

Federal Court



Cour fédérale

Date: 20090727

Docket: T-457-08

Citation: 2009 FC 758

Ottawa, Ontario, July 27, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

**THOMAS BROWN, GLORIA FRY,
TOBY LYNNE MEADE AND JOY HUBLEY**

Applicants

and

**ATTORNEY GENERAL OF CANADA
AND PUBLIC SERVICE COMMISSION**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Thomas Brown, Ms. Gloria Fry, Ms. Toby Lynne Meade and Ms. Joy Hubley (the “Applicants”) seek judicial review of a decision made by Ms. Sonia Gaal, Vice-Chair of the Public Service Staffing Tribunal (the “Tribunal”) dated February 26, 2008. In that decision, the Tribunal dismissed complaints of abuse of authority that had been filed by the Applicants pursuant to section 77 of the *Public Service Employment Act* (the “PSEA” or the “Act”), which is Part 3 of the *Public Service Modernization Act*, S.C. 2003, c. 22, alleging, among other things, that the Deputy Minister

of National Defence abused its authority in choosing a non-advertised over an advertised process in extending the acting appointment of Ms. Anne McGuinness.

Background

[2] The Applicants work in the Formation Logistics Branch of the Department of National Defence (“DND”) in Halifax. At the time of their hearing before the Tribunal, the Applicants each held a position at the PG-02 level.

[3] In June 2005, DND held an open competition for a Senior Contracts Officer position at the PG-04 level. Ms. McGuinness, Ms. Meade and Ms. Fry all applied for the position. Ms. McGuinness and Ms. Fry were unsuccessful in the knowledge examination and Ms. Meade withdrew for personal reasons. The position was never filled.

[4] Competitions were also held for a PG-03 position. Ms. Meade and Ms. Fry applied in August 2004 and June 2005, but were unsuccessful.

[5] Upon the basis that the PG-04 position had yet to be filled and due to operational requirements, Ms. Lila Zwicker, the Contracts Coordination Manager of the branch, announced at a meeting on January 26, 2006 that Ms. McGuinness would be placed as an acting appointee in that position. At this time, Ms. McGuinness occupied an AS-04 level position in Internal Audit at DND. Ms. Zwicker has stated in her testimony before the Tribunal that she chose Ms. McGuinness upon the basis that Ms. McGuinness had received the highest, although failing, mark on the knowledge exam.

[6] Ms. Zwicker and Ms. McGuiness' then supervisor could not determine when Ms. McGuiness could begin in the new position. Accordingly, Ms. Zwicker announced at the January meeting that Ms. McGuiness would instead be deployed into a PG-03 Senior Contracts Officer position on February 13, 2006 and then on the same day, was to commence acting in the PG-04 Senior Contracts Officer position. This is what happened and Ms. McGuiness did not actually serve in the PG-03 position.

[7] Ms. McGuiness' acting appointment was for less than four months and was due to expire on May 31, 2006. During this period, arrangements were made to complete the appointment process to fill that position. The new staffing process was commenced on March 31, 2006.

[8] Ms. Fry's supervisor, Ms. Christine Lynds, was a PG-03 Senior Contracts Officer. She also applied for the PG-04 position. She had applied for this position in June 2005 but withdrew her application three months later. When she learned that Ms. McGuiness would be receiving the initial acting appointment, she again requested the position but was refused. In April 2006, Ms. Lynds was offered the acting appointment at the PG-04 level. She was told that she would have to first take an introductory contracts course and receive some on the job training. However, at the end of May 2006, Ms. Lynds informed Ms. Zwicker that she was no longer interested in the position.

[9] Following this, Ms. Zwicker extended Ms. McGuiness' acting position for another four months through a non-advertised process.

[10] In July 2006, Ms. Zwicker met with Ms. Fry, who had expressed an interest in the PG-04 acting position. Ms. Zwicker informed Ms. Fry that only those candidates ranked at the PG-03 level would be considered for the acting position.

[11] On August 16, 2006, the Applicants filed their complaints alleging that Ms. Zwicker had abused her authority. They argued that Ms. Zwicker had failed to give reasonable consideration to the appointment of qualified PG-02 candidates on an acting basis, in the interim period prior to the conclusion of the second staffing process that commenced in March 2006.

[12] In its decision, the Tribunal identified three issues as follows:

- a. Did the Respondent abuse its authority when it deployed Ms. McGuiness to the PG-03 position and then placed her in an acting appointment of less than four months as a PG-04;
- b. Did the Respondent abuse its authority in selecting Ms. McGuiness for the acting appointment as a PG-04 when it extended her appointment for more than four months;
- c. Did the Respondent abuse its authority when it chose a non-advertised process for the acting appointment of June 1, 2006.

[13] Upon the first issue, the Tribunal determined that it did not have jurisdiction to consider the deployment or initial acting appointment. With regards to the question of deployment, the Tribunal noted that *Czarnecki v. Deputy Head of Service Canada et al.*, 2007 PSST 001 had previously found that in order to succeed on a claim made under section 77 of the Act, there must have been an appointment or proposed appointment. However, pursuant to subsection 53(1), a deployment is not the same thing as an appointment and so the Tribunal concluded that it lacked jurisdiction to hear a complaint under section 77 upon the basis of a deployment.

[14] The Tribunal likewise determined that it lacked jurisdiction to consider the initial acting appointment since pursuant to subsection 14(1) of the *Public Service Employment Regulations*, S.O.R./2005-334 (the “Regulations”), an acting appointment of less than four months may not be challenged by way of a complaint alleging abuse of authority under section 77.

[15] With respect to the second issue, the Tribunal found that there was no abuse of authority shown in the appointment of Ms. McGuiness in the acting position once it exceeded four months.

[16] Finally, with respect to the third issue, the Tribunal found that despite the fact that Ms. McGuiness did not qualify for the position, Ms. Zwicker had acted appropriately in selecting her, given the branch’s past practice of offering an acting assignment to individuals one level below the level of the new position, given Ms. McGuiness’ past experience and in light of the fact that Ms. McGuiness had ranked first amongst those candidates vying for the position.

Issues

[17] The following issues arise in this application:

- a. What is the appropriate standard of review;
- b. Did the Tribunal err in excluding relevant evidence, by assessing the issue of abuse of authority on the basis of isolated events rather than from a global perspective;
- c. Did the Tribunal err in rejecting evidence concerning the treatment of Ms. Lynds in comparison with Ms. McGuinness.

Discussion and Disposition

[18] Both the Applicants and the Respondents argued that the standard of review is to be identified upon a pragmatic and functional analysis, having regard to four factors; that is the presence of a privative clause, the expertise of the decision-maker, the purpose of the legislation and the nature of the issue.

[19] The pragmatic and functional analysis is to be approached in the context of the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[20] The Act contains a privative clause in section 102 which provides as follows:

Decisions final

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

Caractère définitif de la décision

102. (1) La décision du Tribunal est définitive et n'est pas susceptible d'examen ou de révision devant un autre

No review by certiorari, etc.	tribunal.
(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.	Interdiction de recours extraordinaires (2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action du Tribunal en ce qui touche une plainte.

[21] The Tribunal is a specialized body that exists for the purpose of adjudicating complaints made under section 77 in accordance with its statutory mandate as set out in subsection 88(2).

[22] The broad purpose of the Act is to govern employment in the federal public service. The purpose of section 77 is to allow for complaints, on specified grounds, about the internal appointment process to employment in the public service.

[23] The nature of the question, that is whether an abuse of authority occurred, is essentially a factual question that requires a weighing of the evidence presented.

[24] In *Dunsmuir*, the Supreme Court of Canada said that decisions of administrative decision-makers are to be reviewed upon either the standard of correctness or of reasonableness. Questions of

fact will generally attract review on the standard of reasonableness, in other words, on a standard of deference.

[25] I am satisfied that upon balancing the four elements of the pragmatic and functional analysis here, the appropriate standard is reasonableness.

[26] The Applicants argue that in its treatment of their arguments about the deployment of Ms. McGuinness to the PG-03 position, the Tribunal mischaracterized the issue. The Applicants say that they were not alleging that the deployment *per se* constituted an abuse of authority under section 77 and acknowledge that neither a deployment nor an acting appointment of less than four months can be the basis for a complaint alleging abuse of authority, having regard to the Act and the Regulations.

[27] Rather, they argue that the conduct of DND in respect of the deployment and initial acting appointment of Ms. McGuinness provide a context within which to evaluate whether the extension of her acting appointment constituted an abuse of authority. In this regard, the Applicants rely on the Treasury Board's Deployment Policy to show that even before the extension of Ms. McGuinness' acting appointment, the Respondents were prepared to disregard that policy in order to ensure that Ms. McGuinness would occupy the PG-04 position. A copy of the policy is attached as an exhibit to the Affidavit of Alan Phillips, filed as part of the Applicants' Application Record.

[28] The Respondents submit that the threshold to find abuse of authority in the choice of the hiring process and in the establishment and assessment of essential qualifications is high. The hiring processes should not be the object of a complaint about abuse of authority, in the absence of evidence that the decisions in question were made in bad faith, were based upon personal favouritism or were otherwise affected by similar considerations. The Respondents submit that the Deputy Head's decision did not rise to this level and the Tribunal has not committed a reviewable error in its decision.

[29] The Respondents argue that the Tribunal did not exclude relevant evidence and did not ignore the totality of the evidence, in its consideration of the deployment of Ms. McGuinness to the PG-03 position. They note that the Tribunal detailed the events that had taken place, beginning with the deployment of Ms. McGuinness to the PG-03 position and her acting appointment to act in the PG-04 position on the same day. They point out that the Tribunal found that DND had been candid about its reasons for the deployment of Ms. McGuinness and that Ms. Zwicker had valid and legitimate reasons for offering the acting appointment to only two PG-03 level candidates, that is to Ms. McGuinness and Ms. Lynds.

[30] Relying on the decision in *Laidlaw et al. v. Canada (Attorney General et al.)* (1999), 166 F.T.R. 217, the Applicants argue that it is an abuse of authority to deploy an employee for the sole purpose of assigning that person to a different position than that to which he or she had been deployed. In this case, they submit that the deployment of Ms. McGuinness to the PG-03 position, immediately followed by her acting appointment to the PG-04 position, was an abuse of authority

since Ms. McGuinness never worked in the PG-03 position and arguably, was deployed to the PG-03 position simply as a means to facilitate her acting appointment to the PG-04 position.

[31] The Respondents submit that the decision in *Laidlaw* can be distinguished since it was made pursuant to the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 and the former *Public Service Employment Regulations*, 2000 S.O.R./2000-80 both of which have been repealed. In light of the current Act's departure from the former legislative scheme and its different approach to the merit principle, the Respondents submit that *Laidlaw* is of limited relevance.

[32] The Applicants made their complaints pursuant to paragraph 77(1)(b) of the Act which provides as follows:

Grounds of complaint	Motifs des plaintes
<p>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</p> <p style="text-align: center;">...</p> <p>b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal</p>	<p>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 :</p> <p style="text-align: center;">...</p> <p>b) abus de pouvoir de la part</p>

appointment process; or	de la Commission du fait
...	qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;
	...

[33] Paragraph 77(1)(b) does not refer to any other provision of the Act and “abuse of authority” is not defined in the Act. It is, however referred to in subsection 2(4) as follows:

References to abuse of authority	Abus de pouvoir
(4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.	(4) Il est entendu que, pour l'application de la présente loi, on entend notamment par « abus de pouvoir » la mauvaise foi et le favoritisme personnel.

[34] The subject is discussed by David Phillip Jones & Ann S. de Villars in *Principles of Administrative Law*, 4th ed. (Scarborough: Thomson Carswell, 2004). The learned authors discuss abuse of authority at p. 154 as follows:

Nevertheless, unlimited discretion cannot exist. The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide range of abuses. It is possible to identify at least five generic types of abuses, which can be described as follows. The first category occurs when a delegate exercises his discretion with an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations. The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering relevant matters. Thirdly, the courts sometimes hold that an abuse of discretion has been committed where there is an improper result, including unreasonable, discriminatory or retroactive administrative actions. A fourth type of abuse arises when the delegate exercises his discretion on an erroneous view of the law. Finally, it is an abuse for a delegate to refuse to exercise his discretion by adopting a policy

which fetters his ability to consider individual cases with an open mind.

[35] I agree with the submissions of the Applicants that the Tribunal erred by failing to look at the totality of the evidence regarding the employment of Ms. McGuiness in the PG-04 position, even on an acting basis.

[36] The Book of Documents that was prepared on behalf of the Applicants in support of their complaint contains materials about the circumstances relating to the PG-04 position, that is the position of Senior Contracts Officer, classified as PG-04. The selection process number for this position was 05-CC-DND-HALFX-033098. According to the Notice of Open Competition, the closing date for this competition was June 30, 2004.

[37] Process notes, prepared by Mr. Anton Topilnyckyj, HRO, dated October 21, 2005, record that the process was deemed unsuccessful because there had been no successful candidates found.

[38] Notes taken in respect of a CCD Section Heads meeting on November 2, 2005 indicate that general human resources issues were discussed and under that heading, the following appears:

- PG 2, 3, 4 -No successful candidates in PG competitions
- PG Development programme will be used to staff the vacant PG2 positions. Candidates will be hired at the PG1 level and undergo a 12 to 14 month training program.
- Other staffing avenues to be explored for PG3/4

[43] The Applicants' Book of Documents also includes a document entitled "FLOG Staffing Action/Casual Pay Request", dated January 30, 2006. This records the deployment of Anne McGuinness, as a PG-03, to position number 144139, that is Senior Contracts Officer.

[44] The reverse of that document, with the same title, records the appointment of Ms. Anne McGuinness to acting position 144134, at level PG-04. The document provides the following rationale for her appointment to the acting position:

Although there were no successful candidates, this employee placed first on a PG-4 competition that was run in order to staff this position on a permanent basis.

[45] This document indicates that the term for the acting position is until June 26, 2006.

[46] The Book of Documents also includes a form, entitled Recommendation and Approval of Acting Situation, approving the appointment of Ms. McGuinness from position 144139, level PG-03, to position 144134 at group level PG-04, effective for the period February 13, 2006 to May 31, 2006. This document is dated February 29, 2006.

[47] By letter dated March 29, 2006, Ms. McGuinness was formally offered a deployment to position number 144139, level PG-03, effective February 13, 2006. She accepted the offer by signing the letter on April 13, 2006.

[48] There is another form entitled "Recommendation and Approval of Acting Situation", dated June 23, 2006. This is an extension of Ms. McGuinness' acting position, but the reference here is to

position 304047 at group level PG-04. The acting period is from June 1, 2006 to September 30, 2006. The document is signed by Ms. Zwicker and dated June 23, 2006. Ms. McGuiness signed her acceptance of this acting position on June 28, 2006.

[49] The materials also include another FLOG Staffing Action/Casual Pay Request form, referring to the extension of Ms. McGuiness' acting status with reference to position number 304047, with a start date of February 13, 2006 and with an end date of September 30, 2006. The position is referenced as PG-04.

[50] There is another document which provides the rationale for the extension of the acting position beyond four months. According to this document, the extension was required from June 1 to September 30, 2006 "since staffing action was delayed beyond [the] original four-month acting appointment." As well, this form records that a competition was underway and would be finalized in September, 2006, but that in the meantime, the position had to be filled.

[51] The materials also include a form entitled "Information Regarding Acting Appointment" with reference to the appointment of Ms. Anne McGuiness as Senior Contracts Officer, classification PG-04. The date of notification was August 15, 2006 and the closing period for filing complaints was noted as August 20, 2006. Before the Tribunal, Ms. Zwicker explained that there had been a previous version of this document but that it was lost. As a result, the second version contained within the record was created on June 23 and signed by Mr. Topilnycky on August 15.

[52] The posting of the original version of this notice led to the filing of the complaints by the Applicants. In an email dated July 26, 2006, Ms. Gloria Fry, one of the Applicants, indicates that the “initial acting position and subsequent extension was staffed through a non-advertised process with no posting on the Public Service Staffing Advertisements and Notifications...”.

[53] It is neither necessary nor appropriate for me to make a finding as to the occurrence of any abuse of authority, in the manner in which the Tribunal dealt with the Applicants’ complaint. It is noteworthy, however, that a failure to consider all relevant evidence may constitute an abuse of authority, according to the factors discussed by Jones and de Villars referred to above. The question before me is whether the Tribunal’s decision meets the standard of reasonableness. In my opinion, it does not.

[54] In my view, the Tribunal failed to consider the evidence before it, from a global perspective. It improperly focused on isolated events, rather than looking at the overall picture as to what transpired from the time that Ms. McGuinness was placed in an acting position as a PG-04, immediately after her deployment in the PG-03 position. Without status as a PG-03, it appears that Ms. McGuinness would not have been eligible for the PG-04 position. The core of the Applicants’ complaint does not relate to the deployment of Ms. McGuinness, but rather to what happened subsequently.

[55] In the result, this application for judicial review is allowed, the decision of the Tribunal is set aside and the matter is remitted to a differently constituted panel for determination in accordance with these Reasons. The Applicants shall have their costs to be taxed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, the decision of the Tribunal is set aside and the matter is remitted to a differently constituted panel for determination. The Applicants shall have their costs to be taxed.

“E. Heneghan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-457-08

STYLE OF CAUSE: THOMAS BROWN, GLORIA FRY, TOBY LYNNE
MEADE AND JOY HUBLEY v. ATTORNEY
GENERAL OF CANADA AND PUBLIC SERVICE
COMMISSION

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**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN, J.

DATED: July 27, 2009

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