Federal Court  Cour fédérale

**Date: 20090721**

**Docket: T-1626-07**

**Citation: 2009 FC 740**

**Ottawa, Ontario, July 21, 2009**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**ROBERT KANE**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA and PUBLIC SERVICE COMMISSION**

**Respondents**

## REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Mr. Robert Kane (the "Applicant") seeks judicial review pursuant to Section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, of the August 3, 2007 decision made by the Public Service Staffing Tribunal (the "Tribunal"). In that decision, the Tribunal dismissed the complaint brought by the Applicant pursuant to paragraph 77(1)(b) of the *Public Service Employment Act*, (the "PSEA" or the "Act") which is Part 3 of the *Public Service Modernization Act*, S.C. 2003, c. 22. In his

complaint, the Applicant alleged abuse of authority by the Deputy Head of Service Canada on two grounds, first in declaring his substantive position a new position rather than a reclassified position and second, for choosing an internal advertised process rather than an internal non-advertised process to staff the new position.

Background

[2] The Applicant was employed with the Department of Human Resources and Social Development – Service Canada in the Newfoundland office. In May 2005, a new interim organizational structure was announced for the Newfoundland and Labrador Region of Service Canada, which in part led to the establishment of the In-Person Community Services ("IPCS") business line. The Service Delivery Manager IPCS position was created on August 30, 2005 and was listed at the level of PM-05. On September 1, 2005, the Applicant was deployed into this position from his previous PM-05 position.

[3] By a memorandum dated October 6, 2005, all staff in the Region were informed that following the interim reorganization in May, a review would be conducted to determine the appropriate level of resources required for the Regional Support Unit for the IPCS Directorate. Following this review, on February 14, 2006, the Regional Management Board approved the establishment of the IPCS Support Unit. This Unit was to consist of a Regional Manager at the PM-06 level and six staff, including two PM-05s, two PM-04s, one AS-03 and one CR-04.

[4] The Regional Management Board proceeded with an internal advertised appointment process to fill the PM-05 and PM-06 positions. The Applicant applied for the PM-06 management position in February 2006 and was assessed for that position by means of a Public Service Commission ("PSC") standardized test.

[5] By memorandum dated March 1, 2006, all staff in the Region were advised of the reorganization of Regional Headquarters. Specifically, the memorandum stated that the Regional Manager IPCS position was sent to classification for review. If classified at the PM-06 level, it would be filled from within the pool of candidates resulting from the PM advertised process that was underway. In the meantime, the memorandum said that the Applicant would continue as Manager, IPCS, pending the outcome of that review.

[6] This Regional Manager IPCS position was classified at the PM-06 level effective June 15, 2006. The Applicant received acting pay retroactive to February 14, 2006, the date that creation of the position was approved. By letter dated May 1, 2006, the Applicant was informed that he had not achieved the necessary pass mark on the standardized test and would not be considered further in the process. By email dated August 9, 2006, he was informed that upon completion of his acting assignment, he would continue with the IPCS at the PM-05 level and be deployed into one of the PM-05 positions created as a result of the reorganization, or he could be placed on a priority list for another PM-05 vacancy.

[7] On August 31, 2006, the Applicant was informed that his substantive position had been declared redundant and he was offered a position as Senior Project Manager within the IPCS Directorate. As well, he was asked to remain as the acting Regional Manager IPCS until the end of September or until an appointment was made, whichever occurred first. The Applicant agreed to continue in an acting position.

[8] On September 11, 2006, the Applicant filed a complaint with the Tribunal, alleging abuse of authority, contrary to the PSEA.

[9] The Tribunal identified two issues for determination. The first issue was whether there had been an abuse of authority in the choice of an internal advertised appointment process to staff the Regional Manager IPCS position. The second issue was whether there had been an abuse of authority in the decision to not appoint the Applicant to the position.

[10] With respect to the first issue, the Tribunal found that the Applicant had failed to meet the burden of showing that the Deputy Head had abused her authority in deciding to advertise the position. On the second issue, the Tribunal concluded that the Applicant had not shown an abuse of authority on the part of the Deputy Head in her decision to not appoint the Applicant.

Issues

[11] Two issues arise for determination in this application, that is the appropriate standard of review and whether the Tribunal erred in finding that the distinction between a new position or a

reclassified position was not relevant to finding whether there was an abuse of authority in the choice between an internal advertised and an internal non-advertised appointment process.

Discussion and Disposition

i) Standard of Review

[12] Both the Applicant and the Respondents argued that the standard of review is to be identified upon a pragmatic and functional analysis, having regard to four factors; that is the presence of a privative clause, the expertise of the decision-maker, the purpose of the legislation and the nature of the issue.

[13] The pragmatic and functional analysis is to be approached in the context of the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[14] The Act contains a privative clause in section 102 which provides as follows:

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| Decisions final<br><br>102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court. | Caractère définitif de la décision<br><br>102. (1) La décision du Tribunal est définitive et n'est pas susceptible d'examen ou de révision devant un autre tribunal. |
| No review by certiorari, etc.<br><br>(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, | Interdiction de recours extraordinaires<br><br>(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par |

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| prohibit or restrain the Tribunal in relation to a complaint. | voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action du Tribunal en ce qui touche une plainte. |

[15] The Tribunal is a specialized body that exists for the purpose of adjudicating complaints made under section 77 in accordance with its statutory mandate as set out in subsection 88(2).

[16] The broad purpose of the Act is to govern employment in the federal public service. The purpose of section 77 is to allow for complaints, on specified grounds, about the internal appointment process to employment in the public service.

[17] The nature of the question, that is whether an abuse of authority occurred, is essentially a factual question that requires a weighing of the evidence presented.

[18] In *Dunsmuir*, the Supreme Court of Canada said that decisions of administrative decision-makers are to be reviewed upon either the standard of correctness or of reasonableness. Questions of fact will generally attract review on the standard of reasonableness, in other words, on a standard of deference.

[19] I am satisfied that upon balancing the four elements of the pragmatic and functional analysis here, the appropriate standard is reasonableness.

ii) Did the Tribunal Err?

[20] In his submissions before the Tribunal, the Applicant focused on the circumstances of his deployment in the position of Regional Manager. He said that he was deployed into this position which was characterized in an email dated August 9, 2006 as "not clearly defined" and requiring development. This email came from Ms. Bonnie Pope, Director, IPCS and the Applicant's supervisor. Ms. Pope went on to provide the Applicant with an explanation for the decision to use an advertised process in filling the position, as follows:

> …There is no doubt that the work you did during the past several months was significant and contributed greatly to the organizational structure that was recommended and approved at the February 14 RMB meeting. Having said that, approval to staff the managers role at the PM 6 position, required the establishment of a new position at that level. Since it was a new position at a higher level, it was deemed fair and appropriate to provide all managers with the opportunity to compete versus, making an appointment via non advertised process [sic]. (p. 181 App. A.R.)

[21] Before the Tribunal, the Applicant argued that in determining that the position was a new one rather than a reclassified position, the employer acted unreasonably and ignored the Public Service Human Resources Management Agency of Canada ("PSHRMAC") Guidelines with respect to reclassification. Those Guidelines refer to four circumstances under which a new position must be established, as follows:

> Establishment of a New Position
>
> A new position must be established in lieu of reclassifying an existing position in the following circumstances:

- A significant change in work results in an increase of more than one level in the current occupational group.

- The position has been reclassified within the last two years. Most work does not evolve at such a pace as to justify an additional change in level within this timeline **unless** the position is part of a departmental Apprenticeship or Professional Training Program (APTP) established in accordance with the Public Service Commission *Guide to Staffing Delegation, Appendix 9*.

- There are significant changes in the work that break the continuity of its evolution. This may include such changes as a new hierarchical reporting relationship, increased span of control, the addition of new functions, or increased responsibility for human resources.

- There is more than one position in the organization performing similar work, and not all are being reclassified. It is important to be transparent and fair. Rather than assigning the new work to one position in preference to another, a new position should be created so that consideration may be given to the career advancement of all the employees.

[22] The Applicant made his complaint pursuant to paragraph 77(1)(b) of the Act which provides as follows:

| Grounds of complaint | Motifs des plaintes |
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| 77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for | 77. (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle elle n'a pas été |

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| appointment by reason of | nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes : |
| … | … |
| b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or | b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas; |
| … | … |

[23] Paragraph 77(1)(b) does not refer to any other provision of the Act and "abuse of authority" is not defined in the Act.

[24] The Tribunal referred to the decision in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 and said that the burden lay on the Applicant to show that the choice of an advertised process for the PM-06 position, whether it was a new position or a reclassified position, was an abuse of authority. The Tribunal noted that section 33 of the Act does not limit the choice of an advertised or non-advertised process in any way. There is no reference to the nature of the position being staffed.

[25] The Tribunal rejected the Applicant's submissions, finding that the distinction between a new or reclassified position was not relevant in assessing whether the choice between an advertised or non-advertised appointment process had involved an abuse of authority.

[26] The Tribunal, relying on the decision in *Robbins v. Deputy Head of Service Canada et al.*, [2006] PSST 0017, concluded that the choice of an advertised or non-advertised process does not *per se* constitute an abuse of authority. Rather, an applicant must establish that the decision to make that choice was an abuse of authority.

[27] The Tribunal noted that the decision to establish the Regional Manager position was made on February 14, 2006 and the Regional Management Board advised employees on March 1 that "if the position were classified at the PM-06 level, it would be staffed from the pool of candidates resulting from the PM-06 advertised process" that was then in progress.

[28] The Tribunal went on to say the following in paragraph 63:

> [63] The Job Opportunity Advertisement for this selection process was posted in February, 2006 to establish a pool of candidates from which the respondent could appoint. The complainant submitted his cover letter and résumé on February 12, 2006. The decision to appoint from a pool of candidates was made prior to the results of the classification process and prior to the complainant's standardized test results. These actions do not demonstrate any abuse of authority, to the contrary.

[29] The Tribunal focused on the timing of the decision to select the successful candidate for the PM-06 position from a pool and found that this decision was made before the classification process had been finalized. At this time, the Applicant had not received the results of the standardized test. The Tribunal concluded that the action of the employer to establish a pool of candidates did not constitute "any abuse of authority, to the contrary".

[30] The Tribunal also addressed the issue of whether the decision not to appoint the Applicant to the Regional Manager PM-06 position involved an abuse of authority. It concluded that it did not, relying on the fact that the Applicant had failed the standardized test chosen by the Respondents. It found that the failure of the Applicant to satisfy the "merit criteria based on the assessment method" that had been chosen led to the result of not being considered for the appointment, not the choice of the appointment process itself.

[31] As noted above, "abuse of authority" is not defined in the Act but it is referred to in subsection 2(4) as follows:

| References to abuse of authority | Abus de pouvoir |
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| (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism. | (4) Il est entendu que, pour l'application de la présente loi, on entend notamment par « abus de pouvoir » la mauvaise foi et le favoritisme personnel. |

[32] The subject is discussed by David Phillip Jones & Ann S. de Villars in *Principles of Administrative Law*, 4th ed. (Scarborough: Thomson Carswell, 2004). The learned authors discuss abuse of authority at p. 154 as follows:

> Nevertheless, unlimited discretion cannot exist. The courts have continuously asserted their right to review a delegate's exercise of discretion for a wide range of abuses. It is possible to identify at least five generic types of abuses, which can be described as follows. The first category occurs when a delegate exercises his discretion with an improper intention in mind, which subsumes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations. The second type of abuse arises when the delegate acts on inadequate material, including where there is no evidence or without considering

> relevant matters. Thirdly, the courts sometimes hold that an abuse of discretion has been committed where there is an improper result, including unreasonable, discriminatory or retroactive administrative actions. A fourth type of abuse arises when the delegate exercises his discretion on an erroneous view of the law. Finally, it is an abuse for a delegate to refuse to exercise his discretion by adopting a policy which fetters his ability to consider individual cases with an open mind.

[33] In arguing that the Tribunal erred in law by failing to inquire if the PM-06 position was a new or reclassified position, the Applicant is relying on an alleged failure of the Tribunal to follow prior jurisprudence from the Supreme Court of Canada and the Federal Court of Appeal, that is he is not alleging that the Tribunal erred in interpreting the Act or acted without jurisdiction. The alleged error of law relates to the way the Tribunal purportedly ignored relevant jurisprudence including *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489 and *Doré v. Canada*, [1987] 2 S.C.R. 503.

[34] The Applicant submits that the decision in *Canada (Attorney General) v. Laidlaw et al.* (1998), 237 N.R. 1 restrains an employer's discretion when it excludes an applicant from an appointment process upon the erroneous presumption that the position is new. In particular, the Applicant relies on para. 15 where the Federal Court of Appeal said the following:

> [15] In the case at bar, the evidence is to the effect that the Commission, assuming it had the right to choose between the subsection 10(1) or the subsection 10(2) process, had decided to proceed under subsection 10(2) whenever the jobs reclassified were not new jobs. The appellants did not benefit from that process solely because, in the view of Revenue Canada, their jobs were new jobs. Once it is determined by the appeal board " and that finding was confirmed by the Motions Judge " that the jobs were not new jobs, the premise under which the Commission excluded the appellants from that process proved to be wrong and their exclusion could no

> longer be justified for it was based on an erroneous consideration. Furthermore, the Commission should not be allowed, once it has chosen to proceed under subrule 4(2), to treat differently employees whose situation is similar. In these circumstances, there is no need to refer the matter back to the appeal board for it has already reached the right conclusion and could do nothing more than reach the same conclusion but on other grounds.

[35] It must be said that the current Act deals with the merit principle in a different way than did the former *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the "Former Act"). The Former Act was under consideration in *Laidlaw*. Subsections 10(1) and 10(2) of the Former Act provided as follows:

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| Appointments to be based on merit | Nominations au mérite |
| 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 of candidates as the Commission considers is in the best interests of the Public Service. | 10.(1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sure 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 des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique. |
| (2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as | (2) Pour l'application du paragraphe (1), la sélection au mérite peut, dans les circonstances déterminées par règlement de la Commission, être fondée sur des normes de compétence fixées par celle-ci plutôt que sur un examen comparatif des candidats. |

the Commission may establish, rather than as measured against the competence of other persons.

[36] In the current statutory regime the merit principle is addressed in section 30, as follows:

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| Appointment on basis of merit | Principes |
| 30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence. | 30. (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique. |
| Meaning of merit | Définition du mérite |
| (2) An appointment is made on the basis of merit when | (2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies : |
| (a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and | a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir; |
| (b) the Commission has regard to | b) la Commission prend en compte : |
| (i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future, | (i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir, |
| (ii) any current or future operational requirements of the organization that may be identified by the deputy head, and | (ii) toute exigence |

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| (iii) any current or future needs of the organization that may be identified by the deputy head. | opérationnelle actuelle ou future de l'administration précisée par l'administrateur général, |
| Needs of public service | |
| (3) The current and future needs of the organization referred to in subparagraph (2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization. | (iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général. |
| | Besoins |
| | (3) Les besoins actuels et futurs de l'administration visés au sous-alinéa (2)b)(iii) peuvent comprendre les besoins actuels et futurs de la fonction publique précisés par l'employeur et que l'administrateur général considère comme pertinents pour l'administration. |
| Interpretation | |
| (4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit. | Précision |
| | (4) La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite. |

[37] The Applicant argues that the Tribunal erred in dismissing the key element of his complaint as irrelevant. He submits that the core of his complaint was the Respondents' decision to treat the Regional Manager PM-06 position as a new, rather than a reclassified position. He notes that the Respondents did not contradict his assertion that there was a practice in the Newfoundland and Labrador region for an appointment of incumbents in reclassified positions to their former positions.

[38] In brief, he submits that if the Respondents had properly recognized the Regional Manager PM-06 position as a reclassified position, then, in light of the existing practice and in accordance with the PSHRMAC Guidelines, he would have been appointed to the position. He also argues that, from his perspective, the fact that he had failed the standardized test is irrelevant since the decision to rely on the standardized test was based on the assumption that the position was new and it cannot be assumed that the test would have been required if the staffing process had not been advertised. As well, he argues that he was qualified for the position because he had satisfactorily performed his duties during this acting tenure.

[39] I agree with the submissions of the Respondents that the current statutory regime marks a departure from the Former Act. The principle of merit remains but it is different from that engaged under the former legislation. The concepts of relative merit and individual merit, pursuant to subsections 10(1) and 10(2) respectively of the Former Act are no longer engaged. According to the material filed by the Respondents in their Application Record, a Parliamentary Committee rejected the proposal that these concepts be reintroduced in the present statutory scheme governing employment in the public service.

[40] The prior jurisprudence is of little, if any, relevance to the issues arising from the present application. The question is not whether the Regional Manager PM-06 position was properly characterized as new rather than reclassified but whether the employer abused its authority in determining that the position would be staffed by an advertised process following the creation of a

pool of candidates. Participation in the pool was to be determined upon the basis of success in completing a standardized test. This method of proceeding is authorized by the Act.

[41] I agree with the submissions of the Respondents that the Applicant has not established an evidentiary foundation for his allegations about a “practice” in the Newfoundland and Labrador region concerning the appointment of an incumbent to a reclassified position.

[42] I agree with the submissions of the Respondents, as well, concerning the relevance of the PSHRMAC Guidelines. These Guidelines appear to be a guide to the factors to be considered when a position is to be reclassified. I do not accept that they impose a limit on the manner in which positions are to be staffed, that is, the choice of a staffing process.

[43] The Tribunal characterized the issue before it as whether an abuse of authority had occurred in the choice of an advertised process over a non-advertised process having regard to the timing of that decision. It found that this decision had been made before the results of the classification process were known and prior to the Applicant’s participation in the standardized test.

[44] Having regard to the evidence filed and the statutory framework, I am not persuaded that the decision was unreasonable. In the result, the Applicant’s application for judicial review is dismissed with costs.

## JUDGMENT

**THIS COURT ORDERS AND ADJUDGES that** the application for judicial review is dismissed with costs.

"E. Heneghan"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1626-07 |
| **STYLE OF CAUSE:** | ROBERT KANE v. ATTORNEY GENERAL OF CANADA and PUBLIC SERVICE COMMISSION |
| **PLACE OF HEARING:** | Ottawa, Ontario |
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| **DATED:** | July 21, 2009 |

**APPEARANCES:**

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| Stephan Bertrand | FOR THE RESPONDENTS |

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