

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

GOVERNMENT OF THE NORTHWEST TERRITORIES

Applicant

- and -

ROBERT VOUDRACH

Respondent

MEMORANDUM OF JUDGMENT

A) INTRODUCTION AND BACKGROUND

[1] This is an Application for judicial review of the decision made by a Staffing Review Officer in relation to a staffing action initiated by the Government of the Northwest Territories (GNWT).

[2] The GNWT advertised for a position of Technical Advisor in October 2012. Six persons applied for the position, including the Respondent, Robert Voudrach. The Selection Committee screened in two applicants, Mr. Voudrach and Matthew Millett. Both were interviewed for the position.

[3] The interview consisted of several questions. The applicants' answers were scored by the Selection Committee, using interview marking sheets that outlined the expected answers. The passing mark for the interview was 60%. Mr. Millett had his interview first and he received a mark of 81%. Mr. Voudrach was interviewed next. His score on the interview was 39%.

[4] Two days after Mr. Voudrach and Mr. Millett were interviewed, it was discovered that another application for the position had actually been received before

the closing date. The record does not disclose how this happened, but what is clear is that this seventh application was not forwarded to the Selection Committee at the same time as the six others.

[5] By the time it was discovered that there was a seventh application, one of the three members of the Selection Committee, Alana Mero, had gone on holidays. A decision was made to have Jill Robertson, who was acting in Ms. Mero's position during her absence, replace her on the Selection Committee. The seventh application was reviewed and the applicant was screened in. That applicant was interviewed but did not receive a passing mark. Following this, a verbal offer was made to Mr. Millett for the position.

[6] Mr. Voudrach appealed the decision to offer the position to Mr. Millett. In the Appeal Application that he completed, he outlined a number of concerns about the processes that were followed in this competition.

[7] Mr. Voudrach claimed that the GNWT's Affirmative Action policy was not followed and that the scoring of his interview was done on the basis of a comparison of his answers with Mr. Millett's answers. He claimed that this worked to his disadvantage. Mr. Voudrach questioned the relevance of some of the answers in the interview marking sheets in relation to the questions asked. He also took issue with aspects of how his interview proceeded: he stated that he was interrupted in giving some of his answers, which made him feel rushed, and prevented him from elaborating as much as he would otherwise have. He argued that this was significant because he was told, after the competition, that one of the reasons he did not do well on the interview was that he could have expanded more on some of his answers.

[8] Mr. Voudrach's appeal was referred to a Staffing Review Officer pursuant to the *Staffing Appeals Regulations*, R-025-2006. The Staffing Review Officer did a preliminary screening of the appeal in accordance with the *Regulations*, and she determined that the appeal should proceed. She then interviewed Mr. Voudrach, Ms. Mero, Ms. Robertson, and the two other members of the Selection Committee, Shirley Kisoun and Kate Smith. She also reviewed various materials, such as the interview questions and the marking sheets.

[9] The Staffing Review Officer's findings are set out in her Report, which is part of the Record that was filed in these proceedings. She did not give effect to any of Mr. Voudrach's grounds of appeal. She specifically rejected his assertions about comparative marking, his criticisms of the interview marking sheets, and his assertion that he was not permitted to give full answers during the interview process. She concluded that Mr. Voudrach simply did poorly on the interview.

[10] However, the Staffing Review Officer was concerned about the information that came to light during her interviews about the change in the composition of the Selection Committee partway through the interview process. She concluded that this was not in keeping with the procedures set out in the Human Resources Manual. She acknowledged that given Mr. Voudrach's score on the interview, this may not have affected his outcome on the competition, but found that he should be given the benefit of the doubt on this issue. On that basis, she allowed his appeal.

[11] The GNWT now seeks to have that decision quashed.

## B) ANALYSIS

[12] Section 7(1) of the *Regulations* outlines the powers of a Staffing Review Officer following the hearing of an appeal:

- 7 (1) On the completion of a hearing, the Staffing Review Officer shall
- (a) grant the appeal if he or she determines that
    - (i) an error was made in the application of the Act, the regulations or the applicable policies, directives or procedural guidelines during the competition process to which the appointment was made, and
    - (ii) the error adversely affected the appellant's opportunity for appointment; or
  - (b) deny the appeal.
- (2) If a Staffing Review Officer grants an appeal he or she may, having regard to all the circumstances, direct that the competition be restarted at the point at which the error occurred, or be redone.

[13] The GNWT takes issue with the Staffing Review Officer's conclusion that an error was made and that the error adversely affected Mr. Voudrach's opportunity for appointment. The GNWT also argues that the Staffing Review Officer's directions for the rectification exceeded the scope of her powers pursuant to the *Regulations*.

### 1. Standard of review

[14] In any judicial review, the first question that arises is what standard of review applies to the impugned decision. The Supreme Court of Canada has developed a number of criteria to be considered when making that determination. A Court seized with the issue may also rely on existing jurisprudence that has already determined

what standard of review applies in a specific context. *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 57.

[15] This Court has recently had to decide what standard of review applies to a decision made by a Staffing Review Officer in exercising the powers set out in the *Regulations*. As is often the case, the standard of review depends on the nature of the decision under challenge. Reasonableness is the standard that applies to the Staffing Review Officer's assessment of the facts and application of the governing policies, such as the GNWT's Human Resources Manual. However, if what is at issue is the scope of the Staffing Review Officer's powers in giving directions to rectify any errors made, this engages questions of jurisdiction, and the applicable standard of review is correctness. *Government of the Northwest Territories v. Degrow*, 2012 NWTSC 75, at paras 11-16.

[16] Here, the standard of reasonableness applies to the Staffing Review Officer's conclusion that the process followed was not in keeping with the guidelines and procedures set out in the GNWT's Human Resources Manual. The same standard applies to her conclusion that this error adversely affected Mr. Voudrach's opportunity for appointment.

[17] As for the measures of rectification ordered, the GNWT's claim that the Staffing Review Officer exceeded her powers engages an issue of jurisdiction and is subject to review on a standard of correctness.

2. Whether the decision to grant the appeal was reasonable

[18] Pursuant to Paragraph 7(1) of the *Regulations*, to allow an appeal, the Staffing Review Officer must conclude that an error was made in the competitive process and that the error adversely affected the appellant's opportunity for appointment.

[19] This makes sense. It is important that the proper procedures be followed in staffing actions undertaken by the government. At the same time, some errors may have had no impact on the person who has appealed the outcome of the competition. It is not desirable that competitive processes be redone every time any error is made, irrespective of the type of error or the impact that it had. The *Regulations* strike an important balance between ensuring that proper procedures are followed and avoiding unnecessary delays and more cumbersome processes.

[20] Here, the GNWT argues that the Staffing Review Officer erred in concluding that it was an error to replace Ms. Mero on the Selection Committee when the seventh application was discovered. The GNWT notes that the Human Resources Guide does not require that the Selection Committee remain composed of the same people

throughout the competition and that on the contrary, it specifically contemplates the replacement of a member.

[21] Section 103 of the Human Resources Guide includes a number of provisions dealing with Selection Committees. The provisions most relevant to the issues raised in this matter are paragraphs 7 and 9:

7. Members of the Selection Committee are expected to participate in all aspects of the screening, interview and assignment components of the competition in order to maintain consistency.

(...)

9. Where a Committee member must remove himself/herself from the competition and it is necessary to replace the member, a substitute may be used for interviews as long as he/she reviews and concurs with the competition file prior to participating and signs off on all components of the file.

Human Resources Manual, Section 103, *Exhibit "C" to Affidavit of Laura Gareau sworn March 27, 2013.*

[22] The GNWT argues that while paragraph 7 recognizes the importance of maintaining consistency, it does not go so far as to create an absolute requirement to have the members of the Selection Committee remain the same throughout the process. The GNWT further notes that paragraph 9 specifically contemplates the situation where a member of the Selection Committee has to be replaced. The GNWT argues that this provision was complied with: when she replaced Ms. Mero, Ms. Robertson reviewed the entire competition file and concurred with the decisions that had been made up to the point.

[23] The GNWT argues that the Staffing Review Officer erred in not considering these paragraphs in arriving at her decision. This, the GNWT argues, contributed to her making a finding that is unreasonable.

[24] I have no difficulty agreeing with the GNWT that paragraph 9 contemplates a change in the composition of the Selection Committee before the interviewing phase of the competitive process begins. I am less convinced that it also contemplates changes to the composition of that committee once interviews have started taking place.

[25] The provision refers to "interviews" in the plural. This suggests to me that it contemplates a change that would apply to all the interviews.

[26] More fundamentally, the provision contemplates that a replacement member will review the competition file and concur with decisions made up to that point. It is difficult to see how a replacement member could “concur”, in the true sense of the word, with results of interviews that he or she did not take any part in. At best, that person could review other committee members’ notes and on that basis, concur with the scoring. But the replacement member, not having heard the applicant give answers to the questions, could hardly form an independent opinion about the quality of the answers given and concur in the result reached by others.

[27] That being the case, I have some difficulty with the GNWT’s position that the Human Resources Guide contemplates a change in the composition of the Selection Committee in the middle of the interview process.

[28] However, the circumstances of this case are such that I do not need to make a finding either way on that aspect of the matter. That is so because in my view, the Staffing Review Officer’s conclusion that the error adversely affected Mr. Voudrach’s opportunity for appointment cannot stand.

[29] The standard of review of reasonableness mandates deference to the decision-maker’s findings. Questions that come before administrative tribunals often do not lend themselves to one specific result, and may well give rise to a number of possible conclusions. The role of this Court on a judicial review is not to re-assess the case on its merits:

A Court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

*Dunsmuir v. New Brunswick, supra*, at para. 47.

The Staffing Review Officer’s assessment must be examined in light of those principles.

[30] The Staffing Review Officer correctly noted that by the time Ms. Robertson replaced Ms. Mero on the Selection Committee, both Mr. Voudrach and the candidate who was successful had already been interviewed, and that Mr. Voudrach did poorly on the interview. In her analysis, she wrote:

It is imperative that the membership of the Selection Committee remains consistent throughout the competition. This ensures consistent evaluation throughout the process, and fair and equitable treatment of all candidates. It is true that the

Appellant did quite poorly on the interview, and the change of Selection Committee members may not have affected this outcome. However, the benefit of the doubt on this issue must be given to the Appellant.

Staffing Review Officer Report, *Record (Tab 10)*, 8<sup>th</sup> and 9<sup>th</sup> page.

[31] The Staffing Review Officer went on to elaborate on why she considered how the change in Selection Committee could have compromised the fairness of the process for Mr. Voudrach:

The interview of Robertson helps illustrate this concern. The Human Resources Manual requires that interviews be based on a set of predetermined questions with a predetermined marking scheme, all of which is to be agreed upon by the Selection Committee members. Robertson clearly had some preconceived notions in regard to the Appellant. Further, she did not interview the appellant or the proposed appointee and yet, she was confident that the original proposed appointee was the best candidate for the position. Whether true or not her decision to “rubber stamp” the decision of the original Selection Committee *could be perceived* to be influenced by her views of the Appellant. This is unfair to the Appellant and could be unfair to other applicants.

Staffing Review Officer Report, *supra*, 9<sup>th</sup> page.

[32] It was open to the Staffing Review Officer to conclude that Ms. Robertson had certain preconceived notions about Mr. Voudrach, given some of her comments when she was interviewed:

Robertson added that she understood the Appellant felt he was not given enough time to answer questions. Robertson indicated that Mero is a “people person”, and was certain that Mero would have gone “out of her way” to ensure the Appellant had a fair chance in the interview process. She also added that the Appellant had worked for the Housing Corporation before, and that he was “not the most reliable” person and that “apparently” he could be “difficult to work with”.

Staffing Review Officer Report, *supra*, 7<sup>th</sup> page.

[33] But these comments are hardly relevant to the outcome of the process: by the time Ms. Robertson became involved, Mr. Voudrach had already failed the interview and would not have been offered the position in any event. In fact, as the seventh applicant did not pass the interview, Ms. Robertson’s involvement ultimately had no bearing at all on the outcome of this competition. That being so, in my view, there is a significant logical flaw in the Staffing Review Officer’s finding that Ms. Robertson’s involvement, *after* Mr. Voudrach was interviewed, and *after* his interview was scored, could justify granting Mr. Voudrach’s appeal.

[34] Mr. Voudrach argued at the judicial review hearing that Ms. Robertson's comments were an indication the Selection Committee members who interviewed him were biased against him, and that they passed their bias on to her. Had the Staffing Review Officer concluded that there was bias on the part of the persons who scored Mr. Voudrach's interview, this argument might have merit.

[35] But that is not the case. As I mentioned previously, the Staffing Review Officer, in fact, dismissed Mr. Voudrach's claim that he was not treated fairly during his interview. She dealt with those assertions at the very beginning of the "Analysis" section of her Report:

The Appellant suggests that the marking of his interview was somehow influenced by the fact the proposed appointee was interviewed before him, and that there was some sort of comparison of the two interviews. I reject that suggestion. There is no evidence to indicate this. Further, the interview marking sheet gives expected responses to the questions, which helps restrict any arbitrary marking scheme. The Appellant also suggests that some of the interview questions are for "southerners", indicating that his northern experience would colour his answers. Again, I reject this suggestion. If anything, the Appellant's northern experience should have given him the advantage of being able to answer questions based on his firsthand experience. The Appellant also suggests that he was stopped from giving full and complete answers to the questions, and suggests the questions were not clarified for him. Again, I reject this suggestion and accept the evidence of the Selection Committee members, who indicated that the Appellant had difficulty answering questions despite being given ample opportunity to go back to questions. In all, I find that the Appellant simply did poorly on the interview.

Staffing Review Officer Report, *supra*, 8<sup>th</sup> page.

[36] It is abundantly clear from the Staffing Review Officer's Report that she concluded that Mr. Voudrach failed his interview because he did poorly, and not because of any unfair treatment during the interview or in the scoring process. Implicit in those findings is a rejection of any notion of bias on the part of the Selection Committee members who interviewed him. It is not for this Court to revisit those findings, especially considering that Mr. Voudrach has not applied for a review of any of the Staffing Review Officer's findings.

[37] I conclude, with respect, that the Staffing Review Officer's conclusion that "the benefit of the doubt" should be given to Mr. Voudrach as to whether he was adversely affected by the change in the composition of the Selection Committee does not fall within the range of possible, acceptable outcomes, having regard to the legal framework she had to apply and the facts that were before her. The bottom line is that well before Ms. Robertson had any involvement in this matter, Mr. Voudrach's



score on the interview was well below the passing mark and he would not have been offered this position in any event.

[38] I have not overlooked the other submissions that Mr. Voudrach's presented at the judicial review hearing. However, those submissions went primarily to the merits of his original appeal. His submissions to this Court were similar to those he presented to the Staffing Review Officer about how he was adversely affected by comparative scoring, lack of fairness during his interview, and other criticisms of the process followed. All those submissions were unequivocally rejected by the Staffing Review Officer.

### C) CONCLUSION

[39] I remain skeptical about the wisdom of relying on Paragraph 9 of Section 103 of the Human Resources Manual to change the composition of a Selection Committee once the interview process on a competition has already started. However, for the reasons outlined above, I have concluded that in the specific circumstances of this case, the change in the composition of the Selection Committee could not have had any impact on Mr. Voudrach's opportunity for appointment in this competitive process. That being so, the GNWT's application must succeed. Given this conclusion, I do not need to deal with the issue related to the rectification measures that were ordered.

[40] The application is granted, and the decision of the Staffing Review Officer is quashed.

[41] There will be no order as to costs of these proceedings.

L.A. Charbonneau  
J.S.C.

Dated at Yellowknife, NT  
this 26<sup>th</sup> day of September 2013.

Counsel for the Applicant: Tricia Ralph  
The Respondent represented himself

**S-1-CV-2013-000010**

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