Date: 20070907

Docket: T-424-06

Citation: 2007 FC 894

Ottawa, Ontario, September 7, 2007

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TANYA ESTWICK and
AMANDA QUINTILIO

Applicants

and

ATTORNEY GENERAL
OF CANADA

Respondents

REASONS FOR ORDER AND ORDER

I. Introduction

[1] Ms. Tanya Estwick and Ms. Amanda Quintilio (the "Applicants") seek judicial review of the decision made on February 9, 2006 by an Adjudicator (the "Adjudicator") acting pursuant to the *Public Service Staff Relations Act*, R.S.C. 1985 c. P-35, (the "PSSRA") as rep. by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 285 (the "*Public Service Modernization Act*"). In that decision, the Adjudicator dismissed a joint grievance (the "grievance"), filed by the Applicants on

May 8, 2003 on the grounds that the Applicants, were not employees pursuant to the *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the "PSEA"), as rep. by the *Public Service Modernization Act*, s. 284, and that he consequently lacked jurisdiction to hear the matter.

II. Facts

[2] The facts in this proceeding are not in dispute and the parties presented an agreed statement of facts to the Adjudicator.

[3] In December 2000, the Correctional Services of Canada (the "CSC") published an advertisement in the *Grande Cache Mountaineer* newspaper concerning an employment opportunity at the Grande Cache Institution (the "GCI" or "Institution") for two individuals with university degrees, to work in sex offender programming. The Applicants applied for these positions and were interviewed at the GCI by a three-member panel of GCI employees. Both Applicants held university degrees, as required by the advertisement. The Applicants were hired by the CSC, effective January 1, 2001. Their contracts were identical and indicated that they were hired as "contractors". The contracts specifically provided that it was the responsibility of the Applicants to ensure that an employer/employee relationship did not develop during the life of the contract.

[4] The Applicants began working for the CGI on January 1, 2001 as facilitators of a CSC program designed to treat and rehabilitate convicted sex offenders. Mr. Ford Cranwell, the GCI Chief of Psychology, was their supervisor. Upon expiry of their three-month contract on March 31,

2001, Mr. Cranwell had instructed the Applicants to continue working until a new contract was drafted. In July 2001, the GCI presented new one-year contracts to the Applicants; these contracts essentially contained the same terms as the previous contract. The Applicants signed the new contracts with an effective date of July 1, 2001.

[5] The Applicants continued to work after the expiry of these contracts and signed new written contracts on July 31, 2002. These contracts covered the one-year term from July 1, 2002 until June 30, 2003. The terms of these contracts were similar to those of the previous contracts.

[6] The contracts indicate that the Applicants were paid a set fee per hour for services rendered with monthly and yearly maximums. There was no provision for payment of benefits, sick leave, vacation or statutory holidays. The Applicants did not claim any of these benefits nor were union dues deducted from their pay. They submitted bi-monthly invoices for payment in which they were identified as “contractors”.

[7] The GCI informed the Applicants that their rate of pay was set by the CSC at the same level as the regular wages paid to program delivery officers who are indeterminate employees. The Applicants were not given the opportunity to negotiate their rate of remuneration.

[8] At all material times, the Warden of the GCI was Mr. Wendell Headrick (the "Warden"). He held delegated authority from the Public Service Commission (the "Commission") to make appointments pursuant to the PSEA.

[9] In their agreed statement of facts, the Applicants described the circumstances and conditions of their employment environment while working at the GCI. They were given a shared office with their names stencilled on a glass panel. They were provided with computers, mailboxes, assigned telephone extensions, office supplies and CSC e-mail addresses that received the same group e-mails as indeterminate employees. They participated in various training programs and courses while working at the GCI. They were primarily responsible for facilitating the sex offender rehabilitation program but were also periodically assigned clerical duties in the Psychology Department.

[10] The Applicants were asked to sign documents stating their commitments to observe and comply with certain policies. They were instructed by the supervisor to perform duties of the psychology clerks as of May 2002; these duties were added by amendment to their new contract under the heading "other duties as assigned by the supervising psychologist".

[11] The Applicants had set hours of work and were expected to notify their supervisor if they were going to be absent, as well as the reason for such absence. They were expected to attend departmental and GCI meetings that usually involved matters outside their responsibility. They were given access to nearly all parts of the building and were entrusted with various sensitive

information. They were closely directed and monitored in their work by their supervisor. They were given various institutional “perks” such as free lunch bags, pens and the like, and were invited to staff events.

[12] In October 2002, the GCI informed the Applicants that the Institution was facing a financial crisis and that all contracts were subject to review. Upon the advice of their supervisor, the Applicants offered to give up forty days of their contracts. This offer was accepted by the CGI. The supervisor wrote a memorandum to the Warden of the GCI during this period to justify retaining the Applicants.

[13] The 2002-2003 contract presented to the Applicants by the GCI differed somewhat from the previous contract. It provided that the Goods and Services Tax (the “GST”) should be applied to the Applicants’ invoices. Ms. Quintilo applied for and received a GST number from the Canada Revenue Agency (the “CRA”). Ms. Estwick applied for a GST number but was informed by the CRA that her application and contract would be investigated by the CRA.

[14] On February 4, 2003, a meeting took place between the Applicants, their supervisor, the Warden and Mr. Mel Sawatsky, a CRA auditor. Mr. Sawatsky informed the Applicants that they were federal government employees, not contractors. He gave them T4 slips for the 2001 and 2002 tax years and informed Ms. Quintilo that her GST number was cancelled.

[15] Soon afterwards, the GCI paid the CRA the outstanding amount owing for the 2001-2002 Canada Pension Plan and Employment Insurance premiums for the Applicants. However, the GCI did not deduct Canada Pension Plan (the "CPP") or Employment Insurance (the "EI") from the Applicants' paycheque.

[16] On March 24, 2003, Mr. Bill Wallis, Chief of Finance for the GCI, advised the Applicants that they were to continue paying themselves as contractors but to stop charging the GST. However, he also advised that they would have to file their income tax returns as employees. When Ms. Quintilio asked whether the CSC considered the Applicants to be contractors or employees, Mr. Wallis responded that they were neither contractors nor were they employees.

[17] On April 17, 2003, the Applicants received identical letters dated April 7, 2003 from Mr. Headrick. These letters stated that, although the CRA ruled that the Applicants were employees under a contract of service, this did not require that an appointment be made pursuant to the PSEA. The letter provided specifically as follows:

> In order to be considered an "employee" in the federal public service an individual must be appointed under the PSEA. In your case this has not and will not occur. We will continue paying amounts to you based on the contract and remit amounts to CCRA [now CRA] regarding CPP and EI on your behalf.

[18] The Applicants met with Mr. Headrick and Mr. Paul Bailey, the Acting Deputy Warden, on the same day, that is April 17, 2003. The Applicants advised that the CRA had told them that their contracts were null and void and that they were employees of the CSC.

[19] On April 23, 2003, Ms. Quintilio received a letter from the CSC stating that the Applicants had not been appointed under the PSEA, notwithstanding the determination made by the CRA. On April 30, 2003, the Applicants were advised by identical letters that their contracts would be terminated effective May 9, 2003.

[20] The Applicants filed a grievance on May 8, 2003. The GCI responded by letter dated the same time, stating that the grievance was refused on the basis that the Applicants were not employees under the PSEA.

[21] In response to a request by the Applicants for records of employment, the GCI provided letters that reported information similar to a record of employment. The Applicants applied for and received the EI benefits.

[22] The status of the Applicants was the subject of a judicial review in cause number T-946-03. By Reasons for Order and Order issued in *Estwick v. Canada (Treasury Board)*, [2004] 257 F.T.R. 84, this Court dismissed the application for judicial review on the grounds of prematurity because the Applicants had not exhausted other avenues for relief. As a result, the CSC and the union of

Solicitor General employees, a component of the bargaining agent, Public Service Alliance of Canada, agreed to refer the grievance to adjudication.

[23] The Public Service Staff Relations Board (the "Board") rejected the Applicants' grievance on the grounds that they were not employees within the meaning of section 92 of the PSSRA. The Adjudicator found that no formal offer of appointment was made by the Warden and the Warden was the only one with delegated staffing authority to make appointments to positions at the GCI. The Adjudicator noted that the Commission has the exclusive right to appoint persons at the CSC and that the CSC is part of the public service. Merit was used to select the Applicants but the Commission was not part of the selection process.

[24] The Adjudicator said that it is "widely recognized" that, prior to an appointment being made, the Commission must perform a priority check to ensure that there are no suitable candidates in its inventory.

[25] Further, the Adjudicator found that there was no evidence that the Commission was involved in the hiring of the Applicants, either before or after the hiring occurred. There was no evidence that the Applicants were appointed to positions created by the Treasury Board, that such positions had been created by either the CSC or Treasury Board, or that the Warden ever appointed the Applicants pursuant to the delegated authority under the PSEA. There was no evidence that the Applicants were issued a formal instrument of appointment.

[26] The Adjudicator found that the CRA ruling was relevant to deductions for the EI and CPP. It was not a ruling that the Applicants were public service employees. Finally, the Adjudicator found that the word “employee” can have “a different meaning in different legislative schemes”.

[27] This decision of the Adjudicator is the subject of the current application for judicial review.

III. Submissions

A. *Applicants’ Submissions*

[28] The Applicants first addressed the applicable standard of review. They submit that the applicable standard of review in this case is correctness. With respect to the four factors of the pragmatic and functional analysis, they submit that the decision of the Adjudicator is not protected by a privative clause. Further, they argue that the courts are more experienced in statutory interpretation than is an Adjudicator. Next, they argue that the purpose of the PSSRA is to provide protection to employees in the public service and the denial of rights under that legislation therefore “warrants closer scrutiny”.

[29] Finally, they submit that the present case raises a pure legal question of jurisdiction, in that the Adjudicator was required to determine the scope of his jurisdiction, as a threshold issue. The Applicants acknowledge that jurisdictional questions do not automatically attract the correctness standard of review but say that they will “usually attract close scrutiny”. In support of these

submissions, the Applicants rely upon the decisions in *Public Service Alliance of Canada (Attorney General) and Econosult Inc.*, [1991] 1 S.C.R. 614 ("*Econosult*") and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 ("*Pushpanathan*").

[30] With respect to the applicable law, the Applicants acknowledge that the normal common law test to determine the existence of an employer/employee relationship is not determinative in the context of the federal public service. Rather, they say it is necessary for the requirements of the PSEA, in particular the requirement to hire on the basis of merit pursuant to section 10(1) to be respected. In this regard, they rely on the decisions in *Econosult* and *Canada (Attorney General) v. Greaves*, [1982] 1 F.C. 806 (F.C.A.). They further submit that pursuant to sections 6 and 8 of the PSEA, the Commission can delegate its exclusive authority to make appointments to the Deputy Heads of departments and their officials.

[31] The Applicants rely on the decision in *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489 ("*Brault*") as defining the preliminary steps necessary for an appointment into the public service. The steps are as follows:

> a. A department must determine that a position needs to be created and defined, the corresponding functions and required qualifications;
> b. Financial approval must be obtained from the Treasury Board; and
> c. The necessary appointment is made by the appropriate authority in accordance with the selection process outlined in the PSEA.

[32] The Applicants argue that *Brault* and *Doré v. Canada*, [1987] 2 S.C.R. 503 ("*Doré*") are authorities for the proposition that the government need not intend to create a position and make an

appointment within the meaning of the PSEA. They argue that these positions suggest the lack of intention to make an appointment is not fatal to the attainment of the employee status under the PSEA, as long as there is "compliance with the crucial requirement of selection in accordance with the merit principle".

[33] According to the Applicants, this is a "purposive" approach that is consistent with early jurisprudence such as *Bambrough v. Canada (Public Service Commission Application Board)*, [1976] 2 F.C. 109 (C.A.). In that case, the Federal Court of Appeal recognized the "merit principle" as a dominant objective under the PSEA and the essential criterion by which exercise of powers under that act should be assessed.

[34] The Applicants further acknowledge that the PSEA requirements are not supplanted by factual circumstances or the common law employer/employee test. Nonetheless, they submit that the case law does not make common law principles irrelevant for the purposes of the PSEA. They submit that as long as the substantive requirements of the PSEA selection processes are met, any "technical irregularities" in hiring can be addressed based on the common law. In this regard, they again rely on the decision in *Econosult* and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. They argue that the "wisdom" of such an approach is demonstrated by the decision in *Public Service Alliance of Canada v. Treasury Board (Indian and Northern Affairs Canada)*, [2002] 4 C.N.L.R. 172 ("*Six Nations*"). According to the Applicants, the Board in that case considered common law employment factors in the context of the PSEA. The Applicants also

submit that the decision in *Canada (Attorney General) v. Marinos*, [2004] 4 F.C. 98 (F.C.A.) ("*Marinos*") favours application of the standard of correctness in this case.

[35] The Applicants argue that they were hired by the CSC through a process based on the merit principle. They base this argument upon the fact that the CSC published an advertisement listing the requested qualifications and screened applications. They say that the CSC also assembled a three-member panel to interview candidates and, at the end of this process, chose the Applicants as the top ranked participants. They add that the Adjudicator was satisfied that merit was used to select them.

[36] Further, the Applicants submit that the CSC adequately identified and defined employee positions to meet the *Brault* preliminary threshold by identifying the positions needed as sex offender facilitators at Grande Cache Institution, as well as preparing a description of the functions and requested qualifications for the positions and advertising this description in the local newspaper. According to the Applicants, the CSC clearly stated its conception of the position and the corresponding functions in the Statement of Work contained in the Applicants' contracts. The Applicants add that a CSC witness acknowledged that the functions were largely the same as the Correctional Programs Officer (WP-4) job description.

[37] The Applicants further note that the positions at the Grande Cache Institution were required on an ongoing basis, that the Adjudicator observed that the services provided by the Applicants were needed "to fulfill a requirement for an extended period of time", and that the department is required to provide sex offender programming to assist the rehabilitation of offenders under the

Corrections and Conditional Release Act, S.C. 1992, c. 20 (the "*Corrections and Conditional Release Act*").

[38] The Applicants argue that the Adjudicator erred in finding that no appointments took place on a number of grounds. They submit that the Adjudicator's overriding error was in focusing on whether the Respondent intended to make an appointment to the federal public service.

[39] In this regard, they submit that the Warden of the Grande Cache Institution possessed delegated hiring authority under the PSEA and that although he did not conduct interviews and choose candidates, nonetheless he made the appointments in question through his "knowledge and approval" of the competition process and selection of the Applicants. Relying on *Doré* at page 510, the Applicants submit that the Adjudicator erred in finding that the Warden could not have appointed them because he did not intend to do so.

[40] Next, the Applicants argue that the Adjudicator erred in law by relying on the absence of formal letters of offer or instruments of appointment. They submit that the PSEA does not require a formal letter of offer and argue that the instrument of appointment that is required under section 22 of the PSEA can be issued at any time after an appointment is made; see *Oriji v. Canada (Attorney General)*, [2003] 2 F.C. 423 (T.D.) ("*Oriji*").

[41] Third, the Applicants dispute the Adjudicator's suggestion that no appointment took place because no priority check was performed. They say that the Commission is not required under the

PSEA to perform a priority check prior to making an appointment to the public service where the appointment is made by a delegated authority. Further, the Applicants submit that neither *Brault*, *Doré*, nor *Six Nations* establish a requirement for the Commission's involvement in the appointment process where staffing authority has been delegated to a deputy head.

[42] Fourth, the Applicants dispute the Adjudicator's decision that both the CRA ruling and the surrounding factual circumstances were irrelevant. They acknowledge that, although the CRA ruling deems them "employees" for the purposes of the EI and CPP, neither the *Employment Insurance Act*, S.C.1996, c. 23 (the "*Employment Insurance Act*") nor the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the "*Canada Pension Plan*") refer to the PSEA. However, the Applicants note that the *Employment Insurance Act*, paragraph 5(1)(b), and the *Canada Pension Plan*, paragraph 6(1)(b), both state that insurable and pensionable employment, respectively, includes "employment" by "Her Majesty in right of Canada".

[43] They also acknowledge that it is only possible to be employed by the federal government through the application of the PSEA. They submit that neither the *Canada Pension Plan* nor the *Employment Insurance Act* explain any other process for determining the meaning of "employment" by the federal government. They argue that upon application of the principles of statutory interpretation, the *Employment Insurance Act*, *Canada Pension Plan*, and PSEA should be read together.

[44] The Applicants submit that it is “inconceivable” that Parliament intended that individuals could be employees for the purposes of the employment insurance and pension plan benefits, but not for the purposes of other employee benefits such as those defined in the PSEA and PSSRA.

[45] In the present case, the Applicants say that the Respondent declined to appeal the CRA ruling. They submit that that ruling is binding on the Treasury Board as employer. They argue that the Adjudicator’s decision puts them in the “absurd situation” of being required to make Employment Insurance and Canada Pension Plan contributions but without the right to pursue corollary benefits such as those in the PSSRA.

[46] Finally, the Applicants argue that the Adjudicator’s decision is inconsistent with the decision in *Six Nations*. The Applicants say that the Board in that case accepted that the teachers were employees under the PSSRA in spite of the absence of certain PSEA “formalities” and that the underlying facts are not sufficiently distinct to justify a different result in the present case.

B. *Respondent’s Submissions*

[47] The Respondent addresses the four elements of the pragmatic and functional analysis and focuses on the fourth factor, that is the nature of the question involved. The Respondent describes the question at issue here as a question of mixed fact and law, that is whether the Applicants were in fact employees of the federal public service pursuant to the applicable law. The Respondent makes a preliminary note that issues related to the federal public service “fall in the very heartland of an

Adjudicator's expertise". The Respondent submits that the appropriate standard of review is patent unreasonableness.

[48] According to the Respondent, the substantive issues raised in this application for judicial review are what level of formality is required for appointment under the PSEA and whether that level was met here.

[49] The Respondent argues that the PSSRA expressly restricts the category of persons considered employees for the purposes of the PSSRA. He cites the definitions of "employee" and "public service" set out in section 2 of the PSEA and notes that "public service" is given the same meaning under both the PSEA and PSSRA.

[50] The Respondents note that section 8 of the PSEA gives the Commission the exclusive right to make appointments to the federal public service and that no other legislation provides authority for such an appointment. He notes that Parliament's objective in granting this exclusive authority was to limit the creation of federal government employer/employee relationships to those cases where valid authority is exercised pursuant to the PSEA. In this regard, the Respondent submits that section 22 of the PSEA, which provides that appointments under the PSEA take effect upon issuance of an instrument of appointment, is consistent with the said parliamentary objective.

[51] The Respondent cites *R. v. Panagopoulos*, [1990] F.C.J. No. 234 (T.D.) ("*Panagopoulos*"), where the Court commented that candidates for appointments under the PSEA must normally

submit to the merit principle and be selected as the most competent candidate by a selection committee mandated by the Commission.

[52] The Respondent characterizes *Econosult* as the most authoritative decision and notes that the Supreme Court of Canada commented on the restrictive meaning of "employee" for the purposes of the PSEA.

[53] The Respondent argues that the Adjudicator was not bound by the *Six Nations* decision and says that, in any event, that decision does not support the Applicants' argument. The Respondent says that although in *Six Nations* the Adjudicator focused on this objective intention of the Applicant, the contract at issue there did not contain clauses stating that they were not being hired as employees of the Crown.

[54] In any event, the Respondent argues that the alleged error of law in *Six Nations* was clarified by this Court in *Farrell v. Canada*, [2002] 225 F.T.R. 239 ("*Farrell*") and by the Federal Court of Appeal in *Professional Association of Foreign Service Officers v. Canada (Attorney General)*, 2003 FCA 162 ("*Professional Association of Foreign Service Officers*"). In *Farrell*, the Respondent says that this Court indicated that an appointment under the PSEA will only occur after the authorized process is followed. The Court also placed weight on the absence of a written offer of employment. See paragraphs 9-10 and 16-17 of *Farrell*.

[55] In *Professional Association of Foreign Service Officers*, the Federal Court of Appeal ruled that the applicants were not federal public service employees until they accepted formal offers of employment, notwithstanding the fact that they were considered employees for the purposes of deductions for the income tax, CPP and EI.

[56] The Respondent argues that the Adjudicator's decision is correct and that the Applicants are not employees of the federal public service because there was no evidence before the Adjudicator that positions had been created by the Treasury Board to which the Applicants could be appointed, as required by *Econosult* and *Rostrust Investment Inc. v. CUPE*, [2005] P.S.S.R.B. 1.

[57] As well, the Respondent argues that the Applicants failed to establish that an appointment was made pursuant to delegated authority. The Respondent notes that the Applicants signed contracts indicating that they were contractors and specifically stating that they were not employees. They were paid an hourly rate based on submitted invoices that they signed as contractors. They did not receive the benefits enjoyed by employees covered by collective agreements and did not claim benefits pursuant to any provision in the Collective Agreement prior to the termination.

[58] Further, the Respondent submits that the Warden of the GCI, the only person who held the delegated staffing authority, testified before the Adjudicator that he never offered the Applicants a position at the GCI pursuant to the PSEA.

[59] The Respondent argues that there was no evidence that the PSEA external staffing process, as outlined by the evidence of Diane Bird, the Labour Relations Officer with the CSC, was followed in the present case. It says that Ms. Bird's testimony shows that the Commission is involved in public service appointments and further, that public service appointments involve sending a statement of qualifications and a draft job poster to the Commission, the issuance of a priority clearance number by the Commission and a letter of offer from the Commission.

[60] The Respondent also submitted a number of arguments in reply to the arguments of the Applicant, some of which are addressed below.

[61] The Respondent submits that the ruling by the CRA is not determinative of employment under the PSEA because the testimony of the auditor shows only that the CRA considered the applicants to be employees for the purposes of Employment Insurance and Canada Pension Plan deductions. The CRA made no findings with respect to the employment status for the purposes of the PSSRA.

[62] In response to the Applicants' submissions concerning the applicability of the decisions in *Brault* and *Doré,* the Respondent argues that these cases are distinguishable on their facts. In each of these cases, the Board dealt with acting appointments within the federal public service. In any event, the Respondent argues that the Court in *Econosult* rejected the proposition that the Board can deem individuals to be members of the federal public service in the disregard of statutory formalities.

[63] With respect to the Applicants' submissions that they suffered from an unfair process, the Respondent argues that this issue was dealt with in *Syndicat général du cinéma et de la télévision v. Canada (National Film Board)*, [1992] 141 N.R. 213. In that case, the Federal Court of Appeal said that there is nothing in the PSSRA or any other legislation governing the federal public service that requires an employer to organize its affairs so as to create hiring conditions that are most favourable to bringing its temporary employees within the PSSRA.

[64] Finally, the Respondent submits that the Applicants' arguments concerning the relevance of traditional common law employee/employer criteria was rejected in *Econosult* and *Canada (Attorney General) v. Gaboriault*, [1992] 3 F.C. (C.A.).

IV. Discussion and Disposition

[65] As mentioned above, the Applicants filed their grievance on May 3, 2003. The Adjudicator issued his decision on February 9, 2006. According to the transitional provisions of the *Public Service Modernization Act*, the former legislation applies to grievances that were not formally disposed of prior to the coming into force of certain provisions of the new statute. In this regard, I refer to the *Public Service Modernization Act*, Part V, section 61 as follows:

61. (1) Subject to subsection (5), every grievance presented in accordance with the former Act that was not finally dealt with before the day on which section 208 of the new Act	61. (1) Sous réserve du paragraphe (5), il est statué conformément à l'ancienne loi, dans sa version antérieure à la date d'entrée en vigueur de l'article 208 de la nouvelle loi,

comes into force is to be dealt with on and after that day in accordance with the provisions of the former Act, as they read immediately before that day.

(2) For the purposes of subsection (1), an adjudicator under the former Act may continue to hear, consider or decide any grievance referred to him or her before the day on which section 209 of the new Act comes into force, except that if the adjudicator was a member of the former Board, he or she may do so only if requested to do so by the Chairperson.

(3) The Chairperson has supervision over and direction of the work of any member of the former Board who continues to hear, consider or decide a grievance under subsection (2).

(4) If an adjudicator under the former Act refuses to continue to hear, consider or decide a grievance referred to in subsection (2), the Chairperson may, on any terms and conditions that the Chairperson may specify for the protection and preservation of the rights and interests of the parties, refer the grievance to a member of the new Board.

(5) If a grievance referred to in subsection (1) is referred to adjudication after the day on which section 209 of the new Act comes into force, the provisions of the new Act apply with respect to the appointment

sur les griefs présentés sous le régime de l'ancienne loi s'ils n'ont pas encore fait l'objet d'une décision définitive à cette date.

(2) Pour l'application du paragraphe (1), l'arbitre de grief choisi sous le régime de l'ancienne loi et saisi d'un grief avant l'entrée en vigueur de l'article 209 de la nouvelle loi, peut continuer l'instruction de celui-ci. Si l'arbitre est un membre de l'ancienne Commission, il ne peut continuer l'instruction du grief que si le président le lui demandé.

(3) Le membre de l'ancienne Commission qui continue l'instruction d'un grief au titre du paragraphe (2) agit sous l'autorité du président.

(4) En cas de refus d'un arbitre de grief de continuer l'instruction d'un grief au titre du paragraphe (2), le président peut renvoyer le grief à un membre de la nouvelle Commission selon les modalités et aux conditions qu'il fixe dans l'intérêt des parties.

(5) Si le grief visé au paragraphe (1) est renvoyé à l'arbitrage après la date d'entrée en vigueur de l'article 209 de la nouvelle loi, l'arbitre de grief qui en est saisi est choisi conformément à la nouvelle loi.

(6) Pour l'application des paragraphes (2) et (5), l'arbitre de grief jouit des pouvoirs dont disposait un arbitre de grief

of the adjudicator. (6) For the purposes of subsections (2) and (5), the adjudicator may exercise any of the powers an adjudicator under the former Act could have exercised under that Act.	sous le régime de l’ancienne loi.

[66] “Employee” is defined in section 2 of the PSEA as follows:

"employee" means a person employed in that part of the Public Service to which the Commission has the exclusive right and authority to appoint persons;	"fonctionnaire" Personne employée dans la fonction publique, même si elle a cessé d'y travailler par suite d'une grève ou par suite d'un licenciement contraire à la présente loi ou à une autre loi fédérale, mais à l'exclusion des personnes…

[67] “Public service” is defined in section 2 of the PSEA as follows:

"public service" has the same meaning as in the Public Service Staff Relations Act.	"fonction publique" Ensemble des postes qui sont compris dans les ministères ou autres secteurs de l'administration publique fédérale spécifiés à l'annexe I, ou qui en relèvent.

[68] “Employee” is defined in section 2 of the PSSRA as follows:

"employee" means a person employed in the Public Service,	"fonctionnaire" Personne employée dans la fonction

other than…	publique, même si elle a cessé d'y travailler par suite d'une grève ou par suite d'un licenciement contraire à la présente loi ou à une autre loi fédérale, mais à l'exclusion des personnes…

[69] “Public Service” is defined in section 2 of the PSSRA as follows:

"Public Service" means the several positions in or under any department or other portion of the public service of Canada specified in Schedule I;	"fonction publique" Ensemble des postes qui sont compris dans les ministères ou autres secteurs de l'administration publique fédérale spécifiés à l'annexe I, ou qui en relèvent.

[70] Section 6 of the PSEA provides as follows:

6. (1) The Commission may authorize a deputy head to exercise and perform, in such manner and subject to such terms and conditions as the Commission directs, any of the powers, functions and duties of the Commission under this Act, other than the powers, functions and duties of the Commission under sections 7.1, 21, 34, 34.4 and 34.5. (2) Where the Commission is of the opinion (a) that a person who has been	6. (1) La Commission peut autoriser un administrateur général à exercer, selon les modalités qu'elle fixe, tous pouvoirs et fonctions que lui attribue la présente loi, sauf en ce qui concerne ceux prévus aux articles 7.1, 21, 34, 34.4 et 34.5. (2) Par dérogation aux autres dispositions de la présente loi mais sous réserve du paragraphe (3), la Commission révoque ou empêche la nomination - externe ou interne

or is about to be appointed to or from within the Public Service pursuant to the authority granted by it under this section does not have the qualifications that are necessary to perform the duties of the position the person occupies or would occupy, or
(b) that the appointment of a person to or from within the Public Service pursuant to the authority granted by it under this section has been or would be in contravention of the terms and conditions under which the authority was granted,
the Commission, notwithstanding anything in this Act but subject to subsection (3), shall revoke the appointment or direct that the appointment not be made, as the case may be, and may thereupon appoint that person at a level that in the opinion of the Commission is commensurate with the qualifications of that person.
(3) An appointment to or from within the Public Service may be revoked by the Commission pursuant to subsection (2) only on the recommendation of a board established by the Commission to conduct an inquiry at which the employee and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.
(4) The Commission may, as it sees fit, revise or rescind and reinstate the authority granted

- d'une personne à un poste de la fonction publique lorsque, selon elle:
a) cette personne ne possède pas les qualités nécessaires pour s'acquitter des fonctions du poste auquel elle a été - ou est sur le point d'être - nommée en vertu d'une délégation de pouvoirs accordée au titre du présent article;
b) la nomination contrevient aux conditions fixées à la délégation de pouvoirs par laquelle elle a été autorisée.
La Commission peut ensuite nommer cette personne à un niveau qu'elle juge en rapport avec ses qualifications.
(3) Dans le cas d'une nomination - interne ou externe -, l'exercice par la Commission du pouvoir de révocation prévu au paragraphe (2) est subordonné à la recommandation d'un comité chargé par elle de faire une enquête au cours de laquelle le fonctionnaire et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.
(4) La Commission peut, à son appréciation, réviser ou annuler et renouveler toute délégation de pouvoirs accordée par elle en vertu du présent article.
(5) Sous réserve du paragraphe (6), un administrateur général peut autoriser des subordonnés ou toute autre personne à exercer l'un des pouvoirs et fonctions que lui confère la présente loi, y compris, mais

by it pursuant to this section.
(5) Subject to subsection (6), a deputy head may authorize one or more persons under the jurisdiction of the deputy head or any other person to exercise and perform any of the powers, functions or duties of the deputy head under this Act including, subject to the approval of the Commission and in accordance with the authority granted by it under this section, any of the powers, functions and duties that the Commission has authorized the deputy head to exercise and perform.
(6) In the absence of the deputy head, the person designated by the deputy head to act in his absence or, if no person has been so designated or there is no deputy head, the person designated by the person who under the Financial Administration Act is the appropriate Minister with respect to the department or other portion of the Public Service, or such other person as may be designated by the Governor in Council, has the powers, functions and duties of the deputy head.

avec l'approbation de la Commission et conformément à la délégation de pouvoirs accordée par celle-ci en vertu du présent article, l'un de ceux que la Commission l'a autorisé à exercer.
(6) En l'absence de l'administrateur général, c'est la personne désignée par celui-ci qui exerce ses pouvoirs et fonctions; à défaut, ou s'il n'y a pas d'administrateur général, c'est la personne désignée soit par le ministre compétent, selon la Loi sur la gestion des finances publiques, pour le ministère ou le secteur de la fonction publique en cause, soit par le gouverneur en conseil.

[71] Section 8 of the PSEA provides as follows:

8. Except as provided in this Act, the Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose appointment there is no authority in or under any other Act of Parliament.	8. Sauf disposition contraire de la présente loi, la Commission a compétence exclusive pour nommer à des postes de la fonction publique des personnes, en faisant partie ou non, dont la nomination n'est régie par aucune autre loi fédérale.

[72] Subsection 10(1) of the PSEA provides as follows:

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.	10. (1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.

[73] Section 22 of the PSEA provides as follows:

22. An appointment under this Act takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument.	22. Toute nomination effectuée en vertu de la présente loi prend effet à la date fixée dans l'acte de nomination, le cas échéant, indépendamment de la date de l'acte même.

[74] Section 92 of the PSSRA provides as follows:

92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award, (b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4), (i) disciplinary action resulting in suspension or a financial penalty, or (ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or (c) in the case of an employee not described in paragraph (b),	92. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, un fonctionnaire peut renvoyer à l'arbitrage tout grief portant sur: a) l'interprétation ou l'application, à son endroit, d'une disposition d'une convention collective ou d'une décision arbitrale; b) dans le cas d'un fonctionnaire d'un ministère ou secteur de l'administration publique fédérale spécifié à la partie I de l'annexe I ou désigné par décret pris au titre du paragraphe (4), soit une mesure disciplinaire entraînant la suspension ou une sanction pécuniaire, soit un licenciement ou une rétrogradation visé aux alinéas 11(2)f) ou g) de la Loi sur la gestion des finances publiques; c) dans les autres cas, une mesure disciplinaire entraînant

disciplinary action resulting in termination of employment, suspension or a financial penalty,
and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.
(2) Where a grievance that may be presented by an employee to adjudication is a grievance described in paragraph (1)(a), the employee is not entitled to refer the grievance to adjudication unless the bargaining agent for the bargaining unit, to which the collective agreement or arbitral award referred to in that paragraph applies, signifies in the prescribed manner its approval of the reference of the grievance to adjudication and its willingness to represent the employee in the adjudication proceedings.
(3) Nothing in subsection (1) shall be construed or applied as permitting the referral to adjudication of a grievance with respect to any termination of employment under the Public Service Employment Act.
(4) The Governor in Council may, by order, designate for the purposes of paragraph (1)(b) any portion of the public service of Canada specified in Part II of Schedule I.

le licenciement, la suspension ou une sanction pécuniaire.
(2) Pour pouvoir renvoyer à l'arbitrage un grief du type visé à l'alinéa (1)a), le fonctionnaire doit obtenir, dans les formes réglementaires, l'approbation de son agent négociateur et son acceptation de le représenter dans la procédure d'arbitrage.
(3) Le paragraphe (1) n'a pas pour effet de permettre le renvoi à l'arbitrage d'un grief portant sur le licenciement prévu sous le régime de la Loi sur l'emploi dans la fonction publique.
(4) Le gouverneur en conseil peut, par décret, désigner, pour l'application de l'alinéa (1)b), tout secteur de l'administration publique fédérale spécifié à la partie II de l'annexe I.

[75] As noted above, the Applicants and the Respondent take different views of the applicable standard of review. The Applicants argue that the decision of the Adjudicator should be reviewed on the standard of correctness, while the Respondent submits that the standard of patent unreasonableness should apply. According to the decision in *Pushpanathan*, a pragmatic and functional analysis is to be conducted, having regard to four factors, in deciding the appropriate standard of review in a given case. Those four factors are: the presence or absence of a privative clause, the expertise of the tribunal, the statutory purpose, and the nature of the question.

[76] There is no privative clause for the decision of an adjudicator. In *Econosult*, at pages 630-631, the Supreme Court of Canada said the following:

> The express definition of "employee", however, shows a clear intention by Parliament that it has decided the category of employee over which the Board is to have jurisdiction. It is restricted to persons employed in the Public Service and who are not covered by the *Canada Labour Code*. The Board's function by the very words of s. 33 is not to determine who is an employee but rather whether employees who come within the definition provided, are included in a particular bargaining unit.
>
> There is no provision in s. 33 or indeed in this statute that gives the Board exclusive jurisdiction to determine who is an employee on the basis of the Board's expertise.

The absence of a privative clause favours a highly deferential standard of review.

[77] Although the Board admittedly has expertise on matters that clearly fall within its jurisdiction, it cannot claim relative expertise in the statutory interpretation of the limits of its own

jurisdiction. As stated by the Federal Court of Appeal at paragraph 16 of *Marinos* "[t]he adjudicator can claim no expertise in the interpretation of the PSEA, nor can she claim any with regard to the PSSRA" where that statutory interpretation goes to defining the limits of its own jurisdiction.

[78] The purpose of the PSSRA is to facilitate effective collective bargaining in the public service. In my opinion, the purpose of the specific definition of "employee" in the PSSRA is to restrict the collective bargaining regime to the limited category of persons who are members of the public service. Again, I refer to the decision of the Supreme Court of Canada in *Econosult* at page 634 where the Court said as follows:

> Finally, what is the reason for the Board's existence in this scheme of labour relations? I agree with my colleague that it is the resolution of labour management disputes between the federal government and its employees. Those who are authorized to bring disputes before the Board are employees, employee organizations and employers as defined in the legislation which clearly confines the ambit of these disputes to the Public Service. No purpose is served by extending its jurisdiction to employees outside the Public Service who have recourse to other labour relations legislation, either federal or provincial.

This perspective again favours a highly deferential standard.

[79] Finally, I turn to the nature of the question. In one sense, the question posed is strictly a question of jurisdiction, that is whether the Adjudicator had the jurisdiction to hear and adjudicate the grievances submitted by the Applicants. A "pure" jurisdiction can be considered on the standard

of correctness. The observations of the Federal Court of Appeal in *Marinos* at paragraph 16 are relevant here.

> A reading of paragraph 2(g) of the PSSRA makes it clear that the words "on a casual basis" connote the application of legal standards which will have an effect on the jurisdiction of the adjudicator. The adjudicator is under an obligation to look outside her "home territory" and refer to the PSEA which governs Ms. Marinos contracts. The adjudicator can claim no expertise in the interpretation of the PSEA, nor can she claim any with regard to the PSSRA, since there is no provision in the PSSRA which gives her exclusive jurisdiction to determine who is employed "on a casual basis". The adjudicator can make no error of law at this point. She has to be correct.

[80] However, the key to the existence of jurisdiction in this case is whether the Applicants are "employees" for the purposes of the PSEA. In my opinion, this question is one of mixed fact and law where the evidence is to be assessed according to the legal requirements. I agree with the submissions of the Respondent that the applicable standard of review in this case, in relation to this question, should be patent unreasonableness. In this regard I refer to the decision of the Federal Court of Appeal in *Barry v. Canada (Treasury Board)* (1997), 221 N.R. 237 (F.C.A.) where the Court said the following at page 239:

> It is true that prior to the repeal of the privative clause, that court had held in **Canada (Attorney General) v. PSAC**, [1993] 1 S.C.R. 941 … that the appropriate standard of review for decisions of an adjudicator acting under the **Act** was whether the decision was "patently unreasonable". In our view, nothing has changed by virtue of the repeal of the privative clause.

