

Federal Court



Cour fédérale

Date: 20160920

Docket: T-928-15

Citation: 2016 FC 1062

Ottawa, Ontario, September 20, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**MURRAY WILKINSON,
JERRY JESSO, CHRISTOPHER ARGUE,
JAMES BASTARACHE, CATHERINE BLACK,
CYNTHIA BURNS, LAURA CLARKE, RICHARD
CUZZETTO, ANGELO DE RIGGI, JEFF DUNK,
GEORGE DURSTON, JACQUES FRECHETTE,
LILY-CLAUDE FORTIN, FRANK GONCALVES,
NELSON GUAY, CLAUDE HARVEY, MARK HASTIE,
MARK HAYES, FANNY HO, ALANA HUNTLEY,
MARK KAPICZOWSKI, KEVIN KELLY, ROSE-ANN JANG,
ALAN JOHNS, ANGELIA JOHNSON, CAMERON JUNG,
BOB LEDOUX, ROBERT LOHNES, INA MACRAE,
DEBBIE MAIN, GREGORY MCKENNA,
SHANE MCKINNON, KAREN MCMAHON,
MAUREEN MILLER, MANJIT SINGH MOORE,
RON NAULT, FIONA NORTHCOTE, HENRY PETERS,
LINDA ROBERTSON, RALPH SCHOENIG,
PATRICK SCOTT, DARLENE STAMP,
RICHARD STEFANIUK, DOUG TISDALE,
KEITH WATKINS, HARALD WUIGK**

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision of the Deputy Head of the Canada Border Services Agency [CBSA], dated May 19, 2015, refusing to adopt the recommendation of the Classification Grievance Committee [Committee] to reclassify their occupational position from FB-06 to FB-07.

[2] The Applicants submit that the Deputy Head relied on irrelevant considerations and that the decision was unreasonable. They seek an order quashing the decision and sending it back for re-determination.

[3] For the reasons that follow, I will allow this application.

[4] The Applicants each hold the position of Manager, Regional Programs [MRP] at the CBSA. This position is currently classified at the FB-06 group and level. In 2007, they filed a grievance under the *Public Service Labour Relations Act*, SC 2003, c 22 seeking a reclassification of their position to the FB-07 group and level. The grievance was considered by the Committee which agreed that the position should be classified as FB-07. The Committee made a recommendation to the Deputy Head to that effect. In February 2013, the Deputy Head refused the recommendation.

[5] The fundamental point of difference between the Committee and the Deputy Head rested on their respective rating of one factor - Decision Making. The Committee was of the view that the evidence justified that this factor's rating be increased to degree 6; whereas the Deputy Head

was of the view that it should remain at degree 5. A degree 6 in Decision Making would allow the MRP position to be reclassified as FB-07.

[6] The Applicants filed an application for judicial review of the Deputy Head's decision. Justice Roy of this Court allowed the application and found that the Deputy Head's decision was unintelligible: *Wilkinson v Canada (Attorney General)*, 2014 FC 741 at para 44, 243 ACWS (3d) 367:

In a case like this one, the reasons given to depart from a well-articulated recommendation must be intelligible, in the sense that they "are able to be understood" (*The Canadian Oxford Dictionary*, 2001, *sub verbo*, "intelligible"). With great respect, the decision does not have that measure of intelligibility. It seems to contemplate statements made with respect to degrees 7 and 6 as if they related to degrees 6 and 5. If that is not what the decision actually meant, the respondent has been incapable of enlightening the Court either by providing an alternate meaning. The respondent also seems to rely on "the intention behind ... the position" in order to take the analysis outside of the job description that is at the heart of the grievance adjudication. Finally it faults the Committee for not having considered the organizational context, where it would appear that the Committee considered that context. If the Deputy Head disagreed with the findings on that account, he did not express where his disagreement lies. At the end of the day, this reviewing court is left without understanding "why the tribunal made its decision" (*Newfoundland and Labrador Nurses' Union, supra*, para 16).

[7] In May 2015, the Deputy Head issued the re-determination decision and once again refused the Committee's recommendation, apparently on the basis that the positions at issue are provided guidance and additional scrutiny by regional managers:

The ratings of the new decision differ from that of the Committee on one element, Decision Making. Where the Committee argues that the work of the MRP position is greater than degree 5 and warrants a degree 6, the President is of the view that the MRP

position's decision making responsibilities are less than degree 6 and similar to degree 5. The disagreement with the Committee's rating is the importance given by the Committee members to the guidance and substantive nature of the MRP's decisions and recommendations.

