Federal Court  Cour fédérale

Date: 20130208

Docket: T-1793-11

Citation: 2013 FC 139

Ottawa, Ontario, February 8, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MICHAEL BACKX

Applicant

and

CANADIAN FOOD INSPECTION AGENCY AND NANCY GRIFFITH

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a final level grievance decision by Stephen Baker, Vice-President Operations of the respondent Canadian Food Inspection Agency [CFIA or employer], granting the applicant's grievance in part. In his grievance, the applicant, Dr. Michael Backx, argued that the list of qualified candidates generated with respect to a competition to staff a VM-02 Veterinarian-in-Charge position in London, Ontario, relating to the Meat Hygiene division, should not have been used to staff a promotional VM-02 position related to the Animal Health division. Although the grievance was

granted, the CFIA decided not to grant the applicant's requested corrective action; hence the present application for judicial review.

Facts

[2] The applicant is a veterinarian employed with the Operations Branch of the CFIA at the London, Ontario District Office. The Operations Branch typically comprises a Meat Hygiene division and an Animal Health division, although these are not official employment categories in the Veterinary Medicine [VM] occupational group. The applicant holds a VM-01 position in the latter division since 1981.

[3] The facts with respect to the staffing process are not in dispute. In August 2006, the CFIA held a competition to staff a VM-02 Veterinarian-in-Charge position within the Meat Hygiene stream. The competition poster indicated that the list of qualified candidates, referred to as an Eligibility List, "may be used to staff similar positions." Dr. Backx did not apply for this job as his job experience and interests did not relate to Meat Hygiene and because he had not been advised that the staffing results of the competition could be used in the future to staff Animal Health positions.

[4] However, in early 2007, the CFIA used the Eligibility List generated in the context of the August 2006 competition to staff a VM-02 District Veterinarian vacancy relating to Animal Health. The successful candidate was the respondent Dr. Nancy Griffith, who had experience in Meat Hygiene at the VM-01 level.

[5] The applicant alleges that the London-based District Veterinarian position was an ideal opportunity for him because he was seeking a promotion in the job he had done for twenty-nine years and was not willing to move to another city.

[6] In November of 2007, the applicant filed a grievance under section 208 of the *Public Service Labour Relations Act*, SC 2003, c 22 [PSLRA], challenging the employer's decision to use the August 2006 Eligibility List to staff the disputed vacancy. He alleged that the decision to treat the two positions as "similar" violated the CFIA's staffing principles of fairness, openness and efficiency, and noted that other veterinarians, both in and outside of the region, who were interested in the District Veterinarian position were prejudicially affected by this decision as they were not advised that the Eligibility List could be used to staff Animal Health related positions.

[7] The CFIA denied the applicant's grievance at the final level, concluding that the positions were similar based on the experience requirements. This decision was quashed on judicial review before this Court and the matter was referred back for re-determination by a different final level decision-maker (*Backx v Canada (Canadian Food Inspection Agency)*, 2010 FC 480 [*Backx (FC)*], aff'd in 2011 FCA 36 [*Backx (FCA)*]). Justice O'Keefe of this Court found that, based on the facts of the case, the employees would not consider the positions similar even if the employer might and that the announcement advertising the staffing process did not dissuade employees from making this distinction between the two types of positions. Since the decision-maker failed to address the lack of similarity in the positions, which was the applicant's primary ground for his grievance, both Courts held that the CFIA's decision did not display the required justification, transparency and intelligibility in the decision-making process.

Decision under Review

[8] A new final level decision-maker was appointed to hear the applicant's grievance. The applicant did not wish to have a further hearing but provided further written submissions, detailing his position on the matter and the appropriate corrective action he requested. Of importance to this case, the applicant submitted that the grievance concerned the decision to proceed with the appointment of Dr. Griffith despite formal objections from affected veterinarians and that the only way to correct the CFIA's violation of its staffing policy was to run another selection process to staff the disputed position. The applicant notably stated:

> The notion that they could be offered another opportunity or that they could be assessed and added to the current VM-02 pool, if they meet the requirements for entry to the pool, is not a corrective action that addresses the particular lost opportunity. It must be understood that this grievance is about the fact that a coveted position became available and those who would have been the most interested and most suitable for the position, were not given the opportunity to apply. (Exhibit B to the Backx affidavit, at page 3: Applicant's Record).

[9] This time, the applicant's grievance was allowed but the CFIA refused to grant the remedy sought by Dr. Backx, finding that "the appointment made to the Animal Health position in the London District Office was valid and cannot be revoked." Rather, the CFIA offered the applicant the opportunity to be assessed against the requirements in an ongoing VM-02 selection process launched from March 2010 to June 2012 for the Ontario Area, which was intended to create a pool of qualified candidates who would be eligible for VM-02 vacancies as they arose anywhere in the Province of Ontario.

[10] The applicant alleges that he declined the CFIA's offer because the only position he was interested in obtaining was the VM-02 District Veterinarian position in London. Furthermore, there were no current vacant positions and the applicant found there was little chance that the position he was interested in would become vacant in the near future given that it had just recently been filled.

[11] The issues in this application for judicial review are the appropriateness of the remedy offered to the applicant in the circumstances and the CFIA's refusal to revoke the impugned appointment.

Issues

[12] The questions raised by the applicant in this case are as follows:

1) What is the appropriate standard of review?
2) Did the CFIA err in concluding that it did not have the authority to revoke Dr. Griffith's appointment?
3) Alternatively, was the remedy provided to Dr. Backx reasonable?

[13] Contrary to the applicant's suggestion, the CFIA's final level grievance decision-maker did not decide that they did not have the authority to revoke the impugned appointment, but rather that the said appointment *could* not be revoked because it was valid. The impugned decision contains no determination with respect to its authority to revoke an appointment. It is also clear from the recommendation of Lisa Martin, Senior Labour Relations Advisor with the CFIA, which preceded the decision, that the CFIA's "inability to revoke the appointment" does

not refer to its legal authority to do so, but to the validity of Dr. Griffith's appointment. I would therefore reformulate the second issue as follows:

(2) Did the CFIA err in refusing to revoke Dr. Griffith's appointment?

Standard of Review

[14] Since *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], the standard of review analysis involves a two-step process. The reviewing court is first required to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 at para 16; *Dunsmuir*, above, at para 62).

[15] The parties are in agreement that in the ordinary course, the employer's decisions in relation to staffing, such as the employee's entitlement to a promotional appointment with retroactive pay as a remedy, is a "matter of discretion" reviewable on a standard of reasonableness (*Macklai v Canada (Revenue Agency)*, 2011 FCA 49 at para 7). That being said, the parties are divided on the standard of review that the Court should apply to the question of the revocation of the impugned appointment of Dr. Griffith.

[16] As Justice O'Keefe underlined in *Backx (FC)*, above, at para 22, the case law regarding the appropriate standard of review for a variety of final level decisions made under the *Public*

Service Labour Relations Act, SC 2003, c 22 [PSLRA] is not settled, so that a contextual approach should be adopted having regard to the nature of the question.

[17] The applicant asserts that the CFIA denied his request to re-launch the selection process solely on the basis of its view that it did not have the authority to do so, which, in the applicant's view, is a question of law that falls outside of the specialized area of expertise of the decision-maker. I have considered the applicant's arguments and authorities with respect to the decision-maker's lack of independence within the final level grievance procedure under the PSLRA (*Assh v Canada (Attorney General)*, 2006 FCA 356 at para 44-46 and 50-51; *Appleby-Ostroff v Attorney General of Canada*, 2010 FCA 84 at para 21-23) and the Court's ability to view the interpretation of law or policy as questions on which it is at least as expert as the administrative decision-maker (*Endicott v Canada (Treasury Board)*, 2005 FC 253 at para 9; *Blais v Canada (Attorney General)*, 2004 FC 1638 at para 16). However, as explained earlier, I am of the view that the Court cannot regard the issue of revocation of the impugned appointment as one of pure law, because the CFIA based its decision on its view of the validity of the appointment and not on its lack of authority in law.

[18] The respondent referred me to a number of cases that have applied the standard of reasonableness on non-adjudicative final level grievance decisions which interpret and apply internal procedures and policies (*Hagel v Canada (Attorney General)*, 2009 FC 329 at para 19-27, aff'd in 2009 FCA 364; *Peck v Canada (Parks Canada)*, 2009 FC 686 at para 17-26; *Spencer v Canada (Attorney General)*, 2010 FC 33 at para 18-32). In light of these cases, I believe that the position of the respondent in this case is more in line with the jurisprudence.

[19] The question at issue before the final decision-maker was one of mixed fact and law. The question of the validity and revocability of an appointment involves a fact-based inquiry and hinges on the application of administrative procedures similar to those applicable in other non-adjudicable classification grievances. I conclude that both the revocation of Dr. Griffith's appointment and the appropriateness of the CFIA's corrective action are reviewable against the standard of reasonableness.

[20] For the following reasons I find that the latter issue is most determinative in this case. I would therefore deal with the issues in reverse order.

Analysis

Was the remedy provided to Dr. Backx reasonable?

[21] In granting Dr. Backx's first judicial review application, this Court noted in obiter that "the only acceptable outcome would have been one that was in favour of the applicant and that remedied his lost ability to apply for the district veterinarian position." Despite this indication from the Court, the CFIA refused to grant the remedy sought by the applicant, namely to be allowed to apply for the Animal Health MV-02 position in London, on the basis that there was no cause for the current appointment to be revoked.

[22] The applicant's lost ability was, in fact, that to be considered for a promotion to a position that both corresponded to his experience and allowed him to maintain his residency in London. The applicant submits that the CFIA's offer to allow the applicant to be considered in

another selection process for positions that might become available in any city is not a meaningful remedy. It offered the applicant nothing that he did not already have, and completely failed to address the fact that due to the employer's mistake in treating the two positions as similar, potential candidates, including the applicant, lost the opportunity to apply for the promotional position that they qualified for.

[23] The applicant also argues that even if Dr. Griffith's appointment could not be cancelled, it was still necessary to re-run the competition to determine who would have been the successful candidate, because the identification of the successful candidate is necessary to determine the available corrective measures for the CFIA to respond to the applicant's particular situation.

[24] The applicant's arguments with this respect are well-founded. As per *Dunsmuir*, above, at para 47, a review for reasonableness "inquires into the qualities that make a decision reasonable, referring to both the process of articulating the reasons and the outcome" and these qualities include "the existence of justification, transparency and intelligibility within the decision-making process." I agree with the applicant that the outcome of the final level grievance decision is unreasonable, notably because it is not responsive to the applicant's claim and does not provide him with any meaningful remedy.

[25] There is nothing to suggest that the CFIA's offer remedied the applicant's loss of opportunity in any way, nor that the CFIA took reasonable steps to provide the applicant's with a suitable remedy in his particular circumstances. Although it is open to the CFIA to choose how to

remedy the loss suffered by the applicant as it sees fit, it must do so in a reasonable and meaningful manner.

[26] The respondent submits that there is no requirement either under the *Canadian Food Inspection Agency Act*, SC 1997, c 6 [CFIAA] or the *Public Service Employment Act*, SC 2003, c 22 [PSEA] that an appointment opportunity be provided to employees and no right or requirement is violated by not affording employees an opportunity to compete. The respondent further submits that the concept of reasonableness refers to the manner in which an existing right must be exercised and should not be used to create a substantive right. As a result, a remedy that does not allow a grievor to be considered for a specific position or that does not provide for the revocation of the appointment is not unreasonable.

[27] The respondent's position does not withstand scrutiny. Even if the CFIA has no obligation to provide each and every potential candidate with an opportunity to compete, there is no basis for the proposition that the CFIA does not have an obligation to remedy the losses suffered by a more qualified candidate who successfully grieved against the impugned appointment. The respondent has failed to validly assert its argument before this Court and before the Federal Court of Appeal and it granted the applicant's final level grievance, hence acknowledging that its selection process was vitiated and that the applicant had lost an opportunity.

[28] Any risks that may arise from proceeding with an appointment the validity of which can be successfully challenged subsequently must be borne by the deciding authority. This is what the CFIA chose to do in spite of the complaints and the controversy surrounding Dr. Griffith's

appointment. It is worth noting that an August 16, 2008 communiqué of the CFIA [2008 communiqué], which will be discussed in further detail below, foresees the risk for CFIA managers to make appointments pending a challenge to their validity given the scope of the CFIA's authority to cancel an appointment as provided for in section 2.2 of its Human Resources Delegation of Authority [HRDA], Schedule II. The relevant passage of the communiqué reads as follows:

> HR Advisors should advise their client managers of the narrow scope of authority 2.2 and the subsequent risk in proceeding with appointments prior to the related staffing recourse and grievance periods ending and prior to the resolution of any resulting staffing complaints and grievances. In some situations, interim staffing arrangements, such as an acting appointment, may be an appropriate staffing option.

[29] The respondent argues that the applicant failed to mitigate his damages when he refused to apply for the VM-02 District Veterinarian position competition that was offered to him as a remedy. As mentioned earlier, the applicant's position in his first and second grievance was that he was not prepared to move to another city where a similar promotional position would be available. The applicant's obligation to mitigate his damages does not rise to accepting to apply for positions that are not yet available and/or not located in the city that he has worked and lived in for at least 29 years.

[30] Having regard to all of the circumstances of this case, I find that the CFIA's proposed corrective action is unjustified in its reasons and outcome, and is therefore unreasonable.

Did the CFIA err in refusing to revoke Dr. Griffith's appointment?

[31] Whether the CFIA erred in refusing to revoke Dr. Griffith's appointment depends on factual circumstances which are not in the record before this Court, such as whether an identical position is available in London or whether damages can be afforded for the applicant's loss. However, I find that the decision-making process lacked justification, transparency and intelligibility in many respects.

[32] Subsection 13(1) of the CFIAA gives authority to the President of the CFIA to appoint the employees. Section 7 provides that the President may delegate to any person any power, duty or function conferred on him under the CFIAA or any other legislation. The parties have raised and discussed the issue of whether the CFIA has the authority to revoke a validly challenged appointment. Although the CFIAA does not provide the President with an express authority to revoke an appointment, comparable to the authority vested in the Public Service Commission pursuant to section 81(1) of the PSEA, I agree with the applicant that the right of the CFIA to revoke an impugned appointment following a successful grievance against it exists as an implied term of the appointment.

[33] The final level grievance decision-maker did not explain why an appointment made following an erroneous and unreasonable process was valid and irrevocable.

[34] The CFIA relies on a modification of its human resources policies, effective December 9, 2010, as a result of the 2008 communiqué. While the former version of section 2.2 of the CFIA's HRDA confirmed its authority to "repeal an appointment when it is determined that a fraudulent practice or breach of CFIA statutory obligations, staffing policies or staffing values has occurred,"

the new version provides that an appointment can be "void when it is determined that the appointed candidate committed fraudulent actions and/or made fraudulent representations in the course of the staffing process."

[35] The applicant submits that the CFIA should not be allowed to rely on a modification of its own policy on available corrective measures that was initiated subsequent to Dr. Griffith's appointment. For his part, the respondent alleges that the adjective "fraudulent" was meant to apply to both "practice" and "breach." It is submitted that the modification is simply a clarification of the language of the policy (affidavit of Vickie Boulanger), so as to better reflect that the CFIA's authority to revoke an appointment is limited to circumstances when the appointee acted fraudulently.

[36] Notwithstanding the fact that the former version of the HRDA was in place at the time of the impugned appointment, the respondent did not present a compelling justification for CFIA's choice to read down its authority to cancel an appointment so as to include only practices and breaches on the part of the appointed candidates.

[37] The respondent argues that according to *Messier v Canada (Solicitor General)* (FCA), [1985] FCJ No 227, "an appointment made as a result of fraudulent misrepresentations by a candidate with respect to material facts is quite simply voidable" without recourse to a specific power of revocation. However, one could argue that no statutory right to grieve the CFIA's staffing decisions, and recourse to have their legality reviewed upon judicial review, would have existed if the decision-maker did not have the authority to remedy its wrongdoings.

[38] The respondent takes the position that the PSEA does not apply to the CFIA because this Court has ruled in *Forsch v Canada (Canadian Food Inspection Agency)*, 2004 FC 513 at para 18 that "due to the CFIA's legislated power to appoint its employees, granted by subsection 13(1) of the CFIA Act, the provisions of the [PSEA] dealing with the appointment of persons to the federal public service do not apply to the CFIA: subsection 8(1) of the PSEA [current section 29(1) of the PSEA]." In fact, the CFIA is vested with large powers with respect to appointments of its employees by virtue of the CFIAA, including the authority to create policies surrounding appointment procedures. The respondent's position implies that appointments made by the CFIA are final and simply irrevocable under any circumstances, other than where fraudulent misrepresentations were made by the successful candidate. Yet, in my view, had the legislature intended to create such an exception, it would have done so in express and unequivocal terms.

[39] For these reasons, I would allow the application for judicial review. The decision of the final level decision-maker is set aside and the matter is remitted back to a different final level decision-maker of the CFIA for redetermination in accordance with these reasons. Costs shall follow the event.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed;

2. Costs are granted in favour of the applicant; and,

3. The decision of the final level decision-maker is set aside and the matter referred back to a different final level decision-maker of the Canadian Food Inspection Agency for redetermination in accordance with these reasons.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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