Federal Court		Cour fédérale

Date: 20090608

Docket: T-1168-07

Citation: 2009 FC 574

Ottawa, Ontario, June 8, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

CHRIS HUGHES

Applicant

and

ATTORNEY GENERAL OF CANADA, ALLISON DONALD, CAROL GREEN, DEAN HENDERSON, HEATH LARIVIERE, MICHELLE MUKAHANANA, STACIE ROSENTRETER AND JENNIFER SOBERG

Respondents

REASONS FOR JUDGMENT

[1] Mr. Hughes, the applicant, was found not to be qualified for selection into a pre-qualified pool of candidates for appointment to Customs Inspector, PM-02 positions in Victoria, Sidney and Bedwell Harbour, British Columbia (Victoria pre-qualified pool). As a result, Mr. Hughes filed a complaint under the former *Public Service Employment Act*, R.S.C. 1985, c. P-33[1] (Act) with the Public Service Commission (Commission) concerning the Victoria pre-qualified pool. An

investigation was then conducted pursuant to section 7.1 of the Act. The investigator concluded that Mr. Hughes' complaint was well-founded for four reasons. They were that:

1. All of the appointments made from the Victoria pre-qualified pool in December of 2004 and March of 2005 did not respect the merit principle because there was no evidence that the appointees were assessed and met the qualifications established for the newly reclassified Customs Inspector positions.
2. Those appointments were not made in accordance with the department's delegation agreement with the Commission and were in violation of the *Public Service Employment Regulations, 2000,* SOR/2000-80 (Regulations) because the department had no authority to make appointments to the PM-03 group and level from a pre-qualified pool established at the PM-02 group and level.
3. Seven of the indeterminate seasonal appointments made through the Victoria pre-qualified pool were invalid because the appointees had been previously appointed through the same pre-qualified pool. This violated subsection 5(3) of the Regulations. Two of the term appointments made in December of 2004 were invalid for the same reason.
4. One successful candidate was improperly appointed to a term position in March of 2005. The appointment was improper because the candidate did not meet a geographic criteria which candidates in the selection process were required to meet in order to be eligible for appointment.

[2] Two allegations made by Mr. Hughes were, by agreement, not initially investigated by the investigator. This was because the need to investigate those allegations was dependent upon the outcome of the investigation into other allegations. The allegations not initially investigated were that:

- The marking of some of the candidates' competencies was inconsistent.
- The department had "blacklisted" Mr. Hughes.

[3] At the conclusion of the investigation, the investigator determined that given the findings of his investigation there were no longer grounds to investigate these two allegations. This was because Mr. Hughes had received a term appointment when the first round of appointments from the Victoria pre-qualified pool were made in 2003. The second and third round of appointments were invalid. Investigating the two allegations would not alter the fact that the second and third round of appointments were invalid.

[4] By virtue of section 7.5 of the Act, the Commission was given discretion based upon this investigation to take "such corrective action as the Commission considers appropriate." The Commission accepted the findings of the investigator and ordered corrective measures. The corrective measures taken by the Commission took into account its conclusion that for a number of reasons it was not possible to recreate the conditions which existed when the Victoria pre-qualified pool was originally established. The Commission ordered the following corrective measures be taken:

- that the results of the selection process be set aside;

- that [Canada Border Services Agency] reassess the seven persons who were appointed from the PQP and who are still employed with [Canada Border Services Agency] against the qualifications required for the reclassified position of Border Services Officer (PM-03);

- that [Canada Border Services Agency] provide the results of the reassessment of the seven persons to the Vice-President of the Investigations Branch, Public Service Commission, no later than thirty (30) days following the date of this Record of Decision;

- should it become necessary, that the appointment of the individuals who fail to be found qualified be revoked within sixty (60) days following the date of this Record of Decision.

[5] This is an application for judicial review of the Commission's decision.

