Federal Court of Appeal  Cour d'appel fédérale

Date: 20210601

Docket: A-121-20

Citation: 2021 FCA 106

CORAM: **WEBB J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

YOGINDER GULIA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on May 26, 2021.

Judgment delivered at Ottawa, Ontario, on June 1, 2021.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: WEBB J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

[1] The applicant, Yoginder Gulia, seeks judicial review of a decision of a one-member panel of the Federal Public Sector Labour Relations and Employment Board (2020 FPSLREB 39), dismissing Mr. Gulia's staffing complaint. A registry officer with the Courts Administration Service, Mr. Gulia applied unsuccessfully, in an internal advertised selection process, for a senior registry officer position with the Tax Court of Canada. His complaint, brought under

section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, alleged abuse of authority in the choice of process, the area of selection, and the assessment of merit. He also alleged retribution for his union activity, and racial bias in the appointment process.

[2] In dismissing the complaint, the Board held that it had no jurisdiction to consider the allegation relating to the area of selection. It proceeded to find that none of the other grounds put forward by Mr. Gulia were made out.

[3] Mr. Gulia submits that all of the grounds for judicial review that he raises attract the correctness standard of review. He asserts that the Board was wrong to decline jurisdiction to consider the area of selection, that there was an abuse of authority in the area of selection and choice of process, that his written examination was graded in an erroneous and biased manner, and that the appointment process was predetermined to select the successful candidate.

[4] Mr. Gulia, who was self-represented at the hearing before the Board, also objects to Part IV of the Board's reasons. There, under the heading "The complainant's conduct," the Board severely criticized Mr. Gulia's conduct at the hearing, which according to the Board included "interrupting, hectoring, and debating with a witness or counsel" and "[impugning] the personal and professional integrity of the respondent witnesses […]." Mr. Gulia states that the Board was wrong to set out these criticisms without first giving him a "show cause" notice, and thus an opportunity to respond.

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

[6] Before I discuss in turn each of the grounds Mr. Gulia raises before this Court, I will address two preliminary issues: the burden a complainant under section 77 of the Act must meet and the applicable standard of review.

[7] Mr. Gulia does not take issue with the Board's explanation (at paragraphs 5 to 8 of its reasons) of the burden that he bore as a complainant under section 77. As the Board explained, Mr. Gulia had the burden of proving, on a balance of probabilities, that there was an abuse of authority in the appointment process. An abuse of authority includes not only bad faith or personal favouritism, but also other forms of inappropriate behaviour. For a finding of abuse of authority to be made, "an error or omission must be so egregious that it could not have been part of the delegated manager's discretion."

[8] As already noted, Mr. Gulia contends that all of the grounds he raises in his application are subject to the correctness standard of review. I disagree. The Supreme Court's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 30, establishes that reasonableness is the presumptive standard of review of exercises of delegated decision-making authority such as that in issue here. None of the exceptions identified in *Vavilov* apply. A reasonable decision, *Vavilov* instructs, is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." A reviewing court must defer to a decision with these qualities: *Vavilov* at para. 85. Under the *Vavilov* framework, "[t]he burden is on the party challenging the decision to show that it is unreasonable": *Vavilov* at para. 100.

[9] However, *Vavilov* does not address the standard of review for questions of procedural fairness. As this Court has held, therefore, "[a] court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all of the circumstances": *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 at paras. 46-47, citing *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 54. That is the question we must ask in relation to Mr. Gulia's assertions of bias or reasonable apprehension of bias.

[10] I turn now to the grounds for his application that Mr. Gulia puts forward.

[11] Mr. Gulia first alleges that the Board improperly applied the evidence in failing to find that there was abuse of authority in the choice of process and area of selection. His position before the Board was that the choice of process and area of selection were determined based on the Tax Court registry's negative view of Federal Court registry officers, and that, in keeping with assurances he alleged had been made to the union, the position should have been available only to existing Courts Administration Service employees, rather than all public service employees in the Greater Toronto area.

[12] Both Mr. Gulia and the respondent called evidence on this issue. The Board found (at paragraph 17) that the evidence on which Mr. Gulia relied in support of his assertion that the Tax Court registry held a negative view of Federal Court registry officers was "unattributed gossip," which the respondent's evidence contradicted. It pointed out that the successful appointee was in fact from the Federal Court. The Board concluded (also at paragraph 17) that Mr. Gulia had

"failed to establish evidence upon which [it] could conclude that on a balance of probabilities, an abuse of authority occurred in the choice of process."

[13] In applying the reasonableness standard of review, the reviewing court "must refrain from 'reweighing and reassessing the evidence considered by the decision maker'": *Vavilov* at para. 125, citing *Canada (Canadian Human Rights Commision) v. Canada (Attorney General)*, 2018 SCC 31 at para.55. I cannot conclude that the Board's disposition of this element of Mr. Gulia's complaint was unreasonable.

[14] Mr. Gulia next asserts that the Board was wrong to conclude that it had no jurisdiction to hear complaints about areas of selection. In coming to this conclusion (at paragraphs 19 and 20 of its reasons), the Board relied on its own prior case law as to the scope of its jurisdiction. Mr. Gulia does not challenge the reasoning in the cases to which the Board referred. I see nothing unreasonable in this element of the Board's decision.

[15] Despite its conclusion on the jurisdiction question, the Board went on to consider Mr. Gulia's allegation that there was abuse of authority in choosing the area of selection. Noting that this element of Mr. Gulia's complaint was based on the same "unattributed gossip" that it had found insufficient to support Mr. Gulia's allegation relating to the choice of process, the Board found (at paragraph 21) that, similarly, Mr. Gulia had failed to lead sufficient evidence to support his allegation on area of selection. As I have stated in relation to the choice of process issue, Mr. Gulia has not shown this conclusion on the part of the Board to be unreasonable.

[16] Mr. Gulia next submits that his written examination was marked, relative to other candidates' examinations, in a biased and erroneous manner. His argument in support of this submission focuses on the giving of bonus marks to other candidates (including the successful candidate), as well as to the marking of his own examination. The Board found (at paragraph 23) that Mr. Gulia was eliminated from the appointment process because he achieved a failing grade on the question assessing "[a]bility to plan, set and assign priorities and to make decisions." Mr. Gulia received a grade on this question of 6.5 out of 14. The passing grade was 8.

[17] It is common ground that the test for a reasonable apprehension of bias is whether a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, would think that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly: *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at 394. The onus of demonstrating bias rests with the party that alleges it: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 114.

[18] The Board was satisfied on the evidence (at paragraphs 24 to 28 of its reasons) that the marking was objective and conformed with the rating guide. The evidence that it considered included evidence that compared Mr. Gulia's examination against that of the successful candidate and explained "in precise detail" why marks were given or not given. Mr. Gulia's argument on this point in effect asks the Court to reweigh and reassess the evidence. I see no basis to do so. I would not find any reasonable apprehension of bias, or any error, in the marking of the written examination.

[19] Mr. Gulia goes on to submit that there was a predetermined decision to appoint the successful candidate. The Board found (at paragraph 32) that there was no evidence to support this allegation, apart from what was acknowledged to be "office gossip," and that Mr. Gulia had therefore failed to meet his burden of proof on this issue. Mr. Gulia has not shown any reason for the Court to interfere with this aspect of the Board's decision.

[20] I turn then to Mr. Gulia's objection to Part IV of the Board's reasons, which Mr. Gulia describes as "character assassination" to which he was not given a chance to respond. Mr. Gulia refers to Part IV in support of his allegation of reasonable apprehension of bias on the part of the Board that would require setting aside its decision. He also asserts that he is entitled to a "suitable remedy," and that this Court should order "an enquiry to dig out the truth" of what led the Board member to make the comments he made.

[21] Mr. Gulia's description of the comments made by the Board in Part IV is inaccurate in two respects. First, he states in his memorandum that the Board went so far as to "[issue] an order that [Mr. Gulia] cannot represent himself before [the Board] in future hearings." This is not correct. What the Board stated (at paragraph 54 of its reasons) was that Mr. Gulia would be "well-served," if he appears before the Board again, to have a representative conduct the hearing on his behalf, but that "[i]f he is self-represented again, he will be required at all times to show respect to the presiding member, the opposing counsel, the respondent's representative, and all witnesses."

[22] Second, Mr. Gulia states that he recognized the Board's bias only after the hearing, when he read the Board's criticisms of his conduct in Part IV. He asserts that this explains why he did not raise the bias issue before the Board at the hearing, so as to fulfil the requirement that a party alleging bias do so at the earliest opportunity: *Beddows v. Canada (Attorney General)*, 2020 FCA 166 at para. 10. But in Part IV (at paragraphs 48 and 49), the Board refers to incidents that occurred during the hearing. It states that "[s]everal times during the proceedings," the Board had to ask Mr. Gulia to "refrain from interrupting, hectoring and debating with a witness or counsel," and that "[s]everal times," Mr. Gulia interrupted the Board in its duties at the hearing.

[23] In any event, I would not give effect to Mr. Gulia's allegations of bias or reasonable apprehension of bias. As the respondent submits, there is a strong presumption that decision-makers carry out their duties impartially: *Zündel v. Citron (C.A.)*, [2000] 4 F.C. 225 at 242, [2000] F.C.J. No. 679. Overcoming this presumption requires cogent evidence: *R. v. Bennett*, 2016 BCCA 406 at para.17. Interventions, admonishments, and uncomplimentary comments on the part of the decision-maker do not necessarily give rise to a reasonable apprehension of bias, but may be appropriate in the context of the entire proceeding: *Slawsky v. Edmonton (City) Composite Assessment Review Board*, 2019 ABQB 77 at paras.107-108.

[24] In this case, the Board (at paragraph 47) felt it necessary to comment on Mr. Gulia's conduct on the basis that the conduct "was of such departure from any reasonably acceptable standard […]." On the record before the Court, which does not include a transcript of the proceeding before the Board, I would conclude that no reasonable apprehension of bias, let alone

any actual bias, has been shown. Even if a reasonable apprehension of bias had been shown, there would be no authority for this Court to order the enquiry to which Mr. Gulia refers.

[25] For these reasons, I would dismiss the application with costs. Both parties proposed $2,500 as the costs they should receive if they were successful. With this guidance, I would fix costs at $2,500, all-inclusive.

"J.B. Laskin"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
Marianne Rivoalen J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-121-20

(APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD DATED APRIL 20, 2020 (2020 FPSLREB 39) FILE NO. EMP-2016-10442)

STYLE OF CAUSE:	YOGINDER GULIA v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY ONLINE VIDEO CONFERENCE
DATE OF HEARING:	MAY 26, 2021
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	WEBB J.A. RIVOALEN J.A.
DATED:	JUNE 1, 2021

APPEARANCES:

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