Federal Court Cour fédérale

Date: 20240822

Docket: T-1484-23

Citation: 2024 FC 1309

Ottawa, Ontario, August 22, 2024

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CLAIRE (BIWEI) ZHANG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Claire (Biwei) Zhang [Applicant] seeks judicial review of a June 19, 2023 decision [Decision] of the Public Service Commission of Canada [Commission] finding that the Applicant committed fraud in an appointment process [Appointment Process] for a position with the Canadian Border Services Agency [CBSA].

[2] The application for judicial review is dismissed. The Commission's determinations that the Applicant committed fraud in the Appointment Process and its order for corrective measures were reasonable.

II. Background

[3] The Applicant submitted two applications in the CBSA Appointment Process: application A441247 [First Application] at 2:24 a.m. on January 30, 2019 using an email address from the University of Montreal; and application A298864 [Second Application] later that day at 3:31 p.m. using an email address from York University [together, the Applications]. The Applications were virtually identical but contained minor differences such as different identifying names on the email addresses. The Applicant's name on her resume, submitted in both Applications, included both identifying names, and the resumes were essentially identical. The Applicant contends that she submitted the Second Application to correct errors in the First Application.

[4] For each Application, the Applicant received two emails on March 5, 2019 inviting her to take two standardized exams, administered by Evaluation Personnel Selection International [EPSI], and providing information about the assessments, including the 180-day waiting period to rewrite an exam. She also received two requests to sign a confidentiality agreement and access codes for the exams.

[5] On March 10, 2019, the Applicant signed and returned the confidentiality agreements for each Application. On March 15, 2019, CBSA contacted the Applicant requesting her to re-sign the confidentiality agreement, stating, "Hello Claire, [c]an you please put your full name for your

signature on the confidentiality agreement. You have to put your name on it, not Biwei Zhang's". The Applicant did so for the First Application without seeking further clarification.

[6] The Applicant took the exams within 24 hours under the different Applications. On April 26, 2019, a representative from EPSI contacted CBSA about the Applicant because the two Applications were connected to different emails, enabling her to take the exams twice. CBSA contacted the Applicant asking for confirmation as to which application number was hers and whether she submitted two Applications. The Applicant responded, "[m]y application is A298864", which is the Second Application.

[7] On August 27, 2020, the Applicant was informed of an investigation into her actions under section 69 of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 [*PSEA*] to determine whether she committed fraud in the Appointment Process. During the process, the Applicant submitted an apology letter and was interviewed twice. The investigator [Investigator] subsequently prepared an investigation report and the Applicant was given an opportunity to provide comments, which she did on May 1, 2023.

III. Decision

[8] On June 19, 2023, the Commission sent a letter to the Applicant informing her of the Decision. The Commission accepted an amended version of the investigation report [Amended Investigation Report] and ordered corrective actions. The letter included a copy of the Amended Investigation Report and a Record of Decision.

[9] The Amended Investigation Report's summary states:

> The evidence does not demonstrate, on the balance of probabilities, that [the Applicant] was dishonest when she submitted two applications in external appointment process 2018-EA-HRB-EC-03/04/05-208. However, the evidence does show, on the balance of probabilities, that she committed fraud through her actions after she submitted her applications, when she did not clarify that she was not two different candidates and when she took two standardized exams twice within the appointment process, in order to increase her chances of being appointed.

[10] The Commission ordered corrective measures. For a period of one year, the Applicant must notify the Commission in writing before accepting any position or work within the federal public service. The Applicant will only be able to accept the position or work after receiving written confirmation from the Commission that it has communicated with the sub-delegated manager and provided them with the relevant information. If the Applicant joins the federal public service within one year, the Applicant must also complete an ethics course followed by a discussion with her manager within two months of joining the federal public service.

IV. Preliminary Issue

[11] The Applicant brought a motion for an order to file a supplemental affidavit, with exhibits including the email correspondence and signed confidentiality agreements for both Applications, material pursuant to Rule 312 of the *Federal Court Rules*, SOR/98-106. This material was before the Investigator and relied upon in preparing the Amended Investigation Report but was not included in the Certified Tribunal Record or the Applicant's affidavit. The evidence meets the test for filing a supplementary affidavit as the documents will serve the

interests of justice, will assist the Court, and will not cause substantial or serious prejudice to the Respondent (*Rosenstein v Atlantic Engraving Ltd.*, 2002 FCA 503 at para 8).

[12] The Respondent does not oppose the admission of the documents. However, none of the exceptions to the rule that only documents which were before the decision-maker should be considered by the Court in an application for judicial review apply in this case (*Lemelin v Canada (Attorney General)*, 2018 FC 286 [*Lemelin*] at para 6; *Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2006 FC 720 at para 50).

[13] The supplementary affidavit is accepted for filing. While the Respondent does not oppose, I am cognizant that it is difficult to determine what exhibits were before the decision-maker, therefore, I will err on the side of admitting these. In any event, after reviewing the exhibits, they do not assist the Court in determining this application.

V. Issues and Standard of Review

[14] I agree with the parties that this matter raises the following issues:

1. Was the Commission's determination that the Applicant had committed fraud reasonable?
2. Was the Commission's order for corrective measures reasonable?

[15] I agree with the parties that the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. This case does not engage one of the exceptions set out in *Vavilov*, therefore, the presumption of reasonableness is

not rebutted (at paras 16-17). A reasonableness review is a robust form of review that requires the Court to consider both the administrator's decision-making process and the outcome of the decision (*Vavilov* at paras 83, 87; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] at para 58). A reviewing court must take a "reasons first" approach to assess whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justifiable in relation to the relevant factual and legal constraints (*Vavilov* at paras 15, 99; *Mason* at paras 59-61). The onus is on the Applicant to demonstrate the unreasonableness of the decision (*Vavilov* at para 100).

VI. Relevant Provisions

[16] The investigation was initiated pursuant to the *PSEA*:

> **Fraud**
>
> 69 If it has reason to believe that fraud may have occurred in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, the Commission may
>
> (a) revoke the appointment or not make the appointment, as the case may be; and
>
> (b) take any corrective action that it considers appropriate.

VII. Analysis

A. *Was the Commission's determination that the Applicant had committed fraud reasonable?*

(1) Applicant's Position

[17] The *PSEA* does not define fraud. In *Seck v Canada (Attorney General)*, 2012 FCA 314 [*Seck*], the Federal Court of Appeal adopted the following definition of fraud for the purpose of section 69 of the *PSEA*:

> [39] …Fraud thus has two essential elements: (1) dishonesty, which can include non-disclosure of important facts; and (2) deprivation or risk of deprivation.
>
> [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.
>
> [41] …With regard to section 69 of the Act, to prove the second element, it therefore suffices to establish that the appointment process could have been compromised.

[18] The applicable standard of proof for the purposes of section 69 of the *PSEA* is a balance of probabilities (*Seck* at para 38).

[19] On the first element, the Commission made findings regarding the Applicant's credibility that are inconsistent with a finding of intent to deceive. The Applicant did not alter her name in the Application to deceive CBSA into thinking she was two different persons. The Applications were almost identical, except for a couple of errors, including her first and last name, which were reversed in one of the Applications. The Applicant believed that the Appointment Process would detect that she applied twice, as it previously did for a similar process for Statistics Canada. The Applicant trusted the Appointment Process and did her best to adhere to the instructions sent to her after she received the two invitations.

[20] On the second element, it was unreasonable for the Commission to conclude that the Appointment Process could have been compromised by the Applications in light of its design. EPSI was able to flag that the Applicant wrote the exams twice.

[21] The Commission has inappropriately analyzed the Applicant's conduct in a bifurcated manner by separating the Applicant's submission of the Applications from the events flowing logically from that action. It is illogical to find that the Applicant's actions in applying twice were not fraudulent but subsequently submitting two confidentiality agreements with identical names then re-submitting one in compliance with a request from CBSA was fraud. Instead, a finding of no fraud in the Applicant's initial submission of the Applications should lead the Commission to find that there was no intention to deceive in the actions following the submission of the Applications.

[22] The Commission also did not adequately consider that the Applicant is a student whose first language was not English, a young Chinese woman who is fairly early on in her career, and overall unfamiliar with public service appointments processes. Similarly, the Commission did not adequately consider the confusing communications that the Applicant received from CBSA concerning the confidentiality agreements and invitations to take the exams. The Commission also failed to reconcile its finding that the Applicant committed fraud with the facts that there were clear consistencies of identifying information across the two Applications.

[23] A finding of fraud is a serious matter that can have serious consequences for the individual, including a summary conviction under section 133 of the *PSEA* and irrevocable

damage to the public servant's reputation (*Samatar v Canada (Attorney General)*, 2012 FC 1263 [*Samatar*] at paras 122-125). The actions that form the basis of a finding of fraud must also rise to a certain level of criminality or quasi-criminality in light of the serious circumstances. The Applicant's actions may only show poor judgment, not fraud.

[24] The allegations in this matter are of a much less serious nature than other cases where the Court has upheld a finding of fraud under section 69. This matter also does not demonstrate the same intention to deliberately deceive in order to gain an advantage (*Seck*; *Lemelin*; *Challal v Canada (Attorney General)*, 2009 FC 1251; *Dayfallah v Canada (Attorney General)*, 2018 FC 1120 [*Dayfallah*]; *St-Amour v Canada Border Services Agency*, 2014 PSLRB 93).

(2) Respondent's Position

[25] The Commission reasonably applied the two elements of the definition of fraud adopted in *Seck* (at para 39). The standard of proof is the civil standard of balance of probabilities. The assessment in *Seck* does not require an assessment of criminality (at para 39).

[26] The Commission reasonably found that the Applicant, on a balance of probabilities, was dishonest based on the evidence before the Commission. First, the Investigator reasonably concluded that the Applicant would have known it was dishonest to take the exams twice and not permitted, especially as the 180-day waiting period had not elapsed. The Applicant admitted the exams were not intended to be written multiple times. An action can still be deemed dishonest even if there is a quality assurance mechanism in place. Second, the Investigator found that there was a tipping point, which made the Applicant's subsequent actions dishonest. It became no

longer a clerical error as the Applicant knowingly failed to inform CBSA that she submitted two applications when asked whether she had done so. She also took the same exam twice despite the clear instruction that it could only be retaken after a 180-day period.

[27] The Commission further found that the second element of the test was met, which requires evidence proving on a balance of probabilities that an applicant knowingly takes steps to deceive the persons responsible for the appointment process and thereby increase their chances of being appointed (*Seck* at para 42). The Applicant gained an advantage over other candidates because she had two attempts to pass the same exams, increasing her chances of moving forward in the Appointment Process.

[28] First, it is reasonable that the CBSA did not detect that a candidate may have submitted more than one application prior to sending out exam invitations as it was an automated pre-screening, despite that another appointment process through Statistics Canada was able to detect it and consolidate the Applicant's applications. Second, corrective measures are ordered on a case-by-case basis. Despite the Applicant's claim that the matter is much less serious than other reported cases on section 69 of *PSEA*, another investigation by the Commission in a similar circumstance resulted in corrective measures of having to notify the Commission for three years before accepting a position within the federal public service, as well as completing an ethics course. Third, the Commission did consider the Applicant's circumstances in its analysis, including her being a student, language differences, her age, and expression of remorse. The Commission found she would have been familiar with assessments generally as a student and that taking the exam more than once without permission was likely not permitted.

(3) Conclusion

[29] The Commission's determination that the Applicant committed fraud was reasonable.

[30] The Amended Investigation Report forms part of the reasons for the Commission's decision and it allows the Court to understand the basis on which the Commission made its decision (*Cadostin v Canada (Attorney General)*, 2020 FC 183 [*Cadostin*] at para 55). In the Amended Investigation Report, the Investigator reasonably applied the correct test from *Seck* for determining, on a balance of probabilities, whether there is fraud for the purposes of section 69 of the *PSEA*.

[31] The first element of dishonesty requires deceit, lies or other fraudulent means that are knowingly used in an appointment process (*Seck* at para 40). Dishonesty may include the non-disclosure or concealment of important facts in circumstances where that would be viewed by a reasonable person as dishonest (*Seck* at para 40).

[32] The Investigator reasonably determined that the Applicant was dishonest by misleading the CBSA and taking the standardized exams twice within a 24-hour period, despite the 180-day waiting period. While the Applicant disputes this determination, making factual findings, assessing credibility, and drawing reasonable inferences are within the heart of the Commission and the Investigator's expertise and knowledge, to which the Court must defer (*Cadostin* at para 68). There was a reasonable basis for the Investigator to determine that the Applicant had been dishonest as the Investigator reviewed evidence on both sides and considered whether a

reasonable person would consider the non-disclosure that she was not two separate applicants as dishonest, and made a credibility finding with respect to the Applicant's explanation.

[33] Similarly, the Investigator reasonably considered the factual context in making this determination and weighed the Applicant's status as a student whose first language was not English, her unfamiliarity with the Appointment Process and continuing correspondence from CBSA, against other factors suggesting the Applicant was being dishonest. The Applicant is essentially asking the Court to reweigh how the Investigator weighed these factors, which is not the role of a reviewing court (*Vavilov* at para 125).

[34] For the second element of deprivation or risk of deprivation, it is sufficient to establish that the appointment process could have been compromised (*Seck* at para 41). The Investigator reviewed the potential benefit to the Applicant by taking the standardized exams twice in increasing her chance of being appointed, how it can compromise the Appointment Process, and how a reasonable person would view it as compromising the Appointment Process by giving an unfair advantage to one candidate. While the Applicant submits that this element was not met because there are checks and balances to catch errors like multiple applications, there was still a risk of deprivation as the Applicant was able to take the standardized exams twice as it increased her chances of being appointed (*Seck* at para 42). The fact that there was no deprivation because EPSI noticed that the Applicant took the standardized exams twice does not take away from the risk of deprivation and that the Appointment Process could have been compromised. The Investigator similarly commented that the Applicant did not personally benefit as both

Applications were eliminated but still found that the Appointment Process was compromised by her having taken it twice.

[35] There is no merit to the Applicant's position that the Investigator unreasonably bifurcated the Decision by determining that the Applicant did not commit fraud by submitting the two Applications but did commit fraud subsequently. It was reasonable for the Investigator to find that the evidence did not support a finding that the Applicant was attempting to deceive the CBSA in initially submitting the Applications under the two names. It was also reasonable for the Investigator to find that the Applicant's actions arose to the level of deceit to constitute fraud after CBSA came aware of the two Applications and tried to communicate with the Applicant about it and considering that, the Applicant wrote the exams twice in a 24-hour period, contrary to the instructions.

[36] I agree with the Respondent that the jurisprudence confirms that the test for determining whether there is fraud for the purposes of section 69 of the *PSEA* does not require a level of criminality in order to make a finding of fraud. It only requires evidence establishing dishonesty and deprivation or risk of deprivation on a balance of probabilities (*Seck* at paras 39-42). Further, the Applicant's submissions on the seriousness of her actions to other cases has little merit, as the test is fact-specific to each applicant.

B. *Was the Commission's order for corrective measures reasonable?*

(1) Applicant's Position

[37] Corrective action by the Commission must be reasonable in light of the circumstances of the case (*Samatar* at paras 122-125). The corrective measures require the Commission to send the Amended Investigation Report and Record of Decision to a deputy head before the Applicant accepts any position or work within the federal public service. This corrective measure is disproportionate and could result in the Applicant's career as a public servant being negatively impacted.

[38] In light of the irrevocable damage that a finding of fraud can have on one's reputation, the nature of the impugned conduct and the extensive mitigating circumstances, the corrective measures are disproportionately harsh should this Amended Investigation Report remain on the Applicant's personnel file indefinitely.

(2) Respondent's Position

[39] The Commission's choice of corrective actions is reasonable and does not place any undue or disproportionate burden on the Applicant. Parliament vested broad discretion to the Commission under section 69 of the *PSEA* to ensure the integrity of the federal public service staffing system (*Dayfallah* at para 103). The Court has determined that corrective actions ordered by the Commission are administrative law remedies and not disciplinary measures, so labour law principles of proportionality do not apply to corrective actions ordered under section 69 of the *PSEA* (*MacAdam v Canada (Attorney General),* 2014 FC 443 [*MacAdam*] at para 112).

[40] Corrective actions must be "designed to protect and reinforce the integrity of the appointment process" (*MacAdam* at para 113). The corrective action ordered ensures the

integrity of the Appointment Process by: (1) allowing sub-delegated managers to consider all the relevant information about a candidate so that they can make an informed staffing decision, to ensure there is no fraud; and (2) ensuring that the Applicant understands her obligations as an employee in the federal public service. Requiring applicants to obtain written permission before accepting any position in the federal public service within a defined period of time is entirely consistent with the letter and spirit of section 69 of the *PSEA* (*Seck* at para 53).

(3) Conclusion

[41] Pursuant to section 69 of the *PSEA*, the Commission may either (a) revoke the appointment or not make the appointment, as the case may be; and (b) take any corrective action that it considers appropriate. These are administrative measures to ensure the integrity of the appointment process in the federal public service (*Seck* at paras 46, 48). Corrective action is not a form of disciplinary measure, which means that labour law principles like proportionality and progressive discipline do not apply to corrective action under section 69 (*Seck* at paras 48-51).

[42] The Commission's corrective measures are reasonable in the circumstances (*Dayfallah* at para 101, citing *Seck* at para 53). Parliament has given the Commission a mandate to safeguard the integrity of the merit system in the federal public service and section 69 specifically is a tool for the Commission to carry out its statutory duty to maintain the integrity of the appointment process (*Dayfallah* at para 103). The Commission is entitled to deference in how it seeks to effect the integrity of the appointment process by ordering corrective action (*Dayfallah* at para 108).

[43] Courts have found that requiring permission before accepting a position within the federal public service for a set period of time, sharing investigation results with a federal public service employer, and requiring an ethics course are reasonable corrective measures within the Commission's jurisdiction (*Seck* at paras 53-54; *MacAdam* at paras 45, 113). The corrective measures do not prevent the Applicant from applying to positions within the federal public service, are time-limited, and ensure that prospective employers in the public service are aware of the Commission's findings (*Seck* at para 54; *Dayfallah* at para 106). It is in the range of defensible outcomes, as it aims to preserve the integrity of the federal public service appointment process (*Vavilov* at para 86).

VIII. Conclusion

[44] For the reasons above, this application for judicial review is dismissed. The Applicant sought costs in the amount of $3,000.00. In light of the result, I am exercising my discretion not to award costs to any party.

JUDGMENT in T-1484-23

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed without costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1484-23
STYLE OF CAUSE:	CLAIRE (BIWEI) ZHANG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 19, 2024
JUDGMENT AND REASONS:	FAVEL J.
DATED:	AUGUST 22, 2024

APPEARANCES:

COLLEEN BAUMAN	FOR THE APPLICANT
YUSUF KHAN	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GOLDBLATT PARTNERS LLP OTTAWA, ON	FOR THE APPLICANT
ATTORNEY GENERAL OF CANADA OTTAWA, ON	FOR THE RESPONDENT