Federal Court of Appeal  Cour d'appel fédérale

Date: 20161117

Docket: A-70-16

Citation: 2016 FCA 290

[ENGLISH TRANSLATION]

CORAM: **GAUTHIER J.A.**
TRUDEL J.A.
SCOTT J.A.

BETWEEN:

DAVID LESSARD-GAUVIN

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Hearing held at Québec, Quebec, on November 17, 2016.

Judgment delivered from the Bench at Québec, Quebec, on November 17, 2016.

REASONS FOR JUDGMENT OF THE COURT BY: TRUDEL J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the bench at Québec, Quebec, on November 17, 2016.)

TRUDEL J.A.

[1] Rule 302 of the *Federal Courts Rules* SOR/98-106 provides that unless the Court orders otherwise, an application for judicial review shall be limited "to a single order in respect of which relief is sought."

[2] In this case, the appellant brought a motion, before the Federal Court, for an order granting him leave to contest, by way of judicial review, two decisions concerning him. The first decision, dated September 30, 2015, was made by Employment and Social Development Canada, which removed his application from an external appointment process within the federal public service.

[3] The second decision, dated December 15, 2015, by the Public Service Commission of Canada (the Commission), pertains of the appellant's complaint regarding the external appointment process and a senior official's alleged interference in this process in order to exclude him. The Commission found that it was not necessary to conduct an investigation. The Commission concluded that this senior official had information on the appellant's past performance and that the selection committee could not be unaware of this information. It was somewhat similar to a reference check. This step was not taken to exclude the appellant's application. According to the Commission, the information received from the appellant did not raise any issues relating to the application of the PSEA.

[4] Exercising his discretion, Justice LeBlanc of the Federal Court (the Judge) did not grant the appellant's motion. After a brief discussion on Rule 302, the Judge correctly stated that the Commission's decision resulted from the exercise of the investigative power granted under section 66 of the *Public Service Employment Act*, S.C. 2003, c. 22 (the PSEA).

[5] Following this statement, the Judge said he was of the view that the appellant's motion raised points pertaining to the theory of exhaustion of remedies. Citing the well settled doctrine

of the Federal Court, the Judge held that once the administrative process had been exhausted, as is the case here, it was the final determination that was reviewable in Court, that of the Commission dismissing the complaint, and not the decision removing the appellant's application.

[6] Consequently, the Judge dismissed the appellant's motion and extended the deadline for filing an application for judicial review of the Commission's decision (Judge's order and reasons, 2016 FC 227).

[7] On appeal, the appellant raised numerous grounds for reviewing the Federal Court's order. However, at the end of the day, we are of the opinion that the main issue before us is whether the Judge, in exercising his discretion, made a palpable and overriding error warranting the intervention of our Court (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, at paragraph 79, citing *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[8] We find no such error.

[9] To rule for the appellant, we would have to accept his theory that the Federal Court erred in not recognizing that: (a) section 66 of the PSEA is not an "adequate alternative remedy," which then involves the principle of exhaustion of remedies and; (b) that the *Canadian Charter of Rights and Freedoms* and various international instruments give litigants "the right to a judge," that is, [TRANSLATION] "a fundamental legal right for every person to a full and equal, fair and public hearing of his civil or penal case by a competent, independent and impartial

tribunal established by law" (memorandum of fact and law of the appellant, at paragraph 59). At the hearing, the appellant added that that fundamental legal right had to be exercisable within an appropriate timeframe, which in this case would allow him to be heard and, if appropriate, be part of the pool of candidates approved for the position sought. We note that that argument on the appropriate timeframe for access to justice was not argued before the Judge. In addition, the appellant has not yet filed the application for judicial review authorized by the Judge.

[10] The PSEA provides that the mandate of the Commission includes conducting investigations and audits into appointments to public service (section 11). In terms of external appointments, section 66 stipulates:

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

[11] We agree with the Judge that: "the powers vested in the PSC under section 66 of the [PSEA] present the characteristics of adequate remedy for any person who contends that an

appointment or proposed appointment resulting from any external appointment process was not based on merit or that there has been an error, omission or improper conduct which affected the selection of the person appointed or proposed for appointment."

[12] It is a convenient remedy involving the Commission's expertise in matters of employment within the public service. It is a quick, economical remedy that enables a complainant to obtain relief, if appropriate. In this case, we note, as did the respondent in his factum, that the remedies sought by the appellant are within the Commission's power.

[13] The Commission's decision letter clearly shows that it considered the grounds of the appellant's complaint before deciding that they did not warrant conducting an investigation. It is a final decision on the merits of the complaint and not on its admissibility, as the appellant contends. It is true that the Commission did not respond to all of the appellant's grievances, but solely because the grounds of complaint were not within its jurisdiction. The Commission reviewed the appellant's complaint in the light of the applicable guidelines, referring the appellant to the Office of the Privacy Commissioner of Canada and the Office of the Public Sector Integrity Commissioner of Canada regarding his allegations of disclosure of personal information and discrimination.

[14] That decision is the result of the administrative process to which the appellant was entitled under the PSEA. We agree with the Judge that "once the administrative process has been exhausted, it is the final determination that is reviewable" before the Federal Court (Judge's reasons, at paragraph 10).

[15] However, that does not mean that the reviewing court will not review the first decision removing the appellant's application. It is difficult to imagine that a review of the reasonableness of the Commission's findings of fact or mixed law and fact (in this case, that the senior official's notes are comparable to a reference check) could have been conducted without considering the first decision and the manner in which it was made. Especially since in this case, the appellant stated that he had already demonstrated, in another matter, misrepresentations made to the Commission by a departmental analyst.

[16] That being said, it does not follow that the Judge erred in not allowing the appellant to seek judicial review of both this first decision and the second in the same application for judicial review, as he attempted to do.

[17] We now turn briefly to the appellant's arguments regarding the Charter and the various international instruments to which he refers in paragraph 42 of his memorandum of fact and law.

[18] The Judge discusses that question in paragraph 23 of his reasons:

> [23] Lastly, the applicant did not demonstrate to me how being unable to contest the decision of both the Department and the PSC simultaneously was related to the *Canadian Bill of Rights*, S.C. 1960, chapter 44, or contravened in such a way as to justify Court intervention, the *International Covenant on Civil and Political Rights or the American Declaration of the Rights and Duties of Man.* The applicant is not faced with a difficulty in accessing the courts. The issue here is rather to determine whether that access must comply with the decision-making structure established by Parliament under the Act.

[19] The appellant has not persuaded us that the Judge had erred in so ruling. We do not find any palpable and overriding error that warrants our intervention.

[20] Consequently, the appeal will be dismissed with costs fixed at $350, inclusive of taxes and disbursements.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-70-16
APPEAL FROM A JUDGMENT OF THE FEDERAL COURT DATED FEBRUARY 19, 2016 (2015 FC 227)	
STYLE OF CAUSE:	DAVID LESSARD-GAUVIN v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	QUÉBEC, QUEBEC
DATE OF HEARING:	NOVEMBER 17, 2016
REASONS FOR JUDGMENT OF THE COURT BY:	GAUTHIER J.A. TRUDEL J.A. SCOTT J.A.
DELIVERED FROM THE BENCH BY:	TRUDEL J.A.

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