] In *Ollevier v Canada (Attorney General),* 2008 FC 199, 323 FTR 207 [*Ollevier*], Justice Dawson, now a judge of the Federal Court of Appeal, accepted that in the context of promoting Defence Scientists, selection boards cannot "tamper with the basic qualifications prescribed by the Department by adding to them or changing part of them in such a way as to limit the factors which could come into play in the judging and ranking of the candidates" (*Ollevier,* at para 32, citing *Canada (Attorney General) v Blashford*, [1991] 2 FC 44 (FCA), at para 5, 28 ACWS (3d) 567 [*Blashford*]). At most, the Committee can provide a mere reasonable elaboration of the requirements suggested by the original qualifications (*Ollevier,* at para 32; *Blashford,* at para 27).

[52] In this respect, the Respondent invites the Court to find that it was open to both the Committee and the Reviewer to find that assessing "Impact" on a multi-year fashion was a "reasonable elaboration of the requirements" for promotion. The Respondent submits that the "Impact" performance indicator must be read within the broader context of the entire DS Salary System framework, which repeatedly states that an employee's performance is to be reviewed over the course of several years.

[53] In particular, the Respondent relies on the following sections of the DS Salary System framework:

> Defense Scientific Service Group Salary Administration System, Introduction
>
> > 6. Rates of professional development can change; the rate of professional development of some employees will significantly increase while for others it may significantly decrease. Such changes will be reflected in the rate of salary progression received by the employee. It requires, however, more than one year to demonstrate that a change in rate of professional development has, in fact, occurred and this has implications for the administration of the DS Salary System. The time-frame on the basis of which sufficient evidence will be found to support a change in salary treatment is normally three years but is occasionally two.
>
> DS Guidelines, Assessing State of Professional Development
>
> > 21. The evidence required to establish the State of Professional Development of a DS is normally acquired over several years […] [A]ssessment of the State of Professional Development of a DS will involve consideration of evidence provided by multi-year performance […]. [M]uch of the evidence is often contained in the record of the past five years.

> 22. The assessment […] requires comparison of the evidence of the employee's performance and accomplishments over a number of years, with the description of the Performance Indicators provided for entry into each level of the DS Group.

DS Salary System: Part VI- DS PER Completion Instructions

> Rate of Professional Development
>
> 7. […] A change in Rate of Professional Development is very seldom, if ever, substantiated by performance demonstrated over a single year […]; it normally requires several years to demonstrate that this change has occurred.
>
> […]
>
> Completion of Subsection 3.1 (Period of Merit Review Evidence)
>
> […]
>
> 22. The length of time (in years) to be covered by this Subsection will depend on the circumstances at the time of completion […]. The length of time will be determined by the Professional Development Manager, in advance of completion of the PER, using the following considerations as guides:
>
> > a. when promotion is to be considered, the period shall encompass the whole career but with emphasis on the past 3-5 years;
>
> Emphasis added.

[54] In my view, when read as a whole, the DS Salary System framework expressly indicates on numerous occasions that a change in a Defence Scientist's rate of professional development is assessed by performance demonstrated over more than one year. Moreover, Part VI of the DS Salary System, which sets out instructions for the completion of PERs, specifically instructs an employee's Professional Development Manager, the manager responsible for assessing evidence

of the state of professional development and recommending career management actions, to consider evidence of the state of professional development that encompasses a Defence Scientist's entire career (with an emphasis on the past 3-5 years) when promotion is to be considered.

[55] Since the "Impact" performance indicator is part of the state of professional development assessment, I find that neither the Reviewer nor the Committee tampered with the basic qualifications prescribed by DND. The DS Salary System framework clearly calls on the Committee to evaluate the state of professional development performance indicators over the course of several years where an employee from the Defence Scientist classification group requests a promotion at the DS-05 level. As the Respondent puts it, multi-year performance is built-in throughout the DS Salary System framework.

[56] I also note that the "multi-year" criterion for the "Impact" performance indicator was applied in Dr. Gladman's 2014 promotion request where the Committee found at that time that Dr. Gladman needed to continue his "contributions to achieve a consistent multi-year history of creativity and superior impacts." Dr. Gladman's 2015 PER also states that he has a "consistent multi-year high-level of impact." Moreover, no evidence was put before the Court that the "multi-year" criterion was applied to Dr. Gladman's assessment and not the other cases for promotion.

[57] There is no doubt that the promotion being sought by Dr. Gladman is important to him, as it is for anyone else in his position. However, as the Federal Court of Appeal stated at

paragraphs 51 and 52 of *Boogaard*, there is no right to a promotion *per se* and granting a promotion is, as indicated previously, a complex and multifaceted exercise involving "sensitive weighings of information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon the changing and evolving needs and priorities of the organization".

[58] Bodies, like the Committee, tasked with assessing whether a promotion should be granted, assume highly specialized roles and their expertise in this area warrants a high degree of deference from the Court (*Begin*, at para 8). Here, I find, when the DS Salary System framework is considered as a whole, that it was reasonably open to both the Committee and the Reviewer to conclude that Defence Scientists at the DS-05 level are expected to demonstrate high impact activities in a "sustained multi-year fashion". This, in my view, amounts to a "reasonable elaboration of the requirements" for a promotion at the DS-05 level.

[59] For these reasons, the judicial review application is dismissed, with costs to the Respondent to be assessed in accordance with Column III of the Table to Tariff B of the *Federal Courts Rules*, SOR/98-106.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, with costs.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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