



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2011-0046
Issued at: Ottawa, May 22, 2012

STEPHEN MCALEER

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 <i>Public Service Employment Act</i>
Decision	The complaint is dismissed
Decision rendered by	Maurice Gohier, Member
Language of Decision	English
Indexed	<i>McAleer v. Deputy Minister of National Defence</i>
Neutral Citation	2012 PSST 0013

Reasons for Decision

Introduction

1 Stephen McAleer, the complainant, participated in an internal advertised appointment process to staff the position of Fire Inspector, at the FR-02 group and level, with the Department of National Defence (DND). He filed a complaint in which he alleges that the Deputy Minister of DND (the respondent) abused its authority in the appointment process by not establishing essential qualifications related to the work to be performed, by unfairly screening out his application, by appointing a person who does not meet the essential qualifications, by having a member of the assessment board who was unqualified, by favouring the appointee, and by discriminating against him based on his age and a failure to accommodate his medical condition.

2 The respondent denies that there was any abuse of authority in the appointment process. It asserts that the complainant's application was screened out for having failed to demonstrate that he met an essential qualification. In addition, the complainant was treated fairly like all other candidates and the resulting appointment was made on the basis of merit. There was no abuse of authority in the establishment of the qualifications required for the position, the assessment board was fully qualified to assess the candidates, the appointee was not favoured, and there was no discrimination against the complainant.

3 The Public Service Commission (PSC) did not attend the hearing; however, it provided written submissions in which it explained the relevant policies and guides that apply to appointment processes. The PSC did not take a position regarding the merits of the complaint.

4 For the reasons outlined in the analysis below, the complaint is dismissed. The Public Service Staffing Tribunal (the Tribunal) finds that the complainant has not established that the respondent's decision to screen out his application from this appointment process was discriminatory. Furthermore, the Tribunal finds that the complainant has not established abuse of authority in either the respondent's conduct of the appointment process, or in its determination that the appointee met the essential qualifications for the position.

Background

5 A Job Opportunity Advertisement was posted on *Publiservice* announcing an FR - 02 appointment process with a closing date of September 10, 2010. The complainant submitted an application by facsimile on that date. Applications were screened against the essential education, experience, and accreditation/certification qualifications set out for the position.

6 The complainant's application was screened out of the appointment process on the basis that he did not demonstrate that he possessed an accreditation to trade qualification TSQ 5B (Fire Prevention and Life Safety Course) or equivalent accredited Fire Inspectors Certification NFPA 1031.

7 On completion of the appointment process, the respondent issued a *Notice of Appointment or Proposal of Appointment* (NAPA) announcing the appointment of Sharlene Bourque (the appointee) to the FR-02 Fire Inspector position. On January 25, 2011, the complainant filed a complaint under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA).

8 On May 28, 2011, the complainant provided notice to the Canadian Human Rights Commission (CHRC) in accordance with s. 78 of the PSEA that he intended to raise an issue involving the interpretation and application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA). Prior to the hearing, the CHRC informed the Tribunal that it would not make submissions in this matter.

Issues

9 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in the establishment of the essential qualifications for the position?
- (ii) Did the respondent abuse its authority when it screened out the complainant's application?

- (iii) Did the respondent abuse its authority in the application of merit by favouring the appointee?
- (iv) Did the respondent abuse its authority in the application of merit by appointing a candidate who did not meet the essential qualifications?
- (v) Did the respondent abuse its authority by having an unqualified member of the assessment board?
- (vi) Did the respondent abuse its authority by discriminating against the complainant?

Analysis

10 In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 62, the Tribunal noted that the preamble to the PSEA provides managers with flexibility in staffing positions. At para. 66 of *Tibbs*, the Tribunal determined that abuse of authority requires improper conduct and that the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority. The complainant has the burden of proving that, on a balance of probabilities, an abuse of authority has occurred.

Issue I: Did the respondent abuse its authority in the establishment of the essential qualifications for the position?

11 The complainant alleges that the respondent should not have requested that candidates possess “accreditation to trade qualification TSQ 5B (Fire Prevention and Life Safety Course) or equivalent accredited Fire Inspectors Certification NFPA 1031”. In the complainant’s view, the respondent should have required that prospective candidates possess prior experience performing the duties of Fire Inspector, and that they had completed both Level I and II of the Fire Inspector’s NFPA 1031 training courses.

12 The respondent submits that s. 30(2) of the PSEA gives it broad authority to set the qualifications that are required for the work to be performed. In this regard, the decision it made concerning the accreditation requirements of the position conforms

to departmental policy - for instance, the Canadian Forces Fire Marshal Directive (the FMD 1004).

13 With respect to the complainant's suggestion that prior experience performing the duties of a FR-02 Fire Inspector should have been identified as a requirement of the position, the respondent replies that although it recognizes that a FR-01 Firefighter will occasionally assist a FR-02 Fire Inspector in the performance of inspection duties, as part of an ongoing on-the-job training, it saw no need to specify such experience given the accreditation requirements it had identified as a qualification.

14 The respondent notes that the FMD 1004 directive provides direction on the required training and experience for the career progression of firefighters employed within DND. It states that in order to be eligible for employment as a Fire Inspector, candidates shall have one or more of the following training levels:

A) DND/CF FIRE SERVICE FIRE RESCUE TECHNICIAN

58. Candidates shall have completed all the training required at the Fire Rescue Technician level;

B) NFPA 1031 FIRE INSPECTOR I

59. Candidates shall require NFPA 1031 Fire Inspector I Certification;

C) NFPA 1001 LEVEL I

60. Candidates shall have completed NFPA 1001 level I (also known as Firefighter I) from an IFSAC/Pro-board accredited institution;

D) FIRE PROTECTION ENGINEERING TECHNICIAN

61. Candidates shall have Fire Protection Engineering Technician accreditation; and

E) Attestation d'Études Collégiale (AEC) en Prévention en Sécurité Incendie

62. Candidates shall have successfully completed the "*attestation d'étude collégiale (AEC) en prévention en sécurité incendie*" program.

(Emphasis part of the original)

15 The respondent notes that the FMD 1004 directive goes on to explain that if a candidate is hired with the NFPA 1031 Fire Inspector Level I certification, then the person shall have 18 months to complete additional training, which includes the NFPA 1031 Fire Inspector Level II certification.

16 As the Tribunal found in *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 42, the PSEA gives managers broad discretion to establish the necessary qualifications for the position to be staffed. In the case at hand, the FMD 1004 directive identifies the training levels that a candidate shall have in order to be eligible for employment as a Fire Inspector. This directive clearly states that it is not necessary for a candidate to possess both Levels I and II certification as a NFPA 1031 Fire Inspector in order to be eligible for appointment as a FR-02 Fire Inspector. To the contrary, the directive specifies that possession of the NFPA 1031 Fire Inspector Level I certification is sufficient. Aside from his personal opinion, the complainant presented no rational explanation to show that the respondent's decision to require NFPA 1031 Fire Inspector Level I certification was anything but the reasonable and proper exercise of its authority under s. 30(2) of the PSEA to establish the qualifications for a position. No evidence was presented by the complainant to challenge the respondent's position that the essential qualification related to accreditation was necessary for the work to be performed. Therefore, the Tribunal finds that the establishment of the qualification was a proper exercise of the manager's exercise of discretion in this area. See also *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004, at paras. 45-46.

17 For these reasons, the Tribunal concludes that the complainant has not demonstrated that the respondent abused its authority when it established the essential qualifications required for the position of FR-02 Fire Inspector.

Issue II: Did the respondent abuse its authority when it screened out the complainant's application?

18 The complainant's application was screened out of the appointment process on the basis that he did not demonstrate that he possessed an accreditation to trade qualification TSQ 5B (Fire Prevention and Life Safety Course) or equivalent accredited Fire Inspectors Certification NFPA 1031.

19 The complainant testified that he is 56 years old and that he has occupied the position of FR-01 Firefighter since 1983. He submitted his application for the FR - 02 Fire Inspector position by facsimile transmission around 1 p.m. on the closing date of Friday, September 10, 2010.

20 He then called the Civilian Personnel Office (CPO) seeking confirmation that his application had been received. Unable to contact anyone at CPO, the complainant drove 1.5 hours to CFB Gaagetown, NB. He testified that he met Gary Vautour, a Human Resources Officer, who was still in his office late Friday afternoon and who verified that the original faxed copy of his application had indeed been received. The complainant then gave Mr. Vautour another copy of his application and also a copy of his certificate for the *Fire Fighter Qualification Level 5* course (#89-01) he had completed in 1989 at CFB Borden. When Mr. Vautour noted that this did not seem to be the same course, the complainant explained that this course was the Fire Inspector's course back in 1989.

21 It is an admitted fact that the complainant did not provide a copy of the certificate along with the application he filed by facsimile transmission. When asked during the hearing why this certificate was not included in his original application, the complainant replied that he must have forgotten to include it and did not realize it at the time.

22 During the hearing, the complainant presented his study notes from the 1989 course he had taken as well as a photograph of the graduating class listing him as a participant – documents that did not form part of his application. The performance objectives (study modules) for the #89-01 course were virtually identical to those listed for a QL5 Firefighter Journeyman course #90-01 given the following year.

23 The respondent's evidence paints a significantly different picture. According to the respondent, the complainant did not meet Mr. Vautour on the closing day of the appointment process, nor did he provide a copy of his certificate for the #89-01 course until a meeting held ten months later, in July of 2011, well after the presentation of his complaint.

24 Mr. Vautour is the Human Resources Officer who was assigned to advise and guide management during this appointment process. He also acted as a member of the assessment board. Mr. Vautour testified that he has been working a compressed

workweek since 2008. He works Monday to Thursday, and every Friday he is off. On two or three separate occasions since 2008, Mr. Vautour did work on a Friday when he had to attend a workshop or training session. However, he was not at the office on Friday, September 10, 2010, nor did he meet or speak with the complainant on that date. Although the complainant had indicated that he possessed such a certificate in his application letter, it was not included in the attached documents.

25 On September 27, 2010, the complainant was advised that his application had been screened out of the appointment process. Mr. Vautour recalled that the complainant dropped into the office a few days later and mentioned that either the personnel records or the fire hall might have a copy of his certificate. Steps were taken to have both of these areas checked, but a copy of the certificate was not found in either place. Mr. Vautour advised the complainant of the search results in a letter dated October 14, 2010, which read, in part, as follows:

The Compensation Advisor, Cheryl Bulmer does not have a copy of any training certificate on your Personnel File from 1989, the year that you had indicated to us, of having successfully completed this training. We've also checked with the local Fire Hall to see if they have any records of such training and they do not. The Fire hall also checked with the Training School in Borden who (sic) has no record.

During the Staffing Process, the onus is on the candidate to provide proof of their credentials as it relates to the Statement of Merit. Henceforth, the decision stands as being screened out of this Staffing Process.

26 Mr. Vautour testified that the first time he ever saw the complainant's certificate for the #89-01 course was during a meeting held the first week of July 2011.

27 Josée Gauthier is the Human Resources Assistant who was assigned to provide administrative support for the FR-02 Fire Inspector appointment process. She worked closely with Mr. Vautour, acted as a member of the assessment board during the interview phase, and performed the reference checks. Ms. Gauthier maintained the staffing file by gathering the five candidates' applications, printing and stapling each of them, and placing them in the staffing file. She confirmed that the only documents she received from the complainant were the application documents he had sent by facsimile transmission. On September 10, 2010, Ms. Gauthier left the office around 3:30 p.m. She did not see the complainant in the office on that day.

