Federal Court  Cour fédérale

Date: 20161104

Docket: T-2173-15

Citation: 2016 FC 1236

Ottawa, Ontario, November 4, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

VANYA PETKOVA ANDONOVA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Vanya Petkova Andonova, seeks judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a December 4, 2015 decision of the Investigations Branch of the Public Service Commission [the Commission]. In that decision, the Commission decided not to investigate, pursuant to section 66 of the *Public Service Employment Act*, SC 2003, c 22 [the Act], a request by Ms. Andonova for review of an external appointment

process by Citizenship and Immigration Canada [CIC]. Ms. Andonova asserts that the decision to eliminate her from the CIC appointment process was not made on the basis of merit.

[1] As explained in greater detail below, this application is dismissed, because the Commission's decision is a reasonable one. Its decision, that an investigation of Ms. Andonova's case was not warranted, was based on its conclusion that Ms. Andonova's candidacy was assessed against qualifications required for the position, using assessment tools linked to those qualifications, and that she had failed to meet one of the essential qualifications. My finding is that this conclusion falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

II. Background

[2] Ms. Andonova is currently employed in the private sector, working as an Administrative Coordinator in the field of taxation. She explains that she is dedicated to a career in public service and that, in pursuit of that objective, she applied for a clerical position with CIC through an external appointment process. On June 3, 2015, CIC advised Ms. Andonova by email that she had been placed on a shortlist for further consideration for a General Support Clerk position. As part of that selection process, she completed a written online examination on June 25, 2015 and attended an in-person interview on July 16, 2015.

[3] On October 19, 2015, after Ms. Andonova followed up with CIC, she was informed that she would not be considered further in this appointment process because the assessment board had determined that she did not meet an essential qualification for the position — Effective

Interactive Communication. On October 22, 2015, Ms. Andonova requested that the Investigations Branch of the Commission review this external appointment process. Her request explained the process by which her application was submitted and assessed and asserted her claim that the decision on her application was not on the basis of merit.

[4] On December 4, 2015, the Director of the Investigations Branch of the Commission communicated to Ms. Andonova its decision that an investigation was not warranted. That decision is the subject of this judicial review.

III. Evidentiary Issues

[5] Before proceeding to the merits of Ms. Andonova's application, the Court must address evidentiary issues raised by the parties. Ms. Andonova filed a motion in writing under Rule 369, seeking to add to the record before the Court a supplementary affidavit which attaches documentation including email correspondence between CIC and one of Ms. Andonova's references. The Respondent objects to this documentation being considered by the Court, on the basis that it was not before the Commission when it made its decision and on the basis that it is being submitted after the parties have filed their respective application records. On May 24, 2016, Justice Hughes issued an Order that this motion be dealt with by the judge hearing the application for judicial review.

[6] The Respondent also argues that certain documents included in Ms. Andonova's Application Record should not be given any weight by the Court, because they were not before the Commission when it made its decision not to investigate. These are documents attached to

Ms. Andonova's affidavit, which appear intended to demonstrate certain of her skills, training and achievements.

[7] At the hearing of this application, I proposed that the parties make their respective submissions on these evidentiary issues in the course of their submissions on the application, so that the Court could assess the relevance of the evidence with an understanding of the issues in the application itself.

[8] I turn first to the evidence, found at pages 36 to 52 of Ms. Andonova's Application Record [the Disputed Evidence], which includes certificates, test results, and other documentation relevant to her accomplishments. The Respondent relies on authority to the effect that applications for judicial review are to be conducted on the basis of material that was before the original decision maker, subject to narrow exceptions for general evidence of a background nature that is of assistance to the Court; evidence that is relevant to an alleged denial of procedural fairness that is not evident in the record before the decision-maker; or evidence that demonstrates a complete lack of evidence before the decision-maker for an impugned finding (see *Love v. Canada (Privacy Commissioner)*, 2015 FCA 198 [*Love*], at para 17).

[9] I agree that the Respondent has accurately characterized the relevant principle. There is no evidence before the Court that the Disputed Evidence was before the Commission when it made its decision. Ms. Andonova has argued that the Certified Tribunal Record in this matter is deficient and that the Disputed Evidence was within the possession of CIC, having been provided by her in the course of her application process. However, there is no evidence before

the Court to that effect. Ms. Andonova's affidavit, which attaches the Disputed Evidence, merely refers to this documentation as supporting statements earlier in her affidavit. It does not state that this documentation was provided to CIC.

[10] Therefore, even if Ms. Andonova's argument were to be interpreted as an allegation of a procedural defect such as a deficient investigation by the Commission, so as to arguably invoke an exception to the principle that only material before the Commission is to be considered in the judicial review, the evidence before the Court does not support a conclusion that the Disputed Evidence was in the possession of CIC and should have been identified by the Commission. Moreover, as explained in more detail below in my analysis of the merits of this application, CIC's decision to eliminate Ms. Andonova from the appointment process, and the Commission's decision not to investigate her elimination, did not turn on her professional achievements, to which the Disputed Evidence may have been relevant. Rather, it was based on CIC's assessment of one of the essential qualifications for the position for which he was applying, through the written examination she submitted and the interview she attended.

[11] I therefore agree with the Respondent's position that the Disputed Evidence should be given no weight. I also note that, because this evidence has no bearing on the basis on which Ms. Andonova was eliminated from the appointment process, the Disputed Evidence would not affect my decision even if I were to consider it.

[12] Moving to the new evidence which Ms. Andonova wishes to add to the record before the Court, I note that her Notice of Motion relies on Rule 226(1) of the *Federal Courts Rules*, which

requires a party who becomes aware that its affidavit of documents is inaccurate or deficient to serve a supplementary affidavit. The Respondent argues that Rule 226(1) is not applicable to the present situation. However, Ms. Andonova is self-represented, and I have considered her motion under Rule 312, which permits a party to an application to file additional affidavit evidence and a supplementary record with leave of the Court. In *Forest Ethics Advocacy Assn v National Energy Board*, 2014 FCA 88 at paras 4-6, Justice Stratas articulated the test for admissibility under Rule 312, which I would summarize as follows:

A. The evidence must be admissible on the application for judicial review;

B. The evidence must be relevant to an issue that is properly before the reviewing Court; and

C. If these two preliminary requirements are met, the Court may exercise its discretion, considering the following:

i. Was the evidence sought to be adduced available when the party filed its affidavits or could it have been available with the exercise of due diligence?

ii. Is the evidence sufficiently probative that it could affect the result?

iii. Will the evidence cause substantial or serious prejudice to the other party?

[13] The new evidence which Ms. Andonova wishes to introduce is email correspondence between CIC and Melanie Laskaris, one of her references [the New Evidence]. Ms. Andonova's affidavit attaching this evidence explains that she became aware that her record was deficient, in that it did not contain support for her assertion in this judicial review that her references were checked following her interview, and that the New Evidence supports this assertion.

[14] The Respondent argues that the New Evidence should not be introduced, because it was not before the decision-maker, the Commission, and because of the timing of Ms. Andonova's efforts to introduce it. I have considered whether that this evidence falls within one of the exceptions identified in *Love* , given that Ms. Andonova again argues that the Certified Tribunal Record is deficient because it does not include the New Evidence. She submits that, because the New Evidence represents correspondence with CIC, it must have been within CIC's possession. As with the Disputed Evidence canvassed above, this argument could be characterized as an allegation of a procedural defect in the Commission's investigation, so as to invoke an applicable exception and support a finding that the New Evidence is potentially relevant and admissible. However, even characterizing Ms. Andonova's argument this way, I find that the factors applicable to the exercise of the Court's discretion under Rule 312 do not warrant admission of the evidence.

[15] The factors that militate in favour of admitting the New Evidence are an absence of any significant prejudice to the Respondent and the fact that the New Evidence demonstrates that it was received by Ms. Andonova on April 14, 2016, which is after she filed her original affidavit in her Application Record on March 24, 2016. However, militating against admission, there is no

evidence to support a conclusion that with due diligence Ms. Andonova could not have obtained the New Evidence before she filed her Application Record. More significantly, I find the New Evidence to be of little probative value to the issues before the Court. The Respondent acknowledges that Ms. Andonova's references were checked following her interview (although noting that the evidence in the Certified Tribunal Record is that the references were not assessed by CIC). As Ms. Andonova argues, the New Evidence would support her assertion that her references were checked. However, as this point is not disputed, the New Evidence is of little probative value to the issues the Court is now considering, and I do not consider the factors applicable under Rule 312 to support admission of the evidence.

[16] The motion to admit the New Evidence is therefore denied. I note that I will consider later in these Reasons the arguments by Ms. Andonova that flow from the undisputed fact that her references were checked following her interview.

IV. Issues and Standard of Review

[17] Ms. Andonova does not expressly set out the issues for the Court's consideration. The Respondent characterizes the issues as identification of the applicable standard of review and the reasonableness of the Commission's decision not to investigate (the latter issue being based on the Respondent's position that the applicable standard is reasonableness).

[18] I agree with this characterization of the issues. I also agree with the Respondent's position that that past jurisprudence has settled that reasonableness is the applicable standard of review for decisions of the Commission not to investigate under section 66 of the Act (see

Moglica v Canada (Attorney General), 2010 FCA 34 at para 5, leave to appeal to SCC refused, 2010 CarswellNat 1315).

V. Analysis

[19] Before proceeding to analysis of the merits of this application, it is helpful to review relevant provisions of the Act. Part 2 of the Act addresses the process for appointments to the Canadian Public Service. Under the heading "Basis of Appointment", section 30 provides that such appointments are to be made on the basis of merit and explains the meaning of this requirement:

Appointment on basis of merit	**Principes**
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	**Définition du mérite**
2) An appointment is made on the basis of merit when	(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	a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général

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, and

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

Needs of public service

(3) The current and future needs of the organization referred to in subparagraph (2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization.

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,

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

Besoins

(3) Les besoins actuels et futurs de l'administration visés au sous-alinéa (2)b)(iii) peuvent comprendre les besoins actuels et futurs de la fonction publique précisés par l'employeur et que l'administrateur général considère comme pertinents pour l'administration.

Interpretation	**Précision**
(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.	(4) La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite.

[20] Section 31(1) of the Act sets out the employer's authority to establish qualification standards for a position:

Qualification standards	**Normes de qualification**
31(1) The employer may establish qualification standards, in relation to education, knowledge, experience, occupational certification, language or other qualifications, that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.	**31 (1)** L'employeur peut fixer des normes de qualification, notamment en matière d'instruction, de connaissances, d'expérience, d'attestation professionnelle ou de langue, nécessaires ou souhaitables à son avis du fait de la nature du travail à accomplir et des besoins actuels et futurs de la fonction publique.

[21] Section 36 provides authority for the selection of assessment methods to determine whether a person meets applicable qualifications:

Assessment methods	**Méthode d'évaluation**
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	**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

referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).	qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).

[22] Part 5 of the Act addresses investigations and complaints relating to appointments. Section 66 deals specifically with investigations by the Commission of external appointments:

External Appointments	**Nominations externes**
66 The Commission may investigate any external 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	**66** La Commission peut mener une enquête sur tout processus 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 :
(a) revoke the appointment or not make the appointment, as the case may be; and	a) révoquer la nomination ou ne pas faire la nomination, selon le cas;
(b) take any corrective action that it considers appropriate.	b) prendre les mesures correctives qu'elle estime indiquées.

[23] Ms. Andonova's request, that the Commission review the external appointment process in which she was engaged, invoked the Commission's jurisdiction under section 66 of the Act, as she asserted that the decision by CIC on her application was not made on the basis of merit. Noting that CIC had advised her she did not meet the essential qualification of Effective Interactive Communication, her request to the Commission referred to her skills, training, and experience in that area. Similarly, in this application for judicial review, she explains that she

was able to complete the written examination by correspondence within the stated time-frame and that she was highly satisfied with her interview performance. She asserts that her communication skills are strong, explaining that she has been an Administrative Coordinator in taxation for nearly nine years and that she would not have been able to perform her duties without effective communication skills.

[24] Ms. Andonova has also explained to the Court that she is passionate about the prospect of working for the Canadian Public Service, that she shares the values of the Public Service, and that a position of the sort which she sought with CIC represents her dream career. She also explained that being eliminated from the appointment process, particularly after CIC checked her references including from her present manager, has left her in a vulnerable position in her current workplace.

[25] Overall, Ms. Andonova's argument to the Commission, and again before the Court, is that the decision to eliminate her from the competition could not have been based on merit, as she is confident that she performed well in the written examination and at the interview and that she possesses the communication skills required for the position. As reflected in the Commission's decision as conveyed to Ms. Andonova, and in the File Review document which further explains the reasons for that decision, the Commission made inquiries of CIC following receipt of her request. The information obtained from CIC indicated that Ms. Andonova failed to meet one of the essential qualifications for the position, being Effective Interactive Communication. The Assessment Rating Guide applicable to Ms. Andonova's application indicated that this qualification was assessed based on the written examination and the interview,

resulting in her obtaining a mark of 2/5 where the pass mark for the qualification was 3/5. The Assessment Rating Guide further explained CIC's analysis resulting in this mark.

[26] The Commission's decision stated that a review of the documentation provided suggested that the assessment tools employed were linked to the qualifications required for the position and that it appeared Ms. Andonova was assessed based on the criteria outlined in the assessment guide. Based on the information it received, the Commission determined that an investigation was not warranted, as the information did not raise a problem in the application of the Act or related regulations and policies.

[27] While Ms. Andonova's interest in public service is commendable, the Court cannot identify a reviewable error in the Commission's decision not to investigate the appointment process in her case. The Commission identified that she was eliminated based on failure to meet an essential qualification and that appropriate assessment tools (the examination and interview) were employed to assess that qualification. While the Commission did not expressly engage in a statutory analysis, I note from the statutory provisions canvassed above that an appointment based on merit requires assessment of essential qualifications for a position and that the Act authorizes the establishment of qualifications and means of assessing such qualifications. Particularly when reviewed against the standard of reasonableness, which considers whether a decision falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47), there is no basis for the Court to interfere with the Commission's decision.

[28] With respect to the fact that a reference check was conducted following Ms. Andonova's interview, she points out that the File Review document underlying the Commission's decision states that it does not appear that her references were contacted in light of the fact that she had not met one of the qualifications assessed at the interview. The Respondent acknowledged in argument that this statement is incorrect, as Ms. Andonova's references were contacted although not assessed. The Respondent referred the Court to a communication from CIC to the Commission explaining that, because Ms. Andonova did not obtain a passing mark for the Effective Interactive Communication criterion, the reference component of the evaluation of three other qualifications (Adaptability and Flexibility, Values and Ethics, and Focus on Quality and Details) was not completed.

[29] This explanation is consistent with a review of the Assessment Rating Guide, which was used to record Ms. Andonova's performance and notes the assessment method used for each of the qualifications. For instance, the section of the Assessment Rating Guide related to Effective Interactive Communication describes this qualification as being assessed based on an interview and written assessment. In contrast, the section on Adaptability and Flexibility describes this qualification as being assessed based on an interview, written assessment and reference check. This section records "References were not assessed as she did not pass C3".

[30] The evidence supports the Respondent's position that Ms. Andonova's references were checked but not assessed, because she failed to meet the essential qualification of Effective Interactive Communication as assessed through the written examination and interview. It appears that the Commission interpreted the information obtained from CIC, that the references were not

evaluated or assessed, as meaning that they were not contacted. While this is a factual error, it is not a material or reviewable error rendering the Commission's decision unreasonable. Based on the record before the Commission which demonstrates that Ms. Andonova's references were not assessed because she did not meet an essential qualification, I cannot conclude that the Commission's decision would have been any different if it had recognized that the references, although not assessed, had been contacted.

[31] I recognize that Ms. Andonova is arguing that the fact her references were checked following her interview supports her assertion that she passed the interview stage of the application process. However, I see no basis in the record for such a conclusion. The evidence canvassed above expressly supports the contrary assertion by the Respondent, that Ms. Andonova's references were not assessed because of the negative evaluation of one of the essential qualifications resulting from the examination and the interview.

[32] Finally, I note that Ms. Andonova points out that the Certified Tribunal Record contains multiple copies of her Assessment Rating Guide, bearing a footnote date of July 16, 2015 (the interview date), only one of which is signed and stamped with a date of August 4, 2015. I cannot identify any basis from this evidence to conclude that the Commission's decision, not to investigate this appointment process, was unreasonable.

VI. Costs

[33] The Respondent seeks costs of this application. The Respondent has not proposed an amount but concedes that such costs should be nominal.

[34] As the Respondent has prevailed in this application and has claimed costs, I agree that a costs award is appropriate. I note that, in *Mabrouk v Canada (Public Service Commission)*, 2014 FC 166, Justice McVeigh awarded costs of $250 against a self-represented applicant, in dismissing an application for judicial review of a decision by an investigator of the Commission following an investigation under section 66 of the Act. Guided by this precedent, but also noting the express acknowledgement by the Respondent in the present case that costs should be nominal, I award costs of $150.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's motion under Rule 369 for admission of new evidence is dismissed.

2. This application for judicial review is dismissed.

3. Costs of $150 are awarded to the Respondent.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	VANYA PETKOVA ANDONOVA V THE ATTORNEY GENERAL OF CANADA
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