

Federal Court



Cour fédérale

**Date: 20160927**

**Docket: T-1988-15**

**Citation: 2016 FC 1089**

**Ottawa, Ontario, September 27, 2016**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**MURLIDHAR GUPTA**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Murlindhar Gupta is a scientist employed by Natural Resources Canada [NRCan]. He has brought an application for judicial review of a decision of the Deputy Minister of Natural Resources [Deputy Minister] to deny his request for recourse in respect of his applications for promotion under the Career Progression Process.

[2] For the reasons that follow, I find that the Deputy Minister failed to consider relevant factors, specifically the involuntary change in Dr. Gupta's research focus and his extended leave of absence, and also failed to consider whether Dr. Gupta's management accomplishments were properly evaluated. The application for judicial review is therefore allowed.

## II. Background

[1] Dr. Gupta joined NRCan as a visiting research fellow with the Clean Electric Power Division, and became a research scientist in 2004. From 2002 to 2009, the focus of Dr. Gupta's research was the development of low-emission clean coal and carbon capture.

[2] Dr. Gupta alleges that he was subject to various forms of harassment and other inappropriate behaviour by his supervisors. In a grievance decision dated October 30, 2008, the Assistant Deputy Minister, Energy Technology and Programs Sector, acknowledged that the actions of his supervisor had caused Dr. Gupta to lose "professional traction". Following a leave of absence from 2009 to 2010, he was involuntarily reassigned to an area of research outside his expertise. He grieved the reassignment. The settlement of the grievance resulted in a Memorandum of Agreement dated October 30, 2012 [MOA].

[3] The MOA was primarily concerned with Dr. Gupta's prospects for promotion. It permitted him to apply for promotion outside of the usual Career Progression Process.

[4] Like many scientists employed within the Public Service of Canada, Dr. Gupta is subject to an "incumbent-based" promotion process governed by s 22(2) of the *Public Service*

*Employment Act*, SC 2003, c 22 and s 2 of the *Public Service Employment Regulations*, SOR/2005-334. Promotion is based on an assessment of the work performed by the individual scientist – the “incumbent” who occupies a position. Scientists are promoted in accordance with the increase in the quality or quantity of their work, and are compensated accordingly.

[5] Pursuant to the *Handbook to NRCAN’s Application of the “RE Framework”* [Handbook], research scientists submit annual dossiers of their work to a Career Progression Committee [CPC]. The CPC then determines whether the candidate should be promoted based on specified criteria.

[6] In addition to the specified criteria, a candidate may choose to bring other factors to the attention of the CPC. The pertinent section of the Handbook reads as follows:

**Note: This is one area where most candidates do NOT need to fill in.**

The relevant factors – if a candidate has any – may include:

- [...]
- any major change in circumstances which affected cited achievements/contributions;
- [...]
- extended leave of absences interrupting a continuous scientific career (e.g., parental leave);
- [...]

This section is not to be used as a summary of the application being presented. When appropriate (as described above), the researcher may present historical or background information, in approximately 400 words, which will help the reader to have a

better understanding of the documentation. If no information is required, write “No relevant factors to highlight” in this section.

[emphasis original]

[7] If a candidate is not satisfied with the CPC’s assessment of his or her dossier, the candidate has access to an Internal Recourse Mechanism [IRM]. The IRM panel conducts a review of the CPC’s evaluation of the candidate’s dossier. The IRM panel then provides a recommendation to the Deputy Minister, who is the final decision-maker on whether the process followed by the CPC was fair.

[8] The IRM panel may recommend that the Deputy Minister appoint a new CPC to re-evaluate a candidate’s dossier only in certain circumstances. These include an “abuse of authority” on the part of the CPC. Pursuant to the IRM policy, an “abuse of authority” arises when, among other things, “a delegate acts on inadequate material (including where there is no evidence or without considering relevant matters)”. The IRM policy provides the following explanatory note:

Abuse of authority is more than simply errors or omissions; however, when a delegate acts on inadequate material and/or takes action [*sic*] which are, for example, unreasonable or discriminatory, these actions may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

[9] Dr. Gupta submitted his dossier in accordance with the modified procedure contemplated by the MOA. The MOA provided that the CPC review would be completed within four weeks, but after eleven months it was still ongoing. Dr. Gupta also submitted his dossier in accordance

with the usual career progression process. Both processes denied Dr. Gupta's requests for promotion, and he sought recourse in accordance with the IRM.

