

Federal Court



Cour fédérale

Date: 20200911

Docket: T-1909-19

Citation: 2020 FC 892

Ottawa, Ontario, September 11, 2020

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

IBUKUNOLUWA DEBORAH BADMUS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, a litigant in person, seeks the judicial review of the decision of the Public Service Commission [PSC] to decline to investigate further a request made for an investigation about her elimination from an appointment process conducted by the Department of Veterans Affairs [VAC]. The judicial review application is made pursuant to section 18.1 of the Federal Courts Act, RSC, 1985, c F-7. For the reasons that follow, the judicial review application cannot succeed.

I. The facts

[2] The facts in this case are not in dispute.

[3] Ms. Badmus, who is not a public servant, applied for the position of Benefits Program Officer with VAC on May 22, 2019. The position had been advertised on a Government of Canada website. There was a written assessment portion to the application which was open to persons residing in Canada and Canadian citizens residing abroad. The applicant was qualified to offer her candidacy and the application was to be online for the job opportunity.

[4] The advertisement posted on line is quite specific as to what are the requirements:

When you apply for this process, please keep in mind that the essential merit criteria (education, experience, some abilities and some personal suitabilities) will be assessed by the answers you provide in your online application and your answers may be validated by a professional reference. You must be as detailed as possible in your answers.

It is NOT sufficient to only state that the qualifications are met or to provide a listing of current or past responsibilities. Rather you must clearly demonstrate HOW, WHEN, and WHERE the qualification was met through substantiation by examples. Information on your described skills, experience, etc. provided in the screening questions should be supported by your resume. Failure to provide the above information in the format required may result in your application being rejected from the process. Candidates may not be solicited for incomplete or possible missing information.

Resumes may be used as a secondary source to validate the experience and education described in the screening questions.

Please attach two recent references * on your resume.

* 2-5 years is considered recent

INSTRUCTIONS

When recording your examples, be sure you:

- Provide concrete, specific examples of actions that speak directly to the experience sought.
- Choose examples with sufficient complexity, impact and degree of difficulty that will allow you to illustrate to what extent and depth you have shown the behaviours expected for each qualification.
- Focus on what you did. In referring to an experience achieved in the context of a team, set your role apart from the role(s) of others.
- Please describe the achievements in the past tense. This will help to ensure that you are providing concrete examples, rather than making general statements (e.g. instead of saying "I work well within a team...." you can say "I worked well with a team when....").
- Use action verbs when describing your experience i.e. lead, managed, organized, planned, prepared, informed, determined, etc.
- Provide all examples in sentence format.
- Each example must include when the example took place, background of each situation, what you did, how you did it, what your role was in the situation, and what was the outcome.

(Certified Tribunal Record (CTR) pages 51-52)
[My emphasis.]

Evidently, the requirement is that answers be specific in addressing the questions asked. Those who wish to apply for the job opportunities are warned that generalities will not do.

[5] For our purposes, Ms. Badmus was found to lack with respect to the following three essential qualifications identified with an asterisk which are found under the general category of “personal suitability” which, the form announces, will be assessed through the online application. The four elements under “personal suitability” are:

- PS 1 – Judgment*
- PS 2 – Effective Interpersonal Relationships
- PS 3 – Client Service Orientation*
- PS 4 – Dependability*

(CTR, p. 53)

[6] To be sure, there are other essential qualifications that are listed. Thus, there are requirements concerning education/experience as well as abilities, which are listed in the form:

- AB 1 – Ability to communicate effectively in writing.*
- AB 2 – Ability to communicate effectively orally.
- AB 3 – Ability to prioritize, organize and manage a workload.
- AB 4 – Ability to analyze and problem solve.*

The ability AB 4 is said to “be assessed through your online application” (CTR, p. 53) and it was the “ability to analyze and problem solve” that was found lacking as another essential qualification.

