Federal Court  Cour fédérale

Date: 20100413

Docket: T-1022-09

Citation: 2010 FC 399

Ottawa, Ontario, April 13, 2010

PRESENT: The Honourable Justice Leonard S. Mandamin

BETWEEN:

JOHN H. MCLAUGHLIN

Applicant

and

ATTORNEY GENERAL OF CANADA,
CHANTAL MAGNY

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, John McLaughlin, applies for judicial review of the May 22, 2009 decision of the Independent Third Party Reviewer to dismiss his request for recourse with respect to an internal staffing decision by the Canada Revenue Agency (the CRA).

[2] The Applicant is a collections officer at the CRA. On October 16, 2008, following a CRA staffing exercise, he was informed he was appointed to a permanent position as a Collections Officer, SP-057, 2008. On November 7, 2008 the CRA decided to cancel the appointment and re-

run the selection process for the position because of errors in the first exercise. Another candidate was appointed as a result of the second selection process.

[3] The Applicant applied for recourse through the CRA's Staffing Process and an Independent Third Party Reviewer (the Reviewer) was appointed to hear the Applicant's claim. The Reviewer concluded, even though no employee had requested recourse in the initial staffing process, that the CRA was entitled to revoke the Applicant's appointment in order to correct "egregious errors" in the initial staffing process. The Applicant requests judicial review of the Reviewer's decision.

[4] For reasons that follow, I am granting the application for judicial review.

BACKGROUND

[5] This case asks whether the CRA acted arbitrarily by revoking the employment offer it made to the Applicant as a result of corrective measures it initiated because of two mistakes it made in posting the job in question here.

[6] The evidence shows the Applicant was offered the job. However, four days later CRA discovered Mr. Convertini was not sent a copy of the initial call letter. Mr. Convertini is an elegible employee who occupied the position in question in an acting capacity. Around this same time the agency also realized it did not specify the term of the employment as indeterminate, that is, as permanent. It subsequently revoked the offer it made to Mr. McLaughlin and reissued its call indicating:

> "On August 1, 2008, a call letter was sent to qualified candidates from the above-noted selection process for a position in the Tax Services and Debt Management Division at the St. Catharines TSO. Due to an administrative error steps are now being taken to address the situation."

[7] The next call was sent to the entire pre-qualified pool and it specified the indeterminate term. The Applicant reapplied. Chantal Magny, who had withdrawn her application from the first call letter because the term was not specified, applied anew because the term was now specified. She was ultimately the successful candidate. Mr. McLaughlin was notified of her placement and initiated the recourse procedure.

[8] In January 2009, the Applicant requested Independent Third Party Review of the matter. He argued, much as he does here, that CRA failed to observe its own policies by taking corrective measures without any requests for recourse. He contends this course of action was arbitrary within the meaning of the expression contemplated by the Staffing Process.

DECISION UNDER REVIEW

[9] The Independent Third Party Reviewer's mandate is limited to determining whether the CRA acted arbitrarily.

[10] The Reviewer summed up the question before him as: "What should the Employer have done when it became aware of these errors and omissions?"

[11] The Reviewer found it was "entirely understandable that Mr. McLaughlin would have been upset and dismayed by the Employer's decision to restart part of the staffing process after he had been notified the he was the successful candidate".

[12] The Reviewer found this change of course was not due to an improper motive on the part of the Employer. Instead, he found the employer acted to correct the failure to indicate the nature of the appointment, a failure the Reviewer described as a "glaring omission".

[13] He rejected the Applicant's argument the appropriate procedure would have been to wait for an aggrieved employee to seek redress. Finding instead the Employer risked violating a general principle of fairness found in the Staffing Process. He wrote:

> I disagree that the Employer cannot be proactive in addressing egregious and serious errors in the staffing process, and must not do so unless and until [sic] there redress procedure is invoked. In my view, management would have been in violation of the fairness component of the "Staffing Principles" if it had failed to act in a timely fashion (as it had in this instance) in the face of the errors that had come to its attention.
> …
> It is clearly not in the interest of the employees of the CRA to establish the proposition that the Employer cannot address egregious errors unless and until the redress process has been invoked. To uphold such a proposition would only create frustration among employees, and may prevent the redress of staffing errors.

[14] The Reviewer found CRA did not act arbitrarily and dismissed the Applicant's complaint.

RELEVANT LEGISLATION

[15] The *Canada Revenue Agency Act*, (1999, c. 17) provides:

53. (1) The Agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business.	53. (1) L'Agence a compétence exclusive pour nommer le personnel qu'elle estime nécessaire à l'exercice de ses activités.
54. (1) The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.	54. (1) L'Agence élabore un programme de dotation en personnel régissant notamment les nominations et les recours offerts aux employés.
(2) No collective agreement may deal with matters governed by the staffing program.	(2) Sont exclues du champ des conventions collectives toutes les matières régies par le programme de dotation en personnel.

