



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2008-0211

OTTAWA, SEPTEMBER 16, 2009

DWIGHT POWELL

COMPLAINANT

AND

**THE DEPUTY MINISTER OF HUMAN RESOURCES AND SKILLS
DEVELOPMENT CANADA**

RESPONDENT

AND

OTHER PARTIES

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

DECISION The complaint is dismissed

DECISION RENDERED BY Robert Giroux, member

LANGUAGE OF DECISION English

INDEXED *Powell v. Deputy Minister of Human Resources and Skills
Development Canada et al.*

NEUTRAL CITATION 2009 PSST 0027

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Dwight Powell, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) following an appointment to the position of Insurance Program Advisor (PM-03). He alleges that the respondent, the Deputy Minister of Human Resources and Skills Development Canada (HRSDC) abused its authority in the application of merit. He questions the validity of the General Intelligence Test 310 (GIT-310) used to assess the essential education qualification since the failure rate was strikingly high. He alleges that the respondent abused its authority when it refused to investigate the high failure rate of the GIT-310.

[2] The complaint was filed with respect to appointment process 2007-CSD-IA-ONT-SC-21 under section 77(1) of the *Public Service Employment Act*, S.C. 2003, c.22, ss.12 and 13 (the *PSEA*).

BACKGROUND

[3] On April 27, 2007, the respondent initiated an appointment process for various positions at the PM-03, PM-04, PM-05 and PM-06 group and levels.

[4] The complainant applied for the position of Insurance Program Advisor (PM-03) in Richmond Hill, Ontario.

[5] The education requirement stated on the *Job Opportunity Advertisement* was as follows:

Graduation with a degree from a recognized university or a satisfactory score on the General Intelligence Test (GIT) 310

or

Successful completion of a two (2) year post-secondary program (e.g. Community College or CÉGEP) from a recognized educational institution.

[6] On June 21, 2007, the complainant wrote the GIT-310 because he did not have a university degree nor had he completed a two-year post-secondary program. He was

informed on July 6, 2007 that he had not achieved the required pass mark. He was therefore eliminated from the appointment process.

[7] After learning that the failure rate for the GIT-310 was very high, he asked the Human Resources Corporate Ontario Regional Office to conduct an investigation into the matter. He did not receive any information. He therefore followed up with an Access to Information request to get the results of several other GIT-310 testing processes that had been conducted during the same period of time and during the same regional staffing initiative in the summer of 2007.

ISSUES

[8] The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority by using the GIT-310 as an assessment tool?
- (ii) Did the respondent abuse its authority by refusing to investigate the validity of the GIT-310 as an assessment tool?

SUMMARY OF RELEVANT EVIDENCE

[9] The complainant stated that failing the GIT-310 did not disturb him too much at first. However, when he realized that he was one of many who failed the test, he started to question the results that showed, in his view, that the test was defective. He brought this to the attention of the Human Resources Consultant responsible for the appointment process, as well as to the union executive of the Ontario regional group. He requested information from Human Resources concerning the failure rate. He testified that he also submitted an Access to Information request and obtained the information on January 21, 2008. On the basis of the information provided, he arrived at the following conclusion: the test was written by 215 candidates at the PM-03, PM-04, PM-05 and PM-06 levels; 67 passed (31.16%) and 148 failed (68.84%).

[10] The complainant testified that he tried a number of avenues to bring the high failure rate to the attention of the respondent in order for the respondent to investigate

and correct the situation. He informed the respondent of his concerns that the GIT-310 was problematic. According to the complainant, an abnormally high failure rate would demonstrate a fault in the test and the purpose for which it was designed. He informed the respondent that if it was the case, it would seem appropriate to suspend and revise the various appointment processes in which the success of this test is a requirement as an alternative to having a university degree. In his view, nothing was done by the respondent to correct this. He stated that there was a lack of transparency on the part of the respondent as it failed to address the issue.

[11] He decided to file a complaint with the Tribunal when the results of the process were posted. In his complaint, he refers to the Public Service Commission's (PSC) *Guide to Implementing the Corrective Action and Revocation Policy*, more specifically under the heading "Policy Statement":

[...] If, after investigation, it is determined that an assessment tool was not reliable, it may be necessary to develop a new tool and correct the defect by administering the new tool to all those who were initially assessed in an advertized process. In this case the persons affected would be all of those initially assessed.

