Federal Court  Cour fédérale

Date: 20110531

Docket: T-80-10

Citation: 2011 FC 629

Ottawa, Ontario, May 31, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

JENNIFER BEYAK

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, the Attorney General of Canada, applies for judicial review of the December 18, 2009 decision by Mr. Guy Giguère, Chairperson of the Public Service Staffing Tribunal (the Tribunal).

[2] The Tribunal had previously found two staffing appointments to be an abuse of authority and ordered revocation of those appointments. It further ordered that corrective action be taken by National Resources Canada (NRCan) including withholding staffing delegation until the managers

involved received training, review of their other appointments and assessment of the NRCan human resources section's capability to provide appropriate staffing advice.

[3] The Tribunal's orders for corrective action, but not its finding of abuse of authority or its order of revocation of appointments, were set aside by the Federal Court on judicial review and returned to the Tribunal. The Tribunal amended its corrective action orders by turning them into recommendations.

[4] The Applicant now applies to the Court to set aside the recommendations made in the amended Tribunal decision on the basis the Tribunal has no authority to make such recommendations.

[5] I have come to the conclusion the Tribunal may make non-binding recommendations and I dismiss this application for judicial review for reasons that follow.

Background

[6] The Respondent, Ms. Beyak, filed two complaints of abuse of authority regarding the appointment of Ms. Monique Delorme as a Business Development Officer (classified as CO-01) with NRCan, by the director, Mr. Tom Hynes and the manager, Mr. John MacMillan.

[7] On March 3, 2009, the Tribunal found that the two complaints of abuse of authority were substantiated. The Tribunal also concluded that Mr. Hynes and Mr. MacMillan had abused their

authority under the *Public Service Employment Act*, S.C. 2003, c.22 (PSEA) by acting in bad faith and conducting themselves in an irrational and unreasonable way which led to the unfair appointment of Ms. Delorme as Business Development Officer.

[8] The Tribunal ordered the appointments revoked and further ordered corrective actions as follows:

> [200] The Tribunal orders the respondent to immediately rescind Mr. Hynes' delegation of authority under the *PSEA*. The respondent can determine whether it will work toward reinstating that delegation, but must not do so unless proper training is provided and Mr. Hynes can demonstrate that he meets appropriate, pre-determined requirements to exercise delegated authority.
>
> [201] The Tribunal orders the respondent not to reinstate Mr. Hynes' delegation, until it reviews all appointments made under the new *PSEA* involving Messrs. Hynes and MacMillan, proceeds with desk audits where appropriate, and determines that this was an isolated incident.
>
> [202] The Tribunal orders the respondent to assess, within 90 days, the capability of its human resources organization to provide proper support and advice to management concerning non-advertised appointment processes, and to correct within six months any shortcomings arising from the assessment.

[9] The Applicant applied for judicial review of the March 9 decision contesting the above orders for corrective action. It did not challenge the Tribunal's findings or the order that the impugned appointments be revoked.

[10] On June 10, 2009, Deputy Justice Lagacé considered that very issue in *Canada (Attorney General) v Cameron and Maheux*, 2009 FC 618 (*Cameron and Maheux*) and ruled at para 33 that:

> [33] By means of its decision, the Tribunal can very well make the deputy head aware of an incident, but it cannot with an order take the place of the PSC, the deputy head or the employer in determining whether corrective action must be taken outside of the specific context of the complaint before it.
>
> (emphasis added)

[11] On the consent of the parties, Madame Prothonotary Roza Aronovitch granted a judicial review application on September 17, 2009, setting aside the above corrective action orders and remitted the matter back to the Tribunal "to provide it with an opportunity, if necessary, to deal with the matter in a manner not inconsistent with paragraph 33 of the Court's decision [in *Cameron and Maheux*]."

[12] On December 18, 2009 the Tribunal revisited its earlier decision and determined that it had the power to make recommendations for corrective actions. The Tribunal amended its March 3, 2009 decision essentially by changing its corrective action orders to recommendations.

[13] The Applicant now brings this application for judicial review, submitting that the Tribunal is trying to achieve indirectly what it has no power to order under the *PSEA*. The Applicant submits the Tribunal erred in law by acting without jurisdiction or exceeded its jurisdiction contrary to paragraphs 18.1(4) (a) and (c) of the *Federal Courts Act* and subsection 81 (1) of the *PSEA*.

Decision under Review

[14] In its amended decision on December 18, 2009, the Tribunal set out its rationale for being able to make non-binding recommendations:

> [12] Parliament's intention as expressed in the preamble of the PSEA is to have recourse aimed at resolving appointment issues. In examining the evidence in a complaint, the Tribunal may note problems that go beyond the appointment process at issue in the complaint. The Tribunal may want to make the respondent aware of recommended measures that would address these problems. In such cases, the recommendations of the Tribunal are non-binding since they are not made under the provisions of the *PSEA* which grant the Tribunal the power to order corrective action. The Tribunal's recommendations are provided for guidance purposes only.

[15] The Tribunal modified its previous corrective action orders into non-binding recommendations. The Tribunal's specific changes to its earlier reasons are underlined in the following excerpts:

> Concerns outside the context of the complaint
>
> [190] The Tribunal has broad corrective powers under subsection 81(1) and section 82 of the *PSEA* when it finds that a complaint under section 77 is substantiated. The Tribunal may order the respondent to revoke the appointment or not make the proposed appointment. The Tribunal can order the respondent to take any corrective action that it considers appropriate with the exception of an order that an appointment be made or that a new appointment be conducted. As the Federal Court stated in *A.G. (Canada) v. Cameron and Maheux*, 2009 FC 618, the Tribunal's order for corrective measures must relate only to the appointment process at issue in the complaint. Where the Tribunal has concerns outside of the context of the complaint it can, however, make the respondent aware of its concerns. It should be noted that the corrective measures are directed

at the respondent in the form of an order and not to the individuals involved in a finding of abuse of authority.

…

[191] Parliament has directed in the Preamble that the discretion given in staffing matters under the *PSEA* to the PSC and deputy heads be delegated at the lowest level to provide the necessary flexibility in staffing It is important therefore to ensure that this discretion be exercised in a reasonably way as intended by Parliament. When the Tribunal determines that it is not the case and that there has been an abuse of authority, the Tribunal can order corrective action specific to the complaint. Where the Tribunal's concerns are more of a systemic nature, such as ensuring that this direction is exercised as Parliament intended in other appointment processes, it can make the deputy head and the PSC aware of these concerns.

…

[195] The evidence put before the Tribunal clearly establishes that Mr. Hynes should not continue to act as a sub-delegate of the respondent unless appropriate corrective measures are taken by the respondent. The evidence also demonstrates that measures put in place by the respondent have failed to ensure that these appointments were based on merit and that the PSEA, the PSER and policy requirements were met and not circumvented. These considerations direct the Tribunal in making the following recommendations that should provide guidance in addressing the Tribunal's concerns.

[196] Mr. Hynes has testified that he had limited training in the PSEA and relied on the advice of Human Resource Advisors. At a minimum, he should receive training that is appropriate for someone delegated to exercise staffing authority under the PSEA. The Tribunal recommends that, unless such training is completed and an assessment of Mr. Hynes's ability to make appropriate decisions and conduct proper appointment-related processes is done, he should not be delegated any staffing authority under the PSEA.

> [197] The Tribunal has found that Mr. Hynes demonstrated disregard for the PSEA and other staffing requirements. Mr. Hynes's direction clearly led to the abuses of authority in the appointments at issue in these complaints. In light of these findings, the respondent should ensure that this is an isolated incident and that Mr. Hynes could exercise the discretion in accordance with the PSEA and other staffing requirements. The Tribunal recommends that the respondent review all internal appointments involving Messrs. Hynes and MacMillan and proceed with desk audits where appropriate, before Mr. Hynes is delegated any staffing authority under PSEA.
>
> [198] In addition, the respondent provides advisory and some oversight functions through its human resources personnel and has put in place measures such as an established criteria for non-advertised appointments. However these had proven to be ineffective in the circumstances of these complaints. Therefore, the Tribunal recommends that an assessment should be made within 90 days of the capability of the human resources organization in NRCAN to provide proper advice to management, particularly with respect to non-advertised appointment processes and to correct within six months any shortcomings arising from the assessment.

[16] The Tribunal made no other changes to its earlier decision.

Legislation

[17] The *Federal Courts Act*, R.S.C. 1985, c. F-7 as am. (*FCA*) provides:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and (b) to hear and determine any	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour : a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral; b) connaître de toute demande

application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral
18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
…	…
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit

[18] The *Public Service Employment Act*, S.C. 2003, c. 22 (*PSEA*) provides:

Preamble	Préambule
	Attendu :
Recognizing that the public service has contributed to the building of Canada, and will continue to do so in the future while delivering services of highest quality to the public;	que la fonction publique a contribué à bâtir le Canada et continuera de le faire dans l'avenir tout en rendant des services de haute qualité à sa population;
Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded;	qu'il demeure avantageux pour le Canada de pouvoir compter sur une fonction publique non partisane et axée sur le mérite et que ces valeurs doivent être protégées de façon

…

authority to make appointments to and within the public service has been vested in the Public Service Commission, which can delegate this authority to deputy heads;

…

delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians;

…

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(b) an abuse of authority by the Commission in choosing

indépendante;

…

que le pouvoir de faire des nominations à la fonction publique et au sein de celle-ci est conféré à la Commission de la fonction publique et que ce pouvoir peut être délégué aux administrateurs généraux;

…

que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manoeuvre dont ils ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens;

…

77. (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de

between an advertised and a non-advertised internal appointment process;

…

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.

82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.

88.(2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court.

(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Tribunal in relation to a complaint.

l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas

…

81. (1) S'il juge la plainte fondée, le Tribunal peut ordonner à la Commission ou à l'administrateur général de révoquer la nomination ou de ne pas faire la nomination, selon le cas, et de prendre les mesures correctives qu'il estime indiquées.

82. Le Tribunal ne peut ordonner à la Commission de faire une nomination ou d'entreprendre un nouveau processus de nomination.

88.(2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu du paragraphe 65(1) ou des articles 74, 77 ou 83 et de statuer sur elles.

102. (1) La décision du Tribunal est définitive et n'est pas susceptible d'examen ou de révision devant un autre tribunal.

(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto

— visant à contester, réviser, empêcher ou limiter l'action du Tribunal en ce qui touche une plainte.

(emphasis added)

Issues

[19] The Parties differ on the issues arising in this judicial review. The Applicant submits the standard of review is correctness while the Respondent submits the standard is reasonableness.

[20] The Applicant frames the issues from a jurisdictional viewpoint, submitting the issue is:

- Whether the Tribunal erred in law or acted without jurisdiction or exceeded that jurisdiction in making recommendations as to what constituted the appropriate corrective measures required in the circumstances?

[21] The Respondent approaches the questions differently setting out the issues as:

- Did the Tribunal err in making non-binding recommendations in relation to its systemic concerns involving the appointment process?
- Does this Court have jurisdiction to review non-binding recommendations made without express statutory and *obiter dicta* comments made by the Tribunal?

[22] I consider the issues to be:

- Does the Tribunal have the jurisdiction to make recommendations?
- Does the Court have the jurisdiction to review recommendations made by the Tribunal?

Standard of Review

[23] Given the very differing approaches of the Parties to these issues, I consider it necessary to first assess the standard of review on the question of whether the Tribunal has the jurisdiction to make recommendations.

[24] The Supreme Court of Canada's decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 34 (*Dunsmuir*) held there are only two standards of review, correctness and reasonableness. The Supreme Court stated that a reviewing court must first examine whether the standard of review for the question has already been determined: *Dunsmuir* at para 62.

[25] The Applicant argues that the Court has previously found the correctness standard applied in two similar cases involving the Tribunal, *Lavigne v Canada (Deputy Minister of Justice)*, 2009 FC 684 (*Lavigne*) and *Cameron and Maheux*.

[26] In *Lavigne*, Justice Shore conducted a standard of review analysis where an applicant was challenging the Tribunal's decision to dismiss his complaint on a variety of grounds. Justice Shore considered the question of whether the Tribunal correctly interpreted the term "abuse of authority" to be a pure question of law. However, he went on to note that the Tribunal's decision that the assessment board acted wrongfully and abused its authority involved questions of mixed fact and law, assessed against a standard of reasonableness. After considering the factors, Justice Shore assessed the question before him on the standard of reasonableness.

[27] In *Cameron and Maheux*, Deputy Justice Lagacé considered the Tribunal's orders for corrective actions much as ordered previously by the Tribunal in this case. He conducted a contextual analysis focusing on the question of the Tribunal's jurisdiction, finding that the standard of review involved correctness with regard to the question of jurisdiction and reasonableness with respect to the Tribunal's finding of mixed fact and law.

[28] Deputy Justice Lagacé determined that the combined reading of sections 77, 81 and 82 of the *PSEA* required that "any corrective action ordered by the Tribunal must address only the appointment process that is the subject of the complaints before it": *Cameron and Maheux* at para 18.

[29] Deputy Justice Lagacé reviewed the three corrective orders made by the Tribunal at para 22, namely:

> (a) review all appointments made by the manager since the Act came into force;
> (b) suspend the staffing authority delegated to the manager during this review; and
> (c) provide training to the manager to ensure she correctly understands her responsibilities and obligations under the new provisions under to Act.

Deputy Justice Lagacé held that these corrective action orders infringed on the Public Service Commission's (PSC) exclusive authority under sections 15(1) and 24(2) of the *PSEA* to delegate and supervise appointment authority, displaced the deputy head's authority to sub-delegate this authority and interfered with the deputy head's discretion to conduct a review and to require employees to take training. He also took note of the *Financial Administration Act* (*FAA*) which provided that deputy heads in public administration may determine the learning, training and development requirement of persons employed in their respective sectors of the public service.

[30] Deputy Justice Lagacé stated:

> [33] The authority given to the Tribunal by the Act to hear complaints of abuse of authority related to the appointment process as is the case here does not give it the right to interfere in the authority conferred by the *FAA* as stated above.
>
> …
>
> [35] However, even admitting that there was an abuse of authority in the appointment process that was the subject of the two complaints, for reasons already given, the Court must find that the three corrective actions ordered are not entitled to deference by this Court; not only are they ill-founded in fact and law, and therefore unreasonable, but they also considerably exceed the jurisdiction of the Tribunal.

[31] In my view, a significant consideration in the above analysis was that the tribunal had made orders that intruded upon the jurisdiction of the PSC and the deputy heads. This necessarily involves a question of jurisdictional boundaries and review on the standard of correctness.

[32] The Federal Court of Appeal carefully analyzed the subject of jurisdictional boundaries in *Canadian Federal Pilots Association v Canada (Attorney General*), 2009 FCA 223. In that case Justice Evans stated at para 39:

> I well appreciate why correctness is the appropriate standard of review for interpretation of a statutory provision which demarcates the authority of competing different administrative regimes: *Dunsmuir* at para. 61. However, I can see no justification in contemporary approaches to the roles of specialized tribunals and generalist courts in administrative law for characterizing as an "jurisdictional issue", and thus reviewable on a standard of correctness, the interpretation of other provisions in a tribunal's enabling statute that do not rise a "question of law that is of 'central importance to the legal system... and outside the... specialized area of

> expertise of the administrative decision-maker (*Dunsmuir* at paragraph. 55).

[33] Justice Evans summed up as follows:

> [50] To conclude, in order to establish that the board has exceeded its jurisdiction by misinterpreting a provision in its enabling statute, which neither raises a question of law of central importance to the legal system nor demarcates its authority vis-à-vis another tribunal, an applicant must demonstrate that the board's interpretation was unreasonable.
>
> [51] The only qualification I would add is that the tribunal must have legal authority to interpret and apply the disputed provision of its enabling legislation. However, administrative tribunals performing adjudicative functions, such as the Board, normally have explicit or implied authority to decide all questions of law, including interpretation of its enabling statute, necessary for disposing the matter before it: Nova Scotia (Workers Compensation Board) v Martin, 2003 SCC 54, [2003] 2 SCR 504 at paras 40-41.
>
> [52] In my view, it is too late in the development of administrative law in Canada for an applicant to invoke the ghost of jurisdiction passed to inveigle the Court into reviewing for correctness a tribunal's interpretation of a provision in its enabling statute, without subjecting it to a standard of review analysis. It would, in my view, make no sense to apply correctness standard when the tribunal has the authority to interpret and apply the provisions to the facts, and a standard review analysis indicates legislature intended the tribunal's interpretation to be reviewed only for unreasonableness.

[34] Keeping the foregoing in mind, I conclude a standard of review analysis is to be conducted to determine the appropriate standard of review.

[35] The Supreme Court in *Dunsmuir* at para 64 dictated that this analysis is contextual, dependent on relevant factors including:

1. presence or absence of a privative clause;
2. purpose of the tribunal as determined by interpretation of enabling legislation;
3. nature of the question at issue; and
4. expertise of the tribunal.

I will address each in turn.

The presence of a privative clause

[36] The decisions of the Tribunal are buttressed by a strongly worded privative clause in the PSEA which reads as follows:

> 102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court.
>
> (2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Tribunal in relation to a complaint.

[37] The same statutory wording was considered to be a ‘watertight’ privative clause in the *Canada Labour Code* in *Maritime Employers Association v Canadian Union of Public Employees, Local 375*, 2006 FC 66 at para 26. The privative clause expresses Parliament's intention that the Tribunal should be accorded deference on matters within its expertise.

The purpose of the tribunal

[38] The mandated purpose of the Tribunal under s.88(2) of the PSEA is simply but broadly defined in the preamble to "consider and dispose of complaints".

[39] The Tribunal is an independent body that serves a central role in maintaining the values set out in the preamble of the *PSEA* which includes a "public service based on merit and non-partisanship and in which these values are independently safeguarded."

[40] The broad mandate of the Tribunal, coupled with its role as the independent guardian of merit and non-partisanship, point to deference for its rulings: *Kane v Canada* (*Attorney General*), 2009 FC 740 at para 16, rev'd on other grounds 2011 FCA 19.

Nature of the question

[41] The Tribunal had to consider both a question of law on whether it could make recommendations in relation to the matter before it and of fact to form the basis for making recommendations. Accordingly, in formulating its recommendations, the Tribunal had to consider mixed questions of law and fact, which points to a standard of reasonableness.

Expertise

[42] The Tribunal necessarily has special expertise in matters of public service staffing. Its members must have knowledge of and experience in employment matters relating to employment practices in the public sector: *Lavigne* at paras 41-42.

[43] I conclude that the thrust of the *Dunsmuir* standard of review factors for Tribunal rulings not involving jurisdictional questions strongly weighs towards the standard of review of reasonableness. This would include questions involving interpretation of the Tribunal's home statute.

Analysis

Does the Tribunal have the jurisdiction to make recommendations?

[44] The basic conflict between the parties' stances lies in the perception of the Tribunal's purpose versus the Tribunal's powers. The Applicant argues that the powers of the Tribunal are limited and it cannot encroach on powers that have been expressly granted to the PSC and deputy heads. The Respondent submits the Tribunal's role is an independent safeguard of the principles of merit and non-partisanship in the public service.

[45] The Applicant argues that the Tribunal cannot exercise authority in matters for which it has not been given the authority to do so. The Applicant points out that Parliament has given the authority to appoint and delegate to the PSC, not the Tribunal. The Applicant went on at length to demonstrate how the legislation reflects that the Tribunal does not have the power to conduct an investigation, a review, or an audit, and therefore cannot make orders in these areas. I do not see this as a relevant point, as the issue at hand focuses on the Tribunal's non-binding recommendations and not whether the Tribunal had the power to make binding orders in these areas.

[46] The Applicant emphasizes that the Tribunal's powers are limited to ensuring that the appointment or process is corrected by providing a remedy for the consequences of the breach as the Court ruled in *Cameron and Maheux*. The Applicant argues that the Tribunal's recommendations to review all appointments made involving Mr. Hynes and Mr. MacMillan was inappropriate because the other appointment processes were not the subject of the complaint before the Tribunal. It was possible, after all, that while they abused their discretionary authority during the appointment process in dispute, they fully understood their responsibilities and obligations during the process followed for other appointments.

[47] The Applicant argues that the Tribunal "ought not, through strongly worded recommendations, be permitted to achieve indirectly what this Court has determined it could not achieve directly." The Applicant explains that such recommendations, which may in themselves not involve immediate legal consequences, "may only lead to acts or orders which do so", as they may create expectations from the complainants as to how the Public Service Commission should exercise its discretion. This, the Applicant argues, would interfere with its discretionary power.

[48] The Applicant also submits that the power to make such recommendations is not expressly provided by the PSEA to the Tribunal. While other Acts of Parliament have provided such an authority, such as the Privacy Commissioner's authority to do so under the *Privacy Act*, and while within the PSEA itself some powers of recommendation was expressly provided to the PSC under section 17, no such power to recommend was outlined for the Tribunal.

[49] I am not persuaded by the Applicant's suggestion that recommendations, though not legally binding, may create harmful "expectations" about how the PSC should act regarding matters under its authority. Non-binding recommendations are just that: not binding. The employer, PSC or deputy head is free to accept or reject such recommendations.

[50] The Tribunal directed its attention to the principles stated in the preamble of the *PSEA*, and the Court's decision in *Cameron and Maheux,* which stated it could draw the employer's attention to the matter.

[51] The preamble of the *PSEA* establishes as fundamental the importance of merit and non-partisanship in the public service. The PSEA establishes the Tribunal as an independent tribunal and assigns to it under s.88(2) a broad statutory mandate "to consider and dispose of complaints". In my view, this open-ended language suggests Parliament chose to give the Tribunal considerable flexibility.

[52] The only express restriction placed on the Tribunal's remedial authority is under s.82 of the PSEA which specifies that the Tribunal may not order the PSC to make an appointment or conduct a new appointment process. The PSEA does not expressly prohibit the Tribunal from making recommendations.

[53] At the heart of the issue is whether the Tribunal has a broad flexibility to fulfill its mandate (as suggested in the statute) or whether the Tribunal is restricted to correcting the particular problem brought to its attention (as suggested by the jurisprudence in *Cameron and Maheux*). The Court in

Cameron and Maheux does note that the Tribunal may make the deputy head aware of the incident. I would think that the Tribunal may not only make a deputy head (or the PSC) aware of an incident but also its concerns arising from the incident. One way of doing so would be in the form of recommendations grounded in the facts surrounding the incident that led to the successful complaint.

[54] As such, I find that the Tribunal's interpretation of its home statue as allowing it to make recommendations where it identified matters of concern arising from matters before it to be reasonable.

Does the Court have jurisdiction to review recommendations made by the Tribunal?

[55] The Respondent submits that the Court does not have the jurisdiction to intervene in a challenge to either non-binding recommendations or to *obiter* views by the Tribunal because they are part of reasons for a decision, not the decision itself. It submits that the main issue of a judicial review application should be a Tribunal decision, rather than its reasoning.

[56] The Respondent lists a number of cases to support this assertion, including *GKO Engineering v. Canada*, 2001 FCA 73 at para 3 where the Court noted: "…the respondent may not agree with all the reasons of the lower Court or tribunal. Unless the respondent seeks a different disposition, however, the respondent has no basis to bring its own judicial review application."

[57] The Respondent likens the non-binding recommendations as akin to *obiter dicta* comments, which have not been found to justify the Court's intervention on a judicial review as was the case in *Air Canada Pilots Association v Air Line Pilots Association*, 2007 FCA 241 where the Federal Court of Appeal stated at para 27:

> Finally, ACPA blames the Board for having given a declaratory opinion in obiter. However, precisely because the views expressed by the Board were obiter dicta, they have no precedential value…and would not justify the intervention of this Court on a judicial review application.

[58] However, in response to this *obiter dicta* submission, I would note that after the Court set aside parts of the original order and then sent the matter back, the Tribunal conducted a short analysis before concluding that it could make non-binding recommendations. The Tribunal's recommendations form the essence of the amendment and therefore are not mere *obiter dicta* commentary.

[59] In terms of the reviewability of recommendations, the Respondent also points to *Jada Fishing Co. v Canada (Minister of Fisheries and Oceans)*, 2002 FCA 103 (*Jada Fishing Co.)*, where the Court found at para 12:

> It is clear that the Minister is empowered under section 7 of the Fisheries Act, R.S.C. 1985, c. F-14, with absolute discretion to make decisions with regard to fishing licences. The Panel, on the other hand, was without statutory authority and merely made recommendations which the Minister was entitled to accept or reject. Accordingly, the Panel's recommendations are not in themselves prima facie reviewable. In this case, due to the breadth of the Notice of Application for Judicial Review before Pelletier J., I am well

> satisfied that this Court can review a discretionary decision of the Minister based, in part, upon the Panel's recommendation.
>
> (emphasis added)

[60] Although most subsequent cases citing *Jada Fishing Co* deal with the relationship between a decision and the recommendation on which the decision was based, it is generally accepted that the non-binding recommendations themselves are not reviewable: see *Chauvin v Canada*, 2009 FC 1202, [2009] FTR 200 (*Chauvin*) at paras 72, where Prothonotary Aalto cites *Jada Fishing Co.* to conclude that the Governor General's Advisory Council in providing its non-binding advice is not subject to review.

[61] In *Lingley v New Brunswick* (*Board of Review*), [1976] 1 F.C. 98 (CA), the Court of Appeal stated that expressions of opinion did not constitute decisions "if they do not, in law, settle a matter and have no binding effect." It found that the recommendation in question did not have these characteristics:

> It does not determine or purport to determine whether the person in custody is to be discharged; under the statute such a determination is to be made by the Lieutenant Governor. Moreover the recommendation of the Board, being the mere expression of an opinion, is not binding on anyone; it does not bind the Lieutenant Governor, who may choose to ignore it, and it is not even binding on the Board itself since the Board could certainly modify the views expressed in its report. (para 10)

This approach is still valid today, as can be seen in *Chauvin*, where the Court granted the respondent's motion to strike the applicant's application to either set aside the recommendation of Advisory Council of the Order of Canada or send it back for reconsideration.

[62] Notwithstanding the foregoing, in certain situations, the Court has found recommendations may be considered reviewable, when a decision relies solely on the recommendation or when the recommendation affects the legal rights or interests of a party.

[63] *Jada Fishing Co.* suggests that when the recommendation is "inexorably connected" to the Minister's decision, the Court will review the recommendations in the sense that it will review the Minister's decision adopting those recommendations. In *Waterman v. Canada (Attorney General)*, 2009 FC 844, the AFLAB's recommendations were found to be "inexorably connected" to the Minister's decision but without legal effect unless "adopted" by the Minister as a basis for his decision. On that basis, the Court found that these recommendations can be challenged in an application for judicial review, even if it is the Minister's decision that should formally be the subject of the review.

[64] In the case at hand, the PSEA provides that the PSC and deputy head may consider a varied number of sources in exercising their respective authorities. Where the PSC or the deputy head may rely on a number of sources, it does not appear that they are compelled nor would rely solely on the recommendations made by the Tribunal, given that by statute they may consider a variety of sources. Nor can it be assumed that the Tribunal's recommendations will necessarily be followed. I

find the Tribunal's recommendations in this case are not reviewable as inexorably connected to any decision.

[65] In *Morneault* it had been argued that the findings of a report made by the Commission of Inquiry did not constitute "decisions" that could be judicially reviewed. The Court of Appeal, however, found that the findings was a matter that could be reviewed, given that the respondent was directly affected by the findings, as the findings were exceptionally important to the respondent because of the impact on his reputation.

[66] I consider this to be an important exception. Do the Tribunal's recommendations possibly affect the legal rights or interests of a party? If they could, the recommendations may be reviewable.

[67] The Tribunal explicitly specified that it intended its recommendations to be for guidance purpose only. However, intention is not necessarily a determinative factor, as the Court has emphasized the need to probe deeper as to whether a recommendation would affect the legal rights or interests of a party: *Morneault* at para 42.

[68] Here, in the case at hand, the Tribunal employs strong language concerning the actions of the director and manager involved, and its recommendations may be interpreted as implying other possible misconduct. However, the Applicant has accepted the Tribunal's finding of abuse of authority and has not made any submissions concerning impact on reputations involved. Nor have the individuals in question joined as a party to challenge the original orders or the subsequent

recommendations. I do not see evidence of any other legal rights or interests of a party that may be affected. Accordingly, I would not consider granting judicial review on this basis.

Conclusion

[69] In result, I find the Tribunal's interpretation of its home statute, the PSEA, that it had jurisdiction to make recommendations, to be reasonable and I further find its non-binding recommendations are not reviewable as being inexorably connected with a decision or of having an impact on the reputation of a party.

[70] I find the Tribunal's wording of its recommendations to be somewhat awkward because the recommendations were simply substituted for the previous corrective action orders. Such substitution is not always prudent. I consider the awkwardness in the Tribunal recommendations to be the result from the history of this proceeding as well as the fact that the judicial review referring the matter back to the Tribunal provided minimal guidance on the subject of recommendations.

[71] The parties have directed my attention to a subsequent decision of the Tribunal, *Susan Ayotte et al v The Deputy Minister of National Defence and Other Parties,* 2010 PSST 0016 where the Tribunal also made recommendations. In that ruling, the Tribunal's reasoning and recommendations appear to be better considered and do not transgress into the above discussed areas that might result in a judicial review of the recommendations.

[72] In this circumstance, if I am wrong in my analysis that these particular Tribunal recommendations are not reviewable, I would exercise my discretion not to grant judicial review because the development of Tribunal recommendations is just beginning, and judicial review of Tribunal recommendations should await a more appropriate case.

[73] For these reasons, I dismiss this application for judicial review.

[74] I make no order for costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. I make no order for costs.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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