

CANADA / JUDGMENT

Gayef v. Canada (Attorney General)

2003 FC 1364

COURT

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BETWEEN:

VAN GAYEF,

Applicant,

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent.

REASONS FOR ORDER

LAYDEN-STEVENSON J.

- [1] Mr. Van Gayef is convinced that he is qualified to be a Team Leader, Audit (AU-4) at Customs and Revenue Canada, but his employer has now twice found him ineligible for promotion. He is requesting judicial review of a Public Service Commission of Canada, Appeal Board decision.
- [2] The Appeal Board found that the merit principle was adhered to in a corrective measures assessment ordered by another Appeal Board. As a result of the corrective measures assessment, the Corrective Measures Selection Board (CMSB) made a decision not to place Mr. Gayef on the list of people qualified for the position of Team Leader, Audit.
- [3] Mr. Gayef argues that the personal suitability reassessment was flawed in that it was carried out in a manner different from the assessment of the other candidates (and different from the first assessment of the applicant himself) and therefore did not respect the merit principle. He contends that the Appeal Board, by failing to recognize this, erred in law. He is requesting that the decision of the Appeal Board be set aside and that the matter be reheard by a differently constituted Appeal Board.
- [4] In response, the Attorney General submits that, while there was some variation between the way the first and second assessments were conducted, this is irrelevant because the same standard was applied to all candidates for the promotion list.

FACTS

- [5] Mr. Gayef participated in closed Competition 9-NAR-CC-PRA-CGY-436, held in 1999, to identify employees qualified for the position of Team Coordinator, Audit (AU-04) at Tax Services in Calgary, Alberta.
- [6] In the first competition, the selection board told all the applicants in advance that personal suitability was a major area for marks and testing, but that knowledge and ability would also be assessed. There was a written exam, an oral interview, and a reference check.
- [7] The written exam assessed knowledge. It was marked out of 210 possible points, with a pass of 118. Ability was assessed by an oral interview and marked out of 340 possible points, with a pass of 204. Personal suitability, also assessed at the oral interview, was subject to adjustment based on a reference check from a supervisor. It was marked out of a total of 560 possible points, with a pass of 336.
- [8] Personal suitability was divided into four areas for assessment: tact, leadership, initiative, and judgment. There were standard definitions for each:
 - tact: the capacity to be courteous, respectful, and polite in one's dealings with others;
 - leadership: the capacity to give guidance and direction to subordinates;

- initiative: undertake [sic] new work activities without specific direction; rectifies a situation by taking corrective action;
 - judgment: recognizes relevant information, identifies and evaluates options and chooses the best response.
- [9] The personal suitability oral interview segment took the form of eight situational or behaviour-based questions. Two questions were asked in relation to each of the areas of assessment. The questions were evaluated using a marking grid developed by the selection board.
- [10] The reference check asked supervisors to answer in writing four questions concerning the four areas of personal suitability (tact, leadership, initiative, and judgment) according to the definitions of those areas provided by the selection board. Those answers were then used to verify the selection board's assessment. Depending on the reference's contents, the scoring for a particular area of assessment could increase, decrease, or remain the same. The reference check played a verification and adjustment role only and had no independent value. There was no maximum number of points, nor was there a pass mark, for the reference on its own.
- [11] Mr. Gayef was not successful in the first competition because he did not obtain the minimum mark for personal suitability. He successfully appealed that decision under subsection 21(1) of the Public Service Employment Act, R.S.C. 1985, c. P-33 (PSEA). The Appeal Board, on June 20, 2000, ordered that Mr. Gayef be given a second oral interview to assess his personal suitability qualifications. As a result the CMSB was struck. Since he had received passing marks on the knowledge and ability sections of the competition, the CMSB's only concern was a reassessment for personal suitability.
- [12] For the corrective measures assessment, the CMSB decided to use a role play exercise instead of behaviour-based questions. The department took the position, before the second Appeal Board, that Mr. Gayef would have an unfair advantage if the same tool was used again.
- [13] Some time between the 1999 competition and the corrective measures assessment in February, 2001, one of the selection board members altered the definitions for the four areas of personal suitability. That selection board member was not a member of the CMSB. The new definitions are as follows:
- tact: an understanding of what to say or do or what not to say or do in order to avoid offending someone;
 - leadership: the capacity to effectively influence the opinions, attitudes and behaviours of others;
 - initiative: the capacity for independent action; the capacity to rectify a situation by taking corrective action rather than placing blame;

- judgment: the capacity to act on the basis of observation and analysis rather than emotion.
- [14] The reassessment took place on February 20, 2001. Mr. Gayef received a memorandum providing background information concerning a company that was being audited by a team member. He did not, however, receive information related to the reason for the audit. He was to prepare for a meeting with a company representative. There were no expected answers in the role play.
- [15] By memo, the role player for the company representative received six issues with instructions to address them. He was told to act angry. A friend of Mr. Gayef played the company representative. Mr. Gayef claims that because of this, he found it difficult to treat the role play seriously and, as a result, he used an acronym and expression that he would not have used had he not known the individual.
- [16] Mr. Gayef then met with another role player who was playing the auditor. That role player had contextual information, but no instructions on how to behave. Mr. Gayef did not know this role player, but asserts that her actions did not appropriately reflect those of a new employee dealing with a supervisor.
- [17] After the role play was completed, the CMSB met with the role players to obtain their comments.
- [18] Mr. Gayef had prepared notes related to the role play situations. There was a time limit on the role plays and, as a result, he was cut short before he had a chance to get through everything in his notes. The CMSB destroyed these notes after the interview, so they were not available for the Appeal Board to examine.
- [19] Mr. Gayef received a copy of the role play evaluation, dated March 1, 2001. He noticed that the reference check had not been included in his evaluation of personal suitability. The CMSB took steps to correct the problem. In doing so, it also made some other changes to the assessment before it was finalized on April 18, 2001.
- [20] The CMSB used the reference check comments provided to it for the original competition. As before, the CMSB used the reference check to adjust the assessment of the oral interview. This time, however, it evaluated the reference check comments based on the complexity of the examples given by the supervisor. The CMSB classified each example as "non-complicated", "medium complexity" or "high complexity". The selection board did not do this in the first selection process.
- [21] At the Appeal Board hearing, the supervisor testified that had he known of the change in definitions or that the examples would be evaluated based on complexity, he likely would have changed his reference to reflect these considerations.
- [22] After the adjustment, the CMSB determined that the total marks were still insufficient, and Mr. Gayef was not included on the eligibility list.

[23] Mr. Gayef appealed to the Appeal Board under subsection 21(4) of the PSEA. The grounds were:

- the role play was more complex and difficult than behaviour-based questions;
- there were no expected answers developed prior to assessment on the role play;
- the method used to evaluate tact, leadership, initiative and judgment was unfair, unreasonable and in violation of the merit principle;
- the original reference check should not have been used because the definitions had been altered since the supervisor prepared his evaluation and the reference check answers were treated differently because they were given different weight;
- the CMSB erred in adding other statements and information to the evaluation when it incorporated the reference check;
- the marking of the second performance was inconsistent with the first;
- the CMSB erred in the interpretation, evaluation and scoring of the role playing exercise in a way that was unfair, unreasonable, and in violation of the merit principle.

[24] The Appeal Board dismissed the appeal on all grounds.

RELEVANT STATUTORY PROVISIONS

Public Service Employment Act,

R.S.C. 1985, c. P-33

5. The Commission shall

- (a) appoint or provide for the appointment of qualified persons to or from within the Public Service in accordance with the provisions and principles of this Act;
- (b) operate and assist deputy heads in the operation of staff training and development programs in the Public Service;
- (c) engage competent persons to assist the Commission in the performance of its duties;
- (d) [Repealed, 1992, c. 54, s. 4]
- (e) report to the Governor in Council on such matters arising out of or relating to the administration or operation of this Act and the regulations as the Commission considers desirable; and
- (f) perform such other duties and functions with reference to the Public Service as are assigned to it by the Governor in Council.

Loi sur l'emploi dans la fonction publique,

L.R.C. 1985, ch. P-33

5. La Commission_:
- a) conformément aux dispositions et principes énoncés dans la présente loi, nomme ou fait nommer à un poste de la fonction publique des personnes qualifiées, appartenant ou non à celle-ci;
 - b) met en oeuvre ou aide les administrateurs généraux à mettre en oeuvre des programmes de formation et de perfectionnement du personnel au sein de la fonction publique;
 - c) engage des personnes compétentes pour se faire aider dans l'accomplissement de ses fonctions;
 - d) [Abrogé, 1992, ch. 54, art. 4]
 - e) fait rapport au gouverneur en conseil sur les questions liées à l'application de la présente loi et de ses règlements qu'elle estime opportunes;
 - f) s'acquitte des autres missions touchant à la fonction publique que lui confie le gouverneur en conseil.
10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.
- (2) For the purposes of subsection (1), selection according to merit may, in the circumstances prescribed by the regulations of the Commission, be based on the competence of a person being considered for appointment as measured by such standard of competence as the Commission may establish, rather than as measured against the competence of other persons.
10. (1) Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction publique.
- (2) Pour l'application du paragraphe (1), la sélection au mérite peut, dans les circonstances déterminées par règlement de la Commission, être fondée sur des normes de compétence fixées par celle-ci plutôt que sur un examen comparatif des candidats.
12. (1) For the purpose of determining the basis for selection according to merit under section 10, the Commission may establish standards for selection and assessment as to education, knowledge, experience, language, residence or any other matters that, in the opinion of the Commission, are necessary or desirable having regard to the nature of the duties to be performed and the present and future needs of the Public Service.

12. (1) Pour déterminer, conformément à l'article 10, les principes de la sélection au mérite, la Commission peut fixer des normes de sélection et d'évaluation touchant à l'instruction, aux connaissances, à l'expérience, à la langue, au lieu de résidence ou à tout autre titre ou qualité nécessaire ou souhaitable à son avis du fait de la nature des fonctions à exécuter et des besoins, actuels et futurs, de la fonction publique.
16. (1) The Commission shall examine and consider all applications received within the time prescribed by it for the receipt of applications and, after considering such further material and conducting such examinations, tests, interviews and investigations as it considers necessary or desirable, shall select the candidates who are qualified for the position or positions in relation to which the competition is conducted.
- 16(2)
16. (1) La Commission étudie toutes les candidatures qui lui parviennent dans le délai fixé à cet égard. Après avoir pris connaissance des autres documents qu'elle juge utiles à leur égard, et après avoir tenu les examens, épreuves, entrevues et enquêtes qu'elle estime souhaitables, elle sélectionne les candidats qualifiés pour le ou les postes faisant l'objet du concours.
17. (1) From among the qualified candidates in a competition the Commission shall select and place the highest ranking candidates on one or more lists, to be known as eligibility lists, as the Commission considers necessary to provide for the filling of a vacancy or anticipated vacancies.
17. (1) Parmi les candidats qualifiés à un concours, la Commission sélectionne ceux qui occupent les premiers rangs et les inscrit sur une ou plusieurs listes, dites listes d'admissibilité, selon le nombre de vacances auxquelles elle envisage de pourvoir dans l'immédiat ou plus tard.
21. (1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.
21. (1) Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.(1.1) Where a person is appointed or about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service by a process of personnel selection, other than a competition, any person who, at the time of the selection, meets the criteria established pursuant to subsection 13(1) for the process may, within the period provided for by the regulations of the Commission,

appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.

(1.1) Dans le cas d'une nomination, effective ou imminente, consécutive à une sélection interne effectuée autrement que par concours, toute personne qui satisfait aux critères fixés en vertu du paragraphe 13(1) peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

(2) Subject to subsection (3), the Commission, on being notified of the decision of a board established under subsection (1) or (1.1), shall, in accordance with the decision,

- (a) if the appointment has been made, confirm or revoke the appointment; or
- (b) if the appointment has not been made, make or not make the appointment.

(2) Sous réserve du paragraphe (3), la Commission, après avoir reçu avis de la décision du comité visé aux paragraphes (1) ou (1.1), doit en fonction de celle-ci_:

- a) si la nomination a eu lieu, la confirmer ou la révoquer;
- b) si la nomination n'a pas eu lieu, y procéder ou non.

(2.1) Where the appointment of a person is revoked pursuant to subsection (2), the Commission may appoint that person to a position within the Public Service that in the opinion of the Commission is commensurate with the qualifications of that person.

(2.1) En cas de révocation de la nomination, la Commission peut nommer la personne visée à un poste qu'elle juge en rapport avec ses qualifications.

(3) Where a board established under subsection (1) or (1.1) determines that there was a defect in the process for the selection of a person for appointment under this Act, the Commission may take such measures as it considers necessary to remedy the defect.

(4) Where a person is appointed or is about to be appointed under this Act as a result of measures taken under subsection (3), an appeal may be taken under subsection (1) or (1.1) against that appointment only on the ground that the measures so taken did not result in a selection for appointment according to merit.

(3) La Commission peut prendre toute mesure qu'elle juge indiquée pour remédier à toute irrégularité signalée par le comité relativement à la procédure de sélection.

(4) Une nomination, effective ou imminente, consécutive à une mesure visée au paragraphe (3) ne peut faire l'objet d'un appel conformément aux paragraphes (1) ou (1.1) qu'au motif que la mesure prise est contraire au principe de la sélection au mérite.

SCOPE OF THE MERIT PRINCIPLE

[25] The merit principle is the statutory requirement that the best person be found for the job - or that the best people are found eligible for a job - in any given competition. The merit principle requires meaningful and fair comparison between various candidates for any position, but it also allows for setting minimum thresholds for qualified candidates.

[26] In *Attorney General of Canada v. Greaves et al.*, [1982] 1 F.C. 806, the Federal Court of Appeal had occasion to discuss the merit principle. Mr. Justice Pratte stated:

[A] selection made by competition following all the statutory requirements may be tainted by the fact the qualifications of the candidates have been wrongfully assessed. This is true when the selection is made by competition; it is also true if the selection is made without a competition. The requirements of the merit principle are, in my view, always the same. They do not vary with the method of selection chosen. That principle requires that the selection be made "according to merit", which means, "that the best persons possible will be found for the various positions in the Public Service ...". [Nanda v. Appeal Board Established by the Public Service Commission, [1972] F.C. 277, at p. 297, per Jackett C.J.].

[27] In the same case, Mr. Justice LeDain noted:

I believe the merit principle was intended to achieve more than merely the appointment of qualified persons in the Public Service. Its purpose is to find the best qualified persons from among those who are available. In the case of a competition the persons who are available are identified as candidates for the position. The Commission, or those exercising its delegated authority, know for certain the persons whose qualifications for the position must be compared in the light of the merit principle in order to comply with the requirement of section 10 of the Act.

[28] In *Evans v. Canada (Public Service Commission Appeal Board)*, [1983] 1 S.C.R. 582 at 593, Mr. Justice Estey, writing for the majority, noted that the function of selection boards "is to assess the application for eligibility by each candidate, applying thereto a uniform standard of tests or yardsticks". In dissent, but not on this point, Mr. Justice Dickson (as he then was) noted at p. 618:

The merit principle serves employer as well as employee interests. The merit system protects an applicant's interest in being assessed on the basis of reasonable and appropriate selection standards; but it is also designed to protect the public interest in having the best qualified people available appointed to the public service.

[29] The merit principle requires not only that consistent standards be set, but that they be applied consistently. In any given case, the Appeal Board, in its determination of whether the merit principle was adhered to, must consider both. In *Buttar v. Canada (Attorney General)* (2000), 254 N.R. 368 (F.C.A.), Madam Justice Sharlow wrote:

The problem, however, is that the appeal board perceived a limitation to its jurisdiction that precluded it from even considering the possibility that the selection standards were inconsistently applied. It is conceded by the counsel for the Attorney General that in a selection process of the kind undertaken here, a failure to apply the standards consistently would offend the merit principle. Thus the appeal board failed to discharge its mandate, which is to guard the integrity of the application of the merit principle. While it has been said that an appellant cannot claim more than the integrity of the merit principle, it is equally true that an appellant should not be obliged to settle for less.

[30] However, an irregularity in a competition does not always vitiate the appointments made as a result of that competition. It invalidates those appointments where there is a real possibility that, in the absence of the irregularity, the result of this competition might have been different: *Stout v. Canada (Public Service Commission, Appeals Branch)* (1983), 51 N.R. 68 (F.C.A.).

ISSUES

[31] The issues can be reduced to the following questions:

- (a) What is the appropriate standard of review for Appeal Board decisions, and in particular, this Board's decision?
- (b) Did the Appeal Board commit a reviewable error when it found that the corrective measures interview process did not breach the merit principle?

STANDARD OF REVIEW OF APPEAL BOARD DECISIONS

[32] The parties agree that, under the pragmatic and functional approach, where a question arises before an Appeal Board involving a question of law or jurisdiction, the Appeal Board decision must be correct: *Boucher v. Canada (AG)* (2000), 252 N.R. 186 (F.C.A.); *Buttar*, supra.

[33] Where the Appeal Board's decision does not raise a question of law or jurisdiction, but merely a question of whether a conclusion is supported by the evidence, the standard of reasonableness applies: *Upadhyaya v. Canada (AG)* (2000), 198 F.T.R. 149 (T.D.); *Hains v. Canada (AG)* 2001 FCT 861, [2001] F.C.J. No. 1238. An unreasonable decision is one not supported by reasons that can stand up to a somewhat probing examination. A defect may arise in the evidentiary foundation or in the logical process by which conclusions are drawn from it: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748.

[34] The standard of review for findings of fact is that they must not be made in a perverse or capricious manner or without regard to the material before the Board - a standard the equivalent of patent unreasonableness: *Federal Courts Act*, R.S.C. 1970 (2nd Supp.), c. 10, as amended, paragraph 18.1(4)(d); *Lai v. Canada (AG)* (2001), FCT 740, [2001] F.C.J. No. 1088. Findings of fact must be accorded a higher degree of deference than legal conclusions,

unless those findings are made without regard to the evidence before the Board: *Maassen v. Canada (AG)* 2001 FCT 633, [2001] F.C.J. No. 961; *Rogerville v. Canada (Public Service Commission Appeal Board)* (1996), 117 F.T.R. 53 (T.D.), aff'd 2001 FCA 142.

- [35] The Respondent submits that the applicable standard of review in this case is reasonableness because the Appeal Board was not interpreting legislation or making legal determinations; the issues were primarily factual. The Appeal Board simply applied the merit principle to the facts before it. Thus, the Appeal Board decision does not raise a question of law or jurisdiction.
- [36] Mr. Gayef argues that the decision under review raises questions of law in determining the requirements of the merit principle. Thus, a standard of correctness should apply.
- [37] In the present circumstances, the issues in this case raise questions of mixed fact and law. The Appeal Board was responsible for determining whether the CMSB corrective measures assessment was the equivalent of that in the initial competition within the context of adherence to the merit principle. The Appeal Board was also responsible for determining whether the change in definitions of the qualities to be assessed affected any part of the assessment such that the merit principle was violated. To make these determinations, the Appeal Board had to consider a number of factors. If Mr. Gayef is correct that relevant factors were not considered, then the Appeal Board erred in law.

APPLICATION OF THE MERIT PRINCIPLE BY THE APPEAL BOARD

- [38] In written submissions, Mr. Gayef maintained that the merit principle was violated in a number of ways. In oral argument, the issues were significantly narrowed and the matter can be determined by asking: Did the Appeal Board, in determining that the merit principle had been adhered to, consider all of the relevant issues?
- [39] Mr. Gayef contends that the merit principle must apply equally to corrective measures. Otherwise, corrective measures would be pointless as a remedy. The Board was required to determine whether the merit principle was adhered to in the selection process. The principle requires that all candidates must be assessed according to the same standards.
- [40] The Respondent argues otherwise and asks whether changing the assessment tool for corrective measures was reasonable. The Appeal Board said yes, and there is no basis to conclude that this was not a reasonable finding. The merit principle does not necessarily require that the same tools be used in a corrective measures context as were used in an initial competition; it only requires that they be comparable.
- [41] The difficulty is that using the same assessment standards is not necessarily to be equated to using comparable tools. Assessing a candidate by the same standards may (or may not) also require that the qualities measured by those tools be the same and that similar weight be given to various elements of a competition. The Appeal Board found that the qualities measured by the new tool were roughly comparable and that the differences complained of

were negligible and made no difference to the outcome of the corrective measures assessment. Its finding, however, was based on the manner in which the candidate was evaluated on the role play only.

Did the Appeal Board fail to assess the issue of whether the role of the reference letters was comparable to their role in the original competition, taking into account the new definitions used in the second competition?

- [42] The Appeal Board found that the definition of leadership was substantially altered and broadened, although the way the role play exercise was conducted did not require the CMSB to factor in the new elements of the definition. Consequently, the change made little difference to the standard applied to the role play.
- [43] Having found that the new definition of leadership was substantially different, what the Appeal Board did not address was the question of whether the new definition affected the assessment of leadership when applied to the reference check. The reference letters were written with the old definitions in mind, and the CMSB did not request new letters.
- [44] Nor did the Appeal Board consider whether the new definitions affected the way the reference letters were evaluated. It noted that "Mr. Ryan testified that if there had been different definitions of the personal suitability elements which incorporated other degrees of complexity, his reference would likely have changed," but did not address the treatment of the reference letters by the CMSB.
- [45] Having found that the definitions for tact, initiative and judgment were substantially similar, the Appeal Board arguably need not have assessed whether the changes to those definitions affected the evaluation of the references. However, the Appeal Board did not discuss whether the changed definition for leadership - incorporating broader concerns - affected the assessment of the reference check.
- [46] This was a matter that should have been considered. For instance, the reference letters set out the old definitions for the qualities being evaluated, while both CMSB evaluation documents refer to the new definitions. The Appeal Board did not effectively address this contradiction, nor did it consider whether the reference with regard to leadership might have been discounted because it did not speak to the higher leadership requirements of the new definition.

If the Appeal Board failed to consider the changed definitions in the context of the reference check, was this an error?

- [47] In relation to the role play, the reference check was another area of assessment where the change in definitions could have resulted in a violation of the merit principle. By not considering the effect that the change of definitions could have on the reference check evaluation, the Appeal Board failed to exercise the function for which it was appointed, i.e. to determine whether the merit principle has been respected. The decision of the Appeal Board is lacking because it does not address and determine all of the issues that were

properly before it.

Did the Appeal Board fail to assess whether the weight given to the reference letters was comparable to the original competition?

- [48] In the original competition, there were two questions used to evaluate each of tact, judgment, initiative and leadership. Each question was marked out of 70 for a total of 140 points. The reference checks were used for a particular purpose: (a) where they confirmed the board's evaluation, no change was made; (b) where they supported a higher assessment, additional marks were to be added; (c) where they supported a lower assessment, marks were to be deducted from the total. Thus, a hypothetical score of 100/140 for leadership could increase, decrease, or remain the same, depending on the comments in the reference check.
- [49] The selection board added together the scores for a total out of 560 possible points. The pass was 60% or 336/560. In Mr. Gayef's case, the total received in the first competition was 322/560, not enough to pass.
- [50] In the final stage of the corrective measures competition, the CMSB's written analysis confirms that it was not using the reference check in the same way as it was used in the first competition, although its rationale regarding method is vague:

A role play and a reference check were used to globally assess Personal Suitability. Since the role play is a representative sampling of the job of Team Leader, Audit (AU-04), it has been given greater weight than the reference check. This is because the reference check reflects the qualifications of the substantive position, or lower levels, in this case, an AU-03 Tax Auditor.

Additionally, more weight was given for the breadth and depth of the examples of behaviour, in the references, as follows: 1) Non complicated 2) Medium complexity 3) High complexity.

No further references were conducted as it was determined that between the time of the first selection process and the corrective action taken as a result of an allowed appeal, Mr. Van Gayef was supervised by several Team Leaders for only short periods of time.

- [51] In the corrective measures competition, each area of assessment was initially marked out of 70 points. The Applicant was awarded a total of 140/320, well below 60%.
- [52] Following the adjustment based on the reference letters, the total for each area of assessment was changed to one out of 140 points, as in the first competition. There was no explanation as to how the CMSB arrived at its final numbers.
- [53] In the first competition, for each area of assessment, the two scores out of 70 were added together and then adjusted, based on the relevant references. In the final corrective measures assessment, the approach is obscure. Moreover, there is evidence that the references were treated substantially differently: the scale of non-complicated to high complexity was not applied in the first competition.

[54] The Appeal Board did not consider the mechanics of the scoring beyond establishing that it was done on the same marking grid. This approach left the Appeal Board unable to assess whether the weight given to the references was comparable to their weight in the original competition, let alone whether any difference in weight was appropriate. The Appeal Board also neglected to consider whether using the complexity scale amounted to applying a different standard to Mr. Gayef.

If the Appeal Board failed to consider whether the changed weighting of factors resulted in a different standard in the corrective measures, was this an error?

[55] The Appeal Board thought that the weight accorded to the letters was a matter to be decided by the CMSB:

Nevertheless, it was the prerogative of the selection board to determine how much weight should be attached to [the reference]. It concluded that the role play provided a more realistic measure of his personal suitability than the reference. The role play simulated a situation which might typically occur in the performance of a team leader position, whereas the examples provided by the reference related to situations which occurred in more junior level jobs. The board's decision was thus well justified.

[56] While this conclusion, on its face, is reasonable, in my view, it was incumbent on the Appeal Board to determine whether the assessment of the correctional measures was truly equivalent to the assessment in the original competition. Mr. Gayef was entitled to be assessed according to the same standard as the other candidates. He alleged that his references were not weighed in accordance with the same standard. The Appeal Board did not address the allegation. It did not determine whether the references had been treated differently, and if so, whether the differential treatment was material in the sense that it might have affected the result of the competition.

[57] Failure to consider a relevant factor is an error of law: *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, supra. The Appeal Board had a duty to determine whether the selection board's conclusions were reasonable. It was for the CMSB to ensure that the assessment on the corrective measures was equivalent to that in the original competition. Mr. Gayef alleges that, for various reasons, the assessments were not equivalent. The Appeal Board must determine whether that is the case or not. It says that the determination of the appropriate assessment is for the selection board [CMSB]. I accept that proposition, provided that the assessment conforms to the merit principle. The Appeal Board did not determine whether that was the case.

[58] The Appeal Board did not consider all of the relevant issues. Its decision does not fully respond to the mandate of subsection 21(4) - to determine whether the corrective measures taken resulted in a selection made according to merit. This constitutes reviewable error.

[59] The application for judicial review will be allowed and the matter will be remitted for redetermination before a differently constituted Appeal Board. Mr. Gayef is entitled to costs. An order will issue accordingly.

Judge

Ottawa, Ontario

November 19, 2003

FEDERAL COURT

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-431-02

STYLE OF CAUSE: VAN GAYEF

- and -

THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: OCTOBER 8, 2003

REASONS FOR ORDER BY: THE HONOURABLE MADAM JUSTICE LAYDEN-STEVENSON

DATED: NOVEMBER 19, 2003

APPEARANCES:

MR. CHRISTOPHER ROTHAMFOR THE APPLICANT

MR. MICHAEL ROACHFOR THE RESPONDENT

SOLICITORS ON THE RECORD:

NELLIGAN O'BRIEN PAYNE FOR APPLICANT

OTTAWA, ONTARIO

MR. MORRIS ROSENBERGFOR THE RESPONDENT

DEPUTY ATTORNEY GENERAL OF CANADA

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