Federal Court  Cour fédérale

Date: 20130501

Docket: T-728-12

Citation: 2013 FC 455

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 1, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

DUNG TRAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is the second application for judicial review undertaken by the applicant, Ms. Dung Tran. In both cases, the applications for judicial review were made in relation to the staffing processes for three positions for which the applicant had applied. They are:

- Senior International Auditor, Audit Division, Eastern Quebec Tax Services Office (Quebec City site), 2009-8880-QUE-1206-8880;

- Auditor, Large Files, Audit Division, Eastern Quebec Tax Services Office (Quebec City site), 2009-8882-QUE-1206-8882;

- Senior Tax Avoidance Auditor, Audit Division, Eastern Quebec Tax Services Office (Quebec City site), 2009-8883-QUE-1206-8883.

[2] Following the hearing, I informed the parties that I intended to dispose of this second application for judicial review by granting it. This constitutes the judgment and reasons.

[3] First of all, it should be noted that counsel for both parties conducted themselves in a highly professional manner. They spared the Court from futile arguments and cut straight to the chase, identifying the real issues and appropriate remedies to the extent that the Court feels compelled to conclude in favour of the applicant. The concessions made by each side sought to avoid the kinds of acrimonious debates which are generally not conducive to resolving matters. It was in this spirit that concessions were made and received.

[4] Given the Court's finding, it is not necessary, and would not be useful, to deal with the merits of the case. It will suffice to briefly outline the background, to decide the matter based on the record as it stands and to order that it be referred back for a hearing *de novo* by a new selection board to be constituted later.

[5] This proceeding is an application for judicial review of a decision, dated March 6, 2012, by a selection board of the Canada Revenue Agency. That decision concluded that the applicant's

application did not meet the pre-requisite criteria for the three selection processes at what is called the "pre-requisite" stage.

[6] In a decision dated August 19, 2011, my colleague, Justice François Lemieux, issued a judgment (2011 CF 1010) between these same parties in favour of Ms. Tran. The files were referred back to the Revenue Agency for "reconsideration of the applicant's application by a differently constituted board". Essentially, the Court found that the selection board did not have an accurate picture of the tasks performed by the applicant even as the review focused on her actual experience to determine whether she met the pre-requisite criteria for the position.

[7] Thus, a new selection board was constituted. It made its finding in a brief written decision dated March 6, 2012. This decision establishes three things:

(a) that the members of the selection board met with the applicant's supervisor to clarify her tasks without her being present;

(b) that the review of the information, including that provided by the supervisor, allowed them to determine that the applicant did not meet the expectations at the pre-requisite stage. No further explanation was provided;

(c) and that the selection board informed the applicant that the Agency's Staffing Program provided for no recourse following the application of a corrective measure.

[8] The Court has concluded that this approach is lacking in several respects.

[9] The parties agreed that the appropriate standard of review for questions of procedural fairness is that of correctness (*Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339) and that of reasonableness for questions of mixed fact and law. I agree. Indeed, there is an abundance of case law to this effect, the Federal Court of Appeal having recently decided, in a case involving labour law, that "The standard of review applicable to an administrative tribunal's determination of questions of mixed fact and law is presumed to be reasonableness" (*Payne v Bank of Montreal*, 2013 FCA 33, para 32).

[10] There is no need to undertake a detailed review of the staffing process at the Canada Revenue Agency to dispose of the application for judicial review. The Agency is required to develop a program governing staffing (section 54, *Canada Revenue Agency Act*, SC 1999, c. 17). For the purposes of this case, suffice it to note that the staffing process that was adopted consists of three main steps: the pre-requisite review stage, the assessment stage and the placement stage. The applicant failed to make it past the first stage in two attempts.

[11] At the pre-requisite review stage, The Staffing Program provides that the candidate's expression of interest is to be reviewed for the pre-requisites that were identified in the notice of job opportunity or the Statement of Staffing Requirements (section 4.3.2.1). The program provides for its own recourse mechanism in the form of individual feedback (section 4.3.2.2). This feedback is a mandatory step before proceeding to other forms of staffing recourse (section 5.5). Moreover, this individual feedback serves two purposes. It allows for corrective measures to be taken in cases where the selection board has failed to properly assess the information

provided by the candidate (sections 4.3.2.2. and 4.3.2.3.) and it has an educational purpose in that it allows the candidate "to receive input on development needs" (section 5.6).

[12] Individual feedback therefore allows for the candidate to be provided with the reasons why his or her application was unsuccessful. If the selection board has erred, it may correct itself. The rejection of an application is subject to judicial review on a reasonableness standard, unless there has been a breach of the rules of procedural fairness. A reviewing court must exhibit great deference with regard to the decision. However, the decision must have the distinction of being within the realm of reasonableness:

> . . . 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*, [2008] SCC 1 SCR 190 (*Dunsmuir*), at para 47).

[13] The reasons obviously do not need to be perfect or explained at great length. Given that "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (see Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 708 at para 14).

