



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

FILE: 2007-0294

OTTAWA, OCTOBER 15, 2008

**PIERRE MONGEAU**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

**RESPONDENT**

**AND**

**OTHER PARTIES**

<b>MATTER</b>	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
<b>DECISION</b>	The complaint is dismissed
<b>DECISION RENDERED BY</b>	Sonia Gaal, Member
<b>LANGUAGE OF DECISION</b>	French
<b>INDEXED</b>	<i>Mongeau v. Deputy Minister of National Defence et al.</i>
<b>NEUTRAL CITATION</b>	2008 PSST 0026

## REASONS FOR DECISION

### INTRODUCTION

[1] The complainant, Pierre Mongeau, alleges that the respondent, the Deputy Minister of National Defence, abused its authority by eliminating the complainant from the selection process for the position of General Shop Foreman on the ground that he did not meet one of the essential qualifications.

[2] The complainant submits that he was not assessed fairly by one of the members of the assessment board, and further argues that the respondent relied on insufficient evidence in scoring and awarding marks for the criterion “Behavioural Flexibility”, which was an essential qualification. More specifically, he alleges that the respondent contravened the *Appointment Policy* of the Public Service Commission (PSC).

[3] On June 21, 2007, the complainant filed his complaint with the Public Service Staffing Tribunal (the Tribunal) pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*).

[4] A hearing was held in Montréal on May 29 and 30, 2008.

### ISSUES

[5] In order to resolve this complaint, the Tribunal must determine the following issues:

- (i) Was the complainant assessed in a fair and equitable manner by the assessment board?
- (ii) Did the respondent abuse its authority by using the test prepared by FormaClé instead of the PSC standardized test “Supervisor Simulation Exercise (428)”?

### BACKGROUND

[6] The position of General Shop Foreman, group and level GL COI 11 C3, was advertised on *Publiservice* on March 30, 2007 (process 07-DND-IA-MNTRL-060357).

There were two positions to be filled, one in Montréal and the other in St-Jean-sur-Richelieu (St-Jean). The complainant applied for the position in Montreal.

[7] The statement of merit criteria and conditions of employment specified that the criterion “Behavioural Flexibility” was one of the essential qualifications that had to be met. This criterion was assessed in a written test and an interview. The pass mark for this criterion was 50%.

[8] There were five members on the assessment board: Daniel Dumulong, Mechanical and Electrical Shop Superintendent in St-Jean; Bernard Trottier, Mechanical and Electrical Shop Superintendent in Montréal; Jacques Boily, General Shop Superintendent in Montréal; Daniel Auclair, Supervisor of Electrical Instruments Technicians in St-Jean; and Elizabeth Marion, Human Resources Advisor.

[9] There were 25 applicants screened in on the basis of their curriculum vitae and who wrote an exam and then proceeded to an interview if they were successful in the exam. All the members of the assessment board attended the interviews. However, Ms. Marion did not take part in scoring the written tests, which was done a day or two after the test.

[10] The written test took place on May 1, 2007 and lasted 150 minutes. There were eight questions and 14 simulation exercises, including a question on health and safety. Each simulation exercise was designed to assess more than one merit criterion. Due to lack of time, the complainant did not complete simulation exercise 12 which assessed the “Behavioural Flexibility” criterion and was thus not given any marks for that question. He received 40% (8/20) for this criterion on the written examination, as he had completed the other simulation exercises that also assessed “Behavioural Flexibility”.

[11] The complainant met the other criteria. However, even though he had not attained the pass mark of 50% on the written test for the “Behavioural Flexibility” criterion, he was called for an interview in Montréal on Wednesday, May 9. The reason being that the total of the results of the written test and of the interview determined whether or not an applicant met this criterion. An applicant could thus get sufficient marks in his interview to end up with 50% for this criterion.

[12] The respondent contracted with a private company, FormaClé, to develop the test as well as an assessment and selection guide for this process. This was not the first time that the respondent had retained that company, but it was the first time for this particular position. Mr. Trottier, a witness for the respondent who had been involved in the process from the outset, explained that he had given the required criteria to FormaClé. The test was reviewed by the board members with technical experience and by a human resources advisor. FormaClé made the changes requested by the assessment board. The final version of the contents of the test was approved by all the members of the assessment board before being used for this process.

[13] Mr. Trottier testified that, while they could have used the PSC standardized test 428 to assess applicants, the respondent had “made excessive use” [Translation] of this test and some of the applicants had even used it to assess their own employees.

[14] The names of the applicants were not on the written test because each applicant was identified by a number; the complainant was number three. The members separately marked each answer using a preset grid, then discussed the answer as a group. The final mark for each answer was reached by consensus; in other words, all the members agreed on the mark that was given. According to Mr. Trottier, if the members had given different scores for a particular answer—for example, if two members had given an applicant a mark of three and two members had given him a four—they gave the benefit to the applicant, awarding him a four because the members of the board “were easily convinced to lean towards four” [Translation].

[15] Ten applicants were called for an interview. The applicants were assessed immediately following their interview.

[16] At the interview, the complainant dealt successfully with the question dealing with “Behavioural Flexibility”, receiving a mark of four out of five. However, he only had eight marks out of 20 for this criterion on the written test, as he had not provided an answer for simulation exercise 12. He did not qualify for this criterion because he obtained a total of 12 marks out of 25, or 48%. As a result, he did not qualify for the position.

#### SUMMARY OF RELEVANT EVIDENCE

[17] The complainant referred to two incidents that occurred on the day of the interview which involved Mr. Dumulong, a member of the assessment board. According to the complainant, this proves that Mr. Dumulong was unfair and acted in bad faith towards him which is why he failed. The complainant also testified that he did not know Mr. Dumulong.

[18] Five people testified before the Tribunal. Before hearing their testimony, the Tribunal ordered the exclusion of the witnesses, as requested by the respondent.

(i) Incident before the interview

[19] The complainant testified about the two incidents. The first took place immediately before his interview, while some members of the board—Ms. Marion, Mr. Trottier and Mr. Dumulong—along with other employees were taking a break outside.

[20] According to the complainant, Mr. Dumulong made a comment to the effect that the day was easier for the applicants being interviewed because “the board members were the ones taking notes that day” [Translation]. The complainant replied jokingly that it should not always be the same ones who worked. To which, Mr. Dumulong allegedly responded in a serious tone of voice that he had just lost two marks on the test because of this comment.

[21] Pierre Guyon, an employee, testified about this incident. He said he was outside and heard Mr. Dumulong’s comment about the two lost marks, but went on to explain that he had not heard the whole conversation. According to Mr. Guyon, Mr. Dumulong was serious although people’s comments were generally made in jest.

[22] Bernard Trottier, a member of the assessment board, also heard Mr. Dumulong’s comment, but in his view the comment was made in a friendly way and was intended as a joke. He said that there was a pleasant atmosphere at work and that people teased each other a lot.

[23] According to Mr. Trottier, Mr. Dumulong did not ask the board to deduct two marks from the complainant for any reason, either at the interview or when the complainant was being assessed.

[24] Mr. Trottier said that the complainant did not lose two marks because of this comment; rather, it was because he had not provided an answer to simulation exercise 12 on the written test. In Mr. Trottier's opinion, the complainant would only have had to write down a few words in answer to this question to obtain at least one mark which would have allowed him to meet this criterion with a score of 52%. The complainant received 8/20 for this criterion on the written test, and scored 4/5 at the interview, for a total of 12/25 or 48%. One extra mark on the written test would have given him  $9/20 + 4/5 = 13/25$  or 52%.

[25] Mr. Trottier explained that Ms. Marion asked the members to review the complainant's answers for both the oral and the written parts, since he had received 48% for this criterion. According to Mr. Trottier, the assessment board took the same approach with other candidates whose answers were close to the passing mark for a given criterion. However, even after this review the board felt that it was not appropriate to award the complainant more marks for his written test. The four out of five marks on the interview were justified as his answer would have required more information to merit five marks.

[26] The respondent also called Mr. Dumulong as a witness. He explained that he had worked in the Montréal garrison for 12 years and that he knew a number of employees. He also explained that there was a good atmosphere and camaraderie during the break; people were making jokes and he was catching up with former colleagues.

[27] Mr. Dumulong also testified that he had spoken to the complainant several times in the past to obtain work-related information and had always received prompt and courteous service. He considered that he and the complainant knew each other professionally, and he added that he had "nothing against Mr. Mongeau" [Translation].

[28] Mr. Dumulong acknowledged that he had made the comment to the complainant about losing two marks, but stated that the remark was so harmless that he did not remember what the complainant had said to him to warrant the comment. He testified that there were five or six people present, and that they had heard him. He added that he was joking and that he would never have thought that the complainant would have taken it seriously. He indicated that he was one of five members on the assessment board and that he would never have asked the other members to lie or to falsify their results to fail the complainant by two marks.

[29] Mr. Dumulong explained that the complainant failed this criterion because he did not give an answer to simulation exercise 12 of the written test. In his view, his comment about the two lost marks had no influence on the complainant's failure, especially since the written test had been corrected well before the interview. Furthermore, the names of the candidates were not indicated, so the board members did not know which test corresponded to which applicant.

[30] It was only on the actual day of the interviews that the assessment board members learned the names of the candidates they were meeting as per the schedule. At that point, they were able to associate the identification number assigned to an applicant for the written test with a specific person.

(ii) Incident during the interview

[31] The complainant explained that he had been rather nervous at the interview. He said that he went into the room and introduced himself, as there were people he did not know. At that point, according to him, Mr. Dumulong aggressively told him words to the effect that "he (the complainant) would not be taking control" [Translation]; rather, that he was in charge. Nevertheless, the complainant thought that he had "performed well" [Translation] at the interview.

[32] Jacques Boily, a member of the assessment board, testified on behalf of the complainant. He remembered the discussion between the complainant and Mr. Dumulong during the interview, and said that the complainant seemed very nervous and spoke up right away to introduce himself. He said that Mr. Dumulong then told the

complainant that he would explain to him how the interviews took place, and that he himself was conducting the interviews. According to Mr. Boily, Mr. Dumulong did not say directly that the complainant "would not be taking control" [Translation]. Mr. Dumulong was not aggressive, but his tone was curt and direct. In Mr. Boily's view, it was appropriate for Mr. Dumulong to explain to the complainant how the interview was going to proceed because all the interviews were conducted in the same manner.

[33] Mr. Boily said that the complainant did very well in the interview. According to him, Mr. Dumulong never told the board that the complainant had to lose two marks because he had made "silly comments" [Translation] to him. Moreover, the board never considered deducting two marks from the complainant for no reason.

[34] Mr. Trottier also testified about this exchange between the complainant and Mr. Dumulong. He confirmed that the complainant introduced himself and started to explain that he had held the position on an acting basis, and what he had done while in the position. He explained that Mr. Dumulong told the complainant that the interview was going to proceed in a certain way. However, Mr. Trottier said Mr. Dumulong was not aggressive.

[35] Finally, Mr. Dumulong explained that he had offered to conduct the interviews, to which all agreed. He therefore introduced the applicants and the board members and explained how the interview would proceed for each applicant.

[36] According to Mr. Dumulong, when the complainant entered, he introduced himself and started discussing subjects that were covered by the interview questions. M. Dumulong therefore asked to speak and explained the process to the complainant. He added that his tone was not violent or aggressive, but was serious. There were five members on the board and, in his view, it was necessary to start the interview and not waste any time. He thought that if his tone had been aggressive, the other members of the board would have told him. However, no one subsequently made any comments to him to that effect.



ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[37] The complainant submits that he was not assessed in an equitable manner, following the two incidents involving Mr. Dumulong.

[38] Regarding the first incident, which occurred before the interview, the complainant alleges that the comment was made seriously. In his opinion, the Tribunal should prefer his testimony that he and Mr. Dumulong did not know each other. He argues that Mr. Dumulong testified that they knew each other simply to prove that the comment had been made as a joke.

[39] The complainant found out during the informal discussion that he had failed that criterion by two marks, as he had 48%. In his view, these are the same two marks that Mr. Dumulong had told him he would lose.

[40] The complainant submits that there must be a clear connection between the required qualification and the assessment of the "Behavioural Flexibility" criterion. According to the complainant, standardized test 428 assesses this criterion better than the test developed by FormaClé. He argues that simulation exercise 12 of the written test, which he did not answer, did not effectively assess the "Behavioural Flexibility" criterion.

[41] He alleges that the respondent contravened one of the criteria set out in the PSC's *Appointment Policy*:

Assessment

(...)

The assessment processes and methods effectively assess the essential qualifications and other merit criteria identified and are administered fairly. (...)

[42] The complainant also alleges that, at the interview, he should have obtained five out of five marks for his answer to the question relating to "Behavioural Flexibility".

[43] The complainant refers to *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, in support of his position that the respondent abused its authority because it relied on insufficient evidence in scoring and awarding marks for the criterion “Behavioural Flexibility”.

[44] He also argues *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, to establish that the Tribunal may review assessment methods.

#### B) RESPONDENT’S ARGUMENTS

[45] The respondent argues that clear and convincing evidence is required to prove abuse of authority. The respondent alleges that the complainant offered speculation and assertions that are far from constituting positive evidence that abuse of authority occurred. There is no evidence to support the complainant’s allegations.

[46] The respondent submits that the complainant obtained 40% (8/20) for the “Behavioural Flexibility” criterion on the written test, and after the interview had a mark of 48%. The respondent also states that Mr. Dumulong’s comment was made long after the written test had been corrected. He adds that there is no evidence that the complainant’s mark on the written test was changed after the interview.

[47] The respondent points out that since the complainant did not provide an answer in simulation exercise 12, he did not receive any marks for it and thus did not receive sufficient marks to meet this merit criterion. According to the respondent, the complainant caused his own failure, not the assessment board. The respondent asserts that all applicants were subject to the same rules during the test and the assessments.

[48] The respondent submits that the Deputy Head had no obligation to use the PSC test to assess the applicants and could, at his discretion, establish the essential qualifications pursuant to paragraph 30(2)(a) of the *PSEA*. The respondent argues that the questions and simulation exercises of the written test effectively assessed the “Behavioural Flexibility” criterion.

[49] As for the issue of the credibility of the witnesses, the respondent maintains that it is necessary to look at the circumstances in which Mr. Dumulong made his comment

prior to the interview. The evidence shows that the comment was made as a joke and that it was not a serious environment. The complainant himself said that he made his comment to Mr. Dumulong while joking, but that Mr. Dumulong replied in a serious and aggressive tone. From the respondent's point of view, the complainant's behaviour during the break and his testimony regarding Mr. Dumulong's comment are contradictory. Furthermore, the respondent emphasizes that Mr. Trottier also took the comment as a joke. This is an environment where there was a great deal of teasing all day long.

[50] The respondent submits that Mr. Dumulong had no particular influence on the selection board, as there were five members who made the decisions.

[51] The respondent argues that it is important to note that there is no evidence that Mr. Dumulong held a grudge against the complainant, or that they had any issues that could explain Mr. Dumulong's bad faith as alleged by the complainant.

[52] The respondent submits that the common and determining characteristics of the terms "bad faith" and "personal favouritism", as they appear in subsection 2(4) of the *PSEA*, require that the Deputy Head make a distinction between right and wrong, and that there be negative intent. These terms should be interpreted as referring to flagrant or very serious wrongdoing. The respondent also filed case law and excerpts from doctrine to support its position.

[53] The respondent argues that the complainant has not proven his allegations and that there is no evidence of abuse of authority. The Tribunal should dismiss the complaint because the complainant has not met his burden of proof.

#### C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[54] The PSC did not attend the hearing but filed written submissions. The PSC argues that, for abuse of authority to occur in a staffing process, there must be proof of intent such as bad faith, personal favouritism, carelessness or recklessness. The PSC also filed case law and excerpts from doctrine in support of its position.

ANALYSIS

**Issue I:** Was the complainant assessed in a fair and equitable manner by the assessment board?

[55] As established in several Tribunal decisions, the complainant has the burden of proving that he was not assessed in a fair and equitable manner. See, for example, *Tibbs*.

[56] The complainant submits that the two incidents involving Mr. Dumulong contributed to his failure.

[57] The respondent alleges that the complainant failed because he did not provide an answer to simulation exercise 12 of the written test. According to the respondent, the complainant's failure has nothing to do with what was said by Mr. Dumulong.

[58] The Tribunal heard witnesses with different versions for each of the incidents.

[59] A similar situation occurred in *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, where the Tribunal stated the following on assessing the credibility of witnesses:

[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.

[60] One cannot simply add up the number of witnesses who perceived Mr. Dumulong's tone to be serious and compare it to those who interpreted the comment as a joke or a comment to lead the interview process. The Tribunal must consider the situation in which the comments were made as a whole as well as

Mr. Dumulong's role as a member of the assessment board. However, the Tribunal does not have to decide whether or not Mr. Dumulong and the complainant knew each other to render its decision.

[61] Regarding the incident that occurred before the interview, the Tribunal finds that the atmosphere was generally relaxed and that the people who were present adopted a joking tone. Mr. Dumulong said that he was seeing former colleagues. The evidence shows that this is a workplace where a great deal of teasing goes on among the employees, and there is a good atmosphere at work. The complainant testified that he made his comment to Mr. Dumulong as a joke.

[62] It is possible that Mr. Dumulong made his comment without laughing, but the Tribunal finds that it was a joke intended to make people laugh. No other allegation or evidence was filed to indicate that Mr. Dumulong had any reason whatsoever to want to cause the complainant to lose two marks.

[63] Mr. Dumulong testified that he will never again make this kind of joke, which was misinterpreted. In the Tribunal's view, this example shows that this type of comment should be avoided, as it may lead to misinterpretation when an applicant is not chosen.

[64] Furthermore, the evidence shows that the complainant's written test was scored before this comment was made, and that no marks were taken away as a result of it. The assessment board had five members, four from the workplace and one representative of human resources. There is evidence that when the written test was scored, marks were awarded by consensus for every answer and that the board decided in favour of the applicant when in doubt. The written test had been marked at least one week before the interviews were held, and the names of the applicants had been replaced by a number.

[65] As for the incident that occurred at the beginning of the interview, there is evidence that the complainant was nervous and that he spoke up, introducing himself. Mr. Dumulong allegedly interrupted him in order to explain the process. The Tribunal finds that Mr. Dumulong's tone was serious in this instance because he wanted the interview to proceed in the same manner as the other interviews. This does not

demonstrate, however, that Mr. Dumulong showed bad faith towards the complainant and that he held it against him.

[66] Mr. Dumulong had only one vote out of four for the written test, and one out of five for the interview. Mr. Boily and Mr. Trottier, who were board members, both testified that Mr. Dumulong never mentioned to the board that the complainant should lose marks for no reason.

[67] It appears that the complainant did well in the interview, but received four out of five marks for the “Behavioural Flexibility” criterion because he did not provide all the information required to obtain full marks.

[68] The Tribunal has already explained that its role is not to reassess answers given in interviews in order to decide whether the marks awarded are adequate. See *Oddie v. Deputy Minister of National Defence et al.*, [2007] PSST 0030:

[92] However, the Tribunal will not reassess the content and accurateness of the referees' answers as the selection board is in the best position to interpret them. Similarly, the Tribunal will not re-evaluate the scoring during the interview process as stated in *Portree, supra*:

[52] (...) Therefore, the Tribunal's role is not to reassess a complainant's marks on a given answer or review responses given during an interview simply because a complainant does not agree with the decision regarding an interview question. (...)

[69] There is no dispute that the complainant did not answer simulation exercise 12 that was used to assess in part the “Behavioural Flexibility” criterion. The Tribunal finds that this is the only reason why the complainant failed. Mr. Boily and Mr. Trottier explained that, if the complainant had even written one or two lines, he would have received at least one mark, which would have allowed him to score 52% for this criterion.

[70] It is an unfortunate coincidence that the complainant obtained 48% for this criterion while he needed 50% to pass, which made him think of the two marks mentioned by Mr. Dumulong before his interview. There is, however, no connection between the complainant's failure and this comment. The evidence reveals absolutely no discussion or manipulation of marks by anyone with the purpose of causing the complainant to fail.

[71] The Tribunal finds that the complainant was assessed in a fair and equitable manner by all members of the board.

**Issue II:** Did the respondent abuse its authority by using the test prepared by FormaClé instead of the PSC standardized test “Supervisor Simulation Exercise (428)”?

[72] The complainant argues that PSC standardized test 428 assesses “Behavioural Flexibility” better than the test prepared by FormaClé.

[73] Section 36 of the *PSEA* reads as follows:

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

[74] In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal dealt with section 36 of the *PSEA*:

[53] As highlighted by the words “**may use any assessment method**”, section 36 of the *PSEA* is non-prescriptive; a selection board may choose from a wide range of assessment tools and methods. [...]

[75] The respondent thus has discretion to choose the assessment tool for assessing applicants and to make an appointment based on merit pursuant to subsection 30(2) of the *PSEA*.

[76] The respondent explained that PSC standardized test 428 was not used to assess the applicants because it had been used too often; some of the applicants had taken the test in previous appointment processes. It was thus not a reliable tool for assessing applicants for this process. As indicated in *Visca*, a manager has discretion to choose the assessment method that he deems appropriate for the process.

[77] In this case, Mr. Trottier explained that the four members of the assessment board with technical expertise and one representative from human resources reviewed and made changes to the FormaClé questions. Corrections were made and a consensus was reached for the final version used for the assessments.

[78] The Tribunal has no reason to believe that the “Behavioural Flexibility” criterion was not properly assessed by the test developed by FormaClé. The board knew what it wanted to test for this criterion and communicated this to FormaClé, who followed the board’s directives.

[79] Given the facts in this case, the Tribunal finds that there was no abuse of authority in the decision to use the FormaClé test rather than the PSC test.

DECISION

[80] For all these reasons, the Tribunal dismisses the complaint.

[81] The Tribunal wishes to thank the parties for their excellent presentations and for their professionalism throughout the hearing.

Sonia Gaal  
Member

PARTIES OF RECORD

Tribunal File:	2007-0294
Style of Cause:	<i>Pierre Mongeau and Deputy Minister of National Defence et al.</i>
Date and Place of Hearing:	May 29 and 30, 2008 Montreal, Quebec
Date of Reasons:	October 15, 2008
APPEARANCES:	
Mr. Stéphane Fiset	For the complainant
Mr. Karl Chemsî	For the respondent
N/A	For the Public Service Commission
N/A	For the other party



