



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2010-0673
Issued at: Ottawa, October 30, 2012

ROSE OSTERMANN

Complainant

AND

**THE DEPUTY MINISTER OF HUMAN RESOURCES AND
SKILLS DEVELOPMENT CANADA**

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority under section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	The complaint is substantiated
Decision rendered by	John Mooney, Vice-Chairperson
Language of Decision	English
Indexed	<i>Ostermann v. the Deputy Minister of Human Resources and Skills Development Canada</i>
Neutral Citation	2012 PSST 0028

Reasons for Decision

Introduction

1 Rose Ostermann, the complainant, participated in an internal advertised appointment process to staff three Project Manager positions at the PM-06 group and level with the Department of Human Resources and Skills Development Canada (HRSDC). She filed a complaint that she was not appointed by reason of abuse of authority in the application of merit. More specifically, she alleges that the respondent failed to properly assess her candidacy with respect to the essential qualification of judgment.

2 The Deputy Minister of HRSDC, the respondent, denies that there was any abuse of authority in the appointment process. It asserts that there were no flaws in the assessment of the complainant.

3 The Public Service Commission (PSC) did not attend the hearing but submitted written arguments in which it sets out its interpretation of abuse of authority and describes the relevant policies and guides that apply to this appointment process. Its *Assessment Policy*, for example, provides that assessment methods and tools should be able to effectively assess the candidates' qualifications and provide a sound basis for making appointments according to merit. The PSC did not take a position regarding the merits of the complaint.

4 For the reasons set out below, the Tribunal finds that the complainant has established that the respondent abused its authority in the appointment process by failing to properly assess her candidacy with respect to judgment. It used a referee who had supervised the complainant for only a few weeks and whose reference was completely at odds with other references. The respondent gave as much weight to that reference as it did to the references provided by persons who had supervised the complainant for much longer periods.

Background

5 On April 23, 2010, the respondent posted a *Job Opportunity Advertisement* (JOA) on *Publiservice*, a federal government website, to staff an Insurance Program

Manager position, a Special Projects Manager position, and a Senior Project Manager position, all at the PM-06 group and level. The JOA also stated that the appointment process would be used to create a pool of qualified candidates to staff future similar positions at HRSDC.

6 Ginette Ethier, who at the time of the appointment process was the Director, Canada Pension Plan / Old Age Security, Processing and Payment Services Branch, chaired the assessment board. The assessment board also included Carole Sabourin, Director General at the Employment Insurance Branch, and Lynn Townsend, who worked at Service Canada at that time.

7 The respondent used the following assessment methods to assess the candidates' qualifications: a review of résumés, a written examination, reference checks, and an interview.

8 The complainant was eliminated from the appointment process because she did not meet the judgment qualification, which was identified as an essential qualification.

9 On October 27, 2010, the respondent posted a *Notice of Appointment or Proposal for Appointment* regarding the appointment of Jill Norman to the Special Projects Manager position.

10 On October 29, 2010, the complainant brought 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 (PSEA) in relation to Ms. Norman's appointment.

Issue

11 The Tribunal must determine whether the respondent abused its authority in its assessment of the complainant.

Analysis

12 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 because the PSC or the deputy head abused its authority in the appointment process. Abuse of authority is not defined in the PSEA, however, s. 2(4) offers the following guidance: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.”

13 As the Tribunal’s jurisprudence has established, the use of such inclusive language indicates that abuse of authority includes, but is not limited to, bad faith and personal favouritism.

14 In *Kane v. Attorney General of Canada and Public Service Commission*, 2011 FCA 19, at para. 64, the Federal Court of Appeal found that abuse of authority can also include errors. Whether an error constitutes an abuse of authority will depend on its nature and seriousness.

15 Abuse of authority can also include improper conduct and omissions. The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

16 The complainant alleges that the respondent failed to properly assess the essential qualification of judgment by using as a referee a person who had only supervised her for approximately five weeks, and by attributing too much weight to that referee’s observations.

17 Ms. Ethier explained that the judgment qualification was assessed by two questions on the written examination and by reference checks. A cumulative mark was assigned to the qualification. The complainant received five marks out of ten for her answer to one question of the written examination and six marks out of ten for her answer to the other question. She received five marks out of ten for the reference checks. Her cumulative mark was therefore 16 marks out of 30. The passing mark was 18 marks (60%). She therefore failed the essential qualification of judgment.

18 The complainant testified that she has worked at HRSDC for over 30 years. She currently works as a Program Officer at the PM-05 group and level. She acted for

three years as an Insurance Program Manager, which was one of the positions to be filled in this appointment process. The complainant does not take issue with the scores that she received on the written examination. However, she believes that the respondent abused its authority in terms of one of the references regarding her work performance, which was at great odds with the references provided by two other referees.

19 The question on the reference questionnaire for the judgment qualification reads as follows:

Question 4 - Judgement

a) Please tell us a time where the candidate exercised good judgment.

- What was the situation?
- Who were the players?
- Was it a delicate or difficult situation?
- What was the end result?

b) Has there been time where the candidate did not exercise good judgment?

c) Does he/she review alternatives before making a decision?

20 Ms. Ethier sent the complainant an email on July 14, 2010, in which she asked her to provide the names of three references, including her current supervisor/manager. The complainant provided Ms. Ethier with the name of her current supervisor, Johanne Mennie, Director, New Service Offerings, Processing and Payment Services (PPS) Branch, Service Canada, and the names of two previous supervisors, Lori Genyn, Director, Central Operations, Passport Canada, and Bonnie St-Julien, Director, Employment Insurance Workload Management. The complainant specified in that email that she had only worked with Ms. Mennie since June 28, 2010.

21 The complainant testified that Ms. St-Julien supervised her from October 2007 to April 2008. Ms. Ethier conducted that reference by telephone on July 27, 2010, and recorded her answers on the reference questionnaire. The complainant referred the Tribunal to the question that asked the referee whether there was a time when the candidate did not exercise good judgment. Ms. Ethier recorded that Ms. St-Julien

answered in the negative. Ms. Ethier also recorded that Ms. St-Julien provided examples of instances where the complainant showed good judgment. The assessment board determined that Ms. St-Julien's description of the complainant's judgment deserved seven marks out of ten.

22 Ms. Mennie was also asked to give a reference. She manages 25 employees and six programs that total hundreds of millions of dollars. She has worked in the public service for 25 years, 18 years as a manager.

23 Ms. Mennie joined the PPS Branch on June 28, 2010, and completed the reference questionnaire on August 4, 2010. Ms. Mennie therefore had only supervised the complainant for just over five weeks when she completed the reference questionnaire.

24 The complainant testified that Ms. Mennie's observations related mainly to two situations. In question 4 of the reference questionnaire which assessed judgment, Ms. Mennie referred to the observations she had made in question 2 of the same questionnaire. Question 2 assessed strategic thinking. Ms. Mennie wrote in answer to question 2, that the two consultants hired by the complainant to prepare a workshop were performing tasks that the complainant should have undertaken. The complainant explained that the workshop occurred in late May or early June, 2010, that is, before Ms. Mennie was appointed to her new position. The complainant hired the consultants to assist her in preparing the workshop, but she and her staff remained the subject-matter experts for the presentations. The complainant therefore contends that Ms. Mennie's observations were not justified.

25 Ms. Mennie testified that the reference to question 2 in question 4 was a typographical error. In question 4, she meant to refer to the comments she made in answer to question 1 which dealt with the complainant's ability to lead and influence people. Ms. Mennie's observations regarding that ability were negative. She wrote in question 1, for example, that the complainant does not share information with her colleagues or with her. She also gave an example where a program had been poorly

designed and the complainant could not influence her colleagues regarding possible changes to the program.

26 Ms. Mennie described a second situation in question 4 of the reference questionnaire. She wrote that a manager in the region informed the complainant one morning that there was a possibility of fraud in a program that the complainant was managing. The complainant did not inform Ms. Mennie of that possibility, even though that same week she had shared with her team a template that employees and managers had to use to inform management of critical situations. The complainant should also have alerted Integrity Services. Ms. Mennie only learned of this incident around five o'clock that same day through a consultant. Ms. Mennie met with the complainant the next morning to obtain more details on that incident. Ms. Mennie had to take charge of the situation.

27 The complainant testified that the second situation Ms. Mennie described in her reference in question 4 occurred when she was acting in the Insurance Program Manager position. She stated that she had never encountered that type of situation before. The complainant added that her plan was to gather information and if she thought there was a potential fraud, she would have contacted Integrity Services to initiate an investigation.

28 At the hearing, Ms. Mennie gave more details regarding this incident. On July 15, 2010, a client in the Québec Region complained about a website that appeared, falsely, to be a federal government website that dealt with wage protection applications. Ms. Mennie informed senior management and Integrity Services of the incident. An investigation was conducted and it was determined that the website was fraudulent and it was shut down. Ms. Mennie stated that the complainant should have informed her immediately and steps could have been taken earlier to initiate the investigation.

29 Ms. Mennie did not give an example of an instance where the complainant exercised good judgment. She only gave examples of situations where, in her opinion,

the complainant exercised bad judgment. The assessment board decided, based on Ms. Mennie's reference, to award no marks to the complainant for judgment.

30 Ms. Ethier testified that although she asked candidates for three references, she contacted only two of them if both assessments were similar. When there were discrepancies, she contacted the third reference provided by the candidate. In the complainant's case, there were discrepancies between the references she had provided. The reference provided by Ms. St-Julien was positive, although it did not provide many details, while the one provided by Ms. Mennie was very negative, with more details. What was unusual about Ms. Mennie's reference was that she did not give an example of an instance where the complainant showed good judgment. Ms. Ethier stated that this did not happen often in reference checks. Given the discrepancy between the two references, the assessment board decided to contact the third referee provided by the complainant, Ms. Genyn, who provided her reference in writing on August 12, 2010.

31 Ms. Genyn supervised the complainant from May 2008 to June 2010. Ms. Genyn gave the complainant a very positive reference for judgment. Ms. Genyn wrote that there was no instance where the complainant did not exercise good judgment, and provided several examples where the complainant showed good judgment. For example, the complainant had to present a sensitive report to senior management. The complainant's recommendations were all adopted due to her tact and diplomacy. The assessment board gave the complainant nine points out of a maximum of ten points for Ms. Genyn's description of the complainant's judgment.

32 Ms. Ethier decided to consult human resources and they suggested that the assessment board assign a mark based on the average score for judgment for the three references. This yielded a score of 5.3 which was rounded to five marks out of ten for the references.

33 On August 23, 2010, the complainant was informed in writing that she had been eliminated from the appointment process because she did not meet the judgment qualification.

34 Ms. Ethier testified that she contacted Ms. Mennie again in October 2010 and asked her whether she wanted to make any changes to her reference. Ms. Mennie answered that she did not, and that she could add other examples of instances where the complainant did not show judgment, or the other personal suitability merit criteria for this appointment process.

35 The respondent argues that it assessed the complainant's judgment in a fair manner since it could not ignore Ms. Mennie's negative comments. According to the respondent, to do so could have amounted to favouritism.

36 The role of the Tribunal is to review the appointment process used in order to determine whether there was abuse of authority. Thus, its role is not to re-evaluate the marking of the complainant's answer. Rather, the Tribunal's role is to examine the test, interview or reference checks, including how they were administered, in order to determine whether there was abuse of authority. See *Elazzouzi v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 0011 at para. 10, and *Costello v. Deputy Minister of Fisheries and Oceans Canada*, 2009 PSST 0032.

37 Section 36 of the PSEA gives the assessment board a broad discretion in the choice of assessment methods. That discretion, however, is not absolute. The Tribunal may decide that there was an abuse of authority if the complainant establishes that the respondent committed serious errors in the assessment. Such errors can include using methods that do not properly assess a qualification. The Tribunal finds that in this case the errors made in assessing the complainant on the judgment qualification were serious enough to constitute an abuse of authority.

38 The most serious error committed by the respondent concerns the simplistic and rigid approach that the assessment board used in determining that the complainant failed the judgment qualification. As the Tribunal has explained in *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012 (application for judicial review dismissed: *Attorney General of Canada v. Grundison*, 2009 FC 212), at para. 127:

... [I]n the context of the *PSEA*, where recourse is now focused on the exercise of discretion in appointment processes, an assessment board should not refuse to exercise its discretion through strict application of a guideline which fetters its ability to assess each candidate with an open mind. Where the Tribunal determines that the assessment board has fettered its discretion in this way, it may find that the assessment board abused its authority.

39 The complainant referred the Tribunal to the PSC's *Structured Reference Checking – A User's Guide to Best Practices* (the reference guide). Although, as the PSC pointed out, the respondent is not bound by the reference guide, it contains "common sense" guidelines. For instance, the reference guide states as follows at p. 8:

The most up-to-date, comprehensive information on the applicant's competencies will come from the referees with whom the applicant has worked the longest and the most recently. A common request is that applicants and referees have worked together for at least six months within the last five years.

...

...Supervisors have had the opportunity to observe the applicant perform in a number of different circumstances and develop over time...

40 The reference guide is consistent with the Tribunal's jurisprudence concerning the use of references. For instance, in *Dionne v. Deputy Minister of National Defence*, 2008 PSST 0011, at para. 55, the Tribunal stated: "What is important is that the referee is familiar with the work of the candidate, and can provide sufficient information to allow the board to conduct an adequate assessment of a candidate's qualifications." The assessment board failed to take into consideration the fact that, at the time of the reference, Ms. Mennie had only supervised the complainant for a few weeks. As well, based on the evidence of Ms. Mennie, the Tribunal finds it inconceivable that she had the opportunity to observe the complainant perform in a number of different circumstances and develop over time. The Tribunal finds that the assessment board did not conduct an adequate assessment of the complainant's qualifications when it included Ms. Mennie's reference without considering the appropriate weight to be attached to the reference. The limited period of time in which the referee observed the complainant called for flexibility in the marking and an appropriate assignment of weight in the assessment process.

41 The assessment board also failed to properly reconcile the divergence of opinions among referees. Attributing the same weight to each of them was not a reasonable method to address that difference of opinions. The assessment board could, and should, have reviewed the information provided by the three references and exercised its discretion in a fair and reasonable manner. Instead, the assessment board adopted a simple mathematical approach, which consisted of adding the three marks and dividing the total by three and, therefore, attributing equal weight to all three references, despite an important discrepancy between them. By so doing, the assessment board acted in an arbitrary manner and fettered its discretion.

42 The respondent argues that Ms. Mennie had supervised the complainant for three months by the time that they contacted her again in October 2010 to ask her if she wanted to change her reference. The Tribunal finds that whatever the content of that discussion, the assessment was concluded based on Ms. Mennie's original reference. The assessment was completed by August 23, 2010, when the complainant was informed that she had been eliminated from the appointment process as she did not obtain the necessary pass mark for judgment. Whatever discussions that the board chair and Ms. Mennie may have had subsequent to this had no bearing on the result of the appointment process.

43 The respondent also argues that the complainant did not object to the assessment board using Ms. Mennie as a reference. The evidence does not support this argument. The complainant did raise concerns. When asked to provide the name of her current supervisor, the complainant replied in her email of July 20, 2010 to Ms. Ethier that she and Ms. Mennie had only worked together for about three weeks.

44 The typographical error in Ms. Mennie's reference was another, albeit less serious error that could have affected the complainant's assessment. While on its own, it would be insufficient for a finding of abuse of authority, the error misdirected the assessment board's attention. The judgment qualification was assessed by question 4 of the reference questionnaire. In answer to the question that asked whether the complainant had showed bad judgment, Ms. Mennie referred, without further comment, to the situation she had described in question 2 of the same questionnaire.

In that question, Ms. Mennie wrote negative comments regarding the complainant's use of consultants. The assessment board, therefore, was considering the complainant's use of consultants in determining whether the complainant had good judgment. At the hearing, however, Ms. Mennie stated that referring to question 2 was an error; she meant to refer to question 1 in which she commented on the complainant's lack of ability to lead and influence people. Therefore, in assessing the complainant's judgment, the assessment board was considering, in part, the wrong material. It was supposed to be examining the information provided by Ms. Mennie in question 1, but, because of Ms. Mennie's typographical error, it was reviewing the information provided in question 2.

45 It is also interesting to note the assessment board's ratings concerning the other components of Ms. Mennie's reference. In addition to judgment, the reference check assessed the ability to lead and influence people, strategic thinking, and client orientation. The assessment board determined that the descriptions and observations provided by Ms. Mennie regarding those three other qualifications indicated that the complainant did not possess them at all. The assessment board therefore gave the complainant zero points out of ten for each of these qualifications as well. Again, Ms. Mennie's reference was completely at odds with the references provided by Ms. St-Julien and Ms. Genyn, which the assessment board decided deserved good marks. In other words, according to Ms. Mennie, the complainant who has worked in the public service for over 30 years, who occupies a position at the PM-05 group and level, and who acted for three years in the very position being staffed, has no judgment, ability to lead and influence people, strategic thinking, or client orientation. The ratings that the assessment board gave based on Ms. Mennie's reference are difficult to fathom. The comments regarding the other three qualifications in Ms. Mennie's reference check do show, in the Tribunal's view, a lack of balance in her observations.

46 The parties did not address those three other qualifications because once the decision was made to eliminate the complainant, she was not assessed further. Those qualifications would have also been assessed in the interview phase of the assessment process, which the complainant did not reach.

47 In summary, the errors committed in the assessment of the complainant were as follows. First, given the typographical error in Ms. Mennie's reference, the assessment board relied on wrong material. Secondly, the assessment board used a reference from a supervisor who had only supervised the complainant for a short period of time. It then placed as much weight on this notably negative reference as it did for two references from individuals who had supervised the complainant for much longer periods of time. Finally, as explained above, the assessment board acted in a simplistic and arbitrary manner that fettered its discretion.

48 The Tribunal therefore concludes that taken together these errors are serious enough to constitute an abuse of authority.

Decision

49 For all these reasons, the complaint is substantiated.

Corrective Action

50 The complainant did not assert that the person appointed was not qualified for the position. The Tribunal has determined that revocation is not appropriate in this case.

51 Since the complainant's judgment qualification was improperly assessed, the Tribunal orders that the respondent reassess that qualification within sixty (60) days of the date of this decision. If the complainant meets that qualification, the respondent must complete her assessment in regard to the other qualifications and, if she is found qualified, place her name in the pool of qualified candidates if that pool still exists.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2010-0673
Style of Cause	<i>Rose Ostermann and the Deputy Minister of Human Resources and Skill Development Canada</i>
Hearing	October 13 and 14, 2011 Ottawa, Ontario
Date of Reasons	October 30, 2012
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