

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20150529**

**Docket: A-426-13**

**Citation: 2015 FCA 135**

**CORAM: DAWSON J.A.  
TRUDEL J.A.  
RENNIE J.A.**

**BETWEEN:**

**PAUL ABI-MANSOUR**

**Appellant**

**and**

**DEPUTY MINISTER OF FOREIGN AFFAIRS  
AND INTERNATIONAL TRADE CANADA**

**Respondent**

Heard at Ottawa, Ontario, on May 19, 2015.

Judgment delivered at Ottawa, Ontario, on May 29, 2015.

**REASONS FOR JUDGMENT BY:**

**RENNIE J.A.**

**CONCURRED IN BY:**

**DAWSON J.A.  
TRUDEL J.A.**

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**REASONS FOR JUDGMENT**

**RENNIE J.A.**

[1] This is an appeal from a decision of the Federal Court, dismissing the appellant's judicial review application of a decision of the Public Service Staffing Tribunal (the Tribunal). Before the Tribunal, the appellant alleged that the Department of Foreign Affairs and International Trade (DFAIT) discriminated against him on the basis of his race and/or national or ethnic origin in finding him not qualified for a job posting and abused its authority by appointing two

candidates who did not meet the education requirement of the Job Opportunity Advertisement (JOA).

[2] The underlying facts are straightforward. The appellant applied for an information technology position. Both the JOA and the Statement of Merit Criteria & Conditions of Employment specified that applicants had to satisfy an education requirement of two years post-secondary education in computer science, information technology, information management or another speciality relevant to the position. The JOA instructed applicants to include a cover letter that demonstrated how they met the education and experience requirements. The JOA specified, in very clear terms, that the failure to provide the information in the cover letter would result in the rejection of the application.

[3] The appellant did not mention his education in his cover letter. In consequence, the appellant's application, as well as 35 other of the 332 applications, was screened out of the competition.

[4] The appellant subsequently filed nine complaints of abuse of authority pursuant to section 77 of the *Public Service Employment Act* (S.C. 2003, c. 22) before the Tribunal. For reasons reported at 2012 PSST 0008, the Tribunal found that the appellant had established a *prima facie* case for discrimination but held that DFAIT demonstrated a complete and reasonable explanation for the appellant's elimination from the process. The Tribunal also rejected the abuse of authority claim advanced by the appellant, finding no evidence that would dispute the testimony of

DFAIT's witnesses regarding the assessment of the successful candidates' educational credentials.

[5] The Federal Court dismissed the appellant's application for judicial review of the Tribunal's decision. In Reasons for Judgment (2013 FC 1170) the Judge concluded there was no breach of procedural fairness in the conduct of the hearing and that the Tribunal had rendered a reasonable decision in dismissing the appellant's complaints. The appellant now appeals to this Court from the decision of the Federal Court. I would dismiss the appeal, substantially for the reasons given by the Judge.

[6] The role of this Court on appeal from a judicial review is to determine whether the judge correctly identified and properly applied the standards of review to a tribunal's decision: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 47; [2013] 2 S.C.R. 559. The Judge, at paragraphs 53 and 54 of his decision, correctly identified the applicable standards of review. Issues of procedural fairness are reviewable on the standard of correctness: *Mission Institution v. Khela*, 2014 SCC 24; [2014] 1 S.C.R. 502. The remaining issues of abuse of authority and discrimination were properly reviewed on a standard of reasonableness.

[7] While the appellant advances many arguments in support of his appeal, I will only address those that are strongest. They may be categorized as breaches of procedural fairness and errors in respect of the finding that there was no discrimination or abuse of authority. Insofar as the breaches of procedural fairness are concerned, the appellant alleges that the Tribunal

breached procedural fairness by limiting his cross-examination of a DFAIT witness, by refusing to allow him access to DFAIT's premises to access documents relating to other candidates for the appointment, and in basing its decision on allegedly perjured testimony from one of DFAIT's witnesses. I will address this latter point in the context of the abuse of authority argument. In his oral submissions, the appellant also contended that the Tribunal breached procedural fairness in not maintaining a transcript of the proceedings.

[8] None of these grounds disclose a reviewable error.

[9] The Tribunal ruled that the appellant's cross-examination as to the educational qualifications and credentials of Ms. Fata, the officer who screened out the appellant, were not relevant to either of the appellant's complaints concerning discrimination or abuse of authority. In eliminating the appellant from the competition for failure to comply with the instructions with respect to educational requirements, Ms. Fata was performing an administrative function, to which her educational background had no demonstrable relevance. Determinations as to relevancy are within the jurisdiction and discretion of the Tribunal. The exercise of that discretion in this case did not breach any duty of fairness.

[10] The Tribunal also appropriately rejected the appellant's request for access to DFAIT's premises to obtain the full application records of the nine successful candidates since the records of only two of the candidates were relevant to his allegations of discrimination. Further, the Tribunal, as an element of its ability to manage and conduct its proceedings, is under no

obligation to maintain a recording and produce a transcript. In any event, the absence of a transcript had no material bearing on any of the appellant's arguments.

[11] I turn to the issues of discrimination and abuse of authority.

[12] The Tribunal's finding that DFAIT adduced a complete explanation for the appellant's elimination from the competition was entirely reasonable. The appellant failed to show that he met the educational criteria according to the prescribed and clearly-communicated application requirements. Ultimately, it was the appellant's responsibility to comply with the JOA instructions and demonstrate in his cover letter how he met the education and experience requirements. The appellant conceded, in this Court and the Federal Court, that the instructions in the JOA were clear and the consequences of non-compliance expressly set out. Further, the Tribunal found that the screening method was objective, transparent and not discriminatory.

[13] The appellant also contends that the Tribunal erred in not finding that there was an abuse of authority arising from the appointment of one particular candidate, who the appellant claimed did not have the required educational qualifications. As the Judge noted, the Tribunal heard evidence from those responsible for the assessment of the candidates on this precise issue and did not find any reason to conclude that the successful candidates did not meet the educational requirements. I see no reason to interfere with the Tribunal's assessment of this evidence.

[14] Tangential to this ground, the appellant contends that the Judge erred in refusing to accept new evidence produced on judicial review by the appellant. The purpose of this evidence

was to establish that one of the successful candidates did not receive his education from a recognized institution. The Judge found that this issue was specifically addressed by the Tribunal and that its consideration included both documentary exhibits and the testimony of officials responsible for the process. The Judge concluded that the proposed new evidence could have been submitted at the time of the hearing before the Tribunal. Further, the evidence would not be sufficient to support the appellant's allegations of perjury by the witness. A mistaken belief or disagreement between witnesses does not mean one or the other is necessarily a perjurer.

[15] Finally, the appellant contends that DFAIT was obligated to hire him in order to fulfill employment equity needs. This argument was properly rejected by the Tribunal. Subsection 30(2) of the *Public Service Employment Act* grants a discretion to consider broader organizational needs, but only after a candidate has been found qualified. In this case the discretion granted by subsection 30(2) was not engaged as the appellant had not demonstrated the essential qualifications of the position. In any event, as the Judge noted, the evidence before the Tribunal was that 50% of the successful candidates were visible minorities, a point which significantly undermined the contention that the requirement to expressly address the educational requirements in the cover letter as a component of the screening process was designed to exclude minorities.

[16] To conclude on a procedural point, the style of cause of this appeal should be amended to remove "Department of Foreign Affairs" as the respondent and substitute the "Deputy Minister of Foreign Affairs and International Trade Canada" as respondent. Government departments are

not legal entities and cannot be named as parties: *Gravel v. Canada (Attorney General)*, 2011 FC 832, 393 F.T.R. 219.

[17] Several observations are in order in respect of costs. The appellant submitted that portions of an affidavit he attempted to file as part of the appeal book were redacted because it “fell into” the hands of a judge who was biased. Allegations of bias against a judge are very serious. They were made without any evidentiary foundation and were withdrawn at the hearing. The appellant also made unsubstantiated allegations that counsel for the respondent was acting without instructions, and that a witness had given perjured testimony. In light of this, an award of costs at higher level is warranted.

[18] Accordingly, I would dismiss the appeal, with costs, inclusive of disbursements and taxes, fixed at \$2,527.65.

"Donald J. Rennie"

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J.A.

“I agree”

Eleanor R. Dawson

“I agree”

Johanne Trudel



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE RICHARD BOIVIN, DATED NOVEMBER 18, 2013, FEDERAL COURT DOCKET NO.: T-868-12)**

**DOCKET:** A-426-13

**STYLE OF CAUSE:** PAUL ABI-MANSOUR v.  
DEPUTY MINISTER OF  
FOREIGN AFFAIRS AND  
INTERNATIONAL TRADE  
CANADA

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** MAY 19, 2015

**REASONS FOR JUDGMENT BY:** RENNIE J.A.

**CONCURRED IN BY:** DAWSON J.A.  
TRUDEL J.A.

**DATED:** MAY 29, 2015

**APPEARANCES:**

Paul Abi-Mansour THE APPELLANT

Christine Langill FOR THE RESPONDENT

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