When she leaves at the end of her workday, she places staffing files in a locked drawer, and any document received while she is absent is placed in her mail slot. Ms. Gauthier never received a second copy of the complainant's application, and Mr. Vautour never mentioned either meeting the complainant or receiving any additional document from him. Ms. Gauthier provided the staffing file to Eugene Mahoney, the Chief Fire Inspector at CFB Gagetown, who was the manager conducting the appointment process. He reviewed the five applications in the staffing file and screened them against the education and experience qualifications and the results were recorded in a *Screening Board Report* dated September 23, 2010.

28 Ms. Gauthier then sent the September 27, 2010 letter advising the complainant that his application would not be considered any further in the appointment process. She recalled that efforts were subsequently made to locate a copy of a certificate mentioned in the complainant's application, but that these efforts had been unsuccessful. She testified that she had never seen the complainant's certificate for the #89-01 course before the hearing.

29 Mr. Mahoney was the chair of the assessment board for the appointment process conducted to fill the FR-02 Fire Inspector position. Mr. Mahoney established the merit criteria, decided which type of process would be used to staff the position, and screened the applications that were received. Mr. Vautour and Ms. Gauthier assisted him as assessment board members during the interviews. When Ms. Gauthier brought him the staffing file so that he could review the applications, with respect to the complainant's documentation, it contained only the original submission sent by facsimile transmission. Mr. Mahoney testified that the first time he saw the complainant's certificate for the #89-01 course was during a meeting held in July 2011, well after the assessment process had been completed.

30 There are two opposing versions as to when the complainant's certificate was presented. The complainant says that he provided a copy during his visit to the CPO on September 10, 2010, the closing day for submitting an application, whereas the respondent contends that the training certificate was presented by the complainant ten months later during a meeting held in July 2011.

31 Given the conflicting evidence, the Tribunal must assess credibility and determine which version of the facts it will accept. The test when credibility is at issue is well-established. The Tribunal must determine which version is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in the circumstances. See *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at page 357, and *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, at paras. 45 and 46.

32 For the reasons that follow, the Tribunal finds that the documentary and testimonial evidence presented does not support the complainant's contention that he visited the CPO at CFB Gagetown on Friday, September 10, 2010, to provide a second copy of his application along with a copy of his training certificate.

33 Mr. Vautour was unwavering in his testimony about working a compressed workweek, which gives him Fridays off, and his practice of coming to the office on Fridays only on very rare occasions. More specifically, Mr. Vautour recalled that he was not in the office on Friday, September 10, 2010, but that the complainant had visited the office a few days later when he suggested that a copy of his certificate could perhaps be found in his personnel records or the fire hall. A practical and informed person would find that the version of events described by Mr. Vautour is consistent with the content of correspondence exchanged at the relevant time, such as the September 27, 2010 and the October 14, 2010 letters that summarized the various attempts made to locate the complainant's training certificate. Moreover, it is unlikely that the respondent would make significant efforts to try to locate the certificate, such as searching the complainant's personnel records, the local Fire Hall, and the training School in Borden if it already had the certificate in its possession. According to the testimony of the two individuals who handled the staffing file, Ms. Gauthier and Mr. Mahoney, it did not contain the second copy of the complainant's application, nor the training certificate. Lastly, Mr. Vautour and Mr. Mahoney both stated that they did not see this certificate until a meeting held in July 2011, ten months after the closing date for receipt of applications, and Ms. Gauthier insisted that she had never seen a copy of the complainant's training certificate until the hearing.

34 The Tribunal finds that a practical and informed person would conclude, based on a balance of probabilities, that the complainant had not presented a copy of his training certificate when he applied for the FR-02 Fire Inspector position, but had only referred to his training certificate in his letter of application without providing a copy, that efforts were unsuccessfully made to locate a copy of this certificate, and that a copy of the certificate was ultimately provided by the complainant at a much later date, after the appointment process had been completed.

35 In prior decisions, the Tribunal has consistently found that it is the candidate's responsibility to ensure that the application is complete and contains all of the information necessary to demonstrate that he or she meets the essential qualifications. See *Charter v. Deputy Minister of National Defence*, 2007 PSST 0048, at para. 37; and *Henry v. Deputy Minister of Service Canada*, 2008 PSST 0010, at para. 56.

36 For all these reasons, the Tribunal concludes that the respondent did not abuse its authority when it decided to screen out the complainant for having failed to demonstrate that he possessed the required training accreditation.

Issue III: Did the respondent abuse its authority in the application of merit by favouring the appointee?

37 According to the complainant, the respondent demonstrated personal favouritism and preferential treatment towards the appointee in two ways. First, the respondent refused to assign him light duties following an injury he had sustained, yet it had done so for the appointee during her pregnancy. Second, the appointee was favoured because she had been tutored and evaluated by Mr. Mahoney at the Fire Hall during a past training course.

38 With respect to the first matter, the complainant explained that he had suffered a lower back injury and was absent from work for a period of 17 months from December 2009 until April 2011. According to the complainant, mid-way through his absence from work, and prior to this appointment process, a New Brunswick WorkSafe counsellor had requested that the respondent accommodate him by appointing him as a FR-02 Fire Inspector because this position is less strenuous.

It primarily requires the performance of office duties, whereas the FR-01 Firefighter's position involves more physical duties such as climbing ladders, carrying people and equipment, and climbing in and out of fire trucks. At the time, the respondent had also refused to assign him light duties in the fire hall's alarm room that was staffed by commissionaires. Mr. Mahoney testified that these events had occurred before the appointment process took place and that they had no bearing on his assessment of any of the candidates.

39 Turning to the complainant's allegation that the appointee was favoured as a result of the tutoring she received, Mr. Mahoney confirmed that he had indeed assessed the physical fitness of candidates in the FR-01 process from which the appointee was originally hired in 2007. Every FR-01 Firefighter has specific training requirements that must be completed. Mr. Mahoney recalled supervising an exercise several years ago during which the appointee had to demonstrate being capable of resetting a fire alarm panel, and where she and a few others had to interview a FR-02 Fire Inspector. Mr. Mahoney testified that he had no personal relationship or social contact with the appointee outside of the workplace. Mr. Mahoney added that he and the complainant worked together on the same shift as part of the same crew for many years and that they had always enjoyed a good working relationship.

40 While the PSEA does not define abuse of authority, s. 2(4) states that "[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism." As noted by the Tribunal in *Glasgow*, at para. 41:

[...] 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.

41 The complainant has failed to demonstrate the existence of any kind of personal relationship between Mr. Mahoney and the appointee. The Tribunal finds that the examples raised by the complainant are typical of the normal professional training

relationships that are likely to exist in any workplace. The complainant presented no evidence to demonstrate that Mr. Mahoney treated the appointee any differently than other FR-01 Firefighters in terms of training and career progression. The fact that a manager tutored an employee during training exercises cannot be interpreted, by itself, as evidence of personal favouritism on the part of that manager towards that particular employee. In addition, the issue of accommodation measures raised by the complainant occurred prior to the commencement of this appointment process. He has not demonstrated how these matters had any bearing on how the respondent treated either him or the appointee in the course of screening the applications or assessing the candidates in the course of this appointment process. As a result, the Tribunal finds that the complainant has not demonstrated that personal favouritism played any part in this appointment process.

42 For these reasons, the Tribunal concludes that the complainant's allegation of personal favouritism or preferential treatment is unfounded.

Issue IV: Did the respondent abuse its authority in the application of merit by appointing a candidate who did not meet the essential qualifications?

43 The complainant alleges that the respondent abused its authority by appointing a candidate who did not meet the essential qualifications required for the position. In particular, the complainant argues that the appointee did not possess both Level I and II Fire Inspector training courses, and that she did not meet an essential ability qualification *"to apply codes and standards applicable to Fire Service Engineering review of specifications and drawings related to infrastructure construction and renovations"*.

44 With respect to the training courses, the Tribunal has already concluded that the respondent's decision to establish the Level I Fire Inspector training accreditation as an essential qualification for the FR-02 Fire Inspector's position conformed to the FMD 1004, which provides direction on the required training and experience for

the career progression of firefighters employed within DND. There is no dispute that the appointee possessed Level 1 NFPA certification when she applied. The Tribunal is satisfied that the respondent has demonstrated that the appointee met this essential qualification.

45 The ability to apply codes and standards applicable to Fire Service Engineering review of specifications and drawings related to infrastructure construction and renovations was assessed by means of a two hour written exam. In his capacity as Chief Fire Inspector, Mr. Mahoney developed the exam questions and selected the blueprint that would be used for the exercise. He explained that as part of the exam, candidates were provided with several code books, such as: the National Building Code of Canada, the National Fire Code of Canada, the National Fire Protection Association Codes & Standards, the Natural Gas & Propane Code, the Canadian Electrical Code, and the Underwriter's Laboratory of Canada Standard. During this exam, the candidates had to review 10 questions, each worth 2 points, and answer the questions while providing the appropriate reference. The pass mark for this written exam was 12/20 and the appointee obtained a score of 16/20.

46 The Tribunal held in *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011, at para. 77:

Section 36 of the *PSEA* provides that the deputy head may use any assessment method that he or she considers appropriate in an internal appointment process. For the Tribunal to find that there was abuse of authority in the selection of the assessment methods, the complainant must prove that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria, or are discriminatory.

47 The complainant has not established that the respondent abused its authority when it used a written exam to assess the qualification. He has presented no evidence to demonstrate that the assessment tool was incapable of adequately assessing the given qualification, or that it resulted in an inappropriate assessment.

48 Based on the evidence presented by the parties, the Tribunal concludes that the complainant has not demonstrated, on a balance of probabilities, that

the respondent appointed a candidate who did not meet the essential qualifications of the FR-02 Fire Inspector position.

Issue V: Did the respondent abuse its authority by having an unqualified member of the assessment board?

49 The complainant alleges that the chair of the assessment board, Mr. Mahoney, was not qualified in the fire prevention field to do an assessment of the candidates' qualifications because he was appointed to the position of Chief Fire Inspector in an internal non-advertised appointment process.

50 In support of his contention, the complainant presented the NAPA issued in March 2008. In addition, the complainant noted that Mr. Mahoney had never taken the QL5 course; rather, he had completed the QL6 course for supervisors.

51 In response, Mr. Mahoney described his work experience. He was a volunteer firefighter before he was hired as a FR-01 Firefighter in 1984. Mr. Mahoney became an FR-02 in the Fire Inspector's Office around 1989-1990, and was subsequently promoted to the position of Chief Fire Inspector for CFB Gagetown, at the FR-03 group and level, in 2008. Mr. Mahoney took several courses at the fire school, such as: the TQ-3, TQ-5, and TQ-6A courses. He also served for two years as Vice-President and President of the New Brunswick Fire Chief Association's executive committee, an organization involved in the development of guidelines for training and the administrative side of firefighting.

52 The Tribunal concludes that the complainant has not met his onus of demonstrating that Mr. Mahoney was unqualified to act as a member of the assessment board. On the contrary, the evidence presented shows that Mr. Mahoney was eminently qualified to serve as chair of the assessment board in this appointment process. The fact that Mr. Mahoney was appointed as a FR-03 Chief Fire Inspector in a non-advertised process is immaterial.

Issue VI: Did the respondent abuse its authority by discriminating against the complainant?

53 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.

54 In this case, the complainant is alleging discrimination on the basis of disability and age.

55 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, to 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 age.

56 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. [...]

57 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* (1990), 14 C.H.R.R. D/12 (F.C.A.), at para. 7.

58 The Tribunal is required to determine whether the complainant's allegation of discrimination, if believed, justifies a finding in his favour in the absence of an explanation from the respondent. Thus, at this stage of the analysis, the Tribunal cannot take into consideration the respondent's explanation 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.

59 If the complainant establishes a *prima facie* case of discrimination, the onus then shifts to the respondent to provide a reasonable non-discriminatory explanation for its decision to eliminate him from this appointment process.

a) *Discrimination on the basis of disability*

60 With respect to his medical condition, the complainant alleges that the respondent had refused to assign him to light duties following an injury he had sustained. It is uncontested that the complainant suffered a lower back injury and was absent from work for a period of seventeen months from December 2009 until April 2011. The complainant testified that approximately mid-way through his absence from work, a New Brunswick WorkSafe counsellor had requested that the respondent accommodate the complainant by appointing him to a FR-02 Fire Inspector position. The uncontested evidence is that this position is less strenuous since it primarily consists of office duties, whereas the FR-01 Firefighter's position involves more physical duties such as climbing ladders, carrying people and equipment, and climbing in and out of fire trucks. At the time, the respondent had also refused to assign the complainant light duties in the fire hall's alarm room, which was staffed by commissionaires.

61 The closing date to apply in this appointment process was September 10, 2010. The complainant was on medical leave when he applied. The complainant applied for the very position to which he had previously sought to be accommodated. Mr. Mahoney did not deny that the complainant had sought this particular accommodation prior to the commencement of the appointment process for the FR-02 position. Moreover, it is the complainant's evidence that he provided a copy of the training certificate demonstrating that he met the accreditation screening requirements when he visited the CPO.

62 The Tribunal finds that the evidence of the complainant, if believed, is sufficient to establish a *prima facie* case of discrimination on the basis of disability.

63 The onus, therefore, shifts to the respondent to provide a reasonable non - discriminatory explanation for its decision to eliminate him from this appointment process.

64 For the reasons set out in its analysis of Issue 2, the Tribunal is satisfied that the respondent has provided a reasonable non-discriminatory explanation concerning its decision to screen the complainant out of this appointment process. The Tribunal finds that the respondent's decision to screen out the complainant from this appointment process was based on his failure to demonstrate that he possessed the necessary training accreditation when he submitted his application, and this was the sole reason for why he was screened out.

65 The Tribunal concludes that the complainant has not demonstrated that he was discriminated against on the basis of disability in this appointment process.

b) Discrimination on the basis of age

66 With respect to age, the complainant, who is 56 years old, alleges that he was discriminated against because the respondent wanted to replace older workers with younger ones.

67 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.

68 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).

69 In the case at hand, the complainant's allegation of discrimination on the basis of age is insufficient to justify a finding of *prima facie* discrimination in his favour. The complainant provided no evidence to support his belief that he was discriminated against on the basis of his age. Aside from his belief, there is no evidence that age was a factor in the respondent screening the complainant out of the appointment process.

70 The Tribunal concludes that the complainant has not demonstrated a *prima facie* case of discrimination on the basis of age.

Decision

71 For these reasons, the complaint is dismissed.

Maurice Gohier
Member

Parties of Record

Tribunal File	2011-0046
Style of Cause	<i>Stephen McAleer and the Deputy Minister of National Defence</i>
Hearing	March 6 and 7, 2012 Fredericton, New-Brunswick; and March 22, 2012 Ottawa, Ontario (teleconference)
Date of Reasons	May 22, 2012
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For the respondent	Anne-Marie Duquette
For the Public Service Commission	Marc Séguin (written submissions)