

CANADA / JUDGMENT

Lee v. Attorney General of Canada

[1981] 2 SCR 90

COURT

Supreme Court of Canada

DECIDED

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Lee v. Attorney General of Canada

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Supreme Court Judgments

Date

1981-10-06

Report

[1981] 2 SCR 90

Judges

Laskin, Bora; Martland, Ronald; Ritchie, Roland Almon; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Chouinard, Julien; Lamer, Antonio

On appeal from

Federal Court of Appeal

Subjects

Administrative law

Decision Content

Supreme Court of Canada

Lee v. Attorney General of Canada, [1981] 2 S.C.R. 90

Date: 1981-10-06

Ronda Lynn Lee Appellant;

and

Attorney General of Canada Respondent;

and

Paul Murby, Loren Butchart and J. David Lee (Respondents in the Federal Court of Appeal).

1981: February 24 and 25; 1981: October 6.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law—Labour law—Appellant first in two job competitions in order of merit—A qualification “Top Secret Security Clearance”—Security clearance denied without reason—Appeal under s. 21 of Public Service Employment Act—Appeal Board to determine only whether the selection process has been conducted in accordance with the merit principle—Security clearance no part of the selection process—No degrees of merit in respect of security reliability—Public Service Employment Act, R.S.C. 1970, c. P-32, ss. 10, 12, 21—Public Service Staff Relations Act, R.S.C 1970, c. P-35, s. 112(1).

Appellant was a successful candidate in two closed competitions designed to create “eligible lists” in order of merit to clerical positions in the Criminal Index Section of the R.C.M.P. One of the qualifications required in each case was “Top Secret Security Clearance”. The security clearance was denied by the R.C.M.P.; no reasons were given. The appellant appealed under s. 21 of the Public Service Employment Act against these decisions to the Appeal Board. The Appeal Board allowed the appeal on the basis that it had the power to review the “reasonableness” of the refusal by the deputy head of a security clearance and to require the deputy head to justify that refusal before the Board. Failing such justification the Board could conclude that the refusal was not a reasonable one, and for that reason, the merit principle had not been observed in the selection process. The Federal Court of Appeal set aside that decision. Held: The appeal should be dismissed.

Although the requirement of a security clearance was listed in the announcement of the positions as one of the “qualifications”, it was not one that had to be evaluated by the Commission in accordance with the merit principle, pursuant to the provisions of ss. 10 and 12 of the Public Service Employment Act. The authority to require a security clearance as a condition of appointment and the authority to determine whether such a clearance should be granted were part of the management authority that had not been excluded by the Public Service Employment Act or assigned by it to the Commission. There were no degrees of merit in respect of security reliability. It was sufficient that there be unresolved doubt with respect to a particular candidate to require a refusal of security clearance.

The scope of an appeal under s. 21 of the Public Service Employment Act was to determine whether the selection process as a whole had been conducted in accordance with the merit principle. The additional requirement of security clearance was not part of the selection process contemplated by s. 10 and could not be subject to review by an appeal board under s. 21.

APPEAL from a judgment of the Federal Court of Appeal[1], setting aside a decision of the Public Service Commission Appeal Board. Appeal dismissed.

Maurice W. Wright, Q.C., and A.J. Raven, for the appellant.

William Hobson, Q.C., and John Haig, for the respondent.

The judgment of the Court was delivered by

MARTLAND J.—This appeal is from the judgment of the Federal Court of Appeal which allowed an application by the respondent, the Attorney General of Canada, pursuant to s. 28 of the Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, to set aside a decision and order of an Appeal Board established by the Public Service Commission to hear an appeal by the appellant pursuant to s. 21 of the Public Service Employment Act, R.S.C. 1970, c. P-32 (“the Act”). The circumstances which gave rise to the appellant’s appeal to that Board are as follows.

The appellant was a successful candidate in two competitions conducted pursuant to the Act and Regulations made thereunder. Both were closed competitions established pursuant to the provisions of s. 7(2)(b) of the Regulations and were designed to create “eligible lists” from which appointments were to be made to clerical positions in the Criminal Index Section of the Royal Canadian Mounted Police (“R.C.M.P.”) in Vancouver. Persons in these positions would have access to information in the R.C.M.P. files relating to known or suspected criminal activity, unsolved crimes and past criminal history of specific individuals. As a result of these competitions, two eligible lists were established and each list contained the names of four candidates in order of merit. The name of the applicant appeared first on each list.

The competition poster for each competition set out the duties of the position and the qualifications required of the successful candidate. One of the qualifications required in each case was “Top Secret Security Clearance”. Following the preparation and publication of the two eligible lists, the applicant was advised by the R.C.M.P. in a letter dated December 8, 1978, that she was being denied the required security clearance. No reasons were given. As a result, she was not appointed to fill either of the existing vacancies. The persons occupying positions 2 and 3 on each list were appointed. The appellant appealed against these decisions to the Appeal Board pursuant to s. 21 of the Act which reads:

21. Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made from within the Public Service
 - (a) by closed competition, every unsuccessful candidate, or

- (b) without competition, every person whose opportunity for advancement, in the opinion of the Commission, has been prejudicially affected,

may, within such period as the Commission prescribes, 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, are given an opportunity of being heard, and upon being notified of the board's decision on the inquiry the Commission shall,

- (c) if the appointment has been made, confirm or revoke the appointment, or
- (d) if the appointment has not been made, make or not make the appointment, accordingly as the decision of the board requires.

At the hearing, counsel for the respondent took the position that the Public Service Commission Appeal Board was without jurisdiction to inquire in any manner into the reason or reasons behind the refusal to grant to the appellant the level of security clearance required for the two positions and, accordingly, no evidence was offered as to the circumstances behind such a decision.

The principal documentary evidence relied upon by the respondent at the hearing consisted of a copy of Cabinet Directive No. 35, dated December 18, 1963, and a signed letter from the Commissioner of the R.C.M.P. (who was the "deputy head" as defined in the Act) dated January 9, 1979, to the Commanding Officer, District Headquarters, R.C.M. Police, Vancouver, which stated in essence, following procedures outlined in the Cabinet Directive, that "I have come to the conclusion that Ronda Lynn Lee will not be granted a security clearance".

The Appeal Board allowed the appellant's appeal against the appointments made in respect of the two competitions. It asserted its power to review the "reasonableness" of the refusal by the deputy head of a security clearance and to require the deputy head to justify that refusal before the Board and, failing such justification, to conclude that the refusal was not a reasonable one and, for that reason, the merit principle had not been observed in the selection process.

The Cabinet Directive, referred to above, was entitled "Security in the Public Service" and was issued by the Federal Cabinet. Reference was made by Heald J., in his judgment in the Federal Court of Appeal, to the following paragraphs in that Directive: 1. Security in the public service of Canada is essentially a part of good personnel administration, and therefore it is the responsibility of each department and agency. The security of classified information in the possession of a department or agency may be placed in jeopardy either by persons who may be disloyal to Canada and her system of government or by persons who are unreliable because of defects in their character.

9. The following procedures by which this policy is to be implemented are designed to provide that the most careful screening possible be given, particularly to persons who will have access to highly classified information. It is the continuing responsibility of each government department and agency to ensure that its security remains unimpaired.

13. If a favourable determination is made, the department or agency may grant a security clearance to the level required for the efficient performance of the duties of the position concerned. If, on the other hand, there is in the judgment of the deputy minister of the department or the head of agency concerned a reasonable doubt as to the degree of confidence which can be reposed in the subject, the granting of a security clearance will be delayed until the doubt has been resolved to the satisfaction of the deputy minister or the head of agency.
25. (iv) The deputy head of a department or agency will be responsible for granting or withholding a security clearance and will assume a continuing responsibility for a person's access to Top Secret, Secret and Confidential information.

He went on to say:

It is clear from these excerpts that Directive No. 35 makes security the responsibility and the continuing responsibility of each department and agency and makes the deputy head responsible for granting or withholding a security clearance.

Heald J. relied on s. 112(1) of the Public Service Staff Relations Act, R.S.C. 1970, c. P-35, as authority for his conclusion that the Appeal Board was precluded from going behind the failure of the deputy head to grant a security clearance. Section 112 of that Act provides:

112. (1) Nothing in this or any other Act shall be construed to require the employer to do or refrain from doing anything contrary to any instruction, direction or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.
- (2) For the purposes of subsection (1), any order made by the Governor in Council is conclusive proof of the matters stated therein in relation to the giving or making of any instruction, direction or regulation by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

Le Dain J. did not share the view of Heald J. as to the application of s. 112(1). He concluded, however, for other reasons, that the decision of the Appeal Board should be set aside. In his reasons, Le Dain J. referred to ss. 10 and 12 of the Act which provide as follows:

10. 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.
12. (1) The Commission may, in determining pursuant to section 10 the basis of assessment of merit in relation to any position or class of positions, prescribe selection standards as to education, knowledge, experience, language, age, 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, but any such selection standards shall not be inconsistent with any classification standard prescribed pursuant to the Financial Administration Act for that position or any position in that class.

- (2) The Commission, in prescribing selection standards under subsection (1), shall not discriminate against any person by reason of sex, race, national origin, colour or religion.

The reasons given by Le Dain J. are as follows:

This, I think, leads us to the heart of the issue. Although the requirement of a security clearance was listed in the announcement of the positions in this case as one of the “qualifications”, it is not in my opinion a qualification that must be evaluated or assessed by the Commission in accordance with the merit principle, pursuant to the provisions of sections 10 and 12 of the Public Service Employment Act. The authority to require a security clearance as a condition of appointment and the authority to determine whether such a clearance should be granted are part of the management authority that has not been excluded by the Public Service Employment Act or assigned by it to the Commission. The Cabinet Directive is a directive from the Government concerning the exercise of this authority. It is the deputy head who is responsible for taking the initiative and making the decision as to security clearance in a particular case. The nature of the decision is that if, after making the necessary investigation, there is unresolved doubt as to whether a person should have access to classified information, that doubt is to be resolved in effect against the person in question and a security clearance is to be refused. A decision of that kind has nothing to do with the merit that is contemplated by sections 10 and 12 of the Public Service Employment Act and s. 7(4) of the Public Service Employment Regulations, which provide that the Commission (or the deputy head exercising the delegated authority of the Commission under s. 6 of the Act, as distinct from his management authority) shall assess the relative merit of candidates according to a selection process and selection standards determined by the Commission. The decision of a deputy head with respect to security clearance is not an evaluation of a candidate’s relative merit. There are no degrees of merit in respect of security reliability. It is sufficient that there be unresolved doubt with respect to a particular candidate to require a refusal of security clearance.

The scope of an appeal under s. 21 of the Public Service Employment Act has had to be determined judicially in the light of the other provisions of the Act, and in particular, the central provision of s. 10. It has been held by this Court that the task of the Appeal Board under s. 21 is to determine whether the selection process as a whole has been conducted in accordance with the merit principle, but not to substitute its opinion for that of a selection board on the merit of a particular candidate. In the present case the selection process contemplated by s. 10 was carried out by selection boards which made their report and established eligibility lists reflecting their assessment of relative merit. It was that process that was subject to review by the Appeal Board. The additional “qualification” or requirement of a security clearance was not, and could not be, evaluated or assessed by the selection boards and was not, for the reasons I have indicated, part of the selection process contemplated by s. 10. As such, it could not in my opinion be subject to review by an Appeal Board under s. 21.

Kerr D.J., the third member of the Court of Appeal, shared the opinion of Le Dain J. He said:

It appears to me that in this case security clearance was a condition precedent for an appointment of an otherwise successful candidate who had been rated by the selection board (rating board) on the basis of merit. Security clearance was not a factor in that rating process, and none of the candidates was rated by the selection boards on security. In my opinion, the nature and functions of a selection board are not such as to include the inquiry and investigation that may be appropriate in a case such as this for a decision as to security.

In my opinion the reasons given by Le Dain J. and Kerr D.J. are correct. I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: Soloway, Wright, Houston, Greenberg, O'Grady & Morin, Ottawa.

Solicitor for the respondent: R. Tassé, Ottawa.

[1] (1980), 31 N.R. 136.

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