



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**FILE: 2006-0085**

**OTTAWA, MAY 2, 2007**

**CARL BROUGHTON**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES**

**RESPONDENT**

**AND**

**OTHER PARTIES**

<b>MATTER</b>	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
<b>DECISION</b>	The complaint is dismissed
<b>DECISION RENDERED BY</b>	Sonia Gaal, Vice-Chair
<b>LANGUAGE OF DECISION</b>	English
<b>INDEXED</b>	<i>Broughton v. Deputy Minister of Public Works and Government Services et al.</i>
<b>NEUTRAL CITATION</b>	2007 PSST 0020

## REASONS FOR DECISION

### INTRODUCTION

[1] On July 30, 2006, the complainant, Mr. Carl Broughton filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*). He claims that his application for the position of Investigations Manager with the Department of Public Works and Government Services Canada should have been screened in as he met all the qualifications (selection process number 2006-SVC-IA-HQ-86079).

### PRELIMINARY MATTER

[2] On March 20, 2007, the Deputy Minister of Public Works and Government Services, the respondent, filed a motion to dismiss the complaint for the complainant's failure to appear during a pre-hearing conference and failure to provide his submissions as directed by the Tribunal.

[3] For the reasons set out below, the respondent's motion to dismiss is denied; however, the complaint is dismissed on the merits.

### BACKGROUND

[4] The complainant filed his allegations on October 15, 2006. The respondent filed the reply on November 6; the complainant filed his further response on the same day.

[5] On January 24, 2007, the Tribunal informed the parties by email that a hearing was scheduled for March 26 and 27, 2007. The Notice of Hearing was attached to this email. On February 12, the Tribunal sent the parties an email to inform them that a pre-hearing conference via teleconference was scheduled for February 26, at 10 am. The Tribunal sent a further email on February 15 to provide the details for the parties to call into the conference.

[6] The complainant requested that emails be sent to his personal email address. The Tribunal's record indicates that the complainant and the other parties received the emails sent by the Tribunal, in particular the three emails listed in the above-noted paragraph.

[7] The Tribunal proceeded as scheduled with the pre-hearing conference on February 26 at 10 am. The respondent and the Public Service Commission (the PSC) were represented and ready to participate. The complainant, on the other hand, was not present. The Vice-Chair who was presiding at the pre-hearing conference informed the parties present that they would wait fifteen minutes to provide the complainant with the opportunity to join in.

[8] At 10:15 am, the complainant had not joined the conference call. The Vice-Chair told the parties who were present that the pre-hearing conference could not take place without the complainant and that they would be apprised of the next steps in this proceeding.

[9] On February 26, the Vice-Chair provided her instructions to the Registrar to inform the parties that the Tribunal would decide the complaint without holding an oral hearing in accordance with subsection 99(3) of the *PSEA*. The Registrar sent the letter on February 26 informing the parties of this decision.

[10] Again, the Tribunal's record confirms that the complainant received this letter of directives by email. The Tribunal directed the complainant that he had until 4 pm on March 9 to provide any additional information, submissions and case law to support his complaint. The complainant was also informed that the Tribunal may render a decision with the documents on file if he failed to provide any further information.

[11] The PSC had until March 16 to provide its submissions, while the respondent was to provide its position by March 23. Finally, the complainant was to file a response to the PSC and the respondent, if any, by March 26.

[12] The Tribunal did not receive any further submissions or correspondence from the complainant.

[13] On March 16, the PSC submitted that the complainant's failure to appear and to file his submissions is indicative of an unwillingness to pursue his complaint.

[14] On March 20, the respondent filed its motion to dismiss.

[15] The complainant did not respond to the PSC's submissions or the respondent's motion to dismiss.

#### ISSUES

(i) Is the complainant's failure to appear at a pre-hearing conference and to submit any additional information within the timelines directed by the Tribunal tantamount to a failure to appear at a hearing in accordance with section 29 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*)?

(ii) Should the Tribunal summarily dismiss the complaint in accordance with subsection 99(2) of the *PSEA* for being frivolous or vexatious?

(iii) Has the complainant proven an abuse of authority by the respondent?

**Issue I:** Is the complainant's failure to appear at a pre-hearing conference and to submit any additional information within the timelines directed by the Tribunal tantamount to a failure to appear at a hearing in accordance with section 29 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*)?

## ARGUMENTS OF PARTIES

### A) RESPONDENT'S ARGUMENTS

[16] The respondent submits that section 99 of the *PSEA* provides the Tribunal with the authority to summarily dismiss a complaint for failure to appear. The inaction of the complainant demonstrates a lack of interest for the continuance of his complaint and is akin to "abandonment".

[17] The complainant's failure to file his submissions should be treated as a withdrawal of his allegations. Consequently, the withdrawal of the allegations renders the complaint frivolous and vexatious under subsection 99(2) of the *PSEA*.

[18] The respondent argues that the complaint should be summarily dismissed without the need of further submissions from the respondent.

### B) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[19] The PSC is of the view that the complainant's failure to appear at the pre-hearing conference of February 26 and to provide his submissions by March 9 is tantamount to a failure to appear at a hearing.

[20] Without further evidence or submissions from the complainant, the PSC submits it would not be unreasonable for the Tribunal to dismiss the complaint.

## ANALYSIS

[21] Subsection 99(3) of the *PSEA* provides that the Tribunal may decide a complaint without holding an oral hearing. Thus, when a complaint is filed with the Tribunal, it may be decided by either oral or paper hearing. The Tribunal may hold an oral hearing where parties appear in person before the Tribunal to present their evidence and arguments or submissions. Alternatively, the Tribunal

may decide a complaint based on the written information on the record. This is called a paper hearing.

[22] In the latter case, the Tribunal will inform the parties beforehand of its intention to proceed with a paper hearing and will provide them with timelines to produce their submissions, documents and case law in support of their respective positions. This procedure was followed in this case.

[23] Section 29 of the the *PSST Regulations* reads as follows:

29. If a party, an intervenor or the Canadian Human Rights Commission, if it is a participant, does not appear at the **hearing of a complaint or at any continuance of the hearing** and the Tribunal is satisfied that notice of the hearing was sent to that party, intervenor or participant, the Tribunal may proceed with the hearing and dispose of the complaint without further notice.

(emphasis added)

[24] The Tribunal is of the opinion that the word “hearing” should be given its ordinary meaning, that is, either an oral hearing or a paper hearing. Furthermore, the words “dispose of the complaint without further notice” in section 29 of the *PSST Regulations* indicate that it refers to the portion of the complaint process where the Tribunal will make a decision on the complaint.

[25] Therefore, the complainant’s failure to participate in the pre-hearing conference is not tantamount to a failure to appear as contemplated by section 29 of the *PSST Regulations*. A pre-hearing conference is fundamentally different than a hearing. The purpose of the pre-hearing conference is, as its name suggests, to prepare the parties and the Tribunal for the hearing of the complaint by addressing procedural issues and technical questions before the hearing. It is not to “dispose of the complaint”.

[26] However, the Tribunal finds that the complainant’s failure to produce his submissions by March 9 and further response, if any, by March 26 as required by the February 26 letter is a failure to appear at the hearing of his complaint in accordance with section 29 of the *PSST Regulations*. The Tribunal’s directives

were clear that the complaint would be determined without an oral hearing and would be decided with the documents on file; in addition, specific timelines were identified for all the parties to meet prior to the disposition of this matter by paper hearing.

[27] Thus, the Tribunal is satisfied that, in addition to the Notice of Hearing sent to the parties on January 24, 2007 in accordance with section 28 of the *PSST Regulations*, the additional notice of the paper hearing of this complaint was sent to the complainant and other parties on February 26, 2007. By failing to provide his written submissions within those timelines established by the Tribunal, or requesting an extension to file them, section 29 of the *PSST Regulations* applies. The Tribunal will, therefore, render its decision on this complaint with the documents on file.

**Issue II:** Should the Tribunal summarily dismiss the complaint in accordance with paragraph 99(2) of the *PSEA* for being frivolous or vexatious?

#### ARGUMENTS OF PARTIES

[28] The arguments submitted by the respondent and PSC outlined above under Issue I are also applicable here.

#### ANALYSIS

[29] Subsection 99(2) of the *PSEA* reads as follows:

**99.** (2) The Tribunal may summarily dismiss any complaint that, in its opinion, is frivolous or vexatious.

[30] Despite the complainant's failure to participate in the pre-hearing conference, to provide his submissions as directed by the Tribunal and to respond to the respondent's motion to dismiss, the fact remains that he filed a complaint which contained some information. He then submitted his allegations, along with copies of emails and other documents, to which the respondent replied in detail. He also filed a further response to the respondent's reply.

[31] Thus, the Tribunal is not prepared to dismiss the complaint as being frivolous or vexatious since there is sufficient information to render a decision on the merits.

[32] Furthermore, if Parliament had intended as a consequence of a complainant's failure to appear at a hearing that the complaint be treated as abandoned or withdrawn, it would have clearly stated this. There is nothing in the *PSEA* to support this interpretation. Of note, subsection 22(3) of the *PSST Regulations* specifically address that the Tribunal may consider a complaint withdrawn "if the complainant fails to provide allegations".

[33] Since the complainant provided allegations, the wording of section 29 of the *PSST Regulations* applies and clearly specifies that the Tribunal may proceed with the hearing without further notice and dispose of the complaint.

[34] The Tribunal will now render its decision on the complaint.

**Issue III:** Has the complainant proven an abuse of authority by the respondent?

#### ARGUMENTS OF PARTIES

##### A) COMPLAINANT'S POSITION

[35] The complainant submits he was an RCMP officer for 26 years and trained to conduct various types of investigations. He alleges that he met all of the essential qualifications for the position of Investigations Manager.

[36] The complainant believes that the Director "was targeting candidates with extensive experience in conducting and managing investigations in white collar crime which is not clearly indicated in the Essential Qualifications of the poster but rather in the asset qualifications."



[37] He submits that candidates did not need to meet the asset qualifications to be screened in and that the essential qualifications do not properly demonstrate the requirements for the position. The complainant was unaware that candidates would be screened in based predominately, if not exclusively, on asset qualifications.

[38] He claims that this was not a fair and transparent screening process as the Director responsible for this staffing action appeared to screen out as many candidates as possible using the asset qualifications in order to reduce the amount of interviews he would have to conduct; only eight out of 32 applicants continued in the process.

[39] The complainant also compares his experience and background with two of the successful candidates who were screened in and submits that his experience is equal, if not superior, to theirs.

B) RESPONDENT'S POSITION

[40] The respondent submits that the persons proposed for appointment were the only candidates found to be qualified. All the candidates were assessed in the same manner and screened against the essential qualifications; eight were considered further in the process. The Director applied the asset qualifications at the time of appointment only.

[41] The complainant was screened out on the basis of experience which was an essential qualification. This was explained to him during the informal discussion which was conducted through an exchange of emails. The essential qualifications stated that the candidates required "extensive experience conducting and managing investigations in at least two of the following fields" followed by a list of six fields.

[42] Although the complainant possessed extensive experience in one of the fields, criminal investigations, his résumé did not demonstrate any experience in one of the other acceptable fields.

[43] Since the complainant was screened out on the basis of experience, which was an essential qualification, there was no need to assess him further in the process.

[44] The respondent claims that there was no bad faith or personal favouritism that influenced the Director, either in screening out the complainant, or proposing the qualified candidates.

[45] The respondent further submits that the complaint should be dismissed as the complainant has not met the burden of proving on a balance of probabilities that the respondent abused his authority, either when he screened out the complainant or did not propose for appointment or appoint the complainant.

#### ANALYSIS

[46] The Tribunal established in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, that a complainant has the burden of proof with respect to complaints of abuse of authority before the Tribunal.

[47] The complainant filed his complaint under paragraph 77(1)(a) which reads as follows:

**77.** (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(...)

[48] The complainant's main arguments are that he had the necessary experience to have been screened in and he also believes that he was screened out because he did not meet the asset qualifications. He further believes that his experience compares to that of the selected candidates.

[49] The respondent argues that the selection board assessed the complainant's application against the essential qualifications listed on the advertised notice for this position. It was determined that the complainant had extensive experience in only one of the six listed fields and was screened out.

[50] It is not sufficient for a complainant to make bold statements in the complaint and allegations claiming abuse of authority without supporting these allegations with evidence from witnesses, facts and/or documents. The fact that the complainant disagrees with the selection board's decision as to whether the complainant had the required experience in two fields does not amount to abuse of authority and is clearly insufficient for the complaint to succeed.

[51] The Tribunal explained that convincing evidence is necessary for a finding of abuse of authority in *Portree v. Deputy Minister of Human Resources and Social Development et al.*, [2006] PSST 0014:

[47] An allegation of abuse of authority is a very serious matter and must not be made lightly. In summary, in order to succeed before the Tribunal, a complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal's review and intervention.

(...)

[49] Employees who allege that there has been an abuse of authority and, thus, a contravention of the *PSEA* and who wish to obtain a remedy for that contravention must present convincing evidence and arguments to be successful. (...)

[52] The complainant has not demonstrated any serious flaw or wrongdoing by the assessment board when it assessed his experience. According to the respondent, all the candidates were assessed in the same manner.

[53] The Director explained to the complainant in detail in an email dated July 10, 2006 the reasons why his experience did not meet the essential qualifications. He also added: "This does not mean that you are not a competent investigator by all means but compared to other more specialized investigators, I had to make a decision on whom I should advance to the interview stage." The Director concludes the email by inviting the complainant to try again in the future and offers the complainant the opportunity to meet to discuss further possibilities.

[54] The Tribunal's role is to determine if there was an abuse of authority in the appointment process and not to redo the appointment process by reviewing the complainant's experience to determine and second guess whether his experience was assessed correctly by the selection board. As stated in *Portree, supra*:

[48] Although the *PSEA* gives the Tribunal broad powers in relation to any matter before it, it is not an investigative body. Accordingly, it is not mandated to go on a fact-finding mission on behalf of a complainant. (...)

[55] The complainant also argued that he was screened out based on the asset qualifications and not the essential qualifications. Here again, there is no evidence to support this allegation which is denied by the respondent.

[56] The complainant's final allegation concerns the comparison of his experience with two of the successful candidates' experience. The Tribunal has stated in a number of decisions that the *PSEA* does not require a comparison of candidates for an appointment to be made on the basis of merit. See, for example: *Aucoin v. President of the Canada Border Services Agency et al.*, [2006] PSST 0012:

[43] The *PSEA* no longer requires the establishment of a rank between candidates and does not require a comparative assessment of candidates in order for a position to be filled. The only requirement of the *PSEA* is that the person appointed must be qualified for the job as stipulated in paragraph 30(2)(a). Employees do not need to compare their results with those of appointees in order to ascertain whether they had better answers that affected their marks, standing or ranking in the selection process. (...)

See also: *Portree, supra*; *Visca v. Deputy Minister of Justice et al.*, [2006] PSST 0016; and, *Robbins v. Deputy Head of Service Canada et al.* [2006] PSST 0017.

[57] In summary, the complainant has not demonstrated on a balance of probabilities an abuse of authority by the respondent.

[58] It would be helpful for the Tribunal and the Registry when complainants have decided not to pursue their complaint to inform the Tribunal of their decision by using the form available on the website. This allows the numerous persons involved in various departments to close their file without spending further time on it.

#### DECISION

[59] The complaint is dismissed.

Sonia Gaal  
Vice-Chair

#### PARTIES OF RECORD

Tribunal File:	2006-0085
Style of Cause:	<i>Carl Broughton and the Deputy Minister of Public Works and Government Services et al.</i>
Hearing:	Paper hearing
Date of Reasons:	May 2, 2007