



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0152

OTTAWA, APRIL 1, 2008

GOLDIE GLASGOW

COMPLAINANT

AND

DEPUTY MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA

RESPONDENT

AND

OTHER PARTIES

| | |
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| MATTER | Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i> |
| DECISION | Complaint is dismissed |
| DECISION RENDERED BY | Guy Giguère, Chairperson |
| LANGUAGE OF DECISION | English |
| INDEXED | <i>Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.</i> |
| NEUTRAL CITATION | 2008 PSST 0007 |

REASONS FOR DECISION

INTRODUCTION

[1] Goldie Glasgow works as a Project Accounting Clerk in Financial Operations, Ontario Region Finance, Public Works and Government Services Canada (PWGSC). She applied when a one year acting opportunity as a Financial Officer (FI-01) was advertised in her unit. However, she was unsuccessful and she filed a complaint of abuse of authority. Ms. Glasgow believes that she was not appointed because the appointment of the successful candidate was based on personal favouritism.

[2] Ms. Glasgow's claim of personal favouritism is essentially twofold. First, she claims that favouritism affected the appointment process as the successful candidate, Ms. Tsang, had been given opportunities for training that were not extended to others. The complainant alleges that this job training opportunity gave an advantage to Ms. Tsang. Secondly, she claims that the successful candidate was assessed more leniently than herself.

[3] The complaint was filed with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*), on October 6, 2006 (process no: 2006-SVC-ACIN-ONT-92902).

[4] The respondent, the Deputy Minister of Public Works and Government Services denies that there was any abuse of authority concerning this appointment. The respondent states that the complainant was not found to meet the essential qualifications, and that all candidates were evaluated in a consistent manner.

ISSUES

[5] To resolve this complaint, the Tribunal must determine the following issues:

(i) Did the successful candidate get an opportunity for training that was not extended to others? Did this on-the-job training give an advantage in the written test to the successful candidate?

(ii) If so, does this constitute personal favouritism?

(iii) Did the selection board assess the complainant's answers differently from those of the successful candidate?

(iv) If so, does this constitute personal favouritism?

SUMMARY OF RELEVANT EVIDENCE

[6] Monica Lam, Chief, Expenditure Accounting, Finance, Finance Operations, Ontario Region testified on behalf of the respondent. She explained that in the Expenditure Accounting Unit (unit) there are two employees at the FI-01 group and level, and two teams of six to seven employees at the CR-04 group and level. The nature of the work is expenditure accounting which is processing payments.

[7] In April, 2006 Ms. Lam was planning for future requirements for the unit and she identified training needs for employees. Ms. Lam sent an email on April 24, 2006 to employees in the unit to inform them of her plan to create some on-the-job training opportunities in certain accounting functions. The purpose of the on-the-job training was to assist employees in their career development or to acquire certain skills. She pointed out that these short-term on-the-job training opportunities would be assigned at level and that participants would remain in their positions. The email indicated that employees "interested in assuming responsibilities with more challenges" were to reply by April 26, 2006.

[8] Eight employees, including the complainant, replied with expressions of interest. In her April 24, 2006 email response, the complainant noted that she had been doing some post-payments audits, and wondered whether she would also be receiving training in this function. Ms. Lam testified that she got the impression from this comment that Ms. Glasgow did not need post-payments audit training.

[9] On April 28, 2006, Ms. Lam sent a follow-up email to employees in the unit. She informed those interested in the on-the-job training that time would be scheduled to meet individually to discuss the opportunity. She indicated that the on-the-job training opportunity was not an offer or guarantee of promotion. Rather, it was an opportunity to gain experience beyond one's day-to-day duties. She specified that participants might

be assigned to functions that required in-depth accounting knowledge, and would need to have this knowledge prior to the assignment.

[10] She also stated in the second paragraph of this email that, on May 1st 2006, Teresa Tsang would be assigned to train on functions related to the National Verification Framework (NVF) post-payment audit and reporting. During this period, Ms. Tsang's duties would be shared by Cynthia Gurango and Doris Chen. David Saporta would take over Ms. Gurango's current duties. She concluded by stating that the Expenditure accounting team's workload has been reduced. Accordingly, current work distribution would be reviewed and employees should be ready to rotate functions.

[11] Ms. Lam explained that Thomas Wong, a Financial Officer in the unit, at the FI-01 group and level, was responsible for doing work on the NVF which consisted of auditing payments that were already made. Headquarters would send samples to be audited and after reviewing these against a checklist, a report would be submitted. Mr. Wong needed help in pulling out payments, making copies and preparing the report. Ms. Tsang was assigned to help him in these functions.

[12] Ms. Lam testified that the email addressed two distinct matters. The first paragraph related to the on-the-job training, and the second paragraph dealt with the reassignment of duties.

[13] Ms. Lam was asked in examination-in-chief if she had a discussion with Ms. Tsang, Mr. Saporta and Ms. Gurango prior to sending this second email. She replied that the discussion was not on the on-the-job training, but on the second part of the email that dealt with the reassignment of duties. Ms. Lam explained that Ms. Tsang was scheduled for four months vacation leave beginning in June 2006 and Ms. Lam wanted to plan for someone to do her job while she was away. As well, Ms. Tsang would have time before she left on vacation to help Mr. Wong with the NVF function. The plan was that when Ms. Tsang returned from vacation, Ms. Gurango would go on an assignment.

[14] Ms. Lam was asked in examination-in-chief if she had a discussion with Ms. Glasgow prior to sending the second email. Her answer was that both Ms. Gurango and Mr. Saporta had expressed their interest for on-the-job training prior to the second email. In cross-examination, she explained that everyone who had indicated their interest was offered an opportunity, albeit in a variety of ways such as training or mentoring. The opportunity given to Ms. Tsang was available at the time. When Mr. Wong left, the NVF functions were assigned to another unit and could no longer be assigned to an employee in the unit.

[15] Ms. Lam did meet later with Ms. Glasgow and asked her to take on other functions which would give her exposure to different skills. According to Ms. Lam, Ms. Glasgow said that she would think about it, but did not pursue this opportunity. Ms. Lam also suggested areas of improvement with day-to-day tasks.

[16] Jason DiBiase, a Financial Officer in the unit was granted education leave in the summer of 2006. Ms. Lam testified that she had no knowledge of this request when she sent the emails on the on-the-job training opportunity. The education leave created an acting opportunity in the unit. On August 15, 2006 an email was sent by Karen Fleck, Acting Regional Director Finance, to employees of Ontario Region Finance, PWGSC, informing them of an acting F1-01 opportunity in the unit. There were three candidates who were tested. They were all from the unit in positions at the CR-04 group and level.

[17] Both the complainant and the successful candidate provided their résumé when they applied for the acting FI-01 position. These show that Ms. Glasgow is currently enrolled in a Public Administration Degree Program and that Ms. Tsang is pursuing a Certified General Accountant (CGA) designation.

[18] Ms. Glasgow testified that she believed from the outset that Ms. Tsang would be appointed to the acting FI-01 position, as she had performed some of the functions of the FI-01 position such as reconciliation and auditing during the on-the-job training. She is not claiming that there was a personal relationship such as friendship between Ms. Lam and Ms. Tsang. She feels that if she had been given the same on-the-job training opportunity, she would have had a better chance to be successful in the

appointment process. However, it was the fair thing to do for the respondent to advertise the acting position and therefore she applied.

[19] The duration of the written test was supposed to be three hours; however, candidates were given only two and a half hours. They all failed the test. The selection board corrected the situation by making some modifications for the last parts of the test. In Part III, question 3 was partially removed and question 4 was removed and replaced by a question in the oral interview. In Part IV, which tested the ability to communicate effectively in writing, candidates were asked to answer two additional questions.

[20] The complainant provided testimony related to each question where she made allegations that she was underscored. Specifically, she gave evidence on the following aspects in the written test: Part I, questions 2 and 4 on the knowledge of auditing techniques; Part II, questions 1, 3 and 4 on the ability to interpret and apply financial policies. The complainant described how information was missing in Part II, question 3 of the written test. As such, she could not include this information in her answer and was underscored by 5 points. The complainant also gave evidence on the following from the oral test: Part I, question 1 relating to knowledge of the *Financial Administration Act*; and, Part II, questions 2 and 5 on knowledge of government accounting practices.

[21] The complainant also testified that she believed the successful candidate was given points that she should not have received; specifically, in the written test at Part I, questions 1(a) and (b), and Part II, question 1, and in the oral test at Part I, question 1.

[22] The complainant was asked in cross-examination if there were any questions in the test relating to the NVF. She indicated that it was question 3 in the oral interview questions, as the document used in the account verification process is similar to the document used in the NVF. She answered this question based on how she does this in her own job. She received 10 out of 15 points for this question while Ms. Tsang received 15 points. She agreed that a candidate could get a passing mark whether they had experience in the NVF or not.

[23] Ms. Lam testified and explained the marking for each of the questions where the complainant had made allegations of unfairness. She explained how the selection board strived to give marks to the complainant for reasonable answers. She also explained why marks were given for Ms. Tsang's answers to the questions in dispute as outlined by the complainant above.

[24] Ms. Lam testified that there were no questions in the test related to the NVF. She explained that the questions in the test on the ability to reconcile financial data were related to the day-to-day payments processing function that every employee of the unit should have the ability to perform. Whereas the NVF is an audit task done quarterly on samples that are provided by headquarters.

[25] Royal Senter, a member of the selection board, also testified. He explained that the final marks were a joint effort. The board worked on consensus to assess the answers of the candidates. He explained that, after they realized that insufficient time was given to the candidates to complete the written test, the last questions were modified to give the most advantage to all candidates.

[26] Ms. Tsang was the only candidate to pass all the essential qualifications and to be found qualified. She was appointed for a term of one year, but eventually went on maternity leave. She was not replaced as there was no pool of qualified candidates.

LEGISLATION

[27] This complaint was filed under paragraph 77(1)(a) of the *PSEA*, which refers to the criteria for making an appointment on the basis of merit at subsection 30(2) of the *PSEA*. These provisions should be read together, and are 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);

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.

[28] Abuse of authority is not defined in the *PSEA*; however, subsection 2(4) provides the following:

2. (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.

Issues I and II: Did the successful candidate get an opportunity for training that was not extended to others? Did the on-the-job training give an advantage in the written test to the successful candidate? If so, does this constitute personal favouritism?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[29] The complainant submits that her allegations of personal favouritism are tied to having been treated unfairly. Values of fairness and transparency in the *PSEA* were not reflected in this appointment process. According to Ms. Lam's April 24, 2006 email, employees who were interested in the on-the-job training opportunity were to reply by April 26, 2006. Ms. Lam's announcement two days later that Ms. Tsang would train on functions related to the NVF demonstrates that the decision to assign her was predetermined. The evidence is uncontested that Ms. Tsang was the only employee who was assigned any on-the-job training

[30] The complainant also submits that the on-the-job training provided to Ms. Tsang gave her an advantage in the written test that constituted personal favouritism.

B) RESPONDENT'S ARGUMENTS

[31] The respondent provided written submissions on abuse of authority. One of its arguments is that abuse of authority must include some element of improper intention. Abuse of authority is not defined in the *PSEA*; however, under subsection 2(4), it includes bad faith and personal favouritism. Therefore, the respondent submits that some improper intention is required.

[32] The respondent argues that the limited class rule applies. It relies on *Walker v Ritchie*, [2006] 2 S.C.R. 428, where the Supreme Court of Canada adopted this rule in determining legislative intent. Under this rule, the scope of the general term (abuse of authority) would be limited to a class to which the specific terms (bad faith and personal favouritism) belong. Therefore, it submits that a finding of abuse of authority requires an element of improper intention.

[33] With specific reference to the circumstances of this complaint, the respondent argues that the rotational training assignments were not continued because of the departure of the Finance Officer on education leave. As well, the respondent submits that the evidence establishes that the opportunity related to the NVF function was given to another group after Ms. Tsang had been given the opportunity and, as such, could no longer be assigned to an employee in Ms. Lam's unit.

[34] The respondent also submits that the complainant failed to establish that any questions asked in the assessment for the acting appointment pertained to the on-the-job training opportunity for which Ms. Tsang was selected. As well, the complainant's résumé indicated that she had been doing reconciliation of all hold-back liabilities since July 1990.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[35] As it has done in previous complaints, the Public Service Commission (the PSC) provided written submissions on the concept of abuse of authority. It argues that abuse of authority requires an element of improper intention. However, when serious

carelessness or recklessness is established, as in *Finney v Barreau du Québec*, [2004] 2 S.C.R. 17, bad faith may be imputed.

ANALYSIS

[36] While the *PSEA* does not define abuse of authority, it certainly includes personal favouritism. Subsection 2(4) states that “[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.”

[37] The respondent submits that the limited class rule should be applied to interpret subsection 2(4). The limited class rule, as explained by Rothstein J., writing for a unanimous court, “is helpful in determining legislative intent when a court is faced with a list of items followed by a general term” (see: *Walker v. Ritchie*, at page 9 QL). In *National Bank of Greece (Canada) v. Katsikonouris* [1990] 2 S.C.R. 1029; [1990] S.C.J. no. 95 (QL) at paragraph 11, the Supreme Court of Canada found that when a general term precedes an enumeration of specific examples, it would be illogical to apply the limited class rule.

[38] Therefore the limited class rule cannot be applied in the interpretation of subsection 2(4) since the general term (abuse of authority) precedes the specific terms (bad faith and personal favouritism).

[39] Moreover, the words “*for greater certainty*” found at the beginning of subsection 2(4) are placed there for a purpose. Parliament referred specifically to bad faith and personal favouritism to make certain that there would be no argument that these improper conducts constitute abuse of authority. It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament’s intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.

[40] Bad faith and personal favouritism are some of the most serious forms of abuse of authority which the public service as a whole should diligently strive to prevent. When it does occur, all necessary action should be taken to correct the abuse. Clearly, the purpose of subsection 2(4) is to ensure that there is no argument that these

improper conducts constitute abuse of authority. See, e.g., Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at 180-182. For all those reasons the Tribunal finds that the limited class rule has no application in the interpretation of subsection 2(4) of the *PSEA*.

[41] Where there is a choice among qualified candidates, paragraph 30(2)(b) of the *PSEA* indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organisational needs. The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

[42] The complainant argues that there is circumstantial evidence establishing personal favouritism in this case. First, the complainant submits that the successful candidate was the only employee to benefit from any on-the-job training, and this opportunity was provided because of personal favouritism. The complainant is claiming that this opportunity helped the successful candidate in answering questions in the assessment for the acting FI-01 appointment. Ms. Lam denied that this was on-the-job training, and testified that it was only a reassignment of duties.

[43] The respondent made an objection at the beginning of the hearing to the admissibility of documents related to the on-the-job training. It argued that these documents were not relevant to the complaint as the on-the-job training opportunity was not related to the appointment. However, the Tribunal dismissed the respondent's objection, and allowed this documentation to be admitted. The documentation is relevant as it could be circumstantial evidence establishing a pattern of personal favouritism.

[44] Evidence of personal favouritism can be direct, such as facts establishing clearly the close personal relationship between the person selecting and the appointee. However, it will often be a question of circumstantial evidence where some action,

comments or events prior to, and during, the appointment process will have to be reviewed. Depending on its source and its particular relation to the issues in a complaint, circumstantial evidence can be as convincing as direct evidence. As Morley R. Gorsky, S.J. Uspich & Gregory J. Brandt, *Evidence and Procedure in Canadian Labour Arbitration* (Toronto: Thomson Carswell, 1994) state, at page 13-5:

Circumstantial evidence can lead to as thorough a sense of surety as does direct evidence. Indeed, circumstantial evidence can sometimes be more convincing than direct evidence. The convincing power of circumstantial evidence usually lies in the weight of many circumstances added together.

[45] As well, an analysis of the credibility of witnesses may be required where there is conflicting evidence. The Tribunal is faced with two versions of the nature of the opportunity offered to Ms. Tsang. As such, the Tribunal must establish which of these two versions is more credible. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), the test to be applied when credibility is at issue is well-established. The following passage from *Faryna*, at p. 357, sets out the test to apply as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[46] Thus, the Tribunal must determine which version is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in the circumstances.

[47] Ms. Lam's April 28, 2006 email followed-up on her April 24, 2006 email. Its subject title was "FW: On job training opportunities." It stated that Ms. Tsang is assigned to train on functions related to NVF, post-payment audit and reporting from May 1 to June 9, 2006. This matches the description of the on-the-job training opportunities found in the first email of April 24, 2006. The first email specified that the assignment would be for a short-term period (four to six weeks) to train in certain accounting functions such as post-payment audits and reporting. It is reasonable to assume that this was an on-the-job training opportunity in accounting functions.

[48] This opportunity did involve the reassignment of duties for several employees; nevertheless, it was an on-the-job training opportunity for Ms. Tsang. As well, Ms. Lam testified that she sent the email so that employees would know that she would still offer them "assistance even if they are not chosen." A practical and informed person would readily recognize that the preponderance of probabilities is that this was an on-the-job training opportunity as described in the first email. Ms. Lam did confirm that it was not offered to other employees because of the reassignment of the NVF functions to another section. The Tribunal, therefore, finds that this was an on-the-job training opportunity that was not extended to others.

[49] However, the respondent did provide convincing evidence that no personal favouritism was tied to or derived from this on-the-job training opportunity. The April 24, 2006 email stated that the employees' job performance, academic background and operational requirements would be determinative as to who would be assigned which functions, and at what time. The April 28, 2006 email also explained that employees were required to have in-depth accounting knowledge prior to being assigned some on-the-job training.

[50] Ms. Lam explained in her testimony that she had concerns with the complainant's ability and knowledge in dealing with some of the day-to-day tasks, and that she met with the complainant and suggested areas of improvement. Ms. Lam also got the impression from Ms. Glasgow's reply to the April 26, 2006 email that she did not need post-payments audit on-the-job training.

[51] There was additional relevant evidence presented at the hearing. Ms. Tsang was scheduled to be on leave for four months beginning in June 2006. Given this timing, she was available to be assigned before she left to assist Mr. Wong with the NVF function. Ms. Tsang was also enrolled in an accounting program aimed at achieving her CGA designation. This educational pursuit would have provided her with in-depth accounting knowledge and the academic background referred to in the April 28 email. Strangely, Ms. Lam did not testify to this; instead, she tried to explain that Ms. Tsang's assignment to the NVF was not an on job-training opportunity.

[52] This evidence does not support a finding that Ms. Tsang was chosen for this on-the-job training opportunity because of personal favouritism. Rather, the preponderance of evidence is that Ms. Tsang was assigned to this on-the-job training opportunity because of her academic background, accounting knowledge and operational requirements.

[53] As well, the complainant did not establish that any questions in this appointment process were related to the NVF. The questions on the ability to reconcile financial data were related to day-to-day functions performed in the unit to process payments. Thus, the Tribunal cannot substantiate the allegation of an unfair advantage in the appointment process derived from the on-the-job training.

[54] In conclusion, the Tribunal does find as a fact that Ms. Tsang was given an opportunity for training that was not extended to others in the unit. However, for all the reasons set out above, the Tribunal does not find that the on-the-job training that was offered to the successful candidate constitutes personal favouritism.

Issues III and IV: Did the selection board assess the complainant's answers differently from those of the successful candidate? If so, does this constitute personal favouritism?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[55] The complainant submits that a close examination of the manner in which both the successful candidate and the complainant were marked reveals that they were marked with different criteria. The complainant argues that the successful candidate was marked more leniently.

[56] She also submits that when the selection board adjusted the marking scheme, the adjustments only favoured Ms. Tsang since she was the only candidate who was successful. The selection board could have adjusted the complainant's scores as she narrowly failed in two of the three essential qualifications.

B) RESPONDENT'S ARGUMENTS

[57] The respondent submits that the complainant has failed to establish that the marking was inconsistent. The respondent further submits that the complainant has not challenged the fact that the successful candidate is qualified and meets the merit criteria.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[58] The PSC submits that the following test should apply to establish personal favouritism in the marking of a test. The complainant must show that there were discrepancies in the marking or assessment of the candidates which were to the advantage of the successful candidate. The complainant must also prove that the discrepancies are of such a serious magnitude and recurring nature that the discrepancies would lead the Tribunal to conclude that personal favouritism had occurred. The PSC argues that the discrepancies cannot simply be errors or omissions; they must be clear and serious to constitute abuse of authority.

ANALYSIS

[59] Under the former PSEA, the ground for appeal was that relative merit was not achieved, that is, that the most qualified candidate had not been chosen. To determine merit answers had to be rated and ranking was mandatory. Parliament moved away from that prescriptive staffing process and, instead, adopted individual merit as the basis for an appointment. Merit is now defined at subsection 30(2) of the *PSEA*, and public service managers have significant flexibility to staff.

[60] The Tribunal has in numerous complaints observed that this flexibility is not used and former practices of rating answers and ranking candidates are still used to select the person who is appointed. Unfortunately, there seems to be a perception by some that these former practices are still necessary to establish how the selection is based on merit and not an abuse of authority. This is not the approach that is envisioned at paragraph 30(2) (a) of the *PSEA* where managers have the discretion to choose, from among qualified applicants, the person who in the manager's judgment is the **right fit**.

Furthermore, paragraph 30(2) (b) indicates that this discretion could be exercised on the basis of additional asset qualifications, operational requirements and organisational needs.

[61] The flexibility provided by the *PSEA* could help shorten the time needed to staff and better ensure that positions are staffed according to operational requirements and organisational needs. With changing demographics affecting the job market, it is even more important that the public service adopt modern staffing practices.

[62] However, this persistence in using former staffing practices does not, in and of itself, constitute abuse of authority. When managers choose to revert to these former staffing practices, the Tribunal will review their application to determine whether or not there was an abuse of authority in their application. See: *Visca* at paragraph 44; and, *Akhtar v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0026, at paragraph 42-44.

[63] When a complainant alleges that there has been differential treatment, such as personal favouritism or bias, in the marking of the answers to a test or the ranking of candidates, the Tribunal where appropriate, will examine how marks were awarded, or the order of the ranking. The Tribunal will review the evidence to make a determination as to whether the allegation of differential treatment leads to the conclusion of abuse of authority and, thus, a substantiated complaint.

[64] The Tribunal values the PSC's submissions in terms of what constitutes an appropriate test. However, the test proposed by the PSC may not be broad enough. There might be situations where one serious error in marking or ranking would be conclusive evidence of abuse of authority. There could also be a series of errors, which taken individually would not be conclusive of differential treatment; yet, the weight of all these errors taken together could lead to a finding of differential treatment.

[65] As the Tribunal's jurisprudence has established, the burden is on the complainant to prove on a balance of probabilities that there was abuse of authority. If the evidence of differential treatment is such that the Tribunal can conclude that it is

more probable than not that there was abuse of authority, then the burden is discharged.

[66] There was no ranking of candidates in this complaint as there was only one candidate that was found qualified. However, answers were marked and the Tribunal determined in the circumstances of this complaint, that it was appropriate to review how marks had been awarded.

[67] Information was missing in the written test so that candidates were unable to provide a required answer. The respondent agrees that five marks were not given to candidates, which meant that the complainant did in fact meet the essential qualification of ability to interpret and apply financial policies. The Tribunal does find that there was an error which meant that the complainant did meet this essential qualification. However, there were still two other essential qualifications that the complainant failed to meet. Notwithstanding this error in the application of the assessment tool, the Tribunal is not satisfied that the complainant has proven any differential treatment. The evidence is clear that this error affected all candidates equally.

[68] The second error concerned the duration of the written test. The selection board corrected the situation by making some modifications to the last parts of the test. The complainant claims that these modifications only helped the successful candidate to meet the essential qualifications.

[69] The Tribunal reviewed the candidates' marks and finds that there is no evidence to substantiate this claim. On the contrary, a close examination of the marks reveals that all candidates were helped by the modifications. The complainant and the successful candidate passed the essential qualification of ability to communicate because of the supplementary questions on the ability to communicate effectively in writing. As for the question in the oral interview replacing question 4, it helped both the complainant and the successful candidate; they were given marks of 17.5 and 21 respectively. The complainant still did not achieve the pass mark of 50 out of a total of 100 marks for the ability to reconcile financial data; she had 28 marks in total as she received only 10.5 out of 50 marks in the written test for this essential qualification.

[70] The Tribunal has also reviewed all the evidence for the answers where the complainant alleges that she was underscored, or where she claims other improprieties. The Tribunal finds that Ms. Lam's testimony provided a valid and reasonable explanation for the marking of those answers. The answers provided by the successful candidate were more complete than those of the complainant. The cross-examination of this witness did not reveal any inconsistencies on this aspect of the complaint; her explanations as to the marking, and the allocation of marks related to the questions at issue were straightforward and reasonable. In addition, Mr. Senter explained how the selection board arrived at its final marks for each of the candidates; they worked on a consensus basis to assess the answers of the candidates, and assign the corresponding marks.

[71] The Tribunal finds that the marking was consistent for both candidates. There is no evidence to support the allegation that the complainant was assessed differently than the successful candidate.

DECISION

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

Guy Giguère
Chairperson

PARTIES OF RECORD

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| Tribunal File: | 2006-0152 |
| Style of Cause: | <i>Goldie Glasgow and the Deputy Minister of Public Works and Government Services Canada et al.</i> |
| Hearing: | October 1 and 2, 2007 Toronto, Ontario |
| Date of Reasons: | April 1, 2008 |
| APPEARANCES: | |
| David Cunning | For the complainant |
| Caroline Engmann | For the respondent |
| John Unrau | For the Public Service Commission |