Federal Court of Appeal | Cour d'appel fédérale

Date: 20231011

Docket: A-216-22

Citation: 2023 FCA 206

CORAM: **MACTAVISH J.A.**
MONAGHAN J.A.
BIRINGER J.A.

BETWEEN:

MARIO GHAFARI

Applicant

and

ATTORNEY GENERAL OF CANADA
(STATISTICS CANADA)

Respondent

Heard at Ottawa, Ontario, on September 21, 2023.

Judgment delivered at Ottawa, Ontario, on October 11, 2023.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: MACTAVISH J.A.
BIRINGER J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The applicant, Mario Ghafari, seeks judicial review of a decision of the Federal Public Service Labour Relations and Employment Board (Board) dated September 12, 2022 (2022 FPSLREB 77) dismissing his complaint alleging abuse of authority in an internal appointment process. For the reasons that follow, I would dismiss the application for judicial review.

I. Background

[2] Because the Board's reasons describe the background to Mr. Ghafari's complaint in detail (at paras. 16-58), a brief summary of the salient facts is sufficient for purposes of this application.

[3] Mr. Ghafari was a candidate for a senior methodologist position at Statistics Canada with a job classification of MA-04. The appointment process involved several stages.

[4] First, candidates were screened in or out of the competition based on their public service performance assessment (the PSPA). All candidates screened in were required to complete a "track record" in which they clearly demonstrated how they met the six essential competencies for the position. Passing all six was a prerequisite to proceeding to the next stage of the appointment process. Each candidate's director was responsible for validating their track record and assessing their qualifications. To do so, directors were permitted, but not required, to speak to candidates' supervisors.

[5] Mr. Ghafari's director, Mr. Dolson, assessed Mr. Ghafari as not meeting any of the six essential competencies. On the track record validation, Mr. Dolson observed that the examples Mr. Ghafari provided were not at an MA-04 classification level. In the course of validation, Mr. Dolson spoke with two chiefs of sections where Mr. Ghafari worked or had worked, but not his immediate supervisor.

[6] After learning that he would not proceed to the next stage of the appointment process, Mr. Ghafari sought feedback from Mr. Matthews, a member of the selection panel. To prepare for that discussion, Mr. Matthews asked Mr. Laniel, an assistant director familiar with Mr. Ghafari's work, to review Mr. Ghafari's track record. Mr. Laniel did not confer with Mr. Dolson for that purpose and concluded Mr. Ghafari met two competencies, but not the other four.

[7] The *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (Act) requires appointments to be made based on merit and subsection 30(2) describes the circumstances in which an appointment is made on the basis of merit. An unsuccessful candidate for an internal appointment may make a complaint to the Board that they were not appointed or proposed for appointment by reason of an abuse of authority in the exercise of authority under subsection 30(2): ss. 77(1)-(2). The burden of establishing abuse of authority rests with the complainant: *Gulia v. Canada (Attorney General)*, 2021 FCA 106 at para. 7 (*Gulia*).

[8] Mr. Ghafari made a complaint to the Board under section 77 of the Act, alleging an abuse of authority resulting in an incorrect assessment of his competencies for the senior methodologist position. His complaint identified four areas of concern:

1. Mr. Dolson was biased against Mr. Ghafari based on three specific prior interactions.

2. While revised following a grievance, Mr. Ghafari's PSPA was inaccurate when he first applied for the position, putting him at a disadvantage. (Although Mr. Dolson signed this evaluation, Mr. Ghafari's supervisor prepared it.)

3. Mr. Dolson should have consulted with Mr. Ghafari's immediate supervisors when completing his assessment.

4. The assessment by Mr. Dolson was inaccurate.

[9] The Board dismissed Mr. Ghafari's complaint addressing each of these areas of concern. While acknowledging Mr. Ghafari's belief that he was not fairly assessed in the appointment process, the Board explained that its role was not to reassess him. Rather, the question before the Board was whether an abuse of authority had occurred. The Board observed that Mr. Ghafari had the burden of establishing bias or other abuse of authority and concluded he had not demonstrated either.

[10] Mr. Ghafari now seeks judicial review of the Board's decision.

[11] Mr. Ghafari's memorandum of fact and law raises many issues. However, at the outset of the hearing, he advised us that he understood that pointing out minor errors or inconsistencies would be insufficient and that he therefore would focus his oral argument on three points: two alleged breaches of procedural fairness by the Board and one alleged error by the Board in ignoring significant evidence.

[12] Nonetheless, I have reviewed the record in light of each of the specific concerns raised in Mr. Ghafari's memorandum, but not raised at the hearing. I am satisfied that none of them warrant this Court's intervention given this Court's role on judicial review. Thus, these reasons focus on the specific issues raised in oral submissions to this Court: first addressing Mr. Ghafari's procedural fairness arguments, and then the alleged errors in the Board's decision to dismiss his complaint.

II. Alleged Breaches of Procedural Fairness

[13] Mr. Ghafari alleges that the Board breached his rights to procedural fairness in deciding to exclude and limit certain proposed witnesses and in refusing to accept his new evidence after the hearing was complete.

[14] Procedural fairness requires that the person affected by a decision have the opportunity to present their case fully and fairly and to have the decision made in a fair, impartial and open process, appropriate to the context of the decision: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 (S.C.C.) at para. 28 (*Baker*). However, the requirements of procedural fairness are context specific: *R. v. Nahanee*, 2022 SCC 37 at para. 53; *Baker* at paras. 21-22.

[15] When a breach of procedural fairness is alleged, this Court must ask itself whether, having regard to all the circumstances, a fair and just process was followed: *Lipskaia v. Canada (Attorney General)*, 2019 FCA 267 at para. 14; *Canadian Pacific Railway v. Canada (Attorney*

General), 2018 FCA 69 at para. 54; *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69 at paras. 46-47; *Gulia* at para. 9. Those circumstances include "factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the [decision-maker's] constituencies": *Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15 at para. 231.

A. *The Exclusion of Witnesses Did Not Breach Rights of Procedural Fairness*

[16] I turn first to the Board's decision to exclude certain of Mr. Ghafari's proposed witnesses, which followed a pre-hearing conference call. Mr. Ghafari submits the process followed by the Board was not procedurally fair.

[17] The record before us discloses that, in January 2022, the Board asked each of the parties to provide it with its list of witnesses. The respondent named two witnesses, but reserved the right to call others; Mr. Ghafari sent a list of eight witnesses other than himself. The respondent asked for information about the nature of the testimony of three of Mr. Ghafari's proposed witnesses. By email to the parties, the Board sought information about the parties' availability for a teleconference. In response, Mr. Ghafari advised that he wanted to understand the nature of the testimony of one of the respondent's proposed witnesses.

[18] The Board's email explained that the teleconference was for the "purpose of … [finding] out from [Mr. Ghafari] the nature of the testimony" of his witnesses. It went on to state that "[i]n relation to the request for an expert witness (Michelle Simard), at the conference call

[Mr. Ghafari] will be asked to identify the area of expertise and to explain why expert testimony is necessary to support his complaint".

[19] Having heard from Mr. Ghafari, and presumably the respondent, the Board advised the parties in writing, shortly after the teleconference, that it had decided that Mr. Ghafari would not be permitted to call two human resources advisors because their evidence was not relevant to the allegations in the complaint. While reserving on the relevance of their evidence until the hearing, the Board also limited Mr. Ghafari to one witness on each of two other subjects to avoid repetitive testimony. The Board also confirmed Ms. Simard could testify, but not as an expert, so no expert report was needed.

[20] Mr. Ghafari alleges that the Board's email convening the teleconference did not inform him that he would have to explain his reasons for calling the proposed witnesses or that an exclusion of witnesses might follow. Furthermore, he says, while publicly available guides to hearings before the Board state witnesses may be the subject of pre-hearing conferences, nothing told him an exclusion of witnesses could result. In particular, Mr. Ghafari notes the difference in the email's contents concerning Ms. Simard's proposed testimony and that concerning the other witnesses. Finally, he questions whether a conference call was the appropriate forum for this discussion, suggesting that it did not allow him to present documentary evidence and may have interfered with other participants understanding him because they could not see him.

[21] Even in the absence of statutory provisions prescribing particular procedures, an administrative decision-maker has considerable discretion in determining its own procedure:

Re:Sound v. Fitness Industry Council of Canada, 2014 FCA 48 at para. 37, citing *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] S.C.R. 560, 57 D.L.R. (4th) 663 at 568-569 (S.C.R.).

[22] However, here, the governing legislation expressly grants the Board the power to order pre-hearing procedures, to order that a pre-hearing conference or hearing be conducted by means of telecommunication provided all participants can communicate with each other, and to accept any evidence: *Federal Public Service Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, ss. 20(b), (c), (e) (Board Act) and *Public Service Staffing Complaints Regulations*, SOR/2006-6, s. 27. Moreover, the Board may decide any matter before it without holding an oral hearing: Board Act, s. 22.

[23] I accept that the email convening the teleconference might have been clearer. I also accept that Mr. Ghafari may not have understood that exclusion of his proposed witnesses might result from the teleconference. However, I am not convinced the process the Board followed amounted to a breach of procedural fairness.

[24] Mr. Ghafari had notice that the testimony of his witnesses was the subject of the teleconference. While there is no transcript of the call, I must presume that he was asked to explain to the Board both the nature of the testimony and the reasons that testimony was important to his complaint. Mr. Ghafari does not suggest that, once he understood the nature of the teleconference, he asked the Board for an adjournment or the right to make subsequent submissions and was refused. Consistent with this, the record shows that some time after the

parties learned of the Board's decision, Mr. Ghafari wrote to the Board expressing disagreement with the decision and explaining why those witnesses were important. However, he did not raise any concerns about the process itself. Following Mr. Ghafari's email, the Board did not change its decision on witnesses, explaining its decision was final.

[25] In my view, this process was open, transparent and procedurally fair.

[26] I have also considered whether the Board's refusal to consider any evidence from the two human resources advisors constituted a breach of procedural fairness. Mr. Ghafari explained that he believed their evidence was relevant to the design of the "tool", by which I understand him to mean the job poster, the track record and the validation process. The Board considered that evidence irrelevant to the complaint and so inadmissible.

[27] The Board is "to be afforded considerable discretion in their assessments of the admissibility of evidence" and rarely will "the refusal to allow evidence … be so significant that it will amount to a denial of procedural fairness": *Agnaou v. Canada (Attorney General)*, 2014 FC 850 at para. 102, aff'd 2015 FCA 294, leave to appeal to refused, 36730 (26 May 2016), citing *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, [1993] S.C.J. No 23 at 490 (S.C.R.) (*Trois-Rivières*). However, the rejection of evidence will be a breach of natural justice if the rejection "has such an impact on the fairness of the proceeding" that it "[leads] unavoidably to the conclusion that there has been a breach of natural justice" (procedural fairness): *Trois-Rivières* at 491.

[28] The focus of a complaint under section 77 of the Act is abuse of authority in the exercise of authority under subsection 30(2) of the Act—that is, the authority to make an appointment on the basis of merit. An appointment is based on merit where the person meets the essential qualifications for the work performed: Act, s. 30(2)(a). But those qualifications may be established by the employer and, to determine whether a person meets the qualifications for the position, any assessment method considered appropriate may be used: Act, ss. 31, 36. The Board explained that it could not examine the choice of assessment method or the qualifications for the position: reasons at paras. 101, 110.

[29] Central to Mr. Ghafari's complaint were allegations about Mr. Dolson—that he was biased, that he did not consult Mr. Ghafari's supervisor, that he did not properly assess Mr. Ghafari's competencies, and that the assessment Mr. Dolson completed was not accurate. Given that context and the Board's conclusion that Mr. Ghafari failed to demonstrate the relevance of the human resources advisors' testimony to that complaint, I am not convinced the exclusion of their evidence is significant enough to constitute a breach of Mr. Ghafari's right to procedural fairness.

B. *The Refusal to Admit Post-hearing Evidence Did Not Breach Rights of Procedural Fairness*

[30] Mr. Ghafari's second procedural fairness argument relates to the Board's refusal to accept additional evidence after the conclusion of the hearing. Mr. Ghafari became aware of the evidence in question during his cross-examination of one of the respondent's witnesses on Friday March 4, 2022, the last day of testimony. Oral arguments were made the following Tuesday,

followed that same day by written submissions. Two days later, Mr. Ghafari wrote to the Board seeking permission to introduce the additional evidence.

[31] Mr. Ghafari's request addressed the test for admission of post-hearing evidence. After receiving submissions from the respondent, the Board refused to admit the evidence, explaining that, in its view, the test for admission of new evidence was not met. Among its reasons, the Board pointed out that Mr. Ghafari did not make his request until two days after the last hearing day.

[32] Mr. Ghafari submits that the Board's decision was procedurally unfair because he only learned of the evidence on the last day of testimony and so could not have obtained it earlier than he did. He also asserts that the period of time within which the Board expected him to seek permission to admit it was too short.

[33] I see no breach of procedural fairness. The Board heard arguments from both sides and then made its decision. Even if Mr. Ghafari could not access the evidence until after the close of the hearing, nothing prevented him from asking for time to obtain it, either immediately following the testimony of the witness who raised it, or during his final oral submissions four days later. I also observe that the Board concluded the evidence was "readily available before the hearing". In my view, the substance of Mr. Ghafari's submissions on this matter is disagreement with the Board's application of the test for new evidence.

III. The Board's Decision to Dismiss the Complaint Was Reasonable

[34] I turn now to Mr. Ghafari's submissions concerning the Board's decision to dismiss his complaint. In his memorandum, Mr. Ghafari alleges the Board made errors of fact and law, ignored relevant evidence, and provided insufficient reasons.

[35] The matter before us is not an appeal of the Board's decision, but rather a judicial review. The applicable standard of review is presumptively reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (*Vavilov*) at para. 10. Reviewing courts derogate from the reasonableness presumption only where the rule of law or a clear indication of legislative intent requires a different standard to be applied: *Vavilov* at para. 10. Here, neither an applicable rule of law nor legislated standard calls for another standard. Therefore, the standard of review is reasonableness.

[36] Reasonableness review has two elements—an assessment of the reasoning process and an assessment of the outcome: *Vavilov* at para. 83. To be reasonable, the Board's decision must fall "within a range of possible, acceptable outcomes", defensible given the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47. A reasonable decision is one "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law"; reasons are not to be "assessed against a standard of perfection" and need not "include all the arguments, statutory provisions, jurisprudence or other details" a reviewing court might prefer: *Vavilov* at paras. 85, 91. Rather, the reasons are to be read "in light of the record and with sensitivity to the administrative regime in which they were given": *Vavilov* at para. 103.

[37] The focus of Mr. Ghafari's submissions before us was the Board's failure to expressly refer to evidence that formed a substantial part of his written submissions to the Board and which he considers of critical importance—the Statistics Canada competencies dictionary. As I understand it, the competencies dictionary is a document of general application to Statistics Canada's employees and positions, describing and defining competencies in four broad categories.

[38] A decision is not unreasonable merely because the reasons do not refer to all the evidence. Rather, to set aside a decision as unreasonable, this Court must be satisfied the decision has "sufficiently serious shortcomings … such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" and "[a]ny alleged flaws … must be more than merely superficial or peripheral to the merits of the decision": *Vavilov* at para. 100.

[39] Mr. Ghafari's written submissions to the Board focused on perceived errors and faults in the appointment process that, he says, amount to an abuse of authority. These included submissions related to the use of the PSPA, whether immediate supervisors rather than section chiefs should have been consulted, and the absence of a marking scale, answer key or direction as to how to assess a candidate's track record.

[40] As Mr. Ghafari explained it, the descriptions of six essential competencies for the position of senior methodologist in the job poster and track record matched exactly the language of the same competencies in the competencies dictionary and therefore, to assess those

competencies, directors should have been directed to the competencies dictionary. In particular, he submitted that while the competencies dictionary describes what needs to be demonstrated to achieve each particular level rating for those six competencies, those levels are not tied to a job classification. In contrast, he submitted, other competencies in the dictionary are tied to job classification. Because the job poster specified a minimum level rating (i.e., Level 2) for only two of the six essential competencies, he submitted that any example in the track record demonstrating the competency should have sufficed as a passing grade. Thus, he submitted, the six competencies for the senior methodologist position should not have been assessed at an MA-04 level. Doing so, he argued, amounts to an abuse of authority and this was evidenced by the differences in the assessment of his competencies by Mr. Dolson and Mr. Laniel.

[41] While I agree that the Board did not expressly refer to or analyze the competencies dictionary, this is far from a serious shortcoming in the context of Mr. Ghafari's complaint, which centered on Mr. Dolson's actions.

[42] Moreover, it is clear that the Board did consider Mr. Ghafari's submissions relating to the appointment process itself: see Board reasons at paras. 71, 72, 73, 98, 107, 109, 110, 111. I am satisfied that, even if it did not expressly refer to the competencies dictionary, the Board understood and considered, but did not accept, Mr. Ghafari's submissions summarized in paragraphs 39 and 40 above.

[43] In particular, paragraphs 102 to 115 of the Board's reasons fall under the heading "The assessment of the essential qualifications' core and functional competencies". There the Board

"grapple[s] with…central arguments raised" by Mr. Ghafari: *Vavilov* at para. 128. The Board explains that its "role is not to reassess candidates in an appointment process but to examine how the assessment has been done" and that reviewing "the information available to the assessors" would lead to a reassessment: reasons at paras. 102, 105. Contrary to Mr. Ghafari's submission, the Board found that the track record referred to the need to provide examples with sufficient complexity, but that complexity was not a criteria for assessing core and functional competencies: reasons at paras. 107-108.

[44] The Board addressed two other concerns regarding the assessment. First, Mr. Ghafari asserted "that the instructions for the six competencies were ambiguous and that there was no requirement that they be assessed at the MA-04 level". Second, he claimed "that examples of methodology and statistics work were not required in the examples". The Board disagreed, observing that "[t]he instructions clearly stated that the competencies were to be described, considering '… that you are applying for an MA-4 position …'." so that "[i]t was open to the director to assess those competencies considering the core work functions of the MA-04 level (statistics and methodology)". The Board observed that even if it accepted Mr. Laniel's assessment as more accurate, Mr. Ghafari did not meet the threshold because he still did not satisfy four of the six competencies.

[45] Mr. Ghafari has not convinced me that the Board's decision is unreasonable because its reasons failed to specifically address the competencies dictionary. Reading the Board's reasons as a whole, I am satisfied the Board was responsive to Mr. Ghafari's submissions, and that the Board "*listened* to the parties": *Vavilov* at para. 127 (emphasis in original).

[46] Before the Board, Mr. Ghafari alleged bias on the part of Mr. Dolson. While his notice of application alleges the Board made unreasonable findings of fact and did not give due weight to the evidence of bias, we must accept the Board's factual findings and cannot reweigh or reassess the evidence, absent special circumstances: *Vavilov* at para. 125. I see no special circumstances that permit me to interfere with the Board's factual findings and see no error in its finding that there was no bias.

[47] Finally, as I note above, before us Mr. Ghafari did not specifically address many alleged errors of fact and law raised in his memorandum. Having considered each of those allegations closely in light of the record, I am satisfied they do not, alone or collectively, render the Board's decision unreasonable. This includes the Board's decisions to exclude witnesses and to refuse to admit evidence after the hearing.

IV. Conclusion

[48] In conclusion, I am satisfied that the Board's decision to dismiss Mr. Ghafari's complaint was reasonable and that the Board did not breach Mr. Ghafari's rights to procedural fairness. Therefore, I would dismiss the application for judicial review. As the respondent does not seek costs, I would award none.

"K.A. Siobhan Monaghan"
J.A.

"I agree
Anne L. Mactavish J.A."

"I agree
Monica Biringer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW FROM A DECISION OF MR. IAN R. MACKENZIE, FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD, DATED SEPTEMBER 12, 2022, DOCKET NO. 2022 FPSLREB 77

DOCKET:	A-216-22
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CONCURRED IN BY:	MACTAVISH J.A. BIRINGER J.A.
DATED:	OCTOBER 11, 2023

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