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

File: 2009-0648
Issued at: Ottawa, August 3, 2011

PATRICIA MAXWELL

Complainant

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1)(*a*) of the *Public Service Employment Act*
Decision	Complaint is dismissed
Decision rendered by	Kenneth J. Gibson, Member
Language of Decision	English
Indexed	*Maxwell v. Deputy Minister of National Defence*
Neutral Citation	2011 PSST 0021

Reasons for Decision

Introduction

1 The complainant, Patricia Maxwell, alleges that the respondent, the Deputy Minister of National Defence, abused its authority in an appointment process for a Chief Technical Services position at the EG-04 group and level. She alleges that she was the victim of discrimination on the basis of sex and disability. She also believes that the respondent was biased against her because of her union membership. Finally, the complainant alleges that the assessment of her qualifications was seriously flawed. The respondent denies the allegations.

Background

2 On July 31, 2008, the respondent initiated an internal advertised appointment process to establish a pool of qualified candidates for the position of Chief Technical Services in the Canadian Forces Housing Agency (CFHA). The appointment process was open to persons employed in the public service working within a 150 kilometre radius of Fredericton, New Brunswick, employees of the Department of National Defence (DND) working in the CFHA across Canada, and members of the Canadian Forces with a home posting within a radius of 150 kilometres of Fredericton, New Brunswick. The closing date was August 14, 2008.

3 The Public Service Commission (PSC) informed the respondent on August 1, 2008 that all persons with potential priority for appointment had either been screened out or had been removed from the priority inventory. The email noted that priority persons not identified for referral from its inventory may self-identify and must then be accorded full priority consideration.

4 Six applicants, including the complainant, were notified on December 15, 2008, that they were screened into the appointment process.

5 On March 16, 2009, the complainant informed the respondent that she had been registered in the PSC priority inventory with the priority entitlement of disabled person. She indicated that her priority entitlement started on October 20, 2008. She stated in the

email that she was entitled to be appointed to any position for which she was found to be qualified.

6 On March 25, 2009, the complainant wrote an exam that was used to assess three essential knowledge qualifications set out in the Statement of Merit Criteria. The complainant was interviewed for the position on July 14, 2009.

7 The respondent notified the complainant by email on July 15, 2009, that she had been eliminated from the appointment process because she had failed to meet two essential qualifications for the position. The two essential qualifications were (K1) knowledge of applicable national, provincial and municipal codes, including safety standards and materials used in the construction and renovation of residential housing, and (A4) the ability to supervise effectively.

8 A *Notification of Appointment or Proposal of Appointment* of Danny Heath to an EG-04 position was issued on October 2, 2009. The complainant filed a complaint under s. 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the PSEA) on October 14, 2009.

9 The complainant gave notice to the Canadian Human Rights Commission (CHRC) that she intended to raise an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the *CHRA*). On June 8, 2010, the CHRC informed the Tribunal that it did not intend to make submissions in this complaint.

10 In her allegations dated January 18, 2010, the complainant alleged that the respondent had demonstrated personal favouritism towards one of the candidates, but she did not pursue this allegation at the hearing on April 14 and 15, 2011.

Preliminary matter

11 The PSC submits that the Tribunal has no jurisdiction to hear the complainant's allegations related to the administration of her priority status as a disabled person. It agrees that the Tribunal has jurisdiction to hear her other allegations.

12 The PSC cited *Magee v. Commissioner of the Correctional Service of Canada*, 2011 PSST 0012, at para. 20, to argue that it is responsible for administration and oversight in matters of priority entitlement as set out in its *Guide on Priority Administration*.

13 The PSC submits that under the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*), disabled persons may include employees of the Canadian Forces (the CF) and the Royal Canadian Mounted Police (the RCMP) and these are not persons employed in the public service. It submits that where an appointment process considers disability priorities that portion of the process is an external appointment process and such persons cannot be unsuccessful candidates in an internal appointment process if they are not appointed on the basis of their disability priority. The PSC states that under s. 77 of the PSEA, the Tribunal only has jurisdiction to hear a complaint from an unsuccessful candidate in an internal appointment process. The PSC states that where there is an issue concerning a person with a disability priority involving the application of merit, or an alleged error, omission or improper conduct in an external appointment process, a PSC investigation under s. 66 of the PSEA is the appropriate course of action.

14 The complainant submits that at all times this was an internal appointment process. She contends that whether or not there are external persons in an appointment process is a matter of fact. In this case, the complainant is employed in the public service, and there is no evidence that any other disabled persons were considered for this position. The complainant referred to the Tribunal's decision in *Richardson v. Deputy Minister of Environment Canada*, 2007 PSST 0007, in support of her position that the onus is on the PSC to prove that an external appointment process was conducted.

15 The Tribunal has no jurisdiction, under s. 77(1) (*a*) of the PSEA, to hear complaints involving external appointment processes. However, in this case, the

complainant obtained her disability priority entitlement under s. 7(1) of the *PSER*, which applies to persons employed in the public service. It reads as follows:

> 7. (1) An employee who becomes disabled and who, as a result of the disability, is no longer able to carry out the duties of their position is entitled to appointment in priority to all persons, other than those referred to in section 40 and subsections 41(1) and (4) of the Act, to any position in the public service for which the Commission is satisfied that the employee meets the essential qualifications referred to in paragraph 30(2) (*a*) of the Act.

16 There is no evidence that anyone other than the complainant had a priority entitlement in this appointment process. Section 8(1) of the *PSER* deals with priority entitlement for, among others, members of the CF and the RCMP who have been released or discharged for medical reasons. This section has no application in this case. The Tribunal has no evidence that any such CF or RCMP members were candidates in this appointment process. Section 7(1) does not stipulate that priority entitlement must be considered in the context of an external appointment process rather than an internal appointment process. The PSC's *Guide on Priority Administration* makes no distinction between external and internal appointment processes in the administration of these entitlements.

17 There is evidence that one CF member participated in this appointment process. However, members of the CF may participate in internal appointment processes. Section 35.1(1) of the PSEA provides:

> **35.1**(1) A member of the Canadian Forces
>
> (a) may participate in an advertised internal appointment process for which the organizational criterion established under section 34 entitles members of the Canadian Forces to be considered, as long as the member meets the other criteria, if any, established under that section; and
>
> (b) has the right to make a complaint under section 77.
>
> (2) A member who participates in a process referred to in subsection (1) is, for the purpose of the process, deemed to be a person employed in the public service.
>
> (3) In this section, "member" means a person who is enrolled in the Canadian Forces.
>
> 2005, c. 21, s. 115

18 According to the area of selection in the *Job Opportunity Advertisement,* this appointment process was open to certain persons in the public service, including certain

members of the CF. The participation of members of the CF in the appointment process does not render the process external

19 Therefore, the Tribunal finds that this is an internal appointment process.

20 Section 66 of the PSEA applies to external appointment processes only and, as the Tribunal found above, this case concerns an internal appointment process.

21 The Tribunal acknowledged in *Magee* that the PSC's *Guide on Priority Administration* provides that the PSC is responsible for administration and oversight in matters of priority entitlement. However, the Tribunal also stated in *Magee* that its mandate in a complaint brought by a person who is a priority extends to the question of whether the respondent abused its authority in the exercise of its discretion as regards s. 30(2) of the PSEA.

22 When considering a complaint of abuse of authority, the Tribunal considers the totality of the relevant evidence and cannot disregard some events because they may fall outside of the Tribunal's jurisdiction. As the Tribunal explained in *Brown v. Deputy Minister of National Defence*, 2010 PSST 0012, events that came before the appointment process at issue must be viewed as interconnected, and with a global perspective, regardless of whether the Tribunal has jurisdiction over all or some of them. (See also the preceding decision of the Federal Court in *Thomas Brown, Gloria Fry, Toby Lynne Meade and Joy Hubley and Attorney General of Canada and Public Service Commission*, 2009 FC 758).

23 The Tribunal also notes that s. 87 of the PSEA provides that there is no right to complain where an appointment is made involving the appointment of a disabled person under regulations made pursuant to s. 22(2) (*a*) of the PSEA*,* but s. 87 does not apply here since the person appointed or proposed for appointment was not a person with a priority entitlement.

24 This complaint was brought under s. 77 of the PSEA, which reads as follows:

> 77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2)

> may-in the manner and within the period provided by the 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)….
> >
> > [...]
> >
> > (2) For the purposes of subsection (1), a person is in the area of recourse if the person is
> >
> > (*a*) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process.
> >
> > […]

25 In this case, there is no dispute between the parties that the deputy head has made or proposed an appointment, that the complainant is a person employed in the public service, that she is in the area of selection, that she is an unsuccessful candidate in the appointment process, and that she is in the area of recourse. She therefore meets the requirements of s. 77(1) (*a*) of the PSEA and has the right to file a complaint of abuse of authority concerning this appointment.

26 Abuse of authority is not defined in the PSEA, but s. 2(4) provides: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

27 In *Tibbs v. Deputy Minister of National Defence,* 2006 PSST 0008, at para. 57, the Tribunal found that where bad faith or personal favouritism is proven, then a complaint of abuse of authority will be substantiated. The Tribunal also found that by the use of such inclusive language in s. 2(4), Parliament intended that the concept of abuse of authority not be limited to bad faith and personal favouritism.

28 With the exception of s. 77(3) of the PSEA (allegations of fraud and political influence), there is nothing to limit the allegations of abuse of authority that a complainant may make in a complaint.

29 The Tribunal finds that it can consider the concerns raised by the complainant with respect to her priority entitlement in this internal appointment process. Accordingly, the PSC's preliminary motion is dismissed

Issues

30 The Tribunal must determine the following issues:

(i) Did the respondent abuse its authority in the assessment of the complainant?

(ii) Has the complainant established a *prima facie* case of discrimination on the basis of disability or sex?

(iii) Did the respondent demonstrate bias against the complainant based on her union involvement?

Analysis

Issue I: Did the respondent abuse its authority in the assessment of the complainant?

31 As stated above, the complainant was notified on July 15, 2009, that she had been eliminated from the appointment process because she had failed two essential qualifications, K1 (knowledge of applicable national, provincial and municipal codes, including safety standards and materials used in the construction and renovation of residential housing) and A4 (ability to supervise effectively). During the hearing, the respondent conceded that the complainant had passed K1, but because she had failed A4 she could not be appointed.

32 The complainant was assessed by a written exam and an interview. Qualification K1 was assessed by both the written exam and the interview. Qualification A4 was assessed by the interview.

a) The assessment of K1

33 The written exam was used to assess three essential knowledge factors identified as K1, K2 and K3. The complainant believes that the written exam was flawed and questions whether it effectively assessed the essential qualifications for the position. Under s. 30 of the PSEA, a person may be appointed to a position where the PSC, or delegated deputy head, is satisfied that the person to be appointed meets the

essential qualifications for the work to be performed. A flawed exam may call into question whether an appointee met the essential qualifications.

34 None of the six candidates passed K1 on the written exam. The complainant and Mr. Heath were the only two candidates who passed K2 and K3. As none of the candidates had passed the written exam, the respondent was concerned that the appointment process might fail to identify any qualified candidates. It had conducted two previous unsuccessful appointment processes for the EG-04 position. Since the complainant and Mr. Heath had passed K2 and K3, the respondent decided to invite them to an interview and further assess K1 at the interview. To ensure adequate assessment of this qualification, the board decided to add two questions on K1 at the interview.

35 Under s. 36 of the PSEA, the respondent has considerable flexibility in the selection and use of assessment methods. However, it is expected to conduct a fair and transparent assessment process. The decision to further assess K1 during the interview did not disadvantage any of the other candidates since they had also failed two other essential qualifications, K2 and K3. On its face, the Tribunal finds that there was nothing inappropriate or unfair in the assessment board's approach to dealing with K1, provided the exam and interview questions effectively assessed the qualification.

36 The complainant's concerns relate to three exam questions used to assess K1. The three questions in the exam are identified as Q1, Q3 and Q5. The K1 qualification reads as follows:

> **K1:** Knowledge of applicable National, Provincial and Municipal codes, including safety standards and materials used in the construction and renovation of residential housing.

37 With respect to Q1, the complainant alleges that there was an error in the question. The respondent conceded the error at the hearing.

38 Éric Perrault was called to testify by the respondent. Mr. Perrault is the Manager, Regional Housing Portfolio (Québec-East) for CFHA. He has a bachelors' degree in Civil Engineering and a master's degree in Business Administration. He has 30 years of experience in the construction and engineering fields, including experience with military facilities, residential and other construction. Mr. Perrault was the sub-delegated manager responsible for the appointment process at issue.

39 Mr. Perrault testified that the error in Q1 related to the date of the National Building Code (the NBC) used in the question. He explained that if Q1 was removed from the assessment of K1, there would be seven remaining questions (five in the written exam and two in the interview) and he was satisfied that this was sufficient to assess the qualification. Mr. Perrault testified that the questions used to assess K1 were broad and that six questions would have provided the assessment board with enough information for assessment purposes.

40 In its final arguments, the respondent admitted that the error in Q1 invalidated the question. The respondent confirmed that once Q1 was removed from consideration, the complainant obtained a revised score of 18 out of 32, and Mr. Heath obtained a revised score of 20 out of 32, with both candidates passing.

41 The respondent argues that it had initially intended to assess K1 with six questions on the written exam. When it decided to further assess K1 in the interview, it added two more questions. The respondent submits that even if Q1 is eliminated, K1 was assessed by seven questions, one more than originally intended.

42 The Tribunal finds that the respondent's decision to remove Q1 from the assessment is reasonable in the circumstances. It also notes that the respondent is satisfied that there were sufficient remaining questions to assess the K1 qualification. However, the complainant is alleging that two of these other questions were flawed and these allegations need to be examined in order to determine if K1 was assessed effectively.

43 Question three (Q3) is the second question of concern to the complainant. The question and two answers read as follows:

> 3. A vapour barrier is used to contain the water vapour within a Building. Name (2) mechanisms that tend to drive water vapour through the building shell. **(2 points).**
>
> 1) Vapour pressure
>
> 2) Air movement

44 The complainant alleges that the description of a vapour barrier in the question is incorrect. As a result, she claims that the second answer, air movement, is also incorrect.

45 The complainant submitted evidence from the NBC and the National Research Council (NRC) to demonstrate that an air barrier and a vapour barrier are different things. She also contends that a vapour barrier is not intended to prevent air movement or to contain the water vapour within a building, but is used to prevent the diffusion of water vapour into the wall cavity.

46 On cross-examination, the complainant was asked to read a portion of one of the NRC documents that she submitted. It reads as follows: “Moisture problems in walls have been attributed in large measure to two mechanisms: vapour diffusion, and now more importantly, air leakage, specifically the deposition of moisture by moist air exfiltrating through the building envelope.” She was also asked to read a portion of a document from the Canadian Mortgage and Housing Corporation (CMHC), which states: “Two mechanisms tend to drive water vapour through the building shell: vapour pressure and air movement.”

47 The complainant testified that she was not familiar with the purpose of CMHC, believing it had something to do with mortgages. She did not see the relevance of the CMHC document since it is not related to the NBC that is legislated for use in Nova Scotia and is the subject of K1.

48 Mr. Perrault testified that Q3 did not ask for a definition of a vapour barrier. The question related to the “materials” portion of K1 and its purpose was to determine candidate knowledge of the ways water vapour can be transferred through a vapour

barrier. He stated that CMHC is involved in more than just mortgages. It is a subject-matter expert on housing and he understood the answer to Q3 was taken directly from their material.

49 The respondent argues that the complainant misread the question. She stated that dealing with air movement is not the purpose of a vapour barrier and, therefore, air movement cannot be a correct answer. However, the respondent submits that the question asks for two mechanisms that drive water vapour through a building shell and the two answers provided are correct fo/r this question. The respondent notes that Mr. Perrault is an engineer with 30 years of experience in the housing field and that he testified that he regularly uses CMHC as a technical source.

50 Based on the evidence, the Tribunal finds that the respondent has established the necessary congruence between the question asked and the expected answers to Q3. Mr. Perrault is a highly experienced engineer, who is knowledgeable in the field. His knowledge on technical matters was not challenged at the hearing. The Tribunal, therefore, accepts his testimony as to what knowledge Q3 was designed to test. The complainant has failed to prove her allegation that Q3 is flawed.

51 The complainant's third concern relates to question five (Q5) for K1. The question and answer for Q5 are as follows:

> 5. What is the purpose of the National Building Code? **(6 points)**
>
> The NBC was essentially designed to establish minimum standards for public health, fire prevention, and safe and adequate structures in the interest of public safety standards for building construction, including modifications and additions, and the evaluation of changes in occupancy and renovations.

52 The complainant testified that the answer to this question reflects someone's personal interpretation of the purpose of the NBC, it is incomplete and it is not taken directly from the NBC. She read from the Preface to the NBC, which states:

> The NBC establishes provisions to address the following four objectives, which are fully described in division A of the Code:
>
> - Safety
> - Health

- Accessibility for persons with disabilities
- Fire and structural protection of buildings

53 She stated that accessibility was absent from the expected answer. The complainant also acknowledged that she had not included accessibility in her answer to this question.

54 Mr. Perrault agreed that the question was not taken word for word from the NBC. He testified that the purpose of the question was to determine if candidates knew that the NBC was used for fire prevention, safety, etc. He stated that if a candidate had included reference to accessibility in their answer, the board members would have discussed whether this was a reasonable response and would have checked the reference material to see if it was appropriate.

55 The respondent submits that it would be impossible to include the entire NBC in the answer to Q5. The answer key is a summary and the issue that should be addressed is how well did the board deal with answers provided by the candidates.

56 The Tribunal finds that the respondent acted reasonably in assessing Q5. It is clear that the respondent was seeking a general understanding of the purpose of the NBC. It was not expecting candidates to describe the purpose verbatim from the NBC. The Tribunal notes that if accessibility had been included in the answer key, it would not have improved the complainant's score since she did not include accessibility in her answer. The Tribunal also notes that the complainant obtained a passing score of three out of six on this question.

b) The Assessment of Ability to Supervise Effectively

57 The assessment board determined that the complainant failed to meet essential qualification A4, Ability to supervise effectively.

58 The complainant notes that she failed to meet the qualification by one-half point. She believes that she should have received an extra point for her answer to question A4.3, which would have given her enough points to pass the qualification.

59 The question for A4.3 reads as follows:

> A4.3
>
> A month ago you requested from your inspector that a written notice be sent to a contractor concerning the contractor's poor workmanship. You follow up and find out it was not done. This is not the first time the inspector had "let you down".
>
> How would you handle this situation?

60 Question A4.3 was worth five points. The answer key lists five answers to the question. After each answer there is a number in parenthesis. Two of the answers have one point in parenthesis and the other three answers have two points in parenthesis. These numbers in parenthesis add up to eight points.

61 The complainant alleges that her answer to A4.3 met the first two expected answers in the answer key. The numbers in parenthesis for these two answers add up to three. However, she states that she was only given a mark of two for this question.

62 The complainant was interviewed by two board members, Arthur Hinks and Mr. Perrault. Mr. Perrault agreed that the numbers in parenthesis after the answers to A4.3 add up to eight, but he testified that the purpose of these numbers was to give a relative weight to the answer. He said that there was no correlation between these weights and the candidate's total score for the question.

63 According to Mr. Perrault, the complainant's response to A4.3 met the first expected answer to the question. However, in his view, she only partially met the second expected answer. He explained that the board was looking for more depth in that answer. He also said that the complainant's remaining answer was future oriented while the board was looking for immediate action.

64 Mr. Perrault testified that he discussed the complainant's interview with Mr. Hinks immediately after the interview took place and they reached a consensus score of two out of five for the complainant on A4.3.

65 The Tribunal has heard the uncontested testimony of Mr. Perrault as to what the board was looking for in candidates' answers to question A4.3, and that the board

members conferred at the conclusion of her interview, concurring on her score. The complainant's predominant concern was with how the assessment board tallied up her score rather than the assessment of her answer. The Tribunal received a thorough explanation as to why the complainant was given the mark that she received.

66 The Tribunal has determined that its role is not to redo an appointment process. The Tribunal's role is to examine the appointment process to determine if there was abuse of authority. See, for example, *Oddie v. Deputy Minister of National Defence*, 2007 PSST 0030, at para. 66. In this case, the Tribunal is not satisfied that the respondent abused its authority in the assessment of question A4.3.

c) The consideration of the complainant's priority entitlement

67 The complainant testified that she was employed as an engineering support technician at the DD-04 group and level until she left the workplace due to disability. She acknowledged that appointment to an EG-04 position would constitute a promotion.

68 The complainant testified that she was instructed to look for a new position in July 2008. She alleges that her priority status should have commenced at that time. However, she was not registered in the PSC's Priority Information System until October 2008. While there is some question over when the complainant's priority entitlement should have commenced neither the respondent nor the PSC dispute the complainant's entitlement to priority as a disabled person.

69 The complainant alleges that her priority entitlement was not respected in this appointment process. She testified that she informed the respondent (self-referral) that she had a priority entitlement. She alleges that it was improper to assess her at the same time as the eventual appointee and to assess her against the asset qualifications at the interview. She contends that a person with a priority entitlement should be assessed before candidates without a priority entitlement and, if they are found to meet the essential qualifications, they are entitled to be appointed.

70 The complainant cited the following paragraph from the PSC's *Guide on Priority Administration* (the *Guide*), Part I, in support of her position:

> 1.11 What to Do When Priority Persons Self-refer
>
> Priority persons may directly contact managers who are planning to staff or are in the process of running an appointment process after having received clearance to do so. In such cases, the first duty of the organization is to confirm the person's entitlement. This confirmation can be obtained through the PIMS. Priority persons who self-refer must be treated as if they had been referred by the PSC, including their appointment ahead of all others, if found qualified.

71 On cross-examination by the respondent, the complainant read the subsequent paragraph from the same section of the *Guide*. It reads:

> The PSC normally requires that priority persons referred to organizations as a result of a clearance request be assessed prior to the assessment of any other persons. However, because self-referrals often occur after an organization has started its staffing process, the PSC will allow self-referred priority persons seeking positions at levels higher than their substantive level to be assessed along with the rest of the candidates involved in the process, provided the organization does not jeopardize the priority person's entitlement's duration in so doing…

72 The PSC submits that since the appointment process at issue involved a promotion for the complainant, the respondent was not required to consider her candidacy prior to other candidates. The PSC cited the following from Part I, Section 1.9.4 of the *Guide*:

> The PSC refers priority persons for positions that are equivalent to, or lower than, the level of their substantive position…
>
> The PSC will not normally refer persons to higher level positions… Priority persons seeking an appointment to higher-level positions are advised to conduct their own job searches. Priority persons who wish to be considered for such positions must inform the hiring organization of their interest, and that they have priority status. The hiring organization must respect the priority entitlement, keeping in mind that it applies to positions at any level for which the priority person meets the essential qualifications. Only in cases of a priority person requesting consideration for a higher-level position can a hiring organization opt to assess such priority persons along with other candidates.

73 As the Tribunal noted in dealing with the issue of jurisdiction above, the complainant's priority entitlement arises from s. 7(1) of the *PSER*, which provides that a

disabled person may be appointed to any position in the public service for which they satisfy the Commission (or the delegated deputy head) that they meet the essential qualifications referred to in s. 30(2)(*a*) of the PSEA.

74 The issue here is whether the complainant was entitled to be assessed before the successful candidate and, if found qualified, to be appointed. The Tribunal finds that the applicable principles set out in the *Guide* were not contravened in this appointment process. The complainant was not a priority person referred to the respondent from the priority clearance system. The complainant was a self-referral. She was seeking a position at a higher level than her substantive position. The *Guide* states that in these circumstances "the PSC will allow self-referred priority persons seeking positions at levels higher than their substantive level **to be assessed along with the rest of the candidates involved in the process**, provided the organization does not jeopardize the priority person's entitlement's duration in so doing…" (emphasis added). There is no evidence before the Tribunal that the respondent jeopardized the duration of the complainant's priority entitlement in not assessing her before other candidates. The complainant has not referred the Tribunal to any legislative authority or policy instrument that supports her position that she was entitled to be assessed before Mr. Heath.

75 In addition, the *PSER* and the relevant PSC policies are clear that a person with a disability priority may only be appointed in priority to other persons if they meet the essential qualifications for the position. The respondent has determined that the complainant did not meet one of the essential qualifications and she could not, therefore, be appointed as a priority or otherwise.

76 The Tribunal notes the complainant's concern with regard to being assessed against the asset qualifications for the position. Given her priority entitlement, she was entitled to be appointed to any position for which she was found to meet the essential qualifications. The respondent did not explain why the complainant was assessed against one or more of the asset qualifications during the interview. Nevertheless, since the complainant failed to meet one of the essential qualifications, this concern had no bearing on the outcome of the appointment process.

77 Having examined the appointment process, and specifically the concerns raised by the complainant, the Tribunal finds that the complainant has failed to establish that the respondent committed any abuse of authority with respect to her assessment. The respondent has provided a sufficient response to all of the concerns raised by the complainant. For all these reasons, the Tribunal finds that the respondent did not abuse its authority in the assessment of the complainant.

Issue II: Has the complainant established a *prima facie* case of discrimination on the basis of disability or sex?

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

79 Section 7 of the *CHRA* makes it a discriminatory practice to directly or indirectly 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. Section 3 of the *CHRA* lists the prohibited grounds of discrimination, which include disability and sex.

80 In this case, the complainant is alleging discrimination on the basis of disability and sex.

81 In the human rights context, the complainant has the onus to prove a *prima facie* case of discrimination. In *Ontario (Human Rights Commission) v. Simpson Sears*, [1985] 2 S.C.R. 536 (known as the *O'Malley* decision), the Supreme Court of Canada set out the test for establishing 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. [...]

82 If the complainant establishes a *prima facie* case of discrimination, the onus shifts to the respondent to provide a reasonable non-discriminatory explanation for its decision to eliminate her from this appointment process for the EG-04 position.

a) Discrimination on the basis of disability

83 In her written allegations, the complainant stated that she was asked a question at her interview that concerned dealing with workplace conflict. The question reads as follows:

> PS3-2 (Interview)
>
> Describe a time when you had a conflict with a peer at work.
>
> How did you resolve the situation?

84 She said that in her response to this question, she related how she had handled an issue of workplace harassment that led to a founded complaint. The complainant obtained a score of zero out of three on this question.

85 At the hearing, the complainant stated that the harassment she experienced was the cause of her workplace injury and led to her disability status. She testified that when she mentioned that she was entitled to priority status due to disability, she "sensed that the interview started not to go my way." According to the complainant, she felt that the board members did not consider her suitable for a supervisory position. The complainant offered no further elaboration on what transpired at the interview on the issue of discrimination due to disability.

86 The complainant did not question the accuracy of the notes taken by the board members concerning her response to the question at issue. She did not adduce any evidence to show that the board incorrectly assessed her response in relation to the answer key for the question. Furthermore, the complainant did not provide any evidence regarding what the board members said or did that led to her impression that they did not find her suitable for appointment due to her disability.

87 In the absence of such evidence, the Tribunal is left only with the complainant's belief that her score on this question was based on her disability and that, in the minds of the assessment board, her disability disqualified her for this supervisory position. The problem is that there is a significant lack of evidentiary foundation to support this allegation.

88 In *Filgueira v. Garfield Container Transport Inc*., 2005 CHRT 32, the Canadian Human Rights Tribunal (CHRT) found:

> [41] The question that I am left with is this: if an employee believes that someone in a different ethnic group is doing the same job, and receiving a higher wage, is that enough to establish a *prima facie* case of discrimination? I think there must be something more. There must be something in the evidence, independent of the complainant's beliefs, which confirms his suspicions. I am not saying that a complainant's beliefs do not have any evidentiary weight. It depends on the circumstances. But an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough.

89 In dismissing the application for judicial review, the Federal Court held that the CHRT's finding that the evidence was so minimal as to have no effect in law satisfied the no *prima facie* evidence test (2006 FC 785).

90 In this case, the complainant's allegation, even if believed, is neither complete nor sufficient to justify a finding in the complainant's favour. Her position is based entirely on her belief with regard to what was going on in the minds of the assessment board members, without any confirming evidence independent of this belief. Mr. Perrault was the only board member called to testify. The complainant's representative had the opportunity to cross-examine Mr. Perrault concerning the complainant's belief as to the board members' mindset. However, there were no questions put to the witness with respect to this allegation.

91 The Tribunal finds that the complainant has not established a *prima facie* case of discrimination on the basis of disability. Her allegation cannot be substantiated.

b) Discrimination on the basis of sex

92 In her allegations, the complainant stated that in response to an interview question on the Leadership qualification, she mentioned volunteer work as a Cub Leader and as the Chair/Commissioner of the New Maryland Scouts Canada Organization Group Committee. She noted that one of the interviewers recorded in his notes that she was involved as a group leader with the Girl Scouts. She contends that she never has had such a role with the Girl Scouts and she did not mention the Girl Scouts at the interview.

93 At the hearing, the complainant testified that the interviewer's inaccurate assumption of her having been involved with the Girl Scouts indicated to her that she had been placed in a "female box." She concluded from this mistake that the respondent did not believe women were capable of performing these types of supervisory positions.

94 A DND document entitled *Guidelines on Staffing Options* was submitted by consent. The document identifies the EG group as a group in which women are consistently under-represented. The document also states that, where possible, assessment boards should include members from employment equity designated groups, such as women, especially where designated group members are in the pool of candidates. The complainant testified that the EG group is male dominated, that the two members of the interview board were male, and that no females were involved in her technical assessment. She further noted that when she was involved in the assessment process, the only females in the work area seemed to be working in a clerical role.

95 The complainant also reiterated her belief that the tenor of the interview changed when she mentioned her experience with sexual harassment.

96 The Tribunal is required to determine whether the complainant's allegations, if they are believed, justify a finding in her favour in the absence of an answer from the respondent.

97 Discrimination can be proven by direct or circumstantial evidence. In this complaint, all the evidence relating to sex discrimination is circumstantial. The test to be applied, when considering circumstantial evidence, has been articulated by Beatrice Vizkelety, *Proving Discrimination in Canada*, (Toronto: Carswell, 1987), at p. 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.

98 The complainant need only show that the alleged discrimination was one, not the sole or even the main, factor in the respondent's decision to eliminate her from this appointment process for a *prima facie* case to be met. (See: *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 (F.C.A.), at para. 7).

99 The complainant's position that she has been the subject of sex discrimination flows from three observations: (1) the error made by one of the interviewers in his notes on the leadership qualification; (2) her knowledge that females are underrepresented in the EG group and that she was only assessed by male board members, and (3) her belief that the tenor of the interview changed when she mentioned her past experience with sexual harassment.

100 Even in the absence of an answer from the respondent, the evidence is not, when examined individually or as a whole, complete and sufficient to justify a finding of discrimination based on sex in this assessment process.

101 The complainant's comment that the tenor of her interview changed when she raised her experience with sexual harassment is exceedingly vague. As noted above, with respect to the allegation of discrimination on the basis of disability, the complainant has not provided any evidence to explain what the board members did or said which led her to conclude that the interview changed to her disadvantage. Even if the tenor did change, no evidence was presented to the Tribunal as to why or how this might have led to discriminatory action against the complainant.

102 The Tribunal accepts that the EG group is male dominated, but this is not, in itself, proof that the preponderance of males is the result of discrimination in staffing practices or that the members of this interview board have discriminated against female candidates, in general, or against the complainant in particular. The Tribunal cannot, therefore, draw an inference of sex discrimination from the DND document since it does not render such an inference more probable than other possible inferences. It may be, for instance, that too few women are applying for positions at the EG-04 level within DND. (See, e.g., *Chopra v. Canada (Department of National Health and Welfare)*, [2001] CHRD No. 20, at paras. 236 and 237 (QL)).

103 Regarding the member of the interview board who erred in attributing the complainant's experience with Scouts Canada to the Girl Scouts, it is indeed possible that the board member's error was based on a stereotype concerning female roles. However, it is important to place the notation in context. It was made in relation to an interview question pertaining to the Leadership qualification. Mr. Hinks, the assessment board member who wrote the notation, awarded the complainant a passing score of two out of three for this question.

104 As stated, 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. The Tribunal is not satisfied that an inference of discrimination on the basis of sex is more probable than other possible inferences. The Tribunal cannot accept that the complainant's inference of discrimination with respect to the notation "Girl Scouts" is more probable than an inference that this notation was inadvertent and did not adversely influence the assessment board's assessment of the complainant on the interview.

105 The Tribunal finds that the evidence of the complainant, even if believed, is not sufficient to establish a *prima facie* case of discrimination on the basis of sex. Accordingly, the complainant's allegation of discrimination on the basis of sex cannot be substantiated.

Issue III: Did the respondent demonstrate bias against the complainant based on her union involvement?

106 In *Denny v. Deputy Minister of National Defence*, 2009 PSST 0029, at para. 124, the Tribunal explained that "(s)uspicions, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious."

107 The complainant testified that at the time of the appointment process she was a member of the Union of National Defence Employees and the chief local steward for CFHA at Gagetown, New Brunswick. She alleges that the interview board's marking of her response to a question concerning supervisory experience in a unionized setting demonstrates that the board was biased against her because of her union activities.

The complainant is also alleging bias by the assessment board based on her belief that the assessment board did not receive her answer to the question in a manner "beneficial" to her.

108 The question was used to assess the asset qualification "supervisory experience from within a unionized setting." It reads as follows:

> Question – Provide a recent example of a supervisory position you held where your staff were unionized employees. Did the fact that your staff was unionized affect the way you interacted with them? If so, how?

109 According to the complainant, she told the board that she would treat all employees fairly and respectfully, and that she would respect the collective agreement. She testified that "this was not received in a manner I felt was beneficial to me."

110 On cross-examination, the complainant acknowledged that she had not held a position where she supervised unionized staff.

111 The respondent argues that the complainant has not met the burden of proof with respect to this allegation. The question assessed experience in a unionized environment. It submits that the complainant obtained a score of one out of five because she did not have any experience supervising in a unionized setting, not because she participated in a union.

112 The Tribunal finds that the question is clearly seeking information on the candidate's experience in supervising in a union setting. The complainant admitted that she had no such experience. It is, therefore, not surprising that she obtained a low mark on this question. The Tribunal also notes that this question assessed an asset qualification and the complainant was not eliminated from the appointment process because of her mark on this question.

113 The Tribunal finds that the complainant's allegation of bias based on her union involvement is entirely speculative. There is no evidence to support the allegation. Accordingly, the complainant has failed to prove this allegation.

Decision

114 For all these reasons, the complaint is dismissed.

Kenneth J. Gibson
Member

Parties of Record

Tribunal File	2009-0648
Style of Cause	*Patricia Maxwell and the Deputy Minister of National Defence*
Hearing	April 14 and 15, 2011 Fredericton, New Brunswick
Date of Reasons	August 3, 2011
APPEARANCES:	
For the complainant	Louis Bisson
For the respondent	Joshua Alcock
For the Public Service Commission	Marc Séguin