

**Date: 20090420**

**Docket: T-88-08**

**Citation: 2009 FC 390**

**Ottawa, Ontario, April 20, 2009**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**RAYMOND KILBRAY and RON WERSCH**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA and  
THE PUBLIC SERVICE COMMISSION OF CANADA**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] Mr. Raymond Kilbray, and Ron Wersch, the Applicants, apply for judicial review of the Public Service Staffing Tribunal's (the Tribunal) decision to dismiss their complaint that the Deputy Head of Service Canada abused his authority in the appointment of an acting Manager - Technical Services at Service Canada in Winnipeg.

## **Background**

[2] Mr. Warren Reynolds, the Information Technology Centre (ITC) Director (the Deputy Head), supervised three divisions: Client Services, Technical Services and Operations. In order to fill the position of Manager - Technical Services, he established a Statement of Merit Criteria describing the requirements for the position for ITC Division of Service Canada in Winnipeg. He decided Ms. Hoffmueller qualified for the position; thus the appointment was made through a non-advertised appointment process without competition.

[3] On September 11, 2006, the Information Regarding Acting Appointment announced the appointment of Sharon Hoffmueller as acting Manager - Technical Services, CS-04 level position (CS stands for Computer Services). Prior to the acting appointment, Ms. Hoffmueller was the Manager - Client Services, an AS-06 level position (AS stands for Administrative Services). The appointment was on an acting basis for a one year period from September 5, 2006 to September 4, 2007.

[4] Raymond Kilbray filed the first notice of complaint under s. 77(1)(b) of the *Public Service Employment Act*, 2003, c.22, ss.12,13 (PSEA). On September 25, 2006, Ron Wersch filed a second similar notice of complaint. Both are employees of the Technical Services Unit for Service Canada in Winnipeg. Mr. Kilbray's position is classified as CS-03; Mr. Wersch's position is CS-02.

[5] The essence of the Applicants' complaint to the Tribunal, aside from the use of non-advertised staffing process, was that the Deputy Head established inadequate Essential

Qualifications for a position by lowering the knowledge requirement to completion of two years of a post-secondary educational program or an acceptable combination of education, training and/or experience.

[6] Both Applicants testified before the Tribunal. Mr. Kilbray, who held a CS-03 position, complained that he missed an opportunity to compete for the acting managerial CS-04 position. Mr Wersch, who held a CS-02 position, complained that he was denied an opportunity to move up to a CS-03 position should Mr. Kilbray be successful. The Respondent called Mr. Reynolds, to testify about: the acting position, staffing considerations in the Division, Ms. Hoffmueller's work as Manager - Client Services, and his reasoning in the staffing action.

[7] The Tribunal found Mr. Reynolds was a credible witness. He was responsible for three main groups: Client Services, Technical Services and Operations. The employees in Technical Services are in the Computer Services group (CS-02 – CS-04). A technical support analyst (CS-02) or a technical support team leader (CS-03) may be assigned to resolve technical problems from the call centre.

[8] Mr. Reynolds decided he needed a strong manager and leader to take over the unit to allow for a smooth transition, following the departure of the previous manager on a one-year appointment. Mr. Reynolds had knowledge of the position to be filled and the daily requirements of the work. He prepared the Statement of Merit Criteria by: looking at previous staffing for the position; checking *Publiservice* for recent examples of appointments to see if they allowed for equivalencies instead of

the two year post-secondary diploma requirement; reviewing the CS-04 work description; and discussing the position with other ITC managers and Directors. He did not consider the classification standard when he developed the Statement of Merit Criteria.

[9] He decided he needed an experienced generic manager to fill the role rather than someone with good technical skills. The technical requirements could be satisfied by the CS-02 and CS-03 positions which had to be maintained. By appointing Ms. Hoffmueller to the CS-04 managerial position and not filling her AS-06 position by partially reassigning her duties to the remaining manager, he could conform to the future plan agreed to in February 2006 by the ITC managers. Mr. Reynolds decided the primary responsibilities of the position were to assimilate, understand and make sound management decisions based on information collected in the unit and to have sufficient general knowledge of day to day situations. The Manager - Technical Services was not necessarily a specialist or expert for technical resolution.

