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

File: 2009-0458
Issued at: Ottawa December 6, 2011

ISAAC JALAL

Complainant

AND

THE DEPUTY MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority under section 77(1) (*a*) of the *Public Service Employment Act*
Decision	The complaint is dismissed
Decision rendered by	John Mooney, Vice Chairperson
Language of Decision	English
Indexed	*Jalal v. Deputy Minister of Human Resources and Skills Development Canada*
Neutral Citation	2011 PSST 0038

Reasons for Decision

Introduction

1 Isaac Jalal, the complainant, participated in an internal advertised appointment process to staff Advisor positions at the PM-05 and AS-05 groups and levels at Human Resources and Skills Development Canada (HRSDC). He filed a complaint in which he alleges that the Deputy Minister of HRSDC (the respondent) abused its authority in the appointment process by not assessing his qualifications properly, by discriminating against him because of his race and ethnic origin, by breaching departmental policies, and by providing misleading information in the assessment guide. He also contends that Linda Ducharme, one of the persons who interviewed him, was not fluent in English, and that the assessment board members showed personal favouritism towards Sandra Langlois, the appointee, because she is Francophone.

2 The respondent denies that there was any abuse of authority in the appointment process. It asserts that the complainant was properly assessed without discrimination. He was eliminated from the appointment process because he did not meet three essential qualifications. The respondent also maintains that it did not breach departmental policies or provide misleading information in the assessment guide, and that the assessment board members possessed the required linguistic qualifications to assess the complainant. Ms. Langlois was appointed because she was the right fit for the position, not because she is Francophone.

3 The Public Service Commission (PSC) did not attend the hearing, but submitted written submissions in which it explained the relevant policies and guides that apply to appointment processes. Its *Assessment Policy*, for example, provides that assessment methods and tools should be able to accurately assess the candidates' qualifications. The PSC did not take a position regarding the merits of the complaint.

Background

4 The complainant has been a public servant for 25 years. He now works at HRSDC as a Legislation and Policy Interpretation Officer, a position at the PM-04 group and level.

5 In May 2008, the respondent issued a *Job Opportunity Advertisement* (JOA) on the *Publiservice* website to fill, on an indeterminate basis, nine anticipated Advisor positions at the PM-05 and AS-05 groups and levels through an internal advertised appointment process (process 2008-CSD-IA-NHQ-51089). The JOA also noted that the process could be used to fill identical or similar positions in the future.

6 The assessment methods for the process consisted of a review of résumés, a written examination, an interview, and a reference check. The complainant was eliminated from the appointment process because he failed to meet three essential qualifications that were assessed through the interview.

7 On July 8, 2009, the respondent issued a *Notification of Appointment or Proposal for Appointment* (notice of appointment) on *Publiservice* regarding the appointment of Ms. Langlois to an Advisor PM-05 position.

8 On July 10, 2009, the complainant filed a complaint of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) under s. 77(1)(*a*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA).

9 Six other persons were appointed through the assessment process at different times. No complaints were filed concerning those six appointments. The pool of qualified candidates expired on March 31, 2011.

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

Preliminary matters

Evidence received after the hearing

11 Following the completion of the parties' evidence at the hearing, the parties agreed to present their arguments in writing.

i) The complainant's recollection of his answers during the interview

12 The complainant submitted his written arguments on January 28, 2011. In those submissions, he alleged that the assessment board did not fully record his answers to three interview questions. To correct this alleged omission, he described what, according to his recollection of the interview, were his answers to those three questions. His written recollection of his answers contain many new elements that were not in the notes taken by the assessment board members at the time of the interview, nor were they mentioned by the complainant in his oral testimony at the hearing. The respondent argued that this new evidence was not admissible because the evidence had been closed at the end of the hearing.

13 The case law regarding the issue of admitting new evidence once a hearing has closed indicates that this is a matter left to the discretion of the Tribunal Member hearing the case, and this discretion should be exercised sparingly and prudently. Finality of a hearing is critical in our justice system and only where the interest of justice requires it may a hearing be reopened for further evidence. See *671122 Ontario Ltd v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII).

14 In determining whether to accept the complainant's new evidence concerning his answers to the interview questions, the Tribunal has applied the test articulated in *Whyte, Kasha v. Canadian National Railway,* 2010 CHRT 6 (CanLII). This test requires that the following three conditions be fulfilled in order to accept new evidence where a tribunal has not yet reached its final conclusion:

> 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the hearing;
>
> 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
>
> 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

15 The Tribunal finds that it cannot accept this new evidence at the stage of the written arguments. The evidence does not meet the first condition set out in the *Whyte* test. The complainant had ample opportunity in his testimony during the hearing to

describe what he believes he told the assessment board. More importantly, to accept that evidence would be greatly unfair to the respondent who did not have the opportunity to cross-examine the complainant on the reliability of that new evidence, especially in light of the fact that the complainant's recollection of his answers seems to come a year and a half after he did the interview.

ii) The documents submitted with the complainant's reply

16 On March 4, 2011, the complainant forwarded to the Tribunal his written reply to the respondent's written arguments. He included four documents that he labelled C-1 to C-4, and an annex. The respondent asked the Tribunal to ignore all of these documents since they were submitted after the close of the evidence.

17 Document C-1 is comprised of six emails between the complainant and the respondent, four of which had already been submitted to the Tribunal. Those four emails are therefore already part of the record.

18 The two emails in C-1 that had not been introduced at the hearing are dated June 17 and July 21, 2009.

19 In his email of June 17, 2009, after being informed that he was not qualified the complainant asks to meet the respondent. The Tribunal will not accept that new evidence since it does not meet the first two conditions of the *Whyte* test. The complainant could have tendered that evidence at the hearing since he already had it in his possession. Also, that evidence has no influence on the result of this complaint. Nothing turns on the fact that the complainant asked to meet the respondent for informal discussion.

20 In his email of July 21, 2009, the complainant asks the respondent for a copy of the *Notice of Consideration.* The Tribunal will not accept that evidence since it does not meet either the first or second condition set out in the *Whyte* test. The complainant had that email in advance of the hearing and could have tendered it at the hearing. Furthermore, the fact that the complainant asked the respondent for the *Notice of Consideration* has no influence on the outcome of this complaint. As explained further in

these reasons, it was the complainant's responsibility to obtain the appointment notices that are posted on the *Publiservice* website.

21 Document C-2 is comprised of three emails between the complainant and the Tribunal regarding the matter of obtaining a copy of the notice of appointment. These emails do not constitute new evidence. This evidence fails the first two conditions of the *Whyte* test.

22 Document C-3 is the list of the names of the appointees. The Tribunal will not accept this evidence since it fails to meet the second condition of the *Whyte* test. The Tribunal is not satisfied that this list would have had any influence on the result of this complaint. As indicated later in these reasons, since this complaint concerns the appointment of Ms. Langlois, the names of the other appointees are not relevant to this complaint.

23 Document C-4 is a letter from the complainant's physician regarding the effect of the appointment process on the complainant's health. The Tribunal will not accept this evidence since it would not have had an influence on the result of this complaint. For the reasons set out below, the Tribunal has determined that the complainant has not established a *prima facie* case of discrimination in this appointment process and, therefore, the Tribunal does not need to make any assessment of damages flowing from the alleged discrimination. This evidence may have become relevant if the complaint had been substantiated, but the Tribunal has dismissed the complaint.

24 Lastly, the annex simply reproduces, for ease of reference, parts of the complainant's main submissions. The annex therefore does not constitute new evidence.

Charter arguments

25 In his written allegations presented to the Tribunal on April 19, 2010, the complainant alleged that the respondent discriminated against him because of his race and ethnic origin, contrary to ss. 15(1) and 16(1) of the *Canadian Charter of Rights*

and Freedoms, Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11 (the *Charter*).

26 At the beginning of the first day of hearing on January 5, 2011, the complainant's representative informed the Tribunal that she was withdrawing all *Charter* arguments.

The complainant's allegations regarding the other appointees

27 The complainant challenges the six other appointments that were made through the same assessment process used to appoint Ms. Langlois. More specifically, he argues that merit was not properly applied in regard to those candidates. He reviewed their assessments in great detail to show that they did not deserve the points they were awarded. According to the complainant, the respondent showed favouritism towards those six other appointees. He therefore asks that their appointments be revoked.

28 Both the respondent and the PSC vigorously oppose that allegation, arguing that the Tribunal does not have jurisdiction over those other appointments because the complainant did not file complaints regarding any of them. His complaint is only related to Ms. Langlois' appointment.

29 Under s. 77 of the PSEA, the Tribunal's jurisdiction is limited to a specific appointment:

> **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
>
> [. . .]
>
> (Emphasis added)

30 A complaint under s. 77(1) of the PSEA is related to an appointment. In some cases, one assessment process may give rise to several appointments, and each of those appointments can be subject to recourse. That is why the Tribunal asks complainants to identify the appointment or proposed appointment being challenged by asking them to forward the notice of appointment to the Tribunal. The notice of appointment may contain the name of one person appointed or proposed for

appointment, or the names of several persons. Section 79(1) of the PSEA provides that each person appointed or proposed for appointment is a party to the complaint and has the right to be heard. Each of those persons is kept informed throughout the process and has the right to participate in the hearing as a full party.

31 In this case, seven appointments were made from the same assessment process, at different dates. Separate notices for each appointment were posted on the *Publiservice* website. When the complainant made his complaint on July 10, 2009, he did not attach any notice of appointment to his complaint. On July 10, 2009 and on July 28, 2009, the Tribunal asked the complainant to send the notice of appointment in order to identify the person appointed or proposed for appointment.

32 On August 7, 2009, the complainant sent the Tribunal the notice of appointment for the appointment of Cathy Cayan. He added that although nine positions were supposed to be staffed through the assessment process, he could only find that notice.

33 In a Letter Decision dated November 6, 2009, the Tribunal noted that the complaint period for Ms. Cayan's appointment was July 16, 2009, to July 31, 2009, that is after the complainant made his complaint. It also noted that the complaint period for Ms. Langlois' appointment was from July 8, 2009 to July 23, 2009. As indicated above, the complainant made his complaint on July 10, 2009, that is within the complaint period for Ms. Langlois' appointment, but not within the complaint period for Ms. Cayan's appointment. The Tribunal therefore determined that the complaint was related to the appointment of Ms. Langlois instead of the appointment of Ms. Cayan. On November 12, 2009, the Tribunal informed Ms. Langlois that a complaint was brought regarding her appointment and that she had the right to be heard. She chose not to exercise that right.

34 The Tribunal therefore finds that it only has jurisdiction over Ms. Langlois' appointment because the complainant did not lodge complaints concerning the six other appointments. It was the complainant's responsibility to search the *Publiservice* website at different times to see if other appointments had been made from the appointment process and forward the notices of appointment to the Tribunal for each appointment

within the applicable complaint period if he wanted to challenge the other appointments. Allowing the complainant to challenge those six other appointments would constitute a serious breach of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 as amended by SOR/2011-116, and the rules of natural justice since those other six appointees were never informed that their appointments were the subject of a complaint and they were not given the opportunity to exercise their right to be heard.

35 The Tribunal will, in some cases, examine the assessments of the other appointees if it sheds light on the issues before it. However, because their appointments were not properly challenged before the Tribunal, for the reasons set out above, the Tribunal cannot make any finding as to whether their appointments were based on merit. In the present case, the Tribunal has limited its examination of the assessment of the other appointees to the issues before it as explained later in these reasons.

Issues

36 The Tribunal must decide the following issues:

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

(ii) Did the respondent discriminate against the complainant because of his race or ethnic origin?

(iii) Did the respondent breach departmental policies and provide misleading information in the assessment guide?

(iv) Was Ms. Ducharme sufficiently fluent in English to assess the complainant's qualifications?

(v) Did the respondent show personal favouritism towards Ms. Langlois because she is Francophone?

Analysis

37 Section 77(1)(*a*) of the PSEA provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment because the PSC or the deputy head abused its authority in the appointment process. Abuse of authority is not defined in the PSEA, however, s. 2(4) offers the following guide: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

38 As the Tribunal jurisprudence has established, the use of such inclusive language indicates that abuse of authority includes, but is not limited to, bad faith and personal favouritism. In *Kane v. Attorney General of Canada and Public Service Commission,* 2011 FCA 19, at para. 64, the Federal Court of Appeal found that abuse of authority can also include errors. It is clear from the preamble and the scheme of the PSEA that abuse of authority requires much more than mere errors. Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question. Abuse of authority can also include improper conduct and omissions. The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence,* 2006 PSST 0008.

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

39 The complainant argues that he was improperly assessed. He reviewed his assessment in great detail and argues that he should have received more marks. The complainant is in fact asking the Tribunal to redo his assessment. The Tribunal has held in numerous decisions that its role is to determine whether there has been an abuse of authority, not to reassess candidates or redo the appointment process (see, for example, *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 0020). The Tribunal will therefore examine the assessment of the complainant's qualifications to determine whether there was an abuse in that assessment, but it will not redo the assessment that has already been conducted by the assessment board.

