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

FILE: 2007-0127

OTTAWA, DECEMBER 21, 2009

NORM MURRAY

COMPLAINANT

AND

THE CHAIRPERSON OF THE IMMIGRATION AND REFUGEE BOARD OF CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)*(b)* of the *Public Service Employment Act*
DECISION	Complaint is dismissed
DECISION RENDERED BY	Guy Giguère, Chairperson
LANGUAGE OF DECISION	English
INDEXED	*Murray v. Chairperson of the Immigration and Refugee Board of Canada et al.*
NEUTRAL CITATION	2009 PSST 0033

REASONS FOR DECISION

INTRODUCTION

[1] Norm Murray works as a Case Officer (CO) at the PM-01 group and level, at the Immigration and Refugee Board (IRB) in Toronto. He complains that the respondent's choice to use a non-advertised appointment process to staff new PM-05 positions discriminated against him on the basis of his race. He alleges that this non-advertised process constitutes systemic discrimination where job barriers result in a clustering of visible minorities in CO positions at the PM-01 group and level. He asserts that this clustering at the IRB has been recognized in several employment systems review reports.

[2] The respondent, the Chairperson of the IRB, denies that it abused its authority and discriminated against the complainant by conducting this non-advertised process. According to the respondent, the choice of a non-advertised process was made in the interest of fairness to existing Refugee Protection Officers (RPO) following the decision to replace the RPO PM-04 positions with new PM-05 positions. Proceeding by way of a non-advertised process eliminated the requirement to declare these employees surplus and, therefore, ensured their ongoing employment.

BACKGROUND

[3] In October 2006, the IRB announced plans to integrate its tribunal support operations, resulting in reorganization. RPO positions at the PM-04 group and level were replaced by PM-05 Tribunal Officers (TO). Incumbents of those positions were assessed. Those who qualified were appointed to the new PM-05 positions through non-advertised appointment process number 07-IRB-INA-03-13392. Those who failed to qualify remained at the PM-04 level in Developmental Tribunal Officer (DTO) positions, with training plans in place.

[4] The complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) on March 21, 2007. He filed a second complaint on the same issues containing further particulars on April 4, 2007. Both were filed under section 77 of the

Public Service Employment Act, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) and concern appointment process number 07-IRB-INA-03-13392.

[5] At the beginning of the hearing, the respondent asked that the two complaints be consolidated. Pursuant to section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-06, the complaints were consolidated.

ISSUES

[6] The Tribunal must determine the following issues:

(i) Does the complainant have a right to bring this complaint?

(ii) Has the complainant established a *prima facie* case of discrimination in the choice of a non-advertised appointment process??

(iii) If so, has the respondent provided a reasonable explanation for its choice of a non-advertised appointment process?

SUMMARY OF RELEVANT EVIDENCE

Creation of the new Tribunal Officer and Developmental Tribunal Officer positions

[7] The IRB is the largest federal tribunal in Canada. It employs approximately 1,000 people situated throughout its headquarters in Ottawa, its Toronto, Montréal and Vancouver regional offices, and other offices across the country. The IRB has three divisions, each of which has its own mandate. The Refugee Protection Division is the largest, and its mandate is to decide claims for refugee protection made by persons in Canada. The Immigration Division conducts admissibility hearings and detention reviews. The Immigration Appeal Division hears appeals of sponsorship applications, certain removal orders concerning residency obligations, and appeals by the Minister of Citizenship, Immigration and Multiculturalism from decisions of the Immigration Division regarding admissibility.

[8] Serge Tanguay has been Deputy Director General, Operations, at the IRB for the last four years. He testified for the respondent. He provided background with respect to

the decision to reorganize the adjudicative support functions at the IRB. When Mr. Tanguay began to work at the IRB in 2003, there was a significant backlog of about 50,000 refugee claimant cases. He explained that the capacity at the IRB is about 25,000 cases per year. The backlog was addressed through sunset funding from Treasury Board, to establish a special office at the IRB to deal with the backlog. Additional members were appointed and additional RPOs and registry officers were hired. The IRB was successful in dealing with the backlog.

[9] During this period of time, the complainant acted in an RPO position at the PM-04 group and level in the Refugee Protection Division for three years, beginning in 2002.

[10] Mr. Tanguay explained that after the backlog was addressed, a work force adjustment exercise (WFA) took place at the IRB in 2005 and 2006. He indicated that the WFA was necessary in response to a significant reduction in refugee claims following the September 11, 2001 attacks, where worldwide air travel decreased and more security measures were implemented. The WFA affected some RPOs, as well as some term employees. The WFA was successful as there were no lay-offs.

[11] While refugee claims decreased, immigration appeals increased over the years and the IAD's inventory of appeals increased considerably. Mr. Tanguay explained that, to address the increase in immigration appeals, an Immigration Appeal Division Innovation Project was initiated to reduce inventory by changing the immigration appeal process to make it less judicial.

[12] Several ways to accomplish this were identified. The streamlining of files was implemented with the expectation that this could result in early resolution of some cases. As well, in-depth file reviews and background analysis were provided as additional adjudicative support to members. Alternative Dispute Resolution (ADR) methods such as mediation were assigned to public service employees so that members could concentrate on adjudication.

[13] The IRB was also facing a delivery problem in assigning staff across the different divisions. In particular, there was no flexibility to assign the RPOs to other divisions as

these positions existed only in the Refugee Protection Division. This situation was reviewed, and a massive undertaking, involving a number of employees, was initiated with the goal of achieving better integration of the three divisions of the IRB.

[14] In 2006-2007, the IRB began to implement a new adjudicative support structure across all divisions with revised functions, work descriptions, positions and competency profiles. The new structure has four classification levels with four generic work descriptions: PM-06 Assistant Director; PM-05 Tribunal Officer (TO); PM-04 Developmental Tribunal Officer (DTO); and, CR-05 Administrative Assistant.

[15] The complainant explained that his acting appointment as an RPO had ended in 2006 as a result of a WFA based on lack of work. However, he does not believe that the WFA was warranted as there was a large backlog of cases in other divisions.

[16] The complainant stated that six months after his acting appointment as an RPO ended, he learned that the IRB was changing the RPO positions to TO positions. The complainant asked Mr. Helden, a Human Resources Advisor, how he could apply for the TO positions. Mr. Helden told him that he could not apply as it was a promotion. Nevertheless, the complainant sent him a note indicating that he wanted to apply for the TO positions.

[17] The newly created TO positions meant the elimination of the RPO positions. To enable all employees in RPO positions to acquire the competencies of the TO positions, individual learning plans were developed and they were offered training. They were assessed during the winter of 2006-2007 against the competency profile for the TO position.

[18] Those who met the competency profile were promoted through a non-advertised appointment process to TO positions. Those who did not remained at the PM-04 group and level in DTO positions. Once they had acquired the competencies and were assessed, they were promoted to TO positions (PM-05). Each RPO position was abolished once the incumbent accepted a position in the new adjudicative support structure. There were no WFA situations since there were as many new positions as current employees in the RPO positions.

[19] Edith Baragar testified for the complainant. She is currently an Immigration Officer, but worked previously at the IRB. In 2007, she was an RPO and went through an assessment process, after which she worked as a TO assigned to the IRB's Refugee Protection Division. She explained that her duties as a TO were the same as what she had done as an RPO. She examined the claimant and cross-examined witnesses in the hearing room. She also presided over interviews for the expedited process used for countries with high acceptance rates. The rest of the time she prepared for hearings, researched and disclosed information relevant to the cases.

[20] Ms. Baragar explained, however, that there were two separate RPO jobs. Some RPOs did the screening, identifying issues and initial disclosure. Other RPOs did hearings and the expedited process. She also explained on cross-examination that the RPO position had existed only in the Refugee Protection Division; in contrast, the new TO position was found in all three divisions of the IRB.

Choice of Non-Advertised Process

[21] Carole Cyr has been Director General, Human Resources, at the IRB since August 2006. She testified for the respondent. Ms. Cyr explained that there was consultation with the Public Service Commission (PSC) on the choice of a non-advertised process for the new TO position. She testified that the choice was made in accordance with two criteria of the IRB *Policy on the Choice in Appointment Process: Criteria for Non-Advertised Processes*, namely, criterion 6 "an appointment following a classification decision of an employee's substantive position"; and, secondly, considering the far reaching scope of this decision, approval by the Executive Director under criterion 11.

[22] Ms. Cyr testified that a written rationale was prepared to explain the choice of a non-advertised process. A *Question & Answer* document prepared for employees explained in more detail the upcoming change with the new adjudicative support structure. These changes and reports on its implementation were discussed at regular meetings of the IRB's National Labour Management Consultative Committee. As well, a

national conference was held in November 2006 to explain to employees the new adjudicative support structure and the resulting changes.

Clustering of Visible Minorities in the Case Officer Position

[23] An Employment Systems Review (ESR) was initiated by the IRB in 1997 as required by the *Employment Equity Act*, S.C. 1995, c. 44, to identify employment barriers affecting designated Employment Equity groups. Following this, the Canadian Human Rights Commission (CHRC) conducted an audit of the IRB and submitted an interim report in August 1999. The CHRC found that the ESR was useful, but deficient in its investigation of employment barriers for some designated groups (members of visible minorities, Aboriginal people, and persons with disabilities). The IRB was required to conduct a follow-up ESR. This follow-up report on October 15, 2000 was prepared by Hara Associates Inc., titled *Immigration and Refugee Board: Employment Equity Employment Systems Review Follow-up Report* (the Hara Report) was introduced as an exhibit at the hearing.

[24] Ms. Cyr is responsible for employment equity at the IRB. She explained that one of the three key issues of the Hara Report was whether there was clustering of visible minority employees in the lower levels of the PM group.

[25] She pointed out that the Hara Report indicated that the promotion of visible minority candidates was more than representative, and that the clustering in the lower levels was due to the filling of senior positions from other departments. She testified that the Hara Report established that there was a legitimate operational requirement for the PM-01 and PM-04 structure existing at that time and that, while it might be a difficult career path, it was not impossible to advance through the PM group at the IRB. She referred to the Hara Report where it indicated that the clustering in the lower levels was, neither bad nor good, but, neutral.

[26] The Hara Report also looked at other areas which may impact the promotional possibilities of visible minority employees. It indicated that there was a lack of transparency in the process by which employees were assessed and promoted in the PM group. The Hara Report found that this may increase reliance on informal systems

which disadvantage designated group members. In particular, performance evaluation was not consistently used; there was a lack of learning plans for employees, and competency profiles for positions were not developed. The Hara report made several recommendations as a strategy to address these findings.

[27] Ms. Cyr indicated that following the Hara Report, the CHRC found, in 2001, that the IRB was in compliance with the requirements of the *Employment Equity Act.* She testified that the recommendations of the Hara Report were fully addressed and referred to a document entered in evidence entitled *Hara Report Recommendations and Subsequent Actions Taken.*

[28] The complainant explained that he remains in the same substantive position as when he began working at the IRB in 1989, namely a Case Officer (CO) in the Immigration Appeal Division at the PM-01 group and level. He has been active in the union, holding different offices over the years such as chief steward of the local union, National Vice-President, and co-chair of the equity committee for the Toronto office of the IRB.

[29] The complainant testified about the CO functions, and the clustering of visible minorities in these positions. In his view, the clustering is not intentional, however, only one employee in this group is not a visible minority, and most have been in this function since 1991. He indicated that a CO must be able to understand precedents, legislation and principles of natural justice. COs need to screen files and decide if the case has substantially been heard before. The complainant referred to this legal principle by its Latin term *res judicata*.

[30] Grace Chujor and Bibi Wali testified for the complainant. Both are COs (PM-01) at the IRB Toronto office where they have been employed for 18 and 19 years respectively. Both acted as Deputy Registrar at the PM-03 group and level a few years ago.

[31] Ms. Chujor explained that the supervisor encouraged COs to act in the Deputy Registrar position on a rotational basis. Later, the IRB held a process to appoint an

employee to this position on an indeterminate basis. Ms. Chujor stated that none of the PM-01s who acted in this position were successful in this appointment process.

[32] Ms. Chujor explained that she emigrated from Africa and has done all she could to advance her career. She has completed a Bachelor of Arts in administration. She is committed and gets along with her supervisor. However, when it comes time for a promotion, she never gets it. She likes the job she is doing, but there is no opportunity for advancement.

[33] Ms. Chujor testified that some duties previously done by COs are now done by TOs, such as the screening for removal orders. She feels that COs are treated by the IRB as if they do not exist by taking away job content from their positions, and putting it in the TO positions. On cross-examination, she testified that employees in TO positions are now doing ADR and mediating files while, as a CO, she used to do screening for ADR. She explained that the difference is that the TOs are getting training, and that she was denied training. If she had received the training, she could have also done mediation.

[34] Ms. Wali explained that she was assigned to a pilot project when ADR was first introduced at the IRB. She developed an interest in it, and took some ADR courses. It hurt her that the ADR functions were taken away from the COs and assigned to the TOs. She testified on cross-examination that the members of the IRB used to do mediation, and the role of the CO was limited to screening for ADR.

[35] Satnam Channa worked previously at the IRB as a labour relations specialist, and now is a manager of employee relations with a private company. He testified for the complainant. He explained that, when he worked at the IRB, the complainant was viewed as a disruptive individual in the workplace. However, he believes that his role as a union activist explains why the complainant can be forceful at times. Mr. Channa developed a good relationship with the complainant, who was his counterpart as a union representative.

[36] Mr. Channa read the Hara Report which recognized issues of clustering of visible minorities in clerical positions at the IRB. He explained that he saw some correlation

between the Hara Report and his experience in the workplace. He noticed when he was attending meetings at the IRB that he was often the only member of a visible minority group. In his view, the majority of members of visible minority groups were in clerical positions, and only a few were managers. He believes that, while unintentional, the employment system is preventing these employees from getting promotions.

[37] He was asked on cross-examination about the types of clustering mentioned in the Hara Report and, specifically, what was mentioned on pages 2-4 and 2-5. He acknowledged that the Hara Report indicates that there are three types of clustering – good, bad and neutral. He also acknowledged that the Hara Report does not conclude that the clustering at issue is bad clustering.

Expert Witness Evidence on Systemic Discrimination

[38] Carol Agocs was called by the complainant to testify as an expert witness on systemic discrimination. The respondent had no objection to her qualifications as an expert. However, it objected to her testimony, submitting that the witness would testify on issues that the Tribunal must determine, such as the allegation of systemic discrimination, and the Tribunal has the expertise to make this determination.

[39] The complainant argued that it is common practice in leading evidence on systemic discrimination before human rights tribunals to provide statistical evidence, anecdotal evidence, and expert reports. Systemic discrimination is a legal issue, and expert reports on this issue are admissible evidence.

[40] The Tribunal qualified Dr. Agocs as an expert witness on systemic discrimination. The Tribunal admitted the evidence, and reserved its decision as to the weight it would place on it.

[41] Dr. Agocs testified about her work on systemic discrimination. She explained that the issue of systemic discrimination requires an understanding of the dynamics of systemic discrimination which creates preference and bias. Institutions set up employment systems that have, as an unintended consequence, discrimination against specific groups.

[42] Dr. Agocs issued a report on September 12, 2008 titled *Analysis of Possible Impact of Systemic Racial Discrimination in the Case of Norm Murray, Immigration and Refugee Board*. On page 1 of her report, Dr. Agocs provided the following definition of systemic discrimination:

> [Systemic discrimination is defined as] patterns of behaviour that are part of the social and administrative structures of the workplace, and that create or perpetuate a position of relative disadvantage for some groups, and privilege for other groups, or for individuals on account of their group identity.

[43] In her analysis, Dr. Agocs referred to three diagnostic elements: numeric representation; employment policies and practices (employment systems); and, organizational culture. She based her analysis on documents that were available to her such as the Hara Report, the CHRC's *Employment Equity Compliance Review: Immigration and Refugee Board* 2805-60/J2, June 1, 2001 (CHRC Compliance Report), the IRB *Corporate Integrated Human Resources Plan: A Multiyear Vision, 2008-2009 to 2010-2011*, and documents on the Treasury Board website.

[44] For her analysis, Dr. Agocs first reviewed the exclusion of the complainant from consideration for the TO position. She relied on the allegations of the complainant, the respondent's reply to the allegations, and the *Job Opportunity Advertisement* that was open to all employees of the federal public service with a closing date of January 19, 2008. She testified that she found a number of job barriers that, together, she believes constitute a pattern of systemic discrimination.

[45] On cross-examination, the respondent presented Dr. Agocs with a list of 36 employees appointed to the TO position in the Toronto region in the non-advertised appointment process at issue. This document indicates that 12 had self-identified. Dr. Agocs testified that she did not believe that her conclusion would have been different if she had had access to this information. She explained that there is still a gap between full representation of visible minorities in PM-01 positions, and one-third representation in PM-05 positions.

[46] Dr. Agocs was also asked about a document titled *Visible minority representation from 2006-2008 within the Central region compared to National* that showed an

increase in visible minority representation: from 21.5% to 25% at the PM-04 level and from 0% to 25.58% at the PM-05 level between 2006 and 2008. She acknowledged that it would have been good to have this information for her analysis. She also acknowledged that she did not contact the IRB to get information for her analysis. Dr. Agocs confirmed that her report was based on information obtained from the complainant, his counsel, and other sources she knew.

Advertised Appointment Processes for Tribunal Officer and Developmental Tribunal Officer Positions

[47] In 2008, the respondent posted new *Job Opportunity Advertisements* on *Publiservice* for TO positions and DTO positions. These *Job Opportunity Advertisements* were entered into evidence at the hearing. The posting for the TO (PM-05) positions was open to all employees of the Public Service of Canada, with a closing date of January 19, 2008 (appointment process 2008-IRB-EA-014353). A note indicated that the appointment process was also open to persons residing in Canada and Canadians residing abroad. According to the advertisement, the intent of the process was to create a pool of qualified candidates, and it was anticipated that 15 positions would be staffed. The posting for the DTO (PM-04) positions was open to IRB employees of the Central Region, with a closing date of January 28, 2008 (appointment process 2008-IRB-TO-IA-014352). According to this advertisement, it was anticipated that three positions would be staffed. It also stated the following:

> This selection process is designed to identify employees who have the potential to perform the duties of a Tribunal Officer at the fully functional PM-05 group and level. Employees appointed at the PM-04 group and level will be promoted to the fully functional PM-05 group and level once they meet the qualification requirements of the higher level.

[48] The complainant testified on cross-examination that he is in the area of selection for the TO positions, but he did not apply as he was not aware of this job opportunity at the time. However, he did apply for the DTO position. He stated that the DTO process is supposed to address some of the concerns raised in his complaint. At the time of his testimony, he had not heard anything further about the status of these appointment processes, but understood that there would be only one DTO position staffed.

Prior Complaint to the Canadian Human Rights Commission

[49] The complainant filed a complaint of discrimination on the basis of race and colour with the CHRC on April 22, 2004. In this complaint, he alleged that, while working as an RPO, he told his supervisor that he overheard racial comments being made about another African-Canadian colleague.

[50] He believes that his supervisor failed to reprimand these employees for their comments. A fact-finding committee set up to deal with his complaint concluded that he should apologize to these employees as he misunderstood what was being said and he overreacted. He alleged that management attempted to manipulate his colleague to turn against him and encouraged an employee to file a complaint against him. Later, he received a threatening note in his mailbox containing racist comments. He complained, but the investigation of his complaint went nowhere.

[51] The complainant had to take sick leave because of the stress and poisoned work environment during this period. He believes that management has encouraged and supported racism, harassment and discrimination as it failed to act on his complaints. He further believes that because he filed this complaint, he has suffered repercussions in the workplace.

[52] On cross-examination, the complainant was asked if he had received the CHRC investigator's report. He indicated that he had not seen it, but was aware that it went to the Public Service Alliance of Canada lawyer. He confirmed that other issues investigated by the CHRC were the clustering of visible minorities at lower level jobs, and the non-advertised processes for the TO and DTO appointments. He acknowledged that the CHRC found that the evidence did not support his allegations.

[53] The complainant also acknowledged on cross-examination that the CHRC dismissed his complaint as it found that the respondent had not failed to provide the complainant with a harassment-free workplace. It also found that the respondent did not pursue a policy, rule, practice or standard which deprived the complainant and other visible minorities of permanent employment advancements due to their race and colour.

RELEVANT LEGISLATION, REGULATIONS AND POLICIES

[54] Section 33 of the *PSEA* provides that appointments can be made following an advertised or non-advertised process. This complaint was filed under paragraph 77(1)(*b*) of the *PSEA*, which relates to abuse of authority in the choice of process. As well, section 80 of the *PSEA* provides the Tribunal with the power to interpret and apply the *Canadian Human Rights Act* (*CHRA*) where a complaint raises a human rights issue.

[55] These provisions read as follows:

> **30.** […] (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
>
> (i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,
>
> (ii) any current or future operational requirements of the organization that may be identified by the deputy head, and
>
> (iii) any current or future needs of the organization that may be identified by the deputy head.
>
> **33.** In making an appointment, the Commission may use an advertised or non-advertised appointment process.
>
> **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 Tribunal's regulations — make a complaint to the Tribunal 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);
>
> *(b*) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process;
>
> […]

80. In considering whether a complaint under section 77 is substantiated, the Tribunal may interpret and apply the *Canadian Human Rights Act*, other than its provisions relating to the right to equal pay for work of equal value.

[56] The following provisions of the *CHRA* are relevant to the discrimination issue:

3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.

[…]

7. It is a discriminatory practice, directly or indirectly,

[…]

(*b)* in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

[…]

10. It is a discriminatory practice for an employer, employee organization or employer organization

(*a*) to establish or pursue a policy or practice, or […] that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[…]

15.(1) It is not a discriminatory practice if

(*a*) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

[…]

[57] The following provisions of the PSC *Policy on the Choice of Appointment Process* are also relevant to this complaint, and read as follows:

Choice of Appointment Process

Policy Requirements

In addition to being accountable for respecting the policy statement, deputy heads must:

[…]

> • establish and communicate criteria for the use of non-advertised processes; and
>
> • ensure that a written rationale demonstrates how a non-advertised process meets the established criteria and the appointment values.
>
> […]

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[58] The complainant submits that the choice of a non-advertised process was tainted with discrimination and, therefore, constitutes an abuse of authority under the *PSEA*. He recognizes that the pool of PM-04 candidates was legitimate; however, the respondent should have considered qualified employees such as himself because of its employment equity obligations. Given his experience as an RPO, the complainant should have been considered for the position, and not eliminated through the choice of a non-advertised process.

[59] The complainant argues that section 80 of the *PSEA* gives the Tribunal jurisdiction to hear complaints of abuse of authority where systemic discrimination is alleged. Thus, where discrimination has occurred, regardless of intention, this may constitute abuse of authority. When sections 77, 80 and 81 of the *PSEA* are read together, it is clear that the Tribunal has jurisdiction to consider human rights issues and apply the *CHRA.* The complainant submits that the *PSEA* makes no distinction between discrimination and cases of systemic discrimination.

[60] The complainant submits that, in a complaint of abuse of authority, the evidence of systemic discrimination must be linked to the appointment process. The impact of the systemic discrimination must relate to the individual who complains of not being appointed. The complaint of systemic discrimination is necessarily related to Mr. Murray since, as a black African Canadian, he is a member of a visible minority group. The complainant asserts that this situation is similar to the decision in *Chopra v. Canada (Department of National Health and Welfare)*, [2001] C.H.R.D. No. 20.

[61] The complainant submits that he has established a *prima facie* case of discrimination. According to the complainant, the respondent's employment system constitutes a barrier to his appointment because of his status as a visible minority. He had performed the job of an RPO for several years.

[62] The evidence of Dr. Agocs supports the conclusion that there appear to be job barriers. She believes that the clustering is bad. The complainant contends that her evidence provides the Tribunal with a model to make such a determination. She analyzed numerical representation, the employment system, and the organizational culture. She concludes that each of these is an indicator of job barriers. The testimony of the complainant's witnesses is further evidence of job barriers in all three dimensions of the analysis.

[63] According to the complainant, the respondent exercised the broadest possible discretion in choosing a non-advertised process. Since he has established a *prima facie* case of discrimination based on the evidence of systemic discrimination, it is incumbent on the respondent to provide evidence to meet its *bona fide* occupational requirement (BFOR) defence. The respondent has failed to raise any evidence of a BFOR defence for conducting a non-advertised process. According to the complainant, the respondent has not provided any evidence that it has attempted to accommodate him to the point of undue hardship.

B) RESPONDENT'S ARGUMENTS

[64] The respondent submits that, by its nature, a complaint of systemic discrimination cannot be the subject of a complaint under section 77 of the *PSEA*. Implicitly, in a complaint of systemic discrimination, a group has been affected. However, a complaint of abuse of authority must be personal to the complainant as the Tribunal found in *Visca v. Deputy Minister of Justice et al*., [2006] PSST 0016, at paragraph 24.

[65] According to the respondent, the Tribunal does not have the jurisdiction to conduct a review of human resources systems to make a determination of systemic discrimination. This inquiry falls clearly under the mandate and expertise of the CHRC.

[66] In the alternative, the respondent submits that, if the Tribunal finds that it has jurisdiction to consider a complaint of systemic discrimination, the complainant must demonstrate a nexus between being a member of a visible minority and not being appointed. The complainant bears the initial burden in a complaint of discrimination. It is not enough to be a member of a visible minority. He must demonstrate that, but for his membership in a visible minority group, he would have been appointed.

[67] In support of its argument, the respondent relies on the following jurisprudence: *Ontario (Human Rights Commission) v. Simpsons Sears (O'Malley)*, [1985] 2 S.C.R. 536, at paragraph 28, [1985] S.C.J. No. 74 (QL); *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, at paragraphs 48 to 50, [2007] S.C.J. No. 4 (QL); and, *Ingram v. British Columbia (Workers' Compensation Board)*, 2003 B.C.H.R.T. 57, at paragraph 20, [2003] B.C.H.R.T.D. No. 55 (QL).

[68] According to the respondent, Dr. Agocs relied only on information provided by the complainant, and made no effort to get additional information from the respondent. The respondent argues that no weight should be placed on the evidence provided by the expert witness as she was so aligned with the complainant that she assumed the role of an advocate.

[69] The respondent acknowledges that section 80 of the *PSEA* gives the Tribunal jurisdiction to apply the *CHRA* within the context of a complaint of abuse of authority under section 77 of the *PSEA*. The respondent submits that, while it is well established that there is no requirement of intention to make a finding of discrimination, a finding of abuse of authority would require a discernment between right and wrong by the deputy head, if not improper intention.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[70] The PSC submits that evidence of systemic discrimination, albeit circumstantial, can be used to establish that the complainant was discriminated against in an appointment process and, hence, an abuse of authority. The PSC relies on the decision of *Canada* (*Canadian Human Rights Commission) v. Canada (Department of National*

Health and Welfare) (*re Chopra*), [1998] F.C.J. No. 432 (QL), 146 F.T.R. 106. However, the PSC argues that, where evidence of systemic discrimination is not linked to the appointment process, the matter should be addressed by the CHRC.

[71] The PSC submits that discrimination under the prohibited grounds set out in the *CHRA* is an abuse of authority under the *PSEA* only when the discrimination is the result of an improper intention, or when bad faith can be presumed.

[72] The PSC argues that, when the Tribunal finds that there has been discrimination, but no improper intention or imputed bad faith, it should leave the matter for the deputy head and the PSC to resolve. The deputy head could pursue an investigation under subsection 15(3) of the *PSEA* and the appropriate corrective action could be taken. If the PSC took a different view than the deputy head, and considered such discrimination to be very serious, it would then consider exercising its audit authority under section 17 of the *PSEA*. This, in turn, could lead to a recommendation by the PSC to the deputy head to take appropriate corrective action. Finally, if the circumstances require, the PSC would consider the revocation of the deputy head's appointment delegation.

ANALYSIS

Issue I: Does the complainant have a right to bring this complaint?

[73] The *PSEA* provides that the Tribunal can interpret and apply the C*HRA* in considering complaints of abuse of authority without any distinction between direct or systemic discrimination. The complainant is African Canadian and a member of a visible minority group. He alleges that he was not appointed as a result of systemic discrimination.

[74] As the Tribunal explained in *Zhao v. Deputy Minister of Citizenship and Immigration et al.*, [2008] PSST 0030, at paragraphs 56 and 57, the *Employment Equity Act* was enacted to ensure that federally-regulated employers provide equal opportunities for employment to the four designated groups, namely: women; Aboriginal people; persons with disabilities; and, members of visible minorities. A necessary precondition for the application of section 80 of the *PSEA* is that a complaint raises a

prohibited ground of discrimination as specified in subsection 3(1) of the *CHRA*. The complainant stated in his complaint that his case "is not an employment equity case but rather a case based on discrimination against me with regards to my race […]". He has, therefore, identified a prohibited ground of discrimination proscribed by the *CHRA*.

[75] In *Visca*, at paragraph 24, the Tribunal explained the personal interest required to bring a complaint as follows:

> In subsection 77(1) of the PSEA, the words "*a complaint to the Tribunal that he or she was not appointed or proposed for appointment,"* clearly stipulates that a complaint must be personal to the complainant. **A person can only complain "that he or she was not appointed" and cannot complain that other persons were not appointed**. (Emphasis added)

[76] The complainant does not complain about other employees not being appointed. His complaint is personal to him as required by subsection 77(1) of the *PSEA*. The complainant claims that he is qualified for the TO positions, and should have been provided with the opportunity to apply for this promotion. This opportunity was denied to him because the respondent chose a non-advertised appointment process.

[77] The Tribunal finds that the complainant had a clear personal interest in bringing this complaint.

Issue II: Has the complainant established a *prima facie* case of discrimination in the choice of a non-advertised appointment process?

[78] The complainant has the ultimate burden of proving on a balance of probabilities that the respondent has engaged in a discriminatory practice. The initial evidentiary onus of proof rests with the complainant to establish a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and, if believed, is complete and sufficient to justify a finding of discrimination in the absence of an answer from the respondent. See: *O'Malley.* If a *prima facie* case is established, the onus shifts to the respondent to provide a reasonable explanation (as per the *O'Malley* test), or to establish a BFOR defence (see: *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service*

Employees' Union (B.C.G.S.E.U.) (*Meiorin*), [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46 (QL)).

[79] The Tribunal is required to determine whether the complainant's allegations, if they are believed, justify a finding in his favour in the absence of an answer from the respondent. Thus, at this stage of the analysis, 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, [2004] F.C.J. No. 941 (QL), at paragraph 22 (F.C.A.)).

[80] One test for establishing *prima facie* discrimination in the context of complaints concerning employment hiring and promotion situations which was referred to by the respondent in its book of authorities is *Shakes v. Rex Pak Ltd.* (1981), 3 C.H.R.R.D./1001, at paragraph 8918 (Ont. Bd. Inq.). The *Shakes* test is as follows:

(1) The complainant was qualified for the particular employment;

(2) The complainant was not hired; and,

(3) Someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

[81] The complainant led evidence that he was qualified for a TO position. The work descriptions of the TO and former RPO positions were introduced into evidence. In addition to his testimony, he tendered his résumé and his Performance Review Forms for the periods that he worked as an RPO. The complainant holds a B.A. and a M.A. from the University of Windsor. His Performance Reviews while acting as an RPO were very favourable. There was no evidence presented by the respondent at the hearing to refute the complainant's testimony that he was qualified for a TO position.

[82] The distinguishing feature which is the gravamen of the human rights complaint in this case is the race of the complainant. However, other than the fact that they were former RPOs and that they were assessed as qualified for TO positions, there was no evidence led concerning the respective qualifications of those appointed employees.

The List of Employees Appointed to the PM-05 Tribunal Officer Position Toronto Region which was introduced into evidence indicates that one-third (12 out of 36) of the employees appointed self-identified as members of a visible minority group. There was no other evidence at the hearing concerning these employees who had been promoted to the TO position.

[83] The *Shakes* test is not helpful in the context of this complaint since the complainant was not a candidate in this non-advertised process. Human rights tribunals and the courts have emphasized that the *Shakes* test, while a useful guide, is not a test that should be rigidly applied in every employment situation. See, for example: *Premakumar v. Air Canada*, [2002] C.H.R.D. No. 3, at paragraph 77. Moreover, as Mr. Justice Evans explained in *Morris v. Canada (Canadian Armed Forces*), 334 N.R. 316, [2005] F.C.J. No. 731 (QL) (F.C.A.), at paragraphs 26 and 28 (QL):

> **26** In my opinion, *Lincoln* is dispositive: *O'Malley* provides the legal test of a *prima facie* case of discrimination under the *Canadian Human Rights Act*. *Shakes* and *Israeli* merely illustrate what evidence, if believed and not satisfactorily explained by the respondent, will suffice for the complainant to succeed in some employment contexts.
>
> [...]
>
> **28** A flexible legal test of a *prima facie* case is better able than more precise tests to advance the broad purpose underlying the *Canadian Human Rights Act*, namely, the elimination in the federal legislative sphere of discrimination from employment… it is now recognized that comparative evidence of discrimination comes in many more forms than the particular one identified in *Shakes*.

What the Tribunal must determine is whether the complainant has established a *prima facie* case of discrimination (the *O'Malley* test).

[84] The complainant need only show that the alleged discrimination was one, not the sole or even the main, factor in the respondent's choice of a non-advertised appointment process for a *prima facie* case to be met. (See: *Morris*; and, *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 (F.C.A.), at paragraph 7).

DIRECT AND CIRCUMSTANTIAL EVIDENCE

[85] There is no direct evidence of discrimination against the complainant related to the respondent's 2007 choice of appointment process. However discrimination can be,

and often is established through circumstantial evidence. Human rights tribunals and the courts have recognized that they must be cognizant of “the subtle scent of discrimination.” (See: *Basi v. Canadian National Railway Company*, [1988] C.H.R.D. No. 2 (C.H.R.T.)). The test to be applied, which has been adopted by human rights tribunals and the courts, when considering circumstantial evidence, has been articulated by Beatrice Vizkelety, *Proving Discrimination in Canada*, (Toronto: Carswell, 1987), at page 142 as follows:

> The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard [of preponderance of the evidence], may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

[86] Moreover, evidence of systemic discrimination is admissible as circumstantial evidence of direct individual discrimination. As the Federal Court held in *Chopra* (1998) at paragraph 22 (QL): “The Tribunal erred in disallowing the applicants from adducing general evidence of a systemic problem as circumstantial evidence to infer that discrimination probably occurred in this particular case as well.”

[87] The complainant has adduced circumstantial evidence to support his position. He alleges that he was discriminated against on the basis of race by the employment practices of the respondent which created a cluster of visible minority employees at the lower ranks of the IRB. This circumstantial evidence comes in the form of reports dealing with employment equity at the IRB, expert testimony of systemic discrimination, and testimony of current and former colleagues.

[88] Considerable evidence was provided at the hearing to establish that there has been, and continues to be, clustering of visible minorities at the lower levels of the IRB, such as the PM-01 level. Despite having acted at higher levels from time to time, the complainant, Ms. Chujor and Ms. Wali have all worked more than 15 years for the IRB at the substantive PM-01 level without promotion. The observations of Mr. Channa help to reinforce the testimony of these witnesses.

[89] Moreover, the Hara Report confirmed that, as of the date of its report in 2000, clustering of visible minorities existed at the lower levels of the PM group at the IRB. Ms. Cyr, who joined the IRB in 2006, did not dispute that this clustering existed.

[90] Although there have been efforts to alleviate this situation, the Tribunal finds that the complainant has established that there has been clustering of visible minorities at the lower levels of the PM group at the IRB.

[91] To support his argument that these clusters are the result of systemic discrimination, the complainant relies on the expert testimony and report of Dr. Agocs. In her report, at pages 6-7, Dr. Agocs concludes as follows:

> On the basis of the evidence available to me I conclude that the career advancement of Mr. Murray and other visible minority employees in the Toronto office has probably been restricted by a number of job barriers which are part of a pattern of systemic racial discrimination.
>
> […]
>
> Evidence to substantiate or refute the allegation that systemic discrimination has resulted in the exclusion of Mr. Murray, as well as other visible minority employees, from consideration for the Tribunal Officer positions, and from other career development opportunities, could be provided by an in-depth audit.

[92] On Dr. Agocs' own admission in her report, she appears to be acknowledging that there is insufficient evidence to substantiate the allegation of systemic discrimination. While it is, ultimately, for the Tribunal to make this determination, it is telling that it is the complainant's expert witness who has offered this tenuous conclusion.

[93] Dr. Agocs' report contains a number of fundamental flaws. First, her report references *Job Opportunity Advertisement*, appointment process number 2008-IRB-EA-014353, which was open to all employees of the public service, with a closing date of January 19, 2008. This is not the appointment process that is the subject of the complaint. The complaint concerns appointment process number 07-IRB-INA-03-13392. Secondly, and more importantly, the Tribunal finds that Dr. Agocs was missing key information. As she concedes at page 4 of her report, "more recent data for the Toronto region were not available to me."

[94] She was challenged on this during cross-examination. A document titled *Visible minority representation from 2006-2008 within the Central region compared to National* shows an increase in the representation of visible minorities from 0 as of March 31, 2006 to 25.58% as of March 31, 2008 at the PM-05 group and level. Dr. Agocs conceded that it would have been good to have this information for her analysis. While she did not contact the IRB to get information for her analysis, there is no evidence that the respondent would not have provided it to her. Dr. Agocs confirmed that her report was based on information obtained from the complainant, his counsel, and other sources she knew.

[95] In *Chopra* (2001), then Member Hadjis analyzed the expert evidence before him. He stated the following at paragraphs 236 and 237 (QL) that resonates in this case:

> [236] […] However, without a more detailed review of existing policies and staffing actions, one cannot be certain that systemic discrimination is the cause of under-utilization. A more in-depth study, for example, could demonstrate that too few members of that group are applying for promotions. One could inquire as to why that is the case and a further examination may show that this is linked to some discriminatory activity. But I find that mere reliance on the utilization rate without further analysis does not assist meaningfully in the establishment of circumstantial evidence of discrimination.
>
> [237] For all the above reasons, I have concluded that the evidence of Dr. Weiner with respect to statistical evidence of discrimination is of little assistance in this case and certainly does not itself constitute circumstantial evidence of a *prima facie* case of individual discrimination as alleged in Dr. Chopra's complaint.

[96] Similarly, for the reasons set out above, the Tribunal finds that Dr. Agocs' conclusion concerning systemic racial discrimination lacks the necessary evidentiary foundation to support it. Accordingly, her evidence is of limited assistance in this case, and certainly does not itself constitute circumstantial evidence of a *prima facie* case of individual discrimination based on race as alleged in the complaint.

[97] Both the complainant and the respondent rely on the Hara Report to support their respective positions on this complaint. The Hara Report defined "bad clustering" and "neutral clustering" as follows, at page 2-5:

> (Bad clustering) occurs when designated group employees have difficulty receiving promotions and do not receive their proportionate share. Average representation may be

> acceptable in the group, but the designated group employees are unacceptably concentrated in the lower levels.
>
> (Neutral clustering) occurs when barriers to promotion exist, but are related to legitimate occupational requirements of jobs at different levels.

[98] The authors of the Hara Report surmised that the clustering which existed at the IRB was neutral. The Hara Report states at page 2-5: "The statistical evidence, combined with earlier observations in the SMIF report, suggests that the clustering is not a sign of positive change either. Instead, the numbers suggest the clustering to be neutral."

[99] Thus, based on the evidence presented at the hearing, the Tribunal finds that the complainant has not adduced sufficient circumstantial evidence to substantiate his allegation of systemic discrimination.

[100] Even where there is sufficient circumstantial evidence to prove alleged systemic discriminatory barriers to the promotion of visible minorities to TO positions, the complainant is still required to demonstrate a link between this evidence and the evidence, both direct and circumstantial, of individual discrimination in his situation in order for a *prima facie* case of discrimination to be established.

[101] In his reasons for decision in *Chopra* (2001) at paragraph 211 (QL), on the re-hearing of the *Chopra* case following the Federal Court's decision in *re Chopra* above, then Member Hadjis explained as follows:

> […] [E]ven if the existence of systemic barriers to the promotion of visible minorities into the EX group was established, the Commission would be **required to demonstrate a link between this evidence and the evidence, both direct and circumstantial, of individual discrimination** in Dr. Chopra's situation, **in order for a *prima facie* case to be established**. However, the greater the disparity in the data between visible minorities and non-visible minorities, the less the necessity of other evidence, in order to make out a *prima facie* case. (Emphasis added)

[102] The complainant has argued that his situation is similar to the situation faced by Dr. Chopra. The Tribunal disagrees. In *Chopra* (2001), then Member Hadjis found that the failure to offer Dr. Chopra the opportunity to act was, at least in part, due to a perception that he was not suitable for the managerial position because of his "cultural

background," *i.e.* his national or ethnic origin. In contrast, the complainant acted as a PM-04 RPO for three years.

[103] The evidence must establish first that systemic barriers exist, and, secondly, that there is a link between the evidence of systemic barriers and evidence of individual discrimination against the complainant, based on his race. Both evidentiary steps are necessary. Without both, there is no *prima facie* case. In this case, not only is there insufficient evidence that there was systemic discrimination but, even if there was, there is insufficient evidence before the Tribunal that links the alleged systemic barriers to individual discrimination against the complainant.

[104] For all these reasons, the Tribunal concludes that the complainant has not established a *prima facie* case of discrimination.

Issue III: Has the respondent provided a reasonable explanation for its choice of a non-advertised process?

[105] While the above finding is sufficient to dispose of the complaint, in the event that a reviewing court were to find a *prima facie* case of discrimination on the evidence, the Tribunal will provide its findings on whether the respondent has met its evidentiary onus of establishing a reasonable explanation for the choice of process.

[106] Once *prima facie* discrimination has been established, the evidentiary onus shifts to the respondent to provide a non-discriminatory reasonable explanation for the choice of process. (See, for example: *Lincoln* at paragraph 23 (QL)).

[107] The respondent provided considerable evidence, through the testimony of its witnesses and documents tendered, with respect to the new adjudicative support structure leading to the creation of the new TO positions. The evidence demonstrates that employees were kept apprised of this restructuring initiative. For example, minutes of the IRB's National Labour Management Consultative Committee (NLMCC) for the relevant time period 2006-2008 contain records of discussions under the heading Adjudicative Support Strategy, which corroborate the testimony provided by Ms. Cyr.

[108] The complainant alleges that the respondent did not respect the PSC's appointment values in choosing between an advertised and a non-advertised appointment process. He claims that he should have been provided with an opportunity to apply and, by precluding him from doing so, the appointment process was not transparent.

[109] In previous decisions, the Tribunal has explained what transparency means in the context of a non-advertised appointment process. For example, in *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration et al.,* [2008] PSST 0024, the Tribunal stated the following:

> [59] The Preamble to the *PSEA* sets out the legislative purpose of the Act and refers to a public service that embodies "transparent employment practices." The *Canadian Oxford Dictionary* defines transparent, with reference to transactions and activities in business and government, as "open to examination by the public." Thus, for non-advertised appointment processes, persons in the area of recourse may complain to the Tribunal on the ground of abuse of authority. The *PSEA* requires that persons in the area of recourse be notified of appointments made or proposed.
>
> [60] Policies of the PSC also ensure that there are transparent employment practices. The policy on notification requires that persons in the area of recourse are notified of their right to complain. With respect to non-advertised appointment processes, PSC policy requires that deputy heads establish and communicate criteria for the use of non-advertised processes, and requires a written rationale. These requirements ensure there is a written record of decisions made.
>
> [61] The *Public Service Staffing Tribunal Regulations* provide for exchange of all information relevant to the complaint. It is in these ways that the *PSEA* and policies made under it ensure transparent employment practices. And this is the reason why it is so important that managers follow the requirements of the legislation.

[110] The respondent provided documentary evidence, and the testimony of its witnesses, which support its position that employees were fully informed of the IRB's plans for staffing the new adjudicative support structure. For example, the following excerpts of the Question & Answer document dated October 24, 2006 illustrate the transparency of the IRB in choosing a non-advertised process for the TO positions:

> - Adjudicative support services will now include new responsibilities requiring new competencies, such as: Alternative Dispute Resolution, streamlining of IAD files, quality assurance, mediation and others. The addition of new duties and the re-allocation of responsibilities mean that the new work descriptions are significantly different than the ones that existed in RPD, therefore requiring the creation of new positions. (At page 2)

- Q-14 How will the positions in the new structure be staffed? A. All existing PM-04 employees will be offered training and they will have individual learning plans developed, to enable them to acquire the competencies of the PM-05 level. They will be assessed over the course of the winter 2006-2007 against the competency profile of the PM-05 Tribunal Officer. Those who meet the competency profiles **will be promoted through a non-advertised process** (without competition) to the PM-05. (At page 4 – emphasis added)

[111] The *Justification for appointment of the PM-04 to the PM-05 using a non-advertised process 2006-2007* document was also introduced (the written justification). This document highlights that the rationale for the choice of a non-advertised process was the implementation of a new adjudicative support structure. The complainant contends that this written justification did not comply with the IRB's *Policy on the Choice in Appointment Process: Criteria for Non-Advertised Processes*. Ms. Cyr testified that the staffing decision was made in accordance with two criteria from this policy, namely: criterion 6 – "an appointment following a classification decision of an employee's substantive position;" and, criterion 11 – "an appointment following approval of the Executive Director."

[112] The complainant contends that criterion 6 is not applicable since this was not a reclassification, but a new position. Moreover, he suggests that criterion 11 is simply a catch-all since reliance on this criterion would render all of the other criteria meaningless.

[113] The Tribunal does not accept the complainant's characterization of criterion 6. The January 25, 2007 Minutes of the NLMCC state, at page 4: "It is a rigorous process and is not a reclassification." New TO positions were created and classified as PM-05; employees in substantive PM-04 RPO positions were appointed to the TO positions once they met the competency profile for the new position. At that point, the RPO positions were eliminated. While Ms. Baragar testified that her duties as a TO were the same as her duties as an RPO, she acknowledged that the RPOs were only in the Refugee Protection Division, and TOs work throughout the three divisions. She also pointed out that RPOs performed two different jobs.

[114] The PSC's policy requires a written rationale demonstrating how the choice of a non-advertised process meets the appointment values of access, fairness and

transparency. The written rationale simply states that these non-advertised processes respect the appointment values without explaining how they do so. It could also have better articulated how the non-advertised processes met the established criteria of the IRB's *Policy on the Choice of Appointment Process* by referring specifically to criteria 6 and 11. Nevertheless, the Tribunal is satisfied that the respondent's evidence is credible and responds to the requirements. The Tribunal finds that these omissions in the written justification are not serious enough to constitute an abuse of authority.

[115] The Tribunal finds that the TO positions were created as part of a restructuring initiative at the IRB – the new adjudicative support structure. The respondent presented convincing and cogent evidence concerning the new adjudicative support structure, and the justification for its choice of non-advertised appointment processes to staff the TO positions. The complainant acknowledged in his argument that the pool of PM-04 candidates was legitimate. The Tribunal finds, based on the evidence, that the respondent's explanation, namely that proceeding by way of non-advertised processes eliminated the requirement to declare employees who had been substantive RPOs surplus and, therefore, ensured their ongoing employment, is reasonable, and non-discriminatory.

[116] The Tribunal is satisfied that the IRB's written rationale complies with the IRB's *Policy on the Choice in Appointment Process: Criteria for Non-Advertised Processes* and the PSC *Policy on the Choice of Appointment Process*.

[117] The complainant obviously felt that he could perform the TO function as well as these candidates given his three years as an acting RPO and, thus, should have had an opportunity to compete through an advertised process. However, the Tribunal finds that the respondent has met its evidentiary burden of establishing a reasonable non-discriminatory explanation for choosing between an advertised and a non-advertised appointment process with respect to appointment process number 07-IRB-INA-03-13392.

[118] If a *prima facie* case had been made, and since the respondent met its evidentiary burden, the onus would shift back to the complainant to satisfy the Tribunal that the explanation provided by the respondent was a pretext for the respondent's otherwise discriminatory practice. The complainant has not satisfied the Tribunal that the respondent's explanation for choosing non-advertised processes was a pretext.

[119] The fact that the respondent subsequently conducted two advertised appointment processes in 2008 for TO and DTO positions (appointment process numbers 2008-IRB-EA-014353 and 2008-IRB-TO-IA-014352) adds further weight to the respondent's position that the non-advertised appointment process was chosen as a result of significant organizational change in the form of the new adjudicative support system.

[120] The complainant argues that he established a *prima facie* case of discrimination, based on the evidence of systemic discrimination, and, therefore, it is incumbent on the respondent to provide evidence to meet its BFOR defence. The complainant contends that the respondent has failed to raise any evidence of a BFOR defence for conducting non-advertised processes.

[121] Since the Tribunal has found that the complainant has not proven *prima facie* discrimination, there was no onus on the respondent to lead evidence concerning a BFOR defence. A prerequisite for a BFOR analysis is a finding of *prima facie* discrimination.

[122] As a final note, the Tribunal wishes to address the issue of intention in the context of complaints where discrimination is alleged. The Tribunal has consistently ruled in its decisions that a finding of abuse of authority under the *PSEA* does not require intent. (See, for example: *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, at paragraph 72; *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044, at paragraph 36; *Cameron and Maheux v. Deputy Head of Service Canada et al.,* [2008] PSST 0016, at paragraph 76; and, *Chiasson v. Deputy Minister of Canadian Heritage et al.*, [2008] PSST 0027, at paragraph 46).

[123] To hold otherwise would mean that Parliament has vested the PSC, and by extension deputy heads, with the authority to appoint or lay off an employee in an unreasonable or discriminatory way, provided it was done unintentionally or without any improper intention. Clearly, the PSC and deputy heads do not have the authority to act in this manner.

[124] It is well established that a finding of discrimination in human rights jurisprudence does not require intent. Thus, in a complaint filed under section 77 of the *PSEA*, if the Tribunal finds that the complainant was not appointed or proposed for appointment as a result of a discriminatory practice, regardless of intention, it can conclude that the respondent has abused its authority. In *Tibbs,* the Tribunal explained the following concerning discrimination:

> [73] While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.
>
> [74] To require that a finding of abuse of authority be linked to intent would lead to situations that clearly run contrary to the legislative purpose of the *PSEA*. It could not have been envisioned by Parliament that, for example, **when a manager unintentionally makes an appointment that leads to an unreasonable or discriminatory result, there would be no recourse available under the *PSEA*.** When a manager exercises his or her discretion, but unintentionally makes an appointment that is clearly against logic and the available information, **it may not constitute bad faith,** intentional wrongdoing, or misconduct, but the manager may have abused his or her authority. (Emphasis added)

[125] Parliament specifically provided in subsection 2(4) of the *PSEA* that abuse of authority includes bad faith and personal favouritism. There is no debate that, where bad faith or personal favouritism is found, this constitutes unacceptable conduct amounting to an abuse of authority. See *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007. Similarly, Parliament specifically provided in section 80 of the *PSEA* that the Tribunal could interpret and apply the C*HRA* in considering complaints of abuse of authority. The *CHRA* is *quasi*-constitutional legislation. Given the importance of human rights legislation and its *quasi*-constitutional status in Canada, there should be no debate that discrimination is unacceptable conduct which constitutes abuse of authority.

DECISION

[126] For all these reasons, the complaint is dismissed.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2007-0127
Style of Cause:	*Norm Murray and the Chairperson of the Immigration and Refugee Board of Canada et al.*
Hearing:	September 23 to 26, and November 10, 2008 Toronto and Ottawa, ON
Date of Reasons:	December 21, 2009
APPEARANCES:	
Yavar Hameed	For the complainant
Lesa Brown	For the respondent
John Unrau	For the Public Service Commission