



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2008-0105
Issued at: Ottawa, June 29, 2010

ROBERT BOIVIN

Complainant

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

AND

OTHER PARTIES

Matter Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*

Decision Complaint is dismissed

Decision rendered by Merri Beattie, Member

Language of Decision English

Indexed *Boivin v. President of the Canada Border Services Agency et al.*

Neutral Citation 2010 PSST 0006

Reasons for Decision

Introduction

1 The complainant, Robert Boivin, participated in an internal advertised appointment process for Senior Officer Trade Compliance positions in the Greater Toronto Area Region (GTA) of the Canada Border Services Agency (CBSA). He alleges that he was subjected to discrimination during his assessment, on the basis of his religious beliefs and on the basis of a disability.

2 The respondent, the President of the CBSA, denies that there was any discrimination or abuse of authority in this appointment process. The respondent maintains that the Tribunal must consider questions of discrimination in the context of a complaint of abuse of authority under the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12, 13 (*PSEA*).

Background

3 A *Job Opportunity Advertisement* was published on *Publiservice* for Senior Officer Trade Compliance positions at the FB-04 group and level, with the CBSA. The closing date for applications was May 11, 2007. The *Advertisement* stated that the assessment tools could include written examinations, an oral presentation, an oral interview, and Employee Performance Management Reports and/or reference checks.

4 On August 2, 2007, the complainant was informed in writing that he had been successful on two written examinations and he was invited to attend an interview, which took place on August 13, 2007. The complainant was informed in writing on October 13, 2007 that he had been eliminated from the appointment process because he had not passed one or more of the essential qualifications.

5 On February 5, 2008, he filed his complaint with the Public Service Staffing Tribunal (the Tribunal), alleging abuse of authority in his assessment, in accordance with paragraph 77(1)(a) of the *PSEA*.

6 The complainant originally filed three allegations with his complaint. During the hearing, the complainant stated that he would be proceeding with only two of the three

allegations. These two allegations are that his human rights were breached, in question 4, based on religion and based on disability in question 5.

Issues

7 The Tribunal must determine the following issue:

Did the respondent abuse its authority in assessing the complainant due to alleged violations of the *Canadian Human Rights Act (CHRA)*?

Summary of relevant evidence

8 The evidence introduced throughout the hearing focused on questions 4 and 5 that were presented during the interview portion of the appointment process, the nature of the complainant's religious belief, and the nature of the complainant's disability. Evidence was also introduced that pertained to the steps taken relating to the complainant's request for accommodation and an offer to reassess the complainant that was made by the respondent.

9 In addition, the complainant introduced evidence pertaining to his having been referred to Health Canada for an evaluation of his fitness for work and his belief that he was required to undergo this evaluation after he had shared information in his workplace that he did not want to participate in Christmas parties. Following arguments by the parties with respect to relevance, the Tribunal agreed to admit a package of documents as exhibits, for the sole purpose of showing the complainant's state of mind at the time of this interview.

Nature of religious beliefs and Question 4

10 The complainant testified that his personal religious beliefs do not include Christmas or any decorating or festivities associated with Christmas. He submitted excerpts from several books he owns, stating that they were amongst those that have formed the basis for his personal religious beliefs, including his belief that Christmas is not Christian.

11 Two witnesses testified for the complainant. Both established a longstanding relationship with the complainant and testified as to their personal knowledge of the complainant's long-held beliefs with respect to Christmas.

12 The complainant addressed the respondent's questions about an email dated December 14, 2006, in which he requested permission to attend a Christmas lunch of another work unit. The complainant explained that he used the term "Christmas lunch" because it is the term used by others. In his view, it was a team lunch with friends who would not impose Christmas on him. He stated that he frequently goes to lunches and that this one just happened to be at Christmas time.

13 In addition to his beliefs concerning Christmas, the complainant testified that his religious beliefs govern his behaviour with respect to volunteering. He stated that volunteering is important but should be done secretly, to avoid seeking recognition. The complainant explained that he included volunteer work in his application to this appointment process because it was relevant to work at the CBSA. He also stated that he makes an exception to secrecy with respect to his volunteer work on behalf of veterans because he is a student of history and this work has an educational aspect.

14 The complainant explained that the first portion of the interview was a presentation, which he had prepared in advance of the interview. Following that, he was given five questions in writing and the assessment board members left the room while he reviewed them, then returned and asked each question orally.

15 The complainant submitted three copies of question 4 and the expected responses. Each copy contained the notes of one of the three board members who interviewed him. Question 4 reads as follows:

Competency

Teamwork and Cooperation (1 mark per point to a max. of 7)

Definition: Teamwork and Cooperation is working cooperatively with co-workers or others involved in a common goal, being part of a team and working together, as opposed to working competitively or on a separate agenda.

You have volunteered to participate on a committee to organize the office Christmas party.

The first meeting of the committee has been called and the other volunteers include a manipulative employee who wants everything done his way, a young, new energetic employee, and a long-time employee close to retirement.

What steps would you take to help your team work effectively together to organize a successful and memorable evening for all?

(Emphasis in original)

16 The complainant testified that when the board returned to the interview room, he raised an objection to question 4, stating clearly that it required something that was contrary to his beliefs. He restated his objection when question 4 was asked orally. The complainant said that at that point the assessment board told him that he could answer the question in a different context, but he believed that renaming the event a holiday party would not have changed the fact that it was a Christmas party. He acknowledged that he assumed that “different context” meant different party. He tried to think of the question in another context, but he felt sick and could not. He stated that he would have ended his interview at that point but that would have resulted in losing his right to recourse. He testified that he did not ask that the question be restated without any reference to Christmas, nor did he refuse to answer the question. He attempted to answer in the Christmas party context. He also stated that it would have been discriminatory for him to be asked a different question because of his religious beliefs.

17 The complainant said that he was shocked by the question because he believed that his recent referral to Health Canada was due to his religious beliefs, specifically his refusal to participate in Christmas parties. The complainant drew the Tribunal’s attention to two documents in the Health Canada referral package. One is the ten-page *Fitness to Work Evaluation Request* prepared by the complainant’s manager. He noted a reference on page three concerning a conflict over Christmas 2006-related events in the workplace. The other document is an email the complainant sent to his manager and his Director on January 2, 2007 which, in his view, informed the respondent of his religious beliefs. When he saw question 4, he questioned how Marg Gayler, the assessment board chairperson, could not know the reason for his absence from the workplace.

Immediately after his interview, he asked her if she knew why he was not at work, and he believed her when she said she did not.

18 The complainant stated that he has known Ms. Gayler for several years. He described her as the lead person with respect to the duty to accommodate, and he respects her. He believes that there was no malice intended and that the question with the reference to Christmas was an oversight.

19 The respondent called Ms. Gayler as a witness. Ms. Gayler is Manager, Regional Programs, Trade Compliance Division, GTA Region. She stated that she was a member of the assessment board throughout the appointment process and became board chairperson one week before the interviews were conducted.

20 She testified that the assessment board members collectively developed the interview questions as well as the expected answers. Question 4 was designed to demonstrate an essential qualification, namely, teamwork and cooperation. She explained that the Senior Officers, Trade Compliance must work with colleagues within and outside their units to perform audits, post audit verifications and outreach functions. They also interact with clients. Teamwork and cooperation are necessary to performing the duties of the positions.

21 Ms. Gayler also spoke about the expected responses for question 4, which read as follows:

- Discuss with the committee how the party will be arranged
- Negotiate who will do what
- Do your part so no one is let down
- Share your knowledge and experience with the team
- Recognize and capitalize on individual strengths
- Encourage other team members to participate and to provide input
- Seek consensus for plans
- Works with others to ensure common goals are met
- Set a good example for benefit of all
- Take a leadership role if necessary to move the party plans along
- Consider the personality types of the team members when communicating with them

- Approach team members in a manner that is non-confrontational or demanding, and that is tolerant and open (i.e. allows for free-flow of ideas, suggestions)
- Other Responses

22 Ms. Gayler testified that there was no discussion of including Christmas-related traditions, such as decorations and gifts as part of the expected responses. The assessment board was looking for candidates to demonstrate teamwork and cooperation in working with others toward an established goal.

23 She testified that, at the time the questions were developed, she was aware that the complainant was not in the office but had no knowledge of the reasons. She also stated that the complainant does not report to her.

24 Ms. Gayler explained that the candidates invited to the interview were given instructions to prepare a ten-minute presentation. Each interview began with an informal exchange to put candidates at ease, followed by the candidate's presentation. Then candidates were given a written copy of questions 1 to 4 and 6 and were allowed 15 minutes alone to review the questions and make notes. The board members then returned and asked all of the questions orally.

25 She testified that, when the board returned to the interview room, the complainant stated that he was offended by the reference to a Christmas party in question 4. The interview proceeded with the questions in sequence and, when question 4 was asked, the complainant again stated that he was offended but started to give his response to the question. She said that the complainant did not expand on his statement that the reference to a Christmas party was offensive. She does not recall a reaction from the assessment board or any discussion of an alternate scenario for question 4.

26 According to Ms. Gayler, at the completion of that portion of the interview, candidates were asked whether they wanted to add anything to the responses they had given. Her recollection is that the complainant did not add anything at that time.

27 Ms. Gayler testified that the complainant raised his concern about question 4 with her near the end of October 2007, when they were making arrangements for an informal discussion. She stated that this was after the complainant was informed that he had not met the qualifications for the positions.

Nature of disability and Question 5

28 The complainant testified that he has had a problem with his eyes all of his life. He does not know the cause of the problem but it has progressively worsened, although at a slow pace. Light affects his vision and causes him extreme migraine discomfort in his eyes. The more he is exposed to light, the more difficult it is to see and the more fatigue he experiences. His eyes focus separately making it difficult to track objects in motion. He can see well in the dark.

29 The complainant stated that after light exposure, he needs time to recover in darkness. He explained that dark glasses of one type are best for fluorescent lighting and allow him to read whereas, for sunlight, he needs polarized glasses, which impede his ability to read.

30 The complainant introduced a letter addressed to him dated August 2, 2007 inviting him to attend the "Interview portion" of this appointment process. The complainant also introduced the *Job Opportunity Advertisement* for this appointment process into evidence, which states at page four that the assessment tools may include "written examinations; an oral presentation; an oral interview, Employee Performance Management Report and/or reference checks". He also produced a letter he wrote dated August 2, 2007, requesting accommodation for a visual disability during his interview scheduled for August 13, 2007. His request was as follows:

Please note that I will require accommodations for my disability. I am light sensitive and it would be best if the lighting in the room can be reduced, however, since I know that the board members will be required to write, I would require wearing dark glasses. The arrangements can be made at the time of the interview, and I am quite flexible.

31 The complainant travelled from Hamilton to Toronto by Go Train for his interview, a trip of about one hour. He stated that it was a sunny day. On his arrival, he stayed outside in the shade before entering the building for his interview.

32 He testified that after answering interview questions 1 to 4 and 6, question 5 was given to him in writing. He introduced a copy of question 5 and the expected responses. Question 5 reads as follows:

Competency

Analytical Thinking (10 Marks – See marking chart)

Definition:

Analytical thinking is understanding a situation by breaking it into smaller pieces, or by tracing the implications of a situation in a step-by-step way. It includes organizing the parts of problem, situation, etc., in a systematic way; making systematic comparisons of different features or aspects; setting priorities on a rational basis; and identifying time sequences and causal relationships.

Seven new television shows F, G, H, I, J, K, and L, have been selected for fall programming. Exactly one television show will air each day of the week. The following scheduling restrictions apply:

- **I must be shown on Sunday**
- **H must be shown on either Tuesday or Wednesday**
- **F and K must be shown on consecutive days, but K cannot be shown on Tuesday**
- **G and L cannot be shown on consecutive days**

If G is shown on Thursday, which of the following must be true?

- a. **F must be shown on Saturday**
- b. **F must be shown on Monday**
- c. **L must be shown on Monday**
- d. **L must be shown on Saturday**

Please provide and explain your analysis that lead (sic) you to this response.

(Emphasis in original)

33 The complainant testified that the light conditions in the room were adequate for him to read questions 1 to 4 and question 6 and write notes. According to the complainant, question 5 differed from the others because it required finding information and analyzing it.

34 He views question 5 as a written test because it required both reading and writing. He stated that he did not see the part of the question starting from “[I]f G is shown on Thursday...” to the end, because of the effects of his earlier exposure to sunlight and the impact on him of having been asked a question “about Christmas”. The complainant stated the following: “I had already gone through the Christmas issue. It was in the back of my mind and I was trying to sort it out, but it was not making any sense.”

35 The complainant testified that he would have requested different accommodation had he known there would be a written test question, but he was not told. He said that for a written question he would have arrived early, requested a dark room, and asked that the written question be administered first. He also clarified that for a written test he would have asked for different lighting than what he requested for an oral assessment.

36 He testified that Ms. Gayler had monitored written tests he had taken previously and was familiar with his disability. He assumed that she would know the accommodations he required for a written test. He stated that his accommodation needs had always been met.

37 The complainant acknowledged that, when he saw question 5, he did not ask for different accommodation or tell the board that he was having difficulty. He stated that, at that point, his morale was low because of question 4 and he just wanted to finish the assessment and leave. He also stated that he did not say anything to the board because, in his view, it would not have made a difference.

38 The complainant said that, by that time, he was experiencing eye fatigue. He stated that, given the combined effect of travelling for one hour on a sunny day, being interviewed, and being asked a question about a Christmas party, there was nothing that could have been done to enable him to deal with a written question at that time. According to the complainant, asking for further accommodation would have meant having to return another day and he did not want to do that.

39 The complainant agreed that his needs with respect to travel for the interview were met; his interview was held in a Toronto location that made travel easier for him

than the Mississauga location where the other candidates were interviewed. He also testified that the accommodations he requested in his email of August 2, 2007 were met; however, the accommodation he requested was for an oral interview.

40 The complainant acknowledged that he did not contact anyone about his accommodation concerns until after he was informed that he had not qualified; then he sent Ms. Gayler an email to inform her that he intended to file a complaint with the Tribunal. He stated that discrimination cannot be claimed until the results of an appointment process are known.

41 The complainant also tendered evidence that he had participated and qualified in a subsequent appointment process for FB-04 positions in the CBSA.

42 Ms. Gayler testified about the requirement for analytical thinking to perform the duties of a Senior Officer Trade Compliance. Incumbents are often faced with circumstances that require them to understand what is requested and determine what needs to be considered to resolve a situation. She testified that the written version of question 5, including the qualification definition, was handed to candidates and read aloud to them. Candidates were given a work sheet and allowed ten minutes to work on the question before answering orally. Unlike the first set of questions, the board members stayed in the room with candidates while they worked on question 5.

43 She also stated that she did not consider question 5 to be a written test. She stated that all of the interview questions were handled the same way; candidates received the questions in writing and orally, they were given time to make notes and prepare, and they answered orally.

44 Ms. Gayler testified that she knew the complainant had requested accommodation for his interview and described the arrangements that were made: the interview was conducted in downtown Toronto, which is accessible by public transit, as opposed to the location in Mississauga where all other interviews were held; the interview was held in an interior room; and the room had two sets of lights, should adjustments be necessary. She also testified that she had previously monitored the

complainant for written examinations, where the setting was a bit darker than the one used for this assessment.

45 Ms. Gayler testified that the complainant did not request any additional or different accommodation during his interview and did not comment on the lighting in the room or his physical state. At the end of each interview, candidates were asked if they had any questions for the board members and the complainant did not raise anything.

Offer to meet complainant in order to discuss reassessment

46 Ms. Gayler stated that she is aware that there was an offer made by a more senior manager to reassess the complainant; she was not aware of what the proposed reassessment would entail.

47 The respondent also called Micheline Leduc as a witness. Ms. Leduc is Director, Human Resources Programs, and is responsible for Employment Equity and other corporate human resources programs in the CBSA nationally. In examination-in-chief, Ms. Leduc was asked to comment on a letter, dated December 4, 2008, to the complainant from Goran Vragovic, Executive Director, GTA Region. She stated that she had no direct involvement in the decision to issue this letter, which asks the complainant to contact a CBSA representative to discuss a reassessment and any accommodations required for a reassessment.

48 When the complainant was questioned about the respondent's offer to reassess him, he acknowledged that he had very recently received the letter; however, he had not contacted the respondent to discuss a reassessment in this process, as the letter had requested. In the complainant's view he had already been reassessed since he had participated in a subsequent, similar appointment process to staff FB-04 positions in the CBSA.

Arguments of the parties

Complainant's arguments

49 The complainant refers to section 80 of the *PSEA*, which authorizes the Tribunal to interpret and apply the *CHRA*. He submits that the Tribunal explicitly identified discrimination as abuse of authority by including it among the five categories of abuse of authority identified in *Tibbs v. Deputy Minister of Defence et al.*, [2006] PSST 0008 (*Tibbs*).

50 The complainant notes that subsection 2(4) of the *PSEA* explicitly includes personal favouritism in the meaning of abuse of authority under the *PSEA*. However, he disputes the interpretation of personal favouritism that the Tribunal has applied in previous cases. He relies on a decision from the British Columbia Labour Relations Board to argue that personal favouritism includes a broad notion of discrimination; one which is not limited to discrimination on grounds prohibited by the *CHRA*. He refers to this as unjust discrimination and argues that, as an element of personal favouritism, unjust discrimination is included in the meaning of abuse of authority under the *PSEA*.

51 The complainant argues that religion is a prohibited ground of discrimination under subsection 3(1) of the *CHRA*. He also submits that on January 2, 2007, he informed the respondent regarding his religious views respecting Christmas. Referring to the Supreme Court of Canada's decision in *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R 551; [2004] SCJ No. 46 (QL) (*Amselem*), he submits that the Tribunal must determine whether his religious beliefs are held genuinely, sincerely, and legitimately. He also submits that freedom of conscience and religion are the first rights listed under section 2 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and therefore, are the most important freedoms, with which there should be no interference.

52 The complainant submits that the evidence demonstrates that his religious beliefs concerning both Christmas and volunteering are *bona fide*. Relying on section 7 of the *CHRA*, he argues that it is discriminatory to differentiate adversely in relation to an employee on a prohibited ground of discrimination. He acknowledges that question 4 did not require candidates to actually organize a Christmas party. He notes that he told

the assessment board twice that question 4 offended his religious beliefs. He submits that his *bona fide* beliefs prevented him from even formulating a response to a question concerning a Christmas party. He also argues that, by including question 4, the respondent gave preference to candidates who celebrate Christmas.

53 The complainant submits that he has established a *prima facie* case of discrimination based on religion and that the respondent has failed to prove a *bona fide* occupational requirement.

54 The complainant also submits that he has been the subject of discrimination under subsection 3(1) of the *CHRA*, based on a disability. He states that he is visually impaired, has previously received accommodations in the workplace for his disability, and that the respondent does not dispute his disability.

55 He submits that question 5 is a written examination because of its format and the requirement to analyze a written document. He also states that his request for accommodation for the interview was based on the invitation he received on August 2, 2007, and that he did not consider a written examination when he made his request. He argues that there was nothing in the invitation that led him to conclude that accommodation for anything but an oral interview would be needed. In support of this, he refers to the definition of interview in the Oxford Canadian Dictionary, which confirms that an interview does not include a written examination. Therefore, he submits that he was not properly accommodated for the assessment.

Respondent's arguments

56 The respondent submits that the Tribunal has firmly established that in a complaint of abuse of authority under section 77 of the *PSEA*, the complainant bears the burden of proof. It refers to the Tribunal's decision in *Tibbs* and to human rights decisions that a complainant bears the initial burden of establishing a *prima facie* case of discrimination.

57 The respondent disputes the complainant's argument that personal favouritism includes discrimination. It notes that the cases relied upon by the complainant deal with a specific area of labour law that is governed by provincial legislation.

58 Referring to Supreme Court of Canada jurisprudence, (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161; [2007] SCJ No. 4, [2007] (QL) (*McGill*) and *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536; [1985] SCJ no. 74(QL) (*O'Malley*), the respondent argues that a *prima facie* case requires that the complainant must first demonstrate that he possesses the characteristic that is a prohibited ground of discrimination. Secondly, the complainant must demonstrate a nexus between the characteristic and the alleged differential, adverse treatment.

59 The respondent submits that the complainant's testimony on the subjects of Christmas and volunteering demonstrates inconsistencies that are sufficient to undermine the sincerity of his stated religious beliefs. Accordingly, it argues that the complainant has failed to demonstrate *bona fide* religious beliefs as they relate to the subject matter of question 4.

60 The respondent also argues that the complainant has failed to establish a *prima facie* case of discrimination based on religion because he has failed to demonstrate the necessary nexus between his religious beliefs and his ability to answer question 4. The evidence shows that the purpose of the question was to assess teamwork and cooperation, and that the question did not require any knowledge of Christmas. The respondent argues that the complainant has not provided an explanation as to how the reference to an office Christmas party in the question prevented him from explaining how he would organize a team and distribute work.

61 The respondent submits that the assessment board suggested that the complainant answer question 4 in a different context when he expressed his objection during the interview. It argues that this was an opportunity for him to address the qualification being assessed and that the complainant's testimony shows that he was capable of thinking of the question in another context.

62 With regard to the question of discrimination based on disability, the respondent does not dispute the complainant's testimony regarding his visual impairment in the context of this complaint, but argues that the complainant has failed to demonstrate the necessary nexus between his disability and his ability to answer question 5. It submits that, although the complainant testified that he was able to read only part of the question due to his disability, the question was read aloud to him before he was required to respond.

63 The respondent states that the complainant's accommodation needs had been met in the past and for this interview. There was no accommodation request that was ignored or refused and the complainant did not request further accommodation when his accommodation needs changed.

