Date: 20071214

Docket: T-271-07

Citation: 2007 FC 1308

BETWEEN:

KHAJA VICARUDDIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of the decision of the Appeal Board of the Public Service Commission of Canada (the "Board"), in which it dismissed the applicant's appeal against the appointment of Alan Capstick to the position of Regional Director, Real Property, Accommodation and Portfolio Management in the Edmonton region of Public Works and Government Services Canada (the "position").

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[2] The position was advertised in fall 2005, with a closing date of December 16, 2005. Although the Selection Profile, an internal document, indicated that the language requirement was Bilingual Non-imperative CBC/CBC, the position was advertised as English Essential. Thirteen candidates applied, of whom six were interviewed in February 2006. Of the six interviewees, only one, Mr. Capstick, passed the knowledge portion. The results of the interviews were released on May 19, 2006, and Mr. Capstick was sent a conditional letter of offer.

[3] The applicant launched his appeal with the Board on June 22, 2006, and made several allegations with regard to the selection process. Of those allegations, two are relevant to this application for judicial review. The applicant argued that the successful candidate had been appointed without being assessed for ability in French, contrary to the Selection Profile. Furthermore, the applicant argued that Mr. Capstick had received an unfair advantage, because he had received a number of acting appointments prior to his appointment to the position.

[4] In its response to the linguistic profile allegation, the respondent sought to introduce a Note to File which had been prepared after completion of the selection process, on May 3, 2006, and which indicated that an error in the Selection Profile with regard to the linguistic profile had been rectified. The applicant objected to the admissibility of this evidence because it was not disclosed before the hearing and there was no one available who could be cross-examined on it. The respondent also provided the testimony of Heather Peden, the Regional Director General of the Western Region, who stated that the position, which was under her authority, had always been English Essential.

[5] The Board held its hearing on October 26, 2006, and released its decision on January 2, 2007. The applicant filed his application for judicial review on February 9, 2007.

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[6] The Board dismissed the applicant's appeal in its entirety. With regard to the linguistic profile of the position, the Board made the following comments:

> . . . the responsible manager for the position, Ms. Peden, was present, examined and cross-examined throughly [sic] on the point of the English essential linguistic profile of the position. This was reflected on both the Statement of Qualifications and the competition poster. Ms. Peden credibly and forthrightly presented her evidence that the position was English essential. She bore no responsibility for drafting the internal document of the Public Service Commission which has now been corrected. The document is informal in appearance and bears no date or signature. In any event, the internal document was not communicated to the candidates, none of whom could have been influenced by it. I find, therefore, that the assessment of candidates was not tainted in the matter of language assessment. The position was assessed with the correct linguistic profile. The error occurred in the Public Service Commission's administrative documents. I take note of Ms. Preto's [counsel for the applicant] objection that no person was available at the time of the hearing to be examined on the note to file. However, given Ms. Chartrand's [counsel for the respondent] explanation of the origin of the note to file, I accept that it is a business record made by a person under a duty to make it and that it was made in a timely way. This tribunal regularly receives and accepts hearsay evidence and to the extent it is required, I accept this document as a further exception to the hearsay rule.

[7] On the issue of unfair advantage, the Board stated the following:

> . . . Mr. Capstick doubtless brought to this selection process whatever benefit he derived from the "luck or happenstance" that befell him when he received his past temporary assignments. I find nothing in the record before me to show that the selection tools were crafted

> expressly to address Mr. Capstick's experience and the appellant has not persuaded me that the knowledge and experience gained could not have been addressed by diligent preparation for this selection process. There has been no suggestion that preparatory study materials were unavailable or inadequate. The appellant's case for unfair advantage rests on what was termed as Mr. Capstick's "significant and exclusive access to" and participation in "the 'inner circle' of executives in the region" in the absence of documentation of formal selection processes. I do not find this line of reasoning persuasive. It has not been shown that the structure of the assessment was ill-suited to the position or that it was tailored to Mr. Capstick and his experience in his previous assignments. *Doré* [*v. Canada*, [1987] 2 S.C.R. 503 at 511], *Pearce* [88-21-PSC-2; upheld on application for judicial review to the Federal Court of Appeal *Attorney General of Canada v. Pearce*, [1989] 3 F.C. 272], and *Stelmaschuk* [1989 ABD [10-1], page 65 at 68] each acknowledge that temporary assignments are viable means of staffing in the public service. Mere acceptance of a temporary assignment and discharge of the duties of the position cannot disentitle an individual from later competing for that position or a similar one. It is my view that substantially more than the fact of receiving these assignments is required to ground the allegation of unfair advantage.

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[8] Section 21 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, allows for appeals of appointments and reads as follows:

21. (1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.	**21**. (1) Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

[9] These appeals are governed by the *Public Service Employment Regulations, 2000*, SOR/2000-80, the following provisions of which are relevant to this appeal:

25. (3) Subject to subsection (8) and (9), full disclosure shall be completed within 45 days after the date of the letter, referred to in paragraph 23(*b*), that acknowledges the receipt of the written document bringing the appeal.	**25**. (3) Sous réserve des paragraphes (8) et (9), la divulgation complète doit être réalisée dans les quarante-cinq jours suivant la date de l'accusé de réception du document écrit visé au paragraphe 21(1).
[…]	[…]
26. (1) An appellant shall be provided access, on request, to any information, or any document that contains information, that pertains to the appellant or to the successful candidate and that may be presented before the appeal board.	**26**. (1) L'appelant a accès sur demande à l'information, notamment tout document le concernant ou concernant le candidat reçu et qui est susceptible d'être communiqué au comité d'appel.

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[10] This matter raises the following issues:

(1) What is the appropriate standard of review of the Board's decision?

(2) Did the Board fail to carry out its duty of fairness when it accepted the Note to File as evidence?

(3) Did the Board commit a reviewable error when it concluded that Mr. Capstick had not received an unfair advantage in the selection process?

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Appropriate standard of review

[11] The parties agree that, based on the decision of the Federal Court of Appeal in *Davies v. Canada (Attorney General) et al.* (2005), 330 N.R. 283, the appropriate standard of review of the Board, as a result of a pragmatic and functional analysis of the Board's decision is: (1) correctness for questions of law; (2) reasonableness on questions relating to the selection process and other questions of mixed fact and law; and (3) patent unreasonableness on questions of fact.

[12] In the case at bar, the parties therefore agree that on the issue of the alleged breach of procedural fairness, the applicable standard of review is that of correctness, and on the issue of the "unfair advantage", it is patent unreasonableness, given that it involves a finding of fact by the Board.

Breach of procedural fairness

[13] The applicant argues that the Note to File correcting the internal administrative document concerning the position's linguistic requirements was inadmissible and, therefore, should not have been allowed into evidence. The applicant further alleges that, once the Note was admitted into evidence, he was denied procedural fairness because of the Board's refusal to allow him to cross-examine the author of the Note.

[14] With respect to the Note to File's admissibility, the decision to allow the Note into evidence is a discretionary one to which deference is owed (see, for example, *Chou v. Canada (Attorney General)*, 2006 FC 184, [2006] F.C.J. No. 229 (T.D.) (QL)). The Board's reasons indicate that the extent to which it relied on the Note was minimal, if at all. Specifically, the Board accepted the

evidence of Heather Peden, the responsible manager for the position, that the Note to File was an administrative document of the Public Service Commission for which she had no responsibility for drafting. Ms. Peden stated that the Note was not communicated to the candidates so none of them could have been influenced by it. The Board noted that Ms. Peden was examined and cross-examined thoroughly on the point of the English Essential linguistic profile of the position. As the representative of the department which has exclusive responsibility for establishing the necessary qualifications for a position, Ms. Peden was the appropriate person to testify to the position's linguistic requirements. The Board found that Ms. Peden credibly and forthrightly testified that the position was always English Essential. This was communicated to potential candidates through both the Statement of Qualifications and the competition poster. Finally, the fact that the internal administrative document concerning the position's linguistic requirements was eventually corrected within the Public Service Commission is of no relevance to the competition. In this whole context, I do not see any breach of fairness which warrants the intervention of this Court.

"Unfair advantage"

[15] The applicant submits that, due to his holding of a number of temporary appointments, including executive positions within the group the position was in, Mr. Capstick received an unfair advantage in the selection process. The respondent submits that the Board did not err in its determination that Mr. Capstick had not received an unfair advantage.

[16] Indeed, the purpose of the selection process is to ensure that appointments are made on the basis of the merit principle, which requires not only that the successful candidate be qualified for the job, but also that he or she be the most qualified candidate (*McAuliffe v. Canada (Attorney General)*

(1997), 128 F.T.R. 39). The merit principle can be violated if the successful candidate had an unfair advantage in the selection process. For example, the appointment of a candidate who has already occupied the position for some time can pose "a severe threat to the merit principle" (*Berger et al. v. Canada (Attorney General) et al.* (2004), 249 F.T.R. 93 at para. 39). In *Canada (Attorney General) v. Pearce*, *supra*, Justice Mahoney, for the Federal Court of Appeal, wrote at page 280 that the merit principle was not only offended by giving an assignment that was so lengthy that it amounted to an appointment: "It seems to me that other circumstances taken together with an assignment may equally offend the merit principle." Similarly, "[f]amiliarity with the actual duties of a position may provide the candidates in place with an unfair advantage with the risk that a selection process may not result in a selection according to merit" (*McAuliffe*, *supra*, at page 44).

[17] In this case, the applicant challenges the interview portion of the selection process, arguing that the way the knowledge questions were framed gave Mr. Capstick "a marked advantage resulting from his experience." The Board found that this was not the case, as there was nothing to demonstrate that diligent preparation could not address the knowledge and experience gained by Mr. Capstick, nor that "the structure of the assessment was ill-suited to the position or that it was tailored to Mr. Capstick and his experience in his previous assignments." In my opinion, based on the evidence, not only has the applicant failed to demonstrate that the Board's decision on this issue was patently unreasonable, but I find the Board's finding perfectly reasonable.

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[18] For all the above reasons, this application for judicial review is dismissed, with costs.

"Yvon Pinard"

Judge

Ottawa, Ontario
December 14, 2007

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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