



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2011-0134, 2011-0156 and
2011-0158

Issued at: Ottawa, October 16, 2012

MARCUS DAVIES, KARRA-LEE GERRITS AND ROBERT BURLEY

Complainants

AND

**THE DEPUTY MINISTER OF FOREIGN AFFAIRS AND
INTERNATIONAL TRADE CANADA**

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	The complaints are dismissed
Decision rendered by	Merri Beattie, Member
Language of Decision	English
Indexed	<i>Davies v. the Deputy Minister of Foreign Affairs and International Trade Canada</i>
Neutral Citation	2012 PSST 0026

Reasons for Decision

Introduction

1 Marcus Davies, Karra-Lee Gerrits and Robert Burley, the complainants, were candidates in an internal advertised appointment process conducted to fill Foreign Service Officer positions (FSOs) at the FS-04 group and level in the Department of Foreign Affairs and International Trade Canada (DFAIT). The complainants allege that the respondent, the Deputy Minister of DFAIT, informed candidates of the assessment criteria and then changed the criteria without telling them. They assert that some of the criteria that were assessed are not appropriate for FS-04 positions, and Ms. Gerrits challenges whether her assessment was based on those criteria. All three complainants also allege that there were inconsistencies in the way assessments were conducted in this appointment process.

2 Mr. Davies and Mr. Burley challenge the expertise of their interview panel members and Ms. Gerrits raises concerns because one panel member participated in her interview by telephone.

3 The respondent asserts that the assessment criteria reflect the requirements at the FS-04 level and were the basis for all assessments. It denies that it misled candidates. It also maintains that the interview panel members were competent, understood the approach to assessing the interview questions, and were consistent in applying the established approach.

4 The Public Service Commission did not attend the hearing. It made written submissions regarding its relevant policies, but did not take a position on the merits of these complaints.

5 For the reasons that follow, the complaints are dismissed. The Public Service Staffing Tribunal (the Tribunal) finds that the evidence does not demonstrate that the assessment criteria were inappropriate or that the respondent misled candidates regarding the criteria to be assessed. Neither does the evidence support a finding that the interview panel members were incompetent or inconsistent, or that they improperly assessed the complainants' qualifications.

Background

6 This appointment process was conducted in three stages. Candidates' education and experience qualifications were assessed using their applications, and several qualifications were assessed by a written exam. The complainants were successful in these first two stages of the process. Three key leadership competencies were assessed during an interview. It is at this stage that the complainants were eliminated from the process.

7 When the *Notification of Appointment or Proposal of Appointment* was issued in February 2011, the complainants filed complaints of abuse of authority with the Tribunal under s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA).

Issues

8 The Tribunal must determine the following issues:

- (i) Did the respondent mislead the complainants regarding the criteria that would be assessed during the interview?
- (ii) Were the assessment criteria appropriate for the positions to be staffed?
- (iii) Was the method of assessing the key leadership competencies appropriate and applied consistently?
- (iv) Were the interview panel members competent to assess the complainants' key leadership competencies?

Analysis

Issue I: Did the respondent mislead the complainants regarding the criteria that would be assessed during the interview?

9 The three key leadership competencies that were assessed during the interview were strategic thinking, engagement, and values and ethics. These competencies were listed on the *Job Opportunity Advertisement*, the *Statement of Merit Criteria*, and the

invitation to an interview issued by the respondent. The competencies themselves are not at issue in these complaints. It is the criteria or indicators that were used to assess each competency that are the basis for this allegation of abuse of authority.

10 The interview invitation to candidates informed them that they "... may find the key leadership competencies definitions at the following link", followed by the web address for the Treasury Board Secretariat (TBS) Key Leadership Competencies Profile (KLC profile). A copy of the KLC profile was submitted into evidence on consent of the parties. In addition to the definitions, the KLC profile contains effective behaviours or criteria that would demonstrate the competencies at the deputy minister, assistant deputy minister, director general, director, manager and supervisor levels.

11 Nancy Guy, Director of Rotational Staffing, explained that the competencies, as defined in the KLC profile, apply to FS-04 work; however, none of the levels for which the TBS has established criteria corresponds directly to FS-04 positions. She referred to a note in the KLC profile that informs departments that they may implement it as is or adapt it to reflect their particular requirements. For this appointment process, the respondent developed its own criteria for the competencies.

12 The complainants submit that the respondent misled them by instructing them to prepare using the TBS website, but not informing them that the assessment criteria for the competencies had been changed. Each of the complainants prepared for their interview by accessing the TBS website and reviewing the competency definitions. As well, they each studied the criteria in the KLC profile. Only Mr. Burley sought advice from those involved in this appointment process. He sent an email to the FS-04 process email address asking which level would be tested. The response he received did not directly answer his question, but it did not misdirect him. He was advised to prepare in order to succeed at the interview, which was for positions at the FS-04 level. Mr. Burley decided to study the manager-level criteria, as did Mr. Davies. Ms. Gerrits studied the criteria for managers and directors.

13 In *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 0003, the Tribunal concluded that the complainant's interpretation of application instructions to candidates

was different from the intended one, but was reasonable in light of the wording of the instructions. The Tribunal found that the ambiguity in the instructions constituted an error, which was a contributing factor in the ultimate finding of abuse of authority.

14 However, this case does not deal with instructions, but rather with a reference to information that candidates had the option to use. The Tribunal finds that the respondent directed candidates to the definitions in the KLC profile, but did not direct them to the effective behaviours or criteria. Although the KLC profile does not include any effective behaviours for FSOs at the FS-04 level, the complainants chose to study the effective behaviours in the KLC profile and they each chose the level of behaviours they studied.

15 The complainants have not established that the respondent misled candidates regarding the assessment criteria for the key leadership competencies.

16 Mr. Davies also contends that the assessment board members were misled by the change in criteria. His position is based on his belief that the assessment board members were familiar with or had been given the effective behaviours in the KLC profile. The Tribunal, however, finds no support for this position. The evidence clearly shows that board members were given an assessor booklet for each candidate, which contains the criteria developed by the respondent for the competencies to be assessed. That was the only set of criteria that was given to the board members for this appointment process.

Issue II: Were the assessment criteria appropriate for the positions to be staffed?

17 The complainants submit that some of the criteria that were assessed in this appointment process are appropriate for very senior executive-level positions, but are not suitable for FS-04 positions. The complainants referred to the KLC profile and the *Indicator Source Summary* (source summary) in support of their position.

18 As its title indicates, the source summary contains the three key leadership competency definitions, lists the indicators or assessment criteria for each competency and identifies the source for each criterion. It was prepared by the respondent after the

appointment process was completed to provide information to candidates. Of the 27 criteria in the source summary, 19 are from the KLC profile at the director, manager or supervisor level, or a combination thereof. The remaining eight criteria are drawn from a source identified as “other”.

19 Mr. Davies submits that providing context and a clear, concise outline of a project or initiative is a criterion for strategic thinking that is only required at the assistant deputy minister level, or higher, according to the KLC profile. He also submits that in the KLC profile, communicating a vision, goal or objective is a criterion for engagement, not strategic thinking.

20 The Tribunal finds that these two criteria can be found under strategic thinking at each of the six levels in the KLC profile. The manager level, for example, includes the requirement to develop the unit’s direction based on a thorough understanding of the functional area and to track changing priorities, which both speak to context. Communication of a vision, goal or objective is reflected in the requirement to encourage and incorporate diverse and creative initiatives and perspectives and to make effective recommendations at the manager level.

21 More importantly, however, Mr. Davies did not demonstrate that these two criteria are irrelevant to strategic thinking at the FS-04 level.

22 Ms. Gerrits submits that it was unreasonable for the assessment board to expect her to demonstrate strategic thinking at the director general level in her interview. She stated that the manager and director levels in the KLC profile require feedback to an immediate supervisor.

23 Sections 47 and 48 of the PSEA provide for feedback to candidates about an appointment process and their results in the process. Ms. Gerrits testified that during her informal discussion, Luc Santerre, Director, Commercial Relations for south and south-east Asia, Australia, New Zealand and the Pacific, told her that she had not demonstrated that she had provided policy guidance to senior management in headquarters in her example for strategic thinking. A senior manager in headquarters

would be an assistant deputy minister, leading Ms. Gerrits to conclude that the criterion used in the assessment was for the director general level.

24 Mr. Santerre was a member of Ms. Gerrits' assessment panel. He explained that Ms. Gerrits described her involvement in a working group on energy that resulted from a commitment between the Prime Minister of Canada and the President of Mexico. Mr. Santerre testified that Ms. Gerrits referred to resistance to the initiative from certain experts, but she failed to explain why or how that resistance manifested. She also failed to explain whether DFAIT senior management, central agencies, the Privy Council Office or the Prime Minister's Office were informed or involved in dealing with the resistance.

25 The strategic thinking criteria that were assessed include communicating, integrating information from multiple sources, seeking clarification and making recommendations, but they do not specify a level at which these activities must be done. Based on the established criteria and Mr. Santerre's testimony, the Tribunal concludes that Ms. Gerrits' assessors did not expect her to interact at a specific predetermined level, but rather that she demonstrate that she had interacted at the level or levels that were appropriate in the context of the example she chose.

26 Ms. Guy explained that, among the FS-04 positions, there are Project Managers who mostly work abroad, Deputy Directors who are largely in headquarters, and subject matter experts. She stated that the foreign service community, and FS-04s in particular, have specific requirements and no one set of criteria in the KLC profile fits the broad range of FS-04 work. Ms. Guy explained that the criteria for this process were initially taken from the KLC profile and modified based on the FS-04 work descriptions. Then the proposed criteria and draft interview questions were circulated to managers who have a good understanding of FS-04 work. Finally, mock interviews were held with current FS-04 employees and the questions and criteria were finalized. The criteria identified in the source guide as coming from the "other" source were established through this process.

27 The Tribunal finds that the complainants' evidence is insufficient to support a finding that the assessment criteria are irrelevant or inappropriate for the FS-04 positions to be staffed.

Issue III: Was the method of assessing the key leadership competencies appropriate and applied consistently?

28 In this appointment process, the respondent adopted the approach that each interview question would assess only one competency. The complainants argue that the respondent failed to respect the value of transparency by not informing candidates of that approach. They also argue that this approach is rigid and, furthermore, it was not applied consistently to all candidates.

29 Ms. Gerrits also submits that one of the interview questions was biased in favour of candidates with a policy background and that she was assessed on factors that were not among the established criteria. She also raised a concern that one of the panel members for her interview participated by telephone. Mr. Burley submits that the rating scale is flawed.

30 Before their interview, each candidate was given the three questions and had 20 minutes to review them and prepare themselves. The fact that candidates were not told that each question assessed one competency or which question assessed which competency is not in dispute.

31 The complainants each testified about what combination of the competencies they identified in each question. In the end, they all concluded that each question would assess all three competencies and they prepared their responses accordingly.

32 During their informal discussions as well as during the exchange of information between the respondent and the complainants, as part of the Tribunal's complaint process, the complainants learned that each question assessed only one competency. During those exchanges the complainants were also given what they contend is conflicting information about flexibility accorded to the assessors in applying the assessment approach.

33 Mr. Burley testified that Mr. Weichert told him that the assessment panel would only consider looking for evidence of a competency in responses to other questions when a candidate was “borderline” in the competency-specific question. Ms. Gerrits testified that she was also informed that the assessors had that flexibility, whereas Mr. Davies testified that Ms. Guy told him that none of the assessment panels used candidates’ overall interview responses to assess one specific competency.

34 The complainants submit that the assessment approach is rigid and unfair, particularly since candidates were not informed of the approach. They assert that in an interview designed to assess three competencies, it should not matter where in the interview the competencies were addressed. The complainants also submit that the instructions to assessment panel members did not preclude them from assessing a competency across interview questions.

35 Ms. Guy testified that, from the outset, each interview question was designed to assess one of the three competencies. She testified that she was confident that the assessment board members knew the assessment approach. She explained that after the interview questions were developed, they were reviewed by senior foreign service managers and tested through mock interviews. She stated that most of the assessment board members had been involved in the development and testing of the criteria and interview questions. Also, human resources held a briefing with the assessors and gave them an information package before the interviews began.

36 Nevertheless, in a meeting of the assessment board with Ms. Guy after the first day of interviews, assessors asked whether they could consider a candidate’s response to another question, when assessing the response for the competency-specific question. This was also discussed within and among the various assessment panels.

37 At the meeting Ms. Guy confirmed the original instruction to assessment board members that candidates had to demonstrate a specific competency in their response to the question for that competency. She testified that the interview as a whole was designed to assess whether candidates had demonstrated two of the competencies in previous work and whether they demonstrated the third competency in a situational

question. The short 20-minute preparation time and the 30-minute time limit for responding were intended to elicit somewhat spontaneous responses that would reflect candidates' immediate thoughts or instincts. In the meeting, Ms. Guy told board members that gaps in a candidate's response were important indicators of whether they possessed the competency, and had to be considered when applying the rating scale. At the same time, she stated that, as executives, the assessors should use their judgement. If an otherwise fully qualified candidate had only a minor gap in one competency that was clearly demonstrated in another question, assessors could use their judgement as to whether the candidate did, in fact, possess the competency. They were not, however, to change the interview into a global assessment tool.

38 The Tribunal also heard testimony on this matter from one member of each of the complainants' assessment panels. Mr. Santerre was on Ms. Gerrits' panel, Nadia Ahmad, Director, North American Partnerships and Operations, participated in Mr. Davies' assessment, and Andreas Weichert, who was Director, Headquarters Strategic Trade Planning and Performance Management at the time of this process, was on Mr. Burley's assessment panel.

39 Ms. Ahmad testified that she understood that discretion was warranted when a candidate had done very well on two competencies and was "borderline" for the third one. She explained Mr. Davies' assessment and testified that his results did not warrant using the discretion available to the assessment board, since Mr. Davies failed to demonstrate two of the three competencies.

40 Mr. Weichert testified that he understood that if an otherwise very good candidate was "borderline" on only one competency, the panel had the discretion to determine whether the candidate had demonstrated that they possessed the competency in another question. He stated that his panel had not exercised this discretion in the interviews it conducted. Mr. Weichert testified that Mr. Burley's response to the strategic thinking question was very strong but he was weak in engagement as well as values and ethics. This result did not, in his view, meet the standard for applying the discretion available to assessors.

41 Mr. Santerre testified that he felt a natural tendency to look beyond a competency-specific question for indicators of that competency, although that was not the design of the interview. He explained why Ms. Gerrits' response to the strategic thinking question merited a narrative score of "good", but not the "very good" score that was needed to meet the requirement. Ms. Gerrits met the requirements for engagement as well as values and ethics. Mr. Santerre stated that the panel looked at her responses to the other two questions and found elements of strategic thinking; however, those elements were insufficient to raise her score for that competency.

42 The Tribunal finds that the respondent was sufficiently clear about the qualifications to be assessed in this appointment process. The respondent informed candidates of the qualifications – the three key leadership competencies – that would be assessed in the interview and directed candidates to the definitions of the competencies. The Tribunal does not agree with the complainants' view that the respondent needed to inform candidates of the details of the approach to assessing the key leadership competencies. According to Ms. Guy's testimony, the interviews were designed to elicit thoughtful but unrehearsed responses that would reflect the degree to which candidates actually possess the competencies.

43 The complainants have not established that this approach is inappropriate for assessments for positions at the FS-04 level. The fact that the complainants misjudged the purpose of the questions is insufficient to demonstrate that the approach adopted by the respondent is improper.

44 Although each of the complainants testified about how their responses addressed criteria in the KLC profile, those were not the criteria that were used in this appointment process. Each of the complainants also provided examples of how they had addressed a competency in the overall context of their interview. In addition, Mr. Davies testified that during his informal discussion, Jeffrey Marder, one of his interview panel members, told him that he had covered everything that the board was seeking, but not in the proper questions. The approach that was used in this appointment process, however, required that candidates demonstrate each competency in their response to the question for that competency. In addition, one assessor from

each of the complainants' assessment panels explained why the use of the available flexibility was not warranted in their cases.

45 The assessment board was comprised of executives who knew that each question was designed to assess one of the three competencies and that they had some latitude to use their judgement in assessing candidates. The complainants have not established that it was inappropriate to permit senior managers to use their judgement in assessing candidates in this appointment process. Nor have they demonstrated that the assessment board members failed to use their judgement or used it improperly in assessing candidates.

46 Ms. Gerrits argues that the strategic thinking question demonstrates bias in favour of policy work over trade commission work. She submits that most of the options provided in this question are not a good fit with trade commission work, especially in a foreign posting. She chose to use an example of a bilateral negotiation she had done because her background in trade had not provided much policy experience. She testified that, in informal discussion, Mr. Santerre told her that her example was unique and difficult to assess.

47 Mr. Santerre testified that candidates were not expected to provide a specific type of example and that the interview questions were designed to assess candidates with varying experience. He stated that some candidates, including Ms. Gerrits, chose examples that made it difficult to assess a competency. Nevertheless, he explained that the assessment panel took the time that was needed and was able to assess Ms. Gerrits' response against the definition and criteria for strategic thinking.

48 The Tribunal finds that, in addition to Mr. Santerre's testimony, the documentary evidence does not support Ms. Gerrits' assertion of bias against trade commission work in this appointment process. The question to assess strategic thinking required candidates to describe a complex project or initiative they had developed or led at headquarters or abroad. Several types of projects and initiatives were listed in the question as examples of the kind of work candidates should describe. Two of the examples are specifically trade-related, whereas only one example is policy-specific.

49 Ms. Gerrits also submits that her strategic thinking qualifications were assessed on criteria that are not related to that competency. Her interview consensus form includes the comment that she was weak in setting the broader context and that there was a gap in the “story line”. The Tribunal finds, however, that these comments relate directly to the first criterion for strategic thinking – “Provides context and outlines project or initiative in a clear and concise manner”.

50 Similarly, the Tribunal is satisfied that the assessment panel’s comment that Ms. Gerrits’ response to the values and ethics question lacked the engagement of staff, is linked to the criterion “[f]osters climate of transparency, trust and respect within work unit...” and to “[b]uilds and promotes ... respectful work unit”, both of which are criteria for assessing values and ethics in this appointment process.

51 Mr. Davies asserts that the rating scale is flawed because the definitions of “good” and “very good” overlap. The key leadership competencies were assessed on a narrative scale of superior, very good, good, fair and poor. The assessors were given definitions for each score, which were submitted into evidence. The Tribunal finds that the two definitions in question, on their face, are distinguishable from one another. In addition, the three assessment board members who testified all said they had a good understanding of the rating scale, had no difficulty applying it, and applied it consistently throughout the interviews. The Tribunal finds no evidence that the rating scale was flawed.

52 In her testimony, Ms. Gerrits stated that she found it disconcerting not to have visual contact with one of her panel members, who participated in the interview by telephone.

53 Conducting an interview by telephone is sometimes necessary. The Tribunal notes that, given the very nature of DFAIT, a significant amount of work is likely done by telephone. In any case, two panel members were present with Ms. Gerrits in the interview room and there is no evidence that there were problems with the phone connection or difficulties hearing and understanding what was said. There is no evidence that Ms. Gerrits’ assessment was affected in any way.

54 In summary, the Tribunal finds that the complainants have not demonstrated that the chosen assessment method was inappropriate or that there were any irregularities or inconsistencies in the interviews conducted to assess the key leadership competencies.

Issue IV: Were the interview panel members competent to assess the complainants' key leadership competencies?

55 The Tribunal has held in numerous cases that assessors need to be familiar with the work of the positions to be staffed. See, for example, *Sampert v. Deputy Minister of National Defence*, 2008 PSST 0009 at para. 54. The Tribunal finds that there is no evidence that the assessment interview panel members in this process were incapable of assessing the complainants' key leadership competencies.

56 Mr. Davies claims that someone with a legal background would have had a better appreciation of his response to the first interview question. He was not aware that Ms. Ahmad, who was a member of his interview panel, has a juris doctorate, a master of laws, and is a member of the District of Columbia Bar. There is no evidence that Ms. Ahmad is insufficiently familiar with FS-04 work to assess candidates for that work.

57 Mr. Burley challenged Ms. Guy's role in his assessment interview, given that she is not an FSO or an Executive. Ms. Guy testified that Human Resources (HR) Advisors attended interviews to ensure consistency, for example, in time allotment. They were also present when panel members discussed candidates' interviews and arrived at a consensus on the assessment. During the consensus discussions, the HR Advisor would ensure consistent application of the assessment tools, but was not involved in assessing candidates. Mr. Santerre testified that HR Advisors attended many interviews as observers. He stated that they sometimes took notes, but did not assess candidates.

58 Ms. Guy testified that she took notes during the interviews she attended, including Mr. Burley's, and answered panel members' questions during consensus discussions; however, the panel members, not she, assessed candidates. Mr. Weichert confirmed that his panel sometimes asked Ms. Guy to refer to her notes during their consensus discussions but she did not interfere with the panel members' assessment.

59 The complainants have not demonstrated any abuse of authority related to the competence of the assessment board members in this appointment process.

Decision

60 For all these reasons, the complaints are dismissed.

Merri Beattie
Member

Parties of Record

Tribunal Files	2011-0134, 2011-0156 and 2011-0158
Style of Cause	<i>Marcus Davies, Karra-Lee Gerrits and Robert Burley and the Deputy Minister of Foreign Affairs and International Trade Canada</i>
Hearing	March 1 and 2, and June 19 and 20, 2012 Ottawa, Ontario
Date of Reasons	October 16, 2012
APPEARANCES:	
For the complainants	Deborah Cooper, Professional Association of Foreign Services Officers
For the respondent	Joshua Alcock, Counsel, Department of Justice
For the Public Service Commission	Marc Séguin, Counsel, Department of Justice (written submissions)