Date: 20090409

Docket: T-397-08

Citation: 2009 FC 366

Ottawa, Ontario, April 9, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

PETER TATICEK

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The crux of this case can be summarized as follows: "A promise made is a debt unpaid and the … [law] has its own stern code" (with apologies to Robert Service).

The Public Service Commission of Canada (PSC) investigator (Investigator) of the Applicant's complaint promised to provide documents and a copy of a draft report upon which to comment. The promise was not fulfilled and the original complaint was dismissed.

II. BACKGROUND

[2] The Applicant, a federal public servant, took part in an external competition (a competition open to both public servants and the general public) for two positions at Industry Canada. In the course of the competition, participants were to self-assess their experience in the specific area called for in the competition, without knowing what level of experience had been set as a requirement for the position. That detail was contained in the Job Description, a document not available to the participants. As a result of the Applicant's assessment, he was "screened out" of the competition because he self-rated his experience as Level 3 and Level 4 was required.

[3] On December 5, 2006, the Applicant submitted a complaint requesting an investigation pursuant to s. 66 of the *Public Service Employment Act* (Act).

66. The Commission may investigate any external appointment process and, if it is satisfied that the appointment was not made or proposed to be made on the basis of merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment, the Commission may	**66.** La Commission peut mener une enquête sur tout processus de nomination externe; si elle est convaincue que la nomination ou la proposition de nomination n'a pas été fondée sur le mérite ou qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée ou dont la nomination est proposée, la Commission peut :
(*a*) revoke the appointment or not make the appointment, as the case may be; and	*a*) révoquer la nomination ou ne pas faire la nomination, selon le cas;

(*b*) take any corrective action that it considers appropriate.	*b*) prendre les mesures correctives qu'elle estime indiquées.

The core of his complaint is related to the experience level set as a requirement for the position.

[4] On October 3, 2007, the Investigator met with the Applicant and his representative (Pelletier). The meeting is crucial to this case because it is the nature and extent of the promises made at this meeting which ground this judicial review.

[5] The Applicant's evidence about the promises made at this meeting was that the Investigator promised to provide additional information, a draft copy of the investigator report, and an opportunity to make comments and submissions before the report would be finalized.

[6] Pelletier's evidence is to the same effect but is more precise. It was Pelletier's position that the Investigator agreed to obtain further information from Industry Canada and to provide it to the Applicant and to Pelletier. That information included the number of candidates, whether screening covered both positions, and whether candidates had been assessed on the "essential qualifications" only or on both the "essential qualifications and the asset qualifications". Pelletier's evidence was also that the Investigator would provide a copy of her preliminary report and an opportunity to comment on it. Failing any comments, the report would be final.

[7] Pelletier's affidavit evidence was supported with notes made at the time. While these notes are not identical to the recollection outlined in Pelletier's affidavit, they are consistent with her recollection. Neither Pelletier nor the Applicant were cross-examined on their affidavits.

[8] The Investigator's recollection, set out in her affidavit, was that at the October 3 meeting the Applicant and his representative had no comments on the department's documents.

[9] As to the promise to provide further documents, the Investigator acknowledges that the promise was made but admits that the department only provided her with some of the information (the number of candidates and the job description). She concluded that this information was not relevant and was not relied upon by her in preparing her report.

[10] The Investigator denies that she promised to provide the draft report and to afford an opportunity to make submissions. It was her recollection that she only said that she would afford the successful candidate an opportunity to comment on the preliminary report. She was cross-examined on her affidavit but nothing of any great import arose.

[11] Although the Investigator did not forward the "promised" documents or draft report to the Applicant, the Investigator did forward the facts portion of the draft report to the successful candidate.

[12] Having heard nothing further from the successful candidate, the Investigator issued her final report dismissing the Applicant's complaint.

[13] The final report, dated December 21, 2007, was issued on December 24, 2007 with the clear wording that it was a final report and that the Applicant had 30 days to bring a judicial review in the Federal Court.

[14] The Applicant received the report on December 28, 2007. Pelletier did not see her copy of the report until January 10, 2008. Thereafter there was communication with the Investigator in an effort to reconcile the promises made with the receipt of a final report and an effort to determine if the Investigator had truly intended to make the report final.

[15] Several voicemail messages were left with the Investigator starting on January 14, 2008. Finally, on February 19, 2008, the Investigator contacted Pelletier. Pelletier's notes indicate, and her affidavit attests, that the Investigator responded that she thought that she had sent along the information previously requested and further that having received no comments from the Applicant, she had proceeded to finalize her report. The Investigator agreed to check the file to determine if her recollection was correct.

[16] Finally, on February 28, 2008, the Investigator left a voicemail message that she had not sent any information to the Applicant or Pelletier and that there was nothing she could do as the file

was closed. The Applicant takes the position that this is the time at which the finality of the decision was communicated and the 30-day period for commencing a judicial review began on this date.

[17] The Applicant filed his judicial review on March 11, 2008.

[18] There are two principal issues in this matter:

a. Was an extension of time for commencing a judicial review required and if so, should it be granted?

b. Was there a breach of procedural fairness by failing to honour the commitments made by the Investigator (whatever they may have been)?

III. ANALYSIS

A. *Extension of Time*

[19] Both the extension of time (if any) and the merits of the judicial review are significantly affected by a finding as to the nature and extent of the promises made by the Investigator.

[20] The Applicant says that in view of these promises, particularly not to finalize the report until his comments on the draft report were received, the Applicant did not know that the decision was final until February 28, 2008 or alternatively had a reasonable basis for not commencing a judicial review within 30 days following December 28, 2007.

[21] The Respondent argues that the finality of the decision was clear from the words of the covering letter and therefore the delay is unjustified.

[22] Having set out the facts in some detail, it is also necessary to refer to the PSC's policy document "Framework for Mandated Investigations Relating to Appointment Processes" (Framework), and in particular the part which deals with the Investigator's role.

[23] The policy addresses two investigation methods. One, called a "fact finding meeting", where all the parties sit down together; and the other, a technique which goes beyond a meeting. The latter method was the one employed. The Framework states:

> The investigator will ensure that the principles of procedural fairness are followed. This will include, when a methodology other than fact-finding meeting is used, the distribution of the draft report (facts only) to the parties (for their review and comments) prior to the analysis and conclusion on the case.
>
> [Emphasis added]

[24] As between the two versions about the promises, I find that the Applicant's version is more credible and plausible. It is not just that two people on the Applicant's side say the same thing but, more importantly, their recollection is more consistent with contemporaneous notes, with post-decision actions, and with the policy above. The Investigator's recollection is tinged with imprecision and her post-decision actions are inconsistent with her denial that she would have made any such promises about sharing the draft report. To the extent that there may have been any

misunderstanding about the scope of the promises (there being agreement that some promises were made), the responsibility rests with the person who made the promise.

[25] Therefore, on the issue of the date of communication of the final decision, and most particularly its finality, on these facts it occurred on February 28, 2008 when the finality (a subject of reasonable confusion) was confirmed unequivocally. Therefore, the judicial review was filed in time.

[26] This Court has, and likely will continue, to prohibit efforts to extend the statutory deadline by seeking re-openings or reconsiderations and other similar techniques (see *Taylor v. Canada (Public Service Commission)*, 2003 FCT 566). None of those techniques were in play here.

[27] Even if there was a delay, the Applicant has met the critical aspects for an extension – there was a continuing intent to challenge the decision, there was a reasonable explanation for the delay, there was an arguable case on the merits, the delay was short, and no real prejudice occurred (see *Canada (Minister of Human Resources Development) v.* Hogervorst, 2007 FCA 41).

[28] For these reasons, there is no need for an extension of time but if it were required, it is granted. The Applicant's failure to bring a motion for an extension of time prior to the hearing could, in other circumstances, have been fatal.

B. *Procedural Fairness*

[29] As indicated above, I have found that the Investigator gave the Applicant assurances that she would forward additional documents. She did not do so, and indeed did not pursue obtaining some of them from Industry Canada. Further, the Investigator undertook to provide the Applicant with a draft report for comment, which was never done.

[30] Since as early as Lord Denning's decision in *R. v. Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association*, [1972] 2 Q.B. 299, promises of particular procedure to be followed have been held to be binding at least as a matter of natural justice/procedural fairness. The importance of the legitimate expectations raised by such promises was recognized in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, at page 819, in considering the five factors which anchor the duty of fairness:

> … (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.
>
> [Emphasis added]

[31] In this case, it was entirely unfair to promise one thing and do another, even if the Respondent thinks that the undelivered documents were irrelevant or of no consequence. That unfairness was compounded by the prejudice to the Applicant's ability to challenge the experience level (Level 4) required by the employer.

[32] The Respondent would have the Court interpret s. 72 of the Act as depriving a complainant of the right to the promised documents and promised procedure. Section 72, applicable because this was an external competition, reads:

72. Where an investigation is conducted under this Part in relation to a person's appointment or proposed appointment, that person and the deputy head in relation to the appointment — or their representatives — are entitled to make submissions to the Commission, Commissioner or other person, whichever is conducting the investigation.	**72.** La personne dont la nomination ou la proposition de nomination est en cause dans le cadre d'une enquête visée à la présente partie et l'administrateur général concerné, ou leurs représentants, ont le droit de présenter leurs observations à la Commission ou, si une personne a été chargée de l'enquête, à celle-ci.

[33] The Respondent argues that this section is designed to, and should be interpreted as, severely restricting procedural fairness to a complainant. It seeks to have this Court read out significant aspects of procedural fairness pursuant to this.

[34] It takes stronger words than these to sanction the breach of promises and the elimination of key aspects of procedural fairness, natural justice, and the right to be heard. Section 72 is designed for the protection of the successful candidate and the senior bureaucrat responsible for the decision in respect of all investigations; whether they come from a complaint by an unsuccessful candidate, by some other form of complaint, or even by a self initiated investigation of the PSC.

[35] The Respondent's position is also inconsistent with the PSC's Framework document (see paragraph 22 of these Reasons), unless one were to take an unnatural and restrictive interpretation of the term "parties". In this case, the Applicant had a similar interest in the complaint process to that of the successful candidate (a job opportunity), he had a specific and focused complaint (the level of experience required), and he had been a participant in the job competition. It is difficult to see how the Applicant is any less of a "party" than the successful candidate or the deputy head.

[36] The Respondent relies on s. 79(1) of the Act (which is applicable to internal competitions) to suggest that a complainant in the same position as the Applicant in an external competition has significantly less rights to procedural fairness, including the right of legitimate expectation, than a complainant in an internal competition.

79. (1) A person making a complaint under section 77, the person appointed or proposed for appointment, the deputy head and the Commission — or their representatives — are entitled to be heard by the Tribunal.	**79.** (1) Le plaignant visé à l'article 77, la personne qui a fait l'objet de la proposition de nomination ou qui a été nommée, la Commission et l'administrateur général, ou leurs représentants, ont le droit de se faire entendre par le Tribunal.

[37] In addition to noting that s. 79(1) relates to a Tribunal process and enshrines rights of procedural fairness which might otherwise be available under public law principles, I cannot see that by passing s. 79(1) Parliament could have intended to deprive a complainant of the right "to be heard" or of other procedural protections merely because a job competition was available to public servants as well as other members of Canadian society.

[38] The Respondent's interpretation would mean that, in respect of a flawed job competition, public servants in an internal competition would be entitled to a wide array of procedural protections, but members of the Canadian public involved in the same government's job competition would not enjoy any such procedural protections. Again, clearer language than presently exists would be required to displace the requirement for procedural fairness.

[39] I need not decide whether a breach of procedural fairness requires a showing of prejudice to be actionable (see *Re: Minister for Immigration and Multicultural Affairs; ex parte Lam* [2003] HCA 6) because in this case there was both breach and prejudice. However, I have doubts as to the soundness of the Respondent's submission on this point given our Supreme Court's reasoning in *Baker*, above.

IV. CONCLUSION

[40] For all of these reasons, this judicial review will be granted with costs. The Investigator's Report will be quashed, and the matter will be remitted to the Public Service Commission for investigation and report consistent with these Reasons by a different investigator.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted with costs, the Investigator's Report is quashed, and the matter is to be remitted to the Public Service Commission for investigation and report consistent with these Reasons by a different investigator.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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