

Federal Court



Cour fédérale

Date: 20190923

Docket: T-1844-18

Citation: 2019 FC 1198

Ottawa, Ontario, September 23, 2019

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

CADOSTIN, MACKENZY

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Mackenzy Cadostin, the Applicant, seeks judicial review of a decision (Decision) of the Public Service Commission of Canada finding that he committed fraud within the meaning of section 69 of the *Public Service Employment Act*, SC 2003, c 2 (PSEA) by knowingly providing false information regarding his employment references in an appointment process within the federal public service. Mr. Cadostin submits that the Commission's investigative process breached his right to procedural fairness and that the Decision and corrective action ordered against him were unreasonable.

[2] The application for judicial review is brought pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

[3] While I have carefully considered his submissions, Mr. Cadostin has not persuaded me that there is a basis for this Court to intervene. The investigation undertaken by the Commission was thorough and procedurally fair. The Decision and corrective measures imposed by the Commission were justified and intelligible and the ultimate finding of fraud reasonable in light of the evidence assembled by the investigator and submitted to the Commission. Consequently, the application for judicial review will be dismissed.

I. **Background**

[4] Mr. Cadostin applied for a job with Public Service and Procurement Canada (PSPC) at the AS-04 level in February 2017. At the time, he was employed by Agriculture and Agri-Food Canada at the PM-01 level. Mr. Cadostin successfully passed a written exam and interview for the position. He was then asked to provide three references: his current supervisor and two others. Mr. Cadostin provided four references, the most recent of which dated from 2013, but refused to provide the contact information for his current supervisor, Mark De Luca. He explained that Mr. De Luca was away on sick leave and that he did not want to include Mr. De Luca as a reference.

[5] Each of the references was asked to fill out a reference template provided by PSPC. The references were completed and submitted and verification took place in June and July 2017. Ms. Nancy Bernard was the manager tasked with verifying Mr. Cadostin's references. She

initiated a number of calls with his references but was unable to contact three of the four references by telephone. Ms. Bernard then proceeded by way of email communication with limited success.

[6] On August 3, 2017, Ms. Bernard informed Mr. Cadostin that the evaluation committee (Committee) intended to contact Mr. De Luca to obtain a recent evaluation of Mr. Cadostin's work and to act fairly as they had communicated with the other candidates' supervisors. Ms. Bernard explained that the Committee had the right to contact Mr. De Luca but wanted to inform Mr. Cadostin out of courtesy. Mr. Cadostin refused the request, stating that the Committee could not communicate with someone whom he had not provided as a reference. He then withdrew from the appointment process and Mr. De Luca was not contacted to provide a reference.

[7] Mr. Cadostin submits that he did not name Mr. De Luca as a reference because he was, at the time, being harassed by Mr. De Luca. He states that Mr. De Luca would have made his life miserable if he discovered Mr. Cadostin was looking for another position. Mr. Cadostin characterizes PSPC's stated intention to contact Mr. De Luca as an ultimatum to either withdraw from the competition or risk exacerbating his work situation.

[8] PSPC noticed a number of similarities among the completed templates received from three of Mr. Cadostin's four references, leading to concerns about their authenticity. On October 30, 2017, PSPC referred Mr. Cadostin's file to the Commission to determine whether an investigation should be initiated.

[9] On November 28, 2017, the Commission informed Mr. Cadostin that it would open an investigation pursuant to section 69 of the PSEA concerning the possibility that he had provided false references in the PSPC appointment process.

[10] I note that, during this period, Mr. Cadostin was hired as a Program Officer with Crown-Indigenous Relations and Northern Affairs Canada. The Commission undertook a second investigation pursuant to section 69 of the PSEA regarding that appointment process and issued a decision (Second Decision). Mr. Cadostin is seeking to have the Second Decision set aside in a separate application for judicial review before this Court.

[11] Mr. Cadostin argues in his Memorandum that he cannot be investigated and disciplined for the same actions twice, relying on the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11 (Charter)* and labour law principles. As noted below, he has also sought to introduce in this application evidence regarding the second investigation. I explained at the hearing of this matter that the second investigation and resulting report are not at issue in this application and that I would not consider either Mr. Cadostin's evidence relating to that investigation or his assertion of double jeopardy.

II. **The investigation**

[12] The investigation was conducted by Ms. Stéphanie Poitras (Investigator). The Investigator considered the documentary evidence surrounding the references in issue and interviewed Mr. Cadostin and Mr. De Luca. Mr. Cadostin was interviewed twice: once during

the investigation and again after he had provided his comments on the investigation report (Report) (discussed below). Mr. De Luca was interviewed to obtain his evidence regarding his ability and willingness to provide a reference for Mr. Cadostin.

[13] In April 2018, the Investigator prepared a factual report (Factual Report) which summarized the facts collected during the investigation. The full Factual Report was sent to Mr. Cadostin and a partial copy was sent to Mr. De Luca for verification and comment. The Investigator considered the comments received from Mr. Cadostin and, on June 11, 2018, completed the Report.

III. **Investigation Report**

[14] The material findings in the Report were as follows:

- Mr. Cadostin's supervisor. The Report summarized Mr. Cadostin's reasons for refusing to provide Mr. De Luca as a reference, noting his changing narrative. When the Investigator first interviewed Mr. Cadostin, he stated that he had a good relationship with Mr. De Luca but that he did not want to name him as a reference because Mr. De Luca was on sick leave and would not have wanted Mr. Cadostin to start a new position because Mr. De Luca valued the excellent quality of his work. In contrast, Mr. De Luca stated that he had not been on sick leave and would not have refused to provide a reference, although the reference would not have been uniformly positive due to concerns he had with Mr. Cadostin's work

and reaction to feedback. Mr. De Luca's evidence that he was not on sick leave was confirmed by information in the employer's leave system.

After receiving the Factual Report, which contained Mr. De Luca's testimony, Mr. Cadostin alleged discrimination and harassment by Mr. De Luca as the reasons for refusing to name him as a reference. When informed of Mr. Cadostin's allegations, Mr. De Luca stated that he had never been the subject of a complaint or grievance from Mr. Cadostin.

The Investigator found that it was likely that Mr. Cadostin had not provided Mr. De Luca as a reference because he did not want to receive a negative recommendation. She characterized his testimony regarding Mr. De Luca as contradictory and not credible and found that Mr. Cadostin knew that Mr. De Luca did not consider him an exceptional employee. The Investigator concluded that Mr. Cadostin had provided false information regarding Mr. De Luca to the Committee in order to gain an advantage in the appointment process.

- The references. The Report set out in detail the Investigator's findings regarding the three references in issue:
 1. Mr. Cadostin testified that the three references were individuals for whom he had worked, for varying periods, in Montréal. He stated that he had occupied many positions over the years and that he had had no contact with the references once leaving their employ. He

was unable to furnish current coordinates for the references, supplying only a public email address for each.

2. The three completed reference templates contained concerning similarities from three ostensibly independent references, namely: the omission of the name of their organization; the position occupied by Mr. Cadostin; and, their contact information, including phone numbers. The Investigator noted the Committee's original concerns about the use of similar wording in each reference, calling the templates "fichiers" despite the fact that the emails from PSPC described the templates as "questionnaires" and "documents". Each reference also contained similar information and commentary regarding Mr. Cadostin.
3. The absence of contact information for the references meant that the Committee could not contact them for verification purposes. Ms. Bernard tried to contact the three individuals with very limited results. The Investigator also attempted to contact each of the references who either refused to assist her or failed to respond. The Investigator concluded that it was unlikely that authentic references would omit their current contact information from a reference form, nor would they refuse to assist the Committee during the appointment process and the Investigator during the investigation.
4. There were material inconsistencies in the dates Mr. Cadostin had worked for each of the references. The Investigator attempted to independently link the references to their respective businesses at the relevant dates but was unable to do so.
5. The Investigator found that Mr. Cadostin's testimony regarding his references was contradictory. In his initial interview, Mr. Cadostin stated that he had neither drafted nor revised the reference templates. However, the Investigator asked Mr. Cadostin to complete a Word template to provide more information about his references. Mr. Cadostin testified that he used his home computer to do so. The computer identification properties of the completed references and the Word template prepared by Mr. Cadostin indicated that all four documents were last modified by the same author, "Proprio". While the Investigator accepted Mr. Cadostin's statement that he did not know that his computer was configured using that name, she concluded that it was not reasonable to

believe that four people would have each configured their computers with the same name.

6. Mr. Cadostin initially stated that he could not provide current coordinates for the references. In contrast, after receiving the Report, Mr. Cadostin forwarded copies of a number of emails allegedly from the references, each indicating that they had requested that he complete the reference templates and that they had approved the content inserted by Mr. Cadostin. Mr. Cadostin took the position that this evidence exonerated him from a finding of fraud. The Investigator did not agree and stated that the subsequent evidence in fact contradicted Mr. Cadostin's original evidence that he had not participated in the completion of the reference templates.
 7. The Investigator noted in the Report that the email addresses provided by the references were all from free online email providers (@outlook.fr; @caramail.com; @mail.com). A search of Mr. Cadostin's Internet browsing history showed that he had visited the site @mail.com the same day one of his references had sent his completed template to PSPC from an @mail.com account.
- Finding of Fraud. The Investigator concluded that Mr. Cadostin had committed fraud pursuant to section 69 of the PSEA. She cited the two-part definition of fraud set out by the Federal Court of Appeal (FCA) in *Seck v Canada (Attorney General)*, 2012 FCA 314 (*Seck*): (1) dishonesty, including the non-disclosure of important facts; and (2) deprivation or risk of deprivation. The Investigator stated that Mr. Cadostin's testimony regarding Mr. De Luca and his references was not credible. She found that Mr. Cadostin had intentionally provided false information regarding his references and his relationship with Mr. De Luca, thereby satisfying the first part of the test. This information was used in the evaluation of Mr. Cadostin's candidacy and, had PSPC not taken action to investigate the authenticity of the references, could have compromised the integrity of the

appointment process. Only after it was apparent that the Committee would contact Mr. De Luca did Mr. Cadostin withdraw from the appointment process.

Therefore, the second part of the test was satisfied.

IV. **Decision under review**

[15] On June 19, 2018, the Report was presented to the Commission to receive its approval to consult Mr. Cadostin regarding the Report and the proposed corrective action. The Commission gave its approval and the Report and proposed corrective action were provided to Mr. Cadostin for his comments. He was informed that his comments would be given to the Commission for consideration prior to its final decision. Mr. Cadostin submitted extensive comments in August 2018. He was interviewed a second time at this juncture to afford him the opportunity to provide the original confirming emails from his references that were included in his comments on the Report.

[16] The Decision is dated September 18, 2018. The Commission accepted the Report, noting that the investigation concluded that Mr. Cadostin had committed fraud in an advertised internal appointment process by knowingly submitting false information regarding his references. The Commission stated that it had considered all of the comments received but that the comments did not contain new information that would warrant a change to the Report or the corrective action used for consultation.

[17] In accordance with its authority to take corrective action under section 69 of the PSEA, the Commission ordered that:

1. For a period of three years, Mr. Cadostin must obtain the Commission's written approval before accepting any work or position within the federal public service. Should Mr. Cadostin accept a term, acting or indeterminate appointment in the federal public service without having first obtained such approval, his appointment will be revoked.
2. For a period of three years, should Mr. Cadostin obtain work through casual appointment or student work programs within the federal public service without first notifying the Commission, a letter will be sent by the Oversight and Investigations Sector (OIS) of the Commission to the Deputy Head advising of the fraud committed by Mr. Cadostin, with a copy of the Report and Decision.
3. A copy of the Report and the Decision will be sent by the OIS to the Deputy Minister of Crown-Indigenous Relations and Northern Affairs, informing her of the fraud committed by Mr. Cadostin.
4. Mr. Cadostin must complete the course *Values and Ethics Foundations for Employees* at the Canada School of Public Service within two months of the Decision. The course must be followed by a discussion between Mr. Cadostin and his director or director general to ensure that the course has been understood by Mr. Cadostin. Crown-Indigenous Relations and Northern Affairs Canada will inform the OIS once the course has been completed by Mr. Cadostin and the discussion has taken place.

