

Date: 20090121

Docket: T-252-08

Citation: 2009 FC 55

Ottawa, Ontario, January 21, 2009

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

VERA GERUS

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT AND ORDER

[1] This is an application for judicial review of a decision made by the Director General of the Revenue and Accounting Systems Directorate of Canada Revenue Agency which decision was provided to the Applicant by way of a letter dated January 25, 2008. In that decision the Director General confirmed certain staffing actions taken by the Agency and declined to take any corrective measure. For the reasons that follow, I am allowing the application and returning the matter for redetermination by a different person.

[2] On April 29, 1999, Parliament enacted the *Canada Revenue Agency Act*, S.C. 1999, c. 17 which, among other matters, provided in sections 53 and 54 that the Agency would be responsible for appointment of employees, staffing, and recourse for employees:

Appointment of employees

53. (1) *The Agency has the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business.*

Commissioner's responsibility

(2) *The Commissioner must exercise the appointment authority under subsection (1) on behalf of the Agency.*

Staffing program

54. (1) *The Agency must develop a program governing staffing, including the appointment of, and recourse for, employees.*

Collective agreements

(2) *No collective agreement may deal with matters governed by the staffing program.*

Pouvoir d'embauche de l'Agence

53. (1) *L'Agence a compétence exclusive pour nommer le personnel qu'elle estime nécessaire à l'exercice de ses activités.*

Nominations par le commissaire

(2) *Les attributions prévues au paragraphe (1) sont exercées par le commissaire pour le compte de l'Agence.*

Programme de dotation

54. (1) *L'Agence élabore un programme de dotation en personnel régissant notamment les nominations et les recours offerts aux employés.*

Exclusion

(2) *Sont exclues du champ des conventions collectives toutes les matières régies par le programme de dotation en personnel.*

[3] The Agency adopted a Staffing Program which was to be reviewed in five years time (section 89 of the Act). Such a review was undertaken by the Agency in conjunction with the firm

of Deloitte & Touche. A Report (*The Canada Revenue Agency: The First Five Years* (Ottawa: The Canada Revenue Agency, 2006)) was given which provided a somewhat self-satisfied summary at page 35:

“The CRA’s recourse approach strikes a balance between right-based and interest-based approaches to resolving complaints and is supported by the alternative dispute resolution training provided to managers and employees...As a result of this new process, staffing recourse has been transformed from an adversarial and defensive process into one where openness and dispute resolution practices predominate.”

[4] This approach was criticized by the Professional Institute of the Public Service of Canada which pointed out that there have been a number of complaints with the Program, particularly with respect to recourse. In its Presentation to the House of Commons Standing Committee dated June 2006 the Institute said at page 7:

“...CRA managers are taking every opportunity to avoid using the system because it is essentially flawed...The Professional Institute is concerned that CRA management considers staffing recourse as a career management process rather than a recourse process. While career management is important, so is recourse.”

[5] A number of proceedings have been taken in this Court in respect of the Program, including proceedings directed to recourse, one of which has been recently decided by Justice Mandamin of this Court involving the husband of the Applicant here. That decision is cited as *Barry Gerus v. Attorney General of Canada*, 2008 FC 1344. The issues in that case have no bearing on the issues in the case presently before me save to illustrate that the Program, including the recourse provisions, are in need of serious reform, especially with legal considerations in mind.

FACTS

[6] The facts of this case are relatively simple keeping in mind that the Applicant has restricted herself to a single issue. It is to be noted that in respect of the affidavit of the Applicant filed in these proceedings the parties have come to an agreement that paragraphs 6 to 11 inclusive, 14 and 15, 16 to 19 inclusive, 20 and 22 are to be struck from the Record. I will so order.

[7] The Applicant Vera Gerus is an employee of the Canada Revenue Agency. Since about 2003 she worked in Ottawa at the level designated as CS-03. She and her husband moved from Ottawa to Summerside, Prince Edward Island in July 2006. The Applicant was granted “Leave Without Pay for Spousal Relocation” and, effective June 13, 2007, was granted “Preferred Status” pursuant to the Staffing Program, Annex “S”, of the Directive on Preferred Status. The purpose of the granting “Preferred Status” is set out in subparagraph 1.1 of Annex S:

1.1 The purpose of granting Preferred Status is to endeavour to provide continued employment to permanent employees of the Canada Revenue Agency (CRA), where feasible, in accordance with CRA’s business needs. This Directive does not apply to CRA’s Executive Cadre.

