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

File: 2009-0267
Issued at: Ottawa, February 7, 2011

EMMANUEL DIDIER
Complainant

AND

THE DEPUTY MINISTER OF JUSTICE
Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1)(*a*) of the *Public Service Employment Act*
Decision	The complaint is dismissed
Decision rendered by	John Mooney, Vice-Chairperson
Language of decision	French
Indexed	*Didier v. Deputy Minister of Justice*
Neutral Citation	2011 PSST 0005

Reasons for Decision

Introduction

1 Emmanuel Didier, the complainant, applied for the position of Senior Counsel at the LA-BB-02 group and level in the Department of Justice Canada. The Deputy Minister of Justice, the respondent, found that the complainant did not meet one of the essential qualifications for this position.

2 The complainant filed a complaint of abuse of authority against that decision. The complainant submits that the respondent abused its authority in concluding that he was not qualified for the position. According to the complainant, the respondent erred in failing to take relevant elements into consideration in the assessment of his skills, notably his Ph.D. thesis in law and his publications, and erred in deciding that his answer to Question 3 on the examination was incorrect.

3 The respondent denies having abused its authority in assessing the complainant's qualifications. According to the respondent, the complainant's answer to Question 3 on the examination was simply inadequate. The respondent submitted that it did not have to take the complainant's Ph.D. thesis in law or his past publications into account in assessing his knowledge of the federal legislative process.

4 The Public Service Commission (PSC) submits that the respondent did not fail to take relevant elements into consideration in assessing the complainant's skills. If the complainant believed that his Ph.D. thesis in law contained elements relevant to his answer to Question 3, the onus was on him to refer to it in his answer, which he did not do.

Background

5 On November 28, 2008, the respondent initiated an internal advertised appointment process to staff, on an acting basis until October 2010, a position of senior counsel LA-BB-02 in the Legislative Services Branch, Bijural Revision Services Unit (Taxation and Comparative Law), Department of Justice Canada.

6 The candidates had to write an examination consisting of three questions to assess their knowledge. The complainant failed Question 3 on the examination, which assessed “knowledge of the federal legislative process” [translation], an essential qualification for this position.

7 On April 14, 2009, the respondent posted a *Notification of Appointment or Proposal of Appointment*, announcing that Marie-Claude Gaudreault would be appointed to the above-stated position.

8 On April 28, 2009, the complainant made a complaint of abuse of authority to the Public Service Staffing Tribunal (the Tribunal) pursuant to s. 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA), which provides that a person in the area of recourse may file a complaint with the Tribunal that he or she was not appointed or proposed for appointment by reason of an abuse of authority by the PSC or the deputy head in the exercise of the authority conferred by s. 30(2) of the PSEA on the assessment of candidates’ merit.

9 The parties agreed to deal with this complaint by means of written submissions. Section 99(3) of the PSEA provides that the Tribunal may decide a complaint without holding an oral hearing.

Issues

10 The Tribunal must determine the following issues:

(i) Did the respondent abuse its authority in choosing to assess the candidates’ knowledge of the federal legislative process solely by means of a written examination?

(ii) Did the respondent abuse its authority in concluding that the complainant had failed Question 3 of the written examination?

Analysis

11 The expression “abuse of authority” is not defined in the PSEA; however, s. 2(4) provides that it includes “bad faith and personal favouritism”. In *Tibbs v. Deputy Minister*

of National Defence, 2006 PSST 0008 (*Tibbs*), the Tribunal found that it is clear from the PSEA that abuse of authority is more than mere errors and omissions.

12 The Tribunal has specified in many decisions that the onus is on the complainant to prove, on a balance of probabilities, that there was abuse of authority in an appointment process (see, for example, *Tibbs* at para. 49).

Question I: Did the respondent abuse its authority in choosing to assess the candidates' knowledge of the federal legislative process solely by means of a written examination?

13 The deputy head had set "knowledge of the federal legislative process" [translation] as a merit criterion. This qualification was assessed by Question 3 of the written examination, which reads as follows:

> Explain in no more than one thousand (1000) words the role of comparative law specialists in the federal legislative process and the intervention methods used to maximize the consideration of civil law and common law in the drafting of the government's bills and proposed regulations.
>
> [translation]

14 France Allard, General Counsel, Manager and Comparative Law Specialist, Justice Canada, marked the complainant's examination. She determined that the complainant failed the question.

15 The complainant submits that the respondent ruled out relevant elements in assessing this qualification. According to him, the respondent should have taken his specialized knowledge in jurilinguistics into account, considering that he has published a number of works in this field, including two works on bilingual and bijural legislative drafting:

- A Ph.D. thesis in law, *Droit des langues et langues du droit, au Canada. Étude comparée du droit linguistique et de la jurilinguistique des Provinces et de l'État fédéral en Common Law et en droit civil*, Paris, Université de Paris 1 – Sorbonne, 1984;
- A book entitled *Langues et langages du droit*, Montréal, Wilson et Lafleur, 1990.

In other words, the complainant submits that the respondent should have, in assessing his knowledge of the federal legislative process, taken into consideration the above written works in addition to his answer to Question 3 on the examination.

16 The Tribunal cannot agree with this argument. Section 36 of the PSEA gives the delegated deputy head extensive discretion in choosing candidate assessment methods:

> 36. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(*a*) and subparagraph 30(2)(*b*)(i).
>
> [emphasis added]

17 It was up to the respondent to decide how it would assess the candidates' knowledge of the federal legislative process. In this case, the respondent decided that this qualification would be assessed only on the basis of the written response to Question 3 on the examination, not the candidates' studies or publications. This choice was fully within the respondent's discretion under s. 36.

18 The candidates' degrees were taken into consideration in this appointment process, but at another stage of the process, specifically, at the screening stage. As indicated in the Statement of Merit Criteria, to be eligible for the appointment process, candidates had to have certain law degrees (there were various possible combinations of civil law and common law bachelor degrees). The complainant fulfilled that academic requirement and was asked to complete the other stages of the process in order to be assessed on the basis of the other merit criteria.

19 In *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 42, the Tribunal recognized the flexibility that s. 36 confers on managers in their assessment of qualifications and selection of assessment methods:

> Broad discretion is given to managers under subsection 30(2) of the *PSEA* to establish the necessary qualifications for the position they want to staff and to choose the person who not only meets the essential qualifications, but is the right fit. Similar discretion is provided under section 36 of the *PSEA* for those with staffing authority to choose and use assessment methods to determine if the person meets the established qualifications. [. . .]

20 The respondent could not supplement the complainant's answer by seeking elements of the answer in the complainant's degrees and past writings because the respondent had decided that this knowledge would be assessed solely on the basis of the candidates' answers to Question 3 on the examination. (Moreover, the complainant did not mention his writings in his answer to this question on the examination.)

21 As the PSC emphasized in its written submissions, it would have been unfair to the other candidates to draw elements of the complainant's answer to Question 3 on the examination from sources that were not part of the assessment methods chosen to assess this knowledge.

22 The Tribunal issued a similar decision in *Jacobsen v. Deputy Minister of Environment Canada*, 2009 PSST 0008. In that ruling, the Tribunal found that the assessment board's decision to use an examination to assess the candidates' knowledge fell within its discretion under s. 36 of the PSEA, and that this provision did not impose a requirement on the assessment board to take the candidates' education into account when assessing the skills required for a position.

23 The complainant argues that in giving no consideration to his degrees, particularly his Ph.D. in law, in assessing his skills, the respondent and the PSC are attributing a content or value to his degrees and, in so doing, are infringing s. 93 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, U.K., which provides that exclusive jurisdiction over education resides with the provinces. The Tribunal is of the opinion that the complainant's argument does not stand up and that he has not shown in any way that the respondent abused its authority. It was up to the respondent to decide how it would assess the candidates' knowledge of the federal legislative process, and it decided to assess it solely on the basis of a written examination question, not the candidates' studies and past publications. Neither the respondent nor the PSC attributed any content whatsoever to the complainant's degrees, as he alleges. No one interfered in matters of provincial jurisdiction.

24 The complainant submits that the respondent should have taken into consideration his current functions in the assessment of his knowledge of the federal

legislative process. According to him, the nature of his functions shows that he has this knowledge, since he is head of the comparative law section in the Department of National Defence's legislative drafting branch. According to him, he was the first to draw up the plan for setting out civil law and common law notions in bijural and bilingual federal statutes. He states that the legal and administrative descriptions of this principle are elements of the answer to Question 3 on the examination, notably the Cabinet's legislative drafting policy.

25 The Tribunal finds that it was up to the assessment board to choose the method it would use to assess the candidates' knowledge of the federal legislative process. The assessment board chose to assess the candidates' knowledge of the federal legislative process by means of a written examination, not their previous professional experience. This choice falls fully within the respondent's discretion over the choice of assessment methods as set out at s. 36 of the PSEA. The respondent therefore did not have to take the complainant's occupational background into consideration when assessing this qualification. This choice of assessment method is therefore not an abuse of authority.

26 The complainant argued that at a meeting held during the exchange of information (that is, after the complainant had made his complaint), the respondent acknowledged that it ". . . knew that the complainant had published works and documents and that the complainant knew the subject matter of the third question" [translation]. In the respondent's written arguments, which include a joint statement of facts from the respondent and the complainant, Ms. Allard's remarks are set out in a more qualified manner. The joint statement notes that during the exchange of information, Ms. Allard told the complainant ". . . that she acknowledged that from his past publications, the complainant seemed to know the mechanisms of the federal legislative process, but that nothing in the complainant's answer showed that this was the case . . ." [translation].

27 The Tribunal is of the opinion that the fact that Ms. Allard thought that the complainant "seemed" [translation] to have knowledge of the federal legislative process from his past publications means little. As explained above, the respondent had chosen to assess this qualification by means of Question 3 on the examination, not the

candidates' degrees and publications. The complainant therefore had to show in his answer to Question 3 that he had knowledge of the federal legislative process, and he failed to do so.

28 The Tribunal finds that the assessment method chosen by the respondent is reasonable and that the result is fair (see *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011, at para. 77). All candidates had to answer the same question. This question was used to assess knowledge of the federal legislative process because it asked the candidates to explain how comparative law specialists can maximize the consideration given to civil law and common law in drafting bills and proposed regulations for the federal government. To provide an adequate answer to this question, it was necessary to refer to the federal legislative process.

29 The complainant submits that his Ph.D. degree in law and the intellectual property in his doctoral thesis and his other publications constitute incorporeal movable property within the meaning of art. 907 of the *Civil Code of Québec*. He submits that failing to take this intellectual property into consideration in his assessment is conversion under common law. Conversion is a civil fault that consists of appropriating another's property for one's own use (see *Mozley & Whiteley's Law Dictionary*, E.R. Hardy Ivamy, Tenth Edition, Butterworths, London, Sidney, Toronto, 1988). The Tribunal does not see how the complainant can allege that the respondent is appropriating the complainant's incorporeal rights. The complainant's degrees and writings remain his own, and no one has appropriated them in any manner. All of that has nothing to do with the fact that the complainant failed to provide an adequate answer to Question 3.

30 The complainant also submits that the respondent infringed on his right to equality guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms* (the Charter) by failing to take into account the ". . . degrees, publications, course contents, subject matters studied, works, thesis or others to assess the candidates' knowledge . . ." [translation]. The Tribunal has already dealt with the issue of the choice of assessment methods. Section 36 of the PSEA expressly gives the assessment board considerable discretion in choosing the assessment methods. The Tribunal does not

see how the respondent's choice of assessment methods can infringe the Charter-protected right to equality because all of the candidates had to fulfill the same requirements. If it were necessary, as the complainant wants, for an assessment board to review all of the candidates' writings and course contents, in addition to the other documents listed by the complainant, the assessment process would become an unmanageable administrative colossus.

31 The Tribunal therefore finds that the complainant has failed to show that the respondent abused its authority in choosing to use a written examination to assess the candidates' knowledge of the federal legislative process.

Question II: Did the respondent abuse its authority in concluding that the complainant had failed Question 3 of the written examination?

32 The complainant submits that Question 3 of the written examination is poorly worded and that his answer was correct.

33 The Tribunal has ruled in numerous decisions that its role is not to reassess candidates, but rather to determine whether there was an abuse of authority in the appointment process (see, for example, *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 0020).

34 The Tribunal finds that if the complainant had been of the opinion that the terms used were not clear, he should have asked for clarification. The Tribunal also finds that the question is sufficiently clear. It is clear that candidates are asked to describe the means that comparative law specialists can use to intervene in the legislative process so as to maximize the consideration given to civil law and common law.

35 According to the complainant, the respondent used the term "comparative law specialists" [translation] incorrectly, since all lawyers are "comparative law specialists" [translation] because they have to characterize legal circumstances in order to apply the relevant rules of law to them. For example, an Ontario lawyer drafting a will for a client residing in Montréal must identify the connecting factors to two territorial jurisdictions. Such a lawyer must therefore compare two legal systems. The Tribunal does not see

how this statement is relevant. Although many lawyers do need to apply two legal systems, it is clear that the question addressed the role of “comparative law specialists” [translation] who work within the federal legislative process, not the role of all “comparative law specialists” [translation] in Canada.

36 The complainant submits that his answer to this question is valid. Ms. Allard, who marked the examination, reached the opposite conclusion. She determined that the complainant had failed the question. She noted on the complainant’s examination paper that he “does not answer the question” [translation], “gives an editorial on the place of comparative law specialists in Canada” [translation] and “does not demonstrate knowledge of the legislative process in any way” [translation]. According to the respondent, the complainant simply did not answer the question.

37 The Tribunal reviewed the complainant’s answer and is of the opinion that the respondent’s conclusion is not an abuse of authority. Indeed, the complainant did not answer the question asked. He did not describe the role of comparative law specialists in the federal legislative process and the means of intervention that can be used to maximize the consideration of civil law and common law. The complainant’s answer was largely a criticism of the question asked, the Department of Justice Canada and the federal government. He criticized the wording of the question, but did not answer it. According to the complainant, the expressions used are “extremely vague and general” [translation]. Among other things, he criticized the use of the term “comparative law specialists” [translation]. The complainant also criticized the Department of Justice because it does not require law faculties to have bijural programs. He also criticized the fact that Justice Canada hires legal practitioners who are not bilingual and bijural. The complainant lauded bijuralism and criticized the federal government for its lack of initiative in this field. He also wrote that the question asked is “. . . unfortunately a manifestation of this slackness and dearth of curiosity, vision and rigour that still characterize many aspects of the federal administration . . .” [translation]. The Tribunal finds that the respondent was correct in concluding that the complainant’s answer did not deal with the fundamental question of the role of comparative law specialists in the federal legislative process and the means of intervention to maximize the consideration given to civil law and common law.

38 The complainant also submits that the elements of the answer sought by the respondent, such as the reference to the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.), and the Cabinet directives on legislative drafting, are referred to in various passages of the following of the complainant's works on federal jurilinguistics:

- Didier, E. *Langues et langages du droit*, Montréal, Wilson et Lafleur, para. 573; p. 460 et seq.;
- Bastarache, M., Didier, E., *et al.*, *Language Rights in Canada, Les droits linguistiques au Canada*, 1st and 2nd ed., Montréal, Wilson et Lafleur, 1987 and 2004, in particular chapter 6 of the 2nd edition.

39 The Tribunal has already disposed of this issue. The respondent was under no obligation to look through the complainant's previous writings for elements of the answer.

40 The complainant argues that in refusing to accept his answer, the respondent violated his freedom of expression guaranteed by s. 2(*b*) of the Charter. According to him, this refusal is a form of censure, since it shows that candidates cannot go against the dominant administrative ideology in the field of bijuralism. The Tribunal finds that this allegation is without merit. In no way did the respondent criticize the complainant's views on bijuralism and its place in the federal government. The respondent concluded that the complainant failed Question 3 because he simply did not answer the question asked.

41 The complainant also submits that Ms. Allard did not have the required competency to mark his answer to Question 3 on the examination. He points out, among other things, that although she is a member of the Barreau du Québec, she is not a member of a law society of a Canadian province or territory governed by common law. He also notes that he is better qualified than she to answer questions on bijuralism and comparative law because in addition to being a member of the Barreau du Québec, he is, among other things, a member of the Ontario Bar Association and was formerly a member of the Law Society of New Brunswick.

42 The Tribunal finds that this allegation is without merit. Membership in a law society is not the only way to acquire knowledge in an area of law. As the respondent

emphasizes, Ms. Allard, the manager of the position to be staffed, is general counsel, manager and comparative law specialist in the Bijural Revision Services Unit (Taxation and Comparative Law). In particular, she published a study on behalf of the Department of Justice Canada entitled “The Supreme Court of Canada and its Impact on the Expression of Bijuralism”. She is therefore highly knowledgeable in this subject field. In addition, the complainant has not shown that she made mistakes in marking his answer to Question 3 of the examination.

43 The Tribunal finds that the complainant has failed to demonstrate that the respondent abused its authority in concluding that the complainant’s answer to Question 3 on the examination was inadequate.

Decision

44 For all of these reasons, the complaint is dismissed.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2009-0267
Style of Cause	*Emmanuel Didier and the Deputy Minister of Justice*
Hearing	Paper hearing
Date of Reasons	February 7, 2011
REPRESENTATIVES:	
For the complainant	Emmanuel Didier
For the respondent	Martin Desmeules
For the Public Service Commission	Lili Ste-Marie