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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

BETWEEN

ANTOUN EL-HAROUNI

Complainant

and

**DEPUTY HEAD
(Department of Employment and Social Development)**

Respondent

and

OTHER PARTIES

Indexed as

El-Harouni v. Deputy Head (Department of Employment and Social Development)

In the matter of a complaint of abuse of authority pursuant to s. 77(1) of the *Public Service Employment Act*

Before: Renaud Paquet, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Alexandre Toso, counsel

For the Public Service Commission: Louise Bard

Heard via videoconference,
January 25 and 26, 2022.

REASONS FOR DECISION**FPSLRB TRANSLATION**

I. Complaint before the Board

[1] On February 25, 2019, Antoun El-Harouni (“the complainant”) made a complaint under s. 77(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), alleging that the deputy head of the Department of Employment and Social Development (“the respondent”) abused its authority within the meaning of s. 77(1)(a) of the *PSEA* in the internal selection process numbered 2018-CSD-IA-QUE-13932 (“selection process 13932”).

[2] The purpose of the selection process was to seek candidates for senior manager positions at the PM-06 group and level in the respondent’s Strategic Services Branch on the island of Montréal. Once the education and experience requirements were met, the process assessed the following abilities and skills:

- Create vision and strategy;
- Mobilize people;
- Maintain integrity and respect;
- Collaborate with partners and stakeholders;
- Promote innovation and guide change;
- Achieve results; and
- Communicate effectively.

[3] The complainant met the education and experience requirements. Therefore, he was screened in. The respondent then invited him to take part in the next step of the selection process, which involved producing what it termed a portfolio that aimed to assess the skills “Mobilize people” and “Achieve results”.

[4] On May 28, 2018, the complainant notified the respondent that he would not submit the requested portfolio. He wrote the following:

[Translation]

...

As I have already mentioned to you, it is impossible for me to put together the portfolio since you are asking me to describe to you experience that I do not have (or that I have not had over the last five years). Furthermore, since this experience is not part of the essential qualifications described in the position’s statement of merit criteria, I ask you to provide a different method to assess the three targeted skills, for me and for other candidates who could find themselves in the same situation.

...

[5] Since the complainant did not complete the requested portfolio, the respondent eliminated him from the selection process.

[6] In his complaint, the complainant alleges that the respondent's method of assessing the skills "Mobilize people" and "Achieve results" was an abuse of authority in the application of merit. In his view, this method meant that candidates had to have work experience that was not part of the essential qualifications included in the job poster.

II. Summary of the evidence

[7] On the whole, the parties' evidence was not contradictory. At the hearing, the complainant testified first. Next, the respondent called as a witness Serge-Luc Bédard, who had been a member of the selection board. During the selection process, he worked for the respondent under contract on several projects, after having retired in 2017 from a director position in the EX group. Under the instructions of two directors working for the respondent, he coordinated the staffing process in question. He also screened the candidates.

[8] Mr. Bédard carried out the same work for selection process 2018-CSD-IA-QUE-13318 ("selection process 13318"), which the respondent conducted in parallel. The complainant was not a candidate in that selection process, as he did not believe that he met the essential qualifications for the position.

[9] The selection board determined that the complainant met the essential qualifications for the selection process at issue. In addition to education, the qualifications included the following experience:

- recent and significant experience managing one or many major projects;
- recent and significant experience developing effective and collaborative working relationships with partners, stakeholders, and several client groups or several levels of government; and
- experience managing human resources.

[10] As for the last requirement, candidates had to show that they had supervised employees, assigned them work, and managed and assessed their performance. They also had to indicate the number of employees they supervised as well as the related period and duration.

[11] Mr. Bédard testified that portfolios are commonly used in selection processes, to assess candidates' skills. According to him, they allow candidates to highlight their experience. In a document adduced in evidence that had been given to the candidates, the respondent noted the following with respect to the portfolio:

[Translation]

...

For the skills Achieve results and Mobilize people, describe your accomplishments based on observable behaviours demonstrated at work. Describe situations, concrete facts, descriptions, and relevant and specific events that clearly demonstrate each behavioural indicator. Highlight the level of difficulty, complexity, and variety of the steps you took and the scope of the results attributable to your contribution. The assessment board will use the information to assess the extent to which the targeted skills were attained.

...

[12] The respondent's document also stated that the candidates had to choose 3 accomplishments for each skill and that they were limited to 1000 words per skill. The document then explained in detail how it defined the 2 skills assessed by the portfolio. It stated that the portfolio had to be completed by May 28, 2018. Finally, the document indicated that the portfolio would also be used to assess the candidates' skills in selection process 13318, to fill senior business expertise manager positions.

[13] In an email to the respondent dated May 22, 2018, after explaining his problem with the portfolio, essentially as he did later on May 28, 2018 (see paragraph 4), the complainant asked whether the respondent had provided an alternative method of assessing the two skills. About two days later, he and Mr. Bédard discussed the issue by telephone. According to Mr. Bédard, during the conversation, he apparently told the complainant that he believed that the complainant was able to complete the portfolio, the instructions for which had to be interpreted with a broader vision. Mr. Bédard also allegedly told the complainant that if he believed that he could not meet the position's requirements, he could withdraw his application.

[14] Mr. Bédard testified that he discussed with the selection board the complainant's request to change the selection tools; the board decided not to change anything, out of fairness to the other candidates, among other reasons. Then, on June 11, 2018, the board's chairperson notified the complainant by email that the board had decided to maintain its decision to use the portfolio as an assessment tool. Finally, on

June 18, 2018, the respondent notified him that his application could not be considered as he had not submitted the portfolio, and that his application was rejected.

[15] The respondent adduced in evidence the rating grids used to assess candidates for the skills that the portfolio measured. To pass, the candidates had to receive a rating of 4, which was defined as follows:

[Translation]

A sufficient number of performance indicators were covered. The answers were generally appropriate but lacked development. Most of the issues were identified. The overall rating is satisfactory.

[Emphasis in the original]

[16] Later, in 2019, as part of the Board's information sharing process, a human resources advisor for the respondent wrote to the complainant, informing him that to pass, candidates had to cover at least half the indicators for each skill and demonstrate mastery of these indicators.

III. Summary of the arguments

A. For the complainant

[17] The complainant's view is that the portfolio was not a valid selection tool because a candidate who did not have the required human resources experience could not provide the requested examples and therefore could not complete the portfolio. Thus, he was automatically excluded from the process, as he could not provide the requested examples.

[18] The portfolio did not match the position's requirements, which included human resources experience but did not mention the period, while the portfolio referred to that experience over the last five years. He had that experience, but it dated from more than five years before.

[19] The portfolio was used in two selection processes with different requirements. By doing so, the respondent used a selection tool that was not expressly tailored to the selection process in question.

[20] The complainant raised these problems with the selection board and asked that a selection tool other than the portfolio be used to evaluate the skills it assessed. The respondent ignored the problems raised and refused to review the selection tool in question. It did not care whether the selection tool was valid. As a result, he was unfairly eliminated, as he could not complete the portfolio.

[21] According to the complainant, the respondent's refusal to correct the error in its choice of selection tool was an abuse of authority within the meaning of s. 77 of the *PSEA*.

[22] To support his arguments, the complainant referred me to the following decisions: *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11; *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8; *Jacobsen v. Deputy Minister of Environment Canada*, 2009 PSST 8; and *Soccar v. the Commissioner of the Royal Canadian Mounted Police*, 2013 PSST 14. He also referred me to the *PSEA*'s preamble.

B. For the respondent

[23] According to the respondent, no evidence adduced supports the argument that it abused its authority in this selection process. The portfolio was a reasonable selection tool, and its content was directly related to the statement of merit criteria (SMC). The respondent was entitled to ask the candidates to provide what it asked for.

[24] A selection tool, like the portfolio, is used to choose the best candidates; it is not designed so that all candidates can pass it.

[25] The skills in the SMC were essential for the position to be filled. The skills that the portfolio assessed were among those essential ones.

[26] The instructions given to the candidates on how to complete the portfolio were clear and detailed. They had to talk about their experience and their learnings. According to Mr. Bédard's testimony, the complainant could have completed the portfolio, but he chose not to.

[27] To support its arguments, the respondent referred me to the following decisions: *Jolin; Tibbs; Canada (Attorney General) v. Cameron*, 2009 FC 618; *Lavigne v. Canada (Justice)*, 2009 FC 684; *Feeney v. Deputy Minister of National Defence*, 2008 PSST 17; *Jean-Pierre v. Chairperson of the Immigration and Refugee Board*, 2016

PSLREB 62; *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 4; *Portree v. Deputy Head of Service Canada*, 2006 PSST 14; *Visca v. Deputy Minister of Justice*, 2007 PSST 24; and *Wall v. Deputy Minister of Fisheries and Oceans*, 2009 PSST 2.

C. For the other party

[28] The Public Service Commission did not appear at the hearing. However, it submitted a document setting out its interpretation of the applicable law. I read it carefully but found it of little use to me because of its rather general nature. Nonetheless, it deals with a part of the case law that the parties submitted. The decisions that they submitted are sufficient for me to make an informed decision based on the applicable law.

IV. Reasons

[29] The complaint refers to s. 77 of the *PSEA*, particularly, s. 77(1)(a), which reads as follows:

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2)

[30] The complainant alleges that the method that the respondent used to assess the skills “Mobilize people” and “Achieve results” was an abuse of authority in the application of merit. According to him, this method required work experience that was not part of the essential qualifications in the SMC.

[31] The *Tibbs* decision, rendered by the Public Service Staffing Tribunal (PSST), describes what could constitute an “abuse of authority” with the meaning of the *PSEA*. At paragraph 70 of that decision, the PSST wrote the following:

[70] As highlighted in the complainant's submissions, Jones & de Villars, supra, have identified five categories of abuse found in jurisprudence. As the learned authors note at page 171, these same general principles of administrative law apply to all forms of discretionary administrative decisions. The five categories of abuse are:

1. *When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).*
2. *When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).*
3. *When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).*
4. *When the delegate exercises discretion on an erroneous view of the law.*
5. *When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.*

[32] Abuse of authority does not have to be accompanied by intent for the Board to find that it occurred. However, the complainant had to prove to me that on a balance of probabilities, the respondent's actions, decisions, or behaviours constitute an abuse of authority.

[33] This complaint deals with the respondent's use of a portfolio to assess the skills "Mobilize people" and "Achieve results". In and of itself, using a portfolio by no means constitutes an abuse of authority in the application of merit.

[34] Section 36 of the *PSEA* gives the respondent broad discretion when choosing selection tools and reads as follows:

36 In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

[35] Exercising that broad discretion, the respondent chose the portfolio to assess certain skills required for the advertised position. Nothing in the adduced evidence allows me to conclude that choosing a portfolio as an assessment method was an abuse of authority.

[36] According to the complainant, this selection tool required work experience that was not part of the essential qualifications in the SMC. On the basis of the evidence adduced, I do not agree with his arguments.

[37] First, according to the SMC and Mr. Bédard's testimony, to be screened in, the candidates required human resources management experience. I note that the complainant was found qualified, according to this criterion. Second, the SMC set out a series of seven skills essential to the job, including "Mobilize people" and "Achieve results", which were assessed through the portfolio. Finally, in the instructions for completing the portfolio, the respondent referred to those same two skills. So far, everything is consistent and leaves me without any hint of an abuse of authority; quite the contrary.

[38] The only thing that could be perceived as lacking somewhat in consistency, without necessarily being seen as a form of abuse of authority, is the required human resources management experience. The SMC had it as a basic requirement, without mentioning or constraining time. However, the portfolio referred to that experience over the last five years. Therefore, candidates could have been screened in for their older human resources management experience but still would not have been able to complete the portfolio in accordance with the requested information because they had little or no recent experience. Apparently, this is why the complainant decided not to complete and submit a portfolio to the respondent.

[39] That said, this is very far from a situation in which the respondent abused its authority. Certainly, the respondent could have been clearer about the experience required to pass the screening stage and could have asked for recent human resources management experience. Had it done so, I am inclined to believe that without a doubt, this complaint could have been avoided.

[40] In any event, on that last point, the respondent seems to have chosen a different, more defensible approach. According to Mr. Bédard, the complainant was informed that he had to consider the expected behaviours within a broader vision than as he understood it. Nothing prevented the complainant from explaining his experience in his portfolio and submitting it to the selection board for consideration. The board could have exercised its discretion and found that the provided information showed that the complainant met the assessed criteria, namely, "Achieve results" and "Mobilize people", which were still the essential qualifications assessed. Instead, he chose to not submit any portfolio, which made it impossible to assess him on these skills and consequently eliminated his candidacy. Thus, it cannot be said that the respondent acted arbitrarily or unreasonably and that it abused its authority.

[41] The complainant alleges that using the portfolio in two different selection processes was problematic. I do not agree with that allegation. Both processes required candidates to demonstrate the same two skills in question for positions at the PM-06 group and level, in the same department. In this complaint, it should come as no surprise that the respondent chose the same selection tool, especially since the two processes were being held concurrently.

[42] The complainant alleges that the respondent abused its authority when it ignored his concerns about the portfolio. In effect, he submits that the respondent refused to exercise its discretion properly and consider the case with an open mind (the fifth category in *Tibbs*). I do not agree with this allegation. The respondent had no obligation to withdraw or modify the tool that was selected. The concerns that the complainant raised could have been addressed when his portfolio was assessed, but instead, he chose not to submit one. Therefore, the respondent never had the opportunity to exercise its discretion when assessing the two skills in question.

[43] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[44] The complaint is dismissed.

March 7, 2022.

FPSLREB Translation

**Renaud Paquet,
a panel of the Federal Public Sector
Labour Relations and Employment Board**