64 Finally, the respondent submits that the complainant's evidence is insufficient to establish that he meets the qualifications for the FB-04 position in question. As such, he has met only one of the three evidentiary requirements for establishing a *prima facie* case of discrimination in a hiring context, as described in *Shakes v. Rex Pax Ltd.* (1981), 3 C.H.R.R D/1001 (Ont. Board of Inquiry) (*Shakes*). Therefore, the respondent submits that the complainant has failed to demonstrate a *prima facie* case of discrimination based on a disability.

Public Service Commission's Arguments

65 The Public Service Commission (PSC) submits that a breach of the *CHRA* is a serious matter that compromises an appointment process and must be addressed through one of the several different mechanisms provided by the *PSEA*. The PSC argues that in a complaint under section 77 of the *PSEA* the Tribunal must be satisfied that the breach was the result of actual improper intention or was the result of such serious recklessness or carelessness that bad faith can be presumed. The PSC argues that, if Parliament had intended that every breach of the *CHRA* be an abuse of authority, it could have included discrimination in subsection 2(4) of the *PSEA*.

66 The PSC disputes the complainant's argument regarding personal favouritism and discrimination. The PSC states that the complainant's interpretation would essentially require the Tribunal to modify section 3 of the *CHRA* by adding personal favouritism as a prohibited ground of discrimination.

67 The PSC submits that the Tribunal should assess the sincerity of the complainant's religious beliefs based on the Supreme Court's ruling in *Amselem* and definitions of "*bona fide*" and "good faith" in Black's Law Dictionary (1999), 7th edition. It submits that important contradictions in the complainant's testimony should be considered by the Tribunal in weighing the evidence with respect to the sincerity of the complainant's religious beliefs.

68 The PSC also argues that the respondent took appropriate measures with respect to question 4, when it suggested that the complainant answer the question without reference to Christmas.

69 With regard to the issues pertaining to question 5, the PSC states that it is satisfied that this question was intended to be an oral question, that the complainant's accommodation request had been addressed, and that the respondent has applied the PSC policies appropriately.

Reply arguments

70 In reply, the complainant clarifies that he objected to question 4 based on its religious nature, not because it dealt with a social event. He also submits that he has met his burden of proof with regard to disability because he took reasonable care to communicate his accommodation needs to someone with knowledge of his disability and accommodation needs. He requests that the Tribunal consider his circumstances at that moment, when examining submissions by the respondent and the PSC that he did not ask for new accommodations.

Relevant legislative provisions

71 Subsection 88(2) of the *PSEA* sets out the mandate of the Tribunal, and in particular, its mandate to hear complaints of abuse of authority made under section 77 of the *PSEA*.

88. (2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

72 Subsection 77(1) establishes the circumstances and the grounds for making a complaint regarding an internal 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; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

73 Sections 80, 81 and 82 of the *PSEA* set out the Tribunal's authority to interpret and apply the *CHRA* in considering a complaint made under section 77, and its powers and limitations with respect to remedy.

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.

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head 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.

(2) Corrective action taken under subsection (1) may include an order for relief in accordance with paragraph 53(2) (e) or subsection 53(3) of the *Canadian Human Rights Act*.

82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.

74 Subsection 3(1) of the *CHRA* sets out the prohibited grounds of discrimination and section 7 describes discriminatory practices in employment.

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,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

75 Section 10 of the *CHRA* describes discriminatory practices in an employment setting:

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

(a) to establish or pursue a policy or practice, or

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

76 Included in the Tribunal's authority to order corrective action in subsection 81(2) of the *PSEA*, is the power to include relief in accordance with paragraph 53(2)(e) and subsection 53(3) of the *CHRA*.

53.[...]

(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

[...]

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

(3) In addition to any order under subsection (2), the member or panel may order the person to pay such compensation not exceeding twenty thousand dollars to the victim as the member or panel may determine if the member or panel finds that the person is engaging or has engaged in the discriminatory practice wilfully or recklessly.

[...]

77 Parts of subsections 15(1) and 15(2) of the *CHRA* are also relevant to this complaint.

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* requirement;

[...]

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

78 Section 25 of the *CHRA* defines disability as follows: “disability” means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

Analysis

The *PSEA* and the Tribunal’s jurisdiction to apply the *Canadian Human Rights Act*

79 The Tribunal must determine whether there has been abuse of authority as a result of alleged discriminatory practices. Under subsection 88(2) of the *PSEA*, the Tribunal’s mandate with respect to internal appointment processes is to consider and dispose of complaints made under section 77 of the *PSEA*. Section 77 of the *PSEA* provides that an employee may bring a complaint to the Tribunal that he or she was not appointed because of abuse of authority.

80 In *Tibbs*, the Tribunal noted that Parliament chose not to define abuse of authority beyond stating that abuse of authority includes, but is not limited to, bad faith and personal favouritism. The Tribunal also identified an analytical framework of five categories of abuse of authority for analyzing such allegations.

81 The *PSEA* clearly permits the Tribunal to interpret the *CHRA* in determining whether there has been abuse of authority. In section 80 of the *PSEA*, Parliament specifically provides the Tribunal with the authority to interpret and apply the *CHRA* in considering complaints of abuse of authority brought under section 77 of the *PSEA*. Accordingly, it is clearly within the Tribunal's jurisdiction to examine an allegation of discrimination in a complaint of abuse of authority.

82 The Tribunal does not agree with the PSC's argument that a breach of the *CHRA* will constitute an abuse of authority only when improper intent is established or such serious carelessness or recklessness is found that bad faith can be presumed.

83 It is well established in human rights jurisprudence that a finding of discrimination does not require intent. Justice McIntyre's description of discrimination at paragraph 37 in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; [1989] S.C.J. No. 6 (QL) is noteworthy:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

84 In reviewing key issues pertaining to discrimination in *McGill*, Justice Abella reiterated the principle that intent need not be proven to establish discrimination. Writing in concurring reasons, she noted at paragraph 48 that "the essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly."

85 In addition, the Tribunal has consistently ruled that a finding of abuse of authority does not require intent, and that an interpretation requiring proof of intent would run

contrary to Parliament's intention in enacting the *PSEA*. (See for example, *Tibbs*, at paragraph 72, and *Rinn v Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044, at paragraph 36).

86 The complainant's interpretation of personal favouritism relies solely on provincial case law from the B.C. labour relations regime. Nothing in the complainant's submissions on this matter disturbs the Tribunal's findings with respect to personal favouritism in *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.* [2008] PSST 0007 or its other decisions. This issue however is not determinative as it was made to further support the complainant's submission that the Tribunal has the jurisdiction to address human rights questions in examining abuse of authority. The Tribunal has already determined that it does have this authority.

87 In addition, as noted by Chief Justice Lamer in *Dagenais v. CBC Broadcasting*, [1994] 3 S.C.R. 835, at paragraph 72, a "hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law". See also *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698; and *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84.

Burden of proof

88 Section 3 of the *CHRA* includes both religion and disability as prohibited grounds of discrimination. Section 7 of the *CHRA* states that it is a discriminatory practice, directly or indirectly to refuse to employ or continue to employ any individual; or, in the course of employment, differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

89 It is well established that the complainant has the burden of proof, on the balance of probabilities, in complaints of abuse of authority under the *PSEA*. (See for example, *Tibbs* at paragraphs 50, 53 and 55).

90 In the human rights context, the complainant has the burden to prove a *prima facie* case of discrimination. In *O'Malley*, the Supreme Court of Canada described the nature of a *prima facie* case of discrimination:

28 [...] The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. [...]

91 In its specific consideration of the *CHRA* and proof of discrimination in *Morris v. Canada (Canadian Armed Forces)*, [2005] FCA 154; [2005] F.C.J. No. 731 (QL), the Federal Court of Appeal reaffirmed that, in matters of employment, a *prima facie* case of discrimination under the *CHRA* is demonstrated using the test established in *O'Malley*.

92 More recently, Justice Abella described the threshold burden to establish a discriminatory distinction, or *prima facie* discrimination, in *McGill*. She notes at paragraph 49 that not every distinction is discriminatory in nature, and that membership in a group protected under human rights legislation does not, without more, guarantee access to a human rights remedy. The complainant has the threshold burden to establish the link between the group membership and the arbitrariness of the disadvantaging conduct. It is that link that triggers the possibility of a remedy.

93 Once the complainant has established a *prima facie* case of discrimination, the onus shifts to the respondent to justify the *prima facie* discriminatory practice. Within the context of section 15(2) of the *CHRA*, the respondent must prove that the standard is *bona fide* and rationally connected to the requirement in question. If the respondent justifies its conduct in accordance with section 15(2) of the *CHRA*, then there is no discrimination. Otherwise, the claim of discrimination will stand.

Ground of religion

94 Religion is a prohibited ground of discrimination under subsection 3(1) of the *CHRA*. To determine whether there is a discriminatory practice based on the ground of religion in this case, the Tribunal must determine whether the complainant has a *bona*

fide religious belief. If so, the Tribunal must then decide whether the complainant has established a *prima facie* case of discrimination.

95 The Supreme Court of Canada described important concepts for establishing *bona fide* religious belief at paragraphs 39 to 46 in *Amselem*. First, a complainant's belief must have a nexus with religion whether or not it is based on a precept followed by others. Secondly, a complainant must establish that the belief is sincerely held, irrespective of whether the belief is required by official religious dogma or is in conformity with the position of religious officials. Writing for the majority in *Amselem*, Justice Iacobucci provided the following definition of religion at paragraph 39:

39 [...] While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

96 This complaint concerns the complainant's declaration that he does not believe in the religious observance of Christmas. In his testimony, the complainant explained his background and some of the information upon which this belief is founded. He testified that he considers himself a Roman Catholic, although he disagrees with many Roman Catholic precepts. He states that his beliefs concerning Christmas are similar to those of the Jehovah's Witnesses, but not identical. He also said that he is not offended by invitations to Christmas parties but he does not participate because they transgress his religious beliefs. He submits that, based on his experience, an office Christmas party entails a Christmas tree and decorations, which he views as false idols that his beliefs prohibit him from worshipping. He does not decorate his home for Christmas. Testimony of his two witnesses supports the complainant's testimony that he does not observe Christmas.

97 Both the respondent and the PSC argue that the complainant's religious beliefs are not sincerely held. The respondent refers to two apparent contradictions in the complainant's testimony, one pertaining to the complainant's request for permission to

attend a Christmas lunch and another pertaining to the complainant's tolerance of Christmas decorations. The PSC suggests that the differences between the complainant's statements and his actions should be considered by the Tribunal when deciding whether his religious beliefs are *bona fide*.

98 With regard to the complainant's request to attend a Christmas lunch, the Tribunal accepts the complainant's explanation that he viewed this lunch as a team lunch and that he used the label "Christmas lunch" in his request for ease of communication only. It also notes that the complainant testified that he would permit Christmas decorations in his home if they were brought in by a family member because he is tolerant of family members who do not share his beliefs.

99 Notwithstanding the submissions of the respondent and the PSC, the Tribunal finds that the complainant's beliefs concerning Christmas are sincerely held. What will and will not offend the complainant's religious beliefs may not be readily identifiable to someone without intimate knowledge of those beliefs. Moreover, the matter that will offend cannot necessarily be identified by the label of Christmas which, based on the complainant's evidence, he will use or disregard in accordance with his understanding of what the actual situation will entail.

100 Based on the evidence, the Tribunal finds that the complainant does not adhere to commonly held precepts of a conventional religious organization. His beliefs are based on his own study and contemplation; they are personal to him. In addition, the Tribunal finds that the complainant's beliefs have a nexus with religion, though, unlike the cases submitted by the parties, the nexus is to his personal religious beliefs. Accordingly, the Tribunal finds that the complainant holds *bona fide* religious beliefs that prohibit him from participating in an event that has the purpose of celebrating Christmas.

Prima facie case

101 Having determined that the complainant holds *bona fide* religious beliefs, the Tribunal must now determine whether the complainant has established that the question in the interview constitutes a *prima facie* discriminatory practice. In other words, is the

allegation made by the complainant complete and sufficient to justify a finding in the complainant's favour, in the absence of an answer from the respondent?

102 The complainant submits that he could not properly answer question 4, which asks candidates to assume that they had volunteered to organize a Christmas party, for three reasons. First, his religious beliefs prevented him from answering a question that was religious in nature. Secondly, the complainant points to his belief that he should not seek recognition through volunteerism and therefore, his volunteerism must not be shared publicly. He argues that this created a barrier to answering the question. Thirdly, the complainant states that at the time he was presented with the question, he believed that it had been deliberately constructed with the Christmas-related context due to his having previously disclosed that he did not celebrate Christmas and his subsequent referral for a Health Canada evaluation. From his perspective, there was a connection between the fact that he had shared his views about Christmas, his subsequent referral to Health Canada and, several months later, the interview question presented to him by the assessment board.

103 The complainant raised several substantiated or partially substantiated cases of religious discrimination in his arguments: *Tahmourpour and the CHRC*, [2008] CHRDR No. 10; 2008 CHRT 10 was overturned in *RCMP v. Tahmourpour*, [2009] FC 1009; [2009] FCJ No. 1220; *Kurvits v. Canadian Human Rights Commission and Treasury Board and the Public Service Alliance of Canada*, T.D. 7/91, pertained to contributions of union dues and religious beliefs; *Jones v. C.H.E. Pharmacy Inc. et al.*, 2001 BCHRT 1, concerned the dismissal of a retail employee for failure to arrange Christmas poinsettias for the purpose of marketing Christmas and not retail sales; and, *Amselem*, addressed the requirement for a religious group to remove dwellings that are biblically mandated during a religious festival. The latter three cases concern practices or conduct that went to the heart of the complainant's religious belief. That is not the case here. The evidence shows that, in this case, interview question 4 imposed a clearly described requirement on the complainant, which did not pertain to his religious beliefs and did not adversely impact on the complainant based on his religious beliefs.

104 The Tribunal finds that question 4 clearly sets out the qualification to be assessed and defines it. Teamwork and cooperation are at the heart of the question, not the presence or absence of a belief in the religious celebration of Christmas. Unlike *Jones*, the purpose of the question was not to market Christmas, nor did it oblige a candidate to reveal or contravene his or her beliefs to address the question. The question was designed to assess the candidates' capacity for teamwork and cooperation. That purpose is clearly and explicitly identified in the question.

105 With regard to the manner in which candidates would be evaluated on the question, the standard set by the respondent in this question consists of three parts. The qualification teamwork and cooperation, and the allotted marks are two parts of the standard; both of these parts were made clear to candidates. The third part of the standard is the list of elements or criteria the respondent determined would demonstrate the qualification; the expected answers, which were not shared with candidates.

106 The Tribunal finds that the reference to Christmas in the question is incidental, positioned only to allow candidates to consider how they would go about demonstrating the required qualification. There is no evidence that a candidate's personal beliefs about Christmas would affect the board's evaluation of a candidate's response. The Tribunal finds that the question is not religious in nature.

107 The Tribunal also finds that the purpose of the question was clear. The question provides the candidates with a definition of what is being assessed, teamwork and cooperation. It should have been clear to the complainant that the task at hand was to demonstrate that he had that qualification.

108 For the same reasons, the Tribunal cannot accept the complainant's argument that his beliefs about volunteering prevented him from giving an answer to question 4, which was clearly designed to assess the qualification that it identified, not the ability to speak openly about volunteer activities.

109 In addition, the Tribunal finds that the complainant's subjective beliefs do not explain his failure to meet the essential qualification being assessed in this question. The complainant testified that, at the moment that he saw question 4, he believed that

there was a connection between the events surrounding his referral to Health Canada and the reference to Christmas in the question. The Tribunal notes that there were only two minor references to Christmas in a large package of more than forty pages that was part of the submission to Health Canada. This does not establish any link whatsoever between the Health Canada referral and interview question 4, and the complainant did not provide any other evidence that supports his position. As the Tribunal has already found, the wording of the question clearly expressed its purpose, to evaluate teamwork and cooperation. The Tribunal finds that there is no foundation for the complainant's belief or, at best, only a very remote one. As a bare possibility without more, it does not in any way meet the degree of probability that is required here.

110 The Tribunal also notes that the complainant testified that, in other work related contexts, he could readily convert the idea of a Christmas lunch to a team lunch, removing it from prohibition in accordance with his religious beliefs.

111 In addition, in his own evidence, the complainant testified that he no longer believes that a Christmas party was deliberately used in the interview question because of his circumstances. He stated that he spoke with Ms. Gayler immediately after the interview and was satisfied that the inclusion of a Christmas party context in the question had no connection with events that had occurred earlier in the year.

112 Furthermore, there is no evidence before the Tribunal that any of the assessment board members knew about the complainant's beliefs concerning Christmas during the appointment process. The complainant referred to an email that he had sent prior to the appointment process, which informed the respondent of his religious beliefs. The email, however, was sent to an individual who was not a member of the assessment board, and there is no evidence that the information was shared with the assessment board members.

113 In the Tribunal's view, in light of the clear purpose of the question, the complainant's personal perceptions could not have been a factor that would explain his inability to address a question that clearly stated the qualification to be assessed. Based on a reading of question 4 as a whole, the Tribunal finds that it does not require any

knowledge of Christmas, seek any information about a candidate's personal views with respect to Christmas, or require that candidates make public their volunteer activities. The Tribunal finds that there is no connection between the complainant's ability to answer question 4 and his religious beliefs and, accordingly, the complainant has not established a *prima facie* case of discrimination on this ground. The Tribunal concludes that the complainant's religious beliefs were not a factor in his failure to meet the essential qualification that was assessed in question 4.

114 Furthermore, the Tribunal also finds that the respondent has provided a reasonable explanation for question 4. The Tribunal notes that Ms. Gayler testified that question 4 was developed by the members of the assessment board to allow candidates to demonstrate their teamwork and cooperation skills. She stated that the board did not discuss Christmas or Christmas traditions as part of the criteria to be assessed. This testimony was uncontested.

115 The Tribunal has already made observations that the purpose of the question was clear and explicit in its wording. Furthermore, as the complainant testified, the board did propose that he disregard the reference to Christmas and use a context of his choosing to answer the question. This underscores the fact that the scenario of a Christmas party was not integral to the question or the competency to be assessed. This also shows that the complainant was offered an opportunity to respond to the question in a different context, without any reference to Christmas, and demonstrate how he met the qualification that was described within the question.

116 The Tribunal has examined question 4 in detail, and the context could, in fact, have been changed to "you are on a committee to organize **an office event.**" This substitution would not have changed the purpose of the question, or rendered it incapable of assessing the qualification of teamwork and cooperation. Based on the qualification it assessed and the expected answers, the Tribunal finds that no advantage or disadvantage was created by the use of Christmas in question 4.

117 The complainant rejected the respondent's proposal to adapt the question by ignoring it. The complainant has not offered evidence that supports his belief that he

could not adapt the question. Furthermore, the complainant's assertion that he could not adapt the question is contradicted by his testimony that in other workplace contexts, he could readily change the notion of a Christmas lunch to a team lunch, removing it from prohibition in accordance with his religious beliefs. There is also no evidence that the complainant informed the board that he was unable to make that same sort of conversion at the time he was asked the question. Furthermore, the complainant did not ask for time to reflect, or tell the board that he needed to stop the interview. All of these steps were open to him if he had a concern with the option offered by the respondent to adapt the question. After a careful review of question 4, the Tribunal finds that this was a reasonable proposal.

118 The Tribunal is also of the view that even if it had found that there was a *prima facie* case, the evidence also clearly demonstrates that the requirements of 15(1) and 15(2) of the *CHRA* would also have been met.

Ground of disability

119 The complainant alleges that he has a visual disability, that he was required to answer an interview question that included a written component and that, because he did not have advance warning of the nature of the interview question, the respondent did not accommodate him within the meaning of the *CHRA*.

120 Disability is a prohibited ground of discrimination under subsection 3(1) of the *CHRA*. The Tribunal must therefore first determine whether the complainant has established a *prima facie* case of discrimination.

Prima facie case

121 Under section 25 of the *CHRA*, disability includes any previous or existing mental or physical disability. Neither the respondent nor the PSC led evidence that challenged or contradicted the complainant's evidence that he has a visual disability. The evidence before the Tribunal includes the complainant's testimony about the symptoms he experiences when exposed to light. The complainant explained that the amount of exposure to light determines the impact on his vision and that he must subsequently

recover in darkness. There is also evidence that the respondent provided the complainant with accommodations pertaining to these symptoms in the past. In addition, when the hearing for this complaint was scheduled, the complainant requested and was provided accommodation for extreme sensitivity to light. The complainant testified as to the need to wear dark glasses when exposed to light and the Tribunal observed that the complainant wore dark glasses during the hearing. The Tribunal finds that the complainant has a visual disability.

122 The complainant submits that question 5 was a written test because it required the analysis of a written document to provide a response. He argues that, because the question had a written and reading component and not only an oral component, he was disadvantaged due to his visual disability.

123 The evidence shows that question 5 was designed to assess a candidate's capacity for analytical thinking and that candidates responded to the question orally. The Tribunal finds however, that while a component of the administration of this question was clearly oral, a candidate's interaction with the question was not completely oral in nature. Candidates were allowed to both listen to the question and read it on paper. In order to respond orally to the question, candidates had to integrate several instructions, which, in the Tribunal's view, would be more easily accomplished by referring to the written document.

124 The Tribunal accepts the respondent's position that the interview, including question 5, was intended to be oral. Nevertheless the Tribunal finds that, more likely than not, an individual with the type of visual disability that the complainant has described, would have been disadvantaged in answering the question. Candidates without the disability described by the complainant would have been able to rely on both hearing the question read aloud, and reading and referring to the written question and instructions when preparing and responding. The Tribunal finds that an individual with the type of visual disability that the complainant has described would have suffered an adverse impact by the manner in which question 5 was presented in the interview process. Accordingly, the complainant has established a *prima facie* case of discrimination.

125 The Tribunal cannot support the respondent's argument with regard to applying *Shakes* to establish a *prima facie* case of discrimination in this case. As the Federal Court of Canada noted in *Morris*, the *Shakes* test is not definitive; it is merely one illustration of the test for human rights discrimination in employment. The test for a *prima facie* case of discrimination under the *CHRA* is the test established in *O'Malley*.

Bona fide justification

126 Having determined that the complainant has met his burden of establishing *prima facie* discrimination, the onus shifts to the respondent to establish that the *prima facie* discriminatory conduct or criterion is justified, in accordance with section 15(1)(a) and 15(2) of the *CHRA*. Section 15(1)(a) of the *CHRA* states that a standard or practice is not a discriminatory practice if it is demonstrated that it is a *bona fide* occupational requirement. In accordance with section 15(2) of the *CHRA* the respondent must also demonstrate that, for any practice mentioned in paragraph 15(1)(a), accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

127 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3, [1999] S.C.J. No.46 (*Meorin*) did not address section 15(2) of the *CHRA*, but its three-part test for determining *bona fide* occupational requirements clarifies the analysis to apply to determine whether a *prima facie* discriminatory standard or conduct can be justified:

- First, that the respondent adopted the standard for a purpose rationally connected to the performance of the position.
- Secondly, that it adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose.
- Thirdly, that the standard is reasonably necessary to the accomplishment of that legitimate work related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

128 The Tribunal finds that question 5 has a rational purpose as an assessment tool for appointment to the position. Given the question's complexity, it is appropriate that it was given to candidates in writing. Based on the evidence, the Tribunal also finds that the decision of the board to use this question and to permit candidates to refer to the written question was made with an honest and good faith belief that it was necessary to the fulfilment of the legitimate work-related purpose.

129 The Tribunal notes that the complainant did not present arguments on the first two components of the *Meorin* test. He testified that the manner in which the question was administered was an oversight. The Tribunal is satisfied that the key issue to address here relates to point 3 of the *Meorin* test. The complainant does not dispute that his request for accommodation, as it was initially presented to the respondent prior to the interview, was fully met. His argument is that he could not properly make the request because the respondent failed to provide sufficient details regarding the interview for him to do so. Had he known that one of the interview questions would have a written component, he would have requested different accommodation.

130 The respondent argues that it fully provided the complainant's requested accommodations and that the complainant did not inform the assessment board that those accommodations were insufficient. Therefore, it was not in a position where it could have accommodated him further. The respondent submits that the complainant failed to meet his responsibilities with regard to accommodation.

131 As the Supreme Court of Canada stated in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, [1992] S.C.J. No. 75, accommodation is a process, and the process of accommodation is not fixed or absolute. Although the respondent must decide how to act on requests for accommodation and is accountable to act on such requests appropriately, the responsibilities pertaining to the process do not rest solely on its shoulders. In discussing the duty to accommodate in *Renaud*, Sopinka, J. emphasized that employees are also very much a part of the accommodation process (at paragraph 43):

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for

such an accommodation. Thus, in determining whether the duty of accommodation has been fulfilled, the conduct of the complainant must be considered.

132 In the *Meorin* decision, the Supreme Court of Canada confirmed the principle established in *Renaud* that all parties, including the employee, have obligations related to the accommodation process and, in paragraph 65, provided a list of questions pertaining to those obligations. Paragraph 66 of the *Meorin* decision specifies that there are both procedural and substantive inquiries in the accommodation. These may be separated as a practical matter, but in fact, they overlap.

133 The process of accommodation therefore, requires the communication and engagement of both parties. The steps that establish that the parties have met their obligations in the accommodation process are not immutable, nor can they be rigidly compartmentalized. This is precisely because of the need, at times, to fine-tune how the requirement for accommodation is met, and the need for dialogue and cooperation from both the respondent and the employee. The process of accommodation cannot always result in perfection, particularly when it is clear that the party who must address the request does not know that there is a problem.

134 The parties are expected to act in a reasonable and cooperative manner in finding solutions to requests for accommodation. If there is a breakdown in the accommodation process, the issue becomes who is responsible for the breakdown and the outcome of the complaint will be determined by the answer to that question. The matter that the Tribunal must determine therefore, is where and how the process of accommodation broke down in this case.

135 The Tribunal does not agree with the complainant's argument that the respondent failed to accommodate him, because it did not identify question 5 as having, in part, a written component during the interview. This is not a situation where the respondent's oversight can be considered determinative of the outcome of the accommodation process. There is no evidence that the respondent would have refused to address the complainant's concerns had he raised them. On the contrary, there is evidence that the respondent had addressed the complainant's requests for accommodation appropriately in the past.

136 In coming to this determination, the Tribunal does not want to suggest that in every interview setting, there would be or should be an expectation that, as a matter of course, candidates in appointment processes would raise accommodation requests.

137 However, in this case, the evidence is clear that the complainant was aware of the need to make his request and that the only way that the accommodation process could have moved forward was in the complainant expressing the request in order to fine-tune the accommodation measures that had already been put in place. The Tribunal notes that there is no dispute between the parties that the respondent actually met the needs of the complainant as they were described in his email. The evidence shows that the employer was under the impression that it had in fact met the accommodation request fully. The complainant did not lead any evidence that suggests that the employer would have had a different impression. There is also a general acknowledgement from the complainant that he was accustomed to making accommodation requests to the respondent and that these had been met. Furthermore, the complainant made it clear in his testimony that he considered requesting accommodation during question 5, but declined to do so. Finally, the complainant was offered an opportunity to be reassessed, which could have addressed issues pertaining to accommodation. The Tribunal finds that the complainant declined this offer by ignoring it without any discussion.

138 The complainant testified as to his previous practice of requesting accommodation and his familiarity with the process. He had already made a request for accommodation for this assessment interview, and he understood that there could be some fine-tuning to the accommodation he had requested. The complainant's email request for accommodation prior to the interview supports this finding. It specifically states that the arrangements could be made at the time of the interview and that the complainant is quite flexible in this regard. In his testimony, the complainant also expressed trust in one of the assessment board members based on her responsiveness to his past accommodation needs.

139 The evidence also shows that the complainant had turned his mind to the need to raise concerns about accommodation at the time he was given question 5. He testified

that he made a decision not to request further accommodation because he would have had to return to complete the assessment and did not want to do this. He also stated that he was tired, it would not have made a difference, his morale was low because of question 4, and he wanted to finish the assessment and leave. While the Tribunal appreciates that the complainant may have been experiencing certain feelings about the interview, none of his stated reasons satisfactorily explain why he would not clarify his accommodation needs.

140 The Tribunal also finds that the complainant failed to raise this concern at the end of the assessment interview, although he specifically questioned Ms. Gayler about his concern with question 4. Her response to his question dispelled his concerns about question 4 and yet he did not convey his concerns regarding question 5. The complainant may have needed some time to reconcile what he had perceived to be true during the interview and what he understood and believed immediately afterward, however, he did nothing to resolve his concerns about accommodation during the interview or afterwards.

141 The Tribunal also notes that the complainant was offered an opportunity to be re-assessed before the hearing of this complaint. He declined this offer. A reassessment would have provided him with the opportunity to address his needs for accommodation in question 5.

142 There is no evidence of other steps the complainant took until the complaint was filed. The evidence on record is not clear as to when the respondent became aware that the complainant believed that he was not accommodated for his disability during his assessment interview. Based on documents on the record, the Tribunal can only be certain that by late February 2008 the respondent knew the complainant had raised an allegation concerning his disability and accommodation in this appointment process, because a copy of this complaint was forwarded to the respondent on February 21, 2008.

143 In conclusion, the Tribunal finds that the complainant did turn his mind to making a request for accommodation, but did not do so during or after the interview. He failed to meet the requirements necessary for the accommodation process to go forward both during and after the interview, and refused an opportunity to be reassessed. In light of the above, the Tribunal finds that the complainant has failed to establish that he was the subject of discrimination based on disability, within the meaning of the *CHRA*.

Decision

144 For all these reasons, the complaint is dismissed.

145 As the complaint is not substantiated, it is unnecessary for the Tribunal to address the parties' submissions on remedy.

Other matter

146 In his closing argument, the complainant requested that the Tribunal give consideration to the 2007/2008 *Annual Report of the Office of the Privacy Commissioner of Canada*; particularly a section entitled *Administrative and Quasi-Judicial Bodies – Balancing Openness and Privacy in the Internet Age*.

147 The complainant submits that the personal nature of religion and the private nature of medical information warrant the protection of his privacy in the Tribunal's Reasons for Decision in this case. He also argues that the privacy of the witnesses should be protected because one is a minor and the others' careers may be affected by the outcome of this complaint. He also makes reference to an "overlap" with matters before the Public Service Labour Relations Board (PSLRB).

148 The complainant submits that the Tribunal's Reasons for Decision, including the style of cause, be depersonalized for four reasons: the fact that there are personal matters discussed in this complaint; the fact that this is the first complaint pertaining to religious beliefs; the fact that a minor was involved in these proceedings; and, the fact that he has other proceedings before another adjudicative body.

149 The respondent did not provide a reply to this request.

150 The PSC objects to the complainant's request. It submits that the complainant has not provided any evidence of potential harm or negative impact to himself or any witness, if the style of cause remains unmodified. As well, it submits that this complaint is not connected to any matters that the complainant may have under review in another jurisdiction, nor has the complainant provided evidence of an overlap or any potential negative impact. Finally, it is of the view that any concerns about privacy should have been raised when the complaint was filed or at the beginning of the hearing and that it is too late for the matter to be considered.

Analysis

151 The complainant's request is such that, if it were granted, it would restrict the principle of the open court. The principle of the open court requires that adjudicative proceedings be transparent and public.

152 The Supreme Court of Canada has commented upon the historic principle of open court on a number of occasions, both before and after the passage of the *Charter*. To paraphrase *Nova Scotia (Attorney General v. MacIntyre* [1982] 1 S.C.R. 175 (*MacIntyre*) generally, pre-*Charter* cases convey that covertness in proceedings is the exception and openness is the rule. Individual sensibilities do not normally form the basis for exclusion of the public from judicial proceedings. (see part V, *MacIntyre*) In addition, the party who is asking for the restriction to public access has the burden of establishing that the open court principle should not apply.

153 With the advent of the *Charter*, the Supreme Court of Canada adopted the common law open court principles, with some modifications to balance countervailing rights of freedom of expression, the administration of justice, and privacy. *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, examined the common law principle of open court proceedings under the lens of the *Charter* and provided a modified framework for determining how or when a restriction would be applied. This test was adapted in *R. v. Mentuck* [2001] SCJ No. 73, resulting in the

Dagenais/Mentuck test, which determined that confidentiality orders should only be granted when:

- such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and,
- the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

154 In *Re Vancouver Sun*, [2004] 2 S.C.R. 332, 2004 SCC 43, the Supreme Court of Canada reconfirmed the *Dagenais/Mentuck* test, noting that openness is integral to the independence and impartiality of courts, as well as to both the public's confidence in the justice system and its understanding of the administration of justice.

155 Administrative tribunals have supported the open court principle. Decision 219A-2009, file no. U3570/08-32 of the Canadian Transportation Agency provides an excellent synopsis of the law in this area and its application to quasi-judicial bodies. It adapted the *Dagenais/Mentuck* test as follows:

- whether the order is necessary to prevent a serious risk to the important interest sought to be protected; and
- whether that interest is so important that the right to freedom of expression and more specifically, the open court principle should be disregarded

156 In *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110, the Public Service Labour Relations Board acknowledged that in some contexts, the open court principle may not be a stringent requirement and may depend on the context and mandate of the tribunal that presides. Nevertheless, the principle needs to be recognized and weighed in an adjudicative context.

157 This Tribunal is of the view that, given its mandate and its quasi-judicial nature, it is bound by the rules governing the open court principle. The Tribunal applies legal principles and evidence in making its determinations. Hearings are held in public. Complaints to the Tribunal are made by individual employees, and the Tribunal's decisions are of interest to the parties in conflict. In addition, there are other stakeholders with a valid interest in these decisions. The mandate of the Tribunal is such that issues and interests in conflict between the individual parties have an impact on the public service and the public at large. The values found in the preamble to the *PSEA* underline the spirit and letter of the legislation, and the Tribunal has a significant role in demonstrating to the public that those values are upheld.

158 Applying the *Dagenais/ Mentuck* test to the complainant's request, the Tribunal finds that the complainant has not tendered any evidence of serious risk or harm. The Tribunal also notes that in drafting this decision, as in others, it only identifies facts and personal information that are required to ensure an open and accountable decision. The privacy of participants in Tribunal proceedings is upheld, where appropriate. For that reason, in this case, the names of witnesses who appeared on behalf of the complainant are not in the decision. In this fashion the Tribunal has attended to the complainant's primary concern about witnesses.

159 The fact that the complainant has raised an allegation under the *CHRA* that has not been previously raised before the Tribunal does not, without more, establish the need to depersonalize the decision. With respect to proceedings before another adjudicative body, the complainant has not provided any evidence as to how the open court principle in this case would undermine those proceedings.

160 In the Tribunal's view, the complainant has not entered concrete evidence to support a finding that depersonalization of the parties' or witnesses' names should occur. There is no evidence to support the notion that a risk exists that is serious enough to rebut the principle of open court.

161 With regard to the second component of the *Dagenais/Mentuck* test, the Tribunal is of the view that depersonalizing a decision presents a suggestion of secrecy and has

the potential to erode public access and public trust in the Tribunal's processes. No evidence has been provided that demonstrates how or why the effect of depersonalizing the parties outweighs the effects of the open court principle.

162 The complainant's concerns do not constitute sufficient reasons for intruding on the open court principle in this case. The Tribunal is an adjudicative body and therefore subject to the open court principle. In this case, the principle of public access should prevail.

Decision

163 The complainant's request that these Reasons for Decision be depersonalized is denied.

Merri Beattie
Member

Parties of Record

Tribunal File	2008-0105
Style of Cause	<i>Robert Boivin and the President of the Canada Border Services Agency et al.</i>
Hearing	December 9-10, 2008 Hamilton, ON
Date of Reasons	June 29, 2010
APPEARANCES:	
For the complainant	Robert Boivin
For the respondent	Lesa Brown
For the Public Service Commission	Lili Ste-Marie