[7] The assessment of the four essential qualifications that were found lacking (AB 4, PS 1, PS 3, PS 4) came as a result of the four answers provided to the following four questions:

AB 4 – Ability to analyze and problem solve.

Describe a time when you had to analyze a problem and come up with a solution to propose to your supervisor. What was the problem? Who was involved? What was the result?

Applicant Answer:

GALAN LAW FIRM, Barristers, Toronto 2012-2013
Personal Injury Law-Articling Student (6 months)

Whilst at Galan Law Firm where I drafted several Legal Documents and wrote several Legal Opinions, I wrote up and drafted a major Notice of Appeal for the Law Firm in response to a Client’s case. (Personal Injury Law). The result was that my draft was adopted by the Law Firm and filed in Court on appeal on the Client’s behalf.

PS 1 – Judgement:

A coworker, who is a good friend, asks you to review her cousin’s file. She feels that her cousin, who is a Veteran of the Afghanistan War, should be getting more money and financial support from the department. What do you do?

Applicant Answer:

In such a case I would declare a Conflict of Interest because the co-worker is a good friend of mine and the fact of our friendship could influence my review and decision on her cousin's file.

PS 3 – Client Service Orientation:

Describe a time when you felt particularly good about a service you provided to a client that resulted in a positive outcome.

Applicant Answer:

At Fola Law Professional Corporation where I part-articled (details withheld for reasons of confidentiality and privilege), I was involved with interviewing a Family Law Client for a Child Protection Application. I assisted with the case prep and I accompanied the Principal Lawyer to Court in respect of the case. We won the case and the Client's child was returned to her by Child Protection Services. I was happy about the outcome just seeing the Client's huge relief.

PS 4 – Dependability:

Yesterday, your supervisor assigned an urgent file to you which you didn't have time to complete. It requires a decision today before noon. It is now 7:00 am and the office has just been closed for the day due to a snow storm. The application is from a client who is in financial distress and at risk of being evicted from her apartment at the end of the day. What do you do?

Applicant Answer:

In such a case I would put in some extra time to assist the Client because of her peculiar and extra-ordinary circumstances. I would complete the Review on the Client's file outside of the Office hours and ensure I do due diligence on the file.

The outcome of my review however, would not be determined by her situation. It would be dependent on the facts before me and the application of the relevant laid down policies, guidelines and regulations in respect of the handling of such files.

[Bold added.]

The applicant failed to reach the minimum score of 6/10 for each of the four qualifications.

[8] As we shall see, the applicant disagreed with the assessment. It was conducted by VAC. The *Public Service Employment Act* (SC 2003, c 22, ss. 12, 13, *PSEA*) provides for the Public Commission [PSC] to conduct investigations and audits relevant to appointments to and within the public service (s. 11(b)). As spelled out in the Preamble to the *PSEA*, the authority to make appointments is vested in the PSC which can delegate it to Deputy Heads. Pursuant to section 66 of the *PSEA*, the PSC may investigate an external process, like the one under consideration in this case, “if it is satisfied that the appointment was not made or proposed to be made on the basis of the merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment ...”.

[9] Ms. Badmus challenged the findings made by VAC which found that the candidate failed four of the essential qualifications. It is from the decision of the PSC not to investigate further that the applicant seeks to have a judicial review.

II. The decision under review

[10] After an initial review, the PSC concluded that the matter should not be sent further for investigation. The decision letter is dated November 6, 2019 and relates exclusively to the position sought by the applicant within VAC in Kirkland Lake, Ontario. The applicant had contended that she was “marginalized and not given a fair opportunity to proceed in the recruitment for the above-mentioned process”.

[11] The decision letter goes on to report that the applicant was eliminated from the process because she did not meet four essential qualifications which are enumerated. The PSC reminds

the applicant that VAC, pursuant to sections 30 and 36 of the *PSEA*, has the flexibility to determine the essential qualifications for a position and how to assess candidates. The PSC agrees that the assessment tools used by VAC were linked to the required essential qualifications. More specifically, the PSC reports that the responses to questions relating to essential qualifications “lacked the level of detail required in the expected responses”. The decision letter concludes that an investigation is not warranted, as “the information received does not raise a problem in the application of the *PSEA* or related regulations and policies”.

