

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20140305**

**Docket: A-82-13**

**Citation: 2014 FCA 60**

**CORAM: PELLETIER J.A.  
GAUTHIER J.A.  
MAINVILLE J.A.**

**BETWEEN:**

**PAUL ABI-MANSOUR**

**Appellant**

**and**

**PUBLIC SERVICE COMMISSION**

**Respondent**

Heard at Ottawa, Ontario, on January 21, 2014.

Judgment delivered at Ottawa, Ontario, on March 5, 2014.

**REASONS FOR JUDGMENT BY:**

**MAINVILLE J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
GAUTHIER J.A.**

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**REASONS FOR JUDGMENT**

**MAINVILLE J.A.**

[1] These reasons concern an appeal from an unreported decision of Gagné J. of the Federal Court (the Judge) dated February 7, 2013 (the Order) by which she dismissed an application for judicial review from a decision of the Public Service Staffing Tribunal dated November 24, 2011 dismissing the appellant's request to add the Treasury Board as a party to the proceedings concerning his staffing complaint.

Context of the proceedings

[2] In December of 2010, the Public Service Commission advertised an employment opportunity at the EC-04 group level. The appellant applied for the position, but was eventually screened out of the selection process for failure to meet the minimal requirements of the position.

[3] The appellant thereafter filed a complaint with the Public Service Staffing Tribunal under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

Subsections 30 (1) and (2) and paragraph 77(1)(a) of the *PSEA* read 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.

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

(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

(b) the Commission has regard to

(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,

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

**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.

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

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) la Commission prend en compte :

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

and

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

**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);

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

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

[4] The appellant alleges in his complaint that (a) the entrance tests developed by the Public Service Commission are culturally and linguistically biased, and the practices of the Commission have transformed members of cultural and linguistic minorities into second class citizens; and (b) the persons responsible for the specific competition he applied for conspired with Treasury Board officials for improper purposes in order to alter the requirements for the competition so as to screen out the appellant. The appellant thus seeks that the appointment of the successful candidate be revoked and that a new competition be held in which he would be allowed to participate.

[5] Within the context of this complaint, and on the ground that Treasury Board officials played an important role in ensuring that he was screened out of the competition, the appellant requested that the Public Service Staffing Tribunal add the Treasury Board as a party to the proceedings and also be ordered to produce various documents.

The decisions below

[6] The Public Service Staffing Tribunal dismissed the request to add the Treasury Board as a party on the ground that it has no statutory authority to do so. It based its decision on its reading of subsection 79(1) of the *PSEA*:

**79.** (1) A person making a complaint under section 77, the person appointed or proposed for appointment, the deputy head and the Commission — or their representatives — are entitled to be heard by the Tribunal.

**79.** (1) Le plaignant visé à l'article 77, la personne qui a fait l'objet de la proposition de nomination ou qui a été nommée, la Commission et l'administrateur général, ou leurs représentants, ont le droit de se faire entendre par le Tribunal.

[7] Nevertheless, pursuant to its authority under paragraph 99(1)(e) of the *PSEA*, the Public Service Staffing Tribunal compelled a Treasury Board official to produce some of the documents requested by the appellant.

[8] The appellant brought an application for judicial review of this decision in the Federal Court. Relying on the decision of this Court in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 (*C.B. Powell*), the Judge opined (at page 2 of her Order) “that interlocutory decisions of administrative organisms and tribunals can only be judicially reviewed if exceptional circumstances exist”. She consequently refused to review the decision of the

Public Service Employment Tribunal on the ground that the circumstances at issue were not exceptional.

### The issues in appeal

[9] Though the appellant raises many grounds of appeal, these may be subsumed into the following two questions:

- (a) Did the Judge breach the principles of procedural fairness?
- (b) Did the Judge err in dismissing the judicial review application?

### Analysis

[10] At the hearing before the Judge, the respondent submitted that at this stage of the proceedings, she should not disturb the interlocutory decision of the Public Service Staffing Tribunal since none of the exceptional circumstances discussed in *C.B. Powell* applied. In this appeal, the appellant submits that by failing to raise that issue earlier and by failing to refer to *C.B. Powell* in its memorandum of fact and law, the respondent took him by surprise at the hearing. As a result, the appellant claims that his right to a fair hearing was breached.

[11] After carefully reviewing the record, I do not agree with the appellant. The respondent clearly raised the issue at paragraphs 80 to 83 of its memorandum of fact and law submitted prior to the hearing before the Judge (the Memorandum). I reproduce here some extracts from that

Memorandum:

-“In the recent decision of *Halifax (Regional Municipality) v. Nova Scotia*, the Supreme Court of Canada has clearly stated that reviewing courts should not intervene in administrative decisions by Tribunals at an early stage of the process...” (Memorandum at paragraph 80);

-“As the Supreme Court has recently restated in the *Re Halifax* decision, the Courts should not be intervening at the early stages of an administrative process...” (Memorandum at paragraph 82);

-The within case falls squarely in that principle...The court as a matter of course should not be intervening at this stage, rather it should let the administrative process be followed and completed.” (Memorandum at paragraph 83).

[12] The appellant nevertheless submits that it was only at the hearing before the Judge that the respondent first referred to the decision of this Court in *C.B. Powell* and to the decisions of the Federal Court which applied it. However, the Supreme Court of Canada’s ruling in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364, which was mentioned by the respondent in its Memorandum, specifically refers to *C.B. Powell*.

[13] Taking into account the overall circumstances of the proceedings, I cannot conclude that the Judge failed to provide the appellant with a fair hearing.

[14] Moreover, the application for judicial review had no merit.

[15] None of the remedies sought by the appellant in his complaint to the Public Service Staffing Tribunal can be provided by the Treasury Board. Indeed, in his complaint the appellant is essentially seeking the revocation of the appointment which was made to the position he was seeking, his appointment to that position or to a similar position, and monetary compensation. None of these remedies directly involve the Treasury Board.

[16] In these circumstances, the issue of whether or not the Public Service Staffing Tribunal had the jurisdiction to add the Treasury Board as a party to the proceedings is not determinative of the appeal. There is no legal or factual reasons which would justify adding the Treasury Board as a party, even if the Tribunal had the jurisdiction to do so, a matter which we need not decide. Consequently, no fundamental issue of procedural fairness or of jurisdiction was at issue in the proceedings.

[17] I would consequently dismiss this appeal, with costs.

"Robert M. Mainville"

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J.A.

"I agree.  
J.D. Denis Pelletier"

"I agree.  
Johanne Gauthier"



**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-82-13

**APPEAL FROM AN ORDER OF THE HONOURABLE JUSTICE GAGNÉ DATED  
FEBRUARY 7, 2013, DOCKET NUMBER T-2006-11**

**STYLE OF CAUSE:** PAUL ABI-MANSOUR v.  
PUBLIC SERVICE  
COMMISSION

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** JANUARY 21, 2014

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

**CONCURRED BY:** PELLETIER J.A.  
GAUTHIER J.A.

**DATED :** MARCH 5, 2014

**APPEARANCES:**

PAUL ABI-MANSOUR FOR THE APPELLANT  
(ON HIS OWN BEHALF)

RICHARD FADER FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

William F. Pentney FOR THE RESPONDENT  
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