Date: 20070921

Docket: T-340-07

Citation: 2007 FC 940

Ottawa, Ontario, September 21, 2007

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

NEIL CLEGG

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by Chairperson Line Chandonnet of the Public Service Appeal Board (Appeal Board) dated January 18, 2006, granting the respondent's appeal made pursuant to section 21 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as amended (PSEA).

FACTS

The competition process

[2] In the spring of 2005, the respondent participated in a competition for an EX-01 rotational position with the Department of International Trade Canada. The competition required candidates to undertake the Standardized Situational Judgment Test (SSJT), a test prepared specifically for the Departments of Foreign Affairs and International Trade (DFAIT) EX-01 rotational staffing competitions. The SSJT is a psychometric test developed by the Personnel Psychology Centre (PPC). It is designed to assess the judgment required for handling issues in work-related situations at the EX-01 level.

[3] For this competition, the SSJT was administered to 370 candidates throughout the world. The instructions provide that candidates are to be given two hours to complete the test. The test consisted of 40 fact situations and questions. However, an information sheet circulated with the SSJT indicated that candidates would only be given 90 minutes to complete the test. DFAIT admits that this was a clerical error and that candidates were to be given two hours to complete the SSJT. When the respondent took the SSJT on July 6, 2005, he was given 90 minutes to complete the test. One other candidate was given this reduced time limit; all other candidates were given two hours for completion.

[4] When it was discovered that the respondent had not been given the same time as other candidates, department officials notified the PPC, requesting advice on how to proceed. Upon

recommendation from PPC's Manager of Test Consultation, the respondent was asked if he wished to review his test for an additional 45 minutes. He replied that he would be willing to do so.

[5] On August 31, 2005, the respondent reviewed his SSJT for the allotted 45 minutes. After reviewing his test, the respondent's score dropped from 69% to 66%. Because the pass-mark was 72%, the respondent was screened out of the competition.

[6] On August 15, 2006, the respondent commenced an appeal pursuant to section 21 of the PSEA. The appeal was heard by the Appeal Board on December 14, 2006 in Ottawa, Ontario.

Decision under review

[7] On January 18, 2007 the Appeal Board allowed the respondent's appeal on the grounds that he was not assessed on the same standards as the other candidates. The Chair found that granting the respondent an additional 45 minutes to review his test was an insufficient corrective measure since it put him in a position where he effectively had to write the SSJT twice. Chair Chandonnet states at paragraphs 20 and 21 of the decision:

> ¶ 20 I fail to see how compressing a 2 hour exam in 1.5 hours, will allow for the same outcome as the other candidates. I also fail to see how adding a 45 minute period, two months after the fact, puts a candidate in the same frame of mind as other candidates who [have] benefited from a full 2 hours. The evidence showed that the original test was taken by the appellant on July 6th 2005 and that the additional 45-minutes was administered on August 31st 2005. The

> appellant had to basically rush though his questions thinking that he had 1.5 hours to complete the test.
>
> ¶ 21 What the evidence showed was that the appellant was not submitted to the same standards as the other candidates. He was basically put in a position where he had to write the SSJT twice; once on July 6th , where he had to do so in a compressed timeframe, and once on August 31st, approximately two months later, where he was given even less time to go through the exam(30 minutes).

[8] In reaching this decision, the Appeal Board relied on the 2000 Federal Court of Appeal judgment in *Buttar v. Canada (Attorney General)* (2000), 254 N.R. 368 (F.C.A.), where the Court ruled at paragraph 24:

> ¶ 24 In the circumstances of this case, the validity of the appointment … could not fairly be determined without considering whether his qualifications were assessed on the basis of the same standards as were applied to other candidates simultaneously seeking promotion to the same level….

[9] It is this decision allowing the respondent's appeal that is the subject of this application for judicial review.

RELEVANT LEGISLATION

[10] The principle underlying all public service appointments is the merit principle contemplated in subsection 10(1) of the PSEA. Section 21 of the PSEA provides a mechanism allowing unsuccessful candidates to appeal an appointment to an Appeal Board constituted by the Public Service Commission. Section 26 of the *Public Service Employment Regulations, 2000,*

S.O.R./2000-80 (the Regulations) provides a system for the disclosure of relevant documents. The relevant legislation is set out in Annex "A" of these reasons.

ISSUES

[11] The applicant raises three issues:

1. Did the Appeal Board err in failing to consider and analyze important relevant evidence?

2. Did the Appeal Board err in failing to admit relevant evidence from a witness?

3. Did the Appeal Board err in allowing the appeal after the respondent did not object to the additional 45 minutes to complete the test until after he was advised he had failed the test?

STANDARD OF REVIEW

[12] In *Dr. Q v. The College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, the Supreme Court of Canada reaffirmed the primacy of the pragmatic and functional approach in relation to the review of administrative decisions, holding at paragraph 25:

> ¶ 25 For this reason, it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker. Nor is a reviewing court's interpretation of a privative clause or mechanism of review solely dispositive of a particular standard of review. … The pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors. This approach applies

> whenever a court reviews the decision of an administrative body. … Review of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach.[Emphasis added.]

[13] In *Davies v. Canada (Attorney General)*, 2005 FCA 41, 330 N.R. 283, the Federal Court of Appeal considered the standard of review to be applied by a reviewing judge to the decisions of an Appeal Board constituted pursuant to section 21 of the PSEA. In applying the pragmatic and functional approach, the Court found that pure questions of law are to be reviewed on a standard of correctness, while questions of mixed fact and law are to be accorded more deference and are reviewable on a standard of reasonableness *simpliciter*.

[14] The parties are in agreement that when determining whether the Chairperson's conclusions are supported by the evidence, the standard to be applied is that of reasonableness *simpliciter*. As Madam Justice Heneghan made clear in *Hains v. Canada (Attorney General)*, 2001 FCT 861, 209 F.T.R. 137 at paragraph 26:

> ¶ 26 In my opinion, the present application concerns the review of the Appeal Board's decision with respect to its factual findings about the Selection Board's decision and the Appeal Board's application of the merit principle pursuant to section 10 of the Act. The Appeal Board reviewed the evidence presented to it. The question is whether the Appeal Board's conclusions are supported by that evidence. The applicable standard, then, is reasonableness.

[15] In relation to issues of procedural fairness and natural justice, it is clear that the pragmatic and functional analysis does not apply: *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392 at paragraph 52, citing *Canadian Union of Public Employees v. Ontario*

(Minister of Labour), 2003 SCC 29, [2003] 1 S.C.R. 539 at paragraphs 100-103. As the Federal Court of Appeal makes clear at paragraph 53 of *Sketchley*:

> ¶ 53 [The Supreme Court of Canada's decision in *Canadian Union of Public Employees*] directs a court, when reviewing a decision challenged on grounds of procedural fairness, to isolate any act or omission relevant to procedural fairness….This procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached its duty. [Emphasis added.]

ANALYSIS

Issue No. 1: Did the Appeal Board err in failing to consider and analyze important relevant evidence?

[16] The applicant states that the corrective measures taken by the Selection Board were sufficient to place the respondent in an equal position in relation to others who took the test. In support of this position, the applicant's witness, Dr. David Forster, led evidence that the nature of the SSJT was such that the combined effect of the original 90 minutes and the additional 45 minutes ensured that the respondent was assessed "in an equitable manner relative to other candidates": Affidavit of Dr. David Forster at paragraph 11.

[17] In her decision, the Chairperson disagreed with the applicant's position, finding that the corrective solution prevented the respondent from being assessed on similar standards to other

candidates. As stated above, the Chairperson held at paragraph 21 of her decision:

> ¶ 21 What the evidence showed is that the appellant was not submitted to the same standards as the other candidates. He was basically put in a position where he had to write the SSJT twice; once on July 6th, where he had to do so in a compressed timeframe, and once on August 31st, approximately two months later, where he was given even less time to go through the exam.

The Chairperson's decision, however, makes no reference to Dr. Forster's testimony; namely his contention that the nature of the test meant that time was not an important factor in assessing a candidate's performance on the SSJT.

[18] Based on this omission, the applicant submits that the Chairperson committed a reviewable error in ignoring the expert evidence presented to her. In support of this position, the applicant relies on *Cedepa-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, where Justice Evans held that:

> ¶ 17 … the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"…. In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact. [Emphasis added.]

[19] It is clear that the evidence of Dr. Forster is integral and important to the applicant's position that the additional 90 minutes provided to Mr. Clegg was sufficient to place Mr. Clegg in an equitable position with the other candidates who wrote the test. However, from reading the partial transcript of the hearing (part of the transcript is missing due to an administrative error) and from reading the decision of the Appeal Board, I am satisfied that the Appeal Board did consider and analyze Dr. Forster's evidence. The partial transcript shows that the Chairperson specifically considered Dr. Forster's position, and referred to him by name. This was at the outset of the hearing. Dr. Forster gave further testimony later in the hearing for which the transcript is missing. Also, in reading the decision, the Appeal Board considers and analyzes the substance of Dr. Forster's opinion evidence and rejects it. Accordingly, the Appeal Board did not err in law in failing to consider and analyze this evidence.

Issue No. 2: Did the Appeal Board err in failing to admit relevant evidence from a witness?

[20] Subsection 26(1) of the Regulations states that an appellant is entitled to any document that "pertains to the appellant or to the successful candidate and that may be presented before the appeal board." As Mr. Justice Phelan stated in *Levy v. Canada (Attorney General)*, 2004 FC 262, 248 F.T.R. 170 at paragraph 21, the word "pertains" should be given wide interpretation and should be read as being equivalent to, relevant or otherwise having a nexus with the appellant or the successful candidate.

[21] At the hearing, the applicant's witness, Dr. Forster, sought to introduce the test score of the other candidate who was in the same situation as the respondent. The applicant contends that this documentary evidence was relevant in that it supported the applicant's position that the candidates' marks were not a function of the amount of time that they had to write the SSJT.

[22] At the Appeal Board hearing, the Chairperson refused to allow the evidence on the ground that it was not admissible pursuant to section 26 of the Regulations. The applicant alleges that the Chairperson misinterpreted the purpose of section 26, stating that nothing in the section prohibits the applicant from tendering evidence relating to another candidate's test scores or makes such evidence inadmissible.

[23] Since this evidence was not previously disclosed to the respondent, the Chairperson correctly refused to admit the evidence. The respondent is entitled to know in advance the documents which the applicant intends to rely upon at the hearing so that the respondent can properly respond. The applicant could have, but did not request an adjournment of the hearing to make proper disclosure.

Issue No. 3: Did the Appeal Board err in allowing the appeal after the respondent did not object to the additional 45 minutes to complete the test until after he was advised he had failed the test?

[24] The applicant submits that a candidate to a selection process must object to an important matter affecting his or her performance in an interview or test or else he waives his right to object

later. The applicant states that because the respondent raised no concern or objection over the testing conditions until he had been screened from the competition, the Chairperson erred in law in allowing his appeal.

[25] In support of this position, the applicant refers to *Cyr v. Canada (Attorney General)* (2000), 201 F.T.R. 191, where Madam Justice Tremblay-Lamer held at paragraphs 18 and 25:

> ¶ 18 The decisions of this Court have held on many occasions that a candidate seeking to have the selection board take into account his or her handicap, illness or any other factor likely to affect his or her performance in the interview or test must draw the matter to the selection board's attention clearly and unequivocally….
>
> ¶ 25 It was only after the eligibility lists were published that the plaintiffs alleged that they had suffered serious hardship at the interviews. Unfortunately, it was too late.

[26] The respondent maintains that *Cyr* is distinguished from the case at bar since "the factors that created difficulties for the candidates [in *Cyr*] were external causes and beyond the actual control or knowledge of the Selection Board". In this case, however, the Selection Board was aware – and in fact was the cause of – the irregularities in the testing process. In such situations, the Selection Board has already been made aware that irregularities in the process have occurred that may negatively impact on a candidate's performance.

[27] I agree with the respondent. It would be unreasonable to expect the respondent to take umbrage with the testing process prior to being informed that he had been screened out of the

competition. As the Chairperson states at paragraph 23 of her decision:

> ¶ 23 It is clear from the evidence that the appellant applied on the competition so that he would have a chance to be promoted. In order for him to consolidate that chance, he had to go through each and every step of the assessment and be successful in doing so. Had the appellant refused the 45-minute solution, the evidence suggested that his participation in this selection process would have stopped there, as none of the other solutions envisaged by the Department to correct the administrative error committed, were acceptable solutions to the Department.

[28] The Appeal Board concluded that the respondent considered that he had no choice but to review the test for an additional 45 minutes as a solution, and not doing so would have excluded him from the competition. Failure to object is not the equivalent to the legal principle of waiver where a party must object to a breach of natural justice as soon as it arises if that party wishes to rely upon that breach at a subsequent appeal. The respondent's participation in a competition process is different than participating in a judicial or quasi judicial hearing. In a judicial or quasi judicial hearing, the party must object at the first opportunity when it is reasonable to expect to do so. The purpose of this requirement is judicial economy. If a party is permitted to obtain judicial review of adverse decisions by remaining silent in the face of known problems the party will remain silent and this will result in a duplication of hearings (see *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 309 at paras. 25 and 26). Accordingly the Appeal Board did not err in allowing the appeal on this basis.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed with costs.

"Michael Kelen"
Judge

Annex “A”

Public Service Employment Act, R.S.C. 1985, c. P-33, as amended

Appointments to be based on merit

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.

Nominations au mérite

10. (1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d’une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l’administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.

Appeals

21. (1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.

Appels

21. (1) Dans le cas d’une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l’appelant et l’administrateur général en cause, ou leurs représentants, ont l’occasion de se faire entendre.

(1.1) Where a person is appointed or about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service by a process of personnel selection, other than a competition, any person who, at the time of the selection, meets the criteria established pursuant to subsection 13(1) for the process may, within the period provided for by the regulations of the

(1.1) Dans le cas d’une nomination, effective ou imminente, consécutive à une sélection interne effectuée autrement que par concours, toute personne qui satisfait aux critères fixés en vertu du paragraphe 13(1) peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle

Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.

l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

(2) Subject to subsection (3), the Commission, on being notified of the decision of a board established under subsection (1) or (1.1), shall, in accordance with the decision,

(2) Sous réserve du paragraphe (3), la Commission, après avoir reçu avis de la décision du comité visé aux paragraphes (1) ou (1.1), doit en fonction de celle-ci:

(a) if the appointment has been made, confirm or revoke the appointment; or

a) si la nomination a eu lieu, la confirmer ou la révoquer;

(b) if the appointment has not been made, make or not make the appointment.

b) si la nomination n'a pas eu lieu, y procéder ou non.

(2.1) Where the appointment of a person is revoked pursuant to subsection (2), the Commission may appoint that person to a position within the Public Service that in the opinion of the Commission is commensurate with the qualifications of that person.

(2.1) En cas de révocation de la nomination, la Commission peut nommer la personne visée à un poste qu'elle juge en rapport avec ses qualifications.

(3) Where a board established under subsection (1) or (1.1) determines that there was a defect in the process for the selection of a person for appointment under this Act, the Commission may take such measures as it considers necessary to remedy the defect.

(3) La Commission peut prendre toute mesure qu'elle juge indiquée pour remédier à toute irrégularité signalée par le comité relativement à la procédure de sélection.

(4) Where a person is appointed or is about to be appointed under this Act as a result of measures taken under subsection (3), an appeal may be taken under subsection (1) or (1.1) against that appointment only on the ground that the measures so taken did not result in a selection for appointment according to merit

(4) Une nomination, effective ou imminente, consécutive à une mesure visée au paragraphe (3) ne peut faire l'objet d'un appel conformément aux paragraphes (1) ou (1.1) qu'au motif que la mesure prise est contraire au principe de la sélection au mérite.

APPEALS

26. (1) An appellant shall be provided access, on request, to any information, or any document that contains information, that pertains to the appellant or to the successful candidate and that may be presented before the appeal board.

(2) The deputy head concerned shall provide the appellant, on request, with a copy of any document referred to in subsection (1).

(3) Despite subsections (1) and (2), the deputy head concerned or the Commission, as appropriate, may refuse to allow access to information or a document, or to provide a copy of a document, if the disclosure might

(a) threaten national security or any person's safety;

(b) prejudice the continued use of a standardized test that is owned by the deputy head's department or the Commission or that is commercially available; or

(c) affect the results of such a standardized test by giving an unfair advantage to any individual.

(4) If the deputy head concerned or the Commission refuses to allow access to information or a document under subsection (3), the appellant may request that the appeal board

APPELS

26. (1) L'appelant a accès sur demande à l'information, notamment tout document, le concernant ou concernant le candidat reçu et qui est susceptible d'être communiquée au comité d'appel.

(2) L'administrateur général en cause fournit sur demande à l'appelant une copie de tout document visé au paragraphe (1).

(3) Malgré les paragraphes (1) et (2), l'administrateur général en cause ou la Commission peut refuser de donner accès à l'information ou aux documents ou de fournir copie des documents dont l'un ou l'autre dispose, dans le cas où cela risquerait :

a) soit de menacer la sécurité nationale ou la sécurité d'une personne;

b) soit de nuire à l'utilisation continue d'un test standardisé qui appartient au ministère de l'administrateur général en cause ou à la Commission ou qui est offert sur le marché;

c) soit de fausser les résultats d'un tel test en conférant un avantage indu à une personne.

(4) Si l'administrateur général en cause ou la Commission refuse de donner accès à de l'information ou à des documents aux termes du paragraphe (3), l'appelant peut demander au

order such access.

(5) If the appeal board orders access to information or a document under subsection (4), that access is subject, before and during the hearing, to any conditions that the appeal board considers necessary to prevent the situations described in paragraphs (3)(*a*) to (*c*) from occurring.

(6) Any information or document obtained under this section shall be used only for purposes of the appeal.

comité d’appel d'en ordonner l’accès.

(5) Si le comité d’appel ordonne que l’accès soit donné à de l’information ou à des documents en vertu du paragraphe (4), cet accès est assujetti, avant et pendant l’audition, aux conditions que le comité d’appel estime nécessaires pour prévenir les situations décrites aux alinéas (3)*a*) à *c*).

(6) L’information ou les documents obtenus en vertu du présent article ne peuvent être utilisés que pour les besoins de l’appel.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-340-07
STYLE OF CAUSE:	The Attorney General of Canada and Neil Clegg
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 12, 2007
REASONS FOR ORDER AND ORDER:	KELEN, J.
DATED:	September 21, 2007

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