



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2010-0778 and 2011-0144  
**Issued at:** Ottawa, March 6, 2013

**PAUL ABI-MANSOUR**

Complainant

AND

**THE DEPUTY MINISTER OF ABORIGINAL AFFAIRS AND NORTHERN  
DEVELOPMENT CANADA**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaints of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Complaints are dismissed
<b>Decision rendered by</b>	Kenneth J. Gibson, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Abi-Mansour v. the Deputy Minister of Aboriginal Affairs and Northern Development Canada</i>
<b>Neutral Citation</b>	2013 PSST 0006

## **Reasons for Decision**

### **Introduction**

**1** The complainant, Paul Abi-Mansour, applied for a Human Resources Business Analyst position at the AS-04 group and level in the Department of Aboriginal Affairs and Northern Development Canada (AANDC). Although he met the essential qualifications for this position and was placed in a pool of qualified persons (pool), he was not appointed to a position. The complainant alleges that the respondent abused its authority by discriminating against him on the basis of race and national or ethnic origin, as demonstrated by the respondent's use of improper assessment methods and the appointment of persons who are unqualified or less qualified than him. He also alleges that the respondent retaliated against him for filing his complaints.

**2** The respondent, the Deputy Minister, Aboriginal Affairs and Northern Development Canada, denies the allegations. It contends that the complainant did not demonstrate that he possessed the asset qualifications that were considered in making the appointments at issue.

**3** The Public Service Commission (PSC) did not attend the hearing but made written submissions.

**4** For the reasons set out below, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant has failed to establish that the respondent abused its authority in this appointment process.

### **Background**

**5** On June 23, 2010, the respondent initiated an appointment process (2010-IAN-AO-NCR-HR-103777) to fill one position and to establish a pool of qualified candidates for future Human Resource Business Analyst positions. The assessment process consisted of a review of candidate applications, an interview and reference checks.

**6** There were 26 applicants to the appointment process. Eleven persons were screened into the process after the review of candidate applications. Following the

interviews and reference checks, six persons, including the complainant, were found to meet the essential qualifications and included in the pool.

**7** Mr. S, an Aboriginal person, was the first person appointed to an AS-04 position from the pool. There was no complaint concerning this appointment.

**8** On December 17, 2010, the respondent issued a *Notification of Appointment or Proposal of Appointment* (NAPA) for the appointments of Irena Privalova and Danielle Morin from the pool to AS-04 positions in the Human Resources and Workplace Services Branch (HRWSB) of the department.

**9** On March 14, 2011, the respondent issued a NAPA for the appointment of Natacha Verner from the pool to an AS-04 position in HRWSB.

**10** Following these appointments, the complainant and Josée Chauret remained in the pool of qualified candidates.

**11** The complainant filed two complaints of abuse of authority under s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA). The first complaint related to the appointments of Ms. Privalova and Ms. Morin was received on December 23, 2010, and the second complaint related to the appointment of Ms. Verner was received on March 21, 2011. The two complaints were consolidated for the purposes of these proceedings, in accordance with s. 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, as amended by SOR/2011-116.

**12** The complainant notified the Canadian Human Rights Commission (CHRC), pursuant to s. 78 of the PSEA, that his complaints raised an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). The CHRC informed the Tribunal that it did not intend to make submissions in these complaints.

**13** Two other persons were subsequently placed in AS-04 positions in HRWSB. Ms. V was deployed from another position. Mr. B was appointed from a different appointment process. Neither of these persons participated in the appointment process that is the subject of these complaints. The complainant alleges the respondent

placed these persons from outside the appointment process at issue to avoid appointing him to a position.

## **Issues**

**14** The Tribunal must determine the following issues:

- (i) What is the role of the Tribunal in addressing the complainant's concerns regarding employment equity?
- (ii) Did the respondent abuse its authority by discriminating against the complainant on the basis of race and national or ethnic origin?
- (iii) Did the respondent retaliate against the complainant for having filed his complaints?

## **Analysis**

### **Issue I: What is the role of the Tribunal in addressing the complainant's concerns regarding employment equity?**

**15** The complainant argues that the *Employment Equity Act*, S.C. 1995, c. 44 (EEA), the CHRA and the PSEA are intended to create a representative workforce and should be read together to accomplish this objective. In particular, he cites the Preamble to the PSEA, which states that Canada will continue to benefit from a public service that is representative of Canada's diversity.

**16** He contends that the PSC and federal departments develop and use subjective assessment tools that too often lead to persons in designated employment equity groups being screened out of appointment processes, that the CHRC is not taking action to enforce the legislative requirements, and that the Tribunal interprets s. 30(2) and s. 36 of the PSEA in a manner that gives too much flexibility to the respondent and undermines the objectives of employment equity-related legislation. The complainant submits that, as a result, many complaints come to the Tribunal based on race and national or ethnic origin but none have been successful.

**17** The Tribunal addressed this issue in *Brown v. Commissioner of Correctional Service Canada*, 2011 PSST 0015, at paras. 65-78. In that decision, the Tribunal stated that it is not its role to enforce compliance with the EEA. Citing the Federal Court of Appeal ruling in *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 27, the Tribunal noted that Parliament bestowed that role on the CHRC. Therefore, the Tribunal has no jurisdiction to consider whether a respondent is fulfilling its responsibilities under the EEA.

**18** The mandate of the Tribunal, as it is set out in s. 88(2) of the PSEA, is limited to the consideration and disposition of complaints made under ss. 65(1), 74, 77 and 83 of the PSEA.

**19** The complainant made these complaints under s. 77(1)(a) of the PSEA. This section empowers the Tribunal to examine an internal appointment process to determine if the respondent abused its authority to make appointments based on merit within the meaning of s. 30(2) of the PSEA, which reads as follows:

**30. (2)** An appointment is made on the basis of merit when

(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

**30. (2)** Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :

a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;

b) la Commission prend en compte :

▪ (i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,

▪ (ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

▪ (iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général

▪ .

**20** Although the CHRC has the role of enforcing compliance with the EEA, employment equity matters may nonetheless be relevant to complaints made before the Tribunal under s. 77. The Tribunal determined in *Brown*, at para. 71, that where the deputy head establishes an organizational need as a merit criterion under s. 30(2)(b)(iii), the Tribunal has authority under s. 77(1)(a) to consider "...evidence as to whether or not the deputy head had regard to the identified organizational need when it selected a particular candidate for the position."

**21** In this case, the deputy head established an organizational need in the Statement of Merit Criteria (SMC) which states that it may limit selection to candidates self-identifying as belonging to one of the following employment equity groups: Aboriginal peoples and visible minorities. As such, the Tribunal will consider evidence as to whether the respondent abused its authority in the present case when it had regard to this organizational need in this appointment process.

**Issue II: Did the respondent abuse its authority by discriminating against the complainant on the basis of race and national or ethnic origin?**

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

**23** 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 race, and national or ethnic origin. The complainant alleges that he was discriminated against on these grounds of discrimination.

**24** The complainant bears the burden of proof in a complaint of abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at paras. 48-55.

**25** In determining whether a respondent has engaged in a discriminatory practice, a complainant must first establish a case of discrimination on a *prima facie* basis. In *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at 558 (para. 28), (known as the *O'Malley* decision), the Supreme Court of Canada set out the test for establishing a *prima facie* case of discrimination:

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.

**26** The Tribunal must therefore 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.

**27** Where no direct evidence is available, discrimination may be established by way of inference, through the use of circumstantial evidence. This type of evidence depends on a series of facts that, when combined, may prove discrimination. See *Ben Achour v. the Commissioner of the Correctional Service of Canada*, 2012 PSST 0024 at para. 73.

**28** It is not necessary that the discriminatory considerations be the sole reason for the actions in issue for a complainant to succeed. It is sufficient that the discrimination be a factor for the employer's actions or decisions. See *Silva v. Canada Post Corporation*, 2011 CHRT 8 at para. 35.

**29** 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. If the complainant establishes a *prima facie* case, the respondent must then provide a reasonable explanation to demonstrate that the alleged discrimination did not occur as alleged or was not a discriminatory practice. The explanation cannot be a mere pretext for discrimination. See *Lincoln* at paras. 22-23.

*Has the complainant established a prima facie case of discrimination?*

**30** The complainant claims that his race and national or ethnic origin were factors in the decision not to appoint him to one of the positions at issue. The complainant is an immigrant from Lebanon of Middle Eastern descent. In support of his allegation of discrimination, the complainant submitted evidence related to the assessment process as well as evidence regarding employment equity practices in the respondent's organization.

*a) The complainant's evidence of discrimination regarding the assessment process*

**31** The complainant was invited to an interview on September 23, 2010. The assessment board consisted of Claude Paradis, Tanya Saulnier and Aurora Zhang. He said that the assessment board knew that he had a foreign degree based on his résumé, which listed a degree in mathematics from an institution identified as "Lebanese University" amongst his educational qualifications. He also identified himself as a visible minority person on the application.

**32** The complainant was accompanied into the interview by Mr. Paradis, who asked him the origin of his accent. The complainant testified that during the interview, Mr. Paradis frequently used a probing technique to question him. The complainant stated that this type of technique is used when you think a person is lying. He further stated that Ms. Saulnier asked only one question. When the complainant asked questions, Ms. Saulnier answered but she had little information or said she did not know the answer. The complainant felt that Ms. Saulnier interacted with him in an intimidating manner at the interview. After the interview, the complainant did not feel optimistic about the likelihood of his success in the appointment process. He felt that if he passed it would be at the minimum mark.

**33** In the complainant's view, the assessment process was totally subjective. He noted that the rating guides completed by the assessment board for his interview show marks crossed out and changed. During his testimony, he went through various questions on the rating guide and explained why he thought his marks should have been higher. The complainant believes that he was marked lower than appropriate on certain questions so the assessment board could justify the appointment of other candidates over him.

**34** In addition, the complainant contends that the personal suitability questions were based on the "local culture" within AANDC, with which he is not familiar, having never previously worked in this department. He claims that an objective, written test would have permitted him to demonstrate his strengths in an objective manner, whereas the oral interview relied on the judgement of the assessment board members.



The complainant contends that there is a correlation between subjectivity in assessment and discrimination.

**35** The complainant introduced email correspondence between Ms. Zhang and Julie Clermont, a senior human resources advisor in AANDC. The complainant testified that in one of Ms. Zhang's emails, she is asking if she can "drop" the complainant from the appointment process because one of his references is not available and she did not wish to wait until the referee's return to obtain the reference. He believes that this is evidence showing that the respondent was searching for ways to eliminate him from the process. He asserted in his testimony that staff in Human Resources intervened to keep him in the process.

**36** On November 10, 2010, the complainant was notified by email that he was successful in the assessment process and had been included in the pool of qualified candidates. Four of the six persons in the pool were subsequently appointed to positions. The complainant and one other person were not.

**37** The Job Opportunity Advertisement (JOA) and the SMC for the AS-04 position provide that in order to meet an organizational need, selection may be limited to Aboriginal or visible minority persons. The complainant testified that of the six persons in the pool, only he and Mr. S met this organizational need. Mr. S was the first person appointed from the process. Organizational need was identified as a factor in selecting Mr. S from the pool. The complainant decided not to file a complaint regarding that appointment because Mr. S was a member of an employment equity designated group.

**38** According to the complainant, the appointment of Mr. S is inconsistent with the respondent's Employment Equity Plan. He submits that the representation of Aboriginal persons in AANDC significantly exceeds the workforce availability for this designated group. The only under-represented group in AANDC is visible minorities and although he was the only visible minority person in the pool, he was not appointed. Instead of appointing him, the respondent appointed three white women who do not meet the organizational need set out in the SMC.

**39** According to the written rationales for these three appointments, they were selected on the basis of being the right fit. The complainant testified that asset

qualifications were used in making the right fit decisions and that references were used to assess the asset qualifications.

**40** The complainant believes that references are not a valid tool for assessing qualifications because candidates select friends and colleagues to provide the references. The complainant referred to a document from the PSC entitled *Structured Reference Checking – A User’s Guide to Best Practices* (Guide). According to the complainant, this document states that references should only be used in the final stages of a selection process and should not be used as a basic selection tool. In this process, he claims that the reference checks provided only a cursory assessment of the candidates’ qualifications and did not provide enough information to demonstrate that they possessed the qualifications assessed.

**41** The complainant introduced résumés, references, rating guides and appointment rationales for Ms. Morin and Ms. Privalova. He testified that there are few notes on the interview rating guides so it is not clear to him how the assessment board arrived at its ratings.

**42** Based on his examination of these documents, he does not believe that Ms. Privalova meets the qualifications for appointment. The essential qualifications set out in the SMC included two years of experience in PeopleSoft or an equivalent system. PeopleSoft is the human resources management system used in AANDC. He submits that Ms. Privalova made very little mention of PeopleSoft in her résumé, and the information from her references is not consistent with the respondent’s conclusions in the rationale for her appointment. He adds that Ms. Privalova’s educational background was in arts and not in information technology.