ISSUES

[16] In my view, this case raises the following issues:

1. Did the ITPR err in fact by mischaracterizing the CRA's administrative errors?
2. Did the ITPR err in law by misconstruing the definition of arbitrary?
3. Did the ITPR err in fact and law by wrongly interpreting the Staffing Program?

STANDARD OF REVIEW

[17] The Applicant asserts the Reviewer is engaged in the interpretation of "quasi-legislative" directives of the CRA Staffing Program. He contends the scope of the Staffing Program and interpretation of 'arbitrary' is a question of law reviewed on a standard of correctness.

[18] The Respondent submits the Reviewer's decision is a matter of mixed fact and law and fact reviewable on a standard of reasonableness.

[19] In my view, the Reviewer is applying the mandated definition of “arbitrary” to the undisputed facts in the case before him. I find his decision is reviewable on a standard of reasonableness, as it does not require a determination with respect to the legal meaning of “arbitrary” or interpretations of statute or common law.

[20] The Supreme Court of Canada held in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 45 there are only two standards of review: correctness and reasonableness. The standard of correctness will apply to questions of law, while questions of mixed fact and law, and questions of fact will be reviewed on a standard of reasonableness. It also found not every case requires a full standard of review analysis; courts may apply the standard of review previously determined by the jurisprudence. (Para. 57)

[21] In *Canada (Customs and Revenue Agency) v. Kapadia*, 2005 FC 1568 Mr. Justice Michael Kelen conducted a pragmatic and functional analysis of the role of an Independent Third Party Reviewer. He found the decision should be reviewed on a standard of reasonableness *simpliciter*. That standard post-*Dunsmuir* is understood as reasonableness today.

[22] The Supreme Court found in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at paragraph 59:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must

> rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (Dunsmuir, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

ANALYSIS

[23] CRA is an agency established by *Canada Revenue Agency Act* (*CRAA*) with the exclusive right to appoint employees. Staffing is governed at the CRA by the Staffing Program established pursuant to section 54(1) of the *CRAA*. Madam Justice Eleanor Dawson found in *Anderson v. Canada (Customs and Revenue Agency)*, 2003 FCT 667 at paras. 14-16:

> “14 As noted above, the predecessor to the CCRA was Revenue Canada. Revenue Canada was a department in the federal public service. Its employees were appointed by the Public Service Commission ("PSC"). Employees therefore had the right to pursue recourse and appeal mechanisms under the Public Service Employment Act, R.S.C. 1985, c. P-33 ("PSEA").
>
> 15 The CCRA was established in 1999. Subsection 53(1) of the Act vests in the CCRA the exclusive right and authority to appoint its employees, and subsection 54(1) of the Act requires the CCRA to "develop a program governing staffing, including the appointment of, and recourse for, employees". Sections 53 and 54 of the Act are set out in Appendix A to these reasons.
>
> 16 The CCRA did adopt a staffing program entitled the "Canada Customs and Revenue Agency Staffing Program" ("Staffing Program"). The Staffing Program provides that the "Selection Process" is one of the principal mechanisms used by the CCRA for the promotion and appointment of staff. The term "Selection Process" means the procedure whereby individuals may express interest in a job opportunity and subsequently be considered and selected for appointment.”

[24] The selection process is divided into three stages: the pre-requisite stage, the assessment stage and the placement stage. Each stage provides steps which meet the employer's need to assemble a competent staff and the employees' rights to fair access to opportunities. Annex E of the Staffing Program describes the three stages of the selection process. Annex L describes avenues of recourse from staffing decisions.

[25] Redress is engaged by candidates affected by staffing decisions. Only one ground of review is available, but it is reasonably broad. Paragraph 4.1 of Annex L of the Staffing Program provides:

> "In all cases, the grounds for recourse for Individual Feedback, Decision Review and Independent Third Party Review is whether the employee exercising recourse was treated in an arbitrary way. The focus should be on the treatment of the individual in the process and not on the evaluation of other candidates/employees." (emphasis added)

[26] Paragraph 4.2 of Annex L defines "Arbitrary" as:

> "In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale, on established policy; not the result of a reasoning applied to relevant consideration; discriminatory (i.e. difference of treatment or denial of normal privileges to persons because of their race, age, sex, religion or union affiliation."

[27] Paragraph 3.3 of Annex L requires recourse to be initiated with the use of a standardized form requesting individual feedback within 7 days of an assessment or staffing decision.

[28] Where an employee initiates recourse with Individual Feedback or the other subsequent reviews, corrective measures may be prescribed. Independent Third Party Reviewers are limited in this respect. They may order an error in the internal selection process or internal staffing process be

corrected, but they may not order how the correction should be made. They may recommend the revocation of an employee's appointment or recommend another "authorized person" be involved in making a decision.

[29] Corrective measures are clearly contemplated as the outcome of a recourse procedure. They are governed by rules requiring performance within a specific time period, notification and recording. Paragraph 7.1 of Annex L reads:

> "Authorized Persons are accountable for taking appropriate corrective measures in a timely manner. During the assessment, internal *selection process* or internal *staffing action*, these corrective measures must be taken and documented within 30 calendar days after the decision is issued, unless the operational requirements or the volume of work that will be required to apply the corrective measures do not permit this."
>
> (emphasis added)

[30] Finally, four broad principles are aspired to in the Staffing Process. They are, "competency, fairness, transparency and adaptability".

[31] The Respondent argues CRA took a proactive role in rectifying its own "serious and egregious errors". "By addressing issues as soon as they became aware of them, rather than sitting back and waiting for an employee to invoke a redress procedure, the CRA acted reasonably and in accordance with its Staffing Principles."

[32] The Respondent argues the CRA is entitled to take corrective measures upon becoming aware of its errors even if recourse is never initiated. It argues it must protect the "whole" process from being undermined by serious administrative errors.

[33] The Reviewer made a series of errors. The first was mischaracterizing the nature of the CRA's administrative errors which in turn led to misapplying the rules of the staffing process to his findings. Finally, he asked the wrong questions in resolving the issue before him.

[34] The Reviewer overstates the significance of the initial administrative errors. He characterizes the failure to notify John Convertini and the failure to specify the term of employment as "egregious and serious errors" and "a glaring omission". Both errors should surely be avoided. However, they are contemplated in the Staffing Program and corrective measures are available for both.

[35] Mr. Convertini became aware of the Applicant's impending appointment and could have sought recourse for not being notified of the call. He did not.

[36] Contrary to Ms. Magny's assumption that the original term was unclear, paragraph 4.12-1 of Annex E of the Staffing Program provides where a term is not specified, it is permanent. Consequently, the specification of the term of employment as indeterminate may be preferred, but it is not essential.

[37] The Reviewer writes, “The question is: What should the Employer have done when it became aware of these errors and omissions?” This is the wrong question. Paragraph 4.1 of the Annex L of the Staffing Program is concerned with whether the employee exercising recourse was treated in an arbitrary way. “The focus should be on the treatment of the individual in the process and not on the evaluation of other candidates/employees”. In my view, the proper question is: Were the Employer’s actions arbitrary with respect to the candidate seeking recourse?

[38] The Reviewer’s principal concern should have been with how Mr. McLaughlin was treated and whether that treatment was arbitrary. The Reviewer limited his understanding of arbitrary to an inquiry into whether or not the employer acted with an improper motive. While improper motives fall into the definition of arbitrary, the definition is not limited to motivation. Where a decision is “not based on rationale or established policy…” it is arbitrary.

[39] The Reviewer found the Employer would be violating the general staffing principle of fairness if it did not initiate its own corrective measures. He refers to the first sentence of paragraph 7.1 of Annex L requiring authorized persons to take appropriate corrective measures in a timely manner. He overlooks every other mention of corrective measures which lead to the inextricable conclusion corrective measures are remedies resulting from a recourse procedure.

[40] The Staffing Program recourse process provides a predictable and transparent process for redress. The Employer’s intervention on a general principle, absent a truly egregious error or flaw, is neither predictable nor transparent. The doctrine of implied exception can be applied to resolve

any conflict in the interpretation of provisions in the Staffing Program. The specific measures provided for in the Staffing Programs take precedence over general Staffing Principle when responding to an employee's pursuit of recourse.

CONCLUSION

[41] The Independent Third Party Reviewer failed to ask the appropriate question as contemplated by the Staffing Program. He exaggerated the significance of the administrative errors; he misconstrued the meaning of arbitrary; and he misunderstood the operation of the Staffing Program. His decision is not reasonable since it does not properly consider the measures available in the Staffing Program.

[42] The May 22, 2009 decision of the Independent Third Party Reviewer is set aside and the matter is remitted to another Independent Third Party Reviewer for redetermination.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. The decision of the Independent Third Party Reviewer made on May 22, 2009 is set aside and the matter is remitted to a different Independent Third Party Reviewer for redetermination.
3. Costs are awarded to the Applicant.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1022-09
STYLE OF CAUSE:	JOHN H. MCLAUGHLIN and ATTORNEY GENERAL OF CANADA, CHANTAL MAGNY
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 25, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN, J.
DATED:	APRIL 9, 2010

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