[10] The IRM panel confirmed the CPC's decisions to refuse Dr. Gupta's requests for promotion. He therefore sought judicial review of the decisions in this Court. NRCan conceded that the processes were deficient. The applications were discontinued on the understanding that Dr. Gupta's dossier would be considered by a newly-constituted CPC, and the result would be made retroactive to September 30, 2011.

[11] On April 30, 2014, the newly-constituted CPC declined to grant Dr. Gupta's request for promotion. Dr. Gupta again initiated the IRM, alleging that the CPC's process was tainted by abuse of authority; specifically, a failure to consider his extended leave of absence and the involuntary change in his research focus.

[12] The IRM panel summarized Dr. Gupta's complaints as follows:

The claimant, Dr. Gupta, alleges that the [CPC] findings for his cases were flawed because:

1. Abuses of authority must be considered for his case in that:
  - a. He was commanded to drastically change research focus during the promotion review period.
  - b. The CPC did not properly apply the career progression criteria for RES 3, imported requirements that are not supported by the Handbook to NRCan's Application of the RE Framework, September 2013 (the Handbook), and acted on inadequate materials.

- c. The CPC based its decisions on grounds other than the published career progression criteria.
  - d. The CPC does not consider student employees to be employees for the purposes of judging management criteria.
  - e. The CPC ignored the claimant's roles in hiring a permanent employee in evaluating management criteria.
  - f. The CPC failed to accept evidence provided of the claimant's contributions to supporting the management of a program.
2. The CPC acted in bad faith in that:
    - a. The addition of two-years of evidence to the previous promotion request was considered to still provide "insufficient evidence" for some evaluations.
    - b. The CPC evaluation report frequently concludes that the applicant has provided insufficient evidence but does not state why the evidence was insufficient for the requested promotion.
3. The review process yields inconsistent findings from year to year.

[13] Dr. Gupta requested an opportunity to make submissions regarding the IRM panel's draft report before it was finalized. The IRM panel refused. Once he received the IRM panel's report, Dr. Gupta prepared written submissions. These were forwarded to the Deputy Minister together with the IRM panel's report. The IRM panel informed the Deputy Minister that Dr. Gupta's submissions did not alter its views. On October 30, 2015, the Deputy Minister accepted the IRM panel's recommendations and closed the file.

### III. Decision under Review

[14] The Deputy Minister accepted the IRM panel's conclusion that Dr. Gupta's dossier had been evaluated objectively and consistently with those of other applicants, and that there was no abuse of authority or lack of good faith.

[15] Where the Deputy Minister adopts the reasons provided by the IRM panel, the panel's report forms a part of the decision (*Gultepe v Canada (Attorney General)*, 2015 FC 645 at para 10; *Gladman v Canada (Attorney General)*, 2016 FC 917 at para 17 [*Gladman*]). The IRM panel concluded as follows:

1. The evaluation process applied to Dr. Gupta's promotion application case was consistent across all applicants and followed the evaluation requirements contained in the Handbook [...].
2. There is no evidence of abuse of authority or lack of good faith in the evaluation of Dr. Gupta's case.
3. From the evidence gathered, the review committee is convinced that the CPC was able to assess the dossier objectively, and the fact that there was clear consensus on the unsuitability for promotion argues that the failure to achieve the RES-03 did not come about as a result of bias or procedural errors.

[16] The IRM panel found that the change in Dr. Gupta's research focus was a "management and not a promotion action", and was not relevant to its review. The IRM panel observed that the change appeared to have been "a remedy for a historical abuse of management authority."

### IV. Issues

[17] This application for judicial review raises the following issues:

- A. Was the Deputy Minister's decision procedurally fair?
- B. Was the Deputy Minister's decision reasonable?

V. Analysis

[18] Questions of procedural fairness are subject to review by this Court against the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Gladman* at para 16).

[19] A Deputy Minister's decision regarding the fairness of an IRM process is a question of mixed fact and law, and is subject to review against the standard of reasonableness (*Rabbath v. Canada (Attorney General)*, 2014 FC 999 at para 31; *Gladman* at para 16). The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Was the Deputy Minister's decision procedurally fair?*

[20] In *Gladman*, Justice LeBlanc found that the level of procedural fairness owed to an employee by an IRM panel is at the lower end of the spectrum. A complainant is not entitled to receive summaries of the reviewer's interviews or a copy of the draft report before it is finalized. Counsel for Dr. Gupta noted that the decision is under appeal, but did not otherwise address it in argument.

[21] Dr. Gupta was afforded a higher level of procedural fairness than the applicant in *Gladman*. He was given an opportunity to comment on the IRM panel's interview notes, and his



written submissions on the IRM panel's report were forwarded to the Deputy Minister for his consideration. In light of *Gladman*, and subject to further guidance from the Federal Court of Appeal, I am unable to find a breach of procedural fairness in this case.

B. *Was the Deputy Minister's decision reasonable?*

[22] The IRM panel found that the change in Dr. Gupta's research focus was a "remedy for a historical abuse of management authority", and was not relevant to its review. The CPC's evaluation report recognized that Dr. Gupta was "required to reorient his research from Clean Electric Power Generation to bioenergy research in 2010", but provided no further analysis. Neither the IRM panel nor the CPC addressed Dr. Gupta's extended leave of absence.

[23] Dr. Gupta argues that the change in his research focus was an aspect of the harassment he suffered at NRCAN, not a remedy. He notes that the Handbook specifically requires the CPC to consider "any major change in circumstances which affected cited achievements/contributions" and any "extended leave of absences interrupting a continuous scientific career" if the candidate requests that these be taken into account. Dr. Gupta identified both of these factors in his submissions to the CPC, and also in his submissions to the IRM panel.

[24] The IRM policy defines "abuse of process" to include a failure to consider relevant matters. Neither the CPC nor the IRM panel properly considered the circumstances that gave rise to Dr. Gupta's change in research focus, nor the impact this may have had on the quantity or quality of his work. Nor did they consider his extended leave of absence.

[25] According to the Respondent, “[e]ven if the CPC agreed with the Applicant that his reassignment to a different group was unfair, it could not have promoted him on this basis. Doing so would have fallen outside its mandate.” I disagree. The Handbook specifically identifies major changes in circumstances and leaves of absences as relevant factors when a candidate requests that they be considered for promotion. Given Dr. Gupta’s submissions, the CPC was obliged to address these factors in its decision. It failed to do so. In my view, it was unreasonable for the IRM panel to disregard this evident flaw in the CPC’s treatment of Dr. Gupta’s application for promotion.

[26] There is another troublesome aspect of the IRM panel’s decision. The IRM panel dealt with Dr. Gupta’s complaint that the CPC had improperly evaluated his management accomplishments as follows:

The CDC [*sic*] evaluation report is silent on the point raised here. This could be either an inadvertent or an intentional omission. Evidence inferred from the interviews suggests that this evidence was considered by the CDC [*sic*] but was not judged to be adequate to support promotion. This allegation could have substance.

[emphasis added]

[27] In its “conclusions and recommendations”, the IRM panel stated that “[t]here is no evidence of abuse of authority or lack of good faith in the evaluation of Dr. Gupta’s case.” The Deputy Minister confirmed that, in his view, “there was no abuse of authority or lack of good faith.”

[28] I cannot reconcile the IRM panel's finding that Dr. Gupta's complaint regarding the CPC's evaluation of his management accomplishment "could have substance" with its conclusion that there was "no evidence of abuse of authority". The IRM panel offered no analysis of this issue. In this further respect, the IRM panel's report and Deputy Minister's decision are unreasonable.

[29] I am unable to say whether the Deputy Minister's decision would have been the same if he and the IRM panel had considered the "relevant factors" prescribed by the Handbook, specifically Dr. Gupta's involuntary change in research focus and his extended leave of absence. There is also an unresolved question of whether the CPC properly evaluated Dr. Gupta's management accomplishments. The matter must therefore be returned to the Deputy Minister for reconsideration.

## VI. Conclusion

[30] The application for judicial review is allowed. The parties agreed that the successful party would be entitled to costs in the lump sum of \$3,250.00.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. the application for judicial review is allowed;
2. the matter is returned to the Deputy Minister for redetermination; and
3. lump sum costs are awarded to the Applicant in the amount of \$3,250.00.

"Simon Fothergill"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1988-15

**STYLE OF CAUSE:** MURLIDHAR GUPTA v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** SEPTEMBER 8, 2016

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**DATED:** SEPTEMBER 27, 2016

**APPEARANCES:**

Christopher Rootham

FOR THE APPLICANT

Abigail Martinez

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Nelligan O'Brien Payne LLP  
Barristers and Solicitors  
Ottawa, Ontario

FOR THE APPLICANT

William F. Pentney, Q.C.  
Deputy Attorney General of Canada  
Ottawa, Ontario

FOR THE RESPONDENT