Federal Court  Cour fédérale

Date: 20180412

Docket: T-1024-17

Citation: 2018 FC 392

Ottawa, Ontario, April 12, 2018

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ANGIE QUI AND
OWEN MCDERMOTT-BERRYMAN

Applicants

and

CANADA REVENUE AGENCY

Respondent

JUDGMENT AND REASONS

[1] The Applicants, employees of the Canada Revenue Agency (CRA) and candidates in a competitive staffing process, seek judicial review of the decision of a Third Party Reviewer, dated June 11, 2017. The Third Party Reviewer found that there was no jurisdiction to conduct the Independent Third Party Review (ITPR) because the Applicants' allegations related to the assessment stage of the staffing process, while ITPR is limited to the placement or appointment stage.

[2] For the reasons that follow, the Application for Judicial Review is dismissed. The Reviewer reasonably found that she did not have jurisdiction to address the Applicants' allegations.

I. Background

A. *The CRA Staffing Process*

[3] Job competitions at the CRA are split into three stages: the prerequisite stage, the assessment stage, and the appointment stage (also referred to as the placement stage). The first two stages are completed by an appointed Selection Board. The placement stage is completed by the manager responsible for staffing the position. All decisions in the process are referred to as "staffing decisions", however the final staffing decision is that which selects the candidate for placement.

[4] Initially, all candidates are reviewed to determine if they meet the prerequisites listed in the Notice of Job Opportunity (NOJO). Those candidates who do are then assessed by the Selection Board.

[5] At the assessment stage, the Selection Board assesses the candidates' qualifications based on job-specific requirements. Candidates who are found to be qualified are placed in a pool of qualified candidates.

[6] At the placement stage, the manager responsible for staffing the position chooses one or more candidates from the pool to be appointed based on one or more criteria.

[7] The CRA's staffing procedures are governed by a policy document, the *Procedures for recourse on staffing (Staffing Program)*, Version 1.2 [Procedures for Recourse or Procedures]. The current version applies to all staffing decisions made on or after December 7, 2015 The Procedures are authorized pursuant to section 54 of the *Canada Revenue Agency Act*, SC 1999, c 17 [the *CRA Act*]. The Procedures, which are long and detailed, provide for, among other things, recourse rights for candidates at each stage of the process.

[8] The purpose of the recourse rights is to address candidates' concerns regarding "arbitrary treatment", which is defined as any staffing decision made:

> In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale or established policy; not the result of a reasoning applied to relevant considerations; discriminatory, that is, as listed in the prohibited grounds of discrimination in the *Canadian Human Rights Act.*

[9] At the assessment stage, a candidate may request Individual Feedback (IF), which consists of a formal discussion between the employee and the manager responsible for that staffing decision (i.e. the staffing decision at the assessment stage) regarding the candidate's concerns about arbitrary treatment. If the candidate's concerns are not resolved, the candidate can then seek Decision Review (DR), which is a discussion between the candidate and the manager's supervisor. As part of the DR process, the candidate has the right to disclosure of information related to their individual treatment, including their assessment results, as well as

information about other candidates in the process (paragraph 5.6.6 of the Procedures for Recourse).

[10] At the placement stage, candidates can again request IF, followed by either DR *or* an ITPR. ITPR is conducted by a third party who reviews a candidate's allegations of arbitrary treatment.

[11] The ITPR is governed by paragraph 5.11 of the Procedures. Paragraph 5.11.1 clarifies that ITPR is reserved for permanent promotions. Paragraph 5.11.11 provides that, in order to be eligible for ITPR, a candidate must have completed IF (at the placement stage), and *not* have requested DR (at the placement stage). In other words, at the placement stage, a candidate seeking recourse must first pursue IF, after which they are presented with a choice between DR and ITPR.

[12] Paragraph 5.11.33 sets out various duties of the Third Party Reviewer, including that they must respect their roles and responsibilities set out in the Procedures, and "examine only staffing decisions related to appointment, prerequisite and assessment decisions are not subject to ITPR". Despite the awkward grammar, the parties agree that this provision means that ITPR reviewers are only permitted to review staffing decisions related to the appointment stage.

B. *The Job Posting and the Applicants' Request for IF*

[13] The Applicants responded to a NOJO for a SP 06, Income Tax Auditor Non-Resident Workload Assessment Officer, with a closing date of October 25, 2016.

