Date: 20081128

Docket: T-641-07

Citation: 2008 FC 1295

Ottawa, Ontario, the 28th day of November 2008

Present: The Honourable Mr. Justice Shore

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

MICHEL EAST

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary Comments

[1] It was impossible for the Appeal Board to determine the right period to make the risk of a leak acceptable. It is not necessary to have objective evidence demonstrating that the accommodations recommended by the Appeal Board would not have negatively affected the other candidates in the competition. As the selection process did not proceed in this manner, it is impossible to say with certainty what effect the use of an alternative assessment method would have had on the other candidates. Requiring the Correctional Service of Canada (CSC) to produce such evidence would place it in an untenable position: “In order to justify the decision to depart from the

recommendations of an outside expert, a government department only needs to demonstrate that there were legitimate concerns that a problem would have arisen if the process had moved forward" (*Tremblay v. Canada (Attorney General)*, 2003 FCT 466, 232 F.T.R. 138 (T.D.), at paragraph 35). Accordingly, the determination that there would be less risk of a leak after a week but more after two or three weeks seems to fall within a selection board's discretion and expertise. The Appeal Board erred in substituting its opinion for what seems to have been a reasonable precaution to protect the merit principle in the selection process.

[2] In its decision, the Appeal Board applied the tests laid down in *Girouard v. Canada (Attorney General)*, 2002 FCA 224, [2002] F.C.J. No. 816 (QL). However, the Appeal Board disputed the Selection Board's reasoning when it concluded that an information leak was no justification for the failure to accommodate the appellant more generously. It is nonetheless the opinion of this Court that the Appeal Board erred in law by disregarding the fact that even the method of accommodation is subject to the merit principle. It is an appeal board's task to determine whether the accommodations provided allowed a candidate to compete on an equal footing with the other candidates (*Tremblay*, above, at paragraph 25). The duty of an appeal board is not to reassess candidates to protect an appellant's rights but rather to conduct an inquiry to determine whether the selection has been made in a way consistent with the merit principle (*Charest v. Canada (Attorney General)*, [1973] F.C. 1217 (F.C.A.), [1973] F.C.J. No. 150 (QL), at paragraph 12; *Blagdon v. Canada (Public Service Commission, Appeals Board)*, [1976] 1 F.C. 615, [1975] F.C.J. No. 162 (QL), at paragraph 21; *Girouard*, above, at paragraph 12). The selection of successful candidates

therefore had to respect the merit principle, regardless of individual results (*McGregor v. Canada (Attorney General)*, 2007 FCA 197, 366 N.R. 206, above, at paragraph 48).

II. Judicial Proceedings

[3] This is an application for judicial review of a decision dated March 5, 2007 by Line Chandonnet of the Appeal Board of the Investigations Branch of the Public Service Commission (Commission) allowing the appeal of the respondent, Michel East, under section 21 of the *Public Service Employment Act*, R.S.C. 1985, c. P-33 [repealed 2003, c. 22, s. 284] (PSEA) (the new PSEA came into force on December 31, 2005).

III. Facts

[4] On November 10, 2004, the CSC issued a competition poster for 60 CX-03 correctional supervisor positions. There were 12 competition numbers, one for each institution in the Quebec region.

[5] Under the heading "Qualifications and Screening Criteria" and the subheading "Experience", the competition poster stated that candidates had to have the following experience: "Extensive experience in the application of a range of correctional operations duties including escorts and inmate case management".

[6] By the application deadline, November 24, 2004, 191 candidates had submitted an application specifying the competition number or numbers for which they wished to apply.

[7] The applications were assessed through a process conducted by the Screening Board and the Selection Board, whose members, Serge Trouillard, Manon Bisson and André Courtemanche, had several years of experience with the CSC.

[8] On December 8, 2004, the Screening Board elaborated on the qualifications set out in the competition poster as follows:

> [TRANSLATION]
>
> It has been agreed that each candidate will have to clearly and specifically demonstrate that he or she has the following experience:
>
> Five years' experience in the application of a range of correctional operations duties in the CSC and/or a provincial or territorial correctional service and/or a community residential centre. As well, within that five-year period, two years of experience in a CX-02 and/or PW and/or PO position. (Acting assignments, indeterminate appointments and probationary periods will be considered.)

[9] After providing this clarification about the qualifications, the Screening Board screened out 35 applications, 17 because the candidates did not meet the qualifications requirement in the competition poster and 18 because the candidates had not clearly demonstrated that they had those qualifications. On December 23, 2004, the candidates who were unsuccessful at that stage were notified of that fact. The applicant sent the candidates who had been screened in a copy of the Statement of Qualifications and a list of the basic study documents for the Knowledge test. An amended list of the study documents was sent to the candidates on January 10, 2005.

[10] On February 17, 2005, the candidates received a letter inviting them to sit the 90-minute Knowledge test scheduled for the morning of March 14, 2005. The letter stated that, if they were unable to attend the test, they should contact Bernadette Gariépy, Human Resources Advisor for the CSC, by telephone. The same letter set out the procedure for withdrawing from the competition: [TRANSLATION] "If you decide not to attend, please inform us of your withdrawal in writing."

[11] In a letter dated March 10, 2005, Mr. East noted that he was facing several difficult situations:

> [TRANSLATION]
>
> Ms. Gariépy, I herewith register a protest concerning the following CX-03 competitions. . . . In fact, I am currently awaiting an adjudication hearing, following unjustified disciplinary action. I was also subjected to a criminal investigation that concluded with "No criminal prosecution will be launched against you." Then, finally, on October 4, 2004, I was impleaded on a frivolous and bad faith harassment complaint; my evidence was irrefutable but, once again, the laxness of CSC managers has resulted in a sword of Damocles over my head.

[12] He therefore requested for the first time that the competition be deferred:

> [TRANSLATION]
>
> . . . I find myself obliged to request that the above competitions be suspended until such time as I am exonerated and/or found guilty of the actions of which I am baselessly accused. Moreover, with the concerted action being conducted against me by certain managers, I am not really able to concentrate on studying for this kind of competition. This conspiracy and hounding have caused me multiple problems, of both a personal and professional nature.
> Please note that I am not withdrawing from the above competitions. . . . This is why I am asking that the proceedings taken by the CSC against me be concluded, so that, just like all the other candidates, I can concentrate fully on the CX03 competitions, free of the problems caused by the actions of certain managers at Leclerc Institution.

This letter, which was postmarked March 11, 2005, was received by the CSC on March 14, 2005, after the Knowledge test was over.

[13] On March 14, 2005, the Chairperson of the Selection Board, Mr. Trouillard, contacted Mr. East by telephone to tell him that his request to defer the competition could not be granted. However, he invited him to take the Knowledge test on the second scheduled date, March 21, 2005.

[14] In Ms. Gariépy's absence, Diane DeSève, Senior Advisor with the centre of expertise for recruitment and selection, confirmed the conversation with Mr. Trouillard in a letter dated March 16, 2005:

> [TRANSLATION]
>
> I cannot help but observe that you are currently having difficulties that, according to you, prevent you from preparing adequately.
>
> . . .
>
> It is out of respect for this same principle that I cannot grant your request in view of all the candidates who have devoted time and energy to preparing for this competition, in which the Knowledge test was administered on March 14.
>
> As Mr. Trouillard, the Board's Chairperson, discussed with you on March 16, we can allow you to participate in a new session of the Knowledge test scheduled for March 21, 2005 at 8:30 a.m. at Regional Headquarters. . . .
>
> . . .
>
> This will be the last opportunity to take the Knowledge test and participate in this selection process.

[15] In a letter dated March 18, 2005, Mr. East made a second request to the Selection Board to defer the competition:

> [TRANSLATION]
>
> . . . I do not understand how deferring the competition and/or postponing my taking the test to a time when I am in a position to prepare adequately for it violates the merit principle. On the contrary, to the best of my knowledge, no candidate has been the target of malicious action by CSC managers.
>
> . . .
>
> You may, however, feel you cannot defer the process and/or give me the opportunity to be a candidate in the selection process at the appropriate time. If so, it will be up to the adjudicator to assess our respective allegations and to rule on this dilemma.

That letter, which was postmarked March 21, 2005, was received by the CSC on March 23, 2005, two days after the second Knowledge test was held.

[16] The appellant therefore did not attend the second Knowledge test on March 21, 2005. On March 30, 2005, the Selection Board wrote to tell him that his requests could not be granted. The Selection Board could neither postpone nor defer his participation in the competition indefinitely without repercussions for the competition itself and the merit principle.

[17] Out of the 150 candidates invited to sit the Knowledge test, 12 did not attend, 5 withdrew from the competition and 59 failed the test. On April 27, 2005, the 74 candidates who had passed the Knowledge test received an invitation letter for the assessment of Abilities and Skills.

[18] On July 15, 2005, the applicant notified all the candidates of the results of the competition by forwarding them the eligibility lists established and the results.

IV. The Decision under Review

[19] On August 1, 2005, after being informed of the results of the competition, Mr. East appealed to the Appeal Board on the basis that the Selection Board had violated the merit principle in excluding him from the competitions he had entered.

[20] The Appeal Board concluded that, since he was facing several difficult situations, "the appellant had to concentrate on defending himself against very serious accusations, rather than being able to concentrate on preparing for the CX-03 competition" (decision, at paragraph 44). The Selection Board had not taken account of the serious and weighty circumstances of Mr. East's situation (decision, at paragraph 54):

> [63] In my view, given the circumstances of the case, it was not reasonable of the Selection Board to accommodate the appellant without taking his needs into account. The Board was considering its own needs, rather than the appellant's, when it postponed the test to March 21, 2005, a date scheduled in advance.

[21] The merit principle had been violated, since the Selection Board had not provided reasonable accommodation:

> [64] . . . There was nothing in the record to show that a postponement of the appellant's participation in the test of longer than a week would compromise the selection process. There was nothing in the record to indicate that discussion between the Selection Board and the appellant took place in order to determine a reasonable postponement period for the test. . . .
>
> [65] If the evidence in the record is examined, nothing occurred in the competition between March 21, 2005, (second Knowledge test session) and April 27, 2005, (start date of the next stage in the assessment process). Therefore, we are speaking of a one-month period in which the appellant could have been allowed to take his written test without jeopardizing the process in any way. The Selection Board might possibly have explained to the appellant that it was unreasonable to wait until the end of the proceedings against him before he took his Knowledge test,

> given that it was impossible to predict when these proceedings would be concluded, and it could have given him more than a week's grace to sit the test.

[22] As regards the argument that a period longer than a week could have increased the risk of the test contents being leaked and compromised the merit principle, the Appeal Board found that such an information leak was no justification for the failure to accommodate the appellant:

> [69] . . . As they were all preparing for the test once they were informed that they had been screened in, I fail to see how two or three weeks' extra time for the appellant could have affected the results in any way. The reasons adduced by the Department, such as an information leak or unfair advantage to candidates already acting in the position, is no justification for the failure to accommodate the appellant. There was as much danger of an information leak of the Knowledge test questions within a week. The Department has not convinced me that the danger would increase over time. . . . Thus, the risk of unfair advantage would not arise from the extension of their acting status for two or three weeks.

[23] Finally, the Appeal Board concluded that Mr. East had not been careless about informing the CSC that he could not attend the first test session.

V. Relevant Provisions

[24] All Public Service appointments are based on the merit principle, in accordance with subsection 10(1) of the PSEA:

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit	**10.** (1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite

of candidates as the Commission considers is in the best interests of the Public Service.	des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.

[25] Section 21 of the PSEA sets out a mechanism that allows unsuccessful candidates to appeal against an appointment to an appeal board established by the Commission:

21. (1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.	**21.** (1) Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

VI. Issues

[26] The two issues raised are as follows:

(1) What is the standard of review applicable to the Appeal Board's decision?

(2) Did the Appeal Board err in concluding that the Selection Board did not comply with the merit principle because it breached its duty to reasonably accommodate Mr. East?

VII. Analysis

(1) What is the standard of review applicable to the Appeal Board's decision?

[27] In *Dunsmuir v. New Brunswick,* 2008 SCC 9, [2008] 1 S.C.R. 190, it was stated that judicial review is a two-stage process. In the first stage, the reviewing court ascertains whether the case law has already determined the degree of deference required with regard to a particular category of questions.

[28] Here, the courts have established the standard of review for questions relating to the selection process in the Public Service. In *Davies v. Canada (Attorney General)*, 2005 FCA 41, 330 N.R. 283, at paragraph 23, the Federal Court of Appeal concluded in its analysis that the applicable standard for reviewing an appeal board's decision on such questions is reasonableness. The Federal Court of Appeal has explained the reasonableness standard in some recent decisions in which it applied that standard to questions of mixed fact and law, such as whether an appeal board's conclusions were supported by the evidence (*McGregor*, above, at paragraph 14; *Canada (Attorney General) v. Clegg*, 2008 FCA 189, 168 A.C.W.S. (3d) 109, at paragraph 18).

[29] The Federal Court of Appeal has concluded that questions of law alone must be reviewed on a standard of correctness. Such questions include the decision as to which party has the burden of proof in the proceedings, the jurisdiction of an appeal board, questions of procedural fairness and natural justice and the right standard to be selected and applied by an administrative tribunal (*Clegg*, *McGregor* and *Davies*, above).

i. Did the Appeal Board err in concluding that the Selection Board did not comply with the merit principle because it breached its duty to reasonably accommodate Mr. East?

[30] The applicant argued that Mr. East's allegations concern labour relations, an external factor that does not require accommodation. According to the applicant, the duty of reasonable accommodation applies to situations involving a ground of discrimination set out in section 3 of the *Canadian Human Rights Act*, R.S., 1985, c. H-6, which is not the case here.

[31] Contrary to what the applicant argues, the duty of reasonable accommodation does not apply only to situations involving a ground of discrimination set out in section 3 of the *Canadian Human Rights Act*. A candidate may ask a selection board to take into account a disability, illness or any other factor likely to affect his or her performance on a test in a competition (*Cyr v. Canada (Attorney General)* (2000), 201 F.T.R. 191, 160 A.C.W.S. (3d) 93 (F.C.T.D.), at paragraph 18). However, the purpose of an appeal under section 21 of the PSEA is not to identify discriminatory standards and determine whether they can be justified. Thus, the question is not whether it is impossible to accommodate a candidate with a disability, but rather what method of assessment is needed to ensure a selection based on merit (*Tremblay*, above, at paragraphs 25 and 33).

[32] In *Girouard*, above, at paragraphs 10-11 and 14, Justice Barry L. Strayer held that it is not necessary to prove a disability within the meaning of the *Canadian Human Rights Act* to invoke the duty of reasonable accommodation. The Federal Court of Appeal stated that, to be accommodated, an appellant need only prove that it is actually impossible for him or her to take the test:

> [13] As a practical matter the respondent department may have to show that if it did take steps to accommodate one or more candidates, such accommodation

> was not only reasonable in relation to the nature of the needs of those candidates but also was not such as to be unfair to other candidates. Such debate as there may well be over the accommodation made, or not made, is all within the context of determining whether merit was compromised. I respectfully agree with the application judge's example of questions which should be considered in these circumstances:
>
> (1) Was the extra time allotted appropriate given the nature of the job?
>
> (2) Was the extra time fair to the other candidates?
>
> (3) Would Girouard's disability mean more time was needed by her?
>
> (4) Was extra time appropriate given the nature of the test?
>
> The appeal board should have focussed on considerations such as these.

[33] In its decision, the Appeal Board applied the tests laid down in *Girouard*. However, the Appeal Board disputed the Selection Board's reasoning when it concluded that an information leak was no justification for the failure to accommodate the appellant more generously. It is nonetheless the opinion of this Court that the Appeal Board erred in law by disregarding the fact that even the method of accommodation is subject to the merit principle. It is an appeal board's task to determine whether the accommodations provided allowed a candidate to compete on an equal footing with the other candidates (*Tremblay*, above, at paragraph 25). The duty of an appeal board is not to reassess the candidates to protect an appellant's rights but rather to conduct an inquiry to determine whether the selection has been made in a way consistent with the merit principle (*Charest*, *Blagdon* and *Girouard*, above). The selection of successful candidates therefore had to respect the merit principle, regardless of individual results (*McGregor*, above).

[34] In *Charest*, the Federal Court of Appeal concluded that a leak of information about interview questions could interfere with the merit principle. In the instant case, the Selection Board's statement that there was a real risk of an information leak that could interfere with the merit principle should have been taken seriously. Mr. East had requested a theoretical period of time, that is, until his problems were over. The Appeal Board suggested that, between March 21, 2005, the date of the second Knowledge test, and April 27, 2005, the start of the next stage of the assessment process, there was a period of nearly a month in which "the appellant could have been allowed to take his written test". The Appeal Board concluded that "the risk of unfair advantage would not arise from the extension of their acting status for two or three weeks" (decision, at paragraphs 65 and 69).

[35] It was impossible for the Appeal Board to determine the right period to make the risk of a leak acceptable. It is not necessary to have objective evidence demonstrating that the accommodations recommended by the Appeal Board would not have negatively affected the other candidates in the competition. As the selection process did not proceed in this manner, it is impossible to say with certainty what effect the use of an alternative assessment method would have had on the other candidates. Requiring the CSC to produce such evidence would place it in an untenable position: "In order to justify the decision to depart from the recommendations of an outside expert, a government department only needs to demonstrate that there were legitimate concerns that a problem would have arisen if the process had moved forward" (*Tremblay*, above, at paragraph 35). Accordingly, the determination that there would be less risk of a leak after a week but more after two or three weeks seems to fall within a selection's board discretion and expertise.

The Appeal Board erred in substituting its opinion for what seems to have been a reasonable precaution to protect the merit principle in the selection process.

[36] Moreover, the extra time allotted was appropriate in light of Mr. East's carelessness. The Appeal Board made a patently unreasonable finding of fact that was not supported by the evidence when it stated that the delay in notifying the Selection Board was reasonable.

[37] The Selection Board received Mr. East's first letter on the day of the test, March 14, 2005. The Court is of the opinion that it was already too late for Mr. East to request accommodation. He had been aware of the test date since February 17, 2005, that is, nearly a month before the test. In February, he had been notified that the criminal proceedings against him would be dropped. He also knew that his problems, namely the disciplinary action and grievances, still remained, but the evidence shows that his situation did not change between the date of the invitation letter and the date of his first letter. In short, there is no evidence explaining why Mr. East did not ask the Selection Board to accommodate him prior to the test date.

[38] The Appeal Board found that the delay was plausible given the intervening weekend. However, it was patently unreasonable to find that the intervening weekend could justify the delay in notifying the Selection Board, especially in this case, since the invitation letter clearly stated that candidates had to call the CSC if there was a problem. The conclusion that Mr. East "preferred to make a written, rather than an oral, request, so as to have tangible proof of his request" hardly explains why he failed to call the Selection Board the same day he wrote his letter.

[39] On March 14, 2005, after receiving the first letter, the Selection Board informed Mr. East by telephone that he could attend a second test to be held a week later. The second attempt to postpone the test involved the same problems; the second letter was received two days after the second Knowledge test session. Mr. East sent the second letter on the day of the test, March 21, 2005, which was too late for the Selection Board to take account of his needs. Finally, contrary to what the Appeal Board claimed, the applicant was not obliged to prove the appellant's bad faith.

VIII. Conclusion

[40] The Appeal Board erred in deciding that the Selection Board did not comply with the merit principle because it breached the duty to reasonably accommodate Mr. East. It was open to the Selection Board to find that delaying the test for Mr. East by more than a week created a risk that information about the test questions would be leaked and might therefore interfere with the merit principle. The Appeal Board's findings were not reasonably supported by the evidence.

[41] In addition, the Appeal Board made a patently unreasonable finding of fact when it stated that Mr. East's delay in notifying the Selection Board was justified. Although Mr. East may have had good reasons for requesting accommodation, he did not demonstrate that he had good reasons for his delay in notifying the Selection Board. Without a convincing reason, the Selection Board had no duty to accommodate in response to a late request.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be allowed;
2. The matter be referred back to a differently constituted Appeal Board for reconsideration based on what was before the Selection Board;
3. With costs.

"Michel M.J. Shore"
Judge

Certified true translation
Brian McCordick, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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