



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2011-0154
Issued at: Ottawa, May 7, 2012

BRIAN NEILSON

Complainant

AND

THE DEPUTY MINISTER OF FISHERIES AND OCEANS CANADA

Respondent

AND

OTHER PARTIES

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

Decision Complaint is dismissed

Decision rendered by Kenneth J. Gibson, Member

Language of Decision English

Indexed *Neilson v. Deputy Minister of Fisheries and Oceans Canada*

Neutral Citation 2012 PSST 0010

Reasons for Decision

Introduction

1 The complainant, Brian Neilson, alleges that the respondent, the Deputy Minister of Fisheries and Oceans Canada, abused its authority when it made a non-advertised appointment to an operations officer position at the GT-05 level. The complainant alleges that his experience was equivalent to that of the person appointed and that he should have been considered for appointment since his work description and that of the GT-05 position were essentially the same. He also alleges that the respondent breached a promise to conduct an advertised appointment process. Finally, he alleges that he was discriminated against on the basis of disability, contrary to the *Canadian Human Rights Act*, R.S.C 1985, c. H-6 (CHRA).

2 The respondent replies that a non-advertised appointment was made because there was only one employee available with the required experience and knowledge of helicopters necessary to perform the duties of the position.

Background

3 A *Notification of Appointment or Proposal of Appointment* was issued on March 15, 2011, for the non-advertised appointment of Bert Chestnut (appointee) to an operations officer position at the GT-05 level.

4 Recourse was open to employees of the Department of Fisheries and Oceans who occupied a position in the Maritime Region and the Coast Guard College in Sydney, Nova Scotia.

5 The complainant filed a complaint of abuse of authority under s. 77(1)(a) and (b) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the PSEA) on March 25, 2011.

6 On September 30, 2011, the complainant notified the Canadian Human Rights Commission (CHRC), pursuant to s. 78 of the PSEA, that his complaint raised an issue involving the interpretation or application of the CHRA. The CHRC informed the

Public Service Staffing Tribunal (the Tribunal) that it did not intend to make submissions in this complaint.

7 The Public Service Commission (the PSC) did not attend the hearing but provided written submissions in which it discussed relevant PSC policies and guidelines.

Preliminary matters

Motion to postpone the hearing

8 At the commencement of the hearing on January 4, 2012, the complainant made a motion to postpone the hearing to April 2012. The complainant's representative submitted that he took over the case at the last minute, he had not had an opportunity to meet with the complainant until mid-December 2011, the file obtained from his predecessor was incomplete, and he only received the missing documents from the respondent on December 22, 2011. He stated that it had been impossible to meet with the complainant over the Christmas/New Year's holiday, and he only had a chance to discuss the documents with the complainant on the day prior to the hearing. The complainant's representative admitted that the missing documents should have been passed on to him by the complainant's previous representative, but they were not. He submitted that he needed at least three days to prepare his case and that the complainant did not feel prepared to proceed. He was willing to proceed, if necessary, under duress.

9 The respondent submitted that the Tribunal had already decided this matter in a letter decision dated December 20, 2011. It saw no reason for the Tribunal to change its decision. The respondent noted that it had complied with the letter decision by providing the missing documents to the complainant on December 22, 2011. It further noted that the documents could have been provided earlier had the complainant requested them. The respondent submitted that the hearing had already been postponed once to accommodate the complainant. It argued that another postponement would be unfair to the respondent. It was willing to accept an adjournment of a few hours, if that would be helpful to the complainant.

10 The Tribunal denied the request to postpone the hearing for the following reasons.

11 On October 12, 2011, the Tribunal granted a request from the same complainant's representative to postpone the hearing scheduled for October 18-20, 2011, because he had recently taken over this and other files from another union representative and he needed time to prepare. At that time, the complainant's representative sought a postponement to December 2011 or later.

12 The hearing was postponed to January 4-6, 2012.

13 On December 16, 2011, the complainant's representative again requested that the hearing be postponed. In his request, he explained that, among other reasons, certain documents were missing from the file and he did not anticipate receiving them in time for the hearing.

14 In a decision dated December 20, 2011, the Tribunal denied the request to postpone the hearing. It noted that paragraph 3.3.2 of the Tribunal's *Policy for Requests for Postponements* provides that after the 30 day period following the Notice of Hearing, a request may be made to postpone a hearing when exceptional circumstances arise. However, the Tribunal was not satisfied that the complainant's representative had identified exceptional circumstances for his request for postponement. The Tribunal noted that the complainant and his representative had over two and one-half months following the first postponement to prepare for the hearing in January 2012, and still had another two weeks to prepare. It also cited s. 98(1) of the PSEA that requires the Tribunal to proceed as expeditiously as possible to determine a complaint. Finally, the Tribunal ordered the parties to cooperate fully to ensure that all documents were found and exchanged.

15 The respondent met the Tribunal's order within two days of the Tribunal's decision of December 20, 2011, by providing the relevant documents to the complainant's representative.

16 At the hearing, the Tribunal noted that the submissions of the complainant's representative were essentially the same as those the Tribunal had dismissed in its decision of December 20, 2011. The Tribunal further noted that the complainant's representative acknowledged that the respondent was not responsible for the missing documents, that the documents could have been obtained earlier had they been requested earlier, and that, even if the complainant and his representative could not have met over the holidays, no reason was given why they could not communicate via telephone and email.

Motions Concerning Certain Allegations

(i) Failure to appoint the complainant in another appointment process

17 The respondent argued that the Tribunal had no jurisdiction to hear this allegation because it related to an appointment process other than the process that is the subject of the complaint.

18 In response to the respondent's objection, the complainant withdrew the allegation.

(ii) Failure to properly assess the duties the complainant was performing as a GT-04 Operations Supervisor against the duties of the GT-05 Operations Officer position, and failure to appoint the complainant by reclassifying the position that he occupied

19 The respondent submits that the Tribunal has determined in previous decisions that it has no jurisdiction to hear allegations concerning job classification. It further argues that an allegation concerning a work description should properly be referred to the Public Service Labour Relations Board (PSLRB) and not to the Tribunal.

20 The complainant submits that the first allegation is not concerned with the classification of a position. It is about the assessment of his GT-04 duties against the duties of the new GT-05 position. The second allegation concerns his contention that he was performing the duties of the GT-05 position and by failing to appoint him to the position he became a surplus employee subject to work force adjustment.

21 The respondent replies that the assessment of duties is a work description issue and not a staffing issue. It maintains that the Tribunal has no jurisdiction to review the respondent's assessment of the duties of a position. Whether a position is new or reclassified, the discretion remains with the respondent to determine how to staff the position. The respondent asserts that the Federal Court of Appeal's decision in *Kane v. Canada (Attorney General)*, 2011 FCA 19 (CanLII) did not change the Tribunal's jurisdiction in this regard. According to the respondent, *Kane* simply states that the respondent cannot base its staffing decisions on serious errors.

22 The Tribunal noted that in *Kane*, the respondent decided to make an appointment to a new position from a pool of candidates that arose from an advertised appointment process. The issue before the Federal Court of Appeal was whether or not the position was new or a reclassification of an existing position. At para. 6 of *Kane*, the Court determined that where the employer bases the exercise of its discretion on an incorrect fact, the decision may be *prima facie* unreasonable and constitute an abuse of authority.

23 At the beginning of the hearing in the present case, the Tribunal could not determine whether a classification-related error had occurred, and, if so, whether that error was relevant to a finding of abuse of authority in the appointment process at issue. The Tribunal reserved its decision on these objections and heard the complainant's evidence.

24 Having heard the evidence, the Tribunal has reached the following conclusions.

25 The Tribunal has confirmed in a number of decisions that it does not have jurisdiction to determine whether a position is properly classified. (See *Velasco v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 0017, at paras. 17 and 19, *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044, at para. 42, and *Kilbray v. Canada (Attorney General)*, 2009 FC 390, at para. 55.)

26 However, the Tribunal has determined that it can consider classification-related evidence to the extent that such evidence is relevant and relates to an allegation of

abuse of authority in an appointment process. See *Velasco*, at paras. 18 and 20. Thus the Tribunal will analyze the classification-related evidence solely from the perspective of whether there has been an abuse of authority under s. 77(1)(a) and (b) of the PSEA.

Issues

27 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority when it exercised its discretion to conduct a non-advertised appointment process?
- (ii) Did the respondent abuse its authority by discriminating against the complainant on the basis of his disability?

Analysis

28 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. Abuse of authority requires more than mere errors, omissions or improper conduct and the complainant has the burden of presenting evidence and making convincing arguments, that, on a balance of probabilities, abuse of authority has occurred.

Issue I: Did the respondent abuse its authority when it exercised its discretion to conduct a non-advertised appointment process?

29 Section 33 of the PSEA explicitly permits the use of non-advertised appointment processes. However, this discretion is not absolute and s. 77(1)(b) of the PSEA provides for a direct challenge to the choice of process on the ground of abuse of authority. (See *Kane*, at para. 3)

(i) *The reorganization*

30 The non-advertised appointment process that is the subject of this complaint resulted from a reorganization of the Coast Guard's Maritime Regional Operations Centre (ROC) Anne Miller, who has been the Regional Director for the past five and one-half years, described the reorganization and the events leading to the non-advertised appointment of the appointee to the GT-05 position.

31 Ms. Miller testified that the reorganization was in response to a study recommending the standardization of the five regional Coast Guard organizations. As part of the reorganization, the ROC was converted from a 24 hour a day operation to a 5-day per week daytime operation. She presented organization charts for the new and old Maritime regional operational service organizations. The new organization, which came into place in 2009, has four GT-05 positions as compared to two GT-05 positions in the old organization. Two GT-05 positions in the old structure continued in the new structure, with some change in duties. The other two GT-05 positions were new positions.

32 All four of the GT-05 positions in the new structure are entitled operations officers. A new generic national work description was established for all GT-05 operations officer positions.

33 Ms. Miller explained that there were a number of GT-03 positions in the old structure that were eliminated. The duties of these positions were integrated into the GT-05 positions.

34 The appointee was working in a GT-03 position in the old structure. His duties were incorporated into one of the new GT-05 positions. The department's Organization and Classification Centre of Expertise (OCCOE) was asked to compare the appointee's GT-03 work description to the national work description for the GT-05 position. The OCCOE concluded that there was coincidence between the two work descriptions. However, policy considerations prohibited a two level reclassification of the appointee's position and, instead, required the creation of a new position. The appointee was placed

in the new GT-05 position on an acting basis so that the duties of the position could continue to be fulfilled.

35 Ms. Miller testified that a subcommittee of the Coast Guard National Executive Board was established to provide human resources advice on the transition to the new organizational structure. She referred the appointee's situation to the subcommittee and it recommended that she take the case to the Fleet Executive Board to ensure consistency in the application of human resources practices during the transition. The Fleet Executive Board determined that it would be appropriate to appoint the appointee to the GT-05 position by way of a non-advertised appointment because his GT-03 position had been eliminated and because of the congruence between his GT-03 position and the new GT-05 position.

36 Ms. Miller testified that the ROC had a need for aviation experience in one of its GT-05 positions. The appointee had been performing these duties in his GT-03 position. She considered the appointee to be the only available person with the required experience. Therefore, as the sub-delegated manager, and with approval from the appropriate management committees, she decided to proceed with the appointee's non - advertised appointment to the GT-05 position.

37 Ms. Miller introduced into evidence the *Rationale for Non-Advertised Appointment Processes (Rationale)* that she prepared to document the justification for the appointee's appointment. The contents of the document were consistent with her testimony.

38 The complainant challenges the *Rationale* document for the appointment decision. He claims that he should have been considered for appointment by way of reclassification to the GT-05 position because: (a) his GT-04 duties are consistent with the GT-05 work description; (b) the appointee's assessment is not consistent with the Statement of Merit Criteria (SMC) for the position; (c) his aviation qualifications are equivalent to that of the appointee; and (d) Coast Guard management reneged on a promise that there would be an advertised appointment process where an appointment

would result in a two-level promotion. The Tribunal will examine each of these claims to determine if the respondent abused its authority in this appointment process.

(ii) Should the complainant have been considered for the GT-05, Operations Officer position based on the coincidence between that position and his GT-04 position?

39 The Tribunal notes at the outset that, under s. 30(4) of the PSEA, the respondent was not required to consider more than one person in order for an appointment to be made on the basis of merit.

40 The complainant testified that he was an Operational Supervisor at the GT-04 level. His position was eliminated as a result of the reorganization. He believes that the new GT-05 work description is consistent with his GT-04 work description and that he should have been given consideration for appointment to the position.

41 The complainant testified that he became aware that the OCCOE was conducting a comparison of his GT-04 work description to the generic GT-05 work description. At the time of this review, his work description was ten years old, the position had evolved and he believed that he was performing duties that were not included in the work description. He understood that his work description had been updated prior to the review, but he said that he had not participated in identifying the changes nor had he seen them.

42 The complainant introduced a series of four emails that he sent to Gordon Hamilton, an officer in the OCCOE, between January 14 and February 2, 2010. These emails followed up on a voice mail he had left with Mr. Hamilton "several weeks" earlier, expressing a desire to participate in the process comparing his GT-04 work description to the generic GT-05 work description. He testified that Mr. Hamilton never replied to his voice mail or any of his emails.

43 The complainant was subsequently informed that the OCCOE had completed its review and had determined that there were significant differences between his GT-04 and the generic GT-05 work descriptions. He believes that the OCCOE's conclusions are incorrect. He consulted with his bargaining agent, and a

representative informed him that he should have been permitted to participate in the review.

44 The complainant's supervisor at the time of the review was Peter Stow. The complainant acknowledged that he did not speak to Mr. Stow about the update of his work description. He also acknowledged that he was informed that Mr. Stow had provided updated information on the GT-04 position to the OCCOE. He did not know where Mr. Stow obtained the information he conveyed to the OCCOE. He acknowledged that Mr. Stow might have obtained this information from other GT-04s.

45 When asked why he himself did not submit information about changes to his work description, the complainant replied that he did not know to whom to submit them. He did not explain why he did not discuss this matter with his supervisor, Mr. Stow.

46 Mr. Stow testified that he has been the Superintendent of the ROC since September 2008. He stated that he spent the early months in his position talking to staff and learning about the duties and responsibilities of staff in GT positions. He acknowledged that the work descriptions for GT positions that he provided to the OCCOE were several years old. Therefore, he provided the OCCOE with updated information that he had gleaned from interviews with staff. He could not recall if he gave Mr. Hamilton a written list of revised or additional duties. He did recall discussing the duties with Mr. Hamilton over the telephone.

47 Mr. Stow introduced into evidence Mr. Hamilton's comparisons of the GT-05 position with the appointee's GT-03 position and the complainant's GT-04 position. He testified that Mr. Hamilton concluded that there was coincidence between the GT-05 and the GT-03 positions, but that there were not enough similarities between the GT-05 and the GT-04 positions to conclude that there was coincidence between them.

48 The respondent did not explain why it excluded the complainant from participating in the review of his former position against the new GT-05 position, or why Mr. Hamilton did not respond to the complainant's voice mail and emails requesting the opportunity to participate in the review. Nevertheless, the complainant did not present

any evidence of any policy, procedure or practice obliging the respondent to involve employees when it undertakes a comparison of their work description against the work description for another position. Furthermore, no evidence was presented that even if the complainant had participated in the review, it would have changed the outcome of the review. The Tribunal finds that the complainant's evidence is insufficient for it to conclude that the respondent committed a serious error constituting abuse of authority under the PSEA.

49 The document prepared by Mr. Hamilton, setting out a detailed analysis of why the GT-04 position occupied by the complainant was not coincident, with the GT-05 position, lists the duties added to the GT-04 position since the description was written in 1999. This list of additional duties was provided by Mr. Stow. There is no evidence that these duties are incorrect or incomplete. While the complainant questions the review process, he did not identify any omissions in the work description information that was reviewed. He also did not explain why he did not discuss updating the work description with Mr. Stow. It is evident that Mr. Hamilton relied on Mr. Stow to provide him with up-to-date information on the duties being performed in the GT-04 position.

50 The Tribunal has no jurisdiction to substitute its conclusions for those of the respondent with regard to the coincidence between the complainant's GT-04 position and the GT-05 Operations Officer position. It can only examine the comparison process to determine if the review involved errors or omissions that might lead to a finding of abuse of authority in the appointment process.

51 The onus is not on the respondent to prove that its actions were free from abuse of authority. As the Tribunal noted in *Tibbs*, at para. 50: "If the onus was with the respondent to prove that there was no abuse of authority, this would lead to a presumption of abuse of authority in all appointments, which without a doubt is not what Parliament intended."

52 Having concluded that the complainant has failed to meet his burden to establish that the work description review undertaken by the respondent was seriously flawed, the

Tribunal finds that the complainant has not demonstrated that he was entitled to be considered for the GT-05 position based on the GT-05 position being coincident with his GT-04 position.

(iii) *Was the appointee's assessment consistent with the Statement of Merit Criteria for the position?*

53 The complainant has claimed that the respondent also abused its authority in the application of merit contrary to s. 77(1)(a) of the PSEA.

54 The complainant introduced a document entitled *Candidate's Assessment against Statement of Merit Criteria (Assessment)* that was prepared by Ms. Miller. He testified that he agrees that the appointee is qualified for the position. However, he says that the assessment refers to an Operations Officer (Aviation) position and that there is no such position. According to the complainant, the operations officer work descriptions are all generic and there is no position specific to aviation.

55 The complainant also claims that the experience described in the appointee's assessment is different from what is required in the SMC. The *Assessment* states that the position requires extensive experience working with helicopters on a regular basis. He states that this is not an essential experience requirement in the SMC.

56 Ms. Miller agreed that the GT-05 operations officer work descriptions are generic, but she testified that the positions were staffed with varying types of expertise to ensure that they covered all operational needs. She said that one position was staffed by a person with expertise in icebreaking and another with expertise in science programs. For this position they needed someone with experience working with helicopters.

57 Ms. Miller referred to the *Rationale* document mentioned above. The document notes, amongst other things, that the appointee, in his GT-03 position, had exclusive responsibility for aviation operations in the Maritimes Region and that these duties had been incorporated into one of the new GT-05 positions. It noted that the appointee had been acting in the position since January 2009 and that he was the only person with the unique skills and knowledge required for the position.

58 Ms. Miller contends that aviation knowledge and experience are included in the SMC. She notes that the first essential knowledge requirement calls for knowledge of the Coast Guard Operational Service Directorate, in particular vessel and helicopter operations. She also notes that the second experience requirement concerns experience supporting Coast Guard resources or program delivery. She says that helicopters fall under resources.

59 Mr. Stow's testimony on this issue was consistent with that of Ms. Miller. He stated that the role of the GT-05 position is to work with clients and coordinate resources. The GT-05s work as a team with shared responsibilities plus a specialty. One GT-05 position has a specialty associated with science-based vessels, another with icebreaking programs and a third with helicopters. The person in the fourth position works on his own files and backs up the other three. He testified that the other Coast Guard regions also have GT-05 positions with generic work descriptions plus specialities.

60 Mr. Stow confirmed that the appointee had been acting in the new GT-05 position because no one else had the depth of helicopter knowledge that he possessed and because the bulk of the duties were the same as in his former GT-03 position.

61 The respondent's position is that experience supporting Coast Guard resources includes experience with helicopters. The complainant has not presented evidence that this is not the case. Based on the testimony of Ms. Miller and Mr. Stow, the Tribunal is satisfied that the operations officer positions may encompass both common and specialized responsibilities and that one of the specialized responsibilities relates to helicopters. The existence of such a requirement in the new organization is supported by the fact that the appointee was performing these duties in the old organization and that he continued to perform these duties on an acting basis once the GT-05 position was created in the new organization. Therefore, the Tribunal finds that the SMC for this Operations Officer position includes experience with helicopters. The SMC also specifically provides for knowledge of helicopter operations. The complainant has not shown, on a balance of probabilities, that the respondent abused its authority in assessing the appointee's helicopter experience under the SMC.

62 In concluding this section, the Tribunal wishes to comment on the respondent's use of a generic SMC for this non-advertised appointment process. After first presenting evidence that all of the operations officer positions are generic, the respondent then proceeded to describe the very unique qualifications that make this position different from the other operations officer positions in the same work unit. Further confusing matters, it referred to the position as Operations Officer (Aviation) in the *Assessment* document. This was an appointment process for a single position. It would have better served the PSEA values of fairness and transparency if the SMC related to this appointment had more clearly set out the helicopter knowledge and experience that were a key requirement for this position. See *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 0004, at para. 50.

(iv) Did the complainant have aviation experience equivalent to that of the appointee?

63 The complainant contends that when the appointee was on leave from his GT-03 position, he and others acted in the position. Therefore, he believes that he has demonstrated that he too, can perform the aviation duties of the GT-05 position, and that it was inappropriate not to consider him for the position.

64 Ms. Miller testified that the complainant had applied in an advertised GT-05 appointment process and had been found not qualified. The complainant acknowledged that he had applied to this process.

65 Ms. Miller agreed that when the appointee was away, GT-02s, GT-03s and GT - 04s would have had exposure to his duties. This would have included up to 20 persons. She testified that these persons may have performed some of the appointee's day to day GT-03 duties, but his longer-term planning duties would have awaited his return. These longer-term duties included client consultation, funding planning and performance feedback.

66 Ms. Miller estimated that the appointee started working with helicopters around 1997. At the time of the reorganization, no one else had the detailed knowledge of helicopter programs that the appointee possessed. In her assessment of the appointee against the SMC for the GT-05 position, she stated that he was the right fit for the position based on his unique experience with aviation operations.

67 Mr. Stow testified that the GT-03 was responsible for long-term aviation planning and coordination with clients. He stated that helicopters are a national resource and that they do not belong to a region. They had to plan a year ahead to ensure access to helicopter time to meet the region's operational needs. The person employed in the GT-03 position undertook consultation with clients to determine the type of helicopter and helicopter time required, and the cost of using this resource. The person in the GT-04 position, on the other hand, was more involved in day to day operational activities such as assigning a pilot to fly somewhere on a given day. It was the person in the GT-03 position who did the majority of the work to ensure that a helicopter was available on that day.

68 According to Mr. Stow, when the new organization came into effect, the appointee acted in the new GT-05 (Aviation) position because the bulk of the duties were identical to his former GT-03 position. Because of this coincidence of duties, the unique nature of the appointee's qualifications and because the appointee's position was "impacted" by the reorganization, it was decided that a non-advertised appointment was appropriate.

69 Ms. Miller testified that in the *Rationale* document, she addressed the departmental criteria for making a non-advertised appointment. She believes that the appointment met all of the requirements of the department's non-advertised process appointment policy.

70 Based on the evidence, the Tribunal finds that although the complainant may have had some exposure to the appointee's duties prior to his appointment to the GT-05 position, he has demonstrated little or no exposure to the key planning functions that distinguish the appointee's knowledge and experience from that of other employees

in the area of selection. The Tribunal is satisfied that the respondent has demonstrated that the appointee possessed unique qualifications and was the right fit for the GT-05 (Aviation) position. It is also satisfied that the respondent followed all required policies and procedures necessary to justify a non-advertised appointment process. The complainant, on the other hand, did not establish that he has equivalent qualifications to the appointee.

71 The Tribunal concludes that the respondent did not abuse its authority when it did not consider the complainant for appointment to this position.

(v) Did Coast Guard management breach its promise that it would conduct an advertised appointment process when an appointment would lead to a two-level promotion?

72 The complainant testified that an Assistant Commissioner of the Coast Guard conducted information sessions with employees prior to the implementation of the new organizational structure. The complainant testified that he attended one of these sessions where the Assistant Commissioner stated that where the duties of a position continue in the new organization and are reclassified upwards by one level, the incumbent would be appointed without an advertised process. However, the Assistant Commissioner stated that where a position was reclassified by more than one level there would be an advertised process. The complainant contends that since the appointee in this case was reclassified upwards by two levels, he should not have been appointed by a non-advertised process.

73 Ms. Miller testified that she was aware of these information sessions but had not attended them. She stated that the reorganization process evolved over several years, ending in March 2012. The information sessions referred to by the complainant occurred very early in the process. According to Ms. Miller, some of the initial reorganization plans were overtaken by events. She explained that it was generally agreed that an advertised appointment process would be used where a reclassification was greater than one level. However, the present case was unusual in that the duties of the GT-03 position were almost identical to those of the GT-05 position. She confirmed

that a lot of thought was given before proceeding with the non-advertised appointment process. It was determined that the non-advertised process could proceed in this case with the approval of the National Executive Board. This approval was obtained.

74 The Tribunal accepts Ms. Miller's explanation of the situation. There is no evidence to refute this version. She had been informed by the OCCOE that the appointee's position was coincident with the new GT-05 position and she believed that the appointee was the only person with the aviation experience necessary for the position. No evidence was presented that the comment made by the Assistant Commissioner early in the reorganization process was fixed and unchangeable. The evidence supports the respondent's position that it used its discretion to address a unique situation that could not have been predicted in advance. The respondent acted in a considered manner, having thought the matter through and having passed the proposed non-advertised appointment through a number of management committees before proceeding. The Tribunal finds that the respondent made an exception to its plan to hold an advertised appointment process where positions were reclassified upwards by more than one level, but in the circumstances of this case, it has offered a reasonable explanation for doing so and did not abuse its authority.

Issue II: Did the respondent abuse its authority by discriminating against the complainant on the basis of his disability?

75 The complainant alleges that the respondent abused its authority by discriminating against him based on his physical disability, contrary to the provisions of the CHRA.

76 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. 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.

77 A complainant has the onus to establish a *prima facie* case of discrimination. The Supreme Court of Canada, in *Ontario (Human Rights Commission) v. Simpson Sears*, [1985] 2 S.C.R. 536 (known as the *O'Malley* decision) set out a test for establishing a *prima facie* case of discrimination as follows:

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 [...]

78 It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. The complainant need only show that discrimination is one of the factors in the respondent's decision. (See *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12, (F.C.A.) at para. 12).

79 The Tribunal is required to determine whether the complainant has established a *prima facie* case of discrimination before it considers the respondent's explanation. (See *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.A. 204, F.C.J. No. 941 (QL), at para. 22 (F.C.A.)). If the complainant establishes a *prima facie* case of discrimination, then the burden shifts to the respondent to provide a reasonable non-discriminatory explanation for its conduct. (See *Kasongo v. Farm Credit Canada*, 2005 CHRT 24, at para. 25).

80 During his examination in chief, the complainant testified that if not for his physical disability, he would have, as a minimum, acted in the GT-05 position. He further stated that, despite the duty to accommodate persons with disabilities, he was not considered for this GT-05 position. He did not provide any further testimony in support of his allegation.

81 The complainant cross-examined Mr. Stow regarding a letter he sent to Health Canada on March 2, 2009, requesting an assessment of the complainant's capability to perform the work described in three work descriptions, including the GT-05 work description.

82 Mr. Stow was questioned on the rationale behind his request to Health Canada. Mr. Stow explained that the complainant was an “impacted” employee, i.e. his position had been eliminated as a result of the reorganization. The complainant had been on leave from the workplace for a few months and had indicated that he was ready to return. The respondent had identified three positions that might be available for his return and it wanted to know if the complainant was capable of performing the duties of these positions.

83 In his letter, Mr. Stow commented on the complainant’s physical limitations. He was asked how he knew about these limitations. Mr. Stow replied that he had obtained some information from another departmental employee, and someone from the Province of Nova Scotia, whose name he could not recall. Mr. Stow stated that because the complainant worked only on the night shift, he had not had an opportunity to personally observe him at work. Mr. Stow acknowledged that he was not an expert on disability and the purpose of his letter to Health Canada was to obtain a medical opinion on the complainant’s capability to work in these positions.

84 Mr. Stow testified that Health Canada informed him that the complainant could perform the duties of these positions with accommodation.

85 The complainant argued that he had been with the department for 15 years and the respondent should have been aware of his capabilities. He submitted that with the assistance of a few technical aids, he was capable of performing the work set out in the three work descriptions sent to Health Canada. According to the complainant, the respondent sought the advice of Health Canada in order to limit his ability to return to work at the Coast Guard.

86 The Tribunal finds that the complainant has established a *prima facie* case of discrimination.

87 In his letter to Health Canada on March 2, 2009, Mr. Stow asked that the complainant’s capabilities be assessed against a new GT-05 position. In the letter, he raised concerns about the complainant’s ability to report to work in 30 minutes in an emergency situation and to complete tasks, even with accommodations in place, at the

pace required in an emergency. Mr. Stow was also concerned about the complainant's fitness to work a five day, eight hour per day work schedule.

88 The complainant testified that his aviation qualifications are equivalent to those of the appointee. He stated that he acted in the appointee's GT-03 position when the appointee was on leave.

89 There is no dispute that the complainant's job description was out-of-date. Mr. Stow provided the OCCOE with updated information on the duties being performed in the complainant's position. He did not consult the complainant to obtain this information. The complainant contacted the OCCOE on a number of occasions seeking to participate in the review of his position against the generic GT-05, Operations Officer position. His requests were ignored. Without the complainant's input, the OCCOE determined that there was no coincidence between the complainant's position and the generic Operations Officer position.

90 At the time of the appointment, the complainant was a GT-04. The appointee was a GT-03. The appointee received a two-level promotion to GT-05 through a non-advertised appointment. The complainant testified that at a briefing on the re-organization process, he was informed that two-level promotions would require an advertised appointment process.

91 The SMC used for the appointment process is generic and not specific to an Operations Officer (Aviation) position. The reference to an Operations Officer (Aviation) position only appears later on, in the *Assessment* and *Rationale* documents for the appointee.

92 In *Basi v. Canadian National Railway Company* (No. 1) (1988), 9 C.H.R.R. D/5029 (C.H.R.T.), the Canadian Human Rights Tribunal referred to the "subtle scent of discrimination." In human rights cases, it is often difficult or impossible to discover overt evidence of discrimination. It is necessary to examine all of the direct and circumstantial evidence that is presented to determine whether an inference can be drawn that discrimination is more probable than other possible inferences or hypotheses.

(See B. Vizkelety in *Proving Discrimination in Canada*, (Toronto: Carswell, 1987), at page 142).

93 In this case, the Tribunal is satisfied that the complainant has provided complete and sufficient evidence to establish a *prima facie* case based on the *O'Malley* test. Considering his evidence alone, he has demonstrated that his disability may have been one of the factors in the respondent's decision to fill this position by way of a non-advertised appointment process. Therefore, the onus shifts to the respondent to provide a reasonable non-discriminatory explanation for its actions.

94 The following is a summary of the respondent's response to the complainant's allegations.

95 With respect to the letter of March 2, 2009, to Health Canada, the respondent submits that at the time the letter was written, the complainant's position was to be eliminated due to the reorganization. The respondent wished to accommodate the complainant in another position, but it needed information on his capability to perform in the positions that were available. It further submits that the evaluation related to three positions, including a GT-05 operations officer position, but not to the specific GT-05 position, which is the subject of this complaint.

96 The respondent submits that it had no duty to consider more than one person for this appointment process. It states that it would have considered the complainant if he had been qualified, but he was not. Ms. Miller testified that the complainant had applied in an advertised GT-05 appointment process and had been found not qualified.

97 Ms. Miller also testified that a non-advertised process was used because she was satisfied that the appointee was the only person available with the depth of knowledge and experience in aviation required for the position. Mr. Stow testified that the appointee was also an "impacted" employee and the OCCOE had determined that his GT-03 position was congruent with the new GT-05 position to which he was appointed. He stated that he drafted some of the wording in the *Rationale*, but he went on language training in January 2011 and his replacement, Garth Sveinson, completed

the staffing process with Ms. Miller. The *Notice of Consideration* for the appointment was issued on March 8, 2011.

98 Regarding the complainant's contention that except for his disability he would have had an opportunity to act in the GT-05 position, the respondent submits that the complainant acknowledged that he received an invitation to express interest in a GT-05 acting appointment, but he was not interested at that time.

99 The respondent maintains its position that the assessment of the complainant's GT-04 work description against the generic GT-05 work description is beyond the Tribunal's jurisdiction. It submits that if the complainant was unhappy with the outcome of the classification process, he should have filed a work description grievance or a classification grievance, both of which fall under the jurisdiction of the PSLRB.

100 The respondent believes that the evidence demonstrates that the SMC covers the aviation qualifications required for the position. It also submits that the choice of a non-advertised appointment process and a two-level promotion were approved at various management levels, were consistent with departmental policies and reflected the unique circumstances of the position.

101 The Tribunal is satisfied that the respondent has provided a reasonable, non-discriminatory, explanation for this non-advertised appointment process for the following reasons.

102 It is important to consider the context in which the letter to Health Canada was written. It was sent on March 2, 2009, more than two years prior to the appointment that is the subject of this complaint. At that time, the complainant had been on leave from the workplace for over two months and he was ready to return. Due to the reorganization, his night shift position was to be eliminated effective March 31, 2009. The Coast Guard needed to place him in a new position. It identified three positions that might be available – a GT-05, an AS-04 and a RO-04.

103 There is nothing in the evidence to support the complainant's contention that the request to Health Canada was made in the hopes of eliciting a response that he was not

fit to return to a position in the Coast Guard. The complainant contends that after 15 years in the department, the respondent should have known his physical capabilities. However, Mr. Stow had only been Superintendent of the ROC for six months when he wrote to Health Canada. He acknowledged that he was not an expert on these matters. Furthermore, what information he possessed was obtained from other sources because he had not observed the complainant at work. Even if he had, he would only have been knowledgeable of the accommodation the complainant required to perform his old position that would soon cease to exist. The request to Health Canada was with respect to three different positions.

104 There is no question that the complainant has a physical disability. The process with Health Canada was transparent, with the complainant copied on all of the correspondence. One of the letters was provided to Health Canada by the complainant's personal physician following consultation with the complainant. There is nothing in the evidence to show that the complainant was opposed to the process prior to the filing of his complaint.

105 In Mr. Stow's letter to Health Canada he comments that the complainant's "...level of experience and depth of knowledge is widely considered to be an asset to this organization." He also stated: "The department is committed to working with this employee so that he may remain in the workforce." The letter appears clearly directed towards obtaining information to assist the respondent in placing the complainant in another position within the Coast Guard.

106 The complainant testified that but for his disability he would have acted in the GT-05 position. By his own testimony, he did act in the position when the appointee was on leave, before it was reclassified to the GT-05 level.

107 The *Rationale* document for the non-advertised appointment states that the appointee commenced acting in the GT-05 position in January 2009. At that time, the complainant was on leave. There is no evidence that there were any opportunities for the complainant, or anyone else, to act in this particular position between the date it was reclassified and an indeterminate appointment was made. There is evidence that the

complainant was asked if he was interested in acting in a GT-05 position, but he was not interested at the time of the request.

108 In the *Rationale*, the respondent noted that there were no priority persons with the required knowledge or experience for the position. The PSC, in its submissions, confirmed that the complainant was not a person with priority status for appointment at the time of this appointment process.

109 Although the complainant alleges that he had qualifications similar to those of the appointee, the evidence of Ms. Miller and Mr. Stow is that the complainant's and the appointee's positions were very different. This was confirmed by the OCCOE. Furthermore, the complainant had been found not qualified for a GT-05 position in an advertised process.

110 Ms. Miller testified that while the complainant may have acted in the appointee's position from time to time, he would not have performed the longer-term duties of client consultation, funding planning and performance feedback. The complainant did not refute this testimony.

111 In his comparison of the complainant's GT-04 position with the new GT-05 position, Mr. Hamilton stated:

That work description [the GT-04] indicated that the main duties for which the position was responsible were coordinating short term operational work..." and "...these duties [the GT-04] involve day-to-day coordination of activities with few of planning (sic) and developing and implementing functions of NMWD 510 [the new GT-05].

(information in brackets added)

112 Although the complainant noted that he was not permitted to participate in the work description comparison exercise, the complainant did not refute Mr. Hamilton's conclusions that his position did not require him to perform the longer-term duties.

113 The Tribunal finds Mr. Hamilton's failure to reply to the complainant's communications to be troubling. Nevertheless, as the PSC noted in its submissions, a classification process and an appointment process are two separate actions. No evidence was presented that the complainant had any entitlement to participate in

the work description review. Nor was any evidence presented linking Mr. Hamilton or the OCCOE in any way to the subsequent non-advertised appointment process in this case.

114 The Tribunal gives considerable weight to the evidence showing that the appointee performed the aviation duties from 1997 until they were integrated into the new GT-05 position in 2009. He then continued to perform them on an acting basis until his appointment in 2011. Effectively, the appointee had been performing the aviation duties for 14 consecutive years.

115 The Tribunal accepts the respondent's explanation for its appointment decision. It has established that the complainant did not have the required depth of knowledge and experience with aviation that the appointee possessed. While Health Canada's evaluation means that the complainant, with accommodation, was physically capable of performing the duties of a GT-05 position, to be appointed to a position under s. 30(2)(a) of the PSEA, a person must meet all of the essential qualifications for a position. The complainant did not demonstrate that he met the aviation qualifications for the GT-05 position that is the subject of this complaint.

116 The Tribunal finds that the evidence is consistent with an appointment based on the appointee being the right fit for the new GT-05 position, rather than the complainant having been denied the appointment because of his disability.

117 There is no evidence to suggest that the respondent's reasonable explanation is in any way a pretext for its otherwise discriminatory practice.

118 Accordingly, the Tribunal finds that the complainant has failed to prove that the respondent abused its authority by discriminating against him in this appointment process.

119 Having considered the evidence individually and as a whole, the Tribunal concludes that the complainant has not met his burden to prove that the respondent abused its authority in this appointment process.

Decision

120 For all these reasons, the complaint is dismissed.

Kenneth J. Gibson
Member

Parties of Record

Tribunal File	2011-0154
Style of Cause	<i>Brian Neilson and the Deputy Minister of Fisheries and Oceans Canada</i>
Hearing	January 4-6, 2012 Halifax, Nova Scotia
Date of Reasons	May 7, 2012
APPEARANCES:	
For the complainant	Larry Teslyk
For the respondent	Allison Sephton
For the Public Service Commission	John Unrau (written submissions)