[14] The NOJO sets out, among other things, the duties of the job, who can apply, and the staffing requirements (which include essential assessments and discretionary assessments). In the section, "Staffing requirements to be assessed/ applied", the NOJO sets out "Essential assessment(s)". It states that "the following staffing requirements will be assessed using locally developed assessment tools, Candidates must receive a minimum pass mark on each staffing requirement assessed", and then identifies "dependability" as the only essential assessment, with a minimum pass mark of 60, to be assessed using a locally developed tool. The section concludes with the statement, "[r]esults from the assessment of staffing requirements may be used at the appointment stage to select candidate(s) for appointment".

[15] At the assessment stage, the candidates were assessed against five criteria. The first four criteria focused on the candidate's experience with certain types of audits. These were evaluated on a "meets/not meets" basis. The fifth criterion was a structured reference check, also referred to as a locally developed tool. The reference check asked the referee to check the appropriate descriptor – Always, Almost always, Frequently, Rarely or Never – for five dependability related indicators, for example, "employee manages competing workloads and changing priorities".

[16] The Applicants were assessed and placed in the pool of qualified candidates. Both applicants requested IF at the completion of the assessment stage. They received IF on December 1, 2016.

[17] The IF form for both Applicants indicates that the manager advised them how they were assessed for the purpose of their inclusion in the pool (i.e. the assessment stage). Both Applicants were also provided with a copy of their reference checks, which were prepared by Mr. Bondy. The questions on the reference check were discussed and the Applicants had no further questions. The manager found that there was no arbitrary treatment.

[18] Although a score was assigned to the reference check, there is no evidence on the record about how that score was arrived at, and the Court's questions about this process went unanswered. In the Applicants' case, (and for everyone else, as later revealed) the referee for their reference check was the Chair of the Selection Board, who also happened to be the Applicants' recent supervisor, Mr. Bondy.

[19] The Applicants did not pursue DR at the assessment stage.

[20] At the placement stage, three candidates were chosen from the qualified pool. Neither of the Applicants was successful. Of the criteria applied, only the reference check differentiated the qualified candidates, as it was the only criterion for which a score was applied. The Applicants were not appointed to the position because their scores on the structured reference check were lower than those of the successful candidates.

C. *The Placement Stage; the Applicant's Request for IF and ITPR*

[21] The Applicants requested IF at the placement stage. The Manager responsible for the placement decision found that there had been no arbitrary treatment. The Applicants then requested ITPR. The Applicants' allegations focussed on the fact that their referee, Mr. Bondy, was also the Chair of the Selection Board, which they argued was contrary to CRA policy. The Applicants also alleged that the overall procedure used for the structured reference check was not fair or transparent.

[22] As noted by the ITPR Reviewer, the Applicants alleged that:

- It is contrary to policy for the Board Chair to complete and grade references as part of a structured reference check. A different referee should have been used. Moreover, the reference provided by the Board Chair was just his opinion and was not based on facts or relevant information.
- The candidates were never asked to supply names of other references, which was contrary to policy.
- The Applicants were not made aware of any negative elements of their work, contrary to CRA policy, which requires that if referees address "negative elements", the employee must have been previously made aware of the negative elements (e.g. in the course of performance appraisal).
- The Selection Board could not explain how they arrived at the marks given in the reference check.
- The staffing process was conducted with bias, or a reasonable apprehension of bias.

[23] Before addressing the allegations, the Respondent made submissions contesting the jurisdiction of the Reviewer to conduct the ITPR based on paragraph 5.11.33 of the Procedures for Recourse.

[24] The parties agreed that the Third Party Reviewer should first determine whether she had jurisdiction to conduct the review before addressing the merits of the allegations. The Reviewer concluded that she had no jurisdiction and dismissed the Applicants request.

II. The Decision of the ITPR under Review

[25] The Reviewer set out the submissions of the Applicants and Respondent in detail, which appear to raise the same arguments that were made to the Court on this Application for Judicial Review.

[26] As noted, the Respondent argued that the Reviewer had no jurisdiction, pointing to paragraph5.11.33 of the Procedures for Recourse, which provides that ITPR assesses only staffing decisions related to placement decisions and not prerequisite or assessment decisions. The Respondent argued that the Applicants' allegations were exclusively about the assessment stage.

[27] The Respondent also argued that the Applicants should have known that the results from the structured reference check at the assessment stage could be used at the appointment stage, given that this was stated in the NOJO. Therefore, the Applicants should have exercised their

recourse rights at the assessment stage by requesting Decision Review at that stage, rather than waiting until the placement stage to raise their concerns about the reference check.

