Federal Court  Cour fédérale

Date: 20090630

Docket: T-1870-07

Citation: 2009 FC 686

Ottawa, Ontario, June 30, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

WARREN PECK

Applicant

and

PARKS CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, Mr. Warren Peck, seeks judicial review of the decision made by Final Level Delegate to the Chief Executive Officer of Parks Canada Michel Latreille to deny his classification grievance. The applicant, who retired in 2007, has been an employee of Parks Canada since 1997, and he was challenging both the content of his job description and his classification level. For the reasons that follow, I am of the view that this application ought to be dismissed.

BACKGROUND

[2] Warren Peck was the Asset Manager for the Mainland Nova Scotia Field Unit (the "MNSFU") for Parks Canada from April 1, 2005 until his retirement on June 2, 2007. Mr. Peck held the same position from April 1, 1997 to March 31, 2005, pursuant to two secondment agreements between Mr. Peck's employer, Public Works and Government Services Canada ("PWGSC"), and Parks Canada. The general description of Mr. Peck's position is set out in the two memorandums of agreement dated April 2, 1997 and March 17, 2003. They state as follows:

> To provide resident professional expertise to the Field Unit for the life cycle management of all heritage and contemporary assets. This will include the provision of professional and technical advice and guidance to the other managers in the Field Unit, project management expertise in the delivery of the capital program, and asset management expertise in the operation and maintenance of facilities throughout the Field Unit. The Asset Manager will be a member of a Field Unit management team, and will report to the Field Unit superintendent for the day to day work assignments.

[3] During the period of April 1, 1997 to March 31, 2005, Parks Canada had no authority or responsibility for setting the terms and conditions of employment for the applicant, including classification and the content of his job description. This authority lied with Treasury Board, as the applicant was formally an employee of PWGSC. This is confirmed by both memorandums of agreement, which read in part:

> The purpose of this memorandum of agreement is to provide the framework for the assignment of a PWGSC Project Manager to the Parks Canada Mainland Nova Scotia Field Unit…

General Conditions:

1. The assigned Asset Manager will continue to be a PWGSC employee, reporting to the Chief-Transportation and Capital Program for all human resource issues, and for professional direction relating to technical and contractual issues…
2. All payroll costs will continue to be the responsibility of PWGC, subject to the term and condition of the Memorandum of Understanding between Parks Canada – Canadian Heritage and PWGSC, and any amendments thereto…

Duties of the Assets Manager

1. Reports to the Parks Canada Field Unit Manager for all on-going day to day duties associated with the Field Unit. However, the Asset Manager will report to the Chief Transportation and Capital Program for human resource issues (i.e. leave, staffing, staff relations issues, grievances, etc.) because the position rests with PWGSC; and for professional and technical quality control associated with the work.

[4] The applicant had been classified by PWGSC before April 1, 1997, at the EG-07 level. EG is the abbreviation for the Engineering and Scientific Support occupational group. When he became an employee of Parks Canada on April 1, 2005, he maintained his classification at the EG-07 level despite the fact that most other Asset Managers were then classified at the lower AS-05 level.

[5] On April 1, 1999, Parks Canada became a separate agency as that term is used in s. 2 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("*PSLRA*"), and as identified in Schedule V

of the *Financial Administration Act*, R.S. c. F-10 ("*FAA*"). As a result, the employer for employees of Parks Canada was no longer Treasury Board, but Parks Canada itself.

[6] When Parks Canada became a separate agency, it promised its employees to review job descriptions and classifications to ensure that classifications were correct and fair through a project called the National Review. Any employee that received a higher classification as a result of the National Review would have their salary increased to the higher level of the new classification retroactive to April 1, 1997.

[7] Historically, Parks Canada relied on PWGSC to provide engineering and architectural expertise and to supervise major building projects. Parks Canada decided to improve its capacity to be a technically informed client and to supervise major building projects. A key component of this decision was that Asset Managers would have to become more knowledgeable of these areas. The decision was made to hire professional engineers, who were deemed to be more knowledgeable and skilled. Parks Canada's position was that, by having an engineering degree, Asset Managers would contribute more to the job, would be in a better position to assess what was being suggested by experts and, could be entrusted with greater authority in the planning and managing of larger projects.

[8] Not only was the decision made to hire professional engineers in all future vacancies, but also to appoint incumbent Asset Managers who had an engineering degree to the PM group (Program Management) in order to combine their professional expertise with managerial

responsibilities. This is the group in which most senior manager positions are classified. Only one person was retroactively reclassified to the PM group, and this person held an engineering degree.

[9] Other employees who did not hold an engineering degree were retroactively reclassified from the AS-05 level to the higher EG-07 level. Since the applicant came to Parks Canada on assignment from PWGSC as an EG-07 and retained his EG-07 classification at Parks Canada, he did not receive an increase in level. In effect, he was treated like all other Asset Managers who did not have an engineering degree.

[10] The applicant challenged both the content of his job description and his classification level in his grievance dated April 18, 2006. His grievance at the final level was denied on April 2, 2007, by Mr. Latreille, Final Level Delegate to the Chief Executive Officer of Parks Canada. This is the decision that is the subject matter of the within application for judicial review.

THE IMPUGNED DECISION

[11] Mr. Peck grieved his classification decision in the following terms:

> The National Classification Review process has chosen a Master Generic Work Description (Asset Operations Manager, EG-07) that does not reflect the work profile and core activities that exist within the Asset Manager position for the MNSFU. The description does not reflect the O&M and the Capital Program's architectural and engineering challenges and degree of complexity inherent in the existing Asset Management position.

[12] The essence of Mr. Peck's grievance was that he had been doing the job described in the PM-06 job description since 1997 at a "superior" level and, accordingly, should receive the PM-06 classification.

[13] Mr. Peck submitted a written memorandum in support of his grievance. In addition, both Mr. Peck's immediate and former supervisors were strongly of the view that the core activities of the Asset Manager position within the MNSFU meet or exceed the core activities described in the PM-06 job description. Mr. Peck's supervisors also expressed their opinion that the lack of an engineering or architectural degree would not impede Mr. Peck from satisfying the responsibilities of the PM-06 position.

[14] Mr. Latreille interviewed Mr. Peck, as well as his past and present immediate supervisors, but denied Mr. Peck's grievance. In his letter of April 2, 2007, Mr. Latreille first noted that management has "quite a bit of leeway in applying classification standards and setting qualification requirements for appointment". He then summarized briefly the process whereby the job description of asset managers were transformed, and could not find fault with this process "as it is purely a management right to do so and your job rights were fully protected".

[15] Addressing more specifically the grievances of the applicant, Mr. Latreille then wrote:

> Now I come to the critical issue of selecting the appropriate classification group for the new asset manager position: EG, ENG or PM. It is uncommon in the public service to have full-fledged professional engineering functions classified EG. This left only the ENG or PM groups to select from for the new

'forward looking' job descriptions. ENG is a group for which inclusion criteria is very specific while PM is a more generalist group where we find many types of senior management positions requiring a wide variety of qualifications. Throughout the public service, the PM group has been widely used to mix professional technical knowledge with senior management skills. Parks Canada cannot be faulted for following this path even though this particular combination may not have been common previously in the Agency. The Agency argues it also serves to reinforce equity at the local management table when most senior managers are at the same classification level or in the same classification group.

The final point regarding the PM level is that Parks Canada is firm in its refusal to appoint you as a PM senior manager because you do not have engineering degree. Having found that the requirement for engineering degree is not unreasonable and within the right of senior management to impose, I cannot overturn the decision to not appoint you to the PM-6 level. This requirement for appointment is no different than many others imposed by the Agency in many circumstances and indeed it would be no different if the Agency had chosen to reclassify the position to ENG and for the same reasons denied your appointment. Let's not forget this new concept was intended to be 'forward looking'.

This now brings me to consider the classification level and generic description you were given to reflect the work you have been doing until now, which is EG-07 Asset Operations Manager. I carefully examined the nature of your work, the scope of your mandate your managerial responsibilities, as well as the value of the assets (historical sites, infrastructures-building and such), in order to determine which elements were to be considered in the analysis and evaluation of the main trust of the work being performed. I find the generic job description fairly describes in generic terms your work and responsibilities. The evaluation summary further complements the description and the two

> together present a reasonable global picture of your duties. (…)
>
> Having reviewed the EG classification standard, I conclude that the point rating and result of EG-7 are appropriate and consistent with the EG point rating standard.

ISSUES

[16] Mr. Peck argues essentially that he has not been treated fairly, because he did not receive the PM-06 classification despite the fact that he demonstrated the ability to do the job through 10 years of superior performance, and because he has received the same classification as the other 22 Asset Managers even though his job had a higher degree of responsibility and complexity. Accordingly, the issue to be decided on this application for judicial review is whether the decision made by Mr. Latreille is reviewable, on the basis of the appropriate standard of judicial review to be applied to such a decision.

ANALYSIS

[17] To determine the appropriate standard of review, courts must first ascertain whether the standard of review for this particular kind of question has already been determined by the jurisprudence: *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at para. 62. While I have not been referred to any cases dealing with the standard of review to be applied to final level classification decision made pursuant to the *PSLRA* (*Public Service Labour Relations Act*), the dominant view was that same decisions under the predecessor statute (*Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (*PSSRA*)) were reviewable against the standard of patent reasonableness: see, for ex.,

Trépanier v. *Canada (A.G.)*, 2004 FC 1326; *Adamidis* v. *Canada (Treasury Board)*, 2006 FC 243; *Utovac* v. *Canada (Treasury Board)*, 2006 FC 643; *Julien* v. *Canada (A.G.)*, 2008 FC 115; *Cox* v. *Canada (A.G.)*, 2008 FC 596. The grieving procedure under the new *PSLRA* being quite similar to that found in the *PSSRA*, and the privative clause in the two statutes being identical (it was s. 96(3) in the *PSSRA* and it is now s. 214 in the *PSLRA*), the same standard of review should apply to both. Of course, the patent unreasonableness standard and the reasonableness *simpliciter* standard have been merged into a single standard of reasonableness as a result of the decision reached by the Supreme Court in *Dunsmuir*, and that must be taken into account.

[18] In any event, it is clear from a contextual analysis of the factors relevant to the determination of the proper degree of deference that the appropriate standard of review is that of reasonableness.

[19] As already mentioned, the *PSRLA* contains a strong privative clause (s. 214) which militates in favour of great judicial restraint.

[20] The *PSLRA* is a polycentric legislation intended to resolve questions "involving contradictory policy objectives or the interests of different groups" and is not merely an adversarial forum to resolve disputes between two parties: *Trépanier* v. *Canada (A.G.)*, *supra*, at para. 23. In that respect, labour conflicts within the public service differ from similar conflicts in the private sector. As noted by this Court in *Ryan* v. *Canada (A.G.)*, 2005 FC 65, at para. 15: "The resolution of public service disputes, thus by their very nature, are polycentric rather than bi-polar and warrant

a greater degree of deference". This factor also militates in favour of a more deferential standard of review.

[21] The question at issue before the final level decision maker was one of mixed fact and law. It involves an understanding of Parks Canada's scheme of classification and appointment, which is a discrete regime involving the interplay of policies and procedures as well as a comprehensive understanding of the underlying principles. The nature of the question dovetails into the expertise held by the decision maker in this case. This factor militates in favour of a more deferential approach.

[22] The affidavit of Mr. Latreille demonstrates his expertise in this area. He has been in the area of classification and appointment for many years, and is in the best position to understand the policies and underlying principles involved in classification standards and the application of those standards to the particular facts at issue in the case at hand.

[23] For all of these reasons, the appropriate standard of review is that of reasonableness. The applicant has not taken issue with the application of the reasonableness standard. Such a standard will be satisfied if the decision is supported by any reasons that can stand up to a somewhat probing examination: *Canada (Director of Investigations and Research)* v. *Southam Inc.*, [1997] 1 S.C.R. 748, at para. 57. See also *Law Society of New Brunswick* v. *Ryan*, [2003] 1 S.C.R. 247, at para. 55.

[24] A clear distinction must be made between a standard of correctness and reasonableness. When deciding whether a decision is unreasonable, a reviewing court should not ask itself what the correct decision may be or should be. As pointed out by the Court in *Ryan* (at paras. 50-51), there will often be no single right answer in a matter subject to review and a standard of reasonableness permits deference to be accorded.

[25] It is not sufficient to put forward to the Court an alternate approach which could also be described as reasonable. The very nature of a standard of reasonableness encompasses many approaches which could each be described as reasonable.

[26] An applicant, therefore, has a clear burden to establish before a reviewing court that the decision in question could not withstand a somewhat probing examination. Whether the approach advanced by the applicant is also reasonable or not is irrelevant to the Court's task.

[27] Turning now to the merit of this application, a few preliminary remarks are in order. First of all, I agree with the respondent that during the period of April 1, 1997 to March 31, 2005, Parks Canada had no authority or responsibility for setting the terms and conditions of employment for the applicant, including classification and the content of job description. During that period, such authority rested with Treasury Board, as represented by PWGSC. This point was confirmed in the two Memoranda of Agreement between PWGSC and Parks Canada, which brought the applicant to Parks Canada on assignment and to which I have already referred at para. 3 of these reasons. As a

result, any grievance the applicant may have for any period of time prior to his becoming an employee of Parks Canada is with the Treasury Board.

[28] Quite apart from the Memoranda of Agreement which set out the respective responsibilities of PWGSC and Parks Canada, the latter is clearly a separate entity since April 1, 1999. The *PSLRA* defines Parks Canada as a separate employer from Treasury Board (see *PSLRA*, s. 2, def. of "employer", and Schedule V of the *FAA*). Likewise, the *Parks Canada Agency Act*, S.C. 1998, c. 31 ("*PCAA*") states that ss. 11.1(1) and 12(2) of the *FAA*, which sets out the powers of the Treasury Board and of the deputy heads with respect to human resources management, do not apply to the Agency (*PCAA*, s. 13(3)). The Act specifically grants the Agency exclusive authority to act as employer independent of the Treasury Board.

[29] This has been confirmed recently in an adjudication decision under s. 209 of the *PSLRA*. In *Hillarie Zimmermann v. Treasury Board (D.I.A.N.D.)*, 2008 PSLRB 87, the adjudicator confirmed that Parks Canada is a separate employer, rejecting the griever's argument that she was employer by the "federal government". As a result, the Agency's authority to respond to the applicant's grievance is limited to the period for which he was an employee of the Parks Canada Agency.

[30] Second, it is beyond dispute that Mr. Peck continuously performed his job at a high level, as evidenced by his very positive performance reviews from 1997 to 2006. This is acknowledged by Parks Canada. In his cross-examination, Mr. Latreille states that "Mr. Peck demonstrated a very

high level of skill, and knowledge and expertise" and agreed that Mr. Peck's performance reviews were "superior" and "speaks to a very high level of competency".

[31] The only reason Mr. Peck was denied the PM-06 classification was because he did not hold an engineering degree, as is made clear in the decision of Mr. Latreille. Mr. Peck does not deny that that Parks Canada could set the qualifications required for a particular job, nor that it could request an engineering degree for the PM-06 position. What he takes issue with is the decision to deny him that classification without considering his 27 years of experience and the fact that he performed the duties of the PM-06 position at a superior level while working in a position classified as EG-07. In other words, he does not object to the right of Parks Canada to set qualifications for the future, but he submits that due consideration should have been given to the opinions of his superiors that he was qualified for the job through work experience, and that no comparison was made between what he actually did and the PM-06 description (and, for that matter, between his job and that of the other 23 Asset Managers). In his view, it was unfair and contrary to the similar pay for similar work principle to classify and compensate differently two individuals who performed the same job, on the basis of a retroactive qualification (i.e. the requirement of an engineering degree).

[32] While the Court understands Mr. Peck's frustration at having been treated differently because he did not hold an engineering degree, it can find no basis in law to quash Mr. Latreille's decision. Just like the Treasury Board in relation to the employees of the public service, Parks Canada's authority over terms and conditions of employment is broadly defined and certainly includes the untrammelled power to classify positions. Section 13 of the *PCAA* provides:

> Personnel
> **13.** (1) The Chief Executive Officer has exclusive authority to
> (*a*) appoint, lay-off or terminate the employment of the employees of the Agency; and
> (*b*) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.
>
> Right of employer
> (2) Nothing in the *Public Service Labour Relations Act* shall be construed to affect the right or authority of the Chief Executive Officer to deal with the matters referred to in paragraph (1)(*b*).
>
> Human resources management
> (3) Subsections 11.1(1) and 12(2) of the *Financial Administration Act* do not apply with respect to the Agency and the Chief Executive Officer may
> (*a*) determine the organization of and classify the positions in the Agency;
> (*b*) set the terms and conditions of employment, including termination of employment for cause, for employees and assign duties to them; and
> (*c*) provide for any other matters that the Chief Executive Officer considers necessary for effective human resources management in the Agency.

[33] Parks Canada's authority to set terms and conditions of employment, including classification is unrestricted. As noted by this Court in *P.S.A.C.* v. *Canada (Canadian Grain Commission)*, [1986] F.C.J. No. 498, at p. 9, "…the employer in its management functions may do that which is not specifically or by inference prohibited by statute". See also *Brescia* v. *Canada (Treasury Board)*, 2005 FCA 236.

[34] This unrestricted authority to classify a position contained in s. 7 of the *PSLRA*, which reads as follows:

> Right of employer preserved
>
> **7.** Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.

[35] The breadth of the employer's authority was confirmed by the Federal Court of Appeal in *Brochu* v. *Canada (Treasury Board)*, [1992] F.C.J. No. 1057 (at p. 3). While dealing with Treasury Board as employer, its principles apply with equal force to Parks Canada:

> Responsibility for the classification of position rests with the Treasury Board and the departments which it authorizes to exercise such responsibility…Their power to classify positions includes the power to refuse a classification when the description of the position does not met the standards or is not consistent with the organizational structure of the institution.

[36] Implied in the power to classify is the power to determine the classification standard and minimum qualifications for positions. As noted by the British Columbia Supreme Court in *Babcock* v. *Canada (A.G.)*, 2005 BCSC 513, at para. 174:

> The *FAA* authorizes TBC to unilaterally create terms and conditions of employment, classify positions, set rates of pay and to administer the salaries of unrepresented or excluded public service employees.

[37] While dealing with the authority of Treasury Board as employer, *Babcock* applies equally to Parks Canada as employer. It would appear therefore, that Parks Canada may do anything within its

wide grant of statutory authority as employer that is not specifically or by inference restricted by statute.

[38] The applicant has relied on a number of cases which, in his view, stand for the proposition that work experience on the job is relevant to whether a person is qualified for the job and that a person should not be found to be unqualified for a job solely because the person does not hold a formal qualification established by the employer: see, for ex., *IMP Group Limited* v. *Local 2215* (2002), 205 N.S.R.(2d) 179; *Montreal Children's Hospital* v. *Federation of United Nurses Union, local 220* (1974), 8 L.A.C.(2d) 17; *Sunbeam Home* v. *London and District Service Workers Employees' Union, local 368* (1977), 14 L.A.C. (2d) 350.

[39] These cases, however, can be easily distinguished. First of all, they all relate to private sector arbitral jurisprudence. In none of these cases was there an employer exercising statutory authority to establish terms and conditions of employment. Contrary to the situation of a private employer bound by a collective agreement, Parks Canada may in its management function do that which it is not specifically or by inference prohibited by statute. As already mentioned, there is no limitation on Parks Canada's authority over classification. In requiring an engineering degree and engineering certification for the Asset Manager III (Engineer) position, Parks Canada was exercising its wide grant of managerial authority as a separate employer.

[40] Moreover, none of these cases dealt with professional qualifications. Parks Canada contends that holding an engineering degree allows one to "bring more to the job". As difficult as

such an assessment of qualifications may be, it is certainly not an unreasonable assumption that the job experience does not equate to professional competence derived from a university degree and membership in a self-regulated body with all its attendant certification and ongoing education requirements. Finally, the collective agreements pursuant to which the disputes arose in these cases all contain a clause to the effect that past experience would be considered, or that a specific qualification was preferred. There is none of that language in the job description at issue here.

[41] In any event, the authority of Parks Canada to require an engineering degree for the PM-06 classification is not disputed by the applicant. What is challenged is the authority to impose that requirement retroactively. Yet, once it is accepted that Parks Canada has the authority to impose that requirement for the future, there is simply no basis to deny that same authority on a retroactive basis.

[42] Finally, the applicant tries to rely on the "equal pay for equal work" principle to bolster his case. Unfortunately for Mr. Peck, there is no free-standing right to pay equity, and there is no legal foundation for his assertion that it is applicable to the case at hand. The fact that an internal memorandum found on the Intranet site of Parks Canada providing a status report on the National Review process states that the "goal is to ensure employees who perform similar work receive similar compensation regardless of where they work" is not sufficient to incorporate the "equal pay for equal work" principle into the legislation. That policy is framed as a goal, and it clearly was not meant to fetter Parks Canada's legislative authority. In any event, Parks Canada takes the position

that the work performed by non-engineers is not equal to the work performed by engineers. As I previously indicated, this position does not strike me as being unreasonable.

[43] The closest related concept is that of acting pay, i.e. where an employee claims to have substantially performed work not of his or her group and level but of a higher group and level. However, the applicant did not grieve acting pay; indeed, the record does not contain any collective agreement provisions or policies providing for acting pay. It is trite law that an applicant cannot raise an issue for the first time on judicial review.

[44] Furthermore, there is no contract or policy on the record that would support an argument for acting pay (whether characterized as "equal pay for equal work" or otherwise). This Court has confirmed that such a requirement must be specifically located in a collective agreement or employer policy. In any event, it is well established that when an employee is performing the duties of their position but grieves that the same duties are classified at a higher level in other positions, the grievance is not an acting pay grievance but a classification grievance (see, for ex., *Gvildys* v. *Treasury Board (Health Canada)*, 2002 PSSRB 86.

[45] For all the foregoing reasons, I therefore come to the conclusion that this application for judicial review ought to be dismissed, with costs in favour of the respondent.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed, with costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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