Federal Court  Cour fédérale

Date: 20140417

Dockets: T-606-13
T-711-13

Citation: 2014 FC 369

Montréal, Quebec, April 17, 2014

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

YURI KIM

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Overview

[1] These are two judicial review applications, joined by this Court pursuant to Rule 302 of the *Federal Courts Act*, RSC 1985, c F-7.

[2] File T-606-13 deals with two decisions by the Public Service Staffing Tribunal [the Tribunal]: the first decision, dated March 13, 2013, dismissed a complaint by the applicant, Yuri Kim, on the basis that it did not have jurisdiction in relation to a priority appointment for the staffing of position

119-13272 [‘272 position] by the Canada Space Agency [the Agency], pursuant to the *Public Service Employment Act*, SC 2003, c 22 [the Act]; the second decision, dated March 22, 2013, refused the applicant’s request to reconsider the first decision as *functus officio* applied.

[3] Meanwhile, file T-711-13 deals with a decision by the Tribunal, dated April 9, 2013, dismissing a complaint by the applicant, on the basis that it did not have jurisdiction pursuant to the Act in relation to an external appointment process for the staffing of EN-ENG-04 category Operations Engineer position 119-00759 [‘759 position] by the Agency.

Preliminary remarks

[4] At the hearing, counsel for the applicant informed the Court that he would not make any arguments with respect to file T-606-13, as the employee appointed to the position at stake in that file benefited from a priority employment. Therefore, these reasons will not deal with file T-606-13 and the applicant’s application for judicial review of the first and second decisions will be dismissed without costs.

[5] Until February 11, 2013, the applicant had been a self-represented litigant. He then contacted his bargaining unit, the Professional Institute of the Public Service of Canada, requesting assistance for the hearings of his applications for judicial review, which were scheduled to be heard on February 27, 2013. The Institute agreed to provide the applicant with legal counsel for the matters before this Court.

[6] Applicant's new counsel filed a motion for an adjournment of the hearing on consent, in order to familiarize himself with the applicant's case. That motion was denied by the Court and on February 24, 2014, counsel brought a motion under rule 312 of the *Federal Courts Rules*, SOR/98-106, with respect to file T-711-13, seeking to file a supplementary affidavit by Mr. Kim. Filed in support of that affidavit was a letter from the Public Service Commission [the Commission], dated November 5, 2013, whereby the Commission informed the applicant that it had declined to investigate most of his allegations concerning the staffing of '759 position as, in its view, the assessment of his qualifications was done pursuant to an internal staffing process, which was not within its jurisdiction.

[7] At the onset of the hearing, I heard both parties' arguments with respect to this motion and allowed the applicant to file his supplemental affidavit. However, I reminded the parties that the Commission's decision was not currently under review.

Background

[8] The applicant is an aeronautic engineer, scientist and manager with more than forty years experience working in the former USSR, in Israel and in Canada.

[9] In June 2002, he began to work for the Agency as a research scientist [the SE-RES-04 position or the SE-RES category].

[10] On April 11, 2012, the applicant received a letter confirming that the Agency was abolishing the SE-RES-04 position, amidst a larger restructuring of the SE-RES category [the

Work Force Adjustment]. The applicant contends that at that time, his sector manager, Mr. A. Ng sought to convince him to retire as he had reached retirement age. Considering he had only accumulated 11 years of Agency pension, the applicant wished to continue working at the organization.

[11] On January 28, 2013, the applicant received an email from a Human Resources Officer of the Agency, advising him that as an employee affected by the Work Force Adjustment, his candidacy had been referred to the manager of the '759 position for evaluation. Unfortunately, the Officer joined the wrong Statement of Merit Criteria to her January 28 email. As the right one had only been sent to the applicant on February 12, 2013, he was given until February 15, 2013 to provide additional elements to his candidacy.

[12] At 9:22 am on February 15, 2013, the applicant submitted his updated CV for the '759 position. After the assessment of his qualifications against the essential merit criteria of experience for the position, the Agency determined that he did not meet all of the experience merit criteria and so his candidacy would not be retained. By day's end, the Agency appointed Ms. Magdalena Wierus-Jecz to the position. Ms. Wierus-Jecz was part of a pool of pre-qualified candidates for the Agency, established as a result of the external advertised process 11-CSA-EA-74824, which had been undertaken in November 2011.

[13] On March, 13, 2013, the applicant filed a complaint to the Tribunal regarding the appointment of Ms. Wierus-Jecz. He contended that he was not appointed because of

discrimination and that there had been an abuse of authority in unlawfully screening out his candidacy.

[14] The respondent filed a motion to dismiss the applicant's complaint on the basis that the Tribunal did not have jurisdiction to hear complaints resulting from an external appointment process, and that Ms. Wierus-Jecz's appointment fell into that category.

[15] On March 27, 2013, the Commission forwarded an email to the Tribunal confirming that in its view, the Tribunal did not have jurisdiction to hear the applicant's complaint, as Ms. Wierus-Jecz was appointed to the '759 position as a result of an external appointment process. Strangely, in its November 5, 2013 decision, the Commission refused to investigate the applicant's complaint on the basis that when he had applied for the '759 position, he was part of an internal appointment process.

The decision under review

[16] The respondent had provided the Tribunal with the poster advertising the process relating to the establishment of the pool of pre-qualified candidates in November 2011, which included Ms. Wierus-Jecz's candidacy. That poster indicated that all persons residing in Canada and Canadian citizens residing abroad were entitled to apply. The number identifying the process (11-CSA-EA-74824) contained the letters EA, which stand for "external advertised."

[17] Meanwhile, the complainant had contended that he understood that he had been participating in an internal process, with the right to file a complaint before the Tribunal. He

further added that he was qualified for the position and pointed out that it was the respondent that referred his candidacy as a priority employee for this employment opportunity. He claimed that the respondent committed several violations of proper staffing procedures.

[18] On April 9, 2013, the Tribunal found that the appointment was made pursuant to an external appointment process and not an internal one, and so indicated that it did not have jurisdiction to hear the complaint (section 77 and subsection 88(2) of the Act). According to subsection 2(1) of the Act, an internal appointment process is one in which only persons employed in the public service may be considered for the appointment. An external appointment process is one in which persons may be considered whether or not they are employed with the public service. However, the Tribunal notified the applicant that section 66 of the Act provides that the Commission may in certain circumstances investigate an external appointment process.

Issues

[19] The only issue before this Court is whether the Tribunal had made a reviewable error when it dismissed the complaint of the applicant with regard to the ‘759 position.

Standard of Review

[20] The respondent submits that the decisions of the Tribunal should be reviewed against the reasonableness standard, as the decisions involved questions of mixed fact and law, the Tribunal’s procedure and approach to hearing complaints, and the Tribunal’s interpretation of the Act (*Boshra v Canada (Attorney General)*, 2012 FC 681 at paras 26 to 28; *Canada (Attorney*

General) v Kane, 2012 SCC 64 at paras 6-7; *Murray v Canada (Attorney General)*, 2013 FC 49 at para 18; *Canada (Attorney General) v Beyak*, 2011 FC 629 at para 43).

[21] At the hearing, the applicant's counsel agreed that the standard with regard to file T-711-13 should be that of reasonableness, as it involved a question of mixed fact and law as to whether the nomination process to staff '759 position was internal or external. However, he added that should this Court engage with questions regarding the jurisdictional lines between the Commission and the Tribunal, the decision should be subject to review on the correctness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 61; *Seck v Attorney General of Canada*, 2012 FCA 314 at paras 16 and 17).

[22] I agree with the parties that the issue before this Court should be reviewed using the reasonableness standard. The Tribunal is highly specialized, and regularly engages in the interpretation and application of the Act, its home statute, and so it has developed a certain expertise deserving of deference by this Court. As will be further fleshed out below, this Court will not need to address the jurisdictional boundaries between the Commission and the Tribunal.

