Federal Court		Cour fédérale

Date: 20100503

Docket: T-1913-08

Citation: 2010 FC 479

Ottawa, Ontario, May 3, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SHELLEY APPLEBY-OSTROFF

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] The applicant was dismissed from her position at the Canadian Transportation Agency (CTA) and sought to grieve both her dismissal and the internal policy used in the termination process. This is an application for judicial review of the decision by CTA Chair, Geoffrey Hare, dated February 6th, 2009, which denied the applicant's grievance.

[2] The applicant requests an order setting aside the decision of the CTA Chair and remitting the matter back to him for redetermination in accordance with the Court's reasons.

[3] The applicant was a long serving and relatively high ranking official at the CTA. Management determined that her position was no longer required and her employment was terminated. The applicant does not claim that she was wrongfully dismissed, but rather asks this Court to set aside her termination because the employer allegedly used the wrong internal policy in processing her termination. For the reasons that follow, I am unable to agree.

Background

[4] The applicant was employed by the CTA for approximately 18 years and at the time of her termination, she was employed as assistant general counsel and director of the Legal Services Directorate. Her position was classified at the LA-3A level. Her position was neither subject to a collective agreement nor part of a bargaining unit. Therefore, she was considered an excluded employee.

[5] On October 15, 2008, the applicant was informed by her immediate supervisor that her position was being eliminated and she was being terminated. The applicant was informed in a letter received on the same day, that she had three options in accordance with the executive employment transition policy (the EET policy) and was asked to inform the supervisor of her decision by November 5, 2008. Option one involved going on paid leave throughout the six month notice period while concurrently, and for a year afterward, receiving priority consideration for reemployment in the Public Service. Options two and three both involved receiving a cash settlement in lieu of notice, in return for immediate resignation without any priority rights. The only difference was that option

two included some non-financial benefits while option three included an enhanced cash settlement without any non-financial benefits.

[6] Whether the correct policy was applied to the applicant is the primary subject of this judicial review. The Government of Canada's website indicated that the EET policy had been rescinded, yet the respondent argues that it still applied to excluded employees at the LA-3A level as a transitional measure while the first LA collective agreement was negotiated.

[7] During the period between October 15, 2008 and November 5, 2008 a number of events occurred. The applicant attempted to get a better idea of what the cash settlement amounts would be under options two and three. She was provided with a chart that indicated that she would likely receive the maximum allowable amount, 52 weeks pay plus amounts for lost benefits. The applicant found the information confusing and she was also confused about the precise dates when she would be eligible for priority rights under option one. CTA staff scheduled meetings for the applicant to help her in her decision making process. Around the same time, she sought a meeting with the Chair and CEO of the CTA, to discuss extending her employment or to ask for an increased payout. A meeting was held, but her employment was not extended. In regard to her payout amount, she was subsequently told that she was already getting the maximum.

[8] On November 4, 2008, the applicant sought an extension of time to consider her options. This request was denied. It was also communicated to the applicant around this time that if she did make a choice by the end of the business day on November 5th, she would be deemed to have

selected option one. Shortly before the deadline, the applicant advised the supervisor by email that she would waive option one, but that she was reserving her rights to challenge all aspects of her termination.

[9] On November 7, 2008, the applicant was locked out of her office. A letter issued to her on that day confirmed her resignation from the Public Service on November 5th and asked her to inform the CTA of her choice of option two or three.

[10] The applicant grieved the matter arguing that the actions taken regarding her termination were contrary to her terms and conditions of employment. Primarily, it was the applicant's contention that the EET Policy did not apply to her. The applicant sought reinstatement and full compensation for all losses. After some procedural irregularities, the matter was referred to the final level of the grievance procedure. The CTA Chair heard the matter *de novo* and dismissed the applicant's grievance in a letter issued February 6, 2009.

The Decision under Review

[11] The decision letter indicated that before the letter of October 15, 2008 had been prepared, officials at both the Treasury Board Secretariat (TBS) and the Canadian Public Service Agency (CPSA) were contacted to ensure the applicant was provided with the correct entitlements and information. Senior policy analysts at both units agreed that the applicant was subject to the EET policy. It was a transitional measure to ensure excluded employees in the LA-3A level continue to

be covered by their existing terms and conditions of employment while the first LA collective agreement was negotiated.

[12] The letter also summarized many of the events and communications that took place between October 15 and November 5, 2008. It indicated that while the applicant had inquired about an increased benefit beyond the maximum permitted, TBS officials would only approve such an increase in exceptional circumstances. There were no such circumstances here. The applicant was to receive the maximum benefits of a lump sum of 52 weeks pay.

[13] The letter concluded by stating:

> As Ms. Appleby-Ostroff was consistently treated in accordance with the appropriate policy, and as she has available to her all the benefits of the EETP that are within my authority to approve, the grievance is denied.

Issues

[14] The issues are as follows:

1. What is the standard of review?

2. Was it reasonable for the CTA Chair to affirm that the EET policy applied to the applicant?

3. If so, was it reasonable to affirm that the policy had been properly applied to the applicant?

Applicant's Written Submissions

Standard of Review

[15] The applicant submits that the decision is appropriately reviewed against the correctness standard because it was a final level grievance decision without independent adjudication and where the issue involved the application and interpretation of a non-statutory directive effectively incorporated into the contract of employment.

[16] Other factors suggest a standard of correctness. The *Public Service Labour Relations* Act, S.C. 2003, c. 22 (the PSLRA) contains a relatively weak privative clause. Furthermore, the grievance process is the sole means of legal recourse for the breach of an employee's terms and conditions of employment. In addition, this application addresses primarily a question of law (whether the EET policy applies). It is not an issue for which individuals such as the CTA Chair have relevant expertise. Further, the CTA Chair was not an independent decision maker as he was in effect judging his own decision.

The EET Policy did not Apply

[17] The applicant submits that the relationship between the applicant and the Crown was contractual in nature and was of indefinite length. Policies and directives issued by the Treasury

Board are effectively incorporated into an employee's contract of employment, but the EET policy was not in effect in October 2008. It was rescinded by the Treasury Board on July 16, 2007.

[18] Although the CTA Chair indicated that senior policy analysts advised him that the EET policy did apply to the applicant, no affidavits were filed in support. There is no documentation to indicate that the Treasury Board ever made such a decision. Even if such a decision was made, it could not have formed part of the terms and conditions of employment until published and made available. The Government's website still indicates that the EET policy is no longer in effect.

[19] The applicant concedes that the EET policy did continue to apply by operation of section 107 of the PSLRA to some LA employees who had formerly been excluded and were now in the LA bargaining unit. The applicant was never in the bargaining unit.

[20] The work force adjustment directive (WFAD) issued by the Treasury Board formed part of the terms and conditions of the applicant's employment when the EET policy was rescinded. The WFAD is intended to provide employees with job security.

EET Policy Improperly Applied

[21] The applicant submits that even if the EET policy applied, the CTA breached its terms. The CTA attempted to force the applicant from the CTA as quickly as possible and pressured her into accepting a settlement option. This is contrary to the stated purpose of the EET policy to secure

indeterminate employment for affected executives within the Public Service. Nor does the EET policy authorize the three options and deadline or the deemed selection that was presented to the applicant. The EET policy allowed an employee to work during the notice period.

[22] The CTA's position in its letter on November 7, 2009 that the applicant had resigned is factually and legally unsupportable. Resignations must be voluntary.

[23] Further, the manner that the CTA dealt with the applicant was inconsistent with an employer's duty of good faith and fair dealing when handling employee terminations.

Respondent's Written Submissions

Standard of Review

[24] The respondent submits that the appropriate standard had already been settled by the jurisprudence and that standard is reasonableness. The application of policies and procedures to the employment contract is within the decision maker's expertise. This points towards deference. Moreover, the general rule of deference in matters arising out of labour relations should prevail. While a less deferential standard has been held to apply in cases applying a conflict of interest policy to the employment contract, those cases do not apply with equal force to policies regarding termination procedure.

[25] Even on a contextual standard of review analysis, reasonableness is the appropriate standard. There is a privative clause at section 214 of the PSLRA. The PSLRA is polycentric legislation involving contradictory policy objectives and the interests of different groups. Further, the nature of the question at hand is primarily factual and involves application of employer policy. Finally, the CTA Chair had the benefit of advice from the policy centre that had carriage of the policy in question and thus, had a further degree of expertise.

EET Policy was Applicable and was Applied Correctly

[26] The respondent submits that the employer has the authority under the *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 11.1(j) (the FAA), to provide for the terms and conditions of employment. In establishing the EET policy (the conditions governing employees whose positions are discontinued), the employer was exercising its wide grant of statutory authority under the FAA. The employer may, in the exercise of its managerial authority, do that which is not specifically prohibited by statute. The EET policy was extended to employees at the LA-3A level and higher by specific decision of the Treasury Board pursuant to its authority under the FAA. Mr. Thibodeau, Director of Collective Bargaining with the Treasury Board, provided an affidavit confirming, among other things, that when the EET policy was rescinded in 2006, it was extended by the Treasury Board to LA-3A employees during the period for which the LA group negotiated its first collective agreement. The WFAD does not apply to employees who are covered by the EET Policy.

[27] The October 15, 2008 letter clearly stated that by accepting option two or three (the pay in lieu of notice options) you must resign from the public service. Since the applicant chose to take pay in lieu of notice, her employment came to an end.

[28] The applicant was not poorly treated but was treated like any other employee in the same situation at the same group and level. In fact, the record reveals that the CTA did not accept the recommendation of the TBS and offered the applicant the maximum benefit available under the EET policy. Further, the CTA arranged for meetings with the applicant to explain her options and arranged at its own expense for the applicant to see a financial counsellor. The CTA gave the applicant three weeks to make her decision. This deadline was entirely consistent and within the spirit of the EET policy and certainly within the employer's managerial authority under the FAA.

[29] The offer of the 52 weeks pay in lieu of notice was not a negotiated settlement; it was the substance of options two or three when the applicant opted to waive option one. No negotiation was required since the maximum amount possible had been offered.

Analysis and Decision

[30] **Issue 1**

What is the standard of review?

The first step in determining the appropriate standard of review is to ascertain whether existing jurisprudence has already resolved in a satisfactory manner, the degree of deference to be

accorded a particular category of question. If it does not, the Court must engage the second step which is to determine the appropriate standard having regard to *inter alia* the nature of the question at issue, the expertise of the tribunal, the presence or absence of a privative clause, and the purpose of the tribunal (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL) at paragraphs 57 to 64).

[31] This Court in *Peck v. Parks Canada*, 2009 FC 686, found that the jurisprudence with regard to final level grievance decisions under the PSLRA and its precursor, the *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35 (PSSRA), had been settled and that the appropriate standard was reasonableness (at paragraph 17). I cannot take this view. It may be the case that most such decisions ought to be afforded deference, however, several recent cases which I will discuss in more detail below have held the opposite. More fundamentally, I do not believe all such final level grievance decisions ought to be afforded the same degree of deference. Final level grievance tribunals are convened in an *ad hoc* nature under the PSLRA and determine far too broad a range of grievances to be similarly characterized. In my view, the reviewing court should at minimum, compare the nature of the question raised by the grievance with the jurisprudence before concluding that the jurisprudence has determined the applicable standard.

[32] The applicant grieved and now challenges the final level decision, raising the same two issues. Conceding that either one of two Treasury Board directives altered the applicant's terms and conditions of employment, the applicant challenges (i) whether the EET policy was the correct directive to apply, and (ii) whether the EET policy was applied properly.

[33] I would describe the precise category of question raised by this particular judicial review as a final level decision in the PSLRA grievance process where independent adjudication was not available and where the issue involved the application or interpretation of a policy or directive that formed part of the terms and conditions of an employee's employment and did not hinge on key findings of fact.

[34] Similar but not identical questions have been put before this Court and the Federal Court of Appeal in the following three cases.

[35] In *Dubé v. Canada (Attorney General)*, 2006 FC 796, [2006] F.C.J. No. 1014 the applicants, two employees of a federal department argued that the guidelines in question which indicated employment priority, were part of their terms and conditions of employment. They grieved under the PSLRA's predecessor, the PSSRA, which similar to the PSLRA, allowed the employer to establish an internal grievance procedure. The final decision held that the guidelines were not part of the terms and conditions of employment and as such, could not be the proper subject of a grievance but also held that in any event, the guidelines had been applied properly to the applicants. Thus, the application for judicial review in part challenged the interpretation of those guidelines.

[36] In regards to the issue of whether the guidelines formed part of the terms and conditions of employment such that they could be the subject of a proper grievance, Mr. Justice Blanchard held at paragraph 33 that the standard applicable was correctness. While a privative clause existed, in his view, it was a question of statutory interpretation and turned on a point of law. In regards to whether

the employer/Minister had observed the guidelines, the judge held that the standard of review was reasonableness.

[37] In *Canada (Attorney General) v. Assh*, 2006 FCA 358, [2007] 4 F.C.R. 46, 274 D.L.R. (4th) 633, the applicant, a pensions advocate employed by Veterans Affairs, had grieved an order that he return a gift because accepting the gift, in the employer's view, constituted a contravention of the Conflicts of Interest Code (the Code). The Code in force at the relevant time was a Treasury Board Directive tabled by the Prime Minister in the House of Commons. The applicant did not challenge the applicability of the Code to him, only the interpretation of the Code. The applicant's grievance was dismissed at the final level. On judicial review to this Court, Mr. Justice Hughes held that the interpretation of the Code at the final level of grievance was subject to the reasonableness standard.

[38] The Federal Court of Appeal disagreed, determining that the appropriate standard of review was correctness. The Court attached particular weight to two factors. First was the fact that the Code was effectively incorporated into the applicant's contract of employment, yet it fell to be interpreted in the grievance process by a person not independent from the employer. This suggested less deference in the Court's view:

> [51] …Parliament should not be taken to have intended that, subject only to judicial review for unreasonableness, the employer may determine unilaterally whether, by accepting this legacy, an employee would be in breach of contract.

[39] Second, was the fact that the determination of a conflict of interest resembled a question of pure common law, such that the courts would have superior expertise in handling (paragraphs 42 to 46 and 53).

[40] In a recent case, *Hagel v. Canada (Attorney General)*, 2009 FC 329, [2009] F.C.J. No. 417, a group of non-unionized employees were transferred to a different employer within the government, the Treasury Board, although on its face they became workers for the fledgling Canadian Border Services Agency. The employees were assured that their terms and conditions of employment, rates of pay and classification levels would be accepted at the CBSA. Behind this assurance was a Treasury Board decision to continue the terms and conditions of employment until new collective agreements were in place. The employees did not receive the regular annual salary increase and bonuses they would have received at their former employer and thus grieved under the PSLRA. The final decision, handed down by a top official at the CBSA, denied the grievance and essentially told the employees that it was the Treasury Board that had determined how to conduct the transfer of the employees and that the CBSA in turn had treated all employees equitably and in accordance with the Treasury Board's instructions.

[41] On judicial review, Mr. Justice Zinn determined after conducting an analysis that the appropriate standard was reasonableness. The following paragraphs are instructive:

> 25 Matters that may be grieved but not adjudicated are varied. It is not in every case that the decision-maker will possess any more expertise than the Court, particularly where questions of law are involved. In this case, the applicants framed their grievances with reference to administrative policies, not laws. I am satisfied that the

> application of policies and procedures is within the specialized expertise of the decision-maker, which points to deference.
>
> 26 When one examines the statutory scheme as a whole, it is clear that it constitutes a comprehensive scheme for dealing with employment related disputes, whereby Parliament has established an exclusive mechanism of non-adjudicative dispute resolution for grievances which do not involve demotion or termination, or disciplinary actions resulting in financial penalty. This has implications for the level of deference the Court should show to decision-makers acting within this scheme. In this regard, it is noted that in *Vaughan v. Canada*, [2005] 1 S.C.R. 146, Justice Binnie, writing for a majority of the Court, stated:
>
> I do not accept [...] that comprehensive legislative schemes which do not provide for third-party adjudication are not, on that account, worthy of deference. It is a consideration, but in the case of the PSSRA it is outweighed by other more persuasive indications of clues to parliamentary intent.
>
> ...
> While the absence of independent third-party adjudication may in certain circumstances impact on the court's exercise of its residual discretion (as in the whistle-blower cases) the general rule of deference in matters arising out of labour relations should prevail.
>
> What was at issue in *Vaughan* was whether the PSSRA excluded recourse to the superior courts as an alternative to the non-adjudicative grievance process provided for therein. The majority answered that question in the affirmative leaving room only for a "residual" superior court competence. As noted, under the PSLRA, exclusive jurisdiction is now legislated at section 236.
>
> 27 In light of the above, I conclude that with respect to the merits of the decision, the appropriate standard of review is reasonableness. It would be contrary to the reasoning in *Vaughan* to adopt a correctness standard, as advocated by the applicants.

[42] Turning to the case at bar, I do not feel that the jurisprudence has settled the matter of the appropriate standard of review. The additional factors in the second step under *Dunsmuir* above,

need to be reviewed, though I note that the overarching factor in determining the standard of review is legislative intent.

[43] I prefer the reasoning of Mr. Justice Evans in *Assh* above. While I agree that there is a general rule of deference in employment and labour relations matters, I find that this rule does not apply to this particular case.

[44] The Supreme Court of Canada has held that public employment is for the most part now viewed as a regular contractual employment relationship and the general law of contract will apply unless specifically superceded by explicit terms in a statute or the agreement (see *Dunsmuir* above, at paragraph 95, *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, [1999] S.C.J. No. 50 (QL) at paragraphs 29 and 30.) The applicant employee here, like the applicant in *Assh* above, is faced with the unilateral assumption of policies into the terms and conditions of their contract of employment, in this case issued by the Treasury Board. This ability to effectively make unilateral changes to the contract of employment is expressly provided for by various statutes I will refer to later. In any event, and for the purposes of this analysis, the applicant and respondent both agree that the relevant policy became part of the terms and conditions of employment, regardless of whether it was the EET policy or the WFAD policy. In my view then, either policy can be seen as a subset of the terms and conditions to the employment contract.

[45] In my view, this aspect distinguishes the present case and *Assh* above, from *Dube* and *Hagel* above, where it was not established that the policies in question had become incorporated into the employee's contract of employment.

[46] Here the applicant first challenges whether the correct set of terms and conditions were applied. This question in effect asks 'which employment contract was mine?', and is a question to which the employee is normally entitled to receive the correct answer. The CTA Chair consulted senior analysts at the Treasury Board to ensure he proceeded under the correct law.

[47] In the private sector, employees are entitled to take the terms and conditions of their employment contract to a court of law and are entitled to a correct interpretation of their employment contract. Alternatively, the employee and employer can agree to take their dispute to an independent adjudicator who will endeavour to interpret the contract correctly and upon judicial review, both parties are entitled to a reasonable interpretation of the employment contract. In contrast, in the present case, the respondent suggests that an interpretation of the terms and conditions of public employment at the final level of grievance under the PSLRA effectively made by the employer, is only reviewable against the standard of reasonableness.

[48] If the nature of public employment truly is ruled by the principles of contract of employment law, Parliament cannot have intended such a deviation. In other words, Parliament cannot have intended that subject only to judicial review for unreasonableness, the employer may determine which set of terms and conditions govern a given employee. If the public employer has the statutory

right to unilaterally change the terms and conditions of employment, the employee should have an equal right to be apprised of the correct terms of his or her contract of employment in the event of a dispute.

[49] While legislative intent alone indicates the standard of review should be correctness, I now turn to the four factors in the second stage of the *Dunsmuir* above test.

[50] Both questions posed by the applicant involve the application of the correct terms and conditions of employment to the facts of the case. First, the nature of the question involved law, not because the EET policy was law, it was not, but because it had become part of the employee's terms and conditions of employment. Effectively, parts of the EET policy were incorporated into the applicant's legal and binding contract of employment. Therefore, I would characterize the nature of the questions as a question of law, 'Did the EET policy apply?' followed by a question of mixed fact and law 'Was the EET policy correctly applied?'.

[51] On the factor of expertise, the respondent argues that the *Assh* above, decision is distinguishable from the present case on the basis that the impugned decision in that case focused on conflicts of interest, an area where courts have superior expertise. In my view, the Federal Court of Appeal's more general comments on the PSLRA's grievance process in *Assh* above, are also applicable. Mr. Justice Evans held at paragraph 44 that:

> … I said in *Vaughan* (at para. 139) that the informal nature of the grievance process under section 91, and the fact that it is not independent of the employer, suggest that a court should not afford much deference to internal grievance boards' decisions on questions

> that are not purely factual in nature. As already noted, Mr. Assh had no right to refer his grievance to an independent Adjudicator under section 92.

[52] In my view, the lack of an independent arbitrator under the final level grievance process is a strong indicator that such decision makers are to be afforded less deference. Persons who decide such grievances do so as part of their managerial functions. They are not selected for their subject matter expertise or legal expertise. Indeed, in the present case the CTA Chair, a manager with specific expertise in transportation, was effectively sitting in judgment of his own underlying decision.

