



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2009-0257, 0258, and 0259
Issued at: Ottawa, March 31, 2011

**KENZA ELAZZOZI, MOHAMED LABIDI
AND MALIKA LAHLALI**

Complainants

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)(a)
of the *Public Service Employment Act*

Decision: Two complaints are dismissed
One complaint is substantiated

Decision rendered by: Maurice Gohier, Member

Language of Decision: French

Indexed: *Elazzouzi v. Deputy Minister of Human Resources and Skills
Development Canada*

Neutral Citation 2011 PSST 0011

Reasons for Decision

Introduction

1 In January 2009, the Deputy Minister of Human Resources and Skills Development Canada (HRSDC) held an advertised internal appointment process to fill Service Canada Benefits Officer positions at the PM-02 group and level in Québec City. The proposed appointments could be either indeterminate, for a specified period, or on an acting basis.

2 Kenza Elazzouzi, Mohamed Labidi, and Malika Lahlali (the complainants) applied to this process. After marking the written exam, the assessment board (the board) concluded that these three candidates had not obtained the pass mark for various essential qualifications for the position.

3 After the notice of *Information Regarding Acting Appointment* regarding Louise Lotser was published on April 7, 2009, the three complainants filed a complaint with the Public Service Staffing Tribunal (the Tribunal). They allege that the respondent abused its authority in the assessment of their answers in the written exam and in the awarding of points for their answers. Ms. Lahlali also alleges that no expected answer existed for questions 3 and 4 of the written exam.

4 As will be explained in this decision, the Tribunal is of the view that complainants Elazzouzi and Labidi have not shown that the board abused its authority in its determination that they did not meet the ability “applying principles and procedures.” However, as for complainant Lahlali, the Tribunal is of the view that the board abused its authority when it did not take into account relevant factors during its assessment of the ability “thinking skills.”

Background

5 The board consisted of Sonia Godin (chairperson) and Jean-Luc Plante (member).

6 On February 23, 2009, the three complainants wrote an exam that assessed various qualifications. The board used the definitions and factors from the *National Competency Dictionary* (NCD) to describe the essential qualifications for the position. The NCD is a document published by HRSDC that includes a list of competencies and their definitions, as well as the factors used for assessing the competencies.

7 The board concluded that Ms. Elazzouzi and Mr. Labidi did not pass the ability “applying principles and procedures,” which was assessed using an information table and a situational exercise. As for Ms. Lahlali, the board determined that she did not pass the question relating to the ability “thinking skills,” which was assessed through two situational exercises.

Issues

8 The Tribunal must decide the following:

- (i) Did the respondent abuse its authority in deciding that Ms. Elazzouzi and Mr. Labidi did not meet the ability “applying principles and procedures”?
- (ii) Did the respondent abuse its authority in deciding that Ms. Lahlali did not meet the ability “thinking skills”?

Analysis

9 Section 36 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA), gives a deputy head discretion to select and use the tools that it considers appropriate for assessing whether candidates meet the qualifications established pursuant to s. 30(2) of the PSEA. However, this discretion is not absolute and must be exercised without abuse of authority. If it is shown that the method used for assessing the qualifications has no connection with the qualifications or does not provide for their assessment, that the method is unreasonable or discriminatory, or that the result is unfair, the Tribunal may find that there was abuse of authority. The assessment tool must provide for a proper assessment of the qualification in question. If the tool is flawed, then the outcome is unreliable (see *Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada*, 2008 PSST 0015, at para. 34).

10 The role of the Tribunal is to review the appointment process used in order to determine whether there was abuse of authority. Thus, its role is not to re-evaluate the marking of the complainant's answer or to review the answers. Rather, the Tribunal's role is to examine the test or interview, including how it was administered, in order to determine whether there was abuse of authority (see *Costello v. Deputy Minister of Fisheries and Oceans Canada*, 2009 PSST 0032, at para. 69, and *Oddie v. Deputy Minister of National Defence*, 2007 PSST 0030, at para. 66).

Issue I: Did the respondent abuse its authority in deciding that Ms. Elazzouzi and Mr. Labidi did not meet the ability "applying principles and procedures"?

11 Ms. Elazzouzi and Mr. Labidi both failed the assessment of the ability "applying principles and procedures," which, according to the NCD, consists of understanding a set of rules, guidelines, and administrative procedures and applying them in a logical way to concrete situations in order to give recommendations or make decisions accordingly.

12 In the written exam, this ability was assessed in two ways: the extraction of data from an information table and a situational exercise.

13 For the information table, the respondent used a table containing data from a fictitious public transit service. This table included the headings "user categories" [translation] and "rates schedule" [translation]. In order to complete the exercise, the candidate had to answer ten questions by giving the specific amount of the applicable rate or, if the information needed to provide a response was not available, by specifying what data was missing.

14 For the situational exercise, candidates were asked to assume the role of a retailer who must reply to a refund request from a client who missed the return deadline because of a snow storm. The candidates had to interpret and apply a fictitious policy and, if necessary, calculate the amount that would be refunded.

15 The rating scale used for marking this ability consisted of the letters A (excellent) to E (fail). A failing mark meant that the candidate demonstrated a minimum number of

the behaviours identified and an insufficient mastery of the ability. A failing mark indicated that most of the expectations were not met because the majority of the issues were missing.

Ms. Elazzouzi's situation

16 Since 2003, Ms. Elazzouzi has been working in various areas relating to HRSDC's income security programs, aside from a few assignments to Public Works and Government Services Canada and Parks Canada.

17 For the first part of the assessment (the information table – question 1), the assessment board gave Ms. Elazzouzi a D (60-64) according to the rating scale. Only five of the ten answers were correct, two answers were incomplete, and three answers were incorrect.

18 For the second part of the assessment (the situational exercise – question 2), Ms. Elazzouzi received an E (fail) according to the rating scale. Her calculation was incorrect and her answer did not include a number of factors considered critical to resolving the issue, such as considering the effect of a snow storm on the return deadline and verifying the merchandise.

19 For the ability “applying principles and procedures,” the board gave Ms. Elazzouzi an overall mark of E (fail) in a document entitled “*Overall assessment*” [translation]. The board did not continue marking her exam after it was determined that she had failed one of the essential qualifications of the position.

20 During her testimony, Ms. Elazzouzi said that she was very disappointed with the results of the exam. Even though she did not explain it in writing at the time of the exam, she believes that the client in the role-play situation (question 2) was within the return deadline because of the snow storm. She complained of what she perceives to be a lack of transparency in the process because she was not informed of the pass mark for the exam and because the distribution of marks between the first and second question was not specified. In addition, she said that she received little information from the respondent during the informal discussion, and that she did not receive a copy of her

exam until the exchange of information meeting. Lastly, she did not understand how the respondent could have arrived at the final decision that she did not meet the essential qualifications for the position when her entire exam was not marked.

Mr. Labidi's situation

21 Mr. Labidi has had a number of term positions with Service Canada since 2002. He was interested in this appointment process for career development reasons, since he had already had a number of assignments at the PM-02 level.

22 In its document entitled "*Overall assessment*" [translation], the board gave Mr. Labidi an overall mark of E (fail) for the ability "applying principles and procedures."

23 For the first part of the assessment (the information table – question 1), Mr. Labidi was given an E (fail) because only five of his ten answers were correct. One answer was incomplete and four answers were incorrect. For the situational portion of the assessment (question 2), Mr. Labidi received an E (fail) because his calculation was incorrect and his answer did not include a number of factors considered critical to resolving the issue, such as verifying the merchandise and consulting with a manager.

24 During his testimony, Mr. Labidi said, without adding any further details, that Mr. Plante, one of the assessment board members, acknowledged in the informal discussion that some of his answers had been correct, and that this would change his mark from 5 out of 10 to 8 out of 10 for the information table (question 1). Mr. Plante added that this would not have changed the final result because Mr. Labidi had failed the situational exercise in question 2. As with Ms. Elazzouzi, Mr. Labidi complained that the respondent never specified the pass mark for this ability and never explained how the marks were distributed between the first and second questions. Mr. Labidi is not challenging his results for question 2, but suggested that the board should have calculated the average of questions 1 and 2, which would have allowed him to obtain the pass mark (60%). Lastly, he received a copy of his written exam only at the exchange of information meeting.

Respondent's reply

25 Ms. Godin, the chairperson of the assessment board, explained that 67 people applied in the process. After the screening was completed, 33 people were invited to write the exam. All these candidates received a letter indicating the date, time, and duration of the exam, as well as a description of the competencies that would be assessed during the exam. Following the interview and reference checks, 12 candidates were found to be qualified.

26 The respondent explained that it wanted Mr. Plante to testify but that a personal situation had prevented him from attending the hearing.

27 Ms. Godin described how the board marked the written exams. She and Mr. Plante reviewed one question at a time and agreed upon the score that would be given to each candidate's answer. For example, they first examined all the candidates' answers to the first question in order to ensure a consistent approach for this question. They then went on to the next question and so on. As soon as a candidate failed to meet one of the essential qualifications, the marking of the exam was stopped. An expected answer had been prepared for the first two questions, because these were very specific answers from the information table or the calculations that the candidates had to make. The board summarized its findings in a document entitled "*Overall assessment*" [translation].

28 According to Ms. Godin, Mr. Plante was in charge of all the informal discussions. She said that when Mr. Plante reported to her about the meeting, he did not say that he wanted to modify Mr. Labidi's results.

Findings regarding Ms. Elazzouzi and Mr. Labidi

29 Regarding the allegation that the candidates did not know the pass mark for the ability "applying principles and procedures," the Tribunal notes that the first page of the exam contains a list of the qualifications that the exam would assess, along with the following statement: "All competencies are assessed out of 100 points and the passing

mark is 60% for each one” [translation]. All the complainants signed and dated the bottom of this page on their exam.

30 For the first part of the assessment of the ability “applying principles and procedures” (question 1), the candidates had to refer to the data contained in the information table in order to answer the ten sub-questions asked. Given the quasi-mathematical nature of the subject, the “correct” answers were clear and explicit. Candidates had to indicate the applicable rate in the particular circumstances of the various sub-questions or, where applicable, identify the missing data that was needed to be able to answer the question.

31 Regarding the situational exercise in question 2, the critical elements that the candidates had to consider were clear: verification of the merchandise, consultation with the manager, and the effects of the snow storm on the return deadline. The mathematical calculation was also very specific. The Tribunal finds that the marks awarded to Ms. Elazzouzi and Mr. Labidi closely reflect the content of the answer key used by the board for the questions asked in the second assessment method. Therefore, the marks awarded to the two complainants for this question do not seem to be unreasonable in the circumstances.

32 The question of determining who has the burden of proving the allegations was examined by the Tribunal in its decision in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 49 and 50. The complainants must be able to show, on a balance of probabilities, that they were not appointed as a result of an abuse of authority by the respondent.

33 In this case, and for the following reasons, the Tribunal finds that the complainants did not submit sufficient evidence to establish a finding of abuse of authority in the marking of their exams.

34 At the hearing, Ms. Elazzouzi did not provide any details regarding her answers to questions 1 and 2. The Tribunal’s role is not to reassess a complainant’s marks on a given answer simply because a complainant does not agree with the board’s decision (see *Portree v. Deputy Head of Service Canada*, 2006 PSST 0014, at para. 51 and 52.)

It follows that the Tribunal has no evidence that the board abused its authority in the marking of Ms. Elazzouzi's exam.

35 As for Mr. Labidi, on the one hand, he argued that Mr. Plante told him during the informal discussion that he was willing to acknowledge that some of his answers had been correct and that he would modify the marks awarded for question 1. However, Mr. Plante apparently also told him that this would not change his final results because he had nonetheless failed question 2. On the other hand, Ms. Godin said that Mr. Plante never told her anything about this during their meeting, which took place some time after the informal discussion. Aside from the brief statements of these two witnesses, neither one was able to provide further details to clarify the situation. Mr. Plante was not able to testify in order to clarify the situation because of personal reasons. In addition, the Tribunal notes that Mr. Labidi is not challenging his results for the second part of the assessment (question 2), for which he received an E (fail). Mr. Labidi suggested instead that the board modify the results for question 1 and that it calculate the average of questions 1 and 2, which would perhaps allow him to obtain the pass mark of 60%. The fact that the results could have been calculated differently does not establish that the assessment board's approach constitutes an abuse of authority. The Tribunal finds that Mr. Labidi did not demonstrate that the board abused its authority in the marking of his exam.

36 In terms of the allegation regarding the informal discussion meeting, the two complainants reviewed the content of their exam at this meeting but they criticize the respondent for giving them a hard copy of their exam only later, at the exchange of information meeting. According to the Public Service Commission's policy on Informal Discussion, issued under s. 29(3) of the PSEA and with which the respondent must comply under s. 16, persons eliminated from consideration must have access to sufficient information concerning themselves during the informal discussion to understand and discuss the decision. According to their testimony, the complainants reviewed the content of their exam with Mr. Plante and they discussed the reasons why the board determined that they did not meet the ability "applying principles and procedures." The Tribunal finds that there is no evidence that the policy on Informal Discussion was not followed, since the complainants received sufficient information

concerning themselves to allow them to understand the decision and discuss it with Mr. Plante.

37 Lastly, it is perhaps preferable to finish marking such exams for feedback and learning purposes or if it is later determined that there was an error. However, the PSEA does not create such an obligation. Section 30(2)(a) states that, in order for an appointment to be based on merit, the person appointed must meet all the essential qualifications. Thus, a board does not have to continue marking an exam once it is clear that the candidate does not meet one of the essential qualifications assessed by the exam.

38 As a result, and for the reasons cited above, the Tribunal finds that complainants Elazzouzi and Labidi have not demonstrated that the board abused its authority in its determination that the candidates did not meet the ability “applying principles and procedures.”

Issue II: Did the respondent abuse its authority in deciding that Ms. Lahlali did not meet the ability “thinking skills”?

39 Ms. Lahlali began her career in the federal public service in 2003. After a few assignments in various locations, she returned to HRSDC in 2008. She failed the assessment of the ability “thinking skills.”

40 Two situational exercises were used in the written exam to assess the ability “thinking skills.” The same rating scale described earlier [from A (excellent) to E (fail)] was used to mark these situational exercises.

41 In the first situational exercise for assessing the ability “thinking skills,” the candidates were faced with an increase in rent that could not be disputed. The candidates were asked the following (question 3): “You have two (2) options: you can either move or accept this increase. What factors guide your thinking in order to arrive at the ideal solution?” [translation]. According to the rating scale, the board gave Ms. Lahlali a mark of D+ (65-69) for the first situational exercise.

42 During the second situational exercise, the candidates had to explain how they would choose a destination abroad for the vacation they would be taking in the next few months after having been given various alternatives by a travel agent. The candidates were asked the following (question 4): “As you can see, you have a range of options. What factors would you take into account to choose the ideal holiday for you and your partner?” [translation]. Ms. Lahlali answered as follows:

In meeting with the travel agent, I would ask him questions about:

- The pros and cons of each proposal.
- The seasonal rates, given that no date has been set (high and low season).
- We would gather as much information as possible for each destination, the price, comments from other travellers,...
- I would take his contact information, in case we need more details or information.
- After returning home, we would consider the choices offered.
- Are we willing to stay in one city? Do we want a cruise or group tourism trip? A long stay in a sunny destination in a condo with a kitchenette or an all-inclusive beach resort?
- If we choose a destination, would we be able to take the vacation during the low season to save some money?
- We would consult the Internet sites of these destinations, where applicable.
- We would consult blogs and discussion forums, talk to friends who have already [illegible] these destinations to get their comments.
- We would check if there are any vaccines required or provisions to be made for the destinations (visas, medications, safety,...).

Once we had the answers to all these questions, we would be able to make a good decision so that we could have an ideal vacation.

[translation]

43 Ms. Lahlali’s proposed approach for question 4 earned her an E (fail).

44 In summary, for the ability “thinking skills,” the board gave Ms. Lahlali an overall mark of E (fail) in its document entitled “*Overall assessment*” [translation].

Findings regarding Ms. Lahlali

45 There is considerable difference between the situation of the other two complainants and Ms. Lahlali's situation. Given the quasi-mathematical nature of the question used to assess the ability "applying principles and procedures," the "correct" answers were clear and specific. However, this is not the case for the two situational exercises used to assess the ability "thinking skills."

46 Questions 3 and 4 given to candidates are simple but there are no obvious or quasi-mathematical answers to these two questions. Rather, candidates had to respond by explaining the thinking used to arrive at their decision. In other words, they had to do an analysis which, by its nature, is subjective. The NCD defines the "thinking skills" competency and describes the four factors considered to be relevant for assessing the candidates' answers as follows:

The ability to actively and skillfully analyze problems and issues, organize information, identify key factors, identify underlying clauses and generate practical solutions

- Effectively plans and organizes work
- Identifies practical and sound solutions to problems
- Quickly acquires and applies relevant information
- Recognizes pertinent facts and issues

47 The board's observations and the marks awarded for Ms. Lahlali's answers to questions 3 and 4 are as follows:

Question 3 (D+)	Question 4 (E)
Evaluates the current situation in detail, location vs. work, school, etc. Evaluates the current increase and possible future increases. Estimates she has the time, energy and costs without giving details for these. Some issues are not dealt with.	Does not evaluate the situation with her partner and their needs as a couple. Repeats the factors in the question. Does an analysis of the cost. Checks about vaccinations, medications (...), depending on destinations. Too many issues are not dealt with.

[translation]

48 In question 3, the board said that “Some issues are not dealt with” [translation]. The use of the plural leads to the understanding that at least two of the four factors cited previously were not met. For question 4, the board determined that “Too many issues are not dealt with” [translation]. Since logic dictates that “too many” [translation] must be greater than “some” [translation], it must be that at least three, if not four, of the factors identified were not met.

49 However, it seems that the board’s observations do not match the relevant factors identified for assessing this ability. In addition, the Tribunal notes that Ms. Godin’s testimony did not help in clarifying this issue. At the hearing, Ms. Godin read the text of the board’s findings, but she did not explain how the board identified acceptable answers and no explanation was given to justify the board’s findings. Instead, Ms. Godin explained that the board did not develop an expected answer because it wanted to give candidates free reign to present their information, since a number of different approaches could be acceptable. Although the board is free to proceed in this way, it is essential in the circumstances that the board’s observations have a direct and concrete link with the factors deemed relevant for assessing the candidates’ answers. The evidence shows that this was not the case here.

50 It follows that, in the absence of such benchmarks in its analysis of Ms. Lahlali’s answers, the board could not justify, with regard to the ability “thinking skills” in questions 3 and 4, its findings that “some issues are not dealt with” [translation] or “too many issues are not dealt with” [translation]. The board’s findings were therefore unreasonable. As is explained in *Tibbs* at para. 73:

While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

51 For these reasons, the Tribunal finds that the assessment board abused its authority and committed a serious error by failing to link its observations to the four factors considered relevant for assessing the candidates’ answers.

Decision

52 Regarding the complaints submitted by Ms. Elazzouzi and Mr. Labidi, the Tribunal finds that the complainants did not show that the assessment board abused its authority in its determination that the complainants did not meet the ability “applying principles and procedures.” These two complaints are therefore dismissed (files 2009-0257 and 2009-0258).

53 As for the complaint filed by Ms. Lahlali, the Tribunal finds that the assessment board abused its authority by not taking into account relevant factors in assessing the answers to questions 3 and 4 regarding the ability “thinking skills.” The board’s conclusions were therefore unreasonable. As a result, this complaint is substantiated (file 2009-0259).

Corrective Action

54 The relevant provisions regarding corrective action can be found in ss. 80, 81, and 82 of the PSEA. They read as follows:

80. In considering whether a complaint under section 77 is substantiated, the Tribunal may interpret and apply the *Canadian Human Rights Act*, other than its provisions relating to the right to equal pay for work of equal value.

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.

(2) Corrective action taken under subsection (1) may include an order for relief in accordance with paragraph 53(2)(e) or subsection 53(3) of the *Canadian Human Rights Act*.

82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.

55 After having considered the parties’ arguments regarding corrective action, the Tribunal finds that the abuse of authority can be corrected by reassessing Ms. Lahlali’s answers to questions 3 and 4 on the basis of the relevant factors established for the ability “thinking skills.” If she meets the qualification, the assessment of her application should continue.

Order

56 Within 30 days of the date of this decision, the respondent shall take the following corrective action:

- (a) Redo the marking of Ms. Lahlali's answers to questions 3 and 4, which assess the ability "thinking skills," according to the relevant factors as established.
- (b) If she obtains the pass mark for this ability, continue with the assessment of her application.

Maurice Gohier
Member

Parties of Record

Tribunal Files	2009-0257, 2009-0258, and 2009-0259
Style of Cause	<i>Kenza Elazzouzi and the Deputy Minister of Human Resources and Skills Development Canada</i>
Hearing	May 13 and 14, 2010 Montreal, Quebec
Date of Reasons	March 31, 2011
Appearances:	
For the complainant	Sylvain Archambault
For the respondent	Sean F. Kelly
For the Public Service Commission	Marc Séguin