[10] Mr. Reynolds assessed Ms. Hoffmueller against the Statement of Merit Criteria he created and determined that she met all the Essential Qualifications because her experience, training and education were acceptable in lieu of the two year post secondary program. He determined she also met or exceeded the asset qualifications.

### **Decision Under Review**

[11] The Tribunal decided the issues were:

- (i) Did the Deputy Head abuse its authority when it chose a non-advertised appointment process?

- (ii) Did the Deputy Head abuse its authority when it appointed Ms. Hoffmueller to the position?

[12] The Tribunal found that the Applicants had failed to prove that there was an abuse of authority in the choice of a non-advertised appointment process. It decided that the Public Service Commission may use a non-advertised appointment process pursuant to s. 33 of the PSEA which simply states: “In making an appointment, the Commission may use an advertised or non-advertised process.” The Tribunal referred to *Kane v. Canada (Deputy Head of Service Canada) et al.*, 2007 PSST 35, which concluded that a deputy head (delegated by the Commission to make appointments) may choose whichever process best meets the department’s needs. Since there is no preference in the PSEA for one or the other, the Tribunal decided that the Applicants could not allege an abuse of authority merely because a non-advertised appointment process was chosen.

[13] The Tribunal considered whether the Deputy Head abused its authority under subsection 30(2) of the PSEA when it appointed Ms. Hoffmueller. The Tribunal determined that the Applicants bore the burden of proof on a balance of probabilities. The Applicants argued the Deputy Head had: acted in excess of jurisdiction; applied inadequate Essential Qualifications; failed to require satisfactory experience criteria; did not identify organizational needs; and impermissibly narrowed the area of selection.

[14] The Tribunal decided it had jurisdiction because paragraph 77(1)(a) of the PSEA referred to actions of a deputy head and also referenced the merit section, subsection 30(2) of the PSEA. The Tribunal stated:

It could not have been Parliament's intention to permit departments to leave out key duties when establishing essential qualifications. If the qualifications do not match the duties in the work description, then the appointment cannot be made on the basis of merit, and the respondent abused its authority in setting out the essential qualifications.

[15] The Tribunal dismissed the Applicants' argument that by lowering the education standard to a minimum, the position was "no longer a CS-04 position but rather a CS-02 or CS-03 position." The Tribunal noted that the education requirement in the Statement of Merit Criteria met the minimum education standards for the CS group.

[16] The Tribunal found that Mr. Reynolds acted within acceptable standards when he determined that Ms. Hoffmueller's experience as a manager was sufficient to compensate for the lack of completion of two years of an acceptable post-secondary educational program. The Tribunal went on to accept the determination that he required an experienced manager rather than a technical expert for the one year acting position. The Tribunal found that the Applicants failed to prove that Mr. Reynolds abused his authority in his assessment of Ms. Hoffmueller for the acting position. The Tribunal added:

As found in *Rinn, supra*, the Tribunal has no jurisdiction to review whether the position is properly classified as a CS-04.

[17] The Tribunal went on to conclude that the Applicants did not prove that Ms. Hoffmueller did not meet the experience requirement as set out in the Statement of Merit Criteria. It also held that the failure to identify the organizational needs in the Statement of Merit Criteria did not constitute an abuse of authority.

## Issues

[18] Did the Tribunal commit a reviewable error warranting the intervention of the Court? In my view, the issue in this judicial review is:

Did the Tribunal address the issue arising from the Applicants' complaint that the Essential Qualifications for the position were inadequate?

## Legislation

[19] Section 30 of the PSEA sets out the requirement for an appointment on merit.

BASIS OF APPOINTMENT	MODALITÉS DE NOMINATION
<p>Appointment on basis of merit</p> <p><b>30.</b> (1) <u>Appointments</u> by the Commission to or from within the public service <u>shall be made on the basis of merit</u> and must be free from political influence.</p> <p>Meaning of merit</p> <p>(2) <u>An appointment is made on the basis of merit when</u></p> <p>(a) the Commission is <u>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</u></p> <p>(b) the Commission has regard to</p> <p>(i) <u>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,</u></p>	<p>Principes</p> <p><b>30.</b> (1) <u>Les nominations</u> — internes ou externes — à la fonction publique faites par la Commission <u>sont fondées sur le mérite</u> et sont indépendantes de toute influence politique.</p> <p>Définition du mérite</p> <p>(2) <u>Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :</u></p> <p>a) selon la Commission, <u>la personne à nommer possède les qualifications essentielles</u> — notamment la compétence dans les langues officielles — <u>établies par l'administrateur général pour le travail à accomplir;</u></p> <p>b) la Commission prend en compte :</p> <p>(i) <u>toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration,</u></p>

(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.

(emphasis added)

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.

[20] Section 31 of the PSEA sets out the standard for Essential Qualifications:

Qualification standards

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.

Qualifications

(2) The qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i) must meet

Normes de qualification

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.

Qualifications

(2) Les qualifications mentionnées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i) doivent respecter ou dépasser les normes de



or exceed any applicable qualification standards established by the employer under subsection (1).

qualification applicables établies par l'employeur en vertu du paragraphe (1).

[21] Section 77 of the PSEA sets out the grounds for an abuse of authority complaint:

COMPLAINTS TO TRIBUNAL —  
INTERNAL APPOINTMENTS

Grounds of complaint

**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);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

Area of recourse

(2) For the purposes of subsection (1), a person is in the area of recourse if the person is

PLAINTES RELATIVES AUX  
NOMINATIONS INTERNES DEVANT LE  
TRIBUNAL

Motifs des plaintes

**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);

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and

(b) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.

37(1).

Zone de recours

(2) Pour l'application du paragraphe (1), une personne est dans la zone de recours si :

a) dans le cas d'un processus de nomination interne annoncé, elle est un candidat non reçu et est dans la zone de sélection définie en vertu de l'article 34;

b) dans le cas d'un processus de nomination interne non annoncé, elle est dans la zone de sélection définie en vertu de l'article 34.

(emphasis added)

[22] Section 88 of the PSEA establishes the Tribunal's mandate and the qualification of tribunal members:

Tribunal continued

**88.** (1) The Public Service Staffing Tribunal is continued, consisting of between five and seven permanent members appointed by the Governor in Council and any temporary members that are appointed under section 90.

Mandate

(2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

Eligibility

(3) In order to be eligible to hold office as a member, a person must  
 (a) be a Canadian citizen within the meaning of the *Citizenship Act* or a permanent resident within the

Maintien

**88.** (1) Est maintenu le Tribunal de la dotation de la fonction publique, composé de cinq à sept membres titulaires nommés par le gouverneur en conseil et des membres vacataires nommés en vertu de l'article 90.

Mission

(2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu du paragraphe 65(1) ou des articles 74, 77 ou 83 et de statuer sur elles.

Qualités requises

(3) Il faut, pour être membre du Tribunal :  
 a) être citoyen canadien au sens de la *Loi sur la citoyenneté* ou résident

meaning of the *Immigration and Refugee Protection Act*; and

(b) have knowledge of or experience in employment matters in the public sector.

(emphasis added)

permanent au sens de la *Loi sur l'immigration et la protection des réfugiés*;

b) avoir de l'expérience ou des connaissances en matière d'emploi dans le secteur public.

### **Standard of Review**

[23] The Applicants submit that when coming to findings regarding educational and experiential qualifications as assessed against the Essential Qualifications, the standard of review should be reasonableness.

[24] The Respondents submit that on a pragmatic and functional approach analysis, the appropriate standard of review for the judicial review of the Tribunal's decision is reasonableness.

[25] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 62, the Supreme Court of Canada decided that the process of judicial review involves two steps. First, courts must ascertain whether the jurisprudence has already determined the appropriate standard of review. Secondly, where that inquiry is unfruitful, courts must proceed to a standard of review analysis.

[26] The new PSEA came into force in December 2005. This is the first judicial review of a PSST Tribunal decision under this legislation to come before the court. Accordingly, a standard of review analysis is required.

[27] A standard of review analysis is contextual, taking into account a number of relevant factors including:

- (1) the presence or absence of a privative clause;
- (2) the purpose of the tribunal as determined by interpretation of enabling legislation;
- (3) the nature of the question at issue, and;
- (4) the expertise of the tribunal.

*Dunsmuir* at paras. 62 to 64

[28] The Supreme Court added that it will not be necessary to consider all of the factors, as some may be determinative in the application of the reasonableness standard in a specific case.

[29] The PSEA contains a strong privative clause which reads:

Decisions final

102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court.

No review by *certiorari*, etc.

(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain the Tribunal in relation to a complaint.

[30] The Tribunal is mandated by subsection 88(2) to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83 of the PSEA. Its members are required to have knowledge of or experience in employment matters in the public sector. The Tribunal is required to

decide on matters involving fact, mixed law and fact, and have regard to applicable statutory provisions of its governing legislation. In the case at hand, the Tribunal must determine facts and decide on the interpretation and application of the PSEA to the facts, a question of mixed fact and law.

[31] The mandate of the Tribunal is to specifically consider PSEA complaints and its members are those with expertise in employment matters in the public sector as provided in section 88 of the PSEA.

[32] A tribunal which has expertise and interprets its own statute will be reviewed on a standard of reasonableness. In *Dunsmuir*, Justices Bastarache and LeBel of the Supreme Court of Canada stated:

Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 39.

They further noted at paras. 54 and 55 that factors to consider included: “A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance)”.

[33] Based on the above factors I conclude the standard of review of a Tribunal decision is reasonableness. I also conclude that the Tribunal may interpret the applicable provisions in the PSEA providing its interpretation is reasonable.

## **Analysis**

[34] The Applicants argue that the Deputy Head abused its authority under subsection 30(2) of the PSEA because the Essential Qualifications did not reflect the true requirements of the position to be staffed, and as such, the formulation of the Essential Qualifications amounted to an abuse of authority.

[35] The Deputy Head must ensure that all of the essential qualifications necessary for the work to be performed are met. The Applicants submit that a failure to do so, by not reflecting the essential knowledge and educational requirements for the position, is one ground of abuse of authority recognized in law. The Applicants submit that the Deputy Head failed to take into account the classification standard and rationale when determining the Essential Qualifications.

[36] The Applicants submit that the Tribunal did not address their central argument that the Deputy Head abused his authority in establishing the Essential Qualifications that did not correspond to the work to be performed. The Applicants argue that it is a reviewable error.

[37] The Respondents argue that the Applicants' arguments with regard to classification standard and rationale are irrelevant. They argue that classification is not a part of staffing, and does not provide a relevant basis for determination of matters under the PSEA. Rather, classification of positions is an administrative exercise pursuant to Treasury Board's authority. The job descriptions are used to classify and evaluate positions so that the job can be allocated to a particular occupational group.

[38] The Respondents submit that the “work to be performed” in subsection 30(2) does not equate to “work description”. The generic work description reflects specific duties at a specific time, and does not consider any current or future operational requirements, such as internal organizational priorities. Furthermore, the Respondents submit that the PSEA addresses qualification standards, and not classification standards. The PSEA notes that qualification standards should have regard to the work to be performed and the present and future needs of the public service.

[39] Under the PSEA a Deputy Head is given considerable discretion when it comes to staffing matters and in making appointments. This flexibility was recognized by this Tribunal in *Tibbs v. Canada (Deputy Minister of National Defence), et al.*, 2006 PSST 8, at para. 62. The Respondents contend that the Applicants’ argument, that the Essential Qualifications should be tied to the job description and classification standard, would defeat the stated intentions of Parliament regarding the flexibility of the new PSEA.

[40] The Respondents submit that the abuse of authority allegation must be proved by the Applicants. The Respondents should not be required to demonstrate that the choice of Essential Qualifications and the ensuing assessment of the successful candidate against the Essential Qualifications were not an abuse of authority. This burden was on the Applicant to prove and the Tribunal found that they failed to discharge this burden.

[41] The objective of the new PSEA was to reform the previous public service staffing regime because it was too complex and slow. The new staffing system is directed at enabling managers to fill vacancies in a timely fashion with qualified people. The new system no longer uses competitions or relative merit concepts. Rather, the focus is on finding a person who is a good fit for the job. This determination is made by the Deputy Head of each department on delegation from the Public Service Commission. The Deputy Head may then delegate to departmental directors or managers.

[42] Positions in departments are described by detailed work descriptions approved by the Deputy Head in accordance with the delegated authority from the *Classification System and Delegation Authority Policy*. Classification of the positions is delegated to the Deputy Head, on behalf of the employer as represented by Treasury Board.

[43] When a position is to be filled, the Deputy Head or delegate prepares a Statement of Merit Criteria that sets out the essential qualifications, asset qualifications, organizational needs, operational requirements, and conditions of employment.

[44] In *Leung v. Canada (Revenue Agency)*, 2009 FCA 38, Justice Nadon of the Federal Court of Appeal considered the case where the Human Rights Commission did not investigate a classification committee's determination that a new position had no link with the complainant's old position. The complainant was alleging that his employer had discriminated against him because he had filed an earlier human rights complaint. Justice Nadon stated at paragraph 15 and 17:



Thus, in my view, the investigator failed to properly investigate an issue that goes to the essence of the complaint, in that she failed to make a proper inquiry into the classification process which resulted in the appellant having to compete for the new position. It is difficult to understand why the record remains obscure on this matter, considering that the information required to clarify the matter should be readily available from the employer.

....

I am obviously not saying, nor suggesting, that the Commission or this Court have the power to intrude into the employer's classification process, nor into the making of appointments to jobs. However, because the investigator failed to conduct a proper inquiry, a cloud remains over the legitimacy of the classification process which led to the creation of a job for which the appellant had to compete.

[45] The Applicants filed a copy of the CS-04 classification rationale for the position of IM/IT manager at the CS-04 level. It reads in part:

KNOWLEDGE – EDUCATION & EXPERIENCE

The work requires in-depth knowledge of the theories, concepts, techniques and methods of computer sciences and system engineering, particularly relating to systems infrastructure, applications development, system integration, network architecture and configuration, security and training to develop proposals and business cases to support business lines, programs and service delivery for HRDC internal and external clients. ...

.....

Such knowledge is normally attained through university graduation and eight years of related and progressively more responsible experience.

(emphasis added)

[46] The Tribunal considered the education requirement in the Statement of Merit Criteria prepared by the Deputy Head. It read:

Successful Completion of two years of an acceptable post-secondary educational program in computer science, information technology, information management, or another specialty relevant to the position **or an**

**acceptable combination of education, training and experience.** (emphasis in Tribunal decision)

[47] The Tribunal referred to the Computer Systems (CS) Qualification Standard by the CPSA which lists the minimum education standards for the CS group as “successful completion of two years of an acceptable post-secondary education program in computer science, information technology, information management or another specialty relevant to the position to be staffed” and the accompanying note that stated:

At the manager’s discretion, an acceptable combination of education, training and/or experience may serve as an alternative to the minimum post-secondary education stated above. Whenever, the minimum education is met via this alternative, it is met for the specific position only and must be re-assessed for other positions for which this alternative has been specified by the manager.  
(emphasis added)

[48] The Tribunal then found that the Deputy Head acted within acceptable standards when he determined that Ms. Hoffmueller’s experience as a manager was sufficient to compensate for lack of an acceptable post secondary educational program.

[49] The Tribunal does not examine how a high level CS-04 knowledge position, which normally requires university education and eight years of progressive experience, was reduced to a minimum two year post-secondary level education.

[50] The Tribunal dismisses the CS-04 classification question on the basis that, as decided in *Rinn v. Canada (Deputy Minister of Transport, Infrastructure and Communities)*, 2007 PSST 44, it

did not have the jurisdiction to review whether the position was properly classified. However, it must be noted that in *Rinn*, the Tribunal held it could decide whether the Essential Qualifications met or exceeded the qualification standard.

[51] In *Rinn, supra* the Tribunal considered a similar but not identical issue involving a Statement of Merit Criteria. It considered the validity of a Transport Canada staffing appointment of an individual to the position of Acting Regional Manager, Aviation System Safety without the essential qualification of a valid Canadian pilot's licence. The regular position required experience as a pilot. The acting position was essentially the same but with two salient differences: it was a separate "shadow" position created and classified for temporary appointment purposes and it did not require a pilot's licence.

[52] The *Rinn* Tribunal heard testimony that

...pursuant to the *Financial Administration Act*, RSC 1985, c. F-11 (FAA), the Treasury Board is the employer and provides classification of positions in the Public Service under subsection 11.1(b) of the FAA. Pursuant to the Classification System and Delegations of Authority Policy, the Canada Public Service Agency (CPSA), which is part of Treasury Board, authorizes deputy heads to classify positions in accordance with the classification standards.

*Rinn, supra* at para. 10.

The *Rinn* Tribunal also heard that a shadow position had been created where the requirement for recent experience in piloting aircraft had been removed for acting purposes only. The shadow job position had been created and approved by a classification officer for temporary acting positions.

[53] The *Rinn* Tribunal stated:

39. The complainant submits that the classification of the acting position at the TI-08 group and level is invalid and, therefore, it was an abuse of authority to appoint Mr. Beaulne. Quite simply, he does not meet the essential qualification of experience as a pilot. While the respondent agrees that it would be an abuse of authority to appoint a person who does not meet the essential qualifications, it submits that the determination of the classification for the position is not within the jurisdiction of the Tribunal.

40. Subsection 31(2) of the PSEA stipulates that the essential qualifications established by the deputy head for a position, and used in making an appointment based on merit, must meet or exceed the qualification standards established by the employer. Section 31 reads as follows:

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.

(2) the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i) must meet or exceed any applicable qualification standards established by the employer under subsection (1).

41. Subsection 31(2) refers back to paragraph 30(2)(a) and subparagraph 30(2)(b)(i) and, therefore, must also be included in the criteria for making an appointment on the basis of merit. Thus, the Tribunal has jurisdiction to hear a complaint that the deputy head abused its authority by establishing essential or additional asset qualifications that do not meet or exceed the applicable qualification standards established by the CPSA for the employer. (emphasis added)

[54] I prefer the statutory interpretation by the *Rinn* Tribunal. It therefore follows that the same interpretation must be applied by the Tribunal in the case at hand. The Tribunal must first determine if the Essential Qualifications established in the Statement of Merit Criteria by the Deputy Head for the position of Manager - Technical Services meets or exceeds the qualification

standards for the position established by the CPSA for the employer. The Tribunal did not address this issue even though the Applicants raised the issue before the Tribunal.

[55] On review of the material before the Tribunal, I do not find any evidence that a separate shadow position was created and classified for the temporary appointment of Manager - Technical Services as was done in *Rinn*. The standard for the position normally, but not always, required a university degree and eight years of progressive experience. It was incumbent on the Tribunal to examine the justification for the change of the knowledge requirement in the Essential Qualifications in this context. This is not to say that the Tribunal, or this Court, should determine if the position is properly classified. Rather the Tribunal is to examine whether the Essential Qualifications in the Statement of Merit Criteria meet or exceed the qualification standard established for the position of Manager – Technical Services.

[56] I conclude that the decision of the Tribunal is unreasonable in that it has not addressed the Essential Qualification issue raised by the Applicants. It has not followed its own previous interpretation of subsection 31(2) of the PSEA on this issue.

[57] The application for judicial review is granted.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review is granted.
2. The matter is to be remitted back to a differently constituted Tribunal for re-determination.
3. There is no order for costs.

“Leonard S. Mandamin”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-88-08

**STYLE OF CAUSE:** Raymond Kilbray and Ron Wersch v. Attorney General of Canada and the Public Service Commission of Canada

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** November 27, 2008

**REASONS FOR ORDER AND ORDER BY:** Mandamin, J.

**DATED:** April 20, 2009

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