Date: 20080417

Docket: T-270-07

Citation: 2008 FC 502

Ottawa, Ontario, April 17, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MAHER ZAYTOUN

Applicant

and

CANADIAN FOOD INSPECTION AGENGY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

THE APPLICATIONS

[1] The Court has been asked to review two decisions arising out of the staffing process of the Canadian Food Inspection Agency (Agency). The first application, brought by the Agency, relates to a decision made by an Independent Third Party Reviewer (Reviewer), dated October 6, 2006, (Reviewer's Decision) pursuant to the Agency's Staffing Recourse Policy (Policy). Dr. Maher Zaytoun also brings his own application for judicial review of a decision made by the Executive

Director (Director) for the Agency dated January 12, 2007 (Director's Decision), that dealt with the corrective measures taken by the Agency in response to the Reviewer's Decision.

[2] The Agency seeks an order setting aside the Reviewer's Decision or, in the alternative, an order referring the matter to a different Independent Third Party Reviewer for re-determination in accordance with directions from this Court. The Agency also requests costs.

[3] Dr. Zaytoun seeks an order dismissing the Agency's application for judicial review and an order quashing the Director's Decision that did not, in his opinion, implement the Reviewer's Decision.

BACKGROUND

General Framework

[4] Parliament has conferred on the Agency the exclusive right and authority to appoint any employees that it considers necessary for the proper conduct of its business.

[5] On November 1, 2005, the Agency implemented the Policy which sets-out the recourse available to employees affected by staffing decisions.

[6] The Policy provides that a complainant who wishes to pursue staffing recourse must present a written Statement of Complaint to a delegated manager. If the complaint is complete, it will proceed to Discussion of the Complaint. This stage of staffing recourse may involve a series of discussions between the complainant and a delegated manager.

[7] If a complainant is unsatisfied with the Discussion of the Complaint, s/he can request a review of the delegated manager's decision by that manager's Level 3 Manager. The grounds for a request for review are that the complainant does not consider the complaint to have been resolved, or that the delegated manager has failed to cooperate in the staffing recourse process.

[8] The staffing recourse process moves to the final level – Independent Third Party Review of the Complaint - if the complainant and the Level 3 manager are unable to resolve the complaint. The reviewer is chosen from an ITP roster or service provider, if one has been established, or, where no roster or service provider exists, by mutual agreement of the Level 3 Manager and the complainant.

[9] ITP review may take many forms, ranging from a simple paper review to a full hearing. The reviewer has discretion to determine the review procedure. The complainant may be assisted by a bargaining agent representative or another individual throughout the recourse process. The delegated manager and Level 3 Manager may be assisted by an HR Advisor and/or another individual throughout the recourse process.

[10] The reviewer must report his or her findings within 30 days after the complaint has been referred to ITP review.

[11] The reviewer's findings are deemed to be the final staffing recourse decision "except in cases where the Level 3 Manager considers the ITP findings to be based on errors of fact or omission." In such cases, the Level 3 Manager may make recommendations to the President of the Agency to review the findings. The President then reviews the reviewer's findings and presents the final staffing recourse decision to the complainant and the Level 3 Manager.

The staffing selection in this case

[12] Dr. Zaytoun is an employee of the Agency. He was an unsuccessful candidate in staffing process VM-01 AH 05-ICA-CC-IND-B117 (Staffing Process) to staff animal health positions at the VM-01 group and level.

[13] On January 11, 2006, he filed an amended complaint pursuant to the Agency's Policy in relation to the Staffing Process.

[14] Dr. Zaytoun and the Agency provided the Reviewer with an agreed statement of facts. The following facts are not disputed:

a) All candidates to the Staffing Process were required to attend an interview and to write an exam. The interviews and written exams were held over four days, from October 11, 2005 to October 14, 2005;

b) The selection board did not know if any candidate was related to another candidate;

c) All candidates were cautioned not to discuss the assessment with other candidates;

d) Dr. Nanhar and Dr. Sandhu are husband and wife and were candidates in the Staffing Process. They were assessed on different days. Both met the position's requirements and their names were placed on an eligibility list;

e) Dr. Zaytoun did not challenge the selection board's determination that Drs. Nanhar and Sandhu were qualified for the position, nor did he challenge its finding that he was not qualified;

f) There is no evidence that Dr. Nanhar (who was interviewed first) shared information about the assessment with Dr. Sandhu.

[15] Dr. Zaytoun alleged that the Staffing Process violated the Agency's staffing values of fairness and competency because two successful candidates, Dr. Nanhar and Dr. Sandhu, were married to each other and did not write the exam on the same day. Dr. Zaytoun alleged that Dr. Nanhar *could* have shared information about the exam with Dr. Sandhu and this created a perception of unfairness.

[16] Dr. Zaytoun and the Agency provided written representations to the Reviewer. On October 6, 2006, the Reviewer rendered the Reviewer's Decision in which he concluded that "[t]he decision

to conduct interviews and administer a written examination for related spouses on subsequent days tainted the hiring process and breached the Agency's values of fairness and competency." The Reviewer added that the Agency should have collected information about the marital status of the candidates for the purpose of scheduling interviews.

[17] On November 14, 2006, the Director wrote to Dr. Zaytoun to express reservations about implementing the Reviewer's Decision and announced his intention to seek further advice by asking for a legal opinion from the Agency's own lawyer.

[18] On January 12, 2007, the Director wrote to Dr. Zaytoun again. He explained that he considered the Reviewer to have erred in his interpretation of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, and the *Privacy Act*, R.S.C. 1985, c. P-21. In his letter, he purported to implement a corrective measure as follows:

> Accordingly, as corrective measures in response to this report I will ask the Associate Executive Director, with the support of the Area Human Resources Manager, to work with the Ontario Operations Management team and Human Resources to ensure that in future all candidates are clearly and routinely advised of their responsibility to maintain confidentiality during selection processes, as well as informed of the possible consequences should that confidentiality be breached. To go beyond this effort and collect personal information regarding candidate marital status would violate employee privacy and could lead to accusations of discriminatory behaviour on the part of the employer.

[19] The Agency was already routinely cautioning candidates about their responsibility to maintain confidentiality during selection processes, including the Staffing Process that formed the basis of Dr. Zaytoun's complaint.

DECISIONS UNDER REVIEW

Reviewer's Decision

[20] Before deciding the substantive issues of Dr. Zaytoun's complaint, the Reviewer considered the nature of the complaint and the scope of his powers to determine whether the complaint was one permitted by the Agency's Policy. Specifically, the Reviewer considered whether an unsuccessful candidate in a staffing exercise could challenge the Staffing Process despite not having suffered a disadvantage of any kind.

[21] The Reviewer considered the avenues of recourse available to Agency employees who wish to bring a complaint with respect to a staffing process or decision and noted that the Policy provides that "[a] CFIA employee who presents a Statement of Complaint with respect to a staffing process or decision may not file a grievance against the same staffing process or decision, in accordance with Section 208(5) of the *Public Service Labour Relations Act*."

[22] The Reviewer then found that the broad language of the Policy is not as restrictive as traditional grievance procedures because it covers both individual complaints and policy complaints. According to the Reviewer, the language of the policy makes it quite clear that

> the intent of the Staffing Recourse Policy is to oust the practice of limiting access to someone who has suffered a disadvantage in a staffing process…[T]he policy does not limit access to the recourse process to those candidates who have suffered some alleged harm as a result of the Agency's alleged violation of its statutory obligations and staffing policies and values.

Thus, despite the fact that Dr. Zaytoun was found to be unqualified for the position and not to have suffered a disadvantage as a result of the Staffing Process, the Reviewer held that the Policy permitted consideration of his complaint because he had an interest in determining whether the procedure followed by the Agency respected its statutory obligations, its Policy, and its staffing values. This conclusion, according to the Reviewer, is based on a plain and ordinary reading of the language of the Policy and is supported by the differences in the staffing dispute resolution regimes instituted, on the one hand, by the Agency's Policy and, on the other hand, by traditional grievance procedures.

[23] The Reviewer then turned his mind to the effect of the *Privacy Act* on the allegations of unfairness and the remedial suggestions put forward by Dr. Zaytoun. He agreed with the Agency that the disclosure of marital status would constitute a violation of the *Privacy Act*, since that information is not collected for any purpose consistent with its disclosure. However, he ultimately concluded that: "[t]he Agency should have collected the information…for the purpose of scheduling interviews and exams in a manner that would appear to be fair to all candidates, a purpose consistent with the requirements of the *Privacy Act* and therefore allowed."

[24] Finally, after recognizing that the purpose of the *Canadian Human Rights Act* is to ensure that people are not treated differently on the basis of irrelevant considerations, and after agreeing with the Agency that marital status is not a factor in determining candidates' competence or suitability for employment, the Reviewer held that marital status "may be very relevant information for scheduling purposes to ensure that parties are treated equally in a competition and that no

candidate is bestowed an unfair advantage." He went on to say that, because of the nature of the spousal relationship, special precautions should be taken when spouses are competing as individuals for the same position because "[t]he mutual love and affection at the heart of the relationship leads spouses to do things for each other that one would not expect friends and acquaintances to undertake."

[25] The Reviewer concluded as follows:

> The decision to conduct interviews and administer a written examination for related spouses on subsequent days tainted the hiring process and breached the Agency's values of fairness and competency. In order to conduct a hiring process that complied with its staffing values, the Agency should have addressed the issue of the marital status of the candidates.

If the Agency had done this, the Reviewer concluded, it would not have been in violation of any of the requirements of the *Canadian Human Rights Act*.

The Director's Decision

[26] In his capacity as Executive Director of the Agency, the Director wrote a letter to Dr. Zaytoun to inform him of the Agency's decision regarding the corrective measures the Agency intended to take in response to the Reviewer's Decision. This letter, dated January 12, 2007, forms the basis of the reasons for the Director's Decision.

[27] According to the Director, the Reviewer's recommendations would leave the Agency vulnerable to a complaint under the *Canadian Human Rights Act*. He thought that collecting information on the marital status of candidates and scheduling interviews accordingly would

differentiate adversely in relation to an employee with marital status, which is a prohibited ground of discrimination.

[28] The Director also found that the Reviewer erred in his application of the *Privacy Act*:

> …the ITP confuses the disclosure of information with the collection of information in his *Privacy Act* analysis. He states that the marital status information would not be disclosed to third parties…therefore, there would be no violation of the *Privacy Act*. However, what the *Privacy Act* prohibits is the mere collection of personal information by a government institution unless it falls within the following exception: Section 4: No personal information shall be collected by a government institution unless it relates directly to an operating program or activity of the institution.

[29] The Director elaborated further on what he regarded as the Agency's inability to collect personal information in light of the *Privacy Act*:

> Requesting the marital status of applicants does not directly relate to an operating program or to an activity of the CFIA. With respect to staffing, personal information is obtained for the purpose of determining an individual's competence and suitability for employment. A person's marital status is not related to these objectives of the staffing process. Similarly, there would be no basis to require all applicants in a competition to disclose information about their personal relationships with other candidates. If such a policy were created, it would require the selection board to disclose who applied for the competition, which would constitute the release of personal information prohibited by the *Privacy Act*.

[30] The Director concluded by explaining that, although he was responsible for determining the corrective measures in this case, he was also responsible for respecting employee rights generally and the Agency's obligations under all applicable legislation.

[31] In light of these reasons, the Director decided that the appropriate corrective measure would be "to ensure that in future all candidates are clearly and routinely advised of their responsibility to

maintain confidentiality during selection processes, as well as informed of the possible consequences should that confidentiality be breached."

ISSUES

[32] The issues raised in these applications are as follows:

a) The Agency's application for judicial review against the Reviewer's Decision raises the following issues:

(i) What is the appropriate standard of review for a decision of an Independent Third Party Reviewer?

(ii) Is an appearance of unfairness a breach of the Agency's staffing values?

(iii) Does the practice of examining on subsequent days spouses who are in the same competition have the appearance of being unfair?

b) Dr. Zaytoun's application for judicial review of the Director's Decision raises the following issues:

(i) Did the Agency refuse to take corrective action as a result of the Reviewer's Decision?

(ii) If so, was the Director's Decision consistent with the Agency's Policy?

RELEVANT LEGISLATION

[33] The enabling statute of the Agency is the *Canadian Food Inspection Agency Act*, S.C. 1997, c. 6 (Agency Act). The authority of the Agency to hire employees and set the terms of their employment is found in section 13 of the *Agency Act*:

13. (1) The President has the authority to appoint the employees of the Agency.	**13. (1)** Le président nomme les employés de l'Agence.
(2) The President may set the terms and conditions of employment for employees of the Agency and assign duties to them.	**(2)** Le président fixe les conditions d'emploi des employés de l'Agence et leur assigne leurs fonctions.
(3) The President may designate any person or class of persons as inspectors, analysts, graders, veterinary inspectors or other officers for the enforcement or administration of any Act or provision that the Agency enforces or administers by virtue of section 11, in respect of any matter referred to in the designation.	**(3)** Le président peut, aux fins qu'il précise, désigner, individuellement ou par catégorie, les inspecteurs — vétérinaires ou non — , analystes, classificateurs ou autres agents d'exécution pour l'application ou le contrôle d'application des lois ou dispositions dont l'Agence est chargée aux termes de l'article 11.

[34] Section 12 of the *Agency Act* provides that the Agency is a separate entity under the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2. Because of this separate status and the Agency's legislated power to appoint its employees, the provisions of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA) dealing with the appointment of persons to the federal public service do not apply to the Agency. The Agency created the Policy to establish a

complaints process for individuals dissatisfied with Agency staffing decisions. The Policy is made pursuant to the broad legislative authority to appoint employees, found in subsection 13(1) of the Agency Act.

[35] The following excerpts from the Policy are of particular importance and provide some useful background to the matter before the Court:

> *Policy*
>
> The CFIA's staffing processes and decisions will respect the CFIA's statutory obligations, staffing policies and staffing values.
>
> The CFIA encourages and supports informal means of resolving staffing-related concerns through open communication and discussion.
>
> Where informal means do not resolve staffing-related concerns, an individual who considers that a staffing process or decision to which this policy applies did not respect the CFIA's statutory obligations and/or staffing policies and/or staffing values, may pursue recourse in accordance with the process established by the CFIA.
>
> A CFIA employee who presents a Statement of Complaint with respect to a staffing process or decision may not file a grievance against the same staffing process or decision, in accordance with Section 208(5) of the *Public Service Labour Relations Act*.
>
> A CFIA employee who files a grievance against a staffing process or decision may not, at any time, present a Statement of Complaint under the Staffing Recourse Policy, with respect to the same staffing process or decision…
>
> […]
>
> 2.3 *Independent Third Party (ITP) Review of the Complaint*

The Level 3 Manager will obtain the services of an independent third party (ITP) to review the complaint. Where no ITP roster or service provider contract is in effect, the ITP will be chosen by mutual agreement of the Level 3 Manager and the complainant. The ITP review process will be in accordance with the CFIA Staffing Recourse Guidelines on "Independent Third Party Review".

The purpose of the ITP review is to determine if the staffing process or decision in question respected the CFIA's statutory obligations, staffing policies and staffing values. The review will not reassess individual(s) considered in a staffing process or decision, direct the use of a specific method of assessment nor direct corrective measures to be taken by the CFIA.

[…]

The ITP findings will be deemed to be the final staffing recourse decision except in cases where the Level 3 manager considers the ITP findings to be based on errors of fact or omission.

In such cases, the Level 3 Manager may, within 10 days of the presentation of the ITP findings, make recommendations to the President to review the ITP findings. The Level 3 manager will notify the complainant, in writing, within 10 days of the presentation of the ITP findings, that the ITP findings have been referred to the President for review. The President will review the ITP findings and present the final staffing recourse decision, in writing, tot eh complainant and the Level 3 manager.

Staffing Recourse Guidelines and Tools

Financial Management

[T]he CFIA will pay the expense of the complainant to present his/her case to Independent Third Party (ITP) review. At the ITP Review step (2.3), the ITP will determine the means by which the review will be conducted (e.g., document submission, teleconference, in-person interview, meetings with all parties present) to allow both parties to present their case and respond to the case presented by the other party. Consultations between the ITP and the manager with regards to the review and related costs should be

> undertaken as expenditures must be pre-approved by the Level 3 Manager.

STANDARD OF REVIEW

General

[36] Since the hearing of these motions, standard of review considerations have been significantly rationalized by the Supreme Court of Canada decision in *Dunsmuir v. New Brunswick* 2008 SCC 9 and counsel on both sides have provided the Court with able and extremely helpful briefs concerning the import and impact of *Dunsmuir* for the decisions before me.

[37] In light of *Dunsmuir*, in order to determine the appropriate level of deference that I should afford to each decision in this case, I must still conduct a standard of review analysis.

[38] First, I must determine whether the jurisprudence has already determined satisfactorily the degree of deference required for the particular category of question before me. If it does not, then I am required to conduct a contextual analysis to determine the appropriate standard.

[39] I do not think that the standard of review for the issues before me in this case had been satisfactory dealt with by the jurisprudence, and so I must proceed to a contextual analysis.

[40] In light of *Dunsmuir*, the relevant factors in a contextual analysis are:

a) The presence or absence of a privative clause

b) The purpose of the administrative body as determined by interpretation of the enabling legislation;

c) The nature of the question at issue; and

d) The expertise of the tribunal.

[41] *Dunsmuir* teaches that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (para. 47)

Issue 1: Was Dr. Zaytoun's complaint concerning an appearance of unfairness sufficient to give him standing to make a complaint under the Agency's Policy?

[42] The Agency says that this issue should be reviewed in accordance with a correctness standard. The legislation contains no privative clause and this Court has already determined that the purpose of the tribunal in this case is to "provide timely resolutions of a staffing complaint" and that the legislative intent of the enabling statute is to "grant the [Agency] control and autonomy in the manner in which it appoints its employees and deals with complaints in relation to such appointments." See *Forsch v. Canada (Canadian Food Inspection Agency)*, [2004] F.C.J. No. 619 at paras. 23 and 25.

[43] The Agency points out that the Reviewer in this case was called upon to interpret a core aspect of the CFIA's staffing policy and that, while he had expertise in labour law, his *curriculum vitae* demonstrates that he was not working on his "home turf" as regards this issue. In other words, the Reviewer was not interpreting his own statute, or even a policy familiar to him.

[44] The Agency also reminds the Court that Justice Mosley reviewed all of the applicable factors in *Forsch* and concluded that a question of law arising from the interpretation of a previous Agency staffing policy should be reviewed under a standard of correctness.

[45] In short, the Agency says that the Reviewer had no expertise interpreting this policy and chose an interpretation on this issue that is contrary to the Federal Court of Appeal's jurisprudence evolved in a similar context. Therefore, this issue should be reviewed on a standard of correctness.

[46] Dr. Zaytoun says that the appropriate standard of review for this issue is reasonableness, largely because the expertise of the Reviewer relative to the Court is the most important factor, and the Reviewer in this case had extensive expertise on the very issues before the Court.

[47] Dr. Zaytoun agrees that this issue raises a question of law, but he says that the interpretation of the Policy does not raise a question of general application and is "akin to an arbitrator interpreting employer policies in the context of a grievance hearing." As the Supreme Court of Canada pointed out in *Dunsmuir*, at paragraph 55, a question of law that is not of "central importance to the legal

system … and outside the … specialized area of expertise" of the decision maker may be compatible with a reasonableness standard of review.

[48] In this case, Dr. Zaytoun points out that this particular question, while important to the parties, does not rise to the level of being of central importance to the legal system; nor is it a question that was outside the Reviewer's expertise.

[49] My own conclusions of this issue, in light of *Dunsmuir* and the facts before me, are that the Court is being asked to review a legal question of standing under governing legislation and policy, and that although the Reviewer's *curriculum vitae* reveals him to be eminently qualified and experienced in the areas of labour law, administrative law, and labour arbitration, and having long experience as a Reviewer under the system and as an arbitrator, he cannot be said to have greater expertise than the Court in deciding this particular question under the Policy. Consequently, I think this question should be reviewed on a correctness standard.

Issue 2: Does the practice of examining on subsequent days spouses who are in the same competition have the appearance of being unfair?

[50] I think this is obviously a question of fact that, in accordance with *Dunsmuir*, should be reviewed on a reasonableness standard to determine whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. This requires

an analysis of the contextual factors at play in this case in order to determine where the decision should be placed in the "range of reasonableness" that is appropriate to this context.

[51] The Agency takes the position that the level of deference owed to the Reviewer on this issue is relatively low because he had no demonstrable expertise in sociology or psychology and merely drew inference on the effect of a marital relationship on the duty of loyalty owed to an employee, and such inferences had no evidentiary support.

[52] In addition, the Agency says that the Reviewer's findings on this issue did not involve issues of credibility or the weighing of evidence, which traditionally attract considerable respect from a reviewing court. The hearing was done completely in writing and the Court is well-placed to review the findings.

[53] I agree with the Agency on these points of deference.

Issue 3: Did the Agency refuse to take corrective action and was the Director's Decision consistent with the Policy?

[54] Once again, I think that in light of *Dunsmuir*, this question has to be reviewed against a reasonableness standard in order to determine whether the Director's Decision falls within a range of acceptable outcomes that are defensible in respect of the facts and the law.

[55] The Agency points out that the Director's Decision should be afforded a high level of deference because he is well-placed to make decisions that involve a consideration of broad staffing issues and that involve choosing corrective measures that have regard the Agency's operations.

[56] Once again, I agree with the Agency regarding the broad considerations before the Director and the need for the Court to take them into account.

REASONS

The Reviewer's Decision

Perception of Unfairness as a Ground for Standing

[57] The heart of the Reviewer's conclusions on this point is contained in the following words:

> The language of the policy itself seems to be quite clear to the effect that the intent of the Staffing Recourse Policy is to oust the practice of limiting access to someone who has suffered a disadvantage in a staffing process:
>
> > The purpose of the ITP review is to determine if, based on the complainant's allegations, the staffing process or decision in question respected the CFIA's statutory obligations, staffing policies and *staffing values*. (Tab 2, p. 1 of 2)
> > (Underlining mine.)
>
> This appears to be very clear language that provides that a complainant, as determined by those who have access to staffing recourse (Tab 2, page 3 of 14), can raise issues with regard to "the staffing process or decision in question." The words used are the

> "staffing process" and not the "assessment of the complainant." The words used only limit the scope of the complaint to the matter in question. There is no language in the Staffing Recourse Policy that would suggest that the complaint is to be limited to the harm allegedly suffered by her/him. On the contrary, based on the clear language of the Staffing Recourse Policy, I find that the policy does not limit access to the recourse process to those candidates who have suffered some alleged harm as a result of the Agency's alleged violation of its statutory obligations and staffing policies and values [footnote omitted]. To find otherwise, I would have (1) to find some justification for reading the language of the Staffing Recourse Policy in a more limited manner; (2) to identify a mechanism that would allow me to do that; and (3) to read down the plain meaning of the Staffing Recourse Policy. Absent some absurd, contradictory, illegal or unjust result on an ordinary reading of the Staffing Recourse Policy, that is an exercise in creative reading and writing in which I am unwilling to engage.
>
> Consequently, even though the complainant was found to be not qualified for the position, the complainant has an interest in determining whether the procedure followed by the Agency respected its statutory obligations, its staffing policy and its staffing value. I come to this conclusion on a plain and ordinary reading of the language in the Staffing Recourse Policy. This position is supported by the differences in the staffing dispute resolution regimes instituted on the one hand by the Staffing Recourse Policy and on the other hand by the traditional grievance procedure.

[58] The Agency seeks to challenge this conclusion by reference to a line of cases decided in relation to the *Public Service Employment Act* because, says the Agency, "the context and nature of the enquiry is the same." These cases are *Caldwell v. Canada (Public Service Commission)*, [1978] F.C.J. No. 918 (FCA); *Laplante v. Canada (Attorney General)*, [2003] F.C.J. No. 844. The Agency also seeks to distinguish *Charest v. Canada (Attorney General)*, [1973] F.C.J. No. 150 by arguing that, in that case, "there was conflicting evidence on the question of whether or not one of the candidates had in fact received information about the examination."

[59] While it may be that the Agency's staffing values, including competency and fairness are similar to the values and principles that guide the Public Service Commission, I cannot see that this undermines the Reviewer's approach in the present case which is based upon the plain and ordinary meaning of the language in the Agency's Policy that was before him. The Agency argues that just because the Policy refers to "staffing process" does not mean that a complaint is open to someone who has not suffered a disadvantage in a staffing process. I am not convinced by the Agency's arguments that *Public Service Employment Act* case law (the significance of which on this ground is not clear or without controversy) and possible parallels between the *Agency Act* and the *Public Service Employment Act* in terms of process and values are sufficient to import into the Agency's Policy a requirement that, where a complaint is directed at "staffing process" as opposed to "the decision in question," the complainant must demonstrate that he or she has suffered a disadvantage in order to bring the complaint. As the Reviewer says, the plain and ordinary reading of the wording suggest otherwise, and there would have to be a significant reading down, or a real justification, to import such a requirement that is just not offered by the Agency. There have to be reasons why the Agency has its own statute and staffing policy and does not, in this regard, fall under the *Public Service Employment Act*.

[60] Consequently, I believe the Reviewer cannot be said to have interpreted this legal issue incorrectly.

The Reviewer's Principal Finding

[61] The Agency says that, even if the complaint can be brought by Dr. Zaytoun, the Reviewer's finding that married persons are likely to cheat and disregard the caution that was given is made without any evidentiary basis and is based upon a stereotyped assumption that attributes to married persons a proclivity for dishonesty. The Agency says that the Reviewer's conclusions in this regard are based upon "the theory that a spouse is much more likely to choose his (*sic*) family's interests over his (*sic*) employer's."

[62] The nature of the inquiry that the Reviewer embarked upon was conjectural, i.e. he reasons that because spouses are perceived as having a relationship of mutual trust and confidence that "works on an openness, a sharing and a mutual reliance that touches all aspects, financial and emotional, of their personal lives," this means that "as spouses obtain work with the same employer, the personal and work worlds will overlap and conflicting confidences will pull the spouses in various directions."

[63] My review of the Reviewer's CV reveals little in the way of expertise that might invite deference on this particular question. The Reviewer is extremely accomplished and experienced in various areas, but if he has some particular experience with spousal relationships and their dynamics in the employment or administrative law context, this is not revealed. And the nature of his approach to this issue in his Decision suggests to me that he was not dealing with particular facts or evidence on this issue but was drawing upon his personal intuition as a person and a lawyer. It may

be that the Reviewer did have experience that was pertinent to the kind of problem he was dealing with here concerning spousal behaviour and perceptions of fairness but, if so, it is not revealed on the record. Hence, I do not think this particular aspect of the Reviewer's Decision can attract significant deference. This was a paper review upon an agreed statement of facts and the Reviewer had no particular relative advantage that comes from actual engagement with what took place or the individuals involved.

[64] It is important to categorize Dr. Zaytoun's complaint and the Reviewer's findings accurately before deciding whether the Reviewer's Decision can be said to fall within an acceptable range of reasonableness on this point.

[65] The Reviewer characterized the issue as follows:

> A husband and wife were examined on subsequent days. The Selection Board cautioned them, as were all other candidates, not to discuss the assessment with others. The complainant alleges that a simple caution was not enough and that the manner in which the selection process was conducted created the appearance of unfairness.

[66] He then went on to highlight various other aspects of the complaint:

> [T]he complainant is not asking for the disclosure of the marital status of the candidates but is asking the Agency to use that information in order to safeguard the integrity of the selection process by not scheduling spouses on different days.
>
> […]
>
> [Marital status] may be very relevant information for scheduling purposes to ensure that parties are treated equally in a competition and that no candidate is bestowed an unfair advantage.

[…]

I do not believe that it is necessary to refer to game theory to find a justification for conducting a competition in a manner that does not give an unfair advantage to spouses or does not appear to do so. In order to find such a justification, we must look to the nature of the spousal relationship itself and see what there is in it, if anything, that would lead us to take special precautions when spouses are competing as *individuals* for the same position. I take a spousal relation to be one grounded in mutual trust and confidence. In the area of property law, Canadian jurisprudence has developed the constructive trust in order to not defeat the expectations based on the love and affection of a partner [footnote omitted]. One not only expects that a spouse will not take advantage of another, one often sees one spouse place the interests and well-being of the other before her/his own. The mutual love and affection at the heart of the relationship leads spouses to do things for each other that one would not expect friends and acquaintances to undertake. The spousal relationship works on an openness, a sharing and a mutual reliance that touches all aspects, financial and emotional, of their personal lives. I grant that spouses may keep confidential, from their partners, matters that they have learnt through the course of their work. As long as the work and spousal worlds remain distinct and apart, there is little danger that the two worlds of confidence will come into conflict. However, as spouses obtain work with the same employer, the personal and work worlds will overlap and conflicting confidences will pull the spouses in various directions. It is to such a situation that the complainant alludes.

The Agency argues that its employees conduct themselves in a professional manner and that there is no evidence that the spouses breached the caution to not speak about the exams to other candidates. The complainant readily agrees that there is no evidence. Instead, the complainant argues that it creates an appearance of unfairness. Given the nature of the spousal relationship as one based on mutual trust and confidence, I agree that <u>testing each spouse on a different day creates the potential for abuse and the appearance of unfairness</u> (emphasis added). Short of a divorce, it may be quite difficult for successful spouses to convince their fellow employees that they did not share any information with regard to the competition, even if they did wholeheartedly respect the caution given by the selection board. The Agency is placing its employees in

> a very difficult situation, one that is not of the making of the employees but that is within the power of the Agency to correct.

[67] The Reviewer expresses a caution about Dr. Zaytoun's request that he apply *Charest* (a caution with which I agree because, in *Charest*, there was actual evidence of leaked information) and then he rejects Dr. Zaytoun's suggestion that he base his Decision upon "game theory."

[68] Having rejected or qualified these aspects of Dr. Zaytoun's suggestions as a basis for finding an appearance of unfairness, the Reviewer then launches into his own views on the "nature of the spousal relationship" which he says "is based on mutual trust and confidence" so that fairness problems may arise in the workplace:

> [A]s spouses obtain work with the same employer, the personal and work worlds will overlap and conflicting confidences will pull the spouses in various directions. It is to such a situation that the complaint alludes.

[69] The Reviewer does not really refer to any evidentiary basis for his conclusions about the nature of the spousal relationship and its impact upon "conflicting confidences" with an employer. What is more, his conclusions are extremely general. Dr. Zaytoun's complaint was specific to the competition he had participated in. According to the Reviewer, Dr. Zaytoun's complaint related to a husband and wife who were examined on different days for a particular posting in which the "simple caution" given to all candidates was not enough to prevent "the appearance of unfairness." The Reviewer's finding, on the other hand, is very general and to the effect that "[g]iven the nature of the spousal relationship…testing each spouse on a different day creates the potential for abuse and the appearance of unfairness."

[70] The heart of this aspect of the Reviewer's Decision is that the very nature of the spousal relationship (in general) creates conflicting loyalties and hence the "potential for abuse and the appearance of unfairness."

[71] It is also of significance that the Reviewer's concern is not focused upon Dr. Zaytoun in the present case but upon employees generally. Dr. Zaytoun, after all, suffered no personal disadvantage in the assessments that led him to raise his complaint and he conceded there was no actual evidence of unfairness:

> Short of a divorce, it may be quite difficult for successful spouses to convince their fellow employees that they did not share any information with regard to the competition, even if they did wholeheartedly respect the caution given by the selection board. The Agency is placing its employees in a very difficult situation, one that is not of the making of the employees but that is within the power of the Agency to correct.

[72] So this finding regarding the potential for abuse and an appearance of unfairness is not related to any actual unfairness on the facts before the Reviewer. In fact, no actual unfairness was even alleged.

[73] The Reviewer's findings were based upon his own personal views of the "nature of the spousal" relationship and the impact of that relationship upon employee loyalties and their sense of fairness, and the temptations that might arise in a general sense if spouses in the same competition are examined on subsequent days.

[74] In the end, the decision on this issue is little more than personal conjecture that a caution to candidates not to share information is not sufficient to dispel an appearance of unfairness if spouses are tested on different days. There is no actual evidence to support the Reviewer's general conclusions concerning the nature of the spousal relationship and possible conflicts with employee obligations and the potential for abuse in examination settings. He thought that, even with a caution, allowing spouses to take the exam on different days created an appearance of unfairness.

[75] In his written arguments, Dr. Zaytoun says that the "Reviewer concluded that a reasonable person would apprehend that spouses would share information about a job competition with each other" and that "a bystander would reasonably apprehend that a spouse would share information about a job competition where sharing that information would benefit the other spouse." But this is not the basis of the decision. The Reviewer does not use the language of "reasonableness" and his analysis cannot be equated with reasonable bystander principles. He just says "Given the nature of the spousal relationship as one based on mutual trust and confidence, I agree that testing each spouse on a different day creates the potential for an abuse and the appearance of unfairness." This is not an objective assessment based upon a comprehensive set of facts and actual evidence that would have allowed the Reviewer to see what was really happening in any particular assessment competition. The Reviewer simply agrees with Dr. Zaytoun that, even though there was no evidence of unfairness, there was an appearance of unfairness; and the Reviewer grounds that conclusion in his own perceptions of the spousal relationship.

[76] As the Reviewer himself makes clear in his Decision, the Agency's Policy adopts a different approach to the resolution of staffing matters than traditional grievance procedure, and its methods and outcomes should not be viewed in terms of traditional grievance procedure.

[77] In particular, as the Reviewer makes very clear, the "scope of the ITP review is determined by the scope of the complaint." In this case, Dr. Zaytoun had suffered no personal detriment and his experience was limited to the particular assessment in which he had participated. But the complaint he raised had to do with a general perception of fairness and the record before the Reviewer really provided very little in the way of a factual basis upon which to review such a general issue. Hence, the Reviewer was thrown back, in effect, upon his own perceptions and hunches which are the real basis of his decision.

[78] In my view, the Reviewer's general conclusions about the nature of the spousal relationship, the perception of unfairness, and the appropriate remedial action are unreasonable given the narrow scope of the record before him. All he really had to base his decision on was Dr. Zaytoun's opinion that there was an appearance of unfairness and his own views of the dynamics of the spousal relationship in the employment context.

[79] In the end, I think I have to say that the Reviewer's general conclusions on this point cannot be regarded as falling within an acceptable range of reasonableness given the scope of the review that he conducted and the absence of any real evidence. In essence, the Reviewer's obligation was to "determine if the staffing process or decision in question respected the [Agency's] statutory

obligations, staffing policies and staffing values." In this case he had to determine if "allowing spouses to take the same examinations on different days respected the staffing values of fairness and competence." But as the Staffing Recourse Guidelines and Tools also make clear this has to be done "based on the complainants allegations." Dr. Zaytoun's allegations were that, in this particular context, he had not been treated unfairly and there was no evidence of impropriety or unfairness. This is why he had to fall back on the perceived unfairness of spouses taking examinations on the same day and, in that regard, Dr. Zaytoun did not really have much to offer by way of evidence or confirmation. This is why the Reviewer relied almost exclusively upon his own perceptions and intuitions. The Reviewer explained that it was, in fact, the Reviewer's role, as conceived by the Staffing Recourse Guidelines and Tools to "drive the process" because a Reviewer is not a traditional adjudicator:

> The Agency's Staffing Recourse Guidelines and Tools (Tab 2, p. 1-2 of 2) sets out a somewhat different role for the Independent Third Party. S/he examines the facts that form the basis of the complaint, reviews the information already presented in the staffing recourse process, solicits additional information from either of the parties, and consults "with Human Resources regarding the CFIA's statutory obligations, staffing policies and staffing values." The Independent Third Party may use a variety of means, "as deemed appropriate by the ITP," including "interviews, or meetings at which both parties are present." A much more active role is foreseen for the Independent Third Party to drive the process; s/he is given functions, such as interviewing, which a more traditional adjudicator would be loath to assume. In the ITP process, evidence is not taken under oath. Finally the remedial powers of the Independent Third Party are for all practical purposes non existent. Her/his function is limited to fact finding, providing "an analysis of how the staffing process or decision did or did not respect the CFIA's statutory obligations, staffing policies and staffing values." The Staffing Recourse Policy also states that the "…review will not…direct corrective measures to be taken by the CFIA." (Tab 2, p. 13 of 14)

[80] Although the Reviewer perceived such an active role for himself, and recounted the range of tools available, and acknowledged that "his function is limited to fact finding, providing an 'analysis of how the staffing process or decision did or did not respect the CFIA's statutory obligations, staffing policies and staffing values,'" in my view, there is really nothing in the way of fact finding that supports the principle conclusion that "Given the nature of the spousal relationship as one based on mutual trust and confidence, I agree that testing each spouse on a different day creates the potential for abuse and the appearance of unfairness." There are relationships other than the spousal relationship that might give rise to "the potential for abuse" if participants are tested on different days. But the issue is whether there is an "appearance of unfairness" if the Agency cautions all candidates not to share information. The Reviewer's conclusion is that there is something about the spousal relationship that renders a caution insufficient to remove an appearance of unfairness even when such a caution is given. But the only evidence for this conclusion was that Dr. Zaytoun thought there was an appearance of unfairness, and Dr. Zaytoun was an unsuccessful applicant in this particular competition. In my view, this was not a sufficient basis for such a conclusion. There was no evidence before the Reviewer that spouses do not act in accordance with the caution, and so pose a particular problem for administering a fair competition, or that anyone other than Dr. Zaytoun felt there was an appearance of unfairness in the way that this competition, or any similar competition, in which spouses participated was administered.

[81] On this basis then, I have to say that the Reviewer's Decision is unreasonable and cannot stand.

[82] In the event that I should be incorrect in this conclusion, I will also address the issues raised concerning the Director's Decision.

The Director's Decision

Adequate Alternative Remedy

[83] Dr. Zaytoun argues that the Agency had an adequate alternative remedy in this case that it should have used.

[84] The Policy sets out a review process for Reviewer decisions based upon "errors of fact or omission." Dr. Zaytoun says this means that the Level 3 Manager could have referred any factual issues to the President of the Agency within 10 days. The President would then have reviewed the Reviewer's findings in this regard and come to a decision. That decision could then, if necessary, have been subjected to judicial review.

[85] The Agency seeks to overcome this objection from Dr. Zaytoun by arguing that such an approach under the Policy would not be convenient in this case and would have bifurcated the issues. The Agency says that both of the issues that it has raised with regards to the Reviewer's Decision should be determined by this Court. This should be done to avoid multiplicity and for the sake of convenience.

[86] It is by no means clear to me that, had the factual issue gone before the President, the President's decision would have inevitably found its way to this Court, or why the use of the procedure for dealing with "errors of fact or omission" set out in the Policy would have resulted in inconvenience.

[87] Section 2.3 of the Policy provides as following on this issue:

> The ITP findings will be deemed to be the final staffing recourse decision except in cases where the Level 3 manager considers the ITP findings to be based on errors of fact or omission.
>
> In such cases, the Level 3 Manager may, within 10 days of the presentation of the ITP findings, make recommendations to the President to review the ITP findings. The Level 3 manager will notify the complainant, in writing, within 10 days of the presentation of the ITP findings, that the ITP findings have been referred to the President for review. The President will review the ITP findings and present the final staffing recourse decision, in writing, to the complainant and the Level 3 manager.

I am not convinced on the arguments presented that this is an "adequate alternative remedy" within the established meaning of that term. The "errors of fact or omission" could well be merely errors in the record that was before a reviewer and, in light of which, his or her decision would need to be reconsidered. In the present case, we are not looking at errors of fact in this sense. We are categorizing the Reviewer's characterization of the nature of the spousal relationship and its impact upon the perception of unfairness and, although we are labeling his conclusions in this regard as factual, we are doing so to determine the applicable standard of review.

[88] The leading case with respect to adequate alternative remedies is the Supreme Court of Canada's decision in *Harelkin v. University of Regina*, [1979] 2 S.C.R 561. There, the Supreme Court stated that the following factors should be considered when evaluating whether the appellant's right of appeal, in that case to the University's senate committee, constituted an adequate alternative remedy: the procedure on the appeal; the composition of the committee; the committee's powers and the manner in which they were to be exercised; the burden of a previous finding; expeditiousness; and costs.

[89] More recently, in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 at para. 37, the Supreme Court of Canada stated that, in determining whether to enter into judicial review or to require an applicant to exercise the statutory appeal procedure available to them, the court should consider a variety of factors including: (i) the convenience of the alternative remedy; (ii) the nature of the error; and, (iii) the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). The Supreme Court went on to state that the category of factors should not be closed. Instead, the Court should isolate and balance the factors relevant in the particular circumstances.

[90] Dr. Zaytoun argues that the alternative remedy available to the Agency is convenient and that the appellate body (the President of the Agency) had full remedial capacity to grant the relief sought by the Agency. In response, the Agency argues that the remedy under the Policy is not convenient and would have bifurcated the issue.

[91] In the present case, the Policy states that the Reviewer's findings are deemed to be final staffing recourse decisions except in cases where the Level 3 manager considers the ITP findings to be based on errors of fact or omission. Where such errors or omissions occur, the Policy provides that:

> the Level 3 Manager may, within 10 days of the presentation of the Reviewer's findings, refer the Reviewer's findings to the President for review. The President makes the final staffing recourse decision, which could then be subjected to judicial review.

[92] As stated by Justice Layden-Stevenson in *Jones v. Canada (Attorney General)*, 2007 FC 386 at paragraph 40, as a general rule, an application for judicial review will be premature where it is launched before other available avenues of recourse are exhausted because judicial review lies normally with respect to a final decision. However, in special circumstances, the Court will undertake a judicial review even where an adequate alternative remedy does exist. Whether special circumstances exist is a fact-specific analysis, and exceptions to the general rule are rare (*Jones* at para. 45).

[93] Although I have said that the Reviewer's conclusions regarding the nature of the spousal relationship, and its impact upon the perception of unfairness, is a question of fact, I have done this for the particular purpose of determining the applicable standard of review. I am not convinced on the arguments before me that section 2.3 of the Agency's Policy is referring to an error of fact in this sense. The Reviewer's Decision was made upon the basis of an agreed statement of facts. The Director disagreed with the Reviewer's remedial suggestions and his view of the applicable privacy and human rights legislation. Consequently, I am not persuaded that there were errors of fact or

omission on which to base an adequate alternative remedy or that I should not address the Agency's arguments on this issue on their merits.

Merits

[94] Dr. Zaytoun's complaint in this regard is that the Agency essentially did nothing in response to the Reviewer's Decision except confirm the *status quo*.

[95] The Agency says this is not the case because the only evidence before the Reviewer was that the selection board in Dr. Zaytoun's assessment had merely cautioned candidates not to discuss their assessments with anyone in the staffing process under review. As a result of the Reviewer's Decision, the Agency says it went further. It formalized the process by which all employees to all staffing competitions in Ontario are advised about the obligation to hold in confidence information about their assessments and are warned about the consequences of breaching this obligation.

[96] The fact is that there is just not enough evidence in this application for the Court to be able to ascertain what was occurring generally as regards cautions to candidates in assessments and whether the more formalized approach contained in the Director's Decision has meant that something substantively different is now occurring. Hence, I cannot say, as Dr. Zaytoun asks me to, that the Director's Decision is unreasonable because it merely reiterates the *status quo*.

[97] As regards the disagreement between the Reviewer and the Director regarding the implications of the *Privacy Act* and human rights issues, I believe that the Agency's analysis of the problem is sufficient to convince me that the Director acted reasonably in declining to implement the suggestions of the Reviewer as regards gathering personal information about spouses and/or other candidates. Without a full set of facts and a specific complaint it is difficult to be definitive about the legal impact of gathering any such information. But the Director took legal advice and made a reasonable decision based upon possible consequences.

[98] Hence, on the basis of the record before me, I cannot say that the Director's Decision contains a reviewable error in this regard, and it seems appropriate to me that any remedial measure would need to take account of the privacy and human rights concerns referred to by the Director. Indeed, Dr. Zaytoun's counsel appeared to acknowledge as much at the hearing of this matter by suggesting that there were ways to handle this matter practically in each case when scheduling is done for examinations so that those people who might cause a perceptual problem could write on the same day, and that it was really up to the Agency to devise methods of doing this that would result in a minimum intrusion on privacy.

[99] There may indeed be ways of doing this, but based upon the record and the jurisprudence before me in this case, I cannot say that the Director's Decision was unreasonable so that, even if I am wrong, and the Reviewer's Decision can stand, Dr. Zaytoun's application to have the Director's Decision set aside must fail.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The CFIA's application requesting the Court to set aside the Independent Third Person Review of Mr. Palland dated October 6, 2006 is granted. Mr. Palland's decision is set aside and the matter is referred back to a different Independent Third Party Reviewer for reconsideration in accordance with the Court's reasons;

2. The CFIA shall have the costs of its application;

3. Dr. Zaytoun's application for judicial review of the decision of Mr. W. G. Teeter rendered January 12, 2006 regarding corrective measures is dismissed;

4. The CFIA shall have costs of Dr. Zaytoun's application.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-270-07
STYLE OF CAUSE:	MAHER ZAYTOUN v. CANADIAN FOOD INSPECTION AGENCY
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 5, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	RUSSELL J.
DATED:	April 17, 2008

APPEARANCES:

Mr. Chris Rootham	FOR THE APPLICANT
Mr. Alexandre Kaufman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nelligan O'Brien Payne Ottawa, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT