Public Service Staffing Tribunal | Tribunal de la dotation de la fonction publique

FILE: 2007-0277

OTTAWA, SEPTEMBER 5, 2008

BARRY PUGH

COMPLAINANT

AND

THE DEPUTY MINISTER OF JUSTICE

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)*(a)* of the *Public Service Employment Act*
DECISION	Complaint is dismissed
DECISION RENDERED BY	Francine Cabana, Member
LANGUAGE OF DECISION	English
INDEXED	*Pugh v. Deputy Minister of Justice et al.*
NEUTRAL CITATION	2008 PSST 0023

REASONS FOR DECISION

INTRODUCTION

[1] Barry Pugh is an Editor (IS-03) with the Department of National Defence. He applied for, and was screened out of, an internal advertised appointment process for the position of Chief Legislative Editor (SI-08) with the Department of Justice (process no.: 2007-JUS-IA-AL-35572). The complainant alleges that there was abuse of authority under paragraph 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) for the following reasons: the delegated manager erred in determining that he did not meet the experience qualifications for the position; the respondent was required to have more than one person on the assessment board; and, the appointment of the successful candidate was predetermined.

[2] The respondent, the Deputy Minister of Justice, disagrees. The respondent does not believe that the complainant had the necessary experience to fill the position; as well, the respondent is of the view that the appointment process, and subsequent appointment, fully complied with the requirements of the *PSEA*.

PRELIMINARY MATTERS

[3] The complainant filed two motions at the outset of the hearing: first, for recusal of the Tribunal Member; and, secondly, that the hearing be recorded.

[4] The Tribunal dismissed both motions at the hearing, and informed the parties that written reasons would be provided. Those reasons are set out below.

[5] The Tribunal must address the following preliminary issues:

(i) Was the Tribunal Member required to recuse herself from hearing the complaint?

(ii) Was the Tribunal required to record the proceedings?

Issue I: Was the Tribunal member required to recuse herself from hearing the complaint?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[6] The complainant takes the position that the Tribunal Member's conduct constitutes bias and, therefore, she should have recused herself, and not heard the complaint.

[7] The complainant submits that the Tribunal Member did not conduct the pre-hearing conference in an impartial manner. He expressed the view that the Member attempted to dissuade him from calling witnesses, and pressured him to accept a paper hearing. He also feels that the Member attempted to preclude him from requesting documentation, and encouraged him to reveal his case to the parties in advance of the hearing.

[8] The complainant also contends that the Tribunal Member does not have a sufficient understanding of formal processes, was patronizing, and overbearing.

B) RESPONDENT'S ARGUMENTS

[9] The respondent submits that the complainant has not met the test for bias established by the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369.

[10] In addition, the respondent argues that the complainant has failed to provide any evidence to support his allegation of bias and, accordingly, there is no reason for the Tribunal Member to recuse herself.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[11] The Public Service Commission (the PSC) was not present at this hearing and no submissions were received on these issues.

ANALYSIS

[12] In *Arthur v. Canada (Attorney General)* (2001), 283 N.R. 346, [2001] F.C.J. No. 1091 (F.C.A.)(Q.L.), at paragraph 8, the Court held:

> (…) An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard (…)

[13] As the Court held in *Murray v. Canada (Revenue Agency)* (2004), 135 A.C.W.S. (3d) 454, [2004] F.C.J. No. 1874 (F.C.T.D.)(Q.L.), at paragraph 22: "The test for actual bias requires a direct showing of bias such as a clear statement which confirms that bias." There is no evidence of actual bias on the part of the Tribunal Member in this case.

[14] The test for reasonable apprehension of bias is well-established. In *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, writing in dissent, Mr. Justice De Granpré stated as follows, at page 394:

> (…) [T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude? Would he think that it is more likely than not that (the decision-maker), whether consciously or unconsciously, would not decide fairly.

[15] The question the Tribunal must answer, therefore, is whether an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it was more likely than not that the Tribunal Member would not decide the complaint fairly.

[16] The complainant's recusal motion arises from discussions that took place during pre-hearing telephone conference calls prior to hearing. He did not raise any bias concerns during the pre-hearing conference, but raised these concerns on the first day of the hearing.

