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

File: 2011-1176
Issued at: Ottawa, March 1, 2013

CHARLES HAARSMA

Complainant

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1)(*a*) of the *Public Service Employment Act*
Decision	Complaint is dismissed
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	*Haarsma v. the Deputy Minister of National Defence*
Neutral Citation	2013 PSST 0005

Reasons for Decision

Introduction

1 Charles Haarsma, the complainant, was a candidate in an internal advertised appointment process for the AS-06 position of Deputy Director, Air Force Safety, with the Department of National Defence (DND) in Winnipeg, Manitoba. The complainant alleges that the Deputy Minister of National Defence, the respondent, abused its authority by showing personal favouritism toward Nicole Stoddart who was appointed to the position. Further, the complainant states that the respondent also abused its authority by improperly assessing his education, exhibiting bias, and discriminating against him.

2 The respondent denies that it abused its authority. It states that Ms. Stoddart was assessed, found fully qualified and appointed. The complainant was eliminated from the process as he did not meet an asset qualification that was used in screening. The respondent denies that personal favouritism, bias, or discrimination were present in this appointment process.

3 The Public Service Commission (PSC) took no position on the merits of the case. While the PSC did not attend the hearing of this complaint, it did present a written submission in which it reviewed pertinent PSC policies and guidelines.

4 The complainant provided notice to the Canadian Human Rights Commission (CHRC) in accordance with s. 78 of the *Public Service Employment Act,* S.C. 2003, c. 22, ss. 12,13 (PSEA) to indicate that he intended to raise an issue involving the interpretation and application of the *Canadian Human Rights Act,* R.S.C. 1985, c. H-6 (CHRA). Prior to the hearing, the CHRC advised that it would not attend or make submissions in this matter.

5 For the reasons that follow, the complaint is dismissed. It has not been shown that the appointment of Ms. Stoddart was influenced by personal favouritism, that the complainant was improperly assessed, or that the respondent abused its authority through bias or discrimination against the complainant.

Background

6 In 2011, DND issued a Job Opportunity Advertisement (JOA) for an AS-06 position in Winnipeg. The closing date was June 21, 2011. Included in the Statement of Merit Criteria (SMC) for the position was the requirement for graduation with a degree from a recognized university (the education qualification). It was listed as an essential qualification.

7 Shortly thereafter, DND issued a second JOA for the AS-06 position bearing the same appointment process number, but indicating the work locations as Winnipeg and Ottawa. The SMC was changed and, of particular significance to the present case, it now specified that the education qualification was an asset qualification rather than an essential qualification.

8 The applications received for the AS-06 position were sent to the assessment board members, for them to individually screen the candidates against the requirements for the position. The assessment board members were Jeff Helps, Director, Air Force Safety Center, Winnipeg, hiring manager for the Winnipeg position; David Hentschel, Manager DND/CF RF Safety, Ottawa, hiring manager for the Ottawa position; and Sandra Douville, Civilian Human Resources Officer, Winnipeg.

9 The complainant was advised in writing on July 20, 2011, that his candidacy would not be further considered for either location. The hiring manager for the Winnipeg position invoked the education qualification at the initial screening stage. The complainant was found not to possess a university degree and he was screened out of the appointment process. The letter also included details of screening requirements that the complainant did not meet for the Ottawa position. His candidacy was not considered further for either location.

10 On November 17, 2011, a Notice of Appointment or Proposal of Appointment (NAPA) was issued for the appointment of Ms. Stoddart to the AS-06 position in Winnipeg. On November 22, 2011, the complainant filed a complaint of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) under s. 77 of the PSEA concerning the appointment.

Issues

11 The Tribunal must determine the following issues:

(i) Did the respondent abuse its authority in the establishment and assessment of the education qualification for Winnipeg?

(ii) Did the respondent abuse its authority by showing bias against the complainant?

(iii) Did the respondent abuse its authority by discriminating against the complainant on the basis of race, or national or ethnic origin?

(iv) Did the respondent abuse its authority by showing personal favouritism toward Ms. Stoddart?

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 of abuse of authority. The complainant bears the burden of proof in a complaint of abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at paras. 48-55.

Issue I: Did the respondent abuse its authority in the establishment and assessment of the education qualification for Winnipeg?

13 The SMC for this appointment process included both an essential and an asset qualification for education. The essential qualification was “a secondary school diploma or employer-approved alternatives”. The asset qualification was “(g)raduation with a degree from a recognized university”. This asset qualification was invoked for the Winnipeg location and it was used, in addition to the essential qualification, for screening the education of candidates for the AS-06 position.

