



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2010–0598

**Issued at:** Ottawa, November 5, 2012

**JACQUELINE GABON**

Complainant

AND

**THE DEPUTY MINISTER OF ENVIRONMENT CANADA**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority under section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaint is substantiated
<b>Decision rendered by</b>	Eugene F. Williams, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Gabon v. the Deputy Minister of Environment Canada</i>
<b>Neutral Citation</b>	2012 PSST 0029

# Reasons for Decision

## Introduction

**1** Jacqueline Gabon, the complainant, applied in an internal appointment process that advertised two positions at the PC-03 group and level with Environment Canada (EC). The advertisement also stated that a pool of qualified candidates would be created from the process and may be used to staff similar positions with different tenures at the same group and level. She alleges that the respondent, the Deputy Minister of EC, abused its authority in the assessment of her reference check by: (a) not contacting her; (b) obtaining a reference from a former manager who was biased; (c) relying on information from an unqualified referee who had not supervised the complainant directly; (d) failing to accommodate her in its assessment of the reference check; and (e) refusing one of her referees.

**2** The respondent denies the allegations and states that the complainant was eliminated from the appointment process because she failed to meet three essential qualifications that were assessed using a reference check: interpersonal skills, initiative, and judgement. The respondent asserts that the assessment board acted within its authority when it sought further information from past supervisors to allow it to conduct an adequate assessment of the complainant's qualifications.

**3** The Public Service Commission (PSC) did not appear in this matter, but presented a detailed written submission on relevant PSC policies and guidelines concerning assessment and selection, and informal discussion. The PSC also provided submissions concerning discrimination and the duty to accommodate. It took no position on the merits of the complaint.

**4** For the reasons set out below, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant has established that the respondent abused its authority in the appointment process by failing to properly assess her.

## **Background**

5 In June 2009, EC conducted an internal advertised appointment process to fill two positions at the PC-03 group and level and to create a pool of qualified candidates to staff similar positions with different tenures at the same group and level within EC.

6 Candidates were assessed by way of an initial screening of applications, a written exam, an interview process and, finally, a reference check. The complainant passed the first three assessment steps, but on December 23, 2009, the respondent's Senior Human Resources Advisor informed her by email that she had been eliminated from further consideration in the appointment process because she did not obtain a pass mark for three essential qualifications assessed by reference check, namely: interpersonal skills, initiative, and judgement.

7 The complainant filed a complaint of abuse of authority with the Tribunal on September 27, 2010 under s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss.12, 13 (PSEA).

## **Issues**

8 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in its assessment of the complainant?
- (ii) Did the respondent abuse its authority by discriminating against the complainant during the reference check phase of the appointment process?

### *Summary of relevant evidence*

9 The complainant testified that she joined EC in December 2003 at the EG-06 group and level to provide engineering and technical support. As the Head of Procurement, she was hired to look after documentation required to maintain national networks. She was also responsible for quality management. Although the complainant joined EC in December 2003, she continued to work part-time for Statistics Canada until the fall of 2007. At the start of her career with EC, the complainant had 1.5 direct

reports (employees who reported directly to her). This increased to 3.5 direct reports in addition to her responsibilities for co-op students.

**10** In October 2007, the complainant began an 18-month medical leave to repair and rehabilitate her shoulder from a work related injury. She returned in March 2009 to work three days a week, reporting to Christopher Garnett who was the acting manager of her section. She resumed full-time duties in April 2009.

**11** The assessment board for this appointment process was comprised of Board Chair, John MacPhee, who has been the National Manager of the Surface, Weather and Climate Networks section of EC since 2009, and the following members: Supervisor Brian Howe, Consultants Yves Durocher, and Richard Campbell. The complainant stated that she had worked with Messrs. MacPhee, Durocher and Campbell in the past. Mr. Campbell was her supervisor when she joined EC and she had undertaken work for Mr. MacPhee and Mr. Durocher.

**12** The complainant applied for both positions advertised in the appointment process: 1) Supervisor – Standards – Surface Networks, and 2) Senior Environmental Monitoring Scientist. She confirmed that she was successful in the first three stages of the appointment process, but failed the reference check.

**13** During the appointment process, the complainant was asked to provide the names of three professional references such as a supervisor, a colleague, and a member of a professional organization. She provided the names of Mr. Garnett, former acting manager and colleague, Denise Thompson, co-ordinator of the regional charitable campaign, and Ted Sawchuck, an EC supervisor with whom she had worked on departmental committees. The complainant stated that when she returned to work in March 2009, Mr. Sawchuck was responsible for documentation management at EC.

**14** When she was informed that she had been eliminated from the appointment process on December 23, 2009, the complainant sent an email to Mr. MacPhee to request an informal discussion. She followed up on that request in June 2010 with her union representative when she did not receive a response to her initial request. Following the publication of a Notice of Consideration in June 2010, the complainant,

accompanied by her union representative, met with Mr. MacPhee. During the meeting, the complainant learned that the assessment board had obtained and relied on information from persons other than the three individuals she had identified as referees. Moreover, the information that these additional persons had provided was the basis on which she had not obtained a passing mark.

**15** Mr. MacPhee testified that he provided a written reference guide to each of the complainant's referees and assessed their responses.

**16** According to Mr. MacPhee, the reference check assessed four essential qualifications: work under pressure, initiative, judgement, and interpersonal skills. He added that the assessment board had asked applicants to provide a supervisor as a reference because it was looking for someone who could appraise candidates' work under direct supervision. Mr. MacPhee stated that all candidates provided the name of a direct supervisor with two years supervision except the complainant.

**17** Mr. MacPhee testified that he was concerned that the complainant's referees were either not direct supervisors or did not supervise her for a sufficient period of time. Mr. Garnett, the first referee who testified, stated that he supervised the complainant for a few weeks at the end of his 2009 term as acting manager. His observations were from the vantage point of a colleague and mentor to the complainant.

**18** In relation to the second referee, Ms. Thompson, Mr. MacPhee observed that the complainant worked with this referee on the Government of Canada Workplace Charitable Campaign, and on other initiatives. He noted that Ms. Thompson acknowledged that she was not linked to the complainant's operational commitments and had restricted her observations of the complainant's performance to her role of charitable contributions co-ordinator, and other related assignments.

**19** While he recognized that Mr. Sawchuck was a supervisor at EC, when he reviewed Mr. Sawchuck's replies to the questionnaire, Mr. MacPhee learned that Mr. Sawchuck had very little supervisory responsibility over the complainant. Although Mr. Sawchuck had known the complainant since 2004, he prefaced his

response to the questionnaire by apologizing for the sparse information, citing his lack of interaction with the complainant.

**20** Mr. MacPhee testified that he was influenced by Mr. Garnett's statement that he only supervised the complainant for a few weeks while he was acting manager. In discussing the complainant's ability to work under pressure, Mr. Garnett provided one example concerning the hiring of students, but acknowledged that he was unaware of the complainant's goals or timelines as a colleague, and she had been on light duties while he supervised her directly. Mr. MacPhee concluded that Mr. Garnett did not have enough supervisory time with the complainant to meaningfully assess her work under the headings in the reference check. Mr. MacPhee was impressed by the fact that Mr. Garnett specifically commented on the length of time and the circumstances under which he supervised the complainant.

**21** Mr. MacPhee came to the same conclusion after reviewing Ms. Thompson's description of her involvement with the complainant. He testified that Ms. Thompson's observations were based primarily on a five-week period in September and October 2009 when the complainant was on assignment to the charitable campaign. After examining the examples provided by this referee under the headings of judgement and ability to work under pressure, Mr. MacPhee concluded that the referee needed to have a more substantial insight into the complainant's workplace skills related to those qualifications.

**22** After consulting with his staffing officer, who shared his belief that he should obtain the information from a supervisor, Mr. MacPhee obtained the names of the complainant's current supervisor (Michael Manore) and a former supervisor (Guy Girard). He also contacted the complainant's other referee Mr. Sawchuck to confirm the extent of his supervisory role with the complainant.

**23** Mr. MacPhee called Mr. Girard, the complainant's supervisor between May 2005 and November 2006, and explained that the complainant had applied on this appointment process. He also indicated that he needed more input from supervisors.

**24** Mr. Girard provided comments relating to the complainant's judgement. He stated that there was a significant human resources (HR) file concerning the complainant. He also informed Mr. MacPhee that the complainant lacked judgement for moving projects forward, lacked trust for moving the project to the preferred end and would misinterpret feedback as criticism. Further, he informed Mr. MacPhee that the complainant had complained to HR when he tried to provide feedback to her, and had accused him of harassing her. He also informed Mr. MacPhee that there were many issues about her performance, which she had characterized as harassment. Mr. Girard also told Mr. MacPhee that he would fail the complainant on two qualifications: judgement and interpersonal skills. He would not comment on the other two qualifications, namely: initiative and ability to work under pressure.

**25** Mr. MacPhee acknowledged that he did not check with HR to verify what he had learned from Mr. Girard. He stated that Mr. Girard was a supervisor who had been brought in by EC, and Mr. MacPhee believed that he would be truthful and objective because he was a diligent and trustworthy supervisor. Accordingly, Mr. MacPhee gave Mr. Girard's statement weight and concluded that the complainant lacked judgement and interpersonal skills.

**26** Following his reference check with Mr. Girard, Mr. MacPhee felt the need for additional references. Accordingly, he approached the complainant's current manager, Mr. Manore, explained that he had received conflicting perspectives concerning the complainant, and was trying to reconcile the divergent references.

**27** During their discussion, Mr. Manore asked Mr. MacPhee if he was aware of the complainant's file with Mr. Girard. When Mr. MacPhee replied affirmatively, Mr. Manore reportedly said "then you were not going to get anything from me". Mr. Manore also stated that he was conducting a staffing process, to which the complainant had applied. He was concerned that his views could put him in a conflicted position with respect to his own staffing process. Mr. Manore's only comment was that the complainant requires close supervision.

**28** Uncertain about how to proceed, Mr. MacPhee consulted a senior manager and fellow board member Mr. Durocher. The senior manager, Peter Livingstone, advised him that he could not ignore what he had learned. After outlining to Mr. Durocher what he had learned from his conversations with the complainant's present and former supervisor, they then attempted to identify other supervisors who had interacted with the complainant. Mr. Durocher recommended Christine Best and Mr. MacPhee proceeded to contact Ms. Best.

**29** Mr. MacPhee explained to Ms. Best that he was looking for a supervisor who had either functional or line responsibility for the complainant. He asked her whether she had direct knowledge of the complainant and whether she had the ability to answer the questions. Ms. Best said that she did, and provided him with a completed written response a few days later.

**30** Mr. MacPhee read Ms. Best's response in full and invited Mr. Durocher to read it. They accepted the response as part of the process. Mr. MacPhee then considered all of the comments that he had received from supervisors, both oral and written. As a result of his review, Mr. MacPhee concluded that the complainant was not qualified to be a supervisor because she had failed judgement, initiative and interpersonal skills.

**31** Mr. MacPhee stated that he did not ask the complainant to provide another reference because he had already learned the identity of potential managers from HR and the assessment board wanted recent and current supervisors.

**32** Concerning his treatment of Ms. Best's responses, Mr. MacPhee stated that he accepted Ms. Best's remarks because he was satisfied that she had the experience in supervising the complainant and she also had the reputation within the organization. Mr. MacPhee also discussed how he considered and weighed the positive remarks about the complainant, indicating that the assessment board took into account the amount of supervision.

**33** In relation to his dealings with referees for other candidates, Mr. MacPhee stated that he contacted one referee to ask that person to send his written response to the reference check questionnaire, and he advised another referee that his contact with that



applicant occurred too long ago. He added that the complainant's set of references was the only one that did not have a "substantive input reference – two year standing". When asked whether he had intervened with any other candidate, he remarked that he had contacted a reference whose involvement with the candidate was too old.

## **Analysis**

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

**35** In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, the Tribunal established that abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority.

**36** Abuse of authority can also include errors. See *Kane v. Attorney General of Canada and Public Service Commission*, 2011 FCA 19 at para. 64. Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question.

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

**37** Section 36 of the PSEA provides delegated managers with broad discretion in choosing and using assessment methods to determine whether an individual possesses the required qualifications. This authority is not absolute. Thus, the Tribunal may find that there is abuse of authority if, for example, it is established that the assessment method has a fundamental flaw. Assessment methods that do not assess qualifications or are unreasonable, discriminatory or produce a result that is unfair can constitute an abuse of authority. Voir *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 0026.

**38** The reference check is an assessment tool that provides information about a candidate's past performance and accomplishments to determine whether they meet

the qualifications for a position to be staffed. The PSC's Assessment Policy requires that those conducting the assessment are not in a conflict of interest position and are able to carry out their roles, responsibilities and duties in a fair and just manner.

**39** In addition, the PSC guide "Structured Reference Checking: A User's Guide to Best Practices" states that referees should:

- have had an adequate opportunity to observe the applicant in a variety of job-relevant situations so that they are able to provide constructive comments regarding the consistency and quality of the applicant's behaviour;
- have worked with the applicant recently and for a sufficient period of time; and
- be open and candid in communicating relevant information.

**40** Furthermore, the PSC guide "Checking references – a window into the past" indicates that the candidate's consent is not required when the referee is from within a federal institution. However, the guide further states that "[e]ven in cases where consent may not be required, it is suggested that consent be obtained as a matter of courtesy to the candidate". The Tribunal has confirmed this approach. In *Dionne v. Deputy Minister of National Defence*, 2008 PSST 0011, the Tribunal stated as follows, at para. 55: "While it may be preferable to have a candidate's consent, there is no legal requirement to do so, and the PSC guidelines on conducting references do not require consent where the referee is from a federal institution."

**41** In *Dionne v. Deputy Minister of National Defence*, 2008 PSST 0011 at para. 50, the Tribunal observed that "[w]hile candidates can offer as referees those supervisors or co-workers who they believe will provide positive information, the purpose of conducting a reference check is to obtain accurate and relevant information about a candidate, whether positive or negative."

**42** As noted in *Ammirante v. Deputy Minister of Citizenship and Immigration*, 2010 PSST 0003, the Tribunal's role is to examine whether or not there was any impropriety in the assessment process. A review of the relevant evidence in this case

indicates that the complainant has established that there was impropriety in the assessment process on a balance of probabilities.

**43** The respondent was entitled to use reference checks as an assessment method to determine whether the complainant met the essential qualifications of interpersonal skills, initiative and judgement. Similarly, the questions in the reference check guide were appropriately related to the particular qualifications set out in the Statement of Merit Criteria that the board sought to assess.

**44** While there was nothing improper in the respondent's choice of assessment method, the instructions to candidates with respect to references should have been clearer. The candidates were simply given the option to provide professional references such as a supervisor, colleague, and a member of a professional organization. However, the reference check questionnaire was designed to only seek the input of supervisors rather than colleagues or members of a professional organization. In the reference check questionnaire, with respect to the relationship to the candidate, the guide asks the referee the following: "How long did you supervise the candidate?" This situation is similar to the one in *Ammirante*, where the Tribunal found at para. 115: "If the assessment board wanted all referees to be supervisors, it should have requested all supervisors at the beginning of the process. By not complying with its own requirement the respondent demonstrated carelessness."

**45** The failure to provide clear instructions was careless, and constitutes an error in the appointment process. However, the instructions to all candidates were the same and the complainant testified that she believed that all three referees provided by her were former supervisors. If this were the only error committed by the respondent, this would not amount to an abuse of authority in the circumstances of this case.

**46** The Tribunal further finds that the Board Chair's assessment that the complainant's referees did not have sufficient opportunity to observe the complainant in job relevant situations was reasonable in light of the information provided by those referees.

**47** It was reasonable for the Board Chair to anticipate that the referees would have supervised the complainant for an adequate period of time. There was very limited supervisory time by the complainant's referees. Mr. Garnett had supervised her for approximately one month after she returned to work on light duties (three days per week). Ms. Thompson had dealt with the complainant in the context of assignments to the government's charitable fundraising, national public service week and environment week and related events. Mr. Sawchuck began by apologizing for the sparse information because of his lack of interaction with the complainant. Although Mr. Sawchuck was an EC supervisor, he acknowledged that he had very little interaction with the complainant. His encounters with her were in the context of special assignments. For example, he cautioned that his evaluation of the complainant's judgement was based on sporadic observations and conversations with the complainant.

**48** While it may have been more courteous for the Board Chair to consult with the complainant when he determined that the referees did not provide adequate information, he was not required to obtain the complainant's consent to contact former supervisors. See, for example, *Dionne*, at para. 42. The Board Chair sought relevant job related examples from the referees and his decision to approach the complainant's former supervisors, (on the advice of his staffing officer), cannot be faulted.

**49** However, the Tribunal finds that there were serious errors in the procedure that the Board Chair used in dealing with the complainant's former managers Messrs. Girard and Manore. The assessment board had developed a written reference check questionnaire for assessing the candidates. That questionnaire focused attention on the behavioral indicators of the essential qualifications that were being assessed. The Board Chair testified that he read the questions to Mr. Girard and the latter responded by opining that the complainant lacked judgement for moving projects forward and lacked trust for moving the projects to the preferred end. Mr. Girard said that he would fail the complainant on judgement and interpersonal skills and then refused to comment on the complainant's initiative and ability to work under pressure. The Board Chair did not record any of these comments nor, in his testimony, did he provide any specific examples that Mr. Girard gave to support his opinion. Moreover,

the Board Chair did not provide any evidence about what Mr. Girard said about any of the behavioural indicators that are set out in the reference check. Nevertheless, he gave Mr. Girard's verbal opinion considerable weight. In so doing, he did not assess the complainant in accordance with the reference check guide.

**50** Similarly, the Board Chair received little or no information about the complainant from Mr. Manore. Mr. Manore had been the complainant's supervisor for a short period of time following her return to work. There was no evidence that he had known her or worked with her before she left on leave in October 2007. Nevertheless, the Board Chair testified that he gave weight to Mr. Manore's oral statement that the complainant needed close supervision.

**51** In his testimony, Mr. MacPhee did not suggest that he relied on verbal opinions from any of the other candidates' referees. The complainant was the only candidate in the appointment process who was assessed, at least in part, based on verbal opinions of former and/or current supervisors. Accordingly, she was treated differently than other candidates in this appointment process.

**52** Moreover, Mr. MacPhee did not attempt to verify the information he received from Mr. Girard. Although he had information from Mr. Girard about conflicts between himself and the complainant, Mr. MacPhee did nothing to find out whether Mr. Girard's opinion had any factual underpinnings. The following two passages from the PSC Checking References Guide are important to highlight here:

Do not let opinions substitute for facts and examples.

Sometimes personal conflicts can colour information revealed through reference checks.

If you become aware of the presence of personal conflicts, weigh such information carefully.

**53** The Tribunal finds that the assessment board failed to heed both of these cautionary directions when it relied on Mr. Girard's opinions. On the contrary, Mr. MacPhee testified that he gave Mr. Girard's statements weight and concluded after a brief meeting with Mr. Manore that the complainant lacked judgement and initiative. It is difficult to see how he came to this conclusion when Mr. Girard refused to comment

on the complainant's initiative and Mr. Manore only stated that she required close supervision.

**54** In light of the positive information he had received from Mr. Garnett and Ms. Thompson, the Board Chair needed to do more than marginalize the weight given to those references in relation to the opinions of Mr. Girard and Mr. Manore because the latter had once supervised the complainant. By contrast, he weighed the comments of Ms. Thompson, who had a few weeks of contact with the complainant, in the range of 15 – 20% of the weight given to the complainant's former managers. He did this despite the fact that Mr. Manore had very little supervisory time with the complainant.

**55** Finally, the Tribunal finds that there was further impropriety with respect to the weight placed by the assessment board on Ms. Best's reference. The Tribunal has found as a fact that, for each candidate, the assessment board required one referee who was a direct supervisor. Ms. Best did not testify during the hearing. In her completed written reference check questionnaire, in answer to the question, "how long did you supervise the candidate?," she wrote the following:

**I have not directly supervised J. Gabon.** My experience with her has been as her (acting) director at various times, as being a mentor to her managers/supervisors, being a participant at meetings where she has played a role and as a client of the services her group is supposed to provide. (emphasis added)

**56** The Tribunal finds as a fact that Ms. Best had not directly supervised the complainant. This lack of supervisory responsibility may explain why Ms. Best did not assign ratings to several of the behavioural indicators for both the initiative and the judgement qualifications. Yet, she gave an overall rating of 1 out of 5 for initiative, and judgement respectively. While Ms. Best was not called to explain this lack of completeness in her written response, it suggests that either Ms. Best did not have a sufficient supervisory role over the complainant, did not have an opportunity to observe the complainant's behaviours in those areas, or both. Given the number of unfilled ratings in the reference document, it was, therefore, inappropriate for the Board Chair to assign a weight to Ms. Best's remarks that was over four times the weight assigned to the remarks of Mr. Garnett and Ms. Thompson.

**57** It is further telling that in a draft email dated July 12, 2010, from the Board Chair to the complainant, referring to the reference from Ms. Best, he had written: "That reference was enough to fail you in this competition." While the final version of the email that the Board Chair sent to the complainant was less definitive, the draft email, which the respondent did not dispute having been made, supports the Tribunal's finding that the assessment board placed undue weight on the reference provided by Ms. Best.

**58** In summary, the errors and omissions that occurred in this appointment process were as follows: First, the instructions to candidates with respect to the provision of names of referees was unclear. Secondly, notwithstanding that candidates could provide the names of colleagues and members of a professional organization, the reference check guide was designed for supervisors/managers to complete. Thirdly, the assessment board considered the verbal opinions of Mr. Girard without exercising the necessary caution required in the circumstances. Fourth, the assessment board relied on verbal comments from two of the complainant's supervisors when all other candidates were assessed by way of completed written references. Finally, the overwhelmingly disproportionate weight placed by the assessment board on Ms. Best's reference, despite the fact that she had never been the complainant's direct supervisor, and the corresponding lack of weight placed on the references provided by the complainant's three referees was also an error.

**59** Looking at the complaint from the perspective of these collective errors, the Tribunal concludes that the complainant has established, on a balance of probabilities, that the respondent abused its authority with respect to her assessment.

**Issue II: Did the respondent abuse its authority by discriminating against the complainant during the reference check phase of the appointment process?**

**60** Section 80 of the PSEA provides that in determining whether a complaint is substantiated under s. 77, the Tribunal may interpret and apply the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). Section 7 of the CHRA makes it a discriminatory practice to differentiate adversely in relation to an employee in the course

of employment on a prohibited ground of discrimination. Disability is included in the list of prohibited grounds of discrimination in section 3 of the CHRA.

**61** 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.[...]

**62** The complainant's allegation is that she was discriminated against because her 17-month absence from work placed her at a disadvantage vis-à-vis other candidates in the appointment process who had worked during that period of time. She was away from the workplace until March 2009, and the closing date to apply on the appointment process was June 2009. There was no evidence presented at the hearing to refute the complainant's testimony that her absence from the workplace during this period of time related to her disability. The Tribunal finds as a fact that the complainant had a disability during the applicable time period.

**63** The onus is on the complainant to establish a *prima facie* case of discrimination based on her disability. What the complainant is required to prove in this case is that the respondent's requirement that candidates in the appointment process provide one direct supervisor as a reference adversely differentiated against her based on her disability. Since the requirement is neutral on its face, the complainant must establish that the requirement had an adverse effect on her because of her disability.

**64** The reasoning articulated by Abella J. in the following passages of *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4, is instructive:

48 ... a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities,



but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.

**49** What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

**50** If such a link is made, a *prima facie* case of discrimination has been shown. It is at this stage that the *Meiorin* test is engaged and the onus shifts to the employer to justify the *prima facie* discriminatory conduct. If the conduct is justified, there is no discrimination.

**65** If the assessment board had imposed an additional condition that it would not consider any supervisors unless they had supervised a candidate in the one and one-half year period preceding the start of the appointment process, then the complainant may well have established the link between her group membership and the arbitrariness of that disadvantaging criterion. However, the Tribunal cannot find, based on the evidence at the hearing, that the respondent's requirement contained an additional arbitrary criterion of recent supervision. There is nothing in the Reference Check Guide that imposed such a limitation. In fact, the only relevant question on the Reference Check Guide were the following: "How long did you supervise the candidate?" and "How long have you known the candidate and in what capacity?"

**66** There was testimony from Mr. MacPhee that the assessment board wanted recent and current supervisors. However, the assessment board did not limit itself in the case of the complainant, nor was there evidence that it had limited itself in such a way with respect to any other candidate. The only evidence presented on this point concerning other candidates was that Mr. MacPhee advised a referee for one other candidate that his contact with that candidate occurred too long ago for the board to use this referee in the assessment. The Tribunal was presented with no further evidence concerning the reference check of this candidate.

**67** The evidence presented at the hearing revealed that the complainant had been employed by EC for six years and there were supervisors on site who had supervised her for six months during the five years preceding the start of this appointment process.

There was undisputed testimony from Mr. MacPhee that he contacted Mr. Girard. Mr. Girard was the complainant's supervisor between May 2005 and November 2006. According to the undisputed testimony of Mr. MacPhee, Mr. Girard's comments were considered by him. The Tribunal has already addressed the appropriateness of the assessment board's reliance on the verbal comments provided by Mr. Girard. Yet, the fact is that he was the complainant's supervisor for over one year, for a time period that preceded this appointment process by over two years. The assessment board also relied on Ms. Best's reference. The Tribunal has already addressed the appropriateness of the weight placed on Ms. Best's reference by the assessment board. Nevertheless, in terms of the complainant's allegation of discrimination, the evidence concerning Ms. Best's reference does not assist the complainant in establishing the necessary link. On the contrary, according to her completed Reference Check Questionnaire, Ms. Best has known the complainant since approximately 2004. The complainant did not dispute this. The evidence does not lead to a finding that Ms. Best was chosen as a referee because she had recently supervised the complainant.

**68** The Tribunal finds that the complainant has failed to present sufficient evidence that the respondent's requirement to provide one direct supervisor to act as a reference placed her at a disadvantage vis-à-vis other candidates in this appointment process, due to her disability-related absence from work.

**69** In her final submissions, the complainant argued that the respondent had a "generic" duty to accommodate her based on her absence from the workplace for a one and one-half year period. She submitted that the assessment board had a duty to inquire whether she had any additional requirements for accommodation during the appointment process. Since the Tribunal concludes that the complainant has not established discrimination on a *prima facie* basis, the onus does not shift to the respondent to provide a justification for the requirement that candidates provide one direct supervisor as a reference.

**70** As the Canadian Human Rights Tribunal explained in *Moore v. Canada Post Corp.*, 2007 CHRT 31, since the complainant has not established *prima facie*

discrimination, the duty to accommodate under the CHRA is not triggered. Member Sinclair in *Moore* explained as follows:

**86** [...] I cannot emphasize enough that “failure to accommodate” is neither a prohibited ground of discrimination nor a discriminatory practise under the *CHRA*. There is no free-standing right to accommodation under the *CHRA*.

**87** The duty to accommodate only arises in the context of s. 15(2) of the *CHRA* and only when a respondent raises a *bona fide* justification by way of defense to an allegation of discrimination. [...]

### Other Allegations

**71** The complainant’s allegation that the board refused to accept one of her referees and this refusal demonstrated the assessment board’s bias against her is not supported by the evidence. Ms. Thompson is the referee at the centre of this submission. The Tribunal accepts the evidence of Ms. Thompson about her classification and her administrative responsibilities vis-à-vis the complainant during the course of the complainant’s assignments. The Board Chair testified that he did not reject Ms. Thompson as a referee. However, he did not attach the same weight to her observations given the nature and length of her relationship with the complainant and the opportunities for Ms. Thompson to make relevant observations concerning the complainant’s core job responsibilities. Ms. Thompson acknowledged that she was not linked to the complainant’s operational commitments. She stated that her comments stemmed only from her observations of the complainant in various wellness related roles such as a Government of Canada Workplace Charitable Campaign Contribution coordinator. The Tribunal has dealt with the matter of the weight that the assessment board placed on the various references. The evidence, however, does not support a finding by the Tribunal that the assessment board refused to accept Ms. Thompson’s reference.

**72** An allegation that the informal discussion was not done in a timely fashion emerged during the hearing. The complainant testified that she wrote an email to the Board Chair on December 23, 2009 and followed up in June 2010. The Board Chair acknowledged that he had not opened the email in a timely fashion. However, he scheduled a meeting shortly after his oversight was brought to his attention. While it

would have been preferable that the Board Chair respond to the meeting request in a more timely fashion, the delay in this case in providing informal discussion does not amount to an abuse of authority under s. 77(1)(a) of the PSEA. See, for example, *Agboton v. President of the Public Service Commission*, 2010 PSST 0013.

**73** Finally, the complainant's assertion that the respondent failed to apply corrective actions after flaws in the assessment process had been identified is not an allegation that gives rise to a s. 77 complaint, but rather is governed by s. 15(3) of the PSEA. See *Marcil v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 0031, at para. 94.

### **Decision**

**74** For these reasons, the complaint is substantiated.

### **Corrective Action**

**75** There was nothing in the allegations, nor did the complainant assert at any time during the hearing, that the person appointed was not qualified for the position. The Tribunal has determined that revocation is not appropriate in this case. The Tribunal has identified serious errors in the complainant's assessment and the corrective action should satisfy the complainant's request to address these errors.

**76** Since the complainant's interpersonal skills, initiative and judgment were improperly assessed, the Tribunal orders the respondent to reassess those qualifications within sixty (60) days of the date of this decision. If the complainant is found qualified following her reassessment, the Tribunal orders the respondent to place the complainant in the pool from this appointment process if it still exists.

**77** The Tribunal recommends that training in the conduct of reference checks be provided for the members of the assessment board.

Eugene Williams  
Member

**Parties of Record**

<b>Tribunal File</b>	2010–0598
<b>Style of Cause</b>	<i>Gabon v. the Deputy Minister of Environment Canada</i>
<b>Hearing</b>	July 12, 13 and 19, 2012 Toronto, Ontario
<b>Date of Reasons</b>	November 5, 2012
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Joan-Ann Gravesand
<b>For the respondent</b>	Lea Bou-Karam
<b>For the Public Service Commission</b>	Marc Séguin (written submission)