

Federal Court



Cour fédérale

**Date: 20140220**

**Docket: T-1134-12**

**Citation: 2014 FC 166**

**Ottawa, Ontario, February 20, 2014**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**MONGI MABROUK**

**Applicant**

**and**

**PUBLIC SERVICE COMMISSION OF  
CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Mongi Mabrouk (the Applicant) seeks judicial review of a decision dated June 5, 2012 (the “decision”) made by an investigator (the “Investigator”) with the Public Service Commission (the “Commission”).

[2] The decision followed an investigation conducted under section 66 of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13, (the “PSEA”) to determine whether an error, omission,

or improper conduct occurred during the course of an appointment process to the Public Service.

The Investigator concluded that no error had been made.

[3] For the reasons that follow, I would dismiss the application.

I. Preliminary Issue: Style of Cause

[4] The Applicant has named the Public Service Commission of Canada as the Respondent.

[5] This Court has held that the Public Service Commission of Canada is not an eligible Respondent in applications for judicial review according to Rule 303(1) of the *Federal Courts Rules*, SOR/98-106. Accordingly, the Court has applied Rule 303(2) to amend the named Respondent in the style of cause in such cases to “Canada (Attorney General)” (*Gravel v Canada (Attorney General)*, 2011 FC 832, at para 6).

[6] The style of cause is amended and the Respondent will be “Canada (Attorney General)”.

II. Background

[7] The Applicant submits the Investigator:

- made erroneous findings of fact regarding events that took place during the recruitment process preceding his appointment; and
- erred in the procedure he adopted in investigating the Applicant’s complaints.

*A. Recruitment and Appointment Processes*

[8] The Applicant is a bilingual professional engineer (P.Eng) trained in Tunisia.

[9] The Applicant attended a job fair in November 2009 and provided his resume to Jack Vandenberg, Director of the Heritage Conservation Directorate (Public Works and Government Services Canada (PWGSC)) and Gerry Cloutier, Senior Engineering Advisor. The Applicant was invited to an interview in January for an unspecified engineer position.

[10] Independent of the job fair, in December 2009, the Applicant applied for an external advertised appointment with PWGSC for the position of “Engineering Technologist” at the “EG-05” group and level (Note, in the materials this position is also referred to as “EG-5”).

[11] Jack Vandenberg and Gerry Cloutier, on January 21, 2010, interviewed the Applicant as promised at the job fair.

[12] Shortly thereafter, Gerry Cloutier spoke with the Applicant to express interest in having him start as an engineer, subject to:

- obtaining security clearance;
- proof of professional license;
- Canadian citizenship; and
- reference checks.

[13] The parties disagree about the position that was promised to the Applicant. The Applicant claims during this telephone call he was offered a position as a permanent bridge-structural engineer at the “Eng-4” level.

[14] Internal correspondence among the hiring managers, both prior to and after the interview state that the Applicant had the education, experience, and bilingualism to justify considering him for an “Eng-2 or 3” position.

[15] In March 2010, while awaiting verification of security and professional license, the department communicated to the Applicant its intention to offer him a position as a Structure Design Engineer at the “Eng-3” group and level (Note, in the materials, this position is also referred to as Eng-03, or ENG- 3, or ENG-03).

[16] Disappointed, the Applicant wrote an e-mail on March 25, 2010 to the individuals involved in the hiring process. In the e-mail he expressed disappointment in the proposed offer and requested that his professional experience as an engineer in Tunisia be recognized for the position.

[17] The same day, Gerry Cloutier responded to the Applicant by e-mail, explaining that an offer of employment had not yet been made, and new graduates were typically hired at the “Eng-2” and not the “Eng-3” level so his experience was considered. He asked the Applicant to call him.

[18] Following the Applicant’s e-mail, concerns were raised internally among those involved in the hiring process. Jack Vandenberg and Gerry Cloutier expressed concerns about the Applicant’s

personal suitability, as well as questions about the Applicant's claims regarding his professional experience and education. They agreed further investigation into the Applicant was needed. At this point they involved a human resources individual, Brian Scime.

[19] During the course of this investigation, Brian Scime made a series of comments in e-mails to Gerry Cloutier regarding the Applicant. Those comments amount to suggestions of strategies aimed at circumventing the hiring of the Applicant, despite his qualification into the pool of candidates for the external EG-05 (Engineering Technologist) position he applied for, as well as the Eng-03 (Structural Design Engineer) position he interviewed for following the job fair.

