Federal Court of Appeal | Cour d'appel fédérale

Date: 20110119

Docket: A-394-09

Citation: 2011 FCA 19

CORAM: **EVANS J.A.**
DAWSON J.A.
STRATAS J.A.

BETWEEN:

ROBERT KANE

Appellant

and

ATTORNEY GENERAL OF CANADA
and PUBLIC SERVICE COMMISSION

Respondents

Heard at Ottawa, Ontario, on October 20, 2010.

Judgment delivered at Ottawa, Ontario, on January 19, 2011.

REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DAWSON J.A.
DISSENTING REASONS BY:	STRATAS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] It is an essential precept of the federal public service that appointments are based on merit. The merit principle as previously understood was modified by the *Public Service Employment Act*, S.C. 2003, c. 22 (PSEA), part of a package of legislative measures to modernize employment and labour relations in the public sector.

[2] In particular, the PSEA removes the previous statutory distinction between comparative and individual merit, and confers more discretion on management to appoint on the basis that a person is qualified for an appointment, without having to consider whether he or she is necessarily the best qualified. In this way, the PSEA aims to introduce more flexibility and reduce delay in federal public service staffing and appointment decisions.

[3] A key distinction now made by the PSEA is between an advertised and a non-advertised internal appointment process. Thus, section 33 confers an unencumbered discretion on the Public Service Commission (Commission), and its delegates, to decide whether to make an appointment on the basis of an advertised or a non-advertised internal appointment process. A disappointed candidate may complain to the Public Service Staffing Tribunal (Tribunal) of an abuse of authority by the employer in the exercise of this discretion.

[4] Although Robert Kane had been a federal public servant for thirty years, he was not appointed to the position that he was occupying in a temporary capacity. He complained to the Tribunal that the Deputy Head of Service Canada, as part of the Department of Human Resources and Social Development (Deputy Head), had abused her authority by making the appointment from a pool of candidates, selected as a result of an advertised internal competition, and by not appointing him. He alleged that the decision to advertise was based on the erroneous view that the position in question was newly created, whereas in fact, he maintained, it was a reclassification of the position that he had occupied.

[5] The Tribunal dismissed Mr Kane's complaint in a decision dated August 3, 2007: 2007 PSST 0035. It concluded that, given the breadth of the discretion conferred by section 33 over the appointment process, whether the position was newly created or reclassified was irrelevant. Mr Kane's application for judicial review to set aside the Tribunal's decision was dismissed by the Federal Court: 2009 FC 740. He appeals that decision to this Court.

[6] The principal question to be decided in this appeal is whether it was unreasonable for the Tribunal to proceed on the assumption that the choice of an internal appointment process on the basis of an incorrect fact cannot constitute an abuse of authority. In my view, for the employer to base an exercise of discretion on an incorrect fact is *prima facie* unreasonable and can thus constitute an abuse of authority, if the fact in question is material and relevant. Thus, in assessing whether the employer's decision in this case was an abuse of authority, the Tribunal cannot ignore Mr Kane's complaint that the employer based its decision to advertise on an erroneous finding that the position was new, a matter which section 33 permits, but does not require, the employer to consider.

[7] Accordingly, I would allow the appeal and remit the matter to the Tribunal for re-determination.

B. FACTUAL BACKGROUND

[8] In September 2005, the Government of Canada created Service Canada within the Department of Human Resources and Social Development. Its purpose was to facilitate Canadians'

access to federal services and benefits through the provision of “one-stop shopping”. In preparation for the launch of Service Canada, the Newfoundland and Labrador Region had announced in May of that year an interim organizational structure to provide for region-wide business line management, and set up an In-Person and Community Services (IPCS) business line which would be supported by a new regional unit.

[9] On August 30, 2005, the position of Service Delivery Manager for the IPCS business line was created at the PM-05 level. On September 1, 2005, Mr Kane was deployed in a lateral move to fill the position, without a competition. He was given only a generic work description, from which he was asked to identify the duties and functions of the position for inclusion in an up-to-date work description.

[10] On February 14, 2006, the Regional Management Board (RMB) approved an organizational structure for the Regional Headquarters office, including a Regional Manager position for the IPCS business line at the PM-06 level, supported by a staff of six, including two PM-05 positions. The PM-06 Regional Manager position would replace the PM-05 Service Delivery Manager position occupied by Mr Kane, who was asked to continue in this position pending the classification of the Regional Manager position.

[11] At about the same time, an advertised appointment process was started to establish a pre-qualified pool of candidates to fill these and other PM-06 and PM-05 positions. Early in February 2006, Mr Kane applied to enter the competition.

[12] On March 1, 2006, the RMB informed employees that, if the Regional Manager position was classified at the PM-06 level, it would be filled from the pre-qualified pool of candidates selected after the internal competition. On May 1, 2006, Mr Kane was advised that he would not be considered further for a PM-06 position, because he had failed one component of the standardized tests taken by candidates for inclusion in the pre-qualified pool.

[13] On June 15, 2006, the classification review process concluded that the Regional Manager position should be classified at the PM-06 level. Mr Kane agreed to fill the position in an acting capacity. He testified that the duties and functions of the Regional Manager position were not materially different from those that he had been performing since his deployment to the IPCS business management line for Newfoundland and Labrador in September 2005.

[14] Following the classification of the position of Regional Manager at the PM-06 level, Mr Kane claimed a retroactive PM-06 salary increase, on the ground that he had been performing the functions and duties of Regional Manager during his entire deployment. He was granted the increase, not to September 2005 as he requested, but to February 14, 2006, when the RMB decided to create the Regional Manager position at the PM-06 level.

[15] In August 2006, Mr Kane was offered a PM-05 position in IPCS after his previous position had been declared redundant. He was also asked to continue as acting Regional Manager until either the end of September or the position was filled, whichever happened first. On September 11, 2006,

he filed his complaint of abuse of authority with the Tribunal on the appointment of the Regional Manager.

C. LEGISLATIVE FRAMEWORK

[16] The nature of the merit principle before the enactment of the PSEA is indicated by the following provisions of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the former Act). Merit was normally, but not always, comparative, and competitions were the norm.

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 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.	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 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.

[17] The *Public Service Employment Regulations, 2000*, SOR/2000-80, made under the former Act, set out the circumstances in which a selection could be made on individual rather than comparative merit pursuant to subsection 10(2) of the former Act:

5. (2) A selection referred to in subsection 10(2) of the Act may be made in any of the following circumstances:	5. (2) La sélection au mérite visée au paragraphe 10(2) de la Loi peut se faire dans l'une ou l'autre des circonstances suivantes :
…	[…]
(*b*) when an employee is to be appointed to their reclassified position and	*b*) la nomination d'un fonctionnaire à son poste après reclassification, si l'une des situations suivantes existe :
(i) the position has been reclassified as a result of a classification audit or grievance,	(i) la reclassification résulte d'une vérification ou d'un grief en matière de classification,
(ii) the position is one of a group of similar occupied positions in the same occupational group and level within the same part of an organization that have all been reclassified to the same occupational group and level, or	(ii) le poste fait partie d'un groupe de postes semblables, qui sont pourvus, qui sont des mêmes groupe et niveau professionnels au sein du même secteur de l'organisation et qui ont tous été reclassifiés aux mêmes groupe et niveau professionnels,
(iii) there are no other similar occupied positions in the same occupational group and level within the same part of the organization;	(iii) il n'y a aucun autre poste semblable qui est pourvu et qui est des mêmes groupe et niveau professionnels au sein du même secteur de l'organisation;

[18] The current PSEA sets out a version of the merit principle that emphasizes individual, rather than comparative merit.

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.	30. (1) Les nominations – internes ou externes – à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.
(2) An appointment is made on the basis of merit when	(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes

	sont réunies :
(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and	*a)* selon la Commission, la personne à nommer possède les qualifications essentielles – notamment la compétence dans les langues officielles – établies par l'administrateur général pour le travail à accomplir;
…	[…]
(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.	(4) La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite.

[19] In order to achieve more flexibility in staffing and appointment decisions, the PSEA confers an unencumbered discretion on the Commission, and its delegates, in selecting between advertised and non-advertised appointment processes, as well as in the design of instruments for assessing competence.

33. In making an appointment, the Commission may use an advertised or non-advertised appointment process	33. La Commission peut, en vue d'une nomination, avoir recours à un processus de nomination annoncé ou à un processus de nomination non annoncé.
…	[…]
36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)*(a)* …	36. La Commission peut avoir recours à toute méthode d'évaluation – notamment prise en compte des réalisations et du rendement antérieur, examens ou entrevues – qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)*a)* …

[20] The PSEA creates administrative institutions and mechanisms for dealing with complaints about staffing and appointment decisions. For present purposes, the Public Service Staffing Tribunal is of particular importance.

88. (1) The Public Service Staffing Tribunal is continued, consisting of between five and seven permanent members appointed by the Governor in Council and any temporary members that are appointed under section 90.	88. (1) Est maintenu le Tribunal de la dotation de la fonction publique, composé de cinq à sept membres titulaires nommés par le gouverneur en conseil et des membres vacataires nommés en vertu de l'article 90.
(2) The mandate of the Tribunal is to consider and dispose of complaints made under … sections … 77… .	(2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu … ou des articles … 77 … .
(3) In order to be eligible to hold office as a member, a person must	(3) Il faut, pour être membre du Tribunal :
…	[…]
(b) have knowledge of or experience in employment matters in the public sector.	*b)* avoir de l'expérience ou des connaissances en matière d'emploi dans le secteur public.
…	[…]
95.	95.
…	[…]
(2) The Chairperson may retain on a temporary basis the services of mediators and other experts or persons having technical or special knowledge to assist the Tribunal in an advisory capacity and, subject to the approval of the Treasury Board, fix their remuneration.	(2) Le président peut retenir temporairement les services de médiateurs et d'autres experts chargés d'assister le Tribunal à titre consultatif, et, sous réserve de l'approbation du Conseil du Trésor, fixer leur rémunération.
…	[…]
98. (1) A complaint shall be determined by a single member of the Tribunal, who shall proceed as informally and expeditiously as possible.	98. (1) Les plaintes sont instruites par un membre agissant seul qui procède, dans la mesure du possible, sans formalisme et avec célérité.

….	[…]
99.	99.
…	[…]
(3) The Tribunal may decide a complaint without holding an oral hearing.	(3) Le Tribunal peut statuer sur une plainte sans tenir d'audience.

[21] Employees may complain to the Tribunal that there has been an abuse of authority in the making of specified decisions. The following is the provision relevant to this appeal.

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may ... make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of	77. (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut … 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 :
…	[...]
(*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 ;
…	[…]

[22] The PSEA does not provide a comprehensive definition of "abuse of authority". However, it does contain the following provision "for greater certainty".

2. (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.	2. (4) Il est entendu que, pour l'application de la présente loi, on entend notamment par « abus de pouvoir » la mauvaise foi et le favoritisme personnel.

[23] The PSEA sets out the remedial powers of the Tribunal when it upholds a complaint. They do not include a power to order either the Commission or a deputy head to make a new appointment or to conduct a new appointment process.

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.	81. (1) S'il juge la plainte fondée, le Tribunal peut ordonner à la Commission ou à l'administrateur général de révoquer la nomination ou de ne pas faire la nomination, selon le cas, et de prendre les mesures correctives qu'il estime indiquées.
…	[…]
82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.	82. Le Tribunal ne peut ordonner à la Commission de faire une nomination ou d'entreprendre un nouveau processus de nomination.

[24] Decisions of the Tribunal are protected by a preclusive clause.

102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court.	102. (1) La décision du Tribunal est définitive et n'est pas susceptible d'examen ou de révision devant un autre tribunal.
(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Tribunal in relation to a complaint.	(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action du Tribunal en ce qui touche une plainte

[25] In addition to the right of employees to complain to the Tribunal of abuse of authority, employees who are informed during an internal appointment process that they have been eliminated from consideration for an appointment may ask the Commission to discuss that decision with them.

As a result of that informal discussion, or otherwise, the Commission, or the deputy head to whom the power to make internal appointments has been delegated, may revoke an internal appointment and take corrective action, on being satisfied that an error, an omission, or improper conduct affected an appointment.

47. Where a person is informed by the Commission, at any stage of an internal appointment process, that the person has been eliminated from consideration for appointment, the Commission may, at that person's request, informally discuss its decision with that person.	47. À toute étape du processus de nomination interne, la Commission peut, sur demande, discuter de façon informelle de sa décision avec les personnes qui sont informées que leur candidature n'a pas été retenue.
15. (3) Where the Commission authorizes a deputy head to make appointments pursuant to an internal appointment process, the authorization must include the power to revoke those appointments and to take corrective action whenever the deputy head, after investigation, is satisfied that an error, an omission or improper conduct affected the selection of a person for appointment.	15. (3) Dans les cas où la Commission autorise un administrateur général à exercer le pouvoir de faire des nominations dans le cadre d'un processus de nomination interne, l'autorisation doit comprendre le pouvoir de révoquer ces nominations — et de prendre des mesures correctives à leur égard — dans les cas où, après avoir mené une enquête, il est convaincu qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée.
67. (1) The Commission may investigate an internal appointment process, other than one conducted by a deputy head acting under subsection 15(1), and, if it is satisfied 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	67. (1) La Commission peut mener une enquête sur tout processus de nomination interne, sauf dans le cas d'un processus de nomination entrepris par l'administrateur général dans le cadre du paragraphe 15(1); si elle est convaincue 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	*a*) révoquer la nomination ou ne pas faire la nomination, selon le

case may be; and	cas;
(*b*) take any corrective action that it considers appropriate.	*b*) prendre les mesures correctives qu'elle estime indiquées.
…	[…]

D. DECISION OF THE TRIBUNAL

[26] The Tribunal stated that, because of the broad discretion conferred by section 33, a complaint of abuse of authority could not be based simply on the fact that a position had been filled after an advertised internal appointment process. It noted that the RMB had decided to adopt an advertised process before both the classification review of the Regional Manager position had been completed, and the results of the standardized tests were known.

[27] The Tribunal agreed with the employer that neither the PSEA nor any applicable policy mandates the internal appointment process to be followed, regardless of whether the position to be filled is newly created or a reclassified existing position. Further, unlike the former Act, section 33 explicitly confers broad discretion over the selection of an advertised or a non-advertised appointment process. Hence, the jurisprudence arising from the former Act is not relevant.

[28] The *Public Service Human Resources Management Agency of Canada Guidelines* (Guidelines) deal with, among other things, the criteria for distinguishing between a new and a reclassified position. The Tribunal held that these are not law, because they were not made in the exercise of a delegated statutory power. Hence, it wrote, even if the Commission had based its decision to advertise on a misinterpretation of the Guidelines, its decision would not constitute an abuse of authority as being erroneous in law, and therefore, presumably, not an abuse of discretion.

[29] As for Mr Kane's complaint that he was not appointed Regional Manager, the Tribunal stated that section 36 of the PSEA gives the Commission an unfettered discretion to choose the assessment method that it considers appropriate to determine if a person is qualified for a position. Mr Kane was not appointed because he failed one of the standardized tests taken by candidates for a PM-06 position. Accordingly, the Tribunal concluded, even if the decision to advertise constituted an abuse of authority, he had failed to establish that it caused him not to be appointed.

E. DECISION OF THE FEDERAL COURT

[30] The Judge identified the principal substantive issue as whether the Tribunal had erred in law in regarding as irrelevant to Mr Kane's complaint of abuse of authority the characterization of the PM-06 Regional Manager position as either new or reclassified.

[31] First, though, she held on the basis of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2009] 1 S.C.R. 190 (*Dunsmuir*), that unreasonableness was the applicable standard of review. She noted that: the Tribunal's decisions are protected by a strong preclusive clause; the Tribunal is a specialized body created to adjudicate public service employment disputes; and whether an abuse of authority had occurred was essentially a factual question within the expertise of the Tribunal.

[32] After noting the shift in the PSEA from comparative to individual merit, and the absence of any statutory criteria limiting the choice of an advertised or a non-advertised internal appointment process, the Judge discounted the relevance of jurisprudence arising under the former Act. She said (at para. 40):

> The question is not whether the Regional Manager PM-06 position was properly characterized as new rather than reclassified but whether the employer abused its authority in determining that the position would be staffed by an advertised process following the creation of a pool of candidates.

[33] She found that Mr Kane had not proved that it was the practice in the Newfoundland and Labrador region to appoint incumbents to their positions after they had been reclassified, and that the RMB decided to fill the Regional Manager position through an advertised process before it knew either the result of the classification review or that Mr Kane had not passed a standardized test.

[34] In view of the evidence and the statutory framework, the Judge was not persuaded that the Tribunal's decision was unreasonable, and dismissed Mr Kane's application for judicial review.

F. ISSUES AND ANALYSIS

[35] Three issues must be decided in this appeal. First, what is the standard of review applicable to the Tribunal's decision? Second, did the Tribunal err in deciding that the decision to fill the Regional Manager position on the basis of an advertised internal appointment process was not an abuse of authority? Third, if there was an abuse of authority in the choice of an advertised process, did the Tribunal err in finding that Mr Kane had failed to prove that the decision not to appoint him as Regional Manager was caused by the abuse of authority?

Issue 1: Standard of review

[36] The questions in dispute in this appeal principally concern the scope of the term "abuse of authority" in section 77 of the PSEA and its application to the facts of this case. I see no basis for departing from the presumption established in *Dunsmuir* (at paras. 53-54) that specialized tribunals' interpretation and application of their enabling statutes are reviewable on a standard of reasonableness**.**

[37] Experience or knowledge of employment matters in the public sector is a qualification for appointment to the Tribunal: PSEA, paragraph 88(3)(*b*). Thus, while undoubtedly having a legal aspect, the questions in dispute also concern the internal appointment process to fill a position, and are thus within the scope of the Tribunal's expertise. I also note in this context that subsection 95(2) empowers the Chairperson to retain experts as advisors to the Tribunal, including, presumably, lawyers.

[38] The existence of finality and strong privative clauses in section 102 puts the matter beyond doubt: *Dunsmuir* at para. 52. The effect of the "no *certiorari*" provision in subsection 102(2) is to exclude judicial review on the "non-jurisdictional" grounds set out in subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Consequently, since no statutory adjudicator is authorized to make unreasonable decisions, the Tribunal's decision, if unreasonable, may be set aside under paragraph 18.1(4)(*a*) as beyond its jurisdiction.

[39] Unlike the Federal Court in *Lavigne v. Canada (Justice)*, 2009 FC 684, 352 F.T.R. 269 at para. 46 (*Lavigne*), I do not think that the term abuse of authority in section 77 raises a question of law "of central importance to the legal system" and outside the scope of the Tribunal's expertise: the term merely defines conduct on which a federal public service employee may base a complaint to the Tribunal about specified employment decisions. That its scope may incidentally determine whether an employee can only pursue a particular complaint directly in the Federal Court through an application for judicial review, rather than through the Tribunal, does not, in my view, elevate it to a question of "central importance" to the Canadian legal system.

[40] Consequently, I agree with the Judge's conclusion that reasonableness is the applicable standard of review in this case.

Issue 2: Was it unreasonable for the Tribunal to decide that the selection of an advertised internal appointment process for filling the position of Regional Manager could not be an abuse of authority?

[41] This issue needs to be unpacked because it involves four related inquiries: the basis of Mr Kane's complaint of abuse of authority; the relevance of administrative guidelines and policy in the employer's decision-making; the scope of the term "abuse of authority"; and the reasonableness of the Tribunal's conclusion that Mr Kane's complaint could not constitute an abuse of authority.

(i) *Mr Kane's complaint*

[42] Mr Kane complained to the Tribunal under paragraph 77(1)(*b*) that, on the facts of his case, the employer abused its authority by advertising the Regional Manager position, and by not

appointing him to it. The Tribunal may only grant a remedy for breach of paragraph 77(1)(*b*) after determining that the complainant has proved that the Commission or its delegates committed an abuse of authority in choosing between an advertised and a non-advertised internal appointment process under section 33.

[43] Mr Kane argues that the employer treated the "newness" of the Regional Manager position as relevant to the decision to advertise. However, he says, the position was not new, but his old position reclassified. For the employer to base an exercise of discretion under section 33 on a relevant fact, when that fact does not exist, can constitute an abuse of authority. Administrative decisions based on unreasonable findings of material fact are an arbitrary exercise of the statutory power under which they are made. Hence, Mr Kane submits, for the Tribunal to conclude that such a decision was incapable of amounting to an abuse of authority would be unreasonable.

(ii) *Statutory discretion, guidelines and policy*

[44] The PSEA does not link the choice of internal appointment process under section 33 to whether a position is new or reclassified. Unlike the former Act, section 33 does not require the employer to take into account whether a position is new or reclassified before deciding which internal appointment process to adopt. Nonetheless, the breadth of the discretion conferred by section 33 is such that whether a position is new is a factor that the employer may consider. The newness or otherwise of a position is thus relevant to the exercise of the statutory discretion conferred, in the sense that it is a factor that the employer may lawfully take into account, but is not one that it must take into account if the section 33 discretion is to be exercised lawfully.

[45] That the newness of a position is relevant in the above sense is underlined by the Guidelines and a Service Canada Policy (*Criteria for Non-Advertised Appointment Processes Policy*) (Policy), which point decision-makers to this consideration when exercising their discretion under section 33. The Guidelines were promulgated before the PSEA was enacted, but were in force when the decision was taken to advertise the Regional Manager position. Counsel did not suggest that either the Guidelines, or the subsequently issued Policy, were unlawful as being inconsistent with the PSEA, or that it would be improper in this case for the employer to base an exercise of discretion under section 33 on them.

[46] Although primarily concerned with job classification, the Guidelines state (Appeal Book, p. 123):

The appointment process will differ depending on whether the classification action involves a reclassification or the establishment of a new position. Human resources advisors and managers should consult with their staffing advisors in advance of the classification action in order to understand the consequences of the proposed appointment process.	Le processus de nomination utilisé sera différent selon que la mesure de classification se rapporte à une reclassification ou à l'établissement d'un nouveau poste. Les conseillers en ressources humaines devraient consulter leurs conseillers en dotation et les gestionnaires avant de prendre la mesure de classification afin de comprendre les conséquences du processus de nomination proposé.
[emphasis added]	[non souligné dans l'original]

[47] The Policy came into effect with the PSEA in order to provide guidance to deputy heads and managers on the exercise of discretion under section 33. It states (Appeal Book, p. 329):

The objective of the policy is to provide a common framework and objective criteria to guide managers and sub-	L'objectif de la ligne directrice vise à offrir aux gestionnaires et aux cadres subdélégués un cadre commun et des

delegated officials in deciding when to use a non-advertised appointment process to conduct staffing. In deciding between a non-advertised and advertised process they must respect the appointment values of fairness, access and transparency. The decision must respond to the need for flexibility, efficiency and affordability in staffing and support Service Canada in meeting its operational requirements.	critères pour décider quand utiliser un processus de nomination non annoncé. Le choix du processus doit être fait de manière à respecter les valeurs liées à l'équité, l'accessibilité et la transparence dans les nominations tout en répondant aux besoins de souplesse, d'efficacité et d'économie et à aider l'organisation à répondre à ses besoins opérationnels.

[48] In other words, the Policy is aimed at ensuring a degree of consistency, coherence, and accountability in managerial decision-making under section 33. Thus, the Policy sets out (Appeal Book, p. 330) "circumstances in which a non-advertised process might be justified." The criteria for non-advertised appointment processes include (Appeal Book, p. 335):

Appointment of an employee following the reclassification of their position in accordance with the policies and guidelines of the Public Service Human Resources Management Agency of Canada (PSHRMAC) and the PSC.	Nomination d'un employé à la suite de la reclassification de son poste en vertu des politiques et des lignes directrices de l'Agence de gestion des ressources humaines de la fonction publique du Canada (AGRHFPC) et de la CFP.

[49] In my view, these extracts are an acknowledgement by the employer that the newness of a position can be relevant to the exercise of the broad discretion under section 33. This is the important point for the purpose of this appeal. Indeed, the Guidelines go further by stating that the appointment process will differ depending on how the position is characterized. The Policy, however, is more nuanced.

[50] Whether a failure to have regard to the Guidelines or Policy (including their provisions on the appointment process consequences of characterizing a position as new or reclassified) would constitute an abuse of authority is not a question that arises here. As the following extracts from the record show, the employer regarded the Regional Manager position as new and, consistently with the Guidelines and Policy, took this consideration into account in deciding to advertise.

[51] In a memorandum of March 1, 2006, the regional Executive Head, writing on behalf of the RMB, advised staff in the Newfoundland and Labrador region that the position of Regional Manager, IPCS, was being sent for classification review and, if it was classified at the PM-06 level, it would be filled from the pool of candidates who were successful in the competition then in progress. The classification of the position at the PM-06 level was confirmed on June 15, 2006.

[52] On June 20, 2006, the Director of IPCS for the region had advised Mr Kane (Appeal Book, p. 204) that "the new PM 6 position has been established" (emphasis added), and that approval had been given for him to act in the position until it was filled on a permanent basis.

[53] On August 9, 2006, the Director responded as follows to a request by Mr Kane for clarification of the method of staffing for the Regional Manager position (Appeal Book, p. 206):

> There is no doubt that the work you did during the past several months was significant and contributed greatly to the organizational structure that was recommended and approved at the February 14 RMB meeting. Having said that, approval to staff the manager's role at the PM 6 position required the establishment of a new position at that level. Since it was a new position at a higher level, it was deemed fair and appropriate to provide all managers with the opportunity to compete versus making an appointment via non-advertised process. (Emphasis added)

[54] Further, in a letter to the Tribunal, dated October 17, 2006, an Assistant Deputy Minister, People and Culture Branch, Service Canada, wrote (Appeal Book, p. 210):

> The respondent followed the above mentioned Guidelines for Reclassification and deemed the position to be a new position. In this particular circumstance, the Director responsible for the unit decided to run an internal advertised process to allow employees the opportunity to apply.

[55] The principal justification given by the employer for advertising was that the position was new. Accordingly, if Mr Kane could establish that there was no rational basis on which the Regional Manager position at the PM-06 level could be classified as "new", rather than "reclassified", he might succeed in demonstrating that the decision to use an advertised appointment process was arbitrary. This is because the decision would have been based in large part on an unreasonable conclusion about a fact relevant to the exercise of discretion under section 33.

[56] Like the Guidelines, the Policy is not binding in law, and management is entitled to depart from it. Indeed, the Policy itself purports only "to provide a common framework and objective criteria to guide managers" in deciding when to use a non-advertised appointment process, and is far from prescriptive. Nonetheless, its function is to promote "fairness, access and transparency" in decision-making under section 33 (Appeal Book, p. 329). Since fairness includes consistency and treating like alike, the objectives of the Guidelines and Policy will not be achieved if decisions made in accordance with them, but based on unreasonable findings of relevant facts, are allowed to stand.

(iii) *Abuse of authority*

[57] Counsel for the respondents argued that, although not defined in the PSEA, the term "abuse of authority" in section 77 has a narrow scope. It is limited to serious misconduct that carries a moral stigma, and requires a mental element akin to that in the tort of misfeasance in public office. Thus, the respondents submit in their memorandum of fact and law (at para. 62) that "abuse of authority" connotes

> … an intentional element of bad faith, personal favouritism, discrimination, corruption, serious carelessness or recklessness, gross negligence or misfeasance of a similar egregious nature.

[58] The respondents reject the position taken by the Tribunal in many cases: namely, that the concept of abuse of discretion in administrative law, particularly as explained by David Phillip Jones and Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009), pp. 174, 204, is an appropriate guide to the scope of abuse of authority in section 77. See, for example, *Tibbs v. Canada (Deputy Minister of National Defence)*, 2006 PSST 8 at paras. 68-74; *Bowman v. Canada (Deputy Minister of Citizenship and Immigration)*, 2008 PSST 12 at para 81; *Chiasson v. Canada (Deputy Minister of Canadian Heritage)*, 2008 PSST 27 at para. 36; *Jacobsen v. Canada (Deputy Minister of Environment)*, 2009 PSST 8 at paras. 46-48. Counsel for the respondents advanced two arguments in favour of a narrower interpretation of the term.

[59] First, it must be interpreted in light of subsection 2(4) of the PSEA, which states that "abuse of authority" includes "bad faith and personal favouritism". The respondents say that the limited class, or *ejusdem generis*, presumption of statutory interpretation confines abuse of authority to conduct analogous to these examples.

[60] I do not agree. The limited class presumption is normally applied when a general term follows a list of items that have something in common; the scope of the general term is presumptively limited to items that share the feature common to the listed items. However, there is authority for the proposition that the presumption does not apply to provisions where, like subsection 2(4), specific items are stated to be included in a preceding general term. See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 237-239; *Glasgow v. Canada (Deputy Minister of Public Works and Government Services)*, 2008 PSST 7 at paras. 36-40.

[61] Professor Sullivan points out (at 239) that Parliament may provide that a general term includes particular items for reasons other than to indicate the narrowness of the intended scope of the preceding general term, such as providing assurance that items likely to be of particular concern are indeed included in the general term.

[62] This interpretation is consistent with the French text of subsection 2(4), which reads: « … on entend notamment par « abus de pouvoir » la mauvaise foi et le favoritisme. » Like the adverbs "particularly" or "especially", « notamment » may connote the relative importance of something: see *Le Nouveau Petit Robert 2010*, where the synonyms given for « notamment » are « particulièrement, singulièrement, spécialement ».

[63] Second, the respondents say that "abuse of authority" must be interpreted in light of the power of the Commission and deputy heads to take corrective action when satisfied that "an error,

an omission or improper conduct" affected an appointment decision (PSEA, subsections 15(3) and 67(1)). They argue that a ground on which a decision may be corrected under these provisions cannot also constitute an abuse of authority under section 77. Thus, in *Lavigne* the Federal Court stated (at para. 62): "abuse of authority requires more than error or omission or even improper conduct." For the following reasons, a comparison of these provisions is not, in my opinion, particularly helpful in interpreting the scope of section 77.

[64] First, the categories, abuse of authority on the one hand, and errors, omissions, and improper conduct on the other, overlap. All abuses of authority involve improper conduct and error, while some instances of error, omission, and improper conduct may also be an abuse of authority. In my opinion, the fact that not every error or omission, or every instance of misconduct, is sufficiently significant to constitute an abuse of authority does not shed much light on the latter's scope.

[65] Second, an employee's right of access to the Tribunal on the one hand, and, on the other, a managerial discretion to take corrective action, with or without a prior informal discussion with a concerned employee, are sufficiently different kinds of recourse that the scope in which one operates should not be viewed as mutually exclusive of the other.

[66] It would be inappropriate for the Court to attempt to formulate a comprehensive definition of abuse of authority as that term is used in section 77 of the PSEA. I recognize that by limiting the Tribunal's jurisdiction to adjudicate employees' complaints to instances of abuse of authority,

Parliament no doubt intended to reduce the staffing delays, and overly intrusive surveillance, associated with what was effectively *do novo* appellate review under the former Act.

[67] Nonetheless, I reject the narrow meaning of abuse of authority advanced by the respondents as a suitable basis on which to consider the reasonableness of the Tribunal's decision to dismiss Mr Kane's complaint. Such a limited interpretation is supported by neither the statutory text nor, as I explain further at paragraphs 74-77 of these reasons, its statutory context and the objectives of the legislation.

(iv) ***Was the Tribunal's decision unreasonable?***

[68] The reasonableness of an administrative tribunal's decision is determined by reference to its reasons and the outcome. A reviewing court must decide if the tribunal's reasons for decision demonstrate justification, transparency and intelligibility within the decision-making process, and if the decision itself falls within the range of possible acceptable outcomes that are defensible on both the facts and the law: *Dunsmuir* at para. 47.

[69] This case is about whether it was unreasonable for the Tribunal to preclude any consideration of whether the Regional Manager position at the PM-06 level was new, on the ground that section 33 does not require the employer to take this into consideration, but leaves the choice of appointment process to the discretion of the deputy head. The Tribunal regarded any breach of the Guidelines as immaterial, reasoning that, because they are not law, a misinterpretation of them cannot constitute an abuse of authority. Neither the Tribunal nor the Federal Court found it

necessary to articulate an interpretation of the term “abuse of authority”, but regarded the case as involving a largely factual question.

[70] Paragraph 77(1)(*b*) provides that the choice between an advertised and a non-advertised appointment process may constitute an abuse of authority. Parliament thus envisaged that although the scope of the discretion under section 33 is broad, its exercise can form the basis of a complaint to the Tribunal of abuse of authority.

[71] The question of law raised by this appeal is whether the Tribunal committed a reviewable error when it regarded as irrelevant to a complaint of abuse of authority under 77(1)(*b*) the distinction between new and reclassified positions, when the employer gave the newness of the Regional Manager position as the principal reason for the decision to advertise. In my view, the Tribunal erred.

[72] Its error was to proceed on the assumption that, because section 33 does not require the employer to take into account whether the position was new or reclassified, the employer’s characterization of the position as new was incapable of grounding a complaint of abuse of authority. This error rendered the Tribunal’s resulting decision unreasonable because it precluded Mr Kane from attempting to establish that the employer’s characterization of the position as new had no rational basis.

[73] In my opinion, it was unreasonable for the Tribunal, in effect, to conclude that a complaint under paragraph 77(1)(*b*) could not be substantiated, even if the employer decided to use an advertised internal appointment process because the position to be filled was new, and Mr Kane could show that it clearly was not. A decision pursuant to section 33 is arbitrary if based on an irrational finding of a material fact which the employer may consider in the exercise of the power. That the distinction between a new and a reclassified position is relevant to the exercise of the power (in the sense that the employer may lawfully take it into account) is confirmed by the Guidelines and the Policy.

[74] As Justices Bastarache and LeBel noted (at para. 42) when writing for the majority in *Dunsmuir*: "It is also inconsistent with the rule of law to retain an irrational decision." If the Regional Manager position at the PM-06 level was not new, the employer's decision to advertise was *prima facie* irrational because its basis was unfounded and, to that extent, would be inconsistent with values motivating the PSEA: fairness, accountability, and transparency. For the Tribunal to proceed on the basis that such a decision could not support a finding of abuse of authority is unreasonable.

[75] If courts do not permit irrational decisions to stand because they are inconsistent with the rule of law, it is not reasonable for the Tribunal to exclude from the scope of the term "abuse of authority" decisions under section 33 that are based on facts that have no rational support in the material before the managerial decision-maker.

[76] That Parliament could not reasonably be taken to have intended to exclude irrational decisions from the Tribunal's jurisdiction under section 77 is also supported by the statutory context: Mr Kane's complaint is the kind for which adjudication by an expert and independent administrative tribunal is ideally suited. It would also run counter to a rational allocation of functions under the PSEA regarding employees' grievances to interpret "abuse of authority" so narrowly that Mr Kane's only remedies would be to request management to exercise its power to correct its mistakes (PSEA, subsections 15(1) and 67(3), and section 47), or to make an application for judicial review directly to the Federal Court, which would not have the benefit of a decision by the specialized Tribunal. Parliament cannot have intended such a result.

[77] The PSEA was intended to introduce more flexibility into appointment and staffing decisions. However, these objectives do not require an interpretation of the Act that would preclude employees from pursuing an effective remedy for managerial arbitrariness in the exercise of a statutory discretion.

[78] In the present case, the Tribunal did not decide that the Deputy Head based her decision on the mistaken view that the Regional Manager position was new, rather than a reclassified position. The Tribunal did not get this far, because it concluded that the distinction between new and reclassified was not relevant to Mr Kane's complaint of abuse of authority in the exercise of the Deputy Head's discretion under section 33.

[79] However, for the reasons given in paragraphs 72-75 above, it was unreasonable for the Tribunal to hold that it could not be an abuse of authority under paragraph 77(1)(*b*) for the Deputy Head to decide to advertise because the position to be filled was new, even if, as Mr Kane maintains, it clearly was not. It was therefore unreasonable for the Tribunal to have declined to determine whether the decision to advertise was, as Mr Kane alleges, made on the basis of a finding of relevant fact for which there was no rational support in the facts or the applicable criteria, namely, the characterization of the Regional Manager's position as new.

[80] Of course, it is not the Court's role in this appeal to express an opinion on whether the Regional Manager position at the PM-06 level is new or a reclassification of the position previously occupied by Mr Kane. As already noted, he says that the duties are the same, which indicates a reclassification. On the other hand, the organizational structure of the unit has changed, so that there are now two PM-05s reporting to the Regional Manager, which may suggest that the PM-06 position is new: see Guidelines at Appeal Book, p. 123. However, this is something for the Tribunal, not this Court, to decide.

[81] Accordingly, I would remit the matter to the Tribunal to re-determine Mr Kane's complaint under paragraph 77(1)(*b*) on the basis that, since the employer principally justified its decision to advertise on the ground that the Regional Manager position at the PM-06 level was newly created, the Tribunal must decide if this characterization was rationally supportable. If the Tribunal decides that it was not, it would be open to it, after considering all the circumstances, to conclude that the

decision to fill the position on the basis of an advertised appointment process was an abuse of authority.

[82] Conversely, if Mr Kane does not persuade the Tribunal that it was unreasonable for the employer to treat the Regional Manager position at the PM-06 level as new, rather than reclassified, it will dismiss his complaint.

Issue 3: Was it unreasonable for the Tribunal to dismiss Mr Kane's complaint because he had failed to prove that, even if the decision to advertise constituted an abuse of authority, it was not the reason why he was not appointed?

[83] The Tribunal held that Mr Kane was not appointed Regional Manager because he failed one component of the standardized tests administered to candidates for appointment to positions at the PM-05 and PM-06 levels. In other words, even if there had been an abuse of authority in the exercise of the section 33 discretion, he had failed to prove that it was the cause of his non-appointment, as is required before the Tribunal can uphold a complaint under paragraph 77(1)(*b*).

[84] I do not agree. The Tribunal's reasoning assumes that, absent an abuse of authority in deciding to fill the position on the basis of an advertised internal appointment process, the Deputy Head would still have used the same methods to assess whether Mr Kane had the necessary skills and qualifications to fill the Regional Manager position on a permanent basis.

[85] This, with respect, is pure speculation. If Mr Kane is correct and the Regional Manager position at the PM-06 level is not new but is a reclassification of his former position, the employer might well not have followed an advertised process. It is accordingly unreasonable to assume that, even if no competition was held, the standardized evaluative tools used in a competition would necessarily be used to assess if Mr Kane was qualified to continue in the particular job, despite the broad discretion in the choice of methods of assessment conferred on the employer by section 36.

[86] Mr Kane says that the duties of the Regional Manager do not differ materially from those of the Service Delivery Manager, and that the position is therefore a reclassification of the position that he occupied. If this is correct, an assessment of Mr Kane's ability to do the job can reasonably be expected to include, as a significant component, his performance in the twelve months of his deployment to IPCS, first as Service Delivery Manager in the interim organization, and then as acting Regional Manager.

[87] Indeed, section 36 of the Act specifically includes "a review of past performance and accomplishments" as a basis for determining whether a person meets the qualifications for a job. The review in the record of Mr Kane's performance during his deployment to the IPCS business line is positive (Appeal Book, p. 206), and there are no suggestions that his work had been unsatisfactory. A discrepancy between the performance assessments and the results of tests may cause management to examine the appropriateness of the tests in this context. Needless to say, Mr Kane's incumbency did not entitle him to be appointed to the Regional Manager position.

[88] Thus, if, when the Tribunal re-determines the matter, it concludes that there was an abuse of authority in the exercise of the discretion conferred by section 33, it must also decide if the abuse caused Mr Kane not to be appointed Regional Manager.

[89] Finally, Mr Kane believes that he was arbitrarily "singled out" by being made to compete for his own job, and not being appointed to it. To the best of his knowledge as an experienced federal public service employee in the Newfoundland and Labrador region, incumbents in the region have, for years, always been appointed to their positions after reclassification.

[90] I agree with the Federal Court that the Tribunal could reasonably conclude that, even though not contradicted, Mr Kane's assertion is not enough to discharge the burden upon him, as the complainant, to prove that it was a consistently followed practice in the region to appoint incumbents to their position after reclassification. He has not challenged the Tribunal's refusal to require the employer to provide information on this topic.

G. CONCLUSIONS

[91] For these reasons, I would allow the appeal with costs here and below, set aside the decision of the Federal Court, grant Mr Kane's application for judicial review, set aside the decision of the Tribunal, and remit the matter to the Tribunal, differently constituted, to re-determine in accordance with these reasons Mr Kane's complaint that he was not appointed Regional Manager by reason of an abuse of authority by the employer in choosing an advertised internal appointment process. The

re-determination shall be conducted on the basis of the existing record, although the Tribunal may permit the parties to supplement it, and to make oral submissions.

"John M. Evans"
J.A.

"I agree
Eleanor R. Dawson J.A."

STRATAS J.A. (**Dissenting reasons)**

[92] I agree with my colleague's statement of the facts and issues. I agree that the standard of review of the Tribunal's decision is reasonableness. However, my colleague has held that the Tribunal's decision fails under that standard and should be set aside.

[93] I disagree. In my view, the Federal Court was correct: the Tribunal's decision was reasonable and should be upheld.

[94] Our disagreement is not based on differing views of facts or differing subjective assessments of the reasonable standard. Instead, we differ at the level of fundamental principle on how courts should conduct reasonableness review.

A. My colleague's approach

[95] Distilling my colleague's reasons to their essence, my colleague says that the Tribunal's decision is unreasonable because the Tribunal failed to take into account a consideration relevant to the determination of "abuse of authority" under paragraph 77(1)(*b*) of the *Public Service Employment Act*, S.C. 2003, c. 22 (the "Act"). The relevant consideration (the "Newness Consideration") is that the employer thought that the PM-06 position was new and saw "newness" as a reason to advertise and hold a competition for the position, but the position might not be new at all.

[96] The Tribunal upheld the employer's staffing decision and found no "abuse of authority" under paragraph 77(1)(*b*) of the Act. The Tribunal held that the Newness Consideration was irrelevant to whether there was an "abuse of authority." As we shall see, those holdings were reasonable. But my colleague disagrees. In his view, the Newness Consideration is relevant to whether there was an "abuse of authority" and the Tribunal had to consider the Newness Consideration. Its failure to do so invalidated its decision.

[97] My colleague finds that the Newness Consideration is relevant – based not on the legal and factual findings made by the Tribunal, but rather on factual and legal findings he himself makes. My colleague finds as a fact that "[t]he employer's principal justification for advertising [the PM-06 position] was that the position was new" (at paragraph 55), but the position may not be new. My colleague finds as a legal matter that newness of the PM-06 position is relevant to the employer's decision under section 33 of the Act: he states that "…the newness…of a position is thus relevant" (at paragraph 44), "the breadth of the discretion conferred by section 33 is such that whether a position is new is a factor that the employer may consider" (at paragraph 44), and "the newness of a position can be relevant to the exercise of the broad discretion under section 33" (at paragraph 49). If the position were not new, my colleague concludes, as a legal matter, that "the employer's decision to advertise was *prima facie* irrational because its basis was unfounded" (at paragraph 74) and so the employer may have committed an "abuse of authority" under paragraph 77(1)(*b*) of the Act (at paragraphs 75-79). In his legal view, "abuse of authority" under paragraph 77(1)(*b*) of the Act must include "[employer] decisions that are based on facts that have no rational support in the material before the [employer]" (at paragraph 75). Finally, turning to the Tribunal's decision itself,

he finds that it failed to take into account the Newness Consideration. To my colleague, that is the end of the matter – the Tribunal's decision is unreasonable for that reason alone and so it must now reconsider the matter taking into account the Newness Consideration.

[98] That is no longer the accepted approach. No longer do we automatically invalidate decisions because they failed to take into account a relevant consideration. Instead, today, our role is to engage in truly deferential reasonableness review, nothing more.

B. The movement away from my colleague's approach

[99] My colleague's approach harkens back to a time long ago when courts would interfere much more readily with tribunal decisions. Courts would fasten onto a certain type of error, such as a failure to take into account a consideration that the reviewing court itself deems relevant, and then use that error to quash a tribunal decision.

[100] Today, we recognize that such an approach often leads to quite intensive, non-deferential review of tribunal decisions. In this case, my colleague, based on his own view of the facts and the law, determines that the Newness Consideration is relevant to "abuse of authority" under paragraph 77(1)(*b*), examines whether the Tribunal took the Newness Consideration into account, and then finds the Tribunal's decision wanting. Under my colleague's approach, the Tribunal's own assessments of what is or is not relevant do not fall for scrutiny, even deferential scrutiny. Put another way, this sort of approach "seems to leave little room for deference of respect for decision-

maker appreciation of those factors or considerations that were relevant to the interpretation of a particular statutory provision or the exercise of a particular statutory power": David J. Mullan, "Deference from *Baker* to *Suresh* and Beyond – Interpreting Conflicting Signals," in David Dyzenhaus, ed., *The Unity of Public Law* (Oxford: Hart Publishing, 2004) at page 24.

[101] In recent years, the Supreme Court has moved us toward a different approach: truly deferential reasonableness review. No longer is it "sufficient merely to identify a categorical or nominate error" or to "slot a particular issue into a pigeon hole of judicial review," such as the failure to take into account a relevant consideration: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paragraphs 22 and 25, [2003] 1 S.C.R. 226 *per* McLachlin C.J.C. and see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Instead, "[r]eview of the conclusions of an administrative decision-maker must begin by applying [the reasonableness standard of review]": *Dr. Q.*, *supra* at paragraph 25; David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity" (2004), 17 Can. J. Admin. L. & Prac. 59 at page 65.

[102] Under the Supreme Court's approach, we do not determine what considerations are relevant and then impose our determinations of relevance on the tribunal. Rather, the tribunal is given "substantial leeway…in determining the…'relevant considerations' involved in a given determination," and then we engage in reasonable review of what the tribunal has done: *Baker*, *supra* at paragraph 56. Reasonableness review is supposed to be truly deferential review: *Dunsmuir*, *supra* at paragraph 47.

C. Truly deferential reasonableness review

[103] As explained by the Supreme Court, truly deferential reasonableness review requires us to assess whether the Tribunal's conclusions fall within a range of outcomes that are defensible on the facts and the law: *Dunsmuir*, *supra*, at paragraph 47. Our posture must be one of deference; interference by us must be rare.

[104] In order to engage in truly deferential reasonableness review, we must have front of mind a proper understanding of our role.

[105] There are certain realities in the case at bar that remind us of our role. In the Act, Parliament has assigned the tasks of finding the facts, interpreting the legislation, arriving at conclusions and awarding appropriate relief to the Tribunal – not to us. For good measure, Parliament has forbidden us from questioning or reviewing any decision of the Tribunal: Act, section 102.

[106] Of course, the normal rule is that courts must obey Parliament's law. However, the constitution is a higher law and courts have a "constitutional duty to ensure that public authorities do not overreach their lawful powers": *Dunsmuir*, *supra* at paragraph 29; *Crevier v. Quebec (A.G.)*, [1981] 2 S.C.R. 220 at page 234; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at page 1090. In the case at bar, this duty allows us to review decisions of the Tribunal despite Parliament's vesting of exclusive jurisdiction in the Tribunal and despite the privative clause in section 102.

[107] When do “public authorities… overreach their lawful powers” and trigger our duty to interfere? In *Dunsmuir*, we are told that one situation is where a tribunal reaches an outcome that is indefensible on the basis of the law and all of the evidence, even taking into account the particular expertise and policy appreciation of the tribunal. Such an outcome, in the words of *Dunsmuir*, falls outside of the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (at paragraph 47). We interfere because the tribunal has reached an outcome based on an indefensible interpretation, application or exercise of Parliament’s law. We do not interfere simply because the tribunal has failed to consider something that we happen to think is relevant.

[108] To be sure, this holistic approach to judicial review results in considerable deference, much more than my colleague’s approach. But given our narrow role, this is the correct approach.

[109] In this case, unless there is an indefensible interpretation, application or exercise of Parliament’s law – a decision outside of the range of acceptable outcomes – we cannot interfere. We must keep within our narrow role. We must mind our place.

D. Subjecting the Tribunal’s decision to truly deferential reasonableness review

[110] Does the Tribunal’s decision fail truly deferential reasonableness review? Is it indefensible in the sense that I have described? In my view, no. The Tribunal has adopted a defensible interpretation, application and exercise of Parliament’s law. We cannot interfere.

[111] The case at bar concerns an employer in a special employment sector, the public service. The employer made a discretionary judgment call about how to go about staffing a particular public service position in a particular staffing structure. The employer's judgment call was placed before the Tribunal. The Tribunal is a public service staffing tribunal comprised of persons who "must…have knowledge of or experience in employment matters in the public sector" (subsection 88(3) of the Act). It had to consider whether, in these particularly unusual circumstances, the employer committed an "abuse of authority" within the meaning of paragraph 77(1)(*b*) of the Act, a statute governing public service employment. This case rests at the bull's-eye of the exclusive mandate Parliament has given to the Tribunal, not us.

[112] The facts before the Tribunal were unusual. Before the Tribunal was an interim staffing situation, in flux and evolving towards a more permanent structure. At the outset, the employer established a "new interim organizational structure" (Tribunal reasons, paragraph 4). It deployed the appellant, without open competition, into this new interim structure, as a Service Delivery Manager, PM-05 level.

[113] One month later, the employer informed all staff that it was reviewing the new interim structure. Within a couple of months, the employer had finished its review. It announced a revised and finalized staffing structure. In that structure was a new position, a higher level PM-06 position. It was quite similar to the PM-05 position the appellant briefly held in the interim structure, but was within a different staffing and reporting structure.

[114] How should the higher level PM-06 position be staffed? The employer had two options to choose from:

(a) *No advertisement and no competition for the higher level position.* Under this option, assuming the appellant met the requirements of the final, higher level position, the employer would automatically promote the appellant from the PM-05 position he briefly held, into the final, higher level position.

(b) *Advertisement and open competition for the higher level position.* Under this option, the employer would advertise the higher level position and hold an open competition involving the appellant and other qualified employees.

[115] Section 33 authorizes the employer to choose between "an advertised or non-advertised process," *i.e.*, either of the two above options. The section contains no words of limitation and, as the Tribunal found, it gives the employer much latitude. Alongside section 33, however, is a purpose-laden preamble clause in the Act, a clause that guides the employer's discretion. It provides, among other things, that the public service is to "strive for excellence" and "achieve results for Canadians." The preamble also sets out other important principles such as (in no particular order) diversity, linguistic duality, non-partisanship, "fair, transparent employment practices," "effective dialogue," "respect for employees," and giving employers the "flexibility" to hire the person that will deliver "services of highest quality to the public."

[116] On these facts and within this overall statutory context, the employer chose to advertise and run an open competition. The employer offered three reasons for this: the higher level position was new, it was a "position at a higher level," and "it was fair and appropriate to provide all managers with the opportunity to compete" for it.

[117] The employer advertised the position and the appellant entered the competition. He lost and, as a result, he was not promoted to the higher level position. Another candidate performed better in the competition and received the position.

[118] After the competition was held, the appellant complained that he should have been promoted to the higher level position by virtue of his brief incumbency: in his view, the PM-06 position was a reclassification of his old, albeit interim, PM-05 position and was not new. The appellant went to the Tribunal, alleging that in these circumstances and within this statutory context, the employer committed an "abuse of authority" under paragraph 77(1)(*b*) of the Act.

[119] As my colleague notes (at paragraph 66), in 2003 Parliament added the requirement of "abuse of authority" into paragraph 77(1)(*b*) to prevent "overly intrusive surveillance associated with what was effectively *de novo* appellate review under the former Act." It is not every employer mistake or misstatement or questionable judgment call that merits redress before the Tribunal. The Tribunal's task under paragraph 77(1)(*b*) is to look at all of the facts, understand the breadth of section 33 of the Act and the Act's purposes, apply its knowledge and experience concerning public service staffing, and reach a conclusion about whether the employer abused its authority. In carrying

out this task, the Tribunal decided that the employer did not abuse its authority in making the choice it did.

[120] Specifically, the Tribunal made the following specific findings that, in my view, were defensible on the law and all of the evidence:

(a) The Tribunal found that the current Act, passed in 2003, "makes no distinction between a new or reclassified position," unlike the old, pre-2003 Act (Tribunal decision, at paragraph 66).

The Tribunal's finding is defensible. The plain wording of section 33 supports it. Further, under the old, pre-2003 legislation (*Public Service Employment Act*, R.S.C. 1985, c. P-33 and the *Public Service Employment Regulations, 2000*, SOR/2000-80), an employer sometimes had to consider whether a position was new or reclassified: see section 10 of the old Act and paragraph 5(2)(*b*) of the old Regulations. Under the old legislation, in certain circumstances, a reclassified position could not be advertised and subject to open competition. Provided an incumbent met the requirements for the position, in many circumstances the incumbent could simply be slotted into the position, even a higher position, whether or not he or she was the best person for the job. In 2003, Parliament did away with the new/reclassified distinction. In its place was section 33, which, as the Tribunal observed, gives the employer a broad discretion to make an appropriate choice in all the circumstances.

Also in 2003, Parliament enacted the preamble clause and the Tribunal's finding is consistent with many of the objectives in it.

(b) The Tribunal found that the employer's discretion to advertise under section 33 of the Act does not turn on whether the position was new or reclassified. An advertised or a non-advertised appointment process can be used in either case (Tribunal decision, at paragraphs 64 and 65).

This is a defensible interpretation supported by the broad wording of section 33, the preamble clause, and Parliament's abolition in 2003 of the new/reclassified distinction.

(c) The Tribunal found that no administrative policies or guidelines require the use in this case of a non-advertised process (Tribunal decision, at paragraphs 64 and 65).

This is a defensible finding. The Tribunal did not identify any particular policy statements, but my colleague does (the "Policy" and the "Guidelines"). The Guidelines are out of date: as my colleague mentions (at paragraph 45), they were drafted under the old legislation before Parliament abolished the new/reclassified distinction. As for the Policy, it only lists "internal appointment situations that *might* lend themselves to a non-advertised process" and adds that "[a]dditional circumstances *may be considered*" [emphasis added]: the Policy could be fairly read

as providing no guidance on the matter. Finally, in the end result, a tribunal must have regard to Parliament's law, here section 33 and paragraph 77(1)(*b*) of the Act, not administrative policies. That is exactly what the Tribunal did.

(d) The Tribunal found that "[t]he mere choice of conducting an advertised or non-advertised process is not abuse of authority in itself as it is specifically allowed in the [Act]" (Tribunal decision, at paragraph 60). In its view, the employer exercised its authority within the ambit of section 33 of the Act. Therefore, it did not commit an "abuse of authority."

This too is defensible, particularly on the unusual factual record in this case. An interim staffing structure was modified after a couple of months and a higher level position was created. The appellant held the PM-05 position for a very brief time. Section 33 is very broad, it was enacted as part of a reform that abolished the new/reclassified distinction, and many of the Act's purposes set out in the preamble supported the employer's choice of option in this case. In the latter regard, where the Tribunal reaches an outcome that is arguably consistent with the purpose of the legislative scheme, its decision is more likely to be found to be reasonable, than one which is not: *Montreal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraph 42.

E. Particular areas where my colleague's approach has resulted in insufficient deference

[121] It is true that, at paragraph 47 of *Dunsmuir*, my colleague sets out the classic statement about the reasonableness standard being a standard of deference. However, his approach in this case to review is not deferential at all. As I have said above, and as I shall further demonstrate below, this is because he has fastened onto the "nominate error" or "pigeon hole" of "failing to take into account a relevant consideration," rather than engaging in truly deferential reasonableness review.

[122] I would identify four particular areas where my colleague's approach has resulted in insufficient deference, contrary to our proper role.

I

[123] To reiterate, the Newness Consideration that my colleague says the Tribunal failed to take into account was the following: the employer thought that the PM-06 position was new and saw "newness" as a reason to advertise and hold a competition for the position, but the position might not be new at all. In order to establish the relevance of this consideration, my colleague goes further and wades into the facts, finding that the newness of the position was the "principal justification" behind the employer's decision to advertise and hold a competition (at paragraph 55). The employer's other reasons – the fact that the position was higher and the need for other deserving employees to have a shot at the position (see paragraph 116, above) – are seen, factually, as subordinate. Further, as I have shown in paragraph 97 above and as I will discuss further below, the

Newness Consideration is made relevant to section 33 and paragraph 77(1)(*b*) because my colleague interprets those sections in his own way.

[124] In short, in the manner in which it was developed and in the relevance assigned to it, the Newness Consideration is a judicial construction based on judicial views of the relevant facts and the law, not Tribunal views. Then, with the Newness Consideration in hand, the Tribunal's decision is analyzed to see whether that judicial construction is present. Only at this stage of the analysis are words of reasonableness review uttered, but by then it is too late: it is plain to all that the Tribunal did not take the judicially-constructed Newness Consideration into account. The Tribunal's decision is then said to be "unreasonable" because it fits within the "nominate error" or "pigeon hole" of failing to take relevant considerations into account. This is an approach that the Supreme Court has told us not to follow. This is not truly deferential reasonableness review. This is the imposition of the views of the Court over the views of the Tribunal – the body whose views alone should hold sway, according to the law-makers in Parliament.

[125] The factual and legal terrain that my colleague explores was already thoroughly explored by the Tribunal and, as I have shown in paragraph 120, the Tribunal, based on its own exploration, reached defensible conclusions. Before the Tribunal, the appellant urged it to find that the PM-06 position was not new. The Tribunal had evidence suggesting that, contrary to the appellant's submission, the position was, in a very real sense, new (see paragraphs 112-113, above). However, in the end, this factual issue simply did not matter to the Tribunal. It did not see the new/reclassified distinction as being relevant to the employer's discretion to advertise under section 33 of the Act or

the issue of “abuse of authority” under paragraph 77(1)(*b*) of the Act. As we have seen, the Tribunal’s interpretation was defensible based on the plain wording of the section, Parliament’s repeal of the new/reclassified distinction, and the purposes of the Act.

II

[126] My colleague finds that an employer abuses its authority under paragraph 77(1)(*b*) of the Act when it relies on a fact that is wrong and that might have affected its decision. In his words, “abuse of authority” under paragraph 77(1)(*b*) must include “[employer] decisions that are based on facts that have no rational support in the material before the [employer]” (at paragraph 75). Here, my colleague is defining what “abuse of authority” means and he is travelling well down the road of fact-finding. These are the Tribunal’s tasks, not ours. Parliament has given the Tribunal the exclusive power to decide whether an employer has abused its authority and on this it is entitled to deference: *Dunsmuir*, *supra*, at paragraph 47. The Tribunal had all of the evidence before it, including the appellant’s submission that the position was not new and that it was the very basis of the employer’s decision. The Tribunal simply did not accept that. On all of the evidence before it, it found that the employer did not “abuse its authority” under paragraph 77(1)(*b*) of the Act. Following the truly deferential approach to reasonableness review, I have concluded that the Tribunal’s finding is defensible based on the law and all of the evidence.

[127] In paragraphs 59-62 of his reasons, my colleague discusses subsection 2(4) of the Act and whether it means that “abuse of authority” under paragraph 77(1)(*b*) covers only severe matters, as the respondent suggests. My colleague concludes that subsection 2(4) of the Act does not necessary

lead to that conclusion. I happen to agree with him on this. But it is not our job to decide this. Parliament has given it to the Tribunal. Provided that the Tribunal reaches a defensible conclusion, it is entitled to decide differently.

III

[128] My colleague finds that if the employer relied upon a wrong or irrational reason for advertising the position, it may have committed an "abuse of authority" under paragraph 77(1)(*b*) of the Act. In his view, the wrongness of employer reasons can result in an "abuse of authority," and whether the employer's decision was otherwise appropriate or acceptable is irrelevant. Here again, my colleague is interpreting "abuse of authority" in paragraph 77(1)(*b*). This is a matter for the Tribunal, not for us.

[129] The Tribunal heard the appellant's submissions that the position was new and that the employer had erred, but the Tribunal nevertheless found that on these facts there had been no abuse of authority because of the broad discretion given to the employer under section 33. Put another way, the Tribunal implicitly rejected the proposition that if an employer invokes reasons in support of its decision that are "wrong," there is automatically an "abuse of authority" under paragraph 77(1)(*b*). Given the Tribunal's defensible interpretation of section 33, the purposes set out in the preamble clause, and all of the facts of this case, I cannot say that the Tribunal has done something indefensible here.

IV

[130] My colleague considers the Policy and Guidelines to be relevant, interprets and applies them, and uses them to help establish the relevance of the Newness Consideration. He concludes that they "are an acknowledgement by the employer that the newness of a position can be relevant to the exercise of the broad discretion under section 33" (at paragraph 49). He finds that a decision by the employer that is "based on unreasonable findings of relevant facts" will violate the objectives of the Policy (at paragraph 56). Finally, he notes that the Policy and Guidelines make the newness of a position relevant to the employer's discretion under section 33 (at paragraph 73).

[131] But the Tribunal considered the Policy and Guidelines to be irrelevant and, following the truly deferential approach to reasonableness review, I have found this to be defensible. It is for the Tribunal, not us, to decide when there is a violation of administrative policies in this area, and whether such a violation is relevant to the commission of an "abuse of authority" under paragraph 77(1)(*b*) of the Act.

[132] We must remember that administrative policies in specialized areas like this are best interpreted and applied by the administrators. The Tribunal is knowledgeable and expert in public service staffing matters and is familiar with all relevant administrative policies in this area. We are not. When we wade into a thicket of administrative policies, we are armed with legal tools but we lack specialized knowledge. We may get it wrong. For example, certain guidelines made by the respondent and probably known to the Tribunal are contrary to the policies identified by my colleague and are contrary to the conclusions he reaches. For one thing, they emphasize the

irrelevance of the consideration of whether the position is new or reclassified. See online: http://www.psc-cfp.gc.ca/plcy-pltq/qa-qr/appointment-nomination/choice-choix-eng.htm and http://www.psc-cfp.gc.ca/plcy-pltq/qa-qr/appointment-nomination/choice-choix-fra.htm. I do not rely on these guidelines as support for the reasonableness of the Tribunal's decision, as they are not in evidence before us. However, their existence serves to remind us of something important: it is dangerous for us to latch onto administrators' policy statements that counsel happened to put into the record, make our own pronouncements on them, and then use those pronouncements as a basis to meddle with the Tribunal's decision.

F. A final comment

[133] In this case, "abuse of authority" under paragraph 77(1)(*b*) of the Act is very broad, and Parliament has not constrained the Tribunal's ability to interpret and apply those words. As a result, as I have explained, given the facts and the law in this case, it was defensible for the Tribunal to find the way it did.

[134] However, other cases may be different. They may involve statutes where, expressly or by clear implication, Parliament has constrained the tribunal's decision-making in some way. For example, Parliament might constrain a tribunal by setting out a tightly-worded definition of a key statutory phrase, requiring that certain prerequisites be present before the tribunal makes a particular decision, enumerating factors that the tribunal must consider, or prescribing a particular test to be followed. The tribunal might not be able to legitimately interpret its way around or otherwise avoid

these constraints. So if the tribunal disobeyed these constraints, its decision may represent an indefensible interpretation, application or exercise of Parliament's law and may have to be set aside: see, for example, *Dalton v. Criminal Injuries Compensation Board* (1982), 36 O.R. (3d) 394 (Div. Ct.); *Almon Equipment Ltd. v. Canada (A.G.)*, 2010 FCA 193, 405 N.R. 193; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at page 115.

[135] I mention this only to make it clear that a tribunal's failure to take into account a relevant consideration can indeed lead to a finding of unreasonability in a particular case. It may constitute a constraint or requirement that the tribunal cannot defensibly interpret around or otherwise avoid. But that finding of unreasonability is made not because of the existence of the "pigeon hole" or "nominate error" of failing to take into account a relevant consideration, but because, the Court, engaging in truly deferential reasonableness review, finds the tribunal's decision to be an indefensible interpretation, application or exercise of Parliament's law.

G. Conclusion

[136] I agree with the Federal Court that the Tribunal's decision was reasonable. Therefore, I would dismiss the appeal, with costs.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-394-09
(APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE HENEGHAN DATED JULY 21, 2009, NO. T-1626-07)	
STYLE OF CAUSE:	Robert Kane v. Attorney General of Canada and Public Service Commission
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 20, 2010
REASONS FOR JUDGMENT BY:	EVANS J.A.
CONCURRED IN BY:	DAWSON J.A.
DISSENTING REASONS BY:	STRATAS J.A.
DATED:	January 19, 2011

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