[14] In this case, the selection board seems to have confused the corrective measure that may be taken in the context of the assessment of pre-requisites with the corrective measure that was Justice Lemieux's decision to refer the matter back for reconsideration by a differently constituted board. This would explain the statement, in the decision dated March 6, 2012, that no

recourse exists from a corrective measure. It would appear that the board believed that there was but one corrective measure and that it consisted of the judgment of Justice Lemieux. Given that the case was under a *de novo* review, the applicant was entitled to individual feedback, which she was not given. Justice Lemieux's decision was not the corrective measure described in the Staffing Program. In fact, the respondent gracefully conceded this point at the hearing. As a result, the applicant did not receive the reasons for the rejection of her application, which would have allowed for corrective measures to be taken, as the program specifically provides for.

[15] Indeed, had there been individual feedback, it may have been possible to resolve the other issue in this case. It appears that the applicant's supervisor had contacted the selection board, or some of its members, in order for clarification of the applicant's tasks (see decision letter dated March 6, 2012).

[16] This approach constitutes a breach of the *audi alteram partem* rule. Here again, the staffing process adopted by the Agency makes it possible to avoid these kinds of difficulties through the use of individual feedback. Sections 8.1.5, 8.1.6, 8.1.8, 8.1.9, 8.1.10 and 8.1.14 of the "Directive on Recourse for Assessment and Staffing" are particularly eloquent in this regard. A reproduction of these sections is attached as an appendix to these reasons. Either through error, or otherwise, this selection board decreed that no such feedback should be provided.

[17] This means that the decision is reviewable on a reasonableness standard, since it is not possible to determine that the decision was transparent and intelligible within the meaning of

Dunsmuir (above). The decision is also reviewable on a correctness standard because the applicant was disadvantaged with regard to natural justice (*audi alteram partem*).

[18] The respondent argued that it should suffice to return the decision to the selection board in order to receive feedback on development needs. This is a misunderstanding of the flaws that affect the decision. It is wrong to accept the findings of this selection board with respect to the pre-requisite review. Not only did the lack of individual feedback deprive the applicant of advice on her professional development needs, it tainted the decision itself.

[19] In his decision, Justice Lemieux determined that the individual feedback was so flawed that the error "is fundamental and determinative". Far from remedying this deficiency, the new board did not even provide individual feedback. The situation called for a completely new assessment, as if the preceding two exercises had never taken place.

[20] At the hearing the applicant waived costs that would have been calculated on a solicitor and client basis. In addition, she would be content to have the matter referred back to a differently constituted selection board for a new pre-requisite review.

[21] The Court has noted the concessions on the applicant's part. The Court insists, however, that the next pre-requisite review must be undertaken with the utmost rigour and good faith. It will be a *de novo* proceeding in which the applicant must benefit from all of the prerogatives she is entitled to under the program and directive. The quality of the decision to be rendered will be measured against the fact that the same facts led to two applications for judicial review in which

the individual feedback process was deemed to have been deficient. It cannot seek to endorse the "previous decisions."

JUDGMENT

The Court orders that in each of the selection processes that were the subject of this application for judicial review in docket T-728-12:

1. The application for judicial review is granted.
2. The decision dated March 6, 2012 with regard to the three selection processes is quashed and set aside.
3. The staffing processes that are the subject of this application for judicial review are referred back to the Canada Revenue Agency for redetermination in new staffing processes by a selection board composed of persons other than those who sat on the previous boards, and whose decisions were the subject of two applications for judicial review.
4. Further to the agreement reached between the parties with regard to costs, the respondent shall pay the sum of five thousand dollars ($5,000.00) to the applicant.

"Yvan Roy"
Judge

Certified true translation
Sebastian Desbarats, Translator

APPENDIX

Staffing Program
Annex L
Directive on Recourse
for Assessment and Staffing

8.1 The Authorized Person responsible for the assessment, internal selection process or internal staffing action or his or her delegate (e.g., Selection Board Member, Pool Administrator, Resourcing Advisor, Competency Consultant or Technical Competency Assessor):

8.1.5 Will take the time to review any relevant documents, questions or discussion points prior to providing Individual Feedback.

8.1.6 Will provide the candidate/employee with meaningful information regarding his or her own assessment.

8.1.7 …

8.1.8 Will review the decision relevant to the candidate's/employee's concerns and respond to any questions the candidate/employee may have regarding that stage of the internal selection process or the assessment or internal staffing action.

8.1.9 Will provide the candidate/employee with access to his or her own evaluation documents and will provide a copy in advance upon request, except for standardized assessment tools that may have been used.

8.1.10 Will provide appropriate information to explain the basis upon which the assessment or staffing decision was made. The candidate/employee should not be provided with any assessment information regarding other candidates/employees, which would contravene the Privacy Act.

8.1.11 …

8.1.14 Will take necessary corrective measures where appropriate, including allowing the candidate/employee to continue as a candidate in the internal selection process.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-728-12
STYLE OF CAUSE:	DUNG TRAN v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
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REASONS FOR JUDGMENT AND JUDGMENT:	Roy J.
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