**43** Regarding Ms. Morin, the complainant submits that she failed the interview but was appointed nonetheless. He produced an email from Ms. Zhang dated September 30, 2010, listing the candidates who were successful in the interview process. Ms. Morin’s name is not on the list. The complainant submits that the information on project management in Ms. Morin’s references does not demonstrate that she has the experience described in the rationale for her appointment. In terms of

education, the complainant notes that her résumé mentions a few courses in psychology and criminology.

**44** According to the complainant, his technical experience, education, and technical and analytical skills are superior to both of these appointees. He submits that despite his qualifications the respondent chose to appoint these lesser qualified persons.

**45** The complainant also introduced the résumé, references, rating guides and appointment rationale for Ms. Verner. He submits that her experience relates to data entry and that she has no technical background or in-depth experience in human resources systems. He contends that her references do not support the respondent's claim in her appointment rationale that she has the required experience in PeopleSoft training or in human resources business analysis. The complainant further contends that he does possess these qualifications. At the Coast Guard, he participated in the development of a system called MariTime which is similar to PeopleSoft. He also has experience in training as he has been employed as a teacher.

**46** He claims that the reason he was not selected for this appointment instead of Ms. Verner is because he had filed a complaint regarding the earlier appointments.

**47** Following the above-mentioned four appointments, the complainant and Ms. Chauret were the only two persons left in the pool. The respondent filled two more AS-04 positions but did not appoint anyone from the pool. Ms. V was deployed from another position and Mr. B was appointed from a different pool. Neither of these persons had participated in the appointment process at issue in this case.

**48** Both Ms. Morin and Ms. Privalova left the AS-04 positions to which they were appointed under this appointment process. The complainant contends that Ms. V was deployed to Ms. Morin's position and that Mr. B was appointed to Ms. Privalova's position.

**49** The complainant noted that except for more exacting PeopleSoft qualifications the SMC used with respect to the pool from which Mr. B was appointed was similar to the SMC for this process. He submits that if the respondent needed someone with PeopleSoft qualifications, it could have appointed Ms. Chauret. The complainant

believes that the respondent chose to appoint Mr. B from a different appointment process so that the complainant could not file another complaint. Furthermore, he believes that if Ms. Chauret had been appointed, then the complainant would stand out as being the only person left in the pool who had not been appointed to a position.

**50** The complainant submitted a JOA for an EC-04, Human Resources Planning Analyst position in AANDC. This position is also in the HRWSB. It was posted on April 29, 2011. The complainant testified that he was screened out of this appointment process. He believes this is evidence of retaliation against him.

*b) The complainant's other evidence of discrimination*

**51** The complainant introduced four reports that are not directly related to the appointment process at issue: a PSC audit of a sample of appointments during the period October 2008 through September 2009 in the ten regional offices of AANDC; a departmental employment equity plan covering the period 2008-2011; a HRWSB human resources plan covering the fiscal years 2010/2011 through 2012/2013; and a report on the representation of employment equity groups in AANDC during the period April 1, 2010, to December 31, 2010.

**52** The PSC audit found that merit was not demonstrated in 63% of the 64 appointments reviewed. In 28 of these appointments, the PSC found that the documentation on file did not permit it to determine whether all qualifications were assessed or that there was a clear link between the qualifications and the assessment. It also found that for 12 of these appointments, there was no assessment documentation at all. The PSC recommended that the respondent improve compliance by developing assessment tools and methods that fully and fairly assess essential qualifications and other identified merit criteria and that the appointments and appointment processes be fully documented. According to the complainant, the audit demonstrates that merit is not respected in AANDC.

**53** The complainant also drew the Tribunal's attention to a number of passages in the AANDC Employment Equity Plan (EE Plan). It was developed to meet the requirements of the EEA and to outline how AANDC will ensure that it has fair employment systems and a representative workforce. The passages state that in

Canada, the education and work experience of visible minority immigrants tends to be undervalued by employers; visible minorities (especially immigrants) are more likely to be under-employed; visible minorities face a range of barriers found in racism and negative attitudes, corporate culture and unequal treatment; and they tend to be segregated into specialist and technical positions rather than supervisory or managerial positions. The report notes that in the federal public service, there are relatively more visible minority applications for positions than there are appointments and that the PSC intends to explore the issue to determine if this is the result of systemic barriers unrelated to ability. In AANDC, visible minorities represented 6.3% of employees in fiscal year 2006/07 and received 6.9% of all departmental promotions. The EE Plan goes on to state that AANDC will develop a plan to remove employment equity barriers where they are identified and will develop a toolkit to aid in the recruitment of persons in the designated employment equity groups. AANDC would also develop recruitment strategies to meet hiring targets, and identify employment equity as an organizational need for positions for which under-representation has been identified. The complainant contends that in its EE Plan, AANDC is admitting that it has employment equity problems and that action is required to correct them.

**54** In its human resources plan, the HRWSB states that targeted visible minority staffing processes are required to close the gap between visible minority representation in the branch and workforce availability. The complainant contends that this provides general support for his claim that there is discrimination in AANDC.

**55** The complainant submitted a statistical report produced by AANDC, showing the distribution of employment equity groups in the department and the workforce market availability during the period April 1, 2010, to December 31, 2010. He claims that this data provides further support for his claim of discrimination. He testified that the workforce market availability of visible minorities during the period April 1, 2010 to December 31, 2010 was 10.7%. However, the actual visible minority representation in the department was below this figure, and it declined from 8.77% to 8.49% during the course of this period.

**56** According to the complainant, this data also shows that the representation of Aboriginal persons and women in AANDC exceeded their workforce availability, yet the

respondent appointed an Aboriginal person and three women from the pool while failing to appoint him.

*Finding regarding the prima facie case of discrimination*

**57** The complainant argues that two tests that have been developed in human rights law to determine whether a *prima facie* case of discrimination has been established can be applied to his situation. The *Shakes* test (*Shakes v. Rex Pak Ltd.* (1981), 3 C.H.R.R. D/1001 (Ont. Bd. Inq.) at para. 8919) holds that a *prima facie* case has been proven if:

- The complainant was qualified for the particular employment;
- The complainant was not hired; and
- Someone no better qualified but lacking the distinguishing feature which is the gravamen of the human rights complaint subsequently obtained the position.

**58** According to the test set out in *Israeli v. Canada* (*Canadian Human Rights Commission*), 1983 CanLII 6 (CHRT), (1983), 4 C.H.H.R.D./1616 (C.H.R.T.), a *prima facie* case is made out if it is established that:

- The complainant belongs to one of the groups which are subject to discrimination under the CHRA, e.g. race, national or ethnic origin;
- The complainant applied and was qualified for a job the employer wished to fill;
- Although qualified, the complainant was rejected; and
- Thereafter, the employer continued to seek applicants with the complainant's qualifications.

**59** Applying the *Shakes* test to the present case, the complainant claims that he was qualified because he was placed in the pool of qualified candidates. Although he was qualified, and the only visible minority person in the pool, the respondent chose to appoint other persons to the available positions, who were not Middle Eastern or of Lebanese origin.

**60** The complainant further submits that the criteria established by the *Israeli* test have also been met. He claims that the respondent continued to seek candidates and ultimately deployed or appointed persons from outside the pool to replace Ms. Morin and Ms. Privalova, even though the complainant was still in the pool of qualified candidates.

**61** The Tribunal finds that the complainant has satisfied the test for establishing a *prima facie* case of discrimination, as set out in *O'Malley*. The complainant's evidence, if believed and in the absence of an answer from the respondent, would demonstrate that the respondent tried to unfairly eliminate him from the appointment process when one of his references was unavailable, used assessment tools that were highly subjective, appointed unqualified persons to positions, all of whom were neither Middle Eastern, of Lebanese origin or visible minorities, and included him in the pool with no intention of appointing him to a position. It would also establish that the respondent appointed women who were not underrepresented in AANDC rather than an underrepresented visible minority person, recruited persons from outside the pool rather than appoint him, and refused to appoint Ms. Chauret so that the complainant would not be the only person left in the pool without an appointment. In addition, the complainant filed reports and other documents that refer to staffing problems and employment equity representation shortfalls for visible minority persons in AANDC, as well as documenting HRWSB's intent to recruit more visible minority persons.

**62** If one were to apply the *Shakes* test, the Tribunal finds that the complainant's evidence, if believed and in the absence of an answer from the respondent, establishes that he was qualified for the positions inasmuch as he met the essential qualifications, he was not hired, and someone no better qualified than him was appointed who lacked his distinguishing features, namely persons who were not of Middle Eastern or Lebanese origin or visible minorities. Similarly, regarding the *Israeli* test, it would establish that the respondent continued to seek candidates and ultimately filled two positions with persons from outside the pool of qualified candidates in which he was still included.

**63** As will be shown later in this decision, however, the respondent led convincing evidence to rebut the *prima facie* case and demonstrate that in fact the complainant's

race or national and ethnic origin were not factors in its decision to appoint persons other than him. In particular, the respondent established that although the complainant may have met the essential qualifications for these positions, he did not possess the asset qualifications that were likewise considered in making the appointments at issue.

