Federal Court  Cour fédérale

Date: 20130926

Docket: T-161-13

Citation: 2013 FC 978

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 26, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

HIBO NUR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Overview

[1] Following an investigation under sections 66 and 69 of the *Public Service Employment Act, SC 2003, c 22, ss 12 ,13 (the Act)*, the Public Service Commission (the Commission) found that the applicant had committed fraud by submitting Second Language Evaluation (the SLE) results which she knew to be invalid and that the fraud had vitiated the external appointment process which led to her appointment to the position of Operational Support Clerk, CR-4 group and level, at Public

Works and Government Services Canada (PWGSC). The Commission, therefore, revoked the applicant's appointment and imposed certain restrictions on all new appointments within the federal public service for a period of three years.

[2] The applicant seeks judicial review of that decision on the grounds that the evidence submitted at the hearing does not constitute a basis on which to find that the alleged acts were intentional, that the corrective action imposed is unreasonable in the circumstances and that the investigator mandated by the Commission was biased and failed to comply with the principles of natural justice and procedural fairness.

Factual background

[3] During 2006 and 2007, the applicant took a number of SLE tests administered by the Commission, at the request of various government departments. The purpose of these exams is to assess a candidate's second official language proficiency for oral interaction, written comprehension and written expression. Keeping in mind that the results range from "A" to "E", with "A" being the lowest score, her results are as follows:

a. On February 7, 2006, the applicant obtained an "A" on her written expression exam taken at the request of Statistics Canada;

b. On February 7, 2006, she obtained a "B" on her written comprehension exam taken at the request of Statistics Canada;

c. On May 16, 2007, she obtained a "B" on her written expression exam taken at the request of Correctional Service Canada;

d. On May 25, 2007, she obtained a "B" on her oral interaction test taken at the request of Correctional Service Canada;

e. On November 14, 2007, she obtained a "B" on her written comprehension exam taken at the request of Transport Canada; and

f. On December 28, 2007, she obtained an "A" on her oral interaction test taken at the request of Transport Canada.

[4] In an e-mail dated December 31, 2007, the applicant stated that she was surprised by the results of the oral interaction test she took on December 28, 2007, and on January 30, 2008, and requested a rescore. The test was rescored on February 8, 2008, and the result was the same, the applicant obtained an "A". On February 11 and 12, 2008, the applicant was notified of the result by e-mail and by mail, respectively.

[5] In April 2007, PWGSC advertised an external appointment process to fill several Administrative Support Clerk/Operational Support Clerk positions. The linguistic profile of the positions to be filled required a Level B for the three language skills, in the second official language.

[6] In January 2008, the applicant applied for the process. To demonstrate that she met the Level B language requirements for each of the qualifications, she informed PWGSC of the results she obtained on some the SLE tests she took in 2007. However, with respect to the results of the oral interaction test, she received, on January 29, 2008, an e-mail from Diane Savard, Human Resources Manager with PWGSC, the relevant excerpt of which is worth quoting:

> [TRANSLATION]
>
> . . . it may be possible to offer you a temporary position until you obtain the results of your oral interaction exam.
> A temporary (casual) position entails a maximum of 90 days of work per calendar year, per department, which means that if you will not have met the linguistic profile of the permanent position (BBB) by then, you will have to leave the position (and the department) once the 90 days have elapsed . . . .

[7] The next day, the applicant replied that she was interested and ready to start on February 25.

[8] On March 10, 2008, the applicant provided PWGSC with hard copies of the results of the oral interaction exam of May 25, 2007, and the results of the written expression exam of May 16, 2007, on which she obtained a "B". The results of the written comprehension exam were sent at a later date. She did not provide either the results of the oral interaction exam of December 28, 2007, or the rescore results confirming that her mark was an "A". PWGSC, who had the means to do so at the time, did not verify the applicant's SLE test results with the Commission, given that it did not have any particular reason to doubt their validity.

[9] On April 28, 2008, the applicant was appointed to the position of Operational Support Clerk, CR-4 group and level, a full-time and indeterminate position. The letter of offer stated that the applicant was entitled to the bilingualism bonus as she held a position that required the knowledge of both official languages.

[10] In July 2010, the PWGSC's Official Languages Directorate conducted audits concerning the granting of bilingualism bonuses. In the course of those audits, PWGSC realized that at the time

of the applicant's appointment, she did not meet the language requirements of the position because the applicant's oral interaction was rated as "A", only four months prior to her appointment.

[11] The Commission was, therefore, notified by the PWGSC Human Resources Branch that the applicant had allegedly intentionally failed to provide the most recent tests results of her oral interaction assessment and that she did not possess all the requirements of the position being occupied.

[12] The Commission, therefore, mandated Marie-Josée Blais (the investigator) to investigate under sections 66 and 69 of the Act as it had reason to believe that the applicant's appointment was not made on the basis of merit and that the applicant had allegedly committed fraud in the course of the external appointment process that led to her appointment. The applicant was informed of the investigation and allegations of fraud made against her.

[13] On June 5, 2012, the investigator submitted her report to the Commission, in which she recommended that the applicant's appointment be revoked and that certain restrictions be imposed on her, for a period of three years, for any new appointments within the federal public service (recommendations that were retained by the Commission the details of which are given below).

Impugned decision

[14] On December 20, 2012, the Commission's President, Anne-Marie Robinson, accepted the investigation report and concluded that the applicant committed fraud within the meaning of section 69 of the Act by intentionally submitting, in support of her application, the results of the oral interaction test of May 25, 2007, knowing that they were not the most recent results and, therefore, were invalid.

[15] Because the notion of fraud is not defined in the Act for the purposes of section 69 thereof, the investigator, nevertheless, deemed that it meant [TRANSLATION] "a deliberate act that was calculated to deceive". In fact, for the most part, the investigator did not believe the applicant's version of the facts when she claimed that she did not remember the results of the test taken on December 28, 2007, when she sent that of May 2007, nor understood what was meant by a rescore. The investigator determined that the evidence adduced by PWGSC contradicted the applicant's testimony as a whole.

[16] In relying on section 66 of the Act, the investigator also concluded that the applicant's appointment was not made on the basis of merit as she did not meet one of the essential qualifications of the position, namely, the level B linguistic profile required for oral interaction.

[17] In accordance with its authority to take any corrective action that it considers appropriate, the Commission ordered that:

g. the appointment be revoked;

h. for a period of three years following the signing of the Record of Decision, that Ms. Nur obtain the written permission of the Commission before accepting any position or employment within the federal public service. In the event that Ms. Nur accepts a determinate, acting or indeterminate position within the federal public service without first obtaining said permission, her appointment shall be revoked; and

i. for a period of three years following the signing of the Record of Decision, in the event that Ms. Nur obtains employment through casual employment, a temporary agency or student programs within the federal public service without first informing the Commission, a letter shall be sent to the deputy head informing him or her of the fraud committed by Ms. Nur with a copy of the investigation report.

Issues and standards of Review

[18] This case raises the following issues:

j. *Are the decision and corrective action imposed by the Commission reasonable?*

k. *Did the investigator comply with the rules of natural justice and procedural fairness?*

[19] Between the issuance of the investigation report and the decision of the Commission in this case, the Federal Court of Appeal issued its decision in *Seck v Canada (Attorney General)*, 2012 FCA 314 (*Seck*) and defined the concept of fraud set out in section 69 of the Act. It also established that the scope of the jurisdiction of the Commission to conduct an investigation and impose corrective action under section 69 of the Act, insofar as it sets the Commission's

jurisdiction apart from that of deputy heads under subsection 15(3) of the Act, should be reviewed on a correctness basis. Unlike this case, *Seck* involved an internal appointment process.

[20] The first issue raised in the case at bar does not come within the ambit of that standard for two reasons: (i) this case involves an external appointment process over which only the Commission has jurisdiction to determine whether there was "improper conduct" within the meaning of section 66 or "fraud" within the meaning of section 69 of the Act, having in both cases all the powers of a commissioner under the *Inquiries Act* (section 70 of the Act)—and does not, therefore, involve delineating the jurisdiction of two administrative bodies; and (ii) the applicant does not challenge the definition given by the investigator and the Commission to the notion of fraud (which, is consistent with that provided in *Seck*), but rather the application of said definition to the facts of this case. The first issue will therefore be reviewed on a standard of reasonableness.

[21] As for the issues regarding the adherence to the principles of natural justice and procedural fairness as part of the investigation, they will be reviewed on a standard of correctness (see *Seck*, at paragraph 55).

Analysis

a. Are the decision and corrective action imposed by the Commission reasonable?

i. Is the decision reasonable?

[22] The applicant argues that the Commission could not reasonably conclude that she had committed fraud within the meaning of section 69 of the Act, as no proof of the constituent elements of fraud was found in the investigation.

[23] First, the applicant states that she was unaware that she had to submit her most recent results as they invalidated any previous results. According to the evidence adduced, this was a practice within the Commission rather than a formal rule and said practice, albeit common sense according to a psychologist from the Commission, was unfamiliar to public servants who had to apply it. It was not until November 2007 (the evidence is vague about the exact date) that public servants called upon to administer the various tests were instructed to inform the candidates that all new tests results invalidated previous test results.

[24] Furthermore, relying on the investigator's conclusion that PWGSC had failed in its duty by not verifying its results with the Commission, the applicant claims that the Commission is solely responsible for the confusion that resulted.

[25] In short, for the applicant, the investigation failed to establish that she was aware of the Commission practice and that she intentionally submitted invalid results for the oral interaction test.

[26] If the evidence showed nothing more than the confusion created by the fact that the applicant had to take the same tests at the request of various departments in a relatively short period of time, perhaps it may have been unreasonable to conclude that the applicant knowingly failed to

provide the results of the last oral interaction test taken in December 2007, believing that she would be asked to take a new one.

[27] But that is not the case. It was entirely reasonable for the investigator not to believe the applicant when she claimed that in January 2008, she was unaware of the results of the last test. The applicant received those results by e-mail on December 31, replied on the same day that she was surprised and asked whether it was possible to contact a Commission representative to discuss the matter. This exchange of e-mails is far too contemporaneous for the applicant's testimony to be credible.

[28] In addition, two days after she was informed that she would obtain a temporary position until she provided the results of her oral interaction test, she asked whether her December 2007 test could be rescored. She submitted the results of the May 2007 test only after she was informed of the negative results of the rescore. The applicant tried to convince the investigator that she did not know what a rescore was and that in any event, she was never informed of the results. The documentary evidence contradicts the applicant on each of these points. The results of the rescore were communicated to her by e-mail and by mail in February 2008.

[29] The sequence of events and the applicant's attitude are not compatible with the integrity and transparency required of candidates applying for a position within the public service and it was reasonable for the investigator to conclude that the applicant's actions were intentional, regardless of her knowledge or lack of knowledge of any rule or practice and regardless of any negligent act on the part of PWGSC. It was also reasonable to conclude that the applicant knew that if she submitted

the results of her most recent test, her appointment would be revoked (she was informed of those results on January 29, 2008), that she intentionally failed to provide that information and that said failure misled PWGSC. In light of the evidence introduced by the investigator, her conclusion and that of the Commission that the applicant committed fraud within the meaning of section 69 of the Act is therefore reasonable. For the purposes of this provision, the concealment of material circumstances may constitute dishonesty without the need to demonstrate deprivation—it is sufficient to establish that the appointment process is or could have been compromised (see *Seck*, above, at paragraph 41).

ii. Is the corrective action imposed reasonable?

[30] It should be recalled that the investigation in this case was conducted both under section 66 of the Act—to determine whether or not the applicant's appointment was based on merit or was rather the result of an error, an omission or improper conduct—and under section 69 of the Act—to determine whether there was fraud in the applicant's appointment process. However, although the applicant challenges the Commission's decision as a whole, or the overall corrective action imposed, she does not raise any specific argument against the interpretation or application by the investigator and Commission of section 66 of the Act. One of the two investigation report findings reads as follows:

> [TRANSLATION]
>
> Moreover, according to the evidence, the appointment of Ms. Nur was not made on the basis of merit as she did not meet one of the essential qualifications of the position, namely, a BBB linguistic profile in the second language. The evidence also shows that Public Works and Government Services Canada failed to verify Ms. Nur's

> SLE results at the time of her assessment, and that said omission influenced the selection of Ms. Nur for appointment.

[31] Not only does the applicant not contest that finding, but she also relies on the omission on the part of PWGSC in defence of the allegation of fraud against her.

[32] Although the Commission says that its authority to take corrective action is based on section 69 of the Act, it nevertheless acknowledges that the investigation focused on sections 66 and 69 and it accepts the investigation report in its entirety.

[33] If the appointment process was flawed and the appointment was not made on the basis of merit, the decision to revoke it is not a disciplinary measure and does not have to be proportional to any wrongdoing on the part of the employee, as the appointment is void *ab initio* (*Seck*, above, at paragraph 50). It is not, as claimed by the applicant, a discharge or dismissal, the ultimate sanction in employment matters.

[34] Said action, whether taken pursuant to sections 66 or 69 of the Act, is reasonable in the circumstances of this case.

[35] As for the other measure imposed on the applicant, that of being required, for a period of three years, to seek the Commission's permission before accepting any position within the federal public service, though it may seem harsh in light of the applicant's action—she did not submit false results or a forged document, but she rather took advantage of the confusion within the Commission and the various departments concerned—it is less harsh when one considers the applicant's attitude

during the investigation and her lack of transparency for the process. At any rate, said action is reasonable and is aimed solely at protecting the principle of merit and integrity and transparency in the appointment process. It does not bar the applicant from applying to future appointment processes, it is neither a disciplinary nor criminal measure and provided that the applicant complies with this restriction, a third-party employer should not be informed of the findings of the investigation report.

b. Did the investigator comply with the rules of procedural fairness and natural justice?

i. Was the applicant informed of the nature and scope of the investigation?

[36] The applicant alleges that the investigator failed to ensure that she fully understood the substance and breadth of the investigation. Furthermore, she says, the investigator failed to make any language accommodations so that the unilingual Anglophone union representative accompanying her could understand the whole interview.

[37] The applicant was informed, by letter dated November16, 2011, of the nature of the investigation and allegations against her (see page 636 of the Respondent's Record). Also, the notes from the initial interview clearly show that the applicant requested to be interviewed in French, and that the investigator postponed the interview to a later date to allow the applicant to be accompanied by a Francophone representative. The investigator demonstrated that she sufficiently accommodated the applicant.

[38] This ground, raised by the applicant, is without merit.

ii. Was the investigator thorough?

[39] The applicant criticizes the investigator for not contacting Diane Savard, with whom she had the e-mail exchange of January 29, 2008, to obtain her version of the facts. Without having interviewed Diane Savard, she says, the investigator [TRANSLATION] "could not arrive at the conclusion that the applicant intentionally provided invalid results as stated in the mandate of the investigation opened to reach the conclusion that the applicant committed fraud".

[40] Because the majority of the exchanges regarding the results of her language tests took place with Johanne Galipeau rather than with Diane Savard, the investigator did not need to communicate with Ms. Savard to obtain the employer's version. Contrary to the applicant's assertions, it was to Johanne Galipeau that she sent the results of her oral interaction test of May 2007 and it was Johanne Galipeau who informed her that she did not need to retake the SLE tests. Nor did the investigator need to contact Ms. Savard to confirm whether or not the applicant had intentionally provided invalid SLE results.

[41] The investigator nevertheless did attempt to contact Diane Savard and sent her a copy of the report for comment. At the time, Ms. Savard had retired and did not make any comments.

[42] Finally, that is a late argument as the applicant did not raise it during her interview with the investigator or during the investigation.

[43] Pursuant to this Court's ruling in *Bilodeau v Canada (Justice)*, 2011 FC 886, at paragraph 90, the obligation "to conduct a thorough investigation does not mean an investigator is required to turn over every possible stone. The Court will intervene only if the investigator fails to investigate crucial evidence, given the nature of the application and the information already available".

[44] In short, the investigator was through and conducted a sufficiently thorough investigation.

iii. Is there reasonable apprehension of bias?

[45] The applicant alleges that the investigator showed bias by refusing to take into account that [TRANSLATION] "the policy to which she refers to accuse the applicant of fraud was even unknown to the public servants themselves and even less so to the applicant who is but a mere clerk".

[46] In *Wewaykum Indian Band v Canada*, 2003 SCC 45, at paragraph 45, (*Wewaykum Indian Band*), the Supreme Court of Canada stated that "the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information". At paragraph 58 of the decision, the Court added that "[t]he essence of impartiality lies in the requirement of [the decision-maker] to approach the case to be adjudicated with an open mind". Finally, a decision-maker is presumed to act impartially (*Wewaykum Indian Band*, at paragraphs 76 and 77).

[47] In the circumstances of this case, a reasonable person would not conclude that a reasonable apprehension of bias exists. The mere fact of not having taken into account the applicant's version of the facts cannot be the basis for automatically finding that there is reasonable apprehension of bias.

Conclusion

[48] For the reasons set out above, the Court is of the view that its intervention is not required and that the application for judicial review should be dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that:

1. the style of cause is amended to withdraw the Department of Justice as a respondent;

2. the application for judicial review is dismissed; and

3. costs are awarded to the respondent.

"Jocelyne Gagné"
Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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