Federal Court Cour fédérale

Date: 20120517

Docket: T-742-11

Citation: 2012 FC 601

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 17, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MALIKA LAHLALI

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] The Attorney General of Canada filed an application for judicial review of a decision of the Public Service Staffing Tribunal (the Tribunal), on March 31, 2011. In that decision, Tribunal member Maurice Gohier considered three complaints of abuse of authority under paragraph 77(1)(*a*) of the *Public Service Employment Act*, SC 2003, c 22, sections 12 and 13

(PSEA). He dismissed the complaints of Kenza Elazzouzi and Mohamed Labidi and allowed that of Malika Lahlali, the respondent in this case. This decision alone is the subject of this judicial review.

I. Facts

[2] The respondent has been a public servant since 2003. In January 2009, the Deputy Minister of Human Resources and Skills Development Canada (HRSDC) started an internal appointment process to fill Service Canada Benefit Officer positions at the PM-02 group and level in Quebec City. The assessment board, composed of Sonia Godin, chairperson, and Jean-Luc Plante, had used the definitions and factors from the National Competency Dictionary (NCD) to describe the essential qualifications of the position. The respondent applied for this position.

[3] On February 23, 2009, the respondent took a written exam to assess her knowledge of the services offered by Service Canada and knowledge of the following technologies and skills: applying principles and procedures, diagnostic information gathering and reasoning.

[4] After the respondent's written exam was corrected, the assessment board found that the respondent had not received passing marks on questions 3 and 4, which assessed the ability "thinking skills". These questions were in the form of role-playing exercises. On question 3, the candidates were faced with a rent increase that could not be disputed and they were asked the following question: "You have two (2) options: you can either move or accept this increase. What factors guide your thinking in order to arrive at the ideal solution?" In the second role-playing exercise (question 4), the candidates had to explain how they would choose a destination abroad for the vacation they would be taking in the next few months after having been informed of various possibilities by a travel agent. The question read as follows: "As you can see, you have a range of

options. What factors would you take into consideration to choose the ideal holiday for you and your partner?" The respondent received the mark "D+" (65-69) for question 3 and the mark "E" (fail) for question 4.

[5] The relevant factors in assessing the ability "thinking skills" are described in the NCD:

> The ability to actively and skillfully analyze problems and issues, organize information, identify key factors, identify underlying clauses and generate practical solutions.
>
> - Effectively plans and organizes work.
> - Identifies practical and sound solutions to problems.
> - Quickly acquires and applies relevant information.
> - Recognizes pertinent facts and issues.
>
> Applicant's Record, National Competency Dictionary, Vol. 1, Tab 3-E-4, at p 181.

[6] The respondent answered question 4 in the following manner:

> In meeting with the travel agent, I would ask him questions about:
>
> 1. The pros and cons of each location.
>
> 2. The seasonal rates, given that no date has been set (high and low season).
>
> 3. Gathering as much information as possible for each destination, the price, comments from other travellers …
>
> 4. I would take his contact information, in case I need more details or information.
>
> 5. After returning home, we would consider the choices offered.
>
> 6. Are we willing to stay in one city? Do we want a cruise or group tourism trip? A long stay in a sunny destination in a condo with a kitchenette or an all-inclusive beach resort?
>
> 7. If we choose this destination, would we be able to take the vacation during the low season to save some money?

> 8. We would consult the Internet sites of these destinations, where applicable.
>
> 9. We would consult blogs and discussion forums, talk to friends who have already [illegible] the destinations to get their comments.
>
> 10. We would check if there are any vaccines required or provisions to be made for the destinations (visas, medications, safety).
>
> Once we had the answers to all these questions, we would be able to make a good decision so that we could have an ideal vacation.
>
> Applicant's Record, Answers to Lahlali's written exam , Tab 3-E-12, pp 241-242

[7] The board's observations with respect to the respondent's answers to questions 3 and 4 read as follows:

Question 3 (D+)	**Question 4 (E)**
Evaluates the current situation in detail, location vs. work, school, etc. Evaluates the current increase and possible future increases. Estimates the time, energy and costs without giving details for these. Some issues are not dealt with.	Does not evaluate the situation with her partner and their needs as a couple. Repeats the factors in the question. Does an analysis of the cost. Checks about vaccinations, medications (…), depending on destinations. Too many issues are not dealt with.

Applicant's Record, overall assessment of Lahlali, Tab 3-E-15, p 261

[8] On April 22, 2009, the respondent and the other two complainants filed a complaint under paragraph 77(1)(*a*) of the PSEA, alleging abuse of authority in the application of merit regarding the appointment process.

II. Impugned decision

[9] The Tribunal had to determine, *inter alia*, whether the Deputy Minister of HRSDC abused his authority by deciding that the respondent did not meet the ability "thinking skills". The Tribunal began its analysis by explaining the role of the deputy head under section 36 of the PSEA, and noted that the discretion in the choice and use of tools that the deputy head considers to be appropriate in determining whether candidates meet the qualifications referred to in subsection 30(2) of the PSEA is not absolute. The Tribunal may, in fact, find that there was abuse of authority if it is shown that the method used for assessing the qualifications has no connection to the qualifications or does not allow for the qualifications to be assessed, if the method is unreasonable or discriminatory, or if the result is unfair.

[10] The Tribunal then considered its role when a complaint is brought to its attention. On this point, the Tribunal emphasized that its role is not to reassess the marks given by the board for the answers on the exam, but rather to assess the appointment process—the test or interview—to determine whether there was abuse of authority.

[11] The Tribunal then considered the situation of the three complainants. Specifically with respect to the respondent, the Tribunal first noted that there were no obvious or quasi-mathematical answers to questions 3 and 4, insofar as they required explaining the thinking used to arrive at the answer given and, thus, were necessarily subjective.

[12] After reproducing the factors considered relevant by the NCD in assessing the ability "thinking skills" in a candidate, the Tribunal expressed the view that the board's observations did

not match the factors in the NCD. The Tribunal further noted that the testimony of Ms. Godin, chairperson of the assessment board, did not help in reconciling the board's observations with the definition of the ability "thinking skills" provided by the NCD. At the hearing before the Tribunal, she had explained that: (a) the board did not develop any expected answers to questions 3 and 4 of the written exam because the board wanted to allow candidates to present different approaches; (b) the candidates' answers to these questions still had to meet each of the factors of the NCD's definition of "thinking skills"; and (c) in taking into account all these tools, including the above factors, the assessment board was of the view that the respondent's answers were did not meet pass mark.

[13] On March 31, 2011, the Tribunal allowed the respondent's complaint, but dismissed the complaints of the other two complainants. In their case, the correct answers were clear and specific given the objective nature of the situation used to evaluate the ability "applying principles and procedures". It was not the same for assessing the ability "thinking skills", which required much more subjective criteria. The Tribunal essentially came to the conclusion that the board was unable to explain its decision and had abused its authority. After reproducing the board's observations and the marks awarded for the respondent's answers, the Tribunal wrote:

> 48. In question 3, the board said that "Some issues are not dealt with" . The use of the plural leads to the understanding that at least two of the four factors cited previously were not met. For question 4, the board determined that "Too many issues are not dealt with". Since logic dictates that "too many" must be greater than "some", it must be found that at least three, if not four, of the factors identified were not met.
>
> 49. However, it seems that the board's observations do not match the relevant factors identified for assessing this ability. In addition, the Tribunal notes that Ms. Godin's testimony did not help in clarifying

> this issue. At the hearing, Ms. Godin read the text of the board's findings, but she did not explain how the board identified acceptable answers and no explanation was given to justify the board's findings. Instead, Ms. Godin explained that the board did not develop an expected answer because it wanted to give candidates free reign to present their information, since a number of different approaches could be acceptable. Although the board has the liberty to proceed in this way, it is essential, in the circumstances, that the board's observations have a direct and concrete link with the factors deemed relevant for assessing the candidates' answers. The evidence shows that this was not the case here.
>
> 50. It follows that, in the absence of such benchmarks in its analysis of Ms. Lahlali's answers, the board could not justify, with regard to the ability "thinking skills" in questions 3 and 4, its findings that "some issues are not dealt with" or "too many issues are not dealt with". The board's findings were therefore unreasonable. (…)
>
> 51. For these reasons, the Tribunal finds that the assessment board abused its authority and committed a serious error by failing to link its observations to the four factors considered relevant for assessing the candidates' answers.

[14] The Tribunal allowed the respondent's complaint, finding that the situation could be rectified by re-assessing the answers to questions 3 and 4 on the basis of the relevant factors established for the ability "thinking skills" and by continuing the assessment of her application if she met this qualification.

III. Issues

[15] This application for judicial review raises the following three issues:

(1) Did the Tribunal err in reversing the burden of proof or applying an incorrect burden of proof?

(2) Did the Tribunal err in interpreting or applying the concept of abuse of authority within the meaning of the PSEA?

(3) Did the Tribunal commit a clear error in respect of the facts?

IV. Analysis

A. *Legislative framework*

[16] The PSEA came into force on December 31, 2005, and was the first wide-ranging legislative reform of its kind in over 35 years. The objective of the new Act was to reform the old staffing system, which was thought to be too complex and slow. The new staffing system allowed managers to fill vacancies with qualified people in a timely fashion so that the public service could carry out its role of serving Canadians.

[17] To achieve this efficiency objective, Parliament decided to give managers increased discretion with respect to staffing issues. This new philosophy is echoed in the preamble to the PSEA and specifically in the following recognition:

> Recognizing that
> …
> 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.

[18] Parliament also distanced itself from the old system by using a version of the merit principle that emphasizes individual rather than comparative merit, as section 30 of the PSEA shows. From that point forward, a manager would no longer be required to appoint the best qualified candidate to a position; it would be enough that a person would have the essential qualifications established by the deputy head to be appointed to a position. Paragraph 30(2)(*b*) of the PSEA specifies that the Public Service Commission (the Commission) may also take into account any additional qualifications considered an asset to the work to be performed, any current and future organizational needs and any current and future operational requirements. This provision reads as follows:

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

30. (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.

Meaning of merit
(2) An appointment is made on the basis of merit when

Définition du mérite
(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;

(b) the Commission has regard to

b) la Commission prend en compte :

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

(iii) any current or future needs of the organization that may be identified by the deputy head.

(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

[19] In addition, the assessment board has considerable discretion in the selection and use of assessment methods. In this regard, section 36 of the PSEA states:

36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).	36. La Commission peut avoir recours à toute méthode d'évaluation — notamment prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).

[20] Candidates not selected as a result of an internal appointment process may file a complaint with the Tribunal if they believe that they were not appointed or proposed for appointment specifically because of abuse of authority by the Commission or its delegate in the application of merit:

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	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) 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);	a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du

	paragraphe 30(2);

[21] Finally, the PSEA does not provide an exhaustive definition of the concept of “abuse of authority” but it contains the following provision:

2. (1) The following definitions apply in this Act.	2. (1) Les définitions qui suivent s’appliquent à la présente loi.
…	[…]
(4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.	(4) Il est entendu que, pour l’application de la présente loi, on entend notamment par « abus de pouvoir » la mauvaise foi et le favoritisme personnel.

B. *Standard of review*

[22] The issues relate mainly to the existence of abuse of authority under section 77 of the PSEA. It is clearly a mixed question of fact and law, in that this Court must consider the meaning and scope of a statutory provision (section 77 of the PSEA) to then apply it to the facts of this case. In *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 54, [2008] 1 SCR 190 (*Dunsmuir*), the Supreme Court established that deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity. This is precisely the case here, since the issues raised are closely related to the Tribunal’s specialized knowledge with respect to the internal appointment process in the public service. Moreover, section 102 of the PSEA sets out a strong privative clause. Consequently, there is no doubt that the standard of review applicable is that of reasonableness.

[23] In fact, I note that both parties agree on this issue and argue that it is the standard applicable. The decisions of this Court and of the Court of Appeal were also to this effect (*Kane v Canada* (*Attorney General*), 2011 FCA 19, at para 36 (available on CanLII) (*Kane*); *Kilbray v Canada* (*Attorney General*), 2009 FC 390, 344 FTR 203; *Brown v Canada* (*Attorney General*), 2009 FC 758, 369 FTR 54; *Lavigne v Canada* (*Attorney General*), 2009 FC 684 (available on CanLII) (*Lavigne*)). Consequently, the Court must determine whether the Tribunal's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law and whether the decision-making process is transparent, intelligible and justifiable (*Dunsmuir*, above, at para 47).

(1) <u>Did the Tribunal err in reversing the burden of proof or applying an incorrect burden of proof</u>?

[24] The applicant argued that the Tribunal had reversed the burden of proof or applied an incorrect burden of proof by requiring the plaintiff to justify its conclusions. Neither the complaints nor the allegations of each complainant alleged that the board had neglected to refer to each of the factors in its written observations, or that this omission was in itself a serious error amounting to an abuse of power. According to the applicant, the Tribunal did not at all analyze facts relied on by the respondent to prove the merits of her case and rather chose to focus on the lack of evidence presented by the respondent. In support of his argument, the applicant relies on excerpts of the decision where the Tribunal finds that [TRANSLATION] "no explanation was given to <u>justify</u> the board's <u>findings</u>" and that [TRANSLATION] "the board could not <u>justify its findings</u>, with regard to the ability 'thinking skills'".

[25] As in any civil proceeding, the burden of proving an allegation definitely rests with the party making it, on a balance of probabilities. The respondent does not call into question this principle and the Tribunal itself reiterated it in paragraph 32 of its decision.

[26] In her complaint, the respondent alleged that the board had abused its authority in application of merit during the evaluation of her answers in the written exam and in the awarding of marks for the answers. She also alleged abuse of authority because there was no expected answer to questions 3 and 4 in the written exam, which [TRANSLATION] "provided too many grey areas for the purposes of fair and transparent correction" (Applicant's Record, Vol. 1, Allegations, Tab 3-B, p 37). These allegations, on their face, were serious, especially since the board's observations did not really allow a rebuttal inasmuch as they did not match the relevant factors identified for assessing this ability, as the Tribunal noted.

[27] In these circumstances, and in the absence of any other evidence, the Tribunal could have found that the board's findings were not reasonable and that it had abused its authority in failing to link its observations to the four factors considered relevant for assessing the answers as prescribed by the NCD. No doubt aware of this failure, the applicant chose to have Ms. Godin testify so that she could explain how the board identified acceptable answers. Far from clarifying the situation, it seems that Ms. Godin merely read the text of the board's findings and explained that the board did not develop an expected answer so as not to immediately exclude unanticipated but acceptable approaches. It is in this context that the Tribunal found that the board could not justify its findings.

[28] It may well be that the use of the word "justify" was not the best choice. The fact remains that the board was never able to establish a clear link between the essential qualifications, the chosen assessment tools and methods, and the conclusions drawn from applying those methods. Nevertheless, this the very essence of the complaint filed by the respondent, who in fact was alleging abuse of authority in the application of merit in that the deputy head was not able to [Translation] "demonstrate that I do not meet the essential qualifications for the work to be performed, specifically the ability "thinking skills." (Applicant's Record, Vol. 1, Complaint, Tab 3-A, p. 32).

[29] The Tribunal was clearly aware of the fact that the burden of proof rested on the complainants. But from the moment that the respondent's allegations appeared to have a prima facie basis given the objective evidence, the burden fell on the applicant to provide a satisfactory explanation to rebut them. In this case, there was no need for the respondent to give a long demonstration in support of his allegations. The only explanation provided by the Board to support the mark given was in its observations and they were clearly not sufficient to explain the link between the assessment of the answers and the relevant factors. In the circumstances, the Tribunal was entitled to expect that the board demonstrate a clear link between the essential qualifications in the job advertisement and the conclusions drawn from applying the tools and methods, as required by the Public Service Commission Appointment Policy to which the Deputy Minister of HRSDC is subject under section 16 of the PSEA.

[30] Based on the foregoing, I feel that the Tribunal correctly applied the burden of proof and simply applied the PSEA and the Public Service Commission Appointment Policy in its assessment of the respondent's complaint.

(2) Did the Tribunal err in interpreting or applying the concept of abuse of authority within the meaning of the PSEA?

[31] In this regard, the applicant submits that the Tribunal erred in reassessing the respondent's answers and by applying an incorrect criterion to establish abuse of authority, in that it determined that the analysis of each of the factors had to be explained in the assessment board's written observations. By requiring the assessment board to justify its findings, the applicant felt that the Tribunal a not only reversed the burden of proof, but also involved itself in a reassessment process.

[32] The applicant further argued that the threshold which must be passed to find that abuse of authority has occurred in the assessment of essential qualifications is high. Relying on the Tribunal's case law, the applicant argued that an error or an omission can amount to abuse of authority only if there has been serious carelessness or recklessness that can lead to presuming bad faith. In this case, the absence of detailed written comments for each of the factors would not be an error, let alone a serious one amounting to an abuse of authority, particularly since the uncontradicted evidence filed at the hearing confirms that each of the factors was examined by the assessment board.

[33] As previously stated, the PSEA does not provide an exhaustive definition of the concept of "abuse of authority" and merely provides in paragraph 2(4) that this concept "includes" bad faith and personal favouritism. A great deal of case law has been developed around this concept, from which certain conclusions can be drawn.

[34] First, it would not be appropriate to try to limit the concept of abuse of authority to narrow and well-defined categories. Parliament chose to leave it to the Tribunal to interpret this ground of complaint so as to take into account the circumstances of each specific case before it. The Courts should not give in to the temptation of supplementing the broad wording of paragraph 2(4) by proposing interpretations that would lock them into narrow categories and, thus, minimize their scope. Therefore, I fully agree with the Tribunal's reasoning in one of the first decisions it rendered under the PSEA:

> …the Tribunal should not be circumscribed by a definition of abuse of authority. The fact that Parliament chose not to provide a definition of abuse of authority and has established this Tribunal to interpret the concept of abuse of authority in the context of section 65, section 77, and section 83 complaints lends support to the idea that it was not Parliament's intention to have a static definition of abuse of authority.
>
> *Tibbs v Canada* (*Deputy Minister of National Defence*), 2006 PSST 8, at para 60 (available on CanLII).

[35] This approach was recently set out by Justice Evans of the Federal Court of Appeal who refused to limit abuse of authority to "serious misconduct that carries a moral stigma" and rejected the requirement of a mental element akin to that in the tort of misfeasance in public office, as the respondents in that case claimed. On this point, he stated the following:

> It would be inappropriate for the Court to attempt to formulate a comprehensive definition of abuse of authority as that term is used in

> section 77 of the PSEA. I recognize that by limiting the Tribunal's jurisdiction to adjudicate employees' complaints to instances of abuse of authority, Parliament no doubt intended to reduce the staffing delays, and overly intrusive surveillance, associated with what was effectively *do novo* appellate review under the former Act.
>
> *Kane*, above, at para 66.

[36] While acknowledging that the intended purpose of the PSEA was to give managers greater discretion in staffing matters, he stated that he thought that the interpretation should not preclude employees from pursuing a remedy:

> The PSEA was intended to introduce more flexibility into appointment and staffing decisions. However, these objectives do not require an interpretation of the Act that would preclude employees from pursuing an effective remedy for managerial arbitrariness in the exercise of a statutory discretion.
>
> *Kane*, above, at para 77.

[37] It is wrong to interpret the concept of abuse of authority in light of the limited class presumption and claim that abuse of authority should be limited to acts related to bad faith or personal favoritism and, thus, require an element of intention. Also in *Kane*, above, at para 60, Justice Evans showed that the limited class presumption in similar items "does not apply to provisions where, like subsection 2(4), specific items are stated to be included in a <u>preceding</u> general term" (Emphasis added).

[38] In short, I am of the opinion that in addition to bad faith and personal favoritism, abuse of authority includes other forms of inappropriate behaviour. Indeed, more is required than mere errors and omissions, as this Court pointed out in *Lavigne*, above. However, contrary to what the applicant argued, the Tribunal's case law does not state that an error or omission can amount to abuse of authority only if there has been serious carelessness or recklessness to the point where bad faith can

be presumed. Further, it is not necessary, for the purpose of this dispute, to determine whether the five categories of abuse of authority based on case law identified by Jones and deVillars in their book on administrative law (Principles of Administrative Law, 5th Ed., Toronto, Carswell, 2009, at p 204), can be used to define the scope of paragraph 2(4) of the PSEA.

[39] It is clear from reading the PSEA and its preamble, as well as from parliamentary debates, that Parliament intended to simplify the staffing process and give greater discretion to managers in this area. Therefore, counsel for the applicant was correct in saying that the Court must be careful not to bring back the inquisitorial manner of appeals under the former Act by substituting its assessment of candidates' answers for that of the assessment board instead of simply assessing how the board checked the answers.

[40] This being said, the discretion that Parliament delegates to an administrative body or an employee is never absolute and must always be determined based on the legislative objective of the law, as the Supreme Court pointed out in the now famous decision of *Roncarelli v Duplessis*, (1959] SCR 121 (available on CanLII). In adopting the new version of the PSEA, Parliament did not intend to disregard the merit principle or dilute it, but intended to ensure that appointments would also take into consideration the operational needs of the organization and the public service (PSEA, subsection 30(2)).

[41] In addition, the discretion exercised by deputy head must be examined in light of the guidelines adopted under subsection 29(3) of the PSEA. The following paragraph of the Guide to

Implementing the Assessment Policy (Applicant's Record, vol. 1, Tab 3-D, p 76) is particularly relevant:

> The policy statement for assessment requires that:
>
> …
> the assessment processes and methods effectively assess the essential qualifications and other merit criteria identified and are administered fairly;
> …
>
> The second statement refers specifically to the value of fairness and indicates that processes and methods must effectively assess the identified essential qualifications and other merit criteria. To ensure an effective assessment, it is important that the assessment methods, processes and tools be directly linked to the identified merit criteria and that they be able to accurately measure the criteria. In addition, this will ultimately have an impact on the capacity of the selected individual to do the job. "Fair" administration of the assessment means that individuals have had an opportunity to demonstrate their merit for the position and that managers have a sound rationale for the decision(s) that are made.

[42] It was in this context the Tribunal had to determine whether the assessment board had abused its authority by rejecting the respondent's application. In its decision, the Tribunal stated that its role was not to reassess the marks given by the board, but to review the process to assess whether there was abuse of authority. It is significant that the Tribunal dismiss the complaints filed by the other two complainants who were not satisfied with the correction of their written exam.

[43] Far from conducting its own assessment of the answers given by the respondent and the marks given by the board, the Tribunal simply stated that questions 3 and 4 the written exam could not result in objective or obvious answers, but did allow for considering different approaches. While admitting that the board could proceed in this way, the Tribunal pointed out that in such circumstances, it was "essential ... that the board's observations have a direct and concrete link with

the factors deemed relevant for assessing the candidates' answers" (Applicant's Record, Vol. 1, Decision, Tab 2, at para 49.

[44] In making this submission and noting the fact that the board's observations did not match the relevant factors in assessing the ability "thinking skills", the Tribunal did not exceed its jurisdiction or err in its interpretation of abuse of authority. In fact, the selection board's observations are rather terse and do not help to identify which issues were [Translation] "not addressed". It is not possible, in these circumstances, to determine whether the factors listed for the ability "thinking skills" were assessed. It was not enough to say, as Ms. Godin did at the hearing, that all the factors had been reviewed by the assessment board, without other evidence to that effect.

[45] Contrary to what the applicant submits, the Tribunal did not find that the board had a duty to refer to each of the factors in its written submissions. What the Tribunal viewed as problematic was the lack of any relationship between the factors and the board's observations. It was simply impossible to know on what basis the respondent's answers were found inadequate, which is particularly worrisome when the questions do not call for an objective and easily verifiable answer. Allowing this kind of practice would leave the door wide open to arbitrariness and, in so doing, the board committed a serious error. Therefore, I am of the view that the Tribunal did not err in finding that such an approach was an abuse of authority under paragraph 77(1)(*a*) of the PSEA. In so doing, the Tribunal did not interfere with in the discretion conferred on the deputy minister by reassessing the respondent's application, but complied with the Public Service Commission policies in requiring managers to be transparent and justify their decision based on pre-established criteria.

[46] In short, for all the above reasons, I am of the view that the Tribunal did not err in interpreting and applying the concept of abuse of authority and that it could reasonably draw the conclusion that the selection board had abused its authority by not taking into consideration relevant factors in assessing the answers provided in questions 3 and 4 regarding the ability "thinking skills".

(3) Did the Tribunal commit a clear error in respect of the facts?

[47] The applicant argued that the Tribunal committed clear factual errors that make its decision unreasonable. First he stated that the Tribunal could not find that the assessment board had not explained how it identified acceptable answers, after acknowledging that the board had the liberty to not develop an expected answer to give candidates as much freedom as possible. Second, he maintained that the Tribunal had not taken into account Ms. Godin's testimony that it had considered all the assessment tools, including the factors, before making its decision.

[48] On that point, it should be remembered that findings of fact by an administrative tribunal must be treated with the greatest deference in an application for judicial review. As to Ms. Godin's testimony, the Tribunal did not disregard it, but it explicitly made reference to it in these terms (I cite it again for ease of reference):

> At the hearing, Ms. Godin read the text of the board's findings, but she did not explain how the board identified acceptable answers and no explanation was given to justify the board's findings. Instead, Ms. Godin explained that the board did not develop an expected answer because it wanted to give candidates free reign to present their information, since a number of different approaches could be acceptable. Although the board has the liberty to proceed in this way, it is essential, in the circumstances, that the board's observations have a direct and concrete link with the factors deemed relevant for

> assessing the candidates' answers. The evidence shows that this was not the case here.
>
> Applicant's Record, Vol. 1, Decision, Tab 2, at para 49.

[49] It is one thing to accept approach followed by the board and to admit that an open question can sometimes be more helpful in assessing some abilities. It is another to provide no criteria, vague or otherwise, to ensure some consistency and minimal transparency in the assessment, and to provide no explanation of the deficiencies in an answer based on pre-established criteria. The Tribunal did not ignore the evidence submitted by the applicant but felt it was inappropriate and not sufficient, as it was entitled to do.

[50] As to Ms. Godin's statement that the board had in fact considered all the factors in its assessment of the answers given to questions 3 and 4, the Tribunal did not accept it. The Tribunal could assign little weight to this *ex post facto* statement, in the absence of any documentary evidence to corroborate this statement. The Tribunal is in the best position to assess the evidence submitted before it and it could reasonably find that the mere fact of saying that all relevant factors were assessed did not rectify silence in the written submissions on this point and did not explain how the answers did not meet the criteria established to measure the ability "thinking skills".

V. Conclusion

[51] For all the foregoing reasons, I am of the view that this application for judicial review must be dismissed and that the Tribunal's decision must stand.

JUDGMENT

THE COURT ORDERS AND ADJUGES that the application for judicial review is dismissed and the Tribunal's decision is upheld.

"Yves de Montigny"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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