

Cour fédérale



Federal Court

Date: 20150422

Docket: T-825-13

Citation: 2015 FC 523

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, April 22, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

YACINE AGNAOU

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Yacine Agnaou is seeking judicial review of the decision of the Public Service Commission of Canada [the Commission] dated April 16, 2013, which, on the one hand accepted in part the Investigation Report finding that errors had been made in an external appointment process and on the other, as a corrective action, ordered the managers involved to take the

Canada School of Public Service's PO15 Overview of the Workforce Adjustment Directive course.

[2] Having read the parties' records and having considered their written and oral submissions, the application for judicial review will be allowed for the reasons outlined below.

I. Background

[3] In 2009, Mr. Agnaou, who was employed at the time by the Public Prosecution Service of Canada [PPSC], left his position for educational leave.

[4] On November 1, 2010, the position held by Mr. Agnaou was staffed for an indeterminate period. From November 1, 2010, until January 3, 2013, Mr. Agnaou had a priority entitlement pursuant to section 41 of the *Public Service Employment Act*, SC 2003, c 22, [PSEA].

[5] In September 2011, the Office of the Registrar of the Supreme Court of Canada [ORSCC] conducted simultaneous appointment processes in order to fill two legal advisor positions.

[6] Thus, following receipt of the Commission's authorization, the ORSCC advertised two appointment processes, one internal (11-SUC-IA-1221) and the other external (11-SUC-EA-1181).

[7] Mr. Agnaou was identified as having a priority entitlement in the internal process. However, in October 2011, this internal process was cancelled due to the identification of a situation justifying the use of the staffing mechanism set out in section 43 of the PSEA, and the assessment of Mr. Agnaou's priority candidacy was therefore never completed. The position was ultimately filled by Geneviève Domey, a person who was already in the employ of the Supreme Court of Canada [SCC].

[8] In addition, Mr. Agnaou was not identified as having a priority entitlement in the external process, and on November 3, 2011, Renée Thériault received an offer of employment for the position of legal advisor in the external appointment process (11-SUC-EA-1181).

[9] In the fall of 2011, Mr. Agnaou expressed his displeasure at the treatment of his candidacy to the ORSCC, and was not satisfied by the comments he received.

[10] Thus, on March 4, 2012, Mr. Agnaou filed a complaint with the Commission alleging that the ORSCC had breached his priority entitlement.

[11] On June 29, 2012, Denis Bilodeau, Vice President of the Investigations Branch [IB] of the Commission, notified Mr. Agnaou by letter that the Commission had accepted the reasons provided by the ORSCC for having cancelled the internal appointment process through the use of section 43 de la PSEA, but that an investigation would be conducted regarding the external appointment process. Mr. Agnaou is not challenging the Commission's decision not to investigate the internal appointment process.

[12] The first interviews of the investigation into the external appointment process, conducted by Errico Urbani [the investigator], were held in September 2012. Among others, Mr. Urbani met with Karen McCallum, Human Resources Advisor, Human Resources Branch, SCC, and Ms. Julie Terrien, Senior Counsel, Law Branch, SCC and delegated hiring manager.

[13] Essentially, Ms. McCallum indicated to Mr. Urbani that the failure to consider Mr. Agnaou's candidacy in the external appointment process was simply an oversight. For her part, Ms. Terrien indicated to Mr. Urbani that it was not an oversight, but a factor of timing, given that discussions with Ms. Thériault were already underway.

[14] During the investigation, Anne-Marie Larivière, Director of the Human Resources Branch at the SCC offered to review Mr. Agnaou's candidacy, but he refused, having lost all confidence in the process.

[15] On October 7, 2012, Mr. Agnaou emailed the investigator, informing him that his priority entitlement was due to expire on January 3, 2013.

[16] On October 23, 2012, the investigator sent the "Factual Report" to Mr. Agnaou and to the other persons concerned, and on October 30, 2012, Mr. Agnaou submitted his comments in response to the Factual Report.

[17] In December 2012, Mr. Agnaou asked Denis Desharnais, Director General of the Human Resources Directorate at PPSC, whether the benefits associated with his priority entitlement

could be protected pending the completion of the Commission's investigation. He copied Mr. Bilodeau in that email. Mr. Desharnais informed Mr. Agnaou that the PPSC could not accommodate his request and Mr. Agnaou replied that he had taken the necessary steps to protect his priority entitlement and asked him to notify him if there were any additional steps that were required in this regard.

[18] On January 3, 2013, Mr. Agnaou's priority entitlement expired.

[19] On February 1, 2013, the Commission's IB sent Mr. Agnaou its Investigation Report and, on February 13, 2013, invited him to submit his comments.

[20] The Investigation Report concluded that [TRANSLATION] "Ms. McCallum made an error that affected the choice of appointee by failing to verify with the PSC whether there were other persons with a priority entitlement prior to the appointment of Ms. Thériault. In addition, Ms. Terrien made an error that affected the choice of appointee by appointing Ms. Thériault without assessing or considering Mr. Agnaou's priority candidacy". The Commission's IB proposed, in a letter dated February 13, 2013, that Ms. Terrien and Ms. McCallum take the Canada School of Public Service's PO15 Overview of the Workforce Adjustment Directive course as a corrective action.

[21] In a letter dated February 25, 2013, Mr. Agnaou challenged the Investigation Report and the proposed corrective action.

[22] On April 16, 2013, the Commission's IB sent a [TRANSLATION] "Briefing Note to the Commission" in order to obtain final approval of the Investigation Report and corrective action. Entitled "Final Recommendation", the note asserts that the Commission does not have the legal authority to extend Mr. Agnaou's priority entitlement, and mentions that he refused to have his candidacy assessed by the ORSCC during the investigation, when his priority entitlement was still in force.

[23] On April 16, 2013, the Commission issued its Record of Decision, in which it accepted the Investigation Report and ordered the aforementioned corrective action.

[24] Mr. Agnaou is seeking judicial review of the Record of Decision dated April 16, 2013.

II. Issues

[25] In this case, the issues may be framed as follows:

- 1) Did the Commission breach procedural fairness in the conduct of its investigation?
- 2) Does the Commission's decision respect the purpose of the PSEA, in particular that of section 66?

III. Standard of review

[26] There is no need to conduct an exhaustive analysis of the standard of review applicable to the issues as it has been satisfactorily established by the jurisprudence with regard to the types of questions raised in this case (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 [*Dunsmuir*]).

[27] Thus, the first issue pertaining to possible breaches of procedural fairness must be reviewed on a correctness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Seck v Canada (Attorney General)*, 2012 FCA 314 at para 55 [*Seck*]).

[28] In addition, the second issue deals with the interpretation of the PSEA and is at the heart of the Commission's mandate and expertise. Accordingly, such an issue is reviewable on the standard of reasonableness (*MacAdam v Canada (Attorney General)*, 2014 FC 443 at paras 49-50). Moreover, the Commission has broad discretion under section 66 of the PSEA to "take any corrective action that it considers appropriate" and such discretion calls for deference in reviewing this decision.

IV. Positions of the parties

A. *Mr. Agnaou*

[29] Mr. Agnaou argues that the investigation conducted by the Commission breached procedural fairness because it failed to meet basic expectations of neutrality and thoroughness and that the Commission failed to consider several key pieces of evidence.

[30] Mr. Agnaou further submits that the Commission breached procedural fairness by [TRANSLATION] “taking its time” to complete its investigation and by issuing its decision only after his priority entitlement had expired. He contends that he filed his complaint within the prescribed time period and caused no delays in the investigation or decision-making process.

[31] In addition, Mr. Agnaou maintains that the Commission erred in concluding that no remedial action could be taken in his favour because his priority entitlement had expired, as neither section 66 of the PSEA nor the scheme of the Act support such a finding. Rather, the Commission has the discretion to allow it to issue corrective actions, discretion that must be exercised in accordance with the nature and purpose of the Act conferring such authority on it, in this case, the PSEA. According to Mr. Agnaou, the Commission acted [TRANSLATION] “arbitrarily, on the basis of unjustified reasons and for irrelevant considerations”.

[32] Mr. Agnaou also contends that the Commission’s position that it lacked jurisdiction to investigate allegations of improper conduct of a fraudulent nature is erroneous, and that, on the contrary, section 66 allows the Commission to make findings on fraudulent behaviour.

[33] Mr. Agnaou is asking this Court to revoke the appointments to the positions of legal advisor in the 11-SUC-EA-118 and 11-SUC-IA-1221 appointment processes, to order the Commission to take disciplinary measures against those responsible for his situation, and to order the ORSCC to appoint him to an LA-2A position if a fair and equitable assessment of his candidacy indicates that he meets the essential qualifications. It should be noted that the revocation of Ms. Domey’s appointment, sought by Mr. Agnaou, is not dealt with in the

aforementioned Record of Decision of April 16, 2013, as her appointment occurred as part of the internal appointment process (11-SUC-IA-1221). That appointment is therefore not part of this Court's analysis in the context of the present judicial review.

[34] Lastly, Mr. Agnaou submits that he is entitled to a directed verdict, such a verdict being necessary to obtain the only reasonable outcome in this case.

B. *The respondent*

[35] For his part, the respondent submits that the Commission's investigation was conducted in a manner consistent with the principles of natural justice and that it presented no deficiencies.

[36] The respondent contends that the investigation was carried out in accordance with the requirements set out in section 66 of the PSEA, which allows for the investigation of any external appointment process and for corrective actions to be taken. In addition, the respondent points out that the investigation, properly launched under the aegis of section 66 of the PSEA, did not involve potential fraudulent behaviour governed by section 69 of the PSEA, but was rather intended to determine whether Ms. Thériault's appointment was based on merit and to ensure that no error, omission or improper conduct affected the selection for this appointment.

[37] The Court must show deference as to the breadth and depth of the Commission's investigation.

[38] The respondent further notes that the Commission identified two errors made by the ORSCC.

[39] The respondent submits that the corrective action ordered is reasonable and that the Commission could not, in this instance, order disciplinary measures to be taken, given that these are governed by the *Public Service Labour Relations Act*, SC 2003, c 22, s. 2.

[40] The respondent further contends that it was not open to the Commission to consider a new appointment process as a corrective action given that Mr. Agnaou's priority entitlement had expired at the time the decision was issued, that he was no longer an "employee" and that the PSEA contains no mechanism to extend this priority entitlement. Indeed, section 41 of the PSEA sets the entitlement priority as the period during the employee's leave of absence and one year thereafter, and there is no provision that provides for the possibility of extending it.

[41] The respondent asserts that the duration of the investigation was completely normal.

[42] Finally, the respondent argues that the fact of Mr. Agnaou having a priority entitlement does not confer upon him a right to be appointed to the desired position, especially given that he refused the offer presented to him by the ORSCC to assess his candidacy while his priority entitlement was still in effect.

[43] Lastly, there are no grounds in this case to justify issuing a directed verdict.

V. Analysis

[44] The Court will restrict its analysis to an examination of the corrective action chosen as it is dispositive of this application.

A. *Statutory framework*

[45] The preamble of the PSEA sets this out in the Whereas clauses, among which we find the following statement:

Recognizing that

...

Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded.

[46] The Commission's mission is essentially to safeguard the integrity of the appointment process in the public service (Preamble, PSEA; *Seck* at paras 24, 49).

[47] According to the Commission's *Policy – Selection and Appointment* and section 2.4 of the *Guidance Series – Assessment, Selection and Appointment* of the Commission, documents supported by the PSEA and sections 5 *et seq.* of the *Public Service Employment Regulations*, SOR/2005-334, a manager cannot appoint a person without having previously assessed or considered persons with priority entitlement for appointment who are interested in the position to be filled, to determine whether they meet the essential qualifications for the position.

[48] The priority entitlement for public servants on a leave of absence is set out in section 41 of the PSEA and extends from the period during the employee's leave of absence and one year

thereafter. The PSEA does not provide for any extension of the period during which the priority entitlement is valid.

[49] Moreover, the investigation in this case was conducted pursuant to section 66 of the PSEA, which reads as follows:

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

[50] Thus, paragraph 66(a) of the PSEA grants the Commission authority to revoke an appointment.

[51] Paragraph 66(b) of the PSEA, for its part, grants the Commission broad discretion to take the appropriate corrective action.

B. *Selection of corrective action*

[52] In this case, Mr. Agnaou had a priority entitlement under section 41 of the PSEA and the Commission's investigation confirmed that errors had been made by Ms. McCallum and Ms. Terrien. However, the Commission limited the corrective action to an order directing Ms. Terrien and Ms. McCallum to take training. The Commission's IB indicated in a briefing note to the Commission dated April 16, 2013, that [TRANSLATION] "[g]iven that this priority entitlement ended on January 3, 2013, and that the Commission has no legal authority to extend this period, the Investigations Branch recommends that no corrective action be taken with respect to Mr. Agnaou".

[53] Although corrective action taken by the Commission is reviewable on a standard of reasonableness, this does not mean that the Commission has unlimited discretion in that regard. Corrective action taken by the Commission must respect the spirit of the preamble of the PSEA, namely, the safeguarding of the principle of merit and of the integrity of the public service appointment process. Achieving such an objective requires that corrective action be taken to remedy errors made, such as in this case, that affected the appointment process in that a priority candidacy was not assessed. A decision with respect to corrective action would be found to be unreasonable where the remedy imposed bore no relation to the breach found (*Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369 at para 60).

[54] The Court is of the view that the Commission's order in this case is not reasonable in that it tends not to safeguard the integrity of the public service appointment process. Indeed, the order issued by the Commission provides no remedy at all to Mr. Agnaou, despite the finding of a breach in the appointment process (see *Plato v Canada (Revenue Agency)* 2013 FC 348, at para

21 [*Plato*]). Moreover, the Commission fails to explain how the appointment would remain valid in spite of the errors made during the appointment process. As a result, the Commission failed to meet the criterion of justification, transparency, and intelligibility within the decision-making process (*Dunsmuir* at para 47).

[55] As this Court affirmed in *Plato* at para 19:

However, while the range of acceptable remedial decisions open to CRA in a case like the present is broad, it is not limitless. At the end of the day, there still must be some logical connection between the remedy selected and the breach it is designed to address. If there is no connection, the remedy will be outside the range of possible acceptable outcomes. As Justice Gagné recently noted in *Backx v Canadian Food Inspection Agency*, 2013 FC 139 in assessing the reasonableness of a remedial award in a staffing grievance, an award will be set aside if “it is not responsive to the applicant’s claim and does not provide him any meaningful remedy” (at para 24). To somewhat similar effect, the courts have long held that there must be a rational connection between the breach found by other sorts of labour tribunals and their remedial orders (see e.g. *Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369 at p 409). [*Emphasis added.*]

[56] In this case, Mr. Agnaou was deprived of the opportunity to have his candidacy seriously assessed by the ORSCC in the internal appointment process. The situation in which Mr. Agnaou finds himself is comparable to that of the applicant in *Backx v Canada (Canadian Food Inspection Agency)*, 2013 FC 139. Indeed, the Court noted, at paragraph 25:

There is nothing to suggest that the CFIA’s offer remedied the applicant’s loss of opportunity in any way, nor that the CFIA took reasonable steps to provide the applicant’s with a suitable remedy in his particular circumstances. Although it is open to the CFIA to choose how to remedy the loss suffered by the applicant as it sees fit, it must do so in a reasonable and meaningful manner.

[57] Despite the conclusion drawn by the Court, it is not possible to grant Mr. Agnaou's request to order a directed verdict as the authority to revoke an appointment falls within the Commission's discretion; it may take any corrective action where an appointment process is found to be deficient. In addition, a directed verdict would not be appropriate, given that Mr. Agnaou's candidacy was not assessed and furthermore, the Court record provides no clue as to whether a position at the LA-2A level is available at the ORSCC.

[58] In short, the Court concludes that Mr. Agnaou was deprived of his priority entitlement and that the Commission must take corrective action that has a logical connection to the breach found in its Investigation Report and provide Mr. Agnaou with some sort of meaningful remedy.

[59] The application for judicial review is allowed. The matter is referred back to the Commission in order for it to determine a new corrective action to be taken in accordance with these reasons for judgment. Costs are awarded to Mr. Agnaou.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed with costs against the respondent.
2. The matter is referred back to the Public Service Commission for redetermination of the corrective action to be taken in accordance with these reasons for judgment.

“Martine St-Louis”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

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