

Federal Court



Cour fédérale

Date: 20121219

Docket: T-208-12

Citation: 2012 FC 1508

Ottawa, Ontario, December 19, 2012

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

ANGELA MITCHELL

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is an application for judicial review of a decision by a Decision Reviewer [Reviewer] at Canada Revenue Agency [CRA] in which the Reviewer denied the Applicant's challenge to a selection process decision which the Applicant had claimed was arbitrary.

II. BACKGROUND

[2] The Applicant applied for the position of a Team Leader, GST/HST Program, in CRA. The competition for this position required a simulation exercise to assess Effective Interpersonal

Relationships [EIR]. The EIR simulation used a three-page fact pattern and was evaluated by two Assessors. A passing score was 70% and since the EIR was marked out of 50, 35 was the passing mark.

[3] The Assessors used a Marking Key and a Scoring Key. The Marking Key asked the Assessors specific questions: for example, “did the candidate recognize the need for team building?”; “did the candidate develop and maintain his/her relationship and communication with others, i.e. Gavin, the section manager” The Scoring Key set forth the criteria to be used in judging the overall quality of each answer.

While points are not being assigned to specific criteria, the criteria below will be considered in judging the overall quality of each answer:

- Recognizing people aspects/positive relationships;
- Establishing and maintaining good and productive relations with subordinates[s], peers, supervisors;
- Producing good results through interactions with others;
- Being sensitive and responsive, yet firm when called for;
- Tactfully dealing with difficult or challenging personalities.

[4] The notes on the Applicant’s Scoring Key contained comments on her strengths and weaknesses in responding to the simulation exercise questions. The Applicant was rated 25/50 and was removed from the competition as a result.

[5] The Applicant exercised her right to first level recourse – a Request for Individual Feedback. This recourse is available only on the grounds that the decision was “arbitrary”.

Arbitrariness is defined as:

“In an unreasonable manner, done capriciously; not done or acting according to reason or judgment; not based on rationale or

established policy; not the result of a reasoning applied to relevant considerations; discriminatory, i.e., as listed as the prohibited grounds of discrimination in the Canadian Human Rights Act.”

The 1st level decision concluded that the Applicant was not subject to arbitrary treatment.

[6] The Applicant then exercised her right to second level recourse – Decision Review. That decision is the subject of this judicial review. That decision by a Reviewer addresses the complaint of arbitrary treatment by the Assessors. The Reviewer acknowledged the nature of the Applicant’s complaint; that the Applicant could not determine how she did under each specific item, question or criteria. The Reviewer’s explanation given to the Applicant at a personal meeting was that the assessments were conducted in a holistic manner and assessed globally.

[7] In the Decision, the Reviewer confirms that he met with the Board Members to review the areas of concern.

[8] Ultimately the Reviewer concluded that the methodology and assessment tools used for this process and the assessment itself were appropriate. The Reviewer concluded that the Applicant had not been subjected to arbitrary treatment.

[9] The Applicant’s challenge to the Reviewer’s decision is based on the failure to follow CRA Staffing Program, *Guidelines on Assessment Methods* (undated), the failure to specifically address each question in the Marking Key and each criteria in the Scoring Key and not act in accordance with staffing principles. The real complaint is that the Applicant wanted to be able to match up each item in the Marking Key and the Scoring Key with a comment or rating whereas the comments by

the Assessors merged issues or combined issues and took a more global approach to assessing the skills being assessed.

III. ANALYSIS

[10] The standard of review for this type of decision was established in *Wloch v Canada (Revenue Agency)*, 2010 FC 743 at paragraph 21, and was determined to be reasonableness. The parties accepted that this was the applicable standard of review.

[11] There was a preliminary issue as to the admissibility of the Applicant's notes of what transpired through the levels of review. While these notes were not before the Reviewer, they purport to address the contention that the Reviewer did not address all of the Applicant's allegations.

[12] It is my conclusion that the evidence is admissible because part of the Applicant's position is that she was unfairly treated and that there were failures/omissions by the Reviewer. This type of allegation, much like a claim of breach of natural justice, often cannot be made out on the basis of the tribunal record. In fact, the absence of some action or the omission of some important evidence arises because the tribunal record does not disclose the very matter at issue. It is interesting in terms of fairness that the notes of a CRA observer were included in the record before this Court. On the basis of relevancy and fairness, what is "sauce for the goose is sauce for the gander", the application to strike portions of the Applicant's record is denied.

[13] However, in the end, this favourable ruling does not result in a successful judicial review.

[14] In terms of process, the Reviewer considered the internal policies of CRA and understood the development and use of the EIR simulation. A review of the comments by the Assessors shows a sufficient correlation between those comments and the questions and criteria being used. It is clear on what basis the Assessors came to their conclusion.

[15] The Applicant is not entitled to a specific format being used for assessment. There is no requirement that for each question, there be a corresponding comment. This is not an exercise which requires the type of matrix format claimed by the Applicant.

[16] As the Court of Appeal observed in *McGregor v Canada (Attorney General)*, 2007 FCA 197, at paragraphs 51 and 52, the process of assessment of the skills and traits for promotion is not a mathematical function. It is largely a matter of opinion.

51 However, the abilities and personal suitability characteristics required for the positions being staffed included such things as the ability to manage a multi-disciplinary human resources team, the ability to establish effective partnerships and working relationships with key stakeholders, the ability to effectively communicate orally and in writing, and behavioural flexibility. To require the Selection Board to explain in minute detail the considerations that played into the selection of a rating for a particular ability or personal suitability characteristic would add a level of artificiality to the process. As Justice Pratte stated in *Blagdon* at page 623,

The mere fact that an Appeal Board could, had it sat as a Selection Board, have reached a conclusion different from that reached by the Selection Board is not a sufficient ground for allowing the appeal. **It must be realized that the assessment of the merit of various persons, which is the function of the Selection Board, cannot be reduced to a mathematical function; it is, in many instances, a pure matter of opinion.** And, there is no reason why the opinion

of an Appeal Board should be preferred to that of a Selection Board.

[Emphasis added.]

52 In my opinion, the Appeal Board applied these principles appropriately when rejecting Mr. McGregor's argument, as set out at paragraph 43 of its decision:

It was not necessary for the selection board to justify how many marks could be attributed to each of the selection tools used to assess a particular qualification. The whole point of a global assessment is to allow the selection board to consider all of the information supplied by the candidate. As noted above, assessment cannot be reduced to a mathematical function.

[17] In another unrelated selection type decision submitted by the Applicant, an independent third party reviewing that selection decision concluded that there is a flaw in the use of global assessments. The Applicant's reliance on those comments to establish that the same flaws were evident in her case is unsupportable. Not only are independent third party reviews not precedent setting, they are case-specific. They are proof only of the opinion of that third party; absent a proper evidentiary base and cross-examination thereon, the comment is of little assistance.

[18] In the case before this Court, the Reviewer had all the relevant material, investigated the process, spoke to the necessary people and reached a conclusion which was reasonably open to him.

IV. CONCLUSION

[19] For these reasons, this judicial review will be dismissed without costs.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is dismissed
without costs.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-208-12

STYLE OF CAUSE: ANGELA MITCHELL
and
CANADA REVENUE AGENCY

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 6, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: December 19, 2012

APPEARANCES:

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