[28] The Applicants argued that they did not know and were not made aware that the reference check score would be used for anything other than qualifying the candidates at the assessment stage.

[29] The Applicants relied on *Sargeant v Canada (Attorney General)*, 2002 FCT 1043, 225 FTR 184 (TD) [*Sargeant*], which found that a Third Party Reviewer had erred in declining jurisdiction for ITPR where a link existed between the assessment stage and the placement stage. The Applicants argued that, in their case, the use of the reference check scores for the placement decisions created a link between the assessment stage and the placement stage, which gave jurisdiction to the Reviewer.

[30] The Reviewer noted that the CRA had revised its policy after the decision in *Sargeant* to incorporate the Court's decision into paragraph 7.3.37 of the *Directives for Independent Third Party Review for Staffing Situations* [the Directives] which states:

> The reviewer examines the events and decisions related to the placement stage only, and not to those related to the assessment or prerequisite stages, **unless there is a link between the placement criteria and the assessment or prerequisite stages"**
>
> [Emphasis in the Reviewer's decision]

[31] I note that this provision is no longer included in the Directives. The Respondent advised the Court that paragraph 7.3.37 was "incorporated" into paragraph 5.11.33 of the Procedures for Recourse, which is now the governing provision. There is no evidence on the record to explain when paragraph 7.3.37 of the Directives was amended and incorporated into the Procedures. Paragraph 5.11.33 of the Procedures has been in effect since at least December 2015.

[32] The Reviewer found that the facts differed from those in *Sargeant*. She noted that in *Sargeant*, the applicant had no indication that the results from the assessment stage could impact the placement stage and, as a result, there was no reason for the applicant to seek recourse at that stage. The Reviewer noted that in the present case the NOJO indicated that results from the assessment stage "may" be used at the placement stage. In addition, the criteria at the assessment stage were all assessed on a "meets/not meets" basis *except* for the reference check. The Reviewer found that the Applicants "ought to have known the [reference check] was possibly, or even likely, to be used for placement".

[33] The Reviewer further distinguished *Sargeant* by noting that, at that time, there had been institutional impediments to obtaining evidence of arbitrary treatment at the assessment stage. The CRA later updated its policy to allow for the exchange of information at or during the assessment stage. The Reviewer, therefore, found that the Applicants could have had all the information they needed to challenge the procedure used in the reference check at the assessment stage. She noted that, if the Applicants had sought DR at the assessment stage, they "arguably would have been entitled to see the other candidates' assessments, to satisfy themselves the assessments had been fairly and consistently conducted". Similarly, she found that the

information relied on by the Applicants to base their allegations of bias would have been discoverable as part of DR at the assessment stage, had they pursued it.

[34] The Reviewer found that the Applicants did not face institutional impediments that would have prevented them from raising all of their challenges following the assessment stage. If they had pursued their full recourse rights at that time, their issues would have been resolved before the placement stage. Alternatively, the CRA would have at least been aware that there were possible challenges to proceeding with an appointment on the basis of the reference check. The Reviewer found that these circumstances were not analogous to *Sargeant*.

[35] The Reviewer again cited paragraph 7.3.37 of the Directives, which allowed reviewers to consider events at the assessment stage if there is a link between the placement criteria and the assessment stage. The Reviewer stated, “in my view, paragraph 7.3.37 ought to be interpreted in the context of the staffing process as a whole”. She cited one of her previous ITPR decisions where she had explained the rationale for pursuing recourse at each stage, noting that ITPR processes are resource intensive and often lengthy, therefore any challenges should be raised as early as possible.

[36] The Reviewer noted that at the assessment stage the recourse is IF and DR. She added that it is up to the candidates to determine how far to pursue their recourse at any stage and that candidates cannot abandon their challenge at an earlier stage with the hopes of reviving it later. She found that, even in cases where a link could be found between the two stages, pursuing

concerns about the assessment process via IF and DR at the assessment stage were "conditions precedent" to raising those same concerns at ITPR after the placement decision is made.

[37] The Reviewer rationalized her finding by noting that in some cases there is a long period of time between the completion of the assessment stage and a placement decision, spanning months or even years. She considered that, in such cases, allowing challenges to the assessment stage well after a placement decision had been made, when all necessary information to make the challenge was available earlier, would be unfair to both the CRA and the successful candidates.

