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

FILES: 2007-0378, 2007-0546 AND 2007-0547

OTTAWA, NOVEMBER 6, 2008

ROSARIO VANI

COMPLAINANT

AND

THE CHIEF STATISTICIAN OF CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaints of abuse of authority pursuant to paragraph 77(1)*(a)* of the *Public Service Employment Act*
DECISION	Complaints are dismissed
DECISION RENDERED BY	Helen Barkley, Member
LANGUAGE OF DECISION	English
INDEXED	*Vani v. Chief Statistician of Canada et al.*
NEUTRAL CITATION	2008 PSST 0029

REASONS FOR DECISION

INTRODUCTION

[1] Rosario Vani filed three complaints with the Public Service Staffing Tribunal (the Tribunal) alleging that the respondent, the Chief Statistician of Canada, abused his authority in establishing a bilingual imperative (CBC) linguistic requirement as an essential qualification for Director-level positions. The complainant also claims that the respondent discriminated against him on the basis of age.

[2] The complainant failed to appear at the hearing. The respondent brought a motion for non-suit, and requested that the Tribunal dismiss the complaints.

BACKGROUND

[3] In late May 2007, an internal advertised appointment process was initiated to staff Director-level positions (EX-01) through the respondent's EX Selection and Development Program (selection process no. 07-STC-IA-NCR-100-204).

[4] The official language qualification for these positions is bilingual imperative (CBC).

[5] The complainant applied in this process, but his candidacy was not considered further once it was determined that he failed to meet the language requirement for the advertised positions.

[6] The complainant filed separate complaints against three appointments made from this appointment process. He provided notice to the Canadian Human Rights Commission. The Tribunal consolidated these complaints for the purpose of hearing in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*).

[7] Pursuant to section 28 of the *PSST Regulations*, the Tribunal provided the parties with a Notice of Hearing on April 14, 2008 and an amended Notice of Hearing on May 30, 2008. The hearing was scheduled for June 17-18, 2008.

[8] On June 16, 2008, the day before the scheduled hearing, the complainant requested an adjournment. He claimed that he had insufficient time to serve his subpoenas. The Tribunal denied the complainant's request for adjournment of the hearing by letter decision on June 16:

> The Tribunal has considered the complainant's request dated June 16 for postponement of the hearing scheduled for June 17 and 18, 2007 (*sic*) in Ottawa, Ontario.
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> The request for postponement is denied for the following reasons. All parties were notified on April 14, 2008 that the hearing would be held June 16 and 17, 2008. During the pre-hearing conference held on May 30, 2008, the dates of hearing were changed to June 17 and 18, 2008 at the request of the respondent. A further pre-hearing conference was set for June 11 to confirm witness names. At that conference, the complainant indicated he had still not contacted those persons he wished to call as witnesses. He requested subpoenas late on June 11, 2008, but failed to provide complete information.
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> The complainant now seeks a postponement of the hearing as he did not receive the subpoenas until noon on June 13, 2008. He states that this was too late to give any sufficient notice to the witnesses to reschedule their activities.
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> The Tribunal notes that each party is responsible for ensuring the attendance of their witnesses. The complainant has not provided any exceptional circumstances which prevented him from securing the attendance of his witnesses in a timely fashion.
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> For these reasons, the request for postponement is denied. The hearing will proceed on June 17, 2008 at 9:00 a.m.

[9] The complainant informed the Tribunal at the close of business on June 16, 2008 that he would not be present at the hearing.

[10] It is important to emphasize that a party requesting a summons (subpoena) for a witness has the responsibility of ensuring that all necessary information is provided to the Tribunal to issue the summons. The party is also responsible for ensuring that the witness is served with the summons in a timely manner. All the necessary information for issuing and serving a summons is readily available to the parties in the Tribunal's *Procedural Guide*. Chapter 19 of the *Procedural Guide* states, in part, as follows:

> Anyone who wishes to ensure the attendance of a witness must send the Tribunal a request for a summons. The request must be in writing and include the following information:
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> (a) the Tribunal's file number;
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> (b) the name and address of the person who must appear;

(c) the date, the time and the place where this person is required to appear, if known; and,

(d) a detailed description of the documents or other material that this person must produce at the hearing, if any.

[…]

The party who requested the summons is responsible for ensuring that the witness is served with the summons as soon as possible. In any event, the summons must be served at least seven days before the appearance of the witness.

[11] In this case, the complainant knew by at least May 30, 2008, the date of the first pre-hearing conference, of his responsibilities with respect to obtaining and serving subpoenas. He chose, at his own peril, to delay obtaining and serving subpoenas.

PRELIMINARY MATTERS

[12] At the outset of the hearing, the respondent made a motion for non-suit, and requested that the Tribunal dismiss the complaint on this basis.

ARGUMENTS OF THE PARTIES

A) RESPONDENT'S ARGUMENTS

[13] The respondent submits that the burden of proof is on the complainant, and he has not provided any evidence to substantiate his allegations.

[14] According to the respondent, it would be a waste of time and resources to have to respond to each broad and unsubstantiated allegation contained in the complainant's pleadings; the respondent has answered the allegations in its reply.

[15] The respondent acknowledges the low threshold a complainant needs to meet to contest a motion for non-suit, however, in this case, the threshold has not been met; there is no evidence for the respondent to answer.

[16] The respondent submits that a motion for non-suit is not an assertion that the complainant has failed to prove his case, but rather, that there is no case for the

respondent to meet. The nature of a motion for non-suit, according to the respondent, is that once the motion is made, no more evidence can be presented.

[17] Finally, the respondent submits that the Tribunal is precluded from rendering a decision on the merits since there is no evidence before the Tribunal.

[18] The respondent did not provide any jurisprudence in support of its motion.

B) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[19] The Public Service Commission (PSC) agrees with the respondent's position on the motion.

[20] The PSC submits that, since there is a complete lack of evidence before the Tribunal, the complainant has failed to meet the burden of proof. Accordingly, the complaints should be dismissed.

[21] The PSC did not provide any jurisprudence in support of the respondent's motion for non-suit.

C) COMPLAINANT'S ARGUMENTS

[22] Having failed to appear, the complainant made no reply submissions to the motion.

ANALYSIS

[23] At the outset, the Tribunal wishes to emphasize the unusual nature of a motion for non-suit. The threshold for denying the motion is extremely low; a complainant need only meet a *prima facie* test, rather than the higher balance of probabilities standard. Neither the respondent nor the PSC provided any jurisprudence in support of the motion.

[24] The jurisprudence is clear that an administrative tribunal is master of its own proceedings. In *Prassad* v*. Canada (Minister of Employment and Immigration)*, [1989] 1

S.C.R. 560, at pages 568-69, [1989] 1 S.C.J. No. 25, at para. 16 (S.C.C.)(Q.L.), for example, Sopinka J., writing for the majority, held as follows (Q.L. version):

> **16.** […] We are dealing here with the powers of an administrative tribunal in relation to its procedures. As a general rule, these tribunals are considered to be masters in their own house. In the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice.

[25] In the case of the Tribunal, there are no specific rules laid down by the *PSEA* or the *PSST Regulations* to override the common law powers of the Tribunal as master in its own house. On the contrary, there is express authority under both the *PSEA* and the *PSST Regulations* which reinforces this common law power. Subsection 99(3) of the *PSEA* states as follows: "The Tribunal may decide a complaint without holding an oral hearing." Section 27 of the *PSST Regulations* states: "The Tribunal is master of the proceedings and may determine the manner and order of the presentation of evidence and arguments at the hearing."

[26] Where a party fails to appear at a hearing, section 29 of the *PSST Regulations* applies. It reads as follows:

> **29.** If a party, an intervenor or the Canadian Human Rights Commission, if it is a participant, **does not appear at the hearing** and the Tribunal is satisfied that notice of the hearing was sent to that party, intervenor or participant, **the Tribunal may proceed with the hearing and dispose of the complaint without further notice**.
>
> (emphasis added)

[27] The Tribunal has interpreted section 29 of the *PSST Regulations* in *Broughton* v*. Deputy Minister of Public Works and Government Services et al.*, [2007] PSST 0020. The pertinent passages of this decision are as follows:

> [24] The Tribunal is of the opinion that the word "hearing" should be given its ordinary meaning, that is, either an oral hearing or a paper hearing. Furthermore, the words "dispose of the complaint without further notice" in section 29 of the *PSST Regulations* indicate that it refers to the portion of the complaint process where the Tribunal will make a decision on the complaint.
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> […]
>
> [32] Furthermore, if Parliament had intended as a consequence of a complainant's failure to appear at a hearing that the complaint be treated as abandoned or withdrawn, it would have clearly stated this. There is nothing in the *PSEA* to support this interpretation. Of note, subsection 22(3) of the *PSST Regulations* specifically addresses that the Tribunal may consider a complaint withdrawn "if the complainant fails to provide allegations."

> [33] Since the complainant provided allegations, the wording of section 29 of the *PSST Regulations* applies and clearly specifies that the Tribunal may proceed with the hearing without further notice and dispose of the complaint.

[28] Having addressed the common law and statutory powers of the Tribunal as master of its own proceedings, and the application of section 29 of the *PSST Regulations*, it is necessary to apply the law to the facts.

[29] There is no dispute that the complainant had proper notice of the hearing scheduled to commence on June 17, 2008. The complainant sent the Tribunal an email late in the afternoon on June 16, 2008. He informed the Tribunal that he would not be present at the hearing.

[30] The complainant filed allegations on December 3, 2007. Accordingly, section 22 of the *PSST Regulations* does not apply. The respondent and the PSC each filed replies to the allegations. In her submissions on the motion for non-suit, counsel for the respondent submits that it would be a waste of time and resources to present evidence in response to such broad and unsubstantiated allegations. She acknowledges that these allegations had already been responded to in the respondent's reply.

[31] As explained, the Tribunal does not have to hold an oral hearing to consider and dispose of a complaint. In *Broughton*, the Tribunal determined that, notwithstanding the fact that the complainant had failed to provide written submissions as directed by the Tribunal, it would, nevertheless, render its decision on the complaint with the documents on file.

[32] Counsel for the respondent submits that there is no evidence for the Tribunal to consider. She goes further and suggests that, since there is no evidence, the Tribunal is precluded from rendering a decision on the merits of the complaint. The Tribunal disagrees. The documentation on file provides some evidence in support of the allegations raised by the complainant. Whether or not there is sufficient evidence to substantiate a complaint of abuse of authority requires, of course, a decision on the merits.

[33] The Tribunal has the jurisdiction to conduct a paper hearing based on the written documentation on file. Moreover, section 29 of the *PSST Regulations* provides the

Tribunal with the express authority to proceed with the hearing and dispose of the complaint without further notice.

[34] For these reasons, the respondent's motion for non-suit is denied. The Tribunal will dispose of the complaint on its merits based on the written documentation on file.

ISSUE

[35] The Tribunal must determine whether the complaint of abuse of authority is substantiated.

ARGUMENTS OF THE PARTIES

A) Summary of Complainant's Relevant Evidence and Arguments

[36] The complainant's allegations are essentially threefold: first, the respondent abused his authority by using a closed, secretive staffing process, with pre-determined results; secondly, by imposing an imperative language requirement which was unnecessary, and led to appointments not based on merit; and, finally, the appointments were made on the basis of a prohibited ground of discrimination, namely, age.

[37] In support of his allegations, the complainant provided the following evidence. According to him, nine candidates were screened into a pool without assignments to immediate positions. He states that the appointment of the Director General for National Accounts was announced on October 12, 2007, but the appointment did not take effect until May, 2008. According to the complainant, the respondent used its discretion to delay this appointment because the appointee's language status was not confirmed. This, in turn, resulted in a delay in the appointment to the position of Director, Balance of Payments. The complainant states further that the appointment of the Director, Income Statistics was delayed to May 2008.

[38] According to the complainant, all of this is evidence that the respondent did not need to use an imperative language requirement in this appointment process. He also

submits that this proves that the favoured candidates were predetermined, and confirmed into the positions rather than properly selected.

[39] With respect to his allegation that the respondent has engaged in age discrimination in this appointment process, he states that the ages of the appointees in the last three processes provide proof of this. He states further that the selection process was biased heavily in favour of the younger age group, and there was only the "odd token senior in the process."

B) Summary of Respondent's Relevant Evidence and Arguments

[40] In response to the complainant's allegation that a closed, secretive appointment process was conducted, the respondent submits as follows. For the past three consecutive years, the respondent has conducted a generic EX appointment process. The process is announced on the respondent's intranet site, as well as posted on *Publiservice*. It is open to persons employed in the Public Service of Canada at the EX-minus-1 level or equivalent. The job opportunity poster clearly sets out the assessment tools, and timeframes established for this process. Information sessions are held to respond to prospective candidates' questions. At the June 1, 2007 information session, the assessment tools and timeframes were further explained to interested candidates; they were aware of the timeframes required to meet the language requirements.

[41] First-level screening of candidates was done after reviewing detailed information provided by the candidates. Assessments were done in accordance with PSC policies. The assessment of candidates consisted of formal interviews with five selection board members, together with structured reference checks. The successful candidates were then placed in a pool, and appointed to the EX-01 level positions as vacancies arose.

[42] Given this evidence, the respondent submits that the complainant's first allegation cannot be substantiated.

[43] Dealing with the complainant's second allegation, the respondent submits that jobs in the EX Group require bilingual proficiency at the CBC level or higher, and are staffed on an imperative basis.

[44] The respondent provided the following evidence in response. First, the job opportunity poster clearly informed candidates that the essential qualifications included a language proficiency requirement, and that candidates would be screened on this criterion. All candidates whose second official language results had expired were scheduled for testing. The respondent states that its document entitled “Advice to Candidates on STC Testing” was available to all employees on its intranet. According to the respondent, this document specifically advises candidates to keep all testing appointments, including language testing, except under exceptional circumstances, namely, illness, emergency circumstances, operational requirements, and pre-approved annual leave, all of which must be verified.

[45] As a Statistics Canada employee who had access to the above-noted document, the complainant provided no evidence to support the existence of exceptional circumstances which would have prevented him from attending the official language oral interaction (OI) test scheduled for him. According to the respondent, Mr. Vani failed to attend the OI test, despite the initial test date having been rescheduled at his request. The complainant was screened out on the basis of not meeting the official language proficiency essential qualification.

[46] The respondent relies on the following documentary evidence: Treasury Board Policy on Staffing of Bilingual Positions; and, the respondent’s Official Languages Policy. A copy of the latter document was provided to the Tribunal. In further support of its position, the respondent relies on subsection 30(2) of the *PSEA* in support of its position.

[47] Finally, the respondent submits that the evidence does not support an allegation of age discrimination. The respondent states that the ages of the qualified candidates appointed from this process are 37, 37, 42, 42, 44, 50, and 54 years of age. Candidates were appointed on the basis of their demonstration of the merit criteria.

ANALYSIS

[48] Dealing with the first allegation, there is insufficient evidence to substantiate this allegation of abuse of authority. The complainant has provided no evidence to support

his allegation that there was a closed secretive process with pre-determined results. The evidence provided by the respondent as to the steps taken demonstrates that this appointment process was conducted in an open and transparent manner.

[49] In terms of the second allegation, the respondent's Official Languages Policy is relevant. The pertinent passages of this policy are as follows:

> Imperative staffing: Staffing procedure for a bilingual position where only applicants who meet all the position's requirements are considered.
>
> [...]
>
> Director and higher level positions, assistant director and section chief positions with supervisory responsibilities shall be staffed at the CBC level or higher.
>
> [...]
>
> Imperative staffing shall be required in competition to staff all assistant chief statistician positions, director general positions and director positions.
>
> […]
>
> Bilingual positions shall be staffed on an imperative basis unless sufficient justification has been given as required by TB policy.

[50] Subsection 30(2) of the *PSEA* reads, in part, as follows:

> **30.** (2) An appointment is based on 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** […]
>
> (emphasis added)

[51] It is clear from a reading of subsection 30(2) of the *PSEA* that official language proficiency constitutes an essential qualification to be established by the deputy head. In order for the complainant to succeed on this allegation, he must establish that the deputy head abused his authority in establishing language proficiency of bilingual imperative (CBC) for Director-level positions. The Tribunal has not been presented with any evidence to support a finding that the decision to require bilingual imperative (CBC) language proficiency constitutes an abuse of authority. The respondent's Official

Language Policy requires such a proficiency. The complainant has not satisfactorily linked his statements about the dates of various appointments to his allegation regarding the establishment of imperative staffing qualification. Accordingly, the second allegation of abuse of authority raised by the complainant is not substantiated.

[52] Finally, the complainant's allegation that there was age discrimination in these appointment processes has not been proven. In fact, the complainant has not established a *prima facie* case of discrimination. The complainant has the onus of establishing a *prima facie* case. The well-established test was articulated by the Supreme Court of Canada in *Ontario (Human Rights Commission)* v*. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, at para. 28, as follows:

> The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer.

[53] While not constituting precedent, the following passage from the B.C. Human Rights Tribunal dealing with a disability complaint is instructive. In *Ingram* v*. Workers' Compensation Board et al.*, 2003 BCHRT 57, at para. 20 (Q.L.), the B.C. Human Rights Tribunal stated as follows:

> There would have to be some allegation that a worker has been discriminated against on the basis of disability in order for a potentially valid human rights complaint to exist. In other words, a complainant must allege facts that, if proven, would establish that they have been in some way adversely affected by reason of their disability. It is not enough to say one is disabled and has been treated unfairly. There must be some connection or nexus between the two. That nexus is missing on the facts alleged by the Complainant.

[54] Similarly, in this case, it is not enough for the complainant to allege age discrimination. He must allege facts that, if proven, would establish that he has been in some way adversely affected by reason of his age. That nexus is missing on the facts alleged by the complainant. Accordingly, his allegation of abuse of authority based on age discrimination cannot be substantiated.

[55] The Tribunal cannot let this matter conclude without a strong admonition of the complainant's conduct. Significant resources are expended on arranging oral hearings where they are deemed appropriate. It is the responsibility of the parties to inform the

Tribunal in a timely manner if they are not going to exercise their right to be heard following receipt of a Notice of Hearing.

DECISION

[56] For these reasons, the complaints are dismissed.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal Files:	2007-0378, 2007-0546 and 2007-0547
Style of Cause:	*Rosario Vani and the Chief Statistician of Canada et al.*
Hearing:	June 17, 2008 Ottawa, Ontario
Date of Reasons:	November 6, 2008
APPEARANCES:	
No one appearing	For the complainant
Lesa Brown	For the respondent
John Unrau	For the Public Service Commission