Federal Court  Cour fédérale

Date: 20220114

Docket: T-326-21

Citation: 2022 FC 33

Ottawa, Ontario, January 14, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

JO-ANN MITCHELL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Corporal Jo-Ann Mitchell, seeks judicial review of a Level II Grievance Decision. The Applicant had applied for a promotional opportunity, however, she did not advance to the short-list because she did not rank within the top seven candidates.

[2] She filed a grievance contesting the inclusion of one the members of the short-list on the basis that his inclusion was not in accordance with RCMP policy. The matter turned on whether the disputed candidate was entitled to be included as a "regional candidate". The Applicant had argued that the disputed candidate was a "national candidate", and thus not eligible to be included in the seven top-ranked regional candidates. The Level II Grievance Decision upheld the prior grievance decision finding that the Applicant was not entitled to be included on the short-list for the promotional opportunity and that the inclusion of the disputed candidate was in accordance with RCMP policy.

II. Background

[3] The Applicant is a Corporal in the RCMP based in the "B" Division headquarters in St. John's, Newfoundland and Labrador. In 2015, she applied for a Sergeant-ranked position also located in St. John's.

[4] On December 29, 2015, the National Promotions Unit advised the Applicant that she did not qualify for the short-list, as she did not rank within the top seven candidates. She was the eighth ranked candidate.

[5] In February 2016, the Applicant learned that the successful candidate [Corporal X] had come from outside the Atlantic region. Prior to his appointment, Corporal X had come from a centralized position at the Depot Division in Saskatchewan, having been stationed there for approximately thirteen months. Prior to that, Corporal X had occupied various centralized positions at the RCMP National Headquarters over a period of approximately six years.

[6] The RCMP's Career Management Manual [CMM Manual], which contains a number of policies, provides that after three years in a defined centralized position, a member may compete as a regional candidate. The Applicant filed a grievance on the basis that Corporal X occupied his position at Depot Division for less than three years, as such he was not entitled to compete as a regional candidate. The RCMP's position was that his combined years of service at Depot Division and National Headquarters exceeded three years, and thus Corporal X was entitled to compete as a regional candidate.

[7] Section 4.10.4.2 of the CMM Manual [Policy] states:

> A member who occupies a centralized position with a collator code starting with N, S, or T located at National Headquarters, Ottawa, or at Depot Division, during his/her first three years in such a position, may compete as a national candidate for a decentralized promotion anywhere in Canada. After three years, the member may compete as a regional candidate for a decentralized promotion anywhere in Canada. [Emphasis added]

[8] It is common ground that prior to occupying his position at Depot Division, Corporal X had uninterrupted service for over three years at National Headquarters in positions with collator codes listed in the above Policy. Corporal X's position at Depot Division also had the correct collator code. As such, the issue in the grievance was whether the Policy permitted the continuous years of service to be combined or whether Corporal X was required to spend three years in the Depot Division prior to becoming eligible as a regional candidate. In other words, did Corporal X's move to Depot Division re-start the clock in terms of eligibility? It was also common ground that had Corporal X remained in his position at National Headquarters, he would have been eligible to apply as a regional candidate.

[9] The RCMP grievance process has two levels. First, the Initial Level Adjudicator heard the Applicant's Level I Grievance and rendered the initial decision. Second, the Final Level Adjudicator rendered the Level II Grievance Decision that is the subject of this judicial review.

[10] Before the Initial Level Adjudicator, the Applicant relied on the language of the provision of the Policy, referring to "a" position (as in a singular position), and "a" collator code, at National Headquarters "or" Depot Division, for the proposition that a member must remain in one position for three years, as opposed to occupying multiple qualifying positions successively, before a member is permitted to compete as a regional candidate. She also submitted that a tour of Depot Division lasts three to five years, and that the purpose of the Policy was to prevent short turns (i.e. to prevent the RCMP expending resources to transfer members to Depot Division only to have them leave shortly afterwards by permitting them to compete regionally).

