Federal Court  Cour fédérale

Date: 20211126

Docket: T-1065-20

Citation: 2021 FC 1288

Ottawa, Ontario, November 26, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DANIEL DE SANTIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Mr. De Santis [Applicant] has brought an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 of an August 12, 2020 third level grievance decision [Decision] of the Administrative Tribunal Support Service of Canada [ATSSC]. The Director General of Corporate Services and Chief Financial Services Officer [Director General] denied the Applicant's grievance that his employer failed to comply with its

obligation to provide employees with a complete and current statement of the employee's duties and responsibilities. The Applicant submits that his job description required him to provide conciliation services, which he has never provided.

[2] The Applicant requests that the Decision be set aside and that this matter be remitted to the ATSSC for re-determination.

[3] The application for judicial review is dismissed. The matter is moot because on September 15, 2020, the ATSSC provided the Applicant with an updated work description retroactive to July 29, 2019. The Applicant did not grieve his new, updated work description.

II. Background

[4] The Applicant is an Industrial Relations Officer [IR Officer] at ATSSC within the Programme Administration Mediation Conciliation [PM-MCO] sub-group. IR Officers may investigate cases that come before the Canada Industrial Relations Board [CIRB] and may assist parties before the CIRB with the resolution of disputes. The Applicant states that he supports the work of the CIRB.

[5] There are three salary sectors (or levels) within the PM-MCO subgroup. The levels are competency based and each level is distinguished by the increasing complexity of the work and the required skills and knowledge of the IR Officer. The Applicant falls into Level 2 of the subgroup, expressed as PM-MCO-02.

[6] On October 11, 2019, the Applicant sent a letter to his supervisor asking for a copy of his work description as required by Article 55.01 of the Program and Administrative Services Collective Agreement [Collective Agreement] which states:

> Upon written request, an employee shall be provided with a complete and current statement of the duties and responsibilities of his or her position, including the classification level and, where applicable, the point rating allotted by factor to his or her position, and an organization chart depicting the position's place in the organization.

[7] According to the Applicant's grievance, received on October 23, 2019, his supervisor responded to the request on October 16, 2019. His supervisor provided a 2009 work description that applied to all IR Officers, regardless of classification level. Since 2009, the CIRB's mandate had expanded and so too did the duties assigned to IR Officers.

[8] Since the duties of an IR Officer have evolved since 2009, the Applicant grieved his employer's failure to provide him with a complete and current statement of his duties and responsibilities, in violation of Article 55.01 of the Collective Agreement. Specifically, IR Officers engage in new mandates under Part III of the *Canada Labour Code*, RSC 1985, c L-2 [*CLC*]; the *Wage Earner Protection Program Act*, SC 2005, c 47, s 1; and, the *Status of the Artist Act*, SC 1992, c 33. The Applicant submitted that neither the CIRB nor the IR Officers provide conciliation services as contemplated by the *CLC*. He states that he has never provided conciliation services nor has he ever been appointed as a conciliation officer.

[9] The Applicant received a second level grievance decision on November 22, 2019. Mr. Tardif, Executive Director and General Counsel to the CIRB Secretariat, rejected the grievance

because it was (1) frivolous and (2) reflected a misunderstanding of the Applicant's job. First, it was frivolous because as an IR Officer, the Applicant was required to have "knowledge of relevant provisions and application of Acts and regulations made by Parliament … such as the [*CLC*]". Second, the Applicant misunderstood his role because IR Officers may be required to perform conciliation services.

[10] The Applicant submitted his grievance to the third and final level of the grievance procedure. On August 12, 2020, the Director General denied the grievance.

[11] There was a development after the Decision. The Respondent advises that on September 15, 2020, management provided the Applicant with an updated work description retroactive to July 29, 2019 that contained changes. For example, there are changes to an IR Officer's duties following the amendments made to the *CLC* in 2019. The updated work description is not in the record.

III. The Decision

[12] In the Decision, the Director General made two general points: a work description should not be exhaustive and the federal public service is moving towards the use of standardized work descriptions. As a result, a work description may exclude duties that a position performs or include duties that a position does not perform.

[13] The Director General found that the nature of work performed and the skills required by each of the three PM-MCO levels were similar. Therefore, the distinctions between the three levels did not necessitate separate work descriptions.