V. **Issues**

[18] Mr. Cadostin raises a number of issues in his Memorandum which focus on his innocence, the unfairness and inadequacy of the investigation, and allegations of deceit and

conspiracy on the part of the Investigator, PSPC and the Commission. I will analyse

Mr. Cadostin's submissions under the following headings:

- A. Was the Decision within the Commission's jurisdiction?
- B. Was the Commission's process procedurally fair?
- C. Were the Decision and the corrective action imposed reasonable and, if not, what is the appropriate remedy for Mr. Cadostin?

VI. **Standard of review**

[19] The issues of procedural fairness raised by the Applicant will be reviewed for correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56 (*Canadian Pacific*)). My review in this regard focuses on the procedure followed by the Commission in arriving at its Decision and not on the substance or merits of the case.

[20] The standard of review applicable to the substance of the Decision is reasonableness as the application and interpretation of section 69 of the PSEA falls within the expertise of the Commission (*MacAdam v Canada (Attorney General)*, 2014 FC 443 at paras 49-50 (*MacAdam*); *Dayfallah v Canada (Attorney General)*, 2018 FC 1120 at para 34 (*Dayfallah*)). The Decision must be accorded significant deference by this Court in light of the "discrete and special nature"

of the Public Service regime and the scope of discretion given to the Commission (*MacAdam* at paras 50, 77; *Dayfallah* at para 35).

[21] The reasonableness standard is concerned with ensuring that the decision of a tribunal is justified, transparent and intelligible, and that the decision falls within a range of possible and acceptable outcomes which are defensible in respect of the facts and law applicable in the particular case (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In other words, the reviewing court must look at both the outcome and the reasons that are given for that outcome (*Delta Air Lines Inc. v Lukács*, 2018 SCC 2 at para 27).

VII. Preliminary Matters

A. *Costs award in Prothonotary Tabib's December 13, 2018 Order*

[22] On December 13, 2018, Prothonotary Tabib dismissed with costs a motion brought by Mr. Cadostin to obtain additional material from the Commission pursuant to Rule 317 of the *Federal Courts Rules*, SOR/98-106. Mr. Cadostin requests that the Court cancel the award of costs for reasons that speak to the importance of the materials he requested.

[23] Mr. Cadostin did not exercise his right to appeal Prothonotary Tabib's December 13, 2018 order within the 10-day time limit set out in Rule 51(2). This application is not the proper forum in which to raise substantive arguments regarding the order and the Court will not entertain Mr. Cadostin's request to cancel the award of costs.

B. *Admissibility of Mr. Cadostin's affidavit and new evidence*

[24] The admissibility of evidence tendered by Mr. Cadostin in support of his arguments was the focus of considerable discussion at the outset of the hearing of this application on April 29, 2019. As a result, before turning to my substantive analysis of the issues raised by Mr. Cadostin, I will address the admissibility of: (a) Mr. Cadostin's affidavit dated November 21, 2018; (b) the exhibits and audiotape attached or referred to in Mr. Cadostin's Memorandum of Fact and Law; and, (c) the evidence tendered by Mr. Cadostin to the Court on April 23, 2019.

(a) *Mr. Cadostin's affidavit*

[25] The Respondent argues that large portions of Mr. Cadostin's affidavit are inadmissible and should be struck because they contain opinion and legal argument contrary to Rule 81(1). The Respondent refers to paragraphs 6-8, 12, 16, 18, 23-24, 26-46 of the affidavit.

[26] I have reviewed Mr. Cadostin's affidavit and substantially agree with the Respondent's characterization of its content. The purpose of an affidavit is to put before the Court facts relevant to the dispute. In *Canada (Attorney General) v Quadrini*, 2010 FCA 47 (at para 18), the FCA stated that a court may strike all or part of affidavits where they are abusive or clearly irrelevant or "where they contain opinion, argument or legal conclusions". The paragraphs highlighted by the Respondent contain Mr. Cadostin's opinions, arguments and legal conclusions regarding the issues before me and, as such, are not properly included in the affidavit.

Recognizing that Mr. Cadostin is self-represented and in the interests of proceeding efficiently, I will not strike the paragraphs in question but will exercise my discretion and give no weight to

the arguments and opinions contained in those paragraphs (*Abi-Mansour v Canada (Attorney General)*, 2015 FC 882 at para 30).

[27] I note that Mr. Cadostin has made similar arguments in his Memorandum and can rest assured that his position on the points in issue has been adequately communicated to the Court.

(b) *Exhibits attached to Mr. Cadostin's Memorandum and the audiotape*

[28] Mr. Cadostin attached over 80 exhibits to his Memorandum and requested the admission of an audiotape of his interviews with the Investigator. The Respondent submits that this material is inadmissible because it was not put before the Court by way of affidavit. In addition, most of the exhibits were not before the Commission when it rendered the Decision. The Respondent argues that admission of the exhibits would be prejudicial as there has been no opportunity to cross-examine Mr. Cadostin on the documents or to confirm the authenticity of the audiotape.

[29] At the hearing, the Respondent provided an itemized list in tabular form of: the exhibits to which he objected; the exhibits already contained in the Respondent's record as excerpts from the Certified Tribunal Record (CTR) and which, therefore, may be considered by the Court; and, those exhibits (laws and regulations) to which he made no objection. I have independently verified the accuracy of the Respondent's list.

[30] The evidence contained in Mr. Cadostin's exhibits which is properly before the Court as forming part of the CTR will be considered by the Court. I note that this evidence includes a number of the exhibits Mr. Cadostin considers critical to his case.

[31] The exhibits containing laws and regulations relied on by Mr. Cadostin are admissible and will also be considered by the Court as required.

