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T-2462-14

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Ottawa, Ontario, December 23, 2015

PRESENT: The Honourable Madam Justice Tremblay-Lamer

Docket: T-2453-14

BETWEEN:

OLEG SHAKOV

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-2462-14

BETWEEN:

OFFICE OF THE COMMISSIONER FOR FEDERAL JUDICIAL AFFAIRS, MARC GIROUX AND NIKKI CLEMENHAGEN

Applicants

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[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 [PSC], dated November 3, 2014, to adopt the conclusions of an Investigative Report and the corrective action proposed by the Investigations Branch of the PSC regarding the appointment of Mr. Oleg Shakov as Director of International Programs [IP Director] for the Office of the Commissioner for Federal Judicial Affairs [FJA].

[2] The applications by Mr. Shakov, the FJA, Marc Giroux and Nikki Clemenhagen [collectively, the Applicants] were heard together pursuant to an order rendered by Justice Mactavish on August 21, 2015.

II. Background Facts

[3] The FJA is a federal government department based in Ottawa. Since 1996, its International Programs Division has coordinated the involvement of the Canadian judiciary in international exchanges and in judicial and court reform projects abroad. The Commissioner of the FJA has the rank and status of a deputy head. The PSC has delegated its appointment and appointment-related powers to the FJA. Mr. Marc Giroux is the FJA's Deputy Commissioner and was Acting Commissioner at the time of the appointment process at issue in these proceedings. As such, he had the delegated authority to make appointments within the FJA. Mr.

Giroux was responsible for launching the external non-advertised process no. 11-FJA-ENA-024 [the Appointment Process] that led to Mr. Shakov's term appointment in 2011.

[4] Ms. Nikki Clemenhagen is the FJA's Director, Compensation, Pension, Benefits and Human Resources. She held this position at the time of the Appointment Process and advised Mr. Giroux throughout.

[5] Mr. Shakov ran an independent consulting business. As of 1999, he worked on various contracts for the FJA and was notably their Head of International Projects (what the IP Director position was called at the time) from 2005 to 2009.

[6] The FJA does not have any core funding for the International Programs Division. All funds are obtained exclusively through outside sources such as the Department of Justice [DOJ] and the now defunct Canadian International Development Agency [CIDA].

A. *The Appointment Process*

[7] In April 2011, Mr. Marc Giroux approached Mr. Shakov about replacing the previous IP Director, who had suddenly and unexpectedly decided to leave. Mr. Shakov initially refused but relented after Ms. Clemenhagen suggested a one-year appointment. A new position, "OOC-0179", was subsequently created at the PM-6 group and level with an "English Essential" language requirement.

[8] Mr. Shakov was ultimately appointed to that position following the Appointment Process. The FJA appointed Mr. Shakov for a one-year term, from May 16, 2011 to May 18, 2012. It extended his term for a second year, and in December 2012 appointed him IP Director on an indeterminate basis.

B. *The Investigation and Report*

[9] The PSC is an independent agency charged with making appointments to the public service. That power can be delegated, in which case the PSC retains a supervisory function. In 2013, its Investigations Branch designated Ms. Marie-Josée Blais to investigate Mr. Shakov's appointment after a routine audit of the FJA discovered possible irregularities in the Appointment Process. Ms. Blais conducted a documentary review, interviewed several people and issued an Investigation Report on July 11, 2014.

[10] Ms. Blais concluded that the language requirement, "English Essential", had been tailored to fit Mr. Shakov's profile. Her finding was based on the following evidence:

1. the IP Director position had been "CCC/CCC" bilingual since its creation in 1997 and only became English Essential the month Mr. Shakov was appointed;
2. four out of five positions under the IP Director's supervision were "BBB/BBB" bilingual;
3. management-level meetings were conducted in English and French;
4. the IP Director was the only Director within the FJA not required to be bilingual;
5. Mr. Giroux and Ms. Clemenhagen knew Mr. Shakov had a limited proficiency in French; and

6. Mr. Shakov requested French lessons, and the language requirement was changed to "BBB/BBB" within a month of Mr. Shakov obtaining a BBB linguistic profile in French, showing that both the FJA and Mr. Shakov recognized it was a requirement for the job.

[11] Ms. Blais also found that none of the reasons given by the FJA justified conducting a non-advertised external appointment process. There was evidence that other individuals may have possessed the requisite "highly specialized" skills, the FJA did not actually fear losing Mr. Shakov and the "other reasons" invoked were merely that Mr. Shakov met all the criteria for the position.

C. *PSC Meetings and Decision*

[12] A first meeting of the PSC Commissioners [MoC] was held on July 24, 2014. At this meeting, the PSC requested that the revocation of Mr. Shakov's appointment be added to proposed corrective measures, which already included sanctions against Mr. Giroux and Ms. Clemenhagen. Following this first MoC, the Applicants were given the opportunity to comment on the proposed corrective action, which they did in August 2014.

[13] A second MoC was held on October 31, 2014. On November 3, 2014, the PSC issued its Record of Decision, by which it accepted the Investigations Branch's report and recommendations.

[14] On December 9, 2014, the PSC suspended the implementation of any corrective action pending the outcome of these applications for judicial review.

III. Decision

[15] The PSC accepted the Investigations Branch's report and recommendations. It determined that Mr. Giroux and Ms. Clemenhagen engaged in improper conduct by tailoring the position's language requirements to Mr. Shakov and in choosing a non-advertised process without proper justification or regard for the value of access found in the FJA's *Non-Advertised Appointment Processes Policy* [FJA Policy]. This improper conduct tainted the appointment of Mr. Shakov, even though he had no hand in it.

[16] The PSC mandated the revocation of Mr. Shakov's appointment and the suspension of Ms. Clemenhagen and Mr. Giroux's appointment authorities until they complete certain courses at the Canada School of Public Service. It also rescinded the FJA's delegated authority to reappoint Mr. Shakov to a different position, reserving the right to make such a decision at a later time.

IV. Issues

[17] These applications raise the following issues:

1. Was the PSC's finding of improper conduct in the appointment of Mr. Shakov reasonable? This issue comprises:
   a) the notion of improper conduct;
   b) the finding that the language requirements were tailored to Mr. Shakov's qualifications; and
   c) the justification for undertaking a non-advertised appointment process.

2. Was the corrective action proposed by the PSC reasonable?

3. Did the PSC breach procedural fairness in rescinding the FJA's delegated authority to reappoint Mr. Shakov?

4. Did the PSC exceed its jurisdiction in ordering a retroactive revocation?

V. Standard of Review

[18] Reasonableness is the appropriate standard of review for the PSC's interpretation and application of s. 66 of the *Public Service Employment Act*, SC 2003, ss 12, 13 [PSEA] (*MacAdam v Canada (Attorney General)*, 2014 FC 443 at paras 49-51 [*MacAdam*]. However, correctness is the standard of review on questions of procedural fairness (*Mabrouk v Canada (Public Service Commission)*, 2014 FC 166 at para 31 [*Mabrouk*]).

VI. Submissions of the Parties

A. *Mr. Shakov's Submissions*

[19] With regard to the facts, Mr. Shakov submits that he took the one-year appointment because he thought he could help get the program back on foot without losing too much of his consultancy business. There were no professional advantages for him joining the public service so late in his career and in fact, his annual income was reduced by half. His language skills and the details of the Appointment Process were never discussed. Mr. Shakov states that he accepted a permanent position once the program was back on track because he did not want the progress he had made to be lost.

[20] Mr. Shakov argues that the PSC failed to consider the legal and managerial context in which he was appointed. Mr. Giroux had the authority to establish the qualifications for the IP Director position according to current operational requirements (s. 30(2) PSEA). The crisis situation faced by the FJA justifies his appointment and shows there was no abuse of authority either in establishing the language profile or in choosing a non-advertised appointment process.

[21] There was no need for a bilingual IP Director, according to Mr. Shakov, because all the employees under his supervision were Anglophone and because he did not deal directly with the public. The PSC suggests he benefitted from personal favouritism, yet the investigator never made a finding of favouritism, and in fact it is Mr. Shakov who did the FJA a favour by setting aside his successful business. Moreover, other candidates were invited to apply for the 12-month contract yet none did so.

[22] As for the choice of process, s. 33 of the PSEA granted Mr. Giroux managerial discretion to choose either an advertised or a non-advertised process. An advertised process would have taken at least three months and any other person would have required additional time for training.

[23] Mr. Shakov further submits that the PSC failed to appreciate the significant adverse impacts of its decision on him, specifically considering: (1) he left his consulting business as a favour to the FJA; (2) he has since then lost his business contacts; (3) he is the sole provider for his family; with no immediate job prospects; (4) he is both qualified and needed for the IP

Director position; and (5) the decision affects his quality of life, reputation, dignity and self-worth. Conversely, no party would be prejudiced if Mr. Shakov kept his job.

[24] The proposed retroactive revocation is not reasonable. This context is very different from that in *MacAdam*: (1) the context (urgent or non-urgent); (2) behaviour of the candidates (actively sought "soft landing" or reluctantly agreed after being repeatedly approached by the government); (3) the type of appointment (term or indeterminate); (4) intentions of the hiring managers (personal favouritism or desire to secure the best candidate); (5) the hiring managers' behaviour (attempted to "cover their tracks" or not); (6) the timelines (newly hired or four years into appointment); and (7) the witnesses interviewed (credible or not).

[25] Mr. Shakov also submits that the PSC failed to take its own policies and past decisions into account when deciding which corrective action to take. In other cases the PSC recommended that no action be taken against the person in the Applicant's position. For instance, the PSC *Policy on Corrective Action and Revocation* and its companion, the *Guidance Series – Corrective Action and Revocation*, underscore the importance of taking into account context, consequences on the parties involved and the message an appointment sends to other employees.

[26] Last, the proposed retroactive revocation exceeds the PSC's jurisdiction. Section 66 of the PSEA provides for investigations on external appointment processes. However, the appointment made under that process no longer exists. Mr. Shakov's current indeterminate appointment came from internal process 12-FJA-INA-034.

B. *The FJA's Submissions*

[27] Regarding the facts, the FJA emphasizes the critical situation it faced, which called for a new IP Director who could "hit the ground running": (1) Me Lessard, the IP Director at the time, had admitted to being incapable of performing the work; (2) Ms. Natalyia Horodetsky, Me Lessard's second in command was on sick leave; (3) the International Programs had very few projects and thus very little prospective funding, because all their funding comes from their partners; (4) the International Programs were in jeopardy; and (5) CIDA, their major funding partner, was not pleased with their work. The FJA also emphasizes the reputational and operational consequences it would face if it loses Mr. Shakov and if Mr. Giroux and Ms. Clemenhagen lose their authority to make appointments.

[28] The FJA first submits that the PSC unreasonably interpreted the notion of "improper conduct" found in s. 66 of the PSEA. The notion is not defined in the PSEA, and the Public Service Staffing Tribunal [PSST] only says that it includes bad faith.

[29] The FJA suggests that PSST jurisprudence on the notion of "abuse of authority", found in s. 77 of the PSEA, is an appropriate guideline for what constitutes improper conduct since abuse of authority also includes bad faith. *Lahaie et al v Deputy Minister of National Defence et al*, 2009 PSST 30 [*Lahaie*], recognizes that it is not an abuse of authority to use a non-advertised process where warranted by operational requirements such as urgency. Several PSST cases state that the PSEA does not express a preference between advertised and non-advertised processes. Considering the s. 77 PSEA jurisprudence, the FJA submits that the investigator was

unreasonably biased against non-advertised processes and that she was unwilling or unable to appreciate the urgent staffing needs, recognized in *Lahaie* as a valid justification for non-advertised processes.

[30] The FJA further submits that the PSC made unreasonable conclusions with regard to the language requirements. "English Essential" was appropriate given that the situation was urgent, the appointment was only for a year and the only employees requiring Mr. Shakov's supervision at the time were Anglophone. Subsection 30(2) of the PSEA considers actual needs, not theoretical concerns. Lastly, the FJA argues that the investigator relied on the *Official Languages Act*, RSC, 1985, c 31 (4th Supp.) [OLA] and the Treasury Board's Directive on the Linguistic Identification of Positions or Functions, which were outside her jurisdiction.

[31] The FJA contends that the Investigation Report and PSC failed to consider relevant evidence that the circumstances surrounding process 11-FJA-ENA-024 were exceptional. Mr. Shakov, Ms. Clemenhagen and Mr. Giroux all explained the urgent circumstances to Ms. Blais, yet this was "completely overlooked" by the investigator.

[32] The PSC proposes unreasonable corrective actions, according to the FJA. They are unduly punitive and have no deterrent effect. The alleged improper conduct had no effect on Mr. Shakov's appointment since he was the only qualified candidate. Any concerns about his bilingualism have been resolved. Moreover, the PSC failed to consider the severe repercussions the revocation would have on him. As for Mr. Giroux and Ms. Clemenhagen, whom are both

experienced civil servants, neither requires the entry-level courses the PSC would have them take.

[33] The FJA challenges the PSC's authority to revoke Mr. Shakov's position. He is appointed on an indeterminate basis, over which the PSC has no direct jurisdiction.

C. *Respondent's Submissions*

[34] The Respondent submits that the PSC reasonably concluded that improper conduct affected the selection of Mr. Shakov. Its interpretation of "improper conduct" is in line with the Federal Court's jurisprudence. Conversely, Mr. Shakov conflates "improper conduct" as found in s. 66 PSEA with "abuse of process", "personal favouritism" and "abuse of authority". As for the FJA, it cannot rely on PSST jurisprudence dealing with s. 77 of the PSEA. The s. 77 complaint mechanism specifically considers abuse of authority, unlike s. 66 of the PSEA investigations into improper conduct.

[35] It was reasonable to conclude that the language requirements were tailored to Mr. Shakov's profile. Subsection 30(2) of the PSEA establishes that essential qualifications should be based on the work to be performed. Based on the facts it was reasonable to conclude that bilingualism is required to perform the work of the IP Director. The investigator found that at least one Francophone employee was working on a short-term contract at the time of Mr. Shakov's appointment.

[36] The Respondent contends it was reasonable to conclude that the Appointment Process did not respect the FJA Policy criteria or fundamental values. The relevant criteria that could have justified Mr. Shakov's appointment were: (1) an individual possesses highly specialized skills and could be "lost" if the appointment is not made quickly; or (2) other reasons which support a non-advertised process as being the best staffing option. In the present case, Mr. Shakov was not looking for work elsewhere and the "other reasons" given, that he was qualified, is the basic prerequisite for any appointment. The value of access was not respected, either, since the hiring managers incorrectly assumed that no other person would have been qualified and/or interested in the position.

[37] The proposed corrective action is reasonable according to the Respondent. *MacAdam* holds that the seriousness of the offence, the impact on the affected individuals and the impact on the governmental department involved do not render a decision unreasonable. The actions against Mr. Giroux and Ms. Clemenhagen are "clearly designed to protect and reinforce the integrity of the appointment process" (*MacAdam* at para 113). The temporary suspension of their appointment powers will not paralyze the FJA since the Commissioner can still make appointments. As for the actions against Mr. Shakov, they are neither punitive nor disciplinary because they revoke an appointment "tainted by improper conduct". This is within the PSC's jurisdiction since Mr. Shakov's current internal appointment would not have been possible but for his initial external appointment.

[38] All relevant evidence was considered by the investigator. Ms. Blais acknowledged the urgent circumstances throughout her report. Moreover, the PSC did not make its decision based

on incomplete evidence since the full Investigation Report was provided to the Commissioners a week before the first MoC and the Applicants' comments on the proposed corrective action were provided three weeks before the second MoC.

[39] Lastly, there has been no breach of natural justice in rescinding the FJA's ability to use s. 73 of the PSEA. The PSC has made no decision on s. 73 yet, so it had no obligation to consult the FJA.

VII. Analysis

A. *The notion of improper conduct*

[40] Section 66 of the PSEA states that the PSC can take corrective action where "an error, an omission or improper conduct … affected the selection of the person appointed [in any external appointment process]".

[41] There is no legislative definition of improper conduct. Recently, Justice Mosley in *MacAdam* tacitly confirmed the PSC's definition of improper conduct: "unsuitable behaviour, whether by action or inaction, in relation to an appointment process" (at paras 68 and 77). The British Columbia Court of Appeal approved the definition of the term 'improper' found in the *Shorter Oxford English Dictionary* in *Paz v Hardouin*, [1996] BCJ No 1477, 138 DLR (4th) 292 at para 47: "not in accordance with truth, fact, reason or rule; not in accord with the circumstances or the end in view; unsuitable; ill-adapted". In a case on contract law, it was suggested that the word "improperly" [does not] imply the slightest element of moral turpitude.

The word is used frequently to mean "incorrectly", "unsuitably" or "unbecomingly" (*City of Ottawa v Ottawa Electric Railway*, [1936] 4 DLR 539, [1936] OR 547).

[42] I have found it useful to review the case law on improper conduct as intended in s. 66 of the PSEA, which can be broadly divided into cases where improper conduct was found and cases where it was explicitly not found. The publicly available summaries of PSC investigations are also of use in establishing the meaning of 'improper conduct'.

(1) Cases where improper conduct was found

[43] In *MacAdam*, three hiring managers, including one Mr. Dorsey, were found to have behaved in a manner which constituted improper conduct. The facts included evidence that Mr. Dorsey had encouraged the external assignment of another senior staff member thus opening up a position for Mr. MacAdam. There was evidence that he decided to conduct an external appointment process only upon learning that Mr. MacAdam could not be appointed internally. Mr. Dorsey also had not based the decision to make the position "bilingual non-imperative" on any past experiences or previous failed staffing attempts. Lastly, Mr. Dorsey gave no justification as to why Mr. MacAdam was the only candidate to meet the essential qualifications. The Federal Court found that this was a case where personal favouritism had helped Mr. MacAdam find a "soft landing" in a secure senior public service position.

[44] A human resources employee engaged in improper conduct, in *Mabrouk*, when he sent emails discussing how to circumvent hiring procedures adopted under the PSEA. In that case, his intention was to ensure that Mr. Mabrouk would not be hired. However, his conduct had no

influence on the hiring managers and thus the Federal Court held that it did not affect the appointment process.

(2) Cases where no improper conduct was found

[45] The most recent s. 66 case, *Erickson v Canada (Public Service Commission)*, 2014 FC 888 [*Erickson*] was decided on the basis that the applicant committed an error by appointing an employee without first ensuring she met all the necessary qualifications. The PSC investigator had found there was no improper conduct "as it was based both on the needs of the organization at the time, namely to manage temporary staffing needs, and on the assessment of [the appointee's] abilities to assist with these staffing requirements based on her work as a casual employee" (*Erikson* at para 17). There had apparently been challenges in staffing bilingual administrative positions.

[46] In *Samatar v Canada (Attorney General)*, 2012 FC 1263 [*Samatar*], the Federal Court granted the application for judicial review of the PSC's finding of fraud because of a violation of procedural fairness. The Court indicated that "[t]he determination of the intent behind the actions taken is therefore an essential element of the analysis of the evidence. We cannot look only at the material fact alone" (at para 54). It went on to note how the PSC has previously upheld the necessity of considering intent when determining whether an action constitutes improper conduct.

[47] *Tibbs v Canada (Deputy Minister of National Defence)*, 2006 PSST 8, is a landmark PSST decision on the notion of abuse of authority. This case did not involve improper conduct,

but it recognized that the preamble to the PSEA "reinforces one of the key legislative purposes of the PSEA, namely, that managers should have considerable discretion when it comes to staffing matters… [t]he definition of merit found in subsection 30(2) of the PSEA provides managers with considerable discretion to choose the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements" (para 63).

(3) PSC Investigations into improper conduct under section 66

[48] File number 00-00-49, from 2006, involved an appointment at CIDA. The PSC found there was improper conduct because the Statement of Merit Criteria had been established according to the qualifications of the candidate. There was no link between the qualifications and written comments justifying the appointment. Moreover, several qualifications in the Statement of Merit Criteria were not even evaluated. The PSC ordered that the branch managers attend training but ordered no action against the appointee as he/she was now working in another organization.

[49] File number 00-00-02, from 2007, involved an appointment process where points were awarded based on both an interview and a reference check. The reference check was not included in support of the marks allotted to the chosen candidate. This was improper conduct, though it did not constitute fraud. The PSC ordered a new assessment of the candidate.

[50] In File number 00-00-48, from 2008, a Selection Board Chairperson for Correctional Service Canada did not disclose his prior relationship with the chosen candidate to other

members of the Board. The PSC also took issue with the fact that the Chairperson was involved in developing the selection criteria and that the other Board members subsequently expressed unease with the lack of disclosure. The PSC noted that it is necessary to consider the intent behind actions taken when assessing conduct and that improper conduct occurs where the proper behaviour was known or understood and yet was not followed. The PSC ordered that the Chairperson attend courses at the Canada School of Public Service.

[51] The *Public Service Commission 2012-2013 Annual Report* discusses a case where improper conduct was found: "[t]he HR advisor tailored the linguistic profile of the position to reflect the candidate's language profile, for both the initial appointment and an extension. The sub-delegated manager signed the letter of offer, knowing that the language profile of the appointee differed from that of the position." (Para 4.60 on page 80). The HR advisor was ordered to undertake training but it appears that no corrective action was ordered against the appointee.

(4) Summary

[52] A review of the case law demonstrates that improper conduct is found in cases where managerial concerns were set aside to favour the interests of a particular individual. I have found none where making a decision based on legitimate, objective managerial imperatives was found to be improper conduct. What the cases do reveal is that context is an important consideration in the determination of improper conduct.

B. *The Contextual Approach*

[53] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the Supreme Court of Canada emphasized that a discretionary decision should not be interfered with if it falls within a range of possible outcomes. This range is flexible, and will widen or narrow depending on the nature of the question and other circumstances (*Maritime Broadcasting System Ltd v Canadian Media Guild*, 2014 FCA 59 at paras 34-35, Stratas J [*Maritime Broadcasting*]). It might be considerably constrained by the legislative standards and legal standards worked out in the jurisprudence (*Maritime Broadcasting* at para 58).

[54] While deference is owed to PSC decisions, the same is true for the investigator assessing the discretionary powers of an Acting Commissioner. Thus, when determining whether the FJA engaged in improper conduct, it is essential to consider the legislative and managerial context. The Supreme Court has held that a reasonableness review "takes its colour from the context" (*Canada (Minister of Citizenship) v Khosa*, 2009 SCC 12 at para 59) and that "[i]t is essentially a contextual inquiry" (*Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 18).

[55] In accordance with the delegated authority granted under s. 15 of the PSEA, the Acting Commissioner has the authority to establish the qualifications for the IP Director position (s. 30(2) of the PSEA). In my opinion, under this legislative scheme, the exercise of discretion given to the Acting Commissioner should not be interfered with unless there is evidence that the decision-maker exceeded his or her jurisdiction by acting on considerations unrelated to the interest of the office. As such, it was within his authority to establish the language profile and

choose the appointment process having regard to any additional qualifications that may be an asset and to "the current operational requirements".

[56] The wording of s. 30(2) of the PSEA confirms that the factual context is an important element in evaluating the exercise of discretion of managers in staffing matters, which reflects how hiring managers are well aware of managerial imperatives and urgent staffing needs.

[57] The choices made by the Acting Commissioner came within his broad managerial discretion, as intended by Parliament in enacting the PSEA, considering the situation with which he was faced. His actions were an entirely reasonable short-term solution immediately available – and indeed it seems to have been the only possible decision. The PSC's decision was unreasonable in that it failed to understand the quandary the FJA was in. When asked at the hearing what other options would have been available to save the International Programs Division on the short term, counsel for the Respondent only suggested that Mr. Shakov's contract could have been extended. This was not a feasible option considering Mr. Shakov's contract had already ended and that his contract, in any event, was not for work as a Director.

C. *The establishment of the language profile*

[58] As stated above, context is crucial in determining whether the Acting Commissioner's actions in appointing Mr. Shakov for a one-year term constituted improper behaviour.

[59] The evidence shows that the departure of the previous Director left the International Programs with no proper management and jeopardized on-going projects and future financing. It

also establishes that the FJA could not afford to wait for a new Director. This is the context surrounding the operational requirements at the time when the language profile was established. The evidence also demonstrates that the appointment of Mr. Shakov did not benefit from any personal favouritism. To the contrary, Mr. Shakov accepted this appointment in order to ensure the viability of the International Programs Division, to the detriment of his financial and professional interests. He was hired in exceptional circumstances because he was, on short notice, the only person capable of saving the International Programs in light of his unique experience in this area. An invitation to apply for the one-year contract was sent to public servants who had priority to be hired but no one had the required qualifications.

[60] Section 36(c)(i) of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) states that:

36. (1) Every federal institution has the duty, within the National Capital Region and in any part or region of Canada, or in any place outside Canada, that is prescribed for the purpose of paragraph 35(1)(a), to […] (c) ensure that, (i) where it is appropriate or necessary in order to create a work environment that is conducive to the effective use of both official languages, supervisors are able to communicate in both official languages with officers and employees of the institution in carrying out their supervisory responsibility, and […]	36. (1) Il incombe aux institutions fédérales, dans la région de la capitale nationale et dans les régions, secteurs ou lieux désignés au titre de l'alinéa 35(1)a) : […] c) de veiller à ce que, là où il est indiqué de le faire pour que le milieu de travail soit propice à l'usage effectif des deux langues officielles, les supérieurs soient aptes à communiquer avec leurs subordonnés dans celles-ci et à ce que la haute direction soit en mesure de fonctionner dans ces deux langues. […]

[61] There was no legislative requirement that the position be bilingual because in the short term there was no concern regarding the ability to supervise employees in the language of their choice. While the other Director positions in the FJA have an imperative bilingual profile in order to allow bilingual employees to address their Director in the official language of their choice, at the time of the Appointment Process none of the International Programs Division employees required supervision in French. At the hearing, counsel for the FJA acknowledged that one of the employees was not an Anglophone but noted that this person held a bilingual position. There is no indication that this employee ever needed or asked to communicate with Mr. Shakov in French.

[62] In sum, the investigator failed to consider the critical situation in coming to her conclusions. The evidence of the exceptional circumstances requiring the immediate appointment of a Director in order to ensure the viability of the International Programs was completely overlooked. The decision to establish the linguistic profile as English Essential was designed solely for the best interest of the FJA and not tailored to benefit Mr. Shakov.

[63] Should the Acting Commissioner have put the projects and financing in jeopardy because of a language requirement with no practical necessity in the immediate future? I do not think so. I am satisfied that this managerial decision falls within a range of reasonable outcomes and that the investigator should not have substituted her own opinion of what the FJA required.

D. *The non-advertised process*

[64] Section 33 of the PSEA gives the Acting Commissioner discretion to choose between an advertised and a non-advertised process. The case law recognizes that the circumstances in which an appointment is being made can be considered by the hiring manager.

[65] In *Lahaie et al v Deputy Minister of National Defense et al*, 2009 PSST 30, the PSST affirmed that "to determine whether the respondent abused its authority in choosing a non-advertised process, it is necessary to consider the circumstances under which the appointment was made".

[66] In *Canada (Deputy Minister of Fisheries and Oceans) and Cannon*, 2008 PSST 21, the tribunal accepted that "there can be circumstances in which a non-advertised process is chosen for its speed given the pressing operational requirement to staff the position".

[67] The FJA Policy sets out situations in which a non-advertised process should or may be used. Its stated objective is to "provide a consistent framework and objective criteria for managers to decide when to use a non-advertised appointment process to conduct staffing." The Respondent suggested that the only possible criteria by which this non-advertised process could be considered are (1) the appointment of an individual to a position that requires highly specialized skills and the high-calibre individual could be "lost" if the appointment is not made quickly; or (2) other reasons that are not listed but nevertheless support a non-advertised

appointment process as being the best staffing option. At the hearing, counsel for the FJA emphasized the "other reasons" criterion.

[68] Managers are required to provide a written rationale to demonstrate how their decision meets the appointment values and criteria. The rationale written by Mr. Giroux to justify the use of a non-advertised process referenced the FJA Policy, citing the "other reasons" and Mr. Shakov's special skills. Yet it was not sufficient for the investigator to focus solely on the rationale document – the mission of the PSC investigator is to gather further evidence. In the case at bar, this further evidence was Mr. Giroux and Ms. Clemenhagen's continued insistence on the critical situation. While this may have only been briefly mentioned in the rationale, it deserved to be duly considered.

[69] An advertised process requires more time than a non-advertised process, time which the FJA did not have. The evidence suggests that it would take a minimum of three months to conduct an advertised process and additional time for training. Had the FJA waited that long, it is very possible that the International Programs Division would have collapsed due to a lack of projects and funding.

[70] This was a legitimate reason for the Acting Commissioner to employ a non-advertised process and it was explained during the investigation. The Acting Commissioner was in the best position to assess the departmental context and which process was most appropriate.

[71] Again, in my opinion, there was nothing improper or unsuitable in making a decision in the best interests of the FJA and the survival of the International Programs.

E. *The reasonableness of the proposed corrective actions*

[72] In light of the previous finding setting aside the Public Service Commission's decision, it is not necessary to determine the reasonableness of the corrective actions. However, I would like to make the following comments.

[73] This Court has held that the principles of s. 69 of the PSEA jurisprudence apply to an analysis of corrective action taken pursuant to s. 66 of the PSEA (*MacAdam* at para 109). Labour law principles such as proportionality and progressive discipline do not apply, such that the revocation of an appointment cannot be found unreasonable on the basis that it is not one of the most serious of cases (*MacAdam* at para 112).

[74] This is not to say this Court will always defer to the PSC's choice to revoke an appointment. Justice St-Louis recently stated in *Agnaou v Canada (Attorney General)*, 2015 FC 523 at para 53, that:

> Although corrective action taken by the Commission is reviewable on a standard of reasonableness, this does not mean that the Commission has unlimited discretion in that regard. Corrective action taken by the Commission must respect the spirit of the preamble of the PSEA, namely, the safeguarding of the principle of merit and of the integrity of the public service appointment process. Achieving such an objective requires that corrective action be taken to remedy errors made, such as in this case, that affected the appointment process in that a priority candidacy was not assessed. A decision with respect to corrective action would be found to be unreasonable where the remedy imposed bore no relation to the breach found (*Royal Oak Mines Inc v Canada (Labour Relations Board)*, [1996] 1 SCR 369 at para 60).

[75] I am of the opinion that the proposed corrective actions would have been unreasonable because they do not effectively reinforce the integrity of the Appointment Process. Revoking Mr. Shakov's indeterminate position would be harsh and unfair. *MacAdam* can be distinguished on many points. Most importantly, for the purposes of this case, is the temporary nature of Mr. Shakov's initial appointment and the time that has elapsed since May 2011. The effects of the PSC decision – to deprive the FJA of a successful Director – goes against its very objective of ensuring competent individuals of the highest merit are appointed. This is not a case of removing an inadequate Director. Moreover, no deterrent purpose is served as such a decision only sends the signal that management imperatives should come second to rigid formalism.

[76] As for Mr. Giroux and Ms. Clemenhagen, they acted within their authority in the best interests of the Office of the Commissioner and would not benefit from basic training on staffing issues.

[77] In sum, in this case, the PSC has seemingly applied a "cookie cutter" solution which would have accomplished nothing under the circumstances. To borrow from Justice Martineau in *Samatar*, whose comments apply even though that was a case of breach of procedural fairness, the best interests of justice were not served by "the severity of the injustice committed against the applicant, [and] the intransigence shown by the Commission up until now" (at para 186).

VIII. Conclusion

[78] The evidence in the present case established that there was no favouritism in the appointment of Mr. Shakov. The best person available was chosen for a short term in order to

quickly resolve an urgent problem. This was consistent with the spirit of the preamble of the PSEA. The PSC's conclusion of "improper conduct" was unreasonable as it totally disregarded the context in which the decision of the Acting Commissioner was made.

[79] In the result, these applications for judicial review are allowed and the decision of the PSC dated November 3, 2014, including all corrective actions, is set aside. Costs are fixed at $5,000 in each file.

JUDGMENT

THIS COURT'S JUDGMENT is that these applications for judicial review are allowed. The decision of the PSC dated November 3, 2014, including all corrective actions, is set aside. Costs are fixed at $5,000 in each file.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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