



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2011-0173 and 2011-0243
Issued at: Ottawa, December 12, 2012

MICHAEL ALAN EARLE

Complainant

AND

**THE DEPUTY MINISTER OF TRANSPORT, INFRASTRUCTURE
AND COMMUNITIES**

Respondent

AND

OTHER PARTIES

Matter	Complaints of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	The complaints are dismissed
Decision rendered by	Maurice Gohier, Member
Language of Decision	English
Indexed	<i>Earle v. the Deputy Minister of Transport, Infrastructure and Communities</i>
Neutral Citation	2012 PSST 0036

Reasons for Decision

Introduction

1 Michael Alan Earle (the complainant) participated in an internal advertised appointment process to staff two Receiving Inspector positions, at the GT-03 group and level, at the Department of Transport, Infrastructure and Communities (DTIC). He alleges that the Deputy Minister of DTIC (the respondent) abused its authority by initially screening out his application from the appointment process, by committing errors in the correction of the written exam, by discriminating against him on the basis of disability and race, and by demonstrating personal favouritism towards the appointees.

2 The respondent denies that there was any abuse of authority in this appointment process. It asserts that the complainant was properly assessed and that there is no information or facts to support the allegation of discrimination on the basis of disability or race. It also contends that the assessment of the candidates was done properly and consistently, and that the complainant was eliminated because he failed to meet two essential qualifications.

3 The Public Service Commission (PSC) did not attend the hearing, but filed written submissions in which it explained the relevant policies and guidelines that apply to appointment processes. For instance, the PSC made submissions on its policies related to discrimination, the duty to accommodate, as well as the assessment, selection and appointment of candidates.

Background

4 The complainant has been a public servant for 22 years. He works in the Aircraft Services Directorate of DTIC. He acted as a Receiving Inspector for a period of five years, and had subsequently returned to his substantive position as an Inventory Clerk, at the CR-04 group and level.

5 In November 2010, the respondent issued a *Job Opportunity Advertisement* (JOA) on the *Publiservice* website to fill two Receiving Inspector positions at the GT-03 group and level, on an indeterminate basis. It used an internal advertised

appointment process that was open to employees in the Aircraft Services Group at Transport Canada occupying positions in the National Capital Region.

6 Candidates' qualifications were assessed by means of a review of résumés, a written exam, an interview, and a reference check. The complainant was eliminated from the process when the respondent concluded he had failed to demonstrate, during the written exam, that he met the following two essential qualifications:

- Knowledge of the *Financial Administration Act* and contracting regulations
- Ability to communicate effectively in writing

7 On March 29, 2011, the respondent issued two Notifications of Appointment or Proposal for Appointment on *Publiservice* announcing the appointments of John Wade and Morris Levy to the GT-03 positions of Receiving Inspector.

8 On April 3, 2011, the complainant filed two complaints of abuse of authority with the Public Service Staffing Tribunal (the Tribunal) under s. 77(1)(a) and (b) of the *Public Service Employment Act*, S.C. 2003, C. 22, ss. 12 and 13 (the PSEA).

9 On December 23, 2011, the complainant gave notice to the Canadian Human Rights Commission (CHRC) that he intended to raise an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the CHRA). The CHRC informed the Tribunal that it did not intend to make submissions in these complaints, and requested that it be provided with a copy of the Tribunal's findings in this matter.

Request for an adjournment

10 Near the completion of his testimony, the complainant requested an adjournment so that he could obtain and deliver subpoenas to two additional persons he wished to have testify at the hearing. He wanted to subpoena Sacha Gosselin, his new manager, who was not involved in the appointment process and Morris Levy, one of the appointees in the appointment process. He provided a broad statement as to what those witnesses would testify about: fairness and omission during the assessment process, as well as abuse of authority and personal favouritism. The complainant

argued that he had stated in his *Notice to the Canadian Human Rights Commission* that he may need to have these persons testify. The respondent objected to the request on the basis that the complainant had known of the hearing dates for some time and yet had not taken any steps to ensure the presence of those witnesses at this hearing. The respondent stated that it had spent considerable time and effort preparing for this case, that its witnesses were present, and that it was ready to proceed with the presentation of its case. The respondent argued that the complainant's untimely request was the direct result of a lack of diligence on his part and would cause an undue delay of these proceedings.

11 In considering the request for an adjournment, the Tribunal noted that the complainant had been advised of the hearing dates on September 2, 2011, more than four and a half months before the hearing took place. In addition, during a pre-hearing conference held on December 19, 2011, one month prior to the hearing, when the complainant was asked by the Tribunal to identify his witnesses, he had not named either of these two persons. Furthermore, the *Notice to the Canadian Human Rights Commission* filed by the complainant on December 23, 2011, states that the notice does not constitute a complaint to either the Tribunal or the CHRC. Rather, the document merely constitutes notice to the CHRC that the complainant intends to raise an issue before the Tribunal that involves the interpretation or application of the CHRA. In accordance with s. 98(1) of the PSEA, the Tribunal has an obligation to proceed as informally and expeditiously as possible. The complainant only made broad statements to what the additional witnesses would have testified about. Furthermore, the complainant did not demonstrate to the Tribunal how the testimony of his additional witnesses would influence the Tribunal's decision. He had been aware of the hearing dates for quite some time. If the complainant intended to have these two persons available to testify at the hearing, then he should have requested subpoenas in a timely manner prior to the commencement of the hearing. He did not do so. The respondent was ready to present its case. Its witnesses had modified their work schedules in order to make themselves available for the hearing. Given the broad statement regarding the nature of the additional witnesses' testimony, the Tribunal concluded that granting an adjournment at this late stage would unduly delay the proceedings.

12 Under the circumstances, the complainant's request for an adjournment was denied.

Issues

13 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority when it initially screened out the complainant's application?
- (ii) Did the respondent abuse its authority when it corrected the written exam?
- (iii) Did the respondent discriminate against the complainant on grounds of disability and/or race?
- (iv) Did the respondent abuse its authority by demonstrating personal favouritism towards the appointees?

Analysis

14 Section 77(1)(a) of the PSEA provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment because the PSC or the deputy head abused its authority in the appointment process. Although the term "abuse of authority" is not defined in the PSEA, s. 2(4) 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."

15 Abuse of authority can also include errors. However, it is clear from the preamble and the scheme of the PSEA that abuse of authority requires much more than mere errors. Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question. Abuse of authority can also include improper conduct and omissions. The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

16 Although the complainant indicated on his complaint form that he was alleging an abuse of authority in the respondent's choice of process, under s. 77(1)(b) of the PSEA, he made no submissions on this point during the hearing. The Tribunal therefore will not consider that allegation in these reasons.

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

17 The complainant alleges that the respondent abused its authority when it screened out his application for having been submitted one day late.

18 This internal appointment process was started while the complainant was on a leave of absence from work. On November 4, 2010, the respondent issued a JOA on the *Publiservice* website. On the same day, the manager, Vincent Landreville, Chief, Purchasing Contracts and Supplies, a member of the assessment board, sent the complainant an email informing him about the appointment process. The deadline for submitting an application was November 12, 2010. The JOA contained the following notice concerning the closing date and the receipt of candidate applications:

Closing Date: Friday, November 12, 2010

Applications submitted using the "apply-online" button below can be submitted until 23:59 (Pacific time) on the closing date of this Job Opportunity Advertisement

(Emphasis part of the original)

19 The Tribunal notes that neither the complainant nor the respondent presented a copy of the complainant's application. Nonetheless, according to the testimony of Josée Mainville, the Chief of Human Resources (HR) Services and Annie Grenier, the HR Officer responsible for screening the applications, the complainant had submitted his application at 12:01 a.m. (Eastern Standard Time), on November 13, 2010. Ms. Grenier erroneously concluded that the application had been submitted around noon on Saturday and was therefore untimely. On November 15, 2010, the respondent sent a letter informing the complainant that his application would not be given further consideration since it was received a day late. Upon review two weeks later, the respondent concluded that the complainant's application had been presented prior to

23:59 (Pacific Time) on Friday, November 12, 2010. As a result, on December 2, 2010, Ms. Mainville wrote to the complainant and advised him that a mistake had occurred, that his application would be accepted and that he would soon receive an invitation to attend the written exam.