[11] The Respondent submitted that Corporal X had eight years of uninterrupted service in the requisite collators and locations, and therefore met the requirements of the Policy and was properly allowed to compete as a regional candidate. The Respondent also relied on the information provided by the RCMP's National Staffing Program, which was described as the policy center, as to the interpretation of the Policy. The Initial Grievance Adjudicator described the evidence on the National Staffing Program's interpretation as follows:

> After receiving questions from the representative for the collective grievance, the Respondent indicates that she consulted the NSP, as the Policy Centre, to obtain clarification on CMM 4.10.4.2. The NSP confirmed that the original intent of the section was to have members remain at Depot for a minimum of three years; in fact, policy states explicitly that members could only apply for promotions within Depot. However, both the policy and intent changed in 2012-2013 to allow members in centralized positions at

> National Headquarters and Depot Division to gain regional status like all other members after three years of service. The NSP concluded "[t]he clock doesn't start again if a member moves from one N, S, T collator to another".

[12] In a decision dated June 24, 2020, the Initial Level Adjudicator dismissed the Level I Grievance, finding that the RCMP's decision to allow Corporal X to compete as a regional candidate was consistent with the Policy. The Initial Level Adjudicator found that the material provisions of section 4.10.4 of the CMM Manual as a whole, being the larger section in which the Policy is found, accorded with the National Staffing Program's account of the Policy's objective, reflecting their "intention to allow members in centralized positions at National Headquarters and Depot Division to achieve regional status like all other members after completing three consecutive years".

III. The Decision Under Review

[13] On July 13, 2020, the Applicant filed her Level II Grievance, arguing that the Initial Level Adjudicator's decision was "clearly unreasonable" and ought to be reversed.

[14] The Final Level Adjudicator's mandate in reviewing the Initial Level Adjudicator's decision is as follows: "An adjudicator, when rendering the decision, must consider whether the decision at the initial level contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable" (subsection 18(2) of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR 2014-289). The Applicant bore the burden, on a balance of probabilities, of demonstrating that the initial level decision was clearly unreasonable.

[15] The Final Level Adjudicator provided lengthy reasons for dismissing the Applicant's Level II Grievance that addressed both parties' submissions at the initial and the final levels of the grievance process. The Final Level Adjudicator considered each of the Applicant's five objections to the Initial Level Adjudicator's decision, namely that she failed to: (i) fully consider the plain grammatical meaning of the Policy; (ii) consider the contextual evidence from other sections of the CMM Manual; (iii) consider the contextual evidence of recommended terms of service for Depot Division positions; (iv) provide adequate reasons; and (v) find that the National Staffing Program is not the governing authority on the interpretation and intent of the Policy.

[16] Ultimately, the Final Level Adjudicator concluded:

> Failing to identify any manifest or determinative error in the Initial Level Adjudicator's decision, the Grievor was unable to convince me that the Initial Level Adjudicator's decision was outside the range of possible outcomes with regards to the facts of this case and to the law, including relevant policy and guidelines. In short, I find the Adjudicator's decision is transparent, intelligible, and justifiable, and well within a range of possible, acceptable outcomes defensible in respect of the facts and law.

[17] Following the Level II Grievance Decision dated January 18, 2021 [from here forth, Decision], the Applicant commenced the present judicial review.

IV. Issue and Standard of Review

[18] The issue on this application for judicial review is whether the Final Level Adjudicator's Decision is reasonable. In particular, the Applicant raises the following sub-issues, namely did the Final Level Adjudicator reasonably: (i) consider and interpret the text of the Policy; (ii) consider and interpret the contextual evidence regarding the meaning of the Policy; and/or (iii)

find that the National Staffing Program is the "governing authority" on the interpretation and the application of the intent of the Policy?

[19] The parties agree that the applicable standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. I agree with the parties and find the standard of review of the Level II Adjudicator's Decision to be reasonableness (*Zak v Canada (Attorney General)*, 2021 FCA 80 at para 2).

[20] The party challenging the decision bears the onus of demonstrating that it is unreasonable (*Vavilov* at para 100). Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[21] A reviewing court should also refrain from reweighing or reassessing the evidence considered by the decision maker and must not, absent exceptional circumstances, interfere with factual findings (*Vavilov* at para 85). *Vavilov* instructs that the reviewing court should not approach the underlying decision with the intention of conducting a "line-by-line treasure hunt for error" (at para 102), but rather concern itself with whether "the decision as a whole is transparent, intelligible and justified" (at para 15).

[22] Nevertheless, *Vavilov* instructs that a decision maker "must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them" (at para 126). When a decision maker has failed "to meaningfully grapple with key issues or central arguments raised by the parties [this] may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128).

[23] I am mindful of the guidance given by Justice Boivin of the Federal Court of Appeal in *Canada (Attorney General) v Zalys*, 2020 FCA 81 [*Zalys*] as to the level of deference owed to a Final Level Adjudicator, also described as a Level II Adjudicator, at the RCMP:

> [15] For its part, the Federal Court correctly identified the applicable standard of review as reasonableness (Federal Court's Reasons at para. 13). However, it conducted its own analysis of how the relevant provisions of the RCMP's Administration Manual and National Compensation Manual should be interpreted (Federal Court's Reasons at paras. 27-37, 39, 45-50). Consequently, it was insufficiently deferential and clearly engaged in a disguised correctness review, erroneously focused on its own interpretation of the RCMP's policy manuals, and compared that interpretation to that of the Adjudicator, using its own interpretation as a "yardstick to measure what the [Adjudicator] did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28; See also *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, [2019] 3 F.C.R. 81at para. 49). [Emphasis added]

[24] Moreover, in *Zalys*, Justice Gleason (in dissent although not on this issue) instructs:

> [80] …it is not for this Court to re-conduct the interpretation of the relevant provisions in the RCMP's Administration and National Compensation Manuals based on the arguments advanced to us regarding how those provisions ought to be interpreted. Thus, the issue is not how the Manuals should be interpreted but, rather, whether the interpretation offered by the Adjudicator was reasonable. Accordingly, our focus must be on the Adjudicator's

> decision, which is to be considered in light of the relevant factors outlined in *Vavilov*.
>
> …
>
> [84] It is simply not open to this Court, in the context of reasonableness review of a decision such as this, to decide on the meaning to be given to these provisions, particularly in the absence of any previously-decided case law interpreting these provisions. Were we to do so, we would be engaging in correctness review and departing from firmly-established precedent that recognizes that grievance arbitrators are entitled to considerable deference in their contractual interpretations.

[25] Accordingly, it is not for this Court to re-conduct the interpretation of the Policy. Rather, this Court must assess whether the Final Level Adjudicator's assessment of the Initial Level Adjudicator's interpretation of that section, in light of the factors outlined in *Vavilov*, was reasonable.

V. Analysis

[26] As noted above, the role of the Final Level Adjudicator was to assess whether the Applicant had demonstrated, on a balance of probabilities, that the Initial Level Adjudicator's decision was "clearly unreasonable". It is the role of this Court to assess whether the Applicant has met her burden of demonstrating that it was unreasonable for the Final Level Adjudicator to determine that the Initial Level Adjudicator's decision was not clearly unreasonable. For the reasons that follow, and despite the able submissions of counsel for the Applicant, I have not been persuaded that the Final Level Adjudicator committed a reviewable error.

[27] As stated recently by my colleague Justice Pentney, the interpretation of the relevant articles of an internal policy must be consistent with the text, context, and purpose of those articles (*Green v Canada (Attorney General)*, 2021 FC 178 at para 26).

[28] With respect to the text of the Policy, set out in paragraph 7 of this judgment, the Applicant submits that it was not reasonable for the Final Level Adjudicator to interpret the language of the section as permitting Corporal X's service at National Headquarters and his service at Depot to be joined across two collators to meet the three-year requirement. The Applicant pleads that if that were the case the word "or" would not have been used in the Policy, it would have been "and/or". The Respondent pleads that the Final Level Adjudicator considered the language of the section, and the Initial Level Adjudicator's analysis of the language, and reasonably concluded that "a centralized position" could include multiple positions with the identified collator codes.

[29] Having considered the Initial Level Adjudicator's analysis of the text, and conducted her own analysis, the Final Level Adjudicator found that the Applicant had not established that the Initial Level Adjudicator erred in considering "a position" to "include more than one position as long as a member continues to report to any of the collator codes identified". Bearing in mind *Vavilov* and *Zalys*, I see no reason to intervene. The reasons provided by the Final Level Adjudicator are rationally connected to the language of the Policy and the findings of the Initial Level Adjudicator. While the Applicant's interpretation of the language is one possible interpretation, she has failed to demonstrate that the Final Level Adjudicator's interpretation of

the language was sufficiently flawed so as to render the Decision unreasonable (*Vavilov* at para 100).

[30] The Applicant objects to the Final Level Adjudicator's statement that the Applicant "has expressed her own personal interpretation of policy that would have seen her included in the seven candidates that advanced in the process, which does not stand as evidence that the Respondent, the Initial Level Adjudicator and NSP as the originator of the policy erred in their interpretations conclusions". The Applicant pleads that this comment (i.e. her own personal interpretation) was unwarranted, denigrating, improper, and appears to discount the Applicant's argument because it was in line with her personal interest.

[31] When referring to the Applicant's position, the Final Level Adjudicator, in a number of instances, characterized it as the Applicant's "personal opinion" and her "own personal interpretation". I agree with the Applicant that the use of this language was neither necessary nor warranted. I find, however, that the Applicant's position and her submissions, even if characterized in such terms, were considered by the Final Level Adjudicator. While the choice of language by the Final Level Adjudicator is regrettable, I am not satisfied that it warrants the intervention of this Court.

[32] As to the context, the Applicant alleges that the Final Level Adjudicator failed to reasonably consider certain contextual and purposive evidence relied on by the Applicant. The Applicant alleges that a neighbouring section of the CMM Manual supports the proposition that "short turns" are prohibited under the Policy. The Respondent submits that the Initial Level

Adjudicator considered a number of neighbouring sections of the CMM Manual, to which the Final Level Adjudicator referred, and that the Adjudicators were entitled to prefer the interpretation put forward by the Respondent over that of the Applicant. The Respondent submits that the Applicant is seeking to have this Court re-weigh the evidence.

[33] I agree with the Respondent. Absent exceptional circumstances, it is not the role of this Court sitting in judicial review to reweigh or reassess the contextual evidence considered by the Adjudicators (*Vavilov* at para 125).

[34] The Applicant submits that the Final Level Adjudicator failed to reasonably address and engage with two pieces of purposive evidence: (i) the existence of a Depot Division understudy program [Understudy Program] which acts as an incentive for members to stay at Depot Division for a minimum of three years, and (ii) Corporal X's personnel interview describing the Depot Division terms of duty as three to five years. On the other hand, the Respondent submits that a Final Level Adjudicator cannot be expected to respond to each and every point raised by the Applicant. Rather, in the Respondent's view, the Decision evidences that the Final Level Adjudicator was alive to the issues and dealt with them.

[35] I find that the Final Level Adjudicator considered the Applicant's argument that the Initial Level Adjudicator failed to consider the two pieces of purposive evidence, but ultimately found that the Initial Level Adjudicator was entitled to agree with the Respondent's position on the purpose of the Policy. The Final Level Adjudicator quoted the Applicant's reference to two pieces of evidence in the section of the Decision that dealt with the Applicant's contextual

evidence argument, but she did not explicitly mention the Understudy Program in that section. The Respondent, who relies on *Mao v Canada (Citizenship and Immigration)*, 2020 FC 542 at paragraph 49, submits that the Final Level Adjudicator was not obliged to respond to each argument, and should not be criticized for not re-stating every point.

[36] I do not find the failure to specifically mention the Understudy Program in that section of the Decision to be fatal. It is clear that the Final Level Adjudicator was alive to the issue of the terms of service for Depot positions, and determined that the issue had been dealt with by the Initial Level Adjudicator. The failure to mention a piece of evidence, among several pieces of evidence, when addressing an argument does not mean that the Final Level Adjudicator did not grapple with the issue that the particular piece of evidence spoke to. Moreover, I do not find that the piece of purposive evidence, the Understudy Program, can be equated with a key argument such that the failure to mention it in that section could render the Decision unreasonable (*Vavilov* at para 128). Finally, the Final Level Adjudicator, did mention the Understudy Program later in the Decision when considering the weight attributed to the evidence provided by the Respondent on the National Staffing Program's interpretation.

[37] The final ground raised by the Applicant concerns the statement by the Final Level Adjudicator that the National Staffing Program is the "authority" on the interpretation and the application of the intent of the Policy. The evidence concerning the National Staffing Program's interpretation, as summarized by the Initial Level Adjudicator, is quoted in paragraph 11 of this judgment. In short, the National Staffing Program, who is the originator of the policies found in the CMM Manual, confirmed that the original intent of the Policy was to have members remain

in Depot Division for a minimum of three years. Previously, the policy stated that during the first three years at Depot Division, a member could only apply for a promotion at Depot Division, and the same was true for the section relating to National Headquarters. In 2012-2013, the policy and the intent changed to allow members in centralized positions in National Headquarters and Depot Division to gain regional status after three years – effectively, not re-starting the clock when a member moves from one collator to another (paragraph 32 of the Decision).

[38] The Applicant submits that the Final Level Adjudicator unreasonably held that the National Staffing Program "was the binding authority" on the interpretation and the application of the Policy. The Applicant argues that an unreasonable amount of deference was accorded to the National Staffing Program. The Applicant cautions that the National Staffing Program is an arm of the employer, and as such, this position leads to an absurd result: that the Policy could mean whatever the National Staffing Program says it means, even if that interpretation contradicts the words of the Policy. The Applicant submits that a grievance adjudicator cannot function as a true administrative decision maker if it automatically defers to the management on the interpretation of its policies.

[39] The Respondent pleads that the Final Level Adjudicator did not state that the National Staffing Program is the "binding authority". Rather, the evidence as to the National Staffing Program's position on the purpose and intent of the Policy was taken into account by the Final Level Adjudicator, as was the text of the material section of the Policy, its neighbouring sections, and the whole of the CMM Manual. The Respondent submits that the Applicant is raising the same three arguments before this Court that she raised before the Final Level Adjudicator,

namely, the consideration of the text, the contextual and purposive evidence, and the National Staffing Program's position. Relying on *Vavilov*, the Respondent argues that these issues resemble a treasure hunt for errors and do not focus on the decision as a whole.

[40] Considering the Decision as a whole, I do not find that the Final Level Adjudicator considered herself bound or obliged to simply adopt the National Staffing Program's interpretation of the Policy, or to defer to the National Staffing Program without further analysis. In fact, both Adjudicators analysed the text of the Policy, considered the contextual evidence from other sections of the CMM Manual, and considered the contextual and purposive evidence provided by the Applicant and by the Respondent. The Initial Level Adjudicator concluded that when considering the provisions of Chapter 4 of the CMM Manual as a whole, they accorded with the account of the National Staffing Program as to the policy objective. The Final Level Adjudicator found that the Applicant had "not established that the Initial Level Adjudicator erred in adopting the interpretation of the policy provided by the National Staffing Program rather than the interpretation provided by the [Applicant]." Based on the record before the Final Level Adjudicator, I do not find this conclusion to be unreasonable. Moreover, the Final Level Adjudicator provided a coherent and intelligible explanation for why she referred to the National Staffing Program as the "authority" in the context of the intent and application of the Policy: (i) the National Staffing Program is the "originator" of the policies contained in the CMM Manual, and (ii) the Policy itself identifies the National Staffing Program as the policy center to be contacted for information about the Policy. Using the terms "authority" and "governing authority" when providing an explanation as to the role of the National Staffing Program in

relation to the intent and application of the Policy, does not, in my view, rise to the level of a reviewable error on the part of the Final Level Adjudicator.

VI. Conclusion

[41] For the above reasons, I therefore dismiss the Applicant's application for judicial review.

[42] The Respondent seeks costs. Considering the facts of the matter, and my discretion pursuant to Rule 400 of the *Federal Courts Rules*, costs in the amount of $500.00 should be awarded to the Respondent.

JUDGMENT in T-326-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. Costs to the Respondent in the amount of $500.00.

"Vanessa Rochester"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-326-21
STYLE OF CAUSE:	JO-ANN MITCHELL v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 18, 2021
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	JANUARY 14, 2022

APPEARANCES:

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Me Pierre Marc Champagne	FOR THE RESPONDENT

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