



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2007-0311
Heard at: Toronto
Decision date: June 26, 2009

HAROLD JACOBSON

AND

**THE CHAIRPERSON OF THE IMMIGRATION
AND REFUGEE BOARD**

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 dismissed |
| Decision rendered by | Merri Beattie, Member |
| Language of Decision | English |
| Indexed | <i>Jacobson v. Chairperson of the Immigration and Refugee Board et al.</i> |
| Neutral Citation | 2009 PSST 0019 |

Reasons for Decision

Introduction

1 Harold Jacobson, the complainant, participated in an internal advertised appointment process to staff six Assistant Director, Adjudicative Support positions across Canada, at the PM-06 group and level at the Immigration and Refugee Board (IRB).

2 The complainant believes that one of the assessment board members, Jean-Pierre Lecours, was not impartial in this appointment process. The complainant alleges that Mr. Lecours' involvement in the appointment process was so extensive that, in light of his bias, it amounts to abuse of authority. He also alleges abuse of authority in the establishment of the merit criteria. He asserts that the merit criteria were established after a standardized test was identified as the assessment tool of choice. In his view, the correct procedure is to establish merit criteria and then identify an appropriate assessment tool.

3 The respondent, the Chairperson of the IRB, denies any abuse of authority. The respondent asserts that the members of the assessment board acted in good faith at all times during the appointment process. The respondent also states that the merit criteria, and assessment tools used, were appropriate for the positions to be staffed and the needs of the IRB.

Background

4 In October 2006, the IRB announced plans to integrate its tribunal support operations. As a result, a reorganization was implemented and new, higher level positions were established. Refugee Protection Officer positions at the PM-04 group and level were replaced by PM-05 Tribunal Officers. Incumbents of those positions were assessed. They were either appointed to the new PM-05 positions, or remained at the PM-04 level in Developmental Tribunal Officer positions, with training plans in place.

5 New PM-06 Assistant Director, Adjudicative Support positions were created to replace the PM-05 Operational Services Managers. Since there were fewer PM-06

positions than there were encumbered PM-05 positions, an advertised process was conducted to staff the PM-06 positions.

6 The complainant was unsuccessful in the PM-06 advertised process, and on June 28, 2007 he filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss, 12, 13 (the *PSEA*). At the time he filed his complaint, Mr. Jacobson was employed as one of the Operational Services Managers (the Managers) at the PM-05 group and level with the IRB.

Preliminary matters

7 At the pre-hearing conference, the complainant raised for the first time an issue of discrimination based on age. The Tribunal provided the complainant with an opportunity to pursue this allegation, on the condition that he notify the Canadian Human Rights Commission as required by section 78 of the *PSEA* and section 20 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6. Having failed to comply with the Tribunal's order, the complainant was informed on June 10, 2008 that he was precluded from bringing evidence or making argument concerning discrimination.

8 The Tribunal must determine the following issues:

- (i) Did the participation of Jean-Pierre Lecours as an assessment board member, or his actions in the appointment process, amount to abuse of authority?
- (ii) Did the respondent abuse its authority in establishing the merit criteria?

Summary of relevant evidence

9 The complainant testified that he and the other Managers met individually most mornings with Mr. Lecours, then Regional Director, Central Region, to brief him. In the summer of 2006, Mr. Lecours became aware of a change in the complainant's marital status and began speaking with him about settling his pension. The complainant stated that Mr. Lecours repeatedly asked him about his pension, over a period of several

months. In August of 2006, Mr. Lecours told him to settle his pension by the end of September.

10 The complainant said that Mr. Lecours became angry when, by October 2006, the complainant had not followed his instructions. When the complainant became uncomfortable with what he at first thought was friendly advice, he tried to keep his meetings with Mr. Lecours short in order to avoid discussion of his pension and his personal situation. The complainant testified that these unwelcome discussions continued as the appointment process was announced in October 2006, and did not stop until Mr. Lecours moved to another position.

11 The complainant stated that the Executive Director, a Human Resources representative, and Mr. Lecours met with the Managers when the PM-06 appointment process was announced. He said that the Managers were very angry when they were informed that, if they were unsuccessful in the process, they would be placed in PM-05 Tribunal Officer positions. He explained that this would mean losing management responsibilities and rejoining the union which, in his view, would be a demotion. It would also mean working as colleagues with former subordinates and reporting to former colleagues.

12 The complainant testified that the Executive Director told the Managers that they would not be placed with staff they had formerly supervised. As well, the Executive Director said that there would be an effort to continue the Managers' managerial responsibilities and allow them to maintain their management skills. The complainant stated that Mr. Lecours said that every effort would be made to avoid placing the Managers, who were unsuccessful in the PM-06 process, in Tribunal Officer positions.

13 The complainant stated that, shortly following the meeting, Mr. Lecours reiterated his "promise" that the Managers would not face immediate demotion, would not lose their management responsibilities, would not join the union and would not report to former peers.

14 The complainant testified that, upon receiving the results of the PM-06 appointment process, he tried to reach Mr. Lecours. He said that he was told by

Joyce Budnark, Acting Regional Director, that Mr. Lecours denied having made any promises, and that the unsuccessful Managers should rejoin their teams, reporting to their former peers.

15 As an unsuccessful candidate in the PM-06 appointment process, the complainant remained at the PM-05 group and level. Because of the loss of management responsibilities and the requirement to pay union dues, he considers this a demotion. The complainant testified that one other Manager was also unsuccessful. He stated that, although he also viewed it as a demotion, the other Manager accepted a PM-05 Tribunal Officer position. The complainant testified that his request for one week to find an alternate job was denied by Ms. Budnark.

16 The complainant testified that he was denied access to his assessment results unless he agreed to meet with Mr. Lecours. A meeting was scheduled and, subsequently, cancelled; the complainant received his results three months later.

17 According to the complainant, the pension discussions, the appointment process, the initial denial of his results and the denial of time to find alternate employment were all controlled by Mr. Lecours. He stated that Ms. Budnark was acting on instruction from Mr. Lecours.

18 The complainant filed a harassment grievance on June 27, 2007.

19 The complainant testified that, after one year in surplus status, he accepted a Tribunal Officer position "under duress" and immediately submitted his retirement letter.

20 The complainant testified that three advertisements were issued for the PM-06 positions. He stated that, in the third advertisement, the merit criteria under "Key Management Competencies" were "drastically different." The complainant testified that Mr. Lecours explained that the new criteria were better, and that there was a test available that would provide a fairer assessment since it would be marked by an independent party. He also stated that Mr. Lecours admitted that he did not understand the initial criterion "Management Excellence."

21 Serge Tanguay, Deputy Director, Operations provided the background and reasons for the reorganization of IRB's tribunal support operations. He explained that, prior to the reorganization, support was only provided to the Refugee Protection Board, which is an inquiry board. Following the restructuring, enhanced adjudicative support is now provided to all IRB tribunals, including those of an adversarial nature. He also described the greater managerial responsibilities of the new PM-06 Assistant Directors, which are fewer in number than the previous PM-05 Operational Services Managers.

22 Mr. Tanguay provided a deck on the integration of tribunal support at the IRB for regional staff briefings in October 2006, and a questions and answers document on the new adjudicative support structure dated October 24, 2006. He testified that this information was communicated to staff before any appointment processes were conducted. He also stated that management knew that the changes "would be difficult for staff and management."

23 Mr. Tanguay testified that he had an oversight role in the PM-06 appointment process to ensure objectivity and consistency. The original advertisement and Statement of Merit Criteria (SMC) were developed by management and Human Resources in headquarters and the regions. Mr. Tanguay stated that the second advertisement was changed from "a written examination *will* be administered" to "a written examination *may* be administered," but was uncertain why this was done.

24 The third and final SMC listed Key Management Competencies that were similar to, but different from, the previous two because there was agreement that a neutral assessment tool was needed. The Public Service Commission (PSC) advised the IRB that the standardized test that is used to assess the first set of Key Management Competencies is the SELEX, which is only for Executive (EX) positions. The PSC further advised that another standardized test, the 810, is appropriate for management competencies.

25 Mr. Tanguay testified that the Key Management Competencies in the final SMC are linked to the positions and are reasonable, current management competencies. He stated that Director General, Human Resources, the Director General, Operations and

the Regional Directors agreed on the final SMC and the use of a standard, fair test to assess the competencies. All three advertisements and SMCs were submitted into evidence.

26 Mr. Tanguay acknowledged that the SMC could have remained as originally written if the SELEX had been approved for use. He stated that the management group consensus was that a recognized standardized test should be used to ensure impartiality since most of the candidates would be from within the organization.

27 Mr. Tanguay explained that, upon advice from Human Resources, the process was re-advertised with the new SMC, and a closing date of February 16, 2007.

28 Mr. Tanguay testified that he was absent from work for a period beginning in mid-February 2007; he was replaced on an acting basis by one person and, then, by Mr. Lecours. He stated that he did not leave specific instructions for the appointment process which was already underway.

29 While “pretty sure” that he was there, Mr. Tanguay did not recall statements made by the Executive Director or Mr. Lecours at the meeting in Toronto about promises or a process for Managers who may be unsuccessful in the PM-06 appointment process. Finally, Mr. Tanguay testified that Mr. Lecours had not mentioned any PM-06 candidate’s retirement to him.

30 Susan Bibeau, Director, Immigration, Eastern Region was a member of the assessment board. She explained that she became a board member after the screening of applications had been done and the PSC 810 standardized test had been administered. She testified that, prior to receiving the 810 results from the PSC, it was decided that some of the Key Management Competencies would also be assessed using another tool, which she was involved in developing. This decision was made because the consequences of being unsuccessful in the PM-06 process would be significant for the PM-05 Managers. They would lose their managerial responsibilities.

31 Ms. Bibeau explained that, in addition to the PSC 810, candidates were required to write a briefing note. They also had to prepare and deliver a presentation to three

board members. After all assessments in Montréal and Toronto were completed, the assessment board reviewed all the candidates' assessments to ensure consistency in marking before sending the results to Human Resources. Ms. Bibeau testified that four candidates failed to meet the essential qualifications.

32 Ms. Bibeau stated that Mr. Lecours called her and the other board member to schedule an informal discussion meeting with the complainant. Ms. Bibeau explained that her travel arrangements were in place, but the informal discussion was cancelled because the complainant was ill. Ms. Bibeau confirmed that Mr. Lecours had never spoken with her about the complainant.

Arguments of the parties

A) Complainant's arguments

33 The complainant submits that Mr. Lecours harassed him prior to, during and following the PM-06 appointment process. He submits that Mr. Lecours' involvement in developing the merit criteria, choosing the assessment tools, and assessing candidates was extensive.

34 The complainant argues that Mr. Lecours' involvement in the PM-06 appointment process amounts to abuse of authority. He submits that Mr. Lecours harassed him starting when he asked him why he had not settled his pension, and Mr. Lecours controlled the appointment process that resulted in the complainant losing his managerial, non-unionized responsibilities and, ultimately, his career. He submits that his testimony is uncontested and that the IRB knew of his allegations of harassment against Mr. Lecours because he sent an email to the Chairperson of the IRB.

35 The complainant submits that there were promises made to PM-05 Managers, who were unsuccessful in the PM-06 appointment process, but Mr. Lecours and the Executive Director failed to deliver on their promises.

36 The complainant submits that he was initially denied his results from the PM-06 appointment process, unless he agreed to meet with Mr. Lecours for informal discussion. He did not receive his results until September 2007 and, he submits, that he

is still without complete information about why he failed to meet the essential qualifications.

37 With respect to the Key Management Competencies, the complainant submits that the decision to use a standardized test, and the requirement to choose a different test resulted in changing the merit criteria. He argues that it is not correct to establish essential qualifications based on an assessment tool.

B) Respondent's arguments

38 The respondent submits that the only reason the complainant was not appointed was that he did not meet the essential qualifications. The respondent argues that the complainant has not established a link between his claim of harassment and this appointment process.

39 The respondent argues that the complainant's belief that he was demoted and lost his job as due to harassment is not a subject for the Tribunal's review because there is recourse in another forum.

40 The respondent argues that there is no evidence that Mr. Lecours should have declined to participate in the appointment process because of a conflict of interest or an appearance of bias. The respondent submits that there is no evidence that Mr. Lecours knew that the complainant felt harassed or knew that a harassment grievance would be filed against him.

41 The respondent submits that the testimony of Mr. Tanguay and Ms. Bibeau demonstrates that the PM-06 process was planned and executed based on national consultation and consensus among representatives of management and Human Resources. The respondent submits that there is no clear, cogent evidence that the board members were improperly influenced regarding the complainant.

42 The respondent submits that the board members planned to meet with the complainant for the purpose of informal discussion of his results. The reason the meeting did not take place was that the complainant was not available.

43 The respondent argues that the merit criteria were changed based on advice from Human Resources and the PSC. Furthermore, the change was not made by one person, but in consultation. The respondent submits that a new advertisement was issued because of the change, and there was no effect on candidates since they had not yet been assessed.

C) Public Service Commission's arguments

44 The PSC did not appear at the hearing. As it has done in previous complaints, the PSC provided general submissions on the concept of abuse of authority, and how the Tribunal should focus its approach in this area.

45 The PSC submits that, if Mr. Lecours was aware that the complainant thought he was harassing him, he "should possibly not have participated in the selection process according to the PSC's *Assessment Policy*."

46 The PSC further submits that if the Tribunal finds that Mr. Lecours knew that the complainant felt harassed the potential appearance of bias "could perhaps have been minimized" had Mr. Lecours decided not to be a member of the assessment board.

47 Finally, the PSC argues that the fact that there may have been a conflict of interest is not enough to establish abuse of authority without improper intention, or serious recklessness or carelessness, amounting to bad faith.

Relevant legislative provisions

48 This complaint was filed under paragraph 77(1)(a) of the *PSEA*:

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);

49 Subsection 30(2) and section 36 of the *PSEA* are relevant:

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

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

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) ...

Analysis

Issue I: Did the participation of Jean-Pierre Lecours as an assessment board member, or his actions in the appointment process, amount to abuse of authority?

50 In *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, the Tribunal identified a framework of five categories that can be used as a guide for analyzing allegations of abuse of authority. One of these categories is when a delegate exercises his or her discretion with an improper intention in mind. Those who are authorized to make discretionary administrative decisions must ensure that they exercise their authority impartially, without the intention to favour or harm anyone.

51 The essence of the complainant's position is that one of the board members, Mr. Lecours, acted in bad faith as he was incapable of considering the complainant's candidacy fairly. Moreover, he goes further and suggests that Mr. Lecours' involvement in the appointment process was so pervasive as to negatively taint the entire appointment process.

52 Bad faith in exercising a discretionary power traditionally implies that there is an improper intent, a bias, a lack of impartiality. Bad faith has also been given a broader meaning that does not require improper intent where there is serious carelessness or recklessness. As well, bad faith is established where an act is incomprehensible or inexplicable, leading to the conclusion that it is incompatible with the intended purpose of the authority granted.

53 The complainant submits that a series of events took place that, when taken together, are evidence that Mr. Lecours harassed him before, during and after the PM-06 appointment process. He submits that Mr. Lecours' participation in the PM-06 appointment process was extensive, to the point that he controlled it.

54 It is not the Tribunal's role to determine whether harassment occurred in the workplace. The Tribunal must determine whether the evidence establishes that one or more delegates acted in bad faith by failing to exercise their authority under subsection 30(2) of the *PSEA* in an impartial and unbiased manner.

55 The complainant's evidence on this issue is as follows: several months before the PM-06 appointment process began, Mr. Lecours started questioning him and giving him advice and direction about his pension; Mr. Lecours and the Executive Director failed to take measures they had promised to take to reduce the impact on PM-05 Managers, who were unsuccessful in the PM-06 process; and, Mr. Lecours refused to give him his assessment results unless he agreed to an informal discussion meeting.

56 The Tribunal is concerned that the complainant's assessment results were not provided to him until several months after the appointment process was completed. However, the Tribunal does not find anything inappropriate in the respondent's requirement that informal discussion be conducted in a meeting, particularly when a PSC standardized test is involved. As the Tribunal has indicated in several decisions, the parties should meet whenever possible to discuss the concerns raised in a complaint, since it is more likely to lead to its resolution. Moreover, Ms. Bibeau testified, and the complainant acknowledged, that the informal discussion meeting was cancelled due to the complainant's unavailability.

57 The respondent did not produce evidence to refute the complainant's claim that he and others were promised that something would be done to alleviate the impact of failing to qualify for a new PM-06 position. However, both of the respondent's witnesses testified that it was known that there would be an impact on some of the PM-05 Managers. Ms. Bibeau testified that the Key Management Competencies were assessed using more than one tool for that very reason. Furthermore, the questions and

answers document that was prepared to inform employees contained specific information that PM-05 Operational Services Managers would be impacted, that the new PM-06 Assistant Directors, Adjudicative Support would be fewer than the number of potential candidates and would be staffed by an advertised appointment, and that only the new PM-06 positions would be excluded from union membership.

58 Whether promises to continue managerial responsibilities and union exclusion were made and broken by Mr. Lecours, the IRB's official communications to employees did not inform employees of any such measures. Moreover, the complainant was not singled out for different treatment, as at least one other person lost his or her managerial responsibilities and union exclusion according to the complainant.

59 The complainant's argument that Mr. Lecours' involvement in the PM-06 appointment process was extensive, such that he controlled the process is not supported by the evidence. The complainant did not provide any evidence to establish that Mr. Lecours directed or influenced the appointment process to eliminate him. Both of the respondent's witnesses described a national, collaborative undertaking by management representatives in which decisions were reached by consensus, and in consultation with Human Resources personnel. Mr. Tanguay testified that he had an oversight role in the process until after the SMC had been finalized, and the PSC 810 standardized test had been chosen as an assessment tool. Ms. Bibeau testified about her role in developing the additional questions to assess the Key Management Competencies. Both witnesses testified that Mr. Lecours had not spoken with them about the complainant. Ms. Bibeau testified that she only learned of the complainant's perception of harassment when she saw his complaint to the Tribunal. None of this evidence was refuted by the complainant.

60 In its submissions, the PSC noted that its *Assessment Policy* makes deputy heads responsible for ensuring that their delegates, who are responsible for assessment, are not in a conflict of interest and are able to undertake their responsibilities in a fair manner. This is a reflection of the principle of impartial decision-making.

61 The complainant testified that, in February or March 2007, after the new advertisement and new SMC were issued, he sent an email to the Chairperson of the IRB which addressed the lack of fairness and transparency in the PM-06 appointment process, and included the word harassment. The complainant did not produce the email as evidence before the Tribunal.

62 Without evidence that the Chairperson of the IRB was informed specifically that the complainant had reason to believe that Mr. Lecours could not be impartial, the Tribunal cannot conclude that the Chairperson had sufficient knowledge to question Mr. Lecours' participation in the appointment process.

63 Recognizing that fairness is subjective, the PSC advises delegates, in its *Guide to Implementing the Assessment Policy*, of the importance of the appearance of fairness and impartiality. Perception is important.

64 The complainant testified that, as he became uncomfortable with Mr. Lecours' interest in his pension, he avoided meeting with him except for necessary updates on work-related matters. While these meetings took place almost daily, the complainant did not at any time indicate that he asked Mr. Lecours not to discuss his pension or told Mr. Lecours that he was uncomfortable, or gave Mr. Lecours any indication that he perceived these discussions as inappropriate. His testimony was that in almost daily meetings over a period of several months, he avoided any prolonged conversation and, specifically, any conversation about his pension. There is no evidence that Mr. Lecours knew that the complainant had developed a perception that Mr. Lecours was biased before or during the appointment process.

65 According to the complainant's testimony, he did not fully formulate his conclusions about Mr. Lecours' actions until after the appointment process was complete. He filed a harassment grievance on June 27, 2007, after the Notification of Appointment or Proposal of Appointment for the PM-06 process was issued.

66 The complainant has clearly formed a perception that Mr. Lecours could not have been impartial in undertaking this appointment process. However, there is no evidence that Mr. Lecours was aware of this perception. It is possible that he wanted to be helpful

and did not know his advice was unwelcome. Accordingly, he could not have been expected to reflect on his actions and take steps with respect to the appointment process to mitigate or eliminate the complainant's perception that he was harassing him.

67 The respondent did not provide evidence to contradict the complainant's testimony about the discussions that took place with Mr. Lecours about his pension. The Tribunal has no reason to doubt that the complainant came to view these discussions as interfering and unwelcome. However, there is no evidence of a link between Mr. Lecours' interest in the complainant's pension and either the PM-06 appointment process, or the complainant's results in the process. The complainant's evidence is that the pension discussions started prior to the announcement of the reorganization that led to the appointment process. Based on the complainant's evidence, Mr. Lecours began speaking with him about his pension when he learned that the complainant's marital status had changed.

68 The complainant's allegations of bias can be further analyzed under the well-established test for reasonable apprehension of bias, namely: "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude? Would he (or she) think that it is more likely than not that (the decision-maker), whether consciously or unconsciously, would decide fairly" (*Committee for Justice v. National Energy Board*, [1978] 1 S.C.R. 369, 394).

69 The Tribunal concludes that an informed person, having reviewed all this evidence, would find that it is more likely than not that Mr. Lecours, whether consciously or unconsciously, would fairly assess Mr. Jacobson in this appointment process.

70 The complainant has not satisfied the Tribunal that Mr. Lecours acted in bad faith in exercising his delegated authority related to the PM-06 appointment process. Moreover, there is no evidence that the other board members were improperly influenced. Accordingly, there is insufficient evidence for the Tribunal to find that any of the board members would not have decided his candidacy fairly.

71 The Tribunal finds that there is insufficient evidence to support a finding that Mr. Lecours' participation as a board member, or his actions in this appointment process, amounted to an abuse of authority.

Issue II: Did the respondent abuse its authority in establishing the merit criteria?

72 The facts around this issue are uncontested. After the original advertisement and a subsequent amendment had been issued, the Key Management Competencies in the SMC were changed. A new advertisement was issued which had the effect of initiating a new appointment process.

73 The complainant argues that the new merit criteria were improperly established to fit an assessment tool the respondent wanted to use. He also submits that, if Mr. Lecours made the decision to change the merit criteria, it should be viewed with suspicion.

74 There is no evidence that Mr. Lecours decided or directed the decision to change the merit criteria. There is no evidence that Mr. Lecours or anyone manipulated the merit criteria in order to eliminate or to favour a particular candidate.

75 Subsection 30(2) of the *PSEA* states that an appointment is made on the basis of merit when the person to be appointed meets the essential qualifications, *as established by the deputy head*.

76 In *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024, the Tribunal determined the following concerning the discretion given to delegates of the PSC and deputy heads:

[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. (...)

77 In *Neil v. Deputy Minister of Environment Canada et al.*, [2008] PSST 0004, the Tribunal held, at paragraph 46: “What is required of managers is to *establish the qualifications for the work to be performed.*” (Italics in original)

78 In this case, there is no evidence or argument that the merit criteria do not relate to the work to be performed. On the contrary, Mr. Tanguay described the managerial responsibilities of the new PM-06 positions as being greater than those required of the PM-05 Manager positions. He testified that the criteria in the final version of the Key Management Competencies are linked to the duties of the PM-06 positions.

79 The respondent’s evidence presented at the hearing was that the PSC advised the IRB that its first set of Key Management Competencies could only be assessed by a test restricted to use for EX positions. The criteria were related to the work of EX positions, not to the work of PM-06 positions. This evidence was not refuted by the complainant.

80 Accordingly, the Tribunal finds that the respondent had to change the Key Management Competencies to properly reflect the requirements of the work to be performed in the PM-06 positions. Changing the SMC was a proper exercise of discretion under subsection 30(2) of the *PSEA*.

81 The Tribunal also finds that the respondent’s decision to initiate a new process, and issue a new advertisement and SMC, was both responsible and transparent in the circumstances.

82 There is no evidence to support a finding that the respondent abused its authority in establishing the merit criteria.

83 As a final observation, the Tribunal finds it is important to note that, in his closing arguments, the complainant stated that he came before the Tribunal without documents, although he has hundreds of pages of documents. He relied entirely upon his own testimony as evidence of his allegations and stated that this case “hinges on whether or not my statements were contradicted.”

84 As explained in *Tibbs*, and many subsequent decisions, to succeed, the burden is on the complainant to prove, on a balance of probabilities, that there was abuse of authority. The complainant has not met this burden.

Decision

85 For all these reasons, the complaint is dismissed.

Merri Beattie
Member

Parties of Record

| | |
|----------------------------|--|
| Tribunal File | 2007-0311 |
| Style of Cause | <i>Harold Jacobson and the Chairperson of the Immigration and Refugee Board et al.</i> |
| Hearing | June 19-20, 2008 Toronto, ON |
| Date of Reasons | June 26, 2009 |
| APPEARANCES: | |
| For the complainant | Harold Jacobson |
| For the respondent | Amita Chandra |