



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

FILE: 2007-0271

OTTAWA, APRIL 17, 2009

**JEFFREY TRITES**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF PUBLIC WORKS  
AND GOVERNMENT SERVICES CANADA**

**RESPONDENT**

**AND**

**OTHER PARTIES**

|                             |                                                                                                          |
|-----------------------------|----------------------------------------------------------------------------------------------------------|
| <b>MATTER</b>               | Complaint of abuse of authority pursuant to subsection 77(1) of the <i>Public Service Employment Act</i> |
| <b>DECISION</b>             | Complaint is dismissed                                                                                   |
| <b>DECISION RENDERED BY</b> | Merri Beattie, Member                                                                                    |
| <b>LANGUAGE OF DECISION</b> | English                                                                                                  |
| <b>INDEXED</b>              | <i>Trites v. Deputy Minister of Public Works and Government Services Canada et al.</i>                   |
| <b>NEUTRAL CITATION</b>     | 2009 PSST 0016                                                                                           |

## **REASONS FOR DECISION**

### **INTRODUCTION**

[1] Jeffrey Trites, the complainant, participated in an internal advertised appointment process to staff Pension Specialist positions at the AS-01 group and level in Public Works and Government Services Canada (PWGSC) in Shediac, New Brunswick. He was eliminated from the appointment process after failing to meet the essential qualification “ability to interpret and analyze data” assessed by a written exam.

[2] The complainant had acted in the Pension Specialist position. He contends that he was not appointed because the respondent, the Deputy Minister of PWGSC, refused to reconsider his ability to interpret and analyze data based on his years of experience and training, and his ability to do the job. He asserts that the respondent’s delegate refused to consider his case individually and with an open mind, thereby fettering her discretion.

[3] The complainant further asserts that the respondent was unreasonable in establishing ten essential qualifications for this process, and acted in bad faith by initiating an external appointment process before completing the internal appointment process. Finally, he contends that the assessment board members were not qualified to mark the written exam.

[4] The respondent states that consideration was given to the complainant’s concerns, but it was not appropriate to reassess him using a different assessment tool. The respondent further states that the essential qualifications were properly established for the work to be performed and that the board members were familiar with the work of the positions. Finally, the respondent states that both an internal and an external appointment process were initiated to best meet the operational needs of the organization.

### **BACKGROUND**

[5] The respondent advertised both an internal and an external appointment process to fill several AS-01 Pension Specialist positions, and to establish a pool of qualified

candidates for future operational needs. The external appointment process closed on February 16, 2007 and the internal appointment process closed on February 19, 2007. This complaint concerns the internal appointment process.

[6] A written test was administered to assess three essential qualifications: the ability to interpret and analyze data; the ability to use reasoning skills to solve problems; and, the ability to communicate effectively in writing. The complainant was informed in March 2007 that he had been eliminated from the process since he had not met the ability to interpret and analyze data qualification.

[7] Following an informal discussion, the complainant requested that his personal situation be reviewed by the delegated manager (the delegate) as he felt that his results on the test were not a reflection of his ability to interpret and analyze data, given his personal work history and past performance.

[8] The respondent informed the complainant that it had reviewed the assessment tool and the manner in which it was administered; the respondent was satisfied that the merit criteria were properly applied. The respondent determined that it would not reassess the complainant using a different assessment tool, namely, his past performance.

[9] The complainant filed his complaint with the Public Service Staffing Tribunal (the Tribunal) on June 11, 2007 pursuant to subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12, 13 (the *PSEA*).

[10] The Tribunal decided to render its decision without an oral hearing, in accordance with subsection 99(3) of the *PSEA*. The decision is based on the submissions of the parties and their supporting documents.

## **ISSUES**

[11] To resolve this complaint the Tribunal must determine the following issues:

(i) Did the respondent's delegate fetter her discretion by refusing to reassess the complainant based on his past experience?

(ii) Did the respondent abuse its authority by conducting concurrent internal and external appointment processes?

(iii) Did the respondent abuse its authority in the establishment of the essential qualifications?

(iv) Did the respondent abuse its authority in selecting the assessment board members?

## **ARGUMENTS OF THE PARTIES**

### **A) COMPLAINANT'S ARGUMENTS**

[12] The complainant argues that the respondent's delegate fettered her discretion by not considering his personal situation. He felt his test result was not a reflection of his ability to interpret and analyze data, which he had demonstrated in his work over the previous 18 months. He requested by email on two occasions that his individual case be reviewed, but the delegate did not give any consideration to his years of experience and training, and his ability to do the job.

[13] According to the complainant, the delegate's first response did not answer his questions, nor did it consider his situation. The response he received was a generic response, identical to responses sent to other candidates who had also questioned the test used in the assessment of candidates.

[14] As a result of the delegate's answer, the complainant sent a second e-mail on May 4, 2007 in which he wrote:

My e-mail had requested you review my personal work history and to please use this as a measure of my abilities... This could be accomplished by reviewing my present work, employee appraisals or any work history previously mentioned in my e-mail to you on April 2, 2007.

[15] The complainant states that the delegate's second response only confirmed her position that the test was a fair assessment of the abilities being tested and informed him that he would not be reassessed using a different assessment tool.

[16] The complainant submits that, during an information session on the *PSEA*, he was informed that management has the flexibility to return candidates to the appointment process who had failed a particular skill, if they had demonstrated that they were able to perform that skill as part of their work. After making his view known to management, the respondent's delegate informed him that she was not aware of such an example given during the information session.

[17] The complainant also submits that the respondent anticipated a high failure rate in the internal appointment process, and intended to eliminate as many candidates as possible from that process in order to hire candidates with a higher level of education from the external appointment process. He states that only 31 of the 148 applicants participating in the internal appointment process were placed in the pool.

[18] The complainant states that most of the applicants who were eliminated from the internal appointment process were able to apply to the external appointment process since they met the criteria. However, the complainant submits that approximately 10 candidates, including him, were not able to apply to the external appointment process because they did not meet all the criteria. The complainant did not possess the level of education required in the external process.

[19] The complainant emphasizes that the same ability test was administered during the external appointment process. Therefore, he asserts that as most of the unsuccessful applicants had already had the opportunity to have an informal discussion after the completion of the internal appointment process, they were given an unfair advantage over the other external candidates. In addition, those individuals received a second chance, while he did not.

[20] The complainant challenges the necessity of conducting an external appointment process at the same time as the internal appointment process, since the Job Opportunity Advertisement for the internal appointment process indicated that the anticipated number of positions to be staffed was 20.

[21] The complainant argues that requiring candidates to meet 10 essential qualifications was excessive. He bases his argument on the Public Service

Commission's *Tips Guidance Series – Assessment, Selection and Appointment* document, and quotes the following passages:

Limit the list of essential qualifications to those that are critical for the positions and use asset qualifications to provide flexibility in building the team and/or build on strengths identified through the applicant pool.

Combined methods of assessment, for example, using an interview and reference check to assess a particular merit criterion may produce a more accurate picture, if these methods are well-developed; the different sources can highlight similar results across assessment methods, or bring to light inconsistencies in behaviour or performance;

Consider developing skills inventories to avoid assessing the same qualifications for the same persons in various processes, so that previous results can be applied to future appointment processes.

[22] The complainant also refers to the PWGSC document entitled *The 8 Steps to Ethical Decision-Making*, and cites the following question: "What short-term and long-term consequences are most likely to occur if you take an action? Which action would accomplish the most good overall?"

[23] The complainant submits that an open-minded manager would not have established 10 essential qualifications for a position, would have used more than one method to assess the qualifications, and would have applied assessments from previous selection processes, thus saving time and financial resources. He argues that the respondent's delegate continued to use the testing processes used under the former *PSEA* and refused to consider the flexibility allowed under the *PSEA*. He submits that the respondent's delegate adopted a policy which prevented her from considering individual circumstances with an open mind.

[24] The complainant stated that several other appointment processes resulted in insufficient pools, in support of his allegation that management uses methods to eliminate as many candidates as possible instead of taking an opportunity to create pools.

[25] In his allegations and in his reply submission, the complainant states that the assessment board members have been retired from the Superannuation Sector for over 10 years. The board members held positions in Policy and Legislation, not staffing or

Human Resources, when they retired. He submits that the assessment board members had not worked in “processing type” positions prior to, or at the time of, their retirement. According to the complainant, the requirements of the positions have changed in the last 10 years. He also argues that the board members’ experience with the *PSEA* would be limited.

## **B) RESPONDENT’S ARGUMENTS**

[26] The respondent submits that the complainant requested that he be assessed differently from the other candidates. He wanted his assessment to be based on his past performance rather than the written exam. However, the respondent states that at no time did the assessment board identify past performance as an assessment tool in this appointment process.

[27] The respondent argues that the complainant’s request amounted to asking the assessment board to “shop” for an assessment tool that would give him a favourable result. It refers to the Tribunal’s decision in *Gilbert v. Commissioner of the Royal Canadian Mounted Police et al.*, [2007] PSST 0040, and makes the analogy that the complainant’s request could be interpreted as favouritism on the part of the assessment board if it was determined that the board was trying to find a favourable result for the candidate.

[28] The respondent argues that section 36 of the *PSEA* provides broad discretion to choose assessment methods to determine whether a candidate meets the qualifications that have been established for the position. Furthermore, it refers to *Charter v. Deputy Minister of National Defence et al.*, [2007] PSST 0048 in support of its assertion that the candidate bears the responsibility to demonstrate, through the chosen process, that he or she meets the essential qualifications for the position.

[29] The respondent submits that, in this process, all candidates were assessed for the abilities qualifications using the same written test. It maintains that there is no evidence indicating that the use of the written test was in any way inappropriate or that it constituted an abuse of authority.

[30] The respondent confirms that its delegate and the assessment board identified the assessment tools to be used to assess the applicants prior to posting the Job Opportunity Advertisement. Following the complainant's request that his personal situation be taken into consideration, the delegate undertook a thorough evaluation of the written test. The delegate and the Manager of Human Resources reviewed the points raised by the complainant, and the delegate consulted the assessment board members who had marked the test to ensure that she understood the test and the manner in which it was used. The respondent submits that, after this review, the delegate was satisfied that the merit criteria were properly applied and that the values of the *PSEA* were respected. The delegate and the Manager of Human Resources met with the complainant on May 14, 2007 to explain that he would not be reassessed using his past performance. This information was confirmed the same day in an e-mail to the complainant from the Manager of Human Resources.

[31] The respondent argues that the Tribunal has clearly established in its jurisprudence that reassessment of a candidate's qualifications is not the purpose of an informal discussion.

[32] With respect to the issue of concurrent processes, the respondent submits that the *PSEA* does not prevent a deputy head from initiating an external appointment process while an internal appointment process for the same position is ongoing. The respondent explains that it chose to conduct concurrent appointment processes because that approach would best meet the operational needs of the department. According to the respondent, the complainant has not provided any evidence to demonstrate that the decision to proceed with both processes was motivated by anything other than the operational requirements of the department.

[33] As for the 10 essential qualifications, the respondent argues that subsection 30(2) of the *PSEA* sets out the definition of merit, as well as the authority of the deputy head to establish qualifications. The respondent refers to *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, where the Tribunal established that subsection 30(2) of the *PSEA* provides broad discretion to deputy heads and their delegates to establish the necessary qualifications for the positions they want to staff.



[34] The respondent submits that, under subsection 30(2), a delegated manager must establish the qualifications for the work to be performed. The respondent argues that the complainant has not alleged that the essential qualifications are not relevant to the work to be performed. Consequently, it submits that there is no reason for the Tribunal to intervene in management's discretion in this area.

[35] With respect to the choice of assessment board members, the respondent submits that the complainant has not provided any information to support his claim that the board members are not qualified. The respondent refers to *Sampert et al. v. Deputy Minister of National Defence et al.*, [2008] PSST 0009, and asserts that it is satisfied that the board members were in fact familiar with the work of the positions in question and that they did not have any preconceived notions as to who should be appointed.

[36] In summary, the respondent submits that the complainant has not presented any evidence to establish a finding of abuse of authority.

### **C) PUBLIC SERVICE COMMISSION'S ARGUMENTS**

[37] The Public Service Commission (PSC) submits that the complainant's position appears to be that he should have been assessed for the "ability to analyze and interpret data" using an alternative tool. The PSC argues that the complainant is really asking that the merit criteria be changed for him from "the ability to", to "past experience in" analyzing and interpreting data, which was not part of the identified merit criteria, and had not been assessed for other candidates. According to the PSC, the complainant is asking to be assessed outside of the identified merit criteria, and that would be contrary to PSC policy.

[38] The PSC also provided its usual submissions on the concept of abuse of authority.

### **ANALYSIS**

**Issue I:** Did the respondent's delegate fetter her discretion by refusing to reassess the complainant based on his past experience?

[39] Based on the documentation presented, the Tribunal finds that the respondent's delegate did not fetter her discretion. On the contrary, the evidence shows that the respondent's delegate did consider the complainant's request to be reassessed using a different tool. She undertook a thorough examination of the written test and consulted the Manager of Human Resources and the assessment board members who had marked the test. Having satisfied herself that the assessment tool assessed the merit criteria, and had been properly applied, she met with the complainant to give him her decision, which was also confirmed in writing. The reasons for the decision were provided by the respondent in its submissions: first, the written test was chosen in advance of the appointment process and administered to all candidates; secondly, past performance had never been identified as an assessment tool in this process; and, thirdly, to have allowed the complainant to be assessed differently might have been interpreted as favouritism.

[40] The purpose of informal discussion is not to reassess candidates. This was established by the Tribunal in *Neil v. Deputy Minister of Environment Canada et al.*, [2008] PSST 0004, and in *Rozka et al. v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2007] PSST 0046, at paragraph 76:

Informal discussion is intended primarily to be a means of communication for a candidate to discuss the reasons for elimination from a process. If it is discovered an error has been made, for example, if the assessment board did not consider some information listed on a candidate's application, this provides the opportunity for the manager to correct that mistake. However, informal discussion is not an opportunity to request that the assessment board reassess a candidate's qualifications.

[41] In this case, the respondent's delegate did not determine that an error had been made which required correction. The fact that she decided not to reassess the complainant using a different tool does not alter the fact that she gave his request the appropriate consideration, and disagreement with her decision is not evidence of abuse of authority.

[42] Section 36 of the *PSEA* provides discretion to the PSC, and its delegates, to choose any assessment method it considers appropriate to determine whether a person meets the qualifications established for the work to be performed. The broad nature of this discretion has been explained by the Tribunal in several decisions. See, for

example *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, and *Visca*. Section 36 of the *PSEA* reads as follows:

**36.** In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

[43] The Tribunal has held in *Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada et al.*, [2008] PSST 0015, at paragraph 34 that:

[...] for the Tribunal to find that there was abuse of authority in the selection of the assessment methods, the complainant must prove that the assessment method has no connection to the qualifications or does not allow those qualifications to be assessed, that the methods are unreasonable or discriminatory, or that the result is unfair.

[44] In this case, the respondent's delegate chose to use a written test to assess the ability to analyze and interpret data. The uncontested evidence before the Tribunal is that the written test had, in the delegate's opinion, produced "excellent results" in previous, similar processes. Moreover, after careful review and consultation, the delegate remained confident that the test was an appropriate tool to assess the qualification at issue.

[45] The complainant wanted to be assessed using a different tool, but he has not provided any evidence that the assessment method was flawed, unreasonable or discriminatory. His failure to succeed in this appointment process is not evidence that the test was inappropriate. Furthermore, in *Charter* the Tribunal determined that "[i]n order for a candidate to be appointed to a position, he must demonstrate through the chosen assessment process, that he meets the essential qualifications for the position."

[46] There is nothing to support a finding of abuse of authority in the choice or use of the written test as an assessment method in this appointment process.

[47] The Tribunal finds that the respondent did not abuse its authority since it did use its discretion to consider the complainant's concerns. The steps taken by the respondent's delegate to re-evaluate the test and its administration were appropriate and responsive to the concerns raised by the complainant. The fact that the respondent

did not reassess the complainant using a different assessment tool, namely his past performance, does not amount to an abuse of authority.

**Issue II:** Did the respondent abuse its authority by conducting concurrent internal and external appointment processes?

[48] The Tribunal's mandate is found in subsection 88(2) of the *PSEA*. The Tribunal has the mandate to consider and dispose of complaints made under the following provisions: subsection 65(1) concerning lay-off; section 74 concerning revocation of an appointment; section 77 concerning internal appointment processes; and, section 83 concerning appointments resulting from corrective action.

[49] This complaint was made under section 77 of the *PSEA*, which reads 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);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

[50] Section 77 addresses complaints related to internal appointment processes only. Complaints related to any aspect of an external appointment process cannot be brought under section 77. Neither this section nor any other provision of the *PSEA* authorizes the Tribunal to consider complaints related to external appointment processes. See *Robillard v. President of the Canada Border Services Agency et al.*, [2007] PSST 0015.

[51] It is clear that the complainant has concerns about the decision to conduct an external appointment process. However, as explained, the Tribunal has no jurisdiction over external appointment processes.

[52] Furthermore, the Tribunal is satisfied that the respondent chose to conduct concurrent appointment processes because it determined that it would best meet the operational needs of the department. Section 29 of the *PSEA* gives the PSC, or its delegate, authority to conduct external and internal appointment processes. There is no provision in the *PSEA* which stipulates that such appointment processes cannot be concurrent. Consequently, the Tribunal finds that the respondent did not abuse its authority in relation to this internal appointment process by conducting a concurrent external appointment process.

**Issue III:** Did the respondent abuse its authority in the establishment of the essential qualifications?

[53] Subsection 30(2) of the *PSEA* gives deputy heads and their delegates the authority to establish the essential qualifications for the work to be performed in order to make appointments based on merit.

[54] The Tribunal held in *Visca* that there is broad discretion given to delegates to establish the necessary qualifications for the position they want to staff. In *Neil*, the Tribunal determined that the requirement placed on delegates by subsection 30(2) is to establish qualifications for the work to be performed.

[55] The complainant does not allege that one or more of the essential qualifications are irrelevant to the work to be performed. In fact, he makes no submissions challenging the substance of any of the essential qualifications. He addresses only the number of essential qualifications, stating that it was unreasonable for the respondent to have established so many. He submits that 10 essential qualifications is excessive, based on the PSC's *Tips Guidance Series – Assessment, Selection and Appointment* document.

[56] Limiting the number of essential qualifications and using asset qualifications or other criteria to select a qualified candidate for appointment reflects the requirements and the spirit of subsection 30(2) of the *PSEA*. However, deputy heads have the flexibility to limit merit criteria to only essential qualifications, and establishing numerous essential qualifications is not an abuse of authority in itself. Merely questioning the

number of essential qualifications, without any submissions or evidence about their relevance to the work or any impropriety, is insufficient to support a finding of abuse of authority. There is no evidence to demonstrate that the respondent abused its authority by establishing 10 essential qualifications.

**Issue IV:** Did the respondent abuse its authority in selecting the assessment board members?

[57] The complainant alleges that the two assessment board members were not qualified since they have been retired for over 10 years, they did not work in the position to be staffed prior to retiring, and their experience with the *PSEA* would be limited.

[58] The respondent submits that it was satisfied that the board members were familiar with the work required for the position; they both had many years of experience in the Superannuation, Pension Transition and Client Services Sector of PWGSC.

[59] The complainant has not cited any statutory or policy reference to support his allegation that assessment board members must have performed the tasks or work of the position being staffed. As established in *Sampert et al.*, assessment board members should be familiar with the work required of the position to be staffed.

[60] The Tribunal finds, based on the evidence submitted, that the complainant has failed to prove, on a balance of probabilities, that the board members were not qualified. There is no evidence that the respondent abused its authority by selecting the two assessment board members.

#### **DECISION**

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

Merri Beattie  
Member

PARTIES OF RECORD

|                  |                                                                                                     |
|------------------|-----------------------------------------------------------------------------------------------------|
| Tribunal File:   | 2007-0271                                                                                           |
| Style of Cause:  | <i>Jeffrey Trites and the Deputy Minister of Public Works and Government Services Canada et al.</i> |
| Hearing:         | Paper hearing                                                                                       |
| Date of Reasons: | April 17, 2009                                                                                      |