Federal Court of Appeal  Cour d'appel fédérale

Date: 20160307

Docket: A-230-14

Citation: 2016 FCA 75

CORAM: **PELLETIER J.A.**
STRATAS J.A.
GLEASON J.A.

BETWEEN:

EDITH BARAGAR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on March 4, 2016.

Judgment delivered at Ottawa, Ontario, on March 7, 2016.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: PELLETIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] Ms. Baragar complained to the Public Service Staffing Tribunal that the Deputy Minister of Citizenship and Immigration Canada abused his authority when assessing her application for the position of Pre-Removal Risk Assessment Officer. By decision dated September 11, 2012, the Tribunal dismissed her complaint: 2012 PSST 23.

[2] In the Federal Court, Ms. Baragar applied for judicial review of the Tribunal's decision. By judgment dated March 27, 2014, the Federal Court (*per* McVeigh J.) dismissed her application: 2014 FC 294. Ms. Baragar now appeals to this Court.

A. Background

[3] Citizenship and Immigration Canada advertised for candidates to fill the position of Pre-Removal Risk Assessment Officer. The advertisements stated that candidates had to demonstrate in their applications that they met all of the essential criteria, including "recent experience"—at least twelve consecutive months within the last three years—in administering the *Immigration and Refugee Protection Act* or the *Citizenship Act*, making decisions in immigration or citizenship cases or presenting evidence at Immigration and Refugee Board hearings. Any candidate who failed to so demonstrate would be screened out of the hiring process.

[4] Those conducting the hiring process found that Ms. Baragar did not demonstrate "recent experience" in these areas as required. So, in accordance with the announced criteria, her application was screened out.

[5] Upon learning that her application had been screened out, Ms. Baragar asked for an informal discussion under s. 47 of the *Public Service Employment Act*, S.C. 2003, c. 22 to find out why. That informal discussion took place. Her application remained screened out. Ultimately someone else filled the position.

[6] Ms. Baragar brought a complaint under para. 77(1)(*a*) of the *Public Service Employment Act*. In the words of that provision, she complained that "she was not appointed…by reason of…an abuse of authority."

B. The Tribunal's decision

[7] The Tribunal heard the complaint by way of an oral hearing over four days and written submissions. It dismissed the complaint.

[8] The Tribunal examined the hiring process that was followed. Among other things, it found the facts set out in paragraphs 3-6, above. The Tribunal also found that the criteria for screening out applications were "reasonable" and "appropriate in these circumstances" where there was an "anticipated…high volume of applications" (at paras. 32 and 34). On the evidence before it, the Tribunal found that "the complainant's application, including the cover letter and the résumé, lacked the details that had been requested" (at para. 34). This justified the screening out of Ms. Baragar's application; candidates were told that failure to follow the directions would result in the screening out of their applications. In support of this, the Tribunal also noted some of its earlier jurisprudence to the effect that candidates must "clearly demonstrate in their application[s] that they meet all the essential qualifications" (at para. 33).

[9] Before the Tribunal, Ms. Baragar submitted that the failure to consider the information she provided during the informal discussions under s. 47 of the *Public Service Employment Act* constituted an abuse of authority. The Tribunal rejected this (at para. 38). Referring again to its

own jurisprudence, the Tribunal stated that the informal discussions had a limited purpose: to provide unsuccessful candidates with an opportunity to learn why they were not qualified, not to provide a second opportunity to advance further information for a second assessment. The Tribunal noted that Ms. Baragar submitted further information during the s. 47 discussions but "could not expect [those involved in the hiring] to further assess her experience" because she had already been eliminated by failing to provide "the required information as stated in the instructions" provided to all at the outset of the process (at para. 41). She was required to state her "recent experience" in her application and nothing supplied during the s. 47 discussions changed the fact that her application omitted the information. The Tribunal observed that s. 47 discussions could lead to corrections of mistakes, but here there were no mistakes: her application was wanting.

[10] Finally, Ms. Baragar alleged that the candidate ultimately appointed to the position did not meet the experience requirements and so there was an "abuse of authority." In the hearing before the Tribunal, Ms. Baragar stated that she had no evidence on this, only suspicions. The Tribunal heard testimony, unchallenged, that showed how the successful candidate did meet the experience requirements. Given this evidence, the Tribunal dismissed this ground in the complaint (at paras. 48-49).

C. The application for judicial review in the Federal Court

[11] The Federal Court found that the Tribunal's decision should be reviewed for reasonableness. It found the decision to be reasonable. In its view (at paras. 30-38), the

Tribunal's conclusions were acceptable and defensible on the facts and the law. The Tribunal's view of the limited purpose of s. 47 and the employer's conduct in this case was supportable by its own jurisprudence, authorities such as *Canada (Attorney General) v. Carty*, 2004 FCA 300, [2005] 1 F.C.R. 269, and the evidence before the Tribunal.

D. Analysis

[12] On appeal, we are to determine whether the Federal Court selected the proper standard of review and whether it applied it properly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paras. 45-47.

(1) The standard of review

[13] The Federal Court selected the proper standard of review. At issue is the Tribunal's assessment of whether there was an "abuse of authority" within the meaning of para. 77(1)(*a*) on the evidence before it. As the Federal Court found, this attracts reasonableness review.

[14] The Tribunal's task in this case was primarily a factually-suffused one: it found the facts from oral testimony offered over four days and then had to assess whether those facts disclosed an "abuse of authority." Normally, factually-suffused decisions such as this are reviewed under the reasonableness standard: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 53. To the extent that the Tribunal's understanding of the meaning of "abuse of authority" was bound up in its decision, reasonableness remains the standard of review: *Alberta*

(Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654.

[15] I note that in a case similar to this one—a factually-suffused decision on whether certain employer conduct constituted an "abuse of authority" within the meaning of para. 77(1)(*a*)—the Supreme Court of Canada has held that the standard of review is reasonableness: *Canada (A.G.) v. Kane*, 2012 SCC 64, [2012] 3 S.C.R. 398.

(2) Applying the standard of review

[16] The Federal Court found that the Tribunal decision was reasonable. I agree with the Federal Court.

[17] As the Federal Court noted (at para. 38), our task in conducting reasonableness review is to assess whether the Tribunal's decision falls within a range of possible, acceptable outcomes which are acceptable on the facts and the law: *Dunsmuir*, para. 47.

[18] In some cases, consistent with certain decisions from the Supreme Court of Canada, we have described reasonableness review as an inquiry into whether a decision falls within the decision-maker's margin of appreciation, a margin that can be broad or narrow depending on the circumstances: see, *e.g., Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 26 and Supreme Court cases such as *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paras. 17-18 and 23; *Canada (Citizenship and Immigration) v.*

Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paras. 37-41. Administrative decision-makers, such as the Tribunal in the circumstances of this particular case, normally enjoy a relatively broad margin of appreciation when they make factually-suffused decisions within a specialized employment context: *Kane*, above; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150.

[19] To be clear, in conducting reasonableness review, we are not to make the decision the Tribunal should have made or assess what the Tribunal did against what we might have done. Parliament has given the Tribunal—not us—the responsibility of determining cases like this one. Thus, we are restricted to merely a reviewing role. As explained above, when reasonableness is the standard of review that role is a deferential one.

[20] In my view, the Tribunal made an acceptable and defensible decision that falls within its margin of appreciation. Its decision is supportable on the facts it found from the evidence it heard and considered. (See paragraphs 3-5 and 8-9, above.) It guided itself by its own jurisprudence, none of which has been challenged here. In this regard, we substantially agree with the analysis of the Federal Court at paras. 30-38 of its reasons.

[21] Before us, some of Ms. Baragar's submissions were aimed at reviewing the staffing practices at Citizenship and Immigration Canada and re-trying the Tribunal's decision on her complaint. As explained, our task is to review this particular decision and our job is not to re-try it.

[22] In her memorandum, Ms. Baragar queried whether the s. 47 informal discussions were properly held. She noted the absence of any proof of delegation of authority from the Commission, the party authorized to conduct those discussions under s. 47, to those who engaged in the discussions with her. There is no evidence in the record before us of such a delegation of authority.

[23] At the outset of the hearing before us, Ms. Baragar sought to introduce a new document relevant to the issue of delegation. We ruled that the document was inadmissible because it had not been before the Tribunal.

[24] However, in the end, the document is not material. Assuming that proper delegation was absent, the outcome of the reasonableness review in this case does not change. The Tribunal found, consistent with its jurisprudence, that s. 47 exists as a mechanism by which a candidate can get information concerning the assessment that was made, not as a mechanism for a second assessment. Ms. Baragar got that information. Ms. Baragar also had an opportunity to provide information during the s. 47 discussions with a view to correcting any mistakes in the employer`s assessment that her application did not state her "recent experience." In this regard, she was treated fairly within the context of s. 47 discussions. The employer evidently found no mistakes as a result of the s. 47 discussions: Ms. Baragar was screened out because she did not provide the information required by the instructions provided to all candidates at the outset of the hiring process. The Tribunal found that that was not an "abuse of authority" within the meaning of para. 77(1)(*a*) of the *Public Service Employment Act*. As the Federal Court found, that was an acceptable and defensible finding within the Tribunal's margin of appreciation.

[25] Before us, Ms. Baragar raised the fact that at one point in the process, she was told that her qualifications as described in all of her application and not just in her cover letter would be considered. She says that her resumé was not considered. That is unsupported by the evidence. The Tribunal did examine her resumé and found that it did not set out her "recent experience" adequately.

[26] Ms. Baragar also submitted that at one point in the process, the Deputy Minister's delegate, the delegated authority, changed the original criteria by allowing all materials submitted by her, including emails, to be considered. I do not view the evidence as Ms. Baragar does and neither did the Tribunal. In any event, this is of no moment. Out of fairness to all candidates, those making the staffing decision were bound to follow the announced criteria—"recent experience" had to be set out in the application.

E. Proposed disposition

[27] For the foregoing reasons, I would dismiss the appeal with costs. The respondent seeks $2,500. Having regard to the circumstances of this case, I would instead award $1,000, all inclusive.

"David Stratas"

J.A.

"I agree
J.D. Denis Pelletier J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-230-14
APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE MCVEIGH DATED MARCH 27, 2014, NO. T-1907-12	
STYLE OF CAUSE:	EDITH BARAGAR v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 4, 2016
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	PELLETIER J.A. GLEASON J.A.
DATED:	MARCH 7, 2016

APPEARANCES:

Edith Baragar	ON HER OWN BEHALF
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SOLICITORS OF RECORD:

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