[53] While it was noted in *Vaughn* above, that the absence of third party adjudication can be outweighed by stronger statutory clues suggesting deference, I do not feel that sufficient clues exist in the present case. Parliament set out schemes for both independent adjudication and final level grievance decisions by the employer. Pursuant to section 214 of the PSLRA, a final level grievance decision is considered "final and binding for all purposes of this Act and no further action under this Act may be taken on it". This has been found to be a relatively weak privative clause (see *Assh* above at paragraph 35, *Hagel* above, at paragraphs 23 and 24). It can be contrasted with the much stronger privative clause applicable to the decisions of independent adjudicators. Section 233 states as follows:

> [233] (1) Every decision of an adjudicator is final and may not be questioned or reviewed in any court.
>
> (2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo*

> *warranto* or otherwise, to question, review, prohibit or restrain an adjudicator in any of the adjudicator's proceedings under this Part.

[54] In my view, the weaker privative clause for final level grievances, which only purports to preclude further action under this Act, is entirely consistent with a legislator being cautious.

[55] I would readily acknowledge that the PSLRA is polycentric legislation (see *Peck* above, at paragraph 20). However, this particular grievance is a simple two-party dispute regarding an employee's contract of employment.

[56] Having considered all of the factors, I hold that the standard applicable for the questions raised by the applicant is correctness. Thus, when a guideline, policy or directive can be said to become part of an employee's contract of employment, an employee grieving under the PSLRA alleging a breach by the employer, is entitled to a correct final level grievance decision made by the employer.

[57] **Issue 2**

Was it reasonable for the CTA Chair to affirm that the EET policy applied to the applicant?

The terms and conditions of employment for public servants are, for the most part, not individually negotiated. As pointed out by the Supreme Court of Canada in *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146, 250 D.L.R. (4th) 385:

> The terms and conditions of employment of the federal government's quarter of a million current workers are set out in statutes, collective agreements, Treasury Board directives, regulations, ministerial

> orders, and other documents that consume bookshelves of loose-leaf binders. Human resources personnel are recruited into the system, spend a career attempting to understand it and die out of it. (at paragraph 1 per Binnie J.)

[58] The authority to determine the requirements of the Public Service to lay-off employees and to establish terms and conditions of employment are all specifically provided by statute. The Treasury Board may establish the terms and conditions of employment for employees in the federal public administration pursuant to paragraph 7(1)(e) and subsections 11.1(a), (f) or (j) of the FAA. The EET policy, including its termination provisions, was established under this statutory authority.

[59] A deputy head, such as the CTA Chair, has the authority to terminate any employee for cause under subsection 12(1) of the FAA and to lay-off an employee under section 64 of the *Public Service Employment Act*, S.C. 2003, c. 22.

[60] In this case, the CTA, based on a consultant's report, decided that the applicant was going to be laid off as a result of the discontinuance of her position. In so doing, the employer was acting within its wide grant of statutory authority.

[61] But terminating the applicant's employment triggered the application of the applicable terms and conditions in the applicant's effective contract of employment. However, those terms and conditions do not necessarily remain constant throughout an employee's career. The Treasury Board may unilaterally establish and alter an unrepresented employee's terms and conditions of

employment (see *Assh* above, at paragraph 51, *Babcock v. Canada (Attorney General)*, 2005 BCSC 513, [2005] B.C.J. No. 880 (QL) at paragraph 174).

[62] I have determined that the appropriate standard of review is correctness and therefore, the CTA Chair's decision is not to be afforded any deference in the event that an error is established. However, the onus still rests with the applicant to establish that an error was made by the CTA Chair.

[63] The applicant urges that the EET policy was no longer in effect. The Treasury Board's website stated that the EET policy was no longer in effect, but is kept online purely for historical purposes.

[64] The respondent maintains that despite the erroneous message on the website, the EET policy in fact continued to apply to excluded employees in the LA-3A level and above, as a transitional measure while a collective agreement was negotiated.

[65] In further support of its position, the respondent relied on the evidence of Marc Thibodeau, Director of Collective Bargaining with the Treasury Board, who indicated that despite being rescinded in 2007, as a result of a decision of the Treasury Board, the EET policy was extended to employees at the LA-3A group and above. The actual document containing the Treasury Board decision was not produced and the respondent claims it was a confidence of the Queen's Privy Council for Canada pursuant to section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5.

