Federal Court Cour fédérale

Date: 20140130

Docket: T-188-13

Citation: 2014 FC 103

Ottawa, Ontario, January 30, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

MARC ST-AMOUR

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of the Public Service Commission of Canada (PSC) dated September 21, 2012 and made pursuant to section 69 of the *Public Service Employment Act*, SC 2003, c 22, ss 12, 13 (Act). The decision superseded a prior decision of the PSC made in the same matter and revoked the Applicant's appointment to the position of Senior Technical Analyst. The Applicant submits that the PSC was without authority to make the second decision.

Background

[2] The Applicant joined the federal public service in 1997 in a position classified at the Computer Science Group, level 1 (CS-01). On June 25, 2008, he participated in an internal appointment process to establish a pool of qualified candidates to staff positions within the Canada Border Services Agency (CBSA) of Senior Technical Analyst (08-BSF-IA-HQ-IST-CS-8152) at the CS-02 group and level (2008 Position). The Applicant was a successful candidate and was appointed to the 2008 Position on October 1, 2008.

[3] By letter dated January 17, 2012, the PSC informed the Applicant that an investigation would be conducted to address the possibility that the Applicant had committed fraud in the internal appointment process which led to his appointment to the 2008 Position.

[4] In an investigation report dated May 16, 2012, the PSC found that the Applicant had committed fraud pursuant to section 69 of the Act by providing false information about his level of education in order to meet the educational criteria of the 2008 Position. The Applicant did not possess a Secondary V, General, Diploma as indicated on his CV provided in support of his application. He also admitted that he had not completed high school.

[5] On August 1, 2012, the PSC informed the Applicant of the results of the investigation report and provided him with an opportunity to make submissions in response to the report and the proposed corrective actions being as follows:

a. That the appointment of Marc St-Amour in the position of Senior Technical Analyst, group and level CS-2, made following internal appointment process 08-BSF-IA-HQ-IST-CS-8152, be revoked;

b. For a period of three years from the signing of the Record of Decision, Mr. St-Amour must get the written permission by the Commission before accepting any position or employment within the Public Service of Canada. In the case where Mr. St-Amour does accept a term, acting or indeterminate position without prior permission from the Commission, any such appointment will be revoked;

c. For a period of three years from the signing of the Decision Record in the event that Mr. St-Amour gets hired by way of casual employment, temporary help agency or student program within the Public Service of Canada without prior notification to the Commission, a letter will be sent to the Deputy Head with information of the fraud committed by Mr. St-Amour, copies of Investigation Report 2011-BSF-00396.14072 and of the Decision Record

[6] On August 23, 2012, the Applicant's labour relations officer responded to the investigation report and the proposed corrective actions asserting that revoking the 2008 Position was disproportionate and unnecessary. To ensure that the Applicant "has an accurate understanding of their purpose and ability to comply," she requested the details of the proposed corrective actions including the impact of the revocation on his employment.

[7] On September 10, 2012, the investigator responded to the labour relations officer and stated that, "A revocation implies that all employment within the federal public service is to be ended including the actual department (CBSA)."

[8] On September 21, 2012, the PSC wrote to the Applicant to inform him of its "final decision" on corrective actions following its investigation and attached its Record of Decision (2012-158-IB) which accepted the investigation report and imposed corrective actions which substantively

mirrored those noted above (the letter and the First Record of Decision are hereafter referred to as the First Decision). The Record of Decision stated that the purpose of the corrective actions was to "ensure that individuals do not gain employment in the public service as a result of fraud". The PSC directed CBSA to complete the documentation required to implement the revocation and confirm that it had done so within 60 days of signing the Record of Decision.

[9] A briefing note to the PSC dated December 20, 2012 stated that during the implementation phase of the corrective actions, CBSA indicated that the Applicant had been deployed to another position (position 66815) in March 2011 (2011 Position). And, because the Applicant "…no longer occupied the position obtained as a result of appointment process 08-BSF-IA-HQ-IST-CS-8152 (position 28337), the first ordered corrective action could not be implemented". It proposed to replace the first corrective action with one whereby the appointment of the Applicant to the 2008 Position be revoked retroactively to March 20, 2011, the day preceding his deployment to the 2011 Position. The stated reason for this being that the purpose of corrective actions is to ensure that individuals do not gain employment in the public service as a result of fraud. The Applicant would not have been eligible for deployment had he not been appointed, as a result of fraud, to the initial CS-02 position being the 2008 Position.

[10] On December 21, 2012, the PSC advised the Applicant of the proposed amended corrective action and provided him with an opportunity to respond to same in writing. The Applicant declined to comment. CBSA responded by stating that the proposed revised corrective action was silent on whether the Applicant would cease to be an employee of the federal public service when his CS-02

position was revoked. And, should it be the intention of the PSC to remove the Applicant from the federal public service, then that intention should be clearly stated in the new Record of Decision.

[11] On January 22, 2013, the PSC wrote to the Applicant informing him of its second "final decision" and enclosing a copy of Record of Decision 2012-197-IB (the letter and the second Record of Decision are hereafter referred to as the Second Decision) which replaced the First Decision. The Second Decision is described below.

Decision under Review

[12] The Second Decision restated that it accepted the investigation report which concluded that the Applicant had committed fraud during the 2008 appointment process by submitting a resume containing false information about his academic credentials.

[13] And, in accordance with its authority to take corrective action under section 69 of the Act, the PSC ordered that:

> i. The appointment of Mr. St-Amour to the position of Senior Technical Analyst, at the CS-2 group and level (position number 30128337), made as a result of appointment process 08-BSF-IA-HQ-IST-CS-8152, be revoked retroactively to March 20, 2011, the day preceding his deployment to position number 30168815 at CBSA. CBSA must complete the documentation required to implement the revocation and confirm to the Public Service Commission that it has done so within 60 days of the signing of this Record of Decision. Following the revocation of his appointment, Mr. St-Amour will cease to be an employee of the federal public service:
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> ii. For a period of three years from the signing of this Record of Decision, Mr. St-Amour obtain the Commission's written approval before accepting any position or work within the federal public service. Should Mr. St-Amour accept a term, acting or indeterminate appointment within the federal public

service without first obtained such an approval, his appointment will be revoked and:

iii. For a period of three years from the signing of this Record of Decision, should Mr. St-Amour obtain work through casual employment, temporary help agency or student programs within the federal public service without first notifying the Commission, a letter will be sent to the Deputy Head advising of the fraud committed by Mr. St-Amour with a copy of Investigation Report 2011-BSF-00396.14072 and Record of Decision 2012-197-IB.

ISSUES

[14] In my view, the issues on this application are as follows:

1. What is the applicable standard of review?

2. Was the PSC *functus officio* when it issued the Second Decision?

3. In the alternative, does the doctrine of promissory estoppel apply to prevent the PSC from replacing its First Decision with its Second Decision?

SUBMISSIONS AND ANALYSIS

Issue 1: What is the applicable standard of review?

Applicant's Submissions

[15] The Applicant submits that the appropriate standard of review for the question of whether a tribunal is *functus officio* is correctness (*Canada (Attorney General) v Symtron Systems Inc*, [1999] FCJ No 178 (CA) at para 45 (QL); *Hakimi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 481 at para 28; *Saskatchewan Wheat Pool v Canada (Canadian Grain Commission)*, 2004 FC 1307 at paras 19, 20; *IMP Group Ltd Aerospace Division (Comox) v Public Service Alliance of Canada*, 2007 FC 517 at paras 23, 25-28 [*IMP Group*]; *Tinney v Canada (Attorney*

General), 2010 FC 605 at para 12 [*Tinney*]; *Elsipogtog First Nation Band Council v Peters*, 2012 FC 398 at paras 30-35 [*Elsipogtog*]).

[16] In *IMP Group*, above, the Court found that despite an arbitrator's labour relations expertise, it was in no better a position than the Court to address the issue of *functus officio*, which is a pure question of law outside of an arbitrator's expertise. The Applicant submits that this reasoning also applies to decisions made by the PSC.

Respondent's Submissions

[17] The Respondent acknowledges that the issue of whether the *functus officio* principle applies has attracted a correctness standard of review. However, recent jurisprudence suggests that the reasonableness standard applies to an arbitrator's decision to apply the doctrine of estoppel (*Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 SCR 616 [*Nor-Man*]). And, the question of whether the "manifest intent" exception applies to a decision has been found to be an issue of mixed fact and law and reviewable on a reasonableness standard (*Nova Scotia Government and General Employees Union v Capital District Health Authority*, 2006 NSCA 85 at para 52 [*Capital District*]). Given this, the reasonableness standard should apply in determining whether the First Decision had its intended effect.

Analysis

[18] Where previous jurisprudence has satisfactorily determined the appropriate standard of review applicable to a particular issue, that standard may be adopted by a subsequent reviewing court. Only if this inquiry is fruitless, should the court proceed to analyze the factors in identifying the appropriate standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paras 57, 62 [*Dunsmuir*]).

[19] The standard of review for the question of whether a decision-maker is *functus officio* does not appear to be well settled. Recently, however, Justice Near in *Elsipogtog*, above, considered the relevant jurisprudence and, ultimately, relied on *Capital District*, above, in concluding that the reasonableness standard applied when reviewing whether the adjudicator in that case was *functus officio*:

> [30] The parties disagree on the standard of review to be applied to the Adjudicator's determination that he was not *functus officio*. The Applicant argues that an assessment of whether the adjudicator acted outside his jurisdiction or erred in the application of a legal test requires the correctness standard, while the Respondent contends that this raises a question of mixed fact and law that should be reviewed based on reasonableness. The authorities on this issue appear divided.
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> [31] In C*anada Post Corp v Canadian Union of Postal Workers*, [2008] OJ no 2633, 238 OAC 195 at para 13, the Ontario Superior Court of Justice (Divisional Court) determined that "whether the arbitrator was *functus officio* is a pure question of law for which the standard is correctness."
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> [32] Justice Snider of this Court implied in *IMP Group Ltd Aerospace Division (Comox) v Public Service Alliance of Canada*, 2007 FC 517, [2007] FCJ no 698 at paras 25-28 that assessing

whether an exception to *functus officio* applied could be a question of mixed fact and law. She nonetheless found that in the particular case of a collective agreement "while acknowledging that there is some factual content to the decision, my view is that the question is more heavily weighted to a question of law." The correctness standard was applied.

[33] By contrast, the Nova Scotia Court of Appeal in *Capital District Health Authority v Nova Scotia Government and General Employees Union*, 2006 NSCA 85, [2006] NSJ no 281 determined that these questions were at the fact intensive end of the spectrum and deserving of deference. Writing for the Court, Justice Cromwell, as he then was, concluded at paragraphs 52-53:

> [52] The critical question in this case was whether the language of the main award gave effect to the board's manifest intent. Much of the analysis of the four contextual factors supports giving the board some deference on this issue. The issue is one of mixed fact and law, central to the board's purpose and close to the core of its labour relations expertise. However, the resolution of that question defines the limits of the board's authority to act. This suggests that its resolution of that issue should not be afforded the highest level of deference. I would conclude, therefore, that absent some error in legal principle (either express or extractable from the way it applied the principles) on which the board had to be correct, its determination of whether the initial award gave effect to its manifest intent should be reviewed for reasonableness. In other words, the board's determination of what it manifestly intended must be reasonably supportable by the text of its original award, read as a whole and in context.
>
> [53] The reasonableness standard of review seems to me to strike an appropriate balance between the goals of finality and effectiveness in the context of interest arbitration. Affording the board a measure of deference in relation to determining its own manifest intent will help ensure that the board is able to finish the job assigned to it. Insisting that its conclusion in

> this regard be reasonable, however, ensures that due weight will be given to the goal of finality.

> [34] Having reviewed these determinations, I am of the opinion that the reasonableness standard should be applied based on the reasoning provided in *Capital District*, above. I cannot resolve the question of whether the Adjudicator was *functus officio* without considering the nature of his initial Award. In this respect, the Adjudicator is deserving of at least some deference. Although I acknowledge that the issue relates to the Adjudicator's authority to act, this does not preclude me from applying the reasonableness standard, given the factual content involved.

[20] While recognizing the divergence of jurisprudence with respect to the question of the appropriate standard of review with respect to issues of *functus officio*, in my view the reasonableness standard as accepted in *Capital District* and *Elsipogtog*, both above, applies in this case. The critical issue here involves determining whether the manifest intention exemption to the doctrine of *functus officio* applies. As stated in *IMP Group,* above, this is a question of mixed fact and law because the general principles of *functus officio* must be applied to the particular facts of the case. Although the Court in that case ultimately found that the correctness standard applied, it stated that this was because it was considering a completed collective agreement and, while there was some factual content to the decision, it more heavily leaned towards a question of law. That is not the situation before me.

[21] And, as stated in *Capital District*:

> [46] To determine whether it could issue a supplemental award as it did, the board had to do two things. First, it had to understand the broad legal principles of *functus officio*. Second, it had to interpret

> its initial award to determine its manifest intent. In other words, the board had to decide whether the effect of its supplemental award was to give effect to that manifest intent.
>
> [47] This question, in my view, is one of mixed law and fact. While the interpretation of a contract or a statute is a question of law, it seems highly artificial to so characterize a tribunal's assessment of its own manifest intent. A correct statement of the legal principle, on its own, would not resolve the parties' dispute. Their dispute was "... about whether the facts satisfy the legal tests ..." relating to *functus officio* and involved "... applying the law to the facts... .": Its resolution depends on the particular intent which this board had in these circumstances. This precise issue is unlikely to arise again and the result will be of virtually no precedential value. It is almost entirely a matter of "pure application": **Director of Investigation and Research v. Southam Inc.,** [1997] 1 S.C.R. 748 at paras. 35 and 44. These are the hallmarks of a mixed question of law and fact. [emphasis in original]

[22] Subsequently, in *Nor-Man*, above, the Supreme Court of Canada restated that an administrative tribunal's decision will be reviewable on the correctness standard if it raises a constitutional issue; a question of general law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise; a true question of jurisdiction or vires; or, involves the drawing of jurisdictional lines between two or more specialized tribunals. The standard of reasonableness will prevail where the decision raises issues of fact, discretion or policy; involves inextricably intertwined legal and factual issues; or, relates to the interpretation of the tribunal's home statute or closely related statutes. There, the Court held that an arbitral decision that imposed the equitable remedy of estoppel attracted the reasonableness standard as it did not fall within the categories of questions that demanded a correctness standard and, further, that a contextual analysis also confirmed that the standard was reasonableness.

[23] In my view, the issue of whether the PSC was *functus officio* in this matter similarly does not fall within a category of question to which the correctness standard applies and is more closely aligned with *Capital District*, above. And, on a contextual analysis, (*Dunsmuir*, above, at para 64) even in the absence of a privative clause concerning the particular provision under which the decision was made, considering the purpose of the PSC, the nature of the question at issue and the expertise of the PSC, the reasonableness standard would seem to be most appropriate.

[24] In my view, for much the same reasons, reasonableness is also appropriate in reviewing the second issue being whether the doctrine of promissory estoppel applies to prevent the PSC from replacing its First Decision with its Second Decision (*Nor-Man*, above, at para 35).

Issue 2: Was the PSC functus officio when it issued its Second Decision?

Applicant's Submissions

[25] The Applicant submits that a tribunal cannot reconsider or vary its decision once it has been finalized (Brown, Donald J M, and John M Evans, *Judicial Review of Administrative Action in Canada*, Vol 3 (Toronto: Canvasback Publishing, 2012) (loose-leaf); *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at para 20 [*Chandler*]). The doctrine of *functus officio* is based "on the policy ground which favours finality of proceedings". There are five exceptions to the doctrine, including where there has been an error in expressing the "manifest intention" of the tribunal. However, if a tribunal selects one remedy that is open to it, this does not entitle it to reopen proceedings to make another selection (*Chandler*, above).

[26] The Applicant submits that hearing further submissions from the parties and issuing a decision on issues previously addressed does not fall under the "manifest intention" exception and, instead, is an improper attempt to augment the reasons of the decision-maker (*IMP Group*, above). The critical test is whether the administrative decision-maker "could be said to have finally determined the complaint before him" (*Murphy v Canada (Adjudicator, Labour Code)*, [1993] FCJ No 1236 (CA) at para 16 (QL); *Paley v Fishing Lake First Nation*, 2005 FC 1448 at para 27; *Imperial Oil Resources Ltd v Canada (Minister of Indian Affairs and Northern Development)*, 2003 FCT 478 at paras 25, 26; *Elsipogtog*, above at para 47).

[27] Previous decisions have held that a decision-maker, having made its decision, cannot in a subsequent decision re-examine or vary its order (*Huneault v Central Mortgage Housing Corp,* [1981] FCJ No 905 (CA) at para 7 (QL); *Cargill Ltée v Syndicat national des employés de Cargill Ltée*, 2002 FCA 269 [*Cargill Ltée*]). This is the case even if a decision is made in error (*Narvaez v Canada (Minister of Citizenship and Immigration*), 2009 FC 514 at para 37 [*Narvaez*]). The fact that new evidence may be submitted subsequent to a final decision is not a basis upon which a final decision can be re-opened (*Tambwe-Lubemba v Canada (Minister of Citizenship and Immigration*), [2000] FCJ No 1874 (CA) at paras 3- 4 (QL)).

[28] The Applicant submits that he advised the PSC about his 2011 deployment during the investigation and that it was specifically referenced in the investigation report. Yet the First Decision revoked the 2008 Position without retroactive effect, it did not address the 2011 deployment nor that the Applicant would cease to be employed in the federal public service as a result of the stated corrective actions. The PSC subsequently issued the Second Decision, intended

to supersede the First Decision, to achieve corrective actions that would reverse the deployment and end the Applicant's employment. Both of the decisions were stated to be final.

[29] However, the PSC was *functus officio* and had no authority to issue the Second Decision because: the PSC referred to the First Decision as a final decision thereby disposing of all of the issues raised in the investigation made pursuant to section 69 of the Act; the PSC cannot revisit a final decision because it changed its mind or made an error of jurisdiction; the First Decision expressed the manifest intention of the PSC at the time the decision was issued and did not include any slips or clerical errors; the Act does not indicate that a decision made under section 69 can be reopened; and, the PSC is not entitled to reopen a final decision in order to specify additional or alternative corrective action.

Respondent's Submissions

[30] The Respondent submits that the application of the principle of *functus officio* must be applied to administrative bodies with greater flexibility than to the courts. There is flexibility to reopen such decisions if there has been an error in expressing the "manifest intention" of the administrative body (*Chandler*, above). In *Capital District*, above, the Nova Scotia Court of Appeal found that a supplementary award did not violate the *functus officio* principle. Similarly, in *Canadian National Railway Co v Canada (National Transportation Agency)* (1989), 96 NR 378, [1989] FCJ No 50 (CA) (QL) [*Canadian National Railway Co*], the Federal Court of Appeal found that an original decision of the agency was capable of two different interpretations and that it possessed jurisdiction to issue a second decision which clarified the matter.

[31] The Respondent submits that the First Decision did not express the PSC's manifest intent which was clarified by the Second Decision. It was the PSC's intention to eliminate, on the basis of his appointment to the 2008 Position obtained by fraud, any employment obtained by the Applicant. However, the First Decision was not clearly worded so as to express this intent and to implement the revocation to ensure that employment stemming from the 2008 Position ended, including the 2011 Position. The PSC did not change its mind nor did it augment its reasons or order an alternative remedy.

[32] The Respondent states that the language used in the First Decision, that the "purpose of the corrective action is to ensure that individuals do not gain employment in the public service as a result of fraud", indicates that the PSC intended to eliminate any gain the Applicant may have obtained on the basis of his fraudulent appointment to the 2008 Position. This included, as the investigator explained to the labour relations officer, ending all "employment within the federal public service…including with the actual department (CBSA)." The PSC's intent was also reflected in the briefing note. However, as issued, the PSC's First Decision was not capable of implementing the revocation in a manner that would fulfill its manifest intent.

[33] The PSC's objective to ensure that the Applicant did not gain employment in the public service as a result of fraud is consistent with the case law recognizing the need to preserve the integrity of the appointment system. In *Challal v Canada (Attorney General),* 2009 FC 1251 [*Challal*], the judicial review of an applicant who committed fraud in an appointment process and was transferred to another department was dismissed.

[34] The Respondent submits that the clarification of the PSC's original intentions was conducted fairly as the PSC gave the Applicant an opportunity to make submissions on the proposed revised corrective actions. The Applicant chose not to provide submissions even though in his affidavit filed in support of his application for judicial review he states that when he received the letter advising him of the proposed revision he was of the view that the PSC lacked jurisdiction and was acting unfairly. The Respondent submits that having failed to raise his concerns at the first opportunity, the Applicant should be prevented from advancing the issue in this application for judicial review.

Analysis

[35] As a preliminary point I will address the Respondent's submission that, because the Applicant chose not to raise the issue of *functus officio* when he was notified of the proposed amended corrective actions, that he should not now be permitted to impugn the Second Decision on that basis. In my view, and as set out below, the issue of *functus officio* in this matter primarily concerns whether the PSC's manifest intent was expressed in the First Decision. Accordingly, the PSC's inability to address this issue in the Second Decision because the Applicant did not raise it is not fatal. And, in any event, the issue was squarely raised in the application for judicial review and was fully addresses by both parties. It is, therefore, appropriate and within the Court's discretion to consider the issue.

[36] As a general rule *functus officio* ensures finality in the decision-making process. Brown & Evans, above, describe the doctrine at 12:6200 as follows:

> The doctrine of *functus officio* provides that once an adjudicator has done everything necessary to perfect the decision, they are barred from revisiting them other than to correct clerical errors or other minor technical errors.
>
> […]

[37] Administrative adjudicators and other decision-makers to whom the duty of fairness applies have no inherent jurisdiction to rehear, reconsider or vary a decision once it has been finalized. Rather, having rendered a final decision, they are *functus officio*. Thus, subject to the exceptions to the general rule, or perhaps where the parties agree otherwise, any authority to rehear, reconsider or vary a decision must be found in statute.

[38] The leading authority on the doctrine of *functus officio* continues to be the decision of the Supreme Court of Canada in *Chandler*, above. There, the Court stated the following:

> [20] …As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp., supra.*
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> [21] To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point

> of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

[39] The Court further stated:

> [23] Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute. See *Huneault v. Central Mortgage and Housing Corp*. (1981), 41 N.R. 214 (F.C.A.)

[40] The Federal Court of Appeal stated the following in *Cargill Ltée*, above, based on Justice Sopinka's (as he then was) comments in *Chandler*, above:

> [12] It is worth noting in Sopinka J.'s remarks that:
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> 1. when the administrative tribunal has reached a "final" decision on a matter, it cannot revisit the matter inter alia because it has changed its mind or made an error;
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> 2. the application of the *functus officio* rule should be flexible when the enabling legislation allows the tribunal to re-open the matter so it can fully exercise its jurisdiction
>
> 3. if the tribunal has failed to dispose of a matter which was before it and which it was empowered to dispose of, it ought to be allowed to complete its statutory task;

4. if the tribunal had to select how it would dispose of the matter before it and chose a specific way of doing so, it cannot then reconsider the matter so as to arrive at another solution.

[41] In *Chandler*, above, the Court set out several exceptions to *functus officio*, only one of which has been advanced as being applicable in the present case being, "Where there has been error in expressing the manifest intention of the court" (*Paper Machinery Ltd v J O Ross Engineering Corp*, [1934] SCR 186; *Narvaez*, above at para 26).

[42] In this case, the PSC's investigation was conducted pursuant to section 69 of the Act, which reads as follows:

Fraud	**Fraude**
69. If it has reason to believe that fraud may have occurred in an appointment process, the Commission may investigate the appointment process and, if it is satisfied that fraud has occurred, the Commission may	69. La Commission peut mener une enquête si elle a des motifs de croire qu'il pourrait y avoir eu fraude dans le processus de nomination; si elle est convaincue de l'existence de la fraude, elle peut :
(a) revoke the appointment or not make the appointment, as the case may be; and	a) révoquer la nomination ou ne pas faire la nomination, selon le cas;
(b) take any corrective action that it considers appropriate.	b) prendre les mesures correctives qu'elle estime indiquées.

[43] There is nothing contained in the Act which authorizes the PSC to alter corrective actions once decided. The questions for this Court to decide are, therefore, whether PSC's First Decision was a final decision, and, whether that decision erred in expressing the PSC's manifest intention and may be revisited on the basis of that exception to the doctrine of *functus officio*.

[44] Brown & Evans, above, at 12:6222 describes finality in adjudication as defined in G. Spencer Bower & AK Turner, *The Doctrine of Res Judicata*, 2d ed (London: Butterworths, 1969) at 132 as follows:

> A judicial decision is deemed final, when it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain, and when it is not lawfully subject to subsequent rescission, review or modification by the tribunal which pronounced it.

[45] In this case, the PSC's letter dated September 21, 2012, which attached the first Record of Decision, states that, "The purpose of this letter is to inform you of the Commission's final decision…" The letter also advised the Applicant that if he wished to contest the decision that his right of recourse was to commence an application for judicial review in this Court. It also contemplated the implementation of the First Decision stating that, "The department's officials and the PSC will be in contact shortly concerning the implementation of the corrective actions." The attached first Record of Decision set out its purpose and the corrective actions as described above including revoking the Applicant's appointment to the position of CS-02 as a result of the 2008 appointment process.

[46] Given this, I am satisfied that the First Decision was final. Therefore, it could only be revisited by the PSC if it fell within the "manifest intention" exception enunciated in *Chandler*, above.

[47] Courts have applied the manifest intention exception in various factual circumstances as illustrated by the following decisions.

[48] In *Capital District*, above, an arbitration board was to determine certain issues including the subject employees' rate of pay for the next three years. It issued an award but the parties could not agree on how to implement that part of the award dealing with the "catch-up" component of the wage increase. The board issued a supplemental award to resolve the difficulty. The union objected asserting that the board had no further authority to address the catch up issue as it had finally decided the matter in its first decision and was *functus officio*.

[49] The Nova Scotia Court of Appeal aptly described the goals of finality and effectiveness in decisions:

> [1] This appeal illustrates the tension between two important goals of adjudication: finality and effectiveness. The goal of finality is served by the rule that once a tribunal has finally decided a matter, it has no further power to act. This rule is often identified by its Latin name, *functus officio*. Finality, however, is not an absolute value, and so the *functus officio* rule is mitigated in certain circumstances in order to serve the goal of effectiveness. For example, a tribunal may amend its decision where it has made an error in expressing its "manifest intent." The appeal turns on how the competing goals of finality and effectiveness play out in the particular circumstances of this case.

[50] The Nova Scotia Court of Appeal stated that the best indication of the tribunal's manifest intent will generally be found in the reasons for its initial decision. Unless some disharmony or contradiction is apparent between the allegedly erroneous choice of words and that intent, the language chosen by the tribunal in its initial decision should stand. The Court found that the arbitration board reasonably concluded that the language in the main award by which it described eligibility for catch-up increases did not give effect to the manifest intent of that award:

> [59] I turn first to the board's conclusion as to its "manifest intent". In its supplemental award, the board summarized its purpose in adding the catch-up component to the wage rates: "[t]he clear and overriding purpose of the award was to ensure that employees of this employer were paid the highest rate in Atlantic Canada." This is a reasonable conclusion as to the "clear and overriding" purpose of its main award. It is supported by express and clear language in the main award; this conclusion in the supplemental award simply reiterates what was said in the main award to be the "operating principle" which "guided" the board.
>
> [60] I turn next to the question of whether the disputed language of the main award failed to give effect to this intent. As it had stated in its main award, the board repeated in its supplemental award that its "... objective was not to create any windfalls ... ". It concluded, however, that windfalls would result if catch-up adjustments were made once the top rate was achieved. In other words, the board said that ignoring the ATB component in determining whether the pay was at the top in Atlantic Canada was inconsistent with its intent not to award windfalls for any classification. This, too, seems to me to be a reasonable conclusion. Giving a catch-up payment to a group of employees who are already at the top of the pay rates in the region could reasonably be viewed as a "windfall", and therefore inconsistent with the board's clearly expressed intended objective.

[51] Similarly, in *Canadian National Railway Co*, above, the Federal Court of Appeal found that the agency had jurisdiction to detail more precisely the types of documents it had ordered disclosed in its initial decision on the point (*Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1218 at para 11). In *Nozem v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1449, the applicant was mistakenly given a notice of a decision regarding his refugee claim which indicated that his application for protection had been accepted. The applicant later received a full decision denying his refugee claim. The Court concluded that the Board was not *functus officio* when issuing the second decision because the first notice of decision was issued by administrative error.

[52] Similarly, in *Tinney*, above, Justice Zinn found that the Canadian Human Rights Commission had merely sent a notification in error to a claimant indicating that his complaint would be referred to the Canadian Human Rights Tribunal, when in fact the Commission had reached a negative decision in his file, and that it was open to the Commission to correct that error.

[53] Conversely, in *Cargill Ltée*, above, the Federal Court of Appeal found that the Canadian Industrial Relations Board could not re-examine an order issued under labour legislation. Part of the Court's decision was based on whether there were "indications in the enabling statute that the decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation." The Court found that the effect of the new order was to create new rights. It relied on *Commission scolaire Harricana v. Syndicat des travailleuses et travailleurs de l'enseignement du nord-est québécois*, [1988] RJQ 947 (CA) which found that if the purpose of an arbitral award is to define or clarify an arbitral award made previously, it cannot create broader

rights than those resulting from the first award. In my view, this case can be distinguished as, for the reasons set out below, the Second Decision did not create new rights but served only to clarify the First Decision.

[54] The First Decision contained the corrective actions described above. In my view, it is clear that these were intended to revoke the Applicant's employment arising from the 2008 appointment process because the appointment was the result of his fraudulent application. In this regard, the First Decision states that, "The purpose of the corrective actions is to ensure that individuals *do not gain employment* in the public service as a result of fraud" (emphasis added). It makes reference to the PSC's authority to take corrective action under section 69 of the Act which includes the revocation of an appointment and the taking of any corrective action that it considers appropriate. The First Decision also specifically states that the Applicant's appointment to the position of "Senior Technical Analyst" made as a result of the 2008 appointment process was revoked.

[55] Although not a part of the First Decision, PSC's intent was also relayed to the Applicant in its Investigator's letter of August 23, 2012 sent to the Applicant's Labour Relations Officer which sought to clarify the first proposed corrective action. One of the questions asked was the following:

> What is the impact of a revocation of Mr. St-Amour's CS-2 on his employment? Is it the intention of the Commission that Mr. St-Amour work for the Public Service at a CS-1 level?

[56] The investigator responded that:

> A revocation implies that all employment within the federal public service is to be ended including with the actual department (CBSA).

[57] Regardless, the PSC subsequently took the view that the first of the corrective actions, being the revocation of the Applicant's appointment to the position of CS-02 as a result of the 2008 appointment process, could not be implemented because the Applicant had been deployed to another position in March 2011. The PSC briefing note dated December 20, 2012 which proposed the revised corrective actions states that, "Deployments should not be used to avoid the application of corrective actions," and that the Applicant would have been ineligible for deployment to the 2011 Position had he not been appointed to the 2008 Position as a result of fraud.

[58] While the briefing note states that it was during the implementation phase of the corrective action that CBSA indicated that the Applicant had been deployed to the 2011 Position, in fact, the investigation report refers to the deployment offer and that it was accepted by the Applicant on October 6, 2011. Thus, the deployment was known to PSC when it issued the First Decision. However, in my view, this is only significant as regards to the PSC's subsequent interpretation of the CBSA's ability to implement the PSC's manifest intent and not to the intention itself, being the revocation of any position held by the Applicant as a result of fraud in the 2008 appointment process.

[59] The Second Decision revises the wording of the revocation provision of the First Decision. It states that the Applicant's appointment will be revoked retroactively to March 20, 2011, the day

preceding his deployment, and, that following the revocation the Applicant would cease to be an employee of the federal government.

[60] In my view, the Second Decision served only to clarify the First Decision which had not clearly stated the PSC's manifest intent. Specifically, that because the Applicant's CS-02 Position was obtained as a result of the fraud in the 2008 appointment process, it was revoked. This also, and necessarily, included the 2011 Position as the deployment to it was only possible because of the 2008 appointment. The Second Decision also clarified its intent that, because his position was revoked, that the Applicant would no longer be an employee of the federal public service. The PSC did not change its mind, reconsider or vary its original decision. Nor did it reopen the proceeding to make another or further selection of corrective actions.

[61] Therefore, as the First Decision did not clearly reflect its manifest intent, the PSC was not *functus officio* in rendering the Second Decision which falls within that exemption as set out in *Chandler*, above.

[62] For this reason, it is not necessary to address the Respondent's alternative submission that the First Decision, which was based on fraud, revoked the Applicant's appointment to the 2008 Position rendering that appointment, and the subsequent deployment to the 2011 Position, null *ab initio*.

Issue 3: In the alternative, does the doctrine of promissory estoppel apply to prevent the PSC from replacing its First Decision with its Second Decision?

Applicant's Submissions

[63] The Applicant refers to *Maracle v Travellers Indemnity Co of Canada*, [1991] 2 SCR 50 at para 13 in which the Supreme Court of Canada stated that the party relying on the doctrine of promissory estoppel must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted upon. Further, that the party relying on the doctrine must also establish that they acted on it or in some way changed their position. The Applicant submits that the Courts have applied the doctrine of promissory estoppel to prevent the Crown from insisting on its strict legal rights (*Mentuck v Canada*, [1986] 3 FC 249 at paras 12-20, 35; *Karia v Canada (Minister of National Revenue)*, 2005 FC 639 at paras 9, 10).

[64] The Applicant submits that in the administrative law context, where an employer has overpaid an employee and that employee has relied on the overpayment by incurring special financial commitments, the employer will be estopped from recovering the overpayment (*Ottawa Board of Education v Federal of Women's Teachers' Association*, [1986] OLAA No 58 (P. Picher) at paras 69-84 (QL); *HM Trimble & Sons (1983) Ltd v International Union of Operating Engineers, Local 115 (Overpayment Grievance)*, [2009] BCCAAA No 116 at para 60 (QL); *York University v CUPE, Local 3903 (Malik)*, [2004] OLAA No 112 (Devlin) at paras 16-25 (QL)). Further, an overpayment cannot be recovered where there is evidence of any special projects being undertaken or special financial commitments made because of the receipt of those payments (*Mobil Oil Canada, Ltd v Storthoaks (Rural Municipality)*, [1976] 2 SCR 147).

[65] The Applicant submits that in the present case, he made a number of significant financial commitments and in one case a life-altering decision in reliance on the First Decision which did not result in the loss of his employment. The Applicant and his wife took legal custody of their granddaughter, renewed their mortgage for five years, and, sold their truck to purchase a new vehicle which they would not have done if the First Decision had required the loss of his employment. Therefore, it would be manifestly unfair to allow the PSC to rescind its First Decision and it is estopped from now issuing the Second Decision.

Respondent's Submissions

[66] The Respondent objects to promissory estoppel now being raised as it submits that it was not contained in the Applicant's notice of application. Rule 301(e) of the *Federal Court Rules*, SOR/98-106 (Rules), requires that the notice of application contain "a complete and concise statement of the grounds intended to be argued…"

[67] The Respondent also sets out the principles of promissory estoppel cited in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 SCR 281 at paras 45-48 and submits that the Applicant has failed to show that the PSC made an unambiguous promise that he would retain his position. Further, that the Applicant cannot suggest that he was unaware of the impact of the First Decision on his employment. His labour relations officer was clearly informed that the revocation, as ordered in the First Decision, was intended to end all employment within the federal public service.

Analysis

[68] Rule 301(e) of the Rules states that a notice of application shall set out "a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on." An applicant may not raise an argument not set out in its notice of application. In *Arora v Canada (Minister of Citizenship and Immigration),* [2001] FCJ No 24 at para 9 (QL), this Court set out the justification for the rule as follows:

> [9] ….If, as here, the applicant were able to invoke new grounds of review in his memorandum of argument, the respondent would conceivably be prejudice[sic] through failure to have an opportunity to address the new ground in her affidavit or, once again as here, to at least consider filing an affidavit to address the new issue….

[69] Here, the Applicant should have properly filed a motion to amend its notice, "which would have allowed for a timely debate as to the relevance of such an amendment and, if necessary, the measures required to prevent either party from suffering prejudice" (R*epublic of Cyprus (Commerce and Industry) v International Cheese Council of Canada*, 2011 FCA 201 at para 15). However, this Court has previously permitted the hearing of an issue not raised in a notice of application (*Cameron v Canada (Indian Affairs and Northern Development)*, 2012 FC 579 at para 101; *Do Nascimento v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1424 at para 8) and here there is no suggestion of prejudice to the Respondent.

[70] In any event, the First Decision stated that the Applicant's 2008 Position was to be revoked. Any doubt that the Applicant may have had about the impact of the revocation on his employment, including the 2011 Position, should have been resolved by the reply received from the investigator

to the labour relations officer's request for clarification. The elements of promissory estoppel have not been established as there was no promise or assurance of continued employment and the Applicant could not have reasonably interpreted the First Decision as such, particularly in light of the letter from the investigator. The case law referred to by the Applicant is not supportive of its submissions on this issue.

[71] This application for judicial review is therefore dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This application for judicial review is dismissed; and

2. The Respondent shall have its costs.

"Cecily Y. Strickland"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-188-13
STYLE OF CAUSE:	MARC ST-AMOUR v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 23, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	STRICKLAND J.
DATED:	JANUARY 30, 2014

APPEARANCES:

Steven Welchner	FOR THE APPLICANT
Marie-Josée Montreuil	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Welchner Law Office Professional Corporation Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT