



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0068

OTTAWA, MARCH 27, 2007

CHANTAL JOLIN

COMPLAINANT

AND

**DEPUTY HEAD OF SERVICE CANADA, AS PART OF THE
DEPARTMENT OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT**

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1) (a) of the <i>Public Service Employment Act</i>
DECISION	The complaint is dismissed
DECISION RENDERED BY	Francine Cabana, Member
INDEXED	<i>Jolin v. Deputy Head of Service Canada et al.</i>
NEUTRAL CITATION	2007 PSST 0011

REASONS FOR DECISION

INTRODUCTION

[1] Chantal Jolin complains of an abuse of authority in the application of the merit principle, because her competencies were not properly assessed in the selection process. She explains that she was eliminated from the process on the basis of her results in In-Basket Exercise 810, but subsequently, the same competencies were assessed and she was not then able to prove her competencies.

[2] On July 13, 2006, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal), pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*), after indeterminate appointments had been made to the Department of Human Resources and Social Development – Service Canada on or about July 10, 2006 under an advertised process (2006-REH-NHQ-33004). The respondent is the Deputy Head of Service Canada, as part of the Department of Human Resources and Social Development.

[3] In accordance with subsection 99(3) of the *PSEA*, the Tribunal has decided the complaint without holding an oral hearing. The decision has been rendered on the basis of the submissions of the parties, which were considered and which are summarized below.

BACKGROUND

[4] In January 2006, the selection board produced a statement of merit criteria that was used to make the decisions regarding the assessment of the candidates.

[5] The selection board decided to assess the candidates' merit criteria using a variety of methods and steps in its appointment process. The steps were as follows:

- Screening
- In-basket exercise 810 of the Personnel Psychology Centre (PPC) of the Public Service Commission
- Written examination
- Interview
- Reference check

[6] When the statement of merit criteria was prepared, a human resources officer contacted the Public Service Commission (the PSC) to gather information on In-Basket Exercise 810. The statement of merit criteria was also sent to the PSC for review and to determine whether In-Basket Exercise 810 could be used. The PSC recommended that In-Basket Exercise 810 be used because the statement of merit criteria contained the five specific managerial competencies, namely planning, directing, analyzing, empowering and organizing. The PSC also suggested that the pass mark be set at 16/25.

[7] The selection board therefore decided to use the PPC's In-Basket Exercise 810 to assess the management competencies of the candidates. The pass mark was set at 16/25. It should be noted that the selection board initially intended to set the pass mark at 70%, namely 17.5/25. However, the information given to the candidates was that the pass mark would be set at 16/25, namely 64%. Although this was a mistake, the selection board decided that it had no choice but to keep to the pass mark set at 16/25.

[8] The candidates had to obtain the pass mark in order to go on to the next step in the assessment process, which was the written examination. The pass mark was set before the results of the complainant or the other candidates were known.

[9] On January 30, 2006, the Department held an advertised interdepartmental and national appointment process for positions of "National Human Resources Project Manager" [Translation] (PE-06) in the Department of Human Resources and Social Development – Service Canada. These positions

were open to “employees of the Public Service of Canada who hold a position in Canada” [Translation].

[10] In connection with this advertised appointment process, the Department received 24 applications for the position of “National Human Resources Project Manager” [Translation], including that of the complainant. Of the 24 candidates, four withdrew their application and seven were eliminated at the screening stage. Thirteen candidates thus remained. The complainant was admitted at the screening stage, and was one of the 13 candidates. These 13 candidates therefore continued to the next step, namely In-Basket Exercise 810.

[11] On March 6, 2006, an email was sent to the candidates indicating that the pass mark for In-Basket Exercise 810 had been set at 16/25. The email also indicated that only candidates who obtained the 16/25 pass mark would be admitted to the next step in the appointment process.

[12] When the complainant received this email, she informed the human resources officer that she had taken In-Basket Exercise 810 a few weeks before, in connection with another appointment process. Since the results of In-Basket Exercise 810 are valid for a period of 180 days, the complainant had to wait until this 180-day period was up before doing the exercise again. Consequently, she was unable to redo In-Basket Exercise 810.

[13] On April 10, 2006, the complainant sent the human resources officer by email her results on In-Basket Exercise 810. She had obtained a mark of 10/25. Consequently, the results of this exercise were used in connection with the appointment process that is the subject of this complaint.

[14] Of the 13 remaining candidates subject to In-Basket Exercise 810, six were eliminated, including the complainant, because they had not obtained the pass mark of 16/25. Seven candidates thus proceeded to the written examination stage. No candidate was eliminated on the written examination.

Three candidates were eliminated following the interview, and four candidates were found to be qualified.

[15] On June 20, 2006, the Department accepted three candidacies and published a notification to this effect. On July 10, 2006, the selection board proposed two of the three candidates who had been selected for appointment.

ISSUES

[16] In their submissions on the merits of the dispute, the respondent and the PSC raised a preliminary objection regarding the Tribunal's jurisdiction to deal with assessment methods selected and used by the Department. The preliminary question that the Tribunal must answer is the following:

(i) Does the Tribunal have jurisdiction to hear the complaint made by the complainant under section 77 of the *PSEA* regarding the respondent's selection and use of assessment methods and more particularly the effect of section 36 of the *PSEA* on section 77 of this same Act?

[17] If the Tribunal answers this preliminary question in the affirmative, the Tribunal must then answer the following questions on the merits:

(ii) Who must assume the burden of proof regarding the complaint made to the Tribunal?

(iii) Is there *res judicata* with respect to providing the rating guide to the complainant?

(iv) Did the respondent abuse his authority within the meaning of section 77 of the *PSEA* by eliminating the complainant at the stage of In-Basket Exercise 810?

PRELIMINARY QUESTION

Question I: Does the Tribunal have jurisdiction to hear the complaint made by the complainant under section 77 of the *PSEA* regarding the respondent's selection and use of assessment methods and more particularly the effect of section 36 of the *PSEA* on section 77 of this same Act?

A) ARGUMENTS OF THE COMPLAINANT

[18] The complainant submits that although the respondent has broad discretionary authority to choose assessment methods under section 36 of the *PSEA*, the respondent cannot commit abuse in exercising this authority. In this particular case, the misuse of In-Basket Exercise 810 directly affected application of the merit principle, and would have resulted in an abuse of authority in the assessment of the complainant's qualifications. The Tribunal has jurisdiction to hear the complaint because there is an obvious connection between the recourse provided for in paragraph 77(1)(a) and sections 30(2) and 36 of the *PSEA*.

[19] The complainant is not questioning the respondent's right to choose assessment methods, but rather is challenging their use to assess the competencies that the respondent had previously established.

B) ARGUMENTS OF THE RESPONDENT

[20] The respondent acknowledges that the Tribunal is fully competent to determine whether the assessment of the essential qualifications is tainted by an abuse of authority. However, in the respondent's opinion, Parliament has not given the Tribunal jurisdiction to determine whether there is abuse of authority in the choice of assessment methods. For example, Parliament did not refer to section 36 of the *PSEA* in section 77, although in that section, it expressly refers to sections 30 and 37 of the *PSEA*, and implicitly to section 33 of the *PSEA*.

[21] According to the respondent, the clear effect of section 36 of the *PSEA* is to confer on the delegates of the PSC broad discretion in choosing assessment methods, and this choice is not subject to review by the Tribunal. The respondent has not produced any argument regarding the use of In-Basket Exercise 810.

C) ARGUMENTS OF THE PUBLIC SERVICE COMMISSION

[22] The PSC advances essentially the same arguments as the respondent.

D) ANALYSIS

[23] The complaint has been made under paragraph 77(1)(a) of the *PSEA*. Section 77 of the *PSEA* 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)*;

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

(2) For the purposes of subsection (1), a person is in the area of recourse if the person is

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and

(b) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.

(3) The Tribunal may not consider an allegation that fraud occurred in an appointment process or that an appointment or proposed appointment was not free from political influence.

(our italics)

[24] Paragraph 77(1)(a) of the *PSEA* provides that a complainant may file a complaint if there is abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2) of the *PSEA*, which reads as follows:

30. (...)

(2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that ***the person to be appointed meets the essential qualifications*** for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) ***any additional qualifications*** that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(ii) ***any current or future operational requirements*** of the organization that may be identified by the deputy head, and

(iii) ***any current or future needs of the organization*** that may be identified by the deputy head.

(our italics)

[25] The PSC is thus empowered, under subsection 30(2) of the *PSEA*, to assess whether a person to be appointed has the essential qualifications, taking into account any additional qualifications, operational requirements and current or future needs of the organization. Furthermore, the deputy head is specifically empowered to establish essential and additional qualifications and to specify any operational requirements or current or future needs of the organization. In the present case, the PSC delegated the exercise of its powers to the respondent under section 15 of the *PSEA*. It was thus the respondent, as delegate, who evaluated the person to be appointed.

1. Section 36 of the *PSEA*:

[26] Section 36 of the *PSEA* sets out the means that the deputy head may employ to assess the essential and additional qualifications of the person to be

appointed, as established by the deputy head pursuant to subsection 30(2). For example, section 36 refers directly to paragraph 30(2)(a) and to subparagraph 30(2)(b)(i). Section 36 reads as follows:

36. In making an appointment, the Commission *may use* any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

(our italics)

[27] The purpose of this section is to confer the discretion to choose among the available methods for assessing candidates, and to proceed with an appointment based on merit under subsection 30(2) of the *PSEA*. At different steps in the process of selecting the person to be appointed, the deputy head will be called upon to choose and use various assessment methods, including examinations and interviews. The complaint in the present case thus concerns the choice and use of the assessment method.

[28] In *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, the Tribunal ruled that section 30(2) of the *PSEA* gives managers considerable discretion to choose the person to be appointed, but that this authority is subject to review by the Tribunal. Section 36 also confers discretionary authority in the selection and use of assessment methods. However, as the Tribunal decided in *Tibbs, supra*, the fact that the authority is discretionary does not mean that it is absolute and is not subject to the recourse provided for in paragraph 77(1)(a).

[29] Moreover, if, as the respondent maintains, Parliament had intended, by not referring to section 36 in paragraph 77(1)(a), to limit recourse to subsection 30(2) alone, this approach would logically have been taken in the following paragraphs. However, in paragraph 77(1)(b), which deals with the choice of an advertised or non-advertised process, there is no direct reference to section 33, which states that the deputy head may use an advertised or non-advertised process. There is likewise no reference to subsection 31(2), which provides: "The qualifications referred to in paragraph 30(2)(a) and

subparagraph 30(2)(b)(i) must meet or exceed any applicable qualification standards established by the employer under subsection 31(1).”

[30] In the interpretation of laws, there is a presumption that the various provisions of a statute form a logical and coherent whole (cf. Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th edition (Toronto: Butterworths, 2002), at pages 262-263). When different provisions of a statute deal with the same topic, it is presumed that they must be read together.

[31] In the case of the *PSEA*, Parliament has expressly linked section 36 and subsection 30(2) because they deal with the same topic. Paragraph 77(1)(a) also refers to subsection 30(2). These provisions, when read together, form a logical and coherent whole.

[32] The Tribunal concludes that Parliament, in paragraph 77(1)(a) of the *PSEA*, is referring to abuse of authority by the deputy head in the exercise of his or her duties, namely the exercise of discretion in choosing and using the assessment methods which are covered by the expression “the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head,” indicated in paragraph 30(2)(a) of the *PSEA*. There is no indication here that recourse under section 77 of the *PSEA* is not allowed. The Tribunal therefore cannot accept the respondent’s argument on this point.

2. Section 37 of the *PSEA*:

[33] There is no specific reference linking paragraph 77(1)(a) and section 36, while paragraph 77(1)(c) of the *PSEA* does specifically refer to subsection 37(1). Is this significant, as the respondent maintains? A reading of paragraph 77(1)(c) suggests that this provision is rather particular in that it refers to a specific omission that contravenes another provision of the *PSEA*. Subsection 37(1) of the *PSEA* establishes a clear obligation, unlike section 36 of the *PSEA*, which gives discretionary authority to the deputy head:

37. (1) An examination or interview, when conducted for the purpose of assessing qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i), other than language proficiency, **shall be conducted** in English or French or both at the option of the candidate. ...

(our italics)

[34] Consequently, this section cannot be used as a basis for comparison with section 36 of the *PSEA*. The deputy head has no discretion because he or she is required to conduct an examination or interview in the candidate's language of choice.

3. Allegations excluded in the *PSEA* and Parliament's intent:

[35] The identification of a candidate's essential qualifications necessarily implies that assessment methods must be selected and used to carry out the assessment. The deputy head has all the necessary discretion to choose and use the appropriate assessment method. However, there is no indication in the *PSEA* that Parliament's intent was to exclude, from the recourse provided for in paragraph 77(1)(a) of the *PSEA*, allegations of abuse of authority in the exercise of this discretion.

[36] If Parliament had wanted to exclude allegations pertaining to the selection and use of assessment methods, it could have excluded them as it did in subsection 77(3) of the *PSEA*, for allegations relating to fraud or political influence, and in section 87 of the *PSEA* where it stipulated that no complaint may be made under section 77 in respect of an appointment under subsection 15(6), section 40, subsections 41(1) or (4), section 73 or section 86, or under any regulations made pursuant to paragraph 22(2)(a).

[37] Excluding the choice and use of the method for assessing the person to be appointed from the recourse provided for in paragraph 77(1)(a) would result in an illogical situation that would run counter to the spirit of the legislation. For example, abuse of authority could occur in choosing an assessment method that would unduly favour an individual, or in seeking to harm certain candidates or discriminate against persons on the basis of their sex, age or other prohibited

grounds. The resulting assessment, though based on a defective method, might seem completely impartial, but an abuse of authority would have occurred in the choice of method for assessing the person to be appointed. As the Tribunal has stated in *Tibbs, supra*, Parliament could not have intended to delegate the authority to act in such an outrageous, unreasonable or unacceptable manner.

[38] In light of the above, the Tribunal determines that it has jurisdiction to hear the allegations concerning abuse of authority by the respondent in the exercise of his powers and functions, including the choice and use of assessment methods.

Question II: Who must assume the burden of proof regarding the complaint made to the Tribunal?

A) ARGUMENT OF THE COMPLAINANT

[39] The complainant argues that because her allegations have been presented, the onus is henceforth on the respondent.

B) ARGUMENTS OF THE RESPONDENT

[40] The respondent claims the filing of allegations is not proof of the contents of those allegations and does not effect a reversal of the burden of proof. The respondent does not have to satisfy the Tribunal that the chosen assessment method is adequate, and even less so that it is the best. The respondent also submits that the complainant has not discharged her burden of proving abuse of authority within the meaning of section 77 of the *PSEA*.

C) ARGUMENTS OF THE PUBLIC SERVICE COMMISSION

[41] The PSC has adopted the same line of argument as the respondent regarding the burden of proof, and more specifically holds that the onus is on the complainant.

D) ANALYSIS

[42] In *Tibbs, supra*, the Tribunal determined that the party asserting abuse of authority must assume the burden of proving their assertions. In paragraphs 49 and 50 of that decision, the Tribunal noted that the general rule of evidence in civil matters should be followed:

[49] The general rule in civil courts and in arbitration hearings is that ***the party making an assertion bears the burden of proving this assertion*** rather than the other side having to disprove it. (...)

[50] (...) If the onus was with the respondent to prove that there was no abuse of authority, this would lead to a presumption of abuse of authority in all appointments, which without a doubt is not what Parliament intended. The general rule in civil matters should be followed and ***the onus rests with the complainant in proceedings before the Tribunal to prove the allegation of abuse of authority.***

(our italics)

[43] In two other decisions, namely *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014, and *Aucoin v. President of the Canada Border Services Agency et al.*, [2006] PSST 0012, the Tribunal reminded parties that the complainant must assume the burden of proof. It is not sufficient to file allegations and to argue that the respondent abused his authority in applying the merit principle. The complainant must produce convincing evidence of the abuse of authority that she is alleging.

[44] The Tribunal therefore concludes that the onus of proof is the complainant's to assume, and that she must discharge this burden if she wishes to convince the Tribunal to uphold her complaint.

Question III: Is there *res judicata* with respect to providing the rating guide to the complainant?

A) ARGUMENTS OF THE COMPLAINANT

[45] The complainant argues that her request concerning the rating guide is still relevant, and that access to this guide would have enabled her to better understand, for the purposes of her complaint, how the assessment works in

subsequent stages. She also claims that the respondent's refusal to provide her with this information is evidence of bad faith.

B) ARGUMENTS OF THE RESPONDENT

[46] The respondent submits that the issue of providing the rating guide was resolved in the preliminary decision of the Tribunal, which determined that this guide was not relevant in the present case. The respondent cites *Jolin v. Deputy Head of Service Canada*, [2006] PSST 0006.

C) ARGUMENTS OF THE PUBLIC SERVICE COMMISSION

[47] The PSC essentially makes the same arguments as the respondent.

D) ANALYSIS

[48] The Tribunal has already decided the issue of whether the rating guide should be provided in its decision in *Jolin, supra*. The onus is on the complainant to prove the relevance of the rating guide. The complainant has not raised any new facts or presented any evidence regarding the relevance of the rating guide. She has not produced any new information to support her allegation of bad faith. Consequently, the Tribunal will not deal with the matter in this decision because this issue has already been decided. The principle of *res judicata* applies.

Question IV: Did the respondent abuse his authority within the meaning of section 77 of the *PSEA* by eliminating the complainant at the stage of In-Basket Exercise 810?

A) ARGUMENTS OF THE COMPLAINANT

[49] The complainant argues that a clear and specific connection must exist between the competencies assessed by In-Basket Exercise 810 and the merit criteria.

[50] In-basket exercise 810 makes it possible to assess five specific managerial competencies, namely planning, directing, analyzing, empowering and organizing, and also the overall ability to manage, which are required in positions at the senior management level.

[51] The complainant argues that the respondent has full authority to identify the essential qualifications for the process, but has not identified the five specific competencies or the overall ability to manage in the statement of merit criteria.

[52] The complainant argues that the connection to be made among the competencies assessed by In-Basket Exercise 810 is not clear, and that the only competencies that appear clearly in the statement of merit criteria are those of “planning and organizing” [Translation]. According to the complainant, the other three competencies do not appear in the statement of merit criteria.

[53] She refers to an exchange of emails between the PPC and the human resources officer. She cites the reply of Mr. Larose, of the PSC, dated January 18, 2006, which reads as follows:

The In-Basket Exercise assesses the ability to manage, which includes the following components: Planning, Directing, Analyzing, Empowering and Organizing. Your statement of merit criteria quite closely reflects this, if we make the following connections:

Plan and organize ----- Planning and organizing

Elicit commitment ----- Directing and empowering

Strategic and analytical thinking ----- Analyzing

[Translation]

[54] Finally, the complainant argues that the selection board should have completed her assessment and allowed her to prove her competencies at the various stages in the appointment process. She argues that the respondent has not given her the opportunity to prove her competencies and is not abiding by the spirit and values of the *PSEA*.

B) ARGUMENTS OF THE RESPONDENT

[55] The respondent argues that there is an obvious connection between the choice of In-Basket Exercise 810, the nature of the position and the essential qualifications for the position. Consequently, the Tribunal should show deference regarding the connection between the wording of the qualifications established for the position in the present case and the qualifications assessed by this exercise, quite apart from the fact that this exercise is also deemed to assess the overall ability to manage.

[56] The respondent argues that the assessment methods were chosen from the outset and were applied consistently and fairly to all candidates. In particular, the respondent submits that the pass mark was set before the results obtained by the complainant and the other candidates on In-Basket Exercise 810 were known. The respondent adds that there is nothing unusual about setting the pass mark at 16/25.

[57] The respondent argues that requiring that a person pass In-Basket Exercise 810 amounts to a minimum requirement, and that failure to meet this requirement leads to the conclusion that the person does not have all the essential qualifications established for the position, at the required level. The respondent claims that he has discretion to require mandatory success at a particular stage in the assessment, even though some of the essential qualifications will be assessed in greater detail later on in the process. The respondent also claims that he could have used a different approach to assess the candidates.

[58] The respondent is not arguing that the Tribunal does not have jurisdiction to consider the assessment of a particular candidate. However, the complainant is not alleging abuse of authority in her assessment, nor is she challenging her result on In-Basket Exercise 810.

[59] According to the respondent, abuse of authority is synonymous with serious wrongdoing, and must include an aspect that is “outrageous, unreasonable or unacceptable”. Requiring that a person successfully complete an exercise relating to qualifications, failing which the person cannot be proposed for appointment, is in no way outrageous, unreasonable or unacceptable.

[60] The respondent submits that abuse of authority is a serious allegation, which cannot be made lightly, and cites the decision in *Portree, supra*. The complainant has not cited any fact, let alone produced any evidence, to show that she was not proposed for appointment because of an abuse of authority. The respondent further argues that the complainant has offered nothing but personal opinions in support of her allegations. The selection board was not influenced by any such factor as personal favouritism or bad faith.

C) ARGUMENTS OF THE PUBLIC SERVICE COMMISSION

[61] The PSC maintains that the concept of abuse of authority should not be so broadly interpreted that it exceeds the limits of the system of staffing accountability put in place by the *PSEA*. The new internal staffing system leaves no gaps in the recourse system and thus eliminates any need for a broad definition of the concept of abuse of authority.

[62] The PSC argues that for the Tribunal to find that abuse of authority has occurred, there must be facts that can be described as outrageous, unreasonable or unacceptable. A mere error or omission does not suffice.

[63] Finally, the PSC submits that the evidence must be concrete, and cannot be based on information or documents already identified as irrelevant.

D) ANALYSIS

[64] The Tribunal must determine whether the respondent has committed an abuse of authority in identifying specific competencies and the overall ability to

manage in the statement of merit criteria, in choosing and using assessment methods or in employing the multi-stage appointment process.

[65] The complainant is not alleging bad faith or personal favouritism within the meaning of subsection 2(4) of the *PSEA* or improper intention on the part of the respondent, but rather a misuse of the respondent's discretion, namely improper use of assessment methods.

[66] Abuse of authority is not defined in the *PSEA*. However, the Tribunal has dealt with the issue in detail in *Tibbs, supra*. In that decision, the Tribunal first gave a broad definition of abuse of authority:

[59] (...) A broad definition of abuse of authority in the context of the *PSEA* could, therefore, be misuse or improper use of the discretionary power in staffing processes. However, this definition is too vague to be particularly helpful.

[67] Moreover, abuse of authority is more than a mere error or omission. As the Tribunal decided in *Tibbs, supra*, it always includes improper conduct:

[66] (...) abuse of authority requires wrongdoing. Accordingly, abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority.

[68] Pursuant to paragraph 77(1)(a) of the *PSEA*, the complainant alleges that she was not appointed due to an abuse of authority when the respondent exercised his authority under subsection 30(2).

[69] In its decision in *Tibbs, supra*, the Tribunal referred to an analytical framework established by Jones and de Villars. These authors have identified five categories of abuse found in the jurisprudence. The first category identifies improper intention, while for the four others there can be abuse of authority without improper intention. These categories have been adopted by a number of courts and administrative tribunals throughout the country, in particular in the following decisions:

- *Tucci v. Canada (Revenue, Excise, Customs and Taxation)*, [1997] F.C.J. No. 159 (QL); (1997) 126 F.T.R. 147 (Federal Court);
- *Shell Canada Ltée v. Canada (Attorney General)*, [1998] 3 F.C. 223; [1998] F.C.J. No. 369 (QL) (Federal Court);
- *Lakeland College Faculty Assn. v. Lakeland College*; [1998] A.J. No. 741; [1998] ABCA 221 (Alberta Court of Appeal);
- *Nova Scotia (Human Rights Commission) v. Annapolis (County)*, [2005] N.S.J. No. 469 (QL) ; [2005] NSSC 310 (Nova Scotia Supreme Court);
- *Delivery Drugs Ltd. (c.o.b. Gastown Pharmacy) v. British Columbia (Deputy Minister of Health)*, [2006] B.C.J. No. 893 (QL) (British Columbia Supreme Court);
- *Allad v. Treasury Board (Transport Canada)*, [1995] C.P.S.S.R.B. No. 27 (QL); (1995) 27 PSSRB 8.

[70] Consequently, as indicated in *Tibbs, supra*, these categories are well established and reflect the jurisprudence on the issue:

[70] (...) Jones & de Villars, *supra*, have identified five categories of abuse found in jurisprudence. As the learned authors note at page 171, these same general principles of administrative law apply to all forms of discretionary administrative decisions. The five categories of abuse are:

1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).
2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).
3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).
4. When the delegate exercises discretion on an erroneous view of the law.
5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

[71] These aspects of abuse of authority and the categories of abuse enable the Tribunal to examine the arguments advanced by the parties.

1. Identification of specific competencies and overall ability to manage in the statement of merit criteria:

[72] The complainant is attempting to convince the Tribunal that the respondent acted on inadequate material, thus committing the second type of abuse in not clearly identifying the five specific competencies (planning, directing, analyzing, empowering and organizing) and the overall ability to manage in the statement of the merit criteria. However, a reading of the statement of merit criteria reveals rather that the specific competencies and the overall ability to manage are clearly stated therein:

Essential qualifications

(...)

Recent significant experience in planning and directing multidisciplinary large teams, initiatives, programs or projects (national or regional) ***in the field of human resources.***

Significant experience in managing human and financial resources.

Experience in strategic planning and developing operational frameworks and work plans.

Significant experience in providing advise and recommendations to senior executives concerning human resources policies, programs and other complex issues.

Knowledge of current trends, policies and practices in the field of human resources.

Knowledge of Service Canada's organization and operational priorities.

Evaluate and improve the service.

Plan and organize.

Elicit commitment.

Thinking that is strategic and ***analytic.***

(...)

[Translation]

(our italics)

[73] Apart from “empowering”, all the other competencies are clearly indicated. Although the term “empowering” does not appear as such, the Tribunal has no reason to doubt the expertise of the PPC, which considers the essential qualification “elicit commitment” [Translation] to be equivalent to the components “directing and empowering”.

[74] The Tribunal cannot find that this association between the essential qualification and the components of the In-Basket Exercise amounts to improper conduct that is equivalent to abuse of authority. As the Tribunal stated in *Tibbs, supra*, the Tribunal will only intervene in cases of serious error or omission or where there is improper conduct amounting to abuse of power.

[75] The Tribunal concludes that the respondent acted on adequate material and, in the statement of merit criteria, clearly identified the five specific competencies and the overall ability to manage.

2. Connection between the competencies assessed by In-Basket Exercise 810 and the statement of merit criteria:

[76] The Tribunal understands, from the complainant's arguments, that her elimination from the appointment process represents for her an unfair outcome, given the choice of the In-Basket Exercise, which she regards as in itself an unreasonable action and an example of the third type of abuse.

[77] Section 36 of the *PSEA* provides that the deputy head may use any assessment method that he or she considers appropriate in an internal appointment process. For the Tribunal to find that there was abuse of authority in the selection of the assessment methods, the complainant must prove that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria, or are discriminatory.

[78] In the Tribunal's view, there is a clear connection between the statement of merit criteria and In-Basket Exercise 810. The statement of merit criteria concerns a position of national human resources project manager. As for In-Basket Exercise 810, the PSC Web site documents that the respondent sent to the Tribunal show that this exercise is designed to assess "the important aspects of a management job." The documents on the record show that In-Basket Exercise 810 is relevant.

[79] Furthermore, when the statement of merit criteria was being prepared, one of the respondent's human resources officers contacted the PSC to gather information on In-Basket Exercise 810. The statement of merit criteria was reviewed by the PSC to determine whether In-Basket Exercise 810 could be used, and the PSC found that it could. The PSC even suggested a pass mark. The respondent thus relied on the expertise of the PSC before choosing In-Basket Exercise 810. It would be hard to characterize this way of proceeding as an error, a serious omission or improper conduct tantamount to abuse of authority. On the contrary, the conduct in question is well-considered.

[80] The Tribunal concludes that the choice of In-Basket Exercise 810 did not produce a result that was unfair for the complainant, and is not tainted by abuse of authority.

3. Use of the "In-Basket Exercise 810" assessment method:

[81] The complainant alleges that her elimination from the appointment process is unfair due to the use of the In-Basket Exercise, which she says was applied in an unreasonable manner, this being the third type of abuse.

[82] All candidates, without exception, were subject to In-Basket Exercise 810, and all the candidates had to obtain the pass mark to go on to the next step in the assessment. A human resources officer indeed indicated, in her email of March 6, 2006 inviting the complainant to participate in In-Basket Exercise 810:

(...)

Please note that the pass mark has been set at 16/25 for this process. Only candidates that obtain this pass mark will go on to the next step in the process.

(...)

[Translation]

[83] The pass mark was set before In-Basket Exercise 810 was administered. Furthermore, the selection board made a mistake regarding the pass mark, which was initially supposed to be 17.5/25, or 70%, and which ultimately was

16/25, or 64%. This mistake benefited all the candidates, who had to complete the exercise successfully by obtaining a lower pass mark than originally planned. In spite of this mistake, the selection board used the erroneous pass mark, out of a concern for fairness to the candidates.

[84] In using In-Basket Exercise 810, the respondent treated all the candidates in the same way. There is no impropriety for the Tribunal to consider. In fact, the only mistake that the respondent made, which was to indicate a pass mark of 16/25 instead of 17.5/25, benefited all candidates and was applied to them all.

[85] The Tribunal concludes that the use of In-Basket Exercise 810 did not produce an unfair result for the complainant and is not tainted by abuse of authority.

4. Subsequent steps in the appointment process:

[86] The complainant argues that her elimination from the appointment process is an unfair result for her, since she was unable to proceed with the subsequent steps in the process, and that this in itself amounts to an unreasonable action, which is the third type of abuse.

[87] All the candidates had to go through the same stages in the appointment process. They were all treated in the same way. Furthermore, the complainant had been informed that only candidates who obtained the pass mark would go on to the next step in the process. This approach was used for the other candidates, including the five other candidates who were eliminated.

[88] The respondent may conduct an assessment in several stages. Requiring successful completion of a particular step in the assessment process does not necessarily imply abuse of authority. In the present case, there is nothing improper about this approach.

[89] The Tribunal concludes that the multi-stage assessment of the candidates did not produce an unfair result for the complainant and is not tainted by abuse of authority.

DECISION

[90] For all these reasons, the complaint is dismissed.

Francine Cabana
Member

PARTIES OF RECORD

Tribunal File:	2006-0068
Style of Cause:	<i>Chantal Jolin and Deputy Head of Service Canada, as part of the Department of Human Resources and Social Development et al.</i>
Hearing:	Paper hearing
Date of Reasons:	March 27, 2007