[20] On April 1, 2010, the Applicant apologized by e-mail to the same four individuals and expressed his readiness and willingness to eventually work with the group.

[21] On or about April 29, 2010, following a third interview with the Applicant, Jack Vandenberg and Gerry Cloutier agreed to appoint the Applicant to a one year term appointment at the Eng-03 (Structure Design Engineer).

[22] On June 11, 2010, the Applicant accepted the offer for a one year term position at the Eng-03 level (Structure Design Engineer), starting June 14, 2010 to June 30, 2011.

[23] The Applicant, however, was never notified that he qualified into the pool of qualified candidates for the Engineering Technologist position at the lower EG-05 level. On May 3, 2010, another candidate from the qualified pool was appointed to that indeterminate position.

[24] Towards the end of his one year term as an ENG 03 (Structure Design Engineer), the Applicant was informed by letter dated May 2, 2011, that pursuant to the terms of his original offer, his employment would cease as of June 30, 2011.

[25] Subsequent to learning that his term would not be renewed, on May 11, 2011, the Applicant filed his first request with the Commission to conduct an investigation into the staffing process for the Eng-03 (Structure Design Engineer) position.

[26] On September 30, 2011, following an access to information request through which the Applicant learned of his qualification into the EG-05 (Engineering Technologist) pool, he filed another request with the Commission to investigate the EG-05 selection process.

[27] On November 22, 2010, following the outcome of two jurisdiction reviews, the Investigations Branch of the Commission determined that investigations into the staffing processes for both the Eng-03(Structure Design Engineer) and EG-05 (Engineering Technologist) positions were warranted.

[28] This is the decision subject to the present application for judicial review.

### III. Issues

[29] The issues raised in the present application are:

- A. Were the Investigator's five factual determinations underlying its conclusions reasonable?
- B. Did the Investigator breach the duty of fairness owed to the Applicant?

### IV. Standard of review

[30] Judicial review of factual findings made by investigators during the course of an investigation conducted under section 66 of the PSEA have been held by this court to be subject to a standard of reasonableness (*Challal v Canada (Attorney General)*, 2009 FC 1251, at paras 24-25; *Seck v Canada (Attorney General)*, 2011 FC 1355, at para 12; *Samatar v Canada (Attorney General)*, 2012 FC 1263, at para 34).

[31] Questions involving the fairness of the procedure adopted by investigators in investigations of appointments by the Commission have been held by the Federal Court of Appeal and this Court to amount to questions of procedural fairness and subject to the correctness standard of review (*Seck v Canada (Attorney General)*, 2012 FCA 314, at para 55; *Hughes v Canada (Attorney General)*, 2009 FC 573, at para 19; *Seck v Canada (Attorney General)*, 2011 FC 1355, at para 11).

### V. Analysis

A. *Were the Five Factual Determinations Reasonable?*

[32] The Investigator's findings of fact were based on:

- its review of the documentary evidence submitted to it;

- interviews he conducted with seven individuals involved in the hiring process including the Applicant; and
- invitations he made to all interviewees to make comments on the draft report and then these comments were incorporated;

[33] The Investigator's factual determinations are:

- The Applicant was offered a term contract or determinate Eng-3 (Structure Design Engineer) position on June 11, 2010. He was not in fact offered indeterminate Eng-3, 4 or 5 positions prior;
- Any change in the hiring panel's intention to offer indeterminate employment was as a result of a change in budget and nothing else;
- The behavior of Brian Scime regarding the Applicant did not affect the outcome of the appointment process for both the Eng-3 (Structure Design Engineer) and EG-5 (Engineering Technologist) positions;
- The timing between the initial interview and offer of determinate employment at the Eng-3 (Structure Design Engineer) level was less than 6 months which is not unreasonable; and
- The failure to advise the Applicant of his qualification in the EG-5 (Engineering Technologist) appointment process and placement into a pool of qualified candidates amounts to an error. However the error did not affect the selection of the person appointed.

[34] In my view, each determination is reasonable.



[35] The Applicant submits the Investigator erred in failing to find he had been offered employment at a higher group and level than the Eng-3 (Structure Design Engineer) position he was ultimately offered. He submits Gerry Cloutier made oral contracts in January 2010 and March 2010 for positions at the Eng-4 levels which were breached by the offer of employment at the Eng-3 level.