14 The complainant disputes the necessity of the education qualification that was used for the Winnipeg position, although he presented no evidence in support of his position. He also submits that while he does not possess a university degree, his trade

certifications, memberships and other designations constitute an acceptable alternative to a university degree.

15 Subsection 30(2) of the PSEA sets out the authority of the deputy head to establish both essential and asset qualifications. In *Visca v. Deputy Minister of Justice,* 2007 PSST 0024, at para. 42, the Tribunal held that s. 30(2) gives broad discretion to establish the necessary qualifications for a position.

16 Section 31 of the PSEA provides that qualifications established by the deputy head must meet or exceed any qualification standards established by the employer. See *Fraser v. Deputy Minister of National Defence*, 2009 PSST 0005, at para. 46. The Tribunal has jurisdiction to hear a complaint that the deputy head abused its authority by establishing an asset qualification that did not meet or exceed the applicable qualification standards established by the employer. See *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044, at para. 41.

17 The Tribunal has explained in a number of decisions that managers are required to establish the qualifications for the work to be performed. See, for example, *Fraser*, at paras. 44-53.

18 Mr. Helps testified concerning the establishment of the education qualification, stating the he had recommended its inclusion to address the organization's present needs. He knew that the incumbent of the AS-06 position would be required to research and document, as well as produce papers and reports. In his view, these were standard activities that would be undertaken by a student working toward a university degree. A degree was also needed to give the AS-06 position credibility, placing the incumbent on an equal footing with other professionals who were involved in the same work, nationally and internationally. Further, the AS-06 was a position within the feeder group for EX positions and the majority of EX positions at DND required the employee to possess a university degree. He set out these reasons in an email to Ms. Douville on July 12, 2011.

19 Mr. Helps also explained the differences between the first and second JOA. He stated that after the original posting, Mr. Hentschel asked whether the process could be expanded to include an AS-06 position in Ottawa. They agreed and, as a university degree was not required for the Ottawa position, the education qualification became an asset qualification that could be invoked for the Winnipeg position only.

20 Mr. Helps testified concerning the assessment of the complainant's education against the asset education qualification. He testified that he went through the application looking for evidence of a university degree, but did not find any. Accordingly, he screened the complainant out of further consideration as he did not meet the education qualification. There was no evidence presented to show that any of the candidates who were screened in for the Winnipeg position failed to meet the education qualification.

21 The Tribunal finds that the complainant has not established abuse of authority in the establishment of the education qualification. The evidence supports a finding that the manager established the requirement for a candidate to possess a university degree based on the work to be performed in the Winnipeg office.

22 The complainant also alleges that his trade certifications, memberships and other designations constitute an acceptable alternative to a university degree. The complainant did not refer to any provision in either the PSEA or the *Public Service Employment Regulations,* SOR/2005-334 (PSER) that stipulates that a hiring manager must consider equivalencies or alternatives to a university degree. The Tribunal has confirmed that there are no provisions in either the governing statute or regulations that require a deputy head to establish or accept equivalencies to essential qualifications. See *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0012, at para. 99. Similarly, there are no such provisions with respect to asset qualifications. Therefore, the Tribunal finds that the hiring manager was under no obligation to accept the complainant's trade certifications, memberships and other designations as meeting the education qualification required for the Winnipeg position.

23 Finally, the Tribunal notes that it has recently held that there is nothing in the PSEA or the PSER that would preclude a manager from using an asset qualification at the initial screening stage of an appointment process. In *Pugh v. the Deputy Minister of Justice*, 2012 PSST 0031, at para. 31, the Tribunal held:

> 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.

Issue II: Did the respondent abuse its authority by showing bias against the complainant?

24 The complainant alleges that Mr. Helps was biased against him because of their respective roles in a work refusal complaint made by Mr. Helps in 2008 concerning health and safety conditions in the workplace. The complainant testified that he was the departmental investigating safety officer for the complaint. Because of their roles in that matter, it is his view that Mr. Helps should have recused himself from assessing the complainant in this appointment process.

25 To support his view, the complainant relies on an email of December 30, 2008, as evidence of bias. In it, Mr. Helps discusses his work refusal complaint and refers to “amateurs” who were quoting and interpreting law to him. The complainant believes that “amateurs” was a reference to him.

26 Mr. Helps testified that when he became aware of certain workplace conditions, he raised concerns with the complainant as the safety officer. According to Mr. Helps, the complainant denied that there was an issue and referred him to Human Resources and Skills Development Canada (HRSDC) to file a complaint, which he did. Mr. Helps felt that once he filed the complaint, the complainant in his role as safety officer disputed everything Mr. Helps put forward and their relationship suffered.

27 Referring to the email of December 30, 2008, Mr. Helps denied that he was referring to the complainant. He testified that he was referring to the engineer in charge of the project who, in Mr. Helps view, did not understand the applicable law.

28 The Tribunal finds that the complainant has not established that Mr. Helps was biased against him. There is no evidence of actual bias in this case. The courts have acknowledged that direct evidence of actual bias is difficult to establish and have found that fairness requires that there be no reasonable apprehension of bias. The Tribunal has considered the test for reasonable apprehension of bias in a number of its decisions. In *Denny v. Deputy Minister of National Defence,* 2009 PSST 0029, at para. 125, the Tribunal referred to the Supreme Court of Canada decisions in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 and *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. Following these cases, the Tribunal formulated this test: *Would a reasonably informed bystander looking at the process reasonably perceive bias on the part of one or more of the persons involved in the assessment of the complainant?*

29 The complainant's argument stems from his interaction with Mr. Helps surrounding a workplace refusal complaint and, specifically, Mr. Helps' attitude toward him as evidenced by an email message from late 2008. They clearly held different views on the health and safety issue. It is the complainant's view that Mr. Helps referred to him as an amateur. Mr. Helps has denied this and explained the email, although he acknowledged that their interpersonal relationship suffered over the course of the investigation. There is no evidence of other events or conflict during the intervening two and a half year period from December 2008 to June 2011 when the complainant applied in the present appointment process, and no evidence of any significant link between the events surrounding the workplace complaint and this appointment process. See *Praught and Pellicore v. President of Canada Border Services Agency,* 2009 PSST 0001, at para. 66.

30 On this evidence, a reasonably informed person would not form the opinion that Mr. Helps is biased against the complainant. Rather, the evidence before the Tribunal establishes that they represented different interests on two sides of a workplace issue that was referred to HRSDC for an investigation and a decision. In any event, the education qualification was an objective qualification and Mr. Helps' subjective opinion would have had no bearing on whether or not the complainant met it. Moreover, as

Mr. Helps testified, he was not aware of the complainant's education until he received his application for screening.

31 Viewed as a whole, the evidence shows a difference of opinion in a workplace investigation, but this is not sufficient evidence to support a finding of actual bias or a reasonable apprehension of bias.

Issue III: Did the respondent abuse its authority by discriminating against the complainant on the basis of race, or national or ethnic origin?

32 Section 80 of the PSEA provides that in considering whether a complaint is substantiated under s. 77, the Tribunal may interpret and apply the CHRA.

33 Section 7 of the CHRA provides that it is a discriminatory practice to directly or indirectly refuse to employ or continue to employ any individual, or, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination which, according to s. 3(1) of the CHRA, includes race, and national or ethnic origin.

34 The complainant stated on his application for the AS-06 position that he is Métis. He feels that if he had not been screened out, his membership in the designated employment equity group of Aboriginal could have been favourable to him. Employment equity (EE) can be an organizational need. The *Employment Equity Act*, S.C. 1995, c. 44, sets out the four designated EE groups, namely: women, Aboriginal peoples, persons with disabilities, and members of visible minorities.

35 In order to establish that the respondent engaged in a discriminatory practice, the complainant must first establish a *prima facie* case of discrimination as set out by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.,* [1985] 2 S.C.R. 536 ("*O'Malley*").

36 A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the complainant's favour, in the absence of an answer from the respondent. Once a *prima facie* case is made, the onus then shifts to the respondent to disprove the

allegations or provide some other reasonable explanation. The Tribunal cannot take into consideration the respondent's answer before determining whether a *prima facie* case of discrimination has been established. See: *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.A. 204, at para. 22.

37 It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. The complainant need only show that discrimination is one of the factors in the respondent's decision *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.), at para 7.

38 The Tribunal is not satisfied that the complainant has established a *prima facie* case of discrimination based on race, or national or ethnic origin. The only evidence before the Tribunal is that the complainant self-identified as a Métis, and his belief that his self-identification on his application could have helped him in the appointment process had he been screened in. Although the Tribunal can accord weight to the complainant's belief, the Canadian Human Rights Tribunal has stated that "an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough." See *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 41; application for judicial review dismissed: 2006 FC 785. The complainant has not raised any evidence either direct or circumstantial that shows that his race, or national or ethnic origin was a factor in the decision to screen him out of the appointment process. Therefore, the Tribunal finds that the complainant has not established a *prima facie* case of discrimination based on race, or national or ethnic origin.

Issue IV: Did the respondent abuse its authority by showing personal favouritism toward Ms. Stoddart?

39 Section 2(4) of the PSEA provides that abuse of authority includes personal favouritism. The complainant's view is that personal favouritism led to the appointment of Ms. Stoddart.

40 The evidence before the Tribunal does not establish that there was personal favouritism in this appointment process.

41 The complainant based his argument on an acting appointment of Ms. Stoddart in 2010 and the cancellation in 2010 of an advertised appointment process. Both of these involved the AS-06 position at issue in this case.

42 The complainant testified that in May 2010, DND initiated an internal advertised appointment process for a specified term appointment to the AS-06 position. He applied and on January 14, 2011, he was advised that the appointment process was cancelled.

43 An Information Regarding Acting Appointment (IRAA) was posted on the Government of Canada Publiservice website on November 18, 2010, stating that Ms. Stoddart was appointed to the AS-06 position for the period of May 10, 2010, to November 30, 2010. The IRAA identified the area of selection as DND employees of the designated employment equity group of women, who occupied positions at 1 Canadian Air Division Headquarters. It is the complainant's view that the 2010 appointment of Ms. Stoddart together with the late posting of the IRAA and the restricted area of selection are evidence of personal favouritism in the present appointment process. The respondent states that the mere fact of an acting appointment in 2010 did not guarantee that Ms. Stoddart would be successful in the 2011 appointment process.

44 The evidence before the Tribunal fails to establish that Ms. Stoddart was appointed in the subject appointment process for reasons of personal favouritism. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, the Tribunal found that it was significant that the PSEA refers to **personal** favouritism, emphasizing Parliament's intention that the words should be read together. As the Tribunal indicated at para. 41 in *Glasgow,* personal favouritism may include the selection of a person solely based on a personal relationship, as a personal favour, or to gain personal favour with someone else.

45 Mr. Helps testified that Bruce Wolfe was the incumbent of the AS-06 position in 2010. The internal advertised appointment process was initiated to staff the position for a period when Mr. Wolfe was absent. He added that Mr. Wolfe had indicated that he

would be retiring after his absence, but then changed his mind and returned to the workplace. Mr. Helps explained that the non-advertised acting appointment of Ms. Stoddart, who had worked within the unit since 2001, ensured initial continuity in the position during Mr. Wolfe's absence. Mr. Helps had no information about the chosen area of selection for the non-advertised appointment process. Ms. Douville testified that she was not the responsible Human Resources Officer and, similarly, could provide no information about the process.

46 Section 30(4) of the PSEA expressly provides that the respondent is not required to consider more than one person in order for an appointment to be made on the basis of merit. Moreover, the 2010 area of selection falls within the provisions of s. 34 of the PSEA for establishing areas of selection. Of relevance to this case, it permits the consideration of geographic, organizational or occupational criteria, and membership in a designated group within the meaning of section 3 of the *Employment Equity Act,* S.C. 1995, c. 44, when establishing an area of selection. Women are a designated employment equity group. Furthermore, Ms. Stoddart's qualifications for the AS-06 position were not challenged.

47 The Tribunal notes, however, that the IRAA for Ms. Stoddart's appointment was posted late. Section 13 of the PSER is clear: notification of acting appointments of four months or more must be given when the appointment is made or proposed. As Ms. Stoddart's appointment was initially made on May 10, 2010, even if it was not then contemplated that the appointment would exceed four months, it must have been known by September 2010. Late posting of the IRAA, shortly before the conclusion of the acting appointment, eroded the opportunity for employees to pursue timely and effective recourse against the acting appointment. While this is insufficient to establish an abuse of authority in the circumstances of this complaint, the respondent nonetheless failed in 2011 in its obligation to provide timely notice to employees in accordance with s. 13 of the PSER and, thereby, to adhere to the key public service values of access and transparency. The Tribunal has held in previous decisions that failure to provide timely notice constitutes an omission in an appointment process. See, for example, *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 0024, at para. 90.

Decision

48 For all these reasons, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2011-1176
Style of Cause	*Charles Haarsma and the Deputy Minister of National Defence*
Hearing	December 11 and 12, 2012 Winnipeg, Manitoba
Date of Reasons	March 1, 2013
APPEARANCES:	
For the complainant	Louis Bisson
For the respondent	Anne-Marie Duquette
For the Public Service Commission	Laurence St-Gelais (written submission)