Background Facts

[6] Selection process 2003-2092-PAC-3961-7003 was posted on October 11, 2003, and closed on October 30, 2003. Its purpose was to create a pre-qualified pool of candidates to staff Customs Inspector positions on an indeterminate and term basis in Victoria and Sidney, British Columbia, including Bedwell Harbour.

[7] At that time customs inspection fell within the mandate of the Canada Customs and Revenue Agency and the provisions of the Act did not apply to the staffing of positions in that agency. However, while the selection process was ongoing, the Canada Border Services Agency (CBSA) was established on December 12, 2003. The CBSA was established within the core Public Service, and all appointments within the CBSA became subject to the provisions of the Act.

[8] In the selection process, 23 candidates were found to be qualified, including Mr. Hughes. They were placed in the Victoria pre-qualified pool which was established on March 5, 2004.

[9] Mr. Hughes, along with a significant number of the other successful candidates, had qualified in an earlier selection process for Customs Inspectors in the Victoria area (2002 pre-qualified pool). That selection process was held, and the 2002 pre-qualified pool was established, while customs inspection was still within the mandate of the Canada Customs and Revenue Agency. The 2002 pre-qualified pool expired on March 31, 2004 after the CBSA was created.

[10] In March and April, 2004, thirteen candidates from the 2002 pre-qualified pool were offered term appointments for the summer of 2004. Eleven candidates accepted. During this same time period, eight candidates from the Victoria pre-qualified pool, including Mr. Hughes, were offered term employment for that summer. Mr. Hughes and four others accepted. Mr. Hughes' term of employment began on May 3, 2004 and ended on September 30, 2004.

[11] The department had intended to offer Mr. Hughes the term appointment through the 2002 Victoria pre-qualified pool. However, Mr. Hughes was employed by the Canada Revenue Agency at that time. That agency refused to allow him to be seconded so that he could be assigned work as a Customs Inspector. By the time the department learned that the Canada Revenue Agency would not agree to the secondment, the 2002 pre-qualified pool had expired.

Therefore, the department advised that Mr. Hughes was hired through the Victoria pre-qualified pool.

[12] Two other individuals who, like Mr. Hughes, were selected in both the 2002 pre-qualified pool and the Victoria pre-qualified pool were both offered summer employment through the Victoria pre-qualified pool. One accepted.

[13] Five other persons who were qualified in both pools were appointed from the 2002 pre-qualified pool.

[14] On October 8, 2004, the Customs Inspector positions were renamed Border Services Officers and were reclassified as PM-03 positions. This reclassification followed the transfer of the Citizenship and Immigration port of entry functions to the CBSA. A significant change was to add to the duties of Border Services Officers responsibility for conducting secondary immigration examinations and exercising delegated authority to accept or refuse individuals seeking entry to Canada.

[15] In December of 2004, eight candidates in the Victoria pre-qualified pool were offered term employment. As the positions had been reclassified to PM-03, the offers were made at that level. Five candidates accepted this offer.

[16] In March of 2005, three candidates from the Victoria pre-qualified pool were offered term employment at the PM-03 level. One accepted. Eleven candidates from this pool were offered seasonal indeterminate employment at the PM-03 level. Eight candidates accepted.

[17] No offer was extended to Mr. Hughes in either December of 2004, or March of 2005.

[18] The Victoria pre-qualified pool expired on March 31, 2005. Seven employees who received appointment from this pool remained in the employ of the CBSA at the PM-03 level at the time of the investigation (seven incumbents).

[19] Mr. Hughes filed his complaint with the Commission with respect to the Victoria pre-qualified pool on January 6, 2005, and an investigation resulted.

[20] The investigator rendered his decision on May 30, 2006. Mr. Hughes, the CBSA and the individual respondents were given the opportunity to provide submissions to the Commission about appropriate corrective measures.

[21] On June 13, 2007, the Commission issued its Record of Decision which accepted the findings of the investigator and ordered the corrective measures detailed above.

