



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2010-0091 and 2010-0624  
**Issued at:** Ottawa, May 17, 2012

**SAAD HAMMOUCH**

Complainant

AND

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaints of abuse of authority pursuant to sections 77(1)(a), (b) and (c) of the <i>Public Service Employment Act</i>
<b>Decision</b>	The complaint regarding the appointment of Mr. Gendron is dismissed  The complaint regarding the appointment of Mr. Deblois is substantiated
<b>Decision rendered by</b>	John Mooney, Vice-Chairperson
<b>Language of Decision</b>	French
<b>Indexed</b>	<i>Hammouch v. the Deputy Minister of National Defence</i>
<b>Neutral Citation</b>	2012 PSST 0012

## Reasons for Decision

### Introduction

**1** Saad Hammouch (the complainant) filed two complaints regarding appointments to Quality Assurance Manager positions at the TI-07 group and level within the Department of National Defence (DND). The first complaint relates to the indeterminate appointment of Luc Gendron to the above position (file 2010-0624). The complainant alleges that the Deputy Minister of DND (the respondent) abused its authority in its assessment of his qualifications, failed to respect his right to be assessed in the official language of his choice, and failed to comply with the Public Service Commission's (PSC) policy on informal discussion. The respondent denies those allegations.

**2** In the second complaint (file 2010-0091), the complainant alleges that the respondent abused its authority by awarding Mario Deblois an acting appointment to the above position through a non-advertised process. The complainant makes the same three allegations in this complaint as he does in his complaint regarding Mr. Gendron's appointment. The complainant further alleges that the respondent abused its authority by choosing a non-advertised process to appoint Mr. Deblois, that the respondent showed personal favouritism toward Mr. Deblois, and that Mr. Deblois was not qualified for the position because he did not have the required language proficiency, among other things.

**3** The respondent denies that it abused its authority in appointing Mr. Deblois. According to the respondent, it has the right to choose a non-advertised process to staff a position. The respondent also submits that no personal favouritism was shown toward Mr. Deblois. It properly assessed his qualifications, but failed to check whether his language profile was still valid. When the respondent learned that his language profile had expired, it terminated Mr. Deblois' acting appointment. The respondent used the same arguments provided in the complaint regarding Mr. Gendron's appointment to respond to the other three allegations.

**4** The PSC did not attend the hearing, but did provide the Public Service Staffing Tribunal (the Tribunal) with written submissions in which it explained its appointment policies, in particular its general policy and those on candidate assessment, official

languages, informal discussion, and choice of appointment process. The PSC did not take a position on the merits of the complaints.

5 For the reasons set out below, the Tribunal finds that the complainant failed to establish that the respondent abused its authority in offering Mr. Gendron an indeterminate appointment to the position at issue. However, the Tribunal finds that the respondent did abuse its authority in the assessment of Mr. Deblois' qualifications for his acting appointment to the position at issue.

## **Background**

6 In April 2009, the respondent posted a *Job Opportunity Advertisement* on the federal government's *Publiservice* website to staff a TI-07 Quality Assurance Manager position on an indeterminate basis. A total of 15 people applied, and four were screened out. On September 22, 2009, the remaining 11 candidates, including the complainant, wrote an exam to assess the essential qualification of "detailed knowledge of the Directorate of Quality Assurance (DQA) Quality Management System (QMS)." The complainant failed the exam. Only two candidates passed all stages of the appointment process, including Mr. Gendron, who was appointed.

7 While the appointment process to indeterminately staff this position was taking place, the respondent appointed various people to the position on an acting basis for periods of less than four months. Pursuant to section 14(1) of the *Public Service Employment Regulations*, SOR/2005-334, an acting appointment of less than four months is excluded from the application of merit provided for under section 30(2) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA) and the right of complaint provided for under section 77 of that statute. In June 2009, the respondent invited the employees of the Quebec Regional Quality Assurance office to express their interest in an acting appointment to the position. The positions were located in various work centres in the Greater Montreal area. In order to be considered for an acting appointment, candidates had to have passed a course on sections 32 to 34 of the *Financial Administration Act*, R.S.C., 1985, c. F-11 (the FAA). Those provisions deal with the administrative and financial procedures governing the

procurement of goods and services. The complainant was not considered for the first round of appointments because he had failed that course on June 9, 2009. The complainant later passed the course in September 2009 on another attempt. The respondent then offered him two acting appointments. The first appointment was from September 21 to October 30, 2009, and the second from October 31, 2009, to January 15, 2010.