40 The assessment board was comprised of nine members. The complainant was interviewed by Ms. Ducharme, Human Resources Advisor, who chaired the assessment board, and Thierry Rousseau, Senior Advisor, Federal Provincial Territorial Relations. Ms. Ducharme has been a Human Resources Advisor for four and a half years. She has participated in several assessment boards in her career in the federal public service, which spans more than 21 years. Mr. Rousseau joined HRSDC in 1999.

41 Ms. Ducharme and Mr. Rousseau explained how the interview questions were assessed. They recorded the candidate's answer on an assessment document, which had a list of expected responses/criteria. When the candidate identified an expected response or showed an expected behaviour, the assessment board member ticked off that expected response/criteria. The assessment board also accepted unanticipated valid responses. After the interview was completed, the two board members of the assessment board who had conducted the interview met to review the candidate's responses and the marks they had awarded them. The candidate's answer and marks were later presented to the other assessment board members for discussion. The final mark was the result of a consensus among all nine assessment board members.

42 The complainant argues that neither the testimony of Ms. Ducharme nor Mr. Rousseau is credible because they were present when the complainant testified before the Tribunal. Also, Mr. Rousseau was present when Ms. Ducharme testified. According to the complainant, this practice is contrary to proceedings before tribunals. The Tribunal notes that a request for exclusion of witnesses is routinely granted when a party makes such a request. In this case, however, neither the complainant, nor his representative made such a request.

43 The Tribunal has reviewed the complainant's assessment and finds that there was no abuse of authority in the manner in which the respondent marked his answers. For example, question A1 of the interview, which assessed the ability to lead teams, asked candidates to describe a time when they led a team, and the actions they took to make the project successful. The complainant received five marks out of 10 for his answer and the pass mark was six. According to the notes taken by Ms. Ducharme and Mr. Rousseau at the time of the interview, the complainant described a volunteer project

he worked on for United Way. The project involved delivering pledge forms by a fixed date. An employee involved in the project left the department without informing the complainant. The complainant asked volunteers to help him and they delivered the pledge forms on time.

44 Ms. Ducharme testified that the complainant's answer was weak because the question involved leading a team and his answer had insufficient elements of a leader or of teamwork. Despite this shortcoming, the assessment board still gave him five marks for his answer. The Tribunal finds that the respondent provided a reasonable explanation for the marks it awarded the complainant for his answer to that question.

45 Question A-3 of the interview assessed the ability to analyze issues and provide recommendations, advice and guidance. It asked candidates to describe a project for which they were responsible that best demonstrated their ability to analyze information and provide information to senior management. The pass mark was nine out of 15. According to the notes taken by Ms. Ducharme and Mr. Rousseau at the time of the interview, the complainant answered that he was once asked to integrate five or six different immigration forms into one. To do this, he analyzed the forms, had weekly briefings and prepared bi-weekly status reports. He managed to integrate all those forms into one comprehensive form. Ms. Ducharme and Mr. Rousseau awarded him five and a half marks for his answer. Ms. Ducharme and Mr. Rousseau later discussed the complainant's answer with the other assessment board members, and they all agreed to raise his mark to six.

46 Ms. Ducharme testified that the complainant failed that question because his answer only addressed the first part of the question, that relating to analyzing. He did not to provide any response related to providing advice to senior management. Mr. Rousseau stated at the hearing that the complainant demonstrated that he was able to analyze the forms, but not that he provided recommendations or guidance. After having reviewed the complainant's assessment, the Tribunal finds that Ms. Ducharme and Mr. Rousseau gave a reasonable explanation for the mark awarded to the complainant for his answer to this interview question.

47 Question A-4 assessed the ability to work effectively under the pressure of deadlines and large workloads. The question asked candidates to describe a time when they were under extreme pressure and were required to manage multiple tasks with conflicting priorities, and were able to successfully manage the workload. They were also asked how they overcame those difficulties. The pass mark was six out of 10. The notes taken by Ms. Ducharme and Mr. Rousseau at the time of the interview indicate that the complainant described a day in which he had two meetings in the morning and was asked by his supervisor to make photocopies for a meeting because his supervisor's administrative assistant was absent. The complainant made the photocopies and delivered them to the meeting. To do so in time for the meeting, he rescheduled the first meeting later that morning and rescheduled the second meeting to the afternoon.

48 Ms. Ducharme testified that the complainant received only four marks out of ten for his answer because he identified four expected responses, as indicated in the assessment document, but his answer was too "administrative." For example, he did not seek to delegate tasks. She added that she wrote "discussion info – too administrative [translation]" on the assessment document to remind herself to discuss that aspect of the complainant's answer during informal discussion, which is a phase of the appointment process that occurs after the assessment of candidates is completed, in order to give the complainant advice for future appointment processes.

49 Mr. Rousseau testified that the complainant's answer did not provide sufficient examples of conflicting priorities and working under pressure. He expected that the complainant would prioritize his activities. For example, the complainant could have decided that the 10:30 a.m. meeting was the priority for the day, and move other tasks, instead of rescheduling that meeting. The Tribunal finds that Ms. Ducharme and Mr. Rousseau provided a reasonable explanation for the marks awarded to the complainant for this interview question.

50 The ability to communicate clearly orally (A-6) was assessed by the candidates' responses throughout the interview. The respondent had developed a definition of that qualification and set out different criteria to assess it, including clarity, conciseness,

logic and usage. The complainant stated that he does not understand why he only received six marks out of 10 for that qualification since he pursued his university studies in the English language. Those studies include a Masters' degree in Public Administration and Public Policy. English is his first language.

51 The fact that the complainant pursued his university studies in English is not a sufficient evidentiary basis for the Tribunal to find that the complainant should have received more marks for that qualification. He did not provide any further evidence as to why he should have received more marks for his answer. The Tribunal also notes that the complainant attained a pass score for that qualification. Had he obtained a higher mark for that qualification, it would not have changed the outcome of the process since he failed three essential qualifications.

52 The complainant contends that the respondent was much more lenient towards the appointees than himself when marking the written examination and the interview. He points out, for example, that the assessment board raised the marks they had awarded to several candidates "after the fact".

53 The Tribunal points out that the marks awarded in the written examination are not relevant since the complainant passed that part of the assessment process. As for the interview questions, the Tribunal has examined the assessment of the other appointees' answers and finds that there is no evidence that the respondent assessed them in a more lenient manner. In the example cited above, Mr. Rousseau explained that the marks the two interviewers awarded each candidate were later presented to the nine assessment board members for discussion and the full board did raise marks when deemed warranted. In fact, they raised the marks of the complainant. Ms. Ducharme and Mr. Rousseau had awarded the complainant five and one half marks for his answer to interview question A-3, and the full assessment board raised that mark to six.

54 The complainant also took issue with the assessment board contacting his references since, according to him, he had been eliminated from the process after the interview. The complainant testified that this jeopardized his current job. His manager

withdrew some of his responsibilities because she assumed that the complainant was leaving her unit.

55 The Tribunal finds that the respondent provided a reasonable explanation for conducting the reference check. Mr. Rousseau testified that the assessment board conducted the reference check for the complainant because at that time, it had not yet completed the complainant's assessment. Results were only considered final when they were reviewed by all nine of the assessment board members, which occurred after the reference checks. Consequently, when the reference checks were conducted, the complainant had not yet been eliminated from the appointment process.

Issue II: Did the respondent discriminate against the complainant because of his race or ethnic origin?

56 The complainant contends that the respondent purposely failed him in the interview because it had a preconceived plan to eliminate him from the appointment process because of his race and ethnic origin.

57 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*.

58 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 race and ethnic origin.

Has the complainant established a prima facie case of discrimination?

59 The Tribunal's jurisprudence has established that the complainant has the burden to prove, on a balance of probabilities, that there was abuse of authority in the appointment process (see, for example, *Tibbs* at para. 49).

60 In the human rights context, the complainant has the evidentiary 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. [...]

61 The complainant need only show that the alleged discrimination was one of the factors, not the sole or even the main factor, in the respondent's decision to eliminate him 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).

62 The Tribunal is required to determine whether the complainant's case covers the allegations and, if believed, justifies a finding in his favour in the absence of an answer from the respondent. Thus, at this stage of the analysis, the Tribunal cannot take into consideration the respondent's answer before determining whether a *prima facie* case of discrimination has been established. (See: *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.A. 204, F.C.J. No. 941 (QL), at para. 22 (F.C.A.)).

63 The complainant must also demonstrate a link or nexus between the prohibited ground of discrimination (his race or ethnic origin) and the conduct complained of (his elimination from the appointment process). 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.

64 In dismissing the application for judicial review of *Filgueira*, 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 (*Filgueria v. Garfield Container Transport Inc.*, 2006 FC 785).

65 Similarly, in this case, it is not enough for the complainant to say that he was assessed unfairly because of his race and/or ethnic origin. He must demonstrate that there is some connection between the two.

66 If the complainant establishes a *prima facie* case of discrimination, the evidentiary onus shifts to the respondent to provide a reasonable non-discriminatory explanation for not appointing the complainant to the Advisor position in this appointment process.

The complainant's evidence

67 The complainant contends that the respondent had "a preconceived plan" to eliminate him from the appointment process because of his race or ethnic origin. The evidence that the complainant relies on in support of his allegation of discrimination is twofold: the notes of one of the assessment board members, and an allegedly offensive comment made by Mr. Rousseau during informal discussion.

68 According to the complainant, the fact that Ms. Ducharme wrote "discussion info – too administrative [translation]" in her assessment of the complainant's answer to question A-4 of the interview indicates that she had decided to eliminate him from the appointment process before his interview was completed because of his race or ethnic origin.

69 The Tribunal can find no basis in Ms. Ducharme's comment from which to infer that she wanted to eliminate the complainant because of his race or ethnic origin. On its face, that comment simply indicates that in Ms. Ducharme's view, the complainant's answer was too "administrative" and this should be brought to his attention during informal discussion.

70 The complainant also alleges that the fact that Mr. Rousseau made an allegedly offensive comment indicates that race and ethnic origin were factors in eliminating him from the appointment process. The Tribunal notes that it is not clear which comments the complainant is referring to in his written submissions. It seems, from his written arguments that he is referring to an exchange he had with Mr. Rousseau during

the informal discussion. At that meeting, Mr. Rousseau allegedly said that the position to be staffed was a managerial position which required the incumbent to make decisions and the complainant was not “the right candidate”. The complainant did not mention this in his testimony. Assuming, without deciding, that this evidence is properly before the Tribunal, it cannot infer from that statement that Mr. Rousseau wanted to eliminate the complainant from the appointment process because of his race or ethnic origin. On its face, the plain meaning of this comment is simply that, according to Mr. Rousseau, the complainant did not demonstrate that he was the right candidate for the managerial position that was being staffed. The Tribunal notes that it is well-known that under the new staffing regime, the selection of the person to be appointed is based on “right fit,” and this may have been what Mr. Rousseau was referring to during informal discussion.

71 In conclusion, the Tribunal finds that the actions and events to which the complainant testified, if believed, do not establish a *prima facie* case of discrimination. The complainant's allegation, even if believed, is neither complete nor sufficient to justify a finding in the complainant's favour. His position is based entirely on his belief with regard to what was going on in the minds of the assessment board members, without any confirming evidence independent of this belief. Even if he had demonstrated that the comments described above were discriminatory, he still would have to establish the requisite link between that discrimination and his elimination from the appointment process. The Tribunal finds that the complainant has failed to establish the necessary link. (See *Chopra*, at para. 211 (QL)).

Reasonable non-discriminatory explanation

72 While the above conclusion is sufficient to dispose of the allegation of discrimination, the Tribunal finds that the respondent has provided a reasonable non - discriminatory explanation for not choosing the complainant in this appointment process: the complainant failed three essential qualifications and, therefore, could not be appointed to the position. The complainant has not met his onus of proving that this explanation was a pretext. Under Issue I of these Reasons, in the Analysis section, the Tribunal provided a detailed analysis of the complainant’s assessment.

Issue III: Did the respondent breach departmental policies and provide misleading information in the assessment guide?

73 The complainant contends that the respondent breached departmental policies and provided misleading information in the assessment guide used to assess the essential qualification knowledge of project management principles. That qualification was assessed by question 2 of the written examination and question K-2 of the interview.

74 The complainant referred to documents the respondent published on its website regarding project life cycle, such as the document entitled *Innovation, Information and Technology Branch Links – IITB Project Life Cycle* and the document entitled *Project Life Cycle.* The complainant did not establish that those documents were policies, that is, documents to which HRSDC employees were expected to conform in managing a project. They appear to be information documents on a project life cycle. It cannot be said therefore that they constitute the respondent's policies or that they were breached.

75 The next question is whether the complainant has established that some of the expected responses in the assessment guide were wrong.

76 The expected answers for those questions list the phases in a project life cycle and the items within those phases. An example of an alleged error concerns one of those phases. The expected response identifies "monitoring and controlling" as a phase of a project. According to the complainant, that is wrong since monitoring and controlling is not a phase of a project but rather "a system of project management principles, one of the processes of a management life cycle." The complainant points out that the departmental documents on project life cycle referred to above do not include monitoring and controlling as a project phase.

77 Mr. Rousseau stated that the documents the complainant referred to were geared to information technology projects in HRSDC. Since the appointment process was open to different departments, the expected answer could not be limited to departmental documents. He researched that subject and found out that, depending on the source consulted, some had four phases, others five and others six. The assessment board agreed on five phases. The assessment board wanted to be

flexible and it accepted other possible answers that made sense. It applied the same approach to the items within each phase.

78 The Tribunal finds that the assessment board acted within its discretion in choosing the expected responses. Section 36 of the PSEA gives the delegated manager considerable discretion in the choice of its assessment methods. The complainant has not established that it was unreasonable for the assessment board to decide that monitoring and controlling is a phase of the project life cycle. Managing a project is not an exact science. There is room for variations on the identification and description of project phases, as Mr. Rousseau discovered in his research. Moreover, the respondent accepted all answers that were logical. This approach was reasonable given the subject matter of that question.

79 The Tribunal notes in closing this section of the analysis that the complainant was not eliminated from the appointment process because he lacked this knowledge, but because he failed three abilities qualifications.

Issue IV: Was Ms. Ducharme sufficiently fluent in English to assess the complainant's qualifications?

80 The complainant stated in his written arguments that Ms. Ducharme was not fluent in English. The Tribunal notes at the outset that the complainant did not file a formal s. 77(1)(*c*) complaint that the respondent failed to assess him in the official language of his choice. He is not claiming, therefore, that the respondent failed to conduct his interview in the language of his choice. What he claims is that Ms. Ducharme possessed an insufficient grasp of the English language to have fairly assessed his interview answers. The complainant did not provide any evidence to support this claim. He simply notes that during the hearing of this complaint, she testified in French (an interpreter translated her answers from French to English for the benefit of the complainant).

81 The respondent argues that Ms. Ducharme had the right to testify in the official language of her choice and the Tribunal cannot draw any inference from that choice. Furthermore, she did not use interpretation services when she was cross-examined in English.

82 Ms. Ducharme testified that she has attained level C for oral comprehension in English in her linguistic profile, as tested by the Public Service Commission.

83 The PSC points out that its *Official Languages in the Appointment Process Policy* requires “that each person conducting the assessment of persons participating in an appointment process is sufficiently proficient in either or both official language(s) to enable effective communication with the persons to be assessed in the official language of their choice and to enable their qualifications to be properly assessed. Section VII, iii, of the *Guide to Implementing the Policy on Official Languages in the Appointment Process* adds that the persons conducting the assessment are not required to always have a high level of proficiency in both official languages. Rather the level of proficiency will depend “on the nature of the qualifications assessed and on the complexity of the interaction and communication with persons being assessed in the process.”

84 In *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 0026, at para. 37, the Tribunal held that whether an assessor possesses the requisite language ability to assess someone in the other official language “is a question of fact.”

85 The Tribunal cannot draw any inference from the fact that Ms. Ducharme exercised her right to testify in the official language of her choice. Section 15 (1) of the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.) provides that every person giving evidence before a federal tribunal has the right to be heard in the official language of their choice. To draw any negative inference from that choice would defeat the purpose of that provision. The fact that she chose to testify in French only indicates that she is more comfortable in that language, not that she is not fluent in English.

86 The Tribunal finds that the complainant has not established that Ms. Ducharme was insufficiently fluent in English to assess him properly. He has not established that the questions were too complex for Ms. Ducharme, who has a “C” in oral comprehension (the second highest level in a four level scale), has participated in several appointment processes, and has worked for four and a half years as a human resources advisor in a bilingual capacity.

Issue V: Did the respondent show personal favouritism towards Ms. Langlois because she is Francophone?

87 The complainant contends that the respondent showed personal favouritism towards Ms. Langlois because she is Francophone. His assertion is based on the fact that she was appointed even though she failed two asset qualifications. Also, according to him, she received too many marks for her answers to the written examination and the interview.

88 Personal favouritism has been the subject of earlier Tribunal decisions. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, at para. 39, the Tribunal emphasized the following:

> It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament's intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.
>
> (Emphasis in original)

89 In para. 41 of *Glasgow***,** the Tribunal further explained:

> Where there is a choice among qualified candidates, paragraph 30(2)(b) of the *PSEA* indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organizational needs. The selection should never be for reasons of personal favouritism. Undue personal interests such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

90 In this case, the complainant has not established that there was a personal relationship between any of the assessment board members and Ms. Langlois, nor that there were any other undue personal interests that influenced the decision to appoint her to the position.

91 Ms. Ducharme testified that she worked in the same general branch of HRSDC as Ms. Langlois for one and a half years, but she did not know her "on a personal level." The general branch in which both worked employed over 600 employees. The complainant did not present any evidence to contradict that testimony. Moreover, Ms. Ducharme did not interview Ms. Langlois. Ms. Langlois was interviewed by two other members of the assessment board, Mr. Rousseau and Lucie Gauthier.

92 Neither has the complainant established that any of the assessment board members had something personal to gain from the appointment of a Francophone. The Tribunal notes that there is no evidence as to whether the other board members were Francophones. Candidates' marks were awarded through consensus among all nine assessment board members, not only the members who assessed each candidate.

93 Ms. Ducharme acknowledged that Ms. Langlois failed questions four and five of the written examination which assessed, respectively, knowledge of Parliament and parliamentary committees, and knowledge of the parliamentary legislative process. She testified, however, that those questions assessed asset qualifications, and candidates were not required to possess the asset qualifications to be appointed. Assets were something that were "nice to have," but candidates could be appointed without possessing those qualifications. The need for asset qualifications was individually considered by the manager of each position to which an appointment was made. In the case of the appointment of Ms. Langlois, the manager decided that the person to be appointed did not have to possess those assets.

94 The PSEA expressly provides that the PSC or the delegated manager, when that authority is delegated as is the case here, does not have to use the asset qualifications to appoint a person:

> Appointment on basis of merit
>
> **30.** (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.
>
> Meaning of merit
>
> (2) **An appointment is made on the basis of merit when:**
>
> (*a*) **the Commission is satisfied that the person to be appointed meets the essential qualifications** for the work to be performed, as established by the deputy head, including official language proficiency; and
>
> (*b*) **the Commission has regard to:**
>
> (i) **any additional qualifications that the deputy head may consider to be an asset** for the work to be performed, or for the organization, currently or in the future;
>
> (ii) any current or future operational requirements of the organization that may be identified by the deputy head; and

> (iii) any current or future needs of the organization that may be identified by the deputy head.
>
> (…)
>
> [Emphasis added]

95 It is clear from the wording of s. 30(2) that, to be appointed, a person must meet the essential qualifications, but not necessarily the asset qualifications. The delegated manager can take into consideration whether the candidate possesses the asset qualification in deciding whether to appoint that person, but he or she can appoint a person who does not possess them. See, for example, *Steeves and Sveinson v. Deputy Minister of National Defence*, 2011 PSST 0009, at para. 57.

96 The complainant also argues that Ms. Langlois received too may marks for her answers in the written examination and the interview. According to him, this proves that the respondent favoured her because she is Francophone.

97 The Tribunal has reviewed the examples given by the complainant and it finds that he has not established that the respondent favoured Ms. Langlois because she is Francophone. At the hearing, Mr. Rousseau gave reasonable explanations regarding the marks awarded to Ms. Langlois. For example, he explained why the assessment board gave Ms. Langlois 10 points out of 10 for her answer to the interview question that assessed the ability to work effectively under the pressure of deadlines and large workloads (A-4). In her answer, Ms. Langlois described a project that entailed reviewing her team's tasks and prioritizing them. She indicated that she met with her team each day to discuss the matter and developed a table, which showed the status of each task. She also consulted her superiors and was in constant communication with the financial controller. According to Mr. Rousseau, those were the responses that the assessment board was looking for in answer to this interview question.

98 The Tribunal concludes that the complainant has not established that the respondent favoured Ms. Langlois because she is Francophone, or for any other reason.

Decision

99 For all these reasons, the complaint is dismissed.

John Mooney
Vice Chairperson

Parties of Record

Tribunal File	2009-0458
Style of Cause	*Isaac Jalal and the Deputy Minister of Human Resources and Skills Development Canada*
Hearing	January 5 and 6, 2011 Ottawa, Ontario Last submissions received on March 8, 2011
Date of Reasons	December 6, 2011
APPEARANCES:	
For the complainant	Joanne Daniel
For the respondent	Anne-Marie Duquette
For the Public Service Commission	Kimberly Lewis (written submissions only)