The Decision of the Commission

[22] The reasons of the Commission were relatively brief and were as follows:

> REASONS FOR RECORD OF DECISION 07-06-IB-42
>
> As a general rule, the objective of conciliation is to explore what corrective measures are required to rectify the deficiencies identified in a selection process which impeded the proper application of the merit principle. The examination of corrective measures is premised on the assumption that the nature of the defects may in fact be correctable. In this case, the Commission considers that the defects are not correctable.
>
> The investigation pursuant to section 7.1 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as amended (former *PSEA*), found that several deficiencies existed in the appointment strategy adopted by the department to fill PM-02, Customs Inspector positions. More specifically, the pre-qualified pool (PQP) was not properly used. Appointments for PM-03 positions were made from the PQP which was established for PM-02 positions, persons were appointed more than once from it and were also appointed to positions other than those for which the PQP was intended. The latter occurred because the position underwent a significant change in its functions and was reclassified. The defects were in the establishment and use of the PQP, not in the assessment tools or the assessment itself.
>
> The combination of the fatal deficiencies identified by the investigation along with the existing context of the new positions and new regulations, leads to the conclusion that it is not possible to re-create the conditions which existed when the PQP was originally conducted. It follows that the results of the selection process must be set aside.
>
> This leaves the matter of the seven individuals, namely Allison Donald, Carol Green, Dean Henderson, Heath Lariviere, Michelle Mukahanana, Stacie Rosentreter and Jennifer Soberg, who received appointments from that PQP and who remain employed with the Canada Border Services Agency (CBSA). Under subsection 6(2) of the former *PSEA*, when the Commission revokes a person's appointment, it may thereupon appoint that person at a level that in its opinion is commensurate with the qualifications of that person. To achieve a similar final outcome in

> this corrective measure, the Commission orders that the CBSA take concrete steps to reassess that these individuals are qualified for the positions they hold. The CBSA is to provide the results of the reassessment of the seven individuals to the Vice-President of the Investigations Branch no later than thirty (30) days following the date of this Record of Decision. Should it become necessary, a current successful candidate's appointment will be revoked if he or she fails to be found qualified by the CBSA.
>
> It should also be noted that if the seven individuals were revoked as part of this corrective measure, the deputy head could reassess and reappoint them pursuant to the current *Public Service Employment Act*, R.S.C. 2003, c. 22, ss. 12, 13, as amended, in which the standard is that the person to be appointed meets the essential qualifications.
>
> With respect to the complainant's own situation, there can be no question of making any retroactive appointment as the positions are now substantially different from those for which the PQP was originally established. In subsequent selection processes, he has failed to be found qualified for the position of PM-03, Border Services Officer.
>
> It should also be noted that the high turnover rate of the incumbents for these positions necessitate that the CBSA regularly conduct appointment processes to replenish its staff in several regions throughout Canada. Employment opportunities will continue to exist for individuals who wish to re-apply in the future.

The Issues

[23] In his original memorandum of fact and law, Mr. Hughes lists the issues to be:

1. Did the Commission err in law by allowing persons under illegal employment contracts to benefit and continue in the staffing process?

2. Did the Commission commit a reviewable error by allowing corrective measures to effectively give promotions to candidates that applied to a lower level job with different qualifications and a different classification?

3. Was the decision of the Commission in keeping with the merit principles, contract law and the Act and Regulations?

4. Did the Commission err in law by not allowing the applicant and the remaining unappointed successful candidates to participate in the reassessment through the transitional provisions of the *Public Service Modernization Act*, S.C. 2003, c. 22?

5. Did the Commission err in law in setting aside the entire selection process instead of only revoking the illegal contracts and addressing the appointment phase of the selection process?

6. Did the Commission delays in investigating, issuing corrective measures, and allowing the respondents to keep their jobs, while awaiting corrective measures, give the respondents an unfair advantage?

7. Should the Commission have ordered the CBSA to exhaust the Victoria pre-qualified pool retroactive to June 2004 to the Vancouver positions in light of the fact that the Vancouver investigation showed none of the candidates were assessed properly?

[24] In his supplemental memorandum of fact and law, Mr. Hughes lists the issues as:

1. Given the unreasonable delays and mistakes by the Commission from October 2004 through July 2005 and the lengthy delay issuing corrective measures from June 2006 to June 2007 should the corrective measures be struck down?

2. Should the Commission have ignored the investigator's recommendations about corrective measures?

3. Did the failure of the Commission to check the CBSA April 2005 competition for other candidates that may have been unsuccessful show bias or favouritism?

4. Was it bias or a merit violation on the part of certain Commission employees to cut out the applicant from corrective measures in February 2006 even though the applicant was included in corrective measures from September 2005 to January 2006?

5. Did the respondent misapply the case law cited, *McAuliffe*?

6. Did the Commission err by not considering the applicant's pass marks in the Victoria competitions from 2003 and 2004?

7. Did the incorrect statements by the conciliator that the applicant was not in the Victoria pre-qualified pool cause the respondent to issue erroneous corrective measures?

8. Are the corrective measures flawed in relation to one Border Services Officer due to the CBSA's material non-disclosure?

9. Do the actions of the Commission in May 2006 show favouritism when they changed the proposed corrective measures from revoking the seven illegal contracts to allowing them to keep their jobs as the Commission was worried about their benefits?

[25] I frame the issues as:

1. What is the applicable standard of review to be applied to the Commission's decision?

2. Should the corrective measures ordered by the Commission be set aside due to undue delay?

3. Were certain employees of the Commission biased against Mr. Hughes?

4. Were the corrective measures ordered by the Commission reasonable?

Standard of Review

[26] Contemporaneously with the release of these reasons I issued reasons for judgment in Court file T-1167-07 cited as 2009 FC 573 (companion reasons). This file also involved a challenge brought by Mr. Hughes to a decision of the Commission made under section 7.5 of the Act. There, an investigator appointed under section 7.1 of the Act had also found Mr. Hughes' complaint about the process used to select candidates into a pre-qualified pool for appointment to Customs Inspector, PM-02 positions in Vancouver to be well-founded.

[27] Commencing at paragraph 19 of the companion reasons I considered the standard of review to be applied to the issues. I concluded that the second and third issues set out above raised issues of natural justice and procedural fairness so that the standard of review analysis did not apply to those issues. I also concluded that the fourth issue set out above should be reviewed on the reasonableness standard.

[28] For the reasons given in the companion reasons, I reach the same conclusion here.

Application of the Standard of Review

Should the corrective measures ordered by the Commission be set aside due to undue delay?

[29] Mr. Hughes submits that the corrective measures should be struck down given "the unreasonable delays and mistakes by the [Commission] from January 2005 through July 2005 and the lengthy delay issuing corrective measures from June 2006 to June 2007."

[30] In support of this submission is Mr. Hughes' evidence that:

- He was assured that corrective measures take a maximum of three months to complete. He became emotionally and financially stressed due to the length of time the Commission took to implement corrective measures.

- In July of 2006, the Commission provided proposed corrective measures to the parties. After receiving submissions from Mr. Hughes and the CBSA, the

Commission provided revised proposed corrective measures on September 20, 2006. Thereafter, Mr. Hughes heard nothing for months from the Commission.

- He became very stressed and frustrated with the Commission's delays. He filed a service standard complaint with the President of the Commission.

- The documents Mr. Hughes received from the Commission show that it repeatedly delayed his file through its own mistakes. His file was unnecessarily delayed by nine months in the investigation stage and another nine to ten months in the corrective measures stage.

[31] At the outset, I note that Mr. Hughes complains of significant delay going back to his initial effort to file a complaint, and including delay in the investigative stage. This application for judicial review is concerned only with the Commission's decision of June 13, 2007 relating to corrective measures. Section 7.5 of the Act requires such a decision to be based upon an investigation. Here, the investigation was not concluded until May 30, 2006. Thus, the relevant period for the purpose of considering any delay is that from May 30, 2006 to June 13, 2007. The Commission could not take any step with respect to proposed corrective measures until it received the report of the investigator.

[32] I find the relevant dates and chronology to be as follows:

1. May 30, 2006: The investigator issued his report.

2. June 26, 2006: Mr. Hughes submitted his submissions with respect to corrective measures.

3. July 21, 2006: the CBSA submitted its submissions with respect to corrective measures.

4. July 31, 2006: Mr. Hughes provided his reply to the CBSA's submissions.

5. July 31, 2006: The CBSA provided its final submissions.

6. August 17, 2006: The conciliator prepared proposed corrective measures. Included was the proposal that Mr. Hughes and the seven incumbents participate in a selection process for the PM-03 Border Services Officer position. Assessment tools were to be developed to avoid any unfair advantage accruing to the incumbents.

7. September 20, 2006: The conciliator provided the proposed corrective measures to Mr. Hughes and the CBSA and sought comments thereon. The conciliator also asked the CBSA to notify individuals who might be affected by the proposed corrective measures.

8. October 2, 2006: The individual respondents, being the seven incumbents, requested a one-week extension of the deadline for their submissions.

9. October 2, 2006 and October 5, 2006: Mr. Hughes opposed the granting of the extension. He stated that an "extension would show favourtism *[sic]* towards the Department and the Department's candidates."

10. October 6, 2006: The extension was granted.

11. October 6, 2006: Mr. Hughes responded to the conciliator that both the decision to grant the extension and the proposed corrective measures showed bias. More substantial comments were provided on October 18, 2006.

12. December 22, 2006: The Acting Director of the Regional Operations Investigations Branch of the Commission (Acting Director) took carriage of the conciliation phase.

13. February 16, 2007: The Commission notified Mr. Hughes and the CBSA that it was considering different corrective measures from those it had earlier provided to the parties. The Commission provided an opportunity to comment on the new proposed corrective measures. The draft corrective measures set aside the selection process, required the CBSA to document the assessment of the seven incumbents against the qualifications required for the Border Services Officer PM-03 position and stated that if necessary appointments would be revoked if an incumbent was not found to be qualified. No corrective measures were proposed for Mr. Hughes.

14. March 16, 2007: The CBSA stated that it was satisfied with the proposed corrective action.

15. March 30, 2007: Mr. Hughes provided his lengthy response which strongly objected to the new proposed corrective measures. In his response, he advised that he would amend his pending Canadian Human Rights complaint to add the Commission as a

party and he was considering adding the Commission as a party to his pending civil suit against the CBSA.

16. May 30, 2007: A briefing note was prepared for the President of the Commission. The briefing note recommended that the Commission order corrective measures that were somewhat different from those that were ultimately adopted. The briefing note recommended that the appointments of the seven incumbents be revoked, but that the revocation be suspended to allow the CBSA to assess the qualifications of the incumbents.

17. June 13, 2007: The Commission issued its decision. In essence it required the seven incumbents to be reassessed. Their appointments would be revoked if an individual was not found to be qualified for the position.

[33] As a matter of law, principles of natural justice and the duty of fairness include the right to a fair hearing. Undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied at law. See: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paragraph 102.

[34] In the present case, the evidentiary portion of the process ended at the investigative stage. No issue arises that delay impaired Mr. Hughes' ability to present his case because witnesses had died or memories were lost. There is no issue of this type of unfairness arising from delay.

[35] There are, however, other types of prejudice than prejudice that impairs trial fairness. Unacceptable delay may amount to an abuse of process even where the fairness of the hearing has not been compromised. However, such cases are exceptional and few lengthy delays meet this threshold. The delay must be clearly unacceptable and have directly caused a significant prejudice in order to amount to an abuse of process. Put another way, there is no abuse of process by delay *per se*. The party relying upon the delay must demonstrate that the delay was "so oppressive as to taint the proceedings." See *Blencoe* at paragraphs 115 and 121.

[36] Any delay in this case does not rise to this exceptional threshold for reasons that include the following.

[37] First, the Commission was dealing with relatively complex circumstances. The CBSA had been re-organized during the selection process so as to bring its appointments under the provisions of the Act. By the time the Commission was considering corrective measures, the Act had been repealed. In October of 2004, the PM-02 positions had been reclassified on a national basis to PM-03 positions. The qualifications of the position changed with the reclassification. The Commission had concluded on those facts that it was not possible to re-create the conditions which existed when the Victoria pre-qualified pool was selected. The defects identified by the investigator could not be corrected. The complexity of the circumstances provides some explanation for the time taken by

the Commission, as does the number of opportunities afforded to the parties to comment on proposed corrective measures.

[38] Second, the investigator did not find any defect in the assessment tools or in the assessment of the candidates in the Victoria pre-qualified pool. Notwithstanding that Mr. Hughes was in that pool, he could not be appointed retroactively from that pool to a PM-03 Border Services Officer position. To do so would be to repeat one of the errors found by the investigator. Subsequently, Mr. Hughes was found not to be qualified for the Border Services Officer PM-03 position (an entry-level position). It is difficult in that circumstance to see how Mr. Hughes was prejudiced by the time taken by the Commission to reach its decision about corrective measures. On the basis of the investigator's report Mr. Hughes could have hoped, at best, that the Commission order that he be reassessed. However, he had already failed the selection process for the PM-03 position and the PM-02 position no longer existed.

[39] Related to this is the fact that the Commission's reasons recite that the "high turnover rate of the incumbents for these positions necessitates that the CBSA regularly conduct appointment processes to replenish its staff in several regions throughout Canada. Employment opportunities will continue to exist for individuals who wish to re-apply in the future." No challenge is made to this finding which is, in essence, a finding of fact. The existence of those potential opportunities negates any finding of prejudice. As such, no abuse of process due to delay is established.

[40] On the evidence before me, Mr. Hughes has not established that the delay was so oppressive as to taint the proceedings.

Were certain employees of the Commission biased against Mr. Hughes?

[41] In his supplementary record, Mr. Hughes raises the issue of bias as quoted above at paragraph 24. Specifically, he puts in issue whether bias motivated Commission employees to: fail to check the April 2005 CBSA competition to identify other candidates who may have been unsuccessful; remove him from the corrective measures proposed in February of 2006 when he had been included in the initial proposal; and, change the corrective measures in May of 2006 so as not to revoke the incumbents' appointments. In his supporting written submission he states:

> 26. The PSC [Commission] employee who was responsible for most of the delays was [the Acting Director]. Did his unit's mistakes and his mistakes cause him to develop a bias against the applicant? The applicant went to the Federal Court numerous times for delay and made many complaints of delay and incompetence against the [Commission].
>
> 27. Given [the Acting Director]'s history on the file he should not have been involved in the corrective measures stage.

[42] Mr. Hughes adduced no evidence in support of his allegation of bias. He relies on inferences he draws from his interpretation of the documents that are before the Court.

[43] The test for disqualifying bias or apprehended bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think it more likely than not that the decision-maker would not decide a matter fairly (whether consciously or

unconsciously). See: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 74. Tribunals are presumed to be impartial. The burden of demonstrating the existence of bias, or apprehension of bias, rests on the person alleging bias. A real likelihood or probability of bias must be demonstrated. A mere suspicion of bias is not sufficient. See: *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paragraph 112; *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346 at paragraph 8 (F.C.A.).

[44] I have reviewed the exhibits attached to the affidavits of Mr. Hughes and Ms. Charbonneau. The evidence contained therein falls short of establishing bias, either real or perceived. The fact that the initial proposed corrective measures contemplated that Mr. Hughes be part of a selection process for the PM-03 Border Services Officer position does not by itself establish any perception of bias. The reason for the deletion of this proposed measure is explained in a credible fashion in the Commission's reasons.

[45] Similarly, the decision not to revoke the appointments of the incumbents does not by itself establish any perception of bias. As explained in the Commission’s reasons, even if their appointments were revoked they could be re-appointed if they met the essential qualifications of the position. Moreover, under either of the last formulations of the corrective measures the incumbents were to be assessed and their appointments revoked if they failed to be found to be qualified.

[46] Finally, as the Federal Court of Appeal noted in *Lo v. Canada (Public Service Commission Appeal Board)* (1997), 222 N.R. 393 at paragraph 16, the appeal process set out in section 21 of the Act is a limited process. It does not give an appellate any right to appointment if his or her appeal is successful. An appellant can only seek the integrity of the application of the merit principle. The Court quoted the following passage with approval:

> Under section 10 of the Public Service Employment Act, "Appointments to ... the Public Service shall be based on selection according to merit ...". The holding of a competition is one means provided by the Act to attain the objective of selection by merit. However, it is important to remember that the purpose of section 21 conferring a right of appeal on candidates who were unsuccessful in a competition is also to ensure that the principle of selection by merit is observed. When an unsuccessful candidate exercises this right, he is not challenging the decision which has found him unqualified, he is, as section 21 indicates, appealing against the appointment which has been, or is about to be, made on the basis of the competition. If a right of appeal is created by section 21, this is not to protect the appellant's rights, it is to prevent an appointment being made contrary to the merit principle. As, in my view, this is what the legislator had in mind in enacting section 21, it seems clear that a Board appointed under this section is not acting in an irregular manner if, having found that a competition was held in circumstances such that there could be some doubt as to its fitness to determine the merit of candidates, it decides that no appointment should be made as a result of that competition. [emphasis added]

[47] These comments have application to a complaint made under section 7.1 of the Act. This means that the making of a complaint did not entitle Mr. Hughes to personal relief. It follows that the absence of personal relief does not by itself establish any apprehension of bias.

Were the corrective measures ordered by the Commission reasonable?

[48] Review on the reasonableness standard requires an inquiry into the qualities that make a decision reasonable. Those qualities include the process of articulating the reasons and the outcome. On judicial review, reasonableness is largely concerned with the existence of justification, transparency and intelligibility within the decision-making process. 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 the law. See: *Dunsmuir*, paragraph 47.

[49] There is a lack of jurisprudence that has considered the Commission's powers under section 7.5 of the Act. The Commission's powers under subsection 21(3) have, however, been the subject of comment by the Court. The subsection has been held to limit the Commission to remedying a defect in the impugned selection process. See: *Lo* at paragraph 14. The Commission's discretion under section 7.5 of the Act is broader in that the Commission may issue the corrective measures it "considers appropriate."

[50] Turning to the reasonableness of the Commission's exercise of that discretion, at the outset the Commission accepted the findings of the investigator. It is important therefore to understand the nature of the errors found by the investigator.

[51] The investigator found that:

- appointments for PM-03 positions were made from the pre-qualified pool which was established for PM-02 positions;
- the Victoria pre-qualified pool was established only for a period of one year, rather than two years;
- the names of candidates appointed from the pool were not removed following their appointments;
- several candidates in the pool received multiple appointments; and
- candidates were appointed from this pool at the same time that another pool existed.

[52] The Commission considered the nature of those deficiencies in light of the fact that the PM-02 position no longer existed. The Commission concluded that this made it impossible to re-create the conditions which existed when the Victoria pre-qualified pool was conducted. Given the reclassification of the PM-02 position and the change in the duties and responsibilities that

resulted when the PM-02 position was reclassified, it was reasonably open to the Commission to conclude that it could not re-create the conditions that existed at the relevant time.

[53] The Commission then considered the situation of the seven incumbents. The Commission wrote:

> "[u]nder subsection 6(2) of the [Act], when the Commission revokes a person's appointment, it may thereupon appoint that person at a level that in its opinion is commensurate with the qualifications of that person. To achieve a similar final outcome in this corrective measure, the Commission orders that the CBSA take concrete steps to reassess that these individuals are qualified for the positions they hold …. Should it become necessary, a current successful candidate's appointment will be revoked if he or she fails to be found qualified by the CBSA."

[54] This too was a conclusion that was reasonably open to the Commission. It insured that the seven incumbents were qualified to hold the positions they had been appointed to.

[55] The Commission then turned its attention to Mr. Hughes' own situation. He could not be appointed retroactively to the Border Services Officer PM-03 position because he had been selected for possible appointment to the PM-02 position. Subsequently, in another selection process, Mr. Hughes was found to be unqualified for the position of Border Services Officer, PM-03. It was not unreasonable for the Commission to find that no further corrective measures were required with respect to Mr. Hughes.

[56] Further, the Commission noted that there were regular appointment processes to this entry-level position so that employment opportunities continued to exist for individuals who wished to re-apply.

[57] I find the decision of the Commission to be supported by the evidence, transparent and justified. It falls within the range of possible, acceptable outcomes because it is defensible in respect of the facts and the law.

[58] I have considered all of the issues raised by Mr. Hughes. In view of the above analysis, I do not consider it necessary to deal with each one. However, I wish to specifically address certain points raised by Mr. Hughes.

[59] I incorporate by reference from the companion reasons:

(a) paragraphs 60 to 61 which deal with the voidable nature of public service appointments;

(b) paragraph 63 which explains why the Commission could not order the CBSA to exhaust the Victoria pre-qualified pool retroactive to June of 2004;

(c) paragraphs 66 to 69 which deal with the *McAuliffe* decision; and,

(d) paragraphs 70 to 71 which explain why the Commission was not obliged to follow the investigator's recommendations with respect to corrective measures.

[60] I make the following additional comments.

[61] First, Mr. Hughes states that the CBSA withheld relevant information about one of the incumbents. The information was that the employee was under investigation for allegations of unprofessional Internet postings. However, in a document the Commission noted that there was no indication that the incumbents were not qualified. Mr. Hughes argues that the Commission would not have held this view had the CBSA made proper disclosure, and that the corrective measures would have been different for this incumbent.

[62] I disagree. These allegations were not relevant to the Commission's exercise of discretion. Subsequent, misconduct does not by itself establish that a person lacked the qualifications for their position.

[63] Second, Mr. Hughes argues that incorrect statements made by the conciliator to the effect that Mr. Hughes was not in the Victoria pre-qualified pool caused the Commission to issue erroneous corrective measures.

[64] Again, I respectfully disagree. No one from the Victoria pre-qualified pool could be appointed to the Border Services Officer PM-03 position. This is because their membership in that pool only evidenced their qualifications for the Customs Inspector PM-02 position.

Conclusion

[65] For these reasons, the application for judicial review will be dismissed. In view of the time taken by the Commission to reach its conclusion with respect to corrective measures, I think this is an appropriate case for each party to bear its own costs. No costs are awarded.

"Eleanor R. Dawson"

Judge

1. While the Act has since been repealed, the parties agree that the provisions of the Act continue to apply to this application. I agree. See: the transitional provisions of the current *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 or Bill C-25, *An Act to modernize employment and labour relations in the public service and to amend the Financial Administration Act and the Canadian Centre for Management Development Act and to make consequential amendments to other Acts*, 2nd Sess., 37th Parl., 2003, cl. 72 (assented to 7 November 2003).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1168-07
STYLE OF CAUSE:	CHRIS HUGHES and ATTORNEY GENERAL OF CANADA, ALLISON DONALD ET AL.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 8, 2009
REASONS FOR JUDGMENT:	DAWSON J.
DATED:	JUNE 8, 2009

APPEARANCES:

Self-represented	FOR THE APPLICANT
Graham Stark	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Self-represented	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS