FILE: 2006-0149

OTTAWA, OCTOBER 22, 2008

LINDA CHIASSON

COMPLAINANT

AND

THE DEPUTY MINISTER OF CANADIAN HERITAGE

RESPONDENT

AND

OTHER PARTIES

MATTER	The complaint of abuse of authority pursuant to paragraph 77(1)*(a)* of the *Public Service Employment Act*
DECISION	The complaint is allowed
DECISION RENDERED BY	Francine Cabana, Member
LANGUAGE OF DECISION	French
INDEXED	*Chiasson v. Deputy Minister of Canadian Heritage et al.*
NEUTRAL CITATION	2008 PSST 0027

Reasons for Decision

Introduction

[1] The complainant, Linda Chiasson, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*). The complainant had applied for the position of Manager, Policy Development, at group and level ES-06 (process number 06-PCH-IIA-CC-0076) with the Department of Canadian Heritage.

[2] The complainant alleges abuse of authority by the respondent, the Deputy Minister of Canadian Heritage, for changing the instructions for the written exam she was taking without ensuring that she had, in fact, received the changes. She further alleges abuse of authority by the respondent for not indicating how many points each of the two questions was worth and for not specifying what abilities and knowledge were going to be assessed in the exam.

[3] A pre-hearing conference took place on September 5, 2007. At this conference, the complainant specified that the only issue was whether or not the respondent abused its authority by changing the instructions for the written exam she was taking without ensuring that she had, in fact, received the new instructions. The complainant added that the respondent had not tried in any way to correct its error. The parties agreed that the facts of this case are not at all disputed and that the complaint could be decided without holding an oral hearing.

[4] Subsection 99(3) of the *PSEA* provides that the Tribunal may make any decision without holding an oral hearing. Having heard the parties on this point during the pre-hearing conference, the Tribunal finds that the parties' written allegations and the supporting evidence are sufficient to rule on the issue raised in the complaint. For this reason, the Tribunal has decided to rule on the complaint without holding an oral hearing.

SUMMARY OF RELEVANT EVIDENCE

[5] On February 27, 2006, the respondent posted a job opportunity advertisement on the *Publiservice* website. The job opportunity advertisement sought to staff the position of Manager, Policy Development, International Affairs, at group and level ES-06. The job opportunity advertisement was also accompanied by a statement of merit criteria and conditions of employment.

[6] The respondent chose to administer an off-site exam, that is, candidates wrote the exam outside the respondent's premises.

[7] On April 11, 2006, Dennis Dooley, Human Resources Advisor, forwarded to Arthur Wilczynski, Director, International Relations, the wording of the two e-mails that would be sent to the candidates in the process. He told him that he had to decide whether a maximum number of pages was to be indicated; if so, he had to change the wording of the e-mail accordingly. Mr. Wilczynski replied to Mr. Dooley's e-mail and asked Mireille Dubois, Director, Management Services, to send the questions and instructions to the candidates, and he indicated that he would mark the exams. However, Mr. Wilczynski added that the number of pages for answers to the exam was unlimited, but that if the answers were too long, this would be taken into consideration when the exams were marked.

[8] On April 13, 2006, the candidates were informed by e-mail that they had to write an off-site exam and that the instructions and the questions would be forwarded to them by e-mail on Thursday, April 20, 2006, by 9:00 a.m. They were also advised that they would have until 9:00 a.m. the next day, April 21, 2006, to complete the exam and return it by e-mail. In addition, the candidates were advised that if the exam was not returned by that date, they would be deemed to have withdrawn from the process.

[9] As arranged, the respondent sent the instructions and questions for the written exam to the candidates on April 20, 2006, at 9:03 a.m. The questions for the written exam were as follows:

> The Director-General (DG) of UNESCO has asked the Government of Canada to organize a regional meeting on the Convention (2005) on the Protection and Promotion of the Diversity of

Cultural Expressions. He has asked that this regional meeting deal with other cultural instruments recently adopted by UNESCO as a condition for holding the meeting.