[12] The “information received” is information provided by VAC. A note from the Oversight and Investigations Sector of the PSC on November 4, 2019 reports on the reasons why the answers to the four questions were found to be lacking:

INFORMATION FROM VAC

VAC indicates that the source was eliminated because she failed to meet the following four qualifications:

- Ability to analyze and problem solve: The applicant provided two sentences that did not answer the question.
- Judgement: The applicant provided a one-sentence response that did not provide sufficient detail.
- Client service orientation: The applicant provided a short response that lacked detail and was a very poor example of client service orientation. There was no example of providing any actual direct client service.
- Dependability: The applicant provided a short response that lacked detail and did not address the specific complicating factors outlined in the question (e.g., the office closure).

VAC indicates that the above mentioned qualifications were assessed via the written assessment portion, which was included as part of the online application. They further indicate the pass marks for each qualification was 6/10 and that the source scored a 5/10 on each of the above mentioned qualifications.

As previously indicated, the decision letter was issued two days later.

[13] The CTR is consistent with the information from VAC found in the note of the Oversight and Investigations Section of the PSC. Thus one finds handwritten notations against the answers found deficient (CTR, pages 26-27):

AB 4 – Ability to analyze and problem solve
“did not answer the question”

PS 1 – Judgment
“not enough info”

PS 3 – Client Service Orientation
“not a good example”

PS 4 – Dependability
“follow up?”

In fact, VAC elaborated on these short comments in one exchange of emails (CTR, pages 17 to 20). The comments concerning AB 4, PS 1 and PS 3 are identical to what is reported in the report of the Oversight and Investigations Sector of the PSC of November 4, 2019. The comment about PS 4 is amplified:

PS 4: The applicant provided a short response that lacked detail and did not address the specific complicating factors outlined in the question (e.g., the office closure). She did not explain how she would ensure the file was processed on time. She indicated that she would complete it “outside of the Office hours” but the office was closed due to a snow storm. She also indicated that “the outcome of my review however, would not be determined by her situation” which means she did not understand the urgency of the situation, with the client at risk of losing her home.

[14] The answers to the questions used to assess various essential qualifications are measured against expected elements. They are found at pages 32, 33 and 34 of the CTR:

AB 4 - Ability to analyze and problem solve expected answer

- Describes a problem and demonstrates analytical skills
- Describes approach used to resolve and explains why
- Includes ensuring others needing to know or asking for input
- Uses critical thinking and/or common sense
- Provides results of the solution
- Uses past experience and lessons learned where applicable
- Other acceptable responses of analyzing and problem solving

PS 1 - Judgement expected answer:

- Demonstrates appropriate messaging
- Recognizes relevant information, identifies and evaluates available options and chooses the best approach .
- Applies past experiences when making thoughtful and timely decisions
- Recognizes need for follow-up
- Is cognizant of any need to involve and/or communicate with others
- Demonstrates critical thinking
- Identifies optimal solutions
- Other acceptable responses for judgement
- Identifies when a conflict of interest exists and/or when to step away from a situation

PS 3 - Client Service Orientation expected answer:

- Listens to client's needs
- Demonstrates Respectfulness
- Willing to view issues from the client's point of view
- Cheerful and polite
- Demonstrates a willingness to help
- Other acceptable responses

PS 4 - Dependability expected answer:

- Demonstrates dependability and reliability
- Recognizes the urgency
- Can be counted on to make the best decision
- Responsible
- Requires little to no follow-up/monitoring
- Follows through on actions
- Ensures work gets done despite complicating factors
- Other acceptable responses

[15] The PSC has made public its “Policy on Considerations for Investigations conducted under the PSEA by the PSC Relating to External Appointments, Non-Delegated Internal Appointments and Appointments Involving Political Influence or Fraud [the Policy] (www.canada.ca/en/public-service-commission/services/oversight-activities/investigations--political-influence-fraud.html)” (CTR, pages 39 to 44). The policy statement notes that the decision to investigate is discretionary; decisions are made on a case-by-case basis.

[16] If the PSC has jurisdiction, it will take into consideration whether:

- the matter raises the possibility of a problem in the application of the PSEA that affected the selection for appointment or a breach of the PSEA, the Public Service Employment Regulations (PSER), Commission policies or the terms and conditions of delegation;
- the information received indicates the possibility of a pattern of irregularities in the application of the PSEA, PSER, Commission policies or the terms and conditions of delegation;

III. The challenge to the findings of the PSC

[17] Ms. Badmus challenges the decision of the PSC not to pursue an investigation relating to her sought-after external appointment in the public service.

[18] The applicant claims that she possesses the essential qualifications: she asserts that she has been unfairly marginalized, discriminated against and unjustly eliminated with respect to this recruitment process.

[19] First, the applicant argues that the PSC referred solely to the information received from VAC. She then takes issue with the mention in the decision letter of November 6, 2019 that, in accordance with sections 30 and 36 of the PSEA, “organizations have the flexibility to determine the essential qualifications required for a position as well as the methodology and the tools used to assess candidates in an appointment process”. I reproduce immediately the relevant provisions:

Appointment on basis of merit

30 (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

Meaning of merit

(2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the

Principes

30 (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.

Définition du mérite

(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :

a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l’administrateur général pour le travail à accomplir;

b) la Commission prend en compte :

(i) toute qualification supplémentaire que l’administrateur général considère comme un atout pour le travail à accomplir ou

organization, currently or in the future,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

Assessment methods

36 In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

pour l'administration, pour le présent ou l'avenir,

(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

Méthode d'évaluation

36 La Commission peut avoir recours à toute méthode d'évaluation — notamment prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).

[20] The view expressed is that those provisions cannot allow an organization to subjectively assess a candidate, thus marginalizing and discriminating against such candidate. The applicant further articulates that under the guise of determining essential qualifications, it cannot marginalize and discriminate. However, the applicant did not say how the essential qualifications required by VAC were in any way discriminating. There was no evidence, or even an argument, that the questions would be, for instance, culturally biased or would favour one group over another.

[21] Second, Ms. Badmus states that she was persuaded she was discriminated against because her candidacy was rejected on “just” four essential elements. She complains that she has other essential qualifications and relevant job-related experience which were ignored. She seems to contend that had these been assessed properly, they could have somehow compensated the answers given to the questions seeking to assess specific essential qualifications. She argues that she should have been assessed on eight major essential qualifications and not only on the four where she was found to have failed.

[22] Third, the applicant disputes that the four answers she provided which were found to be lacking were insufficient. In essence, the reader should have read more in the answer provided to questions aimed at testing various essential qualifications than what was on the page. The Court will examine more closely these answers as part of its analysis, given that this issue is probably at the heart of this case.

[23] Finally, the applicant raised the existence of a note posted on her account on the Government of Canada jobs website dated June 24, 2019. The said note referred to the position at VAC (for which Ms. Badmus applied on May 22, 2019) and said: “We regret to inform you that you have been eliminated from the above-mentioned appointment process, as you did not obtain the required pass mark on one or more essential qualifications”. The applicant calls the note “discriminatory” and states that it prevented her from applying for a time for a different position. It remained unclear what relevance the note stating the result of the appointment process for the VAC position has in this judicial review application concerning that very application. It is only the result of the application. The affidavit of Catherine Dumas, an official

of the PSC, explains fully the nature of the notation. It is a note updating a candidate on the status of the specific appointment process. In the case at hand, it is no more than information about the state of affairs in respect of the VAC job. It merely reflects the conclusion that had been reached.

[24] It appears that the applicant considers that the standard of review is reasonableness.

[25] The respondent insists on the discretionary nature of the investigative power of the PSC. The request for an investigation was communicated to the PSC on October 8, 2019; the applicant was advised that the review was to be conducted in accordance with the Policy and was provided with a link in order to access the Policy.

[26] The applicant was screened into the process on account of her education and essential work experience. Once in the process, it was found that Ms. Badmus failed to meet the requirement for four essential qualifications. Those findings says the Attorney General were reasonable and should not be disturbed.

[27] The respondent insists that decisions of the PSC are owed significant deference because of its expertise and the scope of its discretion in the exercise of its functions. The reviewing court ought not to substitute its own view of the matter. Here, this application is an attempt to get the reviewing court to re-weigh the evidence which is supplemented on the part of the applicant by comments that were not part of the original answers which were found significantly deficient. In

the words of the respondent, “(t)his application is not a de novo assessment of the Applicant’s suitability for the VAC position” (respondent’s memorandum of fact and law, para 41).

[28] At any rate, the PSC’s decision is internally coherent and is based on a rational chain of analysis, conforming to the relevant legal and factual constraints. The assessment tools were linked to the required qualifications, the responses were assessed against expected responses and the applicant was eliminated on the basis of a process that was neither subjective nor discriminatory. The findings of the PSC were amply supported by the record.

IV. Analysis

[29] The starting point must of course be a determination of the standard of review applicable and, as importantly, what that standard of review entails. In other words, what is it that an applicant must show in order to prevail on the application for judicial review?

[30] It is the decision of the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] which provides the governing legal framework. Thus, *Vavilov* confirms that there exists in law a presumption that reasonableness is the standard of review (para 25). The presumption may of course be displaced. However, no attempt was made to do so either by the applicant or by the respondent. I cannot see any basis to suggest that some different legislative intent appears from the legislation that would displace the presumption or that the rule of law requires otherwise (*Vavilov*, para 17).

[31] It follows that a measure of deference is owed to administrative decisions subjected to an application for judicial review. The reviewing court must not substitute its own view, but rather must conduct a robust form of review, one focused on “safeguarding the legality, rationality and fairness of the administrative process” (*Vavilov*, para 13). Is the decision transparent, intelligible and justified? The notion is encapsulated in paragraph 15 of *Vavilov*:

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker’s place.

[32] The standard of reasonableness carries some requirements as to the framework that reviewing courts must apply. One is that “reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers” (*Vavilov*, para 75). The reviewing court ought not to ask how it would decide an issue, but rather its focus must be on whether an applicant has shown that the decision is unreasonable. In effect, a measure of deference is owed to the administrative decision-maker, as long as the decision is reasonable.

[33] To some, a decision is not reasonable if one disagrees with it. That does not constitute the test. The *Vavilov* Court offers some guidance:

[99] A reviewing court must develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and

legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

The Court goes on to provide further guidance on what constitutes an unreasonable decision:

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

[34] The burden is on an applicant to show that a decision is unreasonable in that it is not internally coherent or that it is not justified in light of the constraints, legal and factual, that are relevant in the particular case under consideration. An applicant cannot rely on any shortcoming that she may seek to uncover. Rather, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision” (*Vavilov*, para 100). The flaws or shortcomings must be significant to render a decision unreasonable. That is the burden of an applicant.

[35] Fundamentally, the applicant disagrees with the assessment made relative to four essential qualifications and, at any rate, she claims there were other essential qualifications that should have been taken into account. That may tend to show a misunderstanding of what the essential qualifications are.

[36] Clearly, the essential qualifications are treated as “1 absolutely necessary, indispensable. 2 fundamental, basic (essential principles)” (Oxford Canadian Dictionary, Oxford University Press, 2001). That Ms. Badmus met other essential qualifications does not change the fact that she did not meet four of the eight essential qualifications in this staffing process. The focus of the review must therefore be on whether the applicant has shown that the decision is unreasonable where it is found that four questions meant to elicit answers that will demonstrate that the essential qualifications did not meet the requisite level of specificity. The fact that other essential qualifications were met is of no moment because the assessment is not global, considering the right essential qualifications together.

[37] The PSEA provides that an “appointment is made on the basis of merit when the Commission is satisfied that the person meets the essential qualifications for the work to be performed, as established by the deputy head ...” (para 30(2)(a)). Thus, the Deputy Head of VAC fixes the essential qualifications which must be met. Failing to obtain the required pass mark results in being eliminated from the appointment process.

[38] The applicant argued that the PSC should have considered the other essential qualifications to make a valid decision in her case. The reality is that all the essential qualifications need to be met. The fact that the applicant met the qualifications in terms of education and experience cannot compensate for failure concerning other essential qualifications. Here, VAC chose to have as essential qualifications AB 4, PS 1, PS 3 and PS 4 which were to be evaluated through questions to be answered. The advertisement for the position stated forcefully that the essential qualifications falling in the abilities and personal suitabilities categories were to

be assessed through answers to questions. The poster states that “(y)ou must be as detailed as possible in your answers”. It goes on to state that “(i)t is NOT sufficient to only state that the qualifications are met or to provide a listing of current or past responsibilities. Rather you must clearly demonstrate HOW, WHEN, and WHERE the qualification was met through substantiation by examples”. The poster gives, *inter alia*, the following instructions to assist candidates:

- Choose examples with sufficient complexity, impact and degree of difficulty that will allow you to illustrate to what extent and depth you have shown the behaviours expected for each qualification.
- Each example must include when the example took place, background of each situation, what you did, how you did it, what your role was in the situation, and what was the outcome.

[39] I have already reproduced at paragraph 7 the questions and answers that are the subject of debate. Ms. Badmus stated in her memorandum of fact and law, and repeated at the hearing, that she disputed those findings. That is not the burden that needs to be discharged. Rather, an applicant must show that a decision not to investigate further is not reasonable. In *Girouard v Canada (Attorney General)*, 2020 FCA 129, the Court of Appeal finds that merely disagreeing does not render a decision unreasonable:

[43] Counsel for the appellant did not present any arguments, either in written submissions or oral representations, to demonstrate that the Council’s recommendation for removal was unreasonable. Rather, what the appellant faults the Federal Court and the Council for, in short, is not accepting his arguments or his explanations. This is insufficient to demonstrate that the Council’s decision was unreasonable or that the Federal Court did not correctly apply the standard of reasonableness.

[44] Instead of trying to demonstrate how the reasoning process followed by the Council lacks justification, transparency or intelligibility, or how its recommendation falls outside the range of

possible, acceptable outcomes in respect of the relevant legal and factual constraints, Justice Girouard submitted that neither the Council nor the Federal Court had taken into account his submissions or addressed his arguments. Despite the energy and conviction of his counsel in trying to satisfy us of this, I cannot accept this argument.

[40] The PSC was satisfied with the assessment made by VAC (CTR, pages 9-10). It is difficult to see how that is not reasonable as the notion is understood since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 and *Vavilov*. The question about the ability to analyse and problem solve is calling for an answer that will demonstrate the ability to analyse. The applicant responded by stating that she can analyse by referring to a notice of appeal she had drafted as an articling student. The capacity to analyse and solve problems cannot be assessed by responding as the applicant did. The view taken by VAC and the PSC is that the question was not answered.

[41] The response about PS 1, where it was judgment which was to be assessed, was found deficient because it lacked in details. The answer simply asserted that there was a conflict of interest without considering options available, how the conflict arises and why the outcome proposed was appropriate, as well as whether others should be involved and how to communicate with others.

[42] On client service orientation, PS 3, the answer speaks in terms of being involved in the interview of client, assisting in the preparation of the case and accompanying the principal lawyer. Surely, this brought deserved job satisfaction to the applicant. But there were few details (how, when and where) and the role played by the applicant (what you did, how you did it) is

said to lack details such that an assessment of the essential qualification can be performed. As can be seen from the instructions given to the candidates, the emphasis was to be put on fulsome answers to allow for an assessment. The same can be said of the answer given in order to assess dependability (PS 4) which was said to lack details and did not address the complicating factor. Given that the essential qualification was the candidate's dependability, the answer was two sentences long: extra time will be put in and the review would be completed outside of the office hours. Section 66 of the PSEA provides that the PSC may investigate a process, but it needs to be satisfied that the appointment was not made on the basis of merit or that there was an error, omission or improper conduct that offered the process such that corrective action should be taken. The lack of adequate answers to four questions meant to assess essential qualifications was sufficient for the PSC to decline to investigate. The applicant had the burden to convince that the decision is unreasonable.

[43] The applicant's memorandum of fact and law seeks to supplement answers given by suggesting that some elements of the answer be implied. Again, this is not consonant with the instruction given to candidates: "You must be as detailed as possible in your answers" and "Failure to obtain the required pass mark on one or more essential qualifications" says the note posted on the applicant's account results in the elimination of that candidate.

[44] The point of the matter is only to illustrate why the judicial review application must fail on the front of the reasonableness of the decision. The applicant must satisfy the reviewing court "that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, para 100). The mere

disagreement will not suffice. Indeed, the reviewing court must show judicial restraint and respect for the distinct role of administrative decision makers. The PSC concluded that an investigation was not warranted in view of the process followed by VAC and the answer given to four questions aimed at assessing essential qualifications. It has not been shown that the answers given were adequate, such that the Court could find that the discretion to investigate was not properly exercised. On the contrary, there was no demonstration that the answers were adequate. It follows that the decision of the PSC is not unreasonable.

[45] Ms. Badmus has also alleged a violation of procedural fairness, although it was not immediately clear what constitutes the violation she alleges. The Notice of Application speaks of a failure to observe the principles of natural justice, equity and procedural fairness because the PSC omitted to request the job application. As a second ground for the application, the applicant takes issue with “the prejudicial Note posted on the Applicant’s Federal Public Service account in regard to the afore-mentioned job application” which “was not requested or viewed by the Commission before it erroneously concluded that an Investigation is not warranted into the afore-mentioned matter”. The third ground refers to the reasonableness of the decision in view of the facts.

[46] It remains the law that a judicial review dealing with procedural fairness calls for a standard of review of correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 79). The respondent submits that the procedural requirements in order to satisfy the principles of procedural fairness are on the lower end of the spectrum. Ever since *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653, it has been confirmed that “the concept

of procedural fairness is eminently variable and its content is to be decided in the specific context of each case” (p. 682). *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 brought factors that are to be considered in determining what procedural rights are required in given circumstances.

[47] Our Court has found that in a case where the PSC decided not to investigate a complaint, the duty of fairness is located on the lower end of the spectrum. In *Lakic v Canada (Attorney General)*, 2013 FC 1018, my colleague Justice Zinn wrote:

[7] It has been found that the Investigations Branch owes a duty of fairness on the lower end of the spectrum: *Baragar v Canada (Attorney General)*, 2008 FC 841 [*Baragar*]. In *Baragar*, Justice Barnes ultimately found that the duty of fairness imposed on the Investigations Branch was not breached on the facts of that case, in part because the applicant had ongoing communications with the Investigations Branch and at one point, “reformulated” her concerns in a lengthy written submission.”

Later in his reasons, my colleague encapsulated the requirements, which are directly applicable to this case:

[10] Therefore, I find that the Investigations Branch met its duty of fairness, at the level required, in providing the applicant with a copy of the Policy and advising her that her complaint would be dealt with in accordance with that document. Upon reading the Policy, Ms. Lakic would know that the delay was a relevant issue, and she was not prevented from making any relevant submissions in that regard.

[48] This is what occurred in this case. The applicant was provided with the link to the Policy. The CTR shows exchanges of emails involving the applicant directly related to the investigation the applicant wished to be undertaken.

[49] More importantly perhaps, one finds in the CTR the application made by Ms. Badmus, complete with the questions and answers found to be deficient, together with handwritten comments which summarize briefly the reasons for the ratings given. The allegation that the application was not before the PSC is further disproved as the record shows an exchange between officials at VAC and PSC where the reasons are further discussed. Furthermore, the report of the PSC officer who reviewed the matter shows that the application was considered. Clearly the application and the reasons for the ratings on the four essential qualifications found to be lacking were before the PSC.

[50] The reference to the “prejudicial Note” in the Notice of Application is said to not have been requested, or viewed, by the Commission before reaching its conclusion that an investigation was not warranted. That assertion is not supported by any evidence. In fact, the evidence is to the contrary. The CTR contains the “Request Form for Investigation into the Appointment Process” which refers to the sentence to which Ms. Badmus objects. For ease of reference, I reproduce it again:

We regret to inform you that you have been eliminated from the above-mentioned appointment process, as you did not obtain the required pass mark on one or more essential qualifications.

As is quite plain, the sentence merely announces the results, which are posted on the Public Service Resourcing System for the purpose of updating candidates on the status of their appointment.

[51] The applicant, in her memorandum of fact and law and again at the hearing of this case argued that the posting would somehow have “prejudicially hindered from applying for the

above stated position on the said day by a discriminatory Note posted on my account on the Government of Canada jobs website” (memorandum of fact and law, para 8). The “above stated position” is one in the Department of Employment and Social Development. I would offer two observations. First, the matter before the Court relates to a different position in another department, VAC. If the applicant feels that has been prejudicially hindered, it is with respect to another position that has nothing to do with the matter before the Court. The mere fact that the applicant was advised that she did not obtain the pass mark for the VAC position is simply the conclusion of the process for that position. If that hindered her from applying for a different position, this is not before the Court. That involves a different process from the one the Court deals with. Second, the applicant has not articulated how the sentence constitutes a “discriminatory Note” in spite of numerous questions to that effect during the hearing.

V. Conclusion

[52] The Court reached the conclusion that the decision made on November 6, 2019 was reasonable. Unfortunately, the applicant was eliminated from the process because her answers to the questions aimed at assessing essential qualifications fell short of the mark. In spite of my sympathy for the applicant, who expresses frustration at not being selected for a position in the Public Service following previous attempts, I cannot find that the decision is unreasonable as being without justification, transparency and intelligibility, and not being justified in relation to the relevant factual and legal constraints. When considered in light of the record and considering the administrative setting, it has not been demonstrated that there are sufficiently serious shortcomings such that there is not the requisite degree of justification, intelligibility and transparency. In short, the applicant did not meet her burden.

[53] Similarly, the allegations that the job application was not before the PSC and that a note put on the applicant's record was not requested or viewed by the PSC before reaching a conclusion have not been substantiated. Indeed, the record shows that they were before the PSC as confirmed by the CTR.

[54] It follows that the judicial review application is dismissed. The respondent sought its costs. Given the circumstances, costs in an amount of \$500, inclusive of disbursements and taxes, appear to the Court to be adequate.

JUDGMENT in T-1909-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.
2. Costs in an amount of \$500, inclusive of disbursements and taxes, are awarded to the respondent.

“Yvan Roy”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1909-19

STYLE OF CAUSE: IBUKUNOLUWA DEBORAH BADMUS v THE
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: BY VIDEOCONFERENCE BETWEEN OTTAWA
(ONTARIO), OSHAWA (ONTARIO) AND TORONTO
(ONTARIO)

DATE OF HEARING: AUGUST 27, 2020

JUDGMENT AND REASONS: ROY J.

DATED: SEPTEMBER 11, 2020

APPEARANCES:

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FOR THE APPLICANT
(SELF-REPRESENTED)

Marilyn Venney

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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