

Federal Court



Cour fédérale

Date: 20120810

Docket: T-1070-11

Citation: 2012 FC 979

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 10, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

**CHRISTIANE ALLARD, MARIE-ANDRÉ
FRÉDETTE, HÉLÈNE GAGNON, EL MEHDI
HADDOU, ALAIN LAJOIE, SONYA
LAURENDEAU, JULIE NAGEL, DANIEL
PERRON, FRANCE PROVOST, MARIE-
CLAUDE SIMARD, HÉLÈNE SOUCY AND
GENEVIÈVE TOUPIN**

Applicants

and

**CANADIAN FOOD INSPECTION
AGENCY**

Respondent

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 decision dated June 2, 2011, by Omer Boudreau, Vice President of Human Resources (the Vice President) of the Canadian Food Inspection Agency (the Agency), dismissing the applicants' classification grievances and also adopting the recommendation of a Classification Grievance Committee (the Committee).

[2] For the following reasons, the Court came to the conclusion that the Vice President's decision must be set aside, insofar as the *Classification Grievance Process* was not followed by the Committee.

1. Facts

[3] The applicants hold the position of Area Program Specialist, Veterinary Medicine, in the Agency's Quebec area. In accordance with the Agency's *Classification Grievance Process*, the applicants filed grievances disputing the classification of their position at the VM-03 group and level. The applicants do not dispute their assignment to the occupational group, but request that their position be given a higher classification.

[4] The grievances were filed on behalf of the applicants by the Professional Institute of the Public Service of Canada (the Institute), which is the bargaining agent certified by the Public Service Staff Relations Board for Agency employees that are part of the applicants' bargaining unit. The Institute and the Agency are linked by a collective agreement that had the expiration date of November 30, 2011.

[5] The Agency is a separate agency within the public service as defined by section 11 of the *Financial Administration Act*, RSC 1985, c F-11. As a separate employer, the Agency is authorized to set the conditions of employment for employees and to assign duties to them. Under sections 7 and 13 of this Act, the President of the Agency has, and may delegate, the authority to appoint employees of the Agency and to make decisions relating to organization and classification.

[6] The Agency adopted the *Organization and Classification Policy* (Classification Policy), which is used as a framework for managing and monitoring the Agency's organizational design and classification activities. Classification decisions, including those based on classification grievances, are made in accordance with this policy and the corresponding directives, guidelines and principles of organizational design, work descriptions and definitions of occupational groups and classification standards approved by the Agency. The classification standard used to evaluate the veterinary medicine group positions provides that the assessment of positions and the determination of their level of classification are based on the following five factors: nature of the work, complexity of the work, professional responsibility, administrative responsibilities and impact of recommendations and activities.

[7] Unlike content grievances on an employee's work description, which involve the interpretation of the collective agreement, classification grievances are excluded from it and the applicable process is instead governed by the Agency's *Classification Grievance Process*. Under this *Process*, an employee must file a classification grievance in writing with his or her immediate supervisor within the Agency. Each grievance is reviewed on its merits and a recommendation on

the position's classification is made by a Classification Grievance Committee (the Committee) to the Vice President of the Agency through the Manager, Classification and Organization Design. The Vice President, as the President's representative, reviews the Committee's report and may either confirm the Committee's recommendations, render a decision in cases of minority and majority reports or render a separate decision (Part VIII of the *Process*, Exhibit "B" of the affidavit of Allison Tomka, Applicants' Record, Vol 1, p 88).

[8] On or around May 10, 2010, the applicants were advised that the classification of their positions, including the description agreed upon in March 2009, was reviewed and confirmed by the Agency at the VM-03 group and level on June 26, 2010. It was following this decision, in June 2010, that the applicants filed their classification grievances.

[9] On February 15, 2011, the Committee met to allow the applicants' union representative to submit her arguments for the classification of the position at a higher level (level 4).

[10] Following the union representative's submission, the Committee decided that one of its members could not continue to be a member of the Committee because she had been involved in the work description content grievance for the position that was part of the classification grievances. Therefore, she was replaced by another member.

[11] On March 29, 2011, the Committee met again to obtain additional information from the applicants. The Committee wanted details on seven (7) key activities in the work description for the applicants' positions so as to compare them to those in the work descriptions for the benchmark

positions and the relative positions submitted by the union representative. The Committee also contacted the applicants' supervisors for details on these seven key activities.

[12] The information received from the applicants and supervisors on certain key activities of the generic work description were ambiguous. The Committee needed to obtain more details to help it better understand the nature of the work and of the activities carried out by the applicants. Thus, the Committee met again to ask the applicants' managers the same questions that the applicants and their supervisors had been asked.

[13] After receiving the information from the supervisors and managers, the Committee asked the union representative if the applicants had additional submissions to make. The union representative told the Committee that she would make no more submissions on the issue of work description content, specifically because this description was the result of an agreement in the context of a content grievance.

[14] On or around June 8, 2011, the Committee sent the applicants a copy of its report dated May 3, 2011, and adopted by the Vice President on June 2, 2011. The Committee recommended that the positions in question be classified at the VM-03 group and level. The applicants subsequently received a letter from the Vice President advising them that he was approving the Committee's recommendation and that his decision was final and binding, taking effect on June 26, 2011. Therefore, the applicants' grievances were dismissed.

2. Impugned Decision

[15] It is worth reproducing the Committee's findings with respect to the assessment of the two factors that the applicants are disputing: the nature of the work (assessed at level 3) and the complexity of the work (also assessed at level 3). As previously stated, the applicants do not dispute the allocation to the VM (veterinary medicine) professional group, or the assessment of the three other factors used to classify a position from this group: professional responsibility (assessed at level 4), administrative responsibilities (assessed at level 2) and impact of recommendations and activities (assessed at level 4).

[16] Regarding the "Nature of the Work" factor, the Committee wrote as follows:

[TRANSLATION]

The positions in question must develop, clarify and resolve issues of the interpretation of the design and delivery of the Agency's regulatory veterinary medicine programs. They must participate in teams of specialists and write program documents, including directives and changes made to manuals. They are also responsible for monitoring program delivery and assessing the effectiveness of zoonosanitary and food safety programs and acting as head of the specialization in writing, verifying and recommending duties to be incorporated into the compliance verification system. They must coordinate and manage investigations of situations requiring expertise in the specialization and manage or participate in the development, maintenance and assessment of emergency measures.

The nature of the work of the positions in question usually relates to a single specialization but requires the co-operation of colleagues in other specializations; further, the activities differ from each other, including writing documents relating to the programs, making recommendations when reviewing plans and specifications submitted by the industry, monitoring program delivery, assessing and reviewing developments that arise in the field, participating as a

specialist in international audits and managing emergency measures. The nature of the work is higher than the description of degree 2 but is lower than that of degree 4. The nature of the work of the positions in question is higher than that of benchmark position 3, Chief Veterinary Officer, Poultry Plant, because the work of the benchmark position focuses on one specialization in a very specific environment. The nature of the work of the positions in question is lower than that of benchmark position 7, Regional Veterinarian, Animal Health, Moncton, New Brunswick, because the benchmark position is responsible for organizing and managing the work of the animal health program in the region through 10 district offices. The nature of the work of the positions in question compares well with that of benchmark position 6, Chief Veterinary Officer, more complex meat plant (Kitchener), given that the positions in question and the benchmark position works in an area of specialisation and must provide consultation to various stakeholders.

The Committee does not agree with the union's choice of benchmark position 9, Chief, Control Programs, Animal Health Division, as a comparator because the benchmark position is a position responsible for planning, organizing and evaluating national departmental programs, whereas the positions in question are responsible for ensuring the regional implementation of a program. Further, the Committee does not share the view that the positions in question compare with the Agency's position number 12296, National Specialist, Meat Processing Program, since position 12296 has a national leadership role in improving the security and safety of Canadian meat and products from federally registered establishments.

[17] As for "complexity of the work", the Committee made the following observations:

[TRANSLATION]

The positions in question must co-ordinate and manage the development, approval and implementation of action plans to correct situations that could compromise the protection of the animal resource base or threaten the safety of animal food products. The positions in question must provide scientific and policy advice during animal health or food safety emergencies in Canada or abroad. The responsibilities of the positions in question include the need to identify and analyze problem situations where program development does not make it possible to reach the intended objectives. In

addition, the positions in question must identify emerging concerns and risks with a view to improving the Agency's programs.

The complexity of the work of the positions in question requires the use of data obtained by colleagues in the field or by people in the private sector or through personal observation and laboratory tests by the Agency, from other government agencies or from the private sector to ensure that the Agency's programs are applied uniformly throughout the region. The complexity of the work of the positions in question is higher than the description of degree 2 but it is lower than that of degree 4. The complexity of the work of the positions in question is higher than that of benchmark position 3, Chief Veterinary Officer, Poultry Plant, given that the benchmark position acts on the data obtained by direct observation and that the decisions are made according to fairly simple tests with very few variables. The complexity of the work of the positions in question is lower than that of benchmark position 7, Regional Veterinarian, Animal Health, Moncton, New Brunswick, because the benchmark position must make decisions on the planning, organization and administration of the animal health in the region through 10 district offices, involving approximately 50 employees. The complexity of the work of the positions in question compares well with benchmark position 5, Veterinary, Infectious Diseases, since the work of the benchmark position and the positions in question must be done using usual methods, working with people in the field.

The Committee does not agree with the union regarding the choice of benchmark position 9, Chief, Control Programs, Animal Health Division, given that the benchmark position must deal with a myriad of issues related to the implementation of the program across the country. In addition, the Committee does not share the view that the positions in question compare with position number 12296 of the Agency, National Specialist, Meat Processing Program, and with position number 25576, Senior Staff Veterinarian, Animal Products, Animal Health, since both positions deal with the development and implementation of programs nationally and are the positions that will be consulted by the positions in question for advice in implementing the Agency's programs.

3. Issues

[18] This application for judicial review raises the following two issues:

- a) What standard of review is applicable to the decision made by the Vice President of the Agency?
- b) Did the Committee breach its duty of procedural fairness by modifying the content of a work description?

4. Analysis

- a) What standard of review is applicable to the decision made by the Vice President of the Agency?

[19] First, it is appropriate to specify that the Committee's report and the Vice President's decision must be analyzed as a whole for the purposes of this application for judicial review. Although the Vice President is the only one authorized to make a decision in a classification grievance, it is clear that he made this decision relying on the Committee's report. When he endorsed the Committee's recommendation, in particular, he implicitly adopted the reasons. Therefore, the Vice President's decision does not separate the Committee's assessment of the grievance and any error that it may have made will invalidate the Vice President's decision.

[20] Both parties agree on the standards of review applicable to the two issues in this case. There is no doubt that an issue relating to a classification grievance is a question of mixed fact and law that is within the expertise of the final level decision-maker. That is the conclusion I came to in a similar case, after a review of the existing case law in this matter and a contextual analysis, and I do not see any reason to depart from it: *Peck v Canada (Parks Canada)*, 2009 FC 686, at paras 17-23, [2009] FCJ No 1707; see also *Spencer v Canada (Attorney General)*, 2010 FC 33, [2010] FCJ No 29; *Adamadis v Canada (Treasury Board)*, 2006 FC 243, [2006] FCJ No 305; *Utovac v Canada*

(*Treasury Board*), 2006 FC 643, [2006] FCJ No 833; *Beauchemin v Canada (Canadian Food Inspection Agency)*, 2008 FC 186, [2008] FCJ No 238. Accordingly, this Court must show deference and will not intervene unless it can be demonstrated that the Vice President's decision does not fall within "the range of possible, acceptable outcomes which are defensible in respect of the facts and the law" *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] FCJ No 9.

[21] As to issues of procedural fairness, they are not part of an analysis based on a standard of review. When such an issue is raised, the Court must instead determine whether the process followed by the administrative body whose decision is challenged by this application for judicial review is in accordance with the principles of natural justice and procedural fairness: *Canada (Attorney General) v Sketchley*, 2005 FCA 404, [2005] FCJ No 2056. In principle, the breach of a principle of procedural fairness will cause the impugned decision to be set aside. This Court also confirmed in *Grauer v Canada (Attorney General)*, 2009 FC 242, [2009] FCJ No 317, that procedural fairness issues in the context of classification grievances are subject to the standard of correctness.

