

Federal Court



Cour fédérale

Date: 20141021

Docket: T-1674-13

Citation: 2014 FC 999

Ottawa, Ontario, October 21, 2014

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

CAMILLE-ALAIN RABBATH

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review against the decision of the Deputy Minister of National Defence (the Deputy Minister) dated July 30, 2013, denying a request for recourse under the Independent Recourse Mechanism for Defence Scientists (IRMDS). The IRMDS sets out a method of recourse for disputes about promotions for research scientists within the Department of National Defence (DND).

[2] For the reasons set out below, I dismiss the application.

II. Context and Facts

A. *The Staffing System for Research Scientists in the Defence Scientist Occupational Group*

[3] Pursuant to both subsection 34(1) of the *Public Service Employment Act* and section 2 of the *Public Service Employment Regulations* (the *Regulations*), the internal appointment process for the Defence Scientist (DS) group is an incumbent-based process. This process includes both a “career progression framework” and an “independent recourse mechanism”.

[4] The Deputy Minister has established a career progression framework for the DS group entitled the *Defence Scientific Service Group Salary Administration System*. The Deputy Minister has delegated authority pertaining to the career progression framework to the Assistant Deputy Minister, Science and Technology, who considers the input of the Human Resources Management Committee (the Committee) to make decisions pertaining to the career progression of the members of the DS group.

[5] The career progression framework provides that each DS is both paid and classified proportionally to his or her state of professional development. In other words, the DSs are promoted as their research work progresses. An effort to obtain a promotion for a DS begins with a Performance Evaluation Report prepared with input from the DS’s immediate supervisor and immediate line manager. This report includes a professional development recommendation by the Professional Development Manager as to whether a promotion should be granted. If the DS is not satisfied with the recommendation, he or she may have it considered by the Committee.

Based on the state of the DS's professional development, the Committee determines whether the employee should receive a promotion. Such promotion typically includes an increase in salary.

[6] The IRMDS allows an employee who disagrees with the Committee's decision pertaining to, among other things, non-disciplinary denial of promotions and variation of salary increases, to have the decision analysed by an independent reviewer.

[7] Within 15 days following reception of the Committee's decision the DS may submit a written request for recourse to the IRMDS. The Deputy Minister appoints the independent reviewer(s) within 15 calendar days from the date of the receipt of the DS's request. Within 70 calendar days from the day that the IRMDS was initiated, the independent reviewer makes recommendation(s) to the Deputy Minister. The independent reviewer may either confirm the appropriateness of the process used by the Committee or identify the issue(s) that may have negatively affected the decision of the Committee. The reviewer may recommend to the Deputy Minister that the Committee re-examine the case. However, the reviewer may not recommend that a promotion or salary increase be granted, or that the normal rate of progression of the DS be resumed.

[8] Based on the independent reviewer's recommendation(s), the Deputy Minister makes the final decision. This final decision is communicated to the DS within 30 days after the recommendation(s) of the reviewer has been made to the Deputy Minister.

B. *Facts*

[9] The Applicant, Dr. Camille-Alain Rabbath, is a scientist working for the Government of Canada within the DND. The Applicant joined this department on February 4, 2002. He is a DS.

[10] On January 17, 2012, the Applicant received his Performance Evaluation Report indicating that he was not recommended to be promoted from the DS-04 level to the DS-05 level.

[11] On February 7, 2012, the Applicant met with his immediate supervisor and immediate line manager to discuss the recommendation and to hand-write his disagreement in section 6.1 of the report under "Employee comments".

[12] On April 23, 2012, the Applicant received a March 27, 2012 letter formally denying his request for promotion.

[13] By a letter dated April 25, 2012, the Applicant initiated the IRMDS. DND initially appointed Mr. Rand Jackson as the reviewer for the case. This appointment occurred on May 30, 2012, 20 days late. This delay, which was not explained, began a series of missed deadlines by DND that effectively denied the Applicant the benefit of the IRMDS.

[14] The 70-day deadline for the reviewer's recommendation(s) was also not respected. Without any authority to do so and without the Applicant's agreement, DND granted an extension of this deadline. On October 4, 2012, Mr. Jackson informed DND that he was unable to complete the review, due to personal commitments. The Applicant was only informed of this development on November 5, 2012.

[15] In the absence of an appointment of a new reviewer within a reasonable period thereafter, the Applicant wrote on December 12, 2012, requesting that the review recommence. In the absence of a response to this request, the Applicant commenced an application in Federal Court on January 14, 2013, for an order of *mandamus* requiring the appointment of a new reviewer.

DND eventually appointed Mr. Pierre Lessard (the Reviewer) as the reviewer on March 6, 2013, without the need for an order.

[16] On May 13, 2012, Mr. Lessard completed his review and issued his recommendations. In his report, Mr. Lessard, mentioned, among other things:

1. D'un point de vue « mécanistique » il apparaît que les étapes to processus d'évaluation dans la préparation du RAR ont été respectées.
2. La « Note » du Comité devrait être révélatrice, dans ces propos, à ce sujet or elle l'est très peu [...] Cette dernière maintient en effet un flou certain, en particulier par la référence à la notion de rendement « supérieur » qui demande à être mieux défini. [...] Ce faisant, on prive le demandeur de la seule rétroaction directe du Comité qu'il est en droit d'espérer (une représentation personnelle étant exclue).
3. J'estime que la Comité se doit d'assumer l'entière responsabilité de son rôle de palier supérieur dans le processus, ceci incluant une rétroaction effective au demandeur aussi bien qu'à la gestion locale. Pour arriver à ceci, la « Note » du Comité doit fournir par écrit au demandeur avec suffisamment de détails sa décision, la justification et les motifs invoqués [...].
4. Il est donc recommandé que le Comité de gestion des ressources humaines revoie le dossier du demandeur (incluant les commentaires du demandeur si nécessaire) et les minutes de ses délibérations de la revue d'avril 2012 concernant le cas du plaignant. Le Comité doit trouver dans ses délibérations (passées ou à venir) la matière à fournir au demandeur le fondement de sa décision de même qu'une rétroaction adéquate afin de contribuer à la fixation d'objectifs réalistes et d'éviter d'entretenir une situation d'échec, d'épuisement professionnel et de critiques systématique.

[Emphasis in original]

III. Decision

[17] By a letter dated July 30, 2013 (48 days late), the Applicant was informed of the decision of the Deputy Minister to deny the Applicant's request to have the Committee review his file for the 2011-2012 period and provide feedback.

[18] The letter noted that the Reviewer's report confirmed the appropriateness of the process followed by the Committee. The letter also stated that the Reviewer's report confirmed that the Committee adequately assessed all of the relevant documentation and that it had followed the Salary Administration System. The Deputy Minister did not follow the Reviewer's recommendation to have the Committee review the Applicant's file for the 2011-2012 period. The Deputy Minister noted that the Applicant had been promoted earlier in 2013 to the DS-05 level that he sought. The Deputy Minister apparently saw no reason for the Committee to provide feedback regarding the denial of a promotion that the Applicant had since obtained. The Deputy Minister did state that the Reviewer's recommendation to provide more detailed feedback had been discussed with the Assistant Deputy Minister, Science and Technology, and would be taken into account in future Committee deliberations.

IV. Issue

[19] This matter raises the following issue:

1. Did the Deputy Minister err in denying the Applicant's request to have his file sent back to the Committee for reconsideration?

V. Submissions of the Parties

A. *Applicant's Submissions*

[20] The Applicant concedes that the standard of review is reasonableness.

[21] The Applicant submits that the decision has an important negative impact on him. First, the effect of the decision is to render the recourse process ineffective because it forces the DS to go through an administrative process for more than a year “to have the Deputy Minister agree with the reviewer that there were problems but refuse to take any steps”. Second, if the Applicant had been promoted in April 2012, he would be earning approximately \$2,888 more each year until he reaches the top pay rate for the DS-05 level.

[22] The Applicant argues that the decision should be responsive to the Reviewer’s conclusions and recommendations and should provide a meaningful remedy. The Deputy Minister’s decision did not follow this principle. The Applicant submits, among other things, that the Deputy Minister’s engagement that the Reviewer’s recommendation to provide more detailed feedback would be taken into account in future Committee deliberations does not constitute a real remedy for the Applicant in the present case.

[23] The Applicant argues that his subsequent promotion does not justify the absence of a remedy. First, the Applicant submits that the Reviewer himself considered whether the subsequent promotion could be considered in reviewing this case and concluded that it could not. Second, the Applicant submits that the review has an important purpose in that it allows the Committee both to provide input to the Applicant’s professional development (*Tran v Canada (Attorney General)*, 2013 FC 455, at para 11) and to reconsider its decision. In such

reconsideration, the Committee could possibly grant the Applicant a retroactive promotion, which would have financial consequences for the Applicant.

[24] Furthermore, the Applicant argues that the words “independent recourse mechanism” in section 2 of the *Regulations* indicate that the mechanism established must be capable of providing some real recourse that could be of personal benefit to the complainant.

[25] Finally, the Applicant underlines that the Reviewer did not conclude that the Committee’s decision was correct, but only that it followed the correct procedural mechanics. Though the Deputy Minister’s decision states that the Reviewer’s recommendation confirmed that the Committee considered all of the relevant information, the Applicant argues that the Reviewer merely indicated that the required mechanical steps of the Committee’s process were followed and never stated that the Committee’s conclusions were appropriate.

B. *Respondent’s Submissions*

[26] The Respondent agrees with the Applicant that the standard of review is reasonableness. The Respondent also agrees with the principle that a remedy provided under the IRMDS should have a logical connection to the breach and should address to the Applicant’s individual circumstances.

[27] The Respondent argues that, in considering the decision of the Deputy Minister, the Court must be mindful of the role of the Reviewer in the IRMDS, which is to either confirm the appropriateness of the Committee’s process or identify any issue(s) that may have negatively affected its decision.

[28] The Respondent argues that the issues identified in the Reviewer's report focus on the Applicant's ability to understand the Committee's decision rather than with the decision itself or the decision-making process.

[29] The Respondent submits that the Reviewer's intention in recommending that the file be sent back to the Committee was to help the Applicant to understand why he was denied the promotion in order to assist him in obtaining it in the future. Given the intent of the recommendation and the fact that the Applicant had already been promoted to the DS-05 level when the Deputy Minister's decision was rendered, it was unnecessary to send the file back as recommended by the Reviewer. It was reasonable for the Deputy Minister to decide that additional feedback on how to obtain a promotion was unnecessary for an employee who had already obtained the promotion he sought.

[30] Finally, the Respondent submits that the Deputy Minister's decision is responsive in that the Reviewer's recommendation will be considered in the Committee's future reviews.

VI. Standard of review

[31] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 57-58, held that an exhaustive review is not required when the standard of review has already been determined by the jurisprudence. While the present case appears to be the first application for judicial review of a remedial decision taken under the IRMDS, this Court has applied the standard of reasonableness to similar recourse mechanisms (*Backx v Canadian Food Inspection Agency*, 2013 FC 139, at para 19 [*Backx*]; *Spencer v Canda (Attorney General)*, 2010 FC 33, at paras 29-32; *Peck v Parks Canada*, 2009 FC 686, at paras 17-23). Moreover, the question before

the Deputy Minister was one of mixed fact and law because it involves the application of the internal policies and administrative procedures of the DND to a factual situation. This indicates that the standard of reasonableness should apply. Therefore, I agree with the parties that the standard of review in this case is reasonableness.

VII. Analysis

[32] I agree with the Applicant's submission that the Deputy Minister's decision should be responsive to the Reviewer's recommendation. Section 2 of the *Regulations* provides for a "recourse mechanism". An employee who disagrees with the decision of the Committee must have access to a real and effective recourse mechanism. It must provide an employee with a meaningful remedy when the circumstances permit such remedy (*Backx*, at para 24).

[33] I also agree with the Applicant that the Reviewer's report did not explicitly confirm that the Committee considered all of the relevant documentation or that it followed the Salary Administration System, as suggested in the July 30, 2013 letter communicating the Deputy Minister's decision. However, the absence of negative comments on these points suggests that the Reviewer saw no problem with the decision itself. The Reviewer's recommendation to have the Committee review the Applicant's file for the 2011-2012 period was based on the importance of providing him with the basis for its decision as well as adequate feedback to both establish realistic objectives and avoid any feeling of failure:

[...] à fournir au demandeur le fondement de sa décision de même qu'une rétroaction adéquate afin de contribuer à la fixation d'objectifs réalistes et d'éviter d'entretenir une situation d'échec, d'épuisement professionnel et de critiques systématiques.

[34] The ultimate purpose of the Reviewer's recommendation was to help the Applicant to obtain a promotion in the next cycle, the 2012-2013 period. The Reviewer did not question the validity of the Committee's initial decision; he simply concluded that the justification for the decision and the feedback provided to Applicant were insufficient.

[35] However, by the time of the Deputy Minister's decision, the Applicant had already received the promotion to the DS-05 level. If the Deputy Minister had decided to follow the Reviewer's recommendation, the only effect would have been to provide the Applicant with feedback to obtain a promotion that he had already obtained. In my opinion, it was reasonable for the Deputy Minister to make the decision communicated on July 30, 2013.

[36] By the time the Deputy Minister's decision was made, there was no remedy that could be given to the Applicant that would give him more than the promotion he had already received. Based on the Reviewer's recommendation a retroactive granting of the promotion was not contemplated. The Committee's decision to deny the promotion in 2012 was not put in doubt. I agree with the Respondent that if the Reviewer had felt that the substance of the Committee's decision was problematic, he could have said so. Though the Reviewer was constrained from recommending that a promotion be given, he was free to note problems with the Committee's decision. In fact, that was his mandate.

[37] I disagree with the Respondent's argument that the Deputy Minister addressed the Reviewer's recommendation by discussing the Reviewer's comments with the Assistant Deputy Minister, Science and Technology and undertaking to consider them in the Committee's future work. This response does not address the Applicant's individual circumstances. Based on the jurisprudence cited by the Applicant (including *Backx*), this response is inadequate. If it was not

clear to me that the Applicant had already received the only remedy he could expect (based on the Reviewer's recommendation), I would have reached a different decision in this matter.

[38] I conclude with a comment about the multiple occasions in which prescribed deadlines were not respected in this matter, without excuse or explanation. As detailed above, deadlines were missed for (i) the appointment of the first reviewer; (ii) the report from the first reviewer; (iii) the appointment of the second reviewer after the withdrawal of the first; and (iv) the communication of the Deputy Minister's decision to the Applicant following the Reviewer's recommendation. I have no evidence as to whether the situation in this case is unusual or typical, but there was certainly a systematic problem concerning the respect for deadlines in this case, for which the Respondent offered virtually no explanation. DND cannot reasonably claim to have a functioning IRMDS if the requirements thereof are routinely disrespected. In this case, the recourse mechanism was of no use to the Applicant. He did obtain the promotion he sought, but certainly without any credit to the recourse mechanism that was supposed to help him.

[39] Because the Applicant already has his remedy, he has not been prejudiced by the repeated delays. But again, if it was not clear to me that the Applicant was not entitled to any further remedies, I would have reached a different decision.

VIII. Conclusion

[40] In my opinion, the application for judicial review should be dismissed.

[41] The parties have made a joint recommendation as to the appropriate amount of costs in this application. If I were to follow that recommendation, I would award costs to the Respondent.

However, because of the repeated delays by the Respondent in the Applicant's IRMDS case, I have decided that no costs should be awarded in this application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed; and
2. There is no award of costs.

"George R. Locke"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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