

Federal Court



Cour fédérale

Date: 20230926

Docket: T-1353-20

Citation: 2023 FC 1294

Ottawa, Ontario, September 26, 2023

PRESENT: Madam Justice Walker

BETWEEN:

JILL MARIE SWANN

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Cpl. Jill Swann, is a regular member of the Royal Canadian Mounted Police (RCMP or the Force). She seeks judicial review of a decision (the Decision) dated October 1, 2020 evaluating her suitability for appointment to the vacant position of Sergeant, FSOC (the FSOC Sergeant Position) in Nanaimo, British Columbia. The Decision was made by the Officer-in-Charge (OIC) of Federal Serious and Organized Crimes (FSOC) Group 5.

[2] For the reasons set out in this judgment, the application for judicial review is dismissed.

I. Background

[3] The Applicant has been a serving member of the RCMP for many years. In 2016, she filed two complaints with the Canadian Human Rights Commission (CHRC) alleging sexual harassment and discrimination in the workplace. In 2017, the Applicant filed a notice of civil action in the British Columbia Supreme Court (BCSC) also alleging sexual harassment and discrimination in the workplace and claiming damages.

[4] On or about July 23, 2018, the Applicant entered into a settlement agreement to resolve all allegations made in the 2016 CHRC complaints and 2017 BCSC civil action (the Settlement Agreement). Paragraph 2 of the Settlement Agreement provides to the Applicant priority entitlement to promotion to a vacant position at the rank of Sergeant in a non-General Duty position on Vancouver Island.

[5] On September 1, 2020, Sgt. Popat, a Career Development and Resourcing (CDR) advisor with the RCMP, sent an email to the Applicant's CDR Advisor regarding the FSOC Sergeant Position (Job Code 3235). Sgt. Popat asked the CDR Advisor to reach out to the Applicant to determine whether she would be interested in the vacant position. If so, Sgt. Popat requested that the Applicant "submit a 2 page CV written to job code 3235 with consideration given to the job post considerations, additional competency requirements, desirables and the attached job summary/functional competencies". The Job Post Considerations, Additional Competencies and Desirables were set out in Sgt. Popat's email.

[6] The Applicant was the first RCMP member Sgt. Popat invited to apply for the FSOC Sergeant Position.

[7] The position description and requirements for the FSOC Sergeant Position are set out in three documents: (1) Job Code 3235; (2) the Request for Staffing a Member Position; and (3) the Addendum.

[8] The Job Code provides a general description of the FSOC Sergeant Position and responsibilities:

Job Summary

The Federal Policing (FP) mandate is to investigate drugs & organized crime, economic crime, and terrorist criminal activity; enforce Federal statutes; secure Canada's border; conduct international capacity building, liaison and peacekeeping; and ensure the safety [of] major events, state officials, dignitaries and foreign missions.

1. The member is responsible for:
 1. identifying and targeting major organized crime groups;
 2. liaising with various units and police agencies to gather and share intelligence on major crime groups;
 3. supervising and reviewing operational files;
 4. performing the role of case manager in high-level and long-term investigations,
 5. reviewing legal documents, and performing administrative functions;
 6. liaising and working with partner organizations, and
 7. providing guidance and direction in human source/agent handling and development.

[9] The Job Code contains a list of “Job Requirements” with little to no substantive information and a Competency profile that sets out the required competencies and minimum and desired levels of each competency.

[10] The Request for Staffing provides that the requirements and competencies for the FSOC Sergeant Position are contained in the Job Code, Job Post Considerations, Desirables and Addendum (all as forwarded by Sgt. Popat to the Applicant’s CDR Advisor):

Job Post Considerations:

The mission of Federal Serious & Organized Crime is to disrupt, dismantle and support prosecution of serious and organized crime groups and their members in conjunction with domestic and international partners. The NCO will be leading a team focussed on national level priorities, that involve domestic and transnational investigations into drugs and organized crime, utilizing the most up-to-date investigative techniques including but not limited to; undercover operations, use of confidential informers and police agents, and complex judicial authorizations (including Part VI Authorizations). The incumbent must have a comprehensive investigative background, experience with major case management principles, and be able to provide direction on a variety of investigative techniques and strategies. This position is located within an FSOC district office and applicants should be aware that it requires an extensive amount of travel.

Desirables:

- experience in leading/managing complex domestic and transnational investigations into drugs and organized crime;
- experience with undercover operations;
- experience in writing and reviewing complex judicial authorizations including Part VI authorizations.

[11] The Addendum lists additional competencies (concern for safety; ability to develop and manage human sources; and ability to conduct investigations) and a rationale and minimum level

for each. The Addendum notes that “Knowledge of Applicable Legislation & RCMP Policies, Procedures and Strategic Priorities” relates specifically to the drugs and organized crime context.

[12] On September 14, 2020, Sgt. Popat received the Applicant’s Curriculum Vitae (CV) and a signed copy of the required Transfer Planning form. Sgt. Popat forwarded the Applicant’s CV and recent RCMP assessments to the OIC for consideration the following day. In her email to the OIC, Sgt. Popat advised that the Applicant was a Divisional Priority and must be given priority consideration for the position before the Force looks at other applicants.

II. Decision under Review

[13] The OIC determined that the Applicant’s investigative background does not meet the needs of an operational NCO Sergeant position in Federal Policing, particularly on British Columbia FSOC Group 5, Major Projects. The OIC stated that the FSOC Sergeant Position is not a developmental position. It requires an individual with a breadth of experience conducting complex, transnational organized crime investigations with a focus on RCMP National Federal Policing priorities. The Sergeant leads a team of knowledgeable constables and corporals who themselves have experience in successfully conducting such investigations. Past involvement in organized crime investigations is critical given the targets’ sophistication and penchant for violence. The OIC also stated that the incumbent must have experience in covert operations and installation plans, undercover operations and search warrant execution to meet operational objectives and to mitigate officer safety risks.

[14] The OIC made the following observations regarding the Applicant's experience:

- the Applicant states that she has occupied many major case management (MCM) roles but does not have experience as part of a coordinated investigative team or in a Command Triangle leadership role for project investigations involving high-risk techniques, organized crime groups and teams of investigators.
- the Applicant has expertise as a forensic artist, child interviewer, negotiator and arson investigator. These skillsets clearly require significant time and knowledge to develop but are minimally applicable to Federal Policing Major Projects.
- the Applicant does not have experience with national or international organized crime investigations, including the leadership of such projects, the oversight of high-risk techniques or the management of complex datasets and advanced disclosure.
- the Applicant does not have experience or established relationships with external partners, particularly international partners, that are key to the success of FSOC investigations.
- the Applicant's CV outlines her experience and knowledge as an individual contributor and supervisor in frontline policing and Detachment/Regional plain clothes positions. The contexts in which such experience is developed is not applicable to a Major Projects Sergeant position due to the specialized, high risk work of Federal Policing.

[15] In closing, the OIC emphasized that the FSOC Sergeant Position requires knowledge, skills and abilities that are directly related to the day to day operations of a Federal Policing unit and that the Applicant's "career path has not involved any project teams or Federal Policing units, and as such, her experience does not meet the requirements to fill this Federal Policing Sgt Position". The OIC concluded that the Applicant is not an appropriate fit for the job.

[16] The Applicant filed her Notice of Application for judicial review of the Decision on November 9, 2020. The Applicant also filed a second BCSC civil claim against the Respondent for breach of the Settlement Agreement.

III. Admissibility of certain paragraphs of the Applicant's affidavit

[17] The Respondent submits that paragraphs 4 to 10 and 12 to 17 of the Applicant's affidavit sworn on November 19, 2020, together with Exhibits C, D and E to the affidavit, should be disregarded in their entirety because they were not before the OIC. The Respondent argues that the paragraphs and Exhibits in question do not set out information that falls within one of the permissible exceptions to the general rule that the evidentiary record on an application for judicial review is restricted to the record that was before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 (*Access Copyright*); see also '*Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 7).