[17] Pre-hearing conferences are intended to prepare the parties for the hearing and ensure that, as much as possible, the hearing will proceed in an orderly manner. A notice of pre-hearing conference is issued in advance, including a list of issues to be

covered. The notice advises the parties' representatives that they "must be fully prepared to discuss all of the following issues." A Member of the Tribunal leads the discussion during a pre-hearing conference and questions the parties on the issues listed in the notice. In this case, the pre-hearing conferences were conducted as explained in the notice, and in accordance with the normal practice of the Tribunal.

[18] By formal notice dated November 8, 2007 the parties to this complaint were informed of the subjects to be discussed during the pre-hearing conferences. The notice provided the following list of subjects to be discussed:

- Identification of witnesses, of the nature of the evidence to be presented and of the length of the testimonies
- Identification of uncontested facts and of documents that can be introduced by consent
- Identification and/or review of issues in view of simplifying and accelerating the hearing
- Order of proceedings
- Time limits for presentation of arguments
- Exchange of documents that will be produced at the hearing as exhibits, and jurisprudence
- Requirement of interpretation services
- Time and length of the hearing

[19] In terms of the complainant's assertion that he was being steered to a paper hearing, the Tribunal Member discussed the possibility of a paper hearing with the parties before she made the decision on how this case would be heard. Pursuant to subsection 99(3) of the *PSEA*, the Tribunal decides whether to hold a paper or oral hearing. Since the complainant had witnesses that he wished to call, the Tribunal decided to hold an oral hearing.

[20] In support of his motion, the complainant attributes words such as "browbeat," "steer," "overbearing" and "patronizing" to the Tribunal Member's demeanour at the pre-hearing conference. However, his characterizations of the Tribunal Member do not constitute evidence. The Tribunal finds that the complainant has failed to provide any evidence to meet the test of reasonable apprehension of bias.

[21] Accordingly, the complainant's motion for the Tribunal Member to recuse herself was denied.

Issue II: Was the Tribunal required to record its proceedings?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[22] The complainant submits that, in the interest of justice, the proceedings must be recorded. This is particularly the case, he asserts, where he has previously made a motion for the Tribunal Member to recuse herself.

[23] He argues that recording the proceeding is the only way to guarantee a precise, accurate and impartial record.

[24] In support of his motion, the complainant submits that the former Public Service Commission Appeal Boards recorded their proceedings.

B) RESPONDENT'S ARGUMENTS

[25] The respondent acknowledges that the Tribunal is master of its own proceedings, and is required to conduct hearings as informally and expeditiously as possible.

ANALYSIS

[26] The Tribunal does not record, nor does it permit the recording of, its proceedings. In this way, a hearing of a complaint is more informal. This approach is consistent with subsection 98(1) of the *PSEA*, which stipulates that a member of the Tribunal determining a complaint is to proceed as informally as possible. The member of the Tribunal makes his or her own handwritten notes during the hearing. The parties at the hearing generally do so as well.

[27] There are no statutory requirements for the Tribunal to record its proceedings. Moreover, pursuant to section 27 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*), the Tribunal is master of its proceedings.

[28] The complainant provided no jurisprudential support for his motion. There is ample support in the case law for the Tribunal's approach. The Federal Court of Appeal has held in *Rhéaume v. Canada* (1992), 153 N.R. 270, [1992] F.C.J. No. 1131 (Q.L.), as follows at page 271 (N.R.):

> (…) [I]n the absence of any statutory provision, a tribunal, whether it be a court of record or not, but which has been given control of its process, has complete discretion as to any mechanical or other recording of its proceedings, which means that the fact that it has adopted a general policy of refusing to permit such recording, provided that no discrimination is allowed to enter into the application of the policy, is legally unassailable.

[29] The complainant asserts that fairness requires that the proceeding be recorded. The Tribunal is satisfied that it has met its duty of fairness in the circumstances. In *Bagri v. Canada (Attorney General)* (2006), 347 N.R. 388, [2006] F.C.J. No. 540 (Q.L.), at paragraph 6, the Federal Court of Appeal, following Supreme Court of Canada jurisprudence, held as follows:

> In the absence of a statutory duty, the failure of an administrative tribunal to make a recording of its proceedings is not a breach of the duty of fairness, provided that a reviewing court is able to dispose of the grounds on which the applicant has challenged the decision under review: *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 SCR 793, at paras. 81 and following.

[30] The Tribunal has established procedures to ensure that the information necessary to dispose of a complaint is available to it. When filing a complaint, the complainant must provide a full, factual description of the events and circumstances. The parties are required to exchange all relevant information. A complainant is required to submit complete, written allegations. Pre-hearing conferences are held in view of simplifying and accelerating the hearing. Parties submit oral and documentary evidence to the Tribunal.

[31] For these reasons, the complainant's motion to have the proceedings recorded was denied.

[32] To resolve this complaint, the Tribunal must determine the following issues on the merits:

(i) Did the respondent abuse its authority when it screened out the complainant for failing to meet the essential qualifications related to experience, and in appointing the successful candidate?

(ii) Did the respondent abuse its authority in establishing an assessment board of only one person?

SUMMARY OF RELEVANT EVIDENCE

[33] The complainant testified. He also called Francine Fleurangile and Ingrid Ludchen.

[34] The complainant introduced into evidence his cover letter and résumé. He also introduced the Statement of Merit Criteria (SMC) for the position, which contained seven experience criteria. The third and fourth experience criteria are relevant to this complaint. They are as follows:

> 3 – Experience in the substantive editing of draft bills and regulations;
>
> 4 – Experience in the drafting and reformulation of deficient legislative texts;

[35] In his testimony, the complainant made specific reference to paragraphs 3, 4, 5, 8, and 9 of his cover letter. As well, he referred to his résumé, particularly the last paragraph on page one where he indicates experience as a Jurilinguist with Justice Canada as an acting AS-06, and to page 3, point 1. The complainant stated that the work experience in his résumé demonstrates he meets the experience criteria: experience in the substantive editing of draft bills and regulations and experience in the drafting and reformulation of deficient legislative texts.

[36] The complainant also testified that there was only a single board member who screened candidates for this position. He introduced a document prepared by the PSC entitled *Guidance Series- Assessment, Selection and Appointment*, which was last modified August 23, 2007 (the PSC document).

[37] The complainant explained that he conducted an electronic search of the PSC document for the words “assessment board member” and there were no hits; when he ran the plural version, “assessment board members,” his search produced nine results.

[38] Ms. Fleurangile, Chief of Resourcing for the National Capital Region, testified that she was not involved in the appointment process. She explained that her role is limited to providing guidance after a complaint is filed. Prior to a complaint being filed, the person involved in the process would be the staffing officer assigned to the process.

[39] Ms. Ludchen is the person who was appointed to the position. Her résumé, cover letter and assessment were all introduced into evidence. During her testimony, Ms. Ludchen stated the following: there was no relationship between her and the assessment board member that could have influenced the results; there were no discussions, in advance of the appointment process, between her and the assessment board which might be perceived as promising the result before it was finalized; and, there were no discussions between her and the assessment board concerning the results or other candidates before the process was completed.

[40] Marc Cuerrier, Senior General Counsel, Legislative Services Branch, Department of Justice (the Branch), testified on behalf of the respondent. Mr. Cuerrier is responsible for a group of 80 staff that provides expertise and support services to approximately 120 lawyers who draft legislation and regulations. The Branch is comprised of 25 lawyers and other professionals.

[41] Mr. Cuerrier explained that the Branch is the guardian of legislative drafting. Mr. Cuerrier supervises the application of drafting conventions for legislation and regulations and the conduct of reviews to ensure compliance with the law. Mr. Cuerrier explained that his staff are not merely proofreaders; they are responsible for substantive editing of draft legislation and regulations.

[42] Mr. Cuerrier stated that, for the position of Chief Legislative Editor, he was looking for someone with strong experience in legislative editing, and someone who knew how to draft.

[43] The respondent introduced the *Job Opportunity Advertisement* for the position. Consistent with the SMC, the *Job Opportunity Advertisement* stipulated as follows:

> 3 – Experience in the substantive editing of draft bills and regulations;
>
> 4 – Experience in the drafting and reformulation of deficient legislative texts;

[44] The respondent also introduced the work description for the position of Chief Legislative Editor dated March 29, 2007. The work description sets out the position profile as follows:

> The Chief Legislative Editor
>
> - is the Federal Government's expert in legislative editing, revision, publishing, consolidation and drafting techniques; is a member of the Legislative Services Branch management team; and plays a major role in the management of legal information in the Legislative Services Branch;
>
> - manages legislative editing and publishing professional staff in the Legislative Services Branch; and
>
> - directs the publication of the *Table of Public Statutes and Responsible Ministers* and several other reference tables and consolidations that are an essential resource for all government departments as well as for the public and the legal community throughout Canada and elsewhere.

[45] Mr. Cuerrier testified that he reviewed the complainant's cover letter and résumé and felt that the complainant did not meet the experience merit criteria. According to Mr. Cuerrier, the complainant did not demonstrate he met all experience criteria for the position. In reviewing the complainant's documents, he could not find any reference to "Experience in the substantive editing of draft bills and regulations," nor could he find any reference to "Experience in the drafting and reformulation of deficient legislative texts."

[46] Mr. Cuerrier explained that, despite this, on April 27, 2007 he sent an email to André Labelle, Chief Jurilinguist and Legislative Counsel, Jurilinguistic Services Unit, Department of Justice, who was the complainant's supervisor when he worked for the Department of Justice in 2000. According to Mr. Cuerrier, he wanted to ensure that he would not screen the complainant out if he met the experience criteria.

[47] Mr. Labelle replied by email on the same date, April 27, 2007, and stated in part: "(…) has never worked among the legislative editors, so that the only knowledge he

may have of their work is that of a co-worker (a jurilinguist). I would be hesitant to support his application for the position concerned…”

[48] Following the reply from Mr. Labelle, Mr. Cuerrier came to the conclusion that the complainant lacked the necessary experience and decided to screen him out of the process. The Screening and Board Report prepared by Mr. Cuerrier, and introduced into evidence, had the following notation for the complainant in the comments section: “no exp. 3, 4.” The Screening and Board Report had a check mark for experience for Ms. Ludchen.

[49] Mr. Cuerrier continued with the staffing process and conducted an assessment of the only candidate screened in, Ms. Ludchen, against the merit criteria and found her to be qualified.

[50] Mr. Cuerrier confirmed that he was the only assessment board member for this appointment process, and that he was of the view that nothing precluded him from being an assessment board of one. He testified that he was objective, fair and based his assessment on, and only on, the merit criteria.

Issue I: Did the respondent abuse its authority when it screened out the complainant for failing to meet the essential qualifications related to experience, and in appointing the successful candidate?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT’S ARGUMENTS

[51] The complainant argues that he meets all the experience criteria listed in the SMC. He submits that his cover letter and résumé demonstrate the following professional experience: legal translator; simultaneous court interpreter; legal writer; jurilinguist; legal proof-reader; adaptive writing specialist for federal regulations for the Minister of the Environment; writer for two Commissioners of Official Languages of Canada; correspondence officer for the Minister of Health and four Ministers of National Defence; writer for the Governor General of Canada; and, legal representative in quasi-judicial hearings, and in the Federal Court of Canada.

[52] The complainant submits that he has excellent and well-rounded experience for the position. He gained this experience by working in private industry domestically and abroad, the federal government, the Ontario Provincial Court, and the Federal Court of Canada.

[53] The complainant submits that he is better qualified for the position than the selected candidate.

[54] The complainant also argues that Mr. Cuerrier did not assess merit and that supervising Ms. Ludchen for a long period of time influenced his decision to appoint her to the position. He further argues that the results were predetermined because Mr. Cuerrier was in a position to observe Ms. Ludchen's work performance for a lengthy period of time, and he allowed her to occupy the position on an acting basis for a long period. He submits that this is evidence that the results were predetermined.

[55] The complainant, in his written submission, argues that "Mr. Cuerrier had decided to appoint Ms. Ludchen to this position in advance of the competition process and oriented his every action toward that illegal goal in every point in the process."

[56] The complainant argues also that Ms. Ludchen is not qualified for this position and should not have been appointed.

B) RESPONDENT'S ARGUMENTS

[57] The respondent submits that the *Job Opportunity Advertisement* and *Notifications* posted on *Publiservice* were very clear: "*Applicants must clearly demonstrate on their application that they meet all of the following essential criteria and are within the area of selection. Failure to do so may result in the rejection of your application*." Seven separate experience factors were listed under the essential qualification.

[58] According to the respondent, the evidence establishes that Mr. Cuerrier, went above and beyond what was required to satisfy himself that the complainant did not have the necessary experience to meet the essential qualifications for the position before screening him out based on the experience criteria.

[59] The respondent submits that, while the complainant may not agree with Mr. Cuerrier's assessment of his qualifications as stated in his application, this does not amount to an abuse of authority.

[60] The respondent submits that the documentary and testimonial evidence demonstrate that the assessment of Ms. Ludchen was based on the merit criteria and only on the merit criteria. The respondent referred to Mr. Cuerrier's testimony and Ms. Ludchen's assessment, which was introduced in evidence at the hearing.

[61] The respondent argues that the assessment demonstrates that every criterion was assessed, and that Ms. Ludhcen meets all the essential qualifications for the position. Consequently, the appointment was made in accordance with merit.

[62] The respondent argues that the results of this process were not predetermined as alleged by the complainant. The respondent submits that the fact an individual acts in a position prior to being appointed is not evidence in and of itself that this person was favoured in the appointment process. The respondent argues that it is clear in this case that Ms. Ludchen's acting appointment to the position of Chief Legislative Editor did not amount to abuse of authority.

[63] According to the respondent, the evidence led by the complainant falls far short of establishing that there has been any abuse of authority in the appointment of Ms. Ludchen to the position of Chief Legislative Editor.

[64] Finally, the respondent argues that no evidence has been introduced that Ms. Ludchen's appointment was made for any other reason than that she met all the essential qualifications for the position.

ANALYSIS

[65] This complaint is brought under paragraph 77(1)(*a*) of the *PSEA* which reads as follows:

> **77.** (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may – in the manner and within the period provided by the Tribunal's regulations – make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of
>
> > (*a*) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2).

[66] The complainant asserts that the respondent failed to properly assess his qualifications against the established experience criteria for the position.

[67] The Tribunal has held in numerous decisions that its role is to determine if there was an abuse of authority and not to re-assess candidates; the Tribunal needs to be satisfied that there was no serious flaw or wrongdoing in the appointment process. In *Broughton v. Deputy Minister of Public Works and Government Services et al.*, [2007] PSST 0020, for example, the Tribunal held as follows:

> [52] The complainant has not demonstrated any serious flaw or wrongdoing by the assessment board when it assessed his experience. According to the respondent, all the candidates were assessed in the same manner.
>
> (…)
>
> [54] The Tribunal's role is to determine if there was an abuse of authority in the appointment process and not to redo the appointment process by reviewing the complainant's experience to determine and second guess whether his experience was assessed correctly by the selection board.

[68] The complainant alleges that the respondent abused its authority when it screened him out of the process on the basis that he did not meet the experience criteria.

[69] As the Tribunal has held on many occasions, it is up to the candidate to demonstrate that they meet the essential qualifications for the position. In *Charter v. Deputy Minister of National Defence et al.*, [2007] PSST 0048, at paragraph 37, the Tribunal stated: "In order for a candidate to be appointed to a position, he must demonstrate through the chosen assessment process that he meets the essential qualifications for the position." Similarly, in *Henry v. Deputy Head of Service Canada et al.*, 2008 [PSST] 0010, at paragraph 55, the Tribunal held: "The Tribunal finds that it was the complainant's responsibility to ensure that the application was complete and contained all the information necessary to demonstrate that she met all the essential qualifications."

[70] The Tribunal finds, on the evidence, that there were no serious flaws or wrongdoing in this appointment process. On the contrary, in terms of the assessment of the complainant, Mr. Cuerrier went above and beyond what was required of him. Even though he felt that the complainant failed to demonstrate, through his application documentation, the requisite experience, Mr. Cuerrier contacted a former supervisor to inquire whether Mr. Pugh did have the necessary experience related to experience criteria 3 and 4 identified on the SMC and *Job Opportunity Advertisement*.

[71] The complainant testified that his experience meets the requirements, however, he relied only on his original application and did not elaborate or explain how his experience meets the merit criteria. The complainant limited himself to the reading of the document and provided no further clarification as to how his work experience would clearly demonstrate that he meets the experience criteria.

[72] The complainant offered no evidence of any flaw or wrongdoing by the respondent when it assessed his experience.

[73] Mr. Cuerrier stated that what he was looking for was demonstrated experience in drafting legislation, not experience which relates to ensuring the English version matches the French version. He testified that the complainant did not demonstrate that he had the necessary experience.

[74] The complainant alleges that the appointment was predetermined. He claims that, even before the appointment process was initiated, the delegated manager had decided that the position would be filled by Ms. Ludchen.

[75] The complainant attempted to prove this allegation through the testimony of Ms. Ludchen. However, Ms. Ludchen's testimony refuted Mr. Pugh's allegation that the appointment was predetermined. The Tribunal finds that the complainant has failed to adduce any evidence to support this allegation. Moreover, documentary evidence corroborates Mr. Cuerrier's testimony that he went beyond simply reviewing the complainant's application, and supports a finding by the Tribunal that the outcome was not predetermined.

[76] The complainant did not prove that Ms. Ludchen is not qualified for the position. There is no evidence at all that Ms. Ludchen does not meet the merit criteria for the position.

Issue II: Did the respondent abuse its authority in establishing an assessment board of only one person?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[77] The complainant drew the Tribunal's attention to section 1.7 of the PSC document which refers to "assessment board members" in the plural. The complainant states that the PSC document does not refer to "selection board member," but does refer to "selection board members." The complainant referred the Tribunal to the portion of section 1.7 under the heading "*Managers can help ensure that appointment decisions are free of bias and systemic barriers."* Under this heading, the PSC document refers to board members in the plural and not in the singular.

[78] The complainant argues that, because the PSC document refers to board members in the plural, it means that an assessment board must be composed of more than one person. According to the complainant, establishing an assessment board comprised of one board member constitutes an abuse of authority.

B) RESPONDENT'S ARGUMENTS

[79] The respondent argues that an assessment board can be comprised of one person. The respondent referred to section 1.7 paragraph 1 of the same section cited by the complainant. The respondent argues that the first paragraph of section 1.7 of the PSC document supports its position, and reads as follows:

> The role of the manager is to set the merit criteria, decide which of the merit criteria will be assessed/applied for each position and select the person(s) to be appointed. A manager may, however, decide to call upon the services of others to assist in the assessment process. An assessment board can be one or more persons and may or may not include the manager. A manager may choose to have other persons on an assessment board because it is more efficient or because he or she would like to increase the appearance of impartiality. In addition, an assessment board can be comprised of members from outside the organization. …The role of the assessment board is to assess persons against the merit criteria, as determined by the manager, and to provide the manager with the information required to make an appointment decision.
>
> (Emphasis added)

ANALYSIS

[80] Complainants have the burden of proving allegations of abuse of authority before the Tribunal (see, for example, *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008). Here, the complainant has provided no evidence that the use of a single board member in this appointment process constitutes an abuse of authority. On the contrary, the evidence presented by the complainant, namely the PSC document, specifically stipulates that an assessment board can be one person.

[81] Subsection 99(2) of the *PSEA* provides that "[t]he Tribunal may summarily dismiss any complaint that in its opinion is frivolous or vexatious." Given the complainant's research into this matter, it is difficult to conclude that he was not aware of the statements in the PSC document that clearly contradict his argument. In persisting despite this evidence, the complainant comes perilously close to pursuing a frivolous allegation. The complainant chose to refer to the excerpts from section 1.7 and ignore the clear reference in the same section that an assessment board could be composed of one person.

[82] Mr. Cuerrier testified that, since only one candidate was screened into the process, he assessed the person against all of the merit criteria. The complete assessment of the selected candidate was tendered into evidence.

[83] Mr. Cuerrier further explained that, if there had been more than one candidate, his decision would probably have been different. In the circumstances, he felt that there was no need to convene a multi-member assessment board since he was conducting a narrative assessment of the selected candidate.

[84] Section 36 of the *PSEA* confers on the respondent substantial discretion in the selection and use of assessment methods to determine whether candidates meet the qualifications established for a given position. Section 36 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).
>
> (Emphasis added)

[85] The issue of the composition of an assessment board has been previously addressed by the Tribunal. In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal held that the use of multiple panels falls within the broad discretion given to managers under the *PSEA*. Moreover, as the Tribunal held, at paragraph 61 of *Visca*:

> The complainant has the burden of proving allegations of abuse of authority. It was incumbent on the complainant to demonstrate through cogent evidence that the use of multiple panels in this appointment process led to an abuse of authority of a type contemplated by the Tribunal in *Tibbs*, *supra*. He has provided no such evidence.

[86] The use of a single board member to assess candidates falls within the broad discretion provided to managers. In this appointment process, the Tribunal finds that the complainant has not established that the respondent abused its authority in the use of a single board member to assess candidates.

POST-HEARING MATTER

[87] The Tribunal wishes to comment on one final matter which was raised by the respondent during written argument. It deals with the complainant's language in his written submissions. The respondent's counsel has requested that the Tribunal address this in its written reasons and the Tribunal has determined that, in the circumstances, the complainant's choice of words must be admonished as a matter of public record.

[88] The following are excerpts from the complainant's written correspondence and submissions in this case. Given the offensiveness of the language used, the specific names of the individuals have been removed and replaced by letter reference by the Tribunal in an effort to respect the privacy and professionalism of these individuals.

> (…)I did not use insulting words such as "stupid", or "crazy," and if I mentioned "derelict or incompetent" as possibilities for her handling of this matter, the content of her e-mail below and the fact that she sent it at all only compound the body of evidence that she, herself, has provided leading logically and naturally to a questioning of her honesty, competence, motives, and due diligence.
>
> (A), as a legal counselor, has reacted in a way that is puzzling, sadly uncharacteristic of a legal professional and whiny at best. Again, this Tribunal deserves better from a (…) lawyer.
>
> I have no doubt that (A), with time, will recover from [their] unadult hissy fit, and in the meantime I appeal to the Tribunal to ensure, in his decision, that Canadian law recovers from [their] clear and deliberate disobedience of this Tribunal's emphasized instructions.

> As the Tribunal deliberates, I would ask it to consider the implications of not finding in the Complainant's favour: if Canadians cannot expect "transparency and accountability" from the Senior General Counsel of the Department of Justice, then what is the point of Canada's Constitution and laws, and what is raison d'être of the Public Service Staffing Tribunal?
>
> Even if (B) is in the habit of talking to himself (…)
>
> Counsel (…), is in conflict of interest as a legal officer (…). (A) is legally and morally bound to upholding justice while protecting a client, (B), who has violated the letter and spirit of the law (…)
>
> In the end, the only question remaining is: will the PSST have the wisdom, foresight, courage, and moral character to its job; or will it prove itself to be merely a tool for justifying wrongdoing by one of the most senior officers of our country's Justice Department?
>
> The PSST cannot be guided by any consideration of the complainant's original (sic) that would be against the Canadian Charter of Rights and Freedoms; neither can the PSST consider the fact that English is the complainant's first official language and that virtually every other party and witnesses to these proceedings have Canada's other official language as a mother tongue---that would be in violation of The Canada's Official Language Act. As well, the PSST cannot consider the complainant's race or the race of any other parties to this hearing in its deliberation---to do so would be fundamentally offensive to Canada's Constitution, laws, and spirit. Nor can the PSST consider personal dislike or partiality toward the complainant or any other party or person---that should be to engage in the same kind of unethical conduct that the complainant is alleging here on the part of the one-person assessment board.

[89] The tone and language used in these submissions are provocative and disrespectful, and will not be tolerated by the Tribunal.

[90] In a previous decision, *Pugh v. Deputy Minister of National Defence et al.,* [2007] PSST 0025, the Tribunal cautioned Mr. Pugh on his choice of language at paragraphs 47-50:

> [47] The Tribunal wishes to comment on the tone and content of the complainant's reply as it finds many of the observations were offensive and disrespectful to the respondent and the PSC. He often submits that the PSC and the respondent's arguments are "gratuitous", "irrelevant" "arrogant", "self-serving". For example, in his reply to the PSC, the complainant states:
>
>> Competent Canadian jurists may 'disagree with' and be embarrassed by the Canadian Bar's decision to give lawyers status to whatever legal counsellor recommended that the PSC put forward this irrelevant and nonsensical 'argument', yet no matter how justified the jurist's objection might be from a subjective standpoint, the jurist's dismay cannot and should not affect that lawyer's professional status.
>
> [48] The following is another offensive comment directed to the respondent: "The laziness and unwillingness of the respondent to perform the task that the Canadian public paid the Respondents for is still without explanation or excuse."
>
> [49] Veiled threats to the Tribunal are also not acceptable. In referring to the emails addressed in paragraph 16 above, the complainant in an email to the other parties and the Vice Chair makes this statement: "By addressing and not ignoring that matter, the PSST may avoid the prospect of the matter being dealt with at a more intrusive and public level."

> [50] Documents submitted to the Tribunal by any party should never contain insults, ridicule the other parties, or threaten a course of action. These actions would not be acceptable in an oral hearing; they are equally unacceptable in a paper hearing.

[91] Pursuant to subsection 99(2) of the *PSEA*, the Tribunal may summarily dismiss any complaint that, in its opinion, is frivolous or vexatious. The Tribunal has already come seriously close to finding the complainant's allegation concerning the composition of the assessment board frivolous.

[92] The complainant's inflammatory language brings the Tribunal to the point of assessing his conduct as vexatious. This is the second hearing involving Mr. Pugh in which his behaviour has raised serious concerns. A party's behaviour both in and out of court has been held to be relevant to a consideration of whether the conduct can be characterized as vexatious. In *Canada v. Warriner* (1993), 70 F.T.R. 8 (T.D.), [1993] F.C.J. No. 1007 (Q.L.), the Court noted that frivolous and unsubstantiated allegations of impropriety had been levelled against lawyers who had acted for or against the litigant. Similarly, in *Wilson v. Canada (Revenue)* (2006), 305 F.T.R. 250 (T.D.), [2006] F.C.J. No. 1922 (Q.L.), the Court noted indicia of vexatious behaviour include the making of unsubstantiated allegations of impropriety against the opposite party, legal counsel or the Court. In *Canada Post Corp. v. Varma* (2000), 192 F.T.R. 278 (T.D.), [2000] F.C.J. No. 851 (Q.L.), the Court examined the evidence before it and determined, without doubt, that the litigant had conducted the proceeding in a vexatious manner.

[93] Pursuant to section 27 of the Tribunal's *Regulations*, the Tribunal is master of its own proceedings. Moreover, as stated, subsection 99(2) of the *PSEA* provides the Tribunal with the express authority to summarily dismiss **any** complaint which, **in its opinion**, is frivolous or vexatious. Based on the Federal Court jurisprudence referred to above, and the language used in subsection 99(2), the Tribunal is of the view that it was Parliament's clear intention that the Tribunal have the authority to consider not only the complaint itself but, equally importantly, the conduct of the complainant, when determining whether a complaint is vexatious.

[94] The Tribunal has no difficulty in finding that Mr. Pugh's unsubstantiated accusations and innuendos of impropriety against counsel for the respondent and the Tribunal constitute vexatious conduct.

[95] Under subsection 40(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Court may bar a litigant from commencing any further proceedings in that Court except with leave. While a similar provision is not contained in the *PSEA*, the Tribunal is master of its proceedings and will not tolerate such conduct in the future.

[96] Given the fact that Mr. Pugh has defied the Tribunal's previous warning and continues to exhibit vexatious conduct in proceedings before the Tribunal, the Tribunal puts Mr. Pugh on notice publicly to stop all abusive and vexatious conduct in the future in all proceedings of the Tribunal. Otherwise, the Tribunal will take appropriate measures which could include, but not limited to, dismissing a subsequent complaint under subsection 99(2) of the *PSEA* if he continues to engage in vexatious behaviour.

Decision

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

Francine Cabana
Member

PARTIES OF RECORD

Tribunal File:	2007-0277
Style of Cause:	*Barry Pugh and the Deputy Minister of Justice et al.*
Hearing:	December 10-11, 2007
Date of Reasons:	September 5, 2008
APPEARANCES:	
Barry Pugh	For the complainant
Jennifer A. Lewis	For the respondent