Federal Court of Appeal | Cour d'appel fédérale

Date: 20140722

Docket: A-243-13

Citation: 2014 FCA 164

CORAM: **PELLETIER J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

PATRICK MCEVOY AND
CLAUDIO PELLICORE

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on March 25, 2014.

Judgment delivered at Ottawa, Ontario, on July 22, 2014.

REASONS FOR JUDGMENT BY: SCOTT J.A.

CONCURRED IN BY: PELLETIER J.A.
WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20140722

Docket: A-243-13

Citation: 2014 FCA 164

CORAM: **PELLETIER J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

PATRICK MCEVOY AND
CLAUDIO PELLICORE

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

SCOTT J.A.

I. Background and proceedings

[1] This is an appeal from a decision of Mandamin J. of the Federal Court (the Application Judge) dismissing an application for judicial review brought by the Appellants, Mr. Patrick McEvoy and Mr. Claudio Pellicore against a decision of the deputy head's nominee, Ms. Camille Therriault-Power (the Nominee), responsible for classifications at the Canada Border Services

Agency (CBSA). The Nominee accepted the Classification Grievance Committee's (the Committee) recommendation that the classification of the Appellants' Inland Enforcement Officer (IEO) position remain the same at the PM-03 group and level and consequently rejected their grievance.

A. The Committee's decision

[2] The Appellants grieved their job classification which was classified at the PM-03 group and level, contending that their expanded duties following the introduction of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 warranted a PM-04 group and level classification.

[3] Under paragraphs 7(1)(*e*) and 11.1(1)(*b*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11, the Treasury Board is entrusted with the administration of the staff and the classification of positions within the public service. Classification grievances are dealt with by a Classification Grievance Committee in accordance with the following policies: the *Policy on Classification Grievance*, the *Classification Grievance Procedure*, the *Clarification to the Grievance Procedure* and *Reminder-Classification Grievance Resolution Process.*

[4] In accordance with the *Classification Grievance Procedure*, a Classification Grievance Committee was established to deal with the Appellants' grievance. It was composed of three members, a Chairperson, a Treasury Board representative and the Director General Trade Program Directorate at the CBSA.

[5] The Committee heard the grievance on November 29, 2009 and during a second hearing on December 14, 2009. The Appellants and a representative of their bargaining agent, the Public Service Alliance of Canada (PSAC), made oral and written representations. The Committee equally heard from Mr. Robert Johnston, the Director responsible for the Inland Enforcement Program in British Columbia and from Ms. Susan Kramer, Acting Director General, Operations Program, on the duties performed by IEOs.

[6] Further to these presentations, the Committee requested clarification from management regarding some of the work actually performed by IEOs. A copy of the Committee's questions and CBSA's responses was provided to the Appellants. On February 11, 2010, the Appellants filed submissions with exhibits in reply to the responses of the CBSA. On February 26, 2010, the Committee reconvened to deliberate.

[7] The Committee completed its report on March 14, 2010 and signed it on April 16, 2010. The report unanimously recommended that the grieved position remain classified at the PM-03 group and level. The report was forwarded to the Nominee. She approved the recommendation on April 17, 2010. The Nominee's decision was sent to the Appellants on April 19, 2010. The Nominee's letter accompanying the decision specified that the Committee unanimously recommended that the position be classified at the PM-03 group and level and that the decision was final and binding. A copy of the Committee's report was also enclosed.

[8] On April 19, 2010, the Nominee wrote a briefing note to the President of the CBSA. In that note, the Nominee outlined her reasons for endorsing the unanimous recommendation found

in the report and then explained why she thought that two prior ratings of the position at the PM-04 level by outside consultants were inaccurate.

[9] The Appellants filed an application for judicial review of the Nominee's decision on May 18, 2010. On November 5, 2010, further to an access to information request, the Appellants received copies of the briefing note that was sent by the Nominee to the President of the CBSA, on April 19, 2010.

B. The Federal Court's decision

[10] At the Federal Court, the Appellants argued that the Nominee breached procedural fairness and natural justice by confirming the Committee's decision. They submitted that the Committee prejudged the case, failed to provide sufficient reasons, and did not consider all the evidence submitted. The Appellants also contended before the Application Judge that the Nominee had failed to provide them with the opportunity to respond to the additional considerations she raised in her briefing note to the President of the CBSA.

[11] The Application Judge dismissed their application concluding that neither the Committee nor the Nominee had breached procedural fairness. In light of the Nominee's limited role in the process, the Application Judge considered that the Committee was the *de facto* decision-maker. He also found that there was no express requirement that the Nominee provide reasons for the decision to confirm or reject the Committee's recommendation. As the Nominee endorsed the Committee's unanimous recommendation, the Application Judge felt that the briefing note sent to the President of the CBSA, two days after the acceptance of the unanimous recommendation,

did not undermine the Committee's decision and was superfluous. Hence, there was no breach of procedural fairness.

[12] The Application Judge rejected the Appellants' argument that the Committee failed to provide sufficient reasons, on the basis that reasons should address the major points in issue and must set out the reasoning process followed by the decision-maker. He concluded that the Committee had addressed all of the Appellants' submissions.

[13] The Application Judge equally dismissed the Appellants' allegation that the Committee had not considered all of their arguments nor all of the evidence presented. He found that the Appellants' submissions on this issue were based on the assumption that the Committee's reasons were inadequate whereas he was satisfied that the Committee had addressed the evidence that went to the main points at issue.

[14] The argument that the Committee prejudged the Appellants' case was also rejected by the Applications Judge, since the references in the report and the sequence of responses did not substantiate the Appellants' contention. He equally dismissed the argument that Ms. Kramer should not have acted as management representative because of her prior involvement in the file.

[15] The Appellants essentially reiterate the submissions made before the Applications Judge in their appeal to this Court. For the reasons set out below, I would dismiss this appeal.

II. Analysis

[16] On appeal from a decision disposing of a judicial review, the appellate court must first decide the following questions. Did the reviewing court choose the correct standard of review and did it apply it correctly? (see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 43 and *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans),* 2006 FCA 31, [2006] 3 F.C.R. 610, at para. 14).

[17] In the case at bar, the Applications Judge correctly selected the standard of correctness for questions of procedural fairness and the standard of reasonableness for the decision of the Nominee (see *Begin v. Canada (Attorney General),* 2009 FC 634, [2009] F.C.J. No. 742, at paras. 8-9 (*Begin*) and *Hagel v. Canada (Attorney General),* 2009 FC 329, [2009] F.C.J. No. 417, at paras. 28, 34-35).

[18] What constitutes a reasonable decision was clarified in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47. A decision will be reasonable if it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[19] There are four issues raised by the Appellants in this Appeal:

(a) Did the Nominee owe a duty of procedural fairness to the Appellants and if so was it breached?

(b) Did the Committee fail to consider all of the relevant evidence presented by the Appellants and are its reasons inadequate?

(c) Did the Committee commit an error in accepting the evidence given by Ms. Kramer, the management representative?

(d) Did the Committee prejudge the issue?

A. *The duty of procedural fairness*

[20] The Supreme Court of Canada, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 R.C.S. 817, at paragraphs 21 and 22 (*Baker*), established that the duty of fairness is flexible, variable, and depends on the context of the particular statute and the rights affected. In the context of a classification resolution, the case law has determined that the degree of procedural fairness owed to the applicant is on the lower end of the spectrum (see *Beauchemin v. Canada (Canadian Food Inspection Agency)*, 2008 FC 186, 364 F.T.R. 159, at paras. 24 and 42, citing *Chong v. Canada (Treasury Board)*, [1995] F.C.J. No. 693 (QL), [1999] F.C.J. No.176 (QL)).

[21] As a result, the duty of procedural fairness is satisfied "if the complainants had the opportunity to make their arguments relating to the classification of their positions and to be heard and if there was no restriction on their participation" (see *Begin*, cited above, at para. 9).

[22] The Appellants submit that the Nominee relied upon additional considerations, which were not part of the Committee's report, without notifying them. They argue that this constitutes a violation of procedural fairness and that the Applications Judge erred when he concluded these

considerations were superfluous to the Nominee's confirmation of the Committee's recommendation.

[23] During the hearing before this Court, the Appellants' counsel alleged the Nominee may have rejected the Committee's recommendation if she had given them the opportunity to speak to the additional considerations which she raised with the Deputy Head.

[24] In my opinion, this argument fails for the following reasons.

[25] Section VI of the *Classification Grievance Procedure* sets out the procedure which must be followed by the nominee when receiving the Committee's recommendation. In the case of a unanimous recommendation, as here, the nominee is limited to either endorsing or rejecting the Committee's recommendation. Under the terms of reference, the nominee cannot modify a unanimous recommendation and substitute her own conclusions.

[26] In this instance, the Nominee confirmed the Committee's unanimous recommendation on April 17, 2010. The briefing note to the President of CBSA was signed two days later, on April 19, 2010. In that note, the Nominee clearly states why she endorsed the Committee's report and then refers to additional considerations of her own (see the Appellants' Supplementary Appeal Book, page 30). She wrote:

> I feel that the recommendation is sound for the following reasons:
>
> - At each juncture, both originally at CIC, and in more recent decisions from CBSA, this job has been rated at the PM-03 group and level.
> - At the request of the CIU and to reassure the employees that the file would be analyzed with an unbiased view, an accredited consultant chaired the

> most recent hearings and wrote the Classification Grievance Committee report.
>
> - The decision was made by a Classifications Grievance Committee made up of one accredited officer from CBSA, one representative from the Treasury Board Secretariat, and one CBSA management representative who is trained in the use of the PM classification standard.
>
> - The point rating in the latest report situates the job at 440 points, which is at a safe midpoint in the PM-03 scale of 401-500 points.
>
> You will note in the report that two consultants in the past have rated the job as PM-04, but neither can be considered authoritative. The first was hired by the CIU and therefore cannot be considered unbiased. The second consultant was not accredited to provide point ratings, nor did the CBSA request that he do so. The attached report makes reference to a five-page history provided by Mr. McEvoy, one of the grievors, in which he suggests that the CBSA hired this consultant to evaluate the job; however, in reality, the consultant was hired only to write the job description, for which accreditation is not required.

[27] The Appellants' contention that the Nominee could have possibly rejected the recommendation is far too speculative. When a Committee unanimously recommends a classification, the Nominee has very little discretion under the *Classification Grievance Procedure*. If the Nominee rejects the unanimous recommendation of the Committee, the new decision has to be approved by the deputy head, who must then report to the Treasury Board Secretariat, the reasons for the non-acceptance of the unanimous recommendation. The reasons provided to the Treasury Board must be related directly to the recommendations of the Committee.

[28] Furthermore, the duty of procedural fairness lies on the lower end of the scale precisely because of the Nominee's limited discretion. Given that the policies governing classification grievances are designed to foster the acceptance of a unanimous decision, little weight can be put on parenthetical comments. Moreover, these additional comments of the Nominee appear to

preempt questions that the President of the CBSA could possibly raise because two consultants had suggested a higher rating in the past.

[29] In my opinion, it is difficult to conclude that these comments constitute the Nominee's rationale as argued by the Appellants, as well as that the Nominee consequently breached her duty of procedural fairness by failing to allow the Appellants to comment on her briefing note.

B. *Inadequacy of reasons and failure to consider evidence*

[30] The Appellants contend that the Committee's reasons are deficient in that they fail to meet the requirements outlined in Annex 1 of the *Classification Grievance Procedure*. They argue that the reasons fail to provide any meaningful analysis of the substantive issues in dispute. The Appellants claim that the Committee did not analyze the differences between their position as IEOs and the positions that they referenced in their relativity study. They allege that there is no indication that the Committee in fact considered these positions. Consequently, it is their view that they cannot assess how the Committee resolved the discrepancies in the evidence submitted.

[31] Moreover, the Appellants allege that the Committee failed to consider their response to Mr. Johnston's and to Ms. Kramer's evidence. The Appellants also assert that in their response to Ms. Kramer's factual information, they demonstrated significant differences between their evidence and their employer's evidence in terms of IEO's responsibilities which the Committee failed to assess and comment upon.

[32] Having reviewed the record, I cannot agree with these assertions. The Committee's report summarized the Appellants' presentation in detail (see the Committee Report, Appeal Book, volume V, pages 1886 to 1889). It then proceeded to present the questions addressed to Ms. Kramer, the management representative, and her responses that were shared with both the grievors and the PSAC representative.

[33] The Committee dealt initially with the PSAC proposal, clearly stating where it disagreed with the proposed classification and the reasons for its disagreement (see the Committee Report, Appeal Book, volume V, pages 1884 to 1886). It then proceeded in a similar fashion with respect to the Grievors' and the consultants' proposed rating (see the Committee Report, Appeal Book, volume V, pages 1886 to 1889). The Committee acknowledged the four comparative positions suggested by the grievors in their relativity study, namely, Customs Investigator, Immigration Member, Hearing Officer and Tariff Classification Policy Specialist, pointing out where it disagreed with the comparison based on four criteria used to assess the IEO position, that is: Knowledge, Decision-Making, Operational Responsibility and Contacts.

[34] The Committee equally considered the added responsibilities resulting from the coming into force of the *IRPA*. At page 1885 of the Appeal Book, the Committee refers to Ms. Wight's assessment of these new responsibilities, and at page 1887 it references the submissions of the grievors and the fact that two significant authorities were delegated to the IEOs.

[35] For these reasons, I find that the Appellants have failed to convince me that the Committee did not address their arguments. Furthermore, as this review of the Committee's report shows, the Committee's reasons were adequate to permit appellate review.

C. *Evidence given by Ms. Kramer the management representative*

[36] The Appellants submit that the Committee should not have heard Ms. Kramer, the management representative, because they believed that she was not an impartial witness. Their concerns result from her prior involvement in the classification decision that was the subject of the grievance before the Committee. They allege that Ms. Kramer had, in the past, advocated for the existing classification based on inaccurate evidence. The Appellants claim that the Committee did not address their concerns and did not provide any analysis or reasons for ignoring them.

[37] The Appellants emphasize the role of the management representative and the fact that it is not permitted to argue for or against the decision which led to the grievance, nor to attempt to influence any members. The Appellants also underlined the fact that several CBSA employees had been invited to attend as management representatives, but had declined because of their prior involvement in activities related to the classification of the IEO position.

[38] The Appellants misstate their argument. Ms. Kramer was a competent witness. The Appellants' arguments that she should not have been called as a management representative because they feared she was biased on account of her previous involvement are unfounded. A

person can be called to testify whether she is biased or not. The other party has the opportunity to attack the person's credibility by demonstrating bias in the witness' testimony.

[39] The Appellants have failed to point out any evidence of bias in her testimony. Their mere allegation that Ms. Kramer purposely misled the Committee is not substantiated by the record. Furthermore, they have not established that Ms. Kramer actually argued in favour of the existing classification or adopted such a position when providing information to the Committee or acted in any way contrary to the *Classification Grievance Procedure*. In view of their failure to direct the Court to any substantive evidence sufficient to attack Ms. Kramer's credibility as a witness, I reject the Appellants' argument.

D. *Prejudgment*

[40] The Appellants claim that the Committee prejudged their grievance since it stated at page 16 of its report that: "Further to the union's response of February 11, 2010, the Committee reconvened on February 26 to review the union response. After giving careful consideration to the evidence submitted the Committee reached consensus that the new information would not change their decision" (see the Committee Report, Appeal book, volume V, page 1898).

[41] In order to establish that the Committee had prejudged their reclassification request, the Appellants had to prove that "any representations at variance with the view, which has been adopted, would be futile" (see Old *St. Boniface Residents Association Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at para. 57). They have not proven this to be the case. The statement does not indicate that the Committee had a closed mind and that any submissions would be futile.

[42] Furthermore, a decision-maker is not precluded from making a decision as he progressively receives evidence since it is normal to weigh different factors as they come to bear. This is part of the decision-making process.

[43] The statement "[…] After giving careful consideration to the evidence submitted the Committee reached consensus that the new information would not change their decision", as I read it, can be interpreted as meaning that after weighing the new information, it did not outweigh the other evidence which warranted maintaining the classification level as it was. Therefore, it did not "change the decision". In other words, based on its analysis of the relativity study and the parties' submissions, the Committee found that the classification should remain the same, and the union's response did not justify another conclusion. This does not prove that the Committee failed to consider the new information or that it prejudged the issue.

[44] The statement must be understood in its proper context. The important element being whether the Committee remained open to assess and evaluate the additional evidence adduced. There is no evidence to the contrary in the present case.

[45] In sum, the Applications Judge selected the appropriate standards of review and applied them correctly. I would, therefore, dismiss the appeal with costs in favour of the respondent set at $3,000.

"A.F. Scott"

J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-243-13
STYLE OF CAUSE:	PATRICK MCEVOY AND CLAUDIO PELLICORE v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 25, 2014
REASONS FOR JUDGMENT BY:	SCOTT J.A.
CONCURRED IN BY:	PELLETIER J.A. WEBB J.A.
DATED:	JULY 22, 2014

APPEARANCES:

David Yazbeck	FOR THE APPELLANTS
Sean Kelly	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yazbeck LLP/s.r.l. Ottawa, Ontario	FOR THE APPELLANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT