



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2008-0026, 0032, 0034 and 0074
Issued at: Ottawa, September 9, 2011

**ROBERT BROOKFIELD, GARRY MOORE, ALEXANDER MCNIVEN AND
TERRY WOOD**

Complainants

AND

THE DEPUTY MINISTER OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

Respondent

AND

OTHER PARTIES

Matter	Complaints of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	R. Brookfield complaint is substantiated. G. Moore, A. McNiven and T. Wood complaints are dismissed
Decision rendered by	Merri Beattie, Member
Language of Decision	English
Indexed	<i>Brookfield v. Deputy Minister of Foreign Affairs and International Trade</i>
Neutral Citation	2011 PSST 0025

Reasons for Decision

Introduction

1 In November 2006, the Department of Foreign Affairs and International Trade (DFAIT) initiated an internal advertised appointment process to staff Foreign Service Officer positions at the FS-04 group and level (FS-04s). The four complainants, Robert Brookfield, Garry Moore, Alexander McNiven and Terry Wood, allege that the respondent designed the appointment process to select managers although FS-04s are specialist positions and many have no requirement to manage.

2 Mr. Brookfield was eliminated from the appointment process during the initial screening of applications based on the essential experience qualifications. He alleges that the screening criteria improperly excluded candidates with specialist experience. He also alleges that the respondent abused its authority in assessing his experience.

3 Mr. Moore, Mr. McNiven and Mr. Wood met the screening criteria, but were unsuccessful in the written test used to assess the remaining essential qualifications. They allege that the written test was flawed because it failed to assess knowledge, the instructions to candidates were misleading and the marking scheme was not provided. They also allege that the test was compromised because it was administered over an extended period of time.

4 The respondent, the Deputy Minister of DFAIT, denies these allegations and maintains that there was no abuse of authority in this appointment process. The respondent defends its choice of essential qualifications and asserts that the screening criteria were assessed in a consistent manner by experienced senior officials. It also asserts that the written test was professionally designed to effectively assess the essential qualifications, was endorsed by the Public Service Commission (PSC), and contained clear instructions for candidates. The respondent further states that information about this appointment process was made widely available to prospective candidates.

5 The PSC provided submissions regarding the development of essential qualifications in accordance with ss. 30(2) and 31(2) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*). The PSC also provided submissions regarding its *Assessment Policy* and fairness in appointment processes.

Background

6 In July 2005, DFAIT implemented a classification conversion of the Foreign Service (FS) group, converting from two to four levels. No existing positions were converted to the FS-04 level; all FS-04s are new positions. FS employees and positions in DFAIT are managed as a pool of resources. There are two pools of positions at each FS level; one pool of pay positions to which employees are appointed and one pool of duty positions to which employees are assigned, not appointed, on a rotational basis.

7 In December 2006, an appointment process to staff the new FS-04s was advertised on *Publiservice*. Essential education and experience qualifications were assessed based on candidates' applications. A written test was used to assess eight essential competencies.

8 When *Notices of Appointment or Proposal for Appointment* were issued in January 2008, multiple complaints of abuse of authority were filed with the Public Service Staffing Tribunal (the Tribunal) under s. 77 of the *PSEA*. The parties exchanged information relevant to the complaints and the complainants filed their allegations, in accordance with the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *Tribunal's Regulations*), and many complaints were withdrawn. Ultimately, the four remaining complaints were consolidated in accordance with s. 8 of the *Tribunal's Regulations* for a hearing before the Tribunal. Following the oral hearing, the parties submitted written arguments to the Tribunal.

9 Mr. Brookfield represented himself and Mr. Moore represented Mr. McNiven, Mr. Wood and himself before the Tribunal.

Issues

10 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in establishing the essential qualifications?
- (ii) Did the respondent abuse its authority in assessing Mr. Brookfield's experience?
- (iii) Was the written test a reliable assessment tool?

Analysis

Issue I: Did the respondent abuse its authority in establishing the essential qualifications?

Essential Experience Qualifications – Screening Criteria

11 The following essential experience qualifications were used to screen applicants to this process:

One of the following two:

- 1. Experience in complex program delivery related to one specialization from the list (see below).
- OR
- 2. Experience in policy development and implementation of a range of issues relevant to one specialization from the list (see below).

Minimum 4 of the following 5:

- 3. Experience in leading multi-disciplinary project teams.
- 4. Experience in consultative processes with various stakeholders.
- 5. Experience in managing human and financial resources.
- 6. Experience in representing and negotiating on behalf of Canada on complex international issues.
- 7. Experience in progressively responsible and varied positions, at a headquarters environment, or regional office or in posting(s) abroad.

12 Nineteen fields of specialization were listed.

13 Mr. Brookfield argues that candidates could not meet the established screening requirement unless they had management experience. He submits that, although only

four of the last five qualifications had to be met, qualifications 3, 5 and 7 are management criteria.

14 Experience qualification 5 clearly requires direct management experience; however, the evidence demonstrates that qualifications 3 and 7 do not.

15 James Lambert, Director General of the Latin America and Caribbean Bureau, was called to testify by the respondent. Mr. Lambert participated in developing the Statement of Merit Criteria (SMC) for this process. He stated that the committee that established the SMC knew that not all potential candidates would have the traditional, hierarchical management experience required by experience qualification 5. Nevertheless, experience working with others in a leadership role is required to be effective in senior FS positions. Mr. Lambert stated that candidates could meet this requirement through either traditional management experience or experience in team leadership as required under qualification 3, since only four of the last five experience qualifications were required.

16 Lucie Edwards was also called to testify by the respondent. At the time of this process, Ms. Edwards was Senior Assistant Deputy Minister at DFAIT and she was a member of the board that screened applications based on the essential experience qualifications. She confirmed that experience qualification 3 required leadership, not traditional management.

17 Ms. Edwards explained that experience qualification 7 could be demonstrated by advancement to higher level positions with management responsibilities, but could also be demonstrated through more depth in work assignments or more respect and recognition in a community of expertise.

18 The evidence of Mr. Lambert and Ms. Edwards was not contradicted and, therefore, the Tribunal finds that only experience qualification 5 demands management experience; qualifications 3 and 7 do not. Accordingly, the Tribunal finds that candidates with no direct management experience could meet the screening criteria established for this process.

Essential Qualifications - Competencies

19 In addition to the screening criteria, the following eight competencies were established as essential qualifications for assessment in this process: Action Management; Conceptual Thinking; Developing Others; Effective Interactive Communication; Interpersonal Relations and Respect; Judgement; Networking and Alliance Building; and, People/Team Leadership.

20 Mr. Moore argues that five of the eight competencies are management criteria although the FS-04s are specialists not managers. The evidence, however, does not support this argument.

21 The best evidence before the Tribunal on this matter is the Foreign Service Ability Tests Technical Manual, which contains definitions of the competencies. Based on those definitions, only Action Management includes elements of employee management, namely mobilizing staff, and managing employee behavior and performance.

PSEA Requirements

22 Section 30(2) of the *PSEA* sets out the authority of the deputy head to establish qualifications. The deputy head's discretion in exercising this authority is limited by s. 31 of the *PSEA*, which stipulates that the essential qualifications established by the deputy head must meet or exceed the qualification standards established by the Treasury Board as the employer. The two sections should be read together.

30. (2) An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head (...)

31. (1) The employer may establish qualification standards, in relation to education, knowledge, experience, occupational certification, language or other qualifications, that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.

(2) The qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i) must meet or exceed any applicable qualification standards established by the employer under subsection (1).

23 The complainants submit that the respondent established essential qualifications that were designed to select managers although the purpose of this process was to staff specialist positions, not managers. The Tribunal finds that the essential qualifications are linked to the FS-04 work, as required under s. 30(2) of the *PSEA*.

24 According to the *Job Opportunity Advertisement (JOA)* and several other documents provided at the hearing, the purpose of this advertised appointment process was to establish a pool of people who were qualified for appointment to FS-04s in the Commercial/Economic and Political/Economic streams. The evidence establishes that appointments are made to the pool of pay positions. Selection for assignment to a specific duty position is done through a separate process.

25 The FS-04 pay positions are covered by a generic work description, which the complainants submitted into evidence. It lists five key activities, two of them are:

Manages a work unit; (and,)

Leads and coordinates several consultative multi-disciplinary work teams.

26 The complainants also submitted a document dated July 2005, which consists of questions and answers about the FS conversion and restructuring. It is clear from that document that all FS-04s are senior experts or advisors; in other words, specialists. However, the document also states that most of the FS-04s have a number of staff reporting to them.

27 The respondent communicates with DFAIT employees through Administrative Notices that are issued electronically. Several Administrative Notices were submitted to the Tribunal on consent of the parties. One, dated December 18, 2006, refers to making a career choice between FS specialization and an Executive (EX) managerial role. The complainants essentially argue that the two roles are mutually exclusive. However, the evidence demonstrates that FS-04s are specialists and that, while some do not, most of them have management responsibilities.

28 Mr. Moore also submits that knowledge is essential for FS-04 work and Mr. Lambert confirmed in his testimony that it is, yet knowledge is not among the essential qualifications established for this process.

29 The FS-04s are new and this appointment process was held to fill generic pay pool positions. Candidates in this process had to meet significant experience qualifications. The experience these candidates had to possess would have provided them with considerable opportunities to acquire knowledge relevant to the generic FS - 04 work to be performed. Moreover, there is no requirement to assess knowledge qualifications during an appointment process. What s. 30(1) of the *PSEA* requires is that the persons appointed meet the qualifications that are, according to the deputy head, essential for the work to be performed. The evidence presented by Mr. Lambert and Ms. Edwards, together with the documentary evidence, particularly the generic FS - 04 work description and the Foreign Service Ability Tests Technical Manual, demonstrates that the respondent complied with its obligations under s. 30(1).

30 The complainants argue that the essential qualifications do not meet the qualification standard, but they support this argument with references to a standard established by the respondent and references to the classification standard.

31 According to s. 31 of the *PSEA*, it is the employer, not the respondent that establishes qualification standards. Pursuant to s. 2 of the *PSEA*, the employer, in relation to DFAIT, is the Treasury Board. The Tribunal notes that the Treasury Board has established two separate types of standard, each with a distinct purpose. Both sets of standards are published on the Treasury Board's Internet site, along with a series of questions and answers about the standards. According to the Treasury Board, "qualification standards identify the minimum requirements (normally in terms of education or occupational certification) needed to competently perform the work. Deputy Heads and managers must respect these standards when appointing or deploying an employee to a position in the core public administration." On the other hand, "classification standards describe the relative value of work characteristics within an occupational group and determine the levels of jobs in the hierarchy of that group."

32 The Tribunal has dealt with the matter of the Treasury Board's two types of standards. In *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044, the Tribunal established that, in accordance with the *PSEA*, it can consider a complaint that a deputy head established essential qualifications that do not meet or exceed the applicable qualification standard. In *Kilbray and Wersch v. Attorney General of Canada and the Public Service Commission of Canada*, 2009 FC 390, the Federal Court confirmed the approach taken by the Tribunal in *Rinn*.

33 None of the parties produced the Treasury Board's qualification standard for the FS group as evidence in this case. In their testimony, Mr. Brookfield and Mr. Moore both acknowledged that they do not know what qualification standards are. In the Tribunal's view, the respondent should have produced the qualification standard. Nevertheless, the Tribunal notes that the FS qualification standard, which is a public document, sets only a minimum education requirement for positions above the FS-01 level. This requirement was met. The relevant standard sets no requirement to assess knowledge for FS-04 positions.

34 The Tribunal is satisfied that the respondent properly exercised its discretion under s. 30(2) of the *PSEA* in establishing the essential qualifications for this appointment process, including the requirement under s. 31(2).

35 Mr. Brookfield also argues that the respondent should have designed the appointment process to ensure that legal specialists would qualify. However, while the source of potential candidates is considered when the area of selection is established, under the *PSEA*, it is not the purpose of an advertised appointment process to ensure that any specific group or individual within the area of selection is successful. This process was open to applicants with specialization in international law, as well as applicants from 18 other fields of specialization. No one specialization was, or should have been, provided any assurance of success in this appointment process. The purpose of an advertised appointment process is to identify persons who are qualified to perform the work of the position or positions to be staffed.

Issue II: Did the respondent abuse its authority in assessing Mr. Brookfield's experience?

36 Mr. Brookfield submits that the respondent abused its authority in several ways in relation to the assessment of his experience. As explained below, the Tribunal finds that the complainant has not proven abuse of authority with respect to the respondent's application instructions or the competency of the screening board. Similarly, the Tribunal is not satisfied that the respondent abused its authority by revisiting the applications of other candidates who had filed complaints, and subsequently withdrew them.

37 The Tribunal does find that the respondent abused its authority when it failed to assess all of the material Mr. Brookfield provided in his application to this process.

38 The evidence demonstrates that, prior to and upon issuing the initial *JOA*, the respondent informed potential candidates that they would have to clearly demonstrate that they met the screening criteria. The original closing date for applications was December 18, 2006. On December 14, 2006, the respondent issued another *JOA*, amending the closing date to December 22, 2006. On December 18, 2006, the respondent issued an Administrative Notice which, for the first time, informed potential candidates that supporting examples were required to clearly demonstrate their qualifications.

39 Mr. Brookfield had submitted his application on December 6, 2006, and he argues that the respondent should have told him that he could or even should reapply. The Tribunal finds that the respondent was under no such obligation.

40 The Tribunal recognizes that, under the previous FS structure, the process for promotion was significantly different and many FS employees had not participated in this type of appointment process. Nevertheless, candidates have a responsibility to inform themselves about appointment process requirements and the respondent issued information about the detail that was required four days before the final closing date. The Tribunal notes that Mr. Brookfield did not provide evidence that circumstances prevented him from supplementing his application. Also, since he was assessed as

having met two experience qualifications, Mr. Brookfield must have provided sufficient detail regarding those qualifications.

41 The Tribunal has established that those who assess candidates should be familiar with the work of the position to be staffed. See, for example, *Sampert v. Deputy Minister of National Defence*, 2008 PSST 0009. Members of the assessment board are not required to know the work of candidates. Candidates are responsible for presenting their work experience so that the assessors can understand how it relates to the qualifications being assessed. In this case there is no evidence that the board was not competent to assess candidates' applications.

42 Several complaints from candidates, who, like Mr. Brookfield, were initially screened out of this process, were subsequently withdrawn. Mr. Brookfield submits that the respondent relied on new information those candidates provided in their allegations to redo their assessments. However, there is no evidence that the respondent accepted any new information from those candidates. In their allegations, those candidates referred to information they had submitted in their original applications.

43 With respect to the respondent's assessment of Mr. Brookfield's application, the evidence clearly establishes that Mr. Brookfield attached a separate document containing his litigation experience to his application to this process, and that it was not considered when his application was assessed. Ms. Edwards testified that when she assessed Mr. Brookfield's application she did not have the litigation experience document he had provided.

44 When Mr. Brookfield attempted to question Ms. Edwards about the contents of the document, the respondent strongly objected to any reassessment before or by the Tribunal. The Tribunal ruled that it would not redo Mr. Brookfield's assessment, but it would examine how the assessment had been conducted.

45 In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, the Tribunal established that it is an abuse of authority when a delegate acts based on inadequate material. In this process, the respondent based its assessment of the essential

experience qualifications on the applications they received. The evidence demonstrates that the respondent failed to consider the entire content of Mr. Brookfield's application.

46 The Tribunal finds that the respondent abused its authority when it assessed Mr. Brookfield's experience without considering all the information he had provided.

Issue III: Was the written test a reliable assessment tool?

47 Prior to the hearing, the Tribunal granted the respondent's request to protect the written test and the related technical manual. In their response to that request, the complainants agreed that the test material should be confidential, but argued that they needed to see it to prepare for cross-examination of the respondent's witnesses. The Tribunal ordered that Mr. Moore be allowed to view the material under conditions established by the Federal Court in *Canada (Attorney General) v. Gill*, 2001 F.C.J. No. 1171 (QL), and followed by the Tribunal in *Aucoin v. President of the Canada Border Services Agency*, 2006 PSST 0012. At the respondent's request, the Tribunal also agreed that the technical manual and the sample test booklet that were entered into evidence would be sealed. Based on the nature of Mr. Brookfield's complaint, the Tribunal did not grant him access to the test material. Mr. Brookfield was absent from the hearing during testimony related to the test content and the technical manual.

48 Mr. Moore argues that the respondent abused its authority by assessing mostly managerial competencies and failing to assess knowledge. The Tribunal has already addressed the matter of the essential qualifications that were established for this appointment process and found no abuse of authority. The evidence also demonstrates that, from as early as July 2005, the respondent informed its employees that core FS competencies would be tested in the FS-04 appointment process. The July 2005 question and answer document states that knowledge would also be assessed, but subsequent information the respondent provided to employees speaks only of the competencies. Most importantly, the JOA and the SMC both clearly identify that eight competencies would be assessed in this process.

49 The SMC alerts candidates to the qualifications for the position. These are the criteria against which candidates will be assessed. One of the reasons that this

statement is in writing is to clearly inform all potential candidates of the requirements for the position, and what they will need to demonstrate to be appointed. In this case the SMC was made available when the process was advertised and it represents the best evidence of the qualifications established for this appointment process. There is absolutely no indication on the SMC that knowledge would be assessed. On the contrary, it clearly states that candidates would be required to demonstrate eight competencies.

50 Based on the evidence, it is clear that the complainants prepared themselves for this test based on what they thought was important for FS-04 work. However, the evidence does not support a finding that the respondent is responsible for the approach they took.

51 Similarly, the evidence does not support Mr. Moore's argument that the test instructions were misleading. Mr. Moore's test booklet was entered into evidence and it includes a test description and test instructions. The test description states that competencies would be assessed and lists the eight competencies. It also states that knowledge would not be assessed. The instruction section is also sufficiently linked to the competencies. Furthermore, the first page of the test booklet informs candidates to pay attention to its content. While Mr. Moore is correct in stating that the competencies are not in the instruction section of the booklet, it is evident that the test would assess them.

52 The Tribunal concludes that the respondent provided sufficient and consistent information to candidates about the purpose of the written test.

53 Mr. Moore submits that the respondent should have provided the marking scheme and the PSC submits that providing the pass mark for each test question allows candidates to manage their time and improves transparency.

54 This written test is comprehensive. Candidates had to address questions and specific matters in the context of performing an assigned task. They were told to cover all the elements that were stated in the instructions. Marks were not assigned by

question in this case. While the respondent could have informed candidates of the marks and pass marks for each competency, there is no obligation to do so.

55 Mr. Moore also argues that the respondent should have informed candidates that they had to meet each qualification. The Tribunal finds that candidates were so informed. The SMC and the test itself list the essential qualifications, namely the eight competencies. Moreover, s. 30(2) of the *PSEA* sets out the requirement that candidates must meet the essential qualifications to be considered for appointment. Even though the complainants may not have participated in previous appointment processes, it was not reasonable for them to assume that only some essential qualifications had to be met.

56 Mr. Moore also submits that other assessment tools may have been more effective. He submits that candidates had to provide a detailed description of their work experience, but the respondent did not use it beyond the screening phase of the process.

57 The Tribunal has held in several decisions that broad discretion is provided under s. 36 of the *PSEA* for those with staffing authority to choose and use assessment methods to determine if candidates meet the established qualifications. See, for example, *Tibbs*. Mr. Moore has not presented any evidence to demonstrate that the respondents' choice of the written test is an abuse of authority. On the contrary, the respondent's evidence shows that the test was a good tool to assess the established qualifications.

58 Mr. Moore submits that the written test was seriously compromised because it was administered over a lengthy period of time. However, there is no evidence before the Tribunal to substantiate this allegation.

59 It is a fact that the test was administered in several locations over many months. However, there is no evidence that the respondent failed to safeguard the test. On the contrary, according to Mr. Moore's testimony, candidates were required to sign a confidentiality agreement not to discuss the test contents. Furthermore there is no evidence before the Tribunal that the test was, in fact, compromised.

Decision

60 For the reasons stated above, the complaints of Mr. Moore, Mr. McNiven and Mr. Wood are dismissed.

61 For the reasons stated above, Mr. Brookfield's allegation of abuse of authority in the assessment of his experience is founded. Mr. Brookfield's complaint is, therefore, substantiated.

Order

62 The Tribunal orders the respondent to assess Mr. Brookfield's experience qualifications based on his entire original application, within 60 days of this decision.

Merri Beattie
Member

Parties of Record

Tribunal Files	2008-0026, 0032, 0034 and 0074
Style of Cause	<i>Robert Brookfield and the Deputy Minister of Foreign Affairs and International Trade</i>
Hearing	October 27, 28 and 29, 2009 Ottawa, Ontario
Date of Reasons	September 9, 2011
APPEARANCES:	
For the complainants	Robert Brookfield and Garry Moore
For the respondent	Amita Chandra
For the Public Service Commission	Marie-Josée Montreuil