- b) Did the Committee breach its duty of procedural fairness by modifying the content of a work description?

[22] Counsel for the applicants argued that the Committee had used the testimony of the applicants' supervisors and managers to modify certain aspects of the applicants' work description, by minimizing or even totally deleting some of the duties listed in the work description. The Committee is also criticized for accepting the claim of the supervisors and managers that several of the duties within the applicants' key activities are performed at the regional or provincial levels,

rather than at the national level. That is apparently what led the Committee to reject several benchmark positions and comparator positions proposed by the Institute, on the ground that these positions involved work at the national level.

[23] There is no doubt that a classification grievance cannot include disagreement concerning the work description content and that a work description content grievance takes precedence over a classification grievance. The *Classification Grievance Process* could not be clearer in this respect:

2. A classification grievance does not include disagreement concerning the work description content or the effective date of the classification decision. These matters are resolved through the labour relations grievance procedure provided for in collective agreements.

3. A labour relations grievance relating to work description content takes precedence over a classification grievance. A decision on a work description content grievance for a position must be rendered before a classification grievance on that position may proceed. If the work description is modified as a result of a job content grievance, a new classification decision must be issued to which the employee may exercise the right of a new classification grievance. Thus, the initial classification grievance becomes obsolete.

[24] That being said, one must also keep in mind that the work description of the applicants' positions is generic. It describes the work assigned to some similar or identical positions at the same occupational group and level. A generic work description is not tailored to a specific position. As the Federal Court of Appeal stated in *Currie v Canada (Canada Customs and Revenue Agency)* 2006 FCA 194, [2006] FCJ No 784 "[i]t is not uncommon for employees who have a common Work Description to have different duties and responsibilities. So long as those different duties and responsibilities all fall within the general language of their common Work Description, all is well..." (at para 1).

[25] It is true that, in this case, as pointed out by counsel for the applicants, the work description for “Area Program Specialist, Regulatory Veterinary Medicine” is not formally identified as a generic description. But the fact is that this description is applicable to all positions occupied by the applicants in this case. Thus, it is possible that activities contained in a generic work description are not carried out fully or to the same extent in a given position. Moreover, the applicants admitted that they did not necessarily perform all the duties that appear in their work description, even if they may have the required skills needed to perform all the functions listed in this description.

[26] The work description lists twenty-one (21) main roles, which actually represent the applicants’ key activities. Within the classification grievance, the Committee required parts of the additional information for seven (7) of the key activities, i.e. 1, 4, 6, 7, 10, 17 and 20. It goes without saying that the Committee, in reviewing a classification grievance, could not modify the work description or refuse to consider the duties and activities it contains. The applicants and the Agency agreed on the description following a content grievance under the collective agreement. Further, the respondent admitted that the Committee would have breached the principles natural justice if it had modified the work description, to the extent of depriving the applicants of being heard by an impartial arbitrator whose decision would have been subject to judicial review.

[27] Therefore, the entire issue is whether the Committee modified the work description or whether it had considered the information sent by the applicants and their supervisors and managers to make sure it clearly understood the nature of the applicants’ duties so as to determine how the duties and activities listed in their work description are carried out.

[28] A careful reading of the activities described in the work description and the Committee's summary of the comments made by the supervisors and managers reveals that they did not merely modify the applicants' responsibilities to include the context in which these responsibilities are carried out, but that they have, in many respects, called into question the very nature of the activities listed in the work description. A few examples will be sufficient to illustrate this observation.

[29] The first activity is "[d]evelops and maintains Canadian Food Inspection Agency (CFIA) regulations, policies, programs, procedures and standards concerning zoosanitary requirements and food safety". The applicants stated that they performed these duties and they provided examples to this effect, and their supervisors essentially confirmed their statements. However, the managers stated that this key activity [TRANSLATION] "is the responsibility of the positions at headquarters" and minimized the responsibility of the applicants, stating that the applicants are [TRANSLATION] "consulted" in developing policies and [TRANSLATION] "participate" in writing some documents. Finally, the applicants had told the Committee that they develop policies for the Quebec region in consultation with colleagues in other parts of Canada, whereas the managers stated that they were responsible for [TRANSLATION] "keep up to date" documents for the Quebec region.

[30] Even more significant is the gap between activities 4 and 17 as described in the Work Description and the comments made by the supervisors and managers before the Committee.

Activities 4 and 17 of the Work Description read as follows:

4. Consults with provincial governments and Area-based industry groups. Represents the CFIA on and leads international, national and regional committees and working groups participating in bilateral and multilateral consultations and negotiations relating to Canadian policies and programs concerning zoosanitary requirements and food safety.

17. Negotiates the requirements applicable to import and export certification as well as the requirements of programs concerning animals, animal products, animal by-products and other related products. Provides interpretation and advice regarding zoosanitary and food safety requirements applicable to imports/exports.

[31] With respect to activity 4, the supervisors denied that the applicants lead international groups, while the managers stated that the applicants [TRANSLATION] “are not at all involved at the international level and do not participate in bilateral and multilateral consultations relating to Canadian policies and programs concerning zoosanitary requirements and food safety”. With respect to activity 17, the supervisors testified before the Committee that the applicants do not conduct negotiations as provided in this key activity because this kind of work is done in “Ottawa”, while the managers categorically stated that the applicants [TRANSLATION] “do not have responsibilities relating to the first part of this key activity and this responsibility belongs at the national level”.

[32] Activity 6 concerns developing and participating in the development of opinions, interpretations, recommendations and science-related talks concerning zoosanitary requirements and food safety programs, and presenting them to the Agency’s senior management, Network and Operations personnel and other government and non-government organizations. On this point, the supervisors and managers alleged that the applicants performed this type of work [TRANSLATION] “in Quebec only”.

[33] Less of a disparity was noted between the work description and the comments from management about activities 7 and 10. However, activity 20 also reveals major disparities between

the text of the work description and the managers' perception of it. This activity consists in responding to questions and in acting as national and regional spokesperson with respect to zoosanitary and food safety policies and programs, in response to questions from the Agency's personnel, representatives of national and foreign governments and the industry, the general public and the media. While the applicants stated that they regularly act as national spokesperson for the Agency, particularly in French, the supervisors and managers insisted that the applicants speak for the Agency [TRANSLATION] "mostly in Quebec, but also at the national level, especially because of the language".

[34] The above review shows that the Committee did not merely assess the frequency or degree to which the duties in work description were actually performed, but that it went further by modifying the work description itself. The applicants did admit that they do not perform all the duties in the work description on a regular basis. But the work description, as agreed upon by the Agency as a result of a grievance, was nonetheless a comparison tool to be used for classification purposes. The work description, it should be remembered, shows the qualifications required of an employee to fill a given position, even if an employee may not fulfil all of the functions and responsibilities of a work description that applies to several employees.

[35] The very definition of the work description stated in the Agency's *Organization and Classification Policy* provides that it is "a document approved by the respective manager that describes the work requirements of a position or a job. A work description contains all the information needed to evaluate the work using the appropriate classification standard". (Affidavit of Chantal Seeton, Exhibit "A", Respondent's Record, p 29). In the same vein, the Federal Court of

Appeal, in *Eksal v Canada (Attorney General)*, 2006 FCA 50, at para 10, [2006] FCJ No 164, wrote as follows:

[10] ... The fact that the incumbents may be called upon to fulfil only some of those requirements does not modify the job description or establish that the requirements which it embodies are no longer in effect. Indeed, it will be a rare case where an employee is called upon to fulfil all the requirements embodied in a job description all of the time. It follows that ... the only useful comparison which can be made is to the job description.

[36] In this regard, it is significant to note that the Committee seems to have had doubts about its mandate and its jurisdiction to determine the grievance, given the disagreement between the parties on the key element underlying the classification of a position. This is what the Committee wrote on this topic in its report:

[TRANSLATION]

The Committee deliberated a long time on whether it has jurisdiction to further review the grievances given that the information obtained from the supervisors and managers partly invalidates the work description content; the Committee also noted that some information obtained from the plaintiffs themselves calls into question some aspects of the key activities, as described ...

(Applicants' Record, Vol. 1, p 16).

[37] Taking into account this statement, the Committee could not review the classification grievance and should have made sure that the parties agreed on the work description before going any further. If the managers did not agree with the work description or believed that the applications did not really fall within the generic work description that was applied to them, it fell on them to file a content grievance that would have been heard by an impartial arbitrator subject to the judicial review of this Court. It is also significant to note, on this point, that the manager who agreed with

the work description did not actually defend it and merely told the Committee that [TRANSLATION] “she had simply signed a letter to the plaintiffs, written by human resources people in response to the labour relations grievance on the work description content, but that she had not necessarily read the content of the work description” (Applicants’ Record, Vol 1, p 14). In any event, the Committee could not ignore this fundamental disagreement between management and the applicants on the work description and review the classification grievance, presuming that the information obtained would help it to have a balanced view. The disagreement was not about mere terms but on essential aspects of the work description. In this context, the Committee could not determine the classification grievance as stated in section 2 of the *Classification Grievance Process* quoted above. Also see *Beauchemin v Canada (Canadian Food Inspection Agency)*, 2008 FC 186, [2008] FCJ No 238, at para 40.

[38] Having regard to all of the foregoing, the Court is of the view that the Committee exceeded its jurisdiction by modifying the content of the applicants’ work description without giving them the opportunity of being heard by an arbitrator. As opposed to a classification grievance, a grievance on an employee’s work description content is one that involves the interpretation of the collective agreement, here article E 1.01. Therefore, such a grievance may be referred to arbitration under sections 208 and 209 of the *Public Service Labour Relations Act*, SC 2003, c 22.

[39] This breach of the principles of natural justice alone would suffice to invalidate the Committee’s decision. But there is more. Minimizing and even modifying certain duties allocated to the applicants in their work description had a determinative impact on the Committee’s classification of the applicants’ position. It is true, as the respondent pointed out, that the work

description is not the only element that it has to take into account in determining the relative value of a position. It must also be compared to benchmark positions, looked at in relation to the organisational context and must take into account relativity positions. It remains the case that, as conceded by the Agency's Manager, Corporate Classification and Organization Design, the work description is [TRANSLATION] "crucial" for the classification of a position: Affidavit of Chantal Seeton, Respondent's Record, Tab 2, para 14.

[40] Moreover, a careful reading of the Committee's reasons under the headings "Nature of the Work", "Complexity of the Work" and "Professional Responsibility" shows that the Committee was clearly influenced by the comments of the supervisors and managers, according to whom several of the applicants' duties and key activities are performed at the regional or provincial levels and not at the international level. Not only did this perception cause the Committee to implicitly rewrite the work description, but it was also one of the main reasons that the Committee rejected the benchmark positions and the two relativity positions proposed by the union representative. In doing so, the Committee ignored the wording of the work description, which states in several places the national and even international nature of the duties and responsibilities described, relying instead on the testimony of the supervisors and managers that the duties were performed regionally or provincially.

[41] The Court therefore finds that the Committee overstepped its jurisdiction and did not respect the *Classification Grievance Process* by modifying the work description covered by the classification grievance. The Committee usurped the role of a grievance arbitrator and thus breached the principles of natural justice by not respecting the process provided by the collective agreement

and the Agency's own policies. When a classification committee identifies a fundamental disagreement between the parties regarding the work description that it must assess, as in this case, it must remove itself from the grievance until there has been an agreement or, where applicable, an arbitral decision on the work description. In not doing so, the Committee breached the applicants' rights and rendered an unreasonable decision. Therefore, the Vice President's decision to dismiss the classification grievances must be set aside.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed and that the Vice President's decision dismissing the applicants' classification grievances be set aside, with costs to the applicants.

“Yves de Montigny”

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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