

Federal Court



Cour fédérale

Date: 20110819

Dockets: T-493-10

T-494-10

T-503-10

Citation: 2011 FC 1010

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 19, 2011

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

DUNG TRAN

Applicant

and

CANADA REVENUE AGENCY

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Each of the three files before the Court is an application for judicial review by the applicant, Dung Tran, against similar decisions by the chairs of selection boards of the Canada Revenue Agency (the Agency), rejecting, on the same grounds, her applications for various positions. The grounds were that she did not have [TRANSLATION] “recent and significant

experience in auditing at the AU-04 level or above, that is, experience normally acquired over the course of 18 months within the last 5 years”.

II. Overview

[2] The applicant, Dung Tran, has been employed by the Agency since 1996; she was hired by the Department of National Revenue (the Department) at its Tax Services Office (TSO) in Québec, the location of her substantive position. Since 2006, she has been working at the Agency’s National Headquarters in an acting AU-04 position as senior planning and analysis officer. In January 2010, in her substantive position in Québec, Ms. Tran had been at the AU-03 level – Tax Auditing since January 22, 2007.

[3] Before joining the TSO in Québec, she had worked for two years as a tax professional for an accounting firm, which enabled her to become a member of the Quebec provincial order of chartered accountants.

[4] The Agency was created by an Act of Parliament in 1999. It has taken over the Department’s activities. According to section 53 of the *Canada Customs and Revenue Agency Act*, now the *Canada Revenue Agency Act* (the Act), the Agency has the exclusive right and authority to appoint any employees it considers necessary for the proper conduct of its business. Section 54 of the Act provides that the Agency must develop a Staffing Program (the Program) governing, among other things, the appointment of, and recourses for, employees.

[5] The Agency’s Staffing Program states that a selection process is one of the primary

mechanisms the Agency uses to promote and appoint its employees. This selection process is the method by which applicants can express their interest in a vacant position and then be assessed.

If they qualify in the inventory, they may then be considered for, and appointed to, this position.

[6] On January 10, 2010, as part of the selection process, Ms. Tran applied for three positions within the Agency at TSOs in the province of Quebec at the AU-04 level, namely:

First position:	Senior International Auditor
Second position:	Senior Tax Avoidance Auditor
Third position:	Senior Large File Auditor.

[7] In accordance with the Directive on Recourse for Assessment and Staffing (the Directive), a selection board was constituted for each selection process.

[8] The Directive provides that selection processes consist of three main steps:

- (1) Pre-requisite stage: assessment of applications against the pre-requisites stated on the selection process poster;
- (2) Assessment stage: assessment of applications against the qualifications and skills required by the selection process
- (3) Placement stage: placement of one or more qualified persons on the basis of one or several placement criteria stated on the selection process poster.

[9] At the pre-requisite stage, a board may preselect or screen out an applicant by taking into account the pre-requisites required by the selection process, including the following:

- (1) application deadline
- (2) area of selection

- (3) language requirements
- (4) studies/level of education
- (5) professional certification
- (6) experience sought

[10] On January 25, 26 and 28, 2010, the selection boards decided, at the qualification stage (pre-requisite review), that Ms. Tran did not have the required experience, thus screening her out as a candidate for the three positions for which she applied. On February 19, 2010, in accordance with the Directive on Recourse, Ms. Tran filed a request with each selection board chair for reconsideration (individual feedback on the board's decision). In early March 2010, each chair refused Ms. Tran's application for reconsideration.

[11] Following the refusals to reconsider, the applicant filed the following three applications for judicial review against these decisions:

- (1) T-493-10: the decision of Chair Michel Adam, dated March 1, 2010, regarding the position of Senior International Auditor,
- (2) T-494-10: the decision of Chair Mario Trembay, dated March 1, 2010, regarding the position of Senior Tax Avoidance Auditor, and
- (3) T-503-10: the decision of Chair Trassi, dated March 3, 2010, regarding the position of Senior Auditor, Large Files.

[12] To better understand the impugned decisions, it is necessary to elaborate on the experience required and the description of each position.

[13] This information appears in the relevant Notices of Job Opportunity for each position.

(1) T-493-10 – Auditing – International Tax

[14] The job description is as follows:

[TRANSLATION]

This position involves conducting international audits of taxpayers assigned the highest international taxation complexity ratings in respect of all international commercial and financial transactions, while ascertaining compliance with Canadian tax law.

[Emphasis added]

[15] The experience required is the following:

[TRANSLATION]

Recent and significant experience in international auditing in carrying out tasks assigned to a position at the AU-03 level (equivalent) or above.

Recent and significant experience is defined as experience normally acquired over the course of 18 months within the last 5 years.

To demonstrate your significant experience in international auditing, you must submit a two-page document showing clearly your contributions and achievements and return it by e-mail to Michel Adam by no later than the closing date for this notice.

For each of your contributions and/or achievements, please provide the following information:

- Length of time (start and end dates)
- Estimated number of hours
- Description of work done
- Tax topics addressed, sections covered, etc.
- Person(s) able to confirm the information provided (name and telephone number)

For greater specificity, experience in international taxation may have been acquired outside the international taxation field.

To assess the 18-month criterion, members of the board will generally use a basis of 1,800 consecutive hours devoted to the activities.

The purpose of this document is to satisfy the pre-requisite for experience.

[Emphasis added]

(2) T-494-10 – Auditing – Tax Evasion

[16] The position is described as follows:

[TRANSLATION]

This position involves conducting audits at the highest level of complexity to uncover aggressive tax planning schemes and thus ensure compliance with the statutes enforced by the Canada Revenue Agency for the entire Canadian population.

[Emphasis added]

[17] The requirements for experience are identical to those in the T-493-10 – Auditing – International Tax file, including the criterion stating that [TRANSLATION] “[f]or greater specificity, experience in aggressive tax planning may have been acquired outside the aggressive tax planning field” and the requirement to submit a two-page document showing the experience acquired.

(3) T-503-10 – Auditing – Large Files

[18] The position and tasks are the following:

[TRANSLATION]

This position involves conducting complete analyses and reviews of very complex and delicate files of businesses that use very complicated, industry-specific automated accounting systems.

[19] The experience required is described as follows:

[TRANSLATION]

The experience requirements outlined in this job notice relate to all jobs advertised in this job notice unless specifically indicated otherwise.

Recent and significant experience in the Audit Division in carrying out tasks assigned to a position at the AU-03 level (equivalent) or above.

Recent and significant experience is defined as experience normally acquired over the course of 18 months within the last 5 years.

III. The impugned decisions

(1) T-493-10

[20] At page 46 of the Court record is a selection sheet for Ms. Tran, dated January 26, 2010, on which it is stated that Ms. Tran does not meet the experience requirement; the comment is [TRANSLATION] “experience in international auditing not demonstrated”. In his affidavit, Mr. Adam states that, on January 26, 2010, the board decided unanimously that Ms. Tran did not have the experience required. Not until February 12, 2010, was she informed of that decision, in the following words:

[TRANSLATION]

As stated in the notice of job opportunity, experience is one of the pre-requisites for this position. A review of your application shows that you lack the following required experience: Recent and significant experience in international auditing in carrying out tasks assigned to a position at the AU-03 level (equivalent) or above. Recent and significant experience is defined as experience normally acquired over the course of 18 months within the last 5 years. We therefore regret to inform you that your application will not be given further consideration in this selection process.

If you have any questions or wish to obtain additional information, please contact me

[21] Further to the feedback request and a telephone conversation between the applicant and Mr. Adam on March 1, 2010, Mr. Adam informed Ms. Tran that the board would maintain its decision.

(2) T-494-10

[22] As in file T-493-10, the Court record in file T-494-10, at page 1, contains a selection sheet for the applicant, on which the following remark is written below the requirement for experience in tax evasion auditing: [TRANSLATION] “no AU-03 auditing experience, only reviews coding, did not have to obtain information and handle the case”.

[23] Ms. Tran was not informed of the decision until February 12, 2010. The wording is essentially the same as in T-493-10.

[24] On March 1, 2010, as agreed, Ms. Tran and Mr. Tremblay discussed her request for individual feedback. That same day, Mr. Tremblay wrote the following notes in the file:

[TRANSLATION]

Received call from Dung. I asked her if she was in Quebec and if she wanted to do the feedback in person. She preferred to do it by phone so she could have access to her documents and computer. She wanted to know who the other members of the board are. I answered her. I explained how we went about the pre-requisite review, and that the pre-requisites were set by the AD [assistant directors], Audit. We want to have people with experience in the specialty area so they can take on the work quickly. I told her that we do not consider her work to be auditing any more than we would that of an appeals officer. The statement on the poster that the work could have been done elsewhere is aimed at including, for example, auditors who did the avoidance work on their own (on a basic file, for example) with advice from an avoidance officer. In her case, we do not consider that she is doing auditing work.

She stated that her contract with National Headquarters indicates that she will be accepted into the processes. I told her that no one can guarantee that. Who can determine ahead of time what the pre-requisites for a given process will be.

I also spoke to her, at the end, about the wording of her request, which is a bit offensive. In my view, we are three board members who respected all of the values of the Agency, and it shows a lack of respect to write her request the way she did. I told her that it is a bit offensive and she said that it's even more offensive for her to be rejected. I told her that I will send her an email (approx. 20 min. max.).

[Emphasis added]

[25] On March 1, 2010, Mr. Tremblay sent an email confirming that the board's decision would be maintained.

(3) T-503-10

[26] The first page of the Court record shows that, on January 28, 2010, a selection sheet was completed regarding Ms. Tran's application for the position of Large File Auditor. The comment below the experience requirement reads as follows:

[TRANSLATION]

AU-03 since 22-01-2007 at 1206-443. According to Mario Tremblay of Québec, "does not have the experience required, has never done AU-03 auditing, reviewing coding different from auditing.

[27] This decision was conveyed to the applicant on February 12, 2010, written in terms echoing those of the other two decisions she received. She requested individual feedback. A telephone meeting was held on March 1, 2010. On March 3, 2010, she was notified that the board's decision would be maintained.

IV. Grounds raised by the applicant and in her affidavit

[28] In each application for judicial review, the applicant is raising the same grounds in support of her contentions that she was treated arbitrarily at the pre-requisite review stage and that the decisions were unreasonably and arbitrarily maintained at the individual feedback stage:

- (1) The boards selected raised a reasonable apprehension of bias in respect of the applicant;
- (2) Both at the pre-requisite review stage and the individual feedback stage, the board members could not have been unaware that the applicant had the recent and significant experience required for each position. By finding otherwise, they made unreasonable errors in fact or law;
- (3) The decision of each board fails to respect the Agency's commitment to the applicant that she could enter any selection process for which she would have been eligible if not for her acting assignment.

[29] In her affidavit in support of the three applications for judicial review, on which she was not cross-examined, Ms. Tran states that,

- (1) For the positions of Senior International Auditor and Senior Tax Avoidance Auditor, she filed the required two-page documents to show that she had the required experience (see Exhibit "J" attached in a bundle in support of her affidavit); and

- (2) For the third position, that of Senior Large File Auditor, there was no similar requirement.

[30] According to Ms. Tran, Exhibit “J” and the other information required were amply sufficient to fulfill the demonstration requirements for each of the three positions at the pre-requisite review stage. I note that both documents at Exhibit “J” contain the following notice to the reader: [TRANSLATION] “if you need further information, please contact me or contact my manager, David Clarke, at the telephone number provided.

[31] Ms. Tran notes that, although she did not know the reason, the file processed by Mr. Trassi contained no note regarding the individual feedback.

[32] In file T-493-10, she stated the following:

- (1) The board clearly ignored the document at Exhibit “J” in that it provided [TRANSLATION] “a clear demonstration of her recent and significant experience in international auditing; and
- (2) [TRANSLATION] “Although my manager [David Clarke] informed Mr. Adam of the fact that the task description sheet he intended to use for assessing my application was not up to date and that the tasks described did not correspond to the work done, [TRANSLATION] ‘it seems that this document dating back over 15 years was submitted to the board without reservation’. According to Ms. Tran, if her sheet [TRANSLATION] ‘had been up to date, this task description, which still does not exist, would have confirmed all of the

experience described in her two-page document [TRANSLATION] “at Exhibit ‘J’”.

[33] Referring to the notes by Mr. Adam (Exhibit “M” of her affidavit), she listed the inaccurate conclusions they contain, reached hastily on the basis of outdated information, among other things that she (1) is not involved in conducting analyses and making recommendations and decisions for ITA enforcement and, in particular, for international transactions, since part of her work involves auditing the results of files containing adjustments related to international transactions; and (2) does not do reassessments; furthermore, (3) the board failed to consider her auditing experience acquired outside the field of international taxation.

[34] What is more, the board did not contact Mr. Clarke, who was able to confirm the contents of the two pages (Exhibit “J”), and the selection board chair only contacted her supervisor when handling her request for reconsideration.

[35] Regarding the individual feedback session, Ms. Tran states that the feedback was without merit, as follows:

- (1) On February 22, 2010, Mr. Adam, chair of the board, consulted a person who was not a member of the board to determine whether Ms. Tran had been treated arbitrarily and, following this conversation, made his decision to deny her request for reconsideration on the basis of irrelevant grounds, among others, [TRANSLATION] “that she could apply for positions within the Agency that might not be available to auditors in the Quebec region and that the

experience she was gaining as an AU-04 would give her an advantage in the long run”;

- (2) During the feedback session, Mr. Adam [TRANSLATION] “told me that he did not have detailed knowledge of the nature of my duties and listed the criteria that had been considered by the board at the pre-requisite review stage, including having been in contact with taxpayers and having, in the course of an audit, examined certain documents”. Ms. Tran states that she told Mr. Adam that those factors were not set out in the notice of job opportunity or the statement of requirements. According to Ms. Tran, Mr. Adam [TRANSLATION] “simply referred me to the mandate he had allegedly been given by the assistant directors”.

[36] At paragraphs 33 and 34 of her affidavit, Ms. Tran addresses file T-494-10. She challenges the decision of the Tremblay board regarding the position of Senior Tax Avoidance Auditor. She states that the chair, Mr. Tremblay, gave her verbal confirmation that her statement of experience at Exhibit “J” had not been considered [TRANSLATION] “and to justify this omission by the board, he explained to me, during the individual feedback session, that the experience as AU-03 had to have been acquired in the aggressive tax planning division and that the statement in the notice of job opportunity and the statement of requirements that the experience could have been acquired elsewhere was in fact addressed to persons who worked in the international audit division who provided advice on tax avoidance. The applicant states that Mr. Tremblay’s interpretations in this regard are off the cuff and lacking in transparency and objectivity. She adds that if the board had doubts as to the precise nature of her experience, it had

a duty to accept her application for consideration at the assessment stage. In addition, the applicant states that the board did not contact the reference person [David Clarke] who was able to confirm the substance of her statement of experience in tax avoidance auditing.

[37] On the matter of individual feedback, the applicant contends that Mr. Tremblay's decision was without merit for the following reasons:

- (1) He lacked the necessary objectivity because he was offended by her statements;
- (2) The grounds set out in his notes (Exhibit "K") are not consistent with the pre-requisite review stage.

[38] Paragraphs 35 and 36 of Ms. Tran's affidavit pertain to file T-503-10 contemplating her application for the position of Large File Auditor. She states that it is clear that the board chaired by Mr. Trassi acted arbitrarily at the pre-requisite stage.

[39] She uses the following elements to back up her contention:

- (1) The job opportunity documents state that the recent and significant experience sought is in the Audit Division of the TSOs located in Montréal, Laval and Montérégie.
- (2) Her substantive position over the last 13 years has been in the Audit Division of the TSO in Québec, but she was not accepted.
- (3) In fact, some persons who work in the Audit Division do not do auditing but would be eligible. The board members could not ignore that her duties are at

least equivalent to those given to her co-workers in this Division, as shown by the comparative table at Exhibit “P” filed in support of her affidavit.

- (4) When she accepted the position at the Agency’s National Headquarters, she signed a contract (her Exhibit “Q”) which stipulates that she could enter any selection process or have her application considered for any position for which she would have otherwise been eligible if not for this assignment, which means that the board had to consider her experience in the Audit Division or elsewhere, which it failed to do.

[40] The individual feedback she received from Mr. Trassi was without merit because it (1) was predicated on the opinion of Mario Tremblay, who was not a member of the board; and (2) it was never completed by Mr. Trassi, thus depriving her of the opportunity to present all of her arguments.

[41] She concluded her affidavit with more general considerations, including the following :

- (1) The fact that she held a position in which she verified the results of her co-workers’ audits and that her revisions could have an impact on the assessment of their work. She contends that her interventions over the years had upset her co-workers, including members of the board.
- (2) Her performance at the Agency had been assessed as exceeding expectations; this can be seen from the assessment reports attached to her Exhibit “R”, which indicate that she (1) is an excellent auditor with a good investigative

sense; (2) provides assistance to auditors; and (3) has carried out audits that resulted in tax adjustments.

V. Affidavits of the Agency

[42] Each board chair in this case filed an affidavit, on which he was not cross-examined.

(1) Affidavit of Chair Adam

[43] The affidavit of Chair Adam may be summarized as follows with regard to the board's decision:

- (1) The experience required was in carrying out the tasks assigned to the International Auditing position.
- (2) The candidate had to demonstrate that he or she had experience.
- (3) The experience in international auditing was defined as the experience normally acquired during a tax audit of international transactions in taxpayer files; this definition is taken in its usual sense and known by all TSO auditors in Quebec.
- (4) The other board members were AU-04 auditors.
- (5) Upon reading Ms. Tran's two-page document, the board found that Ms. Tran had not demonstrated that she had experience in the field of international auditing, for the following reasons:
 - (a) Her substantive position was AU-03 – Tax Auditor, but she had never performed the functions of this position, since she was on acting appointment;

- (b) She had never examined facts and documents related to audit files . . . ;
 - (c) She had discussions with other employees at National Headquarters about sections of the ITA related to international auditing; and
 - (d) She listed for the board a series of sections of the ITA, tax agreements and policies related to this type of auditing which could have been submitted by anyone from courses or other sources.
- (6) She reviewed coding (assessed tax results) in audit files but, at that point, the audit had already been done.
- (7) The board was unable to find enough elements to establish the relevant experience for acceptance at the pre-requisite stage.

[44] Chair Adam states that candidates had to demonstrate their experience clearly and that, at the pre-requisite stage, the selection board did not contact the resource persons of any candidate. However, Chair Adam states that [TRANSLATION] “of his own accord, he decided to contact David Clarke for a description of the tasks for her current position, and that, on February 5, 2010, [TRANSLATION] ‘I revised the description of tasks I had received from David Clarke because it was not up to date’. At paragraph 22 of his affidavit, he states that it contained nothing to change the board’s decision.

[45] Regarding the feedback, Chair Adam states that

- (1) After the feedback request was made, he contacted David Clarke on February 19, 2010, to check Ms. Tran’s tasks, but the additional information provided by Mr. Clarke [TRANSLATION] “did not show that she had the

required experience in performing tasks assigned to level AU-03 or above”.

- (2) He contacted the Agency’s resourcing advisor in charge of the process [TRANSLATION] “for some advice further to the feedback request and that, from the discussion, it became clear that we had considered her application in the same way as those of the other applicants. We found that Ms. Tran has AU-04 level experience in planning and statistics”.
- (3) On March 1, 2010, he had a telephone discussion with Ms. Tran, during which she brought up her agreement with the Agency. He notes that Ms. Tran’s application had been accepted.

(2) Affidavit of Mario Tremblay

[46] As stated above, Mario Tremblay was Chair of the Selection Board for the position of Senior Tax Avoidance Auditor at the AU-04 level in the Audit Division.

[47] Since 2005, he has been the manager of the Large Business Audit Division, the Aggressive Tax Planning Division and the International Audit Division.

[48] I have summarized the important points of his affidavit:

- (1) The experience criteria were applied uniformly to all candidates in the selection process. The selection board members examined in detail the following documents for all of the candidates at the pre-requisite stage: notices of job opportunity; job descriptions; analysis of individuals’ employment contracts according to our human resources management

systems; candidates' electronic applications; and the two-page letter submitted by the candidates (paragraph 9).

- (2) At paragraph 10 of his affidavit, he reiterates that the board had determined that Ms. Tran did not have the required experience because she did not have recent and significant experience in aggressive tax planning involving the tasks assigned to this position at the AU-03 (equivalent) level or above.
- (3) On March 1, 2010, he discussed Ms. Tran's request for individual feedback with her. He explained to her that her work as [TRANSLATION] "senior planning, resources and analysis officer over the past four years was not auditing work and that she therefore did not meet the experience criteria for the selection process.
- (4) He stated that, as a manager in the Aggressive Tax Planning Division, he was very familiar with the work done in this division and the tasks performed by employees at all levels of the division. This statement also applies to two other members of the selection board, since they are both team leaders. As an example of the type of experience sought by means of the selection process, he attached as Exhibit "B" a copy of the principal activities corresponding to an AU-03 level position in this division.

[49] Paragraphs 19, 20 and 21 of his affidavit are of fundamental importance. I have reproduced them below.

[TRANSLATION]

19. In her case, the applicant has no significant or recent experience in aggressive tax planning. Furthermore, in the last four years, she has done no tax auditing work. So that the applicant's tasks and responsibilities in her current position may be understood, I am attaching copies of the principal activities for Ms. Tran's AU-04 substantive position (senior planning, resources and analysis officer) as **Exhibit "C"** to this affidavit.

20. Before the applicant began working as senior planning, resources and analysis officer, she worked at the AU-02 level. In other words, before being transferred to the position of senior planning, resources and analysis officer, she could not have obtained experience at the AU-03 level or above with regard to aggressive tax planning.

21. It should be noted that Ms. Tran's substantive position is at the AU-03 level as tax auditor. Ms. Tran was appointed to her substantive position in April 2008. Before her appointment, Ms. Tran's substantive position was at the AU-02 level. That said, Ms. Tran had never carried out tasks assigned to a position at the AU-03 level or above in aggressive tax planning. For the last four years, Ms. Tran has been working at National Headquarters in an AU-04 level acting position as "senior planning, resources and analysis officer". This position is in no way related to either aggressive tax planning or tax auditing.

[Emphasis added]

[50] Regarding Ms. Tran's lateral transfer contract, Mr. Tremblay is of the opinion that this contract [TRANSLATION] "does not grant her an exemption from the experience criteria".

(3) Affidavit of Jack Trassi

[51] As stated above, Mr. Trassi was Chair of the Selection Board for the position of Senior Large File Auditor. Since 2008, he has been the Large File Case Manager at the TSO in Montréal. His affidavit is written in English.

[52] His candidate selection sheet for Ms. Tran is dated January 28, 2010. He wrote the following comments under the experience requirement:

[TRANSLATION]
AU-03 since 22-01-2007 at 1206-443. According to Mario Tremblay of Québec, does not have the experience required, has never done AU-03 auditing, reviewing coding different from auditing.

[53] The sheet also indicates that she has been screened out and that the decision is [TRANSLATION] “to be discussed by management: Clovis Dorval notified”.

[54] When Ms. Tran applied for this position, she stated the following under the “experience” heading:

[TRANSLATION]
Since January 2007, my substantive position has been AU-03 tax auditing. My current work as AU-04 is related to auditing. Almost all of the cases I work on are from large files. If you need further information, please do not hesitate to contact me. Supervisor: David Clarke (Court record, page 03). [Emphasis added]

[55] At paragraph 4 of his affidavit, Mr. Trassi wrote the following: “Although I did not participate in the pre-selection decision making process directly, I was consulted on all cases in which a candidate did not meet the requirements of the process. I did handle feedback requests with members of the selection board.”

[56] “Her experience is in the examination of coding which is done by auditors once the audit file has been completed” (paragraph 8).

[57] He acknowledges in his affidavit that Mario Tremblay was contacted and that “he

confirmed that Mme. Tran did have experience in coding but did not have experience performing audits at the AU-03 level in the Audit Division”.

[58] He states he had an individual feedback interview on March 1, 2010. The issue of her contract was raised. He asked for a copy which was provided the same day. He received advice from a senior person in the Agency’s Human Resources who explained that the contract allowed her to apply for competitions should would otherwise not be eligible for because of the geographical selection criteria but she would still have to demonstrate the required experience.

[59] He concluded by stating that the additional information provided as a result of the feedback did not demonstrate she had the required experience and as such the decision to eliminate her was maintained.

VI. Analysis

(a) Standard of review

[60] Since the standards of review were reformed by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, there are only two standards of review: correctness and reasonableness. For a question bearing on the facts, the reasonableness standard applies because the court is accorded a degree of deference. The question of whether a candidate has the required experience is a question of fact (*Anderson v Canada (Customs and Revenue Agency)*, 2003 FCT 667).

[61] I am therefore of the opinion that the applicable standard of review is reasonableness, but

with the nuance set out by the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 (*Khosa*), in respect of paragraph 18(1)(4)(d) of the *Federal Courts Act* (R.S.C. 1985, c. F-7), which reads as follows:

Application for judicial review 18.1 ... Grounds of review (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal ... (d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; ...	Demande de contrôle judiciaire 18.1 ... Motifs (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas : ... d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose; ...
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[62] At paragraph 3 of his reasons, Justice Binnie stated that this section provides legislative guidance as to “the degree of deference” owed to a federal tribunal’s findings of fact. At paragraph 46, Justice Binnie expressed the opinion that Parliament intended such a tribunal’s findings of fact to “command a high degree of deference”.

(b) Conclusions

[63] For the following reasons, each of the applications for judicial review must be allowed.

[64] The applicant had the burden of showing that she met the pre-requisite of having recent and significant experience in a position at the AU-03 level or above for each of the three positions for which she applied.

[65] For the positions of Senior International Auditor and Senior Tax Avoidance Auditor, the applicant provided a two-page document describing the tasks she had performed and the professional experience she had acquired to make her eligible to apply. For example, for the tax avoidance position (Court record, page 101), Ms. Tran wrote that, in her acting position, she spent at least one third of her time analyzing various subjects related to tax avoidance and that she was the designated resource person for all Quebec region files. Regarding the position of Senior International Auditor, the Court record is similar (affidavit of Michel Adam, Exhibit "B").

[66] In the case of the position of Senior Large File Auditor, a two-page document was not required. However, the applicant had indicated to Mr. Trassi that her current work at the AU-04 level was related to auditing.

[67] In each case, at the time of the individual feedback session, it was important for the selection boards and each chair to have an accurate picture of the tasks performed by Ms. Tran in her current position at National Headquarters, which she had held since 2006. The importance of this knowledge arises from the fact that the fundamental idea she was conveying to the selection boards and their chairs was that the tasks she was currently performing were related to auditing and, as such, contributed to the required experience.

[68] Chair Adam was aware of the importance of having accurate knowledge of Ms. Tran's current tasks, since he stated in his affidavit that before the board made its decision, he contacted Mr. Clarke [TRANSLATION] "for a description of the tasks for her current position". Mr. Clarke sent him the document, but warned him that the description was not up to date. Chair Adam states, without providing any details, that he revised this description of current tasks, but did not provide any information on how this revision was carried out.

[69] In his affidavit, Mario Tremblay states that [TRANSLATION] "so that the applicant's tasks and responsibilities in her current position may be understood, he is attaching copies of the principal activities for the AU-04 substantive position . . . as Exhibit 'C'. Unfortunately, Exhibit "C" is the description of tasks that Mr. Clarke had told Chair Adam was out of date.

[70] Jack Trassi simply endorsed Chair Tremblay's conclusions on this point.

[71] In my opinion, such an error is fundamental and determinative. In all three cases, the selection process was flawed. This Court must intervene. The chairs acted arbitrarily in maintaining the decisions.

[72] Without elaborating, and without deciding, I am of the opinion that there are other elements that could justify the intervention of this Court, including (1) the fact that the boards failed to contact the resource persons; (2) certain boards or chairs were influenced by irrelevant considerations; (3) the feedback by Mr. Trassi was incomplete; (4) Mr. Trassi delegated his decision to Mr. Tremblay; and (5) some requirements were allegedly determined by the assistant

directors or exceeded the requirements stipulated. These issues will have to be re-examined by new selection boards and new chairs.

JUDGMENT

THIS COURT ORDERS that in each of the files T-493-10, T-494-10 and T-503-10:

1. The application for judicial review is allowed.
2. The decisions made on March 1, 2010, by Michel Adam and Mario Tremblay and on March 3, 2010, by Jack Trassi at the individual feedback stage, confirming that the applicant's application was rejected for each position for which she applied, are set aside.
3. The files in the selection processes contemplated by the applications for judicial review are referred back to the Agency for reconsideration of the applicant's application by a differently constituted board.
4. With costs for each of the files consolidated under T-493-10.

“François Lemieux”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-493-10
T-494-10
T-503-10

STYLE OF CAUSE: DUNG TRAN v CANADA REVENUE AGENCY

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 17, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** LEMIEUX J.

DATED: August 19, 2011

APPEARANCES:

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(for all three files)

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