



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2007-0074, 2007-0085 AND 2007-0103

OTTAWA, APRIL 1, 2008

COLLEEN HAMMOND, WILLIAM WESTCOTT AND GENEVIEVE GIBBONS

COMPLAINANTS

AND

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

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaints of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
DECISION	Complaints are dismissed
DECISION RENDERED BY	Merri Beattie, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Hammond et al. v. Deputy Head of Service Canada et al.</i>
NEUTRAL CITATION	2008 PSST 0008

REASONS FOR DECISION

INTRODUCTION

[1] Colleen Hammond, William Westcott and Genevieve Gibbons failed to qualify in an internal advertised appointment process to staff various Regional Consultant positions at the PM-04 group and level in Service Canada. Each of them failed to meet one essential qualification. One reference was obtained for each of the complainants as part of the assessment process. They contend that they were not appointed because of an abuse of authority since the assessment board relied on incomplete reference information. Ms. Hammond and Mr. Westcott also contend that two Service Canada managers abused their authority because they refused to provide references for them. Each of the complainants is seeking a reassessment of the essential qualification that he or she failed. They ask that new references be used to reassess merit.

BACKGROUND

[2] In February 2007, Ms. Hammond, Mr. Westcott and Ms. Gibbons each filed a complaint 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*). All three complainants allege abuse of authority by the respondent, the Deputy Head of Service Canada, in assessing their qualifications.

[3] The Tribunal consolidated these complaints for the purpose of hearing in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*).

ISSUES

[4] To resolve these complaints the Tribunal must determine the following issues:

(i) Did the respondent abuse its authority by assessing the complainants based on inadequate information?

(ii) Is it an abuse of authority under paragraph 77(1)(a) of the *PSEA* for a manager to decline to provide a reference for an employee?

Issue I: Did the respondent abuse its authority by assessing the complainants based on inadequate information?

[5] Complainants are required to prove, on a balance of probabilities, allegations of abuse of authority. Abuse of authority is not defined in the *PSEA*. However, in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, the Tribunal identified a framework which sets out five categories of abuse that are found in jurisprudence. While this framework is a guide, it is useful for the parties, in terms of organizing their respective arguments, and for the Tribunal's analysis of the complaint. The Tribunal may determine that a complaint is substantiated on the basis of one or more of these categories of abuse. The applicable category of abuse to be considered in these complaints is the following: "When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters)."

ARGUMENTS AND RELEVANT EVIDENCE OF THE PARTIES

[6] The summary marking sheet for each complainant, related to the qualification he or she failed to meet, was introduced as evidence at the hearing. The written comments on the summary marking sheets are very brief and, in each case, indicate that only some aspects of the qualification were addressed in the reference provided. The complainants argue that the assessment board relied on these incomplete references and, therefore, assessed them based on inadequate material. The complainants claim that this constitutes abuse of authority.

[7] The complainants rely on a Public Service Commission Appeal Board decision, *Penney* (05-CSD-00146), rendered under the former *PSEA*. In *Penney*, an Appeal Board found, in similar circumstances, that the selection board did not ensure that the assessment tool produced the information required to establish relative merit because only one referee was used, and there was no attempt made to clarify, verify or expand upon the referee's statements. In support of its decision, the Appeal Board cited *Madracki v. Canada* (1987), 72 N.R. 257, [1986] F.C.J. No. 727 (Q.L.) (F.C.A.).

[8] The respondent argues that the assessment board was satisfied that it had the information necessary to assess the complainants. Based on the testimony of Mr. Wayne McCarthy, Regional Manager, Insurance Services, who was the chairperson of the assessment board, the qualifications in question were assessed based on candidates' interview responses and references. Mr. McCarthy explained that narrative ratings for the interview responses and references were combined for an overall narrative rating of the qualification. The assessment board then determined a mark within the scale for that narrative rating, based on the pre-established scoring guide. According to Mr. McCarthy, there was no formula used to combine the narrative ratings. The assessment board members considered the candidates' oral responses and their references, and applied their judgement to arrive at consensus on an overall rating and a mark.

[9] Mr. McCarthy testified that all referees were given a definition of the qualification to be assessed, a list of the attributes and behaviours associated with the qualification, and instructions to provide comments on how the candidate has demonstrated the qualification, with supporting examples. He stated that there was no requirement to provide comments for each attribute or behaviour. While some referees did comment on each point, other referees provided more global input. Mr. McCarthy testified that the assessment board did not go back to seek further clarification on any of the candidates' references. He acknowledged that the comments on the summary marking sheets were made some time after the assessments and do not reflect all of the discussion and assessment that took place. According to Mr. McCarthy however, the assessment board had sufficient information to properly assess the candidates.

[10] The Public Service Commission (the PSC) did not attend the hearing, but submitted its arguments and authorities in writing. As it has done in previous complaints, the PSC provided general submissions on the concept of abuse of authority and how the Tribunal should focus its approach in this area.

[11] With respect to these complaints, the PSC submits that in *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014, and in *Gilbert v. Commissioner of the Royal Canadian Mounted Police et al.*, [2007] PSST 0040, the Tribunal found that

an assessment board does not have to obtain more than one reference. Moreover, the board has the discretion to decide if it has sufficient information to properly assess candidates.

[12] The PSC also submits that here, as in *Oddie v. Deputy Minister of National Defence et al.*, [2007] PSST 0030, the reference was not the deciding factor. Information from the reference was combined with the complainant's response to the oral interview question to determine an overall rating of the candidate for the particular qualification.

ANALYSIS

[13] The key principle established in *Madracki* is that an assessment tool must test the qualification; if not, the assessment is unreasonable. Although the *Madracki* decision predates the current legislative framework, the principle remains valid. However, it is not applicable in these complaints.

[14] The assessment tool at issue in these complaints is the reference check. There is no allegation or evidence before the Tribunal that the tool itself, the written instructions provided to the referees, was flawed or inadequate. In fact, the instructions to the referees for the qualifications at issue here were not even produced for the Tribunal, much less called into question. None of the referees testified before the Tribunal and no evidence was produced to suggest any misunderstanding of the reference instructions, or any bias on the part of the referees. In short, there is simply no evidence to support a finding that the assessment tool, the reference check, was incapable of properly testing the qualification found to be wanting for each complainant.

[15] While the Appeal Board in *Penney* relied on the *Madracki* decision, its finding was related to the application of the assessment tool rather than the tool itself. The application of an assessment tool continues to be an essential element of assessment however; the *Penney* decision was made in the context of the requirement to appoint the most qualified candidate. Under the former PSEA, appointments had to be based on this principle of relative merit. The PSEA does not require that appointments be based on relative merit (see *Visca v. Deputy Minister of Justice*, [2007] PSST 0024). In

these cases, there were no representations that relative merit was used as the basis for appointment.

[16] This Tribunal has established that assessment boards are not compelled by any Act or regulation to contact more than one referee, nor does using only one reference, in and of itself, constitute abuse of authority (see: *Portree* and *Gilbert*). There is also no established requirement to follow-up and clarify a reference and an assessment board has the discretion to decide whether it has enough information to make an informed decision regarding a candidate's qualifications. However, these findings should not be interpreted as leave to assess candidates with inadequate information. Further, it is the role of the Tribunal to consider complaints and determine whether there was any abuse of authority in the conduct appointment process.

[17] The assessment board's notes on the complainants' summary marking sheets were brief to the point of being of little value. A more complete record of the assessment discussion and decisions would certainly have been more helpful for the consideration of these complaints. Not only is this good practice, in this staffing system of broad latitude for discretion, it is very important that decisions can be explained comprehensively, sometimes several weeks or months after the fact.

[18] However, the evidence before the Tribunal is that the assessment board based its assessments on two sources of information; candidates' responses to an oral interview question and one reference. Based on the evidence, the two sources of information produced similar results. The complainants' oral interview answers were assessed as poor or fair; insufficient to meet the qualification. The complainants' references were assessed as fair; also insufficient to meet the qualification. The board members could have gone back to the referees for more information but, according to Mr. McCarthy, they felt that they had enough information. The fact that the information from both sources was consistent supports that position.

[19] There is no compelling evidence to support a finding that the assessment board did not have the requisite information to make informed decisions on the complainants' qualifications.

[20] An allegation of abuse of authority is a very serious matter and the onus lies on the complainants to prove abuse of authority. When all the evidence is considered, the complainants' evidence is not sufficient to convince the Tribunal that it is more probable than not that the assessment board abused its authority by assessing the complainants based on inadequate information.

Issue II: Is it an abuse of authority under paragraph 77(1)(a) of the *PSEA* for a manager to decline to provide a reference for an employee?

[21] The complainants, the respondent and the PSC have all focused on whether a manager has an obligation to provide a reference for an employee. Ms. Hammond and Mr. Westcott argue that it is part of a manager's responsibility to provide a reference for an employee; consequently, if a manager declines, this constitutes abuse of authority. The respondent argues that there is no obligation for a manager to provide a reference. The PSC concurs. It submits that there is no Act, regulation or policy compelling a manager or, for that matter, anyone to provide a reference for an employee.

[22] The complainants and the respondent made only a brief reference to the *PSEA* in their arguments on this issue, and the PSC made no reference at all. The complainants simply state that abuse of authority under section 77 of the *PSEA* encompasses the actions of any delegate of the Deputy Head in the exercise of his or her responsibilities within a staffing process. The respondent argues that, if there was an obligation, the failure of a manager to provide a reference would be reviewable by the employer, not the Tribunal.

[23] These complaints have been filed under paragraph 77(1)(a) of the *PSEA*. This provision provides an employee with a right to make a complaint to the Tribunal on the grounds of "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)." For the purposes of these complaints, the relevant part of subsection 30(2) reads:

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 (...)

[24] Under subsection 30(2) deputy heads can establish qualifications. The PSC or the deputy head, when delegated, is authorized to determine whether a person is qualified; in other words, to assess people. Practically speaking, these authorities are exercised by managers and assessment board members. Accordingly, an allegation of abuse of authority under paragraph 77(1)(a) is limited to those exercising the authority to establish qualifications and assess candidates.

[25] There are no arguments or evidence before the Tribunal linking providing a reference with establishing qualifications. Therefore the Tribunal must determine whether the two managers who refused to provide references were exercising the delegated authority to assess candidates. The evidence before the Tribunal is that managers who provided references contributed information which was used by the assessment board, but, in doing so, these managers did not assess candidates.

[26] Mr. McCarthy's testimony concerning the assessment of Ms. Hammond illustrated this separation of the role of the referees from that of the assessment board. One of the assessment board members provided Ms. Hammond's reference. Mr. McCarthy testified that the board member submitted a written reference which was discussed by the board members, who then agreed collectively on a rating for Ms. Hammond.

[27] Further confirmation of this separation of roles is found by comparing the written references with the assessment board's ratings of the complainants based on those references. While the written references for each complainant do contain positive comments such as "very good", "good", "dealt with professionally", "strong working relationships," and "high level of ...," the assessment board rated each complainant in the fair range on the qualification. Thus, what the evidence shows is that the assessment board used the information provided in the references to help it assess candidates, but did not allow the referees to assess the candidates. In short, the reference check was used for what it was meant to be used for, namely, as a tool to assist the board in its assessment.

[28] Mr. McCarthy is one of the managers who refused to provide a reference for one of the complainants. There is no evidence that the other manager who refused to provide a reference was involved in the appointment process in any way. The Tribunal finds as a fact that the referees were not assessing candidates when they provided their written references; the references were used by the assessment board as a tool to assist it in assessing the candidates. Thus, in declining to provide a reference, neither Service Canada manager was performing an assessment function.

[29] Based on the evidence, the Tribunal therefore finds as a fact that the two Service Canada managers were not exercising any authority in this appointment process under subsection 30(2) of the *PSEA* when they declined to provide references. Their refusal is not subject to a complaint of abuse of authority under section 77 of the *PSEA*.

[30] The complainants raised one other concern that deserves comment. They submit that the assessment board determined that informal discussion would only be used to explain why they were unsuccessful, which contravened their rights. The complainants believe that informal discussion should have been used for the purpose of making any corrections to their assessments. However, since it was not established to the Tribunal's satisfaction that there were errors or oversights in the assessments that warranted consideration for correction, it is not necessary for the Tribunal to address this issue.

DECISION

[31] For the above reasons, the complaints are dismissed.

Merri Beattie
Member

PARTIES OF RECORD

Tribunal Files:	2007-0074, 2007-0085 and 2007-0103
Style of Cause:	<i>Colleen Hammond, William Westcott and Genevieve Gibbons et al. and the Deputy Head of Service Canada as part of the Department of Human Resources and Social Development et al.</i>
Hearing:	November 5 and 6, 2007 St. John's, NL
Date of Reasons:	April 1, 2008
APPEARANCES:	
Brian Richey	For the complainants
Neil McGraw	For the respondent
Lili Ste-Marie	For the Public Service Commission