Federal Court  Cour fédérale

Date: 20130606

Docket: T-2121-11

Citation: 2013 FC 611

Ottawa, Ontario, June 6, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ISAAC JALAL **Applicant**

and

MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Jalal cannot accept that he was eliminated from a selection process competition for up to nine new positions within the Federal Public Service. He did not make it into the staffing pool. He believes he was better than the seven candidates who were appointed from that pool. Ostensibly, the selection panel eliminated him from the competition on the basis that he failed three questions in the oral interview. His belief, however, is that he was failed because he is a member of a visible minority, and because the candidates who were selected were "white". More particularly, the first candidate chosen was favoured because she is francophone.

[2] Mr. Jalal complained to the Public Service Staffing Tribunal that there was abuse of authority in the application of merit and in the choice of process. Following a number of pre-hearing decisions and conferences, the complaint was heard, and dismissed, by John A. Mooney, vice-chairman of the Tribunal. This is a judicial review of that decision.

DECISION

[3] Mr. Jalal's application for judicial review shall be dismissed with costs. Contrary to his submissions, he was given a fair hearing. There was no reasonable apprehension of bias on the part of the examiners or the Tribunal. Mr. Mooney's decision is eminently reasonable. As he explained clearly, his duty was not to remark the exams but rather simply to determine whether Mr. Jalal had been rejected because of an abuse of authority or adverse discrimination due to race or ethnic origin. His conclusion that such was not the case was well motivated and should not be set aside.

FACTS

[4] By way of a Public Service Staffing Advertisement limited to employees in the Public Service within the National Capital Region, the Department of Human Resources and Social Development – Learning Branch advertised for the position of "Advisor", classified as PM-05, AS-05. It was anticipated that up to nine positions would be filled soon, or in the future.

[5] The accompanying Statement of Merit Criteria & Conditions of Employment set out 15 essential qualifications including "ability to lead teams, ability to analyze issues and provide

recommendations, advice and guidance" and "ability to work effectively under the pressure of deadlines and large workloads."

[6] The selection panel comprised nine members. They determined that qualifications would be assessed through the candidates' *curriculum vitae*, a written exam, reference checks and an interview.

[7] Mr. Jalal succeeded in the written exam, and his cv and reference checks do not appear to be in issue. However, the selection board determined that he failed the oral interview (exam) with respect to the three essential qualifications referred to above.

[8] On 15 June 2009, Human Resources emailed Mr. Jalal to say: "We regret to inform you that your candidacy cannot be given further consideration in this selection process as you did not obtain the pass mark for one or more of the essential qualifications." He was not satisfied with a post-board meeting and so on 10 July 2009 filed a complaint on the Public Service Staffing Tribunal complaint form. He was not aware that at that time one appointment had already been made. His complaint was originally directed to the fact that he did not get into the pool.

THE GRIEVANCE PROCESS

[9] The complaint was filed with reference to s. 77 of the *Public Service Employment Act*. Subsection 77(1) reads as follows:

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person	77. (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de

in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of	nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :
(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);	a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);
(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or	b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;
(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).	c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).

[10] It is a condition precedent within s. 77 that one cannot complain until the Public Service Commission has made or proposed an appointment. Then, and only then, may a person in Mr. Jalal's position make a complaint to the Tribunal that he was not appointed or proposed for appointment. Mr. Jalal had standing under s. 77(2) and s. 34 in that he was an unsuccessful candidate in an advertised internal appointment process. The issue whether Mr. Jalal had another recourse because his name was not entered in the pool is not before me.

[11] Mr. Jalal's complaint led to some confusion as it did not conform to the *Public Service Staffing Tribunal Regulations*. In accordance with sections 10 and 11 thereof, the complaint must be received by the Tribunal no later than 15 days after the complainant receives notice of the appointment or the proposed appointment, to which must be attached copy of the said appointment or proposed appointment. The reason for this is that the person appointed becomes a party to the process and has the right to defend himself or, in this case, herself.

[12] As a result, some email correspondence was generated between the Tribunal Registry and Human Resources, as the latter could not identify the person against whom the complaint was levied. Mr. Jalal then came up with a name, but she had been appointed more than 15 days after his complaint. Fortuitously, it turns out that one Sandra Langlois had been appointed within the 15-day window, and so the complaint was treated as being directed against her.

[13] Mr. Jalal has taken the position that his complaint was directed against all seven appointees, some of whom were only appointed the year following his complaint. He submits that the Tribunal was inconsistent in that it allowed for the production of the exam results of all seven successful candidates, but then ruled on the merits that the complaint was deemed to have only been directed against Ms. Langlois. Mr. Jalal's logic is faulty. At a preliminary stage, such as production of documents, one may well allow discovery which might lead to a chain of inquiry. It does not follow that all these documents will be held to be relevant when the final decision is rendered.

[14] Mr. Mooney acted both reasonably and correctly in limiting the complaint to the successful candidature of Ms. Langlois.

ISSUES

[15] In its reasons for decision, the Tribunal described the issues before it as follows:

> 36 The Tribunal must decide the following issues:
>
> (i) Did the respondent abuse its authority in the assessment of the complainant's qualifications?
>
> (ii) Did the respondent discriminate against the complainant because of his race or ethnic origin?
>
> (iii) Did the respondent breach departmental policies and provide misleading information in the assessment guide?
>
> (iv) Was Ms. Ducharme sufficiently fluent in English to assess the complainant's qualifications?
>
> (v) Did the respondent show personal favouritism towards Ms. Langlois because she is francophone?

[16] In his application record, Mr. Jalal described the issues in this judicial review as follows:

> The PSST has:
> - ruled on irrelevant issues and has considered primarily irrelevant factors;
> - based its decision on an erroneous finding of fact without regard for the material and evidence before it;
> - contradicted its own regulations and acted arbitrarily in exercising its discretion;
> - conducted questionable hearing process;
> - rejected to consider the crucial evidence provided by the applicant;
> - favoured and ruled on the respondent's misleading and incorrect information; and
> - the applicant did not get a chance to make his case (he and his representative were repeatedly cut off by the respondent's counsel during the hearing). Further, the applicant was denied the opportunity to question the respondent's witnesses involved in appointees' assessments.

[17] Put another way, Mr. Jalal submits that the Tribunal erred in law, made palpable and overriding errors in its finding of fact and acted in a procedurally unfair manner.

PROCEDURAL UNFAIRNESS

[18] Mr. Jalal was entitled to procedural fairness. He was entitled to have a fair opportunity to make his case. On these issues, the Tribunal is not entitled to deference (*Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour*), 2003 SCC 29, [2003] 1 SCR 539, [2013] SCJ No 28 (QL)).

[19] Mr. Jalal's complaints in this area are myriad.

[20] He complains that Human Resources and the Tribunal were talking behind his back in the form of an exchange of emails. This exchange was generated by the fact that the Registry was required to pass the complaint on to the employer. The employer naturally asked the identity of the person against whom the complaint was directed. This led to the Registry communicating with Mr. Jalal. This was purely administrative, and in no way unfair.

[21] There were nine members of the selection panel. The employer stated at a pre-hearing conference that it was only going to call as witnesses the two individuals who had administered the oral exam to Mr. Jalal. He, and his union representative, could have subpoenaed the other seven, but did not.

[22] Mr. Jalal complains that witnesses were not excluded from the hearing .This allowed for collusion and perjury. It was not up to the Tribunal to exclude witnesses. Mr. Jalal and his representative could have moved for exclusion. His allegation of perjury is completely without merit.

[23] He complains that his union representative was constantly interrupted. Yet there is no complaint from her.

[24] Important evidence was excluded. The hearing had been set down for two days. Although evidence was closed, there was not sufficient time for oral argument. Consequently, it was agreed that submissions be made in writing. Mr. Jalal took advantage of this to, in effect, lead further testimony. Mr. Mooney quite rightly discounted this evidence. For instance, Mr. Jalal said that the notes taken by the examiners during his oral exam were incomplete. It was open to him to make that statement during his testimony so as to give the two examiners, who were witnesses, an opportunity to respond. Material and "testimony" received after the hearing could have been produced earlier. Mr. Mooney properly exercised his discretion in his exclusionary order.

[25] Mr. Jalal also complains about his representative. At the beginning of the hearing, she withdrew his complaint that the appointments violated Mr. Jalal's Charter rights. He said she was not so authorized. However, the discrimination provisions of the *Canadian Human Rights Act* did form part of the hearing. The Charter would not have added anything.

[26] Mr. Jalal takes the position that some of the issues set up by Mr. Mooney were irrelevant and not before him. I find it impossible to make that determination. His final written argument

before the Tribunal, which he wrote, rather than his union representative, runs some 169 paragraphs and then his later response ran 30 pages. His application for judicial review is accompanied by a 100-paragraph affidavit, and his memorandum of fact and law runs 129 paragraphs. Mr. Mooney did not act unreasonably in characterizing the issues as he did. In this judicial review, Mr. Jalal did not pursue his allegations that one of the examiners was not sufficiently conversant with the English language to appreciate his answers in the oral exam and that Ms. Langlois was favoured as she is a francophone. However, those allegations were before the Tribunal.

[27] I conclude that Mr. Jalal was given a fair hearing.

REASONABLE APPREHENSION OF BIAS

[28] Turning now to another aspect of natural justice, the alleged apprehension of bias, Mr. Jalal has submitted an analysis of the exam results of the seven appointees, as well as his own, both with respect to the written exam, which is irrelevant since he passed, and the interview. He concluded:

> After having reviewed and compared my examples re: questions A1, A3 and A4, with all the appointees' answers, particularly, with candidates: **#2, #3, #4** and **#5**, it is crystal clear that my answers were much **stronger** and appropriate than most of these appointees. I believe that if a reasonably informed bystander were to compare my examples with the examples of the seven appointees, he would most likely perceive bias on part of the selection board.

[29] Mr. Jalal was actually asking the Tribunal to redo his assessment. That was not its function, and is not the function of this Court. The Tribunal was to determine whether Mr. Jalal's marks, and the marks of others, gave any credence to his allegation of bias or abuse. Perhaps another selection panel would have scored Mr. Jalal higher, perhaps not. That is not the issue. The issue is whether is it was reasonable for the Tribunal to conclude that there was no evidence of an apprehension of

bias. As stated by Mr. Justice de Grandpré in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, at page 394:

> […] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.

[30] In my opinion, there is nothing in the record to support Mr. Jalal's speculation that the selection panel was biased and selected another out of favouritism, or that Mr. Mooney, the vice-chair of the Tribunal, was likewise so infected.

THE TRIBUNAL'S FINDINGS - ERRORS IN FACT AND LAW

[31] Mr. Jalal submits that alleged errors of law, and I have found none, should be assessed on a correctness standard. He submits that Mr. Mooney was not dealing with his home statute because others also deal with it and in considering the *Canadian Human Rights Act* was not dealing with a closely related statute. This cannot be so as the Tribunal is specifically directed to consider adverse discrimination within the meaning of the *Canadian Human Rights Act*. In any event, the standard of review is not in issue. There were no pure questions of law. At most, there were mixed questions of fact and law and findings of fact. Since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL), both matters have been assessed on a reasonableness standard.

[32] As a matter of fact and law, Mr. Jalal was required to give the Canadian Human Rights Commission notice so as to allow it to participate in the hearing if it so chose. He gave that notice but the Commission declined to participate.

[33] As stated by the Supreme Court in *Dunsmuir*, above, at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, 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.

[34] As Mr. Justice Iacobucci warned us in *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, [1996] SCJ No 116 (QL), at paragraph 80:

> I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness *simpliciter*, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

[35] I accept, without need for further comment, that the Tribunal made a proper assessment in determining that the employer had not contradicted its own regulations.

[36] Mr. Jalal has seized upon every possible imperfection in the process. As Mr. Justice Joyal noted in *Miranda v Canada (Minister of Employment and Immigration)*, 63 FTR 81, [1993] FCJ No 437 (QL):

> It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals. Yet we must always remind ourselves of what the Supreme Court of Canada said on a criminal appeal where the grounds for appeal were some 12 errors in the judge's charge to the jury. In rendering judgment, the Court stated that it had found 18 errors in the judge's charge, but that in the absence of any miscarriage of justice, the appeal could not succeed.
>
> […] There can always be conflict on the evidence. There is always the possibility of an opposite decision from a differently constituted Board. Anyone might have reached a different conclusion. Different conclusions may often be reached if one perhaps subscribes to different value systems. But in spite of counsel for the applicant's thorough exposition, I have failed to grasp forcefully the kind of error in the Board's decision which would justify my intervention. The Board's decision, in my view, is fully consistent with the evidence.

COSTS

[37] There is no reason why costs should not follow the event. The employer was put to considerable effort in defending this application. The Minister suggests lump sum costs, all inclusive, of $3,500. In its discretion, this Court is entitled to grant costs on a lump sum basis. Indeed, this approach is preferred as it saves both parties detailed calculations and attendance before a taxing officer. However, a rough and ready calculation should not exceed Tariff B. Based on Column III of Tariff B, I calculate taxable fees of 17 units at $140 per unit, or $2,380. As well, there are necessary disbursements. I fix taxable costs and disbursements at $2,750, inclusive of all taxes, being confident that if taxed, the assessment would be greater than that.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that

1. The application for judicial review is dismissed, with costs in the amount of $2,750, all inclusive.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2121-11
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