



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2008-0059

OTTAWA, DECEMBER 19, 2008

DAVID BELL

COMPLAINANT

AND

**THE DEPUTY HEAD OF SERVICE CANADA PART OF
THE DEPARTMENT OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT**

RESPONDENT

AND

OTHER PARTIES

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

DECISION Complaint is dismissed

DECISION RENDERED BY Helen Barkley, Member

LANGUAGE OF DECISION English

INDEXED *Bell v. Deputy Head of Service Canada et al.*

NEUTRAL CITATION 2008 PSST 0033

REASONS FOR DECISION

INTRODUCTION

[1] David Bell, the complainant, believes that the use of “recent” managerial experience as an essential qualification in this appointment process constituted an abuse of authority.

[2] The Deputy Head of Service Canada, as part of the Department of Human Resources and Social Development, the respondent, is of the view that this criterion was necessary to ensure that those appointed would have the experience to manage in the new human resources regime, and in an office that was moving toward “virtual management”.

BACKGROUND

[3] In June 2007, the respondent initiated an internal advertised appointment process (selection process 2007-CSD-IA-SASK-RE-SC-073) to staff PM-05 Service Manager positions in various locations throughout Saskatchewan. The appointment process was open to persons employed in the Service Canada Initiative of the Department of Human Resources and Social Development (also known as Human Resources and Skills Development) who worked in or occupied a position in the Saskatchewan Region.

[4] The complainant is a Senior Development Officer (PM-04) with Service Canada who works in the Saskatchewan Region.

[5] The appointment process attracted 27 applicants; 14 were screened out.

[6] The complainant was screened out of the process for failing to meet one of the essential qualifications, namely “recent” managerial experience. The Job Opportunity Advertisement and the Statement of Merit (SMC) posted on *Publiservice* stated the essential qualification as:

Recent and considerable experience as a manager in a professional environment, including:
Management of human resources
Management of financial resources
Management of programs and/or services.

[7] A complaint was filed with the Public Service Staffing Tribunal (the Tribunal) on January 21, 2008 under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

[8] Pursuant to subsection 99(3) of the *PSEA*, the Tribunal has determined that it is appropriate to consider and dispose of this complaint by way of paper hearing.

[9] For the purposes of the paper hearing, the parties provided the Tribunal with what they termed “uncontested facts in this matter.” While some of these statements are legal principles rather than facts, the “Agreed Statement of Facts” is reproduced verbatim below:

(i) Pursuant to subsection 30(2) of the *Public Service Employment Act*, deputy heads have the authority to establish the essential qualifications for a position. The Deputy Head of Service Canada has the authority to establish the essential qualifications for positions within Service Canada. At present, this responsibility is sub-delegated within the department in accordance with Service Canada's Sub-Delegation Table of Authorities.

(ii) Pursuant to subsection 30(2) of the *PSEA*, essential qualifications must be related to the work to be performed.

A Statement of Merit Criteria provides the qualifications required to be appointed to a specific position. It is these qualifications which are assessed during an appointment process.

The Key Leadership Competencies Dictionary explains the competencies common to various categories of positions in the Public Service. The competencies listed in the Manager category of the Dictionary represent the competencies expected from employees in positions which fall under this category. For purposes of this Dictionary, the position in question would fall under the Management category.

The Service Canada National Competency Dictionary lists the competencies common to various categories of positions in Service Canada.

The complainant was screened out of the appointment process on the basis that his application did not demonstrate that he had recent experience as a manager in a professional environment. For purposes of this appointment process, the assessment board had defined the term “recent” as meaning within the last five years.

The sub-delegated manager is responsible for establishing the qualifications for a position. With respect to the appointment process in question, Cam King was both the sub-delegated manager and the chairperson of the assessment board.

The Statement of Merit Criteria was developed by a team including Human Resources and the members of the assessment board. It was then approved by Mr. King.

The title of the position in question was Service Manager.

[10] The term “recent” was not defined in either the Job Opportunity Advertisement or the SMC.

[11] The complainant’s experience was obtained 10 or more years prior to the appointment process.

[12] According to the complainant, he accepted an acting appointment to the position of Service Delivery Manager, Saskatoon EI Processing on August 11, 2008.

ISSUES

[13] The Tribunal must determine whether the respondent abused its authority in the following respects:

- (i) by requiring “recent” management experience as an essential qualification;
- (ii) by not defining “recent” in either the Job Opportunity Advertisement or the SMC.

ARGUMENTS OF THE PARTIES

A) COMPLAINANT’S ARGUMENTS

[14] The complainant states that he has over 20 years management experience, although he acknowledges that all of this experience was gained 10 or more years prior to the appointment process.

[15] The complainant submits that the respondent has failed to provide any justification for the requirement of “recent” management experience as an essential qualification. In his view, this requirement is unreasonable, and should not be an essential qualification for the position in question.

[16] In support of his position, he referred the Tribunal to eight examples of job opportunity advertisements from Service Canada for Service Delivery Manager positions in various locations across Canada. He also provided links to two acting appointments, and a PM-06 appointment process in the Saskatchewan Region.

He states that “Service Delivery Manager” and “Service Manager” can be, and are, used interchangeably by Service Canada. He submits that none of these Service Canada posters for Service Delivery Manager positions had a requirement for “recent” management experience in the list of essential qualifications.

[17] In his submissions, the complainant states that the Public Service Commission’s (PSC) Managerial In-Basket Exercise 820, which assesses managerial abilities, has been used since the 1980s without substantial up-dates. According to the complainant, these managerial abilities have been in place since the early part of the 20th century and they remain fundamentally unchanged. The requirement for management experience within the last five years was not justified.

[18] The complainant submits that the sub-delegated manager arbitrarily added the need for “recent” management experience as a means of limiting the appointment process to those who are currently in management/supervisory positions within the Saskatchewan Region of Service Canada.

[19] He submits further that this constitutes personal favouritism towards those who are currently in management/supervisory positions within the Saskatchewan Region of Service Canada.

[20] The complainant states that the term “recent” was not defined in the Job Opportunity Advertisement or the SMC, and this lack of definition also constitutes abuse of authority. He submits that restricting “recent” to experience acquired within the last five years is no more relevant to one’s ability to carry out the duties of the position than if the experience had been acquired 10 or even 20 years previously. According to the complainant, restricting this experience criterion to the last five years is not consistent with either the Key Leadership Competencies Dictionary for the Management category or the Canada Public Service Agency Key Leadership Competencies Effective Behaviours.

B) RESPONDENT'S ARGUMENTS

[21] The respondent submits that the rationale for requiring recent management experience was to ensure that those appointed would be able to perform the full extent of the managerial duties immediately upon appointment. In recent years the respondent has put emphasis on performance management, including responsibility for approval and implementation of employee learning plans and preparation of performance evaluations. Under the new *PSEA*, managers have significantly more authority and responsibility for human resources management. Managers have new accountabilities in areas of procurement, information management and finance that did not exist ten years ago.

[22] The region is moving toward a “virtual management” model where a Service Delivery Manager could be managing employees working from other locations in the region. Management was looking for candidates who could “hit the ground running” in order to meet the region’s operational needs.

[23] The respondent submits that the sub-delegated manager made a decision that employees who had not performed managerial duties within the previous five years could not meet these expectations.

[24] According to the respondent, the requirement for “recent” management experience was a proper exercise of the manager’s discretion under subsection 30(2) of the *PSEA*. In support of its position, the respondent relies on *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, at paragraphs 42 and 43.

[25] In response to the complainant’s argument that other Service Canada job opportunity advertisements for Service Delivery Manager positions did not call for “recent” experience, the respondent relies on *Feeney v. Deputy Minister of National Defence et al.*, [2008] PSST 0017, at paragraph 43, where the Tribunal held that essential qualifications may vary for different positions under certain circumstances and for different locations.

[26] In response to the complainant's submission that the requirement of "recent" management experience constitutes personal favouritism to those currently in management positions in the Saskatchewan Region, the respondent states that the complainant submitted no information to substantiate his claim. Furthermore, his allegation does not meet the definition of personal favouritism set out in *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, at paragraphs 39 to 41.

[27] Finally, with respect to the complainant's submissions that the job opportunity advertisement and SMC posted on *Publiservice* ought to have set out the definition of "recent" experience, the respondent relies on *Neil v. Deputy Minister of Environment Canada et al.*, [2008] PSST 0004, at paragraph 51, where the Tribunal found it was not mandatory to inform candidates in the advertisement of the definition of significant experience.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[28] The Public Service Commission (PSC), as it has done in previous cases, made general submissions on the concept of abuse of authority, and how the Tribunal should interpret this concept.

[29] The PSC once again used this opportunity to argue its position with respect to certain cases that are presently under judicial review. These arguments are not helpful to the case at hand and lack relevance to the issue the Tribunal must decide. The proper forum for these arguments is before the Federal Court and not the Tribunal.

ANALYSIS

[30] Subsection 30(2) of the *PSEA* sets out the definition of merit, as well as the authority of the deputy head to establish qualifications. This subsection states that an appointment is made on the basis of merit when the person to be appointed meets the essential qualifications, *as established by the deputy head*.

[31] In *Neil*, the Tribunal was faced with an argument that the respondent had abused its authority in establishing the requirement of “significant” experience. The Tribunal stated:

[45] Thus, management enjoys a broad discretion to determine the qualifications for a position. In this case, the managers decided that they would require candidates to have significant experience in researching and analyzing complex policy issues. Based on the evidence at hearing, it is clear that the rationale for requiring *significant* experience was to distinguish this level of policy analyst from those at the ES-04 level and to ensure that those appointed would have the experience necessary to work independently and with a minimum of supervision. The Tribunal finds that the establishment of significant experience as an essential requirement for these positions was a proper exercise of the managers’ discretion under subsection 30(2) of the PSEA.

[46] The complainant argued that similar positions at the ES-05 level should have similar qualifications. He also gave his opinion that this would support the trend towards standardization of positions. However, no evidence was presented to demonstrate that managers are required to use similar qualifications for positions at the same level, nor was evidence adduced to show there is a trend towards standardization of positions. What is required of managers is to *establish the qualifications for the work to be performed*. In this case, the Tribunal has no reason to intervene in the manager’s discretion in this area.

[32] In this case, the manager decided to require “recent” management experience as there had been changes in management responsibilities in recent years. The respondent has been placing more emphasis on performance management, and managers have new responsibilities under the new human resources regime, in the areas of procurement, information technology and virtual management of employees. The complainant, who has the onus of proving abuse of authority, has provided no evidence which would lead the Tribunal to a finding that the establishment of “recent” management experience as an essential qualification was not established for the work to be performed. As the Tribunal found in *Neil*, the Tribunal has no reason in the circumstances of this case to interfere with the manager’s discretion in this area.

[33] The complainant seeks to rely on documents such as the Canada Public Service Agency Key Leadership Competencies Effective Behaviours. However, a party cannot simply make reference to the document without more. The complainant is required to provide the relevant sections of the applicable documentation to the Tribunal, and to point out the passages of these documents that he relies on to support his position.

[34] The Tribunal now turns to the complainant's argument that the respondent did not require "recent" management experience for a number of other positions it advertised and, thus, should not have required this qualification for the position at issue. The Tribunal has addressed, and declined to accept, this argument in a previous decision. In *Fenney*, at paragraph 43, the Tribunal held as follows:

[43] Furthermore, the Tribunal cannot agree with the complainant's argument that a previous posting in July 2006 for a FR-01 position in Halifax requiring the NS DL Class 3 as a condition of employment sets a precedent for the future. The deputy head is provided broad discretion in establishing essential qualifications under the *PSEA* which may vary for different positions under certain circumstances and for different locations.

[35] The complainant's allegation that there was an abuse of authority in the establishment of the essential qualification of "recent" management experience is not substantiated.

[36] Turning to the complainant's allegation that "recent" was not defined for candidates, the Tribunal agrees. The reasoning of the Tribunal in *Neil*, at paragraphs 50 and 51, applies with equal force here:

[50] The Tribunal wishes to emphasize that, while it is not mandatory to inform candidates of complete details of how a particular qualification will be assessed, it is in everyone's interest to be as clear and transparent as possible in an appointment process. This will ensure that all those who do, in fact, meet a qualification can demonstrate this and proceed to the next step of the process. Therefore, it would have been preferable for the respondent to provide candidates with greater details on the Statement of Merit Criteria concerning how "significant experience" was to be assessed by the board. This approach is recommended in the Public Service Commission's Guidance Series – Assessment, Selection and Appointment as follows:

In order to assist in the screening of applicants, it is important for the manager to develop a definition of certain words; **for example, what is meant by a requirement for "recent" or "significant" experience.** Once such a definition has been established, the manager or the assessment board, if requested by the manager, should be prepared to respond to inquiries and convey this information to applicants or to prospective applicants (...) Definitions are developed based on the requirements of the position, and not on the experience of qualifications persons have. Therefore, the definitions should be established prior to the review of applications or qualifications of the person being considered.

- **Example** - The advertisement for a particular position indicated that persons require "Significant experience in developing policy." The manager should define the word "significant" and it could be communicated in the advertisement (...).

[51] However, failure to inform candidates of a specific definition related to a merit criterion does not, in and of itself, amount to abuse of authority. The qualification established by the managers and against which candidates would be assessed was set out in the Statement of Merit

Criteria. The Tribunal finds that the qualification itself was sufficiently detailed so that candidates knew what they had to demonstrate.

(emphasis added).

[37] The Tribunal wishes to reiterate the importance of clarity and transparency in the SMC, so that candidates know the requirements they must meet. It would certainly have been preferable for Mr. King to have indicated on the advertisement for the position the time frame he was seeking for “recent”, as well as the definition of “considerable”. Having said this, in the circumstances of this complaint, the lack of a definition in the SMC and Job Opportunity Advertisement has no bearing on this complaint. By his own admission, the complainant’s management experience was acquired at least ten years prior to this appointment process. By any definition of “recent”, he would not have met this essential qualification.

[38] The PSC has issued the *Guidance Series* referred to in *Neil* above. It may be useful in the future for the PSC to address these matters in its submissions to the Tribunal.

[39] The complainant also alleged that the requirement for “recent” management experience limited the potential successful candidates to only those currently in management or supervisory positions in the Saskatchewan Region and, thus, constitutes personal favouritism.

[40] In *Glasgow*, the Tribunal provided guidance as to what could constitute personal favouritism. At paras. 39 and 41, the Tribunal stated:

[39] ... It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament’s intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.

[41] ... The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

[41] There is nothing in either the complainant's evidence or submissions that could lead the Tribunal to substantiate an allegation of abuse of authority on the basis of personal favouritism, as this concept has been explained in *Glasgow*.

DECISION

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

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File:	2008-0059
Style of Cause:	<i>David Bell and The Deputy Head of Service Canada et al.</i>
Hearing:	Paper hearing
Date of Reasons:	December 19, 2008
APPEARANCES:	
Self-represented	For the complainant
Lesa Brown	For the respondent
John Unrau	For the Public Service Commission