

Federal Court of Appeal



Cour d'appel fédérale

Date: 20121207

Docket: A-489-11

Citation: 2012 FCA 326

**CORAM: EVANS J.A.
GAUTHIER J.A.
WEBB J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

and

NEIL SMITH

Respondent

Heard at Ottawa, Ontario, on December 4, 2012.

Judgment delivered at Ottawa, Ontario, on December 7, 2012, .

REASONS FOR JUDGMENT BY:

Gauthier J.A.

CONCURRED IN BY:

**Evans J.A.
Webb J.A.**

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REASONS FOR JUDGMENT

GAUTHIER J.A.

[1] This is an appeal from a decision of the Federal Court (2011 FC 1401 (*Smith FC*)), in which Hughes J. (the Application Judge) allowed an application for judicial review of a decision of the Public Service Staffing Tribunal (PSST) (2010 PSST 0022 (*Smith PSST*)) dismissing Neil Smith's (Respondent) complaint for lack of jurisdiction.

[2] The PSST determined that it did not have jurisdiction to deal with the complaint brought by the Respondent because it did not involve an appointment or a revocation under the *Public Service*

Employment Act, S.C. 2003, c. 22 (*PSEA*). The Application Judge held that this decision was unreasonable.

[3] For the reasons that follow, I would allow the appeal.

The Facts

[4] The Respondent joined the public service in 2003 as a Canine Officer (PM-02) with the Canadian Food Inspection Agency (CFIA). At the time, he was assigned to work with a dog named Bella.

[5] In December of that year, the Respondent was transferred to the newly created Canada Border Services Agency (CBSA) with the same position title and level.

[6] In 2005, the Respondent's position was eliminated and dog handling duties were incorporated into a new Border Services Officer – Customs (BSO) work description with a one page addendum listing those duties. The BSOs were classified at the PM-03 level. The Respondent was offered an indeterminate appointment to a BSO position which he accepted, after receiving an assurance from the CBSA that he would not have to relinquish his dog handling duties.

[7] In January 2007, after a classification conversion exercise, the CBSA completed a new work description for the BSO position (FB-03) incorporating two specific references to dog handling duties in the job description.

[8] From October 2006 to January 2007, the Respondent went on leave, and another BSO assumed dog handler duties working with Bella. When the Respondent returned from leave in January 2007, he assumed other BSO duties at a port of entry. He resumed dog handler duties in September 2007.

[9] In April 2009, Bella was retired. In May 2009, the Respondent received a letter from the CBSA Chief of Operations indicating that, after the classification conversion exercise, the CBSA viewed dog handling duties as an assignment to duties within the BSO work description. The letter announced that CBSA had decided to rotate the dog handling duties in light of the following considerations: fair distribution of career opportunities, employee career objectives, service time as a handler, and the overall experience base within the district.

[10] Subsequently, the CBSA posted a bulletin for an "Assignment Opportunity" for a Food, Plant and Animal Detector Dog Handler position closing in June 2009. It was available only to indeterminate, designated BSOs (FB-03) in Ottawa, who had to undertake a two-day detector dog handler pre-selection course and a ten-week training course with a new dog. The Respondent did not apply as he did not think he would be considered. One of the seven applicants was selected and assigned to perform the dog handling duties with a new detector dog.

[11] The Respondent presented a complaint to the PSST in June 2009 that there had been an appointment and/or a revocation pursuant to section 74 and paragraph 77(1) of the *PSEA*. He also filed a grievance in respect of the same events. The final determination of this grievance is in abeyance pending the final determination of the Respondent's application for judicial review.

The PSST Decision

[12] After a three-day hearing where five witnesses testified, the PSST issued an 11-page decision setting out the facts underlying the complaint, including those emphasized by the Respondent at the hearing before us, such as the content of the poster relating to the detector dog handler assignment opportunity (AB Vol. II, page 169), and the ten weeks of training required for the successful candidate (*Smith PSST* at paragraph 13). The PSST noted the respective positions of the complainant and the CBSA (*Smith PSST* at paragraphs 17-28), before dismissing the complaint for want of jurisdiction. It held that, in the circumstances of this case, the facts did not give rise to either an appointment or a revocation.

[13] In its analysis, the PSST recognized that its decision must be guided by the three-step approach adopted in *Canada v. Brault*, [1987] 2 S.C.R. 489 (*Brault*), and *Doré v. Canada*, [1987] 2 S.C.R. 503 (*Doré*). The key passage with respect to *Brault* is paragraph 43 which reads as follows:

Thus, referring back to the three aspects of the issue, as set out by the Supreme Court in *Brault*, no additional functions or duties were created when Ms. Simoneau was given other existing BSO duties. Addressing the second and third aspects of the test (i.e., a requirement for additional qualifications and the selection of a person possessing these qualifications), the Tribunal finds that, in the circumstances of this case, the training and selection of Ms. Simoneau do not support a finding that an appointment has occurred. Ms. Simoneau was evaluated and trained to prepare her to assume duties found in her work description. The length of the training and the assessments conducted cannot be considered in isolation from the work description.

[14] The PSST also distinguished *Doré*, finding that the BSO who was trained as a dog handler here was not assigned to an entirely new position, but to duties within her existing BSO work description (*Smith PSST* at paragraphs 44-45).

[15] The PSST further rejected the proposition that a revocation of the Respondent's appointment had occurred. It found there to be "no evidence" that either the deputy head or the Public Service Commission had revoked the Respondent's appointment (*Smith PSST* at paragraph 51).

The FC Decision

[16] The Application Judge found that the PSST's conclusion that it had no jurisdiction was unreasonable in light of the principles articulated in *Doré* and *Brault* regarding what constitutes an "appointment". He held that the *Doré* and *Brault* principles remained relevant, even though they were developed in relation to an older version of the legislation (*Smith FC* at paragraph 31).

Quoting from the Supreme Court's decision in *Doré*, he explained that the inquiry must focus on the Department's objective actions, rather than its subjective intent or understanding (*Smith FC* at paragraph 32). He found that the Tribunal had not taken into account the Respondent's perspective, but had considered the matter only from CBSA's point of view (*Smith FC* at paragraph 30).

[17] Relying on *Baur v. Canada (Attorney General)*, 2004 FC 725 at paragraph 47, the Application Judge found that the PSST had erred by not considering the "totality of circumstances" before it and that its decision was therefore unreasonable. He concluded at paragraph 35 by saying:

[i]t looked only at one side, the Border Services side; not at Mr. Smith's side. In so doing, its decision was unreasonable. A Tribunal should be balanced and open in accepting jurisdiction. Jurisdiction is there for a purpose; the Tribunal should accept its mandate and deal with matters such as the present one.

Analysis

[18] The parties agree that the role of an appeal court sitting in review of judicial review is to determine if the lower court identified the appropriate standard of review and correctly applied it (*Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 at paragraphs 13-14; *Canada Revenue Agency v. Telfer*, 2009 FCA 23 at paragraph 19; *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286 at paragraph 28).

[19] The Respondent confirmed that the question in this case was whether the PSST had properly applied the legal test it identified to the facts of the case. Thus, the Application Judge has identified reasonableness as the proper standard ((*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paragraphs 30-33 (*Alberta Teachers'*); *Canada (Attorney General) v. Kane*, 2012 SCC 64 (*Kane*)).

[20] The issue in dispute is whether the Application Judge correctly applied the reasonableness standard by holding that the PSST erred by distinguishing *Doré* and *Brault* and by not considering the Respondent's perspective. In my view, the PSST decision is not unreasonable. I note, however, that the Application Judge did not have the benefit of the Supreme Court of Canada's guidance in *Alberta Teachers'*, above, *Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, and even more recently in *Kane*, above, and *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, when he wrote his decision.

[21] Focusing on specific items of evidence, the Respondent argued that the PSST's conclusion could not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47.)

[22] However, in my view, the PSST clearly considered the relevant case-law and weighed the appropriate factors. It did not say that whenever a duty or function is already part of a work description, the *Brault* test cannot be met; it instead limited its decision to the circumstances before it.

[23] In *Brault*, Justice Le Dain for the Supreme Court of Canada introduced the issue before the Court at paragraph 1 as, "...whether the creation of additional functions or duties in a position in the Public Service of Canada, calling for additional qualifications and the selection of a person possessing such qualifications, amounts to the creation of a new position..." (my emphasis).

[24] Therefore, since the work description of a BSO included the dog handling duty essentially since 2005, it was, in my view, reasonably open to the PSST to distinguish the facts before it from those in *Brault*. As already mentioned, the newly trained person and the Respondent worked as BSOs for a number of years prior to the filing of the present complaint. The Respondent performed his BSO duties without dog handling for a significant period of time in 2007 and another BSO performed the dog handling duties with the same dog during the Respondent's leave. Thus, although the PSST's distinction may appear to some to be too formalistic, I simply cannot see how it can fall outside the range of acceptable outcomes.

[25] Further, I am not satisfied on the basis of the PSST's reasons that it failed to consider all the relevant circumstances including Mr. Smith's perspective.

[26] I agree with the Appellant that whether there has been an appointment or revocation "could be the subject of reasonable disagreement by reasonable people" (*Kane* at paragraph 10).

[27] Accordingly, I would allow the appeal and set aside the Federal Court decision. I would not grant costs in this Court and below.

"Johanne Gauthier"

J.A.

"I agree
John H. Evans J.A."

" I agree
Wyman W. Webb J.A."

Federal Court of Appeal



Cour d'appel fédérale

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY: Evans, J.A.
Webb, J.A.

DATED: December 7, 2012

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