



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007-0064

OTTAWA, NOVEMBER 7, 2008

SHANSHENG ZHAO

COMPLAINANT

AND

THE DEPUTY MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

AND

OTHER PARTIES

MATTER Complaint of abuse of authority pursuant to subsection 77(1)
of the *Public Service Employment Act*

DECISION The complaint is dismissed

DECISION RENDERED BY Merri Beattie, Member

LANGUAGE OF DECISION English

INDEXED *Zhao v. Deputy Minister of Citizenship and Immigration et al.*

NEUTRAL CITATION 2008 PSST 0030

REASONS FOR DECISION

INTRODUCTION

[1] Shansheng Zhao, the complainant, participated in an internal advertised appointment process conducted by Citizenship and Immigration Canada (CIC), to fill the position of Human Resources Manager (PE-04) at the Case Processing Centre (CPC), Vegreville, Alberta. He was eliminated from the process and he filed a complaint of abuse of authority.

[2] The complainant makes three principle allegations. First, the board members arrived more than 1½ hours late for the interview with no sufficient reason, and this amounts to intimidation. Secondly, the board conducted a subjective assessment which was unfair and amounted to discriminatory treatment. Lastly, information was withheld from him and documents were destroyed.

[3] The respondent, the Deputy Minister of CIC, states that there is a reasonable explanation for the delay, the conduct of the assessment was proper, the respondent complied with all orders concerning provision of information and, finally, there was no requirement to keep candidate preparation notes.

BACKGROUND

[4] A three-member assessment board was established for this appointment process, composed of: Shirley Holmstrom, Director, CPC, Vegreville, Alberta; Anne Marie Giannetti, Director, Strategic Resourcing, National HQ, Ottawa; and, Jane Symes, Human Resource Manager, Atlantic Region, Halifax.

[5] The assessment methods chosen to assess candidates for this appointment process, following the initial screening of applications, consisted of an interview, a written exercise and references. The interview guide was prepared several weeks before the interviews. Candidates were provided with one question prior to the interview which was to be answered orally during the interview. Candidates were also informed in advance that there would be a written exercise.

[6] The complainant is a Chief of Human Resources (PE-03) at Correctional Services Canada. He was eliminated from the process for failing to meet the essential qualifications; he was found not to have the requisite knowledge and abilities for the position.

[7] A Notice of Appointment or Proposal of Appointment was posted on *Publiservice* on January 24, 2007; one candidate was selected.

[8] The complaint and the complainant's Notice to the Canadian Human Rights Commission (CHRC) were received by the Tribunal on February 5, 2007. The CHRC notified the Tribunal that it did not intend to make submissions concerning this complaint.

[9] Pursuant to subsection 99(3) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*), the Tribunal ruled that it would decide this complaint by paper hearing.

ISSUES

[10] The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in the assessment of the complainant?
- (ii) Is the interpretation and application of the *Canadian Human Rights Act* triggered by this complaint?

RELEVANT LEGISLATION

[11] The following sections of the *PSEA* are relevant to this complaint:

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).

78. Where a complaint raises an issue involving the interpretation or application of the *Canadian Human Rights Act*, the complainant shall, in accordance with the regulations of the Tribunal, notify the Canadian Human Rights Commission.

80. In considering whether a complaint under section 77 is substantiated, the Tribunal may interpret and apply the *Canadian Human Rights Act*, other than its provisions relating to the right to equal pay for work of equal value.

[12] Subsection 3(1) of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *CHRA*) is also relevant:

3.(1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

[13] Sections 7 and 8 of the *CHRA* will also be referred to in these reasons:

7. It is a discriminatory practice, either directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

8. It is a discriminatory practice

(a) to use or circulate any form of application for employment, or

(b) in connection with employment or prospective employment, to publish any advertisement or to make any written or oral inquiry that expressly or implies any limitation, specification or preference based on a prohibited ground of discrimination.

(emphasis added)

Issue I: Did the respondent abuse its authority in the assessment of the complainant?

ARGUMENTS OF THE PARTIES

A) SUMMARY OF COMPLAINANT'S RELEVANT EVIDENCE AND ARGUMENTS

[14] The complainant raises three principal allegations with respect to this issue. First, he claims that there was intimidation by the board members which amounted to unfair and discriminatory treatment. Secondly, he submits that the assessment was unfair, subjective, discriminatory, and conducted without the use of objective criteria. Lastly, the complainant asserts that information was withheld, and documents destroyed.

[15] Dealing with the first allegation, the complainant's arguments can be summarized as follows. He submits that there was a delay in conducting, and a reduction in the allotted time for, his interview; he claims this constitutes an abuse of authority. In terms of delay by the board in conducting his interview, he asserts that it was intentional. In support of this allegation, he states that his interview was to start at 9:00 a.m.; it commenced at 11:00 a.m. He does not believe the explanation of the board that the interview was delayed due to travel difficulties. He states that he travelled from Edmonton the morning of the interview, and the highway was in good condition. Due to the delay, he states that he suffered stress, intimidation and hunger, all of which affected his performance in the interview. The complainant further asserts that no other candidate's interview was delayed. Finally, he states that his interview was originally scheduled for two hours, but was unexpectedly changed to one hour.

[16] In terms of his second allegation, the complainant claims that the rating guide used in this appointment process was not objective. Rather, the board used a narrative guide. While he concedes that each rating was defined by criteria, there was no further definition of these criteria. He also asserts that, while expected answers were listed on the rating guide, there were no points or weighting assigned. He argues that the rating scale was not well defined, and that there was no clear correlation between the number of correct answers provided by a candidate and the rating assigned. He states that his belief that this was a subjective assessment was corroborated by the board chair during informal discussion.

[17] In support of his third allegation, the complainant states that information pertaining to the successful candidate's assessment was withheld, and was only provided to him after the Tribunal ordered that the information be provided. As well, he submits that documents created by him, which are part of the staffing file, and must be kept for five years after the file is closed, were destroyed by the board. Conversely, according to the complainant, the successful candidate's notes were not destroyed.

B) SUMMARY OF RESPONDENT'S RELEVANT EVIDENCE AND ARGUMENTS

[18] In response to the complainant's first allegation, the respondent submits that the out-of-town board members planned to arrive in Vegreville the day before the scheduled interviews. An email dated December 29, 2006 to this effect was provided to the Tribunal. However, due to winter storm warnings, they did not depart for Vegreville until the morning of January 11, 2008 and arrived late. They left Nisku, Alberta at 8:30 a.m. and arrived at CPC Vegreville, Alberta at 10:30 a.m., after getting lost. Copies of two news articles were provided to the Tribunal to support the respondent's version of events regarding the winter storm warnings in Central Alberta. The respondent also provided a copy of the CPC visitors' register showing that these two board members signed in at 10:30 a.m. on January 11, 2007.

[19] The respondent further asserts that the complainant was mistaken as to his scheduled interview start time; his interview was originally scheduled to start at 9:45 a.m. The respondent provided a copy of an email dated December 8, 2006 to support its submission. As well, a copy of the original interview schedule was provided by the respondent.

[20] The respondent states that, on his arrival, the complainant was informed that there would be a delay, given a building tour, and offered coffee. The respondent also denies the complainant's assertion that his interview was reduced from two hours to one hour. The respondent states that candidates were informed in advance, in writing, to allow two hours for the entire visit, which included the interview, written exercise, and a brief tour of the CPC facility. The respondent provided a copy of an email dated January 5, 2007 to support its submission.

[21] The respondent states that the complainant completed his interview and written test within the allotted two hours, namely, close to 1:00p.m. At no time did the complainant inform the board of any concerns about feeling hungry, intimidated, or upset.

[22] With respect to the second allegation, the respondent submits that the board was comprised of three competent human resources specialists; these individuals understand the requirements of the work in this highly operational, fast-paced environment. As well, they collaborated on the choice and application of the assessment tools. The assessment tools chosen were acceptable methods of assessment.

[23] A comprehensive rating guide was used, which detailed the questions, assessment criteria, and method of rating. The respondent states that the board properly understood expectations related to questions, and had a common understanding of the narrative criteria and definitions. Moreover, the board was diligent, took notes, deliberated on its decisions, and reached consensus; all candidates were assessed fairly and consistently.

[24] The respondent submits that, pursuant to subsection 30(2) of the *PSEA*, the deputy head has the power to establish essential qualifications; and, section 36 of the *PSEA* provides the deputy head with the authority to use any assessment method it considers appropriate. The respondent relies on the Tribunal's decision in *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, at para. 42.

[25] With respect to the third allegation, the respondent submits that notes made by candidates in advance of the interview for the oral presentation were kept, but did not form part of the assessment. Conversely, notes made by candidates during the interviews were destroyed. In terms of the complainant's claim that documents were not provided, the respondent submits that this relates to the exchange of information process after the complaint was filed and, therefore, is irrelevant to a complaint of abuse of authority. In any event, the respondent states that it did comply with the Tribunal's order for provision of information by providing the assessment documentation.

C) SUMMARY OF THE PUBLIC SERVICE COMMISSION'S SUBMISSIONS

[26] As it has done in previous complaints, the Public Service Commission (PSC) provided general submissions on the concept of abuse of authority, and how the Tribunal should focus its approach in this area.

D) SUMMARY OF THE COMPLAINANT'S RELEVANT REPLY SUBMISSIONS

[27] In terms of the complainant's first allegation, he states in reply that the news articles do not describe severe winter conditions, nor make any mention of the highway conditions.

[28] In terms of the third allegation, the complainant replies that, while notes do not have to be used for assessment, they are evidence of how candidates answered the questions. Finally, he reiterates his position that candidates' notes are part of a staffing file, and must be maintained for five years after the file is closed.

ANALYSIS

[29] In terms of the complainant's first allegation, based on the evidence presented, the Tribunal finds the following facts. First, the complainant's interview was originally to commence at 9:45 a.m. on January 11, 2007. Secondly, the board members had planned to arrive in Vegreville on January 10, 2007. The complainant and the board members left for Vegreville in the morning of January 11, 2007.

[30] The respondent states that the board members were delayed because they got lost while driving; the complainant has not provided any evidence to refute this. As such, the Tribunal accepts that the complainant's interview was delayed due to the out-of-town board members getting lost while travelling to Vegreville on the morning of January 11, 2007. This is most certainly not a set of circumstances that gives rise to a substantiated complaint of abuse of authority. There is no evidence that the delay in commencing his interview was intentional on the part of the board, or that it was designed to intimidate him.

[31] Moreover, the complainant has failed to prove that his allotted time for completion of the interview was reduced to one hour. There is no evidence to corroborate the complainant. On the contrary, the documentary evidence, namely, the December 8, 2006 email to the complainant informing him that he had been screened into the next stage of the process, confirms that the interview portion of the assessment was scheduled for one hour.

[32] Finally, with respect to the complainant's assertion that no other candidate's interview was delayed, the evidence shows that the candidate who was to be interviewed before the complainant withdrew from the process prior to the day of the interview. Similarly, the candidate scheduled immediately after the complainant's original time also withdrew. Accordingly, the interview originally scheduled for 1:00 p.m. proceeded as scheduled.

[33] In terms of the complainant's second allegation, the Tribunal has held in a number of decisions that its role is to examine the process used by a deputy head to determine whether there was an abuse of authority. It is not the role of the Tribunal to redo an appointment process. See, for example: *Broughton v. Deputy Minister of Public Works and Government Services et al.*, 2007 PSST 0020, at para. 54; and, *Oddie v. Deputy Minister of National Defence et al.*, 2007 PSST 0030, at para. 66.

[34] In *Visca*, at para. 44, the Tribunal discusses the considerable change brought about by the *PSEA*, permitting a move away from numerically rating and ranking candidates. In *Visca* and in *Jolin v Deputy Head of Service Canada et al.*, [2007] PSST 0011, the Tribunal explains the broad discretion an assessment board has to choose from a wide range of assessment tools and methods, under section 36 of the *PSEA*.

[35] An assessment method must provide a means to determine whether a candidate meets or does not meet an essential qualification in order to comply with the requirement to appoint qualified persons in accordance with subsection 30(2) of the *PSEA*.

[36] In this appointment process, a narrative, rather than a numerical point-per-answer method was used in assessing some of the essential qualifications. Four assessment ratings were established; namely, excellent, very good, good and unsatisfactory. Each of the ratings was defined. The Tribunal finds all these elements to be objective. Moreover, the Tribunal is satisfied that this method allowed the assessment board to determine whether candidates met the essential qualification being assessed.

[37] Narrative assessment requires that board members use their judgement when assessing candidates. There is clearly an element of subjectivity in exercising discretion and judgement. As the Tribunal stated in *Visca*, "Parliament has provided those with staffing authority with the means to exercise the discretionary aspects of their authority, according to their judgement." Those who exercise judgement in staffing must be knowledgeable and must base their judgements on objective criteria, in good faith and free from bias. Based on the evidence and submissions presented in this hearing, the Tribunal finds that the assessment guide was objective, and was applied by knowledgeable board members in this appointment process.

[38] There is no evidence whatsoever to substantiate an allegation that the assessment method used was unfair or discriminatory in any way. Neither is there any evidence that the board members were not objective in using their judgement to assess candidates.

[39] With respect to the complainant's allegation that the respondent withheld information, it is not unusual for the parties to disagree on the relevance of information sought during the pre-hearing exchange of information. Either party can request that the Tribunal make a determination on relevance which may result in an order to provide information, in accordance with the Tribunal's *Regulations*.

[40] Contrary to the respondent's position, the Tribunal is of the view that, in some circumstances, a respondent's actions before or following the appointment process may be evidence which is relevant to a complaint of abuse of authority. In this case, a request for provision of information was dealt with by the Tribunal in pre-hearing letter decisions. The complainant has not raised any new issue or presented any evidence on this matter that is relevant to his complaint of abuse of authority.

[41] Finally, the complainant submits that the destruction of his notes when the successful candidate's notes were retained is evidence of differential treatment and discrimination.

[42] The complainant states that all notes made by candidates before and during the interview had to be given to the board members at the end of the interview. He states that his pre-interview preparation notes were destroyed while those of the successful candidate were kept by the board.

[43] The respondent submits that pre-interview preparation notes were kept if the candidate offered them to the board, but they were not used during assessment. Notes made by candidates during the interview were destroyed.

[44] The Tribunal finds, based on the evidence, that the complainant's pre-interview preparation notes were not retained by the assessment board, while the successful candidate's were. The Tribunal also finds that the preparation notes were not considered by the board in their assessment of candidates.

[45] It has not been established whether the complainant's pre-interview preparation notes were ever in the board members' possession or whether they were destroyed by the board members. Even if it had been established that the notes were destroyed by the board, this would not be evidence in itself of differential treatment or discrimination. No advantage or disadvantage in the appointment process derived from these notes since they were not used by the board in its assessment of candidates. The fact that the complainant's notes were not retained although the successful candidate's were is not an abuse of authority or evidence of differential treatment or discrimination.

[46] Nevertheless, the Tribunal would provide this cautionary note for future processes. If a board allows candidates to take notes prior to or during an assessment process, it would be highly prudent to treat these notes in the same manner for **all** candidates. In a different set of circumstances, such an inconsistency could be material to a complaint. Having said this, all materials, including candidates' notes, that are used for assessment should always be retained, as noted by the Tribunal in the recent decision *Dionne v. Deputy Minister of National Defence et al.*, [2008] PSST 0011, at para. 67.

Issue II: Is the interpretation and application of the *Canadian Human Rights Act* triggered by this complaint?

ARGUMENTS OF THE PARTIES

A) SUMMARY OF COMPLAINANT'S RELEVANT EVIDENCE AND ARGUMENTS

[47] The complainant made several references to discrimination in his written submissions. He submits that there has been an abuse of authority because the respondent failed to respect merit and, since he was treated differently than other candidates, this amounts to discrimination. In his claim for remedy, the complainant asks the Tribunal that he be relieved from the impact of discrimination.

B) SUMMARY OF RESPONDENT'S RELEVANT EVIDENCE AND ARGUMENTS

[48] The respondent argues that the complainant has failed to establish a *prima facie* case of discrimination. The respondent submits that the complainant has failed to establish a link between his assessment results and a prohibited ground of discrimination. Since there can be no finding of discrimination, no remedy under the *CHRA* is justified in this case.

[49] The respondent submits further that, should the Tribunal find that the complainant has established a *prima facie* case of discrimination, a full oral hearing to determine this issue is necessary.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[50] The PSC agrees with the respondent that an oral hearing is preferable if the Tribunal decides that the complainant has raised a valid issue of discrimination.

D) COMPLAINANT'S REPLY SUBMISSIONS

[51] The complainant submits in reply that the respondent intentionally chose to ignore the fact that he is a member of a visible minority group.

ANALYSIS

[52] The complainant has failed to properly make an allegation of a discriminatory practice, as set out in sections 7 and 8 of the *CHRA*. These sections stipulate that a discriminatory practice must be **on a prohibited ground of discrimination**, as specified in subsection 3(1) of the *CHRA*. The complainant has failed to set out in any of his documentation to the Tribunal, any prohibited ground of discrimination, such as race, religion or age.

[53] In his complaint, the complainant makes no reference to a prohibited ground of discrimination; he claims differential treatment.

[54] The complainant filed a Notice to the CHRC, which requires that the prohibited ground of discrimination be specified. The complainant stated as follows: "I also feel that I was discriminated as I was the only candidate interviewed that belongs to an employment equity target group."

[55] The complainant filed five allegations April 20, 2007. In two of these allegations, he states that the respondent abused its authority in treating him in a "discriminatory way." He does not provide any further elaboration in his allegations.

[56] In his final reply submissions, the complainant states that he has been treated differently because he is a member of a visible minority. Visible minority is terminology found in the *Employment Equity Act*, S.C. 1995, c. 44 (the *EEA*). The *EEA* was enacted to ensure that federally-regulated employers provide equal opportunities for employment to the four designated groups, namely: women; Aboriginal peoples; persons with disabilities; and, members of visible minorities.

[57] Under section 80 of the *PSEA*, the Tribunal has the power to interpret and apply the provisions of the *CHRA*. However, a necessary precondition for the application of section 80 is that a complainant raises a prohibited ground of discrimination; none of the prohibited grounds was raised by the complainant.

[58] The Tribunal finds, on the evidence, that the complainant has not established the necessary precondition for the Tribunal to invoke section 80 of the *PSEA*. Accordingly, his allegation pertaining to discrimination under the *CHRA* cannot be substantiated.

[59] The complainant is self-represented; however, he is not uninformed. As a Chief of Human Resources, he can be expected to have some knowledge of human rights legislation by virtue of holding this position. Having said that, an allegation of inappropriate differential treatment is serious and failure to cite the technically-correct grounds should not preclude the Tribunal from considering the case presented before it.

[60] The complainant's submissions on differential treatment have been considered and analyzed in these reasons for decision. Nothing in the evidence before the Tribunal supports a finding that the complainant was treated differently from other candidates. There is no evidence that the respondent acted or failed to act, or based any decisions on the complainant's status as a member of an employment equity target group, namely, visible minority.

DECISION

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

[62] As the complaint is not substantiated, it is unnecessary for the Tribunal to address the parties' submissions on remedy.

Merri Beattie
Member

PARTIES OF RECORD

Tribunal File:	2007-0064
Style of Cause:	<i>Zhao and the Deputy Minister of Citizenship and Immigration et al.</i>
Hearing:	Paper hearing
Date of Reasons:	November 7, 2008
APPEARANCES:	n/a
Shansheng Zhao	For the complainant
Amita Chandra	For the respondent
John Unrau	For the Public Service Commission