[81] The central question arising in this application is the level of formality that is required in order for a public service appointment to occur pursuant to the PSEA and whether this level of formality was demonstrated here.

[82] In *Econosult*, the Supreme Court of Canada consistently emphasised the importance of observing the statutory formalities of public service appointments outlined in the PSEA. The Supreme Court approved, at page 634, the observation of the Federal Court of Appeal, as follows:

> In short, the situation is aptly summed up by Marceau J.A. speaking for the majority of the Court of Appeal when he states (at p. 643):
>
> > There is quite simply no place in this legal structure for a public servant (that is, an employee of Her Majesty, a member of the Public Service) without a position created by the Treasury Board and without an appointment made by the Public Service Commission.

[83] In *Panagopoulos* the Court emphasised that appointments under the PSEA must be governed by the merit principle and that the most competent candidate be declared by the selection committee mandated by the Commission and "thereafter be subject to the right of appeal so that third parties who are aggrieved by such an appointment may contest it".

[84] In the present case, the Applicants appear to be arguing that because their employment was accompanied by certain indicia of hiring by the federal government, that is posting of an advertisement stating qualifications, the assessment before a panel, the status of the Warden as a

person holding delegated authority to make an appointment to the public service, work together to support the inference that they were in fact appointed to the public service.

[85] In short, the Applicants are effectively arguing that they are precisely the type of a "*de facto* public servant" that the Supreme Court of Canada said could not exist. In *Econosult*, at page 633, the Supreme Court said the following:

> In the scheme of labour relations … there is no place for a species of *de facto* public servant who is neither fish nor fowl. The introduction of this special breed of public servant would cause a number of problems which leads to the conclusion that creation of this third category is not in keeping with the purpose of the legislation when viewed from the perspective of a pragmatic and functional approach.

[86] I agree with the submissions of the Respondent that there was no evidence that the positions for the Applicants were created and defined in accordance with the PSEA, the relevant jurisprudence, and the degree of formality expected for an appointment to the public service. Likewise, I agree with the Respondent's submissions that the Warden did not actually or effectively appoint the Applicants to the public service pursuant to his delegated staffing authority.

[87] I also note that there was no evidence that a formal instrument of appointment was issued here pursuant to section 22 of the PSEA. The issuing date of such an instrument was viewed as significant by the Federal Court of Appeal in the *Professional Association of Foreign Services*

Officers appeal, in that the applicants were not considered to be employees for the purposes of the PSEA until the formal instrument of appointment was issued.

[88] The Applicants attempt to discount the importance of instruments of appointment by relying on *Oriji*, a decision of this Court that preceded the *Professional Association of Foreign Services Officers* appeal. The *Oriji* decision, however, stands for the proposition that although they are relevant to the effective date of employment, instruments of appointment pursuant to section 22 of the PSEA need not be issued for an offer of employment by the federal government to be enforceable. The Applicants here are attempting to argue that they were employed by the federal government, not that they are trying to enforce an offer of employment. They cannot refer to any instrument indicating the date on which their alleged employment in the public service became effective.

[89] The Applicants' arguments run contrary to Parliament's intention to restrict the public service to a very particular category of specifically appointed persons. The jurisprudence to date respects this intention, as indicated in *Farrell* at paragraphs 9-10:

> It is well settled that an individual cannot become an employee of Her Majesty in Right of Canada without a specific appointment made in accord with procedures established in accord with these statutes. In this case, since the Director of CSIS is expressly authorized by Parliament to make appointments to CSIS, employees in the public service employed by CSIS must be appointed by the process authorized by the Director.
>
> The principle that an appointment to employment in the public service is required to be made in accord with statutory authority is of

> long standing. Employment as a public servant does not arise by other means it may not be inferred from the facts alleged, unless those include facts alleging that the authorized process has been followed. [Citations omitted.]

[90] In *Farrell*, the Court found that the Applicant was not an employee of the public service because no appointment had been made pursuant to the PSEA even though his work was increasingly extended, he was expected to complete an increasing variety of tasks for the same hourly rate without benefits or overtime pay and he had office space, equipment and an assigned telephone line.

[91] I accept the Respondent's position concerning the relevance to the present case of the decision in *Six Nations*. In the first place, it is not binding on this Court, since it is a decision of a board. In any event, the prevailing jurisprudence runs counter to the decision in that case.

[92] I also agree with the Respondent's submissions concerning the relevance of the CRA's ruling to the status of the Applicants. This ruling is not, and does not purport to be, determinative of the employment status under the PSEA. The remission of premiums under the Employment Insurance and Canada Pension Plan schemes apply generally to all employees, whether public or private, and the ruling by the CRA does not replace the formal appointment process required by the PSEA.

[93] The decisions in *Brault* and *Doré* have been overtaken by the subsequent jurisprudence as represented by the decision of the Supreme Court of Canada in *Econosult*.

[94] In conclusion, I am satisfied that the Adjudicator's determination with respect to the status of the Applicants, as not being members of the public service, is not patently unreasonable. Further, I am satisfied that he correctly decided that he lacked jurisdiction to adjudicate the Applicants' grievance.

[95] This application for judicial review is dismissed with costs to the Respondent.

ORDER

The application for judicial review is dismissed with costs to the Respondent.

"E. Heneghan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-424-06
STYLE OF CAUSE:	Tanya Estwick and Amanda Quintilio and Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 7, 2007
REASONS FOR ORDER AND ORDER:	HENEGHAN J.
DATED:	September 7, 2007

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