

Date: 20060609

Docket: T-1320-05

Citation: 2006 FC 724

Ottawa, Ontario, June 9, 2006

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

**DENISE LAPOINTE, PIERRE TURMEL, SUZANNE LAJEUNESSE,
MARIE-HÉLÈNE GIROUX, MICHEL BEAUCHAMP,
ROLLAND LADOUCEUR, DIANNE TORDORF, IRÈNE DICAIRE,
PAUL KYBA, MARC ALAN TESSLER, LEEANN I. KING,
DAPHNE SHAW DYCK, OTTO NUPPONEN, CARMEN DECARLO,
ILZE DECARLO, FREDERICA DOUGLAS, MARILOU FUNSTON,
SILVANA GRATTON, OSKANA KOWALYK, AINA MARTENS,
ROBERT MURRANT, DENIS PAXTON, CATHIE SIMMIE,
WILLIAM WILLOUGHBY, KEN THOMPSON, LIZ LASOWSKI,
and ANGELA MAILHIOT**

Applicants

and

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA
as represented by TREASURY BOARD**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Deputy Head's Nominee, Immigration and Refugee Board, dated June 24, 2005 wherein the Applicants' classification grievance was rejected and a decision and recommendation of a Classification Grievance Committee following a hearing conducted on February 1, 2005 was followed.

[2] The Applicants are Adjudicators, now called Members, employed by the Immigration and Refugee Board. Commencing in 2002 the Applicants sought reclassification of their group and level with the civil service to that of PM-06. A first hearing was held in February 2003 which led to a recommendation that they be classified at the PM-05 level. Judicial review was sought and an Order of this Court dated February 18, 2004 was given whereby that decision was set aside and the matter was remitted to a Committee differently constituted. A second hearing was conducted and the new Committee in a decision signed June 2005, and agreed to by the Deputy Head's Nominee on 24 June, 2005, again recommended a classification at the PM-05 level. It is this decision that is to be reviewed here.

[3] The Applicants have restricted their submissions to one issue only, the recommendation of the Committee that of the level ascribed to the position occupied by the Applicants in respect of the "Impact" category. The Committee recommended Degree 3, the Applicants sought at Degree 4. Degree 4 would have ensured a classification of PM-06 for the Applicants. Both parties agree that the level of deference to be afforded to the recommendation of the Committee is patent unreasonableness, the highest level of deference. I find, for the Reasons that follow, that the reasons given by the Committee for their recommendation was patently unreasonable.

[4] The grievance procedure finds its origins in section 11.1(1)(b) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 wherein the Treasury Board can provide for the classification of positions and employees of the public service. In brief, a process has been established whereby an employee or group of employees can file a grievance seeking re-classification. A Committee is struck to hear

this grievance, the burden being on the employee(s) to establish that their present classification is erroneous (*Argyracoupoulou v. Canada (Treasury Board)* [2003] F.C.J. No. 1641 at para. 19). A hearing is conducted following which the Committee makes a determination as to the appropriate level, which determination is recommended to the Deputy Head's Nominee who either agrees with the recommendation whereupon it becomes final and binding or disagrees whereupon detailed reasons for that disagreement must be provided. Here the Deputy Head simply agreed with the recommendation without substantive comment.

[5] The Committee is provided with a Classification Standard for use in arriving at a recommendation. In the Introduction, that Standard states, *inter alia*:

This standard describes the plans to be used in classifying and evaluating positions in the Programme Administration Group.

Point rating is an analytical, quantitative method of determining the relative value of jobs. It is particularly suited to heterogeneous occupational groups in which jobs consist of varied combinations of tasks. Essentially, point-rating plans define characteristics or factors common to the jobs being evaluated. They define degrees of each factor and allocate point values to each degree. The total value determined for each job is the sum of the point values assigned under all the factors.

All methods of job evaluation require the exercise of judgment and the orderly collection and analysis of information in order that consistent judgments can be made. A point-rating method facilitates rational discussion and resolution of differences in determining the relative value of jobs.

[6] Four factors are set out which are said not to describe all aspects of jobs, but deal only with those characteristics that can be differed and distinguished and that are useful in determining the relative value of jobs. Those factors are: Knowledge; Decision Making; Operational Responsibility;

and Contacts. Within “*Decision Making*” are two categories, Scope and Impact. The parties are agreed as to the Committee’s assessment that level D for Scope is appropriate. As to Impact, the Applicants argue that Degree 4 is appropriate, not Degree 3 as assigned by the Committee.

[7] The Classification Standard provides several Bench-Mark Position Descriptions, that is, descriptions of existing positions to which a level has already been ascribed. The Standard says as to Bench-Marks:

Bench-mark position descriptions are used to exemplify the degrees of each factor or element. Each description consists of a job summary and specifications describing each of the factors and elements as it appears in the position. The Bench-mark positions have been evaluated, and the degree and point values assigned to each factor or element are shown in the specifications.

The rating scales identify the bench-mark position descriptions that exemplify each degree. These descriptions are an integral part of the point-rating scales and are used to ensure consistency in applying the scales.

[8] The Standard sets out a Classification Plan. Under Decision Making, it says as to “*Impact*”:

“Impact” measures the effect of decisions on program(s) or program delivery. It also measures the effect of decisions on the public, on industry or on other government or private agencies. The impact of decisions cannot extend beyond the area(s) of consideration, i.e., inadvertent impacts are not to be rated.

[9] The Degree to be assigned to differing degrees of Impact are set out:

Impact

- 1. Decisions affect own work, individual clients, single cases or otherwise have restricted application. Proposals or recommendations impact on the work of own section or unit, or have wider application, e.g., groups or classes.*

2. *Decisions impact on the work of the section or unit, or affect groups or classes of people or cases, or otherwise have wider application. Proposal or recommendations impact on established operating guidelines.*
3. *Decisions impact on operating guidelines, or have wide spread application, e.g. specified geographical areas or industrial sectors, or impact on significant departmental entities. Proposals or recommendations impact on program policy formulation, program design or operation.*
4. *Decisions impact on program or operational policy or design, or on major aspects of national programs, or on major departmental entities.*

[10] The use of the Plan including Bench-Marks is set out at page 2 of the Standard:

Use of the Position Classification Plan

1. *Allocation of the position to the category and the group is confirmed by reference to the definite and the description of inclusions and exclusions.*
2. *The position description is studied to ensure understanding of the position as a whole and of each factor. The relation of the position being related to positions above and below it in the organization is also studied.*
3. *Tentative degrees of each factor in the job being rated are determined by comparison with degree definition in the rating scales. Uniform application of degree definitions requires frequent reference to the description of factors and the notes to raters.*
4. *The description of the factor in each of the bench-mark positions exemplifying the degree tentative established is compared with the description of the factor in the position being rated. Comparisons are made also with descriptions of the factor in bench-mark positions exemplifying the degrees above and below the one tentatively established.*
5. *The point values for all factors are added to determine the tentative total point rating.*

6. *The position being rated is compared as a whole to position descriptions to which similar total point values have been assigned as a check on the validity of the total rating.*

[11] Thus the Committee is directed to examine the position in question, set tentative degrees with respect to each factor, and compare them with bench-mark positions as to each category. The categories are then assembled, a total of all values ascribed is made and again checked against the bench-marks.

[12] At issue here is what the Committee did with respect to Impact as set out in its Report. The Report begins by stating that the Committee looked at the four definition statements.

[13] The Committee then reviewed three positions, BM-4, BM-7 and BM-11 the first of which is found to be “*more demanding*” than those of the Applicants, a term not found in the Standard, the other two were said to have “*larger impact*” than those of the Applicants. The Committee then made this finding:

The Classification Grievance Committee Members recognize that the Adjudicator has a significant impact on the life, liberty and security of individuals; a major bearing on Canadian attitudes toward Immigration; impact on the Refugee Protection Division; in that findings of inadmissibility under terrorism, subversion, crimes against humanity, etc. allegations, result in ineligibility to pursue a refugee claim in Canada; impact on program or operational policy, on major aspects of national programs and on major departmental entities when the incumbent analyzes and comments on draft policies and procedures, and from the decisions that he/she makes throughout the hearings.

[14] The wording of this finding fits squarely within the language of Degree 4 for Impact, the highest level. The Committee thus had, first looked at the four categories, looked at three bench-

marks, and made a clear and unequivocal finding, the Applicants position fell within Degree 4 for Impact.

[15] Puzzlingly, and Respondent's counsel admits at least that the Committee was guilty of "poor draftsmanship" the Committee goes on to consider three other bench-marks, BM-27, BM-24 and BM-22 and another position, apparently not a bench-mark, but simply described as "Appeals Officer".

[16] The Committee concluded, without explaining why, having said that the Applicants' position falls within Degree 4, that their position simply should be afforded Degree 3:

The Classification Grievance Committee Members looked at the Classification Rationale for the Member of the Immigration Division (Ex B-4 p.000034-38) provided by the Grievers at the Impact element and disagree with the Grievers' evaluation at degree 4. The Classification Grievance Committee Members are of the opinion that the Adjudicator position is more comparable to Degree 3 as explained in the above comparisons of this report.

[17] There is no explanation given in the comparisons, nor is there any attempt to rationalize them with the finding respecting Degree 4 namely that the Applicants fit squarely within the definition.

[18] At the end of its decision on Impact the Committee provides a "throw away" paragraph as to Trade-Mark Opposition Board Members:

The Classification Grievance Committee Members have not been able to value the differences raised by the Grievers between the Adjudicator position and the Trademark Opposition Board Member as no classification rationale for this position has been provided.

[19] The Committee did not say what it meant by “*classification rationale*”. It is evident from the decision of this Court in *Hertzig v. Canada (Industry Canada)*, Feb. 7, 2001, 2001 F.C.T. 39 that the Trade-Mark Opposition Board Members are classified as PM-06 and were seeking re-classification as LA-02. As to “*Impact*” the Committee could readily consider how decisions respecting registrability of trade-marks on the one hand and admission into or rejection from Canada of persons on the other, would compare. Little, if anything, would be required for that purpose.

[20] A review of the Committee reasons as to Impact inevitably lead to a conclusion that the determination as to Degree 3 was patently unreasonable having regard to the clear finding that all criteria for Degree 4 were met. No explanation was given for departing from that finding. Further, the rejection out of hand of comparison with Trade-Mark Opposition Board Members for the purpose of assessing Impact, without proper consideration of even that which was patently obvious, was patently unreasonable.

[21] As a result, the decision and recommendation must be set aside. The Applicants, at the hearing, asked that the matter be remitted to the Nominee, not the Committee with a direction that Impact be set at Degree 4. This relief is not that which was requested in the Notice of Application. There was no agreement by the Respondent to accept an amendment at this late date.

[22] Therefore, the decision of the Nominee is set aside, the matter is sent back to a Committee to be differently constituted. The new Committee is directed, as provided by section 18.1(3) of the

Federal Courts Act to implement the finding by the present Committee, that the criteria established at Degree 4 respecting Impact have been met by the Applicants. Costs will be to the Applicants to be assessed at the middle of Column III.

JUDGMENT

UPON APPLICATION made to this Court on Wednesday the 7th day of June, 2006 for judicial review of a decision of the Deputy Head's Nominee, Immigration and Refugee Board, dated June 4, 2005, rejecting the Applicants' grievance as to re-classification;

AND UPON reviewing the Records filed herein and hearing oral submissions of counsel for the parties;

AND FOR the Reasons provided herewith;

THIS COURT ADJUDGES that:

1. The Application is allowed;
2. The decision of the Deputy Head's Nominee dated June 24, 2005 is set aside and the matter sent back for re-determination by a Committee, differently constituted, with a direction that such Committee have regard to these Reasons and the factual finding of the previous Committee that the Applicants' position falls within the description afforded to Degree 4 of the Classification Standards for Impact; and
3. Costs are awarded to the Applicants to be assessed at the middle of Column III.

"Roger T. Hughes"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1320-05

STYLE OF CAUSE: Denise Lapointe and others v. Her Majesty the Queen
and others

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: June 7, 2006

**REASONS FOR JUDGMENT
AND JUDGMENT:** HUGHES J.

DATED: June 9, 2006

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