Federal Court  Cour fédérale

Date: 20201202

Docket: T-1756-19

Citation: 2020 FC 1113

Vancouver, British Columbia, December 2, 2020

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

DANIEL DE SANTIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Daniel De Santis, who is self-represented, seeks judicial review of a final level decision made by the Director General of the Administrative Tribunals Support Service of Canada (ATSSC). This decision upheld the denial of a grievance filed by Mr. De Santis regarding a request for flexible work hours.

[2] For the reasons that follow, I am dismissing this judicial review. I have found no breach of Mr. De Santis' procedural fairness rights, and I have concluded that the decision of the Director General is reasonable.

I. Relevant Background

[3] Mr. De Santis is employed as an Industrial Relations Officer (IRO) with the Canada Industrial Relations Board (CIRB) in Vancouver, British Columbia. The CIRB is covered under the umbrella of ATSSC.

[4] The Vancouver CIRB office has six employees. Mr. De Santis is one of the two IROs who physically work in the Vancouver office. Generally speaking, IROs are responsible for conducting investigations, organizing and conducting representation votes, and offering and facilitating mediation sessions. IROs are also responsible for responding to public inquiries regarding the CIRB and the Canada Labour code.

[5] In this position, Mr. De Santis is excluded from collective bargaining. However, Mr. De Santis is subject to the terms of the Collective Agreement between the Public Service Alliance of Canada and the Treasury Board of Canada.

[6] Relevant to this judicial review is Article 25.08 of the Collective Agreement which states:

> 25.08 – Flexible Hours
>
> Subject to operational requirements, an employee on day work shall have the right to select and request flexible hours between 7 a.m. and 6 p.m. and such request shall not be unreasonably denied.

[7] On June 28, 2019, Mr. De Santis was advised by his supervisor, Mr. Craig, that his hours of work were to be 8:00 a.m. to 4:00 p.m. In response, Mr. De Santis made a request under Article 25.08 of the Collective Agreement that his work hours be adjusted with a start time of 7:40-7:45 a.m.

[8] Mr. Craig denied the request citing the operational requirements of the office.

[9] On July 2, 2019, Mr. De Santis filed a grievance alleging a violation of Article 25.08 of the Collective Agreement. On July 12, 2019, Mr. Craig denied the grievance.

[10] The second level grievance filed by Mr. De Santis was also denied.

[11] In October 2019, Mr. De Santis filed a third and final level grievance. His final level grievance was referred to Christopher Bucar, the Director General of ATSSC, for determination.

[12] On October 8, 2019, Mr. De. Santis had a hearing of his grievance by telephone with the Director General. In advance of the telephone hearing, Mr. De Santis provided the Director General with the information he relied upon in support of his grievance.

II. Decision Under Review

[13] On October 21, 2019, the Director General denied Mr. De Santis' grievance on the basis of CIRB client service needs. In his decision, the Director General noted that the established

hours for all CIRB regional offices are 8:30 a.m. to 4:30 p.m. The Director General also noted the importance of CIRB staff being available for public inquiries during office hours.

[14] The Director General concluded that Mr. De Santis' work schedule of 8:00 a.m. to 4:00 p.m. allowed the CIRB office to appropriately respond to persons visiting its office or making inquiries by telephone or email during office hours. Furthermore, the Director General found that Mr. De Santis' manager had "already demonstrated flexibility in allowing [him] to work from 8 AM to 4 PM which is outside the normal office hours". As a result, the Director General concluded that the manager did not violate the Collective Agreement.

III. Issues

[15] Mr. De Santis raises a number of issues on this judicial review which I will address as follows:

A. Was there a breach of procedural fairness?

B. Is the decision reasonable?

C. Should costs be awarded?

IV. Analysis

Standard of Review

[16] The procedural fairness issues raised by Mr. De Santis are considered on the correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)* 2018 FCA 69 at para 34). As noted by Justice Fothergill in *De Santis v Canada (Attorney General)* 2020 FC 723

at para 25, “the ultimate question is whether the applicant knew the case to meet, and had a full and fair chance to respond”.

[17] With respect to the merits of the decision under review the parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*), 2019 SCC 65, at para 23).

[18] A reasonable decision “is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85).

A. Was there a breach of procedural fairness?

[19] Mr. De Santis raises two procedural fairness issues. First, he submits that the Director General relied on advice from the Labour Relations Unit that he was not given the opportunity to respond to, therefore this was a breach of procedural fairness. In response to this argument, the Respondent argues that Mr. De Santis had full knowledge of the issue before the Director General and he had full opportunity to provide the Director General with information that he was relying upon in support of his position.

[20] The Supreme Court in *Vavilov* noted as follows at para 77: “the duty of procedural fairness in administrative law is ‘eminently variable,’ inherently flexible and context specific”. The Court in *Vavilov* affirmed the *Baker* procedural fairness factors as follows: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory

scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself.

[21] As the Grievor, Mr. De Santis clearly knew the case he had to meet based upon the Collective Agreement provision he was relying upon in his grievance. There is no suggestion that the Director General withheld information or that he relied upon information to the detriment of Mr. De Santis. On the contrary, the information provided by the Labour Relations Unit to the Director General related to the operational requirements of the Vancouver office. Such information would not be considered "controversial" or "adversarial" and in fact would or should have been known to Mr. De Santis in any event.

[22] In *De Santis, supra,* Justice Fothergill denied Mr. De Santis' judicial review of another but unrelated grievance. In that judicial review, Mr. De Santis raised strikingly similar submissions to those made in this application. Therefore, on the issue of procedural fairness raised here, Justice Fothergill's findings are equally applicable:

> [30] Mr. De Santis had the right to be informed of the facts against him, not to be given access to all information in the decision-makers possession (*Clarke v Canada (Attorney General)*, 2016 FC 977 at paras 15-17). The grievance process is intended to be informal and non-adversarial. Mr. De Santis initiated the grievance and therefore knew the case to meet. He received a copy of the Interpretation Team's opinion and provided comments in response. There is nothing to indicate that Mr. Bucar relied on any adverse information obtained from ATSSC management personnel that was not disclosed to Mr. De Santis.

[23] Considering the grievance process is a non-adversarial and informal process aimed at resolving workplace disputes, it is not logical or reasonable for Mr. De Santis to expect to have the right to receive and respond to each piece of information in the hands of the Director General. Such a requirement would paralyze the grievance process.

[24] In any event, Mr. De Santis' grievance raised a relatively straightforward issue regarding a request for flexible work hours. Mr. De Santis had the opportunity to provide information to the Director General in advance of the Director General considering the matter and rendering a decision. This was a fair process and Mr. De Santis has not established any breach of procedural fairness on this issue.

[25] The second procedural fairness issue raised by Mr. De Santis relates to his claim that his former supervisor agreed to allow him to work adjusted hours to accommodate him living in a location that entailed a longer commute to and from the office. According to Mr. De Santis, based upon this agreement, between March 2016 to June 2019 his hours of work were 7:50 a.m. to 3:50 p.m. Accordingly, Mr. De Santis argues that his employer is now estopped from requiring him to work from 8:00 a.m. to 4:00 p.m.

[26] In *De Santis*, *supra*, a similar estoppel argument was raised and rejected. When considering the evidence offered, Justice Fothergill states at para 32: "It falls far short of establishing a clear, unambiguous and unqualified practice or pattern of conduct sufficient to give rise to a legitimate expectation in law (*Varadi v Canada (Attorney General)* 2017 FC 155 at paras 46-47)".

[27] In my view, the evidence relied upon by Mr. De Santis does not establish "clear, unambiguous and unqualified" conduct regarding an agreement that he was permitted to work adjusted hours. Mr. De Santis' employer is not aware of such an "agreement", and Mr. De Santis himself has not provided any evidence to support this agreement. Considering the importance of this "agreement", it is reasonable to assume that Mr. De Santis would have somehow confirmed this in writing.

[28] In my view, there is no evidence to support the alleged agreement between Mr. De Santis and his former supervisor to work adjusted hours. This lack of evidence is fatal to the estoppel claim.

B. Is the decision unreasonable?

[29] Mr. De Santis argues that the decision is unreasonable because the denial of his request for flexible hours is not tied to an operational requirement as necessitated by Article 25.08 of the Collective Agreement. In his decision, the Director General notes the need to ensure appropriate office coverage during office hours. This is the operational requirement upon which the denial was justified.

[30] Mr. De Santis relies upon the decision in *Canada (Attorney General) v Degaris* [1994] 1 FCR 374 to support his argument that operational requirements cannot be relied upon to deny the accommodation of an employee. In my view, the *Degaris* decision is of no assistance to Mr. De Santis. The facts in *Degaris* are significantly different. In *Degaris*, the employee requested a leave of absence, not an adjustment in work hours. Further, the Court in *Degaris*

found that it was not open to the employer to refuse a request for leave on the basis that the employer was short-staffed when the short-staffing resulted from the employer's own actions. Here there is no suggestion that the Vancouver office is short-staffed. Rather the issue is about hours of work and ensuring employees are available to respond to public inquiries during these hours.

[31] Mr. De Santis also argues that the decision is unreasonable because the Director General did not engage with the evidence that Mr. De Santis had worked adjusted hours for several years (March 2016 – June 2019) without negatively affecting the operations of the office. According to Mr. De Santis, case management officers can deal with any "walk-in" inquiries.
Mr. De Santis also notes that there was only one occasion in the last five years where someone unexpectedly attended the office after 4:00 p.m. This factor was considered, but it was noted that it is the responsibility of the IROs and not the case management officers to respond to inquires.

[32] Mr. De Santis suggested that the hours of operation and the public's right to access the office are not relevant considerations since the hours are not publically posted. This is both a troubling and meritless submission. I accept the evidence of Jonathan Tremblay-Meloche, a Manager of Workplace Management at the ATSSC, that the hours of operation of all regional offices are 8:30 a.m. to 4:30 p.m.

[33] Finally, I note that Mr. De Santis is already accommodated to work outside of the hours of operation. As stated by the Director General, Mr. Craig has "already demonstrated flexibility

in allowing [him] to work from 8:00 AM to 4:00 PM, which is outside the normal office hours". This fact was glossed over by Mr. De Santis in his submissions.

[34] It was reasonable for the Director General to deny Mr. De Santis' grievance due to the operational requirement of staffing during office hours. Although Mr. De Santis clearly disagrees with the outcome of his grievance, he has not demonstrated that the decision is unreasonable.

C. Should costs be awarded?

[35] The Respondent requests costs in the amount of $1000.00. Mr. De Santis submits that each party should bear their own costs.

[36] As the successful party the Respondent is entitled to costs which I fix at $500.00 inclusive of tax and disbursements.

JUDGMENT in T-1756-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed; and

2. The Respondent is awarded costs in the fixed amount of $500.00 inclusive of tax and disbursements.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1756-19
STYLE OF CAUSE:	DANIEL DE SANTIS v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 23, 2020
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	DECEMBER 2, 2020

APPEARANCES:

Daniel De Santis	THE APPLICANT ON HIS OWN BEHALF
Kieran Dyer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT