Federal Court of Appeal | Cour d'appel fédérale

Date: 20211123

Docket: A-154-20

Citation: 2021 FCA 226

CORAM: **WEBB J.A.**
LASKIN J.A.
RIVOALEN J.A.

BETWEEN:

RAY DAVIDSON

Applicant

and

ATTORNEY GENERAL OF CANADA
(HEALTH CANADA)

Respondent

Heard at Ottawa, Ontario, on November 9, 2021.

Judgment delivered at Ottawa, Ontario, on November 23, 2021.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: WEBB J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] The applicant, Ray Davidson, seeks judicial review of a decision of a one-member panel of the Federal Public Sector Labour Relations and Employment Board (the Board), rendered on May 22, 2020 (2020 FPSLREB 56), dismissing Mr. Davidson's complaint of abuse of authority

brought under paragraph 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the Act). The complaint concerned the assessment of responses Mr. Davidson provided to in-basket exam questions created in connection with an internal competition for the position of Chief, Access to information and Privacy (ATIP) within Health Canada (the respondent). In particular, Mr. Davidson alleged that the two assessors responsible for evaluating the in-basket exam treated him unfairly and assessed his responses to the questions in a disrespectful, negative and unprofessional manner in contrast to the manner in which the assessors assessed and treated the responses of the two successful candidates. Mr. Davidson also alleged racial bias in the appointment process and retribution against him for a human rights complaint he made against Health Canada in 2008.

II. Background

[2] In 2016, Mr. Davidson held a position in the ATIP field, classified as PM-05, with Immigration, Refugees and Citizenship Canada when he applied for the ATIP position, classified as PM-06, advertised in the internal competition with Health Canada.

[3] Mr. Davidson was screened-in and participated in an in-basket exam prepared by the respondent's ATIP department's director, Cynthia Richardson. Ms. Richardson also prepared the rating guide used to evaluate the applicants' responses to the in-basket exam. Ms. Richardson was responsible for the hiring of candidates.

[4] The assessment board was comprised of two assessors, Ms. Richardson and Kathy Rae. Ms. Rae held a position of PM-06 in the ATIP field with the respondent.

[5] The assessors separately reviewed Mr. Davidson's responses to the in-basket exam. Each response was evaluated on a point system with zero being the worst and five being the best response. On the 10 questions that formed the exam, both assessors determined that Mr. Davidson's overall total points did not meet the minimum number of points required to pass the exam. The result was that Mr. Davidson did not qualify to enter into the pool as a candidate or proposed candidate for the PM-06 position.

[6] Mr. Davidson met with the Director of the ATIP department at Health Canada on two occasions after receiving the results of his in-basket exam and the written comments made by the assessors to his responses. Of particular concern to Mr. Davidson was not the rating guide used by the assessors to evaluate his exam, but rather what he saw as the unfair and disrespectful manner in which his responses were criticised by them, and in particular, by Ms. Richardson. He felt under attack.

[7] In late 2016, he filed his complaint before the Board for abuse of authority under paragraph 77(1)(*a*) of the Act.

[8] In 2019, the Board conducted a hearing over two days in which it heard oral testimony from Mr. Davidson, Ms. Richardson and Ms. Rae. It also considered documents tendered during the hearing. As is the common practice for hearings at the FPSLREB, the Board did not record the proceedings and therefore no transcript of it is available.

[9] Before the Board, Mr. Davidson raised four allegations: (1) that the respondent assessed him unfairly; (2) that personal favouritism was shown towards the successful candidates; (3) that the respondent was biased against him; and (4) that he experienced discrimination because of his race or colour and retaliation because he filed a previous human rights complaint against the respondent.

[10] Approximately one year after the hearing, the Board issued its reasons and dismissed Mr. Davidson's complaint. The Board was satisfied that the evidence did not support the allegation that the respondent favoured the two successful candidates. It also found that Mr. Davidson did not establish that his previous human rights complaint was a factor in his elimination from the appointment process and that he did not demonstrate that he the had experienced discrimination in the appointment process. In conclusion, the Board held that Mr. Davidson did not demonstrate that the respondent had abused its authority.

[11] Before this Court, Mr. Davidson is seeking judicial review of the Board's decision on the basis that it is procedurally unfair and that it is unreasonable.

[12] For the reasons that follow, I would dismiss the application for judicial review, without costs.

III. The Questions before this Court

[13] The questions that must be answered can be summarised as follows:

A. Was the Board's decision procedurally unfair? Did the assessors deny Mr. Davidson's rights to a fair and unbiased competition process?

B. Was the Board's decision unreasonable when it found that the assessors' actions towards Mr. Davidson did not constitute an abuse of authority under paragraph 77(1)(*a*) of the Act? That is, was the appointment process made on the basis of merit under subsection 30(2) of the Act?

IV. The Legal Tests and Standards of Review

[14] This application raises several legal tests and the need to clarify the standard of review for the parties. On questions of procedural fairness involving allegations of bias or unfairness against the assessors in the manner in which they assessed Mr. Davidson, this Court is required to ask whether the procedure was fair, having regard to all of the circumstances (see *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69, at paras. 46-47, citing *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at para. 54; *Gulia v. Canada (Attorney General)*, 2021 FCA 106, at para. 9, [*Gulia*]).

[15] Further, the well-established test for a reasonable apprehension of bias is whether a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, would think that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly (*Committee for*

Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369 at p. 394, 9 N.R. 115). The onus on demonstrating bias rests with the party alleging it (*R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 114, 218 N.R. 1).

[16] The standard of review is reasonableness for questions relating to the Board's Reasons for finding that Mr. Davidson had not proven his allegations of abuse of authority under the Act. *Canada* (*Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at paras. 30, 83, and 100 [*Vavilov*], see also *Gulia* at para. 8). A reasonable decision is one that is based on an internally coherent and rational chain of analysis, and is justified in relation to the facts and the law that constrain the decision maker. The exercise of public power at issue must be sufficiently justified, intelligible and transparent in the reasons (*Vavilov,* at paras. 85 and 95). In other words, I must consider whether, as a whole, the decision by the Board, including both the rationale for the decision and the outcome to which it led, was reasonable.

[17] On the question of the evidence before the Board, this Court may not interfere with its factual findings absent exceptional circumstances. We must therefore refrain from reweighing and reassessing the evidence considered by the Board (*Vavilov*, at para. 125).

[18] Further on the question of evidence, in support of his application before this Court, Mr. Davidson filed his affidavit attaching as an exhibit a copy of the notes taken by his wife and him during the two-day hearing before the Board. He relied heavily on these notes while advancing his written and oral submissions. Counsel for the respondent did not object to the

filing of these notes and did not object to Mr. Davidson referencing them in his written materials or during his oral submissions.

[19] While it is unfortunate that a transcript of this hearing is not available and while it is understandable that Mr. Davidson wishes to offer the best evidence he can regarding the oral testimony provided during the hearing before the Board, nonetheless, this Court may not rely on notes taken by the applicant or his wife. Unlike certain tribunals, such as in the context of citizenship and immigration matters where the recording of proceedings is routine, hearings before the Board are not recorded.

[20] In my view, the notes taken during the hearing cannot be described as new evidence, and therefore, I need not be concerned with their admissibility under the exceptions to the admissibility of new evidence set out in paragraph 20 of this Court's decision in *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 FCA 22, 428 N.R. 297.

[21] Further, the notes from Mr. Davidson's spouse are being used to challenge findings of fact and invite this Court to re-hear and re-weigh the evidence in order for us to arrive at our own conclusions as to the merits. That is not our role. We must therefore disregard these notes.

[22] The evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. Accordingly, the only evidence that we may consider here, when reviewing the Board's Reasons, is the written documents tendered during the hearing.

[23] Having set out the standard of review and legal tests that concern this application for judicial review, I will now turn to the Act.

V. Abuse of Authority under the Act

[24] Once the Public Service Commission (the Commission) makes or proposes an appointment in an internal appointment process, pursuant to paragraph 77(1)(*a*) of the Act, an unsuccessful candidate may make a complaint to the Board. Under this paragraph, the complaint is framed as the unsuccessful candidate not being appointed or proposed for an appointment because of an "abuse of authority" by the Commission or the deputy head in the exercise of their discretion under subsection 30(2) of the Act. Subsection 30(1) of the Act specifies that appointments to or from within the public service shall be made on the basis of merit. Subsection 30(2) of the Act provides the meaning of an appointment made on the basis of merit.

[25] The Act does not provide a definition of the term "abuse of authority". However, subsection 2(4) of the Act stipulates that a reference to abuse of authority shall be construed as including bad faith and personal favouritism. The jurisprudence has expanded this meaning to include requiring more than simply establishing errors and omissions. The impugned conduct, error or omission, must be unreasonable, unacceptable or outrageous in some way, such that Parliament could not have intended the person with the authority to exercise its discretion in this manner (see *Pierre v. Canada (Border Services Agency),* 2016 FCA 124, 488 N.R. 176, at para. 37; *Lavigne v. Canada (Justice),* 2009 FC 684, 352 F.T.R. 269, at paras. 61-62; *Brown v. Canada (Attorney General),* 2009 FC 758, 369 F.T.R. 54, at para. 34; and *Tibbs v. Canada (National Defence),* 2006 PSST 8, at paras. 66, 70 and 71). Here, Mr. Davidson alleged abuse of

authority and invoked unfairness, bias, personal favouritism and retaliation as elements of the abuse. He also alleged discrimination because of race, as he identified as a Black man.

[26] Where a complaint raises an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [*CHRA*], such as is the case here, the complainant must notify the Canadian Human Rights Commission of the issue pursuant to section 78 of the Act. The Human Rights Commission responded that it did not intend to make submissions in this matter (Board's Reasons, at para. 3).

[27] Finally, before the Board, the burden of proof to establish the overall allegations of abuse of authority rests with Mr. Davidson (*Gulia*, at para. 7).

[28] I will now turn to the questions before this Court and Mr. Davidson's arguments.

VI. Was the Board's decision procedurally unfair? Did the assessors deny Mr. Davidson's rights to a fair and unbiased competition process?

[29] Mr. Davidson made several arguments alleging procedural unfairness.

[30] In his written materials and during oral submissions, Mr. Davidson spent most of his time comparing the manner in which Ms. Richardson evaluated his responses to the manner in which she evaluated those of the successful candidates. He referred the Court to specific responses he provided to the six exam questions at issue. In particular, he emphasized the negative language

used by Ms. Richardson when she commented on his responses. Such language was largely absent on the responses from the two successful candidates. He argued that any reasonable person would conclude that the harsh language used by Ms. Richardson was unprofessional and unfairly attacked him. According to Mr. Davidson, the comments made by Ms. Richardson were intended to minimize the value of his correct responses, while taking attention away from her having awarded higher marks to the successful candidates.

[31] Some examples of the language used by Ms. Richardson on Mr. Davidson's responses to which he took offense included words such as "very basic", "not passing", "some basic sense of organisation", "very weak", "no depth" "[t]hat's it? [v]ery basic", "very simplistic", "does not pass", "[v]ery little analysis, especially since candidate had info a week in advance", "very impersonal and low likelihood of success", "some good suggestions, some that demonstrate a lack of depth of experience or judgment", "this makes no sense", "both wrong" and "missed key elements, gets confused".

[32] On the question of the evaluation of Mr. Davidson's answers to the responses to the in-basket questions, the Board correctly clarified its role at paragraphs 15 and 16 of its Reasons. It confirmed that its role is not to decide on the merits of the responses and redo or reassess, but rather to decide whether there is some evidence of an abuse of authority in the evaluation process.

[33] The Board found at paragraph 17 of its Reasons that Ms. Richardson provided satisfactory answers to the issues raised by Mr. Davidson, that Ms. Richardson reviewed each

question and answer, and provided reasonable explanations as to why the assessment board concluded as it did. The Board concluded that Mr. Davidson's answers were properly evaluated.

[34] Mr. Davidson is asking this Court to reassess the evidence and to attribute bias in the choice of language used by Ms. Richardson. While the language used by Ms. Richardson was blunt, I am of the view the Board did not err when it found that there was no evidence of bias before it. There is no evidence before this Court that justifies re-assessing this finding. I see no exceptional circumstances allowing me to interfere with the Board's factual findings, and therefore I would not find any reasonable apprehension of bias, or any error, in the marking of Mr. Davidson's in-basket exam.

[35] Next, Mr. Davidson pointed to delay. It took the Board over one year to render its decision. He argued that the longer the delay, the less likelihood for his success should the Board find that the process should be revoked or redone, as candidates might have already moved on in their careers, including being employed with a different organization. I am sympathetic to Mr. Davidson's concerns regarding the time it took the Board to issue its decision, especially when a transcript of the proceedings is not available to him or this Court, however I cannot find that this delay has caused unfairness in this case.

[36] In conclusion, based on this evidentiary record and having regard to all of the circumstances, Mr. Davidson has not proven that he was subject to bias, or a reasonable apprehension of bias.

[37] I now turn to the arguments advanced by Mr. Davidson concerning the unreasonableness of the decision.

VII. Was the Board's decision unreasonable when it found that the assessors' actions towards Mr. Davidson did not constitute an abuse of authority under paragraph 77(1)(*a*) of the Act?

A. *Insufficiency of Reasons*

[38] Mr. Davidson alleged that the Board's Reasons were insufficient. He argued that the Board failed to consider all of the relevant testimony before it and did not properly weigh the evidence. Because of this failure, it was impossible to understand the Board's logic and reasoning on some of its key factual findings.

[39] As an example, Mr. Davidson pointed to paragraph 17 of the Board's Reasons to demonstrate that on the one hand, the Board said it was satisfied that his answers given to the questions on the in-basket exam were properly evaluated. However, the only evidence referenced by the Board in arriving at its decision was the statement of Ms. Richardson at paragraph 14 of the Reasons. The Board did not reference any of Mr. Davidson's testimony and provided none of his detailed responses with respect to the explanations given on all exam questions. According to Mr. Davidson, the Board here should have taken the same approach it took in its decision, *Clark v. Deputy Minister of National Defence et al*, 2019 FPSLREB 8 [Clark]. In *Clark*, at paragraphs 42 to 61, the matter was important enough to the Board for it to identify each exam question at issue and the complainant's concerns. Here, Mr. Davidson argues it was not

reasonable for the Board to simply state that it was satisfied that Mr. Davidson's answers were properly evaluated without providing justification as to how it arrived at its conclusion.

[40] Mr. Davidson provided a further example. Although the Board recorded in its Reasons that Ms. Richardson had indeed taken the copies of the completed in-basket exams home with her, and in doing so, realized that the applicants' names were apparent on the face of the exams, he questioned whether the Board took into consideration his evidence and argument that Ms. Richardson, having knowledge of the names of the candidates on each exam, could tailor her comments to ensure the success of certain candidates over Mr. Davidson.

[41] On this point, the Board accepted at paragraph 22 of its Reasons that Ms. Richardson initially saw the names of the 12 candidates on the exams, but asked the department of Human Resources to remove the names and replace them with numbers so that she could not identify the candidates when she assessed the exams. The Board also accepted that Ms. Rae never saw any names on the exams, and was satisfied that when the assessment board reviewed all of the candidates' answers, they were anonymous.

[42] I reiterate that we may not interfere with factual findings absent exceptional circumstances. I see no exceptional circumstances here. We must therefore refrain from reweighing and reassessing the evidence considered by the Board (*Vavilov*, at para. 125).

[43] Based on the evidentiary record before this Court, I am satisfied that the Board's Reasons are based on internally coherent reasoning and are justified in relation to the law and facts

relevant to it (*Vavilov*, at para. 105). The Board's Reasons are sufficient and provide a transparent and intelligible justification for its conclusions.

B. *Favouritism*

[44] On the question of favouritism, Mr. Davidson argued that Ms. Richardson clearly favoured one candidate over him. According to him, the evidence provided at the hearing demonstrated that Ms. Richardson was a mentor to one of the successful candidates, having worked directly with her for several years and having attended her wedding in the Dominican Republic. She acted as her referee and continued to have a relationship with the successful candidate.

[45] The Board found that Ms. Richardson did not show favouritism towards the successful candidate. It concluded at paragraph 27 of its Reasons that Ms. Richardson's attendance at the wedding of one of the successful candidates took place 7 years earlier, and the evidence was that no further contact of any sort took place between them.

[46] Mr. Davidson's point here is well taken. According to the email documents tendered during the hearing, it appears that there was an ongoing relationship between Ms. Richardson and one of the successful candidates. The email from the candidate in question, dated January 28, 2017, confirms that she has worked with Ms. Richardson in three different departments over the last 12 years. Therefore, it appears that the Board did make a factual error when describing the length of this relationship.

[47] In my view, this error is not sufficiently central or significant to allow me to make an overall finding that the Board's Reasons, taken as a whole, including both the rationale for the decision and the outcome to which it led, was unreasonable (*Vavilov*, at paras. 83 and 100).

C. *Retaliation*

[48] Mr. Davidson takes the position Ms. Richardson never intended to hire him and did everything possible to ensure his failure. He submitted that this conduct formed part of the retaliation he experienced for having successfully complained in 2008 to the Canadian Human Rights Commission about similar issues involving the respondent. The result of the investigation report prepared at that time concluded that Mr. Davidson, who self-identified as a Black man, had on two occasions successfully appealed a certain competition for an ATIP position with the respondent at the PM-05 level, and was still not hired, despite the respondent continuing to seek other candidates. The evidence gathered by the investigator at that time indicated that although Mr. Davidson was qualified, the respondent continued to seek other candidates. As such, it concluded that further inquiry was warranted.

[49] Mr. Davidson also argued that there were inconsistencies in the Board's Reasons when it found that Ms. Rae, who was a candidate for the ATIP position described in paragraph [48] above, testified that she was not aware of Mr. Davidson's 2008 human rights complaint until she learned of it while preparing for the hearing before the Board (Board's Reasons at para. 31).

[50] The Board found that there was no evidence of retaliation against Mr. Davidson. At paragraph 31, the Board noted that Ms. Richardson was not employed by the respondent at the

time of the 2008 human rights complaint. It also made a factual finding that Ms. Rae had no knowledge of the complaint until she prepared for the current proceedings.

[51] Based on the evidentiary record, I may not interfere with the Board's factual findings on the question of retaliation absent exceptional circumstances. I see no such circumstances here.

D. *Racial Discrimination*

[52] Finally, Mr. Davidson raises racial discrimination as a factor in the negative treatment he received from the assessors. He relayed that he has spent years working in the ATIP field within various departments of government and has gathered significant experience. However, contrary to many of his former mentees and colleagues, he has been unable to advance his career notwithstanding the demand for experienced people in this area of government.

[53] Before this Court, Mr. Davidson underscored the 2008 investigative report from the Human Rights Commission in connection with his previous complaints, as referenced in paragraph [48] herein. In addition, he asked us to take notice of the class action proceedings filed in the Federal Court in December of 2020 by Black public service employees against Her Majesty the Queen, in which systemic racism in the public service is alleged.

[54] The Board, in paragraphs 34 to 40 of its Reasons, analysed the question of racial discrimination. It identified the correct test set out by the Supreme Court of Canada in *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 33, and proceeded to determine whether Mr. Davidson was able to demonstrate a *prima facie* case of discrimination.

The Board found that Mr. Davidson had established that he had a characteristic protected from discrimination under the *CHRA,* subsection 3(1) (race and colour) and that he experienced an adverse impact with respect to the competition (he failed the in-basket exam). However, the Board was not satisfied that the protected characteristic was a factor in the adverse impact. Therefore, a *prima facie* case of discrimination was not established.

[55] The Board recognized, and I accept, that discrimination is often insidious. The Board found however that Mr. Davidson had not been able to establish a nexus between his disqualification process and the prohibited ground of discrimination on which he relied. Based on the record before us, I find no reviewable error in the Board's analysis.

VIII. Conclusion

[56] To summarize, Mr. Davidson has not established that he experienced procedural unfairness in his treatment by the assessment board. I would conclude that no reasonable apprehension of bias or actual bias has been shown.

[57] Further, the Board's Reasons found that the respondent's witnesses provided a reasonable and impartial explanation for the differences between their evaluations of the responses provided by Mr. Davidson and the successful candidates. Our role is limited to reviewing the Board's Reasons, and refraining from deciding the issues ourselves. On this record, the Board has based its Reasons for finding that Mr. Davidson was unable to prove an abuse of authority under paragraph 77(1)(*a*) of the Act on an internally coherent and rational chain of analysis that is

justified in relation to the facts and law that constrain it. The reasonableness standard requires that this Court defer to such a decision (*Vavilov*, at para. 85).

[58] Despite Mr. Davidson's able submissions, I would dismiss the application for judicial review, without costs.

"Marianne Rivoalen"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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