Date: 20080708

Docket: T-1636-07

Citation: 2008 FC 841

Ottawa, Ontario, July 8, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

EDITH BARAGAR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Edith Baragar from a decision of the Investigations Branch of the Public Service Commission (Commission). Ms. Baragar initiated a complaint to the Commission concerning her failure to obtain an appointment as a Pre-Removal Risk Assessment (PRRA) Officer with the Department of Citizenship and Immigration following an external appointment process carried out under the *Public Service Employment Act* (Act), S.C. 2003 c. 22. Ms. Baragar alleged to the Commission that the process of selection was carried out in contravention of the requirement under section 30 of the Act for merit-based appointments. Her initial complaint, following a failed grievance claiming constructive dismissal, alleged several

irregularities in the selection process including favouritism, bias, discrimination, a failure to respect the stipulated educational requirements and a failure to apply properly the principle of merit.

[2] Upon receipt of Ms. Baragar's complaint, the Commission wrote to her and advised that she would be informed in writing of its decision upon completion of its review. Ms. Baragar continued to communicate in writing with the Commission and "reformulated" her concerns in a lengthy written submission. The Commission then wrote to Ms. Baragar to advise that it would "be reviewing all the information of this case to determine whether or not there are grounds to proceed with an investigation". Ms. Baragar followed this up with a further detailed written submission which included the following allegations:

> The first issue pertains to the matter of replacing one employee with another employee who is not "better" qualified but "differently" qualified. If originally the term employee was appointed based on merit, then, replacing them with another employee either from the same pool or a different pool without explanation, cause or an employment related related [sic] reason, renders the term appointment little more (actually even less than) than an extended probationary period and their release resembles a dismissal. It allows hiring managers to get rid of employees who are performing, who they don't like or who for other reasons, they may want to replace. Previously, such replacements were justified based on a different definition and application of merit. Term employees were regularly replaced by someone else because that other person was found to have been "better' qualified according to relative merit, the merit principle being applied at that time. With the new selection and appointment process based on individual merit, is there a basis for finding one employee <u>more</u> qualified or <u>more meritous</u> than another who is similarly qualified for the position? This is the question: Will managers be permitted to hire from a pool, release the candidate at the end of a short term and hire another candidate to replace them from the same pool without explanation? Don't forget that person hired briefly has no formal recourse. How is this different from failing to extend my term when I was previously appointed based on merit and found to be fully qualified in the most recent process?

Although previously case law has been definitive about the employment status of a person whose term has expired, the PSMA may require the adoption of a new understanding or interpretation for term employees not unlike the notion of tenancy rights in property law.

The second issue pertains to whether the decision to disregard one of the merit criteria in this competition was lawful. S. 30(2)(b) of the PSEA states that the commission must have regard for the (i) asset qualifications, (ii) operational requirements and (iii) organizational needs. It is understandable that the employer may use one or more of the merit criteria to make their decision but to be lawful, should there not be a reason for not having chosen based on one of the merit criteria? Often the reason if not articulated, is obvious. In my case, the asset qualifications were disregarded as was my past performance in the potision [sic]. There was no reason to disregard the asset qualifications. The asset qualifications were, I believe, set out as indicators of potential in the position, that is, they were qualifications that would contribute to performance in the capacity of decision making. The only logical reason to revert exclusively to performance in the decision making section of the examination and personal suitability scores is based on the assumption that as external candidates, there was no other proper way to assess potential. In my case that was an error. Not only did I possess asset criteria that others did not, I had been performing in an exemplary fashion in the position for a year. To use past performance in the position would not only have been reasonable, to have ignored both my performance in the position as an indicator of decision making competency and the fact that I possessed the asset criteria was patently unreasonable, a misapplication of the act and an abuse of authority.

It was also an error, in the review of my application, to use personal suitability as an indicator that I could contribute to a smooth transition as the organization expanded. Retaining me in the position would not have had any impact on the transition whatsoever. How could they ignore the fact that I was fully integrated into the position when looking for people who would cause the least amount of pain as the organization expanded? I am of the opinion that it is inappropriate to define the “organizational needs” as they did and patently unreasonable to use “indicators” of potential or performance when performance in the position can be reviewed as “proof” of performance.

The requirement to "have regard" to all the merit criteria implies that the decision maker conduct a qualitative assessment of the whole of the candidates' applications. I believe it is an error in law, in making appointments based on merit, to revert to ranking in disregard of other criteria and in so doing, focus on minute differences in performance (relative merit) without regard to more significant differences in the candidates' whole applications (individual merit) including acceptable or exemplary performance in the position. I also believe that the CIC policy manual suggests that ranking should only be used when all else is found to be equal.

The third issue pertains to process. After reflecting on the "organizational needs" (which seem to have been defined after the selection of the pool), I realized that the organizational needs defined were indistinguishable from the objectives of the selection process. That is, this job entails only one function: decision making, what was the objective of the selection process if not to identify competent decision makers? Then, to select for decision makers based on only one aspect of the exam, amounts to a revision of the process used to select good decision makers. Instead of the most qualified individuals being those who possessed competencies in a number of areas which would contribute to their performance as decision makers, the most qualified individuals became those who performed the best in the decision making section of the exam. It appears that they changed the process (of selecting good decision makers) midstream.

Since the objective of the selection process cannot be distinguished from the "needs" of the organization, the exercise resulted in a very simple re-weighting of the essential qualifications. Instead of choosing the best decision makers as they would have in a one step process (under the old act), they are choosing the best decision makers one way and then choosing the best decision makers another way in the second step.

It is also noteworthy that we were not advised as to the weight they would accord these key sections of the exam. Ultimately candidates were ranked based on 2 areas of the selection process: performance in the decision making section and scores for "personal suitability". Should we not have been advised as to the weight these two would be accorded?

I also find it unreasonable if "personal suitability" was so important to the organization, that they would deliberately choose not to use

> my reference from the organization and instead use a reference from outside of the organization.
>
> My opinion is that revising the process used to identify good decision makers, that is using the appointment process to adjust the findings in the selection process is an abuse of authority and failing to notify the candidates of the ultimate weight of the factors used to appoint is a breach of procedural fairness.
>
> By way of this letter I would also like to advise you that I am currently compiling case law supporting this request as well as formulating a few other issues I may yet want addressed. Of course I still want the issue of valid credentials investigated as well as other items brought up in my original request.
>
> Thank you for your attention to these matters.

[3] It is apparent from the record that Ms. Baragar was afforded an informal interview with her employer to discuss her concerns but she remained unsatisfied by the explanations provided. While Ms. Baragar's complaints were numerous, the root of her concern appears to relate to the fact that she was doing the job of a PRRA Officer in an acting capacity and believed that that fact should have given her some priority over external candidates.

[4] The Commission agreed to investigate two matters but it declined to address the issue of whether the decision to appoint other candidates was carried in conformity with the principle of merit. The Commission's letter of July 31, 2007 justified its decision as follows:

> […]
>
> According to the information provided, you indicated that you participated in the above process and that having qualified your name was placed in a pool. You believe that your asset qualifications were disregarded as was your past performance in that same position. You

> feel that you should have been advised as to the weight accorded to key sections of the exam. You indicated that appointments were made whereby the candidates did not meet the educational requirement of holding a degree from a recognized university.
>
> We have taken into account the information provided on the basis of the Commission's *Policy on Considerations for Investigations Conducted Under the New PSEA by the PSC Relating to External Appointments, Non-Delegated Internal Appointments and Appointments Involving Political Influence or Fraud*, which now guides the Investigations Branch when considering whether or not to investigate an appointment process.
>
> For your information, managers are responsible for selecting the assessment methods or tools that are most appropriate for the intended process. In the present instance, notwithstanding the tools utilized, you have successfully been included in the department's pool. Deputy Heads and their delegates may appoint from a pool of successful candidates based either on the organizational and future needs of the department and/or on some asset qualifications and not on the rank of the candidates. As a pool is usually created for a period of time, there is still a possibility that other appointments may be made at a future date from that pool. Therefore, the Investigations Branch will not conduct an investigation on this matter.

II. Issues

[5] (a) Did the Commission breach its duty of fairness to Ms. Baragar?

(b) Was the Commission's decision to investigate only part of Ms. Baragar's complaint unreasonable?

III. Analysis

[6] Ms. Baragar has raised two matters of procedural fairness which must be reviewed on a standard of correctness: see *Sketchley v. Canada (Attorney General)* 2005 FCA 404, [2006] 3

F.C.R. 392 at paras. 52-55 and *Denisov v. Canada (Minister of Citizenship and Immigration)* 2008 FC 550 at para. 10.

[7] Ms. Baragar argues that she was entitled to be consulted by the Commission before it decided not to investigate part of her complaint. She asserts that a process similar to that used by the Canadian Human Rights Commission ought to have been employed, allowing for an opportunity for consultation or reply in response to the presentation of the Commission's preliminary views or concerns. The fairness concerns expressed by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, she says, are applicable to her situation and require a more generous consultation than she received.

[8] I do not agree that the Commission breached any duty of fairness by proceeding as it did. Ms. Baragar was given ample opportunity to make her case and she took full advantage of that opportunity. The record discloses an ongoing dialogue between Ms. Baragar and the Commission spanning several weeks in which her allegations were set out in great detail. I do not agree that the Commission was required to do more. In particular, it was not required to share its concerns or set out its preliminary views with Ms. Baragar in advance of its decision.

[9] The content of the duty of procedural fairness is, according to the *Baker* decision, eminently variable. It must be assessed in the specific context of each case (see *Baker*, para. 21), having regard to the nature of the decision and the process involved in making it, the particular statutory scheme under which the decision is taken, the importance of the decision to the affected party, the

reasonable expectations of the proponent and the choice of procedures actually adopted by the decision-maker (including consideration of its procedural expertise and its institutional constraints).

[10] It should be remembered that in *Baker*, above, the Court concluded that there was no obligation to provide an oral hearing or an interview before the decision was made. The duty of fairness was satisfied in that case by the opportunity to make written submissions to the decision-maker (see para. 34).

[11] The case at bar is certainly not a case which requires a higher standard of procedural fairness than was observed in *Baker*, above. While Ms. Baragar's complaint was undoubtedly important to her, her interest in this process was limited to the opportunity to have her complaint investigated. This would not have included any expectation that the outcome would have been necessarily favourable to her interests. I would also point out that under section 66 of the Act the Commission is afforded a discretion to investigate. Even when an investigation is conducted, the Act does not afford any higher procedural entitlement than the right to make submissions to the Commission (see section 72 of the Act). It seems to me to be fairly obvious that a complainant's right of participation at the earlier stage – where the Commission is deciding whether to investigate a complaint - cannot be any greater than the rights which prevail during an investigation.

[12] Ms. Baragar also asserts that the Commission unfairly failed to consider evidence which was relevant to that part of her complaint that was rejected. In particular, she says that the Commission failed to examine the employer's "Justification of Appointments" document which

explained the basis upon which the PRRA Officer appointments were made. I have reviewed that document and I agree with counsel for the Respondent that its contents do not support Ms. Baragar's complaints. Indeed, that document provides fairly compelling evidence that the impugned appointments did not contravene the principle of merit but rather were made in conformity with the legislative mandate for merit-based hiring recognized by section 30 of the Act. In the result, even if the Commission had taken this document into account (in addition to the other evidence that was provided) it could not have affected the outcome.

[13] Ms. Baragar has also attacked the Commission's decision to decline to investigate her complaint in its entirety. This was a decision falling within the Commission's statutory discretion. For the purpose of identifying the appropriate standard of review, I would adopt the following passage from Justice Carolyn Layden-Stevenson's decision in *Vogan v. Canada (Attorney General),* 2006 FC 129, 296 F.T.R. 28, at para. 29:

> Section 7.1 of the PSEA provides that the Commission may conduct investigations and audits on any matter within its jurisdiction. It is not mandated to do so. The determination is one that involves the exercise of discretion. The question is how much deference is to be afforded to the decision-maker. In *Mercer v. Canada (Attorney General),* [2005] F.C.J. No. 2153, 2005 FC 1567, Mr. Justice de Montigny determined that the applicable standard of review regarding a PSC decision whether to investigate a complaint is that of reasonableness simpliciter. I agree with Justice de Montigny's analysis and his conclusion. […]

[14] As noted above in these reasons, the decision by the Commission to investigate a complaint relating to a Public Service appointment is discretionary. This is reflected in the use of the words "may investigate" in sections 66 and 67 of the Act. The significance of this type of

permissive language was discussed by Justice Yves de Montigny in the following passage from *Mercer v. Canada (Attorney General)*, 2005 FC 1567, 283 F.T.R. 266 at para. 14:

> It is true that the Commission [Human Rights Commission] is not obliged to investigate every complaint that it receives. The case law in this respect is quite clear. For example, in *Patel v. Canada (Public Service Commission)*, [1996] F.C.J. No. 127 (QL), Denault J. stated: "With respect to section 7.1, Parliament, by specifically using the word "may", has conferred upon the Commission the discretion to conduct investigations within its jurisdiction. There is no obligation for it to do so" (para. 8)….

[15] The Commission has developed a set of guidelines that apply to the exercise of its discretion to investigate which includes consideration of whether there is available recourse "through other avenues". It is clear from the Commission's decision letter that it took into consideration the fact that Ms. Baragar had been determined to be qualified for appointment to a PRRA Officer position and remained in the pool of other qualified candidates available for selection through to 2009. In my view this was a relevant factor for the Commission to consider, completely in keeping with its policy guidelines and consistent with a legitimate concern for its institutional constraints. This type of consideration was accepted as relevant by the Federal Court of Appeal in the following passage from *Sketchley v. Canada (Attorney General)*, above, at para. 119:

> Finally, the choice of procedure made by the administrative decision-maker must be considered, especially when -- as in this case -- the statute is silent on this issue. In *Baker*, L'Heureux-Dubé, J. observed that while this factor "is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints" (para. 27). The Commission receives many more complaints than it can, for both practical and budgetary reasons, refer to a tribunal for further inquiry. The Commission's procedural choices in this regard

> deserve respect, as it remains the master of its own procedure, so long as this procedure does not contravene the duty of fairness. This consideration thus points strongly towards a lesser degree of procedural protection.

Also see *International Woodworkers of America v. Consolidated-Bathurst Packaging*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524 at para. 69.

[16] What the Commission appears to have done in this case is essentially to have deferred consideration of part of Ms. Baragar's complaint until it can be determined whether she will later be appointed to a PRRA Officer position. So long as she remains in the pool of qualified candidates, that prospect remains open. One consequence of such a deferral is, of course, that if Ms. Baragar is again passed-over for reasons that could raise concerns about the *bona fides* of the process, she is free to bring a fresh request for an investigation.

[17] I have, therefore, concluded that the Commission's decision to decline to investigate part of Ms. Baragar's complaint was reasonable and should not be disturbed. This application for judicial review is, accordingly, dismissed with costs payable by Ms. Baragar to the Respondent in the amount of $750.00 inclusive of disbursements.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed with costs payable by Ms. Baragar to the Respondent in the amount of $750.00 inclusive of disbursements.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1636-07
STYLE OF CAUSE:	Baragar v. AGC
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	June 9, 2008
REASONS FOR JUDGMENT AND JUDGMENT BY:	Mr. Justice Barnes
DATED:	July 8, 2008

APPEARANCES:

Yavar Hameed 613-232-2688 X228	FOR THE APPLICANT
Gillian Patterson 416-952-8673	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hameed Farrokhzad St-Pierre Ottawa, ON	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT