Federal Court  Cour fédérale

Date: 20130618

Docket: T-787-10

Citation: 2013 FC 685

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PATRICK MCEVOY AND CLAUDIO PELLICORE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application by Mr. Patrick McEvoy and Mr. Claudio Pellicore (the Applicants) for judicial review of a decision dated April 16, 2010, by Ms. Camille Therriault-Power, Vice President of the Human Resources Branch of the Canadian Border Services Agency (CBSA), rendered in her capacity as the Deputy Head's Nominee (the Nominee).

[2] The Applicants are Inland Enforcement Officers (IEOs) with the CBSA. They filed grievances concerning the job description and classification of the position of Inland Enforcement Officer, PMC003 (PM-03), position #30153666 and position #30154307. They contended that their jobs should be classified at the PM-04 level.

[3] The Applicants' grievance resulted in a mediated job description which then went before the Classification Grievance Committee (the Committee) established to consider the classification of that job description. The Committee heard presentations by the Applicants and by their union representative. Both submitted the IEO position should be classified as PM-04 because the IEO's were given new work responsibilities under the *Immigration and Refugee Protection Act*, SC 2001 c. 27 (the *IRPA*). Later the Committee put questions to management about the IEO position and provided the management responses to the Applicants who then responded with further evidence and submissions.

[4] The Committee concluded the IEO's job warranted a classification at the PM-03 group and level and recommended the grieved job be classified at the PM-03 level. The Nominee accepted the recommendation of the Committee that the grieved job of the Inland Enforcement Officer be classified at the PM-03 level, effective August 11, 2002.

[5] The Applicants filed for judicial review. They argue that the Nominee breached the principles of procedural fairness and natural justice by relying on the Committee's decision which had been decided before receiving the Applicants' submissions made in response to the information provided by management. They also argue that the Committee both failed to give sufficient reasons

and failed to consider all evidence and submissions made before it. Finally, the Applicants also argue that the Nominee owed the Applicants an opportunity to respond to additional matters she raised in a letter to the President of the CBSA advising him of her decision.

[6] For reasons that follow, I conclude the application must be dismissed.

Background

[7] Under paragraphs 5(4) and 11.1(1)(b) of the *Financial Administration Act*, RSC 1985, c F-11, as amended, Treasury Board has the power to administer the organization of the federal public service, in particular, the responsibility for classifying positions within the public service. Pursuant to this authority, classification grievances are to be dealt with by a Classification Grievance Committee in accordance with the rules and procedures set out in a series of Treasury Board policies, namely the *Policy on Classification Grievance,* the *Classification Grievance Procedure,* and the supplementary *Clarification to the Classification Grievance Procedure and Reminder – Classification Grievance Resolution Process*.

[8] The roles of the Committee and the Deputy Head's Nominee are outlined in the *Classification Grievance Procedure*. The Committee's mandate is:

> The Classification Grievance Committee is responsible for establishing the appropriate classification and evaluating the grieved position based on the duties assigned by management and performed by the employee and the additional information provided by management and by the grievor and/or his or her representative. It must review and analyze all information presented in a gender neutral way. The classification recommendation to the deputy head

> or nominee must be fair, equitable and consistent with the classification principles.

[9] The Nominee's mandate described in the *Classification Grievance Procedure* states:

> The deputy head or nominee will either confirm the committee's recommendation or make a decision in cases of minority and majority reports. In cases of minority or majority reports, if the minority report is accepted the nominee must so advise the deputy head. If the unanimous recommendation of the grievance committee is rejected by the nominee, the new decision must be personally approved by the deputy head. In such circumstances, the deputy head must report to TBS the reasons for non-acceptance, tied directly to the justification used by the grievance committee in arriving at its recommendation.

[10] The Applicants grieved that the job classification PM-03, for the Inland Enforcement Officer position should be reclassified upward to the appropriate level, PM-04, effective from August 11, 2002. The job description for IEOs in the grievance was adopted by operation of a Memorandum of Understanding dated March 17, 2008.

[11] A Classification Grievance Committee was established to hear the Applicants' grievance on the classification. The Committee was composed of a Chairperson, Mr. Robert Martin, Classification Consultant, Treasury Board Member, James Myles and the Director General Trade Programs Directorate – CBSA, Mr. Mike Jordan.

[12] The Committee heard the Applicants' grievance on November 26, 2009. During the grievance hearing, the Applicants made oral and written representations to the Committee. The Applicants' bargaining agent representative from the Public Service Alliance of Canada (PSAC) also made oral and written representations to the Committee.

[13] Following the grievance hearing on November 26, 2009, and prior to a second hearing on December 14, 2009, the Committee requested additional documents from the departmental Human Resources representative in order to assess the relativity study presented by the Applicants during the hearing of November 26, 2009.These documents were received by the Chairperson of the Committee on December 3, 2009 and were provided to the Applicants via their union representative on the same day.

[14] At the hearing on December 14, 2009, the Committee heard from Mr. Robert Johnston, the Director responsible for the Inland Enforcement Program in the British Columbia region, and from Ms. Susan Kramer, Acting Director General, Operations Programs regarding the duties performed by IEOs.

[15] After the December 14, 2009 grievance hearing and before deliberation, the Committee requested clarification from management pertaining to the work performed by the IEOs. A copy of the Committee's questions and the responses from CBSA management was provided to the Applicants via their union representative on January 29, 2010.

[16] On February 11, 2010, the Applicants provided the Committee with written submissions and exhibits in response to the CBSA management's responses. On February 26, 2010, the Committee reconvened to deliberate.

[17] The Committee members prepared a report that was completed on March 14, 2010 and signed off on April 16, 2010 with the recommendation that the grieved job be classified at the PM-03 group and level. The Committee's report was sent to the Nominee for her approval and signature. The Nominee agreed with the Committee's recommendation and signed approval on April 17, 2010. The Nominee's decision was sent to the Applicants on April 19, 2010.

[18] The Applicants filed an application for judicial review of the Nominee's decision on May 18, 2010. However, previous to the Applicants' application filing, an access to information request relating to this classification process had been filed on April 26, 2010 by Mr. Mike Matuzic, a co-worker of the Applicants, who was also affected by the Nominee's decision.

[19] By way of a letter dated May 11, 2010, CBSA acknowledged receipt of this request. A further letter from CBSA dated June 8, 2010 advised that an extension of up to 150 days past the 30-day statutory time limit would be required to process the access to information request.

[20] On November 5, 2010, CBSA released a package of records in response to the access to information request. Upon review of the documents and by Order of the Court dated March 10, 2011, the Applicants filed a Supplementary Memorandum addressing additional evidence obtained through the access to information request.

Decision Under Review

[21] There are three components to the decision under review. The first component is two decision letters from the Nominee to the grievors dated April 19, 2010. The second is the

Committee's report (Report), including the Committee's recommendation, dated April 16, 2010, which was agreed with and signed by the Nominee on April 17, 2010. The third component of the decision is a letter from the Nominee to the President (presumably the President of the CBSA) also dated April 19, 2010, in which the Nominee provides the President with notice of the outcome of the classification grievance. This last letter is one of the documents obtained by the Applicants through the access to information request.

Nominee's Decision Letters to the Grievors

[22] These two letters, the first in English and the other in French, provide essentially the same information. The Nominee states that the Committee was convened on November 26, 2009 and December 14, 2009 to examine the above grievance. The Nominee states the Committee recommended that the job be classified at the PM-03 group and level and provided the Committee evaluation report. The letters conclude with the Nominee stating that she has approved the recommendation of the Committee and that the decision, which is final and binding, is effective August 11, 2002. The letters advises that a copy of the Report is attached.

[23] As noted, the Nominee approved the recommendation of the Committee as presented in their Report.

The Committee Report

[24] The Committee was made up of one accredited officer from CBSA, one representative from the Treasury Board Secretariat, and one CBSA management representative trained in the use of the PM classification standard. The Committee, on consensus, recommended that the grieved job of Inland Enforcement Officer be classified at PM-03 level, effective August 11, 2002.

[25] The introductory portion of the Report sets out information about the grievance, the committee members, the date and place of the grievance hearings, the nature of the grievance and opening remarks.

[26] The first substantive section of the Report addresses the presentations made by or on behalf of the grievors. The Report first sets out a summary of the presentation made by Ms. Mary Ann Wight of the PSAC in support of the grievors on the reasons for the mediated job description and the proposed evaluation of the IEO's job description. The Report then summarizes the grievors' presentation with respect to: (1) background information, (2) history of the position, and (3) an evaluation of the IEO position.

[27] The second section of the Report addresses the information provided by the management representatives, Ms. Kramer and Mr. Johnston. The Committee only provided brief summaries of the information provided by these two individuals as both of their responses were previously shared with the Applicants.

[28] The third section of the Report sets out the Committee's deliberations. The Report states that the Committee was tasked with establishing:

> the appropriate group and level, and to evaluate the grieved position based on the duties and responsibilities assigned by management and performed by the employees, taking into account the information and recommendations made by the union and the employees representatives on behalf of the grievors and the information and explanation provided by the management representatives.

[29] The Committee Report sets out the evaluation submitted by PSAC on a factor by factor basis and states where and why the Committee disagrees with the submission made. The Committee's deliberations then address the submissions made by the grievors, in particular the grievors' evaluation of the grieved job and exhibits consisting of evaluations made by two external consultants. The Report goes through these submissions and again sets out where and why the Committee disagrees with the submissions made by the grievors.

[30] In the final section of the Report, the Committee sets out its own evaluation of the grieved job followed by a summary showing the degree and total points awarded for each evaluation factor as determined by the Committee.

[31] The Report concludes with the Committee recommendation:

> It is the consensus to the Classification Grievance Committee members that the grieved job (Inland Enforcement Officer) warrants a classification at the PM-03 group and level. Therefore, it is the recommendation of the committee that the grieved job be classified at PM-03 level, effective August 11, 2002.

The Report is dated and signed by all three Committee members.

[32] The decision of the Nominee is found at the end of the Report:

> I agree with the recommendation of the Classification Grievance Committee that the grieved job of Inland Enforcement Officer be classified at the PM-03 level, effective August 11, 2002. This decision is final and binding and cannot be altered until a significant change is made to the duties of the job.

This decision was signed and dated by the Nominee on April 17, 2010.

Nominee's Letter to the President

[33] By letter dated April 19, 2010, the Nominee informed the President of the recommendation of the Committee and her agreement with that recommendation. In the letter, the Nominee stated her reasons for accepting the Committee's recommendations:

> I feel that the recommendation of the report is sound for the following reasons:
>
> - At each juncture, both originally at CIC, and in more recent decisions from CBSA, this job has been rated at the PM-03 group and level.
>
> - At the request of the CIU [Customs and Immigration Union] and to reassure the employees that the file would be analyzed with an unbiased view, an accredited consultant chaired the most recent hearings and wrote the Classification Grievance Committee report.
>
> - The decision was made by a Classification Grievance Committee made up of one accredited officer from CBSA, one representative from the Treasury Board Secretariat, and one

CBSA management representative who is trained in the use of the PM classification standard.

- The point rating in the latest report situates the job at 440 points, which is at a safe midpoint in the PM-03 scale of 401-500 points.

[34] The Nominee also downplayed the two consultants' evaluations of the job that were submitted by the grievors. The Nominee comments that neither could be considered authoritative. The Nominee states the first consultant was hired by the CIU union and therefore could not be considered unbiased. The Nominee went on to state that the second consultant was not accredited to provided point ratings, nor had the CBAS request that he do so.

Legislation

[35] The *Financial Administration Act*, RSC 1985, c F-11 provides:

5. […]	5. […]
(4) Subject to this Act and any directions of the Governor in Council, the Treasury Board may determine its own rules and procedures.	(4) Le Conseil du Trésor établit son règlement intérieur sous réserve des autres dispositions de la présente loi et des instructions du gouverneur en conseil.
…	…
11.1 (1) In the exercise of its human resources management responsibilities under paragraph 7(1)(e), the Treasury Board may	11.1 (1) Le Conseil du Trésor peut, dans l'exercice des attributions en matière de gestion des ressources humaines que lui confère l'alinéa 7(1)e) :
…	…

(b) provide for the classification of positions and persons employed in the public service;	b) pourvoir à la classification des postes et des personnes employées dans la fonction publique;

Issues

[36] The Applicants raise the following issues:

a) Did the Nominee breach the principles of procedural fairness and natural justice by relying on a recommendation by the Committee that was decided before hearing all of the Applicants' submissions or was otherwise predisposed?

b) Did the Committee fail to give sufficient reasons to justify its analysis of the arguments and the evidence and to comply with the requirements of procedural fairness?

c) Did the Committee fail to have proper regard to all the arguments and evidence that was tendered by the Applicants?

[37] A further issue raised is the role of the Nominee in accepting or rejecting the recommendation of the Committee and whether the Nominee in this case owed the Applicants the opportunity to respond to concerns raised in the letter from the Nominee to the President.

Standard of Review

[38] There are only two standards of review: correctness and reasonableness. *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 45 (*Dunsmuir)* Where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir,* at para 62.

[39] Classification Grievance Committees perform highly specialized functions and possess expertise in matters of classification; decisions made by the Committee are to be afforded a high degree of deference. The appropriate standard of review is reasonableness. *Beauchemin c Canada (Canadian Food Inspection Agency)*, 2008 FC 186 at para 20 (*Beauchemin*).

[40] It is well established that the standard of review applicable to issues of natural justice and procedural fairness is that of correctness. *Groulx v Canada (Veterans Affairs)*, 2007 FC 293 at para 14 (*Groulx*).

Analysis

[41] To begin, it is important to keep in mind that the decision being challenged in this case is the decision of the Nominee to accept the recommendation of the Committee. However, in cases where a classification grievance committee is formed, it is essentially the committee which provides the reasons relied upon. It is the committee who hears the evidence and which is required to afford the parties with the appropriate level of procedural fairness; the Nominee's role in these processes is very limited.

[42] The role of a classification grievance committee as the *de facto* decision-maker in cases such as this has been reviewed in the jurisprudence. For example, in *Bulat v Canada (Treasury Board)*, [2000] FCJ No 148. (*Bulat*) at paragraph 10, the Federal Court of Appeal stated:

> An elementary incident of the duty of fairness is that the individual adversely affected should have an adequate opportunity to address an issue that the Committee regarded as central to the disposition of the

> grievance, but which the grievor did not realise was in dispute and therefore could not have been reasonably expected to anticipate, and to address.
>
> [Emphasis added]

[43] The Committee's role of *de facto* decision-maker was also noted by Justice Blais (then with the Federal Court) in *Groulx*:

> [23] In short, the applicant had the right to a hearing before an impartial and expert decision-maker, who rendered a detailed decision based on his arguments and on the official work description which he was familiar with and accepted. Therefore, the Committee rejected the applicant's allegations about his supervisory responsibilities on the basis of information of which he was aware.
>
> [24] Accordingly, I must conclude that the applicant's right to procedural fairness was respected by the Grievance Classification Committee.
>
> [Emphasis added]

[44] It is clear from the above that it is the Committee which owed the Applicants the appropriate level of procedural fairness and whose decision and recommendation that must be reasonable.

Did the Nominee breach the principles of procedural fairness and natural justice by relying on a recommendation by the Committee that was decided before hearing all of the Applicants' submissions or was otherwise predisposed?

[45] Appeal Court Justice Pelletier, concurring, stated the maxim of *audi alteram partem* "requires a decision-maker to ensure that the person affected by a decision has a chance to be heard before the decision is made." *Canada (Attorney General) v Khawaja*, 2007 FCA 388 at para 114

(*Khawaja*). Justice Pelletier cites with approval the following passage of Marceau JA in *Gallant v Canada (Deputy Commissioner, Correctional Service)*, [1989] 3 FC 329 (*Gallant*):

> The rationale behind the *audi alteram partem* principle, which simply requires the participation, in the making of a decision, of the individual whose rights or interests may be affected, is of course that the individual may always be in a position to bring forth information, in the form of facts or arguments, that could help the decision-maker reach a fair and prudent conclusion. It has long been recognized to be only rational as well as practical that the extent and character of such a participation should depend on the circumstances of the case and the nature of the decision to be made. This view of the manner in which the principle must be given effect in practice ought to be the same whether it comes into play through the jurisprudential duty to act fairly or the common law requirements of natural justice, or as one of the prime constituents of the concept of fundamental justice referred to in s. 7 of the *Canadian Charter of Rights and Freedoms*. The principle is obviously the same everywhere it applies.

[46] If the Applicants were deprived of an opportunity to be heard on an important question before the Committee made its decision, the Committee may breach the principles of procedural fairness. In other words, if the Committee had made its decision before the Applicants' submissions had been received or considered by the Committee, the application should succeed.

[47] The Applicants rely on *CUPE v Ontario (Minister of Labour)*, 2003 SCC 29 (*CUPE*) to the effect that questions of natural justice and procedural fairness relate to the procedural framework of a delegate's decision and fall to the Court to determine the content of the duty of fairness as a question of law using a standard of correctness.

[48] The Applicants acknowledge that the scope of procedural fairness obligations tend to fall on the lower end of the spectrum in the context of the classification grievance process due to its

administrative nature. However, the Applicants submit that certain essential requirements of procedural fairness remain regardless of where one falls on the spectrum.

[49] The Applicants also rely on *Chong v Canada (Attorney General)*, [1999] FCJ no. 176 (FCA) (*Chong*), where the Federal Court of Appeal held that grievors must be afforded an opportunity to address an issue that the committee regarded as central to the disposition of the grievance but which the grievor did not realise was in dispute. *Chong* at paras 12-13 The Applicants submit that, notwithstanding the administrative nature of the classification grievance process, the particular issues raised in this application are fundamental aspects of the principles of procedural fairness and are to be assessed on the standard of correctness.

[50] The Applicants submit that the issue of prejudgement goes to the core of procedural fairness and, as such, is an essential requirement of fairness that warrant the intervention of a reviewing court regardless of where the decision-maker falls on the spectrum of procedural fairness entitlements.

[51] The Applicants submit that in this case, the evidence clearly indicates that the Committee had made its decision before parts of the Applicants' submissions had been received or considered by the Committee. The Applicants point to the Report which discloses the Committee had already reached a decision on the merits of the grievance before receiving or considering the Applicants' reply to the information provided by CBSA management. The specific passage relied on by the Applicants states:

> Further to the union's response of February 11, 2010, the Committee reconvened on February 26 to review the union response. After giving careful consideration to the evidence submitted the Committee reached consensus that the new information would not change their decision on the grieved position.
>
> [Emphasis added by Applicants].

[52] The Applicants also point to notes taken at the December 14, 2009 hearing where the Committee heard from the CBSA management representatives. The notes state under the heading "Evaluation" that the Committee members discussed the rating and that all agreed with the ratings. The discussion focused around the "decision making" factor.

[53] The Applicants submit that notwithstanding that the Committee expressly acknowledged its obligation to provide the Applicants with copies of Management's responses and to consider any submissions made in reply, the language of the Committee's report makes it clear that the Committee had already held deliberations on the merits of the grievance before it received the Applicants' reply submissions and that it had already reached a decision.

[54] The Applicants argue that in these circumstances, the Committee violated its procedural fairness obligations by inappropriately pre-judging the merits of the grievance before all of the Applicants' submissions were heard. This failure, the Applicants submit, is a reviewable error.

[55] The Respondent begins by submitting that the procedure before the Committee is non-adversarial. It is an "administrative proceeding which does not engage the rights or privileges characteristic of quasi-judicial proceedings." *Utovac v Canada (Treasury Board)*, [2006] FCJ No

833 at para 16 (*Utovac*). The Respondent relies on this Court's ruling in *Groulx* at paragraph 19 where Justice Blais (then with the Federal Court) stated:

> [19] Therefore, the respondent is right in stating that there is well established case law to the effect that the nature of the process before the Committee tends to indicate a lower level of procedural guarantees. These guarantees are limited to the applicant's right to have his main arguments considered by the Committee and to be advised of information crucial to the case and of which he could not reasonably have knowledge.

[56] The Respondent also submits that, in this case, the Committee did not prejudge the merits of the grievance as submitted by the Applicants. The Respondent submits that the Committee considered all the information presented by the Applicants and considered all the submissions made by the Applicants before it reached its recommendation.

[57] The Respondent argues that after the Committee received the requested clarification from CBSA management representatives pertaining to the work done by IEO's, the Committee provided the Applicants with that information in order to provide them an opportunity to respond. The Respondent points out that the Committee then reconvened to deliberate on February 26, 2010, two weeks after it had received the Applicants' written representations.

[58] The Respondent further submits that the onus to establish a "prejudgement of a matter", as set out by the Supreme Court of Canada in *Old St. Boniface Residents Assn. Inc. v Winnipeg (City)*, [1990] 3 SCR 1170 (*Old St. Boniface Residents Assn. Inc.*), rests on the party alleging the disqualifying bias to "establish that there is a prejudgement of the matter, in fact, to the extent that

any representations at variance with the view, which has been adopted, would be futile." *Old St. Boniface Residents Assn. Inc.* at para 57

[59] The Respondent submits that, while the Committee conducted an evaluation of the grieved job before the Applicants' responses to the information provided by management was received; the evaluation could be characterized as a tentative conclusion. This is supported by an affidavit by one of the Committee members, Mr. Myles. This characterization of the evaluation as a tentative conclusion is also supported in the paragraph relied on by the Applicants above. The Respondent notes that the Committee's tentative conclusion came after the initial hearing where the Applicants and their union representatives were able to provide extensive evidence.

[60] Mr. Myles was a member of the Committee whose decision is challenged in this judicial review. I find no issue with his affidavits where they recount events, actions and dates. However, where a decision maker's affidavit enters the fray over the decision, an issue arises. In his supplementary affidavit, Mr. Myles states:

> 11. The Committee's evaluation (see Exhibit "E", attached to Patrick McEvoy's Supplementary Affidavit page 50) was a tentative evaluation rather then a definitive evaluation. The final evaluation and recommendation was made by the Committee only after it had considered the Applicants' written representations that they submitted to the Committee on February 11, 2010 (see Affidavit of James Myles previously filed in response to this Application for Judicial Review, Applicants' Application Record Vol. V. paras 14, 16 and 17, page 1871.
>
> [Emphasis added]

[61] The Respondent relies on this affidavit by Committee member James Myles, stressing the initial evaluation was tentative and going on to quote Mr. Myles: as stating: "The final evaluation and recommendation was made by the Committee only after it had considered the Applicants' written representations that they submitted to the Committee on February 11, 2010."

[62] In *Stemijon Investments Ltd. v. Canada (Attorney General),* 2011 FCA 299, the Federal Court of Appeal stated:

> [40] During argument of this appeal, the respondent referred us to an affidavit that was filed with the Federal Court. The affidavit is from the delegate of the Minister who made the decision that is the subject of judicial review in these proceedings. In that affidavit, and also in cross-examination on that affidavit, the delegate testified that he relied on other matters when he made his decision, including "the relevant sections of the Income Tax Act." The respondent points to this affidavit as evidence that the Minister had regard to the full extent of his discretion under subsection 220(3.1) of the Act and drew upon that section as the source of his authority.

[63] I conclude I should not give any weight to Mr. Myles' assertion since he ventures into the issue as to whether the Committee predetermined the classification decision before the Applicants' response.

[64] Notwithstanding the forgoing, the question of prejudgment remains. This is an administrative decision for which the standard for procedural fairness affords the decision maker greater flexibility in its procedures. In my view, it would be surprising if the Committee did not engage in some ongoing assessment of the classification factors as it received evidence and

submissions. The question is whether the Committee prejudged the matter before all submissions were in.

[65] The Supreme Court of Canada stated that the onus rests on the party alleging the disqualifying bias to "establish that there is a prejudgement of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile." *Old St. Boniface Residents Assn. Inc.*

[66] On the face of the Report, the Committee states it gave careful consideration to the Applicants' new information. Further, the Committee evaluation of the position and examination of the four factors follows the Committee's reference to the Applicants' response to the management submissions. Some credence must be given to the Committee Report and its choice of words.

[67] Finally, the Applicants' further information emphasizes a challenge to Ms. Kramer and goes into a detailed rebuttal of her evidence which the Applicants submit was without detail and inconsistent. However, what the Applicants do not do is demonstrate that the Committee closed its mind to the merits of the case before them before receiving the Applicants' additional submissions.

[68] I conclude the Applicants have failed to show the Committee made a final decision before hearing all of the Applicants' evidence or submissions.

Did the Committee fail to give sufficient reasons to justify its analysis of the arguments and the evidence and to comply with the requirements of procedural fairness?

[69] The Applicants submit that the duty to provide reasons is another well-established aspect of procedural fairness. The Applicants argue that reasons must not only be provided, but they must also be sufficiently adequate. *Via Rail Canada Inc. v National Transportation Agency*, [2001] 2 FC 25 (FCA) at para 22

[70] The Applicants submit that, in the present case, the Committee failed to meet its obligation to provide adequate reasons. The Applicants argue that the Committee adopted Ms. Kramer's comparison with the Border Service Officer position notwithstanding the numerous differences identified by the Applicants, and rejected the comparisons the Applicants identified with certain other positions. The Applicants submit that the Committee appears to have done so without undertaking a detailed analysis that sets out the salient differences between the positions.

[71] The Applicants also point to several instances throughout the Report where the Committee simply asserts that it cannot accept the Applicants' proposed changes to the ratings for the IEO position. As an example, the Applicants note that the Report states, "'the Committee Members could not agree' with the knowledge rating proposed by the Applicants," and that, "[s]imilarly, the report states only that 'the Committee could not justify a rating greater than C3' and that it 'could not agree' with the benchmarks proposed by the Applicants for the decision-making rating."

[72] The Applicants submit that in several instances throughout its Report, the Committee asserts that it cannot accept the Applicants' proposed changes to the ratings for the IEO position. For

example, the Applicants point to the example that the Report states that "the Committee Members could not agree" with the knowledge rating proposed by the Applicants. While this is correct, the Applicants fail to take into account the following sentence which states, "(See Committee's rationale for this element in PSAC rebuttal for this degree in their evaluation)." The reference contains the Committee's rationale for evaluating the knowledge rating as it did.

[73] The Applicants submit that given the lengthy and detailed nature of the submissions provided by the Applicants and by their union representative, the analysis provided by the Committee in the Report simply does not do justice to the Applicants' arguments. The reasons that are provided are inadequate.

[74] The Respondent submits that the Committee set out in the Report its reasoning process, its finding, the principle evidence upon which these findings were based and the major points in issue.

[75] The Respondent also submits that the Committee was not required to provide an analysis of each and every piece of evidence produced by the Applicants. The Respondent relies on *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 (*Ozdemir*) where the Federal Court of Appeal noted that:

> [9] … Decision-makers are not bound to explain why they did not accept every item of evidence before them. Much depends on the significance of that evidence when it is considered in light of the other material on which the decision was based: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35. at para 9

[76] The Respondent argues that the Report reveals that the members of the Committee considered a) the information received by the Applicants, b) the information received by the management representatives, c) the presentations made by and on behalf of the Applicants, and d) the principal evidence upon which its recommendation was based.

[77] The Respondent submits that the Committee was only required to address the major points in issue and the fact that Ms. Kramer participated in the grievance hearing was not a major point in issue deserving particular attention or analysis by the Committee.

[78] The Respondent submits that the reasons provided by the Committee in the Report are adequate, sufficient and are in compliance with the requirements of procedural fairness.

[79] Decision-makers are not bound to explain why they did not accept every item of evidence before them. It is not necessary for the reasons to list every conceivable factor which may have influenced the decision. In *Kindler v Canada (Minister of Justice)*, [1987] 2 FC 145 at paragraph 23 (*Kindler*) the Court stated:

> A duty to give reasons means that adequate reasons must be given but leaves open the question of how one measures the adequacy of a decision-maker's reasons. If the decision involved is one which requires the exercise of discretion, the reasons given should demonstrate two things: first, that the decision-maker recognized that it had a power to make a choice and second, the factors that it considered in exercising its discretion. Balanced against these requirements, however, is the consideration that to require elaborate and overly scrupulous reasons places an unjustifiable burden on the decision-maker. A requirement to give reasons should not be interpreted in such a way as to cause the court to construe the reasons with technical particularity.

