



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007-0354

OTTAWA, APRIL 8, 2009

CARL GANNON

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

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	Complaint is dismissed
DECISION RENDERED BY	Helen Barkley, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Gannon v. Deputy Minister of National Defence et al.</i>
NEUTRAL CITATION	2009 PSST 0014

REASONS FOR DECISION

INTRODUCTION

1 Carl Gannon, the complainant, participated in an internal advertised appointment process for the position of Manager, Human Resources Services (PE-05), Department of National Defence (DND), Halifax, Nova Scotia (06-DND-IA-HALFX-046830). He contends that the respondent, the Deputy Minister of National Defence, abused its authority by discriminating on the basis of race, when Sandra Grant was chosen for appointment to the position. He alleges that Ms. Grant received preferential treatment and that the respondent appointed her on the basis of qualifications not contained in the Statement of Merit Criteria (SMC).

BACKGROUND

2 There are two positions of Manager, Human Resources Services, in the respondent's Halifax operation: one is at the Fleet Maintenance Facility Cape Scott (FMF position) and the other is at MARLANT and Air Units (M & A position). In November 2005, Kathy Banfield vacated the FMF position. Carol Ann Anderson was appointed to the position on an acting basis for a period of less than four months.

3 On February 16, 2006, Jim Stewart, Regional Director, Civilian Human Resources Service Centre (Atlantic), advertised an acting appointment opportunity for the FMF position, for which the complainant applied. This process was cancelled by Mr. Stewart on April 26, 2006 as Paul Hartigan, the incumbent of the M & A position, returned from language training early and accepted an assignment to the FMF position.

4 During Mr. Hartigan's absence on language training, Sandra Grant and Elena DeCurtis rotated on an acting basis in the M & A position. This was as a result of an acting appointment opportunity advertised in July 2005. The complainant did not apply. An eligibility list was issued on September 8, 2005 ranking Sandra Grant as first and Elena DeCurtis as second. Ms. Grant and Ms. DeCurtis started rotating in this position. Ms. Grant performed the duties on an acting basis from September 2005 until February 2006, Ms. DeCurtis from February to November 2006, followed by Ms. Grant

from November 15, 2006 to July 4, 2007, the date of notification of her appointment on an indeterminate basis.

5 An advertisement to fill one vacancy of Manager, Human Resources Services, on an indeterminate basis was issued in April 2006. A subsequent advertisement was issued at the end of July 2006 for the same position. On July 4, 2007, candidates were notified that Ms. Grant would be appointed on an indeterminate basis to the M & A position.

ISSUES

6 The Tribunal must determine the following issues:

- (i) Did the respondent discriminate against the complainant on the basis of race and, if so, does that constitute abuse of authority?
- (ii) Did the respondent abuse its authority by appointing Ms. Grant on the basis of qualifications not contained in the SMC?

PRELIMINARY ISSUE: ADMISSIBILITY OF EVIDENCE

7 In support of his allegation that the respondent discriminated against him, the complainant sought to enter into evidence several reports and newspaper articles. The respondent and the Public Service Commission (PSC) objected to these documents on the basis that these were not relevant to the allegation. The Tribunal indicated at the hearing that it would rule on the admissibility of these documents in its final decision.

8 Paragraph 99(1)(d) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) provides as follows:

99. (1) The Tribunal has, in relation to a complaint, the power to

[...]

(d) accept any evidence, whether admissible in a court of law or not;

[...]

9 Accordingly, the Tribunal has the power to decide whether to accept any or all of the documents the complainant sought to introduce at the hearing.

10 Dealing first with the *PSC Annual Report on Representativeness (PSC Annual Report)*, the *Statistical Study of Acting Appointment and Subsequent Promotions – Highlights in the Federal Public Service (Acting Appointment Study)*, and the *PSC Study on Drop-off Rates for Employment Equity Groups (Drop-Off Rates Study)*, statistical evidence of a systemic problem of discrimination may be adduced as circumstantial evidence to infer that discrimination probably occurred in a particular individual case as well (See: *Canadian Human Rights Commission v. Department of National Health and Welfare* (1998), 146 F.T.R. 106; [1998] F.C.J. No. 432 (QL)(F.C.T.D.), at paragraph 22 (QL); aff'd (1999) 235 N.R. 195, [1999] F.C.J. No. 40 (QL)(F.C.A.). However, the complainant seeks to tender statistical evidence, not through an expert as required, but, simply by submitting these documents. Moreover, these studies, and any statistical evidence sought to be relied on, must also have a direct relationship to the decision that is the subject matter of the complaint (See: *Chopra v. Canada (Department of National Health and Welfare)*, [2001] C.H.R.D. No. 20 (QL)(C.H.R.T.), at paragraph 211).

11 The complainant has not demonstrated any direct link between the *PSC Annual Report*, the *Acting Appointment Study*, and the *Drop-Off Rates Study* and the subject matter of his complaint, namely that the respondent has discriminated against him when it appointed Ms. Grant.

12 The newspaper articles clearly constitute hearsay evidence. While the Tribunal may accept hearsay evidence, the complainant has, again, not demonstrated any direct link between the newspaper articles, and the subject matter of his complaint.

13 The Tribunal finds that these documents are not directly linked to the allegation that the respondent discriminated against the complainant and therefore will not consider them in reaching its decision on the merits of this complaint.

SUMMARY OF RELEVANT EVIDENCE

14 The complainant testified that each year he wrote in his learning plan that he would like the opportunity to act in a management position. He had never had an opportunity to do so, except for a day here and there. He had worked in the Civilian Human Resources Service Centre (Atlantic) in Halifax for 19 years, and for DND for 31 years. Other employees who were junior to him received acting appointments.

15 The complainant stated that, in 1989 or 1990, he participated in a process for a position at the PE-04 level. Three people qualified, including the complainant, but only two people were appointed. There was also a recent assignment opportunity for the position of Collective Staffing and Outreach. A white female, who had 10 years less experience, was the successful candidate. The complainant was already working in the area.

16 The complainant also testified that there had never been an Afro-Canadian in a management position in Halifax. One black man had been appointed on an acting basis as Manager of the Learning Centre. However, the language profile of the position had been changed from English Essential to bilingual, so that he could not even apply for the position on a permanent basis.

17 The complainant stated that he had not applied for the acting opportunity for the M & A position when Mr. Hartigan went on language training, as there was no actual vacancy. It was to be a time-limited acting appointment until Mr. Hartigan returned. The complainant testified that had there been a vacancy, he would have applied.

18 Mr. Stewart sent the complainant an email message on April 26, 2006 stating that he had decided to cancel the acting process for the FMF position. No reason was given. According to the complainant, once Mr. Stewart saw who had applied, he cancelled the process. The complainant did not discuss this with Mr. Stewart as he believed, at that time, that the indeterminate appointment process for the FMF position would be completed quickly.

19 According to the complainant, although the position advertised was the FMF position, Mr. Stewart used the process to appoint to the M & A position.

20 The complainant also introduced a document developed by the departmental Human Resource Unit which did a gap analysis for employment equity. The complainant explained that if a Human Resources Advisor wished to use employment equity as a hiring requirement they could do the analysis to see if there was a gap in DND with respect to a particular group. In Halifax, there was a gap for visible minorities and for women in June 2006, when this appointment process was advertised. The complainant testified that Human Resources Officers are instructed not to use employment equity groups as an organizational need unless there is a gap with respect to a particular group.

21 Only three people had acting appointments in the positions of Manager, Human Resources Services – Ms. Anderson, Ms. Grant and Ms. DeCurtis. All of these employees are white women.

22 The SMC outlined the following organizational need:

Member of one of the following designated employment equity groups: Persons with Disabilities/Visible minority/Aboriginal people

23 The complainant testified that, in the normal course of an appointment process, once an assessment board had a group of qualified candidates, it would usually apply the asset qualifications or organizational needs. He was the only Afro-Canadian candidate. Despite its inclusion in the SMC, this organizational need was not even considered in this process. It was an error in the process not to at least consider the organizational need.

24 The complainant had been denied an acting opportunity in the FMF position, while Ms. Grant had performed the duties of the M & A position for 15 months, the time it took the respondent to complete the appointment process. This demonstrated preferential treatment by the manager. The manager finally posted a notice of acting appointment on May 31, 2007 for Ms. Grant's acting appointment, which had started in

November 2006. The complainant did not file a complaint, as he was expecting the results of the process to fill the position on an indeterminate basis within a few days.

25 The process to staff this vacant position took over 15 months. The respondent's service standard for conducting an advertised process was 65 days. During the lengthy time period, Ms. Grant benefited from acting in the position. She had a place at the table at all management meetings.

26 Mr. Stewart gave evidence on behalf of the respondent. He stated that he has been Regional Director for the Atlantic Region since 1997. He was responsible for DND's regional civilian human resources for the four Atlantic provinces. Mr. Stewart explained that there were two positions of Manager, Human Resources Services, in the Atlantic Region – the FMF position had a large civilian population located in Halifax, while the M & A position involved providing Human Resources Services to a number of different naval units, as well as four air force units, and other Canadian Forces organizations, located throughout the Atlantic Region.

27 Mr. Stewart started the appointment process in early 2006, when the FMF position became vacant due to the incumbent leaving that position. He advertised the position as Manager, Human Resources Services in April 2006, without specifying the location. It was his intention to see if the successful candidate was a better fit for the FMF position or the M & A position. The incumbent of the M & A position, Mr. Hartigan, was on full-time language training in early 2006 and was expected back in June or July 2006. Mr. Hartigan returned to work early. At the same time, a new senior manager at FMF decided to initiate a massive appointment process to hire about 200 people in a short timespan. Mr. Stewart discussed this challenge with Mr. Hartigan, who undertook to provide Human Resources Services in the FMF position. The situation at FMF of hiring 200 staff under the new *PSEA* was out of the ordinary, and was not a situation where Mr. Stewart would give someone a developmental opportunity.

28 Mr. Stewart stated that, in early May 2006, he was informed that the Commissioner of Official Languages had received a complaint about the Manager,

Human Resources Services positions, namely that one of the two positions should have a bilingual component. Between May and July 2006, he negotiated a settlement to keep the positions as English Essential. A second advertisement was issued with a closing date of August 2, 2006. Mr. Stewart did not communicate anything about this delay to the applicants.

29 The assessment board was composed of Mr. Stewart and Cheryl Reed, Director General. Candidates were screened on experience and asked to write the PSC Middle Manager In-Basket Exercise 820 (PSC 820 Exercise) to assess their ability to manage. They then received a scenario one week in advance of an interview. Candidates had to prepare and make a presentation and write a briefing note. They also had to supply references.

30 Four candidates were found to be qualified for appointment, including the complainant and Ms. Grant. Candidates were assessed on a meets/does not meet basis.

31 Prior to the interviews, Mr. Hartigan had decided that he would like to stay in the FMF position. Therefore, the board was looking for the candidate for the M & A position, who could interact with a number of clients in a strategic way.

32 The board completed a written rationale for its decision that Ms. Grant was the right fit for the position. It noted that she had strengths in the areas of strategic advice and guidance, leadership, client service/relationships and judgement. The board also referred to her score on the analysis factor from the PSC 820 Exercise (5/5) and strong client/supervisor references. The board further stated that the ability to engage a variety of senior clients and manage a diverse number of organizations was essential to the position, as well as the ability to develop and sustain multiple strategic approaches to respond to varying client needs.

33 Mr. Stewart further explained that the M & A position involved numerous client groups. One client is located in the same building as Human Resources Services, but all other clients are spread throughout the Atlantic Region. Ms. Grant was able to demonstrate that she could develop multiple approaches to respond to varying client

needs. The board made its decision regarding the right fit taking into account the whole candidate assessment.

34 While the ability to analyse was not explicitly stated on the SMC, it was one of the factors in the PSC 820 Exercise and was one of the components in the ability to manage. The reference to the ability to engage a variety of senior clients was part of the ability to provide strategic advice. The ability to develop multiple strategic approaches was part of the ability to provide strategic advice and also subsumed under the leadership qualification.

35 Mr. Stewart stated that he had not groomed Ms. Grant in any way. She was one of several applicants who applied for, and was given, the opportunity to act in Mr. Hartigan's position while he was on language training. She had received no special training and, in the past, had an assignment opportunity similar to the one the complainant had undertaken.

36 On cross-examination, Mr. Stewart stated that the organizational need of members in a designated employment equity group was generally put on all advertisements in DND across the country. The intention was to attract members of these groups to apply in appointment processes. A listed organizational need could be used as a factor in the decision of who to appoint. Mr. Stewart testified that a manager had to consider all the circumstances in making his decision. In this particular situation, he felt that the needs of the job and requirements of clients were more pressing than appointing a member of an employment equity group. He decided to apply the right fit for the job and not the advertised organizational need.

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

37 The complainant argues that management discriminated against him by cancelling the acting opportunity for the FMF position. This was after Mr. Stewart knew who had applied. No reason was given for the cancellation. Instead, Mr. Hartigan was placed in that position, and his substantive position was left open so that Ms. Grant

could continue to act in the M & A position. She was being groomed for that position. The preferential treatment awarded to her disadvantaged the complainant. This constituted discrimination contrary to section 7 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (*CHRA*).

38 According to the complainant, Ms. Grant received preferential treatment from the manager. She was acting in the position to be staffed for a period of about 15 months. The manager had cancelled the acting appointment for the FMF position, for which the complainant applied. The complainant was not offered an opportunity to act in the M & A position, even though Mr. Stewart knew that having an acting opportunity was in the complainant's learning plan for a number of years.

39 The complainant submits there is a clear *prima facie* case of discrimination in this appointment process. Using the test enunciated in *Shakes v. Rex Pak Ltd.*, (1982) 3 C.H.R.R. D/1001, it is clear that the complainant was qualified for appointment (and had been in previous processes too). He was not appointed. Thirdly, the person who was appointed was not better qualified.

40 The complainant further alleges that the respondent abused its authority by changing the SMC during the assessment process. A manager can only use the qualifications on the SMC to assess candidates. One of the essential qualifications for the position was the ability to manage, which was assessed through the PSC 820 Exercise. Ms. Grant was found to be the right fit for the position based on the analysis factor from the PSC 820 Exercise, for which she received a rating of 5/5.

41 The complainant argues that the ability to analyse was not a qualification listed on the SMC and, therefore, it was improper to use this qualification to decide on the candidate who was the right fit for the position. The PSC 820 Exercise was used to assess the ability to manage. To pull out one component of that qualification, the ability to analyse, was a misuse of the standardized test.

42 Similarly, the rationale for choosing Ms. Grant stated that "essential to the success of the incumbent of this position is the ability to engage a variety of senior clients that manage a diverse number of organizations." The complainant states that

this ability did not form part of the SMC, was not assessed and, therefore, cannot form part of the criteria used to determine the right fit for the position.

43 A third qualification appeared in the rationale, which was not listed on the SMC. This was the “ability to develop and sustain multiple strategic approaches to respond to varying client needs.” The manager had indicated that this was extremely important for the position but had not included it in the SMC. According to the complainant, this was because the SMC was originally developed for the FMF position. The additional qualifications were used because the position to be staffed was different from the original intention of the manager.

44 While the manager had listed an organizational need, this was not considered. The complainant was the only Afro-Canadian of five candidates, but he was not considered for appointment. Given that the manager had put the organizational need of designated employment equity groups on the advertisement, he was obliged to consider those candidates who met this need.

B) RESPONDENT’S ARGUMENTS

45 The respondent submits that the complainant has put forward two aspects of discrimination – systemic discrimination within the workplace that adversely impacted him and direct discrimination by the manager in denying the complainant a long-term acting appointment. In order to establish systemic discrimination, the complainant must prove there is systemic discrimination in the employment practices in this workplace and, as a result, he was adversely affected. In this case, there is no evidence of negative attitude towards visible minorities that would constitute systemic discrimination. The only evidence brought forward is that he was denied acting opportunities.

46 Mr. Stewart gave evidence that long-term acting appointments are few and far between. When the opportunities arise, such as with Mr. Hartigan’s position while he was on language training, Mr. Stewart advertises them. The complainant did not apply for this, stating he was not interested where there was no actual vacancy.

47 Similarly, Mr. Stewart had advertised an acting opportunity at FMF when Ms. Banfield vacated that position. Due to unforeseen circumstances, that opportunity no longer existed when Mr. Hartigan took the position. The manager gave clear, cogent evidence as to why that was done.

48 The respondent submits that with respect to direct discrimination, the appropriate test is found in the *Shakes* decision. The disadvantaging criterion is the lack of a long-term acting appointment for the complainant.

49 Mr. Stewart explained why he appointed Mr. Hartigan to the position at FMF. There is no evidence that the process was cancelled because the complainant was the only applicant, or because he is black.

50 The complainant also alleges that given the length of time of Ms. Grant's second acting appointment (November 2006 to July 2007), it should have been re-advertised. However, the respondent argues that the evidence is that Mr. Stewart wanted to maintain consistency with the clients, and the position had already been advertised in 2005. He appointed Ms. Grant in November for a period of less than four months, as he believed the process to fill the position indeterminately would soon be completed. The notice of acting appointment was issued on May 31, 2007, which the respondent acknowledged was two months late. The complainant did not exercise his right to recourse concerning this acting appointment.

51 As for preferential treatment given to Ms. Grant, the respondent relies on *Glasgow v. Deputy Minister of Public Works and Government Services*, [2008] PSST 0007. Ms. Grant had competed for the acting appointment in the M & A position. It was rotated between her and Ms. DeCurtis, the other qualified candidate. The complainant referred to her acquiring experience sitting at the management table. However, there was no evidence that this was an advantage. Four candidates, including the complainant, were found qualified in the process for the indeterminate position.

52 The respondent further submits that while the complainant made a generalized request for an acting opportunity, there is no evidence that management knew he

wanted to act in the M & A position. He had not applied for it in 2005, when the opportunity originally arose.

53 Mr. Stewart did not change the merit criteria. The position of Manager, Human Resources Services, was generic. However, for the particular M & A position, Mr. Stewart decided not to apply the organizational need, but instead to focus on the candidate who could provide strategic advice and respond to varying needs.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

54 The PSC argues that the role of the Tribunal is to determine if the deputy head abused its authority when it applied the merit criteria. The Tribunal may consider and apply the *CHRA* within this context. If the Tribunal finds there has been discrimination, the complainant still must show that the discrimination complained of constitutes abuse of authority. While one does not have to prove intention in order to establish discrimination, discrimination does not amount to abuse of authority in every case.

55 The PSC submits that with respect to an organizational need, a deputy head has the choice to apply or not apply it at any point in the process, as long as the decision to apply, or not to apply, the criteria is made objectively.

ANALYSIS

ISSUE 1: Did the respondent discriminate against the complainant on the basis of race and if so, does that constitute abuse of authority?

56 The complainant alleges that he has been discriminated against because the acting appointment opportunity in the FMF position was cancelled. He also contends that the preferential treatment awarded to Ms. Grant by appointing her on an acting basis to the M & A position for a lengthy period constituted discrimination against him.

57 Section 80 of the *PSEA* states:

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.

58 Subsection 3(1) and section 7 of the *CHRA* read, in part, as follows:

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.

[...]

7. It is a discriminatory practice, 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.

59 The complainant alleges that the respondent discriminated against him on the basis of his race by failing to provide him with an opportunity to act as Manager, Human Resources Services, contrary to subsection 3(1) and section 7 of the *CHRA*. At the same time, the appointee had a lengthy acting appointment in the M & A position.

60 Both the complainant and respondent referred to the *Shakes* decision. The well-established *Shakes* test provides that, in the employment context, a *prima facie* case of discrimination is established where a complainant meets the following three-step test (at paragraph 8918):

In an employment complaint, the Commission usually establishes a *prima facie* case by proving (a) that the complainant was qualified for the particular employment; (b) that the complainant was not hired; and (c) that someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint (i.e. race, colour, etc.) subsequently obtained the position. If these elements are proved, there is an evidentiary onus on the respondent to provide an explanation of events equally consistent with the conclusion that discrimination on the basis prohibited by the Code is not the correct explanation for what occurred.

61 Applying the *Shakes* test, the Tribunal is satisfied that the complainant has established a *prima facie* case of discrimination. First, the Tribunal finds, based on the evidence presented at the hearing, that the complainant was qualified for the position. Secondly, the complainant was not appointed. Thirdly, another qualified person, who is not black, obtained the position.

62 According to the *Shakes* analysis, once a complainant establishes a *prima facie* case of discrimination, the evidentiary onus shifts to the respondent to provide a reasonable explanation that the appointment was not based on a discriminatory practice.

63 The Tribunal finds that the respondent has provided a reasonable explanation for its decision to appoint Ms. Grant. The explanation is set out in the written rationale, as well as the testimony of Mr. Stewart given at the hearing. Essentially, the respondent chose Ms. Grant because of her strengths in providing strategic advice and guidance, and her leadership qualities. These were key qualifications for the M & A position.

64 The complainant alleges that he was denied acting appointment opportunities because of his race. The acting opportunity in the M & A position arose initially from Mr. Hartigan's absence on language training in the summer of 2005. The opportunity was advertised and the complainant did not apply. Ms. Grant and Ms. DeCurtis were found qualified and given rotating acting appointments in the position. Those acting appointments have nothing to do with discrimination against the complainant as he expressed no interest in that opportunity. Even when it became clear that the M & A position would remain unoccupied upon Mr. Hartigan's return, the complainant did not express interest in an acting opportunity in that position.

65 The other acting opportunity at issue was advertised in February 2006 for the FMF position. The complainant applied. This opportunity was cancelled by Mr. Stewart in late April 2006 due to two unforeseen circumstances. First, Mr. Hartigan returned early from language training. Secondly, a new manager at FMF decided to initiate a large recruitment program at FMF. The Tribunal finds that the decision to cancel this acting opportunity was based on two factors: the unexpected early return of Mr. Hartigan, an experienced HR Manager, coupled with the need to manage a large recruitment program at FMF. The Tribunal finds that that the explanation provided by Mr. Stewart was reasonable and not based on a discriminatory practice.

66 The Tribunal finds there is no evidence to support the complainant's assertion that Ms. Grant's two acting appointments in the M & A position constitute preferential treatment and discrimination against him. Ms. Grant was appointed to the position from September 2005 to February 2006 under the former *PSEA*, on the basis of being best qualified for the acting appointment, as evidenced by the eligibility list produced at the hearing. The second-ranked candidate was rotated into the position from February to November 2006. When the position was still not staffed on an indeterminate basis in November 2006, Mr. Stewart appointed Ms. Grant on an acting basis and posted notification (albeit late) when that appointment exceeded four months. The Tribunal finds that these appointments were based on merit in order to meet operational requirements until the appointment process for the indeterminate position was completed.

67 The Tribunal therefore finds that these two acting appointments were not the result of preferential treatment and did not constitute discrimination against the complainant.

Issue 2: Did the respondent abuse its authority by appointing Ms. Grant on the basis of qualifications not contained in the SMC?

68 The complainant alleges that the respondent made its decision to appoint Ms. Grant to the M & A position based on qualifications which did not form part of the SMC. The respondent claims that the criteria used for selection are part of the qualifications outlined in the SMC.

69 In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal stated:

[42] Broad discretion is given to managers under subsection 30(2) of the *PSEA* to establish the necessary qualifications for the position they want to staff and to choose the person who not only meets the essential qualifications, but is the right fit. Similar discretion is provided under section 36 of the *PSEA* for those with staffing authority to choose and use assessment methods to determine if the person meets the established qualifications. The Tribunal has discussed the discretion provided by section 36 with respect to the choice of assessment method in *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, at paragraphs 26 to 28.

[43] Weighting the merit criteria and using cut-off scores based on the performance of the candidates are methods that fall within the broad discretion given to managers under the *PSEA*. There is flexibility for managers to determine which criteria are more important than others for a position at the time of the selection process. Mr. Wilson made this determination and chose an assessment method that put more emphasis on two criteria, namely, extensive and recent experience, and judgment.

[44] Under the former *PSEA*, the ground for an appeal was that relative merit was not achieved. The process was prescriptive, ranking was mandatory, and any discrepancy in the process could lead to an appeal being allowed. Now, under subsection 30(2) the *PSEA*, considerable discretion is given to choose amongst the applicants who meet the essential qualifications, the person that in the manager's judgment is the **right fit** for the job. Accordingly, there is no requirement to rank candidates or establish an eligibility list.

70 Thus, managers have broad discretion in determining who the right fit is for the position. In some cases, a manager may select the appointee on the basis of strength in one or more of the essential qualifications, or by applying an organizational need or asset qualification to choose who will be appointed.

71 The Tribunal finds that the assessment board chose Ms. Grant as the right fit based on her overall results in the appointment process and based on the context of the position to be staffed. In the written rationale, the board notes her strengths in strategic advice and guidance, leadership, client service/relationships and judgement. These were four of the qualifications for the position. To support this statement, the board refers to Ms. Grant's answers to the question on client engagement, the analysis factor from the PSC 820 Exercise and strong references.

72 The complainant claims that in referring to Ms. Grant's score on the analysis factor in the PSC 820 Exercise, the board was changing the qualifications for the position. The Tribunal finds that the board did not change or add new qualifications, but rather used one component of the ability to manage to support its decision.

73 The board also noted in its written rationale that "the ability to engage a variety of senior clients that manage a diverse number of organizations" was essential to the success of the incumbent in the position. The Tribunal accepts Mr. Stewart's testimony that this requirement was an aspect of the ability to provide strategic advice and guidance related to civilian Human Resources issues in the context of the M & A position, where there are a number of organizations spread throughout the Region.

74 According to Mr. Stewart, the reference in the written rationale to the ability to develop and sustain multiple strategic approaches to respond to varying client needs, were aspects of two qualifications – the ability to provide strategic advice and leadership. One of the criteria used to assess the ability to provide strategic advice during the interview was clearly identifying workable options to client needs that go beyond the obvious. The definition of leadership included thinking strategically and demonstrating initiative to provide creative solutions to progress Human Resources service delivery. The Tribunal finds that this aspect of the rationale was another way of stating that Ms. Grant demonstrated good leadership and the ability to provide strategic advice.

75 The Tribunal finds that the written rationale was a reasonable explanation for the decision to choose Ms. Grant, rather than one of the other qualified candidates, and it was written in the context of the particular duties of the M & A position. The Tribunal cannot find that the respondent abused its authority in the choice of Ms. Grant.

76 The Tribunal is concerned by several communication issues which came to light during the hearing. First, it would have been beneficial for the manager and the complainant to discuss the reasons for cancelling the acting opportunity for the FMF position. Second, there is no evidence that Mr. Stewart communicated with candidates the reasons for delays during the lengthy time it took to staff the position. Finally, the late notification on May 31, 2007 of Ms. Grant's acting appointment, which began on November 15, 2006, demonstrates poor communication on the part of the respondent. The Tribunal encourages the respondent to develop good communication mechanisms to inform candidates during appointment processes.

DECISION

77 For the above reasons, the complaint is dismissed.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File	2007-0354
Style of Cause	<i>Carl Gannon and the Deputy Minister of National Defence et al.</i>
Hearing	June 5-6, 2008 Halifax, NS
Date of Reasons	April 8, 2009
APPEARANCES:	
For the complainant	Carl Gannon
For the respondent	Caroline Engmann
For the Public Service Commission	Marie-Josée Montreuil