[36] I disagree. The only evidence the Applicant submits in support of his claim that he was offered a position at a higher level is the Personnel Security Clearance form. The form was altered from "ENG-04" to "ENG-2" and dated January 21, 2010, the day of his first interview. The Personnel Security Clearance form is not is not an employment offer or contract. It is an auxiliary document and therefore is not determinative of the position you may eventually be offered.

[37] By contrast the documentation in the Certified Tribunal Record is to the effect that those involved in hiring had only ever considered the Applicant for a position at the Eng-2 or 3 (Structure Design Engineer) level. In an e-mail dated December 29, 2009, prior to the Applicant's interview in January, Gerry Cloutier told Jack Vandenberg that while the Applicant had applied for the EG-05 (Engineering Technologist) position, based on his impressions of the Applicant at the job fair, he thought the Applicant had the education credentials, experience, and bilingualism to justify considering him for "an ENG 2 or 3 (Structure Design Engineer)".

[38] Based on the evidence before the Investigator, his finding that the Applicant was not offered employment at the Eng-4 or 5 level is a reasonable finding.

[39] The Applicant submits the Investigator erred in failing to find the change in the Applicant's offer from an indeterminate appointment to a one year term appointment. The Applicant also submits this was erroneous as it amounts to a breach of Treasury Board Policy. This Policy states that term employment should not be used as a substitute probationary period for indeterminate staffing.

[40] I disagree. The Investigator found that the only offer of employment to the Applicant was for term employment and he accepted that. There is no evidence in the record which would support that an intention to hire at the indeterminate level was ever communicated to the Applicant. Prior to the Applicant's email of March 25, a number of e-mail exchanges took place between the Applicant and each of the members of the hiring unit concerning the intention to offer employment but no correspondence indicated an intention to offer "indeterminate employment" to the Applicant. Even if they had wanted to offer the Applicant indeterminate employment they could not as a result of budgetary changes and constrains.

[41] In my view, the Investigator's finding is reasonable.

[42] The Commission's finding that Brian Scime's conduct did not affect the outcome of the appointment process is also reasonable in my view.

[43] Brian Scime's e-mails of March 29, 30, and 31 discussing how to circumvent the procedures adopted under the PSEA, raise questions as to whether the Applicant's appointment may have been altered for reasons other than merit.

[44] The Investigator concluded that Brian Scime's behavior amounted to improper conduct under the PSEA. However, the Investigator also found that Brian Scime's improper conduct did not affect the appointment process.

[45] In my view this is a reasonable finding.

[46] At the time of the Applicant's e-mail and subsequent responses by those involved in the hiring process, towards the end of March 2010, the Applicant had not yet satisfied the conditions required to hire the Applicant. By the date of the Applicant's e-mail, those most closely involved in the hiring process, Jack Vandenberg and Gerry Cloutier, found the Applicant had not yet established that he possessed the essential qualifications required for making an offer of employment, including proof of education. This in turn led to the decision by Jack Vandenberg to further investigate the Applicant's credentials. This decision was made on March 28, 2010, prior to and independent of Brian Scime's e-mails of March 29, 30, and 31, 2010.

[47] Moreover, the e-mails of Brian Scime can't be said to have influenced the decision to hire the Applicant, since the hiring authorities kept an open mind by meeting the Applicant in April 2010, and ultimately hired him as an Eng 3 (Structure Design Engineer).

[48] The Applicant's submission that the delay amounted to a reprisal or discrimination is, in my view, not supported by the facts in the record.

[49] I agree with the Investigator's finding that the time elapsed between the Applicant's interview in January and offer in June was reasonable.

[50] Subsections 30(1) and 30(2) of the PSEA require that appointments to the Public Service be made based on merit which requires satisfying the Commission that the Applicant meets the essential qualifications, including official language proficiency.

[51] The Applicant needed to provide proof of citizenship, proof of professional licensing, references, security clearance, and language testing before an offer could be made. According to the Human Resources checklist, this was done when :

- language testing results were obtained on April 22, 2010;
- security clearance was obtained after May 3, 2010; and
- proof of education was obtained on May 26, 2010.

[52] In light of the requirements, any delay between when those conditions were satisfied, and June 11 2010, when the offer was made, was reasonable.

[53] The Applicant submits the Investigator erred in determining that the error made by Human Resources in failing to inform him of his qualification into the EG-05 (Engineering Technologist) pool of qualified candidates did not affect the outcome of the hiring process. He submits had he known of his inclusion into the pool, he would have accepted the EG-05 position over the person hired.

[54] The Applicant's submission that he would have chosen the EG-05 (Engineering Technologist) position had he known of his inclusion in the pool is flawed as it presupposes that he had the authority to determine who among the pool of eligible candidates would be offered the position. Under section 29 of the PSEA, the Commission has the exclusive authority at the request of the deputy head to make appointments to the Public Service. The Commission, and not the Applicant, has the authority to select the candidate from among the qualified pool. The deputy head did not select him from the pool.

[55] The Investigator found the error in failing to inform the candidate of his qualification into the EG-05 pool was not determinative to the outcome of the EG-05 appointment of another qualified candidate. The Investigator found that there was only one position available at the EG-05 group and level. At the time of appointment the deputy head, Jack Vandenberg, was aware that the Applicant and the other candidate were in the pool. Under the PSEA, Jack Vandenberg had discretionary authority to choose who among the two qualified candidates, would be offered the position and offered it to the other candidate in the pool. The Investigator found Jack Vandenberg was reasonable in the exercise of his discretion to choose the candidate he did.

[56] Consequently, it was reasonable for the Investigator to determine that although it was an error to fail to inform the Applicant of his qualification into the pool, it did not affect the outcome.

*B. Did the Investigator Breach the Duty of Fairness Owed to the Applicant?*

[57] The Applicant submits the Investigator breached the duty of fairness by:

- denying him the opportunity during the investigation to submit audio evidence and cross examine members of the Commission involved in hiring; and

- refusing to consider his comments on the draft report or his audio evidence.

[58] I disagree with each of the Applicant's submissions.

[59] The Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*), has held that the duty of procedural fairness is flexible and variable, influenced by, among other, the nature of the statutory scheme and the choices of procedure made by the agency itself (*Baker*, at paras 22-27). Thus the degree to which procedural fairness should be accorded in a given case must take into account both the legislated decision making regime in place and the facts of the case.

[60] The Federal Court of Appeal has held that the Commission should be afforded considerable latitude on judicial review of the procedure adopted by a Commission in the way it conducts its investigation commissions. The latitude is needed owing to their need to balance the interests of complainants and the demands of administrative efficacy (*Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113, at para 39).

[61] This rule has been applied when addressing issues of the duty of fairness in hiring decision investigations carried out by the Public Service Commission (*Ayangma v Canada (Attorney General)*, 2010 FC 1194, at paras 95-96).

[62] The statutory scheme applicable to Commission investigations does not require an investigator to accept audio evidence or require witnesses to be cross-examined. Section 70 of the

PSEA imposes a duty on the Commission to carry out investigations as informally and expeditiously as possible, and grants investigators the powers of a commissioner under Part II of the *Inquiries Act*, RSC 1985, c I-11. Those powers are set out in section 7 to 9 of that Act and give broad discretionary powers to commissioners in the conduct of investigations.

[63] The Investigator conducted interviews with each party and completed an independent and impartial review of the files. He documented his methodology and information gathered during the course of the investigation. Each factual determination is justified by references to the record or to Public Service policies.

[64] I do not accept the Applicant's submission that the Investigator did not take the Applicant's comments on the draft factual report under consideration. The Investigator specifically mentions at point 5 that the report was sent to the Applicant and his comments were received. The Investigator referenced the comments received at points 33, 44, 54 and 69 of the report.

[65] Consequently, I would dismiss the application for judicial review.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that:**

1. The “Public Service Commission of Canada” be removed as the Respondent and be replaced by “Canada (Attorney General)”;
2. The application for judicial review is dismissed,
3. Costs in the amount of \$250.00 are payable forthwith by the Applicant.

"Glennys L. McVeigh"

---

Judge



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1134-11

**STYLE OF CAUSE:** Mabrouk v PSCC

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** August 12, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** Justice McVeigh

**DATED:** February 20, 2014

**APPEARANCES:**

Mr. Mongi Mabrouk

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Mr. Max Binnie

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Mr. Mongi Mabrouk  
Ottawa, ON

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

William F. Pentney  
Deputy Attorney General of Canada  
Toronto, Ontario

FOR THE RESPONDENT