



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2006-0220, 2006-0238

OTTAWA, DECEMBER 19, 2008

PAUL ALEXANDER AND SUPRIYA RAVE

COMPLAINANTS

AND

THE DEPUTY MINISTER OF HEALTH CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
DECISION	Complaints are dismissed
DECISION RENDERED BY	Francine Cabana, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Alexander and Rave v. Deputy Minister of Health Canada et al.</i>
NEUTRAL CITATION	2008 PSST 0032

REASONS FOR DECISION

INTRODUCTION

[1] The complainants, Paul Alexander and Supriya Rave, each filed a similar complaint concerning an internal advertised appointment process (no. 06-NHW-ON-IA-029) for the position of Manager, Ontario Operations Centre at the SG-SRE-07 group and level at Health Canada.

[2] Mr. Alexander, who filed his complaint on November 17, 2006, was eliminated from the appointment process because he did not meet all of the experience criteria. Ms. Rave also failed to meet all of the experience criteria; she filed her complaint on November 27, 2006.

[3] The complainants submit that the respondent, the Deputy Minister of Health Canada, abused its authority in the application of merit. They mainly allege that the appointee has been given past acting opportunities to ensure he would be the candidate selected for the position, therefore having an unfair advantage over other candidates. They also allege racial discrimination as they are visible minorities.

[4] The complainants filed their complaints under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*). Given that both complaints relate to the same appointment process and have the same allegations of personal favouritism, improper application of merit and discrimination, the Tribunal consolidated the files on January 18, 2008 in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (*PSST Regulations*).

ISSUES

[5] In order to resolve these complaints, the Tribunal must determine the following issues:

(i) Did the respondent abuse its authority by demonstrating personal favouritism toward the successful candidate thereby improperly screening the complainants out of the appointment process?

(ii) Did the respondent abuse its authority by discriminating against the complainants?

BACKGROUND

[6] On August 4, 2006, a Job Opportunity Advertisement was posted on *Publiservice* to staff the position of Manager, Ontario Operations Centre (SG SRE-07) at Health Canada in Scarborough, Ontario. The process was also intended to establish a pool of qualified candidates for future temporary or indeterminate vacancies.

[7] Applicants were assessed for screening purposes on the basis of their education and experience qualifications. There were 21 applicants for the position, seven met the screening criteria and were considered further in the process. Neither complainant was screened in as they did not meet all of the experience criteria. Only the appointee, Jim Daskalopoulos, met all of the essential qualifications.

[8] Ms. Rave currently works for the respondent. However, Mr. Alexander is no longer employed by the respondent. He indicated that he was on sick leave from December 22, 2006 to January 17, 2007. After that date, it appears that he was on an unpaid leave of absence which he refers to as a “lockout”. He therefore claims that he no longer had access to his office emails and documents.

[9] Both complainants received the Tribunal’s standard form letter acknowledging receipt of their complaints. The letters referred the complainants to the Tribunal’s Procedural Guide, which was developed to assist parties involved in proceedings before the Tribunal.

[10] Throughout the complaint process, Mr. Alexander sent the Tribunal hundreds of emails. Most emails were lengthy, contained copies of previous emails, requested the same information and contained arguments on the merits of the complaint; he often sent several emails in one day. Ms. Rave also sent several emails, however, fewer than Mr. Alexander.

[11] Consequently, the Tribunal issued many letter decisions with respect to these complaints, prior and subsequent to the January 18, 2008 consolidation of the files.

The Tribunal dealt with requests for order for provision of information; it reminded the parties to refrain from sending emails on the merits of the complaints since an opportunity to cross-examine witnesses, submit their arguments and case law would be available at the hearing; and it also addressed the issue of witnesses.

[12] On April 29, 2008, the Tribunal issued a summary of what transpired during the pre-hearing conference of April 25, 2008. It ordered the respondent to provide Mr. Alexander with specific documents and that if they could not be located the respondent would have to attempt to retrieve them with the assistance of the IT team. The respondent was also ordered to provide Mr. Alexander with emails dealing with staffing between Mr. Alexander and three other people. The Tribunal also reproduced the two lists of witnesses to be introduced by the complainants and by the respondent. It further included the issues as being the appointee's qualifications for the position, discrimination against visible minorities, process favouring the appointee and abuse of authority in the screening process.

PRELIMINARY MATTERS

[13] The complainants filed six motions at the beginning of the hearing on May 27, 2008. Some of these issues had already been addressed by the Tribunal through letter decisions. The first motion dealt with three witnesses the complainants wanted to introduce. The second motion concerned summonses the complainants wanted to have issued to their witnesses. The third motion related to witnesses being called by the respondent, as opposed to being called by the complainants. The fourth motion dealt with Mr. Alexander's request for his emails and documents left on his desk. The fifth and sixth motions were similar to the third and fourth motions.

[14] The Tribunal heard the parties and ruled on the motions, maintaining the previous decisions rendered by the Tribunal in various letter decisions in all but one instance; namely, the issue of witnesses.

[15] The complainants were adamant in having Anthony Sangster (Regional Director General, Ontario Region), Jean-Marc Charron (prior Operational Manager, Health Products and Food Branch, Ontario Region), Robert Neil (Chief, Food Laboratory

Division, Health Products and Food, Ontario Region), Karolyn Lui (Regional Director, Health Products and Food, Ontario Region) and Helen Goulet (past Assistant Deputy Minister, Health Products and Food Branch) testify on their behalf.

[16] After a discussion with the complainants and the respondent, the Tribunal concluded that the respondent's witnesses (Mr. Sangster, Mr. Charron, Mr. Neil and Ms. Lui) would now be considered the complainants' witnesses, as requested by the complainants. After hearing the parties on the issue, the Tribunal ensured that the complainants understood the difference between an examination-in-chief and a cross-examination. The Tribunal also explained that since the witnesses were now the complainants' there would be less flexibility afforded to them in examination-in-chief, as there would have been in cross-examination. That flexibility was now granted to the respondent. The complainants stated that they understood the consequences of their request and of the Tribunal's decision. The Tribunal stated that it would reserve its decision with respect to Ms. Goulet's testimony until the appointee had testified. If the testimony was still needed, a ruling would be issued at that time.

MOTION TO STAY THE PROCEEDINGS PENDING JUDICIAL REVIEW

[17] In the afternoon of the first day of the hearing, the complainants filed a motion to stay the proceedings as they wanted to file an application for judicial review because they did not agree with the Tribunal's April 29, 2008 decision with respect to the issue of witnesses that had been dealt with during the pre-hearing conference.

[18] The respondent objected to the motion to stay the proceedings on the ground that there was no prejudice in continuing the hearing. The respondent also stated that the complainants would have the opportunity to apply for judicial review after the Tribunal issued its final decision.

[19] The Public Service Commission (the PSC) also objected to the motion to stay the proceedings as it was also of the view that there was no prejudice to the complainants by continuing with the hearing.

[20] The appointee was also of the view that the hearing should continue.

[21] The complainants did not convince the Tribunal of any type of prejudice to them or the case which would warrant the stay of the proceedings. The complainants did not file any jurisprudence in support of their motion. The Tribunal therefore denied the motion and explained to the parties the hearing would continue because the issue at the pre-hearing conference was different from the present hearing. In addition, the Tribunal explained to the complainants they would have the opportunity to apply for judicial review once the Tribunal issued its final decision.

[22] The Tribunal found no need to stay the proceedings and the hearing continued.

PROCEED IN THE ABSENCE OF THE COMPLAINANTS

[23] At approximately 3:00 p.m. on May 27, 2008, the complainants were asked to proceed with their evidence and provide the other parties with copies of the documents they intended to rely on as evidence at the hearing. They did not have their documents nor did they have copies for the parties.

[24] The complainants were told by the Tribunal to be present the next day, May 28, 2008 at 9:00 a.m. with five copies of each of their documents. It was also decided that Mr. Sangster would testify at 9:30 a.m. on May 28, 2008, and following his testimony the parties would be given some time to discuss the possibility of identifying documents to be introduced by consent.

[25] The Tribunal's Registry Office sent a fax to the presiding member at 8:44 a.m. on May 28, 2008 with a copy of the email received from Mr. Alexander the night before.

[26] Mr. Alexander sent the email to the Tribunal at 11:38 p.m. on May 27, 2008 leading the Tribunal to believe that he would not be present at the hearing on May 28, 2008. Similarly, Ms. Rave sent an email at 9:29 a.m. on May 28, 2008 stating that she agreed with Mr. Alexander's email of May 27, 2008. All parties were present when the Tribunal reconvened the hearing at 9:00 am on May 28, 2008, except the complainants.

[27] The presiding member contacted the Tribunal's Registry Office and instructed it to contact the complainants by telephone and by email to advise them that the Tribunal

would resume the hearing at 11:00 a.m. and that if they chose not to attend, the hearing would continue in their absence. The hearing was adjourned until 11:00 a.m. The presiding member remained in the hearing room until 11:00 a.m.

[28] The Registry Office attempted to contact the complainants by telephone without success since the Tribunal did not have a valid telephone number for Mr. Alexander. A message was left on voice mail for Ms. Rave.

[29] The Tribunal's Registry Office also sent an email at 9:48 a.m. to both complainants:

This is further to Mr. Alexander's email of May 27, 2008 and Ms. Rave's email of today's date in the above file. The parties are advised that the hearing of this matter will proceed at 11:00 a.m. today. Should any of the parties fail to attend, the hearing will proceed in their absence, as per section 29 of the *Public Service Staffing Tribunal Regulations*."

[30] On May 28, 2008, at 10:47 a.m., the Tribunal received an email from Mr. Alexander stating "Thank you" in response to the email sent by the Tribunal at 9:48 a.m. that same day.

[31] On May 28, 2008 Mr. Alexander, on behalf of both complainants, sent an additional email which confirmed both complainants had indeed received the email sent by the Tribunal at 9:48 a.m.

[32] The hearing resumed at 11:00 a.m. and the Tribunal decided, in accordance with section 29 of the *PSST Regulations*, to proceed in the absence of the complainants. Section 29 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 of a complaint or at any continuance of 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.

[33] The Tribunal was satisfied that the instructions given to the complainants on May 27, 2008 before the hearing was adjourned—that they had to be present at 9:00 a.m. on May 28, 2008—were clear and understood by all. Furthermore, proper notice had been provided to the complainants by email at 9:48 a.m. on May 28, 2008

stating that the hearing would proceed at 11:00 a.m. on that day and advising them that if they chose not to be present, the Tribunal would proceed in their absence.

[34] The Tribunal emphasizes that the complainants acknowledged receipt of the notice. Therefore, they were aware of the consequences of not attending the hearing as scheduled.

[35] Based on all of the above, the Tribunal proceeded in the absence of the complainants, and asked the respondent to proceed with its evidence.

[36] The Tribunal dealt with a similar situation in *Broughton v. Deputy Minister of Public Works and Government Services et al.*, [2007] PSST 0020. In that particular case, the Tribunal had decided to have a paper hearing pursuant to section 99(3) of the *PSEA* and provided timelines for the parties to file their submissions. The complainant failed to provide his written submissions by the specified date, which ultimately amounted to not being present at the hearing. Therefore, pursuant to section 29 of the *PSEA*, the Tribunal rendered its decision on the basis of the written submissions, supporting documents and jurisprudence submitted by the respondent and the PSC.

SUMMARY OF RELEVANT EVIDENCE

[37] Since the complainants were not present at the hearing, they did not present any evidence in support of their allegations.

[38] The respondent called two witnesses, Mr. Sangster, and Ms. Lui.

[39] Mr. Sangster testified concerning the acting appointment of Mr. Daskalopoulos. Mr. Sangster has been in the public service for 27 years and has been the Regional Director General since September 2005. He explained that in April 2006 his role changed and that he became responsible for all activities including: First Nations and Inuit Health, Health Environment and Consumer Safety, Health Products and Food Programs, all Corporate Support in the region which includes finance, human resources and all Health Canada activities in the region.

[40] Mr. Sangster explained that following the Auditor General's report, decisions were made so that starting in April 2006 directors were to report to the Regional Director General instead of the Assistant Deputy Minister. These changes were to be in place in April 2006.

[41] Mr. Sangster made reference to an email he sent to staff on May 9, 2006 explaining some changes in the Regional Director General's office. In this email, staff was being informed of the following:

This note is to inform you of a few changes within the Regional Director General's Office (RDGO).

[...]

Also, Jim Daskalopoulos has joined the regional management team as acting Regional Director of Planning and Coordination for a period of six months, effective April 17. Jim will also be supporting the HPFB Regional Renewal transition....

[42] Mr. Sangster submitted that the acting appointment became necessary because of the urgent situation caused by the Regional Renewal which was to be in place in April 2006. He provided the Tribunal with a written assessment against the merit criteria showing that Mr. Daskalopoulos possessed all the essential qualifications for the acting position.

[43] He stated that the acting period was to be for six months, but it was reduced to four months less a day following concerns expressed by other employees. Mr. Sangster referred to an email from Ms. Rave received on May 18, 2006 where she questioned the type of appointment.

[44] Mr. Sangster explained that since his arrival in the department he has been responsible for the promotion of diversity in his region. He stated that he takes diversity very seriously as it is a significant part of what the Public Service stands for. He explained that he participates in the Learning Employee Awareness and Diversity Committee which takes action to make the workplace as accessible as possible and to raise the level of understanding.

[45] Ms. Lui testified that she has been in the public service for the past 16 years and was appointed to the position of Regional Director in 2006. She has been dealing with

staffing for the past 14 years. She also explained that she has received training on the new legislation.

[46] Ms. Lui explained that when she joined the region in 2006, there were eight to ten persons who were not in their substantive positions. Some were ready to retire, some had already retired, and some were on special assignment. She indicated that she gave priority to the Manager Ontario Operations Centre position because this person would be responsible for 55 full time employees and was responsible for the majority of the activities in the region.

[47] According to Ms. Lui, she chose an advertised appointment process because she wanted to find the best possible person. She was new to the region and knew there was a large number of staff, therefore she wanted to cast the widest net possible. She also explained how all the qualifications on the Statement of Merit Criteria (the SMC) were essential to the position.

[48] Ms. Lui further explained that she used an anonymous screening process. A list of candidates was established and a number was assigned to each candidate. The screening was then conducted based on a candidate number. The names of the candidates were not known to the screening board members until much later in the process. Mr. Alexander was identified as candidate number 5 and Ms. Rave was identified as candidate number 12 on the list.

[49] The SMC for the position, along with the Rating Guide used for the screening and assessment of candidates was introduced at the hearing by Ms. Lui.

[50] The experience criteria set out in the SMC are as follows:

- Recent and significant experience in working in a regulatory environment in either government or industry.
- Recent and significant experience in providing advice to management.
- Recent and significant experience in implementing and coordinating a regulatory program within a legislative framework.
- Recent and significant experience in applying, interpreting and making decisions regarding regulatory requirements pertaining to health products.

[51] The Rating Guide defines recent and significant experience in the following manner:

-“recent” is defined as April 1, 2004 to present”;

-“significant” means for a minimum of 24 months.

[52] Ms. Lui testified that Mr. Neil and she individually reviewed the applications, and then met to discuss their assessments to reach consensus.

[53] Mr. Alexander’s application was rejected because he had not demonstrated in the documentation submitted that he met the experience criteria. Ms. Lui drew the Tribunal’s attention to the document entitled SG-SRE-07 Initial Screening Form for Essential Qualifications, which, according to her testimony, represents the summary of the screening assessment.

[54] Ms. Lui indicated that Mr. Alexander did not meet the experience criteria, therefore he was screened out of the appointment process. She testified that he did demonstrate recent experience working in a regulatory environment in either government or industry, but failed to demonstrate significant experience since the documentation only reflected experience since July 2005. She further explained that although he had some experience as an advisor to Human Resources, this was not significant experience advising management. According to Ms. Lui, there was no information found in the documentation provided by Mr. Alexander which demonstrated that he had recent and significant experience in implementing and coordinating a regulatory program within a legislative framework. Lastly, Mr. Alexander demonstrated that he had recent experience in applying, interpreting and making decisions regarding regulatory requirements pertaining to health products, however, he did not demonstrate that he had significant experience.

[55] Ms. Lui stated that she conducted an informal discussion meeting in person with Mr. Alexander where she explained in detail what she was looking for with respect to experience. Following this meeting, Mr. Alexander was provided an opportunity to clarify his experience and he provided his clarification via email which was taken into account by both members of the screening board.

[56] Ms. Lui testified that following the second review of the two sets of documents provided by Mr. Alexander, the conclusion that he did not meet all the experience criteria set out in the SMC did not change.

[57] Ms. Rave was also provided an opportunity, following the informal discussion, to provide clarification concerning the experience criteria, which she did. The clarification was considered by both Mr. Neil and Ms. Lui. The conclusion was that she did not meet the experience criteria as she had not demonstrated that she had the experience required by the screening board.

[58] Ms. Lui stated that both candidates failed to provide dates and positions they occupied in order to demonstrate that they in fact met the experience criteria.

[59] She went on to describe the steps followed for the assessment of candidates who were screened into the process. An In-Basket Exercise Business Options Inc. test, a business thinking test and a Psymax test were administered, an interview took place and a verification of references was conducted.

[60] Mr. Daskalopoulos completed all the steps in the process and he was found to be qualified. According to Ms. Lui's testimony, she was satisfied that he met all of the qualifications for the position and she proposed him for appointment.

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[61] Since the complainants chose not to participate in the hearing as requested by the Tribunal via email on May 28, 2008, no arguments in support of their positions were presented.

B) RESPONDENT'S ARGUMENTS

[62] The respondent submits that because the complainants chose not to appear for the remainder of the hearing, they did not submit any evidence to support their complaints and allegations.

[63] The respondent states that the Tribunal has established that complainants have the burden of proof and must provide clear and cogent evidence that on the balance of probabilities there has been abuse of authority in the selection process.

[64] The respondent further submits that there is no evidence before the Tribunal to support a conclusion of abuse of authority, or of discrimination.

[65] The respondent submits the complainants have not filed any evidence to substantiate their allegation of discrimination. Therefore, it is of the view that because of the lack of evidence the Tribunal can only come to the conclusion that the allegation of discrimination has not been proven, meaning that the respondent cannot be found to have discriminated against the complainants.

[66] The respondent further argues that the authority to establish qualifications is one which belongs to the deputy head. Section 36 of the *PSEA* gives deputy heads broad discretion to identify and use the appropriate tools to determine if an applicant meets the essential qualifications.

[67] The respondent also states that for an appointment to be made in accordance with merit, the candidate must meet all of the essential qualifications established for the position.

[68] It maintains that Ms. Lui's testimony demonstrated that each qualification listed on the SMC was essential to the duties of the position. In addition, Ms. Lui explained that the experience criteria were clearly set out with sufficient detail for the candidates to know what they needed to demonstrate on their application.

[69] The respondent submits that the screening board was looking for recent and significant experience in implementation and management which were defined in the Rating Guide. According to the respondent, those definitions served as a guide for the screening board in assessing each applicant.

[70] It was submitted that the screening board considered many documents when assessing the complainants: Mr. Alexander's *curriculum vitae*, as well as his clarification following the informal discussion concerning his experience; Ms. Rave's *curriculum*

vitae and her clarification following the informal discussion with respect to her experience. However, the respondent asserts that the complainants did not provide time periods, or any dates identifying when they acquired the experience.

[71] The respondent maintains that the applicants have the onus of demonstrating their qualifications.

[72] The respondent submits that Ms. Lui exercised her authority appropriately and fairly in the establishment of qualifications for the position. It also argues that the assessment board acted fairly and appropriately in its assessment of both complainants.

[73] In addition, the respondent maintains that after considering the qualifications of Mr. Daskalopoulos, the assessment tools used by the assessment board, as well as the assessment results which were filed in evidence, there is absolutely no indication that he was not qualified for the position.

[74] According to the respondent, Ms. Lui's testimony demonstrates that she convened an assessment board which was composed of herself, Mr. Neil and Diana Dowthwaite, Director General, Inspectorate, Health Products and Food Branch, but that only Ms. Lui and Mr. Neil assessed the candidates at the screening stage of the process. The appointee passed the In-Basket Exercise Business Options Inc. test, the business thinking test, the Psymax test, the interview, as well as the reference checks.

[75] The respondent submits that the evidence before the Tribunal indicates it was a robust and rigorous assessment process in which Mr. Daskalopoulos was assessed and found to be qualified for the position. The respondent maintains that Ms. Lui testified that as a result of the assessment, she was satisfied that Mr. Daskalopoulos was qualified for the position.

[76] According to the respondent, there is no evidence before the Tribunal to indicate that the appointee was not qualified for the position.

[77] On the issue of personal favouritism, the respondent refers to the Tribunal's decision in *Carlson-Needham and Borden v. Deputy Minister of National Defence et al.*,

[2007] PSST 0038, in which the Tribunal established a test to be applied when allegations of personal favouritism are filed in an advertised appointment process.

[78] The respondent submits that the complainants did not file any evidence to support their allegation of personal favouritism. In fact, the respondent submits that the evidence before the Tribunal clearly demonstrates that there was no personal favouritism associated with the appointment of Mr. Daskalopoulos

[79] As such, the respondent asserts that the evidence before the Tribunal demonstrates that:

- it chose an advertised process for which the area of selection was national;
- the language requirement for the position was changed to non-imperative in order not to unduly limit internal applications for the position in the hope to establish a pool of qualified candidates;
- the Rating Guide was established prior to the posting of the job advertisement not knowing who the candidates would be;
- it conducted an anonymous screening process to ensure applicants would be assessed on their qualifications;
- the two acting appointments of Mr. Daskalopoulos were not made outside the proper processes and statutory requirements;
- none of Mr. Daskalopoulos' two previous acting appointments nor his appointment to the SG-07 position were for any other reason than the fact that he was qualified for the positions.

[80] According to the respondent, all of these steps contributed to a fair and transparent process in appointing a person who met all of the essential qualifications for the position.

[81] In light of the above, the respondent submits that the complainants clearly failed to meet their burden under subsection 77(1) of the *PSEA*.

[82] The respondent requests that both complaints be dismissed.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[83] The PSC submits that because the complainants chose not to attend the hearing, and because of the nature of the evidence presented at the hearing, there has been no evidence provided on the issue of discrimination.

[84] It is of the view that in light of the circumstances in this case it would be very difficult for the Tribunal to reach a conclusion on discrimination. As a result, the PSC withdraws part 3 of its written submission, “Impact of allegations under the CHRA and discrimination,” and asks the Tribunal not to take it into consideration.

[85] On the issue of abuse of authority, the PSC filed its usual submission on how it believes the Tribunal should deal with the issue of abuse of authority.

[86] Finally, the PSC states that based on the evidence heard, there is no breach of its policies in the staffing process.

ANALYSIS

[87] These complaints were filed under paragraph 77(1)(a) of the *PSEA*, which refers to the criteria for making an appointment on the basis of merit pursuant to subsection 30(2) of the *PSEA*. These provisions should be read together, and are 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);

[...]

30. (2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

- (i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,
- (ii) any current or future operational requirements of the organization that may be identified by the deputy head, and
- (iii) any current or future needs of the organization that may be identified by the deputy head.

Issue I: Did the respondent abuse its authority by demonstrating personal favouritism toward the successful candidate thereby improperly screening the complainants out of the appointment process?

[88] The Tribunal has determined in past decisions, such as *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, and *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, that the party alleging abuse of authority must assume the burden of proof. Consequently, as established in *Tibbs*, the general rule of evidence in civil matters should be followed:

[49] The general rule in civil courts and in arbitration hearings is that the party making an assertion bears the burden of proving this assertion rather than the other side having to disprove it...

[50] ... If the onus was with the respondent to prove that there was no abuse of authority, this would lead to a presumption of abuse of authority in all appointments, which without a doubt is not what Parliament intended. The general rule in civil matters should be followed and the onus rests with the complainant in proceedings before the Tribunal to prove the allegation of abuse of authority.

[89] As a result, the complainants must provide convincing evidence that the respondent abused its authority.

[90] Subsection 2(4) of the *PSEA* states that “[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism”.

[91] The complainants allege that the respondent showed personal favouritism in the appointment of Mr. Daskalopoulos to the position of Manager, Ontario Operational Centre and that the respondent abused its authority when it improperly screened them out of the process.

[92] Both complainants chose not to appear at the hearing on May 28 and 29, 2008, and consequently did not present any evidence in support of their allegations.

[93] The respondent, on the other hand, called two witnesses: Mr. Sangster and Ms. Lui.

[94] Mr. Sangster testified as to the steps he followed to appoint Mr. Daskalopoulos on an acting basis and submitted all the documents relating to that staffing process as evidence. He explained that Mr. Daskalopoulos' acting appointment was made on the basis that he was qualified for the position. This process is not the subject of these complaints.

[95] Ms. Lui explained to the Tribunal the steps the assessment board took to assess merit in this advertised process, resulting in the appointment of Mr. Daskalopoulos to the position on an indeterminate basis. Furthermore, the area of selection was national, the language of selection was changed to non-imperative, the Rating Guide was established prior to the posting of the job advertisement and the screening process was anonymous.

[96] Section 36 of the *PSEA* confers upon a deputy head the discretion to choose and use various methods for assessing candidates in order to make an appointment based on merit. However, as the Tribunal stated in *Jolin*, the choice and assessment method is subject to recourse pursuant to section 77 of the *PSEA*. The Tribunal is satisfied that an anonymous screening process based on the candidates' *curriculum vitae*, such as in the present case, is an appropriate method of assessment.

[97] Furthermore, the Tribunal has established on many occasions that candidates must ensure that they clearly demonstrate on their application that they meet all the required essential qualifications for the position. The Tribunal addressed this issue in *Pugh v. Deputy Minister of Justice et al.*, [2008] PSST 0023:

[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 qualification 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".

[98] The evidence demonstrates that the complainants did not meet the experience criteria, which resulted in them being eliminated at the screening stage of the process.

[99] The evidence introduced by the respondent is not contested and demonstrates that the respondent took steps to ensure candidates were assessed only on the information found in their applications. The screening process was anonymous since candidates were identified by numbers instead of by their names. In addition, the complainants, following an informal discussion, had the opportunity to provide clarifications to the screening board with respect to the experience noted on their

curriculum vitae. However, according to the respondent, the clarifications submitted were still not sufficient to screen them in. Ms. Lui testified that the complainants did not provide any dates or positions occupied by them to demonstrate that they had the necessary experience.

[100] The respondent also established the steps followed by the assessment board in assessing the remaining candidates. They used different tools like the In-Basket Exercise Business Options Inc. test, a business thinking test, a Psymax test, an interview and the verification of references.

[101] The Tribunal does not have any evidence to support the complainants' contention that they were improperly screened out of this process. The evidence does not show that the appointee was favoured because he had acted in the position. In fact, the uncontested evidence before the Tribunal demonstrates that the appointee was appointed in accordance with the merit criteria set out in the SMC.

[102] Based on the foregoing, the Tribunal concludes that there is no abuse of authority based on personal favouritism or any evidence demonstrating that the complainants were improperly screened out of the appointment process.

Issue II: Did the respondent abuse its authority by discriminating against the complainants?

[103] The complainants alleged discrimination against the respondent, stating that they were not appointed because they are visible minorities. However, they did not provide any evidence to support their allegations.

[104] The only evidence before the Tribunal is that submitted by the respondent, which is uncontested and it suggests that the complainants were screened out on the grounds that they did not meet the required experience criteria. Consequently, the Tribunal concludes that there is no evidence of discrimination related to these complaints.

CONDUCT OF MR. ALEXANDER

[105] The Tribunal believes that it is important to address the complainant's conduct throughout this process. As mentioned above, the complainant sent hundreds of emails to the Tribunal, which were repetitious and at times disrespectful.

[106] Despite numerous reminders by the Tribunal, the complainant ignored the Tribunal process as set out in the *PSST Regulations*, and continued to send emails about the merits of the case and matters that had already been dealt with by the Tribunal. The *PSST Regulations* provide in sections 11 (form and content of complaint), 16 (exchange of information), 17(3) (request for order for provision of information), and 22 (allegations) the different steps to be taken by a complainant during a complaint process prior to the hearing. Furthermore, arguments on the merits of the complaint are only submitted at the hearing. The Tribunal's Procedural Guide also provides guidance during the complaint process. These regulations and guidelines are in effect in order to facilitate an expeditious resolution of the complaint. Consequently, Mr. Alexander's failure to respect the *PSST Regulations* and guidelines considerably complicated and slowed down the processing of the complaint.

[107] Furthermore, Mr. Alexander exhibited complete disrespect by using derogatory, and offensive language and condescending remarks in his email communications to the parties and to the Tribunal, as well as orally before the Tribunal.

[108] The following are examples of Mr. Alexander's inflammatory remarks in his written communications: "discriminatory coward", "whitey", "at the behest of your nepotistic buddy", "these types of rogue despicable managers running around", "do not let my vis min status and my thick accent fool you... do not think I am the idiot you hope that I am", "is there any reason why you cannot open a communication with a salutation... where I come from ... we like to express some kind of respect" and "I will have you in the courts before you know it".

[109] The Tribunal considers this conduct to be an abuse of process which is also vexatious by its nature, (see *Wilson v. Canada (Revenue)*, [2006] F.T.R. 250, [2006]

F.C.J. No. 1922 (Q.L.)). In fact, the Federal Court of Canada in the *Wilson* decision described vexatious behaviour to include the following:

[31] Other indicia of vexatious behaviour include the initiation of frivolous actions or motions, the making of unsubstantiated allegations of impropriety against the opposite party, legal counsel or the Court, **the refusal or failure to abide by rules or orders of the Court, the use of scandalous language in pleadings or before the Court...**

(Emphasis added)

[110] The Tribunal has dealt with a similar issue in *Pugh*, where it determined that the complainant's use of inflammatory language was vexatious and informed him that if such conduct transpired in future complaints before the Tribunal, it would take appropriate measures which could lead to the summary dismissal of his complaint pursuant to subsection 99(2) of the *PSEA*:

[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...

[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.

[111] The Tribunal finds the conduct of Mr. Alexander to be vexatious. However since the complaints have not been substantiated, it is not necessary for the Tribunal to make a ruling on this issue. Nevertheless, Mr. Alexander must conduct himself according to the *PSST Regulations*, as well as in a courteous and respectful manner with other

parties and before the Tribunal, failing which the Tribunal may summarily dismiss any future complaints.

DECISION

For all these reasons the complaints are dismissed.

Francine Cabana
Member

PARTIES OF RECORD

Tribunal Files:	2006-0220 and 2006-0238
Style of Cause:	<i>Paul Alexander and Supriya Rave and Health Canada et al.</i>
Hearing:	May 27, 28, 29, 2008 Toronto ON
Date of Reasons:	December 19, 2008
APPEARANCES:	
Paul Alexander, Supriya Rave	For the complainants
Lesa Browne	For the respondent
Lili Ste-Marie	For the Public Service Commission
Jim Daskalopoulos	For the other party