

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20110201

Docket: A-215-10

Citation: 2011 FCA 36

**CORAM: SHARLOW J.A.
DAWSON J.A.
LAYDEN-STEVENSON J.A.**

BETWEEN:

**ATTORNEY GENERAL OF CANADA
(CANADIAN FOOD INSPECTION AGENCY)**

Appellant

and

MICHAEL BACKX and DR. NANCY GRIFFITH

Respondents

Heard at Ottawa, Ontario, on February 01, 2011.

Judgment delivered from the Bench at Ottawa, Ontario, on February 01, 2011.

REASONS FOR JUDGMENT OF THE COURT BY:

LAYDEN-STEVENSON J.A.

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**REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on February 01, 2011)**

LAYDEN-STEVENSON J.A.

[1] The Appellant, Attorney General of Canada (the Crown), appeals from the judgment of a Federal Court judge (the judge) allowing the application for judicial review of the respondent, Dr. Michael Backx, with respect to a final level grievance decision. The judge's reasons are reported as 2010 FC 480, 368 F.T.R. 247.

[2] The judge determined that the applicable standard of review with respect to the decision was reasonableness and that the decision was unreasonable. The judge found that the decision failed to address the primary ground advanced by Dr. Backx in his grievance.

[3] In his grievance, Dr. Backx relied extensively on the alleged working culture of the CFIA veterinarians and specifically the division between those working in meat hygiene and those working in animal health. He maintained that each area involved vastly different daily duties. While a Veterinarian-in-Charge position related to meat hygiene, a District Veterinarian position related to animal health. Dr. Backx acknowledged that the competition poster indicated that the resulting eligibility list “may be used to staff similar positions”, but insisted that the positions were not similar and that an opportunity for interested veterinarians to apply for the District Veterinarian vacancy ought to have been provided.

[4] The Vice-President of Operations merely concluded that management acted within its authority when it determined the experience requirements and there had been no violation of CFIA’s staffing values or policies.

[5] In our view, the judge was correct to conclude that the decision was unreasonable. The entire rationale underlying Dr. Backx’s grievance was that the two positions were not similar. The Vice-President made short shrift of that assertion by referring to the poster for the competition which stated “the resulting eligibility list could be used to staff similar positions.” There is no further explanation or discussion. It seems to us that the Vice-President either assumed that the

positions were similar or he simply failed to consider the issue. Either way, his decision is not responsive to the basis upon which the grievance was founded and is therefore deficient. This defect cannot be cured by the Crown's efforts to supplement the Vice-President's reasons by pointing to similarities between the two positions.

[6] In sum, the decision does not display justification, transparency and intelligibility in the decision-making process (see: *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47) because there is a total failure to address the fundamental question.

[7] Additionally, we see no merit in the Crown's submission that the judge exceeded his jurisdiction by substituting his opinion on the merits of Dr. Backx's grievance. While the judge stated his appreciation of the dissimilarity between the two positions, he acknowledged that "the final decision in this matter shall rest with management of CFIA" (judge's reasons at para. 44). At their highest, the judge's observations regarding the lack of similarity between the two positions are *obiter*. They do not constitute a "directed verdict."

[8] For these reasons, the appeal will be dismissed with costs.

"Carolyn Layden-Stevenson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-215-10

STYLE OF CAUSE: **ATTORNEY GENERAL OF CANADA and
MICHAEL BACKX et al**

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 01, 2011

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LAYDEN-STEVENSON J.A.

DELIVERED FROM THE BENCH BY: LAYDEN-STEVENSON J.A.

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