



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007-0254

OTTAWA, JULY 11, 2008

EMILIJA CHAREST

COMPLAINANT

AND

THE DEPUTY MINISTER 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	Complaint is dismissed
DECISION RENDERED BY	Helen Barkley, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Charest v. Deputy Minister of Human Resources and Social Development et al.</i>
NEUTRAL CITATION	2008 PSST 0019

REASONS FOR DECISION

INTRODUCTION

[1] Emilija Charest participated in an advertised appointment process for the position of Senior Advisor, Executive Committees (AS-05) in the Department of Human Resources and Social Development (HRSDC), Gatineau, Québec. She contends that the Deputy Head of HRSDC (the respondent) abused its authority by personally favouring one of the selected candidates and by demonstrating bias against her in the assessment of her abilities.

BACKGROUND

[2] The complainant started to work at HRSDC in 1999 and became an indeterminate employee in 2002. In November 2005 she joined the Corporate Secretary Branch and began performing the duties of Senior Advisor (AS-05) on an acting basis. She was brought into the Branch on assignment by Carole Lafontaine, Manager, Executive Committees.

[3] An advertised appointment process was held to staff two vacancies and to establish a pool for positions of Senior Advisor. Two candidates were proposed for appointment, Natalie Bélanger and Michelle Légaré. During the assessment process the complainant was found not to have met the essential qualification “ability to manage own time”. She filed a complaint under paragraph 77(1(a) of the *Public Service Employment Act*, S.C. 2003, ss.12,13 (the *PSEA*) on June 5, 2007.

ISSUES

[4] To resolve this complaint, the Tribunal must address the following issues:

- (i) Did the respondent abuse its authority by personally favouring Ms. Bélanger in the appointment process?
- (ii) Did the respondent abuse its authority in the assessment of Ms. Charest’s abilities?

SUMMARY OF RELEVANT EVIDENCE

[5] The complainant testified that she had a serious conflict with her supervisor, Ms. Lafontaine, between June and August 2006. Ms. Lafontaine had asked the complainant to train Ms. Bélanger, another acting Senior Advisor, and she also asked the complainant to edit all documents going to Executive Committees. The complainant thought about the request, and declined the editing task, saying it was not in her job description. According to the complainant, Ms. Lafontaine told her she was being insubordinate. The complainant met with the Director General and also the Assistant Deputy Minister to confirm that she was not required to edit the documents.

[6] The complainant indicated that she did edit some of Ms. Bélanger's work. They attended Executive Committee meetings together, and the complainant made suggestions as to what should be highlighted from the meetings. However, she refused to correct Ms. Bélanger's grammar and spelling.

[7] The complainant testified that, since that time, Ms. Lafontaine has treated her differently. For example, she was not provided with a Senior Coordinator to work with her at Executive Committees.

[8] It was also alleged that Ms. Bélanger was favoured by being given two off-site retreats to coordinate during the summer of 2006. The complainant was not given this opportunity.

[9] The appointment process was advertised in October 2006. Ms. Lafontaine, the delegated manager, testified that she decided to run an advertised process for the position of Senior Advisor because her unit had a high turnover and she was hoping to establish a pool of qualified candidates. The Senior Advisor position is responsible for the overall coordination of committee meetings involving the Deputy Minister and Assistant Deputy Ministers (ADMs). Senior Advisors confirm agenda items and meeting times, follow-up with presenters, attend meetings, take notes and ensure records of decision are issued.

[10] Ms. Lafontaine explained that she worked closely with her Human Resources Advisor, Shalla Askari-Farahani, to conduct the appointment process. Ms. Askari-Farahani did the initial screening of candidates on area of selection and then Ms. Lafontaine assessed for education and experience. Ms. Lafontaine prepared a written examination and decided to conduct interviews with candidates. In developing the questions, she worked closely with Ms. Askari-Farahani, who lent her a binder of sample questions for abilities. The interview question which assessed the “ability to manage own time” was taken from that binder. Once the assessment tools were complete, they were sent to Ms. Askari-Farahani for review.

[11] The complainant stated that she had performed the duties of Senior Advisor for about one year when she applied in this advertised appointment process. She believed she had all the qualifications to be the successful candidate. One of her colleagues, Ms. Bélanger, informed her that she thought she and the complainant would be the successful candidates.

[12] The complainant stated that Ms. Bélanger knew more about the appointment process than the other two internal candidates, the complainant and Louise Desjardins. Ms. Belanger informed them of the date of the written examination, the composition of the assessment board, and that there was a fourth candidate, Michelle Légaré, whose written examination was postponed as she was on holidays.

[13] Ms. Desjardins, another candidate in the appointment process, testified that she, the complainant and Ms. Bélanger all applied for the position of Senior Advisor. Ms. Bélanger announced to the other two candidates the date of the written examination. Neither the complainant nor Ms. Desjardins had been so advised.

[14] In a similar fashion, Ms. Bélanger informed them of who was going to be on the assessment board.

[15] Ms. Desjardins also testified that Ms. Bélanger and Ms. Lafontaine were often together.

[16] In February 2007, the complainant accepted an assignment with Cabinet Affairs in another branch of HRSDC. The complainant liked her work in this assignment and hoped to be put into an AS-05 pool from the Senior Advisor process, and then be deployed to Cabinet Affairs.

[17] A short time before the complainant's oral interview she met Zdenka Custic, who was working in the office of the ADM, Human Resources. She told Ms. Custic that she was no longer working in Executive Committees and essentially, that her former manager, Ms. Lafontaine, "could take the job and shove it". Very shortly thereafter, she was informed that Ms. Custic would be one of the members of the assessment board. The complainant immediately contacted Ms. Askari-Farahani and informed her that there were issues between the complainant's family and Ms. Custic's, and that she did not feel Ms. Custic could be objective.

[18] Ms. Askari-Farahani informed Ms. Lafontaine of this situation, and the fact that the complainant was not comfortable with Ms. Custic on the assessment board. Ms. Lafontaine immediately replaced Ms. Custic with Suzanne Laviolette, Executive Assistant, Deputy Minister's Office. Ms. Lafontaine testified that she liked to have three people on the board to do interviews, including a Human Resources Advisor, to take down the responses and ensure the process is fair.

[19] The interview consisted of four questions, one of which assessed the ability to manage one's own time. Candidates were given the questions 30 minutes in advance and allowed to bring notes into the interview. In terms of the fourth question, candidates were to demonstrate their ability to manage their own time with short deadlines, as this is the reality of the Senior Advisor, Executive Committees job.

[20] The question used to assess the ability to manage one's time reads as follows:

Tell us about a situation where you had to handle a number of service requests with very tight deadlines. How did you manage these requests and complete them within the established deadlines?

Please provide the name of a reference who can confirm the answer.

[21] Ms. Charest indicated that not all of her answer to this question was recorded by the assessment board. The board told her she had mentioned only one timeframe, but in fact she mentioned the project had a two-year timeframe and also described the one-year pilot project. She had also indicated she worked with timeframes on a daily basis. It seemed that the board did not like her example, which was a project that she and Ms. Lafontaine had both worked on. The first time she discussed this question after she was eliminated, the board member told her she had failed because she described a two-year project. During a second discussion she was told that it was because she described a group project, not an individual one.

[22] Ms. Lafontaine stated that Ms. Charest's response to the fourth question had been to describe a very large two-year project, and the various elements of the project such as correspondence, coordination and documentation. However, she did not show how she accomplished her deadlines and what her role in the project was. She did not demonstrate how she actually managed her time. She was probed twice and responded first, that timelines were met on a daily basis and, second, that the project was completed within the two-year timeframe.

[23] After the interview was completed, the three assessment board members discussed the complainant's answer to this question. Ms. Lafontaine was careful to let the other board members express their views first. Ms. Lafontaine had been informed (by Ms. Bélanger) that Ms. Charest had said that if she did not qualify, there would be a major grievance.

[24] Ms. Askari-Farahani stated that in her view Ms. Charest's response to question 4 was not a good answer. In her testimony, Ms. Laviolette indicated that she agreed. The board members took the time to go over the answer again to ensure they had not missed anything. Ms. Lafontaine testified that she was very surprised at the complainant's answer, as she had been acting in the position for some time and she knew the job well.

[25] Although candidates were asked for a reference to verify their answers during the interview, Ms. Lafontaine stated that in no case did they go to the references given for

verification of answers. It was not part of the evaluation of candidates. In her opinion, there was no need to contact the referees to corroborate what the candidates had said.

[26] Ms. Askari-Farahani testified that she was a Human Resources Advisor with HRSDC from November 2005 to November 2007. In that capacity she reviewed the rating guide created by Ms. Lafontaine for the assessment of all qualifications. She also provided some tools to Ms. Lafontaine, including a binder which had definitions and expected elements for certain abilities, as well as sample questions. The other board member for the interviews, Ms. Laviolette, did not prepare anything.

[27] Ms. Askari-Farahani was contacted by the complainant prior to the interviews. She did not know how the complainant knew that Ms. Custic was on the assessment board, as only she, her assistant and Ms. Lafontaine knew. However, when questioned on cross-examination, she stated that she would not mind sharing that information with a candidate, as it did not give anyone an advantage.

[28] Ms. Askari-Farahani was a member of the assessment board, but participated as an observer. However, she did indicate that she provided input for the assessment, although she did not participate in the marking of candidates. In terms of Ms. Charest's answer to the fourth interview question, Ms. Askari-Farahani stated that the answer was off-track, and it was impossible to give her a passing mark, as she did not answer the question posed.

[29] Ms. Askari-Farahani confirmed that it often happens that an assessment board member provides a reference for a candidate. She confirmed that Ms. Lafontaine assessed all the references for candidates. Most of the referees provided references by email. If Ms. Lafontaine provided a reference herself for one of the candidates, she still would have to follow the established rating guide. In terms of Ms. Bélanger, Ms. Lafontaine provided the reference and assessment in writing.

[30] Ms. Lafontaine acknowledged that she and Ms. Charest had had a disagreement in the summer of 2006, but they had resolved it. She felt they had a good working relationship.

[31] Ms. Lafontaine had made two requests of the complainant, who was a good writer and a good editor. Ms. Lafontaine asked her if she would vet all records of decision to ensure a high quality. She believed the complainant enjoyed editing and would like to undertake this task. The complainant indicated to her that she would like to think about that request.

[32] The second request was to coach Ms. Bélanger, who had just been placed in an acting Policy Advisor position. While Ms. Bélanger was a good writer, she had not been attending Executive Committee meetings and did not know what management expected in a record of decision. This coaching would be similar to what Ms. Lafontaine had done with Ms. Charest when she started in the position.

[33] The day following the meeting, the complainant came to see Ms. Lafontaine. According to Ms. Lafontaine, the complainant was visibly upset and appeared to be offended by the two requests that had been made. Ms. Charest indicated that she did not want to edit the records of decision and did not want to teach Ms. Bélanger how to write. Ms. Charest left the room and went to see the Director General.

[34] They met again and Ms. Charest indicated that if Ms. Lafontaine was asking her to review Ms. Bélanger's work, the answer was no. However Ms. Charest did accompany Ms. Bélanger to four meetings and reviewed the records of decision, although she did not correct any grammatical errors.

[35] Ms. Lafontaine then prepared a letter of expectation and delivered it to Ms. Charest on July 18, 2006. Shortly thereafter, Ms. Charest apologized for how she had acted.

[36] Subsequently, the complainant and Ms. Lafontaine met to complete Ms. Charest's learning plan which went well. Ms. Charest's assignment with Executive Committees was renewed for another one year period, but Ms. Charest left before it was completed.

[37] In terms of off-site retreats, one retreat had been coordinated by Stéphanie Doyon in November 2006. Ms. Bélanger may have been at an off-site retreat, but there was no coordination role on-site. The employee was there to receive emails and facsimile messages.

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[38] The complainant contends that Ms. Bélanger was personally favoured by Ms. Lafontaine, the delegated manager for this appointment process. Ms. Charest and Ms. Desjardins, another candidate in the process, testified that Ms. Lafontaine and Ms. Bélanger were often together at work. Furthermore, Ms. Bélanger knew more than the other two candidates about the appointment process.

[39] Ms. Lafontaine not only developed the statement of merit criteria, she completed all the assessments of candidates herself, except for the interviews. This included screening candidates for experience and education, marking the written examination, and assessing all the reference checks that were done. In the case of Ms. Bélanger, she was also the referee, and thus assessed the information she had provided.

[40] In addition, the complainant alleges that the manager abused her authority by not completing the assessment process she developed. She did not verify the abilities through the reference checks requested. According to the complainant, this was especially important for Ms. Légaré, who was from another unit and unknown to Ms. Lafontaine.

[41] Finally, it was Ms. Bélanger who informed Ms. Lafontaine that Ms. Charest had threatened to present a major grievance if she did not qualify in the appointment process.

[42] According to the complainant, Ms. Lafontaine also demonstrated personal bias against her. Ms. Lafontaine admitted there was a conflict between the complainant and herself. Given this, she chose not to withdraw from the process but, in fact, completed the appointment process almost entirely herself. She prepared the written examination,

the oral interview and reference checks. She conducted the entire assessment by herself, except for the interview. Prior to the interview, Ms. Lafontaine was informed by Ms. Bélanger that, if unsuccessful, the complainant would file a grievance. The complainant submits that the ethical and appropriate course of action would have been to withdraw as the chairperson of the process to ensure there was a fair assessment.

[43] In terms of the assessment, Ms. Lafontaine asked questions which required verification by referees, but she did not check references to verify that candidates had done what they said. The complainant submits that this amounts to abuse of authority by relying on inadequate material. Particularly in the case of Ms. Légaré, who the assessment board did not know, the board did not confirm that she had the abilities she discussed during the interview. The complainant states that the failure to verify references is evidence of improper intention. The complainant submits that if the board never intended to check references they should not have asked for them.

B) RESPONDENT'S ARGUMENTS

[44] The respondent argues that the complainant has not established personal favouritism in the appointment process. First, the manager ran an advertised process, not a non-advertised process. She involved the Human Resources Advisor at all steps. There were two other persons on the interview panel. There is no evidence to show that Ms. Bélanger was not qualified for the position. The respondent submits that the complainant's arguments amount to vague allegations of personal favouritism, but no actual evidence has been presented. While Ms. Bélanger knew the date of the written examination and the composition of the assessment board, the Human Resources Advisor testified that this was general information that could have been given to anyone.

[45] The complainant performed very well on the written examination. In fact, she received a better mark than Ms. Bélanger, the person she alleges was personally favoured by Ms. Lafontaine.

[46] The respondent notes that Ms. Lafontaine was quick to replace Ms. Custic when the complainant registered an objection to her participation on the assessment board.

[47] In addition, the respondent states that the complainant was assessed in the same way as other candidates. The only variation was that Ms. Lafontaine asked the other board members to speak first in their assessment of the complainant. She did not want to influence them. The assessment board explained what they were looking for in the fourth question, and the complainant did not meet the established criteria.

[48] In terms of the complainant's suggestion that Ms. Légaré was not qualified for the position, the respondent asserts that the complainant did not present any evidence to demonstrate this.

[49] Essentially, the respondent submits that the complainant is disappointed she did not qualify in this appointment process. However that is not enough to substantiate an allegation of abuse of authority. While the complainant referred to a history of conflicts with Ms. Lafontaine, the evidence establishes there was only one incident.

[50] The respondent referred to the Tribunal's decision in *Carlson-Needham and Borden v. Deputy Minister of National Defence et al.*, [2007] PSST 0038, a case in which the chair of the assessment board had also acted as a referee. In that case, the Tribunal held:

[52] In order to be successful in a complaint alleging personal favouritism in an advertised appointment process, a complainant must appear before the Tribunal with convincing evidence demonstrating personal favouritism and not merely make an allegation based on perceptions and irrelevant facts.

[51] In terms of the assessment of candidates, Ms. Lafontaine decided to ask some behaviour-based questions. According to the respondent, it is quite common to ask for references to verify a candidate's response. However there is no obligation on a manager to contact the referee if they feel they have enough information.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[52] The Public Service Commission (PSC) did not appear at the hearing. As it has done in previous complaints, the PSC provided general written submissions on the concept of abuse of authority and how the Tribunal should focus its approach in this area.

ANALYSIS

Issue I: Did the respondent abuse its authority by personally favouring Ms. Bélanger in the appointment process?

[53] In *Tibbs v. Deputy Minister of National Defence et al.* [2006] PSST 0008, the Tribunal held that complainants have the burden of proof with respect to complaints of abuse of authority before the Tribunal. They must prove their case on the balance of probabilities.

[54] The complainant alleges that the manager in this case abused her authority by showing personal favouritism towards the appointees. The Tribunal has recently provided guidance on the concept, and the evidence necessary to demonstrate personal favouritism. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.* [2008] PSST 0007, the Tribunal held:

[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.

[41] (...) 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.

(Emphasis in text)

[55] In *Glasgow*, the Tribunal stated that personal favouritism may be proved through either direct or circumstantial evidence:

[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. (...)

[56] The complainant argues that the appointment of Ms. Bélanger was based on personal favouritism. The evidence presented in support is as follows. The complainant and Ms. Desjardins both testified that the manager and Ms. Bélanger were often together. In the summer of 2006 an opportunity was given to Ms. Bélanger to organize two off-site retreats. Ms. Bélanger had information about the appointment process prior to the other two internal candidates, Ms. Charest and Ms. Desjardins. For example, Ms. Bélanger knew before anyone was officially informed the following information: the date of the written examination, the name of the members of the assessment board and that there was another candidate who was on holidays when others wrote the examination.

[57] In addition, Ms. Lafontaine provided a reference for Ms. Bélanger. The complainant argued that Ms. Lafontaine had total control of the appointment process and conducted all of the assessment by herself, except for the interviews with the candidates.

[58] Finally, the complainant indicated that she was asked to teach Ms. Bélanger how to write in the summer of 2006. By implication, this evidence casts doubt on Ms. Bélanger's qualifications.

[59] The Tribunal finds that there is insufficient evidence to conclude that the appointment of Ms. Bélanger was based on personal favouritism. The evidence of a personal relationship between Ms. Bélanger and Ms. Lafontaine was that they were often together at work, which would seem, at a minimum, to indicate that they got along well. While the complainant alleged that Ms. Bélanger was personally favoured by being given responsibility for two off-site retreats, the evidence does not support this. One retreat was coordinated by another employee, and Ms. Lafontaine testified that duties on-site were clerical in nature. It is clear that Ms. Bélanger had information about the appointment process before the other internal candidates. However, there is no evidence that this information would provide any advantage to Ms. Bélanger in the assessment process, and no further evidence of personal favouritism in this process.

[60] With respect to the argument that Ms. Lafontaine conducted almost all of the assessment process herself, the Tribunal discussed the composition of an assessment board in *Sampert et al. v. Deputy Minister of National Defence*, [2008] PSST 0009:

[53] There is no provision in the *PSEA* which requires a deputy head to establish an assessment board or that it have a certain composition (for example, to have a human resources officer on the board). Whether an assessment board is improperly constituted is a question of fact which depends on the specific complaint and the evidence presented at the hearing.

[54] Those who conduct the assessment should be familiar with the work required in the position to be staffed and, in the case of an advertised appointment process, should not have with any preconceived notions as to who should be appointed. In some cases, managers will choose to conduct the assessment completely on their own. In other cases, a manager might invite an individual from another department or another area within the department, who has a particular expertise, to participate as a board member.

[61] In this case the delegated manager, Ms. Lafontaine, chose to develop the assessment tools, with the assistance of her Human Resources Advisor. The interviews were conducted with two other board members. Ms. Lafontaine waited for them to give their opinion of the complainant's answers prior to commenting herself. While Ms. Lafontaine conducted the rest of the assessment herself, the complainant has failed to produce cogent evidence that there was an abuse of authority in the assessment of Ms. Bélanger. There was no evidence presented that could lead the Tribunal to find that she was not qualified for appointment, or that her appointment was proposed on the basis of personal favouritism.

[62] As a final note, the complainant did allege that personal favouritism was also a factor in the decision to appoint Ms. Légaré. However, there is absolutely no evidence that Ms. Lafontaine even knew Ms. Légaré prior to this appointment process, or that there was any personal connection between them through a third party. The Tribunal therefore concludes that the complainant has not established abuse of authority through personal favouritism towards Ms. Bélanger or Ms. Légaré.

Issue II: Did the respondent abuse its authority in the assessment of Ms. Charest's abilities?

[63] With respect to the second allegation, that the respondent abused its authority by a biased assessment of the complainant's abilities, the evidence shows there was a

disagreement between Ms. Lafontaine and the complainant in the summer of 2006. The complainant testified that she was treated differently after that incident. She stated that she was not provided with a Policy Coordinator to assist her with committee work, but there was no other elaboration of what this meant and why this was evidence of bias. She also stated that she was marginalized by the fact that Ms. Bélanger was given the opportunity to coordinate both off-site retreats held in the summer of 2006. This statement was not accompanied with any further evidence as to what the coordination entailed or how this constituted evidence of bias against the complainant. Indeed, the evidence of Ms. Lafontaine was that another employee coordinated one retreat and that an employee on-site performed a clerical role. The Tribunal does not find clear and cogent evidence of bias in these circumstances. The Tribunal finds that, subsequent to their disagreement, Ms. Charest and Ms. Lafontaine met to complete a learning plan, and that the complainant's assignment was extended. This evidence supports the respondent's submission that the disagreement was resolved.

[64] Ms. Lafontaine had been informed prior to the interviews that, should Ms. Charest fail to qualify, there would be a major grievance. The Tribunal finds that Ms. Lafontaine's decision to require the other two board members to give their opinion of the complainant's answers prior to commenting herself, was appropriate in the circumstances. While in some cases it might be prudent not to participate in an assessment process, managers cannot be held captive to threats of recourse should an employee fail to qualify.

[65] Ms. Charest's allegation of bias on the part of Ms. Lafontaine is essentially that she failed to meet the qualification, "ability to manage one's time". She was assessed by three people and found not to meet the qualification based on her answer to a question asked during the interview. All three assessment board members testified at the hearing as to why she was not found qualified in this area. The Tribunal finds that the assessment board provided a rational explanation to support its evaluation of the complainant on this qualification. There is no basis upon which to conclude that bias was a factor in the assessment of Ms. Charest.

[66] During the hearing, the complainant's representative repeatedly raised the fact that references were requested to verify the behavioural based questions, but the assessment board did not conduct these references. Ms. Lafontaine testified that she had included the request for references for verification at the suggestion of Ms. Askari-Farahini. She did not believe it was mandatory to check references, and had not done so in the past.

[67] In *Jolin v. Deputy Head of Service Canada, as part of the Department of Human Resources and Social Development et al.*, [2007] PSST 0011, the Tribunal stated that section 36 of the *PSEA* provides a deputy head with the discretion to use different means to assess qualifications. The Tribunal also established what is required to find abuse of authority in the selection of the assessment methods:

[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.

[68] In *Canada (Attorney General) v. Clark*, [1997] F.C.J. No. 623; 71 A.C.W.S. (3d) 492 (F.C.A.), the Federal Court of Appeal determined that contacting references to verify behaviour-based questions is not mandatory in order to satisfy the merit principle. The Court stated:

15 It would indeed be strange if this Court were found to have held that behaviour-based questions must, as a matter of law, always be verified in order to satisfy the merit principle. As the evidence makes clear, behaviour-based questions are simply one of a number of tools available in the process of personnel selection. Like all such tools, they are not infallible and have their strengths and weaknesses. Like many such tools, they are also subject to manipulation and even cheating by crafty candidates. The mere possibility that someone may cheat or get the better of the system, however, is surely not a basis in law for declaring the whole system to be defective.

17 Before leaving this matter, I should add that I find particularly compelling the evidence in the record as to the difficulty, and sometimes even impossibility, of verifying all answers to every candidate's behaviour-based questions. This seems to me to argue conclusively against any mandatory requirement of verification as a condition of the validity of the test: if all candidates' answers cannot always be verified then behaviour-based testing can never be acceptable as a selection tool since it will not be possible to know whether or not the answers can be verified until after they are given. One unverifiable answer out of perhaps hundreds would make the whole test invalid. This would seem to me to be a very undesirable result.

[69] While that Court decision was decided under the former statutory framework, the Tribunal is of the view that the principle applies to complaints of abuse of authority under the new *PSEA*. There is no evidence in this case that verifying candidates' answers to behaviour-based questions was a mandatory step in the assessment. The Tribunal finds that it was within the assessment board's discretion under section 36 of the *PSEA* to determine when there was sufficient information to assess a particular qualification. Therefore the respondent did not abuse its authority in failing to contact references to verify the answers to the behaviour-based questions.

DECISION

[70] For the foregoing reasons, this complaint is dismissed.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File:	2007-0254
Style of Cause:	<i>Emilija Charest and the Deputy Minister of Human Resources and Social Development et al.</i>
Hearing:	January 21 and 22, 2008 Ottawa, Ontario
Date of Reasons:	July 11, 2008
APPEARANCES:	
Fred Sadori	For the complainant
Jennifer Champagne	For the respondent