

Date: 20090304

Docket: T-871-08

Citation: 2009 FC 224

Ottawa, Ontario, March 4, 2009

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

KALPANA GUPTA

Applicant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review of a decision of the Public Service Commission of Canada (Commission) is allowed because the Commission was not entitled to confirm the appointment of a candidate for a position within the public service when such confirmation contradicted the findings of an appeal board.

Background Facts

[2] The applicant in this proceeding, Ms. Gupta, was an unsuccessful candidate in a closed competition for PM-02 Compliance Officer positions with the Department of Indian Affairs and Northern Development in Winnipeg, Manitoba. There were nine candidates in the competition, and six were found to be qualified. Their names were put on an eligibility list.

[3] As a result of her lack of success, Ms. Gupta appealed against the selections made in that competition pursuant to section 21 of the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 (Act)¹.

[4] In accordance with section 21 of the Act, Ms. Gupta's appeal was referred to a board established to conduct an inquiry (Appeal Board). Section 21 of the Act is set out in the appendix to these reasons.

[5] Only one ground of appeal advanced by Ms. Gupta is pertinent to this application. Candidates for the PM-02 positions were requested to take a simulation test referred to as the "PSC 425." This was a test used to assess all of the qualifications prescribed in the Abilities factor on the Statement of Qualifications. Ms. Gupta alleged that some candidates had an unfair advantage because they had taken a similar simulation test, the PSC 428, approximately three months earlier.

[6] Ms. Gupta's appeal was allowed by the Appeal Board because it was not satisfied that the candidates who had previously taken the PSC 428 did not have an unfair advantage.

[7] In the course of the hearing before it, the Appeal Board sought and received advice as to the scores of all nine individuals who took the PSC 425, and advice identifying which of the candidates had previously taken the PSC 428. See: page 23 of the reasons of the Appeal Board.

[8] The Appeal Board "upheld the allegation that the candidates who had taken the PSC 428 had had an unfair advantage over those who had not, when they all took the PSC 425 later." On the basis of the information it received during the hearing, the Appeal Board allowed Ms. Gupta's appeal against only five of the successful candidates, those who were ranked in the second through sixth positions. The first-ranked candidate, against whom the appeal was not allowed, was found by the Appeal Board not to have taken the PSC 428.

[9] I pause here to note that this ranking appears to be somewhat problematic in light of the fact that only four of the nine candidates who took the PSC 425 were said to have taken the PSC 428 first, and yet the appeal was allowed in respect of five candidates.

[10] While an application for judicial review of that decision was commenced by Her Majesty the Queen, the judicial review was ultimately discontinued. Thus, the decision of the Appeal Board was neither stayed nor set aside, and remained in full force and effect.

[11] Subsequently, the Commission was notified of the decision of the Appeal Board.

The Decision of the Commission

[12] The Commission first determined, pursuant to subsection 21(3) of the Act, that corrective measures could not be taken to remedy the defect identified by the Appeal Board. The Commission then considered its jurisdiction under subsection 21(2) of the Act. Its conclusions were that:

1. The Commission took no action to revoke the appointment of the first-ranked candidate because the Appeal Board had dismissed the appeal with respect to this person.
2. The Commission revoked the appointment of the second-ranked candidate because the Commission had "confirmed" that he had taken the PSC 428 before taking the PSC 425.
3. The Commission confirmed the appointment of the third-ranked candidate because the Commission "confirmed" that she had not taken the PSC 428 before taking the PSC 425.
4. The Commission confirmed that the fourth-ranked candidate had not taken the PSC 428 before taking the PSC 425. No action was taken, however, because "based on the Appeal Board decision [...] the identified defect does not apply to her situation." Moreover, this person had been appointed without competition to a PM-02 position in accordance with an aboriginal employment program.
5. No action was taken by the Commission in respect of the fifth and sixth-ranked candidates because they were not offered positions, and the eligibility list had expired.

Standard of Review

[13] Counsel for the respondent submits, and I agree, that the Commission's decision is reviewable on the standard of correctness.

[14] The only question before the Court is whether the Commission could confirm or revoke an appointment within the Public Service in a manner that contradicted the findings of an appeal board. As the Supreme Court of Canada held in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraphs 59-61, questions of the following nature are reviewable on the standard of correctness:

- determinations of true questions of jurisdiction made by administrative bodies;
- questions of general law that are of central importance to the legal system as a whole and are outside the adjudicator's specialized area of expertise; and,
- questions regarding the jurisdictional lines between two or more competing specialized tribunals.

[15] This conclusion is also consistent with: the absence, in this case, of any privative provision protecting the decision of the Commission; the fact that in this case the Commission's purpose was to apply the decision of the Appeal Board; the nature of the question (one of law); and, the fact that the Commission does not have expertise superior to that of the Court when considering the authority conferred upon it by the Act.

Application of the Standard of Review to the Decision

[16] For ease of reference, I set out paragraph 21(2)(a) of the Act:

21(2) Subject to subsection (3), the Commission, on being notified of the decision of a board established under subsection (1) or (1.1), shall, in accordance with the decision,	21(2) Sous réserve du paragraphe (3), la Commission, après avoir reçu avis de la décision du comité visé aux paragraphes (1) ou (1.1), doit en fonction de celle-ci :
(a) if the appointment has been made, confirm or revoke the appointment; or	a) si la nomination a eu lieu, la confirmer ou la révoquer;

[17] The provision is explicit that the Commission "shall" confirm or revoke appointments "in accordance with the decision" of the Appeal Board.

[18] I have sympathy for the position of the Commission when faced with what appears to be a problematic decision of the Appeal Board. However, the proper remedy was to challenge the decision of the Appeal Board. The Commission had no jurisdiction to receive evidence and make findings of fact that were contrary to those made by the Appeal Board. The Appeal Board had found that the candidates which were ranked second through sixth had previously taken the PSC 428. The Commission could not reach a contrary conclusion with respect to the third and fourth ranked candidates as it did.

Conclusion

[19] For these reasons, the application for judicial review will be allowed on the terms set out in the judgment that follows these reasons.

[20] I see no reason why costs should not follow the event. The applicant is self-represented.

She and counsel for the respondent have agreed that an award of costs in the amount of \$250.00, all-inclusive, would be appropriate.

1. While the Act has since been repealed, the parties agree that the provisions of the Act continue to apply to this application. I agree. See: the transitional provisions of the current *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 or Bill C-25, *An Act to modernize employment and labour relations in the public service and to amend the Financial Administration Act and the Canadian Centre for Management Development Act and to make consequential amendments to other Acts*, 2nd Sess., 37th Parl., 2003, cl. 72 (assented to 7 November 2003).

JUDGMENT

THEREFORE, THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the Public Service Commission of Canada dated May 1, 2008 is hereby set aside.
2. This matter is remitted for redetermination by the Public Service Commission of Canada in accordance with the reasons of the Court.
3. The respondent shall pay costs to the applicant, fixed in the amount of \$250.00, all-inclusive.

“Eleanor R. Dawson”

Judge

APPENDIX

Section 21 of the former *Public Service Employment Act* reads as follows:

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.

(1.1) Where a person is appointed or about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service by a process of personnel selection, other than a competition, any person who, at the time of the selection, meets the criteria established pursuant to subsection 13(1) for the process 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.

(1.1) Dans le cas d'une nomination, effective ou imminente, consécutive à une sélection interne effectuée autrement que par concours, toute personne qui satisfait aux critères fixés en vertu du paragraphe 13(1) 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.

(2) Subject to subsection (3), the Commission, on being notified of the decision of a board established under subsection (1) or (1.1), shall, in accordance with the decision, (a) if the appointment has been made, confirm or revoke the appointment; or (b) if the appointment has not been made, make or not make the appointment.

(2.1) Where the appointment of a person is revoked pursuant to subsection (2), the Commission may appoint that person to a position within the Public Service that in the opinion of the Commission is commensurate with the qualifications of that person.

(3) Where a board established under subsection (1) or (1.1) determines that there was a defect in the process for the selection of a person for appointment under this Act, the Commission may take such measures as it considers necessary to remedy the defect.

(4) Where a person is appointed or is about to be appointed under this Act as a result of measures taken under subsection (3), an appeal may be taken under subsection (1) or (1.1) against that appointment only on the ground that the measures so taken did not result in a selection for appointment

(2) Sous réserve du paragraphe (3), la Commission, après avoir reçu avis de la décision du comité visé aux paragraphes (1) ou (1.1), doit en fonction de celle-ci :

a) si la nomination a eu lieu, la confirmer ou la révoquer;
b) si la nomination n'a pas eu lieu, y procéder ou non.

(2.1) En cas de révocation de la nomination, la Commission peut nommer la personne visée à un poste qu'elle juge en rapport avec ses qualifications.

(3) La Commission peut prendre toute mesure qu'elle juge indiquée pour remédier à toute irrégularité signalée par le comité relativement à la procédure de sélection.

(4) Une nomination, effective ou imminente, consécutive à une mesure visée au paragraphe (3) ne peut faire l'objet d'un appel conformément aux paragraphes (1) ou (1.1) qu'au motif que la mesure prise est

according to merit.

(5) Section 10 and the rights of appeal provided by this section do not apply to appointments made under subsection 29(1.1) or (3), 30(1) or (2) or 39(3) of this Act or subsection 11(2.01) of the Financial Administration Act or any regulations made under paragraph 35(2)(a) of this Act.

contraire au principe de la sélection au mérite.

(5) L'article 10 et le droit d'appel prévu au présent article ne s'appliquent pas dans le cas où la nomination est faite en vertu des paragraphes 29(1.1) ou (3), 30(1) ou (2) ou 39(3) ou des règlements d'application de l'alinéa 35(2)a), ou en vertu du paragraphe 11(2.01) de la Loi sur la gestion des finances publiques.

FEDERAL COURT
SOLICITORS OF RECORD

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