Federal Court  Cour fédérale

Date: 20111213

Docket: T-1971-10

Citation: 2011 FC 1465

Ottawa, Ontario, December 13, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JADWIGA MAJDAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present application for judicial review pertains to a classification grievance decision of L. Seguin, Director General, Corporate Human Resources Policies and Programs (the Director) at Public Works and Government Services Canada (PWGSC), dated October 28, 2010. The Director's decision adopted the recommendation of the Classification Grievance Committee (the Committee) that the applicant's position be classified at the AR-05 group and level, retroactive to March 1, 2000.

BACKGROUND

[2] The applicant, Jadwiga Majdan, was employed by PWGSC from 2000 to 2007, and held multiple positions during that time. In April 2004, she filed a job content grievance because the generic work description (WD) for her position did not correspond to her actual duties. The parties agreed to resolve the grievance through a memorandum of understanding, which included an agreement to develop a new specific WD for the applicant.

[3] On July 16, 2008, based on the applicant's new WD, her position of Program Specialist/Manager Level II was classified at the AR-05 group and level. On August 18, 2008, the applicant filed a classification grievance pursuant to section 208 of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2.

[4] On June 16, 2009, the classification grievance was heard by the Committee. The applicant gave oral testimony, and her representative, Dejan Toncic, made an oral presentation. Mr. Toncic attests by affidavit that he submitted several documents to the Committee, including three WDs submitted for relativity purposes (the Relativity WDs). Marie-Josée Fournier, a member of the Committee, attests by affidavit that the Relativity WDs were never submitted to the Committee. Mr. Toncic also states that he submitted three WDs for comparator purposes (the Comparator WDs), which the Committee accepted at the hearing without question or challenge.

[5] At the hearing, the applicant told the Committee that Pierre Vaillancourt was not her supervisor while she was working in the grieved position (GP), and furthermore that Mr. Vaillancourt had an *animus* towards the applicant. The respondent states that senior management

submitted Mr. Vaillancourt as a relevant person for the Committee to contact for the classification grievance. Ms. Fournier stated in her cross-examination that the Committee explained to the applicant that her personal issues with Mr. Vaillancourt were irrelevant.

[6] On July 22, 2009, the Committee met with Mr. Vaillancourt to obtain information for the classification grievance. The Committee also sent Mr. Vaillancourt a follow-up email requesting performance reviews and work plans to get a sense of the applicant's duties. Ms. Fournier states in her affidavit that she does not remember ever receiving this information from Mr. Vaillancourt, and if the Committee did receive it, they did not rely on it in their decision.

[7] Mr. Toncic emailed the Committee to reiterate the applicant's position that Mr. Vaillancourt was not the appropriate person to speak with in relation to the grievance, as he was not her supervisor at the relevant time. The Committee also met with two of the applicant's other supervisors.

[8] On December 10, 2009, the Committee emailed the applicant with further questions related to her duties and responsibilities while working in the GP. The applicant notes that on two occasions, Mr. Toncic asked whether the Committee had concerns with her WD, and the Committee responded that it was not challenging the WD.

IMPUGNED DECISION

[9] By letter dated October 28, 2010, the Director informed the applicant that the Committee had unanimously recommended that the GP be classified at the AR-05 group and level. The

Director stated that he approved this recommendation, which was effective retroactively to March 1, 2000. A copy of the Committee's report was attached.

[10] In the report, the Committee summarized the presentation by Mr. Toncic. He submitted that the GP corresponded to a higher AR level than it was currently classified – specifically, level 6. In support of that argument, Mr. Toncic provided background information on the applicant's WD, one of the Relativity WDs (RPS10700), the Comparator WDs, and the characteristic assignments and responsibilities of the GP.

[11] The Committee then reviewed the information supplied by management, including the information provided by Mr. Vaillancourt. The Committee noted the applicant's submission that Mr. Vaillancourt was not her supervisor at the relevant time.

[12] The Committee noted that it had concerns about the applicant's WD, and so it had sought further information from the applicant and management to clarify the essence of the work assigned to the GP. The Committee stated that its discussions focused on these clarifications and explanations from the parties about the applicant's actual duties. The Committee then analyzed the GP in relation to positions it found to be relevant comparators.

[13] The Committee's analysis of the appropriate level at which to classify the GP is thorough and complex. Essentially, the Committee found that the GP was most closely akin to a Project Manager at level 5 (although the Committee acknowledged the difficulty of comparing project-based and program-based positions). The Committee found that the similarity in knowledge

required, the level of responsibilities, and the provision of strategic and technical advice made this the appropriate comparator. The Committee found that the GP was at a lower level than BM 9 (level 6), which is more akin to a Senior Project Manager.

[14] The Committee did not accept Mr. Toncic's argument that the complexity of the applicant's work in the GP merited a higher classification, finding instead that the requirements for the GP were comparable to the requirements at level 5.

[15] The Committee found that it could not consider the three Comparator WDs submitted by the applicant: the Specialist, Consultant Professional Advisor (AR-06) WD was a draft WD with no management signature, and had never been officially evaluated. The Manager, Buildings Structures and Services (AR-07) WD was found to be classified as EN-ENG-06 (engineering) and not AR-07 (architecture), and therefore was evaluated by a different classification standard. The Manager, Regional Operations Support and Commodity Management (AR-07) WD was rejected because there was no position with this title in PWGSC. Contrary to the applicant's claim that this was a draft WD for one of the her supervisors, Jacques Leclerc, the Committee found that Mr. Leclerc's title was Director, Project and Contract Management Services, and also that this position had been abolished.

[16] The Committee concluded that based on the duties and responsibilities of the GP, it was appropriately classified at the AR-05 group and level.

ISSUES

[17] The applicant raises the following issues in this application:

1. The Committee breached its duty of fairness;
2. The Committee ignored relevant evidence, while considering irrelevant evidence, which renders the impugned decision unreasonable.

[18] Because of my conclusions regarding the duty of fairness, it is not necessary to deal with the applicant's subsidiary proposition that the impugned decision is unreasonable.

BREACH OF FAIRNESS ISSUE

[19] A breach to the duty of fairness is not subject to deferential standard of review because it is a fundamental procedural requirement: *Maurice v Canada (Treasury Board)*, 2004 FC 941, 267 FTR 107. The Court finds that the submissions made by the applicant in respect of this issue are well founded and that there has been a breach of procedural fairness. I will first start my analysis with a brief summary of the parties' respective positions on this issue.

Applicant

[20] The applicant submits that the Committee had a duty to act fairly, although he concedes that duty lies at the lower end of the spectrum. The applicant submits that this duty requires the Committee to afford the applicant an opportunity to make submissions on additional or contradictory evidence relied on in its decision: *Maurice*, above, at para 32; *Bulat v Canada (Treasury Board)* (2000), 252 NR 182, 95 ACWS (3d) 99 (FCA).

[21] The applicant submits that the Committee breached its duty of fairness in four instances:

(a) It denied her the opportunity to respond to information provided by Mr. Vaillancourt;

(b) It failed to notify her of its rejection of the Comparator WDs, and thus she could not respond to the reasons for that rejection;

(c) It denied her the opportunity to respond to the information provided by Mr. Leclerc about the GP; and

(d) It did not notify her of its concerns about her WD, despite the fact that her representative inquired on two occasions whether it had concerns.

[22] The applicant submits that her presentation at the hearing was based on her belief that the content of her WD was accepted, since it had been approved by her and management. The applicant submits that the Committee never informed herself or her representative of information it had obtained after the hearing that contradicted the characterization of her position in the WD. In this regard, the applicant notes in particular the information obtained from Mr. Vaillancourt, which the applicant emphasizes Ms. Fournier admitted to relying upon to some degree in the decision.

[23] Regarding the Committee's reason for rejecting the Comparator WDs, the applicant notes that one of the WDs relied upon by the Committee in its relativity analysis was also a draft WD, and was also classified under the engineering (EN) standard. Thus, the applicant submits, it was not self-evident that the Committee could not consider the Comparator WDs because they were drafts or were classified under the EN standard.

[24] The applicant also submits that, had the Committee informed the applicant or Mr. Leclerc of its belief that the position of Manager, Regional Operations Support and Commodity Management (AR-07) did not exist, either of them could have clarified that this was in fact the title of Mr. Leclerc's position at the relevant time.

Respondent

[25] The respondent submits that there has been no breach of the duty of fairness. The respondent mostly relies on *Begin v Canada (Attorney General)*, 2009 FC 634, to submit that there is no right of reply in response to new information if the grievor will only be reiterating her previous arguments. Thus, regarding Mr. Vaillancourt's evidence, the respondent submits that his information was not new or central to the Committee's decision, and therefore the applicant had no right of reply.

[26] Regarding the Comparator WDs, the respondent submits that the applicant should have known that the Committee cannot rely on draft WDs that have not been officially evaluated, nor can it rely on WDs evaluated by a different classification standard. Thus, the failure to bring these issues to the applicant's attention did not amount to a breach of the duty of fairness.

[27] Regarding Mr. Leclerc's information, the respondent submits that his information was not inconsistent with the information provided by the applicant. The respondent notes that Mr. Leclerc never explicitly stated at what level the GP should be classified, but rather provided information on the duties and responsibilities of the GP. Thus, the respondent again submits there was no right to reply to this information.

[28] Finally, the respondent submits that the applicant was made aware of the Committee's concerns about her WD. The respondent directs the Court to emails from Ms. Fournier to the applicant, which asked for further clarification about the duties and responsibilities of the GP. Thus, the applicant cannot claim to have had no notice of the Committee's concerns.

Analysis

[29] Having considered the evidence, analysed the impugned decision, considered the relevant case law and the parties' arguments, this is a case where the intervention of the Court is warranted. Subject to what is otherwise stated in the following paragraphs, the Court wholly endorses the applicant's argumentation.

[30] I will begin by restating that the case law is clear that a breach of the duty of fairness by the Committee will vitiate the decision: *Maurice*, above, at para 11. The cases are also consistent in their articulation of the content of the duty of fairness in a classification grievance—the duty lies at the lower end of the spectrum, but nonetheless requires that the Committee afford the grievor an opportunity to respond to any additional or contradictory information it will rely upon in its decision.

[31] One such articulation of this principle can be found in *Bulat*, above, at para 10:

> An elementary incident of the duty of fairness is that the individual adversely affected should have an adequate opportunity to address an issue that the Committee regarded as central to the disposition of the grievance, but which the grievor did not realise was in dispute and therefore could not have been reasonably expected to anticipate, and to address.

[32] Thus, in order to find a breach of the duty of fairness, the Court must find that the Committee based its conclusion on information to which the grievor had no opportunity to respond. The relevant question is whether the grievor could reasonably have been expected to know that the issue was in dispute, and therefore address the issue in her submissions to the Committee. If the undisclosed information is found to have somewhat taken the grievor by surprise, and was material to the Committee's conclusion, the decision must be set aside. This is such a case.

[33] In *Bulat*, above, the undisclosed information was a manager's statement that some tasks the grievor performed were voluntary and not part of his actual job description. Thus, the manager narrowed the grievor's duties in a way that merited a lower classification, without the grievor's knowledge. This, the Court found, was central information that could not have been anticipated and addressed by the grievor.

[34] In *Maurice*, above, the undisclosed information was the fact that the Committee could not consider the grievor's proposed comparator because it had not been submitted in an acceptable format. The Court found that the Committee should have advised the grievor that it could not consider her substantive arguments about the comparator because of the format problem, and afforded her an opportunity to make additional submissions.

[35] Based on the principles from these cases, I find that the Committee's rejection of the Comparator WDs, without notice to the applicant, breached the duty of fairness. As the applicant

submits, the Committee accepted the Comparator WDs at the hearing without question or challenge, and did not alert the applicant at any point to the fact that it could not consider them.

[36] Although there may be some differences, this scenario is somewhat similar to that in *Maurice*, above: in that case, the Committee rejected the proposed comparator because it was not dated or signed by a classification officer, and not accompanied by an adequate job description. The Court stated in that case at para 35:

> In the particular circumstances of this case, and taking into account *inter alia*:
>
> (i) the absence of any guideline on the form or content of the description of duties to be submitted so that a current position may be considered by the Committee;
>
> (ii) the fact that in the absence of evidence in this regard, the Court may infer that at the meeting the Committee raised no problem of form or lack of clarity in the comparison of positions put forward by the applicant, and that as indicated in Mr. Guérin's affidavit she remained under the impression that she had clearly compared her description of duties with that of other employees to whom her duties were transferred, including Ms. Martin: accordingly, she expected that the substance of her argument would be analysed;
>
> (iii) the Committee should have the best possible information to ensure that its decision is fair and equitable;
>
> (iv) giving notice or a short deadline to the applicant for providing additional information is not an excessively burdensome requirement: it should not unduly compromise or delay resolution of the grievance;
>
> the Court concludes that the Committee should have informed the applicant that it could not consider her arguments because the evidence submitted was not in an acceptable form and given her a short period of time to provide additional information.

[37] Similarly, in the decision under review, the Committee rejected all three proposed comparators on grounds not previously disclosed to the applicant. The Committee's reasons for rejecting the comparators were similar to the reasons in *Maurice* – in two cases, the comparators were not dated and signed, and thus were not official. As the Court found in *Maurice*, there is very little guidance on how to present comparators to the Committee, and therefore it would not have been burdensome to inform the applicant that the Comparator WDs could not be considered in their presented form. Nor was there any suggestion at the hearing that the Committee intended to discard the comparators because they were not relevant and that other comparators should be submitted.

[38] This is particularly true, given the very long length of time the applicant's grievance was under consideration by the Committee. The hearing took place on June 16, 2009, and the decision was not rendered until October 28, 2010. In the intervening time, the Committee was in contact with the applicant and her representative on multiple occasions. Thus, there is no question the Committee could have advised the applicant of the problems with her proposed comparators, and given her the opportunity to address those problems.

[39] Moreover, I am not persuaded that it was self-evident that the Committee would have to disregard the Comparator WDs because they were drafts or they were otherwise irrelevant. The Committee went to great lengths to investigate the reality of the applicant's position, rather than just relying on what was written in her WD. Why then was the Committee required to immediately disregard the Comparator WDs because they said 'DRAFT', rather than investigate them further to determine if they were useful in the Committee's inquiry? Thus, in relation to its rejection of the Comparator WDs, the Committee breached its duty of fairness.

[40] I find that the Committee also breached its duty of fairness by not providing the applicant with an opportunity to respond to the information obtained from Mr. Vaillancourt. The respondent acknowledges that the Committee sought information from Mr. Vaillancourt to clarify the applicant's duties while she worked in the GP. However, the respondent submits, he did not provide the Committee with any useful information and therefore the Committee did not need to inform the applicant of this information and provide her with an opportunity to respond.

[41] However, the Committee referred to the information supplied by Mr. Vaillancourt in its decision:

> Mr. Vaillancourt confirmed that the grievor's primary duties were included in some of the key activities of the work description. He also substantiated some of the information as it relates to the activities. However, he emphasized that the GP primarily exercised a participatory role as expert in the planning and development of strategic frameworks for the Branch.

[42] Thus, contrary to the respondent's submission, Mr. Vaillancourt's information was not completely duplicative of the information presented by the applicant. In the final sentence, Mr. Vaillancourt characterized the GP as involving the provision of expert advice, as opposed to a leadership or management role. This was not benign or neutral information – Mr. Vaillancourt characterized the GP in a way that would clearly merit a lower classification than that proposed by the applicant.

[43] Thus, I do not accept the respondent's argument that Mr. Vaillancourt's information had no effect whatsoever to the Committee's determination. Rather, I find that this is similar to the

undisclosed information in *Bulat*, above – the manager in that case provided information that supported a lower classification than the grievor sought. Similarly in this case, Mr. Vaillancourt's information was clearly detrimental to the applicant's grievance (which is particularly problematic given the fact that he was not her supervisor, and apparently had an *animus* towards her).

[44] Ms. Fournier was equivocal under cross-examination regarding whether the Committee relied on Mr. Vaillancourt's information in its deliberations. She states at one point that he "wasn't able to give us information other than confirming duties that she had been assigned to while he was supervising her"; however, she went on to say: "It's hard to explain. We took it into consideration in the sense that there were certain parts that he was able to explain to us regarding the work." I thus find that I cannot rely on Ms. Fournier's evidence to conclude that the Committee did not rely on Mr. Vaillancourt's information. Furthermore, the presence of this information in the Committee's decision supports the conclusion that the information was relied upon, which triggers an obligation on the part of the Committee to inform the applicant of this information.

[45] The Committee's decision gives the impression that the applicant was advised of Mr. Vaillancourt's information and given an opportunity to respond:

> The grievor was offered the opportunity to respond to this information and explained that Mr. Vaillancourt was not her supervisor relative to those duties as described in the MOU.

[46] However, Ms. Fournier admitted under cross-examination that the Committee only informed the applicant of the fact that it had met with Mr. Vaillancourt; the Committee did not inform the applicant of the content of information supplied by Mr. Vaillancourt. Thus, I find that in this regard the Committee also breached its duty of fairness.

[47] Even if there is a low standard of fairness in classification grievances, this is one of those cases where the Committee simply gave lip service to its duty.

CONCLUSION

[48] For these reasons, the present application shall be allowed by the Court. The Director's decision shall be set aside, and the matter referred back for re-determination by another adjudicator. The newly constituted Committee must hear the applicant before making any final recommendation. The parties have informed the Court that they have an agreement that the successful party be awarded $4500 in costs – thus, costs are awarded to the applicant in that amount.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application is allowed by the Court.
2. The Director's decision is set aside, and the matter is referred back for re-determination by another adjudicator;
3. The newly constituted Committee must hear the applicant before making any final recommendation;
4. The applicant is awarded $4500 in costs.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1971-10
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