



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2009-0493/0494/0495/0505  
**Issued at:** Ottawa, January 10, 2011

**CONNIE GRESS**

Complainant

AND

**THE DEPUTY MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA**

Respondent

AND

**OTHER PARTIES**

|                             |  |
|-----------------------------|--|
| <b>Matter</b>               | Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i> |
| <b>Decision</b>             | Complaint is dismissed   |
| <b>Decision rendered by</b> | Joanne B. Archibald, Member  |
| <b>Language of Decision</b> | English  |
| <b>Indexed</b>              | <i>Gress v. Deputy Minister of Indian and Northern Affairs Canada</i>                                    |
| <b>Neutral Citation</b>     | 2011 PSST 0001   |

# Reasons for Decision

## Introduction

1 Connie Gress, the complainant, applied in an internal advertised appointment process to fill the position of Officer (PM-03) with the Department of Indian and Northern Affairs Canada (INAC) in various locations in Saskatchewan. She was found not qualified as she did not meet one of the essential qualifications for the position. The complainant alleges that the respondent abused its authority in its assessment of her ability to interpret policy (A4).

2 The respondent, the Deputy Minister of INAC, denies that there was any abuse of authority.

## Background

3 The *Job Opportunity Advertisement* was posted on *Publiservice* with a closing date of March 25, 2009. The complainant applied, and was screened into the process. She was invited to attend a testing session on April 24, 2009.

4 The test consisted of one question. Candidates were given a fictional set of facts concerning a disputed band election, a policy, an extract from the *Indian Act*, R.S.C. 1985, c. I-5, and a partially completed briefing note. Candidates were required to complete the briefing note based on the facts and the documents they had been given. They were instructed that their response should “include clear and concise options for senior management and a final recommendation.” The last two sections of the briefing note were entitled “Options” and “Recommendation.”

5 In her response, the complainant provided five numbered paragraphs outlining options. She then amended the final heading of “Recommendation” to the plural “Recommendations” and provided two responses: either conduct a new election, or counsel the parties to mediate their disagreement.

6 The assessment board considered the complainant's response to be weak because she provided more than one recommendation. As such, the complainant was found not to meet the requirements of A4 and her candidacy was not further considered.

7 On July 22, 2009, a *Notification of Appointment or Proposal of Appointment* was posted for five selected candidates.

8 On July 29, 2009, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under section 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the *PSEA*), alleging abuse of authority.

### **Issues**

9 The Tribunal must determine whether the respondent abused its authority in the assessment of the complainant's answer.

### **Relevant Evidence and Analysis**

10 Under section 88(2) of the *PSEA*, the Tribunal's mandate with respect to internal appointment processes is to consider and dispose of complaints made under section 77 of the *PSEA*. Section 77 of the *PSEA* provides that an employee may bring a complaint to the Tribunal that he or she was not appointed because of abuse of authority.

11 The burden of proof in a complaint before the Tribunal rests with the complainant (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.) The Tribunal has consistently ruled that a finding of abuse of authority does not require intent, and that an interpretation requiring proof of intent would run contrary to Parliament's intention in enacting the *PSEA* (see for example, *Tibbs*, at para. 72, and *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044 at para. 36).

12 However, the preamble and the whole scheme of the *PSEA* make it clear that Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority. (See *Tibbs* at para 65. See also *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004 at paras. 50 - 51.)

13 Section 36 of the *PSEA* provides a deputy head with the authority to choose assessment tools. However, the chosen tools may give rise to a complaint of abuse of authority. For example, in *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011 at para. 37, the Tribunal outlined some types of flaws that might occur: tools that might

favour candidates, tools that could cause harm to certain candidates, and tools that could discriminate against candidates on prohibited grounds.

**14** The complainant contends that the assessment board's automatic elimination of any candidate who provided more than one recommendation was a flaw in the assessment tool. She acknowledges that she changed the heading for the "Recommendation" section of the briefing note to be plural, but argues that the two responses she provided were merely different methods for arriving at the same solution and a senior manager ought to be capable of choosing between them. The Tribunal notes that when cross-examined, she described them as two recommendations, stating that she did not view the question as restricting candidates to one recommendation.

**15** Sherri Daniels, Associate Director Governance, INAC, was the chairperson of the assessment board. She testified that the test question was designed specifically to produce only one recommendation. This was an important feature of A4. Senior managers rely on the subject matter expertise of officers who analyze situations and provide them with a recommended course of action. It was critical for an officer to have the ability to interpret a policy and apply it to information to produce a single recommendation. Accordingly, the assessment board considered that a candidate who could not reduce the options to one recommendation showed weakness and was unlikely to be effective if appointed to the position. Ms. Daniels testified that the complainant was one of approximately 15 candidates who were eliminated for providing more than one recommendation.

**16** Darren Svedahl was a member of the assessment board. He testified that before the board started correcting the tests, it made the decision to assess any answer providing more than one recommendation as weak. He stated that the complainant's answer was otherwise well written, but it was not a good demonstration of A4 as she provided more than one recommendation,

**17** The Public Service Commission did not appear in this matter, but did present a written submission in which it observed that the test question asked for several options and only one recommendation.

**18** The Tribunal finds that the complainant has not discharged the burden of proof in this case. The Tribunal finds that the complainant has not established that the assessment board's decision to eliminate any candidate who provided more than one response was an unreasonable limitation or an abuse of authority. This is not a case where the qualification has been altered by the assessment board. The test required candidates to provide options and a recommendation. The Tribunal finds this to be consistent with A4. Additionally, the assessment board has explained the requirements of the position and how they are reflected in the expected answer. The Tribunal finds the explanation to be logical and coherent.

**19** The complainant's evidence concerning her own response is contradictory. She first describes her briefing note as providing two methods, and later as two recommendations. She acknowledges altering the heading in the briefing note to be plural. This is an action that strongly suggests that when she wrote the test she believed that she was providing more than one recommendation.

**20** The question and briefing note each unambiguously point candidates toward providing a single recommendation. The assessment board has explained its reasoning. The Tribunal finds that the complainant has not established that the assessment tool was flawed, that the assessment board erred or that her response conformed to their requirement.

**21** In these circumstances, the Tribunal finds that the complainant has not established an abuse of authority within the meaning of section 77(1)(a) of the *PSEA*.

## **Decision**

**22** For these reasons, the complaint is dismissed.

Joanne B. Archibald  
Member

**Parties of Record**

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| <b>Tribunal Files</b>      | 2009-0493/0494/0495/0505  |
| <b>Style of Cause</b>      | <i>Connie Gress and the Deputy Minister of Indian and Northern Affairs Canada</i> |
| <b>Hearing</b>             | October 21, 2010<br>Regina, Saskatchewan  |
| <b>Date of Reasons</b>     | January 10, 2011  |
| <b>APPEARANCES:</b>        |   |
| <b>For the complainant</b> | Ken Boone   |
| <b>For the respondent</b>  | Philippe Lacasse  |