[32] The evidence contained in the remaining exhibits is not admissible and will not be considered by the Court for the following reasons. First, the fact that the documents in question were not put before the Court by means of an affidavit is a material issue as the Respondent's ability to cross-examine Mr. Cadostin on the documents has been prejudiced (*Kahnapace v Canada (Attorney General)*, 2010 FCA 70 at para 4).

[33] Second, the exhibits were not before the Commission and, in certain cases, post-date the Decision. The general rule is that judicial review proceeds on the basis of the materials that were before the decision-maker subject to limited exceptions (*Association of Colleges and Universities of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20; *Rahman v Canada (Attorney General)*, 2013 FC 1007 at para 27). The limited exceptions extend to additional material that (a) provides general background; (b) demonstrates a breach of procedural fairness; or (c) highlights a lack of evidence before the decision-maker. Mr. Cadostin has not brought himself within the exceptions to the general rule. Although Mr. Cadostin has raised an issue of procedural fairness in this application, the exhibits do not materially assist him as his procedural argument focuses on the conduct of the investigation itself. Any residual benefit to the Court in admitting the exhibits is outweighed by the prejudice to the Respondent and the fact that the evidence was not before the Commission.

[34] I turn now to the audiotape. Mr. Cadostin states that the audiotape contains the recording by the Investigator of his interviews with her during the investigation. He alleges that the audiotape was sent to him well after completion of the investigation. Mr. Cadostin submits that the Investigator's supervisor, Ms. Genevieve Lacroix, lied in her affidavit about when the audiotape was promised to him and the extent to which the information contained in the audiotape was relied on during completion of the Report.

[35] I do not find Mr. Cadostin's arguments persuasive and confirm my ruling at the hearing that the audiotape is inadmissible. In addition to the fact that the audiotape was not submitted to the Court by way of an affidavit, I find as follows. First, the audiotape was not before the Commission when making the Decision. Second, the information in Ms. Lacroix's affidavit is consistent with Mr. Cadostin's submissions. He was provided with the full audiotape (as it pertained to this matter) after completion of the investigation in accordance with the Commission's practice. The Investigator used the audiotape to summarize her findings in preparation of the Report but, as stated above, the audiotape itself was not put before the Commission. Third, Mr. Cadostin has suffered no prejudice from the fact that he received the audiotape of his interviews after completion of the investigation. He was able to use the audiotape to refresh his memory of the interviews to prepare his submissions to the Court, including his submissions that the Investigator distorted his interview statements. Mr. Cadostin's argument that his ability to respond to the Report was hampered by the late delivery of the audiotape is not relevant to the admission of the audiotape in this application.

[36] Mr. Cadostin's arguments for admission of the audiotape centre on whether he was promised an immediate copy of the recording. I have considered these arguments in the context of Mr. Cadostin's allegations of procedural unfairness in the Commission's process.

(c) *April 23, 2019 materials*

[37] On April 23, 2019, Mr. Cadostin attended at the Court and sought to introduce several additional exhibits as new evidence. The documents consist primarily of: emails pertaining to the two public service appointment processes involving Mr. Cadostin and the Second Decision; dated and undated emails from Mr. Cadostin's references; and, policy documents and legislation.

[38] I find that the April 23, 2019 exhibits are inadmissible. These exhibits were not accompanied by an affidavit and were filed immediately before the hearing, thereby exacerbating the potential prejudice to the Respondent. Certain of the exhibits relate to the Commission's separate investigation of Mr. Cadostin and resulting Second Decision and are inadmissible on that basis alone. In addition, it appears that the majority of the exhibits were not before the Commission. In my opinion, none of the exceptions to the general rule that the Court should consider only documents that were before the decision-maker applies in respect of the exhibits.

VIII. **Scope of judicial review**

[39] Mr. Cadostin's submissions both in his Memorandum and before me were heartfelt. He firmly believes he committed no wrongdoing in the provision of references in the PSPC appointment process and that the Commission and its personnel have fundamentally and wilfully misunderstood and misrepresented his actions. He argues that the investigation should never

have been undertaken. Mr. Cadostin has asked not only that the Decision be quashed and the corrective action cancelled but also that his name be included in the pool for the AS-04 PSPC position; that the Commission clear his name; that the investigation into Mr. Cadostin's position with Crown-Indigenous Relations and Northern Affairs Canada be abandoned; and that he be awarded damages for stress and harm to his career.

[40] At the beginning of the hearing, I explained to Mr. Cadostin in some detail the nature and scope of my role on judicial review of the Decision. This application centres on the Court's review of the Decision and is based on the evidence that was before the Commission. This judgment addresses only the Commission's first investigation and the Decision of June 19, 2018. It does not consider or affect the second investigation or the Second Decision. In the same vein, Mr. Cadostin's complaints of harassment and failure to accommodate are not the subject matter of this application and I address them only insofar as they are relevant to my assessment of the reasonableness of the Investigator's factual findings.

IX. Legislative provisions

[41] The Commission is responsible for safeguarding the integrity of the staffing process and the principle of merit in the federal public service as described in the preamble and subsection 30(1) of the PSEA. Section 69 of the PSEA empowers the Commission to investigate potential fraud in an appointment process and to revoke an appointment and take appropriate corrective action where it is satisfied that fraud has occurred:

Fraud

69 If it has reason to believe that fraud may have occurred

Fraude

69 La Commission peut mener une enquête si elle a des motifs

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| in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, the Commission may | de croire qu'il pourrait y avoir eu fraude dans le processus de nomination; si elle est convaincue de l'existence de la fraude, elle peut : |
|---|---|

(a) revoke the appointment or not make the appointment, as the case may be; and

a) révoquer la nomination ou ne pas faire la nomination, selon le cas;

(b) take any corrective action that it considers appropriate.

b) prendre les mesures correctives qu'elle estime indiquées.

X. Analysis

A. *Was the Decision within the Commission's jurisdiction?*

(1) Parties' submissions

[42] Mr. Cadostin submits that the Commission had no jurisdiction to instigate the investigation and that he was blindsided by the investigation after he had withdrawn from the competition; a withdrawal he states was forced on him when PSPC threatened to contact Mr. De Luca. Mr. Cadostin argues that the appointment process ended when his withdrawal was accepted and that the initiation of the investigation was inappropriate and retaliatory.

Mr. Cadostin states in his Memorandum:

As previously explained, once the withdrawal is accepted, the process is over. Thus, they cannot request an investigation after forcing me to withdraw and after accepting that withdrawal. Thus the abusive decision made against me must be quashed as the process was unfair and grossly mismanaged.

[43] The Respondent submits that the Commission has jurisdiction to conduct a fraud investigation where a candidate withdraws from the competition or is not ultimately successful (*Seck* at paras 43-47). The Commission's investigatory authority was designed to ensure the integrity of the appointment process broadly and not just the outcome of the process. The fact that Mr. Cadostin was not appointed to the AS-04 position did not affect the Commission's jurisdiction to investigate.

(2) Analysis

[44] The FCA addressed this issue directly in *Seck*, stating that it is not necessary that an appointment result from alleged fraudulent acts in order for there to be fraud within the meaning of section 69 of the PSEA (*Seck* at para 43). Section 69 is drafted broadly to protect the integrity of the appointment process itself. The Court emphasized the importance of proper references in the federal appointment process, stating that “[p]roviding false references undermines the appointment process; even if the person who committed the fraud is not appointed, the constituent elements of fraud have nevertheless been proved” (*Seck* at para 42).

[45] The FCA distinguished section 69 from other provisions of the PSEA which do require an appointment, actual or proposed, in order for corrective action to be taken (e.g. paragraph 15(3); sections 66, 67 and 68 of the PSEA). The same requirement is not present in section 69 (*Seck* at paras 45-46):

[45] Under all these [other] provisions, there must be an actual or proposed appointment at issue in order for a deputy head or the Commission to be able to intervene. However, this requirement was not added to section 69, which deals with fraud. This is clearly a deliberate choice by Parliament. Thus, under section 69, the

Commission may investigate “[i]f it has reason to believe that fraud may have occurred in an appointment process”. Unlike subsection 15(3) and sections 66, 67 and 68 of the Act, section 69 does not require that an appointment, actual or proposed, be in issue for there to be an investigation and corrective action. This section addresses the appointment process itself and not just the outcome of that process.

[46] Parliament is thus seeking to ensure the integrity of the appointment process in the federal public service. Keeping the appointment process free of fraud is thus a fundamental value that Parliament seeks to safeguard through sections 69 and 133 of the Act. The Commission may therefore investigate and take corrective action when there is fraud in an appointment process whether the fraud led to a fraudulent appointment or not.

[46] I find that Mr. Cadostin’s withdrawal from the appointment process did not defeat the Commission’s jurisdiction to commence and conclude an investigation for fraud pursuant to section 69 of the PSEA and to impose corrective action. I do not accept Mr. Cadostin’s allegations of abuse of power and retaliation. The Commission acted within its oversight mandate and there is no evidence in the record that its decision to proceed with the investigation was prompted by any bias or vendetta against Mr. Cadostin.

B. *Was the Commission’s process procedurally fair?*

(1) Parties’ submissions

[47] Mr. Cadostin submits that his rights to procedural fairness were violated in the course of the Commission’s investigation. He states that it was inappropriate for the Investigator to have contacted Mr. De Luca, the result of which was a worsening of the harassment he suffered. Mr. Cadostin also submits that the Investigator refused to provide him with information about the investigation and failed to provide him with the audio recording of his interviews until the

investigation had been completed. Mr. Cadostin alleges that the Investigator was biased in favour of his managers and covered up their misconduct while affording him no respect. He argues generally that the investigation process was unfair and grossly mismanaged.

[48] Mr. Cadostin alleged in his Memorandum that he faced racism and discrimination during the investigation which factored into the negative Decision. However, at the hearing, he stated that his *Charter* allegations were not racially based and were focussed on the unfair nature of the investigation.

[49] The Respondent submits that the process followed by the Commission was consistent with the jurisprudence regarding investigations for fraud which requires a fairly high level of procedural fairness (*Seck*, above; *Dayfallah*, above; *Lemelin v Canada (Attorney General)*, 2018 FC 286 (*Lemelin*)). The Respondent argues that Mr. Cadostin was made aware of the case against him and was involved fairly in the investigative process. He was informed by the Commission that it would be conducting an investigation for alleged fraud, interviewed twice, and given the opportunity to provide comments and submissions on the Factual Report, the Report and the proposed corrective action. The Respondent states that “[t]hese steps mirror almost exactly the process that the jurisprudence has repeatedly upheld as procedurally fair”.

(2) Analysis

[50] I find that the Commission did not breach Mr. Cadostin’s rights to procedural fairness in its conduct of the investigation. The process followed by the Investigator and the Commission

was consistent with the procedural requirements established by the FCA and this Court for investigations of potential fraud pursuant to section 69 of the PSEA.

[51] I return to the FCA's decision in *Seck*, a case involving an allegation of fraud under section 69 of the *PSEA* based on the provision of fraudulent references. The Court explained the process for conducting a section 69 investigation, affirming that the investigator's duty of procedural fairness when investigating an individual for fraudulent conduct is demanding even though the findings lead to corrective action that is neither disciplinary action, nor criminal penalties (*Seck* at para 57). The FCA emphasized the following (*Seck* at paras 60-62):

- The individual be informed at the outset of the conduct of the investigation and the reason(s) for it. If the individual is not in possession of the evidence prompting the investigation, the Commission must provide that evidence to the individual;
- The individual be afforded the opportunity to present their version of the events as part of the investigation;
- The individual be provided with the preliminary factual report and given an opportunity to comment on it and, further, be provided with a copy of the final investigation report and given an opportunity to comment on that report and the proposed corrective action.

[52] In *Dayfallah*, my colleague, Justice Brown stated (at para 45):

[45] I agree with the Applicant that this issue raises a question of procedural fairness. Therefore the standard of review is correctness, and no deference is owed. I also agree that procedural fairness rises to a high level where an individual's ability to continue in his or her job is at stake: *Lemelin* at para 43. Courts

including the Supreme Court of Canada have confirmed that procedural fairness requires: (1) the Commission inform the individual subject to the investigation of the substance of the evidence obtained by the investigator and put before the Commission and; (2) the individual be provided the opportunity to respond to this evidence and make all relevant representations in relation thereto.

[53] In the present case, Mr. Cadostin was informed by letter dated November 28, 2017 that an investigation of his conduct in the appointment process for the AS-04 position would be commenced on the basis of a suspicion that he had provided false references. He was in possession of the relevant evidence from the outset as he admitted during the investigation that he had completed the reference templates on behalf of the three references. The Commission's letter stated that the investigation would proceed pursuant to section 69 of the PSEA, that the Investigator would contact Mr. Cadostin, and that he had the right to be accompanied through the investigation by a person of his choice. As a result, he was fully aware of the basis of the investigation. Mr. Cadostin was interviewed twice: once at the outset of the investigation and again after he had provided comments on the Report to assess the new evidence to which he had referred in his comments. He was also given the opportunity to provide comments and submissions on the Factual Report and the Report. His comments and submissions were reviewed and considered by the Commission.

[54] Mr. Cadostin relies on the Investigator's alleged delay in providing him with a copy of the audiotape of his interviews in asserting procedural unfairness, relying in part on the obligations of Crown disclosure in criminal cases (*R v Stinchcombe*, [1991] 3 SCR 326). The evidence before the Court, by way of the affidavit of Ms. Lacroix, is that the Investigator followed the Commission's standard process in this regard. The Commission does not provide

recordings of interviews during an investigation to prevent leaks and to safeguard the investigative process. Mr. Cadostin disagrees with this process, stating that it would have been useful to him to have the recording while preparing his comments on the Report.

[55] This Court has stated that an investigator is not required to provide an individual under investigation with the record of the testimony collected in an investigation, even when asked to do so (*Lemelin* at para 46). Here, Mr. Cadostin requested the record of his own testimony. He was present during the two interviews and was aware of the content of his statements to the Investigator. The fact that the recording may have assisted his memory is not sufficient to establish procedural unfairness. Mr. Cadostin was provided with the recording at the conclusion of the investigation consistent with the Commission's practice and had the benefit of the recording during the preparation of his submissions to the Court.

[56] Mr. Cadostin also relies on alleged breaches of the *Privacy Act*, RSC 1985, c P-21 (Privacy Act), in support of his submissions of procedural unfairness. He alleges that the Investigator breached the Privacy Act in sending his personal information to Mr. De Luca in the form of the partial Factual Report. I do not agree. The Factual Report was prepared in the course of an investigative process contemplated by the PSEA. The portion of the Factual Report sent to Mr. De Luca contained the summary of his interview and was properly forwarded to him by the Investigator for comment to ensure its accuracy. The Privacy Act does not preclude this course of action.

[57] Mr. Cadostin also makes reference to paragraphs 12(2)(a) and (b) of the Privacy Act and an alleged failure by the Investigator and Commission to make corrections to his private information despite numerous requests to do so. Paragraphs 12(2)(a) and (b) permit an individual to request correction of their personal information contained in the federal government's records. To the extent that Mr. Cadostin is arguing that there are errors in his personal information in the government's records, his recourse lies in the Privacy Act itself. If he is submitting that the Investigator and Commission breached the Privacy Act by failing to accept his comments and amend the Report accordingly, his reliance on the Privacy Act is misplaced. The Commission's decision to not accept his comments was within its discretion and Mr. Cadostin's recourse, by way of this application, is to challenge the reasonableness of the Decision.

[58] Mr. Cadostin relies on the decision of this Court in *Samatar v Canada (Attorney General)*, 2012 FC 1263 (*Samatar*). Ms. Samatar acted as a reference for Ms. Seck, the appellant in the *Seck* FCA decision. Ms. Samatar was herself accused of fraud and subjected to an investigation pursuant to section 69 of the PSEA. My colleague, Justice Martineau, found serious breaches of Ms. Samatar's rights to procedural fairness in the Commission's handling of the investigation. He emphasized that Ms. Samatar was not made aware at the outset of the investigation of the nature of the allegations or evidence against her personally. Prior to her interview, she was told only that it would pertain to Ms. Seck's candidacy. Further, Ms. Samatar was not given an opportunity to comment on new evidence that was provided late in the investigation or on the final Report placed before the Commission.

[59] The decision in *Samatar* reinforces the importance of procedural fairness in a fraud investigation conducted by the Commission pursuant to section 69 of the PSEA. In the present case, the treatment afforded Mr. Cadostin was materially different from that afforded Ms. Samatar. The Commission's process did not suffer from the serious procedural shortcomings identified by Justice Martineau in *Samatar*. Therefore, the result in that case does not change my finding that Mr. Cadostin's right to a procedurally fair investigation was not breached by the Investigator and the Commission.

C. *Were the Decision and the corrective action imposed reasonable and, if not, what is the appropriate remedy for Mr. Cadostin?*

(1) Parties' submissions

[60] Mr. Cadostin submits that the Commission's Decision to accept the Report and order corrective action was unreasonable. He states that the Investigator and the Commission disregarded evidence that proved his innocence, twisted the facts and, in the case of the Investigator, hid facts and included lies in the Report. Mr. Cadostin argues that, throughout the investigative process, his rights were ignored and his complaints of harassment, racism and abuse of power disregarded. Specifically, Mr. Cadostin states that:

- The Commission and the Investigator ignored evidence that demonstrated that his references were not fraudulent and that he had been a good employee throughout his career. Mr. Cadostin relies on confirming emails forwarded to him from his references that he provided to the Investigator. He argues that it is clear that his references were not false and that the individuals in question approved the content of each of the reference documents he provided.

- The Commission and the Investigator disregarded evidence that Mr. Cadostin was harassed by Mr. De Luca. He states that PSPC ignored the harassment and failed to accommodate him. Further, Mr. Cadostin argues that the Investigator should not have contacted Mr. De Luca. Her decision to do so was an abuse of power as, in his view, he was not required to provide his supervisor as a reference in the appointment process.
- The Commission ignored the extensive comments he provided after reviewing the Report.

[61] The Respondent submits that the Commission's conclusion that Mr. Cadostin committed fraud was justified, transparent and intelligible, and that the Court's intervention is not warranted. The Commission reviewed the Report and Mr. Cadostin's comments and made its own determinations of credibility and findings of fact which are owed considerable deference on judicial review. The Respondent states that, for the purposes of section 69 of the PSEA, fraud has two elements: dishonesty and deprivation. The Respondent argues that the Investigator's determination that Mr. Cadostin engaged in dishonest conduct was well-founded. It followed a rigorous investigation and consideration of Mr. Cadostin's responses to the Factual Report and Report. With regards to deprivation, the Investigator's conclusion was also reasonable as the appointment process could have been compromised had PSPC relied on the fraudulent references.

(2) Analysis

[62] I find that the Decision was reasonable. The Investigator conducted a thorough investigation, interviewing Mr. Cadostin twice, and set out in detail in the Report the basis upon which she drew her adverse credibility findings and conclusions regarding Mr. Cadostin's dishonesty in the provision of his references. Her conclusions were intelligible and transparent

and she correctly assessed her findings against the FCA's two-part test for establishing fraud under section 69 of the PSEA. The Report was placed before the Commission with Mr. Cadostin's comments. The Commission made no reviewable error in accepting the Report without change and in concluding, on a balance of probabilities, that Mr. Cadostin committed fraud within the meaning of section 69 in the course of the PSPC appointment process. Further, I have reviewed the CTR and the Report and find no evidence of malicious behaviour or concealment of facts by the Investigator, nor do I find any evidence that the Commission ignored material exonerating Mr. Cadostin.

[63] The FCA in *Seck* comprehensively addressed the ambit of section 69 of the PSEA. The FCA adopted the criminal law definition of fraud with the proviso that the applicable standard of proof of fraud under section 69 is the balance of probabilities (*Seck* at para 38). The FCA stated that fraud has two essential elements: (1) dishonesty, which can include the non-disclosure of important facts; and (2) deprivation (*Seck* at para 39). The FCA described dishonesty as follows (*Seck* at para 40):

[40] Dishonesty is established where deceit, lies or other fraudulent means are knowingly used in an appointment process. This may include the non-disclosure or concealment of important facts in circumstances where that would be viewed by a reasonable person as dishonest.

[64] With respect to deprivation, the FCA stated that it is sufficient to establish that the appointment process could have been compromised. There is no requirement that the Commission establish actual compromise or injury to the process (*Seck* at para 41).

(a) *Dishonesty*

[65] The Investigator's conclusion that Mr. Cadostin acted dishonestly in the PSPC appointment process rested on two findings of dishonest conduct: (1) adverse credibility findings regarding Mr. Cadostin's explanations for his refusal to provide Mr. De Luca as a reference; and (2) a series of negative factual findings regarding the three independent references.

[66] Mr. Cadostin's testimony regarding Mr. De Luca changed during the course of the investigation. In his first interview, Mr. Cadostin stated that he had a good relationship with Mr. De Luca but that Mr. De Luca was on sick leave and would not want Mr. Cadostin to leave his current position. When confronted with a differing account by Mr. De Luca, Mr. Cadostin changed his narrative and alleged discrimination and harassment by Mr. De Luca. The Investigator considered Mr. Cadostin's harassment allegations but found that his altered explanation for resisting Mr. De Luca as a reference was not credible. The Investigator concluded that Mr. Cadostin's refusal to include Mr. De Luca as a reference was in fact prompted by fear of a negative reference and that Mr. Cadostin gave false information regarding his supervisor to the Committee during the appointment process. I find that the Investigator's conclusion is supported by the evidence.

[67] Mr. Cadostin argues that the Investigator's interview of Mr. De Luca was an abuse of power and unreasonable but I do not agree. The Investigator contacted Mr. De Luca to verify his ability and willingness to provide a reference for Mr. Cadostin. Mr. De Luca's evidence was directly relevant to the investigation and the Investigator's assessment of Mr. Cadostin's conduct during the appointment process. There is no evidence in the record that the Investigator was prompted to contact Mr. De Luca for any reason other than to ensure a thorough investigation.

[68] The Investigator made a number of factual findings that questioned the authenticity of Mr. Cadostin's three submitted references. I have set out those findings in detail in paragraph 14 of this judgment. Briefly, the completed reference templates contained concerning similarities from professionals who were stated to be independent references, each of whom omitted critical contact information that would reasonably be expected in an employment reference. The three individuals then refused to cooperate with the Investigator's attempts to obtain further information, behaviour inconsistent with the conduct of willing references. Further, Mr. Cadostin first stated that he did not participate in the drafting or revision of the reference templates but the computer identification properties of the completed templates and the Word template he completed for the Investigator indicated that they had all been last modified by the same author. Mr. Cadostin subsequently acknowledged he had completed the templates but stated that his references had approved the content. Finally, although Mr. Cadostin provided copies of confirming emails allegedly from the references indicating they had approved the references, he was unable to provide original copies of those emails to the Investigator.

[69] The Investigator considered all of the evidence relating to the references, including Mr. Cadostin's inconsistent testimony regarding his involvement in the completion of the templates and the documentary evidence which suggested he was the author of the references. The Investigator's finding in the Report that Mr. Cadostin acted dishonestly in the provision of his references was justified.

[70] Mr. Cadostin alleges that the copies of the confirming emails he provided to the Investigator established his innocence and that the Investigator and the Commission disregarded

that evidence. I find that this allegation is not consistent with the evidence in the record. The emails, and Mr. Cadostin's submissions regarding their importance, were clearly before the Commission.

[71] The emails are problematic for two reasons. First, they contradict Mr. Cadostin's initial evidence that he was not involved in the completion of the reference templates. Second, the documents he provided were not original emails and the Investigator was unable to establish their authenticity. In light of these concerns, and the other evidence before the Investigator, the fact that she did not accept the emails as sufficient to establish Mr. Cadostin's innocence was not unreasonable.

[72] Mr. Cadostin submits that the Commission ignored the extensive comments he provided after reviewing the Report. However, the Commission stated in the Decision that it considered all of the comments received but concluded that the new information did not warrant a change to the Report. Mr. Cadostin disagrees with the Commission's conclusion but his disagreement does not mean that the Commission ignored his comments.

[73] Dishonesty for purposes of section 69 of the PSEA may include the non-disclosure or concealment of important facts. The Investigator found that Mr. Cadostin acted dishonestly in concealing his reason for refusing to include Mr. De Luca as a reference. He also misled the Committee and the Investigator regarding his completion of the three reference templates. I find that the conclusion of the Investigator that the evidence established Mr. Cadostin's dishonesty,

on a balance of probabilities, was transparent and justifiable, and within the range of possible outcomes for the case.

[74] In essence, Mr. Cadostin is asking the Court to reweigh evidence that was considered by the Commission and to substitute its own findings of fact and conclusions. This is not the role of the Court on judicial review (*Seck* at para 66):

[66] The appellant is asking the Court to reconsider these emails and make its own findings of fact. That is not the role of a reviewing court. In the present case, the role of the judge with regard to this issue was limited to determining whether the conclusions that the Commission drew from the evidence were within the range of acceptable possible outcomes that are justifiable in light of the facts uncovered in the course of the investigation. Considering the evidence adduced and the sensibleness of the conclusions drawn from it by the Commission, the judge did not make any reviewable error in holding that these conclusions were reasonable.

[75] Mr. Cadostin relies on the decision of the FCA in the case of *Canada (Attorney General) v Shakov*, 2017 FCA 250. The case is of limited relevance to Mr. Cadostin's position as the investigation in that case centred on section 66 of the PSEA and not section 69. The FCA was focussed not on allegations of fraud but on the conduct of an external appointment process and the language profile of the position in question.

(b) *Deprivation*

[76] The second element of fraud in the context of section 69 of the PSEA is that of deprivation or risk of deprivation. The Investigator concluded that the PSPC appointment process could have been compromised by Mr. Cadostin's false references. If PSPC had not reviewed the references rigorously and requested an investigation by the Commission, the

outcome of the process could have been affected (*Seck* at para 41). I find that the Investigator's conclusion was reasonable as the evaluation of a candidate's references is a material part of an appointment process.

(c) *Summary*

[77] In summary, I find that the Decision was reasonable. The evidence obtained during the investigation supports the conclusion that Mr. Cadostin acted dishonestly in the provision of references in the PSPC appointment process. Mr. Cadostin provided contradictory evidence during the investigation and the Investigator was justified in her adverse credibility findings. The Investigator reasonably concluded that the most likely explanation of Mr. Cadostin's conduct was that he lied regarding his relationship with Mr. De Luca and submitted references that he himself had completed. He was prompted to do so to better his chances of success in the appointment process. Mr. Cadostin's concealment of adverse facts is sufficient to establish that the PSPC appointment process could have been compromised (*Nur v Canada (Attorney General)*, 2013 FC 978; aff'd 2015 FCA 69). The Investigator fairly summarized and presented the evidence to the Commission, applying the correct two-part test for fraud for purposes of section 69 of the PSEA. The Commission did not err in relying on the Report in discharging its decision-making role, taking into account the comments submitted by Mr. Cadostin in response to the Report.

[78] I have referenced the FCA's decision in *Seck* numerous times in this judgment and I venture one concluding paragraph which parallels Mr. Cadostin's case (*Seck* at para 42):

[42] If we apply these principles to the present case, fraud within the meaning of section 69 of the Act will be found if the

evidence proves on a balance of probabilities that the appellant knowingly provided false references in order to deceive the persons responsible for the appointment process and thereby increase her chances of being appointed. Providing false references undermines the appointment process; even if the person who committed the fraud is not appointed, the constituent elements of fraud have nevertheless been proved.

(d) *Corrective Action*

[79] I find that the corrective action imposed by the Commission was reasonable in the circumstances of this case (*Dayfallah* at para 101). Subsection 69(b) of the PSEA authorizes the Commission to take any corrective action that it considers appropriate once a finding of fraud has been made. The Commission's decision regarding corrective measures is entitled to deference in recognition of both its expertise and its mandate to protect the integrity of the federal public service appointment process.

[80] The three corrective measures imposed on Mr. Cadostin are not disciplinary in nature and do not prevent him from working and applying for jobs in the public service (*Seck* at paras 48-49). The measures ensure that prospective employers in the public service are aware of the Commission's findings and will undoubtedly cause prospective employers to very carefully consider Mr. Cadostin's candidacy for appointment. Nevertheless, the corrective action is reasonable in scope and is time-limited. The measures reasonably safeguard the principles of merit and integrity critical to the public service appointment process, consistent with the Commission's mandate (*Dayfallah* at paras 103, 105).

XI. **Conclusion**

[81] The application is dismissed.

[82] Having regard to all the circumstances of this matter and the parties, and upon consideration of the factors set forth in Rule 400(3), there will be no award of costs.

[83] The Respondent's request made pursuant to Rule 303(2), to change the style of cause such that the Respondent is the Attorney General of Canada, is granted.

JUDGMENT in T-1844-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There will be no award of costs.
3. The style of cause is hereby amended, with immediate effect, to name the
“Attorney General of Canada” as the Respondent.

“Elizabeth Walker”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1844-18

STYLE OF CAUSE: CADOSTIN, MACKENZY v ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: APRIL 29, 2019

JUDGMENT AND REASONS: WALKER J.

DATED: SEPTEMBER 23, 2019

APPEARANCES:

Mackenzy Cadostin

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Fraser Harland

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT