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

File: 2011-0233
Issued at: Ottawa, November 12, 2012

BARRY PUGH

Complainant

AND

THE DEPUTY MINISTER OF JUSTICE

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority under 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	English
Indexed	*Pugh v. the Deputy Minister of Justice*
Neutral Citation	2012 PSST 0031

Reasons for Decision

Introduction

1 Barry Pugh, the complainant, participated in an internal advertised appointment process to staff a Director, Family Law and Assistance Services position at the EX-01 group and level with the Department of Justice (DOJ). He filed a complaint that he was not appointed by reason of abuse of authority in the application of merit. More specifically, he alleges that the respondent abused its authority in the following ways: first, it did not properly apply the asset qualification "experience working in the area of family law"; second, the respondent did not properly apply the organizational need concerning employment equity; third, the respondent misinformed candidates regarding the purpose of informal discussion; fourth, neither the persons doing the screening nor the members of the assessment board properly fulfilled their roles; and, finally, the hiring manager showed personal favouritism towards the appointee.

2 The Deputy Minister of Justice, the respondent, denies that there was any abuse of authority in the appointment process. The respondent asserts that it applied all the merit criteria correctly, that there was no personal favouritism towards any candidate, that the complainant does not understand the purpose of informal discussion, and that there was nothing improper in the screening or assessment of candidates.

3 The Public Service Commission (PSC) did not attend the hearing but submitted written arguments in which it provides its interpretation of abuse of authority and sets out the relevant policies and guides that apply to this appointment process. The PSC did not take a position regarding the merits of the complaint.

4 For the reasons set out below, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant failed to establish that the respondent abused its authority in the appointment process.

Background

5 On October 14, 2010, the respondent posted a *Job Opportunity Advertisement* (JOA) on the federal government website *Publiservice* to fill the position described above.

6 The screening of candidates was done by the hiring manager, Elissa Lieff, Senior General Counsel, Family, Children and Youth (FCY) section, Policy Sector. Ms. Lieff was joined by Michelle Smith, Senior Counsel and Manager, Support Enforcement and Policy Implementation, FCY, for the other phases of the assessment process. Adam Seaby, Senior Human Resources Advisor, Executive and Senior Complement Services, DOJ, was the human resources (HR) advisor involved in this appointment process. He also participated in the screening process by verifying whether the candidates indicated in their application material that they possessed the required education qualification and linguistic profile for the position.

7 Forty-two candidates applied for the position. The respondent screened candidates on education and experience qualifications. Six candidates were screened into the appointment process. They were further assessed through an interview and reference checks. Two candidates were found qualified.

8 The complainant was initially screened out of the appointment process because Ms. Lieff had determined that he did not possess experience working in the area of family law, the only asset qualification. He was, however, placed back into the appointment process following informal discussion when he provided the respondent with additional information that demonstrated that he possessed that experience.

9 The complainant was later eliminated from the appointment process because he did not meet the essential knowledge qualifications that were assessed during the interview, namely: knowledge of the federal government's policy and federal-provincial-territorial issues as they relate to family law, knowledge of social/political/legislative issues relevant to the family justice system, and knowledge of the role and responsibilities of the DOJ as they relate to family law. As well, the assessment board determined that he did not meet the essential qualification strategic thinking.

10 On March 29, 2011, the respondent posted a *Notice of Appointment or Proposal for Appointment* regarding the appointment of Carole Millett.

11 On April 12, 2011, the complainant brought a complaint of abuse of authority to the Tribunal pursuant to s. 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (PSEA).

Preliminary matter

12 At the beginning of the hearing, the complainant asked whether the Tribunal member was familiar with a previous decision, namely, *Pugh v. Deputy Minister of Justice*, 2008 PSST 0023. When the complainant was informed that the Tribunal member may have read the decision, he brought a recusal motion.

13 According to the complainant, the previous *Pugh* decision contained negative comments against him. The basis of the recusal motion is that the Tribunal member may have a predisposition against the complainant based on those comments. The complainant did not present evidence to support his motion. He asked that the Tribunal member be replaced by a member who had not read the *Pugh* decision and was not aware of the comments contained therein regarding him.

14 The respondent opposed the motion. It submitted that the complainant presented no valid reason for the Tribunal member to recuse himself from hearing this complaint.

15 The complainant's recusal motion was denied.

16 There was no evidence presented of actual bias on the part of the Tribunal member in this case. The Tribunal member thus considered whether the circumstances raised by the complainant gave rise to a reasonable apprehension of bias. The person claiming reasonable apprehension of bias has the burden of demonstrating its existence. The test for reasonable apprehension of bias is well-established. In *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, [1976] S.C.J. No 118 (QL), the Supreme Court of Canada sets out the test for reasonable apprehension of bias at page 394 (S.C.R.):

> [T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.…

> [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?

17 More recently, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; [1992] S.C.J. No 21 (QL), the Supreme Court explained the test as follows, at para. 22 (QL): "The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator."

18 The Tribunal's decisions are public documents and it is part of a member's duties to become familiar with the jurisprudence of the Tribunal. It is therefore quite normal that the Tribunal member might have read the decision regarding the complainant's previous complaint. An informed person, viewing the matter realistically and practically, having thought the matter through, would not conclude that the Tribunal member would be unable to decide the case fairly, merely because the Tribunal member was aware of the Tribunal's jurisprudence. The complainant therefore did not establish a reasonable apprehension of bias on the part of the Tribunal member. His position is based on pure conjecture. See *Arthur v. Canada (Attorney General)*, 2011 FCA 223, at para. 8.

19 As it was not demonstrated that the Tribunal member, consciously or unconsciously, would not decide fairly, the complainant's recusal motion was denied.

Issues

20 The Tribunal must decide whether the respondent abused its authority in the application of merit. More specifically, it must answer the following questions:

(i) Did the respondent abuse its authority when it used the asset qualification to screen candidates?

(ii) Did the respondent abuse its authority with respect to the identified organizational need?

(iii) Did the respondent misinform candidates regarding the purpose of informal discussion?

(iv) Did the individuals who conducted the screening or the members of the assessment board fail to properly fulfil their roles?

(v) Did the hiring manager show personal favouritism towards the appointee?

Analysis

21 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.”

22 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.

23 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.

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

25 As the Tribunal’s jurisprudence has established, the complainant has the burden to prove, on a balance of probabilities, that there was abuse of authority in the appointment process (see, for example*, Tibbs,* at para*.* 49)*.*

Issue I: Did the respondent abuse its authority when it used the asset qualification to screen candidates?

26 The respondent used the asset qualification of experience working in the area of family law as a preliminary screening criterion. The complainant argues that the respondent cannot do this since the asset qualification would then become an essential qualification used to eliminate candidates who do not have that experience at the preliminary screening stage. According to the complainant, the respondent misled candidates and prospective candidates by identifying experience in family law as merely an asset. The complainant contends that the respondent took this course of action to avoid having to take the time and effort to interview more candidates.

27 Ms. Lieff testified that she has occupied her present position since 2004, first in an acting capacity, then on an indeterminate basis. She was the hiring manager in the appointment process and held the delegated staffing authority. She established the merit criteria. She used essential experience qualifications and an asset experience qualification to screen candidates. Although she did not identify the asset qualification "experience in working in the area of family law" as an essential qualification, she believed it was an important qualification. She consulted with HR, and was told that she could use both essential and asset experience qualifications to screen candidates.

28 Mr. Seaby also testified on this issue. He confirmed that he told Ms. Lieff that she could use an asset qualification at the screening stage of the appointment process. According to Mr. Seaby, this was an efficient way to run an appointment process, provided sufficient candidates remained in the process after the screening for further assessment. In this case, six candidates remained after the screening and this was sufficient.

29 The Tribunal notes that candidates were informed at the outset that asset qualifications could be used. The JOA clearly stated under the "Other Information (Notes)" section that "[c]andidates may be required to meet the asset qualifications or the organizational needs, depending on the requirements of the specific position being staffed."

30 The PSC, in its *Guidance Series – Assessment, Selection and Appointment*, to which the respondent referred, specifies that merit criteria may be applied in any order:

> **1.4 Application of Merit Criteria**
>
> Merit criteria may be applied in any order (see section 2.6 - Sample Options for Selection). To increase efficiency, an operational requirement could be applied first and then the essential qualifications would be assessed only for those who meet the operational requirement. This means that the appointment decision could be based on a person's meeting an asset qualification, organizational need or operational requirement and that merit criteria other than essential qualifications could be used to limit the appointment process to applicants who meet them.

31 Moreover, neither the PSEA nor the *Public Service Employment Regulations*, SOR/2005-334, (PSER) contain any provision that specifies the stage of the appointment process when an asset qualification can be used, or that it cannot be applied at the screening phase of the process. This is in keeping with the key staffing value of flexibility that is set out in the preamble of the PSEA. When there are many candidates, an asset qualification is an efficient method to narrow the pool of candidates at an early stage. In the present case, there were 42 applicants, six of whom were screened in. In these circumstances, there was nothing improper in the respondent's election to use an asset qualification to screen candidates.

32 The Tribunal notes in any event that the use of the asset qualification to screen candidates was not detrimental to the complainant as he was ultimately found to meet the screening criteria, including the asset experience qualification regarding family law.

33 The Tribunal therefore finds that the complainant has failed to prove that the respondent abused its authority when it used the asset experience qualification to screen candidates.

Issue II: Did the respondent abuse its authority with respect to the identified organizational need?

34 For the purpose of this appointment process, the DOJ identified belonging to a designated group within the meaning of the *Employment Equity Act*, S.C. 1995, c. 44, as an organizational need (EE organizational need):

Applicants must demonstrate on their application that they meet the following criteria

Organizational Needs

The department of Justice is committed to establishing and maintaining a representative workforce. Qualified candidates who self-declare as members of a visible minority group, Aboriginal peoples, persons with disabilities and/or women may be selected for appointment to fulfill organizational needs.

35 The respondent did not use the EE organizational need to staff the position. The complainant argues that the respondent had an obligation either to apply the identified EE organizational need, or to amend the JOA to delete that requirement.

36 Ivan Sicard is the Acting Director General for the Administration Directorate at DOJ. He testified that employment equity considerations can constitute an organizational need and can be used to choose a candidate. He was not involved in this appointment process.

37 Mr. Seaby testified that the respondent had determined that all JOAs would contain a statement that belonging to a designated group is an organizational need that could be used in an appointment process.

38 Section 30 of the PSEA contains the following relevant provisions:

> **30.** (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.
>
> (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, including official language proficiency; and
>
> (*b*) the Commission **has regard to**
>
> […]
>
> (iii) any current or future needs of the organization that may be identified by the deputy head.
>
> […]
>
> (emphasis added)

39 It is clear from the wording of s. 30(2) of the PSEA that the delegated manager has discretion in deciding whether to use an identified organizational need when making an appointment. While all of the essential qualifications in an appointment process must be assessed, the delegated manager has discretion with respect to organizational needs. See *Guimond v. Deputy Minister of National Defence* 2009 PSST 0023 and *Steeves and Sveinson v. Deputy Minister of National Defence*, 2011 PSST 0009. In Steeves at para. 57, the Tribunal explained the distinction between s. 30(2)(*a*) and (*b*) as follows:

> … the words "has regard to" in s. 30(2)(*b*) indicate that the criteria established under this section must be considered; attention must be paid to them, but it is not necessary to assess or use them. If it were necessary to assess and use the asset qualifications, operational requirements and organizational needs, there would be no distinction made between these criteria and the essential qualifications.

40 Accordingly, the respondent had discretion to choose whether to use the EE organizational need. There is no evidence that the respondent abused its discretion. Ms. Lieff and Mr. Seaby provided valid reasons for not using that merit criterion. Both referred the Tribunal to a document entitled *Department of Justice Workforce Representation and Availability Estimates as at March 31, 2010*, which indicates that there were no gaps in the representation of designated groups in EX positions in the Policy Sector where the position at issue is located. There was therefore no need to apply the EE organizational need in this appointment process.

41 Ms. Lieff also explained that organizational needs can only be applied to qualified candidates. In this case, both qualified candidates are members of one EE group - women – but neither is a member of another EE group. In other words, applying the EE organizational need was not necessary and would not have distinguished between the two qualified candidates.

42 The Tribunal therefore finds that the complainant has failed to prove that the respondent was required to apply the identified organizational need or to amend the JOA to delete that requirement.

43 The complainant also argues that the respondent misled employees of the public service since persons not belonging to a visible minority group might have applied for the position had they known that the respondent would not apply that merit criterion.

44 The complainant's argument is mere conjecture. He did not provide any evidence that anyone was misled by this wording. The Tribunal also wishes to emphasize that the wording of s. 77(1) of the PSEA makes it clear that the complaint must be related to the complainant. That section provides that a person may make "… *a complaint to the Tribunal that he or she was not appointed or proposed for appointment…"* As the Tribunal found in *Visca v. Deputy Minister of Justice*, 2006 PSST 0016, a person cannot complain that other persons were not appointed.

45 Nevertheless, the Tribunal notes that the wording of the EE statement on the JOA should have been clearer. The heading **Organizational Needs,** is preceded by the sentence "*Applicants must demonstrate on their application that they meet the following criteria.*" This could leave the impression that one has to be a member of a designated EE group to apply. It would have been preferable to omit the sentence from the JOA or change the wording to avoid any possibility of confusion. The Tribunal finds that the inclusion of this sentence was an error; however, it is not serious enough to constitute an abuse of authority. It would have been preferable to state that candidates who are members of designated groups could include this information in their application because that criterion could be used in the appointment process to choose the appointed person. The EE statement itself, however, does not preclude persons who are not members of designated groups from applying in the appointment process as it states clearly that members of designated groups "may" be selected for appointment to fulfill EE needs. Moreover, if candidates found that the statement was not clear, they could seek clarification from the contact person indicated on the JOA.

46 The complainant further contends that although the JOA stated that the respondent was committed to establishing and maintaining a representative workforce, it had no such intention. According to the complainant, the respondent wanted to know the identity of candidates who were members of visible minority groups and use that

information for other purposes. The complainant provided no evidence to support this contention, nor did he give any indication of what those other purposes might be.

47 The Tribunal therefore finds that the complainant has failed to prove that the respondent abused its authority with respect to the identified organizational need.

Issue III: Did the respondent misinform candidates regarding the purpose of informal discussion?

48 The purpose of informal discussion has been explained by the Tribunal on many occasions. For example, in *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 0046, at para. 76, the Tribunal stated as follows:

> Informal discussion is intended primarily to be a means of communication for a candidate to discuss the reasons for elimination from a process. If it is discovered an error has been made, for example, if the assessment board did not consider some information listed on a candidate's application, this provides the opportunity for the manager to correct that mistake. However, informal discussion is not an opportunity to request that the assessment board reassess a candidate's qualifications.

49 After the complainant had initially been screened out of the appointment process, he received a letter that stated "… should you wish to informally discuss this matter, please contact …". The complainant points out that "informally discuss" is not the same as "informal discussion" which, according to him, is a formal phase in the appointment process. He contends that candidates who were screened out of the appointment process should have been informed that they could be screened back into the process as he was through informal discussion. They should have been informed that informal discussion was the "final level of appeal" of the appointment process.

50 The complainant's submission is untenable. Informal discussion is not an appeal mechanism. The purpose of informal discussion that is provided for in s. 47 of the PSEA is not to reassess a candidate, but to give individuals involved in the assessment process an opportunity to explain to unsuccessful candidates why they were eliminated from consideration. It may also be used to correct errors that could have occurred in the assessment process. In some situations, as in this one, the assessment board may accept new information and change its mind regarding the assessment of a candidate.

51 The Tribunal therefore finds that the complainant has failed to establish that the respondent misinformed candidates regarding the purpose of informal discussion.

Issue IV: Did the individuals who conducted the screening or the members of the assessment board fail to properly fulfil their roles?

52 The complainant argues that members of the screening board and the assessment board did not properly fulfil their roles. This allegation concerns the roles played in this appointment process by Mr. Seaby and Ms. Smith.

53 The complainant contends that there was confusion about Mr. Seaby's role. Although Mr. Seaby testified that he was not a member of the assessment board, he screened candidates on the education qualification and, according to Ms. Lieff, participated in the interviews of candidates.

54 Mr. Seaby testified that he has been a Senior HR Advisor at DOJ for six years and has participated in half a dozen appointment processes to fill senior positions in that department. In this appointment process, he gave the hiring manager, Ms. Lieff, advice on establishing the merit criteria, posting the JOA, choosing the assessment methods, and posting the appointment. His participation in the screening process was limited to verifying whether candidates had indicated in their application material that they possessed the required education qualification and linguistic competency for the position. He performed that task with other employees of DOJ HR. The Tribunal finds that there was nothing improper in having Mr. Seaby or any other HR employee perform this task.

55 Ms. Lieff confirmed that she screened candidates in terms of the experience qualifications.

56 As for the interview, Mr. Seaby testified that he was present, participated in the discussions and wrote down the candidates' answers. He also made notes of comments made by Ms. Lieff and Ms. Smith. He then wrote down the marks that were given by Ms. Lieff and Ms. Smith. Mr. Seaby stated that he did not assess candidates because he does not possess sufficient knowledge of the subject matter to assess them.

57 The only evidence to suggest that Mr. Seaby was a member of the assessment board is that he signed his name on the rating guides beside the box dedicated to the signatures of the members of the assessment board. While this document was entered into evidence, Mr. Seaby was not asked any questions as to the presence of his signature. On the other hand, both he and Ms. Lieff testified that he acted in an advisory role and not as a member of the assessment board in the appointment process. On the basis of the rating guide signature alone, the Tribunal is not persuaded that Mr. Seaby was a member of the assessment board.

58 The complainant further argues that Ms. Smith should not have participated in the appointment process because she did not understand the right fit "rule" since she could not explain in her testimony how that "rule" functioned.

59 The Tribunal notes that, contrary to the complainant's submission, the term "right fit" does not refer to a "rule". It is a term used to describe the basis for deciding who will be appointed from among qualified candidates in an appointment process.

60 The Tribunal is satisfied that Ms. Smith was qualified to be a member of the assessment board. As the Tribunal has stated in *Sampert v. Deputy Minister of National Defence*, 2008 PSST 0009, at para. 54: "Those who conduct the assessment should be familiar with the work required in the position to be staffed and, in the case of an advertised appointment process, should not have any preconceived notions as to who should be appointed." Ms. Smith testified that she was asked to participate in the appointment process because she is a subject matter expert. Ms. Smith's testimony as to her subject matter expertise was not challenged at the hearing. Similarly, there was no suggestion that Ms. Smith may have had any preconceived notions as to who should be appointed. Moreover, while Ms. Smith participated in the assessment of candidates, she did not establish the right fit rationale. Ms. Lieff confirmed that she prepared the rationale. As the Tribunal explained in *Guimond* at para. 34: "The manager has discretion in determining who among the qualified candidates is 'the right fit' for the position." Since Ms. Smith did not participate in deciding who among the qualified candidates was the right fit, her comprehension of that concept is not relevant to this complaint.

61 The Tribunal concludes that the complainant has not proven that either Mr. Seaby or Ms. Smith failed to properly fulfill their respective roles in this appointment process.

Issue V: Did the hiring manager show personal favouritism towards the appointee?

62 The complainant argues that the respondent showed personal favouritism towards Ms. Millett since it appointed her even though he had filed a complaint regarding her appointment.

63 Personal favouritism has been discussed in many Tribunal decisions. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, at para. 39, the Tribunal emphasized the following:

> It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament's intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.
>
> (emphasis in original)

64 In para. 41 of *Glasgow***,** the Tribunal further explained:

> Where there is a choice among qualified candidates, paragraph 30(2)(b) of the *PSEA* indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organizational needs. The selection should never be for reasons of personal favouritism. Undue personal interests such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

65 In this case, the complainant has not established that there was a personal relationship between any of the assessment board members and Ms. Millett, nor that there were any other undue personal interests that influenced the decision to appoint her to the position.

66 Ms. Millett testified that she never worked with Ms. Lieff before the appointment process. Ms. Lieff testified that her relationship with Ms. Millett was strictly professional. Ms. Millett did not report to her. Mr. Seaby testified that he never met the appointee before the appointment process.

67 The complainant did not present any evidence that personal favouritism played a role in the appointment of Ms. Millett. Appointing her despite the fact that a complaint was filed regarding her appointment does not support the complainant's claim that personal favouritism was a factor in the appointment process. There is no provision in either the PSEA or the PSER that prevents a department from making an appointment pending the outcome of a complaint to the Tribunal. In fact, departments should not delay appointments for that reason.

68 The Tribunal finds that the complainant has failed to prove his allegation of personal favouritism.

Decision

69 For these reasons, the complaint is dismissed.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2011-0233
Style of Cause	*Barry Pugh and the Deputy Minister of Justice*
Hearing	April 24 to 26, 2012 Ottawa, Ontario
Date of Reasons	November 12, 2012
APPEARANCES:	
For the complainant	The complainant
For the respondent	Lesa Brown
For the Public Service Commission	Kimberly J. Lewis (written submissions)