[12] The complainant testified that since he was not alone in failing the GIT-310, he questioned the tool, not the fact that he had failed. He referred to a memo to all staff from the Assistant Deputy Minister (ADM) dated April 25, 2008, dealing with appointment processes for 2008-2009, wherein it is stated:

[...]

To ensure that the Region has the people with the required skills and *competencies*, the *Executive Committee has approved the following* initiatives to support the recruitment and staffing strategies of the RSF:

[...]

- A transitional year educational requirement (2008-2009) – allowing the use of the "combination education requirement" (i.e. University degree or completion of a 2 year post-secondary program or an acceptable combination of education, training and/or experience) for all internal advertized appointment processes". [...]

[13] The complainant stated that according to the memo, the ADM decided to suspend the need for the GIT-310 for a period of one year. He understood this memo to be an indication that the GIT-310 was not valid.

[14] Debra Hepburn testified for the respondent. She has been a Regional Business Expertise Consultant (PM-04) in the Integrity Branch of the Ontario Region for the past eight years. She testified that she took a four-week course on the *PSEA* in 2007. She participated in all aspects of the appointment process: advertisement, establishment of the Statement of Merit Criteria (SMC), screening and oral interviews.

[15] Ms. Hepburn referred to the *Job Opportunity Advertisement* and stated that the purpose of the advertisement was to establish a pool of candidates to fill positions in four different branches. She testified that the SMC, including the educational qualifications, was developed in consultation with the Managers of the four branches. She indicated that the definition of education requirements which appeared on the SMC was approved by the Ontario Region Executive Committee (EXCOM) on April 25, 2007. The heads of the four branches gave final approval of the SMC. To her knowledge, the GIT-310 is used as an equivalency to a university degree and it is marked by the PSC.

[16] Ms. Hepburn indicated that she does not know the complainant but was advised of his concerns regarding the test and the high failure rate. The complainant's concerns were forwarded to the Human Resources Consultant for the Ontario Regional office, on July 26, 2007. The Human Resources Consultant indicated in her email of July 26, 2007 that some analysis had begun on the use of the GIT-310 in the advertised process-for a presentation to EXCOM. The concerns raised about the test did not lead her to question the use of the test in the advertised process, and she was satisfied that the issue had been referred to the Human Resources Consultant.

[17] Jacqueline Hilton, Director of Human Resources, Ontario Region for HRSDC also testified for the respondent. She was Manager of Recruitment and Staffing from 1998 to 2006, and was Director of Human Resources when the appointment process took place. She is a member of EXCOM and has received training on the *PSEA*. She stated that in 2005, Human Resources standardised the work of Service Canada and developed a Client Service Agent position (PM-01) requiring post-secondary education. This was in line with the Clerk of the Privy Council's directions about Public Service Renewal. Consequently, the department required post-secondary education at the

entrance level to increase the level of education as part of the Public Service Renewal. This policy was also applied to more senior levels.

[18] When the 2007-2008 appointment processes were initiated, the number of vacancies was projected, and the SMC was developed. Initially it was proposed that the educational requirement be completion of a post-secondary program or graduation with a degree from a university; but after discussion, EXCOM added the GIT-310 as an alternative to university graduation in order to increase opportunities.

[19] Ms. Hilton was aware of the concerns raised about the high failure rate of the GIT-310, since she and EXCOM received a half dozen such concerns. She stated that it was not unusual for individuals to contact her or other members of EXCOM about the concerns, and she responded or prepared responses accordingly. EXCOM received monthly progress reports on the process, and in August 2007, EXCOM reviewed the essential education qualification assessment results to see the rate of progress and information about the pass/failure rate. According to Ms. Hilton, EXCOM monitored the process to ensure that the projected vacancies could be filled and to understand the impact and the lessons to be learned. EXCOM knew that there would be failures based on PSC data. It was also aware that there were double counts in the data for the process, since candidates could apply to more than one of the four different types of positions at the PM-03 group and level. At the August 2007 EXCOM meeting, after discussing the pass/fail numbers, it was determined that it was not necessary to intervene in the process. This determination was based on the excellent reputation of the PSC in test development, the reliability of the GIT-310, and the fact that it had withstood challenge in the past. They were also on target in establishing a pool for future vacancies. She indicated that the union was also briefed by the ADM through the Regional Union Management Consultation Committee.

[20] Ms. Hilton explained the ADM's decision to suspend for one year the requirement for the GIT-310 as an alternative to university graduation. She stated that the department was facing a very high rate of retirement in the next 18 months (approximately 25%) and therefore the forecasted vacancies would increase dramatically. They decided to put in place a transition year in order to increase the pool

of candidates. As such, they decided to accept a combination of education and experience as an alternative to university graduation and not require candidates to write the GIT-310. According to Ms. Hilton, this decision is in accordance with the minimum standard for education for the PM group as indicated in the Treasury Board of Canada Secretariat's (TBS) *Qualification Standards*:

Programme Administration (PM) Qualification Standard

Education

The minimum standard is:

- A secondary school diploma or employer-approved alternatives (see Section 2, Part 1, Alternatives to Education).

[21] Dr. Henry Edwards, Director, Research and Development Division, Personnel Psychology Centre (PPC) at the PSC testified on behalf of the PSC and was qualified as an expert witness with respect to standardized test development. Dr. Edwards' *curriculum vitae* was introduced into evidence. Dr. Edwards stated that the PPC is responsible for developing, upgrading, validating, maintaining, administering, replacing and approving the PSC's assessment tools. He has been in his position since March 2000, and he is familiar with the GIT-310 as an alternative to a university degree.

[22] Dr. Edwards referred to certain sections of the TBS document entitled *Qualification Standards*:

[...]

Specific standards with respect to Education exist for certain groups and levels. Alternatives to Education may also be applicable for certain groups.

[...]

EMPLOYER-APPROVED ALTERNATIVES TO UNIVERSITY GRADUATION

For those occupational groups that do allow an alternative to university graduation, the employer approved alternatives are:

1. a satisfactory score on the PSC test approved as an alternative to university graduation [...]

PROGRAMME ADMINISTRATION (PM) QUALIFICATION STANDARD

Education

The minimum standard is:

- a secondary school diploma or employer-approved alternatives.

[23] Dr. Edwards then referred to the PSC's document entitled *General Intelligence Test (GIT-310)*, which establishes that the GIT-310 can serve as an alternative to a university education requirement. He explained that the GIT-310 is intended to measure an individual's cognitive ability; the ability to use reasoning to solve problems at a level comparable to a university undergraduate degree. The GIT-310 is modeled on the Wechsler Adult Intelligence Test, adapted to be administered as a group test, in a multiple choice format. It covers six different themes recognized for cognitive ability (general information, similarities, arithmetic, vocabulary, memory, block design). The pass score is 88 out of 155 questions (57%). This score is related to the scores of university undergraduates in their last year. The GIT-310 was first validated around 1969, and it has been updated and revised since then. The distribution of scores over the years has not changed significantly, and the contents of the test are as relevant today as a number of years ago. The test is computer scored and candidates can ask for a rescore. The number of errors for this test is very low.

[24] Dr. Edwards commented on two charts entitled *GIT 310 Pass Rates by Occupational Group and Level*, which showed pass rates for the period of April 6, 2003 to May 26, 2008, for the PM, CR and AS groups. One of the charts shows that the pass rate for the PM group is 45.3% with variances depending on the level (PM-01 to PM-06). He stated that the pass rate is influenced by the difficulty level of the content of the test for the people who take the test. He further stated that the variance between this particular appointment process and the average over five years is statistically important because the group of candidates who wrote the test are different from the ones over the five years. He indicated that the pass rates do fluctuate over the five-year period.

[25] With respect to the pass rate in the appointment process at issue in this complaint (*i.e.* 31.16%), Dr. Edwards attributes this result to the characteristics of the candidate group. He does not see the failure rate (68.84%) as a demonstration of the

failure of the test and stated that the GIT-310 is not flawed, but rather a highly reliable instrument as an alternative to university graduation.

[26] Dr. Edwards explained that there was no alternative test for graduation from a Community College or CEGEP. The GIT-320 is used as an alternative to high school graduation.

[27] Dr. Edwards is of the opinion that in the appointment process at issue, the GIT-310 was used appropriately to assess the education qualification established in the SMC. According to him, the GIT-310 is the only test that can be used. He added that the test is used by a number of departments.

ARGUMENTS OF THE PARTIES

A) THE COMPLAINANT

[28] The complainant underlines the fact that the respondent did not investigate the high failure rate of the GIT-310. He submits that the respondent did not approach the PPC to have them review or explain the high failure rate. He challenges Dr. Edwards' assertion that the results of the selection process were due to the characteristics of the candidates themselves.

[29] The complainant submits that the fact the respondent did not investigate the high failure rate and did not provide him with an answer amounts to abuse of the respondent's discretionary power and shows negligence. The use of the test was not appropriate and led to his elimination from the appointment process. He is of the view that the candidates who did not have a university degree should have been assessed on the basis of a combination of experience and education. The complainant submits that the ADM had made this decision as was indicated in his email of April 25, 2008.

[30] The complainant asserts that the use of the GIT-310 was not appropriate and using it to eliminate him from the appointment process constitutes abuse of authority leading to an improper result. He submits that the respondent should have known that using the GIT-310 would eliminate candidates who met the lower educational requirement.

[31] As a corrective measure, the complainant requests that all the candidates who failed the GIT-310 be given the opportunity to be reassessed based on the combination of their experience and education and that those who are qualified be placed in the pool.

B) THE RESPONDENT

[32] The respondent requests that the Tribunal disregard the complainant's submission regarding the educational qualification, as this was not an allegation. The respondent argues that a complaint is personal to the complainant and not to others who were in the same situation as him (see *Visca v. Deputy Minister of Justice et al.*, [2006] PSST 0016, at paragraph 24).

[33] The respondent submits that if the complainant is seeking to challenge the validity of the GIT-310, this is not within the Tribunal's jurisdiction. The complaint is brought against the deputy head for abuse of authority, not against the PSC. The respondent states that the deputy head has the authority to establish qualifications pursuant to subsection 30(2) of the *PSEA*. Section 36 of the *PSEA* gives the deputy head broad discretion to determine the appropriate assessment tool and the GIT-310 is a PSC approved alternative to university graduation.

[34] The respondent submits that there is no evidence to support the assertion that the rate of failure is an abuse of authority. The failure rate as it was calculated did not take into account candidates applying for more than one of the positions advertised. No expert witness was called by the complainant to challenge the PSC's expert witness. A pass rate of 31.16% does not indicate a flaw in the test. The test did not produce unsatisfactory results since management created a pool of qualified candidates to fill future vacancies. In addition, the respondent states that it considered the employees' concerns, analysed them, and presentations were made to EXCOM. Discussions took place at the Union Management Consultation Committee, and EXCOM decided to continue with the appointment process. The respondent submits that the ADM's decision to suspend the use of the GIT-310 for one year (2008-2009) was due to a high rate of expected retirements.

C) THE PUBLIC SERVICE COMMISSION

[35] The PSC submits that Dr. Edwards is an expert witness and that his testimony should be given significant weight. Dr. Edwards explained how the test works, its purpose, its development, the modification over time, the pass rate and the fact that it is highly reliable. It is not equivalent to university graduation, but an alternative. The pass rate in the advertised process, while lower than the five-year average, was not the result of the test itself, but due to the characteristics of the candidates that took the test. No evidence was provided by the complainant to indicate that the test is flawed. The PSC asserts that the use of the GIT-310 was appropriate for the appointment process, as it was developed for this purpose.

Issue I: Did the respondent abuse its authority by using the GIT-310 as an assessment tool?

[36] The legislative authority for establishing qualifications and qualification standards is set out in sections 30 and 31 of the *PSEA*, which read as follows:

30.(1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.

(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.

[...]

31.(1) The employer may establish qualification standards, in relation to education, knowledge, experience, occupational certification, language or other qualifications, that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.

(2) The qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i) must meet or exceed any applicable qualification standards established by the employer under subsection (1).

[37] The minimum standard for the PM group is “a secondary school diploma or employer-approved alternatives”. The requirement for a university degree in this PM appointment process exceeds the minimum educational requirement in the PM *Qualification Standard*. This complies with subsection 31(2) of the *PSEA*.

[38] According to the *TBS Qualification Standards*, a satisfactory score on the PSC test approved as an alternative to university graduation is an employer-approved alternative to university graduation.

[39] Dr. Edwards’ evidence, which was not contradicted, is that the GIT-310 measures an individual’s cognitive ability and the ability to use reasoning to solve problems at a level comparable to a university undergraduate degree. The Tribunal is satisfied that the GIT-310 has been approved by the PSC as an alternative to university education.

[40] The complainant submits that the high rate of failure in this process is evidence that the GIT-310 is flawed. However, Dr. Edwards presented clear and convincing evidence regarding the test, its use and expected results.

[41] He explained that the average pass rate over a five-year period was 45.3%. He also indicated that the pass rates did fluctuate from year to year during the five-year period.

[42] Dr. Edwards testified that the distribution of scores over the years has not changed significantly and that the number of errors for this test is very low. The test was adapted to be administered as a group test in a multiple choice format covering six different themes. The contents of the test are as relevant today as they were years ago. In his view, the variances between this appointment process and the average over five years were due to the characteristics of the candidates that wrote the test.

[43] The data provided by Dr. Edwards showed a pass rate of 45.3% over a five-year period for the candidates taking the GIT-310, with variations of 39.4% at the PM-01

level to 57.1% at the PM-06 level. According to him, it is normal for pass rates to fluctuate over the five-year period. He does not see the failure rate (68.84%) in the present appointment process as evidence of a flaw in the test. The GIT-310 was first validated in 1969 and has since been revised and updated. It was his expert opinion that the GIT-310 is not flawed and that it is a highly reliable instrument as an alternative to university graduation.

[44] An average is the result of adding several amounts together and dividing the total by the number of amounts. As Dr. Edwards indicated pass rates have varied over the years. Some years the average pass score might be higher while other years it is lower. The pass rate in this process was 31.16% (or a failure rate of 68.84%). It is lower than that of the five-year average but Dr. Edwards also indicated that the particular candidates in this appointment process could be different than the ones who had taken the test over the five-year period used to calculate the average.

[45] The Tribunal accepts Dr. Edwards' testimony based on his expertise and familiarity with the test, its application and its results.

[46] The April 25, 2008 email from the ADM explained that appointment processes conducted in 2008-2009 would not require passing the GIT-310. In the complainant's view, this is an indication that the respondent knew the test was not valid. However there is no such reference in the memo. The memo states that the measure is to ensure that the Region has employees with the required skills and competencies, and to support the recruitment and staffing strategies.

[47] Ms. Hilton testified that EXCOM knew that management had many positions to fill as a result of a large number of retirements. Because of the high failure rate when using the GIT-310, it was decided to drop the requirement to pass the GIT-310 in favour of a combination of education and experience to meet the educational qualifications of the PM levels. This would increase the number of candidates that would become available on subsequent processes.

[48] The Tribunal determined in *Gray v. Deputy Head of Service Canada et al.*, [2009] PSST 0015, at paragraph 48 that "[t]he qualifications established for positions may vary

depending on the circumstances which exist at the time of the process, including the organization's current and future needs.”

[49] The deputy head has the discretion to establish different qualifications for positions depending on the circumstances which exist at the time of the process. The Tribunal is satisfied that the respondent's decision to use a different alternative to university graduation was based on a forecast of an increase in retirements and a temporary need to qualify more people to fill the anticipated vacancies. The Tribunal finds that this decision does not reflect that the respondent found any real or perceived flaw in the GIT-310.

[50] The Tribunal therefore finds that there is no evidence to support the complainant's contention that the GIT-310 is not an appropriate test or that it is invalid. The Tribunal also finds that the complainant has not established, on a balance of probabilities, that the respondent abused its authority by using the GIT-310 as an alternative to a university degree in this appointment process.

Issue II: Did the respondent abuse its authority by refusing to investigate the validity of the GIT-310 as an assessment tool?

[51] The complainant argues that the fact his concerns were ignored and that the respondent failed to conduct an investigation into the validity of the GIT-310 is negligent and amounts to abuse of authority.

[52] The evidence establishes that the complainant's concerns were not ignored. EXCOM was aware that there were concerns about the failure rate of the test and these concerns were forwarded to the Human Resources Consultant. EXCOM received monthly reports on the appointment process. It reviewed the essential education qualifications and monitored the pass/failure rate of candidates with respect to the GIT-310. EXCOM was satisfied the appointment process was producing a sufficient number of successful candidates to fill the vacancies forecasted. In addition, EXCOM decided that it was not necessary to interfere in the appointment process because it felt that the GIT-310 was a reliable assessment tool.

[53] The fact that the EXCOM's review and monitoring of the situation did not have the result the complainant desired is not evidence that his concerns were ignored.

[54] The Tribunal finds that there is no evidence to substantiate this allegation of abuse of authority.

DECISION

[55] For the above reasons, the complaint is dismissed.

Robert Giroux
Member

PARTIES OF RECORD

Tribunal File:	2008-0211
Style of Cause:	<i>Dwight Powell and the Deputy Minister of Human Resources and Skills Development Canada et al.</i>
Hearing:	May 12 and 13, 2009 Toronto, ON
Date of Reasons:	September 16, 2009
APPEARANCES:	
Lorraine Diaper	For the complainant
Lesa Brown	For the respondent
John Unrau	For the Public Service Commission