Date:20080523

Docket: A-474-07

Citation:2008 FCA 189

CORAM: **DESJARDINS J.A.**
SEXTON J.A.
TRUDEL J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

NEIL CLEGG

Respondent

Heard at Ottawa, Ontario, on May 7, 2008.

Judgment delivered at Ottawa, Ontario, on May 23, 2008.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DESJARDINS J.A.
SEXTON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] Did the Federal Court Applications Judge (Mr. Justice Michael A. Kelen) commit a reviewable error in law in finding that the decision of the Public Service Commission Appeal Board (Appeal Board or Chairperson) regarding the respondent was procedurally fair? The parties agree that this is the main question at issue (case cited as 2007 FC 940).

Background

[2] I adopt Kelen J.'s statement of the relevant facts:

> [2] In the spring of 2005, the respondent participated in a competition for an EX-01 rotational position with the Department of International Trade Canada. The competition required candidates to undertake the Standardized Situational Judgment Test (SSJT), a test prepared specifically for the Departments of Foreign Affairs and International Trade (DFAIT) EX-01 rotational staffing competitions. The SSJT is a psychometric test developed by the Personnel Psychology Centre (PPC). It is designed to assess the judgment required for handling issues in work-related situations at the EX-01 level.
>
> [3] For this competition, the SSJT was administered to 370 candidates throughout the world. The instructions provide that candidates are to be given two hours to complete the test. The test consisted of 40 fact situations and questions. However, an information sheet circulated with the SSJT indicated that candidates would only be given 90 minutes to complete the test. DFAIT admits that this was a clerical error and that candidates were to be given two hours to complete the SSJT. When the respondent took the SSJT on July 6, 2005, he was given 90 minutes to complete the test. One other candidate was given this reduced time limit; all other candidates were given two hours for completion.
>
> [4] When it was discovered that the respondent had not been given the same time as other candidates, department officials notified the PPC, requesting advice on how to proceed. Upon recommendation from PPC's Manager of Test Consultation, the respondent was asked if he wished to review his test for an additional 45 minutes. He replied that he would be willing to do so.
>
> [5] On August 31, 2005, the respondent reviewed his SSJT for the allotted 45 minutes. After reviewing his test, the respondent's score dropped from 69% to 66%. Because the pass-mark was 72%, the respondent was screened out of the competition.
>
> [6] On August 15, 2006, the respondent commenced an appeal pursuant to section 21 of the [Public Service Employment Act, S.C. 2003, c. 22] (PSEA). The appeal was heard by the Appeal Board on December 14, 2006 in Ottawa, Ontario.

Previous decisions

(a) Appeal Board

[3] The Appeal Board allowed the respondent's appeal on the grounds that he was not assessed on the same standards as the other candidates. It found that the corrective measure of allowing an additional 45 minutes, several weeks later, still had the effect of putting the respondent in a different "frame of mind as other candidates who benefited from a full 2 hours " (at paragraph 20 of the Appeal Board's reasons).

[4] In reaching its decision, the Appeal Board relied on a judgment of this Court, *Buttar v. Canada (Attorney General)*, (2000) 254 N.R. 368 (F.C.A.), [2000] F.C.J. No. 437 (F.C.A.) (QL) [*Buttar*], where it was decided that:

> 24. … the validity of the appointment… could not fairly be determined without considering whether his qualifications were assessed on the basis of the same standards as were applied to other candidates simultaneously seeking promotion to the same level.

(b) Federal Court

[5] Following the decision of the Appeal Board, the appellant (then applicant) applied for judicial review raising three issues mentioned at paragraph 11 of Kelen J.'s reasons:

1) Did the Appeal Board err in failing to consider and analyze important relevant evidence?
2) Did the Appeal Board err in failing to admit relevant evidence from a witness?
3) Did the Appeal Board err in allowing the appeal after the respondent did not object to the additional 45 minutes to complete the test until after he was advised he had failed the test?

[6] Without the benefit of the Supreme Court of Canada's recent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], Kelen J. first determined the applicable standards of review deciding that questions of mixed fact and law are reviewable on a standard of reasonableness *simpliciter* while a standard of correctness applies to issues of procedural fairness and natural justice. In so doing, he acknowledged the parties' agreement "that when determining whether the Chairperson's conclusions are supported by the evidence, the standard to be applied is that of reasonableness *simpliciter*" (at paragraph 14 of his reasons).

[7] Kelen J. then embarked on an analysis of the issues stated above.

[8] Before the Applications Judge, the appellant argued that the Appeal Board committed a reviewable error in ignoring the unopposed testimony of his expert, Dr. Forster, who led evidence as to the nature of the SSJT: a power test as opposed to a speed test (affidavit of Dr. Forster, Appeal Book, Tab 4, page 32 at paragraph 11). A power test is a test in which the score is affected by the choice of answers as opposed to the amount of time allowed completing it.

[9] To illustrate his point, the expert requested to introduce the score sheet of the other candidate submitted to the reduced time limit. According to the appellant, the Appeal Board committed a second error in denying that request on the basis of section 26 of the *Public Service Employment Regulations, 2000*, SOR/2000-80 [*PSEA Regulations*].

[10] On the first issue, Kelen J. stated the following:

> 19. … from reading the partial transcript of the hearing (as part of the transcript is missing view to an administrative error) and from reading the decision of the Appeal Board, I am satisfied that the Appeal Board did consider and analyze … the substance of Dr. Forster's opinion evidence and [rejected] it.

[11] On the second issue, Kelen J. quickly referred to section 26 of the *PSEA Regulations* and upheld the Appeal Board on the basis that the evidence in question had not been previously disclosed to the respondent adding that the "applicant could have, but did not request an adjournment of the hearing to make proper disclosure" (at paragraph 23 of his reasons).

[12] On the third and final issue, Kelen J. rejected the appellant's argument that the respondent should have voiced his concerns before knowing his test results (at paragraphs 27, 28 of his reasons).

[13] Hence the within appeal.

Analysis

[14] The appellant raises the same issues before this Court. Before addressing those issues, the appropriate standards of review must be determined in light of *Dunsmuir*, *supra*.

Standard of Review

[15] As this case arises from a decision of a judge sitting in judicial review, the principles outlined in *Housen v. Nikolaisen*, 2002 SCC 33 [*Housen*] apply: the selection of the proper standard of review constitutes a question of law and is reviewable on a standard of correctness (*Dr Q v.*

College of Physicians and Surgeons of British Columbia, 2003 SCC 19 at paragraph 43 [*Dr Q*]). Ultimately, should this Court identify an error at this stage of the analysis, it will become necessary "to correct the error, substitute the appropriate standard of review, and assess or remit the Board's decision on that basis" (*Lai v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 125 at paragraph 19; See also *Dr Q, supra* at paragraph 43).

[16] In *Dunsmuir*, *supra* the Supreme Court of Canada reduces the available standards of review from three to two, collapsing the standard of reasonableness and patent unreasonableness into "a single form of 'reasonableness' review" (*Ibid.* at paragraph 45). In determining which of the remaining two standards will be appropriate in a given set of circumstances, it proposes a two-step process:

> 62. … First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence [deference] to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[17] This 'standard of review analysis' still has to be done contextually, considering the four well-known factors. However, the majority held that an exhaustive analysis is not required when the standard can be found in the existing case law (*Ibid.* at paragraphs 54 and 57).

[18] In *Davies v. Canada (Attorney General)*, 2005 FCA 41 [*Davies*], this Court addressed the standard of review applicable to decisions rendered by the Appeal Board under section 21 of the *PSEA*. Our Court determined that pure questions of law are reviewable on a standard of correctness,

while a standard of reasonableness applies to questions of mixed fact and law, such as whether the Appeal Board's conclusions are supported by the evidence (*Ibid.* at paragraph 23; see also: *McGregor v. Canada (Attorney General)*, 2007 FCA 197 at paragraphs 13 and14).

[19] As for issues relating to a breach of procedural fairness, it is trite law that no deference is afforded to the Appeal Board and the standard of review is therefore correctness: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 at paragraph 65.

[20] As no error was committed by Kelen J. in the determination of the proper standards of review, I now turn to the issues raised by the parties keeping in mind that questions of law determined by the Judge are reviewable according to a standard of correctness, while questions of mixed fact and law are reviewable according to a standard of palpable and overriding error (*Housen, supra* at paragraphs 8 and 36).

The merit principle

[21] The merit principle, as contemplated by section 10 of the *PSEA* (section 30 of the new Act (S.C. 2003, c. 22)), is the necessary background to an appeal under section 21 of the *PSEA*.

[22] The provision reads as follows:

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the	10.(1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que

Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.	détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.
(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.	(2) Pour l'application du paragraphe (1), la sélection au mérite peut, dans les circonstances déterminées par règlement de la Commission, être fondée sur des normes de compétence fixées par celle-ci plutôt que sur un examen comparatif des candidats.
[I underline]	[Je souligne]

[23] The merit principle is a central aspect of all public service appointments. In *Davies, supra* Richard C.J.A. writes:

> 36. "Merit" is not defined in the *PSEA*. Consequently, it has been up to the courts to determine its meaning. This Court has determined that "merit" in this context means that the best person possible will be appointed to the position, having regard to the nature of the service to be performed: *Nanda v. Public Service Commission* [1972] F.C. 277 at paragraph 34 (C.A.).

[24] As well, in *Buttar, supra*, Sharlow J.A. writes:

> 5. Section 21 of the Public Service Employment Act provides for appeals against appointments. The objective of section 21 is to ensure that the principle of selection by merit is observed: *Charest v. Canada (Attorney General)*, [1973] F.C. 1217 (F.C.A.). Although that principle was first stated in the context of an appeal to an appointment made after a competition, it is applicable to all appeals under section 21.
> …
> 24. … the validity of [an] appointment … could not fairly be determined without considering whether his qualifications were assessed on the basis of the same standards as

> were applied to other candidates simultaneously seeking promotion to the same level. The appeal board erred in declining to consider that issue.

[25] The merit principle requires not only that consistent standards be set, but that they be applied consistently. In its determination of whether the merit principle was adhered to, the Appeal Board must consider both the establishment and application of consistent standards. In *Buttar, supra* it is also stated that:

> 30. … an irregularity in a competition does not always vitiate the appointments made as a result of that competition. It invalidates those appointments where there is a real possibility that, in the absence of the irregularity, the result of this competition might have been different: *Stout v. Canada (Public Service Commission, Appeals Branch)* (1983), 51 N.R. 68 (F.C.A

[26] For the purpose of this appeal, it is unnecessary to say more. I now turn to the questions at issue, keeping in mind that in answering them, the merit principle must be adhered to.

The Issues

[27] Issues 1 and 2 are intertwined as they both relate to Dr. Forster's evidence regarding the nature of the SSJT and the results obtained by a second candidate who passed the test, despite being placed in a situation similar to that of the respondent.

[28] It appears to me that the second issue concerning the admissibility of evidence should be studied before looking into the Appeal Board's consideration and analysis of the evidence. For ease

of reference, however, I will keep the issues in the order in which they appear in the impugned judgment.

Issue 1: Whether the Board ignored evidence

[29] The appellant alleges that the Appeal Board made its decision without regard for the material before it, adding that the Judge erred in dismissing that ground of review (provided for by paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7).

[30] In her reasons, the Chairperson states the facts and the position of the parties. Without specific findings of credibility on the disputed facts, she then proceeds to the analysis of the parties' submissions by first declaring that she has "considered all of the evidence and arguments of the parties although not reproduced in its entirety" (at paragraph 13 of the Appeal Board's reasons). The evidence, of course, includes Dr. Forster's testimony.

[31] The Chairperson then asserts:

> 16. … in the present case, it was clearly established, through the evidence presented, that the appellant was not assessed on the basis of the same standards as were applied to other candidates.
> …
> 19. The appellant was able to complete the SSJT, however he had to rush through the 40 situations and was provided with a shorter timeframe than all other candidates. As a corrective measure, he was provided with 45 extra minutes to, as the Department put it, complete the test and review his answers. The evidence showed that at the end of the first session, the test was already completed. The additional 45 minutes was in effect 15 minutes to get back into the mindset of the exam and 30 minutes to review the answers provided at the first sitting. All other candidates had completed the test in one sitting. Except for one other candidate, none of them were submitted to these conditions when taking the test.
> …

> 20. I fail to see how compressing a 2 hour exam in 1.5 hours, will allow for the same outcome as the other candidates. I also fail to see how adding a 45 minutes period, two months after the fact, puts a candidate in the same frame of mind as other candidates who has benefited from a full 2 hours. The evidence showed that the original test was taken by the appellant on July 6th 2005 and that the additional 45-minutes was administered on August 31st 2005. The appellant had to basically rush through his questions thinking that he had 1.5 hours to complete the test.
>
> [I underline]

[32] Dr. Forster's testimony and evidence were crucial for the appellant as they "supported [his] only argument: that time was not a factor which affected [the] candidates' results because of the nature of the SSJT" (at paragraph 41 of the appellant's memorandum of fact and law).

[33] Dr. Forster is a senior psychologist employed by the Personnel Psychology Center (PPC) of the Public Service Commission of Canada. PPC is responsible for developing assessment instruments such as SSJT.

[34] Neither Dr. Forster, nor his expert opinion are specifically mentioned in the Appeal Board's reasons. The appellant draws an inference from this omission that the Appeal Board's findings were made without regard thereto. At paragraph 44 of his memorandum of fact and law, he cites *Cepeda-Gutierrez v. Canada*, [1998] F.C.J. No. 1425 (F.C.) (QL) [*Cepeda-Gutierrez*] to support his argument.

[35] More specifically, the appellant refers to paragraph 17 where Evans J. (as he then was), notes that "the more important the evidence that is not mentioned specifically and analyzed in the

… reasons, the more willing a Court may be to infer from the silence that … an erroneous finding of fact [was made] without regard to the evidence."

[36] That case was concerned with an application by Cepeda-Gutierrez to set aside the Refugee Division's decision dismissing his claim for refugee status. The evidence that went unreferred to in that decision pertained to the adverse psychological impact on the appellant of being returned to Mexico. It was of sufficient importance to the appellant's claim that the Refugee Division's failure to mention it in its reasons was seen by the Federal Court as a "finding of fact made without regard to it" (*Ibid.* at paragraph 27).

[37] In the present case, more elaborate and informative reasons from the Appeal Board would have been desirable. However, the reasons must be read as a whole before concluding that crucial evidence was ignored.

[38] As also stated in *Cepeda-Gutierrez*, the "reasons given by administrative agencies are not to be read hypercritically by a Court, nor are agencies required to refer to every piece of evidence that they receive that is contrary to their finding" (*Ibid.* at paragraph 16). It may well be that in some cases, a general assertion by a board that it considered all the evidence before it will suffice to "assure the parties, and a reviewing court, that [it] directed itself to the totality of the evidence when making its findings of the fact" (Ibid. at paragraph 16).

[39] This is particularly so in the present instance where Dr. Forster was the only expert witness and where there is a clear correlation between the crux of his testimony and the reasons of the Appeal Board.

[40] From reading the partial transcript and Dr. Forster's affidavit, the Applications Judge could reasonably infer that the Chairperson had considered the appellant's evidence but disagreed, as she was entitled to.

[41] How else could she "fail to see how compressing a 2 hour exam in 1.5 hours will allow for the same outcome as the other candidates" (at paragraph 20 of the Appeal Board's reasons)? That statement is directly linked to the appellant's main argument that the SSJT is not a "speed test" and that the irregularity did not affect the results of the competition.

[42] The Appeal Board found that "the appellant had to complete the same test as the other candidates in a shorter timeframe" (*Ibid.* at paragraph 17 of the Appeal Board's reasons) and was "basically put in a position where he had to write the SSJT twice; once on July 6th, where he had to do so in a compressed timeframe, and once on August 31st, approximately two months later, where he was given even less time to go through the exam (30 minutes)" (*Ibid.* at paragraph 21 of the Appeal Board's reasons).

[43] It concluded that the accommodation given to the respondent departed from the merit principle, thus rejecting Dr. Forster's theory. This finding was open to the Appeal Board. It fell

within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[44] Although the opinion of an expert will be considered by a Tribunal, the decision maker is not bound by it (See: *Tradition Fine Foods Ltd. v. Oshawa Group Ltd.*, 2005 FCA 342 at paragraph 14, leave to appeal dismissed: [2005] S.C.C.A. No. 547 (QL); See also *Scherico Ltd. v. P.V.U. Inc.*, [1989] F.C.J. No. 454 (F.C.A.) (QL)). Kelen J. properly determined that the Appeal Board did not ignore evidence in reaching its decision.

Issue 2: The exclusion of relevant evidence

[45] Dr. Forster attempted, in vain, to introduce into evidence the test score of the other candidate who was given additional time to complete the test.

[46] The justification for refusing that document is in dispute.

[47] The appellant submits that the Chairperson incorrectly invoked section 26 of the *PSEA Regulations* to disallow the evidence (at paragraph 35 of the appellant's factum and Dr. Forster's affidavit, Appeal Book, Tab 4, page 34). The respondent retorts that a review of the partial transcript does not support that conclusion (at paragraph 32 of the respondent's memorandum of fact and law).

[48] The Applications Judge agreed with the respondent that the Chairperson properly refused to admit the evidence “since [it] was not previously disclosed to the respondent” (at paragraph 23 of his reasons). This leads the appellant to argue that the Applications Judge erred in justifying the exclusion of Dr. Forster’s evidence on a “new ground”, as there is no evidence on record of late disclosure.

[49] The absence of a full transcript evidently makes it impossible to verify the allegations of the parties. The partial transcript on record reproduces the introductory submissions of the parties to the Chairperson and none of their evidentiary assertions.

[50] When was the request made to tender the evidence? What was the context and the nature of the discussion between the Chairperson, Dr. Forster, and the parties’ representatives? All of these questions cannot be answered.

[51] The only conclusions that can be reached with certainty from the evidence relating to the other unsuccessful candidate are as follows:

(a) the test score was not admitted as evidence before the Appeal Board.

(b) the test score related to an unsuccessful candidate, that is, one who qualified but whose name was not on the eligibility list (Appeal Book, Tab 4(B), page 236 at lines 14-15).

(c) although consistent with other arguments presented at the hearing with respect to the nature of the SSJT, Dr. Forster’s intended remarks respecting the test were not,

according to him, “determinative on their own” (Dr. Forster’s affidavit, Appeal Book, Tab 4, page 33).

[52] The two last conclusions certainly bring into question the probative value of the test score. The fact that another candidate succeeded at the first run of the test and bettered his score at the second run is, in my view, inconsequential when attempting to demonstrate that the respondent was assessed fairly, that is, on the basis of the same standards that were applied to other candidates. Therefore, the exclusion of the evidence could not have affected the outcome of the case.

[53] Dr. Forster declares that his ultimate goal was to show that the “irregularity in administering the SSJT had no effect on the outcome of the staffing process” (*Ibid.* at paragraph 13).

[54] I fail to see how this demonstration would have helped the Appeal Board in assessing the appellant’s eligibility on the basis of a uniform standard of tests and solution standards (*Evans v. Canada (Public Service Commission Appeal Board*), [1983] 1 S.C.R. 582 at 593).

[55] This being said, in my view, we do not need to decide between the parties’ positions as to the proper interpretation of subsection 26 (1) of the *PSEA Regulations*, which states:

26. (1) An appellant shall be provided access, on request, to any information, or any document that contains information, that pertains to the appellant or to the successful candidate and that may be presented before the appeal board.	26. (1) L'appelant a accès sur demande à l'information, notamment tout document, le concernant ou concernant le candidat reçu et qui est susceptible d'être communiquée au comité d'appel
[I underline]	[Je souligne]

The question of whether it provides a system for the disclosure of relevant information or documents pertaining to the appellant or the successful candidate, or whether it also provides a system for the disclosure of relevant information or documents pertaining to the unsuccessful candidate, as the appellant contends at paragraph 36 of his memorandum of fact and law, shall be left for another case where it will be necessary to answer that question with the support of a proper transcript of the hearing and decision below.

[56] Therefore, I would dismiss the second ground of appeal as it is insufficient to upset the judgment below and change the final result of this appeal.

Issue 3 – The Waiver Principle

[57] Finally, the appellant submits that the Applications Judge "erred in finding that it was not reasonable to expect the respondent to complain about the testing conditions" (at paragraph 53 of the appellant's memorandum of fact and law). Among other cases, the appellant relies on *Cyr v. Canada (Attorney General)*, [2000] F.C.J. No. 1916 (F.C.) (QL) [*Cyr*].

[58] Kelen J. correctly distinguished *Cyr* from the case at bar since "the factors that created difficulties for the candidates [in *Cyr*] were external causes and beyond the actual control or knowledge of the Selection Board." (at paragraph 26 of his reasons, citing the respondent). As well, Kelen J. found that "it would be unreasonable to expect the respondent to take umbrage with the testing process prior to being informed that he had been screened out of the competition." (at paragraph 27 of his reasons).

[59] Indeed, *Cyr*, *supra* reflects the doctrine of waiver as the appellant suggests. However, I am reminded of the words of Donald Brown and Evans J. in *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at 3:6000:

> However, relief will not be refused on the ground of waiver unless the party opposing the application establishes that the applicant was fully informed of the facts, and that the waiver was truly voluntary.
>
> [I underline]

[60] The Appeal Board stated the following on this issue (at paragraph 23):

> It is clear from the evidence that the appellant applied on the competition so that he would have a chance to be promoted. In order for him to consolidate that chance, he had to go through each and every step of the assessment and be successful in doing so. Had the appellant refused the 45-minute solution, the evidence suggested that his participation in this selection process would have stopped there, as none of the other solutions envisaged by the Department to correct the administrative error committed, were acceptable solutions to the Department.
>
> [I underline]

[61] The appellant does not challenge the above conclusion. I read, in this excerpt, an implied finding that the respondent had to accept the alternative provided by the Department if he wanted to maintain his chance of promotion. Thus, I suggest that the waiver could not be said to be voluntary.

CONCLUSION

[62] I would dismiss the appeal with costs.

"Johanne Trudel"

J.A.

“I concur
Alice Desjardins J.A.”

“I agree
J. Edgar Sexton J.A.”