Analysis

[23] During his oral pleadings, the applicant's counsel argued that, as things stood, his client found himself with a right to complain about violations of staffing procedures with regard to the nomination process but no actual recourse for that right. The Tribunal had held that it lacked jurisdiction to hear his complaint as it culminated with an external appointment. As indicated above, the Commission had provided the Tribunal with submissions to that effect, dated

March 27, 2013, recommending "that the complaint be dismissed on the grounds that the complainant does not enjoy a right of complaint to the [Tribunal] with respect to this external appointment" (page 93 of the respondent's T-711-13 record). Both the decision and the Commission's submissions made reference to the latter's (discretionary) jurisdiction pursuant to section 66 of the Act to investigate external appointment processes.

[24] Yet, in its November 5, 2013 decision, the Commission held that it did not have jurisdiction to investigate the applicant's complaint, as section 66 of the Act forbids such investigations with regard to "internal appointment processes unless there is a reason to believe that fraud or political influence may have occurred." In explaining its reasoning, the Commission noted that the applicant's candidacy had been referred to the position as an affected employee by the Work Force Adjustment. The Agency assessed his application in the context of an internal process but ultimately resorted to proceeding with an appointment from an existing pool of qualified candidates stemming from a previous external appointment process.

[25] According to the Tribunal and the Commission, Mr. Kim was assessed internally in a process that ultimately led to an external appointment. Therefore, he found himself with no recourse at either the Tribunal or the Commission.

[26] Applicant's counsel argued that such a strict interpretation of sections 66 and 77 of the Act is contrary to the spirit of the law. In fact, this interpretation leads to an illogical gap and "absurd consequences," which Parliament could not have possibly intended. As the Supreme Court of Canada in *Alberta Union of Provincial Employees v Lethbridge Community College*,

2004 SCC 28 at para 46 explains, "an interpretation that would tend to frustrate the purpose of legislation or the realization of the legislative scheme is likely to be labelled absurd. […] It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences."

[27] Moreover, the applicant's counsel points to *Richardson et al v Deputy Minister of Environment of Canada et al*, 2007 PSST 7 [*Richardson*], where the Tribunal said the following, with regard to Parliament's intention to ensure that appointment processes are not labelled "internal" or "external" in order to escape the jurisdictions of the Tribunal and the Commission with respect to public service employees:

> [13] However, a deputy head cannot designate an appointment process as an "external appointment process," and then consider only one person who is already in the public service, since this would render the distinction between an "external appointment process" and "internal appointment process" meaningless. Moreover, designating an appointment process in such a way could lead to the circumvention of recourse to the PSST, which should be available to persons employed in the public service. Clearly, such an interpretation cannot be what Parliament intended when it set out these definitions in the PSEA.
>
> [14] The onus rests on the respondent to satisfy the Tribunal that an external appointment process was conducted to staff this position. The respondent has provided no evidence that anyone from outside the public service was in fact considered for this position. [Emphasis added.]

[28] The applicant's counsel conceded that the question in *Richardson* differed from what is before this Court, as there, the Tribunal at para 15 ultimately decided that the appointment was made pursuant to an internal process: "although the respondent believed it was conducting an external appointment process, by only considering one person who was already employed in the public service, an internal appointment process was conducted."

[29] For a more similar factual situation to the case at bar, the applicant's counsel referred this Court to the Tribunal's decision in *St-Pierre v Canada (National Defence)*, 2007 PSST 32. There, the Tribunal held that the complainants had no recourse under subsection 77(1) of the Act because they did not apply for the position pursuant to an internal appointment process but an external one, as they were not public service employees at the time. Instead, the Commission would need to undertake an investigation pursuant to section 66 of the Act.

[30] Applicant's counsel insisted that the applicant cannot fall between the cracks of the Act. While he did not advance arguments as to whether the Tribunal or the Commission should ultimately be found to have jurisdiction in Mr. Kim's situation, he preferred that this Court find the Tribunal to have some residual power to hear Mr. Kim's complaint. According to the applicant, the Tribunal has more robust statutory powers to address his complaints.

[31] Moreover, the respondent maintains that the Tribunal's decision itself was reasonable given that it considered the evidence before it, and accordingly determined that the appointment of Ms. Wierus-Jecz was made pursuant to an external appointment process. The applicant's complaint relative to this appointment was specifically barred by section 77 of the Act. The respondent argues that this is largely a finding of fact within the Tribunal's particular expertise and so it is owed great deference.

[32] In response to applicant's counsel's submissions that this decision leaves the applicant without any recourse for his complaint, the respondent argues that the applicant could file a claim before the Canadian Human Rights Tribunal for discrimination or grieve the decision for

improper screening out of his candidacy. I note that at the hearing, the applicant's counsel denied either remedy was available to Mr. Kim, as the Canadian Human Rights Tribunal only has jurisdiction with respect to discrimination matters, while the grievance procedure is not available pursuant to Mr. Kim's collective bargaining agreement. Either way, this issue is not relevant for the determination of the case before this Court.

[33] Moreover, the respondent's counsel contends that the applicant has himself to blame for finding himself without any recourse, as there was in practice no jurisdictional void. She suggested that the applicant had complained about the merit of Ms. Wierus-Jecz's appointment in his submissions before the Tribunal (an external appointment), while complaining about problems relating to his own assessment before the Commission (internally reviewed).

[34] Regardless, the respondent emphasized that the applicant's situation is not an "absurd consequence" of the Act nor should this Court consider that the Tribunal has residual power to hear his complaint pursuant to sections 77 and 87. The respondent conceded that there may potentially be a legislative gap here, but the Tribunal is an administrative tribunal, and so is limited by its statutory mandate. It has no residual power. Nothing in the Act's text suggests that all complaints about staffing decisions should have recourses through the Act. In fact, the Act explicitly bars complaints with respect to certain staffing decisions, such as priority appointments (as was the case in file T-606-13) and deployments.

[35] In response to that last point, applicant's counsel notes that unlike deployments, the Tribunal and the Commission have been granted jurisdiction over external and internal

appointments, and so Parliament could not have intended that Mr. Kim's situation fall in a legal vacuum between the competing jurisdictions of the Tribunal and the Commission.

[36] With all due respect to both parties, there seems to be a misunderstanding or some confusion between what could be qualified as an evaluation process or assessment of a candidacy, and an appointment process.

[37] By reviewing all of the evidence adduced by the parties, I see that there were two evaluation or assessment processes: One external process performed in October 2011, leading to the establishment of a pre-qualified pool of candidates able to fulfill future EN-ENG-04 category positions at the Agency; and one internal process conducted amongst the employees affected by the Work Force Adjustment who could eventually be reassigned to future EN-ENG-04 positions.

[38] It is important to note that the applicant's complaints are not based on sections 40 or 41 of the Act. In fact, the respondent argues that no discretionary or absolute priority applied to the applicant.

[39] That said, I now turn to the staffing of the '759 position. It should, in my view, be considered external as the applicant and Ms. Wierus-Jecz were both concurrently considered for the position, irrespective of the time frame and the fashion with which their candidacies were evaluated or pre-qualified. Looking at the appointment process rather than at the evaluation process is consistent with the wording of the Act; it does not leave a gap in the Act or lead to any absurd consequences.

[40] In this case, there was no official posting of the ‘759 position as the Agency chose to use two pools of candidates for the staffing of the position: one external and one internal. Considering the Act’s definitions as set forth in subsection 2(1), this appointment process can only thus be qualified as external.

Conclusion

[41] Accordingly, I will dismiss both applications for judicial review. As for costs, the respondent asked for $4,000 in total. He argues that in deciding whether costs should be awarded or not, the ability to pay is not a factor pursuant to rule 400 of the *Federal Courts Rules*. The awarding of the costs should be based on the merit of the case (*Solosky v The Queen*, [1977] 1 FC 663, affirmed by [1978] 2 FC 632 (CA)). Considering the outcome of my decision, I will grant costs to the respondent in the amount of $2,000.

JUDGMENT

THIS COURT ORDERS that:

1. Both applications for judicial review be dismissed;

2. Costs are granted in favour of the respondent in the amount of $2,000.00 inclusive of disbursement and interests.

"Jocelyne Gagné"

Judge

Statutory Provisions

Federal Courts Act, RSC 1985, c F-7:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.	18. (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour : a) décerner une injonction, un bref de certiorari, de mandamus, de prohibition ou de quo warranto, ou pour rendre un jugement déclaratoire contre tout office fédéral; b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral
18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;	a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;
(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;	b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;
(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;	c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
(e) acted, or failed to act, by reason of fraud or perjured evidence; or	e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

(f) acted in any other way that was contrary to law.	f) a agi de toute autre façon contraire à la loi.

Federal Courts Rules, SOR/98-106:

Additional steps	Dossier complémentaire
312. With leave of the Court, a party may	312. Une partie peut, avec l'autorisation de la Cour :
(a) file affidavits additional to those provided for in rules 306 and 307;	a) déposer des affidavits complémentaires en plus de ceux visés aux règles 306 et 307;
(b) conduct cross-examinations on affidavits additional to those provided for in rule 308; or	b) effectuer des contre-interrogatoires au sujet des affidavits en plus de ceux visés à la règle 308;
(c) file a supplementary record.	c) déposer un dossier complémentaire.

Discretionary powers of Court	Pouvoir discrétionnaire de la Cour
400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.	400. (1) La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

Public Service Employment Act, SC 2003, c 22, ss 12,13:

Preamble	Préambule
Recognizing that	Attendu :
the public service has contributed to the building of Canada, and will continue to do so in the future while delivering services of highest quality to the public;	que la fonction publique a contribué à bâtir le Canada et continuera de le faire dans l'avenir tout en rendant des services de haute qualité à sa population;
Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded;	qu'il demeure avantageux pour le Canada de pouvoir compter sur une fonction publique non partisane et axée sur le mérite et que ces valeurs doivent être protégées de

façon indépendante;

Canada will also continue to gain from a public service that strives for excellence, that is representative of Canada's diversity and that is able to serve the public with integrity and in their official language of choice;

qu'il demeure aussi avantageux pour le Canada de pouvoir compter sur une fonction publique vouée à l'excellence, représentative de la diversité canadienne et capable de servir la population avec intégrité et dans la langue officielle de son choix;

the public service, whose members are drawn from across the country, reflects a myriad of backgrounds, skills and professions that are a unique resource for Canada;

que la fonction publique, dont les membres proviennent de toutes les régions du pays, réunit des personnes d'horizons, de compétences et de professions très variés et que cela constitue une ressource unique pour le Canada;

authority to make appointments to and within the public service has been vested in the Public Service Commission, which can delegate this authority to deputy heads;

que le pouvoir de faire des nominations à la fonction publique et au sein de celle-ci est conféré à la Commission de la fonction publique et que ce pouvoir peut être délégué aux administrateurs généraux;

those to whom this appointment authority is delegated must exercise it within a framework that ensures that they are accountable for its proper use to the Commission, which in turn is accountable to Parliament;

que ceux qui sont investis du pouvoir délégué de dotation doivent l'exercer dans un cadre exigeant qu'ils en rendent compte à la Commission, laquelle, à son tour, en rend compte au Parlement;

delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians; and

que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manœuvre dont ils ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens;

the Government of Canada is committed to a public service that embodies linguistic duality and that is characterized by fair, transparent employment practices, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues;

que le gouvernement du Canada souscrit au principe d'une fonction publique qui incarne la dualité linguistique et qui se distingue par ses pratiques d'emploi équitables et transparentes, le respect de ses employés, sa volonté réelle de dialogue et ses mécanismes de recours destinés à

résoudre les questions touchant les nominations,

Basis of appointment

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 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.

Needs of public service

(3) The current and future needs of the organization referred to in subparagraph

Modalités de nomination

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 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.

Besoins

(3) Les besoins actuels et futurs de l'administration visés au sous-alinéa (2)b)(iii)

(2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization.

peuvent comprendre les besoins actuels et futurs de la fonction publique précisés par l'employeur et que l'administrateur général considère comme pertinents pour l'administration.

Interpretation

(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

Précision

(4) La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite.

Mandate

(2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

Mission

(2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu du paragraphe 65(1) ou des articles 74, 77 ou 83 et de statuer sur elles.

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

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) 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);

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

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) the failure of the Commission to assess the complainant in the official language of his or

c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle

her choice as required by subsection 37(1).

de son choix, en contravention du paragraphe 37(1).

Area of recourse

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

(b) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.

Zone de recours

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

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) 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.

"external appointment process" means a process for making one or more appointments in which persons may be considered whether or not they are employed in the public service.

"internal appointment process" means a process for making one or more appointments in which only persons employed in the public service may be considered.

« processus de nomination externe » Processus de nomination dans lequel peuvent être prises en compte tant les personnes appartenant à la fonction publique que les autres.

« processus de nomination interne » Processus de nomination dans lequel seules peuvent être prises en compte les personnes employées dans la fonction publique.

Where no right to complain

87. No complaint may be made under section 77 in respect of an appointment under subsection 15(6) (re-appointment on revocation by deputy head), section 40 (priorities — surplus employees), subsection 41(1) or (4) (other priorities) or section 73 (re-appointment on revocation by Commission) or 86 (re-appointment following Tribunal order), or under any regulations made pursuant to paragraph 22(2)(a).

Absence du droit de présenter une plainte

87. Aucune plainte ne peut être présentée en vertu de l'article 77 dans le cas où la nomination est faite en vertu du paragraphe 15(6) (nomination à un autre poste en cas de révocation par l'administrateur général), de l'article 40 (priorités — fonctionnaires excédentaires), des paragraphes 41(1) ou (4) (autres priorités), des articles 73 (nomination à un autre poste en cas de révocation par la Commission) ou 86 (nomination à un autre poste suivant l'ordonnance du Tribunal) ou des règlements pris en vertu de l'alinéa 22(2)a).

Priority — surplus employees

40. Notwithstanding section 41, after a deputy head informs an employee that the employee will be laid off pursuant to subsection 64(1) and before the lay-off becomes effective, the Commission may appoint the employee in priority to all other persons to another position under the deputy head's jurisdiction if the Commission is satisfied that the employee meets the essential qualifications referred to in paragraph 30(2)(a) and that it is in the best interests of the public service to make the appointment.

Priorités — fonctionnaires excédentaires

40. Malgré l'article 41, la Commission, dans les cas où l'administrateur général a indiqué à un fonctionnaire qu'il serait mis en disponibilité au titre du paragraphe 64(1), peut, avant la prise d'effet de la mise en disponibilité et si elle juge que cette mesure sert les intérêts de la fonction publique, nommer le fonctionnaire en priorité absolue à un autre poste relevant de l'administrateur général et pour lequel, selon la Commission, il possède les qualifications essentielles visées à l'alinéa 30(2)a).

Decisions final

102. (1) Every decision of the Tribunal is final and may not be questioned or reviewed in any court.

Caractère définitif de la décision

102. (1) La décision du Tribunal est définitive et n'est pas susceptible d'examen ou de révision devant un autre tribunal.

No review by certiorari, etc.

(2) No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain the Tribunal in relation to a complaint.

Interdiction de recours extraordinaires

(2) Il n'est admis aucun recours ni aucune décision judiciaire — notamment par voie d'injonction, de certiorari, de prohibition ou de quo warranto — visant à contester, réviser, empêcher ou limiter l'action du Tribunal en ce qui touche une plainte.

Filing of order in Federal Court

103. (1) The Commission or any person to whom an order of the Tribunal applies may, after the day specified for compliance or, if no such day is specified in the order, not sooner than 30 days after the day the order was made, file in the Federal Court a certified true copy of the order.

Exécution des ordonnances

103. (1) La Commission ou toute personne à laquelle s'applique l'ordonnance du Tribunal peut, après la date fixée dans l'ordonnance ou, en l'absence d'une telle date, à compter du trentième jour suivant la date de celle-ci, déposer à la Cour fédérale une copie certifiée conforme de l'ordonnance.

Effect of filing

(2) On the filing of an order, it becomes an order of the Federal Court and may be enforced as such.

Effet

(2) Dès le dépôt, l'ordonnance est assimilée à une ordonnance de la Cour fédérale.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-606-13 and T-711-03
STYLE OF CAUSE:	YURI KIM v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 27, 2014
REASONS FOR JUDGMENT AND JUDGMENT:	GAGNÉ J.
DATED:	April 17, 2014

APPEARANCES:

Ben Piper	FOR THE APPLICANT
Léa Bou Karam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Ben Piper Ottawa, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT