

Federal Court



Cour fédérale

Date: 20130208

Docket: T-1287-11

Citation: 2013 FC 144

Ottawa, Ontario, February 8, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

JOHANNES WHEELDON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is the continuation of the litigation regarding a decision of the Social Sciences and Humanities Research Council [SSHRC] denying the Applicant a post-doctoral fellowship [Award Decision].

[2] In my decision cited as *Wheeldon v Canada (Attorney General)*, 2012 FC 355, 216 ACWS (3d) 367, the matter was adjourned to permit the production of the certified tribunal record [CTR], following which the parties were provided with an opportunity to update their submissions.

This is the judicial review of the Award Decision based upon a proper record.

II. FACTS

[3] The facts were generally set out in the previous decision but are repeated here for completeness.

[4] In October 2010, the Applicant, Mr. Wheeldon, applied for a two-year post-doctoral fellowship from the SSHRC. The SSHRC is a federal agency created to promote and support post-secondary based research and training in humanities and social sciences. It annually awards scholarships and fellowships.

[5] On February 10, 2011, the Applicant was informed in the Award Decision that he had not been successful. There are three critical elements in each of the two categories upon which applicants are evaluated. The Applicant claims that there are actually 15 elements and each is, by the SSHRC's admission, weighted equally. The Award Decision gave the Applicant his scores for "Track Record" and "Proposed Program of Work".

[6] In response to questions from the Applicant about the assessment of applications, the SSHRC informed him that he could file an internal appeal. The grounds of such an appeal were limited to procedural error or factual error.

[7] The Applicant pursued the matter further, questioning the application process and requesting a copy of his file.

[8] In response to the request for his file, the Applicant received an administrative file but did not receive any file from the committee members who made the assessment of his application.

[9] In response to further questions from the Applicant, the SSHRC provided some data as to the number of complaints/appeals that were received by the SSHRC for post-doctoral fellowship funding since 2008 and confirmation that specific criteria was used by committee members in evaluating such applications for funding.

[10] On May 5, 2011, the Applicant formally appealed the scoring of his award application on the basis of procedural fairness in that he could not meaningfully understand the basis of the scoring.

[11] The Applicant's judicial review was based on inadequate reasons being a breach of procedural fairness.

[12] Following the previous decision, the Applicant was provided with the CTR principally consisting of a spreadsheet which had contained the final total scores of the SSHRC's Post-doctoral Fellowship submissions for the 2011-2012 application cycle. The version provided to the Applicant was redacted to remove the names and sub-category scores of other candidates.

[13] The Applicant maintained his position that the record did not allow him to know the basis of the Award Decision. The complaint is in part that numeric scores not linked to criteria and sub-criteria are not sufficient for a proper review; in essence, that there is inadequate feedback.

The Applicant also says that he cannot tell in what ways he can improve his proposal for future applications. He relies on *Teitelbaum v Attorney General of Canada*, 2004 FC 398, 248 FTR 283 [*Teitelbaum*], for the proposition that applicants deserve feedback to position themselves to compete in future grant competitions.

[14] The SSHRC allocates its awards based on the recommendations from selection committees who assess, score and rank applications through independent expert reviews. These selection committees are made up of university based researchers and, where appropriate, experts from outside the academic community. Each year between 350-400 Canadian and international scholars and experts volunteer to serve on these selection committees.

[15] The information governing the awards process is available to applicants both through SSHRC staff and on the internet. In the Frequently Asked Questions section, the following appears:

... in view of the large number of applications, committee members are not asked to provide written appraisals of individual applications, nor is a record kept of consensus judgments about the strengths and weaknesses of individual applications.

“Frequently Asked Questions about the Application Process – Doctoral Awards”, online: Social Sciences and Humanities Research Council < http://www.sshrc-crsh.gc.ca/funding-finance/apply-demande/faqs-questions_frequentes/doctoral_awards-bourses_de_doctorat-eng.aspx>.

[16] Selection committee members submit preliminary scores and rank each application in accordance with a formula whose purpose is to distribute marks of a particular applicant in a way that is relative to other applicants in that year's competition. Only the top 20-25% of applications are recommended for funding. In the 2011-2012 competition, only 20% of the applications were funded.

[17] In the Award Decision, the Applicant received a brief statement about the process of selection, the fact that of 877 applications 175 were offered awards and the details of his marks; first, the Track Record mark, then the Program of Work mark and finally the total score.

[18] The critical issue in this judicial review is whether the Applicant was denied procedural fairness by reason of breach of legitimate expectations. The issue of the reasonableness of the decision is a secondary matter.

III. ANALYSIS

[19] Originally the Applicant characterized the attack on the Award Decision as a breach of procedural fairness due to inadequate reasons – phrased as a stand alone right. With the decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, the Applicant could not rely on inadequate reasons as a stand alone ground for judicial review.

[20] The standard of review in respect of procedural fairness is correctness (*Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392).

To the extent that the decision itself is challenged, because of inadequate reasons, that issue is decided under the reasonableness standard of review analysis.

[21] The Applicant claims that he was entitled to a process and a result which gave him information on how he could improve his application for the future. He relies extensively on the *Teitelbaum* decision at paragraphs 116-120 which refer to the legitimate expectations created by Natural Sciences and Engineering Research Council [NSERC] Peer Review Manual that referred to “constructive comments to applicants” and that these comments were to serve a number of purposes including assisting research to improve future applications.

[22] The current case is distinguishable from *Teitelbaum*, above, because no such legitimate expectation was created. The SSHRC website explains that, unlike the NSERC policy, no comments are provided due to the large number of applications.

SSHRC appreciates that unsuccessful applicants frequently seek information to help them improve a future application. Unfortunately, the large number of applications in each competition precludes selection committees from providing written explanations for the scores assigned and from making any comments on the application’s standing in the competition. Therefore, for any given application, the only information available from the selection committee is the competition results and the score assigned. Competition results are not communicated by telephone or email.

“Notification of Competition Results: Fellowships and Scholarships”, online Social Sciences and Humanities Research Council: <http://www.sshrc-crsh.gc.ca/funding-finance/policies-politiques/f_notification-b_avis-eng.aspx>

[23] Given that expressed disclaimer of the provision of comments, the Applicant cannot claim that he was denied some legitimate expectation. The evidence confirms that the Applicant received

what he had been promised – a chance to be granted an award in accordance with an application process that was followed.

[24] To the extent that there is any issue of reasonableness of the decision not to provide comments or reasonableness of the mark given and denial of an award, the decision of the SSHRC is entitled to considerable deference by this Court.

[25] In applying the reasonableness standard of review in an academic context, it has been found that a high degree of deference is owed to the expertise of the decision-making body. In *Mohl v University of British Columbia*, 2000 BCSC 1849, 101 ACWS (3d) 932, aff'd in 2001 BCCA 722, 161 BCAC 276, leave to appeal to SCC refused 295 NR 199 (cited to QL), the BC Supreme Court made at least two comments worthy of repetition here.

13 Where a senate committee makes a decision deferring to faculty on matters of academic judgment, it is my view that the court should accord high deference to such a decision. As will be seen, the underlying decision here was, at its heart, an exercise of academic judgment by faculty as to whether Mohl was able to successfully meet the standards required for his practicum. The significance of this will be apparent after consideration of the procedural issues raised by Mohl.

[...]

16 It seems to me that the question of reasonableness must be intertwined to a certain extent with the question of deference. In other words, the reasonableness of the finding must be considered having regard to the degree of deference to which the tribunal is entitled on the matter at issue.

[26] The same principles are applicable to the SSHRC decision. There is a rationale for the process, there is a knowledgeable body making a highly discretionary decision to which the Applicant has no right to a specific result and there is a clear result.

[27] This is not a situation in which a court would be justified to intervene. It is a matter about which the decision making body has far greater expertise.

[28] The Applicant, as can be seen from his amended relief, seeks to have the Court impose a process on SSHRC regarding the award procedures and to then submit that process for court review within one year. There is no basis for this Court engaging in that kind of remedy.

[29] I can find no basis for disturbing the SSHRC Award Decision.

IV. CONCLUSION

[30] Therefore, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is dismissed with costs.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1287-11

STYLE OF CAUSE: JOHANNES WHEELDON
and
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 24, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** PHELAN J.

DATED: February 8, 2013

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