[14] However, the Director General agreed that the work description provided to the Applicant was "dated and should be reviewed." That said, he did not agree with the Applicant's proposed changes (*i.e.*, that the work description should reference the mandates under the *Wage Earner Protection Program Act* or the *Status of the Artist Act*). The Director General concluded that such changes were not significant. Further, the work description provided to the Applicant was seven pages. That is, it was longer than the Treasury Board Directive on Classification's [the Directive] recommendation of three pages. In the Director General's opinion, it was unnecessary to add the Applicant's proposed changes.

[15] Regarding conciliation services, the Director General concluded that the work description did not limit conciliation to its meaning within the *CLC*. Rather, conciliation as found in the work description referred to broader services, like "informal, confidential processes for resolving disputes." Moreover, PM-MCO-03s usually perform conciliation services.

[16] In summary, the Director General concluded that the duties found in the work description were accurate and did not require changes. However, he recognized that it had been 10 years since the work description was reviewed and that the CIRB was in the process of reviewing it.

IV. Issues and Standard of Review

[17] The issues for determination include:

1. Is the application for judicial review moot?

2. If not, is the Decision reasonable?

[18] A standard of review is only relevant to the second issue. At paragraph 16 of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada articulates a presumption of reasonableness on judicial review. The presumption may be rebutted in two scenarios. The first is where the legislature signals it intends to prescribe a different standard. The second is where the case gives rise to "certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies" (*Vavilov* at para 17). Neither scenario arises here. The parties agree that the standard of review for the second issue is reasonableness.

[19] Under the reasonableness standard "the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99).

[20] I agree with the Respondent that reasonableness is a single standard (*Vavilov* at para 89). There is no basis for giving less deference to the decision maker in this matter.

V. Parties' Positions

A. *Is the Application for judicial review moot?*

(1) Applicant's Position

[21] The Applicant submits that case law does not support the conclusion that this application is moot. Specifically, he refers to *Currie et al v Canada Revenue Agency*, 2008 PSLRB 69 [*Currie*], where a mootness argument was rejected.

(2) Respondent's Position

[22] The Respondent submits that this application for judicial review is moot because it concerns a work description that is no longer in force. The Respondent submits that the Applicant previously acknowledged that this application for judicial review is now purely academic. Further, this Court should not exercise its discretion to hear this case because an order from this Court would be inconsequential for the Applicant. The Applicant can grieve the new work description in a separate proceeding if he is unsatisfied with it. The new work description is not even in the record before this Court. Moreover, this is not an issue of public importance.

B. *Is the Decision reasonable?*

(1) Applicant's Position

[23] The Applicant makes three arguments. First, he submits that it was unreasonable for the Director General to conclude that his work description could apply to all three levels of the PM-

MCO subgroup. Second, it was unreasonable to conclude that the work description did not require updates to reflect changes made to the work of IR Officers. Finally, it was unreasonable to conclude that the work description was accurate when it included tasks that the Applicant never performed, such as conciliation.

(2) Respondent's Position

[24] The Respondent submits that the underlying decision is reasonable. First, it is not unreasonable for all IR Officers to receive the same work description. More importantly, the Applicant did not argue that the Decision was unreasonable at the third level of the grievance. Second, the changes to the work description that the Applicant proposed were not significant in the sense contemplated by the Directive. Finally, the Director General concluded that conciliation in the work description does not have the same meaning as conciliation within the *CLC*; the work description relies on a broader definition. This is consistent with the Applicant's submissions on his grievance. It was not unreasonable for the Director General to rely upon the employer's decision to use a broader meaning of conciliation. Although the Applicant may dispute the use of the word conciliation, his preference is not a basis for finding that the Decision was unreasonable.

VI. Analysis

[25] The determinative issue in this case is mootness. The Respondent has accurately identified the two-step inquiry for determining whether a dispute is moot. First, the Court must determine whether the dispute has disappeared and the issues have become academic. If so, the

Court must determine whether to use its discretion to hear the case anyway (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 353 [*Borowski*]). In *Borowski* the Supreme Court of Canada set out the doctrine of mootness at 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.
>
> [Emphasis added.]

[26] Relying on *Currie*, the Applicant disputes that this judicial review is purely academic. *Currie* was the redetermination of a grievance that the Federal Court of Appeal had ordered. Counsel for the employer argued that the grievances were moot because the grievors originally grieved a work description that had since been revised (at para 6). Much like this case, the revised work description was not the subject of a grievance. Among other things, counsel for the grievors argued that the employer's argument "would render the grievors' rights under their collective agreement meaningless" and it "would mean that in any job description grievance, the employer would be able to avoid adjudication simply by issuing a new job description" (at para 10). The adjudicator rejected the mootness objection because "the Federal Court of Appeal had instructed… to decide the issues in dispute in accordance with its reasons" (at para 161). The employer did not raise mootness at the first adjudication or before the Federal Court.

[27] *Currie* is therefore unlike the present matter because here, the Respondent explicitly raised mootness.

[28] The Court notes that the Applicant previously described this judicial review as "academic" when communicating with his employer *via* email. He did so when inquiring about when he would receive the updated work description that was under review. He also expressed concern that he did not want to be perceived as wasting the Court's time if he ultimately received the remedy he sought from his employer.

[29] I find that the matter is now purely academic because there is no longer a dispute between the parties regarding the work description underlying this application for judicial review. The Applicant received an updated work description – the remedy he sought. Remitting the grievance to the grievance procedure would not serve any purpose (*Amgen Canada Inc v Apotex Inc*, 2016 FCA 196 at para 12 [*Amgen*]). The underlying decision concerns an obsolete work description. It would be fruitless for a decision-maker to re-determine whether it is current or complete.

[30] *Borowski* established the principle that a Court may exercise its discretion to hear the case even if it is moot, and three considerations may guide that discretion (at 358-62). The Federal Court of Appeal summarized those three considerations in *Amgen* at paragraph 16:

> 1. *The absence of adversarial parties*. If there are no longer parties on opposing sides that are keen to advocate their positions, the Court will be less willing to hear the matter.
>
> 2. *Lack of practicality; wasteful use of resources*. If a proceeding will not have any practical effect upon the rights of the parties, it has lost its primary purpose. The parties and the Court should no longer devote scarce resources to it. Here, the concern is judicial economy. However, in

> exceptionally rare cases, the need to settle uncertain jurisprudence can assume such great practical importance that a court may nevertheless exercise its discretion to hear a moot appeal: *M. v. H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577 at paragraphs 43-44.
>
> 3. *The court exceeding its proper role*. In some cases, pronouncing law in a moot appeal in the absence of a real dispute is tantamount to making law in the abstract, a task reserved for the legislative branch of government not the judicial branch.

[31] The Applicant's reliance on *Currie* does not address the mootness issue. Moreover, the adversarial relationship has disappeared in the sense that the Applicant and his employer no longer have a dispute related to the Applicant's former work description. Regardless of whether it was a complete description or not, it is now obsolete.

[32] This case arises from a very narrow factual matrix. In my view, it is not an issue of public importance justifying deliberation by this Court (*Borowski* at 361).

[33] For all of the above reasons, the application for judicial review is dismissed due to mootness.

[34] However, I wish to add a few comments concerning the reasonableness of the Decision. In the Decision, the Director General agreed that the work description should be reviewed while also concluding that the work description was accurate and did not require any changes. This apparent inconsistency is not, in my view, a determinative error. It was one sentence in the Decision, and reasonableness review is not a line-by-line treasure hunt for errors (*Vavilov* at 102). The crux of his decision focused on why the Applicant's concerns did not give rise to a

breach of Article 55.01 of the Collective Agreement. The Director General did not err in that analysis.

[35] I also agree with the Respondent's submission that the Director General sufficiently addressed the issue of conciliation services within the Decision. While the Applicant may disagree with the Decision, the analysis is rational, transparent, and intelligible and, therefore, reasonable. Accordingly, in the event that the matter was not moot, I would nevertheless have determined that the Decision is reasonable.

[36] I also acknowledge the Applicant's frustration in that he was not advised that his work description was under review until the Decision. As indicated in the Answers to Written Examination of Jonathan Tremblay Meloche, CIRB management had indicated in October 2019 that they were planning on reviewing and updating the IR Officer job description before the Applicant filed his grievance. It appears from this evidence that there was some movement toward reviewing and updating the job description that perhaps should have been shared with the Applicant earlier.

VII. Conclusion

[37] The application for judicial review is dismissed because it is moot.

JUDGMENT in T-1065-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed for mootness.

2. There is no order for costs**.**

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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