

Federal Court



Cour fédérale

Date: 20140917

Docket: T-674-13

Citation: 2014 FC 888

Ottawa, Ontario, September 17, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ANNE-MARIE ERICKSON

Applicant

and

**THE PUBLIC SERVICE COMMISSION
OF CANADA**

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Public Service Commission of Canada (PSC), which found that the Applicant, Anne-Marie Erickson, committed an error that affected the selection of Ms. Mosseau-Micoock to a position in the National Energy Board (NEB). The key finding of the PSC for the purpose of this application was that Ms. Erickson made an error which led to the appointment of an employee who was not qualified for the position she was appointed to.

[2] Having reviewed the evidence on file and the parties' oral and written submissions, I have come to the conclusion that this application for judicial review ought to be dismissed.

I. Facts

[3] In 2009, the Applicant was employed as Assistant Secretary at the NEB. When the Secretary stepped down in August 2009, the Applicant was appointed to the position of Secretary in an acting capacity. Megan Ruholl was then appointed Assistant Secretary.

[4] It is alleged that during the period of time that the Applicant was acting, the Chief Operations Officer, Mr. Pradeep Kharé, maintained all staffing actions that would have otherwise been within the Secretary's discretion. It wasn't until June 2010, when she was actually appointed Secretary, that the Applicant claims she was given staffing sub-delegation. In the meantime, the Applicant alleges that she relied on Mr. Kharé and Ms. Chalifoux, a human resources advisor, for advice and assistance in regard to all formalities of public service requirements and procedures, and appropriate staffing procedures and requirements, including documentation to support any recommended staffing position.

[5] In October 2009, the Applicant and Ms. Ruholl attempted to fill a bilingual administrative position within the Office of the Secretary. According to the Applicant, staffing bilingual administrative positions had been challenging. A casual position was advertised, and after candidates were interviewed and assessed against a Statement of Merit Criteria (SOMC) by the Applicant and Ms. Ruholl, it was recommended that Ms. Mosseau-Micoek be hired. From

October 2009 to February 2010, Ms. Mosseau-Micock worked in that casual position in an apparently satisfactory and competent manner.

[6] In December 2009, the NEB still had an immediate need for someone with Ms. Mosseau-Micock's qualifications. As Ms. Mosseau-Micock's position was due to expire, a decision was allegedly made, after consultation with Mr. Kharé and Ms. Chalifoux, to extend Ms. Mosseau-Micock's position into a 1 year term position, from February 16, 2010 to February 16, 2011.

[7] The *Public Service Employment Act*, SC 2003, c 22 (*PSEA*) provides that casual appointments are limited to 90 days. Before the 90 days had elapsed, the Applicant, Mr. Kharé and Ms. Chalifoux signed and submitted a Personal Action Request Form (PARF) proposing to hire Ms. Mosseau-Micock to fill the same position on a one-year term. The PARF proposed an external non-advertised selection process to fill the position.

[8] In order to fulfill the requirements of the *PSEA* for an appointment to the public service, the hiring organization must be satisfied that the proposed candidate meets the essential qualifications of the position, as identified in the SOMC. In this case, the Applicant has confirmed that the SOMC for the term position was the same SOMC used to staff the position on a casual basis in October 2009. Having assessed Ms. Mosseau-Micock for that casual position and then having worked with her in essentially the same position, Ms. Erickson was confident that Ms. Mosseau-Micock was qualified and capable to fill the term position which carried the same duties.

[9] As part of the decision to place Ms. Mosseau-Micoock into the term position and as part of the decision to use a non-advertised process, a rationale was provided to the NEB Human Resources Department from the Office of the Secretary. More specifically, Ms. Ruholl drafted an email describing the reasons for hiring Ms. Mosseau-Micoock into the position in question. That was forwarded to Ms. Erickson, who approved the rationale and forwarded it to Ms. Chalifoux on January 8, 2010. Ms. Chalifoux then had the entire package signed off by Mr. Kharé and a letter of offer was made to Ms. Mosseau-Micoock on February 8, 2010.

[10] In February 2011, the Applicant was advised that the PSC was performing an audit of the NEB's staffing files. The Applicant alleges that she did assist the PSC in its audit, but was never asked any questions about Ms. Mosseau-Micoock's appointment. It wasn't until December 2011 that the Applicant was notified by Ms. Chalifoux that the appointment of Ms. Mosseau-Micoock was to be investigated. The Applicant also alleges that at no time was she under the impression that her role in the hiring of Ms. Mosseau-Micoock was under scrutiny.

[11] The investigation into the hiring of Ms. Mosseau-Micoock took place over the period of April 2012 to October 2012. During the course of the investigation, the Investigator interviewed Ms. Erickson, Ms. Ruholl, Ms. Chalifoux and Ms. Elder (Ms. Chalifoux's administrative assistant), who all played some role in the hiring of Ms. Mosseau-Micoock. Following the interview with the Applicant, a factual report was provided to her and she did not submit any comments to the Investigator, as the report was fairly accurate and did not contain any wrongdoing on her part.

[12] The Investigator then released her Investigation Report on October 2, 2012, which found that Ms. Erickson, Mr. Kharé and Ms. Chalifoux had made an error in assessing the qualifications of Ms. Mosseau-Micoock. Ms. Erickson provided extensive comments to the PSC on the Investigation Report.

[13] On March 19, 2013, the PSC released the decision, one part of which was confirming the Investigator's finding that Ms. Erickson, Mr. Kharé and Ms. Chalifoux had made an error in the assessment of Ms. Mosseau-Micoock's qualifications.

II. The impugned decision

[14] In the Record of Decision, the PSC concluded that the Applicant, Ms. Chalifoux and Mr. Kharé committed an error that affected the selection of Ms. Mosseau-Micoock when they failed to establish that she met all the essential qualifications of the position. As a result, Ms. Mosseau-Micoock's appointment was not made on the basis of merit. It is also mentioned, based on the investigation, that Ms. Chalifoux committed an error that affected the selection of Ms. Mosseau-Micoock when she failed to consider a person with priority entitlement prior to making the appointment.

[15] In terms of corrective action, it was ordered that Ms. Chalifoux take two courses on staffing. Because Ms. Erickson does not have staffing delegation anymore and Mr. Kharé was on leave until his retirement in July 2013, no corrective action was ordered to address the error they committed during the appointment process.

[16] The Record of Decision is based on the Investigation Report and as a result, it is imperative to summarize the findings of the Investigator as it is for all intents and purposes, part of the decision. Following a summary of the evidence and of her interviews, the Investigator reviewed the policy framework for the language assessment and provided a detailed layout of the priority administration and assessment. She then concluded that Ms. Chalifoux's decision to eliminate another candidate from further consideration, based on her expired language results, was not reasonable and constituted an error under section 66 of the *PSEA*, since she was not allowed sufficient time to schedule language testing. The Investigator did not find the Applicant to be responsible for this error, however, and that matter is not in issue in this proceeding.

[17] The Investigator also determined that there was no improper conduct with regard to the appointment of Ms. Mosseau-Micoek, as it was based both on the needs of the organization at the time, namely to manage temporary staffing needs, and on the assessment of Ms. Mosseau-Micoek's abilities to assist with these staffing requirements based on her work as a casual employee.

[18] Having said that, the Investigator concluded that there were errors committed that led to Ms. Mosseau-Micoek's selection to the position. The Investigator noted that many of the documents relating to the assessment of Ms. Mosseau-Micoek were either missing, did not exist, or could not be clarified. Relying on what information was available, she concluded:

It was unclear from the documents available in the staffing file whether all essential qualification identified in the Statement of Merit Criteria were assessed. In fact, Ms. Erickson, by her own admission, had not reviewed the State of Merit Criteria for Ms. Mosseau-Micoek's specified period appointment. As such, the only document found in support of the assessment of Ms.

Mosseau-Micoock's qualifications was the e-mail communication from Ms. Erickson which provided a rationale for her appointment. Without a record of the assessment that established that each of the essential qualification were assessed and met, it cannot be said that the candidate appointed met the qualifications for the position; this constitutes an error under section 66 of the PSEA. Further, it cannot be said that the appointment made, as a result of this process, was made in accordance with merit because the Assessment Board, Ms. Erickson, the HR Advisor, Ms. Chalifoux, and the delegated Manager, Mr. Kharé did not establish that the appointed candidate, Ms. Mosseau-Micoock, met each of the essential qualifications of the position.

[19] The Investigator further concluded that it was clear from the testimony of the interviewees that errors had been made both as a result of their own lack of understanding with regard to the staffing process and the lack of attention to details in order to ensure that staffing requirements were being met.

III. Issues

[20] Three issues arise from this application:

- A. What is the appropriate standard of review?
- B. Was the Public Service Commission's decision reasonable?
- C. Was the Applicant treated fairly?

IV. Analysis

- A. *What is the appropriate standard of review?*

[21] I agree with counsel for the Respondent that the standard of review for decisions of this kind is reasonableness. Section 66 of the *PSEA* grants the PSC the discretion to investigate external appointments and to take corrective action if it is satisfied that the appointment was not made on the basis of merit or that there was an error, an omission or improper conduct that affected the selection of the person appointed. The PSC's decision, therefore, was primarily a factual finding arising from an investigation. As such, its decision is entitled to deference.

[22] To the extent that the PSC's decision may involve an interpretation or application of section 66 of the *PSEA* more generally, it may be considered a question of mixed fact and law. As the Supreme Court stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at para 54, “[d]eference 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”.

[23] In reviewing the PSC's decision on a standard of reasonableness, the Court must not interfere if the decision is transparent, justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence that was before the decision-maker: *Dunsmuir*, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15, 17, [2011] 3 SCR 708.

[24] As for the issue of procedural fairness, both parties submit, and I agree, that it attracts a standard of correctness. When applying this standard of review, the Court will not show deference to the decision-maker's reasoning process, but will undertake its own analysis of the question: *Dunsmuir*, at para 50. Of course, the requirements of procedural fairness will vary with the type of decision-maker and the type of decision under review: *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21-28, [1999] SCJ No 39.

B. *Was the Public Service Commission's decision reasonable?*

[25] The Applicant submits that the Investigator erred in her interpretation of section 66 of the *PSEA* because she completely ignored the requirement that any error made in a particular appointment must affect the selection of the person appointed. The Investigation Report was based on an investigation and conclusions drawn pursuant to section 66 of the *PSEA* that there were errors made in assessing Ms. Mosseau-Micoock's qualifications, without ever determining whether the error affected the selection of the person appointed.

[26] The Applicant further contends that the Investigator erred in placing an onus on the individuals being investigated to provide evidence that Ms. Mosseau-Micoock had the qualifications. Indeed, the basis for the Investigator's conclusion that there was an error in assessing Ms. Mosseau-Micoock's qualifications is based on a lack of evidence of her qualifications. As the complainant, it was the PSC which bore the initial onus of having to prove that Ms. Mosseau-Micoock had the necessary qualifications.

[27] Finally, the Applicant argues that it was wrong for the Investigator to infer from the evidence of a Human Resources Technical Specialist, who played no role in the hiring of the Applicant, that it was the practice of the NEB to obtain a Candidate Evaluation Form (CEF) at the time of Ms. Mosseau-Micoock's appointment. She maintains that her testimony and the testimony of Ms. Chalifoux are to the effect that no such requirement existed at the time and that it was sufficient to provide a rationale indicating the candidate's qualities. She adds that there was sufficient evidence before the Investigator that Ms. Mosseau-Micoock was qualified for the position, and that it was not reasonable to assume that Ms. Mosseau-Micoock was not qualified for the position because no CEF was submitted.

[28] These submissions must be rejected, for the following reasons. The *PSEA* provides that the PSC's mandate is "to appoint, or provide for the appointment of, persons to or from within the public service in accordance with this Act" and to "conduct investigations and audits in accordance with" the *PSEA* (section 11). Section 30 of the *PSEA* provides that appointments "shall be made on the basis of merit". An appointment is based on merit when "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" (subsection 30(2)).

[29] Under section 66 of the *PSEA*, the PSC has the discretion to investigate an external appointment process such as the one that resulted in the appointment of Ms. Mosseau-Micoock. Section 66 reads as follows:

The Commission may
investigate any external

La Commission peut mener
une enquête sur tout processus

<p>appointment process and, if it is satisfied that the appointment was not made or proposed to be made on the basis of merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment, the Commission may</p>	<p>de nomination externe; si elle est convaincue que la nomination ou la proposition de nomination n'a pas été fondée sur le mérite ou qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée ou dont la nomination est proposée, la Commission peut :</p>
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<p>(a) revoke the appointment or not make the appointment, as the case may be; and</p>	<p>a) révoquer la nomination ou ne pas faire la nomination, selon le cas;</p>
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<p>(b) take any corrective action that it considers appropriate.</p>	<p>b) prendre les mesures correctives qu'elle estime indiquées.</p>
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[30] I do not read section 66 as creating a requirement that the selection of the person appointed or proposed for appointment must be affected before corrective action can be taken in all cases. It is clear that such a requirement exists only when there was an error, an omission or improper conduct. When the appointment was not made or proposed to be made on the basis of merit, no such requirement flows from section 66.

[31] In the case at bar, no one involved in the selection or appointment of the candidate could demonstrate that Ms. Mosseau-Micoock's qualifications had been assessed against the essential qualifications established by the SOMC. The Applicant has admitted she did not consider the SOMC applicable to the position when she provided a brief written assessment of the candidate's qualifications. In those circumstances, it cannot be said that the Investigator and the PSC erred in concluding that those involved in the appointment process failed to establish that the candidates had met all the essential qualifications of the position. Even if we accept that a CEF was not

standard practice at the time to assess a candidate, there should have been other documentation showing that an evaluation of the merit took place. Nothing was provided to the Investigator besides a “brief narrative of recommendation” in an e-mail from Ms. Ruholl to Ms. Erickson (Applicant’s Record, p. 12). This was clearly not sufficient to assess the merit of Ms. Mosseau-Micoock’s candidacy, and in those circumstances the Investigator could properly find that the appointment was not made on the basis of merit.

[32] Even if I were to accept the Applicant’s argument that section 66, when properly read, creates a requirement that the selection of the person appointed or proposed for appointment must be affected before corrective action can be taken, the decision of the PSC would still be reasonable. The PSC is entitled to interpret its home statute as long as it does so plausibly. In the context of the general purpose of the *PSEA* and the PSC’s mandate to ensure appointments are made on the basis of merit, it is reasonable to hold that any process in which merit is not demonstrated affects “the selection of the person appointed or proposed for appointment”.

[33] The Applicant submits that, had a proper assessment been conducted, the same candidate would have been found qualified and would have been selected. It is even argued that there was a “staggering” amount of evidence before the Investigator that Ms. Mosseau-Micoock was qualified, that evidence being that she had been hired into a casual position under the exact same SOMC in October 2009, that she worked in that casual position with the same requirements from October 2009 to January 2010 without complaint or incident, that her term position was extended until June 2012, and that she performed her role in that position capably and competently and is now in an indeterminate position with the NEB. With all due respect, this is far from sufficient to

establish that the appointment of Ms. Mosseau-Micoek met the requirement of section 66 of the *PSEA*. Even if it could be established *a posteriori* that Ms. Mosseau-Micoek did indeed perform satisfactorily in her position, it would still not cure a faulty appointment process. The Investigator did not find that Ms. Mosseau-Micoek was not qualified or did not meet the requirements identified in the SOMC, but that it cannot be ascertained whether the appointment was made based on merit because there is no record of the assessment establishing that each of the essential qualifications were assessed and met.

[34] As for the argument that the Investigator or the PSC improperly placed the onus of proof on the individuals being investigated, it is entirely without merit. The PSC is not the equivalent of a complainant, and the Investigator was on a fact-finding mission; her role was clearly not adversarial. As pointed out by the Respondent, the PSC has a statutory mandate to ensure appointments are made on the basis of merit. It has been given the discretion, by statute, to investigate appointments to ensure they have been made in accordance with the *PSEA*. The PSC was therefore simply following its mandate to investigate, make findings, and consider corrective actions.

[35] Finally, the Applicant's objection that she was not responsible in any way for the error identified by the PSC is not reasonable. The Applicant was a team leader who initiated and was involved in a selection process to fill a position at the NEB. With the help of a human resources advisor, she chose to use a non-advertised process that resulted in the appointment of an external candidate to a term position in the public service. She may not have been responsible for the final assessment of the candidate's qualifications because she did not yet have delegated human

resources authority to sign an offer of employment, but she was the one who initiated both this process and the previous process that resulted in Ms. Mosseau-Micoek being hired on a casual basis. Furthermore, she signed the PARF, together with Ms. Chalifoux and Mr. Kharé. To that extent, it could be found that she committed an error that affected the selection of Ms. Mosseau-Micoek.

[36] That being said, the Applicant's mistake was not without explanation: she was new in her position as acting Secretary, was not apparently aware of the need to fill a CEF, and was under pressure because of the difficulty in staffing bilingual administrative positions. Moreover, her involvement in the process appears to have been on a much lower scale than that of Ms. Chalifoux and Mr. Kharé. This does not mean that she bears no responsibility or that she was not involved in a faulty process.

[37] It is worth noting that the Investigator made no finding of improper conduct, and that no corrective action was taken against Ms. Erickson. It is also important to stress that corrective actions taken pursuant to section 66 of the *PSEA* are not the equivalent of disciplinary measures. In that context, I fail to see how the impugned decision could have any long-term, detrimental impact on Ms. Erickson's career at the NEB and elsewhere in the public service.

C. *Was the Applicant treated fairly?*

[38] The Applicant submits that the investigation into her role was unfair for a number of reasons. First, she was never notified of the audit of the appointment of Ms. Mosseau-Micoek which eventually led to the investigation, and therefore she had no opportunity to comment on

the finding of “Merit not demonstrated” in the audit. Second, she was only advised of the investigation almost 12 months after its initiation, and was given no information and guidance as to how her role was being perceived or what error she was alleged to have made. She did not receive notice that she was determined to be part of an assessment board, which is problematic given the fact that she did not foresee she would be considered responsible for the assessment as she had no delegated authority for staffing decisions at the time.

[39] This submission can be easily dismissed. The record contains ample evidence that the Investigator followed a deliberate, transparent process and that the Applicant was provided with numerous opportunities to make submissions. There was clearly no requirement to involve the Applicant at the audit stage, and I fail to understand how the referral to investigation on that basis could “cast the die” for the way the investigation would proceed.

[40] At the interview, the Investigator clearly explained the process she intended to follow and the potential repercussions. She explained that she would provide any persons affected with a copy of her factual report so that they could provide comments or submissions. She also explained that there could be “a negative or adverse finding regarding any persons involved in the process or matter under investigation” (Applicant’s Record, p. 21). When she asked whether the Applicant had any questions, Ms. Erickson said no. Finally, Ms. Erickson responded to the Investigation Report, setting out the reasons why she felt it had not accurately captured her responsibilities or actions with respect to Ms. Mosseau-Micoock’s assessment.

[41] In those circumstances, it is clear that Ms. Erickson was treated fairly and was given the opportunity to present her version of the process leading to Ms. Mosseau-Micoock's appointment. The fact that the PSC accepted the Investigation Report despite Ms. Erickson's response obviously does not amount to a breach of natural justice or procedural fairness.

V. Conclusion

[42] For all of the foregoing reasons, this application for judicial review is dismissed, with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed,
with costs.

"Yves de Montigny"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-674-13

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COMMISSION OF CANADA

PLACE OF HEARING: CALGARY, ALBERTA

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DATED: SEPTEMBER 17, 2014

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