[18] I agree with the Respondent in part and will disregard paragraphs 4 and 5, paragraphs 12 through 17 inclusive and Exhibits C and D to the Applicant's affidavit.

[19] Paragraphs 6 through 10 inclusive and Exhibit E relate facts pertaining to the Applicant's 2016 CHRC complaints and 2017 BCSC civil action that are not in dispute and are properly included in the affidavit. The admissibility of Exhibit E is limited to the existence of the Applicant's civil claim and does not extend to the truth of the claims made.

[20] Paragraphs 4 and 5 of the affidavit recount the alleged events giving rise to the 2016 complaints and 2017 civil action. This information is not admissible. It was not before the OIC when assessing the Applicant's suitability for the FSOC Sergeant Position and is not material to the disposition of this application (*Ewert v Canada (Attorney General)*, 2019 FC 733 at

paras 34-35). I do not agree with the Applicant's submission that the two paragraphs provide crucial context for the application. Any necessary context is contained in paragraphs 6 through 10 of the affidavit.

[21] Paragraphs 12-17 and Exhibits C and D relate the Applicant's application for a different position in the Force in 2018. Again, this information was not before the OIC and is not background information that aids the Court's understanding of the issues before it. The fact that the 2018 application was made in the exercise of the Applicant's right under the Settlement Agreement does not establish a nexus to the OIC's Decision. The Applicant argues that the facts recounted in paragraphs 12-17 demonstrate the RCMP's lack of good faith in implementing the Settlement Agreement but these facts were not before the OIC. The argument requires the Court to accept the truth of the facts as recounted without an adequate evidentiary basis and to draw an inference of bad faith from those facts that is in turn proper context for this matter. The Applicant's position cannot be accepted. It is speculative and unfair to the Respondent who is left with no opportunity to respond to allegations that revolve around a separate appointment process.

IV. Issues

[22] The following issues are before the Court:

- A. Is the application for judicial review premature because the Applicant failed to avail herself of an adequate alternative remedy through the RCMP grievance process?
- B. If the Court decides to exercise its jurisdiction, is the Decision reasonable?

[23] The Applicant requests a number of remedies beyond the quashing of the Decision and reconsideration of her case. As I have declined to exercise the Court’s jurisdiction to consider this application and, in the alternative, found the Decision to be reasonable, it is not necessary to address the Applicant’s requested remedies.

V. Prematurity of the application

[24] The Respondent submits that the Court should decline to consider the substance of this application for judicial review because it is premature. As the Applicant did not grieve the Decision through the RCMP grievance process, the Respondent argues that she has not availed herself of all adequate alternative remedies. The Respondent relies on the well-established principle that, absent exceptional circumstances, an applicant must exhaust all adequate remedial administrative processes before resorting to a judicial remedy (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at paras 30-31 (*CB Powell*); *Dugré v Canada (Attorney General)*, 2021 FCA 8 at para 34 (*Dugré*); *Xanthopoulos v Canada (Attorney General)*, 2020 FC 401 at para 22 (*Xanthopoulos*), *aff’d Xanthopoulos v Canada (AG)*, 2022 FCA 79)).

[25] In *CB Powell*, the Federal Court of Appeal (FCA) emphasized that the circumstances in which a court will consider an application for judicial review even though the applicant has not sought redress through an available administrative process are very rare: “the authorities show that very few circumstances qualify as “exceptional” and the threshold for exceptionality is high [citations omitted]” (*CB Powell* at para 33). The FCA recently characterized this principle as “next to absolute” (*Dugré* at para 37) and explained that exceptional circumstances are “very rare and require that the consequences of an interlocutory decision be so ‘immediate and radical’ that

they call into question the rule of law [citations omitted]” (*Dugré* at para 35; *Herbert v Canada (AG)*, 2022 FCA 11 at paras 11-12 (*Herbert*)).

[26] The Applicant submits that she finds herself in exceptional circumstances because the RCMP’s statutory grievance procedure is wholly ineffective and fraught with systemic deficiencies. She relies on the scathing 2020 report of former Supreme Court of Canada Justice, the Hon. Michael Bastarache, regarding the Merlo Davidson Settlement Agreement, *Broken Dreams Broken Lives, The Devastating Effects of Sexual Harassment on Women in the RCMP, Final Report on the Implementation of the Merlo Davidson Settlement Agreement* (the Bastarache Report). The Applicant argues that the Court should seize jurisdiction as an external body because the RCMP’s culture is toxic and the internal grievance process cannot be trusted to enforce remedies that result from sexual harassment and discrimination complaints.

[27] The Bastarache Report focussed on the endemic and enduring discrimination and sexual harassment experienced by women working for the RCMP. The Hon. Bastarache recommended the creation of “an effective, external and independent body to which RCMP employees may report sexual harassment or misconduct which has the power to investigate and make binding findings of fact and recommend penalties”. While his mandate did not include an in-depth examination of the RCMP’s promotion process, the Hon. Bastarache noted its shortcomings as another example of the “Old Boys Club” where there is concern that required competencies are not seriously assessed and a check the box approach is taken.

[28] The allegations underlying the Settlement Agreement recounted sexual harassment and discrimination but the Applicant makes no allegation of discrimination or harassment on the part of the OIC in this application. Rather, the Applicant's arguments contesting the Decision allege that the OIC (a) considered qualifications for the FSOC Sergeant Position that were extraneous to the requirements of Job Code 3235, and (b) did not implement her right of priority entitlement in the Settlement Agreement.

[29] Further, the Applicant has provided no evidence that the OIC failed to respect her priority right because of her prior claims of sexual discrimination and harassment. In fact, she expresses concern that the OIC was not informed of the facts leading to the Settlement Agreement. In *Xanthopoulos*, the applicant elected not to exercise his right of appeal of an RCMP conduct board decision recommending dismissal. Instead, he filed an application for judicial review of the decision, asserting that the appeal process was "excessively slow and cumbersome, and 'in fact broken'" (*Xanthopoulos* at para 17). In granting the respondent's motion to strike the application on grounds on prematurity, the Court stated that it should not presume that an appeal process would be flawed. The absence of evidence that the applicant's right of appeal was foreclosed as ineffective or inadequate precluded a finding of exceptional circumstances (*Xanthopoulos* at paras 24-25). I make the same finding in this case. The Court cannot presume the Applicant's right to grieve is foreclosed without evidence connecting the present Decision to her prior claims.

[30] There is also no suggestion in the record or in the Decision that the Applicant's competencies for appointment to the FSOC Sergeant Position were not seriously assessed. The

Decision contains a thorough assessment of specific elements of the Applicant's CV against the position requirements and competencies. It in no way reflects the "check the box" process decried by the Hon. Bastarache.

[31] The Applicant notes that the reasons for her priority entitlement were not provided to the OIC. In her view, this omission links the rejection of her application for the FSOC Sergeant Position to a breach of the Settlement Agreement. The fact the OIC was not made aware of the prior gender discrimination and harassment leads the Applicant to characterize the Decision as a continuation of the treatment that precipitated her 2016 CHRC complaints. She argues that, if informed, the OIC may have considered the genesis of the Settlement Agreement and her right to priority promotion when making the Decision.

[32] The record demonstrates that Sgt. Papat communicated the Applicant's priority standing to the OIC via email on September 15, 2020, stating "Sgt Jill Swan[n] is a Divisional Priority which requires that she be given priority consideration for this job opportunity before we look at the other applicants". There is no reference in the email to the basis for the priority. However, there is equally no evidence in the record regarding the meaning of priority entitlement (or similar words) and whether the reasons an individual has such entitlement or status is either required to be or is customarily communicated to a decision maker. In other words, the Court has no basis for considering the Applicant's argument that the omission of the information perpetuates the discrimination and harassment that resulted in the Settlement Agreement. I do not question that the Applicant believes this to be the case. Nevertheless, on the record before me, I

am unable to connect the prior treatment with either Sgt. Popat's communications with the OIC or the OIC's assessment of her CV.

[33] The lack of evidentiary basis for the Applicant's belief highlights one of the underlying reasons for the courts' insistence that all available administrative avenues be exhausted before requesting judicial intervention. As stated in *Xanthopoulos* (at para 22), "[i]f courts short-circuit administrative decision-making, they risk depriving reviewing courts of a full record bearing on the issue". The FCA explained the importance of preventing fragmentation of the administrative process and the need to ensure that a court's ultimate consideration of the matter is based on a full evidentiary record in *Herbert* at paragraph 9:

This principle allows reviewing courts, when a matter comes to them "at the end of the administrative process", to "have all of the administrative decision-maker's findings", which "may be suffused with expertise, legitimate policy judgments and valuable regulatory experience" (*CB Powell* at para. 32).

[34] The Applicant next argues that the grievance process cannot resolve her allegation that the Force breached the Settlement Agreement by failing to implement her entitlement to priority promotion.

[35] The RCMP's two-stage grievance process is set out in the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, (the *RCMP Act*) and the Commissioner's Standing Orders (Grievances and Appeals), SOR/2014-289 (the *CSO*). At the first stage, a member's grievance is considered by an adjudicator once both parties have had the opportunity to file evidence and make submissions. Subsection 16(2) of the *CSO* requires the adjudicator to consider whether the decision at issue "is consistent with the relevant law, or the relevant Treasury Board policy or

Force policy and, if it is not, whether it has caused prejudice to the grievor”. The adjudicator at the second or final stage of the process considers whether the initial decision contravened the principles of natural justice, is based on an error of law or is clearly unreasonable (*CSO*, section 18(2)).

[36] This application engages the Settlement Agreement only insofar as the Applicant’s priority entitlement to promotion to a vacant sergeant position in a non-General Duty position (Vancouver Island). If the Applicant were to grieve the Decision, the parties would have the opportunity to file evidence regarding the scope of the Applicant’s priority entitlement and whether it was respected, the RCMP appointment process and the OIC’s assessment of her competencies. The Applicant has not persuaded me that a first or second level adjudicator would be precluded from considering these factors in evaluating a grievance. The Applicant would then have the right to request the Court’s review of a final grievance decision with the benefit of a full record, including the adjudicator’s evaluation of the Force’s implementation of her right under the Settlement Agreement. Any declaration regarding breach of the Settlement Agreement and resulting damages can be addressed in the Applicant’s civil suit.

[37] In conclusion, I find that the internal RCMP grievance process is an adequate and appropriate alternative remedy available to the Applicant. There is no evidence before me that the Decision or the process leading to it was tainted by sexual discrimination or harassment. The Applicant has not established a compelling link between the OIC’s Decision and the findings of the Bastarache Report or the discrimination and harassment she suffered. Her unequivocal belief

to the contrary does not establish exceptional circumstances and I am satisfied that the Respondent's prematurity objection is established.

VI. The Decision is reasonable

[38] My conclusion regarding prematurity is dispositive of this application. However, the Applicant and her counsel devoted significant effort and time to their submissions challenging the substance of the Decision and, for the Applicant, the reasons for the OIC's negative conclusion is of great personal interest. I have therefore considered both parties' comprehensive written and oral submissions addressing the reasonableness of the Decision within the framework established by the Supreme Court of Canada in *Canada (MCI) v Vavilov*, 2019 SCC 65 at para 25 (*Vavilov*).

[39] A reasonable decision is one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at paras 85, 105). To set aside a decision, a reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[40] The focus of the submissions in the Applicant's memorandum is her argument that the OIC did not evaluate her CV against the requirements of Job Code 3235. Rather, he "unilaterally defined" additional qualifications needed for the FSOC Sergeant Position. The Applicant also submits that the OIC unreasonably overlooked or mischaracterized elements of her CV.

[41] The Respondent submits that the Court should not consider the argument that the OIC was limited to an analysis of the Job Code criteria because neither the Notice of Application nor the Applicant's supporting affidavit clearly identified this issue. The Respondent states that they were thereby deprived of the opportunity to fully respond to the argument in their responding affidavit (Rule 301(e), *Federal Courts Rules*, SOR/98-106 (the Rules); *Young v Canada (Attorney General)*, 2020 FC 1023 at para 49).

[42] I agree with the Respondent that the stated grounds of review in the Notice of Application largely paraphrase section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Applicant describes the grounds for her application as (a) errors of fact and law by the OIC, and (b) the OIC's failure to consider appropriately the Applicant's express priority entitlement to promotion set out in the Settlement Agreement.

[43] Rule 301(e) requires applicants for judicial review to set out in their notices of application the grounds on which they rely. They cannot present new grounds in their memoranda of fact and law, even if the respondent has not been prejudiced. In the present case, neither party presented evidence regarding any restrictions (or absence of restrictions) on the OIC limiting him to a consideration of the Job Code criteria. However, the parties presented sufficient submissions to permit me to exercise my discretion and consider the Applicant's argument but I draw no adverse inference from the Respondent's failure to lead express evidence on the issue.

[44] Subsection 5(2) of the *RCMP Act* permits the Commissioner, who has control and management of all matters connected with the Force, to delegate to any member their powers, duties and functions. The Respondent reasonably submits that this power of delegation extends to establishing specific position requirements in addition to those contained in a general Job Code. Here, the Request for Staffing of the FSOC Sergeant Position states that the job requirements are as listed in the Job Code , “plus those listed in Part F. (Part G may contain rationale on appropriate omissions)”. Part F refers readers to the attached Addendum. Part G (Rationale-Justification) sets out the “Job Post Considerations and Rationale for Desirables” (see, para 11 of this judgment). The Applicant has pointed to no authority restricting the OIC to an evaluation of her suitability against the Job Code. She relies on subsection 9.1(1) of the *RCMP Act* but, as the Respondent notes, the section applies to an individual’s first appointment to the Force as a member and does not apply in this case.

[45] The Applicant does not argue that she was unaware of the job specific requirements referred to in the Request for Staffing. Sgt. Popat’s email to the Applicant’s CDR Advisor states that, if the Applicant is interested in the position, “please have her submit a 2 page CV written to job code 3235 with consideration given to the job post considerations, additional competency requirements, desirables and the attached job summary/functional competencies”. The requirements of the position are clearly set out in these additional provisions and attachments and the Decision reviews the Applicant’s career and competencies against those requirements.

[46] Accordingly, I find that the Applicant has provided no compelling argument as to why the OIC should not have considered the detailed position requirements for the FSOC Sergeant Position.

[47] The Applicant's second set of submissions points to specific findings made by the OIC that, in her view, were not stated requirements or competencies in any of the Job Code, Job Post Considerations or Desirables. She argues that some of the deficiencies in her CV identified by the OIC may be mentioned in one of the documents but they are not drafted as requirements. She also argues that the OIC added to the requirements and competencies. For example, the Applicant concedes that one of the Job Post Considerations refers to domestic and transnational investigations and advanced investigative techniques but states that references by the OIC to "controlled deliveries, covert entries and installations, and international intelligence sharing" are not in any of the documents. Another example the Applicant provides is the OIC's statement that she does not have established relationships with external partners, particularly international partners, which are key to FSOC investigations. She argues that this is a new criterion despite the reference in the Job Post Considerations to the mission of the FSOC group as the pursuit of organized crime groups "in conjunction with domestic and international partners". The Applicant also takes issue with the OIC's statement that the successful applicant must have "a great deal of experience" in major projects because this level of experience is not a stated requirement.

