Public Service Staffing Tribunal
Tribunal de la dotation de la fonction publique

Files: 2008-0673/0674/2010-0630
Issued at: Ottawa, June 14, 2011

CHRIS HUGHES

Complainant

AND

THE DEPUTY MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1)(*a*) of the *Public Service Employment Act*
Decision	The complaints are substantiated
Decision rendered by	Kenneth J. Gibson, Member
Language of Decision	English
Indexed	*Hughes v. Deputy Minister of Human Resources and Skills Development Canada*
Neutral Citation	2011 PSST 0016

Reasons for Decision

Introduction

1 The complainant, Chris Hughes, claims that the respondent abused its authority in the application of merit. In particular, he is alleging that the respondent acted improperly in the administration and marking of an assessment test, when it moved persons from one qualified pool of candidates to another, and by making appointments from the combined pool. The complainant is also alleging that after he filed his complaint, the respondent negotiated with him in bad faith, failed to consider his reasonable settlement offers and tried to coerce him into withdrawing his complaints.

2 The respondent, the Deputy Minister of Human Resources and Skills Development Canada (HRSDC), denies that there has been an abuse of authority. It states that following a review of the test results, it gave the complainant a passing mark. It subsequently invited the complainant to an interview, which he refused to attend. The respondent also takes the position that there was no abuse of authority in its decision to include persons from one pool of qualified candidates in another pool and to make appointments from the second pool. Finally, the respondent asserts that it did not negotiate in bad faith or attempt to coerce the complainant into withdrawing his complaint, nor was it under any obligation to accept the complainant's settlement offers.

Background

3 In January 2008, the respondent initiated an internal advertised appointment process to staff Service Canada Benefits Officer positions at the PM-02 group and level in British Columbia.

4 Candidates were assessed using written tests, including an eight minute timed verification and accuracy test, an interview and reference checks.

5 There were 92 applicants in the appointment process. Twenty-five candidates were found qualified, including eight persons who applied to this appointment process after having been found qualified in an earlier appointment process for the same type of positions.

6 The complainant wrote the verification and accuracy test on February 28, 2008. He was informed on March 19, 2008, that he had failed the test and that he was eliminated from the appointment process. The complainant met with two assessment board members for an informal discussion on March 26, 2008.

7 A notice of *Information Regarding Acting Appointment* regarding three persons was issued on September 23, 2008, and a *Notification of Appointment or Proposal of Appointment* of 17 persons was issued on September 24, 2008. These notices relate to appointments to Service Canada Benefits Officer positions.

8 The complainant filed two complaints under s. 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the *PSEA*) on October 8, 2008, with respect to these appointments or proposed appointments. The complainant filed a third complaint on October 8, 2010, in relation to another appointment or proposed appointment under this appointment process. The complaints were consolidated pursuant to s. 8 of the *Public Service Staffing Tribunal Regulations*, SOR-2006/6 (the *Regulations*).

9 On January 14, 2009, the complainant met with the sub-delegated manager, Don Campbell. During this meeting, offers were exchanged to settle the complaint, but no agreement was reached. The negotiations at this meeting led the complainant to allege bad faith and coercion on the part of the respondent.

10 On February 19, 2009, the complainant was informed by email that as a result of a review of his verification and accuracy test he had been given a passing mark on the test. In the same email, he was invited to attend an interview on February 27, 2009.

11 The interview was postponed. The complainant was seeking to be assessed by methods other than an interview and he had concerns over accommodation. The parties corresponded regarding these issues but no agreement was reached and no interview was held.

12 On September 16, 2009, the complainant submitted his formal allegations pursuant to s. 22(1) of the *Regulations.* In his covering email, he stated that he was withdrawing allegations concerning human rights, anti-union bias and blacklisting that were included in his

initial complaint. He preferred to deal with these issues before the Canadian Human Rights Commission (CHRC) and the Public Service Labour Relations Board (PSLRB).

13 The respondent maintained its position that an interview should be part of the complainant's assessment, and on December 17, 2009, it notified him by email that because, amongst other reasons, he had refused to attend an interview, the assessment board considered his candidacy to be withdrawn.

Preliminary matters

14 The complainant raised two preliminary motions at the start of the hearing. The complainant objects to the admissibility of the Public Service Commission's (PSC) submissions. He contends that they are not properly before the Public Service Staffing Tribunal (the Tribunal) and that they should not be considered in arriving at a decision. Secondly, the complainant submits that the respondent has conceded certain of his allegations and that it should be prohibited from raising a defence to them at the hearing.

15 The PSC did not attend the hearing, but provided written submissions on these motions.

a) Objection to the PSC's submissions

16 The complainant submits that the PSC, in its reply to his allegations dated October 14, 2009, failed to provide a full response to the allegations or issues raised in his complaint, as required by s. 25 of the *Regulations*. He requests that the PSC be limited at the hearing to making submissions on what was contained in its original reply. He also argues that he was "blindsided" by the PSC submissions, having received them only days before the hearing. He considers these submissions to be highly prejudicial to his case and argues that they cover events that occurred after he filed his allegations. The complainant submits that the PSC's submissions are not properly before the Tribunal and should be rejected in their entirety.

17 The PSC argues that the complainant is out of time to make such an objection. It submits that the complainant has had its reply to his allegations for over a year and has never made an objection. It also notes that the complainant never raised his concerns during the

pre-hearing conference on September 21, 2010. Furthermore, the PSC argues that at the time it was required to submit its reply under the Tribunal's *Regulations*, the PSC did not have the benefit of the information that the complainant and the deputy head obtained during the exchange of information stage of the complaint process. The PSC states that it reviews the information obtained from the complainant and the deputy head at the exchange of documents stage following the pre-hearing conference and decides whether to attend the hearing in person or to make final submissions in writing. Finally, the PSC argues that it has a right to be heard under s. 79(1) of the *PSEA*, and it would be contrary to the intent of the *PSEA* to allow the complainant's objection.

18 In response to the PSC's arguments, the complainant submits that the PSC could have asked to participate in the exchange of information, but chose not to participate.

19 The Tribunal notes that s. 16(1) of the *Regulations* provides that the purpose of the exchange of information is to facilitate the resolution of the complaint between the complainant and the respondent. The exchange occurs soon after a complaint is filed and the PSC is not a participant in the exchange of information unless the PSC is the respondent in the complaint. In this case, the respondent is the deputy head, not the PSC.

20 If the PSC wished to participate in the hearing, it was required, as an "other party" to file a reply to the allegations pursuant to s. 25 of the *Regulations*. Section 25(2)(*d*) of the *Regulations* provides that the reply must include "a full response to any allegations or issues raised in the complaint and full particulars of any additional relevant facts on which the party intends to rely…". The PSC stated in its reply to the allegations that based on the complaints, the allegations and the deputy head's reply, it was not able to comment on the integrity of the appointment process. It reserved its right to make final submissions following the presentation of the evidence.

21 The Tribunal accepts the PSC's position that, on the basis of the information in its possession, it was not able to provide a more complete response to the allegations at the time that its reply had to be provided to the parties. According to the PSC, its written submissions on the merits of the complaints are based on the documents that the parties exchanged following the pre-hearing conference, in addition to the allegations and the deputy head's

reply. The PSC did not possess all of this information at the time it was required to provide its reply to the allegations.

22 The Tribunal is satisfied that the PSC complied with the requirements of s. 25 of the *Regulations*. Since the PSC complied with s. 25 of the *Regulations*, it had the right to participate in the hearing, either in person or by way of written submissions.

23 The Tribunal also agrees that if the complainant wished to challenge the PSC's reply, he should have done so much earlier than five calendar days before the hearing. The Tribunal notes that the complainant did not seek to postpone the hearing in order to deal with this issue.

24 If the PSC had decided to participate in the hearing, and had not made its submissions in advance, then the complainant would not have become aware of the PSC's submissions until oral arguments were made, after the evidence had been submitted. The complainant had the benefit of seeing the submissions in advance of the hearing.

25 As the PSC notes, under s. 79(1) of the *PSEA*, it has the right to be heard in relation to a complaint filed under s. 77. Since the PSC complied with s. 25 of the *Regulations*, it would be contrary to the legislative scheme of the *PSEA*, and a breach of procedural fairness, to preclude the PSC from participating in the hearing by making written submissions. For these reasons, the complainant's objection with respect to the PSC's submissions is dismissed.

b) Proposed limitation on the scope of the respondent's defence

26 The complainant submits that the respondent did not provide a full response to any allegations or issues raised in the complaints, as required by s. 24(2)(*d*) of the *Regulations*, when it filed its response to his allegations on October 8, 2009. The complainant argues that the respondent's reply was two pages in length and was not a full response. In particular, he states that the reply failed to address allegations regarding the start of the written test, the rigid marking of the test, the failure to provide corrective action, coercion and bad faith, all of which he claimed demonstrated that the respondent abused its authority. Therefore, he submits that the respondent has conceded these elements of his complaint and argues that the respondent should be barred from raising a defence to them at the hearing.

27 The respondent argues that the complainant should have raised this issue at the pre-hearing conference. It also argues that, in the interests of procedural fairness, it must be allowed to present a defence to all of the complainant's allegations.

28 In its reply of October 8, 2009, the respondent took the position that there had been no abuse of authority in this appointment process. The respondent's position denying an abuse of authority demonstrates that the respondent did not concede the complainant's allegations. Furthermore, the respondent indicated in its reply that, as of the time it was written, the complainant had been given a passing mark on the written test and reintegrated into the appointment process. Therefore, the respondent took the position that allegations relating to the test and bad faith negotiations were no longer relevant. The respondent requested in its reply, that the complaint be put in abeyance to allow the respondent to complete its assessment of the complainant.

29 By letter decision dated October 20, 2009, the Tribunal noted that the respondent and the PSC had replied to the allegations and decided that it would not be conducive to an expeditious resolution of the complaint to hold the file in abeyance. It further noted that since it would be a few months before a hearing would take place, the respondent should use the time to finalize the complainant's assessment and the parties could re-evaluate their positions prior to the hearing if necessary. Neither party made any comments following this decision. In the circumstances, the Tribunal is satisfied that the respondent complied with the requirements of s. 24.(2)(*d*) of the *Regulations* when it provided its reply.

30 Under s. 79(1) of the *PSEA*, the deputy head has a right to be heard in relation to this complaint. Furthermore, there is no evidence that the respondent has conceded any of the complainant's allegations. In the circumstances, the Tribunal agrees that it would be unfair to deny the respondent an opportunity to present a full response at the hearing to the complainant's allegations. Therefore, the complainant's motion is dismissed.

Issues

31 The Tribunal must determine the following issues:

(i) Did the respondent abuse its authority in the administration and marking of the verification and accuracy test?

(ii) Did the respondent abuse its authority when it included persons from an earlier pool of qualified candidates in the pool resulting from this appointment process?

(iii) Did the respondent abuse its authority when it appointed a person from this appointment process?

(iv) Did the respondent abuse its authority by demonstrating bias or bad faith towards the complainant during the appointment process?

Summary of Relevant Evidence

a) *Failure to say "start" at the beginning of the test*

32 The complainant testified that the invigilator for the verification and accuracy test, John Johnson, told candidates to "turn the page" but he did not say "start" or "complete" the test. The complainant said that he had written dozens of these tests and he always waited for these words. He saw others writing so he started to write, too. Because of the delay, the complainant says he lost about 30 seconds of valuable time in the completion of the eight minute test.

33 The complainant failed the test and was eliminated from the appointment process. He asked for an informal discussion and met with board members Johnson and Don Woodward on March 26, 2008. At the meeting, he mentioned that Mr. Johnson had not said "start" at the beginning of the test, but Mr. Johnson replied that he had.

34 Mr. Johnson testified that at the time of the appointment process he was a team leader in the Old Age Security section of HRSDC, and a member of the assessment board. For the verification and accuracy test, he said that he had a one-page instruction sheet with about 15 points on it. One of the points was to say "begin" or "start" so candidates would commence

writing the test. He testified that he gave exactly the same instructions each time he administered the test. Mr. Johnson was an invigilator at four of the nine written tests.

35 Mr. Campbell is the manager of the Canada Pension Plan section at HRSDC in Victoria. He was the sub-delegated manager responsible for the appointment process. The complainant showed Mr. Johnson and Mr. Campbell a document at the hearing and asked if this was the instruction sheet used at the test. The source of the document was not identified. The document did not include the words “start” or “begin”. Mr. Campbell testified that this document did not contain the script used for the test. Mr. Johnson said that there appeared to be missing information on the sheet. He said that the one he had used contained additional information on candidate identification, emergency exits, etc.

36 Mr. Campbell testified that Mr. Johnson informed him that he was sure that he had followed the script and told the candidates, including the complainant, to start the test. Mr. Campbell testified that he considered whether Mr. Johnson might be wrong, but no one else had complained and the complainant did not raise the issue until the informal discussion. He reviewed the test instructions and concluded that it was likely that it was the complainant, rather than Mr. Johnson, who was mistaken.

b) Evidence related to the marking of the verification and accuracy test

37 The complainant described his experience with the verification and accuracy test. The test consisted of a sheet with numbers, names and addresses. Candidates were to circle only the letter or number that was incorrect. The instructions on the test document stated that it would be incorrect to circle an entire word or a sequence of numbers. The complainant obtained a score of 18 out of 23. The passing mark was 19.

38 One of the errors candidates were to identify was in the name of a street. The correct spelling was “Shimareata”. On the answer sheet it was spelled “Shimareita”. Candidates were expected to circle the second “i”. The assessment board denied the complainant one point because it decided that he had circled the letter “t” as well as the letter “i”. The loss of this point was sufficient to fail him on the test. The complainant felt the board was being inflexible and he asked the board at the informal discussion to change its marking of his test. At that time, the board maintained that his answer was incorrect and it refused to change the mark.

39 During the exchange of information stage of the complaint process, the complainant obtained the answer sheets for other candidates. He highlighted the answer sheets for candidates identified as II and IX. He noted that these candidates also circled more than just the letter “i” but their answers were not marked as incorrect.

40 Connie Booty is a team leader in the Canada Pension Plan section of HRSDC. She described herself as the lead person on the assessment board. She testified that she marked some of the verification and accuracy tests. According to Ms. Booty, candidate II circled the second letter “i” in the word Shimareita in its entirety and the adjacent letter “e” was only partially circled. Therefore, she considered that candidate’s answer to be correct. On the complainant’s sheet, she believed that he had incorrectly circled the letters “i” and “t” in their entirety. Ms. Booty acknowledged, however, that candidate IX had also circled the letters “i” and “t” in their entirety, but she had considered it correct at the time.

41 Ms. Booty testified that one board member marked a test and the other board members reviewed the marking. She said there was no disagreement amongst them. She testified that, at some point, Mr. Campbell directed the board to review all of the tests and to change the scoring standard so that it was acceptable if the letters before and after the targeted error were also circled. When this was done, the complainant’s circle was no longer considered incorrect and he was given a passing mark on the test.

42 Mr. Johnson testified that he corrected the complainant’s test but it was not his handwriting on the tests for candidates II and IX. He studied the three tests and agreed that candidates II and IX had circled more letters than appropriate. He believed that all three candidates’ answers should have been marked as incorrect based on the original scoring standard, but that after the standard was changed, the complainant’s and the other two candidates’ answers were correct.

c) *Evidence related to the inclusion of persons from the earlier PM-02 pool in the PM-02 pool resulting from this appointment process*

43 The appointment process at issue led to what is commonly referred to as a “pool” of qualified candidates. The complainant alleges that the inclusion of eight persons from an earlier PM-02 pool of qualified candidates in the pool resulting from this appointment process

was inappropriate because the assessment standards for the two assessment processes were not the same. The complainant referred to this as a "transfer" of candidates or a "merger" of the two pools; however, as explained later in the decision, a more accurate characterization would be that the candidates from the first process were invited to participate in the second process.

44 Mr. Campbell testified that the earlier appointment process for PM-02 positions did not produce enough qualified candidates for all of the positions that were available. Therefore, it was decided to conduct a second PM-02 appointment process. Mr. Campbell was not the sub-delegated manager for the first PM-02 appointment process but he examined the Statement of Merit Criteria (SMC) used in that process and decided that it was still valid. He used the same SMC for the second process. He testified that he examined the tools used in the first process and consulted with the board members and human resources staff on the tools to be used in the second process. He did not study the tools in the former process in detail, as he was more concerned with the tools to be used in the second process.

45 Mr. Campbell said that he exercised his discretion to include eight persons who had not yet been appointed from the first pool in the new PM-02 pool. According to Mr. Campbell, the earlier pool had not expired, the SMCs were identical, and since both processes had been run so close together, it was appropriate to include the eight persons in the new pool without assessing them further.

46 The Staffing Process Report describes the steps taken in conducting the second PM-02 appointment process. Mr. Campbell acknowledged that he signed the report which states that the assessment board was instructed not to assess the eight persons who were in the earlier pool. He could not recall how or when the eight persons were told they would be included in the new pool. He did not recall having any notes or emails on this subject.

47 Elaine Li is a staffing officer in the Western Region in HRSDC. She testified that the department does not move people from one pool to another very often but it can be done if it is equitable to do so. She said that it would be acceptable if the SMCs were the same and the time difference between the two processes was short. She said it would be difficult to require people to go through essentially the same assessment process after a short time period.

Ms. Li testified that there is no HRSDC policy on portability between pools and she did not know if there was a PSC policy.

48 The complainant noted that the pass mark on the verification and accuracy test for the first PM-02 appointment process was 24 out of 30 or 80%. It was 19 out of 23 or 82.6% for the second PM-02 process. He also noted that there were no restrictions on the size of the circles around the incorrect spelling on the first test while there were restrictions on the second test. Given these differences, he questioned whether the persons who passed the verification and accuracy test in the earlier PM-02 process should have been deemed to have passed the test in the second PM-02 process.

49 Ms. Li testified that it was not necessary for the tests to be identical as long as they were comparable. She said that one test might have a higher pass mark but it could be an easier test. It is necessary to take everything into account, not just the pass marks.

50 The parties submitted by consent an Excel spreadsheet entitled *Pool Summary*. This document summarizes the assessment results for all of the candidates in the second PM-02 appointment process. The list of candidates includes the eight persons who were also in the earlier appointment process. It only shows whether these eight persons met the experience qualifications. It does not show whether they met the knowledge, abilities and personal suitability qualifications. Ms. Booty testified that the spreadsheet does not show the assessment of the eight persons on these other qualifications because they had been assessed on these qualifications in the earlier appointment process and it had been decided that there was no need to assess them again.

51 Ms. Booty testified that it was Mr. Campbell who told the board not to assess the eight persons for this appointment process. She did not recall what form of communication Mr. Campbell used to convey this information to the board. She confirmed that although they were not assessed, the eight persons were asked to apply for the second appointment process. She said this was done because the board wanted to know if they had acquired any new asset qualifications since they had been assessed in the previous process.

d) *Evidence related to appointments made from the new PM-02 pool*

52 Levan Turner and Melissa Anstice, two of the eight persons who were found qualified in the first appointment process, were included in the pool for the second process and subsequently appointed to positions. The complainant noted that the *Pool Summary* document contained no marks on two qualifications (*Change and Learning* and *Decisiveness*) for Mr. Turner and Ms. Anstice although the appointment rationales state that their appointment decisions were based on their aggregate scores on these two qualifications.

53 Ms. Li testified that when managers appoint from a pool, they consider the competencies required for a position, then look at the pool to find the people with the required competencies. She agreed it would have been easier to explain the appointment of, for example, Ms. Anstice, if a score was shown for her on these qualifications in the *Pool Summary* document. However, she said the *Pool Summary* was not a legal requirement and that the important thing was that the persons appointed met the essential qualifications for the position, not that their scores were on this particular document.

54 The complainant referred to the appointment of Susan Humphreys. Like the complainant, Ms. Humphreys was a candidate in the second PM-02 appointment process. He noted that according to the *Pool Summary*, Ms. Humphreys met all of the experience qualifications. However, he referred to the cover letter on her application and questioned where it demonstrated that she met the essential experience qualification "experience in interpreting and apply *(sic)* legislation."

55 Ms. Booty testified that her practice was to compare the education and experience requirements in the SMC to the information on each candidate's résumé. If she did not see the required qualifications in the résumé, she would contact that candidate's references to obtain more information to determine if they met these qualifications. She acknowledged that the cover letter was the only document from Ms. Humphreys that they considered in the appointment process. She did not state whether she contacted a reference identified by Ms. Humphreys, but she testified that she had personal knowledge of Ms. Humphreys' work and knew that she met all of the experience qualifications. She said that Ms. Humphreys indicated in her cover letter that she responded to enquiries from clients regarding applications

for the “Common Experience Payment.” According to Ms. Booty, this required her to interpret and apply legislation. She also testified that Ms. Humphreys interpreted and applied the *Privacy Act*, R.S.C., 1985, c. P-21.

56 An email dated March 19, 2008, was entered into evidence. It was sent to those candidates who had been eliminated from the second PM-02 appointment process because they had failed a test. Ms. Booty could not explain why Ms. Humphreys’ name appeared on the list of recipients attached to the email. She testified that she had marked Ms. Humphreys’ test and she also prepared the *Pool Summary* that listed candidate scores on each qualification. She could see from this list that Ms. Humphreys had passed all of the qualifications. Ms. Booty testified that Ms. Humphreys’ appearance on the list of unsuccessful candidates must have been a mistake. She could not explain how this mistake occurred or how it was rectified.

e) *Evidence related to coercion, bias and bad faith*

57 The complainant alleges that the respondent was biased against his appointment because of his reputation for having disclosed illegal activities at the Canada Revenue Agency (CRA). He claims that on account of this “whistle-blowing”, he was subject to years of retaliation and discrimination ultimately leading to his resignation from the CRA in 2005. He also said he had been blacklisted by the Canada Border Services Agency, leading to two PSC investigations that were decided in his favour. He testified that he informed Don Campbell’s brother, Ken Campbell, another manager in HRSDC, about these issues in 2006. He also testified that he had appeared on the Canadian Broadcasting Corporation’s (CBC) *National* news broadcast in October 2007, where he was interviewed regarding his whistle-blowing activities. Although he withdrew his specific allegation of blacklisting from the present complaints against HRSDC, he continues to believe that he is blacklisted by the department, and that this led to the coercion, bias and bad faith that he allegedly experienced during the appointment process at issue.

58 The complainant had worked with another whistle-blower, Levan Turner, at the CRA. Mr. Turner appeared with the complainant on the CBC news broadcast. Mr. Turner was one of the eight persons who had been found qualified in the first PM-02 appointment process, had

been included in the second PM-02 pool, and was subsequently appointed to a Service Canada Benefits Officer position. However, the complainant contends that in contrast to himself, Mr. Turner had initially been appointed to a position in HRSDC in 2004 and had built up a good relationship with the department in the three years before he had appeared on the CBC broadcast.

59 Mr. Campbell said he understood blacklisting to mean that someone should not be hired due to their past history and that a whistle-blower was someone who sees something improper and says so. He acknowledged that his brother is a manager in HRSDC at the same level as himself but he testified that he never had any conversations with his brother about the complainant. Nor could he recall any emails with his brother regarding the complainant.

60 According to Mr. Campbell, when he met with the complainant on January 14, 2009, he offered to reintegrate him into the appointment process. He said that the complainant alleged that he had been blacklisted by the department and if he was screened back into the appointment process, he would not be treated fairly in an interview. He said the complainant did not go into detail regarding the blacklisting. Mr. Campbell denied that he had any knowledge of the complainant's whistle-blowing activities or his appearance on a CBC news broadcast prior to the meeting. He further testified that blacklisting had nothing to do with his PM-02 appointment process. He was aware that the complainant had expressed concerns to others about his treatment in the department but he was not aware of the details. He also said that the complainant never made any suggestions to him regarding how the interview panel might be composed to address his blacklisting concerns.

61 Ms. Li testified that she was not involved in the second PM-02 appointment process until after the pool had been established. She said that she was not aware of the complainant's blacklisting concerns until he filed his complaint.

62 Ms. Booty testified that at the time of the PM-02 appointment process she was not aware of other complaints filed by the complainant. She said that she did not have any conversations with Ms. Li or Mr. Campbell about blacklisting of the complainant.

63 The complainant claims that the respondent attempted to use coercive tactics against him after the complaint had been filed. He alleges that this evidence supports his assertion

that the respondent was biased and had acted in bad faith in its assessment of his candidacy. The complainant testified that he understood that the meeting of January 14, 2009, with Mr. Campbell, had been arranged so that he could view the verification and accuracy tests written by the eight candidates who were included in the new pool. The Tribunal had ordered the respondent to provide this information to the complainant. He testified that Ms. Booty took him to Mr. Campbell's office and then she left.

64 However, according to the complainant, Mr. Campbell wanted to negotiate a settlement of the complaint before showing him the eight tests. It should be noted at this point that the complainant gave extensive evidence with respect to the settlement discussions that occurred at this meeting. He had indicated throughout the Tribunal process leading to the hearing, including in his allegations, that he intended to raise this issue and present evidence relating to it. The respondent did not object at any time to this evidence being adduced as privileged communication, and, in fact, led evidence of its own regarding these matters through cross-examination of the complainant's witnesses (the complainant was the only party to call witnesses at the hearing).

65 The complainant testified that Mr. Campbell offered to give him an extra mark on his verification and accuracy test (sufficient for him to pass) if he would withdraw his complaint and forgo seeing the other eight tests. Alternatively, Mr. Campbell said that he was prepared to proceed to a hearing and defend the assessment board's marking of the test. The complainant asked to review the eight tests before deciding on the offer, but Mr. Campbell declined.

66 The complainant testified that his goal was to get into the pool. Therefore, he offered to withdraw the complaint if Mr. Campbell would pass him on the interview as well as the test. As mentioned above, he told Mr. Campbell that he believed that he had been blacklisted by the department and he was sure that Mr. Campbell would be advised to fail him on the interview.

67 Mr. Campbell testified that prior to the meeting on January 14, 2009, he discussed with human resources staff the possibility of giving the complainant the benefit of the doubt on the one point he missed on the verification and accuracy test, provided he withdrew his complaint and dropped his demand for the tests of those who moved from the old to the new pool. He

made this offer to the complainant and stated that he was giving him an option, not forcing him to accept anything. He said the complainant replied that he wanted to be placed directly into the PM-02 pool. The complainant suggested that this could be achieved by basing his assessment for the present process on his results from other assessments in prior processes in which he had participated. However, Mr. Campbell wanted to limit the discussion to the terms of the offer that he had already made to the complainant.

68 The complainant adduced a significant amount of evidence on the alternative assessment methods he proposed in lieu of an interview. The Tribunal notes that his discussions with the respondent on alternatives to an interview commenced at the meeting on January 14, 2009, some three months after the initial complaints were filed. At the time of the initial complaints, the complainant had been screened out of the appointment process on the basis of the verification and accuracy test and he had not been offered an interview. Therefore, the details of the assessment methods that the complainant offered in lieu of an interview are not relevant to the Tribunal's disposition of these complaints.

69 The negotiations failed and Mr. Campbell provided the complainant with the verification and accuracy tests that he had requested. The test results led the complainant to question (as detailed in section c) above) whether the tests should have been used in qualifying the eight candidates for inclusion in the new pool.

70 Mr. Campbell testified that following the meeting of January 14, 2009, he met with the three invigilators to go through all of the tests. The date of this meeting was not identified. He said they found a few tests, including the complainant's, where the assessment of some of the candidates' answers "could go either way". They decided to pass the complainant and invite him to an interview. Ms. Booty sent the complainant an email on February 19, 2009, informing him that his test had been reviewed and he had been granted the additional point. The email invited him to an interview on February 27, 2009.

71 Ms. Booty testified that Mr. Campbell told her that the purpose of the January 14, 2009, meeting was to show the complainant the verification and accuracy tests completed by the eight candidates in the first PM-02 appointment process. She said that Mr. Campbell never

mentioned anything to her about making an offer to the complainant either before or after the meeting.

72 Mr. Johnson testified that he was with Mr. Campbell and Ms. Booty just prior to Mr. Campbell's meeting with the complainant on January 14, 2009. He said they listened while Mr. Campbell discussed the meeting over the telephone with human resources staff in Vancouver. Mr. Campbell then met with the complainant. After the meeting, Mr. Campbell told Mr. Johnson that he had offered the complainant a choice to be reintegrated into the appointment process or to see the tests of the eight other persons. The complainant had chosen to see the tests. Mr. Johnson understood that human resources had said there would be no agreement if the complainant insisted on seeing the tests. He believed that Ms. Booty was also present when Mr. Campbell recounted what had occurred during his meeting with the complainant.

73 The complainant believes the respondent's refusal to mediate the complaint is further evidence of bad faith. A mediation session was scheduled for April 28-29, 2009, but on April 20, 2009, he was informed that the respondent no longer wished to proceed with the mediation. The complainant said he found this very upsetting and he sent an email to Mr. Campbell that same day asking that the department reconsider its decision to cancel the mediation. He stated that he had mentioned the alleged blacklisting in this email. He also informed the respondent in the email that he had been holding off on a variety of legal actions before the CHRC, the PSLRB and the Tribunal, but he would proceed with those actions unless the respondent agreed to participate in mediation. The mediation did not take place.

Ruling on the admissibility of additional evidence

74 Near the end of his final argument, the complainant sought permission to introduce a new document into evidence. He stated that he was in possession of this document prior to the hearing, but he did not bring it with him because he did not intend to use it. He stated that he did not realize its significance until the previous evening, after the evidence had closed and the hearing had adjourned for the day.

75 The respondent objected to the introduction of additional evidence at that stage in the hearing. It argued that it would be inappropriate to reopen the evidence whenever one of the parties had a “new idea” after the evidence had been closed.

76 The Tribunal denied the complainant’s motion. It noted that the complainant had the document prior to the hearing and he could have asked to submit it before the evidence closed.

77 The complainant sent an email to the Tribunal on October 27, 2010, requesting that the Tribunal reconsider its decision on the admissibility of evidence for the following reasons: he had been ill since August 13, 2010; his printer had malfunctioned and due to printing and other issues he did not have the document at the hearing; the Tribunal scheduled the hearing arbitrarily without consulting the parties; the respondent did not disclose crucial evidence until October 12, 2010; and the relevance of the evidence did not become apparent to him until the last day of evidence at the hearing.

78 He attached to his email two documents that he wished to enter into evidence. It is not clear to the Tribunal whether either of these documents were included in the document that the complainant had attempted to enter into evidence during final arguments. The first document is a summary of the assessment results from the first PM-02 appointment process for the eight persons who were subsequently included in the second appointment process. The second document is a selection decision rationale for the appointment of four persons from the second PM-02 appointment process, three of whom were amongst the above-noted group of eight persons.

79 The other parties did not respond to this email.

80 The Tribunal will treat this matter as a request by the complainant to reopen the hearing to introduce additional evidence. This issue was addressed in *Vermette v. CBC*, (1994) 28 C.H.R.R. D/89, a decision of the Canadian Human Rights Tribunal that was subsequently affirmed by the Federal Court (*Canada (Canadian Human Rights Commission) v. Canadian Broadcasting Corp. (re Vermette)*, [1996] F.C.J. No. 1274 (Q.L.) (F.C.T.D.)). The decision applied the test set out by Ritchie, J.A., in *Gass v. Childs* (1959), 43 M.P.R. 87 (N.B.C.A.) with respect to the reception of additional evidence. The Court in *Gass* had held that amongst the

criteria to be considered before a court exercises its discretion to reopen a hearing is whether it has been shown that the evidence could not have been obtained with reasonable diligence for use at the trial.

81 The Tribunal finds that not only could the documents that the complainant sought to introduce have been obtained with reasonable diligence before trial, but by his own admission, he actually had this information prior to the commencement of the hearing on October 19, 2010. He had simply decided not to bring it to the hearing. The complainant's claims in his email to the Tribunal about having had printer difficulties are contradicted by his statement at the hearing that he did not bring the documents because he did not intend to use them. The Tribunal also notes that despite his claim that he was ill, the complainant did not request a postponement of the hearing or seek any other accommodation due to illness or for other factors. In fact, in an email to the Tribunal dated October 7, 2010, less than two weeks prior to the hearing, the complainant noted that he did not want the hearing to be postponed.

82 The complainant's request to reopen the hearing and adduce additional evidence is therefore denied.

Analysis

Issue I: Did the respondent abuse its authority in the administration and marking of the verification and accuracy test?

83 The complainant has raised two concerns with respect to the verification and accuracy test. The first is his belief that Mr. Johnson failed to say "start" at the beginning of the test and the second is his position that the test was marked rigidly and inflexibly.

84 Regarding the first concern, the complainant argues that the respondent did not produce a copy of the script Mr. Johnson claims he used to instruct candidates at the beginning of the test and it failed to ask Mr. Johnson any questions on the topic at the hearing. He submits that based on the evidence, the Tribunal should rule that his allegation is substantiated and that this was an irregularity in the assessment process. He argues that whether or not he subsequently received a passing mark on the test is not relevant.

85 The respondent submits that following the complaint, Mr. Campbell asked Mr. Johnson if he said “start” or “begin” at the commencement of the test and Mr. Johnson replied that he had. According to the respondent, the complainant only asked Mr. Campbell if the document he showed him was the list of instructions used for the test. He had a chance to explore the question further with Mr. Campbell but chose not to.

86 The Tribunal finds that the evidence regarding whether Mr. Johnson said “start” at the beginning of the complainant’s test is inconclusive. Mr. Campbell and Mr. Johnson testified that there was a script that was used each time the test was administered. Mr. Campbell testified that a document shown to him by the complainant was not the script used at the tests. Mr. Johnson testified that this document appeared to be incomplete. He said the document presented by the complainant had seven points on it, and did not have any instruction to say “start” or “begin”, whereas the document used at the test had about 15 points on it, including an instruction to say “start” or ‘begin”. The origin of the document submitted by the complainant was not explained and the respondent did not submit into evidence the script that it contends was used at the tests.

87 The complainant testified that he started to write the test after he looked around and saw other candidates doing so. This indicates that even if Mr. Johnson did not say “start” or “begin”, and irrespective of whether the script mentioned that the invigilator should say “start”, some signal was given to the candidates that led them to commence writing the test. Based on the available evidence, the complainant has not persuaded the Tribunal, on a balance of probabilities, that he did not have an equal opportunity to commence the test with the other candidates or that he was at a disadvantage to other candidates in the writing of the verification and accuracy test.

88 The complainant’s second concern relates to the marking of his verification and accuracy test. The complainant argues that according to the evidence, there were errors in the verification and accuracy tests for other candidates, which should have been marked incorrect, but were not. He submits that either these candidates should have been marked down or he should have passed. He says that the respondent held him to a higher standard than the other candidates. He submits that he repeatedly asked that the situation be corrected but he was repeatedly denied.

89 The respondent submits that different people assessed the test results. After the complainant filed his complaints, it was decided to change the marking for all candidates. It was important to the respondent that all candidates be treated the same. As a result of these changes, the test was re-marked in favour of the complainant and he was screened back into the appointment process. The respondent contends that if there was an error in the administration of the test, it was corrected when the complainant was given the extra mark and screened back into the appointment process. Having corrected the error, it cannot be found that the respondent abused its authority and the evidence related to the error is not relevant.

90 The issue here concerns whether or not the complainant's answer should have been marked as incorrect because he circled more than the second letter "i" in the word "Shimareita." The instructions that accompanied the test required candidates to "[c]ircle only the letter or number which is incorrect." An examination of the complainant's test shows that he circled the incorrect letter "i" in Shimareita. However, his circle includes part of the letters "e" and "a", and most or all of the letter "t".

91 According to the testimony of Ms. Booty, she considered the complainant to have answered incorrectly by having circled both the letters "i" and "t". Mr. Johnson testified that, for the same reasons, he also considered the complainant's circle to be incorrect.

92 Mr. Campbell testified that when he met with the assessment board to review all of the tests in February 2009, they agreed that there were some tests in which it was not clear whether an answer was correct or incorrect. Therefore, they decided to change the standard, accepting as correct, circles that included the letter before and after the target letter. Using the revised standard, the complainant's disputed answer was correct and he passed the test.

93 The Tribunal notes that there is very little space between the letters and numbers in each address and, in the tests submitted by the complainant for himself and other candidates, there is ample evidence of circles touching or encircling adjacent letters or numbers, not only with respect to the word Shimareita, but with respect to other words as well.

94 When considering the complainant's response in relation to the instructions alone, the Tribunal finds that the assessment board could find that he circled the letters "i" and "t" and

that his answer is incorrect. However, in order to conduct a fair assessment, the assessment board must assess all tests in a consistent manner.

95 The Tribunal finds that the complainant's response on the word Shimareita is no more incorrect than the circle in the test of candidate II who was marked as having provided a correct response. Furthermore, candidate IX was marked as having provided a correct response even though IX's circle appears to include all of the letters "i" and "t". At the hearing, when assessment board member Johnson reviewed the three tests submitted by the complainant, he testified that all three responses should have been marked as incorrect. Ms. Booty conceded that candidate IX had, like the complainant, circled both the letters "i" and "t", but she had considered it correct at the time she assessed the tests.

96 This evidence satisfies the Tribunal that the tests were not marked in a consistent manner. This error had a significant impact on the complainant. It meant the difference between his being eliminated from the appointment process and proceeding to the interview stage in the process.

97 In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 70, the Tribunal identified five categories of abuse of authority applicable to discretionary administrative decisions. One of these concerns an improper result due to unreasonable administrative actions. In this case, the improper result is the elimination of the complainant from the appointment process due to inconsistent marking of the tests. In *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 0027, at para. 48, the Tribunal found that all candidates are entitled to be assessed on the basis of the same standards, applied uniformly to all candidates. This was not the case here as, despite a similar response, one of the complainant's answers was marked incorrect while the answers of other candidates' were marked correct on the same portion of the test.

98 After the initial complaints were filed, the respondent acknowledged that certain tests could have been marked "either way" and decided to broaden the standard for the test. This resulted in the complainant's answer being unquestionably correct. He was then given a passing mark on the test and invited to an interview. According to the respondent, if there was

an error in the marking of the test, then having corrected the error, it cannot be held to have abused its authority.

99 Following the initial filing of the complaints, the respondent sought to negotiate a settlement but the negotiations failed and the complaints were not withdrawn. In the absence of a settlement or withdrawal of the complaints, the Tribunal retains jurisdiction over the complaints despite the subsequent actions of the respondent (see *Morgenstern v. Commissioner of the Correctional Service of Canada*, 2010 PSST 0018, at paras. 39 and 40). Furthermore, although the respondent later reintegrated the complainant into the appointment process, this does not change the fact that the respondent improperly eliminated the complainant from the appointment process on the basis of a test that was not marked fairly and consistently.

100 Based on the evidence, the Tribunal finds that the respondent abused its authority by marking the verification and accuracy test in an inconsistent and unfair manner.

Issue 2: Did the respondent abuse its authority when it included persons from an earlier pool of qualified candidates in the pool resulting from this appointment process?

101 The essence of the complainant's argument is that it was improper to have included the eight persons from the old PM-02 pool in the new PM-02 pool. He contends that it has not been shown that the assessment of candidates in the two appointment processes was comparable, that there is no policy permitting the merger of pools and that there was a lack of transparency due to an absence of documentation related to the merger of the two pools.

102 The foundation of the complainant's argument is that the respondent, at the hearing, did not prove that including qualified candidates from the first pool in the second pool was proper or justified. First, as the Tribunal found in *Tibbs,* at para 55, it is the complainant who has the burden of proof with respect to a complaint of abuse of authority under the *PSEA*. Second, s. 77(1)(*a*) of the *PSEA* is concerned with the appointment of persons to positions under s. 30(2), not the inclusion of persons in pools of qualified candidates. Placing someone into a pool is not an appointment.

103 The Tribunal notes that according to the testimony of Ms. Booty, the eight persons in the former PM-02 appointment process were asked to apply to the second PM-02 appointment process. The respondent determined that on the basis of their assessment in the first process, they were qualified for appointment under the second process without the need for further assessment. The notifications of appointment or proposals of appointment for those persons from the first process who were subsequently appointed under the second process relate only to the second PM-02 appointment process – 2007-CSD-IA-BC-SC-846.

104 The Tribunal finds that the persons who were found qualified in the first PM-02 appointment process were not “transferred” from the old pool to the new pool and the two pools were not “merged”. The eight persons applied for and were found qualified in the second PM-02 appointment process, and were appointed to positions from that process.

105 Section 30(2)(*a)* of the *PSEA* provides that the Commission, or a delegated deputy head, may make an appointment where the person to be appointed meets the essential qualifications for a position, as established by the deputy head. As the Tribunal has noted in numerous cases, s. 36 of the *PSEA* provides the deputy head with broad discretion in the choice, administration and application of assessment methods (see for example *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011 at paras. 26-27, and *Visca v. Deputy Minister of Justice*, 2007 PSST 0024 at para. 51).

106 In this case, the respondent decided that the eight candidates did not have to write the verification and accuracy test because they had passed a similar test in the earlier PM-02 process. The complainant contests the comparability of the tests because the number of questions and the marking schemes were different.

107 In the circumstances of this case, the evidence is that the eight persons who were included in the new pool met the essential qualifications for the PM-02 position in the first process and the SMC describing the essential qualifications for the second process was identical. Although the verification and accuracy test taken by the eight persons in the initial PM-02 appointment process was different from the test used in the second process, there is no evidence that it did not effectively assess the essential qualification of verification and accuracy. Furthermore, unlike the verification and accuracy test used in the second PM-02

appointment process, there is no evidence of any errors or inconsistencies in the marking of the earlier test. Finally, there is no evidence that anyone in the second PM-02 appointment process was placed at a disadvantage because the eight persons did not take the test used in the second process.

108 The eight persons had been found qualified for appointment in the earlier process and it was not necessary to assess them any further, or to include them in the second process, in order to appoint them to a position. Although they were not assessed in the second process, the SMCs for the two processes were identical and the assessment methods were sufficiently similar. In the absence of evidence that the eight persons did not meet the essential qualifications for these positions, the Tribunal does not find any abuse of authority in the appointment of these persons from the second appointment process.

109 The complainant also alleged that a lack of documentation regarding the inclusion of the eight persons in the second pool constitutes abuse of authority. The complainant notes that no documentation was presented to show that the eight persons in the first PM-02 appointment process had been informed that their assessment results could be used in other processes; however, this is not surprising since no evidence was presented that, at the time of the first PM-02 process, the respondent anticipated conducting a second process. The evidence shows that the respondent undertook the second process when it determined that the first process did not produce enough candidates to fill all of the anticipated vacancies.

110 The complainant expressed dissatisfaction that Mr. Campbell and Ms. Booty could not identify, in their testimony, when or by what means the eight persons were informed that they would be included in the new pool. Their lack of recollection on this point does not support the complainant's allegation of abuse of authority. The inclusion of the eight persons in the second process is documented in the *Staffing Process Report* for the second PM-02 appointment process, signed by Mr. Campbell. In any case, the complainant's point is not significant since the eight had been found qualified for appointment and were eligible to be appointed to a PM 02 position based on the old process or the new process.

111 The complainant noted that Ms. Booty and Ms. Li could not identify a departmental or PSC policy that permitted the respondent to merge two pools of employees. The Tribunal finds

that this matter is not relevant since the evidence shows that the pools were not merged but that the eight persons applied to the second PM-02 process.

112 Therefore, the Tribunal finds that the concerns alleged by the complainant with regard to the inclusion of persons from the old pool in the new pool are not substantiated or do not constitute abuse of authority in this case.

Issue 3: Did the respondent abuse its authority when it appointed a person from this appointment process?

113 The complainant argues that the respondent did not properly explain how Ms. Humphreys moved from a list of candidates who had been eliminated from the appointment process to a list of candidates who were successful. He also submits that Ms. Humphreys' cover letter does not explain how she met the experience qualification for interpreting and applying legislation. He says that it was incumbent on candidates to demonstrate that they met this qualification in their application. He notes that the *Assessment Plan – Qualifications & Assessment Tools/Methods* document, submitted by consent of the parties, states that the résumé will be used to verify this experience factor. He argues that if Ms. Booty contacted Ms. Humphreys' supervisor, she acted contrary to the assessment plan and demonstrated preferential treatment for Ms. Humphreys.

114 The complainant referred to the Federal Court decision in *Jeethan v. the Attorney General of Canada,* 2006 FC 135 at paras. 15 and 16, to argue that an inability to explain the reasoning behind an assessment board's decision is a violation of the merit principle. The case in *Jeethan* related to a decision of the Public Service Commission Appeal Board (Appeal Board) under the former version of the *PSEA,* R.S.C. 1985, c. P-33. The Appeal Board found that the members of the selection board that had conducted a closed competition had been unable to explain, remember or reconstruct the rationale underlying the marks awarded to the appellant in that case. The Appeal Board was therefore not satisfied that the selection board had assessed the candidates on the basis of merit. The Federal Court upheld the Appeal Board's decision.

115 The complainant argues that the principles in that case are applicable to the appointment of Ms. Humphreys. Ms. Booty was unable to explain how Ms. Humphreys met the

experience qualifications. He said that she had no records or notes to substantiate her decisions.

116 The respondent submits that when questioned by the complainant, Ms. Booty was able to justify how she dealt with the screening of the experience qualifications. She testified that she knew that Ms. Humphreys' position involved the interpretation and application of legislation. She also testified that, if necessary, she would contact references to obtain additional information. While the complainant argues that the assessment board could only use résumés to determine whether a candidate met the experience qualifications, the respondent submits that the board was entitled to change its assessment method provided it had no improper intent in doing so. Finally, the respondent argues that this issue relates to Ms. Humphreys, not to the complainant, and it is not relevant to the disposition of these complaints.

117 What happens to other persons in an appointment process may be relevant to the disposition of a complaint. The scheme of the *PSEA* is to provide a framework for appointments to positions in the public service. This framework includes accountability for delegated managers and a commitment to the values set out in the Preamble to the *PSEA*. Section 77(1) of the *PSEA* provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of abuse of authority. For greater clarity, s. 10 of the Tribunal's *Regulations* states that a complaint may be made following an appointment or proposed appointment of another person. Thus, the appointment of another person is necessary to set in motion the complaint process, which serves to hold managers accountable. A complaint may identify problems, such as personal favouritism, that demonstrate that a process is so seriously flawed that one or more persons should not be appointed based on that process. (See, for example, *Rochon v. Deputy Minister of Fisheries and Oceans*, 2011 PSST 0007 at para. 60.)

118 In this case, the complainant has identified what he believes to be significant flaws in the appointment of Ms. Humphreys. If proven, and depending on the nature of the flaws, this could have a bearing on the validity of all decisions that were made in relation to candidates under the process. This can only be determined by examining the evidence presented in relation to the treatment of Ms. Humphreys.

119 According to the *Assessment Plan: Qualifications & Assessment Tools/Methods* document for the PM-02 appointment process at issue, experience in interpreting and applying legislation was to be assessed using candidate résumés. Ms. Booty testified that she reviewed the candidate résumés and if she did not see the experience qualifications the board was looking for, she would contact candidate references to determine if they met the required experience. The complainant argues that it was improper for the respondent to base its screening decision on anything other than the résumés.

120 Ms. Booty did not testify that she contacted one of Ms. Humphreys' references. She testified that based on her personal knowledge of the work performed by Ms. Humphreys, she was satisfied that the information in her résumé demonstrated that she interpreted and applied legislation. If Ms. Booty had contacted one of Ms. Humphreys' references to verify her interpretation of the experience qualifications, this might have constituted a departure from the original assessment plan, but it appears to have been done consistent with the intent of verifying that the assessment board had the necessary information to properly assess the experience qualifications. This practice was applied, where necessary, to all candidates, and there is no evidence to demonstrate that this would have constituted personal favouritism by Ms. Booty towards Ms. Humphreys. Although the complainant does not agree with Ms. Booty's assessment of Ms. Humphreys' experience qualifications, he did not have all of the information Ms. Booty possessed when she made her screening decision.

121 Ms. Humphreys' name is on the list attached to the email dated March 19, 2008, that was sent to candidates who were eliminated from the second PM-02 appointment process for failing to meet the abilities and skills qualifications tested in an examination. The *Pool Summary,* dated April 29, 2008, lists those persons who were successful in the appointment process and their ratings on the essential and asset qualifications. Ms. Humphreys' name is on this list as well. Ms. Humphreys' ratings in the *Pool Summary* indicate that she obtained a passing mark on all of the qualifications assessed.

122 Ms. Booty testified that she believed the appearance of Ms. Humphreys' name on the list of candidates eliminated from the process was a mistake. She said it was clear from the *Pool Summary* that Ms. Humphreys obtained a passing mark on all of the qualifications assessed. She was not sure how the mistake occurred or what specific action was taken to

correct it. The complainant, relying on the decision in *Jeethan*, contends that the respondent's inability to explain how Ms. Humphreys went from an eliminated candidate to a qualified candidate is an irregularity in the appointment process supporting his overall claim of abuse of authority.

123 As noted in *Tibbs* at para. 65, much more than mere errors or omissions are required to make a finding of abuse of authority. The appearance of Ms. Humphreys name on the list of candidates eliminated from the appointment process is indeed an irregularity. However, there is no evidence that it is anything other than a mistake, as explained by Ms. Booty. Unlike the situation in *Jeethan*, there is a *Pool Summary* in this case and, as Ms. Booty explained, it shows Ms. Humphreys passed each of the essential and asset qualifications for the PM-02 position. In the absence of any other evidence, the Tribunal is satisfied that the appearance of Ms. Humphreys' name on the list of eliminated candidates is a mistake and not evidence of serious wrongdoing that would constitute abuse of authority.

Issue 4: Did the respondent abuse its authority by demonstrating bias or bad faith towards the complainant during the appointment process?

124 The complainant initially made allegations that HRSDC had blacklisted him in this appointment process but subsequently withdrew them. However, he has maintained his allegations of bias and bad faith which he bases on the meeting held with Mr. Campbell on January 14, 2009, on the respondent's refusal to assess him using assessment methods other than an interview, on the length of time it took for the respondent to accept that he passed the verification and accuracy test, and on the respondent's refusal to participate in mediation. Furthermore, he suggests that the Tribunal should conclude that his testimony regarding the meeting of January 14, 2009, is more credible than that of the respondent given the conflicting testimony of Mr. Campbell, Ms. Booty and Mr. Johnson concerning that meeting.

a) The meeting of January 14, 2009

125 Normally, settlement negotiations are privileged and details of the negotiations cannot be introduced as evidence in a hearing before an administrative tribunal. Given the complainant's introduction of this evidence and the respondent's decision not to object thereto,

the Tribunal finds that both parties voluntarily waived any privilege relating to the evidence of their settlement discussions.

126 The principal facts related to the meeting are not in dispute. Mr. Campbell used the occasion of the meeting to make an offer to the complainant: if he withdrew his complaint and agreed not to see the test results from the original PM-02 appointment process, Mr. Campbell would give him an extra point on the verification and accuracy test and permit him to proceed to the interview stage in the appointment process. This led to a discussion, including counter-offers from the complainant, in which he agreed to withdraw this and other complaints provided the respondent would agree to alternative assessment methods as proposed by the complainant. The complainant's offers were based on his belief that he would not receive a fair interview due to blacklisting and that the treatment he was seeking was comparable to the treatment of the eight persons who were invited to participate in the second PM-02 appointment process. Mr. Campbell testified that he was not convinced that the interview process would be unfair or that the assessment methods proposed by the complainant were proper or warranted. He insisted that his proposal was the only one that he was prepared to implement. At the end of the meeting, there was no agreement, the complainant was not reintegrated into the appointment process, and he was given the requested test results from the former appointment process.

127 In alleging bad faith, the complainant is contending that Mr. Campbell attempted to coerce him into dropping his complaints and to deny him his legal right to see the tests that the Tribunal had ordered the respondent to disclose to him. As will be explained below, the offer proposed by the respondent would not have satisfied the merit-based requirements for appointment set out in s. 30 of the *PSEA*, but the evidence does not demonstrate that what occurred at the meeting on January 14, 2009, would substantiate a claim of bad faith as alleged by the complainant.

128 At the time of the meeting, the complaint process was underway and neither party was under any obligation to make or accept a settlement offer from the other party. Nevertheless, Mr. Campbell decided to use the occasion of the meeting to make a settlement offer to the complainant. The complainant did not find the offer to his satisfaction and made one or more counter-offers to Mr. Campbell. Mr. Campbell, in turn, was not agreeable to the counter-offers

and the negotiation failed, the complainant obtained the documents he came for and the complaint process went forward.

129 Section 30 of the *PSEA* provides that appointments are to be made on the basis of merit and that persons to be appointed must meet the essential qualifications for the work to be performed. As the Tribunal found in *Visca* at paras. 51-53, the respondent has broad flexibility in the selection and use of assessment methods. However, the *PSEA* does not contemplate that a person may be found to meet the essential qualifications for a position based on their willingness to withdraw a complaint or their agreement not to see certain information the respondent has been ordered to provide to them.

130 The intent of the *PSEA* is to provide a person with an opportunity to be considered for a position in the public service on the basis of a fair and transparent assessment related to the work to be performed. If the complainant had accepted the respondent's offer and proceeded to the next stage in the appointment process, he would have done so without having clearly established that he met the essential qualification measured by the verification and accuracy test. While the offer was to that extent improper, it does not demonstrate bad faith towards the complainant. To the contrary, it shows that the respondent was prepared to advance the complainant in the appointment process without his having demonstrated that he met the essential qualification assessed by the verification and accuracy test. If anything, such an arrangement would have provided the complainant with an unfair advantage in the appointment process.

131 Furthermore, the facts do not support the complainant's contention that he was coerced or denied his rights. Certainly, there would have been an issue if the respondent had not provided the documents the Tribunal had ordered it to produce. However, in the context of the negotiations, it is clear that the respondent was offering the complainant a choice. When he rejected the respondent's offer, he was provided with the requested documents and maintained his right to proceed with the complaint.

b) *Refusal to provide alternative assessment methods based on the alleged blacklisting*

132 The complainant proposed that he be assessed using alternative assessment methods based on his belief that he could not receive a fair and unbiased interview at HRSDC. The

complainant submits that this belief that he had been blacklisted by HRSDC provides a basis for a reasonable apprehension of bias on the part of the respondent and warrants special assessment methods.

133 The Tribunal addressed the issue of reasonable apprehension of bias in *Denny v. Deputy Minister of National Defence,* 2009 PSST 0029 at para. 125, where it referred to the test set out in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369:

> [T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…[T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

134 In this case, the complainant has not proven or even attempted to prove that he was blacklisted by HRSDC. He strongly believes that Mr. Campbell and Ms. Booty must have been aware of his blacklisting allegations at the time of the appointment process, and should have provided him with alternative assessment methods because he did not believe he would receive a fair interview. However, they both denied any direct knowledge of his allegations until he brought them to their attention following his initial elimination from the appointment process. Although the complainant suggests that his participation on a CBC news program must have been the "talk of the office," no evidence was presented that this was, in fact, the case. Even if it was, there is no evidence that the complainant's activities at CRA would cause Mr. Campbell or Ms. Booty to become biased against him and deny him employment opportunities in HRSDC. The Tribunal also notes that there is evidence that Mr. Turner, a person involved with the complainant in the whistle-blowing issue at CRA, who also participated on the CBC news program with the complainant, had successfully applied for and been appointed to one of the Service Canada Benefits Officer positions at HRSDC.

135 As the Tribunal held in *Denny* at para. 124, "[s]uspicions, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious." The Tribunal finds that the complainant has not demonstrated that he was treated unfavourably by HRSDC at the time of the appointment process due to his supposed bad reputation arising from his prior dealings with the CRA, or that the representatives of the respondent involved in this

appointment process were biased against him. A reasonably informed person, faced with only the complainant's unsubstantiated belief, would have difficulty accepting as fact that the complainant was blacklisted by HRSDC and that if this blacklisting existed, it would be a factor in any interview conducted in relation to this appointment process. The Tribunal finds that the respondent had no obligation to agree to the alternative assessment methods proposed by the complainant.

136 In *Trites v. the Deputy Minister of Public Works and Government Services Canada,* 2009 PSST 0016 at para. 42, the Tribunal stated: "Section 36 of the *PSEA* provides discretion to the PSC, and its delegates, to choose any assessment method it considers appropriate to determine whether a person meets the qualifications established for the work to be performed." In para. 45 of the same decision, the Tribunal found: "The complainant wanted to be assessed using a different tool, but he has not provided any evidence that the assessment method was flawed, unreasonable or discriminatory." The same reasoning applies to this case. The complainant has only raised an unsubstantiated belief of blacklisting to base his claim that he will not receive a fair interview from HRSDC. The respondent was entitled to use interviews as an assessment method in this case.

137 The Tribunal finds that the complainant has not substantiated his claim that he could not receive a fair interview and that he was entitled to alternative assessment methods.

c) *The length of time it took to reintegrate the complainant into the appointment process and the refusal of the respondent to participate in mediation*

138 The complainant alleges that the fact it took almost a year from the date he wrote the verification and accuracy test until he was reintegrated into the appointment process and the respondent's refusal to participate in mediation are further evidence of bad faith and bias on the part of the respondent.

139 The respondent submits that the complainant wrote the test on February 28, 2008, he was informed that he had failed the test on March 19, 2008, and an informal discussion was held with him on March 26, 2008. He was reintegrated into the appointment process on February 19, 2009. The respondent argues that there was a long and difficult exchange of

information process between the parties. This took time to complete and the complainant's file was not the only one on which HRSDC had to work during this period.

140 The PSC's *Informal Discussion Policy*, which applies to the respondent pursuant to s. 16 of the *PSEA*, provides for the use of informal discussions to correct errors in the assessment process, where appropriate. The complainant, in this case, participated in an informal discussion where he initially raised his concerns about the marking of the test. At that time, he did not have the tests of other candidates for comparison purposes. His position was based solely on his test results in relation to the test instructions. The informal discussion did not result in his reintegration into the appointment process because the respondent did not accept that his test was marked in error.

141 At the hearing, both Ms. Booty and Mr. Johnson testified that they believed the complainant's circle around the disputed letter "i" was incorrect and this remained the case until the standard was changed after the complainant's meeting with Mr. Campbell on January 14, 2009. Therefore, the assessment board had no basis to accept the complainant's answer until after that meeting. On February 19, 2009, a little over a month after his meeting with Mr. Campbell, the complainant was notified that he had passed the test and he was invited to an interview. There is no convincing evidence that the delay in correcting the inconsistencies in the marking of the tests was based on bad faith.

142 With respect to the question of mediation, the mediation services offered by the Tribunal require the voluntary participation of the parties. The Tribunal's role in mediation is limited to facilitation. If either party does not wish to participate in mediation, then mediation does not proceed. On April 20, 2009, the respondent informed the Tribunal and the complainant that it did not wish to proceed with the mediation scheduled for April 28 and 29, 2009. The respondent was entitled to refuse mediation and, therefore, it cannot be concluded that its decision to do so is evidence of bias or bad faith.

143 The Tribunal finds that the respondent did not demonstrate bad faith or bias by refusing to participate in mediation and by not reintegrating the complainant into the appointment process until February 19, 2009.

d) The inconsistencies in the testimony of Ms. Booty and Mr. Johnson regarding the January 14, 2009, meeting

144 Ms. Booty testified that when the complainant arrived to meet with Mr. Campbell on January 14, 2009, she understood the purpose of the meeting was to show the complainant the verification and accuracy tests completed by the eight candidates in the first PM-02 appointment process. She said that Mr. Campbell never mentioned anything to her about making an offer to the complainant either before or after the meeting. This contradicts the testimony of Mr. Johnson, who said he and Ms. Booty met with Mr. Campbell just prior to his meeting with the complainant and listened while Mr. Campbell discussed the meeting with human resources staff. Mr. Johnson said that following the meeting, Mr. Campbell recounted to him what had occurred. He believed Ms. Booty was also present when Mr. Campbell spoke.

145 According to the complainant, this inconsistency calls into question the credibility of Mr. Campbell's and Ms. Booty's testimony. He submits that as the sub-delegated manager and the head of the assessment board, they have the most to lose if the complaint is substantiated.

146 The Tribunal finds that Mr. Campbell's credibility is not in question on this issue. He was not questioned on whether he discussed the proposed offer, or the outcome of the meeting, with Ms. Booty or Mr. Johnson. The Tribunal agrees, however, that the testimony of Mr. Johnson contradicts that of Ms. Booty. But what is the significance of this contradiction?

147 Mr. Campbell testified that he made his offer to the complainant after consulting with human resources staff. No evidence was presented to show that it was appropriate or inappropriate for Mr. Campbell to share the offer with Ms. Booty and Mr. Johnson at the time it was made. A decision to share or not to share information on the offer does not appear to provide any advantage or disadvantage for Mr. Campbell, Ms. Booty or Mr. Johnson. Nor is there any apparent advantage or disadvantage for the complainant. To the extent that there is a contradiction between Mr. Johnson's and Ms. Booty's recollections of their conversations with Mr. Campbell, it is not significant enough to call into question the overall evidence that has been presented.

148 For all the above reasons, the Tribunal does not find that the respondent abused its authority by demonstrating bias or bad faith towards the complainant during the appointment process.

Decision

149 The Tribunal finds that the respondent did not assess the complainant's verification and accuracy test in a manner consistent with the marking of other tests in this appointment process. This was unfair and directly resulted in his elimination from the appointment process. This constitutes abuse of authority. The complaints are therefore substantiated.

Corrective Action

150 The relevant provisions concerning corrective action are found in ss. 81(1) and 82 of the PSEA, which read as follows:

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

151 In the event of a substantiated complaint, the complainant requested that the Tribunal order the following corrective action:

a) Revocation of all appointments under this appointment process;

b) A recommendation that the staffing authority of Mr. Campbell and Ms. Booty be removed;

c) A recommendation that the Mr. Campbell and Ms. Booty receive training on merit and the *PSEA*;

d) A recommendation that HRSDC cease the movement of persons from one pool to another until national standards are established and approved by the PSC; and

e) Any other recommendation that the Tribunal deems appropriate.

152 Based on the findings in this case, the Tribunal believes that corrective action should be limited to the individual circumstances of the complainant. While the respondent should have assessed the results of the verification and accuracy test in a more consistent and fair manner, the Tribunal finds that the impact of this carelessness is specific to the complainant and does not taint the process as a whole. The evidence does not support the contention that the persons who were appointed under this appointment process did not meet the essential qualifications for the positions to which they were appointed. The Tribunal does not find that the error in this case is sufficiently egregious or widespread to warrant the revocation of all appointments and the other actions proposed by the complainant. The complainant suffered from a serious error in the assessment of his verification and accuracy test and the corrective action should be limited to the correction of that error.

153 In these circumstances, the Tribunal could order the respondent to reassess the complainant's verification and accuracy test taking into consideration the manner in which it assessed the tests of other candidates in this appointment process. However, since the filing of the complaint, the respondent has reviewed the complainant's test and informed him that he has been given a passing mark. Therefore, the Tribunal believes that the appropriate corrective action is for the respondent to invite the complainant to an interview and proceed with the assessment process.

154 A significant amount of time has passed since the complainant was eliminated from the appointment process on March 19, 2008. The Tribunal does not know whether the pool established from this appointment process remains in effect or has expired. Therefore, pursuant to its authority under to ss. 81(1) of the *PSEA*, the Tribunal's order will provide that the complainant does not suffer a disadvantage solely due to the length of time it has taken to complete the complaint process and that he have an opportunity, subject to being found

qualified, to be considered for Service Canada Benefits Officer positions for a reasonable period of time.

Order

155 The Tribunal orders the respondent, within three weeks of the date of this decision, to offer the complainant an opportunity to proceed to the interview stage of the appointment process and to complete his assessment in accordance with the assessment plan established for the process. If the complainant is found qualified, he shall be eligible for appointment to Service Canada Benefits Officer positions at the PM-02 level for the duration of the pool established as a result of this process, or for a period of two years from the date of this decision, whichever date is later.

Kenneth J. Gibson
Member

Parties of Record

Tribunal Files	2008-0673/0674/2010-0630
Style of Cause	*Chris Hughes and the Deputy Minister of Human Resources and Skills Development Canada*
Hearing	October 19, 20 and 21, 2010 Victoria BC
Date of Reasons	June 14, 2011
APPEARANCES:	
For the complainant	Chris Hughes
For the respondent	Pierre Marc Champagne
For the Public Service Commission	John Unrau (written submissions)