Federal Court  Cour fédérale

Date: 20111129

Docket: T-2138-10

Citation: 2011 FC 1386

Ottawa, Ontario, November 29, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

NYALL ENGFIELD

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Nyall Engfield brought under subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7,seeking to set aside a decision of the Patent Agent Examining Board (Board) concerning its review of his failing grades in a patent-agent examination written over four days in April 2010. Mr. Engfield complains in his Notice of Application that the Board failed to observe the principles of procedural fairness and made its decision to deny his appeal on the basis of reviewable errors of fact and without regard to the evidence. The first of these issues must be assessed on the basis of correctness and the second on the basis of reasonableness.

[2] At the commencement of the hearing, it was agreed that the only proper Respondent is the Attorney General of Canada and the style of cause is amended accordingly.

[3] It is undisputed that Mr. Engfield received failing grades on three of the four papers he had written in answer to the Board's patent-agent examination. The examination rules set by the Board require a grade of at least 50% on each of the answers to four questions posed and a 60% overall average for all four answers. Any mark of 60% or more on a paper will stand as a credit on subsequent examinations.

[4] The record discloses that Mr. Engfield received marks of 36% on drafting, 47% on validity, 55.5% on examination and 60.5% on infringement and, accordingly, he failed the 2010 examination. However, his grade of 60.5% on the infringement question was accepted by the Board as a credit against any future qualifying examinations.

[5] On September 24, 2010, Mr. Engfield filed an appeal to the Board challenging all four of his grades. He claimed in a detailed submission that his answers warranted grades respectively of 71.8%, 65.25%, 74.5% and 82%.

[6] The Board disagreed. It increased his mark for the second answer from 47% to 48%, but declined to adjust any of the remaining grades. In the result, his appeal failed.

[7] Mr. Engfield acknowledges that the patent-agent examination is difficult to pass. Each question is imposing and each must be answered within four hours. The examination is

administered on four successive days and the answers are rigorously graded against detailed marking guides. In 2008 and 2009, the pass rate for first-time applicants was below 5% and the overall pass rate was below 20%. In short, the majority of those who sit the examination receive failing grades.

[8] In argument before me, it was apparent that Mr. Engfield misunderstood both the scope of the appellate review that was available before the Board and the scope of judicial review that is open to the Court.

[9] Judicial review is not a process by which the Court can remark Mr. Engfield's examination. That is a task assigned to the Board by subsection 14(1) of the *Patent Rules*, SOR/96-423. The functions of setting and marking the annual patent-agent examination fall squarely within the Board's specialized expertise and it is fully entitled, as it has done, to set exacting standards for entry to this profession. Therefore, Mr. Engfield misconstrues the scope of available judicial review where he argues between paragraphs 25 and 53 of his Memorandum of Fact and Law that the Court should effectively re-grade his answers.

[10] The authority of the Board to sit on an appeal from a failed examination is also constrained. The Board's Review Policies and Procedures state that the grounds for review are limited to clerical errors concerning the physical manipulation, addition or reproduction of a candidate's answer book or where the marks awarded are inappropriate having regard to the content of the marking guides. An appeal based on an argument that a marking guide was deficient will not be entertained.

[11] The Board is entitled to a high degree of deference in setting and marking its patent-agent examinations. The Board has appropriately adopted very exacting standards for gaining admission to a very exclusive and learned profession. In an extreme case where there is evidence in the record that the Board manifestly failed to assess a candidate's answers, the Court can intervene on judicial review. However, in this case I have no evidence from Mr. Engfield, or from any witness on his behalf, to establish that the Board's review of his answers was unreasonable. Mr. Engfield has presented arguments to that effect but no evidence. In any event, the fact that he is able to advance a more favourable interpretation of his answers than that adopted by the examiners is no basis for concluding that the appeal results were unreasonable. To the extent that Mr. Engfield takes issue with the adequacy of the Board's marking guides, his challenge falls outside of the scope of the Board's review authority and, therefore, cannot be relied upon on judicial review.

[12] Mr. Engfield also complains that the Board acted unfairly by failing to provide sufficient reasons to allow him to understand why his arguments for passing grades were not accepted. This argument is untenable.

[13] It is not entirely clear from the record that Mr. Engfield ever asked for the Board's reasons before bringing this application. The only reference in the record to the provision of reasons is found in Mr. Engfield's letter of appeal dated September 24, 2010. That letter requests "complete reasons for the enclosed exam so I am able to understand the marker's reasoning". This appears to me to be a request for reasons for the original assigned grades and not for the anticipated reasons from Mr. Engfield's pending appeal. There is no follow-up request for reasons in the record before

me and, given the ambiguity in Mr. Engfield's request, I do not think the Board can be faulted for failing to do more than it did.

[14] In any event, the Board's fairness obligations in the context of an examination review are minimal. It will generally be required to honour its own procedural protocols and, of course, it must always act in good faith. The Board is also required to consider an applicant's submissions to the extent that they are germaine to the Board's review authority. However, the Board has no duty to provide reasons beyond the provision of the marking guides, the examination questions, the answers and the record of the conclusions reached by the reviewers. With the provision of those materials, an applicant has all of the information required to understand the process and to assess the reliability of the assigned grades. In this case, Mr. Engfield had sufficient information to prepare a detailed argument to challenge the initial assigned grades in the prosecution of his appeal and he suffered no apparent prejudice in mounting a substantive, albeit misguided, attack on the test results before the Court.

[15] According to the Federal Court of Appeal in *Gardner v Canada (AG)*, 2005 FCA 284, [2005] FCJ no 1442 (QL), the duty to provide reasons will be minimal where, by virtue of one's intimate involvement in the process leading to a decision, a person has the means to understand its rationale. This is in keeping with the observation in *Baker v Canada (MCI)*, [1999] 2 SCR 817, 147 DLR (4th) 193, that the content of the duty of fairness will vary according to the nature of the decision and the decision-making process. Here the decision-making process is one of a paper review that does not resemble a judicial adjudication. There is also nothing in the Board's written

policies to suggest that any justification is required either for the initial assignment of grades or in connection with their subsequent review.

[16] It is of additional significance that an examination failure is subject to appellate review and it does not preclude subsequent attempts to rewrite. Indeed, it appears that many failed applicants continue to be retested until they succeed. The Board's practice of protecting grades above 60% also militates, to a degree, the rigour of the Board's methods. These are matters that lessen the practical significance of an examination failure.

[17] Mr. Engfield argues that there is nothing in the Board's records to show that his submission was ever considered. I do not agree. It is clear from the record that the individual reviewers were provided with copies of his submission and, in at least one instance, the reviewer made notations on that document. The reviewers were not required to carry out an issue-by-issue response to Mr. Engfield's submission. Their task was to reassess his answers against the marking guides, not against his interpretations. To the extent that Mr. Engfield took issue with the adequacy or content of the marking guides, his argument was misplaced and exceeded the scope of the available review.

[18] Mr. Engfield's criticisms about the length and complexity of the Board's examination and its use of half marks are trivial and of no legal significance. He wrote the same examination as the other candidates and was marked under the same set of criteria. The fact that he found the examination too taxing does not support an inference that the process was unfair.

Conclusion

[19] For the foregoing reasons, this application for judicial review is dismissed with costs payable to the Respondent in the amount of $2,000.00 inclusive of disbursements.

JUDGMENT

THIS COURT'S JUDGMENT is that the only proper Respondent is the Attorney General of Canada and the style of cause is amended accordingly.

THIS COURT'S FURTHER JUDGMENT is that this application for judicial review is dismissed with costs payable to the Respondent in the amount of $2,000.00 inclusive of disbursements.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2138-10
STYLE OF CAUSE:	ENGFIELD v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, ON
DATE OF HEARING:	August 11, 2011
REASONS FOR JUDGMENT:	BARNES J.
DATED:	November 29, 2011

APPEARANCES:

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