

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140617

Docket: A-362-13

Citation: 2014 FCA 162

**CORAM: WEBB J.A.
NEAR J.A.
SCOTT J.A.**

BETWEEN:

OMAR KRAYA

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on June 4, 2014.

Judgment delivered at Ottawa, Ontario, on June 17, 2014.

REASONS FOR JUDGMENT BY:

SCOTT J.A.

CONCURRED IN BY:

**WEBB J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT

SCOTT J.A.

[1] This is an appeal from a judgment of O'Keefe J. of the Federal Court (the Judge) dated October 16, 2013 dismissing Mr. Omar Kraya's (the Appellant) application for judicial review of a decision of the Public Service Staffing Tribunal (the Tribunal) dated March 30, 2012.

[2] The Appellant was a level PG-O2 material acquisition and support officer in the Procurement Group at the Department of National Defence in 2009 when he applied for a position, in the same Department, that had been internally advertised at the PG-04 level. As part of the assessment process, he supplied the names of three individuals who could be contacted for a reference, one of whom was his manager, Mr. Burke. Two of these individuals (including Mr. Burke) supplied a reference and as result of the reference provided by Mr. Burke, the Appellant was eliminated from the competition for the position.

[3] The Appellant, on being apprised of the decision, contacted Mr. Burke and told him that he felt unfairly treated and that he would be pursuing legal action. Mr. Burke then communicated with the Community Management Office (CMO) to ask whether he could retract his reference. This request was refused by the assessment board (the Board) as Mr. Burke failed to provide a reason for wanting to withdraw his reference and he did not indicate that his reference was inaccurate or untrue.

[4] The Appellant filed 27 complaints of abuse of authority under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22 asserting that the Board erred by: 1) failing to diligently pursue his third reference from Mr. Qureshi; 2) using a reference of a person who had no personal knowledge of the complainant; and 3) refusing to remove the reference provided by Mr. Burke.

[5] The Tribunal found that the Board had diligently pursued a reference from Mr. Qureshi and that Mr. Burke had personal knowledge of the complainant. It also concluded that in spite of

Mr. Burke's request to retract his reference, refusal to grant the request and reliance on said reference did not constitute an abuse of authority. The Tribunal determined that the Board had discretion to refuse the retraction and noted that Mr. Burke was a referee chosen by the Appellant himself.

[6] The Judge, on judicial review, applied reasonableness as the standard of review to the substantive issues and correctness to issues relating to procedural fairness. He concluded that it was reasonable for the Tribunal to find that the Board could refuse to grant the request to withdraw the reference provided by Mr. Burke and to rely on said reference as it did not constitute an abuse of authority.

[7] The Appellant argued before this Court that the Judge misstated the facts and did not properly answer the question that was raised in the application for judicial review. He submitted that the Judge made errors of fact by stating that "[f]airness does not require allowing a party to unilaterally retract evidence that he himself submitted to the tribunal if such evidence turns out to be unfavourable" (see 2013 FC 1045 at para. 24). The Appellant claimed that he did not submit a reference to the Board, it was submitted by Mr. Burke and also that he did not unilaterally retract Mr. Burke's reference, since it was Mr. Burke who personally contacted the Board to withdraw his reference. The Appellant's argument does not relate to the correctness of the procedural principle contained in the Judge's statement, but rather to its factual content.

[8] The Appellant also submitted that the Judge failed to properly address the issue that was before him, which was whether the Board could rely on a reference once it had been retracted by the person who submitted it.

[9] The Judge identified the appropriate standard of review and determined that the Tribunal's decision fell within a range of possible, acceptable outcomes. I conclude that the Judge applied the reasonableness standard correctly for the reasons that follow (see *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at para. 43).

[10] Contrary to the Appellant's submission, I find that the Judge examined whether the Board could rely on a reference once a request to retract it had been made by the person who submitted it. The Judge looked into the reference provided by Mr. Burke and determined that the Tribunal did not err in dismissing the Appellant's complaint and accordingly analyzed whether it was reasonable for the Board to refuse the request to retract a reference and to rely on it, even though it was unfavourable to the Appellant.

[11] The Appellant's argument that the Judge erred when he stated that fairness did not require allowing a "party" to unilaterally retract evidence that is unfavourable, must also be rejected. As I read the Judge's statement, it can be interpreted in two ways. The Judge could have meant that fairness does not require allowing the Appellant to unilaterally retract evidence that he submitted (retract Mr. Burke as a reference) if such evidence turns out to be unfavourable, or that it does not require allowing Mr. Burke to retract his reference. In either case, the statement is

correct in that it is the Board's duty to evaluate candidates and to determine their qualifications based on the evidence they chose to provide, including references, whether they turn out to be favourable or not.

[12] I agree with the Judge that the decision of the Tribunal that the Board did not abuse its authority when it relied on the reference provided by Mr. Burke (which he attempted to retract without providing any reasons for doing so) was reasonable.

[13] Accordingly, I would dismiss the appeal, with costs.

"A.F. Scott"

J.A.

"I agree.

Wyman W. Webb J.A."

"I agree.

D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-362-13

**AN APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE O'KEEFE
DATED OCTOBER 16, 2013, DOCKET NUMBER T-858-12.**

STYLE OF CAUSE: OMAR KRAYA v. THE
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: JUNE 4, 2014

REASONS FOR JUDGMENT BY: SCOTT J.A.

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

DATED: JUNE 17, 2014

APPEARANCES:

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