

CANADA / JUDGMENT

# Canada (Attorney General) v. Kane

2012 SCC 64

## COURT

Supreme Court of Canada

## DECIDED

23 November 2012

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Canada (Attorney General) v. Kane Collection Supreme Court Judgments Date 2012-11-23 Neutral citation 2012 SCC 64 Report

[2012] 3 SCR 398 Case number 34147 Judges McLachlin, Beverley; LeBel, Louis; Abella, Rosalie Silberman; Rothstein, Marshall; Cromwell, Thomas Albert; Moldaver, Michael J.; Karakatsanis, Andromache On appeal from Federal Court of Appeal Subjects Administrative law Notes SCC Case Information: 34147 Decision Content SUPREME COURT OF CANADA Citation: Canada (Attorney General) v. Kane, 2012 SCC 64, [2012] 3 S.C.R. 398 Date: 20121123 Docket: 34147 Between: Attorney General of Canada Appellant and Robert Kane Respondent Coram: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. Reasons for Judgment: (paras. 1 to 11) The Court Canada (Attorney General) v. Kane, 2012 SCC 64, [2012] 3 S.C.R. 398 Attorney General of Canada Appellant v. Robert Kane Respondent Indexed as: Canada (Attorney General) v. Kane 2012 SCC 64 File No.: 34147. 2012: November 6; 2012: November 23. Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. on appeal from the federal court of appeal Administrative law — Judicial review — Standard of review — Public Service Staffing Tribunal concluding that decision by employer to staff position by means of advertised process did not constitute abuse of authority — Whether decision of Tribunal reviewable on standard of reasonableness. K was employed by Service Canada in a position classified at the PM-05 level. As part of a reorganization, the position of Regional Manager was created at the PM-06 level. The employer decided to fill the PM-06 position through an internal advertised process. K applied to the competition but failed a mandatory examination. K filed a complaint with the Public Service Staffing Tribunal stating an abuse of authority contrary to the Public Service Employment Act. The Tribunal dismissed K's claim because he had not established abuse of authority. The Federal Court affirmed the Tribunal's decision. The Federal Court of Appeal allowed the appeal and sent this case back to the Tribunal. Held: The appeal should be allowed and the decision of the Tribunal affirmed. The decision of the majority of the Federal Court of Appeal must be set aside for four reasons. First, there is nothing in either the Public Service Employment Act or the Public Service Employment Regulations which requires a deputy head to utilize a particular selection process. Second, the majority assessed the

decision of the Public Service Staffing Tribunal against a claim that K did not make. Third, the decision to send this case back to the Tribunal was based on the majority's reading of the "principal justification" for the employer's decision but the Tribunal made no finding as to what the employer's "principal justification" may have been. Finally, there was no realistic possibility that the Tribunal could find an irrational finding of fact in this case. Statutes and Regulations Cited Public Service Employment Act , S.C. 2003, c. 22, s. 33 . APPEAL from a judgment of the Federal Court of Appeal (Evans, Dawson and Stratas JJ.A.), 2011 FCA 19, 413 N.R. 351, 328 D.L.R. (4th) 193, 36 Admin. L.R. (5th) 48, [2011] F.C.J. No. 79 (QL), 2011 CarswellNat 103, setting aside a decision of Heneghan J., 2009 FC 740, 356 F.T.R. 127, [2009] F.C.J. No. 1396 (QL), 2009 CarswellNat 3528, dismissing an application for judicial review from a decision of the Public Service Staffing Tribunal, 2007 PSST 35, 2007 CarswellNat 6307. Appeal allowed. Christopher Rupar and François Joyal, for the appellant. Andrew Raven and Andrew Astritis, for the respondent. The following is the judgment delivered by

- [1] The Court — Mr. Kane was employed by Service Canada as Service Delivery Manager of the In-Person Community Services business line, a position classified at the PM-05 level. As part of a reorganization, the structure for the work unit was changed and the position of Regional Manager was created at the PM-06 level. Service Canada decided to fill the PM-06 position through an internal advertised process. Mr. Kane applied to the competition but failed a mandatory examination and so was unsuccessful.
- [2] Mr. Kane filed a complaint with the Public Service Staffing Tribunal, stating: "The grounds of my complaint are that my employer abused it [sic] authority in choosing an advertised internal appointment process" (A.R., vol. II, at p. 149).
- [3] Before the Tribunal, Mr. Kane argued that (1) the PM-06 position was not a new position, but a reclassification of the old PM-05 position he had formerly held; (2) the practice in Newfoundland was not to advertise reclassified positions, but to internally fill them by appointment; and (3) advertising the position therefore constituted an abuse of authority under the Public Service Employment Act , S.C. 2003, c. 22 ("PSEA ").
- [4] The Tribunal found that Mr. Kane had not established abuse of authority and dismissed his claim (2007 PSST 35 (CanLII)). The Federal Court, per Heneghan J., found the Tribunal's decision to be reasonable and accordingly affirmed it (2009 FC 740, 356 F.T.R. 127). The Federal Court of Appeal allowed the appeal and sent the case back to the Tribunal for reconsideration (2011 FCA 19, 413 N.R. 351).
- [5] The majority of the Federal Court of Appeal found that the Tribunal's decision was unreasonable because it had failed to consider that an abuse of authority could arise where a decision to use an advertised appointment process was based on an unreasonable finding of material fact. While the employer was not, under the new Act, required to consider whether a position was new or reclassified, that was a factor that the employer could consider. Reviewing the record in this case, the majority found that the employer had in fact

taken the newness of the PM-06 position into account when it decided to use an advertised position. The majority was of the view that the newness of the PM-06 position was the “principal justification” given by the employer for choosing an advertised process. Thus, if Mr. Kane could establish that there was “no rational basis” for the employer’s assumption that the PM-06 position was new, he might have succeeded in demonstrating that the decision to use an advertised process was arbitrary and therefore an abuse of authority (para. 55). The Tribunal, by failing to consider Mr. Kane’s arguments on this point, effectively excluded from the scope of the term “abuse of authority” decisions that are based on facts that have no rational support (para. 75). This was, in the majority’s view, an unreasonable position for the Tribunal to take.

- [6] In our respectful view, the decision of the majority of the Federal Court of Appeal must be set aside for four reasons. First and most fundamentally, the basis of Mr. Kane’s complaint was abuse of authority “in choosing an advertised internal appointment process” (para. 91). The Tribunal acknowledged Mr. Kane’s argument that advertising the position constituted abuse of authority because the PM-06 position was not a new position, but rather a reclassification. However, it held that regardless of whether the position was new or old, Service Canada was entitled to advertise the position, with the result that the alleged newness of the position did not give rise to an obligation to advertise the position. The gravamen of the complaint — that the choice of an advertised appointment process constituted an abuse of authority — was thus addressed by the Tribunal and resolved by its interpretation and application of the PSEA, its home statute. The Tribunal stated: There is nothing in either the PSEA or the [Public Service Employment Regulations, SOR/2005-334] which requires a deputy head to utilize a particular selection process depending on whether the position at issue is either a new or reclassified position. On the contrary, section 33 of the PSEA clearly provides that the deputy head has the discretion to use an advertised or a non-advertised appointment process. [para. 65]
- [7] This proposition, which has not been assailed as unreasonable, was sufficient to dispose of Mr. Kane’s complaint, and made it unnecessary to consider whether the PM-06 position was a new position. The question of whether the PM-06 position was a new position or a reclassification of an old position was not relevant to the ultimate issue, and had no effect on the reasonableness of the decision of the Tribunal.
- [8] Second, the majority assessed the decision of the Tribunal against a claim that Mr. Kane did not make. Mr. Kane assumed throughout his complaint that if he could establish that the PM-06 position was reclassified, he would be entitled to a non-advertised process. Relying on guidelines that had been established under the old Act (R.S.C. 1985, c. P-33) and on past practice in Newfoundland and Labrador, Mr. Kane contended that if the position was reclassified it was no longer open to his employer to use an advertised process. He identified the abuse of authority as the “erroneous interpretation of the facts against the employer’s own reclassification guidelines” (A.R., vol. I, at p. 101 (emphasis added)). In making this argument, Mr. Kane brought evidence which established that his employer assumed the

position was new. He never tried to establish that this was the “principal justification” for that decision; his argument did not require him to do so. On his view, if the position was reclassified, no matter what other reasons the employer might have had for preferring an advertised process, he was owed a non-advertised process. The Tribunal responded to this complaint by finding that, given the broad discretion accorded to employers under s. 33 of the PSEA, Mr. Kane was wrong to argue that he was entitled to any particular process. It found that the guidelines referred to by Mr. Kane were made under the old Act and therefore no longer applied. In our view, Mr. Kane was seeking to restrict the discretion of his employer in a way that does not accord with the purposes or wording of the new Act. It was not unreasonable for the Tribunal to reject this position.

- [9] Third, the decision to send this case back to the Tribunal was based on the majority’s reading of the record to the effect that the newness of the PM-06 position was the “principal justification” for the employer’s decision. The Tribunal noted that s. 33 of the PSEA gives the employer broad discretion with respect to the choice of an appointment process, which includes the discretion to advertise simply because it thinks that more people should have the opportunity to compete for a given position. The employer presented evidence before the Tribunal that the Regional Management Board decided to advertise the position “in order to have a fair, accessible and transparent process to allow more than one person to apply, especially since this was a new position at a higher level” (para. 28). However, the Tribunal made no finding as to what the employer’s “principal justification” may have been. Respectfully, the majority of the Federal Court of Appeal erred by effectively undertaking its own assessment of the record and attributing to the employer a “principal justification” for its decision that the Tribunal did not find. It was not appropriate for the Federal Court of Appeal, on a judicial review, to intervene in the Tribunal’s decision to this extent.
- [10] Finally, we respectfully disagree with the majority’s conclusion that the Tribunal acted unreasonably by failing to give Mr. Kane the opportunity to show that there was “no rational basis” for the employer’s position that the PM-06 position was new. Even accepting (without deciding) that the majority was correct to think that a discretionary decision based on an irrational finding of material fact would constitute an abuse of authority, there was no realistic possibility on this record that the Tribunal could find any such irrational finding of material fact in this case. At the very least, any reasonable reading of the record shows that whether this position was new or reclassified could be the subject of reasonable disagreement by reasonable people.
- [11] The appeal is allowed with costs and the decision of the Tribunal is affirmed. Appeal allowed with costs. Solicitor for the appellant: Attorney General of Canada, Ottawa and Montréal. Solicitors for the respondent: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

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Prepared on 29 October 2026 · Esheria