S.C.A. No. 02745

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Matthews and Chipman, JJ.A.

Cite as: Turner-Lienaux v. Nova Scotia (Attorney General), 1993 NSCA 140

BETWEEN:	)	
	)	
KAREN L. TURNER-LIENAUX	)	Charles D. Lienaux
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
THE ATTORNEY GENERAL OF NOVA SCOTIA representing THE CIVIL SERVICE COMMISSION OF NOVA SCOTIA and GENERAL HOSPITAL	)	Jonathan Davies
	)	and E. J. Flinn, Q.C.
	)	for the Respondents THE VICTORIA
	)	
Respondents	)	
	)	
- and -	)	
	)	
PATRICIA GUILE	)	Dawna J. Ring
	)	for the Intervenor
Intervenor	)	
	)	
	)	
	)	Appeal Heard:
	)	May 11, 1993
	)	
	)	
	)	Judgment Delivered:
	)	May 25, 1993

THE COURT: The appeal is dismissed with costs to both the respondents and the intervenor in the amount of 40% of the costs awarded by the trial judge, plus disbursements in each case as per reasons for judgment of Chipman, J.A.; Clarke, C.J.N.S. and Matthews, J.A., concurring.

CHIPMAN, J.A.:

This appeal concerns the rights to appointment and promotion of non-unionized civil

servants in the public service of this Province and the rights and duties of the Province acting through the Civil Service Commission in connection with hiring and promoting such employees.

The appellant is a non-unionized civil servant under the Civil Service Act, R.S.N.S. 1989, c. 70, holding the position of a laboratory technologist at the Victoria General Hospital in Halifax. She appeals from a decision in the Supreme Court dismissing her action against the respondents respecting a competition under the Act, which awarded the position of Manager of the Blood Bank at the Hospital (Laboratory Technologist IV) to the intervenor rather than the appellant. The appellant sought a myriad of remedies including damages and an order setting aside the competition and promoting the appellant to the position.

The competition was held in July, 1989, as a result of a vacancy in the position of Laboratory Technologist IV. A request for a replacement from the Hospital to the Civil Service Commission described the position as requiring in the case of a Registered Technologist, at least ten years experience or in the case of an Advanced Registered Technologist, at least seven years experience in a major Hospital blood bank. As well, "supervisory/managerial experience of at least four years" was required. In advertising the job, the Commission changed the wording of the qualifications with respect to the experience in a major Hospital blood bank to include "at least four years of which have been in a managerial capacity". Following advertisement, three candidates, including the appellant and the intervenor, were judged by the selection committee. These applications had been first screened by the Civil Service Commission and the names of the applicants were on an eligible list for the position. The selection committee consisted of three persons employed at the Hospital, Dr. Ekram Zayed, Director of Hematology, Therese Godin, a Lab Technologist V and Marilyn Schnare, a Lab Technologist IV. The committee did not receive a copy of the advertisement or competition posting as it was referred to. There is evidence however that Ms. Godin was aware of its contents as she had discussed them with the intervenor prior to her entering the competition. Following judging based on a written examination of each candidate, the third candidate was eliminated. There followed an oral examination and a review of the curriculum vitae of the appellant and the intervenor. The committee found the intervenor's performance during

the competition to be "clearly superior" to that of the appellant. On September 13, 1989 the appellant was advised that the position would be awarded to the intervenor as the successful candidate.

The appellant immediately challenged the decision of the committee on the basis that the intervenor should not have been allowed to enter the competition because although she had more than four years supervisory/managerial experience in a teaching setting, she lacked four years management experience in a major Hospital blood bank. The committee's decision was reviewed by Dr. Malcolm MacAulay, Head of the Department of Pathology of the Hospital. He conducted a thorough review of the competition. After the completion of his review, he concluded that the selection committee had made no error and that it had discharged its responsibility competently and fairly in determining the relative merits of competing candidates.

These proceedings were commenced in the Supreme Court by originating notice on December 19, 1989 and the intervenor was subsequently added as a party by an order consented to by the appellant. On July 28, 1992, following eight days of evidence and submissions by counsel, the trial judge granted a non-suit to the respondents on the basis that there was no evidence of breach of duty owed to the appellant in the course of the conduct of the competition or its review. In a subsequent decision dated August 17, 1992, the trial judge dealt with the question of costs. A request by the appellant for costs against the respondent in any event on the ground that relevant documents were not produced in a timely manner was denied, and costs were awarded to both the respondents and the intervenor against the appellant.

On this appeal, the following issues arise:

(1) the duty owed by the respondents to the appellant in the conduct of the competition and its review;

(2) whether the trial judge erred in holding that the appellant had not made out a **prima facie** case that the respondents breached any duty to the appellant; and,

(3) whether the trial judge erred in the disposition with respect to costs.

Before addressing the issues specifically, we must keep in mind that this is an appeal not from a decision following trial in which the evidence has been weighed, but from the granting of a non-suit. Civil Procedure Rule 30.08 provides:

> "30.08 At the close of the plaintiff's case, the defendant may, without being called upon to elect whether he will call evidence, move for dismissal of the proceeding on the ground that upon the facts and the law no case has been made out."

In the reasons for judgment, the trial judge referred to this rule and pointed out that the test is whether or not a **prima facie** case has been made. It is not a question of whether the judge believes the plaintiff's evidence, but whether there is enough evidence, if left uncontradicted, to satisfy a reasonable person. See J.W. Cowie Engineering Ltd. v. Keeping, et al (1982), 52 N.S.R. (2d) 321(A.D.). In Wentzell v. Spidle (1987), 81 N.S.R. (2d) 200 (N.S.S.C.,A.D.), Clarke, C.J.N.S. on behalf of the court in dealing with an appeal from the granting of a non-suit, referred at p. 201 to the following passage from Sopinka and Lederman, Evidence in Civil Cases at p. 521:

> ". . . If such a motion is launched, it is the judge's function to determine whether any facts have been established by the plaintiff from which liability, if it is in issue, *may* be inferred. It is the jury's duty to say whether, from those facts when submitted to it, liability *ought* to be inferred. The judge, in performing his function, does not decide whether in fact he believes the evidence. He has to decide whether there is enough evidence, if left uncontradicted, to satisfy a reasonable man. He must conclude whether a reasonable jury could find in the plaintiff's favour if it believed the evidence given in trial up to that point. The judge does not decide whether the jury will accept the evidence, but whether the inference that the plaintiff seeks in his favour could be drawn from the evidence adduced, if the jury chose to accept it. This decision of the judge on the sufficiency of evidence is a question of law; he is not ruling upon the weight or the believability of the evidence which is a question of fact. Because it is a question of law, the judge's assessment of the probative sufficiency of the plaintiff's evidence, or the defendant's evidence on a counterclaim for that matter, is subject to review by the Court of Appeal."

We must therefore in addressing the issues keep in mind whether, having regard to the law and the facts which were adduced in evidence, the judge was correct in concluding that there was insufficient evidence, if believed, to satisfy a reasonable person that the case could be resolved

in the appellant's favour.

FIRST ISSUE:

The appellant was not a unionized civil servant and was not subject to any express contractual terms of employment. In Attorney General v. MacNaughton (as yet unreported 1993 - S.C.A. No. 02748), this court pointed out that under the Act a civil servant not subject to a collective agreement or other express contractual arrangement must look to the Act and the Regulations for the terms of his or her employment. These provisions, together with any other relevant legislation, constitute a complete and comprehensive scheme outlining the basis of such employment. Indeed the Regulations, numbering over one hundred, deal with such matters as appointments, compensation, overtime, vacations and holidays, sick leave, leaves of absence and termination. Such legislation is validly enacted by the Province acting within its constitutional powers and governs in all respects the employment of such civil servants by the Crown. The trial judge was correct in recognizing that the Act formed the basis of the appellant's employment.

In addition, it was conceded by counsel for the respondents that a civil servant such as the appellant is, generally speaking, owed the duty of fairness at common law in dealings with respect to her employment. This subject was canvassed by the Supreme Court of Canada in Knight v. Indian Head School Division (1990), 69 D.L.R. (4th) 489 in the context of a dismissal of a person holding public office subject to discharge on notice of three months. The Supreme Court of Canada concluded that a statutory authority had a general duty of fairness in dealing with a public office holder, either at pleasure or subject to dismissal only for cause. This duty depended on the consideration of three factors: (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and, (iii) the effect of that decision on the individual's rights. That case and others therein referred to as well as the decision of this court in MacLeod v. Halifax County Industrial Commission (1988), 86 N.S.R. (2d) 183, considered the existence of such a duty in the context of a dismissal, not a failure to promote. While there is a significant difference between these two situations, I have no difficulty in concluding that such a

duty of fairness exists with respect to any competition for promotion even in the absence of statutory or regulatory mandate.

Our attention was drawn to a number of cases dealing with the requirements of law in the promotion process under the Public Service Employment Act of Canada, R.S.C. 1970, c. P-32 and the regulations pursuant thereto. In Re Irwin (1978), 22 N.R. 475 (F.C.A.), the Federal Court of Appeal in dealing with an application pursuant to s. 28 of the Act held that a rating board established to select from job candidates under s. 7 of the Act erred in selecting on the basis of qualifications established by it. This was an exercise in which it had no power to engage. Its sole function under the legislation (Regulation 7(4)(a)) was to assess "relative merits" of "applicants identified as candidates" in accordance with the appropriate selection standards prescribed by the Commission.

The application made in Irwin was part of an appeal process which included a right to appeal against an appointment to a board established by the Commission to conduct an inquiry. By s. 21 of the Act it was expressly provided that the person appealing had an opportunity of being heard. In Evans v. Public Service Commission Appeal Board (1983), 47 N.R. 255, the Supreme Court of Canada not surprisingly held an appeal board acting under s. 21 of the Act was subject to the rules of natural justice. See also Brown, et al v. Public Service Commission (1979), 9 N.R. 493 (F.C.A.).

The statutory scheme relating to the Civil Service in Nova Scotia is not nearly so detailed. No express provision can be found in either the Act or regulations providing specifically for the fixing of the qualifications by the Commission on the one hand and determination of relative merits at the competition level on the other. No express provisions are made for appeal from a competition to a board and from thence to the courts as is the case under the Federal Civil Service legislation. The governing provisions of the Act are:

> "14 The Commission shall hold examinations to establish lists of persons eligible for appointment to and promotion within the Civil Service.

15 Such examinations shall be of a character fairly to test and determine the relative suitability of candidates to perform the duties of the class to which they seek to be appointed and may

(a) be written, oral, in the form of a demonstration of skill or any combination of these;

(b) consist of an appraisal of documents submitted by the applicant,

and any investigation of training and experience and any test of knowledge, skill or ability may be employed.

16 The Commission shall determine the manner and extent to which vacancies in the Civil Service are given publicity.

17 Vacancies shall be filled by promotion or transfer in so far as is consistent with the best interests of the Civil Service.

18 The Commission shall make appointments and promotions to positions in the Civil Service from the list of eligible candidates meriting appointment or promotion.

. . .

44 (1) No person shall directly or indirectly attempt to influence improperly the Commission or any employee of the Commission with respect to the appointment of himself or any other person to the Civil Service or with respect to the promotion or change in salary of himself or any other employee.

. . .

45 (1) The Commission, with the approval of the Governor in Council, may make regulations relating to employment in the Civil Service and persons employed by a deputy head respecting

. . .

(c) the standards and procedures to be followed in recruitment, selection, assignment, appointment and promotion;

(d) the status or change of status of a person on appointment to or promotion within the Civil Service;

(e) the nature and extent of examination of a person or persons seeking appointment to the Civil Service;"

As the trial judge pointed out, there are no regulations specifically dealing with the above-noted matters. Regulations dealing with the employee's right to generally express a concern

are:

> "94. (1) An employee may bring to the attention of his immediate superior any matter relating to a condition of employment of concern to him.
>
> (2) If within five days the matter is not resolved to the satisfaction of the employee or if a reply acceptable to him is not received, the employee may refer the matter to a person having authority over the immediate superior or may request the immediate superior to refer the matter to such a person and the immediate superior shall, within five days after the request has been received, refer the matter to a person having authority over him and shall advise the employee of the name and office of the person to whom the matter was referred.
>
> (3) If within five days following this referral the matter is not resolved to the satisfaction of the employee or if a reply acceptable to the employee is not received, the person to whom the matter was so referred shall give to the employee and to the Deputy Head a statement in writing indicating why the matter has not been so resolved or a reply given.
>
> 95. An employee is entitled to an interview with the Deputy Head, the Head of the Department of the Commission."

In my opinion, the duty owed by the respondents to the appellant as a managerial level employee seeking promotion through a competition was to act fairly towards her in the conduct of that competition. The trial judge correctly stated that it was necessary for the competition to be conducted fairly and without bad faith, undue influence or bias.

It was submitted on the appellant's behalf that Manual 500 prepared by the Deputy Minister of Management Board contained additional terms governing her employment which define a standard of fairness binding upon the respondent's staff in carrying out the competition. With respect to that submission, the trial judge said:

> "Manual 500 is a 250 page loose-leaf binder containing chapters dealing with staffing, affirmative action, classification and pay, hours of work and overtime, pensions and insurance, leaves and absences, workers' compensation, travel and relocation, training and development, performance appraisal, unsatisfactory performance, drug rehabilitation, handling a grievance, disclosure of information, service awards and separation. The manual is published by

> Management Board and is distributed to personnel managers throughout government departments.
>
> . . .
>
> For the plaintiff to succeed on this issue at this stage of the proceeding, she must prove that the Manual 500 is either a statutory instrument or a contract. The Civil Service Act governs the employment relationship between civil servants and the province and provides for the appointment of persons to the Civil Service. It delegates responsibility for the appointment process to the Civil Service Commission. In s. 14 it provides that the Commission shall hold examinations to establish lists of persons eligible for appointment and promotion. Section 15 provides that the examinations 'shall be of a character fairly to test and determine the relative suitability of candidates ...'"
>
> [underlining added]

The trial judge continued:

> ". . . Management Manual 500 is not a regulation made pursuant to the Civil Service Act. It was not published or filed in accordance with the Regulations Act. It has not received the approval of the Governor in Council, nor has it been published by the Civil Service Commission. The manual is simply a source of information regarding personnel policies and procedures. It contains guidelines not regulations."

Our attention was drawn to Order in Council No. 75-1558 dealing with Manual 500. That Order in Council as far as material provides:

> "The Governor in Council on the report and recommendation of the Executive Council dated the 21st day of November, A.D., 1979, pursuant to Section 3 of the Public Service Act, and all other powers in him vested, is pleased to:
>
> > (m) assign to the Chairman of the Treasury Board (Chairman of the Management Board) all affairs and matters relating to the undernoted functions or offices;
> >
> > (i) the Management Manual."

The Order in Council merely authorizes the head of the Management Board to lay down employment guidelines through the vehicle of Manual 500. It does not clothe these guidelines with the status of regulations. By virtue of s. 3(6) of the **Regulations Act**, R.S.N.S. c. 393, in no

case does a regulation come into force before being filed with the Registrar of Regulations. There is no evidence that Manual 500 was so filed. The manual was not a regulation made pursuant to the Civil Service Act or any other legislation and, therefore, its terms and provisions cannot be taken as containing statutory terms and conditions of the appellant's employment.

The trial judge then disposed of an alternative argument of the appellant to the effect that Manual 500 contained terms and conditions of her contract of employment with the civil service either expressly or impliedly. I agree with the conclusion of the trial judge that Manual 500 is not a contractual document. Among other things, the appellant had no knowledge of the existence of the document until after the commencement of these proceedings.

Finally, the trial judge found that in any event the plaintiff had not established a **prima facie** case on the evidence that the terms of the manual had been breached in any significant manner. Counsel has been unable on argument before us to show that the trial judge erred in this finding.

SECOND ISSUE:

The appellant's case that the trial judge erred in holding that there was no **prima facie** case of breach of duty of fairness rests first upon the contention that the intervenor was permitted to enter the contest when she did not meet the qualifications set out in the competition posting. It will be recalled that the request for a replacement forwarded by the Hospital to the Commission specified that generally supervisory/managerial experience of at least four years was required. The competition posting was changed to require that at least four years of the requisite experience in a major hospital blood bank must have been in a managerial capacity. Nevertheless, both the appellant's and the intervenor's applications were screened by the Civil Service Commission and forwarded to the Committee for the purpose of assessing their relative merits. Valerie Hardy testified that once an application has been forwarded by the Commission from the eligible list it is deemed to be eligible for competition.

Both the appellant and the intervenor had more than 20 years of experience in the

blood bank field. The appellant had been a lab technologist at the Hospital since her graduation in 1971, advancing to a middle management position (Technologist III) in 1981. She managed two or three lab technicians and participated in the management of the lab under the direction of the Manager.

The intervenor was the more senior civil servant. She had graduated one year ahead of the appellant. After spending nine years as a lab technologist at the Hospital, she became an instructor at the Nova Scotia Institute of Technology teaching students to become registered technologists in the Institute's simulated blood bank. The intervenor did four years of independent study to become an Advanced Registered Technologist. For four years she acted as head instructor in the simulated blood bank at the Institute, managing at a level similar to the job for which the competition was held. She was responsible for the complete management of the simulated blood bank, including purchasing, budgeting and administering two full-time and two part-time staff, as well as 90 students requiring employee and student evaluations and resolutions of interpersonal disputes.

Marilyn Schnare testified that both she and Ms. Godin were familiar with what the intervenor was doing at the Nova Scotia Institute of Technology and assumed this experience to be, in the managerial sense, equal to that of the appellant.

The appellant claims that the extensive managerial skills of the intervenor in a simulated blood bank should not, in view of the wording of the competition posting, be taken into account, insisting on a strict literal reading of the posting. The committee, after considering the matter, judged this experience to be requisite for the position of Manager of the Blood Bank at the Hospital.

As already pointed out, there is nothing in the Act or regulations requiring the division of the functions of fixing qualifications and judging merits as in the case of the federal legislation. There is no statutory requirement that the Commission or a selection committee interpret strictly the competition posting and ignore equivalent qualifications of candidates. There is no

statutory or regulatory prescribed form of competition posting.

Both the appellant and the intervenor are non-unionized management employees of the Civil Service Commission who must, as I have pointed out, look to the statutory framework for any rights they may have with respect to their employment, subject only to the duty to act fairly. Neither the Act nor the regulations requires any particular form of advertisement or competition posting. The provisions of the Act quoted above require the Commission to appoint or promote people from a list of candidates meriting appointment. In determining merit, the Commission may consider a variety of characteristics including education, skill and knowledge in assessing the person's ability to perform the duties of the job. The Commission must hold examinations to establish the list. The examinations must fairly relate to the suitability of the candidate to the duties of the job to be performed. The fair conduct of a competition requires therefore nothing more then that each candidate have his or her skills, knowledge and ability assessed in relation to the duties of the job. It is the nature of the job at issue which outlines the duties, not the advertisement or competition posting. The posting itself conferred no further right on the appellant than to participate in the competition which she did. The practice of considering acceptable equivalents whether or not the job posting so specified was established in the evidence forming part of the appellant's case. Among the appellant's witnesses was George Hall, the Executive Director of the Civil Service Commission. He testified that competition postings expressly provided for acceptable equivalents and sometimes they did not. His testimony continued.

> "Q. Is it true that often times in an advertisement you will find both ways used?
>
> A. Yes.
>
> Q. And some jobs require some particular qualifications and sometimes it's required by law a particular qualification?
>
> A. That's correct.
>
> Q. For example, a medical doctor.
>
> A. Yes.

> Q. And if that is required then it should be stated in the ad, isn't that right?
>
> A. Yes.
>
> Q. But isn't it true that management skills don't require that degree of particularity.
>
> A. No, that's correct.
>
> Q. Management skills, when the Commission is considering management skills, it always considers acceptable equivalents?
>
> A. Yes.
>
> Q. And whether or not it's stated in the advertising, the Commission considers that acceptable equivalents for management -type skills are acceptable?
>
> A. [For?] the management elements of the job, yes."

It was not shown that this was an unfair practice. Section 16 of the Act specifically delegates to the Commission the right to determine the manner and extent to which vacancies are given publicity.

No assistance can be gained by examination of a number of labour arbitration decisions relating to promotions which were referred to by appellant's counsel. Those cases are founded upon the interpretation of specific provisions of various collective agreements which form the contractual basis between the unionized employee and the employer, and most commonly deal with seniority rights.

The practice of accepting equivalents without so advising in the job posting could invite problems. Persons misled into not entering a competition because of stated qualifications they did not have might have a basis for complaint if other similarly unqualified persons entered and one of them was awarded the position. The duty of fairness requires that care should be exercised in drafting a competition notice. Where, however, as in the present case the applicant has already been admitted to the contest, such a practice cannot be said to breach any duty of fairness to her. Nothing in the wording of the competition misled her or deprived her of any opportunity. The appellant's first contention fails.

The second ground on which the appellant claims the trial judge erred was in finding that she had not established a **prima facie** case of unfairness, bias or bad faith on the part of Ms. Godin as a member of the selection committee.

At the beginning of the trial, the parties agreed to a number of facts including that Ms. Godin invited the intervenor to enter the competition. There was evidence from the intervenor's discovery examination that she had, in fact, called Ms. Godin to make inquiries about the duties of the position. The intervenor had some concerns with respect to whether her qualifications were sufficient having regard to the wording of the job posting. There was also evidence from the appellant that she discussed with Ms. Godin the fact that the intervenor was applying for the position, saying that she was surprised inasmuch as the intervenor had not been in a blood bank for a long time. Ms. Godin stated that she also was surprised.

Prior to the award of the competition to the intervenor, the appellant and Ms. Godin enjoyed a very friendly relationship, as well as the professional relationship of employee and supervisor respectively. Ms. Godin had provided the appellant with favourable evaluations. They exchanged Christmas presents. On the occasion of Ms. Godin's promotion to Technologist V, the appellant presented her with champagne and a card. The appellant had listed Ms. Godin and Dr. Zayed as references in support of her application. Ms. Godin was not a party to the action but was present in court at the trial and not called by the appellant as a witness.

Marilyn Schnare, a member of the selection committee, was a personal friend of the appellant. She said that she would not let anything happen that would harm her. She stated that there was no evidence of bias or unfairness in the selection process in which she participated. She was surprised that during the course of the examination the appellant did not fare better with respect to those questions more suited to an "in-house" candidate such as the appellant.

The mere fact that one of the members of the selection committee had, prior to the actual commencement of the contest, suggested to the intervenor that she apply, even taken with the evidence of her discussions with the appellant, does not, in my opinion, constitute enough evidence

which, if left uncontradicted, would satisfy a reasonable person of the truth of the allegations by the appellant of unfairness. The fact that Ms. Godin scored the appellant lower on the written exam than did the other two committee members is of little significance, taking into account that the difference was not great (63 as compared to 67.5 and 71.5). As well, Godin scored the appellant higher by a small margin on the oral examination than the score she awarded the intervenor. In his review, Dr. MacAulay stated that he had seen spreads in hundreds and hundreds of examinations and did not consider this much of a spread to be at all surprising. The vast body of evidence led on the appellant's behalf demonstrates clearly the opposite to the position she takes in argument.

It is useful to highlight the evidence outlining the circumstances under which this competition was held.

The competition included a two hour written examination of eight questions, followed by a one hour oral examination containing 14 questions. The examinations appear difficult, requiring detailed and thoughtful responses based on scientific and managerial skills of the contestants. The final phase of the competition included a review of the curriculum vitaes submitted by each candidate. In the case of the written and oral examinations, each member of the selection committee evaluated the answers and material separately with the results being averaged.

The written exam consisted of eight questions and candidates were allowed two hours to complete it. The questions had values assigned to each, the total possible mark being 100. The answers were separately evaluated by each member of the committee and following this they met and reviewed the results. The individual scores were listed and an average was then prepared for each candidate. The intervenor made an average of 79 points and the appellant 67 points.

Prior to the oral exam, the committee drafted a standard introduction to be read to each candidate, as well as a list of 14 questions and two supplementary questions. It was determined in advance who would ask each question. The committee members rotated turns asking questions. Each candidate was asked the same question by the same committee member. Each member had a sheet containing the questions with sufficient space for notes. During the oral exam each committee

member made notes of the answers. At the end of each examination, the candidate was asked if there was anything she wished to add. Miss Valerie Hardy from the Personnel Department of the Hospital was present as an observer during both oral examinations and confirmed that the above procedure was followed and that she did not witness any bias, favouritism or undue influence. Upon completion of the oral exams, the committee discussed the answers, tabulated their scores and averaged them. Out of 140 possible points, the intervenor received 110.8 and the appellant 111.2.

Following the examinations, the committee as a whole reviewed the applications of both parties to make a comparative analysis of their skills in general blood bank experience, managerial experience, educational qualifications and personal development. The committee as a whole decided the values to award to each candidate. Of a possible 40 points, the intervenor received 40 and the appellant 33.5. The results were converted into totals on the basis of the written and oral examinations being each worth 40 percentage points and the track record 20 percentage points. The following are the results:

	Intervenor	Appellant
Written Exam	32	27
Oral Exam	31.7	31.8
Application Comparison	20	16.8
TOTAL	83.7	75.6

In its reporting letter to Valerie Hardy of the Personnel Department of the Hospital, the selection committee reported the results in some detail and concluded:

> "The committee found Ms. Guile's performance during the competition clearly superior to that of Ms. Turner-Lienaux. Throughout the competition, Ms. Guile demonstrated maturity and poise. She appears to have many personal characters which would be an asset to the Blood Bank and to the Division of Hematology.
>
> It is the unanimous opinion of the committee that the position should be offered to Ms. Guile."

Only after the entire examination was conducted and tabulated did the committee report to Miss Valerie Hardy its unanimous decision. Both Ms. Schnare and Dr. MacAulay agreed

that if the questions in the oral and written form favoured anyone they would have favoured the appellant as the in-house candidate.

The trial judge's finding that there was no evidence of unfairness, bias or bad faith in the conduct of the competition ought not to be disturbed.

The appellant's third concern relates to the review of the competition by Dr. MacAulay. He conducted a thorough comprehensive review of the process. He stated that he was deliberately looking for bias but did not find it. He found that the committee used an objective process and used it to the best of their ability. He conducted individual and joint meetings with the selection committee members. He kept them under scrutiny and did not simply accept their word in response to his inquiries. He sought out independent information to verify what they told him. For example, Ms. Schnare and Ms. Godin advised Dr. MacAulay of the personal knowledge they had of the duties of a head instructor at the Nova Scotia Institute of Technology. Dr. MacAulay did not accept that at face value. He also obtained the job description of the head instructor at the Nova Scotia Institute of Technology to better assist him in assessing their knowledge of the intervenor's skills. He directed Ms. Godin to obtain answers to questions he had developed in relation to the intervenor's duties there. He then compared these to the intervenor's references to satisfy himself that the two members of the committee, in fact, knew the job duties of the intervenor sufficiently enough to enable them to evaluate her managerial skills.

Dr. MacAulay discussed the competition posting and the change in wording with persons in the Hospital's personnel office, as well as with the staff of the Commission. He satisfied himself that it was the Commission's policy to allow persons with acceptable equivalent qualifications to enter competitions.

Dr. MacAulay also objectively assessed the entire process of the selection committee. He reviewed in detail the job description of the Manager of the Hospital Blood Bank with each of the questions asked by the selection committee to ensure that, in fact, the questions used in the competition elicited the type of skills which would be required for that job. He spent 12 hours of

his personal time conducting his review and addressing all of the concerns which the appellant had outlined in her letter to him asking that the competition be reviewed. He then spent two or three more hours with the appellant to discuss his findings with her.

The appellant complains that the review was not properly conducted for two reasons: first, that the appellant was not permitted any opportunity to participate in the review process and second, that information was obtained in the course of the review from the intervenor without the appellant's knowledge and for the purpose of bolstering the qualifications of the intervenor beyond that which had been demonstrated in the competition.

With respect to the argument that the appellant was not given an opportunity to make further submissions on Dr. MacAulay's investigations and findings, this point has no merit. With respect to the procedural requirements in carrying out the duty of fairness, L'Heureux-Dube, J. speaking for the majority of the court in Knight, supra, said at p. 512:

> "It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair."

In the absence of an express requirement that a complainant be heard, such as found in s. 21 of the Public Service Employment Act considered in Irwin, supra, I say that the procedure followed by Dr. MacAulay was fair and adequate.

As to the second objection, Dr. MacAulay testified that his purpose in obtaining information about the intervenor's job responsibilities at the Nova Scotia Institute of Technology was so that he could confirm the accuracy of the information she had given the committee with respect to her experience. It is not correct, in my view, to characterize this as having been obtained for the purpose of making the intervenor's qualifications appear to be equal to that of the appellant. Rather it was a part of the process of checking and judging the competition process which the appellant had asked that he do. Again, the procedural requirements in fulfilling the duty of fairness do not mandate that the appellant be entitled to remain at Dr. MacAulay's elbow, so to speak, throughout so that she

may hear and respond to each piece of information encountered by him as he proceeded.

The trial judge found that the procedure carried out by Dr. MacAulay was thorough, objective and detailed. Having reviewed the record, I agree.

In summary, I agree with the trial judge that there was no **prima facie** evidence of breach of duty by the respondents to the appellant either in the conduct of the competition or its review by Dr. MacAulay or the formal review by the Civil Service Commission confirming his findings. In the circumstances, the grant of non-suit by the trial judge was correct.

FOURTH ISSUE:

In dealing with the question of costs, the trial court was exercising its discretion vested in it. Having regard to the principle which so sharply limits the scope of our review of such an exercise of discretion, I am satisfied that no error in that respect has been shown. I would not disturb the order as to costs at trial.

In the result, I would dismiss the entire appeal with costs to both the respondents and the intervenor in the amount of 40% of the costs awarded by the trial judge, plus disbursements in each case.

J.A.

Concurred in:

Clarke, C.J.N.S.

Matthews, J.A.