

Federal Court



Cour fédérale

Date: 20190718

Docket: T-1827-18

Citation: 2019 FC 949

Ottawa, Ontario, July 18, 2019

PRESENT: Mr. Justice Boswell

BETWEEN:

MARTIN CHESSER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Martin Chesser, is a veteran member of the Royal Canadian Mounted Police [RCMP]. He holds the rank of Chief Superintendent.

[2] He was transferred into a classified EX-03 position in February 2014. For the entire time he performed the duties of this position, it remained classified at the EX-03 level. The Applicant was only compensated, however, at the EX-02 level. Three weeks after he requested to be paid at the EX-03 level his supervisor, RCMP Commissioner Bob Paulson, initiated a classification

review which resulted in the position being reclassified to the EX-02 level with a retroactive effective date of June 27, 2011.

[3] In December 2016, the Applicant filed a classification grievance pursuant to the provisions of the *Commissioner's Standing Orders (Classification Redress Process for Members)*, SOR/2002-248, challenging the reclassification. In a letter dated September 5, 2018, RCMP Commissioner Brenda Lucki [the Commissioner] approved the recommendation of a Classification Redress Committee that the position should be classified at the EX-02 group and level.

[4] The Applicant has now applied pursuant to section 18.1 of the *Federal Courts Act*, RCS 1985, c F-7, for judicial review of the Commissioner's decision. He asks the Court to set aside the decision and refer the matter back to the Commissioner with certain directions.

I. Background

[5] In early February 2014, the Applicant was transferred to the position of Commanding Officer of the RCMP's National Headquarters Division. Two and one-half years later, he requested acting pay at the EX-03 level. At the time of this request (in early July 2016), the position was still classified at the EX-03 level but the Applicant was only receiving pay at the EX-02 level. On December 14, 2016, the Applicant learned that his request had been denied and the position reclassified to the EX-02 level on July 27, 2016, with a retroactive effective date of June 27, 2011.

[6] The Applicant corresponded with the Office of Control of Grievances and Appeals [OCGA] on December 15, 2016 and, subsequently, commenced a classification grievance on December 19, 2016. Some nine months later, the Applicant was informed that his grievance would not proceed since he was not in the position at the time of reclassification. On August 24, 2017, the Applicant grieved the decision not to allow his classification grievance to proceed. That grievance was settled about nine months later in May 2018 and the classification grievance proceeded.

[7] After receiving disclosure, the Applicant's grievance representative emailed the coordinator for classification grievances on June 7, 2018, stating that the work description for the position did not accurately describe the position and the work description dispute should be resolved before the classification grievance. In a subsequent email, the Applicant's representative also expressed concern about the fairness of the process and urged the coordinator to select a chairperson from outside the RCMP.

[8] The inaccurate work description was again raised in the Applicant's written presentation submitted on July 26, 2018 to a Classification Redress Committee, along with other concerns, namely:

- a. The July 27, 2016 reclassification decision provided no supporting rationale to justify a retroactive effective date of close to five years. RCMP policy stated that backdating effective dates should be the exception rather than the rule for all positions and that management should submit a supporting rationale highlighting when all or part of the work was assigned to the position, and what part of the work provides reasoning for a change in group or level. Also, a Treasury Board Secretariat Directive on Executive (EX) Group Organization and Classification stated that the effective date for reclassifying positions should reflect the date of the changes, and that reclassification should not be retroactive more than one year.

- b. The procedure for completing the job description was not followed. The June draft was a follow-up to an earlier February draft and to try to justify lower point scoring the June draft eliminated or nuanced to “water down” the description of the job. Neither of the draft job descriptions related to the position were ever made available to the Applicant for his review and certification.
- c. The job classification was rushed (after many years of delay) and the classification report describing the evaluation of the position at the EX-02 level was unsigned; the classification decision was not reviewed by a committee; and the benchmarks selected were not appropriate. For example, when the classification officer notified Commissioner Bob Paulson on August 4, 2016 of their classification decision Commissioner Paulson had already approved the classification eight days earlier (the classification was approved on July 27, 2016).
- d. The position should have been reviewed in 2011 when responsibility for the Musical Ride and the Strategic Partnerships & Heritage Branch had been removed from the position and transferred to the Executive Director Public Affairs, effective June 27, 2011. However, over the following five years the scope and breadth of the position increased significantly, and new responsibilities were added.

II. The Classification Decision

[9] The Classification Redress Committee convened on July 31, 2018 to hear the Applicant’s grievance. The Committee, which consisted of three members, produced a report [the Report] recommending that the grieved position warranted classification at the EX-02 group and level with an effective date of June 27, 2011.

[10] At the outset of the hearing, the chair of the Committee explained that its mandate was (i) to establish the appropriate classification of the grieved position - that is, the level based on the work assigned by management and described in the grieved job description - and (ii) to determine the validity of the effective date of the classification decision.

[11] The Committee then proceeded to summarize the information provided by the Applicant and his representative. Since their presentation was clear and detailed, the Committee members did not contact management to obtain additional information.

[12] The Committee noted it was not mandated to comment on or make recommendations concerning the content of the grieved job description. It then evaluated the grieved position based on the duties and responsibilities assigned by management and described in the work description title, Commanding Officer, National Headquarters, which had an effective date of June 27, 2011 and had been signed by Commissioner Bob Paulson on July 27, 2016.

[13] The Committee noted that the position had been evaluated by a Classification Committee and classified at the EX-03 group and level in January 2010, with an effective date of April 23, 2008. At that time, the position included responsibility for the RCMP Musical Ride Program and the RCMP Strategic Partnerships and Heritage Programs. On May 4, 2011, Commissioner William J.S. Elliot announced that those two Programs would be transferred to the Executive Director, Public Affairs, effective June 27, 2011.

[14] Having completed its analysis of the duties and responsibilities described in the job description, the Committee proceeded with an evaluation of the grieved position. It noted that the position was located at the first hierarchical level below the Commissioner and primarily responsible and accountable for directing the delivery of key programs such as human resources, informatics, staff relations, and property security to support the operations of the RCMP National Headquarters. The Committee remarked that the position exercised significant influence on the

development and implementation of strategies, business plans, accountability frameworks, and policies to establish the infrastructure for responding to management requirements.

[15] The Committee next assessed various factors and sub-factors pertaining to Know-How, Problem Solving/Thinking, and Accountability/Decision Making. The Committee concluded that the grieved position was comparable overall to that of an Executive Director, Canada Business Services Centres, with respect to Know-How and Problem Solving/Thinking. The Committee also concluded that the position was comparable to that of a Director General, Regional Civilian Human Resources Services, with respect to Accountability/Decision Making responsibility.

[16] The Committee then addressed the validity of the effective date, noting that the Applicant and his representative claimed the grieved position should have been reviewed in 2011, when responsibility for the Musical Ride and the Strategic Partnerships & Heritage Branch had been removed from the position, and also that it was unprecedented that a position be downgraded and backdated five years. The Committee further noted that these changes, which eventually led to reclassification of the position from an EX-03 level to an EX-02 level, had been announced by Commissioner Elliott on May 4, 2011 and became effective June 27, 2011.

[17] The Committee observed that the Applicant had been transferred to the grieved position on February 3, 2014, approximately 31 months after responsibility for the Musical Ride and the Strategic Partnerships & Heritage Branch had been removed from the position and transferred to the Executive Director, Public Affairs; and that he had not performed the duties deemed to justify an EX-03 level classification. The Committee concluded it was unfortunate that it took a

long time to review the grieved position following the realignment of duties and functions. The Committee further concluded that no one had been penalized as a result of the delay and that the effective date of June 27, 2011 was valid since the changes had been announced and promulgated as of that date by Commissioner Elliott on May 4, 2011.

[18] Thus, the Committee recommended that the grieved position warranted a classification at the EX-02 group and level with an effective date of June 27, 2011. In a letter dated September 5, 2018, RCMP Commissioner Lucki approved the Committee's Report and recommendation.

III. Analysis

A. *Standard of Review*

[19] The appropriate standard of review for the decision in this case is that of deferential reasonableness (*McEvoy v Canada (Attorney General)*, 2013 FC 685 at para 39 [*McEvoy*], affirmed 2014 FCA 164; *Schamborzki v Canada (Attorney General)*, 2015 FC 1262 at paras 30 and 31; *Roopnauth v Canada (National Revenue)*, 2016 FC 1307 at para 18; *Boucher v Canada (Attorney General)*, 2016 FC 546 at para 13; *Attorney General of Canada v Allard*, 2018 FCA 85 at paras 23 to 25 [*Allard*]).

[20] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "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*,

2008 SCC 9 at para 47). Those criteria are met if “the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[21] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79). The Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115).

[22] An issue of procedural fairness “requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation” (*Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 at para 74). As the Federal Court of Appeal has observed: “even though there is awkwardness in the use of the terminology, this reviewing exercise is ‘best reflected in the correctness standard’ even though, strictly speaking, no standard of review is being applied” (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[23] In the context of classification grievances in the federal public service, the content of the duty of fairness falls somewhere in the lower zone of the spectrum (*Chong v Canada (Attorney General)*, [1999] FCJ No 176 at para 12). The jurisprudence has established that it is a

classification committee which owes an applicant the appropriate level of procedural fairness and whose decision and recommendation must be reasonable (*McEvoy* at paras 41 to 44).

B. *Was the Classification Decision reasonable?*

(1) The Applicant's Submissions

[24] The Applicant contends that, since the original classification grievance was presented to the OCGA, the RCMP ought to have ensured that the dispute with the job description was properly adjudicated. According to the Applicant, the chair of the Committee should have requested a review of the job description prior to deliberating on the classification level.

[25] The Applicant points to the RCMP's Administration Manual (ch. 1.1, section 11.8.1.4), which provides that when a request for classification redress has been made, the chair of a redress committee will:

if necessary, request a review of the job by another accredited O&C [Organization and Classification] Advisor to clarify or obtain job facts. The O&C Advisor submits his/her report to the Chairperson, the member, and the manager/supervisor within 15 calendar days of completing the review. The job review may be done by on-site visits or telephone interviews with the member and manager/supervisor. The O&CA performing the on-site review will not have been involved in the original decision giving rise to the redress.

[26] According to the Applicant, case law has established that if a redress committee has a problem with the job description it should not proceed with the classification grievance. The Applicant says the Committee should have made sure that the parties agreed on the work description before reviewing the classification grievance.

[27] In the Applicant's view, backdating the effective date for the position to June 27, 2011 - a retroactive date of approximately five years - is not justifiable. The Applicant notes that Treasury Board policy states that the effective date should be retroactive no more than one year, and that RCMP policy states that backdating should be the exception rather than the rule for all positions and the chosen effective date must be reasonable and defensible. Although the Committee cited the loss of some responsibilities effective June 27, 2011 as the rationale for accepting that date as the effective date, the Applicant says it failed to account for the numerous additional responsibilities added to the position shortly thereafter and up to July 27, 2016.

(2) The Respondent's Submissions

[28] The Respondent defends the decision. According to the Respondent, the Applicant had the burden of establishing that the classification of the grieved position was wrong, and he failed to meet his burden. The Respondent says the Committee was not required to review the work description for the position to evaluate its sufficiency, and notes that it would be an error for a classification committee to modify the work description or refuse to consider the duties and activities in the work description.

[29] The Respondent points to RCMP policy which provides that a job content grievance is distinct from a classification grievance and that a job content grievance should be resolved separately from and prior to resolution of a classification grievance. The Respondent notes that, although the Applicant objected to the work description in his written submissions to the Committee, he did not file a job content (work description) grievance, nor did he take any steps

to have the classification redress process held in abeyance pending his ability to address the work description.

[30] The Respondent says it was reasonable to establish an effective date of June 27, 2011 for the position. It is clear in the Report that the Committee heard the Applicant and summarized his arguments concerning backdating effective dates. In the Respondent's view, the effective date of June 27, 2011 was reasonable considering that responsibility for the Musical Ride and for the Strategic Partnerships & Heritage Branch had been removed from the grieved position effective that date. As the Applicant did not occupy the position until February 3, 2014, he never actually performed the duties that were, prior to 2011, deemed to have justified the EX-03 level classification. According to the Respondent, this reasoning by the Committee was sound and should not be disturbed since it falls within the range of defensible possible outcomes.

(3) The Classification Decision Was Reasonable

[31] Although backdating the effective date for the grieved position by approximately five years may have been exceptional, that alone does not render the classification decision unreasonable. When the position was classified in January 2010 the effective date was retroactive for more than two years.

[32] Classification matters "are among the most specialized and arcane issues that a labour tribunal may be called upon to determine" (*Allard* at para 25). Decisions made by a classification committee are to be afforded a high degree of deference (*McEvoy* at para 39; *Beauchemin v Canada (Agence Canadienne d'inspection des Aliments)*, 2008 FC 186 at para 20).

[33] In this case, the Court's intervention is not necessary. The Committee's Report is intelligible, transparent, and justifiable; the recommendation and resulting decision by the Commissioner falls within a range of possible outcomes which are defensible in respect of the facts and law.

C. *Was the Applicant denied procedural fairness?*

[34] The Applicant notes that the documentation presented to the Commissioner did not include his grievance submission and, although some of his arguments were summarized in the Report, some of the more salient arguments and information were not reproduced or addressed in the Report. In the Applicant's view, he was not fully heard by the ultimate decision-maker because the Commissioner made her decision without considering his grievance submission.

[35] The Applicant says the documentation provided to the Commissioner contained a pre-determined notification letter which had been drafted prior to the Commissioner ever seeing the Report. According to the Applicant, this letter pre-assumed that the Commissioner had given the matter a "thorough review" when, in fact, she had never seen the Applicant's grievance submission.

[36] By not following Treasury Board policy, the Applicant says the whole reclassification process was unfair. In the Applicant's view, there was no firm foundation for evaluation of the classification for the position because the Committee reviewed an incomplete and unreliable job description, which did not articulate all the increased elements of the position, and ought to have ordered a new unbiased job description for the position.

[37] The Respondent says the Committee afforded the Applicant an appropriate level of procedural fairness. The Respondent also says the Applicant's argument that the Committee should have requested a review of the job description is misguided. According to the Respondent, such a request is a discretionary determination to be made if the chair of a redress committee deems it necessary.

[38] There is no evidence, the Respondent notes, that the Applicant requested a review of the job description, and it was the Applicant's responsibility to initiate a separate grievance with respect to the contents of the work description for the position. In the Respondent's view, all that was required was for the Committee to hear the Applicant's arguments and it did so.

[39] On this issue, I agree with the Respondent. The process was in accordance with procedural fairness because the Applicant had the opportunity not only to make his arguments relating to classification of the position but also to be heard, and there was no restriction on his participation (*Begin v Canada (Attorney General)*, 2009 FC 634 at para 9).

IV. Conclusion

[40] In conclusion, I find the classification decision was reasonable. The Report clearly articulated the reasons for not accepting the Applicant's classification grievance. The Report and the Commissioner's acceptance of the Committee's recommendation are justifiable, transparent, and intelligible, and fall within a range of possible outcomes defensible in respect of the facts and law. The Applicant's application for judicial review is, therefore, dismissed.

[41] Each party requested their costs in respect of this application. The Respondent has been successful in this application and is entitled to costs. The parties informed the Court at the hearing of this matter that they had agreed a lump sum amount of \$950 would be an appropriate award of costs. The Applicant shall, therefore, pay costs to the Respondent in a lump sum amount of \$950 within 30 days of the date of this judgment.

JUDGMENT in T-1827-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; and the Applicant shall pay costs to the Respondent in a lump sum amount of \$950 within 30 days of the date of this judgment.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1827-18

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