[66] The primary sticking point in this case seems to be the Treasury Board's website which indicated that the EET policy was no longer in effect. The applicant was not aware of any of the relevant Treasury Board policies prior to her termination, but now argues that the rescinded EET policy cannot and did not form part of the terms and conditions of her employment. I cannot make that inference.

[67] The Treasury Board displays some policies on its website as a service. While the EET policy was categorized as rescinded on the website, this did not have the same effect as the repeal of a statutory provision or regulation. The Treasury Board has wide statutory authority to set the terms and conditions of the employment for employees such as the applicant. It may draft policies or directives for consistency and ease of administration, but it is not required to by statute. Nor is it required to post or make available its policies.

[68] The applicant seems to suggest that the Treasury Board is bound by the version of one of its policies found on its website. I cannot agree. While it may not be administratively sound, the Treasury Board is entitled under power of statute, to make a decision that deviates from a written policy posted on its website. The CTA sought the Treasury Board's direction and received advice from senior policy analysts at the Treasury Board. While the applicant complains that there is no documentary evidence of such communications, such a lack of evidence does not establish that a substantive error was made by the CTA Chair.

[69] There is no indication that the advice received by the CTA was given in error or that it did not represent the intention of the Treasury Board. On the other hand, the evidence of Mr. Thibodeau supports the notion that the information was accurate.

[70] Other than the website which was never relied on by the applicant, there is no evidence that the Treasury Board did not intend the EET policy to apply. The applicant was given the EET policy with the letter issued to her on October 15, 2008, and at all times was advised that the EET policy applied.

[71] The applicant suggests that even if the Treasury Board did make such a decision, it could not have formed part of the terms and conditions of the applicant's employment until published and made available. I cannot agree. The applicant acknowledges the Treasury Board's broad statutory authority to alter her terms and conditions of employment, but does not point to any provision or case suggesting the Treasury Board is required to post them on their website. I have already determined that the applicant is entitled to a correct answer if she asks what terms and conditions apply to her employment. In any event, the applicant was not aware of either the EET policy or the WFAD policy at the time of her determination and clearly cannot claim to have relied on them.

[72] In the alternative, the applicant would accept that the Treasury Board could extend the application of the EET policy, but suggests that the senior analysts may have mistakenly thought the applicant was a member of the bargaining unit when they informed CTA that the EET policy would apply to the applicant. However, since there is no evidence to support the likelihood of this

possibility, it does not become more than simple speculation. There is no evidence that similarly situated employees were treated differently.

[73] In short, the applicant has not brought forth enough evidence to demonstrate that the CTA Chair was incorrect when he affirmed that the EET policy did apply to the applicant. For the above reasons, I would not allow judicial review on this ground.

[74] **Issue 3**

If so, was it reasonable to affirm that the policy had been properly applied to the applicant?

As I determined above, the CTA Chair's determination on this question is to be reviewed against the standard of correctness. In other words, if the applicant can establish that the policy which formed part of the terms and conditions of her employment was contravened, the Court will not defer to a contrary decision made by a senior manager.

[75] In asserting that the EET policy was not followed, the applicant makes reference, not to any express breaches of the words of the EET policy, but to the employer's apparent bad faith in removing her from the workplace as quickly as possible, something contrary to the spirit and purpose of the EET policy.

[76] It is readily apparent from the record that several clerical errors were made regarding dates in the original letter of termination issued to the applicant on October 15, 2008. This understandably added to the anxiety and frustration felt by the applicant. Terminations of long serving and high

ranking employees are often difficult and on top of an already stressful situation, her termination was not handled very smoothly.

[77] The employer further upset the applicant by stating that she had resigned by virtue of the fact that she chose to accept a cash settlement in lieu of notice.

[78] In my view, such bungling would gain more traction in a wrongful dismissal action. The applicant, however, does not claim that she was wrongfully dismissed. In substance, she was offered the choice of going on paid leave throughout the notice period or one of two types of severance pay packages in lieu of notice. The applicant's only claim under this issue is whether it was unreasonable for the CTA Chair to affirm that the ETT policy was applied properly.

[79] I have read the policy in full. It is drafted in relatively broad terms and in my view, enables a fair degree of flexibility for employers. I will now turn to the applicant's specific arguments.

[80] The applicant suggests that the CTA's conduct was designed to force the applicant from the workplace as quickly as possible and that this flies in the face of the stated purpose of the EET policy which is to "secure indefinite employment for the affected Executive within the Public Service." I disagree. None of the options involved the applicant continuing at the workplace, but this does not violate the EET policy. Option one included paid leave during the notice period, combined with priority rights and assistance in finding another position within the Public Service. It was the applicant who chose not to pursue this option and elected to receive a cash settlement.

[81] Next, the applicant argues that the deadline by which to choose from the options imposed in the October 15, 2008 letter was a violation of the EET policy. Again I disagree. Nothing in the policy prohibits this practice. From a practical standpoint, it is better not to let such issues drag on indefinitely. She was given three weeks to make her determination.

[82] Finally, the applicant argues that the EET policy does not authorize the employer to deem an employee to have selected option one. I disagree. While the EET policy does not suggest this specifically, it clearly indicates that the default expectation is that a terminated employee will pursue another position within the Public Service. Cash settlements are only to be offered when the affected employee elects not to continue with the Public Service.

[83] In my view, there was no basis to suggest that the CTA Chair was in error in affirming that the EET policy had been properly applied. I would not allow judicial review on this ground.

[84] The application for judicial review is therefore dismissed.

[85] Because of the issue of which policy applied to the applicant's case, there will be no order for costs.

JUDGMENT

[86] **IT IS ORDERED that:**

1. The application for judicial review is dismissed.

2. There shall be no order for costs.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Financial Administration Act, R.S.C., 1985, c. F-11

7.(1) The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to	7.(1) Le Conseil du Trésor peut agir au nom du Conseil privé de la Reine pour le Canada à l'égard des questions suivantes :
. . .	. . .
(e) human resources management in the federal public administration, including the determination of the terms and conditions of employment of persons employed in it;	e) la gestion des ressources humaines de l'administration publique fédérale, notamment la détermination des conditions d'emploi;
. . .	. . .
11.1(1) In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may	11.1(1) Le Conseil du Trésor peut, dans l'exercice des attributions en matière de gestion des ressources humaines que lui confère l'alinéa 7(1)e) :
(a) determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service;	a) déterminer les effectifs nécessaires à la fonction publique et assurer leur répartition et leur bonne utilisation;
. . .	. . .
(f) establish policies or issue directives respecting the exercise of the powers granted by this Act to deputy heads in the core public administration	f) élaborer des lignes directrices ou des directives sur l'exercice des pouvoirs conférés par la présente loi aux administrateurs généraux de l'administration

and the reporting by those deputy heads in respect of the exercise of those powers;

publique centrale, ainsi que les rapports que ceux-ci doivent préparer sur l'exercice de ces pouvoirs;

. . .

. . .

(j) provide for any other matters, including terms and conditions of employment not otherwise specifically provided for in this section, that it considers necessary for effective human resources management in the public service.

j) régir toute autre question, notamment les conditions de travail non prévues de façon expresse par le présent article, dans la mesure où il l'estime nécessaire à la bonne gestion des ressources humaines de la fonction publique.

Public Service Employment Act, 2003, c. 22, ss. 12, 13

64.(1) Where the services of an employee are no longer required by reason of lack of work, the discontinuance of a function or the transfer of work or a function outside those portions of the federal public administration named in Schedule I, IV or V to the Financial Administration Act, the deputy head may, in accordance with the regulations of the Commission, lay off the employee, in which case the deputy head shall so advise the employee.

64.(1) L'administrateur général peut, conformément aux règlements de la Commission, mettre en disponibilité le fonctionnaire dont les services ne sont plus nécessaires faute de travail, par suite de la suppression d'une fonction ou à cause de la cession du travail ou de la fonction à l'extérieur des secteurs de l'administration publique fédérale figurant aux annexes I, IV ou V de la Loi sur la gestion des finances publiques; le cas échéant, il en informe le fonctionnaire.

Canada Evidence Act, R.S.C. 1985, c. C-5

39.(1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before

39.(1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements

a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

(2) For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

(2) Pour l'application du paragraphe (1), un « renseignement confidentiel du Conseil privé de la Reine pour le Canada » s'entend notamment d'un renseignement contenu dans :

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

a) une note destinée à soumettre des propositions ou recommandations au Conseil;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

b) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government

d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

e) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa d);

(f) draft legislation.

f) un avant-projet de loi ou projet de règlement.

(3) For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

(3) Pour l'application du paragraphe (2), « Conseil » s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

FEDERAL COURT

SOLICITORS OF RECORD

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