Federal Court  Cour fédérale

Date: 20140624

Docket: T-1011-13

Citation: 2014 FC 607

Ottawa, Ontario, June 24, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

UMBERTO TAMBORRIELLO

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision that dismissed the request for the reclassification of his position made by the applicant, Mr Umberto Tamborriello. The application is made pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] The decision under review was made on May 6, 2013 by the Deputy Head Nominee following the recommendation made by a Classification Grievance Hearing Committee at Transport Canada.

[3] Mr Tamborriello's position is that of a civil aviation security inspector classified at the level of AO-CAI-02. AO stands for the Aircraft Operations group and CAI refers to Civil Aviation Inspection. The applicant sought a reclassification of his position in view of his proposed rating of the various factors or elements which are rated for this kind of a position. The Committee concluded that the total number of points was 462, whereas the applicant proposed that the total number be at 593.

I. Facts

[4] It will not be necessary to describe the facts of this case in view of what was the sole argument presented to this Court.

[5] As already pointed out, factors are rated with a view to getting to a total number of points. Depending on the total, a position would be rated at a particular level. In the case at hand, in order to be classified at the next level, AO-CAI-03, the applicant would have to have at least a total of 491 points.

[6] Here are the factors that are considered together with the degrees of factors, leading to the number of points proposed and given.

Rating proposed by the Applicant

Factors/Elements	**Degree**	**Points**
1. Knowledge	3	238
2. Decisions and Recommendations	C2	185
3. Managerial Responsibility	A2	80
4. Work Environment	2	20
5. Flying Requirements	3	70
Total		**593**

Rating as found by the Deputy Head Nominee

Factors/Elements	**Degree**	**Points**
1. Knowledge	2	182
2. Decisions and Recommendations	B2	140
3. Managerial Responsibility	A1	50
4. Work Environment	2	20
5. Flying Requirements	3	70
Total		**462**

[7] As can be readily seen, the applicant argued that the factors that are rated had been undervalued when compared to other comparable job descriptions. For instance, Mr Tamborriello argued that the knowledge required for his job was higher than what appeared in the job description. Comparing what he considered to be the knowledge requirements to those of similar jobs, he suggested that the degree should be a 3 rather than a 2, with a corresponding difference of 56 points (238-182).

[8] Evidently, the applicant agreed with the ratings given to "4. Work Environment" and "5. Flying Requirements". He disagreed with the other three.

[9] An examination of the decision under review shows that the Committee carefully compared job descriptions to reach a conclusion as to what degree ought to be associated with a factor. The "Knowledge" factor was rated as a 2 because, compared to other positions, the requirements were not as extensive as a job at a higher level. The factor "Decisions and Recommendations" was given a rating of B for the scope of the job and a 2 for the impact. The factor "Managerial Responsibility" was rated as an A for difficulty or diversity of managerial tasks and as a 1 for accountability.

II. Arguments

[10] On this judicial review application, two arguments were originally submitted:

1. The Deputy Head Nominee failed in her duty to provide procedural fairness to the applicant by neglecting to disclose a generic job description with respect to Enforcement Investigations – Flight Operations the employer was developing at the time the applicant's grievance was being dealt with. That negligence, or failure, deprived the applicant from meaningfully participating in the decision-making process.

2. The Deputy Head Nominee based her decision on a recommendation that was flawed because the Classification Grievance Hearing Committee based its recommendation on an erroneous finding of fact made in a perverse or capricious manner, or without regard for the material before it. At any rate the decision is unreasonable with respect to the evaluation of comparable job descriptions.

III. Standard of review

[11] The parties are in agreement that the first issue calls for the standard of review of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392). Reasonableness, on the other hand, is the standard applicable to the judicial review of classification decisions (*Canada (Attorney General) v Gilbert*, 2009 FCA 76).

IV. Analysis

[12] The second issue raised by the applicant can be dealt with quickly since the applicant resiled from his argument during the hearing before this Court. That was a wise concession and the matter was not considered further by the Court.

[13] The standard of reasonableness carries with it a measure of deference towards the decision-maker. The Supreme Court of Canada described the standard in the following fashion in *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190:

> [47] … In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

The decision under review was justified, transparent and intelligible. It clearly fell within that range of possible, acceptable outcomes.

[14] The procedural fairness argument is based on a duty that would be on the employer to disclose information to the applicant in order to participate adequately in the decision-making process. By being denied a full opportunity to have access to a generic work description and the rationale for its classification, the applicant was put in the position of not being able to develop a better argument before the Classification Grievance Hearing Committee.

[15] The argument boils down to this: while the grievance was being dealt with, the employer was developing a generic work description and its classification rationale. Indeed, the new

instruments became effective on May 5, 2013, but were being discussed as early as in October 2012. The recommendation of the Classification Grievance Hearing Committee, which was endorsed by the Deputy Head Nominee, was reached on May 6, 2013.

[16] The classification given to that generic job description is AO-CAI-02 with the following ratings:

Factors/Elements	**Degree**	**Points**
1. Knowledge	2	182
2. Decisions and Recommendations	C1	150
3. Managerial Responsibility	A2	80
4. Work Environment	2	20
5. Flying Requirements	1	15
Total		**447**

[17] The applicant claims that he was not given an opportunity to develop an argument around factors 2 and 3. He argues that had he been awarded 150 for Decisions and Recommendations (instead of 140) and 80 for Managerial Responsibility (instead of 50), he would have surpassed the threshold of 491 (with a total of 502).

[18] Obviously, the argument does not account for the fact that the new generic job description is in fact a new calibration of the job, with the employer wanting Enforcement Investigations – Flight Operations to be stronger with respect to Decisions and Recommendations and Managerial Responsibility, but less so concerning the factor Flying Requirements whose rating drops from 70 to 10 on account of a degree being diminished from 3 to 1. In other words, the new job description stresses Decisions and Recommendations and Managerial Responsibility and requires less emphasis on Flying Requirements.

[19] The applicant did not even attempt to establish a similarity between the generic job description and the one under review, arguing instead that there is a "nexus" between the two.

[20] The grievance process concerning a classification decision is of course subject to procedural fairness. However, the griever would be entitled to a duty of fairness that is "more or less comprehensive depending upon the nature of the interests affected by the decision and the nature of the process involved" (*Chong v Canada (Treasury Board)*, [1999] ACF 176, 170 DLR (4th) 641 [*Chong*]).

[21] In the cases such as this one, the duty of fairness is said to be at the lower end of the spectrum (*Chong*). Here, the applicant contends the duty of fairness is that found in *Groulx v Cormier*, 2007 FC 293. Blais J, as he then was, found that there was a duty to inform the griever of "information crucial to the case" (para 19).

[22] I fail to see how the information which was not shared with the applicant can be seen as decisive, or even critical, let alone crucial. The applicant's burden to show that that information rises to such a high level has not been met.

[23] If the generic job description was said to be the same, or at least had a high degree of similarity with that under examination in this case, it would be unfair to give the new job higher degrees of factors, thus depriving the applicant of the same consideration. But such is not the case.

[24] The degrees used for the classification of the generic job description were the same as those used with respect to the job description in the case at hand. The new generic job description is just that, new. It constitutes a new calibration. The employees will be asked to do more and better Decisions and Recommendations and Managerial Responsibilities then employees were doing in the past, while there will be less Flying Requirements.

[25] The applicant did not show how such information could have been crucial; he merely states that arguments could have been presented, without even suggesting how that could be done. Without more, it is impossible to assess how the information could have been decisive, critical or crucial. It is not even clear that it could have been of any value. That is because without a measure of similarity between the jobs, there is not much that can be done with that information.

[26] The best the applicant did was to suggest that there is a "nexus" between the two job descriptions. Without a doubt there is a nexus between the two. The employer, as it is entitled to, is reorganizing its workforce and decided to use a generic work description. As I understand it, Inspectors, Enforcement, such as Mr Tamborriello, with a position classification AO-CAI-02 would have been expected to perform the position of Enforcement Investigator – Flight Operations classified at AO-CAI-02, had Mr Tamborriello not retired from the Public Service. There is nexus, but the applicant did not go any further. He never argued similarity, or a measure of similarity. The new jobs will have to be performed differently because they are different: the emphasis has changed with the generic job description. But nexus does not bring similarity that could make the comparison possible. And without the ability to compare, it is not possible to

argue successfully that the information is crucial, to the point of breaching the duty of fairness by hiding from the applicant information that could have turned the tide by being crucial.

[27] The applicant has also argued that, without the generic job description, he could not know the case he had to meet. With respect, the argument misses the mark. There is no case to meet and the generic job description that applies to different circumstances does not assist in making the case for a different classification.

[28] If there is a case to meet, it is that the applicant must convince a Classification Grievance Hearing Committee that the job as described is deserving of a higher classification. The applicant in this case did attempt that. He compared his job description to others and sought to establish a similarity such that, compared to those other jobs given a higher degree of factors, his own job could be considered to be undervalued. It cannot be said that the generic job description is the case to meet. As a matter of fact, it received a total of 447 points, less than the job performed by the applicant.

[29] This proposition – a case to meet – is based on the notion that full disclosure is needed to assess the case. It was put in the following fashion in the applicant's memorandum of fact and law: "A party is entitled to full disclosure so that it can assess its case, make inquiries and present its case with the same knowledge of the details of the application as to other parties" (para 36).

[30] We are far from the low end of the spectrum of the duty of fairness. The applicant did not press the issue during the hearing and no authority was offered to support such a high duty of fairness. Actually, this formulation is reminiscent of the disclosure obligation in criminal law as per *R v Stinchcombe*, [1991] 3 SCR 326, where the innocence of persons charged with offences is at stake. Suffice it to say that the interests at stake are completely different and, without more, the bare assertion of such a broad disclosure obligation cannot be supported.

[31] As a result, the judicial review application must be dismissed. The parties have made the joint submission that costs in an amount of $1,500 ought to be assessed. Hence, an award of costs in the amount of $1,500 is made against the applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the judicial review application must be dismissed. An award of costs in the amount of $1,500 is made against the applicant.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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