

Federal Court



Cour fédérale

Date: 20191015

Docket: T-2213-18

Citation: 2019 FC 1295

Toronto, Ontario, October 15, 2019

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

ANTHONY A. BLAIR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns a decision of the Public Service Commission (Commission) dated November 20, 2018 with respect to the Applicant's civil service conduct in applying for a new work position. The Applicant's conduct was investigated, and in the resulting Report dated October 16, 2018, the Investigator found that the Applicant was dishonest in his conduct. The Commission accepted the Investigator's finding and decided that the Applicant would be allowed to retain his present position, but under mandatory conditions set for a period of time.

[2] For the reasons that follow, I find that the Commission's decision is unreasonable.

I. The Scenario Leading to the Investigation

[3] In the Public Service of Canada, the Applicant works as a "Program Manager, Accommodations" (Report at p. 004). In 2017, he applied for the position of Senior Advisor to the Regional Director General. The protocol for applying for that position required that the Applicant fill out an on-line application, submit a cover letter, and submit a résumé (Report at pp. 004-005).

[4] The Applicant submitted the required components of the application. He described his past work experiences in his cover letter. In his résumé, instead of stating his past duties, he reproduced his previous job descriptions.

[5] After reviewing the Applicant's résumé, the "Regional Director, Procurement" became concerned that the Applicant did not perform all the duties he stated in his résumé. The Regional Director emailed three other managers in the Public Service who had supervised the Applicant. Based on their responses, the Regional Director concluded that the Applicant did not perform ten of the duties listed in his résumé.

[6] The Regional Director met with the Applicant, stated this conclusion, and asked if he agreed with it. According to the Regional Director the Applicant "appeared to say that the supervisors' statements were correct – he did not say they were wrong" (Report at p. 006). The Regional Director advised the Applicant that he could only put statements in his résumé if he had

actually performed them. The Applicant responded that “he extracted the statements from the work description – he did not make them up; the work description is a description of his duties and his résumé is a description of his duties, therefore he was permitted to put statements from the work description into his résumé” (Report at pp. 006-007).

[7] As a result, on a referral by the Senior Human Resources Advisor, the Public Service Commission launched the Investigation to determine whether the Applicant committed fraud pursuant to s. 69 of the *Public Service Employment Act*. S. 69 reads as follows:

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

- (a) revoke the appointment or not make the appointment, as the case may be; and
- (b) take any corrective action that it considers appropriate.

II. The Investigator’s Findings and the Commission’s Decision

[8] The Investigator proceeded to collect documentary evidence, and to interview the Applicant and the Regional Director (Report at p. 004). This process resulted in the following findings:

In consideration of all the aforementioned, it can be concluded that, on the balance of probabilities, Mr. Blair acted dishonestly when he knowingly included information in his application about his experience that was not accurate. Mr. Blair misrepresented his experience by including duties in his résumé that he did not perform. The first element of fraud is therefore met.

...

It has been established that Mr. Blair made ten false statements regarding his experience in his application. As stated by Ms. Labrecque, by including these statements, Mr. Blair was misleading potential employers as they would think the descriptions listed in his résumé were in fact descriptions of the work he had performed. Moreover, Mr. Blair's admission that he prepared his résumé by selecting items from his work description that would "probably look good on a resume" demonstrates his awareness that the content of his résumé could impact on the hiring decisions. Had Mr. Blair been deemed to have met the qualifications of the position based on the inaccurate statements made about his work experience, the appointment process could have been compromised. On the balance of probabilities, the second element of fraud is satisfied.

...

The evidence demonstrates that, on the balance of probabilities, Mr. Blair committed fraud, pursuant to 69 of the PSEA, by knowingly making inaccurate statements about his experience in his application for appointment process 2017-SVC-ONT-IA-305715, conducted by Public Services and Procurement Canada.

(CTR at paras 38, 40, 42) [Emphasis added]

[9] The Investigator's findings stated in the Report constitute the Commission's reasons for decision (see: *Seck c. Canada (Procureur général)*, 2012 FCA 314 at para 5).

[10] The Commission concluded:

The Commission accepts the Investigation Report 2018-SVC-00010.28140.

The investigation concluded that Mr. Anthony Blair committed fraud in internal appointment process 2017-SVC-ONT-IC-305715, conducted by Public Services and Procurement Canada to staff a position of Senior Advisor to the Regional Director General, at the AS-6 group and level, by making inaccurate statements in his resume.

The Commission has considered all the comments received. The comments do not contain new information that would warrant a change in the Investigation Report or the corrective action used for consultation.

[Report at p. 0023]

III. The Investigator's Legal Obligations

[11] In reaching the findings, the Investigator was required to apply the law as stated in the Federal Court of Appeal's decision in *Seck c. Canada (Procureur général)*, 2012 FCA 314:

39 In my opinion, for the purposes of section 69 of the Act, the definition of "fraud" established by Justice Cory in *R. v. Cuerrier*, [1998] 2 S.C.R. 371 (*Cuerrier*), at paragraphs 110 to 116, should be used. Fraud thus has two essential elements: (1) dishonesty, which can include non-disclosure of important facts; and (2) deprivation or risk of deprivation.

40 Dishonesty is established where deceit, lies or other fraudulent means are knowingly used in an appointment process. This may include the non-disclosure or concealment of important facts in circumstances where that would be viewed by a reasonable person as dishonest.

41 As Justice Cory notes at paragraphs 113 and 114 of *Cuerrier* — relying on *R. v. Olan*, [1978] 2 S.C.R. 1175, at page 1182, and *R. v. Théroux*, [1993] 2 S.C.R. 5, at pages 25 and 26 — the victim of the fraud is not required to prove that the fraudulent acts caused actual injury or loss. With regard to section 69 of the Act, to prove the second element, it therefore suffices to establish that the appointment process could have been compromised.

[Emphasis added]

[12] The subsequent Federal Court decision in *Ligondé v. Canada (Attorney General)*, 2015 FC 1342, also speaks to the correct application of s. 69 of the *Public Service Employment Act*:

40 In *Seck*, the Federal Court of Appeal determined that the meaning of fraud in section 69 of the PSEA is adopted from the criminal law. The only distinction lies in the burden of proof, as

the applicable standard of proof for a finding of fraud by the Commission is that of the balance of probabilities (para 38). The parties in the present case agree that fraud requires dishonest deprivation. The Court in *Seck* approved the definition of fraud set out in *Cuerrier*. In that case, Justice Cory, writing for the majority, quoted the reasons of Justice McLachlin (as she then was) in *R. c. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.), wherein she described the essential elements of fraud at pages 25-26:

To establish the *actus reus* of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act. ... [I]t will be necessary to show that the impugned act is one which a reasonable person would see as dishonest. Deprivation or the risk of deprivation must then be shown to have occurred as a matter of fact. To establish the *mens rea* of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.

41 Justice McLachlin went on to note at page 26:

The requirement of intentional fraudulent action excludes mere negligent misrepresentation. It also excludes improvident business conduct or conduct which is sharp in the sense of taking advantage of a business opportunity to the detriment of someone less astute. The accused must intentionally deceive, lie or commit some other fraudulent act for the offence to be established. Neither a negligent misstatement, nor a sharp business practice, will suffice, because in neither case will the required intent to deprive by fraudulent means be present. A statement made carelessly, even if it is untrue, will not amount to an intentional falsehood, subjectively appreciated. Nor will any seizing of a business opportunity which is not motivated by a person's subjective intent to deprive by cheating or misleading others amount to an instance of fraud. Again, an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused

would have no knowledge that the prank would put the property of those who heard it at risk. We are left then with deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk. Such conduct may be appropriately criminalized, in my view.

42 The above quotation is illustrative of how plagiarism will not always amount to fraud. To meet the definition of fraud, the act of plagiarism must be deceitful, or one which a reasonable person would otherwise view as dishonest; and the plagiarism must, in fact, result in actual or potential deprivation to the property of another. Furthermore, there must be a subjective mens rea to defraud. The individual must be aware that the dishonest act of plagiarism could, as a consequence, deprive others of what is theirs.

[Emphasis added]

IV. The Applicant's Argument

[13] Accordingly, in conducting her interviews and preparing her report, the Investigator was required to make findings of fact and reach conclusions in accordance with the law.

[14] The Applicant argues that the Investigator did not do what she was supposed to do. The Applicant's primary argument on judicial review is that he was entitled to know, on the evidence that was applied by the Investigator, whether he was found to have engaged in "deceit, lies or other fraudulent means" that were "knowingly used" in the appointment process.

[15] The Applicant's argument is based on his statement to the Public Service Commission that "I will outline that at no time was there any intention to be deceitful or any risk of deprivation" (Report at p. 0021).

V. Conclusion

[16] In my opinion, the Commission's reasons for decision contain three reviewable errors.

[17] First, the Investigator did not apply the law. Factual findings of "deceit", "lies", or "other fraudulent means" must be found to reach the conclusion that "dishonesty" exists. The Investigator did not identify how the Applicant engaged in "deceit, lies or other fraudulent means". In addition, she did not identify how the Applicant's intentions rose to the level of intention necessary for a finding of fraud.

[18] Second, the Investigator did not acknowledge the Applicant's statements about his intentions. The report made no mention of the Applicant's assertion that "at no time was there any intention to be deceitful" (Report at p. 0021). Thus, while the Applicant's actions were investigated, his intentions were not.

[19] Finally, the Investigation Report does not contain any evidence to suggest that the Investigator put to the Applicant the key allegation that he had an intent to deceive. Had this been done, the Applicant would have had an opportunity to respond. I find that the absence of this investigatory necessity constitutes a breach of the duty of fairness owed to the Applicant.

[20] As a result, I find the Commission's decision is unreasonable.

JUDGMENT IN T-2213-18

THIS COURT'S JUDGMENT is that for the reasons above, the decision under review is set aside.

Upon the request of Counsel for the Respondent I hereby amend the style of cause herein to name the Respondent as The Attorney General of Canada.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2213-18

STYLE OF CAUSE: ANTHONY A. BLAIR v THE ATTORNEY GENERAL
OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 1, 2019

JUDGMENT AND REASONS: CAMPBELL J.

DATED: OCTOBER 15, 2019

APPEARANCES:

Anthony A. Blair

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Adam Gilani

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada

FOR THE RESPONDENT