

Date: 20060608

Docket: T-1136-05

Citation: 2006 FC 707

Ottawa, Ontario, the 8th day of June 2006

Present: the Honourable Mr. Justice Shore

BETWEEN:

BRIGITTE NÉRON, MARLÈNE DORVAL AND DIANE DUCHESNE

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] The characteristics required for any position are a matter of context; it all depends on the circumstances, the specific objectives related to the position, which may vary according to time and place. They all determine the necessary qualifications of a given position. They may not appeal to the Court, but it must stand by them if they are reasonable.

NATURE OF JUDICIAL PROCEEDING

[2] This is an application for judicial review made pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, from the decision of an appeal board of the Public Service Commission of Canada (the Commission) on May 30, 2005, by which the plaintiffs' appeals against appointments to the position of client service officer following a selection process of the Department of Human Resources Development Canada were dismissed.

FACTS

[3] On November 4, 2004 the Department of Human Resources Development posted competition notices to fill the positions of client service officers in various offices in the Lac St-Jean area. On November 24, 2004 the selection board gave candidates two consecutive tests simultaneously in three different towns, Alma, Dolbeau and Jonquière. The first test was to serve to assess knowledge and the second test candidates' skills.

[4] During the knowledge test certain candidates in Dolbeau told the invigilators that pages were missing from the test. The invigilators administered the second test, which proceeded without incident. After a telephone consultation, members of the selection board agreed to give candidates thirty additional minutes after the skills test to allow them to answer the questions missing from the knowledge test.

[5] Two days later, on November 26, 2004, the selection board decided to cancel the results of the knowledge test and to give candidates a new knowledge test. However, only candidates who had passed the skills test were called to take the knowledge test again, since each had a sub-minimum passing grade: failure in one of the tests resulted in rejection of the candidacy.

[6] The applicants Brigitte Néron, Marlène Dorval and Diane Duchesne were all candidates in the competition and failed the skills test. On December 2, 2004, pursuant to the competition, an eligibility list was drawn up. Mss. Néron, Dorval and Duchesne were not placed on that list. Under section 21 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 (PSEA), they appealed against the proposed appointments following the selection process. The appeal was heard on April 21, 2005.

IMPUGNED DECISION

[7] The applicants alleged that the competition was held in conditions such that there might be a reasonable doubt as to whether the selection was made on the merit principle. They further alleged that the use of only one selection tool to assess abilities, skills and personal qualifications did not allow a reasonable assessment thereof. The Commission's appeal board dismissed these two allegations and accordingly dismissed the applicants' appeal.

[8] The Commission's appeal board found that the members of the selection board had acted reasonably to ensure that the knowledge test was given in a fair manner. It was not persuaded that the retaking of the knowledge test made it impossible to assess the merit of the candidates.

[9] Further, the appeal board stated that the applicants had not established that the selection board used only one tool in selecting candidates. The weight of the evidence was that several selection tools had been used. The selection board had the discretion to decide on and to use the tools it saw fit in selecting candidates.

ISSUES

[10] The issue in the case at bar is the following:

1. Did the appeal board make a reviewable error when it found that the selection board chose several selection tools which enabled it to adequately assess the candidates in accordance with the merit principle?

[11] Before the appeal board the applicants made two allegations, the first regarding the retaking of the knowledge test and the second the selection tools and the selection board's failure to consider candidates' references. On the other hand, in this judicial review application, the parties submit no arguments on the first allegation and concentrate on the second. The first allegation will thus not be discussed here.

ANALYSIS

Legislation

[12] Section 10 of the PSEA states that Public Service hiring must be conducted according to the merit principle:

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.

(2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.

10. (1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.

(2) Pour l'application du paragraphe (1), la sélection au mérite peut, dans les circonstances déterminées par règlement de la Commission, être fondée sur des normes de compétence fixées par celle-ci plutôt que sur un examen comparatif des candidats.

[13] Here are a few relevant portions of section 21 of the PSEA. Under subsection 21(1) of the PSEA, a candidate who has not obtained a Public Service position in a competition may appeal

against the appointment to a board before which the candidate will be given an opportunity to be heard. Subsection 21(3) provides that the Commission may take such measures as it considers necessary to correct any problem found to exist in the selection process:

21. (1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.

...

(2) Subject to subsection (3), the Commission, on being notified of the decision of a board established under subsection (1) or (1.1), shall, in accordance with the decision,

(a) if the appointment has been made, confirm or revoke the appointment; or

(b) if the appointment has not been made, make or not the appointment.

...

21. (1) Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

[...]

(2) Sous réserve du paragraphe (3), la Commission, après avoir reçu avis de la décision du comité visé aux paragraphes (1) ou (1.1), doit en fonction de celle-ci :

a) si la nomination a eu lieu, la confirmer ou la révoquer;

b) si la nomination n'a pas eu lieu, y procéder ou non.

[...]

(3) Where a board established under subsection (1) or (1.1) determines that there was a defect in the process for the selection of a person for appointment under this Act, the Commission may take such measures as it considers necessary to remedy the defect.

(4) Where a person is appointed or is about to be appointed under this Act as a result of measures taken under subsection (3), an appeal may be taken under subsection (1) or (1.1) against that appointment only on the ground that the measures so taken did not result in a selection for appointment according to merit.

(3) La Commission peut prendre toute mesure qu'elle juge indiquée pour remédier à toute irrégularité signalée par le comité relativement à la procédure de sélection.

(4) Une nomination, effective ou imminente, consécutive à une mesure visée au paragraphe (3) ne peut faire l'objet d'un appel conformément aux paragraphes (1) ou (1.1) qu'au motif que la mesure prise est contraire au principe de la sélection au mérite.

Standard of review

[14] The parties agree that the standard of review in the case at bar is that of reasonableness *simpliciter*. This position is confirmed by a recent case: *Davies v. Canada (Attorney General)*, 2005 FCA 41, [2005] F.C.J. No. 188 (QL), at paragraph 23, in which the Federal Court of Appeal held that the standard of review applicable to an appeal board decision on questions relating to the selection process is that of reasonableness.

Did the appeal board make a reviewable error when it found that the selection board chose several selection tools which enabled it to adequately assess the candidates in accordance with the merit principle?

[15] The purpose of the PSEA in general and of subsection 21(1) in particular favours judicial restraint. In *Davies, supra*, at paragraph 12, John Richard C.J. wrote:

An examination of the legislative purpose of the PSEA and of subsection 21(1) in particular, reveals that the statute's primary purpose is to safeguard the public interest by ensuring that appointments to the public service are based on merit and are free of discrimination and partisanship.

[16] Mss. Néron, Dorval and Duchesne submit that the members of the selection board should have taken into account the prior knowledge they had of their qualifications and abilities. If the members of the selection board had considered that knowledge in their assessment of Mss. Néron, Dorval and Duchesne, it could have been unfair to the other candidates in the competition of whom the board members had no prior knowledge. There was a risk that the assessment would be biased toward Mss. Néron, Dorval and Duchesne as all candidates would not necessarily be treated and assessed equally.

[17] The merit principle is the guiding principle in Public Service hiring. (*Buttar v. Canada (Attorney General)*, [2000] F.C.J. No. 437 (QL), at paragraph 3; *Mercer v. Canada (Attorney General)*, [2004] F.C.J. No.1537 (QL); *Davies, supra*, at paragraphe 31). Section 10 of the PSEA imposes on the Commission a duty to select the best qualified candidate for the position in question in order to comply with the merit principle (*Davies, supra*, at paragraph 35).

[18] It is well settled that the purpose of the right of appeal under section 21 of the PSEA is not meant to protect the appellant's right but to prevent an appointment being made contrary to the principle of selection by merit (*Charest v. Canada (Attorney General)*, [1973] FC 1217). Thus, according to Louis Pratte J.A. of the Federal Court of Appeal, in *Charest, supra*, at paragraph 12, if there is a doubt as to the fitness of the selection process to determine the merits of candidates, an appeal board must allow the appeal filed under section 21 of the PSEA.

. . . it seems clear that a Board appointed under this section is not acting in an irregular manner if, having found that a competition was held in circumstances such that there could be some doubt as to its fitness to determine the merit of candidates, it decides that no appointment should be made as a result of that competition.

[19] The role of the selection board is to determine the merit of candidates for a particular position by using the means they see fit, consistent with the PSEA and the Regulations. In so doing it acts on behalf of the Commission, which under section 12 of the PSEA is empowered to establish the selection standards by which candidates will be assessed for a position (*Davies, supra*, at paragraph 37).

[20] The role of the appeal board is to inquire into whether the selection by the selection board was consistent with the merit principle. If the appeal board is satisfied that the selection was made in compliance with the merit principle, it must dismiss the appeal even if it feels that the result might have been different. The appeal board is not to exceed its jurisdiction (*Ratelle v. Canada (Public Service Commission, Appeals Branch)*, [1975] F.C.J. No. 910 (QL), at paragraph 3).

[21] In other words, the role of the appeal board is to detect and correct errors, the effect of which is to infringe the merit principle (*Canada (Attorney General) v. Bates*, [1997] 3 F.C. 132 (T.D.), [1997] F.C.J. No. 405 (QL), at paragraph 38). The appeal board reviews the process of selecting and assessing candidates by the selection board to ensure that it is consistent with the merit principle. However, it cannot review the qualifications required for the position as determined by the Department in question (*Davies, supra*, at paragraphs 40, 41 and 44).

[22] A person appealing against an effective or imminent appointment of a successful candidate must persuade the appeal board that the merit principle was not observed:

In order to succeed under section 21 in establishing that the merit principle had been offended, the applicants had to convince the Appeal Board that the method of selection chosen was “such that there could be some doubt as to its fitness to determine the merit of candidates” [See Note 9 below] i.e. as to its fitness to determine whether “the best persons possible” [See Note 10 below] were found. An appeal board's main duty being to satisfy itself that the best persons possible were appointed, it goes without saying that an appellant, before even embarking on a challenge to the method of selection chosen, should at least allege (and eventually demonstrate) that there was a real possibility or likelihood that the best persons possible were not appointed. (*Leckie v. Canada*, [1993] 2 F.C. 473 (F.C.A.), [1993] F.C.J. No. 320 (QL), at paragraph 15; see also *Blagdon v. Canada (Public Service Commission, Appeal Board)*, [1976] 1 F.C. 615, at paragraph 6; *Bernard v. Canada (Attorney General)*, 2004 FC 92, [2004] F.C.J. No. 101 (QL), at paragraph 15.)

[23] In the case at bar, Mss. Néron, Dorval and Duchesne did not discharge this burden. The evidence put forward did not allow the appeal board to conclude that the selection board should have had doubts as to the reliability of its assessment of the candidates, and so should have imposed corrective action.

[24] In *Bates, supra*, Douglas Campbell J. held that in applying the merit principle an appeal board should raise questions and make recommendations when a very good candidate fails a test in which he or she should easily have succeeded. The selection board should consider inconsistent information, namely the personal knowledge of members of the board and performance appraisals, with the assessment it has made of the personal abilities of candidates.

[25] The facts in *Bates* are very different from the facts in the case at bar. Ms. Bates had worked as a client service representative for five years and her work was recognized as being excellent. Her employer held a competition in order to give client service representatives whose contracts were expiring an extension of their contracts. The position held by Ms. Bates was the same as that for which she was applying (*Bates, supra*, at paragraph 7). Although Ms. Bates was confirmed in her duties several times and her performance appraisals were “completely favourable”, she failed the test on the required knowledge twice. In the second test, Ms. Bates obtained a mark of 113/200, while the passing mark was 140/200 (*Bates, supra*, at paragraphs 11 and 14).

[26] Campbell J. found that, in the circumstances, “[t]he fact that Ms. Bates scored so poorly on her written examinations raises the undeniable concern as to ‘why?’” Campbell J. raised the possibility that Ms. Bates was suffering from a learning difficulty or a literacy problem, which would make it impossible for her to score well without some form of adjustment (*Bates, supra*, at paragraph 41).

[27] Based on the evidence offered to the appeal board, it is hard to come to the same conclusion in the case at bar since there simply is no discrepancy between what was observed of candidates in

their work and the results of the interview for the position to be filled. In the first case, relational skills were not assessed, whereas it was those skills that were assessed for the position to be filled.

[28] Mss. Dorval and Néron were not applying for the same position they held already: they held positions which called for different qualifications from the one to be filled. As to Ms. Duchesne, although she already had the position of a client service officer before the competition, her performance appraisal was not “completely favourable”, unlike the case of Ms. Bates.

Ms. Duchesne failed on the requirement of [TRANSLATION] “attention to the customer” in the skills’ assessment and it was precisely this aspect of her performance that was criticized in her previous appraisal (Diane Duchesne’s appraisal, plaintiffs’ record, at pages 73 and 76). Then, the evidence says nothing about the margin by which Mss. Néron, Dorval and Duchesne failed their test. In *Bates*, the fact of receiving such a low grade indicated that there had to be a problem with the test.

[29] Although a member of the selection board testified that [TRANSLATION] “the interview results did not fully reflect the abilities of some candidates”, that does not as such support a finding that the test was not reliable. It is usual for members of a selection board who are familiar with candidates to be surprised by their performance of some of them. It is possible that a good candidate will achieve results that are not as good as might have been expected, and the contrary may also occur.

[30] Additionally, the member of the selection board qualified his statement by saying that the results of the interviews did not fully reflect the abilities of some candidates. At best, that statement indicates that there might be a discrepancy between the abilities of some candidates (we do not

know which ones) and the interview results. This statement does not suffice to cast doubt on the reliability of the test.

[31] The selection board has the discretion to determine the selection tools it considered appropriate in assessing candidates. Similarly, the selection board has broad discretion in applying such corrective measures as it considers proper when there are problems or irregularities in the selection process (*Canada (Attorney General) v. Smith*, 2004 FC 623, [2004] F.C.J. No. 785 (QL), at paragraph 6).

[32] The situation in the case at bar is also very different from that in *Charest, supra*. In *Charest*, the selection board interviewed the candidates in order to assess them. In the appeal against the appointments, the appeal board determined that the process had been organized in such a way that it was possible that there could have been leaks, that is, candidates may have been aware of the questions asked by the selection board before their interviews. Although the appeal board was unable, based on the evidence before it, to make a conclusive finding that there had been leaks, it chose to cancel the competition since the risk of a violation of the merit principle was too great. The Federal Court of Appeal upheld that decision by the appeal board, dismissing the candidates' appeals.

[33] In the case at bar, there is nothing to indicate that the selection process was defective or even that was a serious risk of it being so, as in *Charest*. After having considered the selection process, the appeal board found that the merit principle had been observed and there was no reason to cancel the results of the competition.

[34] Treating all candidates equally, comparing them on the basis of the same criteria, is generally one of the best ways to observe the merit principle. Like the other candidates, Mss. Néron, Dorval and Duchesne had an opportunity to present their candidacies and to show they were the best persons for the position in question. The fact that the selection board did not consider their references or the knowledge of certain members of the board of their skills does not mean the selection process did not comply with the merit principle. The selection board did not consider any candidate's references, since it chose other tools for assessing the candidates, and this was part of its function. The selection tools chosen by the selection board had a connection with the qualifications required for the position and made possible an adequate assessment of the candidates, which complies with the merit principle.

CONCLUSION

[35] The decision by the Commission's appeal board to dismiss the appeals of Mss. Néron, Dorval and Duchesne and not to intervene in the selection board's decision was reasonable. The selection board chose selection tools for assessing candidates' qualifications, as it was empowered to do. It assessed all candidates in the same way, based on the selection tools chosen. The merit principle was observed in the selection process. This Court will not intervene in the decision. This application for judicial review must be dismissed.

JUDGMENT

The application for judicial review is dismissed.

“Michel M.J. Shore”

Judge

Certified true translation
François Brunet, LLB, BCL

FEDERAL COURT
SOLICITORS OF RECORD

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