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*Federal Public Sector  
Labour Relations and  
Employment Board Act and  
Public Service Employment Act*



Before a panel of the  
Federal Public Sector  
Labour Relations and  
Employment Board

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BETWEEN

**CHRISTOPHER CLARK**

Complainant

and

**DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

and

**OTHER PARTIES**

Indexed as

*Clark v. Deputy Minister of National Defence*

In the matter of a complaint of abuse of authority - paragraph 77(1)(a) of the *Public Service Employment Act*

**Before:** James Knopp, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Ronald Pink, Q.C., counsel

**For the Respondent:** Nour Rashid, counsel

**For the Public Service Commission:** Claude Zaor, written submissions

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Heard at Halifax, Nova Scotia,  
December 11, 2018.

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## REASONS FOR DECISION

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### **Complaint before the Board**

1 Christopher Clark, the complainant, is an employee of the Department of National Defence (DND). He applied to an internal advertised appointment process, the purpose of which was to create a qualified pool of candidates to staff current and future indeterminate positions for the positions of contract development team leader, project leader, and work centre supervisor, classified SR-CPS-01. The selection process number in question was 14-DND-IA-HALFX-387222.

2 The complainant was screened out at the written exam stage of the process. He passed every section of the exam save one, which had to do with the management of human resources.

3 The complainant feels that the respondent, the Deputy Minister of the DND, did not assess this section accurately or fairly, which gave rise to an abuse of authority.

4 The respondent denies any abuse of authority.

5 The Public Service Commission did not appear at the hearing but presented a written submission in which it discussed its relevant policies and guidelines. It took no position on the merits of the complaint.

6 For the reasons that follow, the complaint is founded. Question 6B of the exam sought two factors pertaining to applications for annual leave. The two answers the complainant provided, although correct given how the question was worded, were not graded fairly. As a result, he did not receive sufficient marks to pass that section of the exam and was therefore excluded from further participation in the appointment process. Therefore, there was an abuse of authority in the appointment process.

### **Background**

7 A job opportunity advertisement for the positions of contract development team leader, project leader, and work centre supervisor was posted on a public service website with a closing date of January 9, 2015. The complainant applied and was screened in to the process. On June 19, 2015, he wrote the exam that is the subject of

these proceedings.

**8** The exam consisted of several different sections. A failing grade in any one meant failing the entire exam. Only those who passed the exam were permitted to move on to the interview process.

**9** The Human Resource Management section of the exam required a minimum of 10 marks out of 15 to pass it. Question 6B was part of that section. It asked, “As a Supervisor, what are two factors to consider before authorizing annual leave?” Three points were allotted to it.

**10** The complainant’s answer consisted of two bullets. The first read “Shop capacity”, and the second, “Any critical jobs employee [*sic*] may be working on that cannot be ‘picked up’ by another employee.” His answers were assessed at .75 marks apiece for a total of 1.5 marks for question 6B.

**11** The complainant received a total of 8.5 marks out of 15 on the Human Resource Management section of the exam, which was 1.5 marks short of the overall minimum necessary to pass it. He passed every other section, but since he failed this one, he failed the entire exam and was not invited to an interview.

**12** On October 9, 2015, the complainant was advised that he had failed to meet one or more of the essential qualifications assessed by the exam, namely, “Ability to Manage Human Resources”. He was invited to informally discuss the results of his exam and how it had been graded.

**13** In the informal discussion, the complainant was advised that he had received only partial marks because he had failed to mention checking whether the employee applying for annual leave had a sufficient leave balance.

**14** The complainant explained that the PeopleSoft human resources management software used to submit leave applications would not transmit one if the employee making it had insufficient credits in his or her leave bank. Therefore, he did not feel it was worthwhile using what amounted to a redundancy as one of his two answers to question 6B. However, his arguments did not win over the respondent, and his grade remained a failing one.

**15** On March 18, 2016, the complainant filed the complaint with the Public Service Labour Relations and Employment Board (PSLREB) alleging abuse of authority in the application of merit under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

**16** On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the title of the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”) and the *Federal Public Sector Labour Relations and Employment Board Act*.

### **Issue**

**17** I must determine the following issue: Did the respondent abuse its authority in the application of merit by reason of an unfair and inaccurate or otherwise unreasonable assessment of the complainant’s responses to question 6B of the exam?

### **Summary of the evidence**

**18** The complainant testified that he has been employed with the DND for 13 years. He entered as an apprentice, rotated through different shops for two years, and then settled into the communications shop, where he has remained for 11 years. In his current position as a communications specialist, he installs and tests communications (radio and satellite) equipment at the Fleet Maintenance Facility at Cape Scott in Halifax, Nova Scotia.

**19** He decided to apply to the appointment process because of his desire to progress in the organization and because he genuinely enjoys working with people in a supervisory role. Once he was screened into the process by way of his education and experience, he wrote and passed what is known as a “General Competency” test, designed to assess written communication skills.

**20** He then wrote the written exam at issue in this case, alongside 20 or 30 other prospective candidates. It was not open book, and no information was provided in

advance on it or on any of its questions.

**21** Question 6B stated, “As a Supervisor, what are two factors to consider before authorizing annual leave?” The complainant testified to being aware of a number of different factors. He provided two on the exam, namely, shop capacity and whether the employee requesting leave is involved in a critical job that another employee cannot take over.

**22** The complainant knew that the two he provided were part of a number of valid factors to consider when dealing with an employee’s leave application. He felt he answered the question properly.

**23** When the complainant was advised he had failed the exam, he was offered an opportunity to informally discuss the results. He did so, with Dan Dugie and Charles Hawker. Mr. Dugie was one of the managers of this appointment process and the only other witness to testify at the hearing.

**24** The answer sheet divides question 6B into two parts. One part consists of a single sentence, which reads, “Does employee have enough leave credits?” The other part has a heading, “Operational Requirements”, with four bullet points underneath it, as follows:

- *Check the workload for the shop in DRMIS and see how many other people are on leave for the same period*
- *Ensure that the work demand does not exceed the shop capacity for that period.*
- *Ensure that the employee has no special skills or training required for the work scheduled during that period that cannot be covered by someone else.*
- *Provide some “turn over” time if required*

**25** The marking instructions for question 6B read as follows: “(1.5 marks for Leave Credits) and (1.5 marks for Operational Requirements or .75 marks for any example of an operational requirement such as the bullets listed above to a maximum of 1.5 marks)”.

**26** In the course of their informal discussion, Mr. Dugie explained to the complainant that he received only partial marks for question 6B because he did not provide, as one of the two factors, the supervisor's obligation to verify the employee's leave balances to ensure the employee has sufficient leave for the application.

**27** The complainant took issue with this, since all leave applications are initiated and approved electronically and online in PeopleSoft. It has a protocol that prevents an applicant from applying for more annual leave than currently exists in his or her bank. If the employee does not have a sufficient balance to cover the amount of leave being requested, then the leave application cannot be sent to the supervisor.

**28** Mr. Hawker apparently then told the complainant that on the contrary, employees were able to request leave even if they did not have a sufficient balance. The complainant testified to being surprised and confused by this statement since it was inconsistent with his own experience with PeopleSoft, but he did not feel he was in a position to pursue the matter further in the informal discussion.

**29** Instead, the complainant ended the informal discussion and went back to his desk to conduct an experiment. He tried to submit a leave application for more annual leave than he actually had in his leave bank, and, as he had expected, he was not permitted to electronically submit it. He testified to receiving an error message to the effect that he had "insufficient leave credits to make this request".

**30** That inconsistency was the basis for his complaint. In addition, he felt he should have received full marks for the responses he did provide.

**31** Mr. Dugie's goal with respect to question 6B was to test the candidate's knowledge of the considerations involved when deciding whether to grant an annual leave application. Mr. Dugie described two different categories of factors, one operational, and one administrative.

**32** According to Mr. Dugie, there is only one administrative factor, which is whether the employee has sufficient leave in his or her bank to cover the amount requested. However, a number of different operational considerations must also be taken into account, including the four listed in the answer sheet (see the four bullet

points listed earlier in this decision).

**33** Therefore, according to Mr. Dugie, it was expected that each candidate would supply one administrative and one operational factor. Candidates such as the complainant who did not supply the administrative factor were assessed only partial marks for operational factors, up to a maximum of 1.5 marks.

**34** In cross-examination, the potential for ambiguity was raised. It was suggested that given the expected answer, the question should have been phrased differently.

**35** Mr. Dugie conceded the possibility that given the way the question was worded, namely, “what are two factors to consider”, a candidate might not have appreciated the precision of the required answer.

**36** Mr. Dugie also conceded that the complainant’s two answers were each correct, but since Mr. Dugie characterized them as “examples” rather than “factors”, he did not award full marks.

**37** Mr. Dugie referred to an online leave application self-service user guide for DND civilian employees. The instructions for managers considering employee leave requests include a step that reads, “Click the **View Employee’s Leave Balances and Transaction Summary** link to review employee’s leave balances then click the **Cancel** button to return to the Details page to record your decision” [emphasis in the original]. Only after that check has been conducted should the manager proceed to the next step, which reads, “Click the **Approve** or **Deny** button” [emphasis in the original].

**38** Mr. Dugie conceded that as a matter of daily practice, many managers do not actually conduct such a check because, as the complainant pointed out, if the employee does not have a sufficient balance, the leave application will not be forwarded for consideration. Mr. Dugie agreed that often, checking for available leave is a somewhat redundant step.

**39** Mr. Dugie testified as to the supervisory procedure followed before PeopleSoft was implemented. In those days, a manager, upon receiving a leave application, would telephone the Human Resources department to check whether the



applicant had sufficient leave in his or her bank. Mr. Dugie testified to using exam questions that might have appeared on previous exams and he agreed it was possible that question 6B had been used on an older exam that preceded the advent of PeopleSoft.

**40** Tendered into evidence were the exam results of the ultimately successful candidate, Mr. R.G. (his name is anonymized in this decision). His answer to question 6B was as follows:

- *Check the employee actually has the leave.*
- *Does operational requirements permit or does it put you below minimum levels.*

[Sic throughout]

**41** Mr. R.G. was awarded full marks, 1.5 for each point.

### **Analysis and findings of fact**

**42** According to s. 77(1)(a), a person in the area of recourse, which includes unsuccessful candidates like the complainant, may make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of an abuse of authority in the application of merit. As was noted in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 (“Tibbs”) and *Visca v. Deputy Minister of Justice*, 2007 PSST 24, considerable discretion is granted to employers when making staffing decisions. Something more than a mere error or omission or even improper conduct is required to show an abuse of authority.

**43** The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority (see *Ostermann v. the Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28 at para. 15).

**44** The complainant submits the unreasonable errors surrounding question 6B, including its wording and the unfair assessment of his answers, constituted an abuse of authority, the effect of which was to prevent him from advancing in the selection process.

**45** I agree. Had the complainant's two responses to question 6B been graded accurately and fairly, he would have received sufficient marks to pass the Human Resource Management section. Since he passed all the other sections, he would have gone on to the interview stage.

**46** It is reasonable to assume that the candidates writing the exam were entitled to rely on the clear, plain language of question 6B when formulating their responses. The question was clear and concise; it sought "two factors to consider before authorizing annual leave".

**47** The complainant's first response was "Shop capacity". The answer guide provides, "Check the workload for the shop in DRMIS and see how many other people are on leave for the same period", and, "Ensure that the work demand does not exceed the shop capacity for that period."

**48** The complainant received only .75 marks for his answer, while the successful candidate, Mr. R.G., received the full 1.5 marks. Neither the complainant's nor Mr. R.G.'s answer was perfect, but Mr. Dugie testified that both were correct in that they accurately described an operational factor.

**49** Mr. Dugie emphatically stated he was looking for the two factors, namely, sufficient leave and operational requirements. However, he openly acknowledged that he did not clearly ask for them in question 6B.

**50** Mr. Dugie testified to an "example" being different from a "factor", but the complainant pointed out that the Oxford Dictionary defines "factor" as "a circumstance, fact, or influence that contributes to a result." Webster's dictionary defines "factor" as "one of the elements contributing to a particular result".

**51** Thus, in relation to the complainant's answer, "Shop capacity" is one factor that a supervisor might consider before authorizing annual leave. Another factor involves, "Any critical jobs employee [*sic*] may be working on that cannot be 'picked up' by another employee." These responses are very close to the ones provided in the answer sheet.

**52** The way question 6B was posed, it was open to a candidate to provide

two separate and distinct items, each of which would have to satisfy not only the Webster's and Oxford dictionary definitions of "factor" but also had to be consistent with what a reasonable person would consider as the ordinary meaning of "factor".

**53** A "factor", simply stated, is any variable that affects the outcome.

**54** I find it unreasonable that Mr. Dugie expected a reader of question 6B to somehow guess at the importance of Mr. Dugie's personal distinction between "examples" and "factors". He had a very clear idea of what he was looking for when he posed question 6B to the candidates. He had a clear vision of two separate and distinct silos of criteria when it came to assessing applications for annual leave. The first was administrative, effectively containing but one example, namely, checking to see if the employee making the application has sufficient annual leave banked. The other contained examples of operational factors that must be considered before granting a leave application.

**55** Unfortunately, while this distinction was very clear to Mr. Dugie, it was not made clear to those writing the exam. Mr. Dugie would have been well within his rights to grade the answers in the manner he did, had he posed the question differently. As it stands, question 6B called for two factors, and the complainant provided them.

**56** I also find that since PeopleSoft prevents employees with insufficient leave balances from even making applications, the answer Mr. Dugie sought amounted to a redundancy. I fully appreciate the complainant's logical approach to answering the question.

**57** I find that not awarding the complainant full marks for his answers to question 6B was a serious error. The complainant was unfairly and inaccurately assessed, which amounted to an abuse of authority.

**58** The respondent argues that I do not have the jurisdiction to reassess the complainant's exam answers. However, I do have jurisdiction to assess whether the exam answers were correctly evaluated. As noted in *Abi-Mansour v. Chief Executive Officer of Passport Canada*, 2014 PSST 12 at para. 29, numerous decisions have held that role of the PSST, and now the Board, is not to reassess candidates or redo the

appointment process. Its role is to determine whether the evidence demonstrates, on a balance of probabilities, that there was an abuse of authority in the assessment that was done. See, for example, *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 42-46.

**59** The complainant properly points out the importance of the preamble to the *PSEA*. A preamble is "... considered an integral part of the *Act* ..." and can help with determining legislative purpose (see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4<sup>th</sup> ed., at 296).

**60** The preamble clarifies the values and ethics that should characterize the exercise of discretion in staffing. It also supports another key legislative purpose of the *PSEA*, establishing new recourse mechanisms on appointment issues before a neutral and independent body. The relevant section of the preamble reads, "... the Government of Canada is committed to a public service ... characterized by fair, transparent employment practices, respect for employees, effective dialogue, and recourse aimed at resolving appointment issues ...".

**61** If the tool used to assess a qualification is flawed, the outcome cannot be considered fair or reasonable (see *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27 at para. 50). This will constitute an abuse of authority, as occurred in this case. Question 6B was flawed in that it did not clearly state what was required of the candidates. It was also assessed incorrectly, which was unfair to the complainant.

### **Corrective Action**

**62** My jurisdiction to consider and order corrective action is contained as follows in s. 81(1) of the *PSEA*:

**81 (1)** *If the Board finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.*

**63** The complainant does not seek the revocation of an appointment, but corrective action is necessary to make him whole. He argues that he would have

passed the exam but for the abuse of authority in the assessment of his answer to question 6B. Therefore, he asks to be interviewed, as he should have been, almost four years before the hearing.

**64** A similar situation arose in *Hughes v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 16. As the Tribunal noted at paragraph 154:

*[154] A significant amount of time has passed since the complainant was eliminated from the appointment process on March 19, 2008. The Tribunal does not know whether the pool established from this appointment process remains in effect or has expired. Therefore, pursuant to its authority under to [sic] ss. 81(1) of the PSEA, the Tribunal's order will provide that the complainant does not suffer a disadvantage solely due to the length of time it has taken to complete the complaint process and that he have an opportunity, subject to being found qualified, to be considered for Service Canada Benefits Officer positions for a reasonable period of time.*

**65** The Tribunal then went on to order that the complainant in that case be offered an opportunity to proceed to the next assessment stage, an interview, and complete his assessment.

**66** I find that similar corrective action is merited in this case.

**67** For all of the above reasons, the Board makes the following order:

**Order**

**68** The Board orders the respondent, within six weeks of the date of this decision, to offer the complainant an opportunity to proceed to the interview stage of the appointment process and to complete his assessment in accordance with the assessment plan established for this process. If he is found qualified, he shall be eligible for appointment to the position of work centre supervisor, classified SR-E-01, for a period of two years from the date of this decision.

January 25, 2019.

**James Knopp  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**