Federal Court Cour fédérale

Date: 20090602

Docket: T-674-08

Citation: 2009 FC 570

Ottawa, Ontario, June 2, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

COLLEEN HAMMOND
WILLIAM WESTCOTT
and GENEVIEVE GIBBONS

Applicants

and

ATTORNEY GENERAL OF CANADA
and THE PUBLIC SERVICE COMMISSION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the April 1, 2008 decision (Decision) of the Public Service Staffing Tribunal (Tribunal) to dismiss the complaints brought by the Applicants against the Respondents. The complaints alleged abuse of authority in assessments of merit in an internationally advertised appointment process by Service Canada in St. John's, Newfoundland.

BACKGROUND

[2] The new *Public Service Employment Act*, 2003, c. 22 (Act) came into force on December 31, 2005 as part of the *Public Service Modernization Act*, 2003, c. 22. The modernization initiative was the first major legislative change to public service human resources since 1967.

[3] The objective of the new Act was to reform the old staffing regime which was thought to be too complex and slow. The new staffing system allowed managers to fill vacancies with qualified people in a timely fashion so that the public service could carry out its role of serving Canadians. The new system no longer used “competitions” or concepts such as “relative merit.” The focus was, rather, on finding a person who was a good fit for the job as determined by the Deputy Head of each department.

[4] The Applicants are employed at the Department of Human Resources and Social Development Canada (HRSDC): Ms. Hammond is a PM-03 Insurance Program Advisor; Mr. Westcott is a PM-02 Employment Benefits Officer; and Ms. Gibbons is a PM-02 Program Officer.

[5] On June 13, 2006, HRSDC posted a Job Opportunity Advertisement for certain PM-04 Regional Consultant Positions in St. John’s, Newfoundland.

[6] The Applicants participated in a selection process for the Regional Consultant Positions which required a reference. The issue before the Tribunal was related to the references received on

behalf of Ms. Hammond in respect of “Personal Suitability- Working with Others” and by Mr. Westcott and Ms. Gibbons in respect of “Abilities-Relationship Building.”

[7] The Reference Check Instructions applied to all qualifications and were on the first page of the package provided to the referees. There were several elements for each qualification assessed. The Instructions asked for specific examples for each qualification and read as follows: “Please provide your comments to illustrate how this candidate has demonstrated the following abilities and skills in their work. Specific examples of situations should be provided in support of each qualification.”

[8] The Applicants allege that the assessment board required that each element had to be addressed in order for the reference to adequately assess merit. None of the referees provided specific examples for each element. The references failed to provide examples with respect to certain elements, although global comments related to all elements were provided.

[9] Where a qualification element was not commented on specifically, the Applicants allege that the assessment board considered the element unassessed and disregarded the positive global comments which praised the Applicants in respect to all, or several, of the elements associated with the qualification. There was no request by the assessment board to have the referees resubmit the references or to seek clarification on any of the references. The Applicants were screened out of the appointment process and lost their promotional opportunity.

[10] Ms. Hammond was found not to meet the "Working with Others" qualification. Her answers at the oral interview were rated as "low-fair" and the answers provided by her reference checks were rated as "fair." The assessment board commented that "Reference was fair. Didn't address PS [personal suitability] sufficient to show better than fair competency in this area. Overall rating L. Fair." The assessment board awarded a score of 30, the lowest score in the "fair" range, for Personal Suitability. Her reference read:

> Colleen is very good in this area. She is a good team player + is very open + honest in her dealings with people. She has a high level of integrity + is very respectful of others' opinions. Conflicts may fluster her somewhat + she may avoid [sic] rather than face head on.

[11] The assessment board found that Mr. Westcott did not meet the "Relationship Building" qualification. His answers at the oral interview were rated as "poor," and the answers provided by his reference checks were rated as "fair." The assessment board commented on the reference as follows: "reference provided only 3/7 elements. Overall rating-low fair." The assessment board awarded a score of 50 in the "fair" range for Relationship Building. Mr. Westcott's reference read as follows:

> When I was managing the SCC in St. John's Bill was involved with a liaison in the disabled community and was instrumental in building strategic alliances and in gathering intelligence on issues. His efforts in this area were important in ensuring our services were responsible to client community needs. Bill also established working relationships with the EAS network. This was crucial in ensuring effective client service. He provided them with the information required to ensure that they provided the best service possible to their clients. Bill had strong working relationships with his peers and supervisor. He displayed interest in the activities in [sic] others and lent his knowledge and experience when appropriate.

[12] The assessment board found that Ms. Gibbons did not meet the "Relationship Building" qualification. Her answers at the oral interview were rated as "low-fair" and the answers provided by her reference checks were rated as "mid-fair." The assessment board commented that the "Reference did not address the 7 expected elements. Points to candidate's sense of co-operation and professionalism, but largely did not address key elements under this ability." The assessment board awarded a score of 50 in the "fair" range for Relationship Building. Ms. Gibbons' reference read as follows:

> Genevieve throughout this pilot initiative demonstrated that she works well with a variety of individuals. She worked closely with staff of the JATE office, although trying and confrontational at times, she did persevere and attempt to resolve any issues on their behalf. I believe that exposure at this level for a period of time provided her the opportunity to grow and learn while experiencing a different level of work. Genevieve did on many occasions go out of her way to assist the organization, only to find it would back fire causing her some grief however viewed it as a learning experience as opposed to personal. Her work with our department in Labrador has exposed her to many culturally sensitive issues, a variety of political issues, along with major opportunities economically of which [sic] she has always dealt with professionally and appropriately.

[13] The references had to be assessed by the assessment board as "unsatisfactory," "poor," "fair," "good," "very good" or "excellent." The board used a grid to convert this score to a number within a range of 0-50 points for Personal Suitability and 0-80 points for Relationship Building. The scores were recorded on each Applicant's scoring sheet. The reference checks were combined with responses from the Applicants' oral interviews to achieve "an overall narrative rating" of the qualifications in question. The Applicants did not meet the minimum requirement for the qualifications in question and were screened out of the selection process. Had the Applicants'

references been scored higher in the "fair" range, or in the "good" range, they would have remained in the selection process.

[14] Between February 13, 2007 and March 5, 2007, each of the Applicants filed a complaint with the Tribunal under paragraph 77(1)(*a*) of the Act and submitted separate allegations. The complaints were consolidated on October 2, 2007. All three complaints alleged abuse of authority by the Respondents, the Deputy Head of Service Canada, in assessing their qualifications. Each candidate, including the Applicants, was assessed using an oral interview and a reference check.

[15] Ms. Hammond specifically indicated "that the selection board had both the authority and the responsibility to all candidates to ensure that any information sought and received from referees was both up to date and sufficient on which to base their assessment." Mr. Westcott and Ms. Gibbons indicated that, "[t]he selection board abused its authority when it made the decision not to clarify or follow up with the referee who provided the reference check for the qualification sub-factor- "Abilities-Relationship Building" regarding elements deemed not addressed by the referee…"

DECISION UNDER REVIEW

[16] The Applicants' allegation before the Tribunal was that the Respondents abused their authority under section 77 of the Act by acting on incomplete and inadequate information with respect to the reference checks conducted during the assessment process.

[17] The Tribunal determined that there were two issues to decide:

1) Whether there was an abuse of authority in assessing the candidates on inadequate information;

2) Whether there was an abuse of authority in declining to provide a reference for a candidate.

[18] The Tribunal found that the Applicants had not met the burden that rested upon them to provide compelling evidence of abuse of authority in the assessment of their qualifications. The Tribunal also found that the Applicants had failed to prove, on a balance of probabilities, that the Respondents had abused their authority when managers declined to provide a reference, because those individuals were not exercising any authority under the Act.

[19] The Tribunal found that there was: (1) no compelling evidence to support the contention that the assessment board did not have the requisite information to make an informed decision; (2) no compelling evidence to demonstrate that either the referees or the assessment board members were biased or had been provided with insufficient information or instruction; or (3) any other information to demonstrate a serious flaw in the process.

ISSUES

[20] The Applicants submit the following issues on this application:

1) What is the applicable standard of review?

2) Did the Tribunal commit an error of procedural fairness in expressly disregarding documentary evidence and in mistakenly declaring that a relevant document had not been entered into evidence before it?

3) Did the Tribunal err in law in failing to apply the proper test to determine whether the assessment board had abused its authority?

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable to these proceedings:

2(4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.	2(4) Il est entendu que, pour l'application de la présente loi, on entend notamment par « abus de pouvoir » la mauvaise foi et le favoritisme personnel.
Appointment on basis of merit	Principes
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.	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.
Meaning of merit	Définition du mérite
(2) An appointment is made on the basis of merit when	(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :
(*a*) the Commission is satisfied that the person to be appointed meets the essential	*a*) selon la Commission, la personne à nommer possède les qualifications essentielles

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 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.

<u>Assessment methods</u>

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).

— 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 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.

<u>Méthode d'évaluation</u>

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).

Grounds of complaint

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(*a*) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(*b*) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(*c*) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

Area of recourse

(2) For the purposes of subsection (1), a person is in the area of recourse if the

Motifs des plaintes

77. (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).

Zone de recours

(2) Pour l'application du paragraphe (1), une personne est dans la zone de recours si :

person is

(*a*) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and	*a*) dans le cas d'un processus de nomination interne annoncé, elle est un candidat non reçu et est dans la zone de sélection définie en vertu de l'article 34;
(*b*) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.	*b*) dans le cas d'un processus de nomination interne non annoncé, elle est dans la zone de sélection définie en vertu de l'article 34.
<u>Excluded grounds</u>	<u>Exclusion</u>
(3) The Tribunal may not consider an allegation that fraud occurred in an appointment process or that an appointment or proposed appointment was not free from political influence.	(3) Le Tribunal ne peut entendre les allégations portant qu'il y a eu fraude dans le processus de nomination ou que la nomination ou la proposition de nomination a résulté de l'exercice d'une influence politique.
102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court.	102. (1) La décision du Tribunal est définitive et n'est pas susceptible d'examen ou de révision devant un autre tribunal.

STANDARD OF REVIEW

[22] The Applicants submit that the first issue in this application involves procedural fairness, which attracts no deference from a reviewing court and is subject to a standard of correctness. See: *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056 at paragraph 46.

[23] The Applicants say that the second issue concerns the application of the proper test for abuse of authority. The determination of the proper test for abuse of authority is a question of law and a contextual analysis must be conducted to determine the appropriate standard of review. The analysis must consider the Tribunal's privative clause, the Tribunal's purpose and expertise and the nature of the legal question at issue. See: *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraph 64.

[24] The Applicants note that although the Tribunal's Decision is protected by a privative clause that privative clause is not as strong as privative clauses set out in other federal legislation. While this clause dictates that some deference is owed to the Tribunal's Decision, it is not subject to the highest degree of deference. See: Act at section 102, *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paragraph 27 (*Dr. Q)* and *Dunsmuir* at paragraph 52.

[25] The Applicants submit that the Tribunal was established to hear complaints of the kind brought forward by the Applicants. So the Tribunal has specific expertise in matters of federal public service staffing practices and procedures. The Tribunal does not, however, have expertise in questions of law. The majority of its members are not lawyers and the issue in this application is the proper test for abuse of authority, a legal issue which the Applicants allege goes beyond the Tribunal's specific expertise. The Tribunal's expertise in identifying the relevant considerations in applying the law is less than that of a reviewing court and, therefore, no deference is due. See: *Dunsmuir* at paragraph 50; *Dr. Q* at paragraphs 28-29 and *Davies v. Canada (Attorney General)*, [2005] F.C.J. No. 188 at paragraphs 21-22.

[26] The Applicants also contend that the determination of the proper test for abuse of authority is a broad legal issue which has applications in all areas of administrative law. It is an issue "that is both of central importance to the legal system as a whole and outside the adjudicator's area of expertise." In such cases, the Applicants say that no deference is due to an administrative tribunal and a standard of correctness should apply. As a result of the Tribunal's error of law, the Applicants submit that it considered irrelevant matters and failed to consider the relevant evidence before it. These errors flow from, and are subsumed by, the Tribunal's failure to apply the proper test for abuse of authority, which taints its entire Decision. See: *Dunsmuir* at paragraphs 50, 54 and 59 and *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] S.C.J. No. 64 at paragraph 62.

[27] The Applicants take the position that, in this case, the Tribunal's error can be articulated without reference to the facts before it; this was not an instance where "the legal and factual issues are intertwined and cannot be separated": *Dunsmuir* at paragraph 53. However, the Applicants also say that while the two issues for consideration in this application are both subject to a standard of review of correctness, the Tribunal's failure to recognize and consider documents entered into evidence before it, and its failure to apply the proper test for abuse of authority, are sufficiently egregious to render the Decision untenable based on any possible level of deference. Therefore, in the Applicants' view, the Decision lacks the "justification, transparency and intelligibility" which are the hallmarks of a reasonable decision: *Dunsmuir* at paragraph 47.

[28] The Respondents submit that section 102 of the Act contains a clear and unequivocal privative clause in relation to all decisions of the Tribunal. This privative clause is a "full and true privative clause" which excludes review by any court and is an indicator that a high degree of judicial deference is owed to the Tribunal.

[29] The preamble to the new Act provides that staffing in the public service is to be based on merit and non-partisanship and that the delegation of staffing authority should afford public service managers the flexibility necessary to staff positions. The Respondents say that, in fulfilling this mandate, the Tribunal not only helps to foster fair and transparent employment practices, as well as constructive and harmonious labour-management relations, but also contributes to a public service that is based on merit and non-partisanship and which strives for excellence, and which is representative of Canada's diversity.

[30] The Respondents note that the Tribunal is an expert statutory tribunal. Its members are Governor-in Council appointments as opposed to Public Service Commission employees. The Act requires them to have knowledge of, or expertise in, employment matters in the public sector. This is a clear recognition by Parliament of the expertise of the Tribunal's members. An established, statutory tribunal benefiting from permanence, core staff members and a legal service unit should be awarded greater deference than an *ad hoc* decision-maker. See: *Public Service Alliance of Canada v. Canada (Canadian Food Inspection Agency)* 2005 FCA 366 at paragraph 21. The Tribunal has a relative expertise on staffing matters.

[31] The Respondents also submit that the Tribunal in this case was fixed with determining whether there was an abuse of authority in the assessment of qualifications and whether there was an abuse of authority by managers in declining to provide references. This required an appreciation of both legal and factual issues and did not amount to a question of law that is of "central importance to the legal system" or one that is "outside the specialized area of expertise of the administrative decision maker" as the Applicants suggest. The Respondents argue that the Tribunal has a greater amount of expertise in the interpretation of staffing issues than the Applicants allege, and this suggests that its Decision should attract a high level of deference.

[32] The Respondents submit that the Tribunal is entitled to a high degree of deference and, in light of *Dunsmuir*, the appropriate standard of review in this case should be reasonableness.

ARGUMENTS

The Applicants

Failure to Consider Relevant Evidence before the Tribunal

[33] The Applicants submit that the Tribunal's record includes the Reference Check Instructions among the exhibits entered before the Tribunal; the record also refers to the same document in the table listing the exhibits entered before the Tribunal. The Tribunal was incorrect in its reasons when it said that this document was not entered into evidence and was not the basis of the allegations before it. This demonstrates that the Tribunal did not consider this document and accepted as

uncontradicted the evidence of the assessment board that "there was no requirement to provide comments for each attribute or behaviour."

[34] The Applicants note that the Reference Check Instructions document was key in establishing their case that the references upon which the assessment board relied in making its assessment as to merit were incomplete and inadequate. The Instructions were repeatedly referred to in the written arguments submitted by the Applicants. In conjunction with the scoring sheets, the Instructions provided clear evidence that the references relied on by the assessment board were incomplete and inadequate for the purpose of assessment of the qualifications in issue. By failing to acknowledge and consider evidence before it, or to properly review the arguments put forward by the Applicants with regard to the evidence cited in those arguments, the Tribunal erred in procedural fairness and violated the Applicants' procedural rights. See: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1996] S.C.J. No. 116 at paragraph 41 and *Nistor v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1805 at paragraph 37.

Failure to Apply the Proper Test for Abuse of Authority

[35] The Applicants note that the Act has established a new scheme for appointments according to merit in the federal public service. Under the Act, an appointment is made on the basis of merit when the Public Service Commission (or its delegate) appoints a person who "meets the essential qualifications for the work to be performed." The Act has largely replaced the previous scheme of relative merit with one of individual merit. Assessment boards must, in an internal selection process,

determine whether candidates possess the essential qualifications at issue. See: Act at section 30(2) and *Tibbs v. Canada (Deputy Minister of National Defence)* 2006 PSST 0008 (*Tibbs*) at paragraph 63.

[36] The Applicants submit that, under the Act, the Tribunal must consider complaints that a person was not appointed pursuant to an internal appointment process by reason of "an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)": Act at section 77(1)(*a*).

[37] The Applicants point out that the Tribunal, in accordance with the stated objectives of its enabling legislation, has adopted a broad definition of abuse of authority. Abuse of authority need not be intentional and the Act does not limit the definition of abuse of authority to the specific issues of bad faith, personal favouritism or discrimination pursuant to the *Canadian Human Rights Act,* R.S., 1985, c. H-6 referenced in the Act. The Applicants contend that the Tribunal has relied repeatedly on the analytical framework set out in David Phillip Jones and Anne S. de Villars, *Principles of Administration Law, 4th Ed.* (Toronto: Thomson Carswell, 2004) at pages 197 and 198. That framework identifies the following categories of abuse:

(a) Improper intention in exercising a discretionary power for an unauthorized or ulterior purpose, in bad faith, or for irrelevant considerations;

(b) Acting on inadequate material where there is no evidence, or ignoring relevant considerations;

(c) Exercising discretionary power so as to obtain an improper result, which may be unreasonable, discriminatory, or retroactive or uncertain in operation;

(d) Exercising discretionary power under a misapprehension of the law; and

(e) Fettering the exercising of discretion by adopting a policy or entering into a contract.

See: *Tibbs* at paragraphs 70 and 72 and *Jolin v. Canada (Deputy Head of Service Canada)* 2007 PSST 0011 at paragraph 70 (*Jolin*).

[38] The Applicants say that the Tribunal has paraphrased the second of the Jones and de Villars categories as follows: "When a delegate acts on inadequate material (including where there is no evidence or without considering relevant matters)." It is the second category of abuse of authority which was at issue in the instant case. These categories of abuse of authority are broad and apply in all areas of administrative law. An application may need to be modified, depending on the specific factual context in which the allegations arise.

[39] The Applicants take the position that any allegation that authority has been abused because a decision-maker has acted on inadequate material must involve a consideration of whether the material in question was inadequate. There must also be a determination as to whether the inadequate information was relied on. If the decision maker did rely on the inadequate information, then there must be a determination as to whether the reliance on the inadequate material was determinative of the outcome: *Oakwood Development Ltd. v. St. François Xavier (Rural*

Municipality), [1985] S.C.J. No. 49 (*Oakwood*) at pages 7-8 and *Tucci v. Canada (Revenue, Customs, Excise and Taxation)*, [1997] F.C.J. No. 159 (F.C.T.D.) (*Tucci*) at paragraphs 8 and 9.

[40] The Applicants say that the Tribunal determined none of the above in applying the test for abuse of authority and ignored the jurisprudence established by the Federal Court with regard to the adequacy of assessment tools in federal public service selection processes. Therefore, the Tribunal failed to understand the applicability of the Federal Court of Appeal's decision in *Madracki v. Canada*, [1986] F.C.J. No. 727 (FCA) (*Madracki*).

[41] The Court in *Madracki* ruled that an assessment tool must test, or assess, the qualification at issue in order for an assessment of merit to occur. The Tribunal in this case focused narrowly on the fact that there was "no evidence to support a finding that the assessment tool, the reference check, was incapable of properly testing the qualification." There was, however, no allegation before the Tribunal that a properly completed reference check, made in compliance with the instructions, was a flawed tool. There was evidence before the Tribunal which clearly indicated that the reference checks used by the assessment board in determining merit were incomplete and inadequate. They did not meet the requirement to test or assess the qualifications at issue as established by *Madracki* at page 4.

[42] The Tribunal stated that it did not apply the reasoning in *Madracki* because the current Act does not require a determination of relative merit. The Tribunal ignored the current Act, which requires appointments to be in accordance with merit as defined by the criteria established in the

Act. One of the criteria is whether a candidate for an appointment meets the essential qualifications of the subject position. In failing to consider whether the reference check in this instance had properly assessed the qualification at issue, the Tribunal misapplied the test for adequacy of an assessment tool established in *Madracki*.

[43] The Applicants note that the first document which indicated that the references in the present case were inadequate for the purpose of assessing merit was the Reference Check Instructions. The Instructions asked for specific examples of each qualification; it is unclear whether a “qualification” is a broad category, such as “Personal Suitability- Working with Others,” or one of the listed elements of that category. However, it is clear from the scoring sheets that the assessment board, whatever its testimony to the Tribunal may have been, considered that there was a requirement that each element be addressed for a qualification to be adequately assessed. The Tribunal incorrectly stated that “no evidence was produced to suggest any misunderstanding of the reference instructions.”

[44] The scoring sheets provide evidence that the reference checks were inadequate. The references either did not address the qualifications at issue, or did not address sufficient elements of the qualification at issue. Despite finding that “[t]he written comments on the summary marking sheets were very brief, and, in each case, indicate that only some of the aspects of the qualification were addressed in the reference provided,” the Tribunal failed to consider relevant information when it said that “there is simply no evidence that the reference tool, the assessment check, was incapable of properly testing the qualification to be found wanting [sic] for each complainant.” The

Applicants say that the fact that only some aspects of the qualifications were addressed by the reference checks rendered those checks incomplete and inadequate for the purpose of assessing the qualification.

[45] The Applicants point out that the Tribunal acknowledged that “the board referees could have gone back to the referees for more information, but, according to Mr. McCarthy, they felt they had enough.” This means that the Tribunal undertook no consideration of the adequacy of the reference checks to assess merit, while openly acknowledging that they were used to screen out the Applicants. Mr. McCarthy’s evidence before the Tribunal was accepted without considering or acknowledging contemporaneous written evidence which was directly contrary to it. While the Tribunal need not refer expressly to every document in evidence before it, it is not open to the Tribunal to ignore contradictory or conflicting evidence.

[46] The Applicants say that the assessment board did rely on incomplete or inadequate information and that the Tribunal merely noted that the assessment board gave the references similar scores to the ones given to the Applicants’ oral interviews. The Applicants submit that this was an irrelevant consideration because results from the oral interviews were in no way determinative of the outcome the references provided. It was not open to the Tribunal to base its conclusions on irrelevant facts. See: *Vo v. Alberta (Workers’ Compensation Board, Appeals Commission)*, [2006] A.J. No. 1628 (Alta. Q.B.) at paragraphs 81, 86 and 88.

[47] The Applicants further submit that, although the qualifications at issue were also tested through oral interview questions, an adequate or complete reference check might, in all probability, have lead to a different assessment of the merit of each of the Applicants. The Applicants did not seek to substitute their own evaluations of their qualifications for those of either the referees or the assessment board.

[48] The Tribunal failed to consider the discrepancy between the assessment board's "fair" assessment of the Applicants and the positive comments provided by the referees. There is no logical way, in the Applicants' view, to reconcile the statements of the Tribunal. Each candidate was rated in the "fair" range, not only for the qualification but for the reference check itself. The assessment board did not accept the clearly positive character of the references provided. The Tribunal erred in failing to take this relevant consideration into account. See: *Choudhry v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 2181 (F.C.) at paragraphs 44 and 48.

[49] The Applicants also submit that, by disregarding the Reference Check Instructions, as well as the clearly positive nature of the references and the scoring sheets which stated that the incorrectly completed references were inadequate to assess the qualifications at issues, the Tribunal failed to consider evidence directly related to the issue before it. It was not open to the Tribunal to fail to resolve conflicting or contradictory evidence or ignore relevant matters. See: *Bocangel v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1259 (F.C.) at paragraph 13 and *Khemiri v. Canada (Solicitor General)*, [2005] F.C.J. No. 1028 at paragraph 22.

[50] The Applicants conclude that, in failing to turn its mind to the sufficiency of the reference checks before the assessment board for the purpose of assessing merit with regards to the qualifications at issue, as well as the extent to which this insufficient material was relied on by the assessment board and determined the outcome of the selection process, the Tribunal improperly applied the test for abuse of authority and erred in law: *Oakwood* at pages 7-8; *Tucci* at paragraphs 8 and 9 and *Madracki* at page 4.

The Respondent-Attorney General

[51] The Attorney General submits that the Applicants base their denial of procedural fairness on the fact that the Tribunal states that the instructions to referees were not provided during the hearing. The Tribunal's record of documents, however, clearly indicates otherwise. The Attorney General contends that this argument is a red herring, since the Tribunal found that the Applicants did not meet their own burden of proof to demonstrate that the Respondents had abused their authority in assessing their qualifications. Whether or not the instructions to the referees were provided to the Tribunal does not change the fact that the Applicants did not meet their own burden.

[52] The Attorney General submits that the Applicants' own answers were insufficient to demonstrate the essential qualifications at issue. So regardless of whether the referees gave higher rated responses than the candidates themselves, they were not sufficient to raise the Applicants to the level of having met the essential qualifications. The Attorney General also says that the Applicants' contention that the assessment board had a responsibility to go back to the referees in

order to obtain further information is unreasonable and does not fall within the general principles of abuse of authority under the Act. The assessment board said that the answers given by the referees were consistent with the responses given by the Applicants themselves during the oral interviews.

[53] In the Attorney General's view, there was no failure of procedural fairness in the assessment board deciding that the oral interview and the referees were consistent. No further clarification was required.

Abuse of Authority

[54] The Attorney General submits that the threshold to find abuse of authority in assessment of essential qualifications is high. The burden on an applicant is to establish that a decision to appoint an appointee was made in bad faith, influenced by personal favouritism or otherwise affected by a similar consideration. The Attorney General notes that the term "abuse of authority" is not exhaustively defined in the Act, but subsection 2(4) of the Act provides that abuse of authority shall be construed as including bad faith and personal favouritism.

[55] The Attorney General says that the shared characteristics, or defining features, of specific items of "bad faith" and "personal favouritism" represent egregious or very serious degrees of misfeasance; both of which are extremely serious. The Attorney General cites this Court in *Carpenter Fishing Corp. v. Canada*, [1997] F.C.J. No. 1811 at paragraph 30 for the proposition that "allegations and findings of bad faith against a minister are…serious and damaging."

[56] The Attorney General also says that the serious nature of such an allegation was recognized by the Tribunal, which noted that the complaints process should not be used merely to state a perceived injustice. An allegation of abuse of authority is a very serious matter and must not be made lightly. An employee must understand that a complaint is more than merely stating a perceived injustice: *Portree v. Canada (Department of Human Resources and Social Development)* 2006 PSST 0014 at paragraphs 47-50.

[57] Academic and judicial authority has found other specific terms that fit the limited class; these include "corruption" and "extreme lack of care," as well as "personal hostility," "political revenge" (although excluded under subsection 77(3)) and "dishonesty." See: Lewis Klar, *Tort Law* (Calgary: Carswell, 1991) at page 198; *Rayonier Canada (B.C.) Ltd. and International Woodworkers of America, Local 1-217 v. Ross Anderson v. Forest Industrial Relations*, [1975] 2 Can. L.R.B.R. 196 at 201 (B.C.L.R.B.), cited by the Supreme Court in *Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298 and *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509. The Attorney General also provides definitions for: "corruption," "fraudulent act" and "gross negligence" from *Black's Law Dictionary* (St. Paul, Minn.: Thomson West, 2004) and concludes that they all share the common features of being of a very serious nature.

[58] The Attorney General submits that, as the Tribunal previously determined, abuse of authority requires more than mere errors or omissions. The threshold to find abuse of authority is

considerably higher and the act or omission has to be a very serious transgression. See: *Tibbs* at paragraph 65 and *Portree* at paragraph 47.

[59] The manner in which a deputy head, or his/her delegate, chooses between an advertised or a non-advertised process, or establishes and assesses the essential qualifications with respect to a particular position, should not be subject to review. The only exception should be where it is established by an applicant, on a balance of probabilities with clear and cogent evidence, that there has been an element of bad faith, personal favouritism, discrimination, corruption, gross negligence or misfeasance of a similar egregious nature.

[60] The Attorney General says that the only real issues before the Tribunal were:

1) The Applicants' contention that the assessment of their qualifications constituted an abuse of authority;

2) That the decision by managers not to provide a reference when asked constituted an abuse of authority.

The Attorney General notes that there is no proof of serious wrongdoing or flaws that were made in regards to either of these issues.

[61] The Tribunal has made reference in the past to the five-part test articulated in Jones and de Villars at page 168, and has suggested in *Jolin*, at paragraphs 69-70, that the full test applies in reviewing claims of abuse of authority under section 77 of the Act.

[62] The Attorney General submits that this test is merely a guideline and is only of particular significance in reviewing abuse of discretion in the absence of a statutory framework. This should not be the definitive test for determining abuse of authority under the Act. Abuse of authority in the context of the Act is distinguishable from the review of ministerial discretion, as can be seen in those judicial authorities that have relied on the test.

[63] The Attorney General also says that none of the six authorities relied on in *Jolin* at paragraph 69 dealt with a question of abuse of authority. None of the discretionary decisions under review in those cases were made in the context of a statutory framework, such as the one that exists under this Act. Instead, the exercise of discretion under review in those cases was a broad discretion afforded to a minister or his delegate, where the enabling statue provided neither guidelines for, nor fettered, the exercise of discretion, nor any statutory parameters upon which to base a review.

[64] While the general administrative law principles articulated in Jones and de Villars may be appropriate in situations of unfettered discretion, all of the noted cases can be distinguished from a review of the exercise of delegated authority granted under the Act with respect to staffing decisions, including the choice of appointment process, the power to investigate and the establishment and application of qualifications for a position to be staffed. The Attorney General cites and relies upon *Portree* at paragraph 51:

> Paragraph 77(1)(*a*) is not intended to be the "catch all" recourse for complaints who allege abuse of authority whenever they are not satisfied with the results of a selection process. A complainant must not treat the Tribunal as a forum of last resort to appeal a deputy head's decision on the appointment or proposed appointment simply because he or she was not selected…

[65] The Attorney General takes the position that paragraph 77(1)(*a*) is also not a "catch all" recourse for complainants unhappy with the permitted discretionary choices a deputy head makes in how to carry out the appointment process. To allow such complaints would risk re-creating the inquisitorial nature of appeal under the former Act.

[66] The Attorney General also cites and relies upon *Carpenter Fishing*, which highlights that allegations of abuse of authority are of such severity and are so potentially damaging to a Deputy Head "that the least one can expect from a litigant…is that they make them expressly and unequivocally." The Attorney General states that the Applicants did not explicitly make the very serious allegation of bad faith, personal favouritism, corruption or any similar misfeasance. Nor did the Applicants lead any evidence of such behaviour.

[67] The Attorney General reminds the Court that the new Act has established a brand new regime, so that several principles from the previous statute are no longer applicable. There is no longer a requirement to rank candidates, or a requirement to establish an eligibility list; and there is no requirement to consider more than one person. Also, there is no requirement to find the most meritorious candidate; however, the person who is appointed must meet the essential qualifications, established by a deputy head or delegate. Pursuant to section 36 of the Act, any method that the Commission or its delegate considers appropriate may be used to assess the qualifications of a candidate. Parliament has consciously chosen a marked departure from the old regime and its prescriptive approach. See: *Robbins v. Canada (Department of Human Resources and Human Development)* 2006 PSST 0017 at paragraphs 45-50.

[68] The Attorney General notes that this significant departure from the previous system of staffing is evidenced from the second reading of Bill C-25 in the House of Commons, as well as from testimony before the Government Operations Committee. See: Second Reading, House of Commons (Bill C-25, Public Service Modernization Act) Minister Robillard, President of Treasury Board, Sponsoring minister of Act; Minister Robillard, President of Treasury Board and sponsoring minister of Public Service Modernization Act before Government Operations Committee, No. 012, 2nd Session, 37th Parliament; S. Fraser, OAG, Standing Committee on Government Operations Committee, No. 012, 2nd Session, 37th Parliament; S. Fraser, OAG, Standing Committee on Government Operations Committee, No. 020, 2nd Session, 37th Parliament, March 20, 2003; T. Tirabassi (1), Parliamentary Secretary to Minister Robillard, Standing Committee on Government Operations Committee, No. 032, 2nd Session, 37th Parliament, April 28, 2003; J. Mooney, Staff Member of Public Service Modernization Task Force, PCO, Standing Committee on Government Operations Committee, No. 041, 2nd Session, 37th Parliament, May 13, 2003 and T. Tirabassi (2), Standing Committee on Government Operations Committee, No. 041, 2nd Session, 37th Parliament, May 13, 2003.

[69] The Attorney General points out that, under the Act, a deputy head is given considerable discretion when it comes to staffing matters and in making appointments. Section 36 of the Act gives the Commission and its delegate a similar, or even wider, degree of discretion in the assessment methods chosen to determine whether a person meets the qualifications of a position. This flexibility was recognized in *Tibbs* at paragraph 62:

> …The preamble of the PSEA is clear and of considerable assistance in interpreting the concept of abuse of authority. The following

> section is of particular note: "delegation of staffing authority (…) should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians.

[70] The Attorney General notes that, in the face of this "clearly legislated flexibility with respect to choosing an appointment process and designing an assessment process," an argument that would lead to a static and inflexible process contrary to the intentions of Parliament regarding the new Act must be avoided.

[71] The principal that "[h]e who asserts must prove" is the basis of our legal system and an abuse of authority is a serious allegation and cannot be presumed. The scheme of the Act and the *Public Service Staffing Tribunal Regulations,* SOR/2006-6 bear no hint that the burden is on the Respondents. A person who alleges that he or she should have been promoted has the burden of proof. See: Morley R. Gorsky et al., *Evidence and Procedure in Canadian Labour Arbitration* (Toronto: Carswell, 2001) at 9-13, 9-15, 9-24.

[72] The burden should not be on the Attorney General to demonstrate that the choice of essential qualifications, and the ensuring that the assessment of the appointee against the essential qualifications was not an abuse of authority. The Tribunal stated that the burden of proof is on the complainant with respect to complaints of abuse of authority. See: *Tibbs* at paragraph 55. Other cases, such as *Tucci,* also pre-date the current Act and address the use of discretion in the absence of a statutory framework. Such a framework is now provided by the Act, especially in the definitions at section 2(4).

[73] The Attorney General concludes by stating that, given the wide latitude afforded to the deputy head with respect to the establishment and assessment of essential qualifications, the Applicants have failed to prove, on a balance of probabilities with clear and cogent evidence, that the members of the assessment board were somehow influenced by any factor amounting to abuse of authority as contemplated by the Act. The allegations of the Applicants, as they relate to the interpretation or requirements of the applicable Act, are simply not substantiated. The Applicants have not established that the Tribunal committed a reviewable error that warrants the intervention of this Court.

The Respondent- Public Service Commission

[74] On October 15, 2008, in a letter from the Public Service Commission to the Federal Court, the Public Service Commission advised that it would not be filling a record in this application.

ANALYSIS

[75] The Applicants say that the Tribunal member correctly framed the issue – “Did the respondent abuse its authority by assessing the complainants based on inadequate information? – but failed to address it and, in fact, disregarded material evidence and failed to apply the proper test for abuse of authority.

[76] In the Decision itself, the reasoning process on abuse of authority appears to be as follows:

a. The applicable category of abuse in the application, based upon the categories identified in *Tibbs*, is “When a delegate acts on inadequate material…” (paragraph 5);

b. The assessment tool at issue in these complaints is the reference check and “There is no allegation or evidence before the Tribunal that the tool itself, the written instructions to the referees, was flawed or inadequate” (paragraph 14);

c. The “application of an assessment tool continues to be an essential element of assessment …” (paragraph 15);

d. Assessment boards are not compelled to contact more than one referee and the use of one reference is not itself an abuse of authority. There is also no established requirement to follow-up and qualify a reference, and an assessment board has the discretion to decide whether it has enough information to make an informed decision regarding a candidates qualifications. However, “these findings should not be interpreted as leave to assess candidates with inadequate information” (paragraph 16);

e. The assessment board’s notes on the complainant’s summary marking sheets “were brief to the point of being of little value” (paragraph 17);

f. The two sources of information used by the assessment board in this case – “candidates’ responses to an oral interview question and one reference” – produced similar results (paragraph 18);

g. There was no abuse of authority based upon inadequate information because:

> “The complainants’ oral interview answers were assessed as poor or fair; insufficient to meet the qualification. The complaints’ references were assessed as fair; also insufficient to meet the qualification. The board member could have gone back to

the referees for more information but, according to Mr. McCarthy, they felt that they had enough information. The fact that the information from both sources was consistent supports that position" (paragraph 18);

h. There is "no compelling evidence to support a finding that the assessment board did not have the requisite information to make informed decisions on the complainants' qualifications." (paragraph 19)

[77] At the heart of the Tribunal's rationale for finding no abuse of authority are its assertions that the assessment board "felt they had enough information" to assess the references as fair and there was "no compelling evidence to support a finding that the assessment board did not have the requisite information … ."

[78] The Tribunal clearly recognized in its reasons that, in order to decide whether the assessment board had abused its authority by assessing the complainants based on inadequate information, it had to find that Mr. McCarthy's assertion that the board "felt that they had enough information" from the referees was tenable. The reason why the Board felt it could accept Mr. McCarthy's evidence on this point was the "fact that the information from both sources [i.e. from the referees and the oral interviews] was consistent supports that position."

[79] This is tantamount to saying that because the Applicants were ranked the same by the assessment board for their oral responses and their references, this is evidence that the referees provided sufficient information for an assessment based upon each reference.

[80] This makes little sense to me. The Tribunal is basing its acceptance of Mr. McCarthy's testimony of "enough information" upon consistency between the two sources used to assess the Applicants. But the complaint to the Tribunal was that the assessment board had simply equated its oral scores with the reference scores because the reference information was not sufficient to permit a real assessment based upon that tool. In other words, the Tribunal avoided examining the principal issue before it by pointing to the result as a reason to reject the complaints.

[81] What is more, there was a significant amount of "compelling evidence" before the Tribunal to suggest that Mr. McCarthy's assessment of "enough information" was not correct. In this regard the Tribunal failed to address and entirely overlooked the following:

a. Mr. McCarthy had himself put on the record in assessing Ms. Gibbons that "Reference did not address the 7 expected elements. Points to candidates' sense of cooperation and professionalism, but largely did not address key elements under this ability." It is difficult to see how Mr. McCarthy could later take the position that there was "enough information" from referees to assess candidates when he had gone on record as saying that "key elements" were just not addressed. Apart from Mr. McCarthy's later bare statement to the Tribunal, there is no indication in the record that, notwithstanding the

referees failure to address "key elements," there was still enough information to make an assessment;

b. There are similar comments in relation to the references provided for the other candidates, which create a very strong impression of inadequate information and no indication that the information provided by the referees was sufficient to allow a real assessment;

c. The Tribunal states categorically that "the instructions to the referees for the qualification at issue here were not even produced for the Tribunal, much less called into question." The evidence, however, is clear that the instructions were before the Tribunal and were a significant aspect of counsel's closing remarks regarding the adequacy of information before the assessment board;

d. When the comments made by referees are compared with the score sheets, there is a strong suggestion that the Applicants were awarded a score based upon deficiencies in the references themselves. In other words, there is a strong impression that the references were assessed, but the Applicants were not.

[82] Counsel for the Respondents argues that the assessment board never directly comes out and says that the information provided by referees was not sufficient to allow an assessment to be made. He says that, in their comments, board members did not say they could not rate the Applicants; they merely said they cannot rate them higher.

[83] A reading of the evidence does not suggest such an interpretation to me. For example, Mr. McCarthy's comments on the reference he used to assess Ms. Gibbons to make it clear that he was not provided with the "key elements" asked for in the instructions to referees. This does not suggest to me that he received "enough information" to assess Ms. Gibbons on the qualification in question.

[84] The Tribunal does not address this central issue. It merely accepts Mr. McCarthy's later testimony of "enough information" on the basis that the "fact that the information from both sources was consistent supports that position." The Tribunal entirely overlooks the significant evidence that does not support such a position and appears not to be aware that the instructions to referees were before it, even when counsel made extensive submissions on point.

[85] All in all, this suggests that the assessment board abused its authority by basing its assessment on inadequate information and the Tribunal entirely overlooked strong evidence on this point.

[86] In my view, this raises a procedural fairness issue that must be assessed on a standard of correctness. See *Sketchley* at paragraph 46. But, even if I were to assess this matter on a standard of reasonableness, as suggested by the Respondents, I would have to say that the error renders the Decision unreasonable within the meaning of *Dunsmuir*.

[87] The second issue raised by the Applicants is the Tribunal's failure to apply the proper test for abuse of authority.

[88] The Applicants point here is that the Tribunal failed to assess whether the material before the assessment board was inadequate, and it failed to assess whether the information, if inadequate, was relied upon, and whether that reliance was determinative of the outcome.

[89] The Applicants say that the Tribunal simply ignored the jurisprudence established by the Federal Court concerning the adequacy of assessment tools in the federal public selection process. In particular, they say the Tribunal failed to understand the applicability of the Federal Court of Appeal decision in *Madracki*. This is because, in failing to consider whether the reference checks had properly assessed the qualification at issue, the Tribunal misapplied the test for adequacy of an assessment tool established in that case.

[90] The Tribunal found that "[a]lthough the *Madracki* decision predates the current legislative framework, the principle remains valid." (paragraph 13) But the Tribunal also concluded that the *Madracki* principle was "not applicable in these complaints" (paragraph 13) because the "assessment tool at issue in these complaints is the reference check" and "[t]here is no allegation or evidence before the Tribunal that the tool itself, the written instructions provided to the referees, was flawed or inadequate."

[91] In *Penney* (05-CSD-00146) at paragraph 47, the Public Service Commission Appeal Board cited and relied upon *Madracki* for the proposition that "while the use of a particular selection tool might be quite reasonable in relation to a particular position, it does not follow that the selection tool

will necessarily produce all of the information which is required in order for the selection committee to reach a thorough and reasonable conclusion."

[92] In concluding that *Madracki* was only relevant to the issue of whether the tool itself – i.e. the reference check in this case – was flawed or inadequate, the Tribunal did not address whether the reference checks produced the data and information required for an assessment to be made. Consequently, the board also failed to address the issues of adequacy, reliance and determinativeness.

[93] Although not strictly necessary for my decision, because I have decided the procedural fairness issue against the Respondents, I agree with the Applicant that, whether a standard of correctness or reasonableness is applied to this second issue, the Tribunal committed a reviewable error in this regard.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the Tribunal’s Decision is set aside. The matter is referred back for re-determination by a different Tribunal member in accordance with my reasons;
2. The Applicants shall have their costs of this application.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-674-08
STYLE OF CAUSE:	**COLLEEN HAMMOND** **WILLIAM WESTCOTT and** **GENEVIEVE GIBBONS** APPLICANTS - and - **ATTORNEY GENERAL OF CANADA and** **THE PUBLIC SERVICE COMMISSION** RESPONDENTS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 21, 2009
REASONS FOR :	HON. MR. JUSTICE RUSSELL
DATED:	June 2, 2009

APPEARANCES:

Ms. Edith Bramwell	APPLICANTS
Mr. Neil McGraw	RESPONDENTS

SOLICITORS OF RECORD:

Public Service Alliance of Canada Collective Bargaining Branch Ottawa, ON	APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	RESPONDENTS