After review of the degree 6 definition, in conjunction with the general guidelines of the Application Guidelines and corresponding examples of work activities; I am of the opinion that the guidance provided to the MRP positions and the additional scrutiny by regional managers are such that the MRP positions do not warrant a degree 6 allocation. [emphasis added]

[8] The Respondent in submitting that it is open to the Deputy Head to disagree with the recommendation of the Committee noted that both "operate under a particular and specialized regime which reflects a high level of expertise." Indeed the Committee is comprised of three individuals knowledgeable in classification issues and experienced in the use of the relevant classification standard. In the present case, they submitted a unanimous recommendation to the Deputy Head which Justice Roy found to be a careful examination comprising some 22 pages.

[9] The Respondent submits that the Deputy Head "is best placed to know and understand the decision-making process of his Agency, including the process from 'top to bottom' and the role of the various levels of management in that decision-making process." Undoubtedly this is true. While I accept the submission of the Respondent that this Court has stated in *Bourdeau v Canada (Attorney General)*, 2015 FC 1089, 258 ACWS (3d) 736 that the process is not a simple matching of words in the position description and the classification standard, this does not suggest that the words in the position description are to be ignored or are not to be considered when examining the position's content and duties.

[10] Indeed, in this case the classification request could not be considered until there was agreement between the parties on the job description. This illustrates just how relevant the work description is when the Deputy Head examines “the process from ‘top to bottom’ and the role of the various levels of management in that decision-making process.”

[11] One of the documents before the Deputy Head when the decision was made was a chart prepared by his human resources officials relating to the decision-making element of the position in question. That chart excerpts portions of the work description statements for the MRP position and juxtaposes them to the Classification Standard, Application Guidelines, and Examples of Work Activities [EWAs] of levels 5 and 6.

[12] I accept the Applicants’ submission that the chart was significantly deficient in that it ignored or omitted relevant aspects of the MRP work description that arguably correspond to the degree 6 EWAs and which could reasonably have led to a finding by the Deputy Head to accept the Committee’s recommendation. I am persuaded that it is more likely than not that the Deputy Head gave considerable weight to this chart because the areas in which it is deficient are the areas the Deputy Head appears to have focused on in reaching the decision that the MRP position was not at degree 6 of decision-making but at degree 5.

[13] In a classification exercise, the work description must be evaluated against the appropriate classification standard, and it is an error to modify the work description or refuse to consider the duties and activities in the work description: *Wilkinson v Canada (Attorney*

General), 2014 FC 741 at para 9, 243 ACWS (3d) 367; *Allard v Canadian Food Inspection Agency*, 2012 FC 979 at paras 26 and 39, 417 FTR 1.

[14] The significant omissions in the chart demonstrate that the MRP work description was modified and not considered in full by the Deputy Head. The chart omits portions of the MRP work description that largely match the EWAs for degree 6 decision-making. Had these portions of the work description been before the Deputy Head, his decision might well have been different. Even with what was before him, counsel for the Respondent conceded that he could have rated it as a 6 rather than a 5 because classification is an art, not a science.

[15] I agree with the Respondent that the materials before the Deputy Head may be considered as part of the reasons: See *Wanis v Canadian Food Inspection Agency*, 2013 FC 963 at para 21.

[16] The Respondent submits that the Deputy Head is assumed to have weighed and considered all the evidence presented and that he is not required to address every excerpt in the work description that is inconsistent with the language that he accepts. As a general proposition, this is sound; however, where the aspects of the work description that are not addressed strongly support a contrary result, the decision-maker must expressly indicate that they have been considered and explain the reasoning for reaching a decision that appears contrary to that evidence. Here there is no such indication. Moreover, the fact that these relevant portions of the work description were omitted from the chart prepared for the Deputy Head makes it a reasonable inference that they were not in fact considered by the Deputy Head in reaching his decision.

[17] For these reasons, the decision must be set aside again and referred back to the Deputy Head for a redetermination in which the entire work description of the MRP position is considered.

[18] The Applicants are entitled to their costs. They seek costs at an elevated level given that this is the second time they have had to have the decision reviewed and for the inordinate delays from the time of the Committee's decision to the time of the Deputy Head's decision. It was suggested that something in the order of \$12,000 to \$15,000 would be appropriate. The Respondent proposed something in the range of \$5,000 to \$6,000.

[19] In my assessment, given the volume of materials produced, the late filing of the chart upon which the decision largely turns, and the fact that this is the second time the decision has had to be reviewed an award of \$8,000 is appropriate.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the decision of the Deputy Head is set aside and the grievance of the Applicants and the recommendation of the Committee is referred back to the Deputy Head for re-determination in accordance with these reasons and is to be made after considering the entirety of the work description of the MRP position. The Applicants are awarded their costs, fixed at \$8,000.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-928-15

STYLE OF CAUSE: MURRAY WILKINSON ET AL v ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: AUGUST 24, 2016

JUDGMENT AND REASONS: ZINN J.

DATED: SEPTEMBER 20, 2016

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