[8] A benefit to the employee is set out in subparagraph 1.3.1:

1.3.1 Individuals with Preferred Status shall be considered for permanent appointments in the following order of priority:
a) Surplus employees or laid off persons;
b) All other individuals with Preferred Status.

[9] It is agreed by counsel for the parties that subparagraph a), above, is not relevant in the circumstances at issue.

[10] Subsections 2.1 and following provide for the manner in which employees having “Preferred Status” are to be considered. I repeat subsections 2.1 through 2.4:

2.1 To be considered for appointment, individuals with Preferred Status must meet the minimum requirements of the position to be filled including requirements for education, official languages and security.

2.2 In order to maximize permanent placement opportunities for individuals with Preferred Status, Authorized Persons, with the assistance of Human Resources, are responsible for ensuring that individuals with Preferred Status are considered for permanent vacancies prior to initiating staffing with or without selection process. Authorized Persons are also responsible for advising individuals with Preferred Status of the outcome, and for granting, upon request, the recourse rights specified in this Directive to those who are not placed.

2.3 Authorized Persons must consider individuals with Preferred Status as part of the area of selection when they conduct a selection process. Such individuals must already be living at a reasonable commuting distance to the location of the position being staffed (even those whose substantive position is in another location or region) and must meet the minimum requirements of that position. Individuals with Preferred Status must also be fully qualified to be included in the pool.

2.3.1 If individuals with Preferred Status qualify as a result of such a selection process, and if there substantive positions are already at the same group and level or equivalent level as the position to be filled, these individuals must be considered in priority over other qualified candidates and will be appointed as a result of their Preferred Status.

2.3.2 If individuals with Preferred Status qualify as a result of such a selection process, and if their substantive positions are at a lower level than the position to be filled, these individuals are included in the pool, but they do not have a priority of placement for a promotion. Consideration for placement is to be based on the same placement criteria that are

applied to all qualified candidates in the pool with the same access to recourse.

2.3.3 Since these individuals with Preferred Status must already be living at a reasonable commuting distance to the location of the position being staffed to be included in the pool, relocation expenses will not be reimbursed, unless this reimbursement is accessible to all other candidates in the pool.

2.4 When there are no opportunities for permanent placement at equivalent levels, Authorized Persons will explore opportunities for permanent lower-level placements. In these instances, only surplus employees and laid off persons are entitled to salary protection in accordance with the Work Force Adjustment provisions of collective agreements.

[11] In the period following the date upon which the Applicant received “Preferred Status” it appears that some positions at the CS-03; CS-02 and CS-01 level at the Summerside branch of the Agency were filled. This included the change of status of at least one person on temporary status to permanent status (“term to perm”) without the Applicant’s knowledge and without giving the Applicant an opportunity to submit an application for consideration. The Applicant found out about these circumstances from a third party and made a complaint to management.

[12] The Agency’s Program, Annex L, makes provision for a two or three stage recourse process depending on the circumstances. Stage 1 is Individual Feedback, which is essentially a one-on-one meeting between the employee and a supervisor. If the employee is not satisfied, they can request a Decision Review and then a Third Party Review, stages 2 and 3 in the recourse process. Third Party Review is not available in respect of complaints such as that made by the Applicant in the circumstances here. In the present case the Applicant met with Allan Raniere, Director, Business Assessing/Public Outputs and Communication, for Individual Feedback. Notes of the meeting were

taken by another person. Those notes indicate that the Agency did move a person from CS-02 to CS-03 but a compromise was made to meet budget considerations. The Applicant indicated that she would accept a lower position. It was pointed out that the Applicant did not meet four different Experience Factors but that she did meet Education and Language criteria. The notes state:

*Education and Language – You (Vera) meets both
Experience Factor – you (Vera) did not meet*

- *Business Suite development or maintenance for BCCS/T2/GST/OL (ie. directly on these applications, ie as an analyst etc.)*
- *POC – experience and understanding life cycle. 24 to 36 months in POCS.*
- *Technical experience. – Supervising employees/contractors in development of large systems. 24 to 36 months – Solutions or Dev*
- *You (Vera) have not had Solutions experience*

[13] The matter then moved to the next stage, a Decision Review conducted by Robert Stanzel, whose decision is the decision under review. Stanzel interviewed the Applicant by telephone and also spoke with Allan Ranieri who conducted the above mentioned Individual Feedback. Stanzel made notes of his telephone conversations with the Applicant. Those notes state, in part:

She is open to any position including a term position, including clerical positions in the TC.

She is very frustrated with the process. She feels she meets the minimum staffing requirements for different positions.

She is not satisfied with the answers of the AI Ranieri gave her such as:

She did not qualify for the CS3 TL positions and that a lack of solutions experience was the key deciding factor. She finds it hard to believe that all TL's entering Solutions have Solutions experience.

She stressed that in preferred status she only had to meet the MINIMUM requirements.

[14] Stanzel drafted a letter setting out his proposed decision which was circulated to others in the Agency for comment. Not all of these persons can be identified from the Record but the Record

indicates that Kim Simard, Naomi Purdy, Naomi Purdy's manager and possibly others were involved. Some changes were suggested as a result. Following this process, Stanzel sent the letter dated January 25, 2008, the decision under review, to the Applicant. The substantive portion of that letter says:

This letter is following your request of December 26, 2007 for Decision Review on all staffing actions that have taken place within ITB East since June 2007, the date when you were given "preferred status". I have reviewed relevant documentation on all staffing actions including an acting MG-06, acting CS-03, and term to perm appointments.

I have also interviewed Allan Raniere the Director Responsible for ITB East. Mr. Raniere was also the one who completed the individual feedback with you on this same request. In addition, I scheduled an interview with you by phone to allow you to explain your points of view and to ensure that I had all the relevant facts from your perspective.

Having considered all of the above I am satisfied that you were considered for all staffing actions and that you did not meet the minimum requirements for any of the staffing actions. As a result the decisions made stand.

As discussed, I have asked that you be notified and considered for any subsequent staffing actions in ITB East during the time you remain on "preferred status."

As a result of this analysis, I have concluded that you were not treated arbitrarily. Therefore, no corrective measure will be taken.

[15] The Applicant seeks to have this decision set aside and redetermined by a different person.

ISSUE

[16] The only issue upon which the Applicant seeks judicial review is as to whether the Director General made a reviewable error in stating that the Applicant did not meet the “minimum requirements” for any of the staffing actions.

[17] Counsel for the parties are in agreement that the applicable standard of review as to what constitutes “minimum requirements” is that of reasonableness as defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

“MINIMUM REQUIREMENTS”

[18] No clear definition as to what constitutes “minimum requirements” is set out in Annex L or Annex S of the Agency’s Staffing Program. Section 2.1 of Annex S speaks of “minimum requirements” as “including requirements for education, official languages and security”. Section 2.3 distinguishes between “minimum requirements” and “fully qualified”. Both sections have been reproduced earlier in these Reasons.

[19] Section 2.2 of Annex S speaks of consideration to be given to those with Preferred Status “prior to initiating staffing with or without selection process” where as Section 2.3 speaks of consideration to be given to persons with Preferred Status “when they conduct a selection process”. Applicant’s counsel argues that this means that where there is no selection process, such as were the circumstances at present, then the requirement that a person be “fully qualified” as set out in section 2.3 does not arise. Counsel argues that it is only when the Agency engages in a selection process

that the issue of “full” qualification arises. Counsel submitted that the situation is analogous to that considered by Justice Dawson of this court in *Anderson v. Canada (Customs and Revenue Agency)*, 2003 FCT 667 at paragraphs 16 to 18:

16 The CCRA did adopt a staffing program entitled the "Canada Customs and Revenue Agency Staffing Program" ("Staffing Program"). The Staffing Program provides that the "Selection Process" is one of the principal mechanisms used by the CCRA for the promotion and appointment of staff. The term "Selection Process" means the procedure whereby individuals may express interest in a job opportunity and subsequently be considered and selected for appointment.

17 The Selection Process comprises three principal stages. The first stage is a review of an applicant against the pre-requisites for the position. The second stage involves an assessment of those who meet the pre-requisites against the qualifications for the position. The third stage deals with the placement of one or more qualified persons. The selection process is described in detail in a directive entitled "Directive on the Selection Process/Pre-qualified Pool" which is Annex E to the Staffing Program.

18 At the pre-requisite stage, a selection board reviews each application for the pre-requisites listed in the statement of staffing requirements, and reiterated in the Notice of Job Opportunity. The selection board must decide whether the applicant meets the pre-requisites. Only applicants who meet the pre-requisites will be considered for assessment, which is the second stage of the selection process.

[20] Counsel for the Respondent argues that section 1.1 of the Annex S of the Program (previously set out) provides that the overriding concern that the Agency’s “business needs” be the essential criteria and therefore a person must be fully qualified before consideration for a position can be made whether or not a selection process is involved.

[21] It is important to note that an evaluation was made as to the Applicant's skills in respect of each of the job categories CS-01; CS-02 and, CS-03. This evaluation was not, however, provided to the Applicant until after these proceeding had been launched. This evaluation shows that for each of the CS-01, CS-02 and CS-03 categories the Applicant meets the language and education requirements, which, are two of the criteria set out in respect of "minimum requirements" in section 2.1 of Annex S of the Program. The third criteria set out in section 2.1, security, is not mentioned. Whenever the evaluation document mentions the words "minimum requirements" it is stated that the Applicant has met those requirements. It is only with respect to other requirements, such as experience, that the Applicant is stated as not meeting listed requirements. On cross-examination, the Applicant freely admits that she does not meet the other requirements.

[22] In this context it is important to note an e-mail sent by Allan Raniere to others, including a copy to Robert Stanzel, dated December 17, 2007, in which he states:

"...we would have to offer Vera a CSI position (on the basis that minimum requirements for CSI would be hard to miss)..."

[23] It is evident that, in drafting the Program, insufficient consideration was given to establishing and clarifying what constitutes "minimum requirements" and how a person having "Preferred Status" is to be treated when job opportunities arise, whether they are subject to a "selection process" or not.

[24] In giving a reasonable interpretation of these provisions by this Court, it must be said that "minimum requirements" are just that, those simply directed to education, language and security.

“Full qualification” is something else - it is directed to talents, experience and capabilities for a particular job. Those having Preferred Status who meet “minimum requirements” are to be placed in a “selection process” with others, and are to be told that they are candidates in that process so that they may be satisfied that they are being evaluated as to “full qualification” fairly. It may be that they are not “fully qualified”. However if the Agency avoids a “selection process” it does so at its peril because in so doing, if there are persons having “Preferred Status” and possessing the “minimum requirements” then they cannot be said to have been treated fairly should another person be chosen to fill the position without going through a selection process.

DECISION UNDER REVIEW

[25] The decision under review, the letter of January 25, 2008 states that the Applicant “did not meet the minimum requirements”. This is clearly an error. It is an unreasonable interpretation of the Program. The Applicant met the “minimum requirements” - she did not however have “full qualifications”. The decision does not address the fact that certain positions were filled without a selection process whereby the Applicant’s lack of “full qualifications” would have been irrelevant. The decision is unreasonable and will be set aside.

[26] The matter must be redetermined by a different person, not Stanzel and not any other person involved in the process, including any person who considered Stanzel’s draft letter. The Program, Annex L provides for corrective measures in paragraph 5 stating:

5. Corrective Measures

- *Authorized Persons are accountable for taking appropriate corrective measures, in a timely manner. During the Selection*

process, these corrective measures must be taken immediately so that the process is not unnecessarily delayed.

- *For staffing, the range of possible corrective measures includes:*
 - *Order correction of the error in process;*
 - *Recommend revocation of appointed employee, if required;*
 - *Recommend having another manager involved in the decision.*

[27] In a reconsideration and determination of corrective measures, the decision maker should be aware of and sensitive to the fact that the provisions of the Program relevant here are poorly drafted and that the Agency, which drafted the provisions, should accept that where an ambiguity arises or matters are sufficiently unclear, an interpretation against its interests should prevail. The rule of *contra proferentem* applies.

COSTS

[28] Costs will be awarded to the prevailing party, the Applicant. The parties are agreed that it is appropriate to fix those costs in the amount of \$3,000.00

ORDER AND JUDGMENT

For the Reasons herein provided:

THIS COURT ORDERS AND ADJUDGES that:

1. Paragraphs 6 to 11 inclusive, 14 and 15, 16 to 19 inclusive, 20 and 22 of the Affidavit of Vera Gerus herein be struck from the Record;
2. The application is allowed;
3. The matter is returned for redetermination by a different person including not by a person who was involved in a review of the decision at issue;
4. The Applicant is awarded costs fixed in the sum of \$3,000.00

"Roger T. Hughes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-252-08

STYLE OF CAUSE: VERA GERUS v. CANADA REVENUE AGENCY

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 19, 2009

**REASONS FOR JUDGMENT
AND JUDGMENT:** Hughes, J.

DATED: January 21, 2009

APPEARANCES:

Mr. Steven Welchner

FOR THE APPLICANT
VERA GERUS

Mr. David Aaron

FOR THE RESPONDENT
CANADA REVENUE AGENCY

SOLICITORS OF RECORD:

Welchner Law Office
Professional Corporation
6274 Elkwood Drive
Ottawa, ON K4P 1M9
Fax (866) 234-3659

FOR THE APPLICANT
VERA GERUS

Department of Justice
234 Wellington Street, East Tower
Ottawa, ON K1A 0H8
Fax: (613) 954-1920

FOR THE RESPONDENT
CANADA REVENUE AGENCY