



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2009-0619
Issued at: Ottawa, February 22, 2011

SHANE EDWARDS

Complainant

AND

THE DEPUTY MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	Complaint is dismissed
Decision rendered by	Lynette Babin-MacKay, Member
Language of Decision	English
Indexed	<i>Edwards v. Deputy Minister of Indian and Northern Affairs Canada</i>
Neutral Citation	2011 PSST 0010

Reasons for Decision

Introduction

1 Shane Edwards, the complainant, was a candidate in an internal advertised appointment process for the position of Litigation Team Leader (PM-06), Policy and Strategic Direction, Indian and Northern Affairs Canada (INAC). He was screened out of the process based on the experience requirements. In his complaint, he contends that this is an abuse of authority and that the respondent was aware that he has the required experience because he acted in the position for three years.

2 The respondent, the Deputy Minister of INAC, denies that it abused its authority. It argues that the complainant was screened out because he did not clearly demonstrate in his application that he met all the essential experience qualifications.

Background and Relevant Evidence

3 The complainant joined INAC in 2003 as Case Manager (EC-05), with the Litigation Management and Resolution Branch (LMRB). In 2006, he was appointed Team Leader (PM-06) on an acting basis and worked in this capacity with the Foster Care and Day School Team, then with the Prairie Team. In February 2009, his director, Natalie Neville, extended his acting appointment to May 29, 2009. The complainant stated that, in total, he was acting team leader approximately three years.

4 The appointment process at issue was advertised on *Publiservice* in March 2009. It was open to “Persons employed in the Department of Indian and Northern Affairs Canada occupying a position across Canada”. On March 30, 2009, the complainant submitted his application.

5 The *Job Opportunity Advertisement (JOA)* listed six essential qualifications and contained the statement: “Applicants must clearly demonstrate on their applications that they meet all the (...) essential criteria and are within the area of selection. Failure to do so may result in the rejection of your application.”

6 Ms. Neville is Director, Eastern Litigation Directorate, LMRB. She was this position's first incumbent, and was appointed to it on February 1, 2009. She prepared the process and chaired the assessment board (the board). She testified that her prior experience allowed her to understand the responsibilities of a team leader and the requirements of this position.

The screening

7 Ms. Neville explained that the parameters in the screening guide were broad and inclusive rather than prescriptive. The board used the assessment tool in the same manner for all candidates. It reviewed candidates' applications for examples and details of work activities in support of their stated experience.

8 Of the thirty-one people who applied, eight were screened in.

9 Ms. Neville testified that she did not use her personal knowledge during the screening as she had insufficient knowledge of any candidate, having been appointed Director shortly before the start of the process. She was aware that the complainant was an acting team leader. She stated that although he reported to her directly, they had limited contact after she arrived in February 2009. Moreover, a managerial position was created shortly after her arrival and team leaders then reported to the manager in this position and not directly to her.

10 She testified that she extended the complainant's acting appointment to provide continuity during the appointment process, but stated that considerations for the indeterminate appointment were very different from those for the acting appointment. She did not explain this difference.

11 Ms. Neville stated that all the candidates who were screened out on the basis of experience had failed to provide sufficient detail and examples of their experience in their applications. This included candidates who had acted as team leaders.

12 On May 8, 2009, the complainant was notified that he had been screened out because he did not meet four of the six essential experience criteria, namely:

- E-2: Experience developing federal positions that conform to policy and operational objectives;
- E-3: Experience developing resolution strategies;
- E-4: Experience developing and implementing work plans;
- E-6: Experience supervising staff.

13 He testified that in his application for this appointment process, he had described his role and skill set as acting team leader since 2006. He had also referred to his experience managing a team of case managers and support personnel in LMRB, and to his managerial experience as a lawyer and sole practitioner in the private sector.

14 According to him, the position advertised was the same one in which he had acted for three years. Its qualifications and duties were virtually identical to those of another team leader position he had applied for prior to this process. He had been screened into that prior process based on an application that was essentially identical to the one he used in the process at issue.

15 In cross-examination, the complainant acknowledged that he had adduced no other evidence that the duties and essential qualifications of these two team leader positions were similar or identical, or that his applications were identical in both cases.

16 Ms. Neville testified that the complainant was screened out because he did not provide sufficient details in his application to demonstrate how he met each experience criteria. For the most part, his application listed the positions he held previously, without describing the work activities he had performed. For example, with regard to the experience supervising staff, Ms. Neville expected a description of his supervisory experience. "Sole practitioner" and "acting team leader for three years" did not tell her explicitly what he had done when he supervised staff and the onus was on him to explain what this supervisory experience involved. She expected a description of the responsibilities, whether they included attendance management, human resources, performance reviews, etc. She wanted explicit statements with details.

17 The complainant acknowledged that, in his application for the current process, he listed the titles of the team leader positions he has held and did not provide examples of his experience. He disagreed with the suggestion that in doing so, he did not clearly demonstrate that he met the experience requirements. He stated that describing his role and its skills set was an adequate demonstration of this. Asked to provide an example of this demonstration in his application, he indicated the entry: “managed a team of case managers as well as support personnel within LMRB and also within a law office.”

The informal discussion

18 The complainant testified that he was extremely dissatisfied with the informal discussion he had with Ms. Neville in May 2009, and that it left him feeling slighted. He stated that it was neither fair nor transparent and that, in his view, the spirit of informal discussion was not respected. He was given a copy of the assessment tool by email only after the meeting. As a result, he was unable to refer to the documents during the meeting and could not respond properly to what was presented to him. He said that Ms. Neville did not take any notes. She told him his application did not meet expectations, contained insufficient examples of his experience, and indicated that he did not take the process seriously. She gave him the impression that he was unprofessional.

19 Ms. Neville testified that the complainant did not clarify his application further at the informal discussion, during which she reviewed the experience criteria that he had not met and explained the type of examples and details expected. She said that she had a general discussion with him on how to apply in a process and provided him with very generic advice. She denied telling him that his application was unprofessional. In response to his statement that he had used the same application as in a previous team leader process, she told him that each process has to be approached separately and differently.

20 The complainant testified that, after the informal discussion, he explained his concerns in a May 21, 2009 email to Ms. Neville and asked that the decision be reconsidered. In the email, he submitted that:

- he had the required experience and skill set for the team leader position;
- he had assumed that by stating he had acted as team leader for three years, he would satisfy the experience requirement;
- the JOA had not given clear details to the applicants of the board's expectations, such as a covering letter with examples;
- because he had been screened into a previous team leader process with a virtually identical application, the JOA should have been clear that the screening standard had changed.

21 On May 28, 2009, Ms. Neville responded that her decision stood. She testified that the complainant provided no further clarification of his application in his email. She would not have accepted information that had not been provided in the original application.

22 On October 8, 2009, the complainant filed a complaint of abuse of authority to the Public Service Staffing Tribunal (the Tribunal) pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22 ss. 12 and 13 (the PSEA).

Issue

23 Did the respondent abuse its authority when it screened the complainant out of the appointment process?

Analysis

24 The Tribunal has confirmed that managers have broad discretion under s. 30(2) of the PSEA to establish the qualifications for the position they want to staff. Similar discretion is provided under s. 36 of the PSEA, to choose and use the assessment method deemed appropriate (see *Visca v. Deputy Minister of Justice*, 2007 PSST 0024

at para. 42). This discretionary power is not absolute and must be exercised fairly and transparently (see, for example, *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011 at para. 37, and *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029 at para. 144).

25 The burden lies with the complainant to prove on the balance of probabilities that an abuse of authority has occurred (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at paras. 49-50).

The screening

26 The complainant argues that his application was adequate and sufficient and listed his various skills. He contends that the respondent fettered its discretion: it knew he had been acting in the team leader position for the past three years, and that he therefore possessed the required experience. He also contends that expectations were not communicated effectively and the level of detail expected in the applications was not clear. Finally, he submits that applicants should have been cautioned that the screening standard had changed from prior team leader processes.

27 The respondent argues that the complainant's qualifications were assessed fairly and properly on the basis of the information he submitted in his application. It argues that it was up to the complainant to clearly demonstrate in his application that he met all the essential experience qualifications and he did not do so. It submits that an assessment board cannot assume that a candidate who has acted in a position has all the required experience. The respondent also argues that expecting applicants to provide examples of their experience is not a requirement that it did not communicate to candidates, as the complainant appears to suggest. Finally, it submits that other team leader processes in which the complainant may have participated previously are irrelevant to this process.

28 The Public Service Commission (the PSC) did not attend the hearing but submitted general written arguments where it provided a brief analysis of the PSC policies, of the *Guide to Implementing the Advertising in the Appointment Process*, and of the PSC document *Guidance Series – Assessment, Selection and Appointment*.

29 Under s. 36 of the PSEA, the deputy head may use any assessment method that he or she considers appropriate in an appointment process.

30 In *Jolin*, at para. 77, the Tribunal stated that, for it to conclude that the respondent abused its authority in the selection of assessment methods, the complainant must prove “that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria or are discriminatory.”

31 In this assessment process, the respondent chose to assess the essential experience qualifications by asking candidates to **clearly demonstrate on their application** (emphasis added) that they met the essential criteria.

32 In the *Canadian Oxford Dictionary*, 2d ed., 2004, the definition of “demonstrate” includes: “*describe and explain...with the help of examples...; logically prove the truth of...; be proof of the existence....*”

33 In numerous decisions, the Tribunal has confirmed that it is up to candidates to clearly demonstrate on their applications that they meet all the essential criteria (see, for example, *Charter v. Deputy Minister of National Defence*, 2007 PSST 0048 at para. 37). In the present case, the JOA cautions candidates that failure to do so may result in the rejection of their application.

34 As the Court has stated in *Lavigne v. Canada (Justice)* 2009 FC 684 at para. 70, it is not for the Tribunal or the Court to establish essential qualifications or to substitute its assessment of a candidate’s qualifications for that of the respondent. The qualifications in the process at hand were sufficiently detailed so that candidates knew what they had to demonstrate. (See for example *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004 at para. 51)

35 This situation is clearly distinct from the situation in *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 0003, a recent decision issued by the Tribunal where the instructions were deficient. In the case at hand, the instructions are clear and

transparent. Furthermore, unlike *Poirier*, there is no evidence to suggest that the manager did not screen all the candidates in a consistent manner.

36 The Tribunal is satisfied that the experience requirements were clearly stated on the *JOA* and that candidates knew what they had to demonstrate. Candidates could not simply list the positions they had occupied and state that they had the required experience. They had to clearly explain how they met each essential qualification. This is supported by the screening guide, which details the type of experience sought.

37 The complainant has testified that, in his view, describing his role of team leader and its skills set was an adequate demonstration of how he met the experience requirement. The Tribunal has examined the complainant's application. In sections entitled Resolution and Management Skills, Communication and Interpersonal Skills, and Research and Technical Skills, the complainant has outlined experience statements but without elaboration.

38 The annotations in the screening guide confirm that the board reviewed his application but could not find sufficient examples that he met the experience required in the Statement of Merit Criteria. The board noted comments such as "multiple factors not demonstrated" and "not sufficiently explained or demonstrated". In addition, the board annotated the application with statements such as "e.g.", "who, how, how long", or "details". This confirms Ms. Neville's testimony that the board was seeking descriptions of the experience and details of the work activities. According to Ms. Neville, the board did not find such descriptions in the complainant's application.

39 The Tribunal notes that eight candidates were able to demonstrate these qualifications and were screened in.

40 The complainant has acknowledged that he assumed that by stating he had acted as team leader for three years, the board would know and conclude that he had the required experience. In *Charter*, the Tribunal found that there is no obligation to infer qualifications when the *JOA* states that it is up to applicants to "clearly demonstrate" that they have the required experience.

41 The complainant argued that the respondent should have provided a clear indication that it would not take the same approach for screening as in previous appointment processes. The Tribunal does not agree. The authority granted to the deputy head in s. 36 to choose any assessment tool deemed appropriate also means that the delegated manager is under no obligation to use identical assessment tools from one assessment process to the next, nor to serve notice on candidates when these tools change. For this reason, the complainant should have approached this assessment process without making assumptions and described and explained his qualifications.

42 The complainant failed to present any evidence that the assessment tool was inadequate or that the board erred in the manner in which it assessed his application. He has not provided evidence that supports his assertion that the required qualifications in the appointment process at issue in this complaint were identical to the required qualifications of a prior process, or that the applications he submitted in each process were identical. In addition, although he has stated that he was screened into the prior process, he has not demonstrated how being screened into the prior process should affect his assessment in the process under review or why the board should have aligned the two processes.

43 The Tribunal does not accept the complainant's argument that it was reasonable for him to assume that his experience would be demonstrated by simply stating that he was an acting team leader and that he had the required skills. In fact, it could have been unfair for the board to consider such a statement as sufficient, yet require that the other candidates fully demonstrate how they met the required experience.

44 For the above reasons, the Tribunal does not agree with the complainant's argument that the manager ought to have drawn on her personal knowledge in the screening process. In addition, the evidence shows that the delegated manager had not been in the position for a significant period of time.

45 The Tribunal finds that the complainant has failed to prove that the respondent abused its authority in finding that he did not demonstrate he met the essential experience qualifications.

Informal Discussion

46 The Tribunal addressed the purpose of informal discussion in *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046 at para. 76. It found that the informal discussion is a means of communication for a candidate to discuss the reasons for elimination from a process. It also provides the board with the opportunity to consider information it might have missed that was in a candidate's application.

47 The complainant argues that the informal discussion was not fair and transparent because the assessment material was not available for consultation, and that as a result, he could not fully discuss his assessment and have it properly re-examined.

48 The Tribunal does not agree with the complainant. It finds that the board met with the complainant and explained its decision. While it did not provide him with the assessment tool during the meeting, it did provide the assessment tool the following day. There is no evidence before the Tribunal that this resulted in his assessment not having been properly re-examined. In addition, it did consider the information he submitted on May 21, 2009. It concluded that nothing raised by the complainant warranted a change in its assessment of his experience.

Decision

49 For the reasons stated above, the complaint is dismissed.

Lynette Babin-MacKay
Member

Parties of Record

Tribunal File	2009-0619
Style of Cause	<i>Shane Edwards and the Deputy Minister of Indian and Northern Affairs Canada.</i>
Hearing	November 8 and 9, 2010 Ottawa, Ontario
Date of Reasons	February 22, 2011
APPEARANCES:	
For the complainant	Shane Edwards
For the respondent	Allison Sephton and Stephan Bertrand
For the Public Service Commission	Kimberley Lewis