Federal Court Cour fédérale

Date: 20230801

Docket: T-1584-19

Citation: 2023 FC 1052

Ottawa, Ontario, August 1, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DALE KOHLENBERG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Dale Kohlenberg [Applicant], a lawyer with the Department of Justice Canada [DOJ], seeks judicial review of a September 17, 2019 decision [Decision] of Johanne Bernard, Chief Financial Officer and Assistant Deputy Minister [ADM Bernard], Management Sector, of the DOJ. ADM Bernard dismissed the Applicant's work description grievance [Grievance] on the

basis that the Applicant's duties were accurately described in his current LA-2A (now LP-02) work description [Work Description].

[2] The application for judicial review is allowed. The Respondent breached the Applicant's right to procedural fairness by failing to provide the Applicant with key information and an opportunity to respond to this information. Had the Decision not been rendered in a procedurally unfair manner I would have found the Decision reasonable.

II. Background

A. *Kohlenberg No 1*

[3] This matter concerns the Applicant's second application for judicial review in relation to the dismissal of his Grievance. The first instance whereby this Court addressed the Applicant's Grievance was *Kohlenberg v Canada (AG)*, 2017 FC 414 [*Kohlenberg No 1*]. The facts applicable to this matter were set out in *Kohlenberg No 1* (at paras 2-11).

[4] To summarize, the DOJ issued new generic work descriptions for lawyers working in its practitioners (LA) group, resulting in the Applicant's work description being re-classified as a "Legal Advisor – Regions – LA-2A". The DOJ directed those who disagreed with their work description to discuss matters with management. In December 2011, the Applicant met with two senior lawyers in management: Daryl Schatz, Regional Director of the Business and Regulatory Portfolio [First Level Grievance Officer] and Michael Brannen, Deputy Regional Director of the Saskatoon Office in the Prairie Region, as well as the Applicant's direct supervisor. On June 18,

2012, the Applicant received his updated Work Description confirming the Applicant's classification at the LA-2A position.

[5] The Applicant had the right under the *Public Service Labour Relations Act*, SC 2003, c 22, s 2 [*PSLRA*] to file two different grievances: a Work Description Grievance and a Classification Grievance. The Applicant filed both, however the Classification Grievance was held in abeyance pending the resolution of the Work Description Grievance. The Applicant's Work Description Grievance claimed that the job description did not accurately reflect the work he does or is expected to do and that other higher level generic work descriptions more accurately described his work. The Applicant's sought-after work description provides both higher salary and higher pension entitlements than the Work Description he received.

[6] Though the Applicant was excluded from the DOJ's lawyers' collective bargaining agent, the Association of Justice Counsel [AJC], he was entitled to the same three-level grievance procedure afforded to AJC union members. The Applicant's Grievance was dismissed at all three levels. After the third-level decision, he applied to the Public Service Labour Relations Board [PSLRB] to proceed to adjudication, but did so without the approval of the AJC. Accordingly, the PSLRB declined to accept jurisdiction. The Applicant then sought judicial review of the decision dismissing his third-level grievance.

[7] This Court granted the application for judicial review for a lack of procedural fairness in both the second- and third-level grievance decisions, primarily owing to the decision-makers'

failure to provide the Applicant with the key materials and the opportunity to respond (at paras 42-43, 49-60, 68, 79-86). Regarding the second-level grievance decision, this Court found:

> [43] First, in making his decision on the Applicant's allegations, Mr. Shenher had before him a negative memorandum written by Mr. Schatz and Mr. Brannen [Schatz/Brannen Memo]. This memo formed part of the record before Mr. Shenher as the second level grievance officer. This memorandum, material and relevant to the decision, was not disclosed to the Applicant: in my respectful view, it should have been. In addition, the Schatz/Brannen Memo is objectionable because it contains errors which the Applicant would have corrected had he been afforded that opportunity. As a final point the Schatz/Brannen Memo is objectionable because of its nature and the fact that it was written by or at least co-authored by the first-level grievance officer, Mr. Schatz.

[8] Regarding the third-level grievance decision, this Court found:

> [68] The Applicant pursued his grievance to the ADM as the third-level grievance officer. In this connection, and in addition to the submissions of the Applicant, the ADM received a report dated September 9, 2014 from Maximilian Baier…a Senior Labour Relations Advisor. Mr. Baier's report recommended that the Applicant's grievance be dismissed [Baier Report]. As with the Schatz/Brannen Memo, Mr. Baier's memo was not disclosed to the Applicant, nor was the Applicant given any opportunity to respond to it in either his written or oral submissions. The Applicant argues this was a breach of procedural fairness that was particularly unfair because the report included both irrelevant and admittedly incorrect information that may have factored into the ADM's final decision. I agree.

[9] But for the aforementioned procedural fairness issues, the Court would have found the second- and third-level decisions reasonable (at paras 67, 89). Accordingly, the matter was sent back for re-determination at the third level by a different grievance officer with the assistance of a different staff relations advisor, and on the basis of a record that excludes certain materials (at para 91).

[10] Following *Kohlenberg No 1*, the Applicant brought three applications for judicial review for two separate grievances, none of which are relevant to this matter. Suffice to say, there is a long history of proceedings that have wound their way through this Court. The present matter relates only to the Work Description Grievance and the re-determined final level Decision.

B. *Events Surrounding the Re-Hearing*

[11] ADM Bernard re-heard the final level Grievance with the assistance of Lisa Carson, Senior Labour Relations Advisor.

[12] The Applicant was afforded one day for settlement discussions and a two-day re-hearing to present his case for both his Work Description Grievance and a separate defamation grievance. These events occurred on May 11, 2018, and January 23-24, 2019. As part of the re-determination process, the Applicant was provided the opportunity to present written submissions, provide supporting documents, and call witnesses.

[13] On July 11, 2018, Ms. Carson advised the Applicant of ADM Bernard's request that he submit to a job validation review, a classification exercise also known as a "desk audit". The Applicant declined the offer, citing concerns that he would not obtain a fair, reasonable, or accurate review.

[14] During the re-hearing, and similarly to the prior Grievance hearings, the Applicant sought to be provided with a work description that accurately described his work and that such work description be properly and fairly classified. The Applicant provided submissions on his role as a

team leader, his work on complex and sensitive files, his provision of strategic legal advice, and his expertise in various areas of law.

[15] On August 27, 2019, following the re-hearing of the Applicant's Grievance, Ms. Carson provided the Applicant with a Work Description Analysis Template [Template] summarizing the work performed by the Applicant above his current Work Description. The Applicant was given until August 30, 2019 to add any additional information. The Applicant replied on September 1, 2019, expressing concern in this changed approach. The Applicant also provided examples in which the Template was "woefully inadequate" and invited Ms. Carson to review his supplemental submission. In response, Ms. Carson gave the Applicant until September 4, 2019 to provide any additional duties or responsibilities.

[16] On September 5, 2019, Ms. Carson informed the Applicant that the First Level Grievance Officer had also reviewed and provided input on the Template. Ms. Carson gave the Applicant until September 12, 2019 to review and respond to his comments. The Applicant responded on September 16, 2019, contesting the First Level Grievance Officer's credibility and requesting a supplemental re-hearing with ADM Bernard to rebut the First Level Grievance Officer's comments. His request was denied.

C. *Final Level Grievance Report*

[17] Ms. Carson issued her 13-page Final Level Grievance Report to ADM Bernard on September 13, 2017 (*sic* 2019) [Final Report], recommending that the Applicant's Grievance be

dismissed. The Applicant asserts that the Final Report was disclosed to the Applicant only on October 15, 2019 as part of the Certified Tribunal Record [CTR] for the present matter.

[18] After setting out the chronology of events and summarizing the Applicant's evidence and witness testimony, Ms. Carson analyzed the Applicant's expertise, work on complex files, and team leadership responsibilities. Regarding his expertise, Ms. Carson noted that although the Applicant appears to be a very experienced lawyer who strives to provide excellent service to clients and mentorship to colleagues, the Applicant provided no evidence that the legal profession or management consider him a recognized expert in certain practice areas or that work is assigned to him on that basis. Regarding his work on complex files, Ms. Carson noted that there was evidence of some higher complexity files, but that the Applicant provided no evidence to show that these files constituted a significant part of his workload. The majority of the Applicant's work fit within his LP-02 Work Description.

[19] As for the Applicant's team leadership responsibilities, Ms. Carson similarly concluded that the Applicant's duties were captured in his LP-02 Work Description. Having listed the Applicant's many specific examples in support of his position, including his work summaries from 2009 to 2016 and this Court's decision in *Kohlenberg No 1*, Ms. Carson noted that the Applicant did not provide any significant evidence that he was working at a substantially higher level on an ongoing basis. Ms. Carson also noted that management had no knowledge of leadership functions being assigned to or performed by the Applicant, including his leadership role as advisory team leader, and that the Applicant himself stated that there were instances

where he did not specifically tell management of his work or he did not know if management knew the full extent of his functions.

III. The Decision

[20] ADM Bernard dismissed the Applicant's Grievance. Having reviewed both the Applicant's oral and written submissions as well as his current Work Description, ADM Bernard was satisfied that the Applicant's Work Description accurately reflected the work assigned as articulated in article 33.01 of the Law Practitioner's collective agreement:

> **33.01** Upon written request, a lawyer shall be entitled to a complete and current statement of the duties and responsibilities of his position including the position's classification level and point rating allotted by factor where applicable, and an organization chart depicting the position's place in the organization.

[21] ADM Bernard addressed each of the four areas of concern raised by the Applicant. First, ADM Bernard concluded that the Applicant's team leadership responsibilities were accurately reflected under the "Key Activities" and "Leadership" sections of his current Work Description. Second, the Applicant's work on complex files and provision of strategic advice was described in various sections of his Work Description including "Client Services Results", "Key Activities", "Critical Thinking and Analysis", "Knowledge", and "Communication and Interaction". Lastly, the Applicant failed to provide evidence that demonstrated his recognition as an expert beyond the scope of his Work Description.

IV. Issues and Standard of Review

[22] After considering the parties' submissions, the issues are best characterized as:

1. Was there a breach of procedural fairness?
2. Was the Decision reasonable?

[23] The Applicant submits that questions of procedural fairness are reviewed on the correctness standard, whereas the merits of the Decision are reviewed on the reasonableness standard. The Respondent declines to comment on the applicable standard of review on procedural fairness, but submits that the applicable standard of review in assessing the merits of an administrative decision is reasonableness.

[24] In my view, the standard of review for procedural fairness is essentially correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at para 54 [*CP Railway*]). No margin of appreciation or deference is owed on issues of procedural fairness. Rather, a reviewing court must determine if the procedure followed by the decision-maker was fair, having regard to all the circumstances (*CP Railway* at para 54).

[25] I agree with both parties that the merits of the Decision are subject to a reasonableness review. None of the exceptions to rebut the presumption of reasonableness arise in the case at hand (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]). To determine whether a decision is reasonable, a reviewing court must examine the outcome of the Decision and its underlying rationale to assess "whether the decision, as a whole, bears the hallmarks of reasonableness—intelligibility, transparency, and justification—and

whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 87, 99).

[26] Reasonableness review is not a line-by-line treasure hunt for error, and a reviewing court must refrain from reweighing and reassessing the evidence (*Vavilov* at paras 102, 125). A decision will be reasonable where the reasons of the decision-maker allow the Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes (*Vavilov* at paras 85-86). Conversely, a decision will be unreasonable where there are shortcomings in the decision that are sufficiently central or significant (*Vavilov* at para 100). The party challenging the decision bears the burden of showing that the decision is unreasonable (*Vavilov* at para 100).

V. Analysis

A. *Was there a breach of procedural fairness?*

(1) Applicant's Position

[27] The process was procedurally unfair. In *Kohlenberg No 1*, the Respondent asserted that the standard of procedural fairness was low because the Applicant had recourse to the Federal Public Sector Labour Relation and Employment Board [FPSLREB], previously the PSLRB. With the opposite position now advanced, the Respondent had a higher standard of procedural fairness to meet.

[28] The Decision is of high importance to the Applicant as it impacts his salary and future retirement pension benefits.

[29] The Applicant had a legitimate expectation of a fair procedure. Ms. Carson consulted with the First Level Grievance Officer more than seven months after the re-hearing. Accordingly, the Applicant expected ADM Bernard to grant a supplemental re-hearing to rebut his contentions. In denying a supplemental re-hearing, ADM Bernard effectively deferred the Decision to the First Level Grievance Officer, repeating the same procedural fairness error in *Kohlenberg No 1* (at paras 61-64).

[30] Contrary to Ms. Carson's report, the Applicant did respond to the Template. Ms. Carson initially provided the Template on August 27, 2019, with a response deadline of August 30, 2019. The Applicant provided an initial response as well as follow-up response on September 1, 2019, identifying several deficiencies that could be remedied by a review of the documents previously delivered to ADM Bernard. The Template was not revised, but abandoned altogether following the First Level Grievance Officer's intervention.

[31] Though submitted as part of the reasonableness of the Decision, the Applicant submits that Ms. Carson failed to report the First Level Grievance Officer's bias against the Applicant, thereby misleading ADM Bernard into believing that she could rely on his advice because his views about the Applicant's current Work Description were wholly credible and unbiased.

(2) Respondent's Position

[32] The degree of procedural fairness owed in a final level grievance decision is at the low end of the spectrum, only entitling a party to understand the case to meet and an opportunity to respond (*De Santis v Canada (AG)*, 2020 FC 723 at para 28 [*De Santis*]; *Blois v Canada (AG)*, 2018 FC 354 at para 36 [*Blois*]). These requirements were satisfied.

[33] The Applicant's contention that procedural unfairness arose due to the denial of the supplemental re-hearing is without merit. Pursuant to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22 [*FPSLRA*] and departmental grievance guidelines, there is no entitlement to an in-person hearing in the public service grievance regime. Administrative decision-makers are entitled to select their own processes, and such choices are entitled to deference (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 27, [1999] SCJ No 39 [*Baker*]).

[34] Further, due diligence required Ms. Carson to consult the First Level Grievance Officer in the re-determination of the matter. There is no basis to conclude that ADM Bernard or Ms. Carson deferred the Decision to him. The Applicant also had a fair opportunity to respond to prejudicial facts throughout the process, including the input from the First Level Grievance Officer. The Applicant was not only provided with the initial Template on August 27, 2019, but was provided further time to comment on the Template on September 5, 2019 following the First Level Grievance Officer's input.

(3) Conclusion

[35] I agree with the Respondent that the duty of fairness owed in an internal grievance process falls at the low end of the spectrum (*Kohlenberg No 1* at para 16; *Blois* at para 36; *Canada (AG) v Allard*, 2018 FCA 85 at para 41). With that said, this duty continues to exist. Namely, an employee "has the right to be informed of any prejudicial facts, and the right to respond to those facts" (*Kohlenberg v Canada (AG)*, 2022 FC 906 at para 23, citing *De Santis* at para 30).

[36] Applying these principles to the matter at hand and based on a review of the record, I find that the Applicant's right to procedural fairness was breached. In response to questioning from the Court, the Applicant stated that the Final Report was only disclosed to the Applicant on October 15, 2019 as part of the CTR for this matter. The Respondent replied that it was their understanding that the Final Report was provided to the Applicant prior to this date and there is no indication in the record to suggest the contrary. Faced with conflicting responses, I find that an absence of correspondence from the date of the issuance of the Final Report, September 13, 2019, to the date of the ADM's decision, September 17, 2019, in any record lends credence to the Applicant's version of events. Accordingly, it is my determination that the breach of procedural fairness arose from the failure to provide the Applicant with a copy of the Final Report and an opportunity to respond to it (*Kohlenberg No 1* at paras 78-80; *Re Sound v Fitness Industry Council of Canada*, 2014 FCA 48 at para 54).

[37] Similarly to this Court's finding in *Kohlenberg No 1*, the Final Report contained relevant and material information that "formed the basis of the case against the Applicant, therefore – on first principles – the Applicant was entitled to have it, even acknowledging that the duty of procedural fairness falls at the low end of the spectrum in this connection" (at para 79). Had he been provided with the Final Report prior to the issuance of the Decision, the Applicant could have advanced his various contentions with its contents that he now advances before this Court.

[38] This conclusion is further supported by excerpt within the Final Report that "[d]espite being afforded the opportunity to add missing information to the chart, none was provided." While technically true that the Applicant did not add any information to the Template himself, he did provide three examples in which he felt the Template was lacking in his September 1, 2019 email to Ms. Carson: his team leader responsibilities, as evidenced by his work objectives and *Kohlenberg No 1*; his expertise in various areas of law; and his provision of strategic legal advice. The Applicant invited Ms. Carson to review his supplemental submission that referenced specific supporting documents. Accordingly, the Final Report was not entirely correct in stating that the Applicant did not provide missing information to the Template. Again, the Applicant could have corrected this had he been provided the opportunity and ADM Bernard would have benefited from a full documentary record in arriving at her Decision.

[39] I also agree that the Final Report erred in its consideration of the Applicant's role as advisory team leader. The Report's conclusion that management had never assigned or had knowledge of his leadership role within the advisory team stands in direct opposition to *Kohlenberg No 1* (at para 65) as well as the Applicant's 2014 work objective wherein Mr.

Brannen directed the Applicant to "[c]ontinue to serve as…advisory team leader". Clearly, in acknowledging that the Applicant met his work objectives in 2014-2015, Mr. Brannen had knowledge of the Applicant's role as advisory team leader, though the scope of such leadership role remains a live issue between the parties.

[40] I will now address the parties' remaining submissions. Contrary to the Applicant's assertion, I do not read the Respondent's August 31, 2020 letter as reversing its legal position in *Kohlenberg No 1* that the Applicant has lawful recourse to the FPSLREB for adjudication. Rather, the Respondent, in responding to the Applicant's request for a letter from the DOJ consenting or not objecting to the referral of his Grievance to the FPSLREB out of concern that the AJC would deny its approval without it, explains that the DOJ cannot waive section 209 of the *FPSLRA*, as amended, by consenting or withholding consent to a referral, but that his application would not create a perception of a conflict of interest or expose him to disciplinary action. The Respondent's position in this regard is consistent with subsection 209(2) of the *FPSLRA*, which does not require an employer's consent for an employee to obtain approval by the bargaining unit in order to proceed to adjudication before the FPSLREB. Accordingly, it remained open for the Applicant to apply to the AJC for approval. There is no indication on the record that the Applicant took any further steps.

[41] Similarly, I respectfully disagree that ADM Bernard effectively deferred the Decision to the First Level Grievance Officer. Ms. Carson provided the Applicant with the First Level Grievance Officer's input on the Template on September 5, 2019, explaining that the Applicant could review the comments and provide additional comments in response, should he feel it

necessary, by September 12, 2019. Ms. Carson noted that "[a]ll comments will be provided to the ADM for consideration prior to rendering the final level decision". In his response, the Applicant did not provide any input, but took issue with the First Level Grievance Officer's participation in the matter and requested a supplemental re-hearing. Although this request was denied, it has been well-established by this Court that the *FPSLRA* does not create any duty for an in-person hearing (*Hagel v Canada (AG)*, 2009 FC 329 at para 35; *Baker* at para 27). Given that Ms. Carson informed the Applicant of the content of information supplied by the First Level Grievance Officer, his right to procedural fairness in this regard was not breached.

[42] There is also nothing in the record to suggest that ADM Bernard relied excessively on the First Level Grievance Officer, thereby creating a closed loop in the Grievance process. To reiterate, it was Ms. Carson, not ADM Bernard, who sought input from the First Level Grievance Officer. Given that the First Level Grievance Officer's comments and the final Template are excluded entirely from the record, it is impossible for this Court to determine the nature or comprehensiveness of his response. Nevertheless, Ms. Carson references the Template that includes the First Level Grievance Officer's comments in the Final Report, yet proceeds to analyze the Applicant's expertise, work on complex files, and team leader responsibilities in detail outside of the Template.

[43] Despite being of the opinion that the Applicant's right to procedural fairness was not breached in this regard, I am similarly left to wonder why Ms. Carson did not request input from Mr. Brannen instead of Mr. Schatz, particularly in light of the reasons in *Kohlenberg No 1* (at

para 64). Mr. Brannen, as the Applicant's direct supervisor, was well-versed with the Applicant's Work Description, as opposed to Mr. Schatz.

[44] Lastly, I see no merit to the Applicant's bias argument against the First Level Grievance Officer. The concept of bias generally does not apply to grievance processes (*Kohlenberg No 1* at para 75).

[45] In summary, on the above basis, I allow the application for judicial review, set aside the Decision and remit it for reconsideration by another final level grievance officer. While this finding is sufficient to dispose of the application, I will also assess the parties' submissions regarding the reasonableness of the Decision.

B. *Was the Decision reasonable?*

(1) Applicant's Position

[46] Contrary to Ms. Carson's conclusion that no evidence was presented that the Applicant performed team leadership responsibilities as assigned by management, the Applicant advanced numerous documents and witness testimony to support his leadership role, including the Applicant's seven consecutive annual work summaries from 2009 to 2016. The Applicant's supervisor never challenged or questioned such documents, but encouraged his continuation in this role as well as the expansion of his duties. Further, as Justice Brown observed in Kohlenberg No 1, the Applicant was an advisory team leader (at para 65), and this conclusion was accepted in the Final Report. Despite this, Ms. Carson incorrectly advised that management had no

knowledge of his duties. Respectfully, given the evidence, the First Level Grievance Officer's lack of knowledge about the Applicant's team leadership duties, particularly in light of his direct supervisor's instruction, is an unreasonable basis for concluding that the Applicant was not a team leader.

[47] Similarly, the Applicant presented various materials to ADM Bernard demonstrating that he is regarded as a legal subject matter expert in several areas of the law. The Applicant also demonstrated that his colleagues recognize his expertise and that management sought his expertise to assist in their work. Management's failure to recognize or acknowledge his expertise reflects their lack of sufficient knowledge or appreciation for the complexity of his files, not the Applicant's lack of expertise. Ms. Carson and ADM Bernard failed to acknowledge this distinction given their lack of legal knowledge, resulting in an unreasonable Decision.

[48] Ms. Carson failed to refer to various pieces of the Applicant's evidence in her Final Report, including examples of his provision of complex and strategic legal advice, as confirmed by his clients, as well as his provision of horizontal legal services. This work is only captured in higher-level work descriptions, yet Ms. Carson failed to draw this to ADM Bernard's attention. Further, Ms. Carson failed to report the Applicant's substantial work on litigation files that his managers failed to recognize as being beyond his duties.

[49] Lastly, Ms. Carson failed to reference two relevant decisions that would have justified that acceptance of the Applicant's Grievance (*Meszaros v Treasury Board (Department of Justice)*, 2016 PSLREB 29 [*Meszaros*]; *Aphantitis v Treasury Board (Department of Justice)*,

2014 PSLRB 85). In *Meszaros*, the grievor's team leader remarked that a higher-level work description may encompass some duties of a lower-level work description, but will also describe additional duties beyond this description (at para 53).

(2) Respondent's Position

[50] The scope of the decision-maker's task is to determine whether the grievor's work description is a complete and current statement of their duties and responsibilities. The grievor bears the onus of proving it is not (*Currie v Treasury Board (Correctional Service of Canada)*, 2021 FPSLREB 102 at paras 166-67). A work description is not a detailed listing of activities in a particular form of wording, though it must contain sufficient information to accurately describe the duties required of an employee (*Jennings and Myers v Treasury Board (Department of Fisheries and Oceans)*, 2011 PSLRB 20 at paras 51-52). If an employee performs work outside of their description, they must establish that it was at the behest of the employer (*Parker et al v Treasury Board (Department of Human Resources and Skills Development)*, 2009 PSLRB 109 at para 71).

[51] Applied to the present matter, the Decision was reasonable. The Applicant's Grievance was denied because his Work Description accurately described his assigned work. ADM Bernard provided a thorough and reasoned analysis, reasonably weighing the Applicant's arguments and evidence in reaching her conclusions for each ground. These conclusions are factually suffused determinations best left to the decision-maker. It is not for the Court to reweigh evidence (*Vavilov* at para 125).

[52] First, ADM Bernard reasonably found that the Applicant's leadership responsibilities were reflected in his Work Description. She specifically identified two applicable headings for this role, Key Activities and Leadership, which described "[p]roviding coaching and knowledge transfer and assigning tasks to less experienced counsel" and "[p]roviding input to managers for performance evaluation…of les [sic] experienced counsel". This conclusion reflects the Applicant's evidence that he mentored and assigned junior colleagues work, but that he did not approve work products, conduct performance appraisals, or approve leave.

[53] Similarly, ADM Bernard reasonably found that the "scope and significance" of the Applicant's strategic advice and work on complex files were adequately described in various headings of his Work Description in light of the Applicant's evidence.

[54] As for the Applicant's expertise, ADM Bernard reasonably recognized that experienced legal counsel develop certain subject matter expertise over time, but that the Applicant did not exceed the duties in his Work Description (*Kerswill v Canada (Treasury Board)*, 2000 PSSRB 91 at paras 23-24, 2000 CanLII 21090).

[55] Decision-makers need not address every piece of evidence. The Decision, when read as a whole in light of the record, allows this Court to understand why ADM Bernard reached her conclusion (*Vavilov* at paras 102-03).

(3) Conclusion

[56] Had the Decision not been tainted by procedural unfairness, I would have found the Decision reasonable. The majority of the Applicant's submissions on this issue relates to the Final Report as opposed to the Decision.

[57] When reviewing the Decision, it is evident that ADM Bernard assessed the Applicant's arguments and evidence and concluded that the Applicant's team leadership, strategic advice, work on complex files, and expertise were accurately reflected in his current Work Description. A decision-maker need not refer to every submission advanced by the Applicant. Nothing appears to be ignored. While I note that the Respondent's submissions attempt to bolster the ADM's Decision in identifying specific descriptions within each heading, I nevertheless am of the view that the Decision bears the hallmarks of reasonableness and, save for the procedural fairness issue, is justified in relation to the factual and legal constraints (*Vavilov* at para 99).

VI. Conclusion

[58] The application for judicial review is allowed. The breach of procedural fairness is sufficient to dispose of the matter.

[59] The Applicant requests costs, citing *Daniels v Canada (Indian Affairs and Northern Development)*, 2008 FC 823. The Respondent requests that costs be awarded on the Tariff in light of the Applicant's misuse of the Court's resources and time. Given that neither party has

provided fulsome submissions on costs, I will allow the parties to make submissions on costs as set forth in the Judgment.

JUDGMENT in T-1584-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is to be re-determined by another final level grievance officer.
2. The parties will provide submissions on costs, not exceeding 10 pages, according to the following schedule:
    a. The Applicant will serve and file their submissions by August 15, 2023; and
    b. The Respondent will serve and file their submissions in reply by August 29, 2023.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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