[Emphasis added]

[80] What is required, however, is that the decision maker set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue and the reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[81] In this case the Report provides a summary of all the evidence provided. The Report specifically summarizes the presentations made by or on behalf of the grievors. The Committee also reviewed and addressed each of the submissions made by the PSAC and the grievors before conducting its own evaluation process and the Committee was tasked to do.

[82] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (*Newfoundland and Labrador Nurses' Union*) the Supreme Court of Canada held that inadequacy of reasons could not be the sole basis for judicial review of a decision. Rather, reasons were to be read together with the conclusion to see if the decision falls within a range of possible outcomes.

[83] I conclude that the reasons of the Committee, as contained in the Report, are adequate. The Report clearly illustrates the decision-making process taken by the Committee. The Report summarizes the evidence and addresses the submissions of the parties; this includes the evaluations done by the consultants that were forwarded by the grievors as exhibits. The Report addresses the major points in issue and the reasoning process is set out and reflects the main relevant factors. The

Report concludes with a detailed analysis of the Committee's evaluation of the classification for the grieved job description.

[84] The reasons in the Committee's Report are rationally directed to its conclusion on the classification level of the grieved job description. The decision of the Committee falls within the range of possible outcomes having regard to the information before it, the submissions the Committee heard and the reasons it gives in its Report.

Did the Committee fail to have proper regard to all the arguments and evidence that was tendered by the Applicants?

[85] The Applicants submit that given the scant reasons provided by the Committee in its report, it must be concluded that the Committee failed to consider all of the arguments and evidence that was put before it.

[86] The Applicants argue that the Committee's failure to consider the evidence before it amounts to a breach of procedural fairness that warrants the intervention of this Court on judicial review. The Applicants provide specific evidence they feel the Committee failed to properly consider. Some of the examples provided by the Applicants include the four jobs in the "Relativity Study" to the PM-03 position and the lengthy and detailed package of written submissions and documentary evidence in response to Ms. Kramer's testimony. The Applicants argue that much of this material was neither adopted nor rejected by the Committee, but rather, in the absence of any reasons explaining its dismissal, it seems the Committee simply ignored this material entirely.

[87] One area that the Committee did not address was the Applicants' submissions as to bias on the part of Ms. Kramer having had prior involvement in 2007 with the controversy surrounding the grieved job description. However, I note one of the consultants whose report was submitted by the Applicants was also involved in the matter for management around 2007. In my view, the Committee properly confined its reasons to the subject matter before it, namely, the question of classification for the grieved work positions.

[88] The Applicants submit that one cannot conclude that the Committee paid any meaningful attention to the arguments and evidence advanced by the Applicants in light of the inadequacy of the Committee's reasons and in the face of the detailed submissions and voluminous documentary record tendered by the Applicants.

[89] The Applicants submit that the Court must conclude that the Committee breached the principles of procedural fairness by failing to consider all of the evidence that was placed before it in this matter.

[90] The Respondent submits that the Committee explained in its twenty-one page Report why it recommended that the grieved positions warrant a classification at the PM-03 group and level. The Respondent argues that the Applicants' characterization of the Committee's reasons as "scant" is inaccurate and that the Committee was not required to provide an analysis of each and every piece of evidence produced by the Applicants.

[91] The Applicants submit that given the reasons provided by the Committee in its report, it must be concluded that the Committee failed to consider all of the arguments and evidence that was put before it. The Applicants argue that the Committee's failure to consider the evidence before it amounts to a breach of procedural fairness that warrants the intervention of this Court on judicial review.

[92] The Applicants' submission on this issue is based on an assumption that the Committee's reasons are inadequate. However, as I have concluded that the Report provides adequate reasons, I must disagree with the Applicants' submission on this issue. In contrast, I find that the Report clearly evidences that the Committee did take into account all of the evidence and submissions of the Applicants. As stated above, the Report sets out a summary of the presentations made by the grievors and those that made presentations on their behalf. It is clear that the Committee took this evidence into account. While the Committee was not required to list off every piece of evidence it accepted or rejected, I am satisfied the Committee did address the evidence that went to the main points in issue.

The Nominee made the decision based on issues that were not put to the Applicants for response.

[93] As noted above, the Applicants are seeking to judicially review the decision of the Nominee. However, the Applicants are, in substance, challenging the decision of the Committee to recommend that grieved job be classified at the PM-03 level.

[94] What makes this case different is the existence of the briefing note written by the Nominee dated April 19, 2010. This letter was an internal letter, directed to the President, providing the President with advance notice of the Nominee's decision to accept the Committee's recommendation. This letter was not intended to be sent to the grievors and only made it into the grievors' possession through an access to information request.

[95] This letter raises the issue of who the decision maker really is and what is the proper role of both the Committee and the Nominee. I have not been referred to any case law where the Nominee's reasons for accepting a recommendation from a classification grievance committee are raised or challenged.

[96] I find it useful to look at what the respective roles of the Committee and the Nominee are. The roles and duties of both the Committee and Nominee are found in the Treasury Board's *Classification Grievance Procedure*.

[97] The *Classification Grievance Procedure* provides the Committee's mandate:

> 1. The Classification Grievance Committee is responsible for establishing the appropriate classification and evaluating the grieved position based on the duties assigned by management and performed by the employee and the additional information provided by management and by the grievor and/or his or her representative. It must review and analyze all information presented in a gender neutral way. The classification recommendation to the deputy head or nominee must be fair, equitable and consistent with the classification principles.

[98] The procedure set in the *Classification Grievance Procedure* clearly sets out that it is the Committee which is tasked with receiving evidence and submissions, establishing the appropriate classification and evaluating the grieved position. All procedural fairness requirements owed to the grievors are owed by the Committee. It is the Committee that is the *de facto* decision-maker.

[99] In this case, the Committee provided a recommendation that met all of the procedural fairness requirements owed to the grievors. The grievors were provided with the opportunity to present their case, to respond to the information provided by the CBSA management representatives, and were provided with adequate reasons by the Committee as to why the Committee made the recommendation it did.

[100] The role set out in the *Classification Grievance Procedure* for the Nominee states:

> 1. The deputy head or nominee will either confirm the committee's recommendation or make a decision in cases of minority and majority reports. In cases of minority or majority reports, if the minority report is accepted the nominee must so advise the deputy head. If the unanimous recommendation of the grievance committee is rejected by the nominee, the new decision must be personally approved by the deputy head. In such circumstances, the deputy head must report to TBS the reasons for non-acceptance, tied directly to the justification used by the grievance committee in arriving at its recommendation.

[101] It is clear that where the recommendation of the Committee is unanimous, the role of the Nominee is limited. The Nominee must either confirm the recommendation or reject it which would then require the new decision to be personally approved by the Deputy Head.

[102] Since there is no express requirement that the Nominee provide reasons for the decision to either confirm or reject the Committee's recommendation, there cannot be a legitimate expectation for a nominee's reasons to be forwarded to grievors.

[103] The Nominee's briefing note set out four reasons why the Nominee felt the Committee's recommendation was sound. These reasons neither follow nor contradict the Committee reasons. The Nominee's briefing note goes on to state that the two consultants' evaluations could not be considered authoritative.

[104] The Nominee considered the two consultant's evaluations of the position to not be authoritative because one consultant was considered biased and the second unqualified. This assessment by the Nominee is contrary to the Committee's acceptance of the two consultant reports as meriting consideration but found wanting on analysis. The question arises whether the Nominee is saying the Committee was wrong to consider the consultant evaluations.

[105] I note where a unanimous committee report is rejected; the Deputy Head must personally make the new decision and provide a report to Treasury Board with the reasons for non-acceptance tied directly to the justification used by the grievance committee in arriving at its recommendation.

[106] It seems to me Classification Grievance Procedure requires the Nominee to confirm or reject the report. The Nominee is not required to give reasons on confirmation but if the Nominee ventures to do so, those reasons must also relate to the Committee's justification. Where the Nominee gives reasons contrary to the Committee's analysis; casts doubt on the Committee decision and otherwise

fails to relate to the Committee's justification, then the Nominee's decision may be subject to challenge.

[107] In this case, having regard to the level of defence to be given to a specialized tribunal such as the Committee, the limited scope for the Nominee on confirmation, and the fact the confirmation was signed by the Nominee on April 17th, and the fact that the briefing note to the President was signed two days later on April 19th, 2010, I conclude, on the facts of this case, the Nominee has not undermined the Committee decision by her contrary reference to the two consultant evaluations. I would hold the Nominee's briefing note departure from the Committee justification superfluous to her confirmation of the Committee recommendation two days earlier.

[108] In result, I disagree with the Applicants that the briefing letter raises issues that the grievors should have had the opportunity to address.

[109] It is worth repeating what Justice Blais (then with the Federal Court) stated in *Groulx* regarding the appropriate level of procedural fairness:

> [19] Therefore, the respondent is right in stating that there is well established case law to the effect that the nature of the process before the Committee tends to indicate a lower level of procedural guarantees. These guarantees are limited to the applicant's right to have his main arguments considered by the Committee and to be advised of information crucial to the case and of which he could not reasonably have knowledge.

[110] The Applicants had full opportunity to have their main arguments considered by the Committee. The Nominee's comments in the briefing note cannot be considered crucial to the case.

The procedural guarantees owed to the grievors in this case were more than met by the Committee. As such, the Applicants' application for judicial review fails on all points.

Conclusion

[111] The application for judicial review does not succeed.

[112] Costs in favour of the Respondent.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. Costs in favour of the Respondent.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. David Yazbeck	FOR THE APPLICANTS
Mr. Neil McGraw	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Raven, Cameron, Ballantyne & Yasbeck LLP Ottawa, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT