



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0240

OTTAWA, SEPTEMBER 24, 2007

CHARLES BARKER

COMPLAINANT

AND

THE DEPUTY MINISTER OF HEALTH CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER Request for order for provision of information

DECISION The request is granted

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION English

INDEXED *Barker v. Deputy Minister of Health Canada et al.*

NEUTRAL CITATION 2007 PSST 0039

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Charles Barker, has asked the Public Service Staffing Tribunal (the Tribunal) to order the respondent, the Deputy Minister of Health Canada, to provide him with certain requested information.

BACKGROUND

[2] In August, 2006 the complainant applied on an internal advertised appointment process for the position of Manager, Ontario Operations Centre at the SG-SRE-07 group and level: selection process 06-NHW-ON-IA-029.

[3] The complainant, along with other candidates, was screened in and wrote a series of tests prepared by an outside consulting firm. These tests are the PsyMax Solution Inventory, Business Thinking Inventory, and the Business Option Inc. In-Basket test. By letter dated October 13, 2006 the complainant was informed that he was not being considered further in this appointment process as he had failed to achieve the required 66% pass-mark for the In-Basket test.

[4] On November 29, 2006 the complainant filed a complaint to the Tribunal under section 77 of the *Public Service Employment Act*, S.C. 2003, ss. 12, 13 (the *PSEA*) concerning this appointment process. His allegations were filed on March 12, 2007.

[5] The complainant alleges that he was not appointed by reason of abuse of authority in establishing and/or applying the merit criteria and also by reason of discrimination based on age.

[6] On April 17, 2007 the complainant filed this request for an order for provision of information which the respondent refused to provide. The information requested is as follows:

1. All assessment tools used during the selection process including, but not limited to, the In-Basket test, the Business Thinking Inventory test, the Psymax Solution Inventory test and interview questions;
2. The marking key (scheme) for all assessment tools;
3. All of the candidates' answers and results throughout the selection process;
4. All correspondence with Compass relating to the development of tests and relating to the selection process.

[7] In its response to the request for an order for provision of information, the respondent submitted that the request is untimely and that the information is not relevant. The respondent also submitted that, should the Tribunal decide otherwise, conditions should be put in place to safeguard the integrity of the testing material.

ISSUES

[8] The Tribunal must decide the following issues:

- (i) Is the complainant's request untimely?
- (ii) Is the information requested relevant to the complaint?
- (iii) If so, should the order be subject to conditions?

ARGUMENTS OF PARTIES

COMPLAINANT'S SUBMISSIONS

[9] With respect to the timeliness of his request, the complainant submits that he has made the request for this information on numerous occasions since January 8, 2007. The respondent informed him on March 1, 2007 that it would not be providing this information.

[10] The complainant submits that the requested information is relevant to his allegation of difference in treatment. The complainant alleges that candidates in

the selection process were treated differently based on a prohibited ground of discrimination, namely, age.

[11] The complainant states that several questions in the assessment tests implied the existence of a limitation, specification or preference on the prohibited ground of age. He says that, of the five candidates who wrote the tests, the two oldest candidates were eliminated from the appointment process, and the remaining three are approximately 15 years younger than him.

[12] In addition, the complainant submits that age may have been a factor used by the consulting firm when it scored the candidates. In support of his submission, the complainant refers to a portion of the respondent's reply in which the respondent states that the candidates' answers "were submitted in a sealed envelope directly to the consulting firm, who (sic) was responsible for gathering the demographic information for their research and marking the assessments."

[13] As the complainant explains in his submissions, he is alleging that age was either considered in the selection process, or that the questions, albeit possibly unintentionally, discriminated against older candidates.

[14] The complainant submits further that the requested information is relevant since the qualifications of the other candidates, particularly the successful candidate, will need to be considered for the purposes of the human rights analysis of the complaint. The complainant relies on human rights caselaw such as *Israeli v. Canadian Human Rights Commission* (1983), 4 C.H.R.R. D/1616, in support of his submission that this information is required for the purposes of meeting his burden of proof with respect to the complaint.

[15] The complainant submits further that there would be no prejudice to the respondent in the disclosure of this information. In fact, he states that as early as October 2006, he was advised by his manager and a member of the selection board that there should be no problem in providing him with a copy of his assessment.

[16] The complainant relies on the Tribunal's decisions in *Oddie v. Deputy Minister of National Defence et al.*, [2006] PSST 0009 and *Renkema v. Commissioner of the Correctional Service et al.*, [2006] PSST 0015, in support of his position that other candidates' information can be ordered disclosed in order to argue allegations of difference in treatment.

[17] The complainant submits that the provision of some of the requested information, namely, the candidates' answers to the In-Basket test "demographic" questions and the correspondence with Compass relating to the development of the test and the selection process would have no effect on 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.

[18] Finally, the complainant submits that should the Tribunal determine that some or all of the requested information may "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," then, pursuant to subsection 17(5) of the *PSST Regulations*, the Tribunal should exercise its discretion and order the provision of information subject to any conditions that it deems appropriate.

RESPONDENT'S SUBMISSIONS

[19] The respondent submits that the request is untimely. According to the respondent, the complainant should have made his request for an order when he was informed by the respondent on March 1, 2007 that it would not be providing him with the requested information. Instead, the complainant allowed the exchange of information period to close, and filed his allegations on March 12, 2007 to which the respondent replied on March 27, 2007.

[20] The respondent submits that, by filing this motion, the complainant is attempting to change and expand the nature and scope of the original complaint and allegations which, if granted, would result in significant prejudice to the

respondent and be contrary to the *PSEA* and the *Public Service Staffing Tribunal Regulations* (the *PSST Regulations*), SOR/2006-6.

[21] Moreover, the respondent argues that the information is not relevant. The respondent states that the three tests were written together for administrative efficiency, but that the Business Thinking Inventory and the Psymax Solution Inventory tests were only scored for those candidates who passed the In-Basket test. Since the complainant did not pass the In-Basket test, the tests and the marking scheme, information related to other candidates' results in respect of these tests, and any correspondence between the respondent and Compass relating to the development of these tests and to the selection process are not relevant.

[22] Finally, the respondent states that it has provided the complainant with information which clearly indicates that no identifying data was shared with the assessment board as to the age of the candidates and that any such data was for the consultant's statistical purposes only, and to be disclosed on a voluntary basis, and, therefore, formed no part of the test scoring process. Candidate information was not shared with the assessment board until the interview stage, which took place for those candidates who passed the In-Basket test. The complainant did not pass the test.

[23] The respondent requests that, if the Tribunal does determine that the information is relevant and must be disclosed, strict conditions be placed on disclosure to protect the ongoing viability and integrity of these standardized tests to ensure that no party obtains an unfair advantage by having access to the tests. The respondent proposed the following conditions be placed on the order:

1. All exchange of information pertaining to the test contents must take place on the employer's premises, under the supervision of the departmental representative.
2. No copy, photocopy or reproduction of the above documents is to be allowed.
3. The complainant and his representative should be allowed to consult the test information during the exchange of information meeting. All test materials will have to be returned to the departmental representative at the conclusion of the meeting.

4. The complainant and his representative should be allowed to take personal notes during the exchange of information meeting, providing that such notes do not amount to a transcription of any test materials. At the end of the exchange of information meeting, all of the complainant's notes will be turned over to his/her representative who will keep them, together with his own notes, until the date set for the hearing.
5. The representative shall endeavour not to disclose information obtained to any person, except during portions of the PSST hearing when any conditions imposed under subsection 17(5) of the Regulations respecting the exclusion of persons from the hearing are in effect.
6. All materials provided for review at the exchange of information meeting shall be returned to the departmental representative at the conclusion of the meeting.

PUBLIC SERVICE COMMISSION'S SUBMISSIONS

[24] The Public Service Commission (the PSC) submits that the complainant's request is out of time.

[25] The PSC submits that the *PSEA*, the Tribunal's *Regulations*, and the Tribunal's *Procedural Guide* provide the framework for the exchange of information. The PSC suggests that, since there is a time period for the exchange of information, this exchange and any requests for the provision of information, should take place within this timeframe. Once the process for the exchange of information is completed, and the allegations are filed, the respondent and other parties should be able to rely on the allegations as a complete document in order to complete their respective replies.

[26] The PSC submits that the intent of the *PSEA* is to facilitate an expeditious and fair complaint process, and to allow requests for orders for provision of information after the close of pleadings could result in a never ending process of delays and requests for modifications.

[27] The PSC did not make submissions as to relevance.

[28] The PSC submits that this request relates entirely to the standardized tests used in this appointment process, along with information relating to the development, use and marking of some or all of these standardized tests.

[29] As such, the PSC submits that this request should be dealt with by the Tribunal in a manner consistent with how the Tribunal dealt with similar requests in *Aucoin v. The President of the Canada Border Services Agency et al.*, [2006] PSST 0012 and *Savoie v. Deputy Minister of Foreign Affairs et al.*, [2007] PSST 0010.

SUCCESSFUL CANDIDATE'S SUBMISSIONS

[30] The successful candidate provided brief submissions by email on February 2, 2007 and, again, on April 19, 2007. He strongly objects to the release of any of his answers/results collected through the selection process; he believes that this information should be protected.

ANALYSIS

Issue I: Is the complainant's request untimely?

[31] On January 8, 2007, the complainant made his first request to the respondent for this information.

[32] Having not received the requested information, the complainant filed a motion with the Tribunal on February 1, 2007 requesting an order for provision of the information. On February 8, 2007, the Tribunal issued a letter of directives to the parties denying the motion because it was premature; the parties had until February 16, 2007 to complete the exchange of information. The Tribunal informed the parties that if, at the end of the exchange of information period, the complainant still required relevant information that had not been provided, he could file a motion to request an order for provision of the information.

[33] A further letter of directives was issued by the Tribunal on February 26, 2007 granting an extension to complete the exchange of information by March 2, 2007.

[34] The complainant's allegations were filed on March 12, 2007; the respondent's reply was filed on March 27, 2007. This motion was filed on April 27, 2007.

[35] The usual procedure is for the complainant to file his motion, along with a request to extend the time for filing his allegations, soon after the close of the exchange of information period, when informed by the respondent that it will not be providing the requested information. By so doing, the complainant will be provided with the requested relevant information prior to filing his allegations.

[36] However, the Tribunal does not agree with the respondent and the PSC that the complainant's failure to bring this motion prior to filing his allegations means that he is out of time to make such a request. There is no provision in either the *PSEA* or the *PSST Regulations* that requires a request for an order for provision of information to be brought before the close of pleadings.

[37] The PSC argues that fairness requires that such a motion be confined to the exchange of information period since to allow otherwise opens the complaint process to the possibility of a never ending cycle of revisions to pleadings and further delays. The *PSST Regulations* provide for the possibility of further revisions to pleadings in sections 23 to 25 by allowing a complainant to raise new or amended allegations, and for the respondent and other parties to reply accordingly. However, a complainant can only amend or raise a new allegation on request, and with leave of the Tribunal.

[38] As the Tribunal has held in *Akhtar v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0026, at paragraph 26:

[26] There should be no element of surprise in the Tribunal complaint process and both parties should have the necessary information to address the issues raised by a complaint." While not specifically included in the *PSST Regulations*, it is important to stress that the obligation of the parties to exchange all relevant information is an on-going obligation that continues until the completion of the hearing.

[39] The Tribunal does not subscribe to the respondent's submission that, by filing the request after the completion of the exchange of information, it is

significantly prejudiced. The complainant made his original request for this information on January 8, 2007 and the respondent has known the complainant's reasons for requesting same since February 1, 2007. Moreover, as explained, if the complainant seeks to amend or raise new allegations, the respondent will have the right of further reply. The Tribunal is not satisfied that the respondent has demonstrated sufficient prejudice here.

[40] Even if the statutory framework required the complainant to bring his motion prior to the completion of the exchange of information, it would be in the interest of fairness to extend such time limit under section 5 of the *PSST Regulations*. As stated, fairness requires that there be no surprises at the hearing and that the parties have the necessary information required to address the issues raised in the complaint.

[41] For all of these reasons, the Tribunal finds that the complainant is not out of time in filing this request for an order for provision of information.

Issue II: Is the information requested relevant to the complaint?

[42] In both his complaint and his allegations, the complainant alleges that he was not appointed by reason of an abuse of authority in establishing and/or applying the merit criteria and also by reason of discrimination based on age.

[43] The complainant alleges that there were questions in the In-Basket test that "implied the existence of a limitation, specification or preference" based on age and he was asked specifically to provide his age. He claims that in the other two tests there were similar questions implying a difference of treatment based on age. He states that another candidate asked during the tests if the candidates were required to respond to the questions relating to age and that no answer was provided. He also asserts that of the five candidates who wrote the tests, the two oldest candidates were eliminated from the appointment process, and the three who went on were approximately 15 years younger than him.

[44] The complainant submits that the requested information is necessary in order for him to argue his allegation of differential treatment on the basis of age.

[45] In *Akhtar, supra*, the Tribunal held:

[38] However, as explained in *Oddie, supra*, and *Visca, supra*, in a complaint where differential treatment is alleged such as a complaint of favouritism, information related to the successful candidate is relevant to an allegation of difference of treatment and, therefore, relevant to the complaint. It is clear from the complaint that the complainant believes that he has been treated differently than the successful candidate and that this differential treatment is rooted in a pattern of favouritism concerning the successful candidate.

[46] Again, in *Akhtar, supra*, the Tribunal also confirmed that the test is one of **arguable relevance**, which requires that there be some relevance, and further explained:

[28] (...) It is important to recognize that the threshold test to establish relevance at this stage of the complaint process is broader than that at the hearing. It may be found that the information produced will lead to the realization that other information not yet produced is relevant and should be provided. As well, information produced may lead to the realization that it is not useful to the party requesting it.

[47] More recently, in *Berglund v. Deputy Minister of National Defence et al.*, [2007] PSST 0034, at paragraph 18, the Tribunal confirmed “the lower threshold in establishing arguable relevance in the context of requests for orders for provision of information.”

[48] The complainant does bear the onus of demonstrating a nexus, or clear link, between the information sought and the complaint. In this case, since the filing of his complaint, the complainant has been consistent in his allegation that he has been treated differently than other candidates in this appointment process. The crux of his complaint is that a factor in this difference in treatment involves a prohibited ground of discrimination, namely, age.

[49] The complainant was eliminated from the appointment process as he did not get the required 66% pass-mark on the In-Basket test and, consequently, the other tests that he completed were not scored. However, the complainant has established that all these tests are arguably relevant to his complaint of

discrimination as they allegedly all have questions implying a difference of treatment based on age. The Tribunal is satisfied that the complainant has demonstrated that there is a clear link between all of the information requested in this motion and the complaint. The Tribunal is also satisfied that the request is sufficiently specific that there can be no dispute as to what the complaint is requesting.

[50] Finally, the Tribunal is satisfied that, by placing appropriate conditions on the provision of this information, there will not be undue prejudice to either the respondent, other candidates, or the person appointed.

Issue III: Should the order be subject to conditions?

[51] Paragraph 17(1)(c) of the *PSST Regulations* reads as follows:

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 the 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.

[52] The respondent has relied on paragraph 17(1)(c) as a ground for its refusal to provide this information. The Tribunal accepts that all of the requested information falls under paragraph 17(1)(c) of the *PSST Regulations*.

[53] However, as the respondent, the PSC, and the complainant have all identified, the Tribunal may exercise its discretion to place conditions on the provision of information that falls within section 17 of the *PSST Regulations*.

[54] The Tribunal is satisfied that the requested information is relevant and that appropriate conditions can be placed on the provision of the information which would prevent the provision of the information from presenting the risks identified in paragraph 17(1)(c), then under subsection 17(4) the Tribunal **must** order that the information be provided.

[55] Subsection 17(5) of the *PSST Regulations* reads as follows:

17. (5) The Tribunal may make the order subject to any conditions that the Tribunal considers necessary, including any conditions that are necessary to prevent the provision of the information from presenting any of the risks referred to in paragraphs (1)(a) to (c).

[56] As the Tribunal found in *Aucoin, supra*, the Tribunal is satisfied that appropriate conditions can be placed on the provision of this information. As well, pursuant to subsection 17(6) and section 18 of the *PSST Regulations*, these conditions will apply before and after the hearing of the complaint, and this information may only be used for purposes of the complaint.

[57] The Tribunal accepts that the conditions proposed by the respondent with respect to this information are appropriate.

DECISION

[58] For these reasons, the complainant's request for provision of information is granted subject to the conditions set out in the order below.

ORDER

[59] The respondent shall provide the complainant and his representative, Simon Ferrand, an employment relations officer of the Professional Institute for the Public Service of Canada (PIPSC), with access to the following information:

1. The In-Basket test, the Business Thinking Inventory test, the Psymax Solution Inventory test and interview questions;
2. The marking key (scheme) for all assessment tools;
3. All of the candidates' answers and results throughout the selection process;
4. All correspondence with Compass relating to the development of tests and relating to the selection process.

[60] The following conditions are placed on the provision of this information:

1. Access to all of this information must take place on the respondent's premises, under the supervision of the departmental representative.
2. The respondent shall give the complainant and his representative sufficient time to review the information. The Tribunal expects that the parties will be able to arrange the required times and duration of access amongst themselves. Any difficulties in this regard can be addressed through pre-hearing telephone conference.
3. No copy, photocopy or reproduction of the information is to be allowed.
4. All information will have to be returned to the departmental representative at the conclusion of the review process. If more than one period of time is required for review, all information is to be returned to the departmental representative at the conclusion of each review session.
5. The complainant and his representative are allowed to take personal notes, providing that such notes do not amount to a transcription of any of the information. When the complainant and his representative are satisfied that they have had sufficient time to review the information, all of the complainant's notes will be turned over to his representative who will keep them, together with his own notes, until the date set for the hearing.

[61] These conditions apply before and after the hearing.

[62] Any information obtained by the complainant and his representative may be used only for purposes of the complaint.

[63] If there are issues with respect to the admissibility at the hearing of any of this information, the parties will raise these issues at the pre-hearing conference.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2006-0240
Style of Cause:	<i>Charles Barker and the Deputy Minister of Health Canada et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	September 24, 2007