Date: 20080826

Docket: T-1399-07

2008 FC 963

Ottawa, Ontario, August 26, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ANDREW TULK

Applicant

and

THE ATTORNEY GENERAL OF CANADA
and JOSEPH FARRAH

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Is it reasonable that there is only one answer marked as correct to a question asked in a selection competition when two of the proposed answers mean the exact same thing?

BACKGROUND

[2] This application for judicial review concerns a decision rendered on June 7, 2007, by an appeal board established by the Public Service Commission under section 21 of the *Public Service Employment Act*, R.S.C., 1985, c. P-33 (now repealed by the *Public Service Modernization Act*, S.C., 2003, c. 22, section 284).

[3] A competition was held to staff the position of Production Superintendent with the Department of National Defence, Gagetown, New Brunswick. Following the assessment process an eligibility list was created ranking six qualified candidates. An appeal from that selection process was allowed on May 24, 2006, by decision of the Appeal Board. On August 10, 2006, the Public Service Commission prescribed corrective measures to address the defects identified by the Appeal Board. The corrective measures required DND to reassess the candidates on the following factors:

- National Building Code
- Health and Safety
- Civilian Performance Management Review
- Ability to interpret and apply data from blueprints and specifications
- Ability to apply collective agreements
- Ability to manage financial resources

[4] These factors were reassessed by way of a written examination. On December 13, 2006, a new eligibility list was issued with Mr. Joseph Farrah, the personal Respondent, ranking first and Mr. Andrew Tulk, the Applicant, ranking second. Mr. Tulk appealed the appointment of Mr. Farrah to the Appeal Board on a number of grounds, all of which were dismissed in its decision rendered June 7, 2007.

[5] Mr. Tulk is seeking judicial review of the decision of the Appeal Board with respect to only one of the issues raised by him at the Appeal Board. He submits that the decision of the selection

board for the competition was unreasonable in that it failed to award him a point for his answer to a knowledge question dealing with familiarity with DND workplace health and safety standards and procedures, despite the fact that his answer was correct.

[6] The selection board scored Mr. Tulk only 0.11 of a point behind the successful candidate. Had his response to the question at issue been scored as correct, he would have been awarded an additional point and thus would have been the successful candidate in the competition.

[7] The question at issue is Question 4, under Knowledge 2 “Health and Safety” which reads as follows:

> Under the Canada Labour Code Part II, 124 states under the “Duties of the Employers" that; Select (1) correct answer.
>
> A. Every employer should ensure the health and safety at work of every person employed by the employer is protected.
>
> B. Every employer must ensure the health and safety at work of every person employed by the employer is protected.
>
> C. Every employer shall ensure the health and safety at work of every person employed by the employer is protected.

Mr. Tulk answered B. The expected and thus correct answer from the standpoint of DND was C. The difference between the responses is the difference, if any, between the words ‘must’ and ‘shall’.

The selection board only accepted the answer containing the word ‘shall’ as the correct response because that is the precise wording of section 124 of the Canada Labour Code. The Appeal Board’s findings as regards this question were as follows:

> In question 4, Mr. Doherty [counsel for the Applicant] asserted that “shall” and “must” have the same meaning. After examining the issue put before me in greater depth, I came to the same conclusion. However, the department relied on the terminology used in the CLC [Canada Labour Code] and accepted “shall” as the correct answer. In applying the criteria expressed in *Scarrizzi (supra)*, I cannot say that the opinion formed by the Selection Board is unreasonable to the point that no reasonable person would have formed the same opinion.

[8] As the Appeal Board noted, section 124 of the Canada Labour Code reads as follows: “every employer shall ensure the health and safety at work of every person employed by the employer is protected” - the wording of answer C.

ISSUE

[9] Mr. Tulk raises as the issue in this application whether the decision of the Appeal Board was unreasonable, in that it failed to intervene with respect to the selection board’s refusal to accept the Applicant’s response to Question 4 as a correct answer, even though it has the same meaning as answer C, the answer designated by the selection board as the correct response.

ANALYSIS

[10] Both parties to this application for review submit, and I agree, that the standard of review of the decision of the Appeal Board raised in this application is that of reasonableness, as defined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[11] The Appeal Board, when it is reviewing a decision of a selection board, must do so by applying the standard set out by the Federal Court of Appeal in *Attorney General of Canada v. Appeal Board established by the Public Service Commission*, [1982] 1 F.C. 803. There the Court of Appeal appears to have imported the "patently unreasonable" standard as the standard in such a review, while at the same time indicating that the prime purpose of an appeal board established under the legislation was to ensure that the merit principle was followed in the selection process:

> The function of an Appeal Board appointed pursuant to section 21 of the Public Service Employment Act, R.S.C. 1970, c. P-32, is to determine, after inquiry, whether the selection made in the instant case was a "selection according to merit" pursuant to section 10 of that Act. The Appeal Board has a right and duty to satisfy itself that the opinion required by subparagraph 5(c)(i) of the Regulations, supra, was in fact formed but it cannot review the reasonableness of the opinion so long as there was some basis for it. The opinion formed would have to be so unreasonable that no reasonable person could form that opinion. The Appeal Board is not entitled to substitute its opinion for that of the Department exercising the delegated authority to form that opinion. The question whether there has been the required opinion formed is relevant to the application of the merit principle, but as to the reasonableness of such opinion, an Appeal Board should be bound by the same limits as a court exercising judicial review or sitting on a statutory appeal.

[12] The Appeal Board in this case found, as a fact, that the word 'must' and the word 'shall' as used in the two possible answers to Question 4 had the same meaning. The Appeal Board does not indicate on what basis it reached that conclusion; however, the evidence submitted by the Applicant in this respect must have been found to have been persuasive. A significant part of that evidence

came from documents authored by the Respondent. In materials prepared and used by DND in its 'Safety Legislation Course' – which materials were listed as a reference for some of the knowledge questions, but not for Question 4 which gave as its reference the "Canada Labour Code Part II, 124" - the Respondent wrote this:

> SHALL & IS
> 108. The use of "shall" and "is" denotes mandatory duties (it means "must"). For example, section 125(q) reads, in part;
>
> > "an employer shall provide … each employee with the information, instruction, training and supervision necessary to ensure the health and safety at work".
>
> 109. This means that the employer must provide the information, instruction, training and supervision to ensure the Health and Safety of their workers. Employers don't have a choice.
> (emphasis added)

[13] The Applicant submits that having found that the two answers, B and C, mean the same thing, it is unreasonable, and is in fact perverse, to accept only one of those answers as correct, rather than accepting both. The Respondent submits that the question asked the candidate what section 124 "states" and that it is reasonable to accept as the correct response that which mirrored the wording of section 124. The Applicant concedes that the "expected" response, answer C, was a reasonable response, but argues that it is equally reasonable to accept the other response, answer B, which has an identical meaning.

[14] In my view the Appeal Board erred in its analysis and reached an unreasonable decision which cannot stand. In my view, if the Appeal Board had engaged in the correct analysis it would have found that the decision of the selection board was one that no reasonable person could hold.

[15] The Appeal Board is required to conduct its examination of the selection process from the premise that "the essential question for the Appeal Board is whether the selection of the successful candidate has been made in accordance with the merit principle": *Blagdon v. Canada (Public Service Commission, Appeals Board)*, [1976] 1 F.C. 615 at para 6 (F.C.A.). With this principle in mind, the Appeal Board, prior to engaging in its examination of the reasonableness of there being only one correct, expected response to Question 4, ought to have considered what the purpose of that question was from the standpoint of the merit principle. In short, what was the question attempting to measure?

[16] The Respondent agreed that the purpose of Question 4 was not to ascertain whether the candidate had memorized and could recite the wording of section 124 of the Canada Labour Code. Clearly if this was the purpose of the question then there was only one correct and acceptable response, answer C. Rather, as was conceded by the Respondent, the purpose of Question 4 was to determine whether the candidate had knowledge of the mandatory nature of the employer's obligations set out in section 124 of the Canada Labour Code. That is to say, the purpose of the question was not to test a candidate's knowledge of the precise wording of the section, but its import. Had the question been directed to the exact wording of the section, it would have more exactly asked what section 124 "reads", or similar wording, rather than using the word "states". More importantly, if the question was directed to ascertaining whether a candidate could recite the precise words of a statute, it may well have been objected to on the basis that it was not part of the knowledge required for this position to be able to recite the Canada Labour Code, or parts of it.

[17] Once the purpose in asking the question is understood, the Appeal Board can then go on to examine the reasonableness of the position of the selection board that there was only one correct answer to the question using the test set out by the Federal Court of Appeal in *Attorney General of Canada v. Appeal Board established by the Public Service Commission*, *supra*.

[18] Having found that two of the answers meant exactly the same thing - both stated exactly what section 124 of the Canada Labour Code mandates - the Appeal Board was then required to ask whether any reasonable person would accept only one of those answers as being correct. In my view, the answer to that question is obvious – and it is no.

[19] Put in a mathematical context, it is like asking whether any reasonable person would accept only C as the correct response to the following:

> What does 2+2 equal? Select (1) correct answer:
>
> A. 3+0
>
> B. 3+1
>
> C. 4+0

[20] Because the Appeal Board failed to consider the true purpose, having regard to the merit principle, of Question 4, its decision that a reasonable person could accept that only one answer to the question was correct was itself unreasonable, and cannot stand. It must be set aside.

[21] The parties agreed that the successful party would be awarded costs fixed at $200.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, the decision of the Appeal Board dated June 7, 2007 is quashed, and the Mr. Tulk's appeal from the decision of the selection board is remitted back to the Appeal Board to render a decision in accordance with these Reasons; and

2. The Applicant shall have his costs of this application, fixed at $200, plus GST.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1399-07
STYLE OF CAUSE:	ANDREW TULK v. THE ATTORNEY GENERAL OF CANADA and JOSEPH FARRAH
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