

FILE: 2006-0147

OTTAWA, MARCH 26, 2007

MATHIEU SAVOIE

COMPLAINANT

AND

THE DEPUTY MINISTER OF FOREIGN AFFAIRS

RESPONDENT

AND

OTHER PARTIES

MATTER Request for order for provision of information

DECISION The request is denied

DECISION RENDERED BY Sonia Gaal, Vice-Chair

LANGUAGE OF DECISION French

INDEXED *Savoie v. Deputy Minister of Foreign Affairs et al.*

NEUTRAL CITATION 2007 PSST 0010

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Mr. Mathieu Savoie, requested the provision of documents concerning a standardized test developed for the Department of Foreign Affairs and International Trade. On March 1, 2007, the Tribunal notified the parties that the request was denied, and that reasons would follow. These are the reasons.

BACKGROUND

[2] On September 30, 2006, Mr. Savoie filed a complaint under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*) concerning the fact that he had not qualified for a position of Management and Consular Affairs Officer (MCO) at the AS-04 level, in advertised process number 06-EXT-IA-RB-MCO-AS-04. The complainant is the incumbent of a substantive position at the AS-02 level, but currently holds an AS-04 position on an acting basis.

[3] The Deputy Minister of Foreign Affairs (the respondent), through the MCO Governance Board, developed a strategic plan for staffing MCO positions and wanted to correct the lack of consistency in the classification of these positions. It was decided that MCO positions would henceforth be classified at the AS-04 level and that recruitment for those positions would be at that level.

[4] Therefore, in April 2006, the respondent posted an administrative notice indicating that there would be an internal appointment process for management and consular affairs officer positions at the AS-04 level. The notice indicated the statement of merit criteria, the essential qualifications and the conditions of employment, among other things. The purpose of the appointment process was to create a pool of candidates, and to make sure that the officers would now be classified at the AS-04 level. The process was open to “all substantive employees of the Management and Consular Affairs Officer stream in the

Department of Foreign Affairs Canada and International Trade at Headquarters and abroad.”

[5] The assessment method used by the respondent was a standardized test (EPSI test) developed for the respondent by the firm Evaluation Personnel Selection International (EPSI), which specializes in developing standardized tools for assessing competencies for this type of position. The test was administered to 57 candidates and 52 passed. The complainant failed the test.

[6] On November 15, 2006, the respondent wrote to the complainant regarding career plans for MCOs. It is worthwhile to reproduce the email in its entirety because it contains information concerning the respondent’s next steps and the support offered to the complainant:

[Translation]

From: Templeton, Viviane -HSP
Sent: November 15, 2006 10:38 PM
To: Savoie, Mathieu -BUCST -AG
Subject: Career plans

Mathieu:

As you know, the AS-04 group and level is henceforth the new recruitment level for the MCO stream.

The MCO Governance Board has decided to give MCOs who are not at the AS-04 level approximately one year to attain the competency levels required for AS-04s. If they wish, these employees may receive targeted coaching or mentoring from their current supervisor or from a mentor in the areas where the most recent AS-04 assessment process, conducted in 2006, revealed needs for professional development.

In September 2007, the employees will be reassessed in relation to AS-04 requirements using a variety of tools, including the EPSI test and a reference check. If employees are not promoted to the AS-04 level at that time, action will be taken to find them work at their incumbency level, outside the MCO stream. The employees in question will continue with their assignment and will continue to receive acting pay until they are promoted to the AS-04 level or until a new appointment is made.

As you are one of the MCOs who have not yet attained the AS-04 level, I would ask you to consider receiving coaching this year, in the areas where weaknesses were revealed by the EPSI test that you took a few months ago. If that is of interest to you, I would be delighted to work with you and your supervisor or mentor to define objectives and benchmarks, and to help you track your progress throughout the year so you will have a clear idea of how you are doing.

I will telephone you in the next few days to follow up on this letter, and I hope that I will be able to work with you in order to ensure your professional development in the MCO stream.

Viviane Templeton
Project head
MCO strategy
(...)

(emphasis added)

[7] Following an exchange of information between the parties, the respondent sent the complainant an email on November 27, 2006, giving him the results of his written test according to the assessed competencies, the marks obtained and the pass marks. On November 28, the complainant again requested that the respondent provide him with information on the standardized test. The respondent refused to provide him with this information.

[8] On December 6, the complainant submitted a request to the Tribunal in which he asked for a copy of the standardized test and the scoring grid for that test.

[9] On December 13, the Tribunal sent the parties a letter decision, in which it dealt with some of the complainant's requests and set a deadline of January 23, 2007 to receive the parties' submissions on the provision of the standardized test and the test's scoring grid.

ISSUE

[10] Should the Tribunal order the provision of documents concerning the EPSI test?

SUBMISSIONS

A) COMPLAINANT'S POSITION

[11] In support of his request, the complainant maintains that he wants to determine to what extent the questions asked enabled EPSI to assess the candidates who had taken the test, by relating those questions to the competencies assessed.

[12] The complainant argues that this test will no longer be used because recruitment for the positions will now be at the AS-04 level, and that no advantage would be given to an individual if the information were provided to him. Furthermore, if the respondent were to use the same test in the future, it could change the scenario.

[13] The complainant asserts that the documents provided by the respondent as part of the exchange of information are not sufficient to determine the relevance of the test in question as a whole. He was not given any explanation of the marks obtained or of the basis on which these marks were determined for each of the essay-type questions. He submits that the scoring grid and the test questionnaire are necessary to establish a relationship between the strategy, the competencies assessed and the questions asked to assess those competencies.

B) RESPONDENT'S POSITION

[14] The respondent argues that it is the technical manual prepared by EPSI and not the test itself that makes it possible to determine the relevance of the questions. According to the respondent, proof of the test's validity is to be found in the high success rate of the candidates: 52 of 57 candidates passed the test. Providing the EPSI test or the technical manual would prejudice the continued use of the test, and would affect the results of the test by giving the complainant an unfair advantage.

[15] As for the scoring grid, the respondent notes that it corresponds to the assessor's guide. Sharing this grid would invalidate the test and affect its results, while again giving the complainant an unfair advantage. The grid contains expected answer elements for each of the competencies that apply to positions at the AS-01 to AS-07 levels.

[16] The test is valid for a period of five to seven years and will be used annually by the respondent as an assessment tool for appointment processes involving MCOs holding positions at the AS-04 to AS-07 levels. This same test will be used to assess the candidates who failed the process in 2006.

[17] Finally, the respondent submits that this information will not help the Tribunal to determine whether there has been an abuse of authority, bad faith or personal favouritism. Furthermore, giving explanations on how the points were awarded constitutes producing arguments, not exchanging information. This information is not relevant; rather, the complainant's request seems to be in the nature of a fishing expedition.

B) POSITION OF THE PUBLIC SERVICE COMMISSION (THE PSC)

[18] The PSC states that the standardized test was not prepared by the PSC and is not PSC's responsibility, but rather the respondent's. The PSC therefore defers to the respondent as far as the test is concerned.

[19] The PSC does, however, refer to *Aucoin v. President of the Canada Border Services Agency et al.*, [2006] PSST 0012, and maintains that this decision should apply to any standardized test.

ANALYSIS

[20] Paragraph 17(1)(c) of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (*PSST Regulations*) deals with a party's refusal to provide information relating to standardized tests:

17. (1) Despite section 16, the complainant or the deputy head or the Commission may refuse to provide information referred to in that section if providing that information might

(...)

(c) affect the validity or continued use of a standardized test or parts of the test or affect the results of a standardized test by giving an unfair advantage to any individual.

[21] The Tribunal has previously dealt with the issue of standardized tests in *Aucoin, supra*. In that case, Mr. Aucoin had been assessed by means of a PSC standardized test used to select candidates for four specific superintendent positions at the PM-04 group and level. He had been excluded from the appointment process, and was requesting documents relating to the standardized test. The Tribunal ordered the provision of certain documents, subject to specific, detailed conditions under subsections 17(4) and (5) of the *PSST Regulations*. However, the situation in the present case is very different from that described in *Aucoin*.

[22] It is useful to refer to the decision in *Canada (Attorney General) v. Gill* (2001) 107 A.C.W.S. (3d) 429; [2001] F.C.J. No. 1171 (QL), of the Federal Court. That decision was examined in detail in *Aucoin*. The Court established issues that the PSC Appeal Board Chairperson had to decide before refusing access to the standardized test:

[11] The **first issue** concerns the pertinence and relevance of the confidential material to which access is sought. The Chairperson must be satisfied that the material pertains to the appellant or to the successful candidate and is liable, by reason of its relevance, to be disclosed before the Appeal Board. **Secondly**, the Chairperson must decide whether providing access to the confidential materials might prejudice the continued use of a standardized test or affect the results of a standardized test by giving an unfair advantage to any individual. If this latter question is answered in the affirmative,

the **third and final issue** is whether the prejudice to the future use of the test can be avoided through the imposition of conditions. If the Chairperson is not satisfied that any conditions will prevent that prejudice, he or she is not to order access to the material in question.

(emphasis added)

[23] The Tribunal must therefore deal with these issues, in order to determine whether it is appropriate to order provision of the documents requested by the complainant concerning the standardized test.

[24] Regarding the **first issue** in *Gill*, namely the relevance of the documents, the Tribunal is of the opinion that the information is relevant because it concerns the assessment of the complainant, who failed the test.

[25] Regarding the **second issue**, namely, whether access to the confidential materials might prejudice the continued use of the test, the Tribunal responds in the affirmative.

[26] The respondent established a strategic plan for the positions of management and consular affairs officers, in which it determined that these positions would now be classified at the AS-04 level and that the recruitment would be at that level. The respondent decided to reclassify those positions. The candidates were assessed by means of the EPSI test and had to pass the test in order to be reclassified at the AS-04 level.

[27] The Tribunal notes that the EPSI test is used by the respondent in this case as a method to assess candidates for the reclassification of AS-04 positions, and not to staff a vacant position, as was the case in *Aucoin*. This same test will be used for assessing candidates who failed the process in 2006.

[28] In this case, any information that the complainant obtains concerning the EPSI test would thus affect the validity or use of the standardized test or of some of its parts, or could affect results by giving an unfair advantage to the

complainant. The complainant would have access to the scoring grid, answers, explanations, and any other information that might affect the results of the test.

[29] Furthermore, the test is valid for a period of five to seven years, and will be used annually by the respondent as an assessment method for the appointment processes of MCOs holding positions at the AS-04 to AS-07 levels.

[30] According to the Tribunal, the disclosure of this test, of the technical manual and of the scoring grid would certainly prejudice the continued use of the standardized test or affect its results by giving an unfair advantage to the complainant.

[31] The **last issue** in *Gill* concerns the possibility of providing an individual who is not a member of the public service, but is a representative of the complainant, with access to information. It should be noted that the complainant has not made a request of this kind to the Tribunal, which nonetheless is considering this issue.

[32] In *Aucoin*, the Tribunal stipulated that certain documents could be reviewed by the complainant's representative, who was not an employee of the public service, subject to detailed conditions.

[33] In *Aucoin*, the standardized test could be used again in the future to assess candidates for other positions. However, this was an uncertain situation, in which no specific date or period of time was known. Furthermore, it was possible that Mr. Aucoin would decide not to participate in the process and would not take the test. In that case, the information that was provided to him would perhaps not have been of use to him in the future and would not have given him an unfair advantage.

[34] On the contrary, as noted above in our analysis of the second issue in *Gill*, in the present case, the complainant failed the reclassification exercise, namely, the EPSI test selected by the respondent. In the November 15, 2006 email

referred to above, the respondent notified the complainant that the candidates who had not passed in 2006 would be reassessed in September 2007 by means of the EPSI test and other methods.

[35] It is thus certain that the same test will be administered again, and that the complainant will write it in the fall of 2007 if he wishes to be reclassified at the AS-04 level.

[36] In the Tribunal's view, this option, namely, allowing the complainant's union representative to have access to information under certain conditions, could also give the complainant an unfair advantage when he takes the test again in September 2007. The representative would necessarily have to discuss with the complainant the information exchanged in connection with this complaint. The complainant would be able to use that information when he writes the test again because he would know what is being sought in the questions and answers.

[37] Consequently, the Tribunal cannot order the provision of the EPSI test and scoring grid, as requested by the complainant, or allow his union representative to have access to this information. Providing these documents could prejudice the validity or use of the test or of some of its parts, or affect its results, by giving an unfair advantage to the complainant, who will take the same test in the fall of 2007.

[38] Finally, the respondent is offering the complainant coaching and mentoring in the areas where he failed, which were communicated to him. The complainant has access to a number of individuals who can help him prepare in order to pass the EPSI test when he takes it again, and thus obtain the AS-04 level. He can therefore take advantage of this assistance to prepare accordingly, without having access to the answers and other information he has requested.

DECISION

[39] For all these reasons, the Tribunal denies the request for provision of information.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal File:	2006-0147
Style of Cause:	<i>Mathieu Savoie and the Deputy Minister of Foreign Affairs et al.</i>
Hearing:	Written request, decided without the appearance of parties
Date of Reasons:	March 26, 2007