

Federal Court



Cour fédérale

Date: 20200624

Docket: T-1836-19

Citation: 2020 FC 723

Ottawa, Ontario, June 24, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

DANIEL DE SANTIS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Daniel De Santis seeks judicial review of a decision by Christopher Bucar, Director General, Corporate Services and Chief Financial Officer, Administrative Tribunals Support Service of Canada [ATSSC]. Mr. Bucar denied Mr. De Santis' third and final level grievance concerning the effective date of his promotion from Program Administration Mediation and Conciliation Officer [PM-MCO] Sector 1 to PM-MCO Sector 2.

[2] For the reasons that follow, Mr. Bucar's decision was both procedurally fair and reasonable. The application for judicial review is dismissed.

II. Background

[3] Mr. De Santis has been employed as an Industrial Relations Officer [IRO] at the Canada Industrial Relations Board [CIRB] since December 2014. The CIRB is a federal administrative tribunal supported by the ATSSC.

[4] IROs belong to the PM-MCO Sub-group, which comprises three salary sectors: PM-MCO-01, PM-MCO-02 and PM-MCO-03. The sectors are defined in Appendix A to the Salary Administration Policy – Mediation/Conciliation Officer Sub-group [Salary Administration Policy]. As the levels increase, an IRO is expected to assume responsibility for files of greater complexity with a commensurate increase in pay.

[5] Pursuant to the Salary Administration Policy and the Industrial Relations Officer (PM-MCO) Administration Guidelines [Guidelines], IROs who wish to advance to the next salary sector may submit applications to their respective Regional Directors during an annual Progression Review Exercise. The Regional Directors then evaluate the work of the IROs and make recommendations to a review committee [Review Committee]. The Review Committee consists of the CIRB's Chairperson, the CIRB's Executive Director and General Counsel, and the Regional Directors of all CIRB offices. The Review Committee reviews and approves all movements to higher salary sectors.

[6] The Guidelines were implemented on November 28, 2017. The first Progression Review Exercise under the new Guidelines occurred in December 2017.

[7] Mr. De Santis participated in the December 2017 Progression Review Exercise, but his application to be promoted from PM-MCO-01 to PM-MCO-02 did not succeed. The IROs who were successful at that time each received retroactive promotions with an effective date of April 1, 2017.

[8] Mr. De Santis grieved the Review Committee's decision to deny his application for promotion in the 2017 Progression Review Exercise. The grievance was dismissed at the second level. It does not appear that he pursued the grievance further.

[9] In December 2017 and again in March 2018, Mr. De Santis spoke to his then supervisor about his interest in promotion. In June 2018, he discussed his grievance with Sylvie Guilbert, the CIRB Secretariat's Executive Director and General Counsel. He says both of them assured him that Progression Review Exercises would be conducted annually and on the same basis as occurred in 2017.

[10] The next Progression Review Exercise took place in January 2019. Mr. De Santis says he was informed by Trevor Craig, Regional Director of the CIRB's Vancouver Office, that all of his casework subsequent to December 2017 would be considered. There was no discussion of the effective date for promotions resulting from the January 2019 Progression Review Exercise.

[11] Mr. De Santis participated in the January 2019 Progression Review Exercise. In correspondence dated February 21, 2019, Ms. Guilbert informed Mr. De Santis that the Review Committee had approved his application for promotion, and he would progress to PM-MCO-02 effective April 1, 2019.

[12] Mr. De Santis immediately informed Mr. Craig that he was dissatisfied with the effective date of his promotion. On February 22, 2019, Mr. Craig sent Mr. De Santis an e-mail message with a detailed explanation for the Review Committee's decision to promote him effective April 1, 2019:

Here is a summary of how the decision on promotion and effective date was reached:

- Your submission was shared with the PM-MCO progression committee members in advance of the Feb 14th meeting[.]
- When I sent in your submission I had included a completed "PMMCO Integration Document" that recommended promotion to the PM-MCO-02 level. However, I purposely left the "Recommended Effective Date" field on the form blank as I was not knowledgeable on how this date was to be determined. My own belief was that you were definitely demonstrating the competencies at the PM-MCO-02 level through the successful handling of the more complex files assigned to you in the fall [...]. However, I did not want to recommend a date which was during the fiscal year if there was a possibility of backdating the promotion to April 1, 2018 [...]
- The committee members had very few questions/comments and it was agreed that you were demonstrating the requisite competencies [that] warranted a promotion to the PM-MCO-02 level[.]
- The committee then turned to the question of effective date and I explained why I had not provided a recommendation with my submission. It was explained to me that the effective

date of a promotion is generally the start of the fiscal year following that in which the IRO demonstrates progression is warranted. It was further explained that there had been backdating in the previous round (ie. 2017/18) as that was the first application of the IRO Administration Guidelines. As a result, when the committee previously discussed effective dates they considered whether an individual had been demonstrating the requisite competencies for promotion prior to the start of that fiscal year. If so, the promotion could have been backdated. As explained above, it was determined that you were assigned the complexity of files and started to demonstrate the competencies at the PM-MCO-02 level during the current fiscal year. As such, the effective date of your promotion was determined to be April 1, 2019. This was the same for all other cases considered by the committee in this round.

As a result of the above, I am unfortunately not supportive of recommending that your promotion to the PM-MCO-02 level be backdated to April 1, 2018. I realize that this is not your preferred option, and I do not want this to take anything away from the positive decision of the promotion. I know that you have worked hard this year and for that I am extremely appreciative. As such, I am open to further discussion on “where to from here”. Perhaps there are other options to recognize your achievements and success?

[13] Mr. De Santis continued to discuss his concerns with Mr. Craig throughout February and March 2019, but they were unable to resolve the matter to his satisfaction. On April 16, 2019, Mr. De Santis grieved the Review Committee’s decision regarding the effective date of his promotion.

[14] The parties agreed that the grievance would proceed directly to the second level. Mr. De Santis presented his grievance to Ms. Guilbert on May 7, 2019. She refused it on May 10, 2019.

[15] Ms. Guilbert noted that a person who wishes to be promoted must demonstrate that he or she is fully and consistently functioning at a certain level and meets the required competencies, and this necessarily requires the passage of time. Ms. Guilbert cited the statements in the Salary Administration Policy that “[a]dvancement to a higher sector is normally contingent upon an incumbent demonstrating effectiveness typical of the higher sector over several successive evaluation periods”, and an employee’s performance “shall be reviewed annually and [...] normally, such reviews and adjustment will occur at the start of the fiscal year coincidental with the revisions to the appropriate salary range”. Ms. Guilbert continued:

Following a review committee meeting in February 14, 2019, the assessment committee was of the view that you did demonstrate that you were ready for movement to the PM-MCO-02 level. It was then established that the PM-MCO progression date would be April 1, 2019, which coincided with the start of the new fiscal year, a few weeks away. This approach is in line with the policy and the guidelines. It applies to all PM-MCO across the Secretariat of the Canada Industrial Relations Board for the review committee's findings of February 14, 2019.

As a result of the above, I am of the view that you have been correctly compensated for the service rendered and that the effective date of April 1, 2019 for your movement to the PM-MCO-02 level is correct and consistent with the Guidelines and other relevant policies or directives. Consequently, your grievance and your corrective action requested are denied.

[16] Mr. De Santis presented his third and final level grievance before Mr. Bucar on July 9, 2019. The hearing’s duration was extended to allow Mr. De Santis to present two grievances: one pertaining to the effective date of his promotion to PM-MCO-02; and another pertaining to the performance rating he received for 2018-19. Only the former is before the Court in this application for judicial review.

[17] Mr. Bucar advised Mr. De Santis that he would hold the grievance in abeyance pending receipt of an opinion regarding the interpretation of the Salary Administration Policy from the Treasury Board's Interpretation Team [Interpretation Team]. Mr. De Santis maintains that Mr. Bucar promised to reconvene the hearing once he received the opinion, but this is disputed by the Respondent.

[18] On July 17, 2019, Mr. De Santis submitted additional information regarding his casework from December 2017 onward. He claimed that he had handled a greater volume of medium- to high-complexity casework than any other IRO in Canada.

[19] The Interpretation Team provided its interpretation of the Salary Administration Policy on September 27, 2019. The opinion confirmed that the effective date of a promotion is normally the start of the fiscal year following the process that results in the recommendation for promotion. On October 2, 2019, Mr. De Santis' Team Leader, Jonathan Tremblay Meloche, forwarded him a copy of the Interpretation Team's opinion. That same day, Mr. De Santis enquired whether Mr. Bucar intended to reconvene the hearing into his grievance.

[20] On October 18, 2019, Mr. Tremblay Meloche sent an e-mail message to Mr. De Santis advising him that Mr. Bucar had reviewed the opinion provided by the Interpretation Team, together with all of the documentation Mr. De Santis had provided. Mr. Tremblay Meloche indicated that Mr. Bucar was comfortable with the information he had received and would not seek additional clarification from the Interpretation Team. Mr. De Santis did not repeat his request to reconvene the oral hearing.

III. Decision under Review

[21] Mr. Bucar dismissed Mr. De Santis' third and final level grievance on October 30, 2019. He confirmed that he had considered the opinion provided by the Interpretation Team, as well as the arguments and documents presented by Mr. De Santis in the course of the grievance procedure. The Respondent notes that this included the explanatory e-mail message that Mr. Craig sent to Mr. De Santis on February 22, 2019, the second level grievance decision of Ms. Guilbert, and a chart Mr. De Santis had prepared regarding the complexity of the files he had handled from December 2017 onward.

[22] Mr. Bucar confirmed the Review Committee's central role in determining a person's eligibility to progress to the next level of the PM-MCO Sub-group:

[...] IROs must demonstrate over several consecutive evaluation periods that they have the appropriate level of competency to work in the higher sector for them to be considered for movement. Accordingly, the work performed at a higher sector, is not the only element that should be factored in when determining eligibility for movement. The review committee has full and complete discretion to determine when these requirements have been met.

This assertion is consistent with the Industrial Relations Officer Administration Guidelines of the Canada Industrial Relations Board (CIRB) which indicates that IROs must demonstrate sustained contributions through the course of the year and have demonstrated the required level of competency for them to be considered for movement within the PM-MCO sectors.

You were deemed to have met the required level of competency of the PM-MCO 02 effective as of April 1, 2019.

[23] Mr. Bucar's decision respecting the effective date of Mr. De Santis' promotion was as follows:

Regarding your allegation that your employer failed to arrive at the proper effective date of your movement within the PM-MCO sectors, the policy states that "Employees' performance shall be reviewed annually [...] Normally such reviews and adjustments will occur at the start of the fiscal year coincidental with the revisions of the appropriate salary range"

The decision to move you from the first sector to the second sector of the PM-MCO sub-group effective at the start of the fiscal year on April 1, 2019, is consistent with the policy, guidelines and interpretation received, as well as the internal practices generally applicable to all IROs of the CIRB.

IV. Issues

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

- A. What is the standard of review?
- B. Was Mr. Bucar's decision procedurally fair?
- C. Was Mr. Bucar's decision reasonable?

V. Analysis

- A. *What is the standard of review?*

[25] Procedural fairness is a matter for the Court to decide. The standard for determining whether the decision maker complied with the duty of procedural fairness is generally said to be correctness; however, attempting to shoehorn the question of procedural fairness into a standard of review analysis is an unprofitable exercise (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56, citing *Mission Institution v Khela*, 2014 SCC 24 at para 79). The ultimate question is whether the applicant knew the case to meet, and had a full and fair chance to respond.

[26] The merits of Mr. Bucar's decision are subject to review by this Court against the standard of reasonableness (*Backx v Canadian Food Inspection Agency*, 2013 FC 139 at para 18). The Court will intervene only if it is satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100).

[27] The Court must look respectfully at both the decision maker's reasoning process and the outcome, and must put the reasons first (*Vavilov* at paras 83-84). A reasonable decision is one that is based on an internally coherent and rational chain of analysis, and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

B. Was Mr. Bucar's decision procedurally fair?

[28] The level of procedural fairness owed to an employee in an internal grievance process is at the low end of the spectrum. The employee has the right to be informed of any prejudicial

facts, and the right to respond to those facts (*Canada (Attorney General) v Allard*, 2018 FCA 85 at para 41, citing *Gladman v Canada (Attorney General)*, 2017 FCA 109 at para 40).

[29] Mr. De Santis says he was denied the opportunity to respond to all the information that Mr. Bucar relied upon before rendering his decision, in particular: (a) the opinion obtained from the Interpretation Team regarding the Salary Administration Policy; and (b) all discussions with ATSSC management personnel concerning his grievance.

[30] Mr. De Santis had the right to be informed of the facts against him, not to be given access to all information in the decision maker's possession (*Clarke v Canada (Attorney General)*, 2016 FC 977 at paras 15-17). The grievance process is intended to be informal and non-adversarial. Mr. De Santis initiated the grievance and therefore knew the case to meet. He received a copy of the Interpretation Team's opinion and provided comments in response. There is nothing to indicate that Mr. Bucar relied on any adverse information obtained from ATSSC management personnel that was not disclosed to Mr. De Santis.

[31] Mr. De Santis says he had a legitimate expectation that his promotion would be retroactive to the date he began performing work of medium- to high-complexity, consistent with the responsibilities of an IRO at the PM-MCO-02 level. He estimates this date to be December 2017, *i.e.*, immediately following the period evaluated in the Progression Review Exercise that occurred in December 2017. He notes that the promotions of those who progressed as a result of the December 2017 Progression Review Exercise were made retroactive to April 1, 2017. He

also relies on the statements allegedly made by his then supervisor and Ms. Guilbert to the effect that future progression reviews would occur on the same basis as they had in 2017.

[32] The evidence of the statements allegedly made by Mr. De Santis' former supervisor and Ms. Guilbert is hearsay and inconclusive. It falls far short of establishing a clear, unambiguous and unqualified practice or pattern of conduct sufficient to give rise to a legitimate expectation in law (*Varadi v Canada (Attorney General)*, 2017 FC 155 at paras 46-47). Furthermore, as Mr. Craig explained in his e-mail message of February 22, 2019, the promotions of those who progressed as a result of the December 2017 Progression Review Exercise were made retroactive because this was the first exercise under the new Guidelines, and the successful applicants had all demonstrated the requisite competencies prior to the beginning of that fiscal year.

[33] Despite meeting with Mr. Bucar for an hour and a half, Mr. De Santis maintains that he did not have enough time to fully present his grievance. He also says that Mr. Bucar promised him that the hearing would be reconvened once Mr. De Santis had provided an analysis of his casework and the Interpretation Team had provided its opinion.

[34] It is unclear whether Mr. Bucar promised to reconvene the hearing as alleged by Mr. De Santis. In an e-mail message dated October 2, 2019, Mr. De Santis wrote that the parties had "contemplated to possibly reconvene" the hearing. The Respondent notes that Mr. Bucar was not obliged to hold an oral hearing at all, let alone reconvene one that had already lasted for an hour and a half (*Chickoski v Canada (Attorney General)*, 2017 FC 772 at paras 38 & 49, citing *Hagel v Canada (Attorney General)*, 2009 FC 329 at para 35).

[35] In any event, Mr. De Santis has not identified any additional information or arguments he would have made if the oral hearing had been reconvened. He has not demonstrated any prejudice arising from Mr. Bucar's procedural choice not to reconvene the hearing before rendering his decision. Mr. De Santis was given numerous opportunities to provide information and arguments in support of his position, and he did so both orally and in writing. Mr. De Santis was informed nearly two weeks in advance that a decision was forthcoming, and he raised no objection.

[36] I therefore conclude that Mr. Bucar's decision was procedurally fair.

C. *Was Mr. Bucar's decision reasonable?*

[37] Mr. De Santis says that Mr. Bucar merely summarized the Salary Administration Policy and deferred to the Review Committee's findings without engaging in any meaningful analysis of the information and arguments he had provided. He complains that Mr. Bucar's decision did not explain the rationale for confirming the effective date of his promotion as April 1, 2019, and therefore failed to demonstrate the requisite degree of justification, intelligibility and transparency (citing *Vavilov* at para 100).

[38] The Respondent acknowledges that Mr. Bucar's decision was brief. However, the Respondent emphasizes the institutional context in which it was made. The decision resulted from an internal grievance process that is intended to resolve disputes in a non-adversarial and efficient manner.

[39] In *Vavilov*, the Supreme Court of Canada warned reviewing courts not to assess administrative decisions against the standard of perfection, observing that “administrative justice” will not always look like “judicial justice”:

[91] [...] That the reasons given for a decision do “not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred” is not on its own a basis to set the decision aside: *Newfoundland Nurses* [2011 SCC 62], at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[40] Administrative decision makers are not required to “respond to every argument or line of possible analysis” or “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion”. A decision is reasonable so long as the decision maker addresses the central arguments and provides sufficient reasons to allow the parties to understand the decision (*Vavilov* at para 128).

[41] According to the Preamble to the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, the statute aims to achieve the “fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment”. Given the institutional context in which Mr. Bucar made his decision, he was not obliged to provide lengthy and technical reasons in the manner of a court. He was required only to provide sufficient reasons to resolve the grievance fairly and efficiently.

[42] I am satisfied that Mr. Bucar’s reasons were adequate in the circumstances. Mr. Bucar addressed the central question raised by Mr. De Santis’ grievance, namely whether the effective

date of his progression was correctly determined. He considered this in light of the factual and legal constraints, citing the applicable policies and guidelines. He took the additional step of obtaining an opinion from the Interpretation Team. This opinion confirmed the Review Committee's and Ms. Guilbert's understanding that the effective date of a promotion is normally the start of the fiscal year following the process that results in the recommendation for promotion.

[43] The Review Committee found that Mr. De Santis was assigned more complex files and started to demonstrate the competencies of the PM-MCO-02 level during the 2018-19 fiscal year. It determined that the effective date of his promotion should therefore be April 1, 2019. It was open to Mr. Bucar to prefer the Review Committee's factual findings over the contrary position advanced by Mr. De Santis. Mr. Bucar relied on the Salary Administration Policy as interpreted by the Interpretation Team, together with the Guidelines. All of these supported the Review Committee's determination respecting Mr. De Santis' effective date of progression.

[44] This is sufficient to dispose of the application for judicial review. I will nevertheless comment briefly on some of the other arguments made by Mr. De Santis.

[45] Mr. De Santis asks this Court to reweigh the evidence of his work history, and substitute its view for that of the Review Committee and Mr. Bucar regarding the date on which he became eligible for progression. However, that is not the role of this Court on an application for judicial review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61; *Vavilov* at para

128). Mr. De Santis has not demonstrated that the Review Committee's factual findings were so flawed as to warrant this Court's intervention.

[46] Mr. De Santis alleges that he performed higher sector work but did not receive fair compensation, in violation of the principle of equal pay for work of equal value. However, IROs may be compensated for performance under two different policy regimes. They may be moved to a higher salary sector pursuant to the Salary Administration Policy, or they may be awarded a lump-sum end-of-year bonus pursuant to the Performance Pay Administration Policy for Certain Non-Management Category Senior Excluded Levels. Mr. De Santis received lump-sum bonus payments under this policy in both 2018 and 2019.

[47] I therefore conclude that Mr. Bucar's decision to affirm the Review Committee's determination with respect to the effective date of Mr. De Santis' progression was reasonable.

VI. Conclusion

[48] The application for judicial review is dismissed.

[49] The Respondent seeks costs in the all-inclusive amount of \$1,500.00. Mr. De Santis says that each party should bear its own costs.

[50] Mr. De Santis represented himself in this application for judicial review. He presented his arguments clearly and did not unduly prolong or complicate the proceedings before this Court.

His arguments, particularly concerning the brevity of Mr. Bucar's reasons, were not without substance. I therefore conclude that this is not an appropriate case for an award of costs.

JUDGMENT

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

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1836-19

STYLE OF CAUSE: DANIEL DE SANTIS v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN VANCOUVER AND OTTAWA

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JUDGMENT AND REASONS: FOTHERGILL J.

DATED: JUNE 24, 2020

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