

Federal Court



Cour fédérale

**Date: 20140327**

**Docket: T-1907-12**

**Citation: 2014 FC 294**

**Ottawa, Ontario, March 27, 2014**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**EDITH BARAGAR**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The Applicant seeks judicial review of a Public Service Staffing Tribunal (PSST) decision which dismissed her complaint that the conduct of the Department of Citizenship and Immigration Canada (CIC) during the hiring process for a PM-04 position amounted to an abuse of authority under subparagraph 77(1)(a) of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 (PSEA).

[2] The Applicant presented a deep understanding of the entire process as well as the appropriate delegated authorities. She argued a number of authorities and legal principles some of which were applicable to her facts and some that were not.

[3] She is passionate about not only her specific situation, but also that the system is fair, and transparent so that the public would be comfortable with what happens in the public service hiring process.

[4] The Applicant applied for one of two internal positions posted on Job Opportunity Advertisements (JOA) on Public Service for the position of Pre-Removal Risk Assessment (PRRA) officer with CIC. One had the linguistic requirement of “English essential” and the other was “Bilingual imperative”.

[5] The JOA stated that the applicants had to demonstrate they met all the listed essential criteria and failure to do so could result in rejection of their application. Experience was an essential criteria. In the notes section, in capital letters, it said the applicants had to submit a cover letter that set out that they met the criteria. It also said that it was not sufficient to just state you met the criteria “...the candidate must provide concrete examples that illustrate how they meet the requirements.” The JOA said the candidates had to describe in detail when and where they gained experience:

- administrating the Immigration and Refugee Protect Act (IRPA) or Citizenship Act;
- in making decisions in citizenship and immigration cases or presenting evidence at Immigration Refugee Board (IRB) hearings.

[6] The application process for the PM-04 position was as follows:

- Applicants were required to demonstrate they met the merit criteria in their application package by giving examples of how in their employment they had met those criteria;
- If they demonstrated by concrete examples they met the criteria, then they were screened in;
- If they were screened in they progressed to the second stage of interviews, testing, references etc;
- The individuals that were successful at the second stage were placed in a pool;
- From the pool the hiring manager selects who to hire.

[7] The Applicant applied for both positions providing identical information in each application.

Over two hundred other people also applied for the two positions.

[8] On October 1, 2009, the Applicant was informed the assessment panel had eliminated her (screened her out) from the appointment process for failing to meet the following essential experience criteria:

- recent experience administering the IRPA;
- recent experience in making decisions in citizenship or immigration cases or presenting evidence at IRB hearings. Recent experience was defined as at least 12 consecutive months within the last three years.

[9] The Applicant argues that the public deserves to have the best qualified candidates in the positions and not the candidates that follow the Public Service instructions and procedures. She says the public would be outraged knowing that people such as herself could be screened out because they did not follow the instructions set out in the public service posting.

[10] Her application included a cover letter and resume. She identified that she did not administer the IRPA during the three year period of 2004 until December 2007. The Applicant acknowledged she did not provide the months and the years that was the 12 month period that she did work as a PRRA officer.

[11] The Applicant on October 9, 2009, sought and had an “informal discussion” with assessment panel member, Barbara Sachs-Syers. The Applicant followed up the conversation by e-mail in which she provided additional details about her experience, references, and reiterated how she met the qualifications required.

[12] Following the informal discussion, Barbara Sachs-Syers briefed the other assessment panel members, Jennifer Woodsworth and Anna Miguel, on the informal discussion and provided her notes to them.

[13] On October 15, 2009, the three members reconsidered the Applicant’s resume, cover letter and notes from the informal discussion, and determined there had been no errors made in the review and elimination of the Applicant’s application.

[14] By e-mail dated October 19, 2009, the Applicant was informed that the assessment panel had been reconvened to review the Applicant's file and ultimately determined that the Applicant had not demonstrated how she met the criteria in her cover letter. Consequently, the assessment panel's original determination was maintained.

[15] On November 11, 2010, the Applicant sent a long e-mail response. That email was responded to on November 17, 2010, by Bonita Hart, and told her that the assessment panel's prior decision stands. The Applicant responded on the same day. The Deputy Minister, Neil Yeates, asked the ADM to look into it. The Director General, Human Resources responded to the Deputy Minister on December 10, 2010, confirming what had happened and that the Applicant had now filed complaints with the PSST. The Director said to have the matter "follow its course through the tribunal" and this recommendation was agreed by the Deputy Minister.

[16] Following the posting of a Notification of Consideration (November 29, 2010) of the successful candidate, the Applicant submitted a complaint to the PSST under subparagraph 77(1)(a) of the PSEA.

[17] After an investigation including a hearing on March 7, 8, 9 and May 7, 2012, with testimony, cross examination and written submissions, the PSST issued a decision dated September 11, 2012. In the decision the PSST dismissed the Applicant's complaint that the decision of CIC to eliminate the Applicant from the competition by screening her out and hiring another candidate amounted to an abuse of authority under subparagraph 77(1)(a) of the PSEA (*Baragar v Canada (Deputy Minister of Citizenship and Immigration)*, 2012 PSST 0023).

[18] The Applicant makes the same abuse of process arguments to this court that she made to the PSST.

[19] The standard of review is reasonableness as it is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 54 (*Dunsmuir*); *Canada (Attorney General) v Lahlali*, 2012 FC 601).

[20] I will dismiss the Judicial Review for the following reasons.

[21] The Applicant submits the failure of the assessment panel to consider her e-mail sent following the informal discussion as part of its subsequent review of the decision to eliminate her amounts to a breach of procedural fairness. She submits the PSST erred by not recognizing it as a reviewable error.

[22] The Applicant relies on sections 47, 49 of the PSEA as authority that the “informal discussion” amounts to a two way conversation akin to an administrative review and requires that her e-mail have been taken into consideration. She relies on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, as authority that she was owed a duty of fairness which was breached when the assessment panel didn’t take her e-mail into consideration.

[23] The Applicant submits the law intended informal discussion to allow her to make further submissions.

[24] The PSST concluded that the assessment panel properly exercised its discretion in refusing to consider the additional information submitted by the Applicant in an e-mail following the informal discussion. Relying on decisions from the PSST, they found section 47 of the PSEA, which provides for informal discussion, does not include an obligation to reassess candidates' qualifications following those discussions. Consequently, the Applicant was not entitled to a reassessment of her application which took consideration of the additional information she submitted after her elimination from the appointment process.

[25] For that reason the PSST concluded that the assessment panel did not err by refusing to consider the Applicant's e-mail submitted following the informal discussion. The PSST found the assessment panel's decision was consistent with the applicable law and the evidence establishing that the e-mail contained details how she met the qualifications that were not included in her original application.

[26] The informal discussion process provided for at section 47 of the PSEA is a discretionary step that is not part of the assessment process. The PSST found that the informal discussion is meant to correct errors but does not amount to a second opportunity for applicants to provide new information for the assessment of their files. This has been the subject of several PSST decisions, that PSST has decided that the purpose of informal discussion is not to reassess a candidate (*Rozka v Canada (Deputy Minister of Citizenship and Immigration)*, 2007 PSST 46).

[27] The Applicant's other argument is that from her cover letter and resume it was obvious how she administered the IRPA even though she did not give concrete examples to show she met the essential criteria.

[28] The Respondent submitted it was not evident what she did or how she met the essential criteria from her application as she failed to provide examples of how she administered the IRPA as was required. As a result the hiring board was unable to determine if she had met the criteria and screened her out.

[29] The Applicant said even though there were over two hundred applicants it was not an onerous task to go back and determine from the resumes and cover letters to see if an applicant met the qualifications or was screened out. She argues that the assessment panel should give reasons as they are an oversight body and the integrity of the system to the public at large to see merit based.

[30] The PSST has found in the past that it is up to the applicants to demonstrate how they meet the essential qualifications and again not for the board to have to do further research and investigation (*Abi-Mansour v Canada (Department of Foreign Affairs)*, 2013 FC 1170; *Edwards v Canada (Deputy Minister of Indian and Northern Affairs)*, 2011 PSST 10; *Henry v Canada (Department of Human Resources and Social Development)*, 2008 PSST 10).

[31] The PSST concluded that the assessment panel did not abuse its authority in screening out the Applicant from the appointment process. The PSST considered the testimony of Applicant, and



Barbara Sachs-Sayer, a member of the three person assessment panel that reviewed the over 200 applications submitted for the appointment, including the Applicant's.

[32] The PSST found the assessment panel's decision and explanation for eliminating the Applicant were both reasonable because:

- The Applicant had failed to provide concrete examples in her resume and cover letter demonstrating how she met the essential qualifications for the position as required by the JOA;
- The assessment panel was not required to assume that the duties and tasks undertaken by the Applicant in her previous positions met the essential criteria of the present appointment.

[33] Further the PSST, in a detailed twelve page decision, set out the reasons that they upheld the assessment panel's decision that the Applicant was screened out. They detailed the Applicant's arguments including her testimony and cross examination of her experience and the assessment panel's process and positions.

[34] The establishment of the qualifications for appointments within the Public Service and the assessment panels' evaluation of candidates against those criteria are the sole responsibility of the employer (*Canada (Attorney General) v Carty*, 2004 FCA 300, at paras 16, 24). It follows then that, the duty of the employer to justify such discretionary decisions is at the low end of the spectrum and the assessment panel does not have to give reasons that someone is screen out. The fact that they

will meet with failed candidates for an informal discussion met the requirements of the duty of fairness.

[35] Finally, the Applicant submitted that the public demands that the most meritorious person be hired for the process. She says the PSST only looked at part of the process which was the screening out of her application. She submits the PSST needs to give meaning to all of the checks and balances as they are to be transparent and informal discussions.

[36] The PSST concluded the assessment panel had not abused its authority in appointing the ultimate candidate, Craig Gloster, to the position. The PSST considered the Applicant's allegations that the ultimate candidate lacked an essential experience requirement. After considering the assessment panel's testimony of the procedure followed in assessing the chosen candidate's application, and the Applicant's testimony, the PSST found the Applicant's allegations of abuse of authority were not substantiated with evidence.

[37] This was a reasonable determination by the PSST.

[38] In sum, I cannot conclude that the decision is unreasonable. The PSST applied the correct test, considered all of the evidence and submissions of the Applicant and rendered a decision that falls "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47). There is no reviewable error.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. This application is dismissed;
2. Costs in the amount of \$100.00 awarded to the Respondent payable forthwith.

"Glennys L. McVeigh"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1907-12

**STYLE OF CAUSE:** Baragar v AGC

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 9, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT BY:** Justice McVeigh

**DATED:** March 27, 2014

**APPEARANCES:**

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FOR THE APPLICANT  
(ON HER OWN BEHALF)

Ms. Karen Clifford

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