**8** On October 20, 2009, the respondent issued a second notice of interest. For this new round of acting appointments, the respondent used the results of the written exam administered as part of the selection process to staff the position on an indeterminate basis. The exam assessed whether a candidate had detailed knowledge of the quality management system. In fall 2009, the respondent decided not to offer any further acting appointments to candidates who had failed that exam. Since the complainant had failed the exam, the respondent did not offer him any further acting appointments to the position.

**9** Mr. Deblois had held the position at issue on an acting basis since July 6, 2009. In October 2009, the respondent offered him another acting appointment from October 3, 2009, to March 26, 2010. Because that appointment extended the acting appointment to a period of four months and over, it became subject to the application of merit provided for under section 30(2) of the PSEA and the right of complaint provided for under section 77 of that statute.

**10** The assessment board for the processes that resulted in the indeterminate appointment of Mr. Gendron and the acting appointment of Mr. Deblois was made up of the board's chairperson, Gaetan Moreau (TI-08), Operations Commander, Quebec Region; Denis Bastien (TI-07), Quality Assurance Manager; and Claude Courchesne (TI-07), Quality Assurance Manager.

**11** On February 17, 2010, the respondent posted notification of Mr. Deblois' acting appointment, more than four months after the start of that appointment. On February 18, 2010, the complainant submitted a complaint of abuse of authority to

the Tribunal pursuant to sections 77(1)(a), (b) and (c) of the PSEA in relation to this acting appointment.

**12** On September 15, 2010, the respondent posted a *Notification of Appointment or Proposal of Appointment* for Mr. Gendron's indeterminate appointment to the position at issue. On October 7, 2010, the complainant filed a complaint of abuse of authority pursuant to sections 77(1)(a) and (c) in relation to this appointment.

**13** The two complaints were consolidated for the purposes of these proceedings pursuant to section 8 of the *Public Service Staffing Tribunal Regulations*, DORS/2006-6, as amended by DORS/2011-116.

**14** The complainant notified 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 plan to attend the hearing or make submissions.

## **Analysis**

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

**16** As has been established in the Tribunal's case law, the use of such inclusive language indicates that abuse of authority is not limited to bad faith and personal favouritism. In *Kane v. Attorney General of Canada and Public Service Commission*, 2011 F.C.A. 19, the Federal Court of Appeal found that an error can also constitute an abuse of authority (para. 64). However, as is clear from the preamble and the scheme of the PSEA, abuse of authority is more than simply errors or omissions. Whether or not an error constitutes an abuse of authority will depend on the nature and seriousness of the error. Abuse of authority can also include an omission or improper conduct.

The scope of the omission or the degree to which the conduct is improper will determine whether or not they constitute an abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

## **The indeterminate appointment of Mr. Gendron**

### **Issues**

**17** The Tribunal must decide the following issues in the complaint regarding Mr. Gendron's appointment:

- (i) Did the respondent abuse its authority in the assessment of the complainant's qualifications?
- (ii) Was the complainant assessed in the official language of his choice?
- (iii) Did the respondent comply with the PSC policy on informal discussion?

**18** In his written allegations to the Tribunal filed prior to the hearing, the complainant alleged discrimination in both files: file 2010-0091 relating to the appointment of Mr. Deblois, and file 2010-0624 relating to the appointment of Mr. Gendron. Moreover, in both files, the complainant notified the CHRC that he intended to raise an issue involving the interpretation or application of the CHRA. However, at the hearing, counsel for the respondent stated that the allegation of discrimination related only to complaint 2010-0091, the appointment of Mr. Deblois, because the complainant's argument was that the respondent had discriminated against him in the administration of the exam on sections 32 to 34 of the FAA, and that the exam related only to the acting appointment of Mr. Deblois. The Tribunal will therefore not rule on the issue of discrimination in the appointment of Mr. Gendron.

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

**19** The complainant argues that the respondent improperly assessed his qualifications in the exam used to assess whether a candidate had detailed knowledge of the quality management system. The Tribunal has held in numerous decisions that its role is to determine whether there has been an abuse of authority, not to reassess the

candidates or redo the appointment process (see, for example, *Broughton v. Deputy Minister of Public Works and Government Services et al.*, 2007 PSST 0020). The Tribunal will therefore examine the assessment of the complainant's qualifications to determine whether there was an abuse of authority in that assessment, but it will not reassess the complainant.