[48] I do not agree with these or other similar submissions made by the Applicant in this regard. The Job Post Considerations state that the FSOC Sergeant will be leading a team focussed on national level priorities, "that involve domestic and transnational investigations into

drugs and organized crime, utilizing the most up-to-date investigative techniques ... The incumbent must have a comprehensive investigative background...”. One of the Desirables of the position is “experience in leading/managing complex domestic and transnational investigations into drugs and organized crime”. In the Decision, the OIC focussed on the necessity for the successful candidate to have experience using “advanced investigative techniques and who can lead teams conducting Organized Crime investigations”. The OIC expressed concern that the Applicant “does not have experience as part of the coordinated investigative team or in a Command Triangle leadership role for project investigations involving high-risk techniques, organized crime groups and teams of investigators”, a statement that reflects the description and competencies for the position.

[49] The Applicant’s insistence that the OIC could not consider any qualifications other than those described in the Job Code, Job Post Considerations or Desirables is not persuasive. I make the same finding regarding her argument that disputes the OIC’s individual words and his consideration of the purpose and function of the FSOC Group to the leadership role of the FSOC Sergeant. The Court’s review for reasonableness looks to the OIC’s chain of reasoning and justification for his conclusions based on the record before him. It is not a line by line parsing of the Decision (*Vavilov* at para 102). Equally important is the fact that the evaluation of candidacy for promotion is a complex process. The FCA recognized the importance of a decision maker’s expertise and knowledge of a position and the organization in RCMP promotion decisions in *Canada (Attorney General) v Boogaard*, 2015 FCA 150 at paragraph 52 (*Boogaard*):

[52] Further, a promotion decision, such as the one in this case, is not a simple one, arrived at by processing information objectively and logically against fixed, legal criteria. Rather, it is a complex, multifaceted decision involving sensitive weighings of

information, impressions and indications using criteria that may shift and be weighed differently from time to time depending upon the changing and evolving needs and priorities of the organization.

[50] The Commissioner, or their delegate, must draw upon their knowledge, experience and expertise of the needs of the RCMP in making promotion decisions (*Boogaard* at para 46). At the time of the Decision, the OIC was an Inspector, Operations Officer Group 5, EDIV Federal Policing. EDIV is the RCMP's British Columbia Division. The Decision demonstrates his experience and expertise.

[51] There is no doubt that, based on her CV, the Applicant has significant experience in conducting and leading investigations but her qualifications do not extend to experience in national or international organized crime investigations or work with international partners. In the OIC's opinion, these aspects of investigative experience are key to success in FSOC investigations. The Applicant argues that she has expanded her knowledge of undercover operations and judicial authorizations, and has cultivated confidential informants, but this argument requires the Court to reweigh the evidence despite the OIC's expertise. The argument also ignores the context in which the OIC assessed the Applicant's experience: the FSOC's focus on Federal Policing and transnational organized crime.

[52] I find that the OIC's review of the Applicant's CV does not unreasonably stray from the Job Post Considerations and Desirables. The OIC assessed the competencies in the Job Code in the specific context of the Considerations and Desirables. The Applicant focusses on single words or phrases but each of those words and phrases denotes a skill set or technical requirement within the scope of functions described in the Request for Staffing and Addendum. The OIC

acknowledged the Applicant's skill sets but concluded that they are minimally applicable to Federal Policing major projects due to the specialized and high-risk work the FSOC Group undertakes. The Applicant has established no error in this statement. The OIC's analysis is respectful and reasonably reflects the stated requirements for the FSOC Sergeant Position and the Applicant's experience and qualifications.

[53] The Applicant also submits that the OIC did not take into account her contractual right to priority appointment to a vacant Sergeant position in a non-General Duty position. Although the OIC was informed by Sgt. Popat of the right, there is no reference to it or the Settlement Agreement in the Decision. The Applicant emphasizes that the Settlement Agreement was not before the OIC when he considered her application.

[54] The OIC does not refer to the Settlement Agreement in the Decision but the omission does not compromise his evaluation of the Applicant's CV against the required technical and experiential competencies for the FSOC Sergeant Position. The OIC's role in the appointment process was the assessment of the Applicant's suitability for the position.

[55] The term "priority entitlement" is not defined in the Settlement Agreement and the parties disagree on its meaning. The Respondent insists that priority entitlement cannot supersede the requirement that the Applicant must meet the job competencies of any vacant Sergeant position within the ambit of her seven contractual opportunities. The Respondent states that the issue of priority does not arise in this application because the Applicant was found not suitable for the position. The Applicant differs and suggests the term has a more substantive

meaning. If she were the sole priority applicant for the position, the Applicant states that she must be appointed.

[56] There is no evidence in the record regarding the content of a priority entitlement to promotion and whether it supersedes the job requirements for a particular position. The Settlement Agreement is silent in this regard. It does not provide that the Applicant must be appointed to a vacant Sergeant's position for which she applies, nor does it address how the Applicant's application is to be assessed. Absent evidence, I cannot accept the Applicant's argument. The practical reality of a sophisticated organization within which personnel have highly specialized roles more likely requires that an applicant for a senior position must meet the required competencies for the position regardless of a right of priority. Accordingly, the lack of analysis of the Applicant's priority entitlement contained in the Settlement Agreement does not undermine the reasonableness of the Decision.

[57] Finally, the Applicant submits that the OIC committed a reviewable error in failing to set out the factual and legal constraints relevant to his Decision but I do not agree. A reasonable decision is one that is justified in relation to the relevant facts and legal constraints (*Vavilov* at paras 99, 101). This requirement does not mean that the OIC was required to provide a list of those constraints.

[58] For all of the foregoing reasons, and in the alternative, I find that the Decision is reasonable in light of the evidence in the record and the legal framework within which it was made.

VII. Conclusion

[59] Despite the Applicant's very capable submissions and genuine belief in her position, this application for judicial review will be dismissed. In reaching this conclusion, I do not minimize in any way the treatment that resulted in the 2016 CHRC claims and the Settlement Agreement.

[60] The Respondent argued at the hearing that this application is moot and that the Court should not hear the matter because there is no live controversy that will affect the rights of the parties (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 17). The FSOC Sergeant Position in Nanaimo, British Columbia, the position in question, has long been filled and the Applicant has since successfully applied for a different promotional opportunity to sergeant (non-FSOC). Should I quash the Decision and order reconsideration, the Respondent states that my order would have no practical effect.

[61] In response, the Applicant submitted that the application is not moot because FSOC positions present unique career opportunities that include the possibility of working with the Canadian Security Intelligence Service (CSIS). The Applicant stated that her career has languished because of the sexual harassment and discrimination she faced and that the Court should step in to assist her.

[62] My findings of prematurity and reasonableness address the material aspects of the Applicant's submissions. As these issues were argued at length and the question of mootness was the subject of only brief oral submissions, I will leave aside this additional question in the interests of efficiency.

[63] At the request of the Respondent, the style of cause in this application will be amended to name the Attorney General of Canada as the proper respondent in accordance with Rules 303(1)(a) and 303(2).

VIII. Costs

[64] The parties agreed that the successful party should be entitled to lump sum costs of \$2,500.00. I see no reason to depart from the parties' negotiated amount and will award costs to the Respondent in the agreed amount.

JUDGMENT IN T-1353-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The style of cause is amended to reflect the Attorney General of Canada as the Respondent.
3. Costs are awarded to the Respondent in the lump sum of \$2,500.00.

"Elizabeth Walker"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1353-20

STYLE OF CAUSE: JILL MARIE SWANN v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 12, 2023

JUDGMENT AND REASONS: WALKER J.

DATED: SEPTEMBER 26, 2023

APPEARANCES:

Sébastien Anderson FOR THE APPLICANT
Sean Bailey

Thomas Bean FOR THE RESPONDENT
Zahida Sharkat

SOLICITORS OF RECORD:

Labour Rights Law Office FOR THE APPLICANT
Barristers and Solicitors
Vancouver, British Columbia

Attorney General of Canada FOR THE RESPONDENT
Vancouver, British Columbia