You must provide two documents:

1. A briefing note for the minister providing recommendations on how to handle this request. The note must include the following elements:
    - Background
    - Considerations
    - Recommendations
2. Main points of the minister's response to the DG of UNESCO.

[Translation]

[10] According to the initial instructions, the maximum length for the answer to each question was not to exceed two letter-size (8½ x 11 inches) pages per question, using a 12-point font and one-inch margins.

[11] After receiving these instructions, the complainant closed her e-mail so that she would be able to concentrate on writing the exam.

[12] A bit later, however, at 9:50 a.m., Ms. Dubois informed the candidates by e-mail that an error had been made in the instructions concerning the maximum length of the answers to the questions:

> Sorry. There was an error in the instructions concerning the maximum number of pages requested. There is no maximum.
>
> Please send me a reply as soon as possible so that I can ensure you have received the new instructions.
>
> Thank you!
>
> [Translation]

[13] Although Ms. Dubois asked candidates to send a reply to her e-mail, no follow-up action was taken if a candidate failed to acknowledge receipt of the e-mail.

[14] The complainant did not open the second e-mail from Ms. Dubois until she had completed the exam and was ready to forward it to her. She sent a reply on April 21, 2006, at 7:25 a.m., informing her that she had closed her e-mail while writing

the exam and had not seen the message in time to take it into consideration in her answers. Her completed exam was attached and she hoped she would not be penalized on that account. The complainant added that Ms. Dubois could get in touch with her if need be.

[15] The assessment board, comprising Mr. Wilczynski and Gordon Platt, Director, International Policy, Planning, Programs and Outreach, assessed the candidates' answers using a rating guide. In this three-page guide, the scoring grid for the first question was about two pages long and was intended to assess the following:

> **Component 1 – Briefing Note: 90 points**
>
> This component assesses the candidates' knowledge and abilities. They must show they know the priorities of the Government of Canada in the area of foreign policy and how they are developed. It is an opportunity for participants to show what they know about the department's priorities and portfolio. The task assesses the ability of candidates to analyse and recommend strategies conducive to promoting the interests of Canadians. It also measures their ability to propose approaches using multi-disciplinary teams and to communicate in writing. The exam also assesses the ability of candidates to work under pressure.
>
> Candidates obtaining the highest score will be called for an interview.
>
> Section by section assessment guide:
>
> **Background:** total of 20 points
>
> Expected answers: Assessment of general knowledge associated with the topic of policy and cultural diversity and the range of partnerships and processes relating to international cultural policy
>
> 1. Information on Canada's support to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions
> 2. Reference to the partnerships that led to its adoption (interdepartmental, civil society and provinces)
> 3. Reference to the effect that Canada has been invited to lead a symposium in a given geographic area
> 4. List of the various international conventions that UNESCO may wish to associate with the symposium – UNESCO International Convention against Doping in Sport and Convention for the Safeguarding of the Intangible Cultural Heritage, in particular
> 5. Reference to the role of Quebec and the provinces in the process
> 6. Information on how the symposium is in line with the priorities of PCH
> 7. Any appropriate combination of the items outlined above or other useful information.

Considerations: total of 30 points

Expected answers: Assessment of the ability to analyse complex issues and lead and co-ordinate the activities of multi-disciplinary teams

1. Should include reference to the complex role that various departments will play in organizing the symposium
2. Ability to recognize and discuss the conditional support of the UNESCO DG with regard to the symposium
3. Discuss the issue of the cost of such a symposium
4. Propose the suitable region and provide the rationale
5. Emphasize the special role that Quebec is supposed to play
6. Explain the linkage between the second international instrument and that on cultural diversity (support for the Convention against Doping, opposition to the Convention on the Intangible Cultural Heritage)
7. Mention civil society's expectations
8. Outline the key outcomes
9. Any appropriate combination of the items outlined above or other useful information

Recommendation: total of 40 points

Expected answers: Assessment of judgment and ability to promote the government's priorities on the international stage and to lead and co-ordinate the activities of multi-disciplinary teams.

1. A well outlined strategy recommending that the meeting be held
2. Recommendations on the management of other stakeholders
3. Suggestions as to how to manage relations with UNESCO

[Translation]

[16] As for the second question, a short paragraph explained that its objective was to assess the candidates' judgment, namely, whether candidates were able to recognize that this question was less important than the first. The rating guide for the second question indicates the following:

Component 2 – Main points of a reply to the DG of UNESCO – 10 points

The objective here is to assess the candidates' judgment. They should recognize that this is less of a priority than the briefing note, i.e. that the note is more important than the specifics of the reply to the UNESCO DG. The candidates should indicate that the minister should recognize the importance of the symposium and reply accordingly to the DG's request concerning other instruments. The main points should be clear and concise.

[Translation]

[17] On September 20, 2006, Mr. Dooley informed the complainant of the names of the persons who had been appointed or proposed for appointment. The complainant was also informed at that time of her right to file a complaint before the Tribunal. The complainant filed her complaint to the Tribunal on September 29, 2006.

ISSUE

[18] To resolve this complaint, the Tribunal must decide the following:

Did the respondent abuse its authority in changing the instructions for the written exam taken by the complainant without ensuring that she had, in fact, received the new instructions?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[19] The complainant submits that the respondent abused its authority in the process concerning the written exam because no one followed up to ensure that she had, in fact, received and taken note of the changes to the instructions. According to the complainant, this demonstrates bad faith and constitutes abuse of authority under the *PSEA*. She further submits that Ms. Dubois should have taken additional action to confirm that the new instructions had been received, such as calling her since she had provided her telephone numbers both at home and at work.

[20] According to the complainant, one of the criteria for marking the exam was the length of the letter presented in the second question. She explained that she understood from the instructions that were sent, that she was to provide two pages per question. In addition, since the exam did not specify the number of points for each question, she put just as much effort into preparing the two questions and answered the two questions on two pages each. She maintains that this put her at a disadvantage in comparison to the candidates who had read Ms. Dubois's second e-mail, which had been sent at 9:50 a.m.

[21] According to the complainant, the respondent acted in bad faith because it did not ensure that the appointment process was fair and did not ensure that adequate information had been sent to the candidates. She further submits that the respondent mismanaged administration of the appointment process and was disrespectful and unfair to her.

B) RESPONDENT'S ARGUMENTS

[22] The respondent submits that the complainant has the burden of establishing that there was abuse of authority by the respondent in the exercise of its authority under subsection 30(2) of the *PSEA*.

[23] The respondent notes that the criterion for finding abuse of authority in determining and assessing essential qualifications under subsection 30(2), is very strict. The respondent maintains that the Tribunal should not intervene in the respondent's decision with regard to the exercise of its authority unless the complainant demonstrates that the respondent acted arbitrarily, dishonestly or in bad faith.

[24] In the respondent's view, changing the initial instructions concerning the maximum number of pages for answering each of the questions was not done in bad faith, or for the purpose of favouring a specific candidate.

[25] The respondent asserts that the complainant did not present any evidence that the candidates were not treated the same way. The same rating guide was used for all of the candidates. In addition, no follow-up action was taken with any of the candidates to ensure that they had, in fact, received the changes to the instructions. According to the respondent, this fact demonstrates that the assessment board's decision was not made in bad faith, or for the purpose of giving an advantage to a particular candidate by reason of personal favouritism.

[26] The respondent argues that the ability to communicate effectively is one of the essential qualifications sought for the position. The candidates had to answer in a concise and precise manner, i.e. two elements demonstrating the ability to communicate effectively. The respondent submits that the fact that the complainant

followed the initial instructions, whereby candidates were to limit themselves to two pages per question, was therefore an advantage rather than a disadvantage for her.

[27] The respondent submits that the complainant did not provide any evidence demonstrating that she would have passed her exam if she had been aware of the new instructions. The respondent further adds that the complainant did not provide any evidence to the effect that she had been penalized, in any manner whatsoever, by the fact that she had not learned about the new instructions.

[28] The respondent notes that section 84 of the *PSEA* sets out the nature of the orders that can be rendered by the Tribunal if it finds the complaint substantiated. However, the respondent points out that the complainant did not request any corrective action by the Tribunal.

[29] Finally, the respondent submits that the complainant did not meet the burden of proof on a balance of probabilities, since she did not demonstrate that the respondent had abused its authority. For all these reasons, the respondent asks the Tribunal to dismiss the complaint.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[30] The Public Service Commission (the PSC) indicates that, having reviewed the complainant's allegations and the information provided by the respondent, it has no conclusions about the facts presented by the two parties.

[31] The PSC submitted general written observations on the concept of abuse of authority and how the Tribunal should deal with this issue.

ANALYSIS

Issue: Did the respondent abuse its authority in changing the instructions for the written exam taken by the complainant without ensuring that she had, in fact, received the new instructions?

[32] The complaint was filed under paragraph 77(1)(*a*) of the *PSEA*:

> 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);
>
> […]

[33] Subsection 30(2) of the *PSEA* reads as follows:

> 30 (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.
>
> (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.
>
> […]

[34] The complainant submits that the respondent demonstrated abuse of authority because it did not take follow-up action after sending an e-mail advising of the change to the instructions for the written exam. She alleges having put an equal amount of effort into preparing the two questions and answered the two questions on two pages each, which placed her at a disadvantage in comparison to the candidates who had received the changes to the instructions for the exam. In addition, the complainant claims that when the respondent was informed of its error, it did not take it into consideration and did not take corrective action, such as having her write a new exam. According to the complainant, these facts particularly demonstrate the respondent's bad faith.

[35] Abuse of authority is not defined in the *PSEA*. However, subsection 2(4) of the *PSEA* does provide certain indications. It reads as follows:

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

[36] In addition, the Tribunal set out the five categories of abuse in *Tibbs* v*. Deputy Minister of National Defence et al.,* [2006] PSST 0008. These same general principles of administrative law apply to all forms of discretionary administrative decisions. The five categories of abuse are:

> 1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).
> 2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).
> 3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).
> 4. When the delegate exercises discretion on an erroneous view of the law.
> 5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

[37] Even though the complainant did not refer to a particular category when alleging abuse of authority, the Tribunal is of the view that the actions that are the subject of Ms. Chiasson's complaint fall within several categories of abuse of authority. Categories 1, 2, 3 and 5 apply to this case.

[38] As the Supreme Court of Canada ruled in *Finney* v*. Barreau du Québec*, [2004] 2 S.C.R. 17; [2004] S.C.J. No. 31 (QL), an element of intent is not required to prove bad faith. Rather, it must be demonstrated that the respondent's conduct is tantamount to serious negligence or recklessness:

> [37] What, then, constitutes bad faith? Does it always correspond to intentional fault? The courts do not appear to equate the state or acts of bad faith squarely with a demonstrated intent to harm another or, consequently, to require evidence of intentional fault.
>
> […]
>
> [39] These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli* v. *Duplessis*, [1959] S.C.R. 121. Such

> conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised […] Moreover, the fact that actions have been dismissed for want of evidence of bad faith and the importance attached to this factor in specific cases do not necessarily mean that bad faith on the part of a decision-maker can be found only where there is an intentional fault, based on the decision-maker's subjective intent…

[39] The Tribunal further set out in *Cameron and Maheux* v*. Deputy Head of Service Canada et al.,* [2008] PSST 0016, that bad faith can be established both by circumstantial evidence and by direct evidence of intent to harm. On this issue, the Tribunal referred to the Supreme Court of Canada decision in *Entreprises Sibeca Inc.* v*. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304; [2004] S.C.J. No. 57 (QL):

> [26] Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.

[40] The respondent submits that the complainant had to demonstrate she would have obtained a different score if she had been aware of the new instructions. The respondent did not provide any evidence in support of this argument. The Tribunal has difficulty seeing how the complainant could demonstrate she would have obtained a different score if she had received the new instructions. As the Tribunal indicated in *Tibbs*, once the complainant has provided some evidence in support of his allegation of abuse of authority; then the respondent will likely have to provide its evidence to counter this allegation. In the absence of contradictory evidence, the Tribunal may draw reasonable inferences from uncontested facts.

[41] It is clear that the complainant was not assessed on the basis of the same standards as the other candidates when she followed the initial instructions. The second question on the exam assessed candidates' judgment in recognizing that this question was not as important as the first one. By following the initial instructions, the complainant had more limited means to demonstrate that she considered the second question less important. She was restricted to a maximum of two pages for the first question, even though it was more important than the second one. Incidently, the rating

guide contains two pages to describe the expected answers to the first question, whereas it only took one short paragraph for the second question.

[42] The same is true for the respondent's argument that the complainant was at an advantage in submitting two pages per question since the ability to communicate effectively was an essential qualification. This argument by the respondent is not supported by the evidence. In this regard, it should be noted that the rating guide did not indicate that the ability to communicate effectively, that is, in a clear and precise manner, was being assessed by the first question. In addition, there is no indication that a candidate who answers this question on more than two pages would be penalized. Instead, the rating guide focuses on the numerous answers sought for the first question. It specifies that the first question sought to assess:

- general knowledge associated with the topic of policy and cultural diversity and the range of partnerships and processes relating to international cultural policy
- ability of candidates to analyse and recommend strategies conducive to promoting Canadian interests
- ability to propose approaches calling upon multi-disciplinary teams and to communicate in writing
- ability of candidates to work under pressure
- ability to analyse complex issues and to lead and co-ordinate the activities of multi-disciplinary teams
- judgment, ability to promote the government's priorities on the international stage and to lead and co-ordinate the activities of multi-disciplinary teams

[Translation]

[43] The ability to communicate effectively, i.e. in a clear and precise manner, is nonetheless assessed in the second question. It is indicated that the "main points should be clear and concise." Therefore, this essential qualification was only assessed in the second question. It is the answer to the second question that had to be concise, according to the rating guide. This leads the Tribunal to conclude that an answer exceeding two pages for the first question was perfectly acceptable.

[44] Under section 36 of the *PSEA*, the deputy head enjoys broad discretion in choosing the method it considers appropriate for assessing a candidate's qualifications.

However, the choice and use of the assessment method is subject to the recourse set out in section 77 of the *PSEA*. Abuse of authority may exist in the choice or the use of an assessment method, as the Tribunal explained in *Jolin* v*. Deputy Head of Service Canada et al.,* [2007] PSST 0011, at paragraph 37:

> 37. Excluding the choice and use of the method for assessing the person to be appointed from the recourse provided for in paragraph 77(1)(*a*) would result in an illogical situation that would run counter to the spirit of the legislation. For example, abuse of authority could occur in choosing an assessment method that would unduly favour an individual, or in seeking to harm certain candidates or discriminate against persons on the basis of their sex, age or other prohibited grounds. The resulting assessment, though based on a defective method, might seem completely impartial, but an abuse of authority would have occurred in the choice of method for assessing the person to be appointed. As the Tribunal has stated in *Tibbs*, *supra*, Parliament could not have intended to delegate the authority to act in such an outrageous, unreasonable or unacceptable manner.

[45] It should be noted that, with respect to the discretion granted by the *PSEA*, the manager was fully entitled to choose an off-site exam without limiting the number of pages for answering the questions. However, the fact that the instructions were changed after sending the exam and the instructions, with no follow-up action, is problematic in this case.

[46] As indicated in *Finney*, an element of intent does not have to be demonstrated for proving bad faith. It has to be demonstrated that the respondent’s conduct is tantamount to carelessness. In this case, the respondent had sent an e-mail on April 20, 2006, at 9:03 a.m. containing the exam and the instructions regarding the number of pages required, i.e. two pages per question. At 9:50 a.m. the same day, the respondent sent a second e-mail to the candidates in which it changed the initial instructions by indicating that the number of pages was now unlimited. The respondent had even indicated in the second e-mail: “Please send me a reply as soon as possible so that I can ensure you have received the new instructions” [Translation]. Why, then, ask the candidates to acknowledge receipt if the respondent had no intention of making sure that all of the candidates were aware of the change made to the exam instructions? Even if the respondent had not mentioned an acknowledgment of receipt, it would have been necessary to communicate with the candidates and make sure that each of them was aware of the new instructions. The Tribunal considers that changing the

instructions without following up, after having sent the exam and initial instructions, demonstrates serious negligence that is tantamount to bad faith.

[47] In a decision concerning the former *PSEA,* the Federal Court of Appeal of Canada determined that failure to apply standards uniformly violated the merit principle (see *Buttar* v*. Canada (Attorney General)*, [2000] 186 D.L.R. (4th) 101; [2000] F.C.J. No. 437 (QL)). In *Canada (Attorney General)* v*. Clegg*, [2007] FC 940; [2007] F.C.J. No. 1214 (QL), the Federal Court of Canada upheld a decision of the Public Service Commission Appeal Board that rested on this principle where the complainant had only had 90 minutes to write his test, unlike the other candidates who had had two hours.

[48] Although these decisions predate the current *PSEA,* this principle is still valid today. The Tribunal deems that all candidates must be assessed on the basis of the same standards. This means that the same rules of the game must be applied uniformly for all candidates. The evidence shows that the complainant was not subjected to the same standards as the other candidates, as she did not receive the change made to the instructions for the written exam. This is not just an inconsequential error.

[49] The Tribunal considers that changing the instructions without taking follow-up action constitutes not only serious negligence tantamount to bad faith but, by not rectifying its error, the respondent relied on inadequate material to assess the complainant.

[50] In *Hammond et al.* v*. Deputy Head of Service Canada et al.,* [2008] PSST 0008, the Tribunal referred to *Madracki* v*. Canada*, [1986] 72 N.R. No. 257; [1986] F.C.J. No. 727 (QL) (F.C.A.) to confirm a key principle, that an assessment tool must test the qualification; if not, the assessment is unreasonable. It is therefore important to determine whether the tool in question, such as the exam, truly assessed what had to be assessed, i.e. knowledge and abilities. That being said, if the tool is flawed, the outcome cannot be considered reasonable or fair.

[51] The Tribunal further considers that the exam was flawed because the instructions were changed without follow-up action being taken. The respondent was therefore unable to truly assess the complainant’s abilities and knowledge given that she was

limited by the initial instructions to two pages per question. As a result of the respondent's error, the complainant was not assessed on the same basis as the candidates who received the new instructions and were able to showcase all of the required qualifications and relevant items on more than two pages. Consequently, the Tribunal finds that the respondent abused its authority by relying on inadequate material when marking the complainant's exam, since it did not consider the fact that the complainant had not received the new instructions in time to write her exam, as indicated in her e-mail of April 21, 2006.

[52] Likewise, the Tribunal considers that the outcome of this exam, which resulted in the complainant not meeting the essential qualifications, cannot be deemed fair since the respondent acted unreasonably by not taking into consideration the fact that she had not received the new instructions.

[53] The respondent stated that all the candidates were treated in the same manner. However, the Tribunal finds that this statement does not automatically lead to a conclusion that there was no abuse of authority. If the assessment tool contains a fundamental flaw, its consistent application cannot be deemed to be reasonable or fair.

[54] Lord Greene alluded to the term "unreasonable" in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corp.,* [1947] 2 All E.R. 680; [1948] 1 K.B. 223 (C.A.), stating that the term is often used to describe what must not be done in the exercise of discretion. He indicates that a person entrusted with discretion must act within the law and call his own attention to the matters which he is bound to consider. Lord Greene goes on to state that, in so doing, a person must exclude from his consideration matters which are irrelevant to what he has to consider and if he does not obey those rules, that person will be said to be acting unreasonably.

[55] As a delegate of the PSC under section 15 of the *PSEA,* the respondent is responsible for ensuring the integrity of the appointment process. It must be able to offer a fair appointment process. When an error occurs in the appointment process, the respondent is required to ensure that the error is rectified as soon as possible and without prejudice to the candidates.

[56] On the whole, the outcome is clearly unfair in light of the fact that the respondent changed the instructions for the exam without following up. When informed of this by the complainant, the respondent acted unreasonably by not taking any action to correct its error. It would not be reasonable to conclude otherwise since the exam was flawed and the complainant's abilities and knowledge were not truly assessed because she was limited by the initial instructions.

[57] The Tribunal finds that changing the instructions for the exam, that is, the number of pages required, after the instructions had already been sent out, and without taking follow-up action, constitutes irrational and unreasonable conduct that led to an unfair outcome. The respondent obviously did not place sufficient importance on the consequences that its conduct would cause after altering the instructions without ensuring that all the candidates had, in fact, received notification of the change. Although the respondent applied the same rating guide to all the candidates, the fact remains that the complainant was not assessed on the same equal footing as the other candidates, as she was limited to two pages per question instead of an unlimited number.

[58] The Tribunal further finds that the respondent refused to exercise its discretion by not examining the complainant's individual case. The respondent could have considered the consequences of its actions and offered a solution acceptable to the complainant under the circumstances. However, the respondent simply disregarded the complainant's e-mail and went ahead with the process without regard for her concerns, or even getting in touch with her to discuss the matter.

[59] It was incumbent upon the deputy head to examine the complainant's situation and give serious consideration as to whether her concerns should be taken into account given the circumstances of the matter. It is true that established guidelines and practices exist for the appointment process. However, the deputy head can exercise discretion in deviating from those guidelines and practices in particular cases such as this one.

[60] The Tribunal finds that the complainant has met the burden of proof on a balance of probabilities. In light of the facts established above, the decision to make changes to the instructions after sending the initial e-mail, without taking follow-up action with the complainant, is more than a mere error or omission; it is an act of bad faith. The evidence shows that the respondent relied on inadequate material when marking the complainant's exam, as it did not consider the fact that she had not received the change to the instructions. The respondent also chose not to exercise its discretion, as it failed to communicate with the complainant after having been informed that she had not received the amended instructions and it failed to take corrective action to rectify its error. The outcome is clearly unfair since the respondent acted unreasonably under the circumstances.

[61] Therefore, there was clearly an abuse of authority in this case.

Decision

[62] For all these reasons, the complaint is allowed.

Corrective action

[63] The complainant did not indiquate what remedy she was seeking in her argument or in her reply.

[64] In this case, the applicable corrective action is set out in subsection 81(1) of the *PSEA* which reads as follows: "If the Tribunal finds a complaint to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate."

[65] The Tribunal considers that when a complaint is substantiated, it may order corrective action even if it does not order the appointment to be revoked.

[66] The Tribunal finds that revocation is not appropriate in this case, but that the following corrective action would be more appropriate under the circumstances.

[67] Since section 81 gives the Tribunal the authority to take the corrective action it considers appropriate, the Tribunal issues the following order:

The respondent shall within 60 days of this decision:

1. Review the procedure used within its department for administering off-site exams used in selection processes.
2. Ensure that the procedure sets forth the action to be taken when new instructions must be given, whether immediately before or during the exam period, so as to be able to certify that all the candidates have, in fact, received the new instructions.

The respondent shall within 90 days of this decision:

Reassess the complainant in respect of appointment process no. 06-PCH-IIA-CC-0076, which was the subject of this complaint.

Francine Cabana
Member

PARTIES OF RECORD

Tribunal File:	2006-0149
Style of Cause:	*Linda Chiasson and the Deputy Minister of Canadian Heritage et al.*
Hearing:	Decision rendered without appearance of the parties
Date of Reasons:	October 22, 2008