**20** Mr. Moreau stated that the candidates wrote the exam on September 22, 2009. The assessment board members corrected the exam separately. Mr. Courchesne and Mr. Bastien corrected the exam first and then met with Mr. Moreau in late December 2009 or early January 2010. The long delay was due to the fact that Mr. Moreau was very busy during that period taking part in the federal government's strategic review. At the meeting, the three assessment board members reviewed and discussed all the answers to arrive at a consensus on the correction of the candidates' answers.

**21** The complainant submits that he should have scored higher on the written exam. For example, in question 5, candidates were asked whether the following statement was true or false: "The Allied Quality Assurance Publication (AQAP-170) is the current publication which defines the NATO Mutual Government Quality Assurance (GQA) Process".

**22** The complainant answered that the statement was true. The expected answer in the exam correction key indicates that the statement is false because the current publication is the AQAP-2070. According to the complainant, the expected answer is incorrect. He filed into evidence an English document entitled *QA Service Delegation of Government Quality Assurance – Outgoing*, which sets out the quality assurance procedures. That document refers to the AQAP-170, and not the AQAP-2070.

**23** Mr. Moreau and Mr. Bastien explained that the AQAP-170, which dates back to September 2003, was replaced by the AQAP-2070. The respondent filed into evidence an email dated January 6, 2005, informing employees of that change. The AQAP-170 is no longer part of their procedures and all Quality Assurance employees were aware of that fact.

**24** The Tribunal is satisfied with the respondent's explanation that the AQAP-170 was replaced by the AQAP-2070 and that all Quality Assurance employees were informed of the change. Therefore, the assessment board was justified in finding that the complainant's answer was incorrect.

**25** The complainant gave another example of what he believed was an error in the assessment of his qualifications. Question 9, part "a" asked candidates the following question: "In the context of the QMS DQA Procedures, what does the acronym "LoD" stand for?"

**26** The expected answer in the correction key, given in English only, reads as follows: "[I]etter of Delegation (DQA) Procedure – Quality Surveillance Planning."

**27** This sub-question was worth three points. The complainant scored zero for his answer. His answer, in English, was "Letter of". The complainant alleges that he should have received two points because he provided two of the three words of the expected answer.

**28** The Tribunal finds no abuse in the way the assessment board marked that answer. The words "Letter of" do not refer to anything because the key word that would give meaning to the expression is missing. The assessment board did not act unreasonably in not awarding any points for that answer.

**29** According to the complainant, question 10 of the exam is another example of how his qualifications were improperly assessed. In that question, candidates were asked to define the expression "Risk Summary" in the context of the DQA's quality management system procedures. The expected answer reads as follows: "The risk associated with a product on a particular contract and the supplier's capability to control that risk."

**30** The complainant scored only two and a half points out of five for his answer, which reads as follows:

The risks can be summarized as follows: Product risk; this is when the product is critical.  
– Supplier risk; this is when the supplier cannot meet requirements or deliver the product



on time. – Risk in the production of a first item or prototype. In general, risks are any problem or obstacle that could hinder delivery of the contracted product or services in accordance with the contract or the desired deadline.

[Translation]

**31** According to the complainant, his answer matched the expected answer in the correction key. He mentioned the two key words of the expected answer, namely, “product” and “supplier”.

**32** Mr. Moreau and Mr. Bastien stated that the complainant had failed to mention the supplier’s ability to control product risk. The Tribunal finds that that assessment, while strict, is not excessive. The respondent provided a reasonable explanation for the complainant’s score on that question. Indeed, the complainant does not explicitly mention the supplier’s ability to control product risk.

**33** The complainant stated that he had been unaware that the respondent had assessed his ability to communicate in writing. He learned of it only a few days before the hearing, when he was consulting the written exam’s correction grid given to him by the respondent. The correction grid indicates that the complainant scored 67.5% on that ability, whereas the pass mark was 75%.

**34** Mr. Moreau explained that, at the written exam, the candidates were asked to write a letter, which would be used to assess their ability to communicate in writing. Mr. Bastien and Mr. Courchesne corrected the letters of all candidates, even those who failed the exam. Those assessments became final only once they were approved by Mr. Moreau. Mr. Bastien and Mr. Courchesne therefore corrected the complainant’s letter and gave him a score of 67.5%, as indicated in the correction grid. However, Mr. Moreau did not correct it because the assessment board later unanimously agreed when they met that the complainant had failed the knowledge exam and, therefore, there was no reason to correct the letter. The Tribunal is satisfied with the respondent’s explanation. The respondent did not tell the complainant that it had assessed his ability to communicate in writing because that ability was never really fully assessed since Mr. Moreau did not approve Mr. Bastien’s and Mr. Courchesne’s

correction of the letter. It was not necessary to complete the assessment of that ability because the complainant had failed the knowledge exam.

**35** The Tribunal therefore finds that the respondent did not abuse its authority in the assessment of the complainant's qualifications.

**Issue II: Was the complainant assessed in the official language of his choice?**

**36** Section 37(1) of the PSEA states that a candidate has the right to be assessed in the official language of his or her choice. Section 77(1)(c) states that a person can make a complaint if that right is not respected.

**37** The complainant alleges that the respondent did not respect that right because an English acronym was used in one of the knowledge exam questions. As noted earlier, question 9, part "a" asked candidates the meaning of the acronym "LoD" in the context of the DQA's quality management system procedures. The acronym was put in quotation marks. It is an English acronym that means "Letter of Delegation". The complainant answered "Letter of".

**38** Mr. Moreau explained that the assessment board had translated all the English acronyms except for "LoD" in question 9, because the board did not translate the American English acronyms, only the Canadian ones. Employees of the DQA always use the English version of that term. Mr. Bastien added that the respondent uses the English term "LoD" in its French-language procedures. For example, the term is not translated in the *Quality Management System (QMS)* document published by the department. Mr. Moreau told the Tribunal that the complainant could have answered in French even though the acronym was in English.

**39** The complainant argued that the respondent's explanation was not reasonable. Americans use the acronym MOU (for Memorandum of Understanding), which is found in part "b" of the same question, but the respondent translated that acronym. The French version of the acronym is PE, for "protocole d'entente".

**40** Because the complainant had chosen to be assessed in French rather than in English or in both official languages, ideally the respondent should have provided him

with a complete French version of all the exam questions. However, the Tribunal accepts the respondent's argument that the English acronym "LoD" is used by the department's Anglophone and Francophone employees. In other words, this technical term has been incorporated into the work vocabulary of all employees, including the Francophone employees. Therefore, the Tribunal finds that, in the situation described above, the respondent respected the complainant's right to be assessed in the official language of his choice. The Tribunal notes that this omission in translating the acronym had no impact on the appointment process results. This part of question 9 was worth three points. If the complainant had given the correct answer, he would have scored 66% on the written exam, but the pass mark was 75%. Therefore, he would have failed the exam even if he had correctly answered part "a" of question 9.

**Issue III: Did the respondent comply with the PSC policy on informal discussion?**

**41** The complainant alleges that the respondent did not comply with this policy. The policy stipulates that a person who requests an informal discussion must have access to sufficient information concerning his or her assessment to be able to understand the department's decision. The policy also states that the delegated authority can correct errors, where appropriate, in the candidate assessment.

**42** The complainant submits that the respondent did not give him sufficient access to information about his exam. During the informal discussion, Mr. Bastien and Mr. Courchesne simply read out his answers to the exam, along with the expected answers, but they refused to give him a copy of his exam or the expected answers. The respondent did, however, give him a copy of those documents later on, after the informal discussion.

**43** The Tribunal finds that the respondent complied with the PSC policy in its informal discussion with the complainant. The respondent gave the complainant access to sufficient information so that he could understand his assessment. Mr. Bastien and Mr. Courchesne explained to him the correction of each of his answers to the written exam. The respondent later gave him a paper copy of the documents. However, the Tribunal must add that simply reading the questions and answers out loud, as the

respondent did, was not a means of ensuring that the complainant properly understood the assessment. The complainant could have been nervous, or he could be a more visual than auditory person. Ideally, the written questions and answers should have been given to the complainant so that he could calmly read them at his own pace.

**44** The complainant added that, after the informal discussion, he discovered errors in the correction of his answers. These are the errors described earlier relating to questions 5, 9 and 10. He therefore asked the respondent for a second informal discussion, which the respondent refused.

**45** The Tribunal finds that these are not errors, but rather, differences of opinion. The complainant did not share the respondent's opinion on the assessment of his knowledge. The purpose of an informal discussion is not to reassess the candidates, but to explain their assessment. The respondent met that obligation by explaining to the complainant the correction of each of his answers. The assessment board was not required to hold a second informal discussion to discuss the correction of the exam.

### **Decision**

**46** For all these reasons, the complaint against the indeterminate appointment of Mr. Gendron is not substantiated.

### **The acting appointment of Mr. Deblois**

#### **Issues**

**47** The Tribunal must decide the following issues in the complaint regarding Mr. Deblois' appointment:

- (i) Did the respondent comply with the PSC policy on choice of appointment process?
- (ii) Did the respondent show personal favouritism toward Mr. Deblois?

- (iii) Did the respondent abuse its authority in its assessment of Mr. Deblois' qualifications?
- (iv) Did the respondent discriminate against the complainant?

**48** The complainant also alleges that the respondent abused its authority in its assessment of his qualifications and in the informal discussion process. He further alleges that the respondent did not respect his right to be assessed in the official language of his choice. Those three allegations relate to the written exam that assessed whether a candidate had detailed knowledge of the quality management system, which was the same exam used in the indeterminate appointment of Mr. Gendron. The respondent stopped offering the complainant acting appointments because he failed that exam. The Tribunal will not re-address those allegations because it found, in the context of Mr. Gendron's appointment, that the allegations of abuse of authority with respect to the exam were not substantiated.

**Issue I: Did the respondent comply with the PSC policy on choice of appointment process?**

**49** The complainant alleges that the respondent did not comply with that PSC policy when it decided to extend Mr. Deblois' acting appointment. Sections 16 and 29(3) of the PSEA stipulate that the person to whom the PSC has given delegated appointment authority must comply with PSC policy in exercising that authority. The PSC's *Choice of Appointment Process Policy* states that when an organization chooses to staff a position by means of a non-advertised process, it must provide a written rationale demonstrating how that choice respects the PSC's staffing values of fairness, access and transparency, and how it is consistent with the human resources plan. Those obligations were set out by the respondent in the *Non-advertised Appointment Rationale*. However, according to the complainant, the respondent did not demonstrate in writing how that choice respected the staffing values or how it was consistent with the human resources plan.

**50** The Tribunal finds that the respondent complied in large part with the PSC policy on choice of appointment process. The words "fairness" and "access" do not appear in the two documents that explain the choice made, namely the *Non-advertised*

*Appointment Rationale* and the *Right Fit Rationale*, but both documents demonstrate that the respondent made the acting appointments, including that of Mr. Deblois, in a manner that respected the values of access and fairness. The acting appointments were accessible because the respondent twice invited the employees of the DQA to indicate whether they were interested in an acting appointment to the position at issue.

**51** The respondent awarded the acting appointments fairly because the *Right Fit Rationale* indicates that it appointed almost all of the individuals who expressed an interest in the position, including the complainant. The complainant was twice given an acting appointment to the position at issue. The respondent chose to stop offering him acting appointments after January 15, 2010, because he had failed the exam to assess whether he had detailed knowledge of the quality management system. That same exam was also used in the process that resulted in the appointment of Mr. Gendron.

**52** The respondent was transparent in advertising the positions to be filled. As indicated earlier, it had solicited applications for the positions on two occasions. Nevertheless, the respondent could have been more transparent when it came to issuing the notification of Mr. Deblois' acting appointment. The notification indicates that his second acting appointment began on October 3, 2009, but the notification was not posted on *Publiservice* until February 2010 (this was the first notification, with a second one being issued later on). Although the delay is unfortunate, the Tribunal finds that, in this case, the omission was not serious enough to constitute an abuse of authority. The complainant knew that Mr. Deblois was in the position before the notification was issued because he was closely following the acting appointments. The complainant, who acted in the same position until January 15, 2010, stated that he had contacted Human Resources to ask why notification of Mr. Deblois' acting appointment had not yet been issued.

**53** Mr. Moreau stated that he consulted the human resources plan when he appointed Mr. Deblois, and that the appointment was consistent with the plan. The complainant, who bears the burden of proof, failed to demonstrate how Mr. Deblois' appointment was inconsistent with the human resources plan.

**54** Therefore, the Tribunal finds that by and large the respondent respected the staffing values set out in the PSC policy when it appointed Mr. Deblois. However, the respondent should have been more transparent by posting notification of Mr. Deblois' appointment earlier. Nevertheless, the Tribunal finds that this omission was not serious enough to constitute an abuse of authority.

**Issue II: Did the respondent show personal favouritism toward Mr. Deblois?**

**55** The complainant submits that the facts as a whole—that is, the choice of a non-advertised appointment process, the choice of assessment tools, and the fact that the written rationale for the appointment process indicates that the respondent was looking for someone from the Longueuil work centre to staff the position—demonstrate that the respondent showed personal favouritism toward Mr. Deblois.

**56** The Tribunal finds that the complainant failed to prove that Mr. Deblois' appointment was the result of personal favouritism. Pursuant to section 33 of the PSEA, the delegated manager may choose an advertised or non-advertised appointment process to staff a position. As explained earlier, the complainant did not establish that the respondent abused its authority in the choice of process.

**57** Mr. Moreau stated that the assessment board members used their personal knowledge of Mr. Deblois to assess his qualifications, along with his employee file and the written exam administered to assess whether the candidates had detailed knowledge of the quality management system. The Tribunal finds that the complainant failed to establish how those assessment methods demonstrated personal favouritism toward Mr. Deblois.

**58** The complainant argues that using an employee's work file to assess his or her qualifications is not very thorough or effective. The Tribunal finds that it is completely legitimate to use an employee's work file to assess his or her qualifications. Indeed, section 36 of the PSEA gives delegated managers considerable flexibility in the choice of assessment methods, and states that those methods can include a candidate's "accomplishments" and "past performance". These are factors that are usually found in an employee's file.

**59** The Tribunal finds that the rationale for choosing Mr. Deblois is reasonable. Mr. Moreau stated that the respondent had wanted to appoint someone who knew the files of the Longueuil work centre, and Mr. Deblois was the only employee at that centre who expressed an interest in the position to be staffed.

**60** Therefore, the Tribunal finds that the complainant failed to demonstrate that Mr. Deblois' appointment to the position at issue was the result of personal favouritism.

**Issue III: Did the respondent abuse its authority in its assessment of Mr. Deblois' qualifications?**

**61** The complainant submits that Mr. Deblois did not have the required linguistic profile for the position at the time he was awarded the acting appointment.

**62** The Statement of Merit Criteria indicates that the official language proficiency for the position was BBB. As explained in the PSC document *Guidance Series – Official Languages in the Appointment Process*, a candidate's second official language proficiency is assessed using the Second Language Evaluation (SLE) tests. The SLE tests assess the following three skills: reading, writing and oral interaction. The three proficiency levels are A, B and C. Level A is the lowest level of proficiency and level C, the highest. An employee can also be exempted from having to undergo a second language evaluation. Such an exemption is expressed by the letter E in a person's linguistic profile. SLE test results are valid for five years, unless the employee has an E rating, in which case the employee does not need to be reassessed. Mr. Moreau stated that Mr. Deblois' linguistic profile was ECE, exceeding the profile required for the position.

**63** Karine Giguère is a human resources advisor with the department. In February 2010, she informed Mr. Bastien that Mr. Deblois' SLE test results had expired. Mr. Bastien stated that he informed Mr. Moreau, who terminated Mr. Deblois' acting appointment that same day.

**64** Mr. Moreau explained that Mr. Deblois' acting appointment had been scheduled to end on March 26, 2010, as indicated in the *Information Regarding Acting Appointment* notification issued on February 17, 2010. On March 1, 2010, Mr. Moreau



issued a second notification indicating that Mr. Deblois' acting appointment had ended on February 19, 2010.

**65** The complainant thus established that Mr. Deblois did not have the full linguistic profile required at the time of his appointment. More specifically, he did not have the required writing proficiency, being exempted from further assessment for the other two skills in the linguistic profile. Language proficiency is an essential qualification for the position to be staffed. As a result, it must be determined whether this error constitutes an abuse of authority within the meaning of section 77(1)(a) of the PSEA. As noted earlier, in *Kane*, the Federal Court of Appeal found that an abuse of authority could include an error made in an appointment. The nature and seriousness of the error determine whether it constitutes an abuse of authority.

**66** Section 30(1) of the PSEA stipulates that appointments must be made on the basis of merit, and section 30(2) specifies that an appointment is made on the basis of merit when the person appointed meets all the essential qualifications for the work to be performed, as established by the deputy head. In this case, Mr. Deblois did not meet one of the essential qualifications. Therefore, his appointment was not made on the basis of merit. The Tribunal finds that appointing someone who does not meet all of the essential qualifications is an error that is serious enough to constitute an abuse of authority within the meaning of section 77(1)(a) of the PSEA. As a result, the respondent abused its authority when it appointed Mr. Deblois to the position at issue.

**67** The complainant also highlights the contradictions in the evidence regarding the assessment of the complainant's detailed knowledge of the DQA's quality management system. The document *Information Regarding Acting Appointment*, announcing the appointment of Mr. Deblois, indicates that such knowledge is an essential qualification for the position. Mr. Moreau stated that the assessment board used the written exam to assess that knowledge. The *Right Fit Rationale* (which unfortunately is not dated) indicates that the assessment board took into consideration the results of the knowledge exam when it appointed Mr. Deblois. The candidates wrote the exam on September 22, 2009. Mr. Moreau stated that Mr. Bastien and Mr. Courchesne corrected the exam the same day the candidates wrote it. However, Mr. Moreau also stated that

he did not correct it until late December or early January. The complainant questions how Mr. Deblois could have begun his second appointment on October 3, 2009, if his assessment was not completed until late December 2009 or early January 2010.

**68** The Tribunal finds that this qualification had not been fully assessed when Mr. Deblois was appointed to the position in October 2009, because the marks were awarded by consensus and Mr. Moreau had not yet corrected the exam. Therefore, the respondent failed to establish that Mr. Deblois had that knowledge at the time of his appointment. The Tribunal thus finds that the respondent abused its authority in its assessment of Mr. Deblois' qualifications by appointing him to the position without having established that he met the qualification of having detailed knowledge of the DQA's quality management system.

#### **Issue IV: Did the respondent discriminate against the complainant?**

**69** The complainant submits that, in the context of Mr. Deblois' appointment, the respondent discriminated against him based on his national or ethnic origin. The complainant is of Moroccan origin. In his written submissions filed prior to the hearing, the complainant also gave his race and colour as prohibited grounds of discrimination, but he withdrew those two grounds at the hearing.

**70** Pursuant to section 80 of the PSEA, in determining whether a complaint under section 77 is substantiated, the Tribunal may interpret and apply the CHRA.

**71** Section 7 of the CHRA stipulates that it is a discriminatory practice to directly or indirectly refuse to employ or continue to employ any individual, or, in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Section 3 of the CHRA lists the prohibited grounds of discrimination, which include national or ethnic origin.

#### **Analytical framework for proving discrimination**

**72** The Tribunal's case law has established that the complainant bears the burden of proving, on a balance of probabilities, that there was abuse of authority in an appointment process (see, for example, *Tibbs*, at para. 49).

**73** In a human rights context, the complainant bears the burden of establishing a *prima facie* case of discrimination. In *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (also 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....

**74** The Tribunal must determine whether, if the complainant's evidence is believed, that evidence is sufficiently complete to justify a finding of discrimination in the absence of an explanation from the respondent. Thus, at this stage of the analysis, the Tribunal cannot take into account the respondent's explanation without having first determined that a *prima facie* case of discrimination has been established. (See *Lincoln v. Bay Ferries Ltd.*, [2004] F.C.A. 204, F.C.J. No. 941 (QL), para. 22 (F.C.A.)).

**75** Discrimination can be proven by means of direct or circumstantial evidence, or a combination of the two. The complainant's evidence in support of his allegation is circumstantial: he submits that he was treated unfairly in an exam on sections 32 to 34 of the FAA. The test for examining circumstantial evidence was established by Beatrice Vizkelety in *Proving Discrimination in Canada* (Toronto: Carswell, 1987), at page 142, which reads as follows:

The appropriate test in matters involving circumstantial evidence, which should be consistent with this standard [of preponderance of the evidence], may therefore be formulated in this manner: an inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.

**76** Even if the Tribunal finds that there is sufficient circumstantial evidence to establish the existence of discriminatory practices, the complainant must still demonstrate a link between that circumstantial evidence and the evidence of individual discrimination against him in order for a *prima facie* case of discrimination to be established. (See the following decisions: *Swan v. Canadian Armed Forces*, (1994) 25 C.H.R.R. 312, para. 30 (C.H.R.T.); *Hill v. Air Canada*, 2003 C.H.R.T. 9, para.

133; *Chopra v. Canada (Department of National Health and Welfare)*, 2001 CanLII 8492 (C.H.R.T.), para. 211).

**77** If the complainant establishes a *prima facie* case of discrimination, the burden of proof shifts to the respondent to provide a reasonable non-discriminatory explanation for not appointing the complainant to the Manager position in this appointment process.

### **The complainant's evidence**

**78** The complainant's allegation of discrimination is based on the fact that the respondent gave him only two and a half days to prepare for the exam to assess his knowledge of sections 32 to 34 of the FAA, while other candidates were given four and a half days. As explained earlier, a candidate must have passed that exam to be considered for an acting appointment to the position at issue. The complainant failed that exam on June 9, 2009.

**79** The Tribunal finds that the complainant failed to establish that the respondent discriminated against him in relation to the exam on sections 32 to 34 of the FAA. The complainant failed to establish that the respondent gave all the other candidates, including Mr. Deblois, more time to prepare for the exam.

**80** The Tribunal also finds that the respondent did not treat the complainant differently in the context of the acting appointments, because the respondent offered him two acting appointments once he passed the exam on sections 32 to 34 of the FAA.

**81** Furthermore, the Tribunal finds that there is no link between the complainant's failure on the exam on sections 32 to 34 of the FAA and Mr. Deblois' acting appointment. When the respondent appointed Mr. Deblois for a second time in October 2009, the complainant and Mr. Deblois had both passed that exam. Therefore, the complainant's failure on the exam in June 2009 had no impact on Mr. Deblois' appointment.

**82** The respondent cannot be said to have discriminated against the complainant when it awarded an appointment to Mr. Deblois in early October 2009, because at that point the complainant was also acting in the same position. The respondent had offered

him two acting appointments, the first from September 21 to October 30, 2009, and the second from October 31, 2009, to January 15, 2010.

**83** In conclusion, the Tribunal finds that the actions to which the complainant testified do not establish a *prima facie* case of discrimination. The complainant's allegation, even if believed, is neither complete nor sufficient to justify a finding in his favour. The complainant failed to establish that the respondent treated him differently than the other candidates in relation to the exam on sections 32 to 34 of the FAA. The complainant was also unable to establish a link between his failure on that exam and Mr. Deblois' acting appointment (see *Chopra*, para. 211 (QL)).

### **Reasonable non-discriminatory explanation**

**84** While the above conclusion is sufficient to dispose of the allegation of discrimination, the Tribunal finds that the respondent also provided a reasonable non-discriminatory explanation for not choosing the complainant for an acting appointment to the position at issue.

**85** Mr. Moreau and Mr. Bastien explained that, prior to taking the exam, the candidates prepared by consulting a website containing explanatory documents relating to sections 32 to 34 of the FAA. The respondent usually gave candidates two and a half days to consult the texts. Normally, a candidate would spend four hours reviewing them, but could spend as much time as needed during the two and a half days. Candidates then had to go to one of the respondent's conference rooms in Verdun to take the exam.

**86** The respondent's witnesses provided a reasonable explanation for why some employees had two and a half days to prepare for the exam, while others had four and a half. Mr. Bastien stated that the original date of the exam was June 9, but because some candidates could not attend on that day and others did not have computer access to consult the texts online to prepare for the exam before that date, the respondent scheduled a second exam for June 11, 2009. The respondent gave all candidates, including the complainant, the choice of writing the exam on June 9 or June 11. The complainant did not dispute that fact. Therefore, the Tribunal finds that the

complainant received the same treatment as all the other candidates in terms of the exam. In fact, the complainant and Mr. Deblois, who was offered the acting appointment, had the same amount of time to prepare because, like the complainant, Mr. Deblois chose to write the exam on June 9.

### **Decision**

**87** The complaint regarding the acting appointment of Mr. Deblois is allowed because he did not meet the qualification of having detailed knowledge of the DQA's quality management system, and he did not meet the language proficiency requirements of the position upon his appointment.

### **Corrective action**

**88** The respondent terminated Mr. Deblois' appointment on February 19, 2010. The complainant did not ask that the Tribunal revoke Mr. Deblois' appointment beyond that date. Because the respondent had already terminated Mr. Deblois' appointment and because the complainant is not asking for a revocation as of the date of the appointment, the Tribunal is of the view that, in this case, a finding of abuse of authority is sufficient. The Tribunal therefore finds that the respondent abused its authority when it awarded Mr. Deblois an acting appointment to the position of Quality Assurance Manager because he did not meet the qualification of having detailed knowledge of the DQA's quality management system, and he did not meet the language proficiency requirements of the position at the time of his appointment.

John Mooney  
Vice-Chairperson

**Parties of Record**

<b>Tribunal Files</b>	2010-0091 and 2010-0624
<b>Style of Cause</b>	<i>Saad Hammouch and the Deputy Minister of National Defence</i>
<b>Hearing</b>	March 22 and 23, 2011 Montreal, Quebec
<b>Date of Reasons</b>	May 17, 2012
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Louis Bisson
<b>For the respondent</b>	Adrian Bieniasiewicz
<b>For the Public Service Commission</b>	Marc Séguin (written submissions)