Federal Court of Appeal | Cour d'appel fédérale

Date: 20180125

Docket: A-126-17

Citation: 2018 FCA 26

CORAM: **BOIVIN J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

STEVE MORRISEY, THOMAS KINGSTON, GILLES LACHANCE, ROBERT MILLAIRE AND RANDELL LATTER

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on January 10, 2018.

Judgment delivered at Ottawa, Ontario, on January 25, 2018.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] Messrs. Steve Morrisey, Thomas Kingston, Gilles Lachance, Robert Millaire and Randell Latter (the Appellants) appeal from a judgment of McDonald J. of the Federal Court (the Federal Court Judge) dated April 5, 2017 (2017 FC 345). The Federal Court Judge dismissed their application for judicial review.

[2] In their application for judicial review before the Federal Court, the Appellants challenged the decision rendered in 2016 by a Classification Grievance Committee (the Committee) which refused to reclassify their positions within the Department of National Defence (DND) from a CS-01 to a CS-02 level.

[3] For the reasons that follow, I would allow the appeal, set aside the judgment of the Federal Court, allow the application for judicial review, quash the decision of the Committee, and remit the matter to the Committee for a re-determination in accordance with these reasons.

I. Background

[4] In 2002, the DND created four new positions in Halifax, Nova Scotia, with the job title "Client Service Team Representative" (the Halifax positions). These positions were classified at the CS-01 level. Another position for Shearwater, Nova Scotia, with the same work description and the same job title, was created at the same time and also classified at the CS-01 level (the Shearwater position). The five Appellants, at one time or another, each held one of the four Halifax positions (Appeal Book, Tab 5-E, p. 92).

[5] In 2008, the Shearwater position was given a new work description and was reclassified from CS-01 to CS-02. Following the upgraded classification of the Shearwater position, the Appellants took various steps to enquire whether their positions in Halifax could also be reclassified at the CS-02 level.

[6] In 2011, following a job content grievance filed by the Appellants in 2010, their work description was amended but their positions remained classified at the CS-01 level. The Appellants, therefore, sought to have their positions reclassified from CS-01 to CS-02. As part of the review process to reclassify the Halifax positions, the Classification Evaluation Officers proceeded to review the classification of the Appellants' positions based on the new work description. The Appellants submitted the Shearwater position as a "comparator position". They argued that the duties and responsibilities of the Halifax positions were materially identical to the Shearwater position which had benefited from a reclassification at the CS-02 level. In order to respect internal relativity with the Shearwater comparator position, they submitted, the Halifax positions should also be classified at the CS-02 level. However, the Classification Evaluation Officers determined, by way of a Classification Consensus Report produced on July 12, 2012 (the 2012 Decision), that the amended Halifax positions should remain classified at the CS-01 level (Appeal Book, Tab 5-B).

[7] Following the 2012 Decision, the Appellants filed a grievance. The Committee convened on June 8, 2016. Before the Committee, the Appellants also emphasized the issue of internal relativity, once again using the Shearwater position as the comparator position, in order to persuade the Committee that the Halifax positions ought also to be reclassified to the CS-02 level.

[8] The Committee issued its decision on July 13, 2016 (the 2016 Decision) and maintained the classification of the Halifax positions at the CS-01 level. The Committee's recommendation was accepted by the Deputy Minister's Delegate.

[9] The Appellants sought judicial review of the Deputy Minister's Delegate's decision. In fact, as noted by the Federal Court Judge, it was the 2016 Decision, endorsed by the Deputy Minister's Delegate, which was under review, since the "*de facto*" decision-maker is the Committee (Federal Court Judge's reasons at para. 13; see *Bulat v. Canada (Treasury Board)*, 252 N.R. 182 (F.C.A.), [2000] F.C.J. No. 148 (QL) at paras. 9-10; *McEvoy v. Canada (Attorney General)*, 2014 FCA 164, [2014] F.C.J. No. 762 (QL) at para. 11; aff'ing *McEvoy v. Canada (Attorney General)*, 2013 FC 685, [2013] F.C.J. No. 756 (QL) at para. 42). The Appellants submitted before the Federal Court that the Committee in its 2016 Decision failed to adequately respond to their arguments with respect to internal relativity (Appellants' Notice of Application for Judicial Review at para. 4; Appeal Book, Tab 3, p. 26). Although the Federal Court Judge was of the view that it would have been desirable for the Committee to further elaborate on the internal relativity issue in its analysis, she concluded that its failure to do so was not a reviewable error (Federal Court Judge's reasons at para. 31). The Appellants now appeal the Federal Court Judge's decision to this Court.

II. Issue

[10] The only issue in this appeal is whether the Committee's 2016 Decision, as it relates to its analysis on internal relativity, is reasonable.

III. Analysis

A. *Standard of Review*

[11] When seized of an appeal from a judicial review application disposed of by the Federal Court, this Court must step into the shoes of the Federal Court and concentrate its analysis on the administrative decision in question (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 46 [*Agraira*]). It must thus determine whether the Federal Court identified the proper standard of review and applied it correctly (*Agraira* at para. 47).

[12] In my view, the Federal Court Judge was correct when she held that the standard of review was reasonableness (Federal Court Judge's reasons at paras. 15-17). However, I disagree with the Federal Court Judge that the Committee's 2016 Decision was reasonable.

B. *The Committee's 2016 Decision*

[13] In order to meet the requirements of reasonableness review, the Committee's reasons, like any other administrative decision, must demonstrate justification, transparency and intelligibility (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47). While adequacy of reasons should not be treated as a stand-alone basis for review, the Committee's reasons, when read as a whole, should allow this Court to determine why it reached the conclusion that it did and whether that decision falls within the range of reasonable outcomes (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62, [2011] 3 S.C.R. 708 at paras. 14 and 16 [*Newfoundland Nurses*]; *Rogers Communications Canada Inc. v. Maintenance and Service Employees' Association*, 2017 FCA 127, [2017] F.C.J. No. 635 (QL) at para. 23).

[14] Moreover, in this case, there are requirements imposed on the Committee by the Treasury Board's Directive on Classification Grievances, which came into effect on July 1, 2015 (Appeal Book, Tab 5-I, p. 275). Specifically, section 3.8.1 of Appendix B of the Directive on Classification Grievances entitled "Classification Grievance Procedure" states that the Committee "responds to the arguments and relativity put forward by the grievor and the grievor's representative". In subsection (e), the Directive states that the Committee's analysis "should summarize the salient points made in support of the grievance, including relativity put forward". Significantly, at subsection (g), the Directive further states that the Committee has to "clearly indicate how the committee arrived at its recommendation", including by analyzing the arguments made by the grievor, "in particular, the proposed ratings, benchmark positions and relativity" (Directive, Appeal Book, Tab 5-I, pp. 287-288).

[15] It is recalled that the Committee was seized of a grievance filed by the Appellants following the 2012 Decision that maintained the classification of the Halifax positions at the CS-01 level. In that respect, the 2012 Decision was the decision the Appellants were challenging before the Committee. Given that the Appellants began taking action when the Shearwater comparator position was upgraded to a CS-02, one of their central claims before the Committee, both in their written representations and in oral argument, was that a failure to upgrade the

Halifax positions from a CS-01 to a CS-02 would contravene the general principle that internal relativity should be maintained.

[16] In its 2016 Decision, the Committee undertook an in-depth and detailed analysis with respect to various factors and assessed the Appellants' positions against various benchmark positions in order to determine point ratings. As for the relativity issue, the Committee's reasons stated that it would discuss relativity in the Committee Deliberations section of its analysis (2016 Decision, p. 4; Appeal Book, Tab 5-E, p. 94). In the Committee Deliberations section, the Committee made the following observations with respect to relativity:

> With respect to the information provided for relativity, the Committee could not discern a significant difference between the duties and responsibilities of the GPs [Grieved Positions] and those of the comparator position, 257840, IT Client Service Representative [the Shearwater Position].
>
> (Appeal Book, Tab 5-E, p. 98)

[17] The Committee thereafter concluded that the Appellants' job classification should be maintained at the CS-01 level.

[18] In my view, the Committee's reasons, when read as a whole, do not permit a reviewing court to understand why the Committee reached the conclusion it did. In stating that it "could not discern a significant difference between the duties and responsibilities" between the Halifax positions and the Shearwater comparator position, the Committee appears to accept the Appellants' argument with respect to internal relativity, namely that there is no reason for the Halifax and Shearwater positions to be classified differently. However, the Committee's

conclusion denies the Appellants' grievance without any further analysis and thus appears to contradict its statement that there is no significant difference between the positions.

[19] The Attorney General of Canada (the Respondent) submits that the Committee is not required to respond to every argument made by the Appellants and that it is sufficient for it to address the major points in issue. Yet, in light of the Appellants' submissions and the factual background to the initial classification grievance, internal relativity was not an argument made in passing but was at the crux of the Appellants' argumentation (Presentation to Classification Grievance Committee, Appeal Book, Tab 5-D, p. 83).

[20] The Federal Court Judge expressed some reservation with respect to the Committee's reasoning on internal relativity and observed that more on that issue might have been desirable (Federal Court Judge's reasons at para. 31). The Federal Court Judge then considered the 2012 Decision to seek justification not apparent in the 2016 Decision regarding internal relativity. In my view, this attempt to supplement deficiencies in the 2016 Decision by reference to the 2012 Decision was a bridge too far. Indeed, although the 2012 Decision was before the Committee, and was in effect the decision being grieved, the 2016 Decision makes no reference to it and there is no indication of whether it was even considered. But more importantly, if this Court were to assume that the Committee considered the 2012 Decision, as the Respondent effectively urges the Court to do, a reading of the 2012 Decision does not clarify the apparent contradiction in the Committee's reasons. To the contrary, it reinforces it. In fact, the Respondent is asking this Court to supplant, as oppose to supplement, the Committee's analysis (*Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] S.C.J. No. 2 (QL) at para 24 [*Lukács*]).

Indeed, the 2012 Decision concludes that there are significant differences between the Halifax and the Shearwater positions (Appeal Book, Tab 5-B, pp. 62-63) whereas the 2016 Decision concludes the opposite – *i.e.* it could not discern a significant difference between the duties and responsibilities of the Halifax and Shearwater positions. Hence, the Committee's reasons on internal relativity points in one direction and its conclusion points in the other. It leaves this Court unable to "connect the dots" (*Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051 at para. 24).

[21] In my view, the Committee's limited analysis on internal relativity, compounded with its contradictory result, demonstrates that it failed to grapple with this substantive live issue put forth by the Appellants and which was necessary to dispose of the matter. Despite an organic reading of the Committee's 2016 Decision (*Newfoundland Nurses* at para. 14) and the Respondent's invitation to engage in speculation, I believe that the Committee's failure to address its contradiction with respect to internal relativity was not within the range of options for the Committee under the reasonableness standard given that the reasons for its decision are not rendered in an intelligible, justified and transparent way (*Lukács* at para. 27).

[22] Finally, although the Respondent admits that the Committee's 2016 Decision with respect to internal relativity could have been more detailed and that the Committee could have made a more explicit finding in respect of internal relativity, she argues that, in any case, the benchmark analysis must take precedence over relativity. I agree with the Respondent that pursuant to the classification framework and more particularly the Directive on Classification (Appeal Book, Tab 6, p. 312), the benchmark analysis should take precedence over relativity. However, I also

note that the Directive on Classification indicates that the relativity analysis is a "valuable" one (Ibid). Not only was the Committee not relieved of its duty to respond to the Appellants' central argument – internal relativity – but it also had to provide an analysis weighing, inter alia, the proposed ratings, the benchmark positions and relativity as set forth at section 3.8.1(g) of Appendix B of the Directive on Classification Grievances (Appeal Book, Tab 5-I, p. 288). That is so because there would be no point in ever considering that the benchmark analysis takes precedence over a "valuable" relativity analysis absent any relativity analysis performed by the Committee.

IV. Disposition

[23] I would accordingly allow the appeal, set aside the judgment of the Federal Court, allow the application for judicial review, quash the decision of the Committee, and remit the matter to the Committee for a re-determination in accordance with these reasons. I would grant costs fixed in the agreed amount of $3,000 all-inclusive.

"Richard Boivin"

J.A.

"I agree
Donald J. Rennie J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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