20 The Tribunal finds that the respondent acted diligently when it realized an error had occurred. It took the appropriate action and reintegrated the complainant into the process. The Tribunal concludes that this sequence of events represents a minor administrative error, the nature and seriousness of which does not rise to the level of abuse of authority. For these reasons, the Tribunal concludes that the complainant has not demonstrated that the respondent abused its authority in its screening of his application.

Issue II: Did the respondent abuse its authority when it corrected the written exam?

21 The complainant alleges that the respondent abused its authority when it decided to remove questions 5 and 10 from the exam and when it lowered the pass mark from 60% to 55% for the written exam. The complainant also alleges that the respondent abused its authority when it incorrectly awarded marks for certain responses.

Removal of written exam questions and lowering of the pass mark

22 Jonas Malcolm has been working at Transport Canada for 13 years. He is currently employed as an Inventory Clerk, at the CR-04 group and level, with the Aircraft Services Directorate, and he was a candidate in the appointment process that is the subject of this complaint. Mr. Malcolm was called to testify by the complainant. He recalled a discussion he had with the manager, Mr. Landreville, after the appointment process was completed. Mr. Landreville told him that he had to eliminate some of the questions and lower the pass mark of the written exam because many candidates had failed.

23 Mr. Landreville has been Chief Purchasing Contracts and Supply for the last two years. He has 23 years of experience in the aircraft industry and he teaches courses on this topic at a local college. Mr. Landreville's primary duties are the proper operation of

a warehouse and purchasing department, as they relate to aircraft operations. The warehouse has two Receiving Inspector positions whose role is to enter parts that are purchased into the inventory system in accordance with Transport Canada requirements. This involves making a thorough inspection of the shipping container and the contents, and verifying the completeness and accuracy of the paperwork by matching the purchase orders with the invoices.

24 Mr. Landreville initiated the appointment process to fill the two GT-03 Receiving Inspector positions because he had to resolve long-term acting situations. He chose an internal advertised process in order to provide a fair, open and transparent process to all staff. Mr. Landreville developed the questions and rating guide for the written exam through consultations with managers from the maintenance and purchasing departments, with the assistance of an HR Advisor. It was originally intended that the essential qualifications shown below would be assessed by means of the following questions on the written exam:

ESSENTIAL QUALIFICATIONS	ASSESSED BY EXAM QUESTIONS
Knowledge of Treasury Board and Transport Canada policies.	Questions 1 and 2
Knowledge of policies and procedures related to civilian aviation operations (CAR's, MCM, WHIMS, TGD, custom's brokerage.	Questions 3, 4, 5, 6, and 7
Knowledge of <i>Financial Administration Act</i> and Contracting Regulations.	Questions 8, 9, and 10
Knowledge of <i>Canada Labour Code - Part II</i> .	Question 11 + interview question
Ability to communicate effectively in writing.	Question 12

25 Ms. Grenier corrected all of the exam questions that required true/false or fill-in the-blank answers. Mr. Landreville corrected Question 8 about financial coding. Question 12, which assessed the *Ability to communicate effectively in writing* was corrected by Sandra Howell, an employee who had started a few months before and who had no prior experience with any of the candidates.

26 When the results of the correction were initially reviewed by Mr. Landreville, it became apparent that no one had passed the written exam. Faced with this outcome, Mr. Landreville consulted with an HR Advisor to determine what options might exist to salvage the process. He was advised that the pass mark for the written exam could be lowered, and that some of the exam questions could be eliminated as long as the remaining ones allowed for an adequate assessment of the essential qualifications. In the interest of keeping the appointment process alive, Mr. Landreville eliminated questions 5 and 10 because candidates had performed very poorly on these two questions, and he lowered the pass mark for each qualification from 60% to 55%. These adjustments resulted in five candidates obtaining a passing grade on the written exam.

Correction of the written exam

27 The complainant also alleges that the respondent incorrectly awarded marks to responses to certain exam questions and that these discrepancies were sufficiently serious as to constitute an abuse of authority on the part of the respondent.

28 Question 6 was one of several questions assessing the essential qualification of *Knowledge of policies and procedures related to civilian aviation operations*. In that question, candidates were required to provide the phrase corresponding to each of ten abbreviations. They received one point for each correct answer. The complainant obtained a score of 5/10. Some discrepancies were brought to Mr. Landreville's attention in May 2011. On review, he noticed that an error had occurred with respect to the marking of candidates' answers. Therefore, a few minor adjustments were made to some of the marks. Mr. Landreville confirmed that both the complainant and Mr. Malcolm had provided a correct answer of *Canadian Aviation Regulations* for the abbreviation CAR, as opposed to an incorrect response of *Canadian Air Regulations*. Therefore they were awarded a point for that answer, thereby raising their scores. The same error had occurred in reverse for one of the appointees (Mr. Levy) where he originally received a score of 6/10, and his score had to be lowered to 5/10. As the respondent explained to the complainant in an email dated May 18, 2011, the change in marks awarded for question 6 did not alter the result that both the complainant and the appointee successfully demonstrated that they met the required qualification. During the

hearing, the complainant also noted that candidate Levy had incorrectly answered *Workplace Hazard Information Management System* for WHIMS instead of *Workplace Hazardous Information Management System* (underline added for emphasis).

29 Mr. Landreville testified that the matter of the WHIMS definition offered by candidate Levy was brought to his attention sometime after the initial correction of the exam and that he considered it to be an acceptable answer which did not warrant the deduction of a point. Mr. Landreville noted that the minor adjustments made to the marks awarded to that question would not alter the overall conclusions reached by the assessment board that Mr. Levy, through the totality of his answers to questions 3, 4, 6, and 7, had demonstrated that he met the essential qualification being assessed.

30 With respect to question 12 on the written exam which was used to assess the candidate's *Ability to communicate effectively in writing*, the complainant testified that his answer and the resulting score of 3/12 indicated that he was under a great deal of stress at the time. In addition, he disagreed with the respondent's observation that there was no flow to his answer and believes that he should have obtained a much higher mark than he received.

31 Mr. Landreville explained that Ms. Howell had corrected the candidates' responses for question 12 and that she had awarded the complainant a mark of 3 out of 12. Although given the passage of time he could not recall the exact reasons for her conclusions, Mr. Landreville indicated that he agreed with the marks awarded by Ms. Howell and her conclusion that the complainant had not demonstrated he met that particular qualification.

32 Lastly, the complainant questioned how it was possible for a candidate to receive a passing mark for question 11, which assessed *Knowledge of Canada Labour Code - Part II*, when half of the marks for this qualification were based on a candidate's answer to an interview question.

Tribunal's Findings

33 Under s. 36 of the PSEA, the respondent has considerable flexibility in the selection and use of assessment methods it considers appropriate to determine whether a person meets the qualifications established by the deputy head in accordance with s. 30(2)(a) of the PSEA.

34 The Tribunal finds that Mr. Landreville, faced with the possibility of having an unproductive appointment process, implemented a course of action that was reasonable and appropriate in the circumstances. See *Maxwell v. Deputy Minister of National Defence*, 2011 PSST 0021. Two qualifications were affected by Mr. Landreville's decision to eliminate questions 5 and 10 from the written exam. The evidence shows that they were nonetheless assessed by means of other questions. For instance, *Knowledge of policies and procedures related to civilian aviation operations* was assessed by questions 3, 4, 6, and 7, and *Knowledge of Financial Administration Act and Contracting Regulations* was assessed by questions 8 and 9. The removal of questions 5 and 10, combined with the lower pass mark allowed Mr. Landreville to continue to use the results of the written exam and meet the requirement to assess all of the required essential qualifications.

35 With respect to the WHIMS abbreviation in question 6, the Tribunal notes that the respondent used this abbreviation in both its exam and its rating guide. In fact, the correct abbreviation is WHMIS and it stands for Workplace Hazardous Materials Information System. Nonetheless, the Tribunal finds that the transposition of letters "M" and "I", or the words they represent, does not alter the fundamental and easily recognizable meaning of the expression. At best, this oversight constitutes a minor error that does not rise to the level of an abuse of authority. Moreover, the respondent's acceptance of Mr. Levy's answer had no effect on his assessment given that his overall marks for that qualification remained above the required pass mark of 21 out of 38.

36 With respect to question 12, the complainant stated that he disagreed with the mark he had received for his response. However, he produced no evidence to

demonstrate that his assessment was improper. Ms. Howell's notes on the complainant's exam indicate "*Does not communicate the problem with an incorrect description on form 8130. Lacks structure & flow – Hard to follow.*" She then goes on to provide an example of how the email could be composed. Her notes also appear to highlight a few grammatical and/or punctuation errors. On its face, Ms. Howell's observations do not appear unreasonable. For the complainant to simply state that he disagrees with the assessment board's marking of his response is not evidence of abuse of authority. The complainant must prove on a balance of probabilities that the respondent abused its authority when it assessed him. The Tribunal's role is to examine the appointment process to determine whether there was an abuse of authority. See *Walker-McTaggart v. Chief Executive Officer of Passport Canada*, 2011 PSST 0039. Lastly, with respect to the completeness of the respondent's assessment of *Knowledge of Canada Labour Code – Part II*, as noted in paragraph 24 above, that qualification was assessed by means of two questions: one was asked during the written exam (question 11) and the other was asked during the interview. The Tribunal finds no error in dividing the assessment of this qualification between the written exam and the interview. Only those candidates who successfully completed the written exam proceeded to the interview. Given that the complainant failed to pass the written exam, he was not invited to the interview. The Tribunal finds that there was nothing improper about this approach.

37 To conclude with respect to this issue, the Tribunal finds that the complainant has not demonstrated an abuse of authority in the correction of the written exam.

Issue III: Did the respondent discriminate against the complainant on grounds of disability and/or race?

38 The complainant submits that the respondent failed to accommodate him when he requested additional time to complete the written exam and thereby discriminated against him on the basis of a disability. The complainant also alleges that the respondent discriminated against him based on race. He submits that he was not appointed because he is a black male. He also submits that the respondent discriminated against him by refusing to continue to rotate the acting assignments for the two GT-03 Receiving Inspector positions among employees. In his view, this

ultimately resulted in the qualification and indeterminate appointment of the two individuals who were acting at the time of the appointment process, both of whom were not visible minorities.

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

40 In matters related to human rights, the complainant has the evidentiary onus first to show a *prima facie* case of discrimination. According to the Supreme Court of Canada, as explained in *Ontario Human Rights Commission v. Simpson Sears*, [1985] 2 S.C.R. 536, (known as the *O'Malley* case) the test for establishing a *prima facie* case of discrimination is 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.

41 The Tribunal must determine whether, the complainant's allegations, if believed, are sufficient to justify a finding of discrimination in the absence of an explanation from the respondent. At this stage of the analysis, the Tribunal cannot take into consideration the respondent's explanation before determining whether a *prima facie* case of discrimination has been established. See *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.A., at para. 22.

42 If the complainant establishes a *prima facie* case of discrimination, then the burden shifts to the respondent to provide a reasonable explanation demonstrating that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory.

Has the complainant established a prima facie case of discrimination related to disability?

43 The complainant was absent from the workplace on certified sick leave related to stress for approximately six months before returning to work on or about January 10, 2011. When advised on January 11, 2011, that the exam would be held a few days later, the complainant wrote to Francis Leblanc, Senior HR Advisor, late in the evening of January 12, 2011, stating: “I’ve just arrived, after 6 months of sick leave (stress), and I don’t want to return.” The complainant testified that he asked Mr. Leblanc for more time to prepare and study for the exam because he felt stressed, but that the respondent did not provide him with any additional time to prepare. During the exam session held on January 14, 2011, the complainant requested that the respondent provide him with additional time to complete the written exam; a request that was also denied. The complainant argues before the Tribunal that physical and emotional symptoms were still disabling at the time of his return, and that the denial of his request for additional time constituted discrimination on the basis of a disability.

44 The Tribunal finds that the complainant has met the burden of establishing a *prima facie* case of discrimination. He has indicated that he felt stressed about the preparation for the exam, as well as at the exam, a symptom directly related to his six-month leave for stress. It now falls to the respondent to provide a reasonable explanation demonstrating that the alleged discrimination did not occur as alleged or that the conduct was somehow non-discriminatory when it denied the complainant’s request for additional time to prepare for and complete the written exam.

Has the respondent provided a reasonable non-discriminatory explanation?

45 In order to understand the context in which the respondent’s decision to deny the complainant’s request for additional time to prepare for and complete the exam was made, it is necessary to review the events leading up to the administration of the written exam.

46 The complainant testified, that while on leave, he received an email from Ms. Mainville, on December 10, 2010, advising him of the respondent’s intention to schedule the written exam for this appointment process during the month of

December 2010. In that email, the complainant was provided with a list of the qualifications that would be assessed by the exam and the various websites where their associated reference material could be found. In a separate letter, also dated December 10, 2010, Ms. Mainville requested that the complainant provide an original medical certificate certifying his ability to participate in both the written exam and interview, if he felt sufficiently recovered to participate in the assessment process in December 2010. He was to provide the medical certificate by December 14, 2010. Alternatively, if the complainant's health did not permit him to participate in the written exam at that time, then it could be scheduled shortly after his return to work which was scheduled to take place on January 10, 2011. On December 16, 2010, the complainant was sent a reminder to consult with his doctor about his ability to be assessed in a staffing process. On December 17, 2010, the complainant responded by saying that his doctor had given him a note which stated that he was: "unfit for any work related activities during this period Nov.10/2010 to Jan.9/ 2011" (sic). Based on this information, Ms. Mainville concluded that the complainant was fit to resume all work related activities, including writing an exam and attending an interview.

47 On January 11, 2011, the complainant received an email invitation to a written exam scheduled to take place a few days later on January 14, 2011. Mr. Leblanc's testimony was uncontested that the other candidates, in December 2010, were given the same three-day prior notice of the exam being held. In an earlier conversation with Ms. Mainville, the complainant had requested that he be permitted to write the exam in a separate location, somewhere other than his workplace given a conflict situation at his workplace. Arrangements were therefore made for him to write the exam in an empty office in a building located away from his usual place of work. The complainant testified that on January 13, 2011, while at work, he downloaded and printed the reference material and began studying for the exam.

48 The written exam was scheduled for 90 minutes. According to the complainant, at the beginning of the exam he asked the invigilator, Ms. Grenier, if he could have more time to complete it because he felt stressed. He did not specify the reasons why he felt stressed or what additional length of time he would require. Ms. Grenier left to consult someone about the matter, then returned and told him that his request for

additional time had been denied. The complainant testified that when the allotted time of 90 minutes had elapsed, he once more requested additional time to complete the exam, again without specifying the amount of time he needed. At that time, Ms. Grenier simply replied that she could not grant his request.

49 Before the Tribunal, the complainant argued that he should have been allowed more time to prepare for and write the exam because he felt stressed having only just arrived from a six month absence from work and because he found out that someone had broken into his desk during his absence and gone through his personal belongings. The complainant also testified that had he been given the opportunity to have more time to study and prepare for the exam, he would have passed it.

50 The CHRA defines disability as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug”.

51 In *Mellon v. Canada (Human Resources Development)* 2006 CHRT 3, the Canadian Human Rights Tribunal provided some guidance in establishing whether a person suffers from a disability:

81. [I]n order to determine whether a person suffers from a disability the Tribunal will have to consider not only the medical condition of the Complainant, but also the circumstances in which a distinction is made. [...]

82. A disability may exist even without proof of physical limitations or the presence of an ailment. Although the Supreme Court is reminding us that an overreliance on medical information is not necessary in order to establish that a disability does or does not exist, there needs to be more than just a bare statement that one suffers from a disability to meet the test. There has to be evidence that the disability is there. This evidence can be drawn from the medical information and from the context in which the impugned act occurred.

52 For the reasons that follow, the Tribunal is of the view that the respondent has provided a reasonable non-discriminatory explanation. Ms. Grenier acted as the invigilator for the complainant’s exam which took place on January 14, 2011. She recalled greeting the complainant on his arrival, then giving him a copy of the exam and asking him to read its instructions. The exam instructions stated the following with respect to disclosing physical or psychological indispositions during the exam:

...If, before or during the testing session, you experience physical or psychological indisposition of sufficient severity to interfere with your test performance, it is your responsibility to inform us that you cannot undertake or continue the test. If you choose to undertake or continue the test despite your indisposition, you must accept the test results.

53 The complainant told her that he was not feeling well, but that he could write the exam. Ms. Grenier testified that more than half-way through the exam period, the complainant asked her if he could be given more time to complete the written exam. Other than a general statement to the effect that he felt stressed, the complainant gave her no specific reason for the request, nor did he identify the additional length of time he was seeking to be given. Ms. Grenier relayed the information to her immediate supervisor, Mr. Leblanc. She recalled that the complainant was disappointed when she informed him that his request for additional time had been denied.

54 Mr. Leblanc testified that Ms. Grenier approached him a little more than half-way through the 90-minute exam period and told him about the complainant's request for additional time to complete the exam. In previous appointment processes, Mr. Leblanc had resorted to the services of the PSC's Personnel Psychology Center in order to assess the accommodation needs of candidates who had identified that they suffered from a specific disability. However, in the case at hand, Mr. Leblanc only had the complainant's general statement that he felt stressed combined with an unspecified request for additional time to write the exam. In addition, Mr. Leblanc knew that the medical information provided by the complainant stated that he was "unfit for any work related activities during this period Nov.10/2010 to Jan.9/ 2011" (sic). The complainant had provided this information after Ms. Mainville's specific request that he provide documentation certifying whether he was able to write the exam and attend an interview. The medical information provided by the complainant led both Ms. Mainville and Mr. Leblanc to conclude that, as of January 10, 2011, the complainant was fit to resume all work related activities, including writing an exam. Moreover, in Mr. Leblanc's view, it was not unusual for candidates to feel stressed during an appointment process, in particular during the phases involving a written exam or an interview. Given that the complainant had made the request more than half-way through the exam period, and that he had not provided any details or reasoning as to how his stress rendered him

incapable of proceeding with the written exam, Mr. Leblanc denied the complainant's request for additional time.

55 The complainant testified that he made the request, for additional time to write the exam, on two occasions; once at the beginning of the exam, and again at the end of the exam. By contrast, Ms. Grenier testified that the complainant had only made one such request and that this had occurred shortly after the middle of the exam. The Tribunal finds that nothing of substance turns on the discrepancy as to the timing and number of requests between these two versions. Neither version alters the fact that the complainant had not established that he was suffering from a disability at the time of the exam which prevented him from completing it within the allotted time. He did not explain how his stress affected his ability to write the exam. He simply made a vague request for additional time because he felt stressed.

56 The complainant argued that he would have passed the exam if he had more time to prepare and study for it. The Tribunal points out that the complainant had previously acted in the Receiving Inspector position for five years – the same position at issue in this appointment process. Also, he was advised on December 10, 2010, of the qualifications that would be assessed during the written exam and he was provided with the associated reference material. Yet, the complainant indicated that he printed the necessary reference material and began studying only on January 13, 2011, the day before the exam was to take place, despite having been informed about the reference material over a month before. The Tribunal finds that the complainant's claim that he would have passed the written exam had he been given more time to prepare and study for it, amounts to mere speculation on his part. No evidence other than his own bare assertion was led to support this claim.

57 Furthermore, although it is clear from his email of January 12, 2011, that the complainant did not want to return to the workplace, the only medical evidence before the Tribunal is that his physician had declared him unfit to return to work before January 9, 2011 inclusively. It is reasonable to infer, given this evidence, in the absence of evidence to the contrary, that the complainant was fit to return to work and resume his work related activities as of January 10, 2011.

58 Given the circumstances surrounding this particular case, the Tribunal finds no basis for the complainant's allegation that the respondent failed to accommodate him in relation to the written exam. Knowing that the complainant was coming back from an extended period of sick leave, the respondent asked the complainant to provide a medical certificate attesting that he was fit to assume work related activities, such as being assessed by means of a written exam and an interview. The complainant informed the respondent that he had a note from his doctor stating that he was not fit for work related activities between certain dates. Consequently, the respondent acted appropriately when it scheduled the written exam to take place after those dates, when there were no restrictions imposed on the complainant's ability to return to work.

59 For all of these reasons, the Tribunal finds that the respondent has provided a reasonable explanation and established that the complainant's allegation of discrimination based on a disability is unfounded. Consequently, the complainant has not established that the respondent engaged in a discriminatory practice based on a disability when it denied him additional time to either prepare for or write the exam. Since the complainant has not established a case of discrimination based on a disability, the duty to accommodate under the CHRA is not triggered. See *Moore v. Canada Post Corp.* 2007 CHRT 31, paras. 86-87.

Has the complainant established a prima facie case of discrimination related to race?

60 Mr. Malcolm, testified that he too felt discriminated against based on his race because he is a black male. He recalled a discussion at the photocopier during which Mr. Landreville stated that the two individuals he wanted were already acting in the Receiving Inspector positions and they had won the appointment process. At the time, Mr. Malcolm reminded Mr. Landreville that the process was still incomplete since the complainant had not yet written the exam. Mr. Malcolm was of the view that Mr. Landreville did not want to continue the rotating acting assignments because he wanted to keep the two individuals, who were not visible minorities, in those positions.

61 This opinion held by Mr. Malcolm was the only evidence presented by the complainant in support of this claim of discrimination. The Tribunal finds that the

complainant has not established a *prima facie* case of discrimination based on race. The complainant cannot simply assert that he was discriminated against because of his race and not provide any evidence, other than a personal opinion held by one of the witnesses, to support his assertion. The Canadian Human Rights Tribunal found in *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32 (CanLII), at para. 41; confirmed by [2006] F.C.J. No. 1005; 2006 FC 785(QL), that “an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough”.

62 The Tribunal finds that the complainant has not established that his race was a factor in his not being appointed. Consequently, his claim of discrimination is not substantiated.

Issue IV: Did the respondent abuse its authority by demonstrating personal favouritism towards the appointees?

63 The complainant alleges that the respondent personally favoured certain candidates by appointing two lesser qualified persons to the position of Receiving Inspector.

64 As noted by the Tribunal in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, at para. 41:

The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

65 The complainant argues that Mr. Landreville demonstrated personal favouritism towards the two persons who were appointed when he made modifications to the written exam, and when he refused to continue to rotate acting assignments for the two GT-03 Receiving Inspector positions.

66 The matter of the modifications made to the written exam and its correction were reviewed in detail during the analysis of Issue II wherein the Tribunal concluded that the respondent’s actions did not constitute an abuse of authority.

67 The complainant alleges that Mr. Landreville also personally favoured the appointees by discontinuing the rotation of the acting assignment, which meant keeping the future appointees in the acting positions longer and then appointing them to the Receiving Inspector positions. Mr. Malcolm testified that Mr. Landreville stated, during a discussion in the workplace the day before the complainant wrote his exam, that he had the two individuals he wanted in the Receiving Inspector positions and who had won the appointment process. At the time, Mr. Malcolm reminded Mr. Landreville that the process was still incomplete since the complainant had not yet written his exam.

68 Mr. Landreville described the conversation he had with a small group of employees about the acting situations in the warehouse. All candidates had completed the written exam by that time, except for the complainant who was scheduled to write the exam the next day. Mr. Landreville informed the group that he had decided to stop rotating employees in the two GT-03 Receiving Inspector positions until the assessment of the candidates was completed. Instead, he would maintain the acting assignments of the two individuals currently occupying the positions since they had both passed the exam. These same persons were later appointed on an indeterminate basis to the positions of Receiving Inspector.

69 The Tribunal accepts Mr. Landreville's explanation that he discontinued the rotating assignments because the assessment of the candidates was almost complete. The complainant has presented no evidence of the existence of a personal relationship between the appointees and Mr. Landreville. With respect to his allegation that the respondent had appointed lesser qualified individuals, the complainant did not present any evidence to establish that either of the two appointees failed to meet any of the essential qualifications for the position.

70 The Tribunal is not persuaded that the appointees were appointed because of personal favouritism.

71 For these reasons, the Tribunal concludes that the complainant's allegation of personal favouritism is unfounded.

Decision

72 The complaints are dismissed.

Maurice Gohier
Member

Parties of Record

Tribunal Files	2011-0173 and 2011-0243
Style of Cause	<i>Michael Alan Earle and the Deputy Minister of Transport, Infrastructure and Communities</i>
Hearing	January 19-20, 2012 and March 20-21, 2012 Ottawa, Ontario
Date of Reasons	December 12, 2012
APPEARANCES:	
For the complainant	Michael Alan Earle
For the respondent	Josh Alcock
For the Public Service Commission	John Unrau (written submissions)