[38] The Reviewer concluded that the Applicants had abandoned their concerns about the reference check by not pursuing DR at the assessment stage. She found that the Applicants could not revive these concerns after the placement stage. She clarified that her determination was based on the particular facts, noting that in future cases, a key factor will be "when the matter complained of was reasonably 'discoverable'".

III. The Applicants' Submissions

[39] The Applicants argue that the Reviewer misconstrued paragraph 7.3.37 of the *Directives* and misinterpreted and misapplied the *Sargeant* decision.

[40] In response to the Respondent's acknowledgment that paragraph 7.3.37 was not operative at the time of the Reviewer's decision and that it was amended and subsumed into a different provision of the Procedures for Recourse (paragraph 5.11.33), the Applicants note that they were

unaware of this change. The Applicants submit that the Reviewer's erroneous reliance on paragraph 7.3.37 further supports their position that the Reviewer erred and that her decision is not intelligible.

[41] The Applicants agree that all of their allegations relate to the assessment stage. However, the Applicants argue that they had no knowledge that the reference check would be used for anything other than the assessment stage, yet the placement decisions were made on the sole basis of results from the assessment stage – i.e., the structured reference check.

[42] The Applicants submit that the facts establish a clear link between the assessment criteria and the placement criteria. Although the Applicants had received their own reference checks from IF at the assessment stage, and although the NOJO stated that the results from the assessment *may* be used at the appointment stage, they submit that they did not know "for sure" that these results would be used. The Applicants point to the Reviewer's acknowledgment that the CRA is not obliged to advise candidates of the criteria it will use to place candidates from a pool, because their staffing needs are "evergreen". The Applicants argue that this is inconsistent with the Respondent's position that candidates were aware of the criteria that *may* be used for placement.

[43] The Applicants submit that the Reviewer acknowledged that, in some cases, there may be a link between the assessment stage and the placement stage which would give the Reviewer jurisdiction. The Applicants submit that the decision at the placement stage was clearly related to

the assessment stage – thereby creating the link – yet the Applicants are left without recourse due to the Reviewer's error.

[44] The Applicants further argue that the Reviewer erred in finding that all of their allegations could have been discoverable at the assessment stage if they had pursued DR following IF, particularly with respect to their allegations of bias. They maintain that at the IF stage, they received only the results of their *own reference checks* and were advised they had qualified for the pool. The Applicants assert that they only discovered evidence of bias after they had requested ITPR and had received the reference checks of other candidates which revealed that the same referee, who was also the Selection Board Chair, conducted all the reference checks. The Applicants submit that the reference checks of the successful candidates led them to believe that the standards had not been applied consistently. The Applicants explain that after receipt of this information, they amended the allegations in their request for ITPR. According to the Applicants, they could not have discovered this information at the assessment stage. They also note that the results of the IF were that there was no arbitrary treatment at the assessment stage.

[45] The Applicants reiterate the allegations made at the ITPR. Among other allegations, the Applicants submit that a reference check conducted by the Board Chair is a violation of the Staffing Policy. The Policy provides guidance about who is an appropriate referee and notes that if a referee is part of the Selection Board there could be a perception of bias.

[46] The Applicants submit that if the reference check is done in an arbitrary manner, the placement decision could similarly be arbitrary.

[47] The Applicants also argue that the Reviewer erred in importing a requirement of "reasonable discoverability" of the allegations of bias to prevent her from assuming jurisdiction.

IV. The Respondent's Submissions

[48] The Respondent relies on paragraph 5.11.33 of the Procedures, which restricts the Reviewer's jurisdiction to staffing decisions related to the placement stage.

[49] The Respondent submits that there is no link between the placement stage and the assessment stage. All of the Applicants' allegations relate to how the assessment was conducted and are directed against the Selection Board, which conducted the assessment, not the manager who made the placement decision. The Respondent adds that the Applicants do not allege that the manager who made the placement decision acted arbitrarily by using the reference check scores.

[50] The Respondent submits that the Reviewer reasonably distinguished *Sargeant*. Unlike *Sargeant*, the Applicants should have known that the score of the reference check could be used at the appointment stage, because the NOJO indicated that it was a possibility. In addition, unlike *Sargeant*, there were no institutional impediments to obtaining necessary information at the assessment stage. The Respondent notes that the CRA changed its policy after the *Sargeant* decision to provide for the release of information at earlier stages. The Respondent also explains

that after *Sargeant*, paragraph 7.3.37 of the Directives was amended to make an exception where a link existed. However, that provision was subsequently revised and is now incorporated in paragraph 5.11.33 of the Procedures, but with no explicit exception where there is a link. The Respondent explains that this change was made as a result of changes to the policy, which now permits additional information to be provided at DR at the assessment stage. The Respondent could not advise the Court when this change occurred or point to anything in the Record to explain the change.

[51] The Respondent submits that the Reviewer's incorrect reference to paragraph 7.3.37 is not a concern. The Respondent's position is that the Reviewer cited paragraph 7.3.37 because she had referred to earlier ITPR decisions which were based on that provision, i.e., it was for context.

[52] The Respondent notes that the Applicants were provided with their individual reference checks after requesting IF at the assessment stage. This revealed that their referee was also the Chair of the Selection Board. The Respondent submits that if the Applicants had gone on to seek DR at the assessment stage, they could have obtained the other candidates' reference checks pursuant to paragraph 5.6.6 of the Procedures for Recourse, (without the identifying information) and would have known that all candidates had the same referee.

[53] The Respondent also suggests that the Applicants would have had no reason to request IF at the assessment stage if they did not think that the reference check would be used at the later stages.

[54] The Respondent submits that the Applicants are disingenuous in their submissions regarding their allegations of bias. The Respondent points out that the Applicants made allegations of bias even before the exchange of information at the early stage of ITPR, noting that their initial ITPR request alleged bias because their referee was the Chair of the Selection Board. The Respondent also points out that in the Applicants' amended claims of bias, they never alleged that the standards were applied inconsistently among the candidates. Therefore, the Applicants' claim that they could not have received the other candidates' reference scores until ITPR is irrelevant. The Respondent adds that the Applicants' allegations of bias were the same following the exchange of documents.

[55] The Respondent submits that the Third Party Reviewer reasonably found that all of the allegations made at ITPR, including bias, could have been discoverable at DR at the Assessment stage.

[56] In addition, the Third Party Reviewer reasonably concluded that the Applicants could not abandon their claims at the assessment stage and revive them later. The Respondent submits that a party should not hold an argument about the process in reserve, to be wielded in case the outcome is not to their liking (citing *Eckervogt v British Columbia*, 2004 BCCA 398, 241 DLR (4^{th}) 685).

V. The Issues

[57] The issue in this Application for Judicial Review is whether the Reviewer's finding that she did not have jurisdiction to conduct the ITPR is reasonable.

[58] This entails consideration of whether the Reviewer erred in making several related findings which led her to her conclusion, including whether the Reviewer erred: in interpreting the Procedures for Recourse, including by relying on a provision that was no longer in force; in finding that the circumstances were not analogous to those in *Sargeant*; in finding that the Applicants should have known that the assessment criteria could be used at the placement stage; in finding that pursuing concerns at IF and DR at the assessment stage are "conditions precedent" to raising concerns at ITPR at the placement stage; in finding that the allegations of bias were discoverable; and, in finding that the Applicants had abandoned their concerns by not pursuing DR at the assessment stage and could not revive the concerns at ITPR at the placement stage.

VI. The Standard of Review

[59] The Applicants submit that this application raises questions of law and jurisdiction, and therefore should be reviewed on the correctness standard. The Applicants note that this Court has already determined that a Third Party Reviewer's decisions about their jurisdiction are to be reviewed on the correctness standard (relying on *Sargeant* at para 29; *Canada (Attorney General) v Gagnon*, 2006 FC 216, [2006] FCJ No 270 [*Gagnon*]; *Buttar v Canada (Attorney General)*, (2000) 186 DLR (4th) 101, [2000] FCJ No 437 (CA)). The Applicants add that, if the Court finds that the standard is reasonableness, the decision of the Third Party Reviewer is not reasonable.

[60] The cases relied on by the Applicants were determined before *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] and subsequent jurisprudence which

have explored the standard of review and have emphasized that true questions of jurisdiction are rare (see *Quebec (Attorney General) v Guérin*, 2017 SCC 42 at paras 32-33, 412 DLR (4th) 103).

[61] As the Respondent notes, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 SCR 654, the Court held that where the decision-maker is interpreting or applying its home statute, reasonableness is the presumed standard.

[62] I agree with the Respondent that the applicable standard of review is reasonableness. Although the Third Party Reviewer is not interpreting a "home statute", she is interpreting the Procedures developed pursuant to section 54 of the *CRA Act*. The CRA's staffing procedures have been described as "quasi-legislation limited only by the context and meaning of the [*CRA Act*]" (Gagnon at para 18). Moreover, the issues at stake are not true questions of jurisdiction and are not central questions of importance to the legal system.

[63] In *Canada (Attorney General) v Lussier*, 2017 FC 528, [2017] FCJ No 554, the Court conducted a standard of review analysis and found that the standard applicable to the issue of the jurisdiction of the Third Party Reviewer is reasonableness.

[64] To determine whether a decision is reasonable, the Court looks for "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible

in respect of the facts and law" (*Dunsmuir* at para 47). Deference is owed to the decision-maker and the Court will not re-weigh the evidence.

VII. Is the Decision – That the Third Party Reviewer Did Not Have Jurisdiction – Reasonable?

[65] The role of the Court on this Application for Judicial Review is not to determine if the Procedures for Recourse are effective, efficient or fair. Rather, it is to determine whether the decision of the Third Party Reviewer, who interpreted and applied the Procedures to the circumstances before her to find that she did not have jurisdiction, is reasonable. As noted above, a reasonable decision is one that falls within a range of acceptable outcomes which are defensible on the facts and the law.

[66] In the present case, there is a dispute about the facts, including what the parties knew or should have known, and when certain provisions were amended. The record does not assist in clarifying some of these facts. For example, there is no evidence regarding paragraph 7.3.37 of the Directives and its amendment and incorporation into paragraph 5.11.33 of the Procedures. There is no evidence about how the structured reference check, which consisted of a series of boxes to be checked off, turned into a score. Nor is there any explanation about why the Selection Board Chair was the referee for every candidate. However, the gaps in the record do not thwart the Court's ability to determine whether the decision to decline jurisdiction is reasonable.

[67] Although the Reviewer made several findings, some of which are questionable, the Reviewer's overall finding is reasonable.

A. *Is the Reviewer's error in relying on a provision that is no longer in force a material error affecting the overall decision?*

[68] The Third Party Reviewer mistakenly referred to an outdated provision in her analysis of whether she had jurisdiction to conduct the review. Paragraph 7.3.37 of the Directives has not been in force since, at least, 2015. The Reviewer erred in referring to it and interpreting it, particularly since she had been directed to the applicable provision, and also referred to it in her summary of the CRA's position.

[69] I do not agree with the Respondent's suggestion that the Third Party Reviewer's reference to paragraph 7.3.37 was only for context, as part of her review of previous ITPR decisions which were based on this provision. The wording of the decision conveys that the Third Party Reviewer was clearly of the view that paragraph 7.3.37 still applied, given her use of the present tense at paragraph 100 of her decision, ". . .paragraph 7.3.37 ought to be interpreted in the context of the staffing provision as a whole", and given the preceding and subsequent paragraphs of her decision.

[70] However, this error is not material to the overall decision. The former paragraph 7.3.37 and the current paragraph 5.11.33 are similar. As noted above, paragraph 7.3.37 of the Directives, states:

> The Reviewer examines the events and decisions related to the placement stage only, and not to those related to the assessment or

> prerequisite stages, unless there is a link between the placement criteria and the assessment or prerequisite stages.
>
> [Emphasis added]

The current provision, paragraph 5.11.33 of the Procedures for Recourse, states:

> The ITPR reviewer must…examine only staffing decisions related to appointment, prerequisite and assessment stages are not subject to ITPR.

[71] As noted above, despite the poor grammar, Paragraph 5.11.33 conveys that ITPR Reviewers can only review staffing decisions arising at the placement stage, and cannot review staffing decisions from the assessment stage.

[72] The difference between the two provisions is that paragraph 7.3.37 included the exception, "unless there is a link…". According to the Reviewer, these additional words were added to reflect the decision in *Sargeant*, which found that certain aspects of the assessment stage may be relevant where there is a link between the assessment and placement stage. *Sargeant* was decided at a time when the relevant provision in the Procedures was virtually identical to the current paragraph 5.11.33 (i.e. the provision did not include the words "unless there is a link…").

[73] The issue before the Reviewer was whether she had jurisdiction for ITPR in the present circumstances, despite that the Applicants' allegations were about the assessment stage. She analyzed this issue by considering whether there was a link as it had been defined in *Sargeant*, and generally whether the case before her was analogous to *Sargeant*. She also considered whether the Applicants should be considered to have abandoned their claims by not pursuing DR

at the assessment stage. The Reviewer's analysis did not turn on the specific wording of paragraph 7.3.37. In my view, the analysis would not have been significantly different if the Reviewer had cited the correct provision.

B. *Are the other related findings reasonable?*

[74] Paragraph 5.11.33 of the Procedures makes it clear that the Third Party Reviewer only has jurisdiction related to staffing decisions at the placement stage. The Applicants acknowledged that their allegations were not about staffing decisions at the placement stage. Relying on *Sargeant*, they argued that the Reviewer had jurisdiction because the results from the assessment stage were used to make the placement decisions, which created a link between the two stages.

[75] The Reviewer did not explicitly determine whether there was such a link. The Reviewer found that she had no jurisdiction for two related reasons: the facts were not analogous to *Sargeant*, because the Applicants could have obtained meaningful recourse earlier at DR at the assessment stage; and, even if there were a link between assessment and placement, the Applicants abandoned their claims at the assessment stage by not pursuing DR, where they could have raised all their allegations. The Reviewer's interpretation of her jurisdiction, which was based on the overall context of the CRA staffing process, and the recourse options set out in the Procedures, is reasonable.

[76] The Reviewer reasonably found that the Applicant's circumstances were not analogous to *Sargeant*. In *Sargeant*, candidates were selected at the placement stage based on their

performance at the assessment stage. An unsuccessful candidate initiated ITPR and made a request for the disclosure of the assessment scores of each of the successful candidates. The Third Party Reviewer refused the request, finding that she was limited to reviewing events and decisions related to the placement stage and, therefore, that the scores from the assessment stage were not relevant. The Court found that the Reviewer erred in finding there was no jurisdiction. The Court found that the selection at the placement stage was based on the candidates' marks at the assessment stage and, as a result, there was a "linkage between the two stages" (at para 33). The Court acknowledged that the Third Party Reviewer did not have jurisdiction to provide recourse at the assessment stage or to review the decision made at the assessment stage, but found that, on the facts, the results from the assessment stage were required to provide "meaningful recourse at the placement level" (para 34). The Court found that the respondent's argument that the applicant could have sought recourse at the assessment stage was not persuasive because the applicant had no way of knowing that the results at the assessment stage would be used at the placement stage and no way of obtaining the other candidates' results during the assessment stage, given the CRA policies in place at the time (paras 41-44).

[77] In the present case, unlike *Sargeant*, the Applicants should have known that the scores at the Assessment stage could be used at the placement stage because the NOJO clearly said so and there were no other essential criteria set out which had a score that would differentiate between candidates. While they submit that they did not know this "for sure", they knew of the distinct possibility.

[78] Also, unlike *Sargeant*, the Applicants would have had an opportunity to obtain the other candidates results if they had pursued DR at the assessment stage. The Applicants requested and received IF at the assessment stage and received copies of their Structured Reference Checks, which revealed that the Chair of the Selection Board was also their referee. They did not pursue DR, despite that the dual role of the referee was arguably contrary to the Policy and may have met the definition of "arbitrary treatment" in the *Procedures*. However, when they subsequently alleged arbitrary treatment at the placement stage, all of their allegations stemmed from the Structured Reference Checks and could, therefore, have been made earlier.

[79] I do not accept the Applicants' assertion that they could not have made their allegations of bias until the placement stage because it was only then that they discovered, via the exchange of information which took place as part of ITPR, how they were assessed in relation to other candidates. First, the Applicants clearly alleged bias as part of their initial ITPR request, *before* any exchange of information had taken place. Although the Applicants suggested in oral argument that the information they received through the exchange of information allowed them to update and "nuance" their bias allegations, their allegations were basically the same throughout. Accordingly, the Applicants assertion that they did not (and could not) raise an allegation of bias until after the exchange of information phase of the ITPR process is not accurate (although the Reviewer appears to have accepted this faulty assertion). Second, even the Applicants' updated allegations of bias – submitted after the exchange of information – do not assert that different standards were applied to the reference checks. The only reference to the information of other candidates obtained during the exchange of information process notes that the successful candidates received a higher score on the Structured Reference Check. The

Applicants have never alleged that the successful candidates' reference checks were carried out any differently.

[80] In addition, even if the Applicants had required the reference checks of the other candidates in order to raise their allegations of bias, the Applicants could have obtained these earlier. Paragraph 5.6.6 of the Procedures allows for the disclosure of other candidates' information, if that information was used to make a "staffing decision", which includes staffing decisions made at the assessment stage (see 4.2, which provides that the term "staffing decision" applies to decisions made throughout the staffing process). Although the Applicants dispute that this would have been provided, this is speculation on their part; the Procedures say otherwise.

[81] Accordingly, it was reasonable for the Reviewer to find that the Applicants' concerns were discoverable earlier and that all of their allegations could have been made at the assessment stage. I would go farther and suggest that, not only were the concerns discoverable, they were, to some extent, discovered. The Applicants clearly knew that their own referee was the Chair of the Selection Board, which was arguably contrary to policy – and they flagged this at IF at the assessment stage, but did not take further steps. Had the Applicants sought DR, they could have raised their allegations about the Structured Reference Check. If the Applicants' concerns remained unresolved, the Applicants could have sought judicial review of the DR decision, *before* the placement stage, as in *Ahmad v Canada Revenue Agency*, 2011 FC 954, 398 FTR 1 (albeit on different facts).

[82] As a result, this case is unlike *Sargeant*. While, there may be a link between the stages (although the Reviewer did not explicitly determine this), the Applicants were not denied an opportunity for meaningful recourse. They could have pursued DR at the assessment stage, but they chose not to. The Reviewer's finding that *Sargeant* did not apply in these circumstances – where there were "no institutional impediments to raising a challenge at an earlier stage" – is reasonable.

[83] The Reviewer also considered whether an applicant should be barred from raising challenges which could have been brought forward earlier, even if a link existed. Relying on her understanding of the scheme of the Procedures, she found that they could be barred. In her view, the Procedures require candidates to pursue recourse to the fullest extent possible at each stage. This too was reasonable.

[84] In reaching this conclusion, the Third Party Reviewer noted that pursuing IF and DR at the assessment stage was a "condition precedent" to pursuing ITPR at the placement stage, assuming that a link exists between the stages. While the use of the language "condition precedent" may appear to add a requirement to the Procedures for recourse at the placement stage, this description is reasonable in the context of the procedures as a whole.

[85] In my view, the Reviewer's reference to a "condition precedent" was simply meant to capture her overall interpretation of the Procedures and their purpose, i.e., to provide for recourse at each stage and to have issues resolved at the earliest stage possible. The Reviewer's comment regarding a condition precedent was related to her finding that it is up to the candidates to

determine how far to pursue their recourse at any stage and that candidates cannot abandon their challenge at an earlier stage with the hopes of reviving it later, whether or not there is a link between the two stages.

[86] The Reviewer is presumed to be knowledgeable about the Procedures for Recourse. She interpreted the relevant provisions "in the context of the staffing process as a whole" (at para 100). The Reviewer recognized that the CRA provides a recourse options at each stage of the staffing process. She also noted that, in order to maintain the integrity of the staffing process, the CRA has an interest in resolving potential disputes as soon as possible, preferably *before* a placement decision is made. She noted that the timeframe between assessment and placement may take "months or even years", (although in this case it did not), and that it would be unfair to both the CRA and the successful candidate to allow a candidate to challenge a placement decision made months earlier, on the basis of facts which could and should have come to light before a placement decision.

[87] Overall, the Reviewer's decision, although not a model of clarity, is intelligible. Given that the CRA offers recourse at each stage, and given the CRA's interest in maintaining the integrity and efficiency of the staffing process, which is the goal of the Procedures, candidates are reasonably expected to raise complaints when they arise. In the present case, it was reasonable for the Reviewer to find that the allegations related to the assessment stage and could have been fully pursued at that stage and, as a result, there was no jurisdiction for ITPR.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. The Applicants shall pay the Respondent's Costs of this Application. If the parties cannot agree on the amount of costs to be paid, the Court will determine the amount, based on the submissions of the parties, to be provided as follows:

3. The Respondent shall serve and file costs submissions not exceeding two pages within 10 days of issuance of this Judgment;

4. The Applicants shall serve and file responding submissions, not to exceed two pages, within 7 days of the receipt of the Respondent's submissions;

5. The Respondents shall file reply costs submissions, if any, not to exceed two pages, within 7 days of receipt of the Applicants' responding submissions; and,

6. The parties may modify the timetable set out above, on consent, and, if so, shall notify the Court of the revised timetable.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1024-17
STYLE OF CAUSE:	ANGIE QUI AND, OWEN MCDERMOTT-BERRYMAN v CANADA REVENUE AGENCY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 27, 2018
JUDGMENT AND REASONS:	KANE J.
DATED:	APRIL 12, 2018

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