*The respondent's explanation for its decision not to appoint the complainant to a position*

**64** The Tribunal finds that the respondent has persuasively rebutted the allegations upon which the complainant bases his *prima facie* case of discrimination. The respondent's explanation is centred on the fact that the complainant failed to demonstrate to the assessment board that he possessed the asset qualifications being sought by the respondent in the appointments, including experience with the PeopleSoft software application.

**65** The respondent called Ms. Zhang to testify. She has been employed in AANDC since April 2008 and has been a Project Manager in the Business Improvement Directorate of HRWSB since September 2010. She is responsible for the planning and execution of information management and information technology projects related to human resources.

**66** Ms. Zhang described HRWSB's organization chart, which has five AS-04 positions. The AS-04s collect and analyze data, assess business requirements, produce reports, provide reporting solutions, and consult users of PeopleSoft data.

**67** An AS-04 appointment process was initiated in early 2010 to fill some of these positions. Experience with PeopleSoft was an essential qualification in that appointment process. However, there were few strong candidates with PeopleSoft experience and the process proved unsuccessful. Shortly thereafter, the process at issue was initiated. The SMC was similar to the previous one, except that the essential PeopleSoft qualifications were changed to two years' experience in PeopleSoft **or an equivalent system**.

**68** In this process, the respondent established four asset experience qualifications as follows: experience in PeopleSoft version 8 or 8.9 or equivalent system, experience



in providing or facilitating training on PeopleSoft, experience in HR Business analyzing and system impact identification, and experience in project management. There was also an asset knowledge qualification: knowledge of SQL or other database queries. Ms. Zhang testified that some, but not necessarily all, of the asset qualifications would be needed for certain of the positions to be filled.

**69** According to Ms. Zhang, the respondent preferred to appoint persons with PeopleSoft experience because it is the only human resources system in use in the department. However, having failed to find qualified persons with the desired PeopleSoft experience in the earlier appointment process, they were prepared, if necessary, to hire someone with experience on another human resources information system and train them on PeopleSoft. Ms. Zhang said that based on her experience, it would take about two years to train a person to become a fully qualified business analyst in PeopleSoft. She explained that she has been in her position for more than four years and still does not consider herself an expert on PeopleSoft. She also said that she has a staff person with four or five years of experience who does daily research to keep up to date on the system.

**70** The respondent also called Ms. Saulnier as a witness. She is the Director of the Process Improvement Directorate in HRWSB and, as previously mentioned, was also a member of the assessment board. Ms. Saulnier explained that she has significant experience in information technology having progressed in the computer systems group from CS-01 to CS-03 and subsequently to an AS-07 manager position at the Department of Fisheries and Oceans (DFO). She joined AANDC in August 2010.

**71** Ms. Saulnier testified that she has 13 years of experience with PeopleSoft. In her opinion, it takes a minimum of three years to become sufficiently proficient to provide support to users of the system. Despite her years of experience she claims that she is still learning things about PeopleSoft.

**72** Ms. Saulnier stated that while at DFO she became familiar with the MariTime system used by the complainant. The Coast Guard is a part of DFO. She testified that the MariTime system takes some data from PeopleSoft but it is a separate system.

She said it is also used for other tasks such as time management and fuel requirements for ships.

**73** According to Ms. Saulnier, the respondent wanted to hire people who would quickly be up and running on the job. She stated that in his application, the complainant demonstrated that he had experience in an equivalent human resources business system but not in PeopleSoft. He also failed to demonstrate that he had the other asset qualifications as requested on the JOA.

*Did Ms. Zhang attempt to unfairly eliminate the complainant from the assessment process?*

**74** Ms. Zhang explained the email correspondence between her and Ms. Clermont concerning one of the complainant's references, Steve Peck. This is the correspondence submitted by the complainant in support of his contention that Ms. Zhang tried to "drop him" from the appointment process.

**75** Ms. Zhang testified that when she tried to contact Mr. Peck by email for the reference on October 12, 2010, she received an "out of office" reply indicating that he would not be back in the office until October 25, 2010. She forwarded this email to Ms. Clermont asking what her options were if she (Ms. Zhang) did not want to wait until October 25, 2010, to obtain the reference. Ms. Clermont replied that she could ask the candidate to provide a substitute reference. Ms. Zhang then wrote back stating that she "...thought we could drop him because of it..." Ms. Zhang testified that the reference to "him" in the email was a reference to Mr. Peck, not the complainant. What she meant was that she had thought she could drop Mr. Peck in favour of another reference, and that Ms. Clermont had confirmed this. Ms. Zhang testified that Mr. Peck read his emails despite being away and offered to provide the requested reference.

**76** The Tribunal finds that the respondent's interpretation of the emails is more consistent with the evidence. The emails are clearly related to the availability of one of the complainant's references and Ms. Zhang appears to be simply seeking advice from Ms. Clermont regarding what she should do if the reference is not available. The advice she receives is to ask the complainant for a new reference. Despite the complainant's contention, there is nothing in the emails to suggest that Ms. Clermont thought that

Ms. Zhang was trying to eliminate the complainant from the appointment process or that she or anyone else in Human Resources intervened to insist that the complainant remain in the process. Ms. Clermont testified during the hearing, and while the complainant asked her a number of questions he did not use this opportunity to adduce any evidence from her to confirm his contention that Human Resources staff intervened to keep him in the appointment process.

*Did the assessment methods used by the respondent contribute to a discriminatory outcome in this case?*

**77** The complainant alleges that the respondent used subjective interview and reference methods to assess employees, which he submits contribute to discrimination. He believes that the respondent should have used an objective written test to assess candidates. He also believes the respondent violated PSC guidelines when it collected references and used personal suitability qualifications that favour those with knowledge of the “local culture” at AANDC.

**78** Before proceeding with the respondent’s answer regarding this allegation, it should be noted that the role of the Tribunal under s. 77 of the PSEA is to determine whether there has been an abuse of authority. The Tribunal may examine the assessment process but it is not its role to reassess candidates or redo an appointment process. See, for example, *Elazzouzi v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 0011, confirmed in *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 42-46.

**79** Ms. Zhang testified that the assessment board had used a written test in the earlier unsuccessful appointment process. For this process, the board members felt that they had sufficient assessment tools to make a decision without a written test. She admitted that each tool has its strengths and weaknesses so they used a combination of tools. The same methods were used to assess all eleven candidates who passed the initial screening.

**80** Ms. Zhang considered the review of résumés to be objective since it was based on what is written by the applicants. This information was then confirmed by reference checks. She acknowledged that the interview could be considered subjective so the

assessment board developed a rating guide in which each question in the interview was linked to a qualification in the SMC. The reference checks were conducted by both email and a conversation with the referee to improve objectivity.

**81** Ms. Saulnier did not agree that the interview questions were subjective. She testified that the questions were related to the essential qualifications and allowed the board to assess whether the candidates had the required qualifications. She said that after each interview, the board went through the candidate's answers question by question and discussed them until they reached a consensus. This discussion sometimes led a board member to change the score on their rating guide.

**82** Section 36 of the PSEA provides that a deputy head may use "any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i)". The respondent has broad discretion to determine the assessment methods to be used. It may use written tests, but it is not required to do so.

**83** In fact, as the PSC noted in its submissions, a written test may pose a barrier for certain employment equity designated persons, such as the visually impaired.

**84** The respondent disputes the complainant's interpretation of the PSC Guide on reference checking. It submits that the Guide provides that reference checks can be used to assess some of the qualifications on the SMC, and to verify the accuracy of information provided by candidates on application forms, résumés and interviews. While the respondent acknowledges that the Guide states that reference checks are "usually" conducted in the final stage of an assessment process, the Guide also states in the same paragraph that reference checks can be done in the earlier stages. According to the respondent, the use of references in this assessment process was consistent with the advice in the Guide.

**85** The Tribunal agrees with the respondent's interpretation and finds that the construction proposed by the complainant is inconsistent with the terms of the Guide when it is read as a whole. The Guide provides that references can be conducted at

various stages in the assessment process and they can be used to assess qualifications as well as to verify information provided by job applicants.

**86** Although the complainant made a broad allegation that references are generally biased because they reflect the views of friends and colleagues, he presented no specific evidence to call into question the integrity of the referees used in this appointment process. The Tribunal notes that the Guide provides that it is a good practice to contact at least two or three referees, preferably recent immediate supervisors, clients and co-workers. In this appointment process, the respondent obtained at least three referees from each appointee, including the immediate supervisor. There is no evidence to support the complainant's assertion that the referees lacked integrity or provided false or misleading information in the references.

**87** With respect to the complainant's allegation that the personal suitability qualifications are based on the "local culture" at AANDC, and would therefore appear to favour persons already employed in AANDC, the evidence shows that the three appointees under this appointment process and Mr. B were all appointed from outside AANDC. Only Ms. V, who was deployed, came from within AANDC. If the personal suitability qualifications reflected local culture, they do not appear to have constituted a barrier to employment of persons from outside the department.

**88** The evidence does not support a finding that the assessment methods used by the respondent were inappropriate or contributed to a discriminatory outcome in this case. The Tribunal finds that the respondent has provided a reasonable explanation for the selection and use of assessment methods in this appointment process.

*Were the persons appointed to AS-04 positions qualified?*

*a) The complainant's qualifications for appointment*

**89** As noted above, Ms. Saulnier explained how the assessment board arrived at a consensus in assessing the essential qualifications in the interview. Both Ms. Zhang and Ms. Saulnier testified that the asset experience qualifications were used in determining whom to appoint from the pool. They testified that the appointees were the right fit for appointment because they had the required essential and asset qualifications

for the positions to which they were appointed. The respondent noted that the JOA for the appointment process states that applicants must demonstrate on their applications that they meet the asset qualifications. It submits that the complainant provided incomplete information about his asset qualifications on his application.

**90** The respondent noted that in the document entitled *AS-04 Business Analyst C.V., Interview and Reference Rating Summary* (the Board Report) for the appointment process, the complainant is only shown as having one asset qualification, experience in a system equivalent to PeopleSoft, referring to his experience with MariTime. He did not indicate that he had any experience with PeopleSoft in his application.

**91** On cross-examination by the respondent, the complainant testified that he forgot to provide the asset qualification information in his application. He claimed that under s. 30(2) of the PSEA, it is only the essential qualifications that are necessary for appointment. He also testified that until it was presented to him at the hearing, he had not read the portion of the JOA that stated candidates may be required to meet the asset qualifications or organizational needs in order to be appointed to a specific position.

**92** It appears that the complainant's own omission contributed to his not being appointed. He failed to provide complete information on the asset qualifications in his application. While he is correct that s. 30(2) of the PSEA requires that a person to be appointed must meet the essential qualifications, that section also provides that the Commission, or delegated deputy head, will have regard to any non-essential asset qualifications, operational requirements and organizational needs in deciding whom to appoint. In *Guimond v. Deputy Minister of National Defence*, 2009 PSST 0023, at para. 36, the Tribunal stated: "When a manager decides to use non-essential criteria, **these criteria must be considered** before the person to be appointed is chosen" (emphasis added). Therefore, it was appropriate for the respondent to consider the asset qualifications in determining who among the qualified candidates was the right fit for appointment from this appointment process. See *Guimond*, at para. 34 regarding the use of the term "right fit".

**93** It is the applicant's responsibility to provide all of the information requested in the JOA. It is not the respondent's responsibility to infer that a candidate has certain qualifications or to seek further information from candidates concerning their qualifications, particularly when they have been instructed in the JOA, as was the case here, to provide such information in their application. See *Abi-Mansour v. Deputy Minister of Foreign Affairs and International Trade Canada*, 2012 PSST 0008, at para. 50.

**94** For these reasons, the Tribunal finds that the respondent has established that the complainant did not demonstrate that he possessed the additional asset qualifications the respondent sought in making these appointments.

**95** The Tribunal therefore concludes that, once the evidence adduced by the respondent is taken into account, the foundation upon which the complainant established his *prima facie* case pursuant to the *Shakes* and *Israeli* tests is rebutted. A common element for both tests is that the complainant be qualified for the positions that are being filled, which in addition to the essential merit criteria, must also take into account the asset qualifications, operational requirements and organizational needs that the employer is seeking in the persons to be appointed. The evidence shows that the complainant did not meet the asset qualifications required for these positions.

*b) The assessment of Ms. Morin*

**96** Ms. Zhang testified that the interview assessed the essential knowledge, ability and personal suitability qualifications. Reference checks were also used to assess personal suitability. According to Ms. Zhang, Ms. Morin was not on the September 30, 2010, list of candidates who were successful in the interview because she had failed one personal suitability qualification, effective interpersonal skills. Since Ms. Morin had failed this essential qualification, the assessment board planned to eliminate her from the process and did not proceed with her reference checks. However, the Human Resources Advisor reminded the board that personal suitability was to be assessed by both the interview and reference checks. She advised them to proceed with Ms. Morin's reference checks as it might lead them to reconsider the failing mark.

**97** A passing mark on this qualification was a score of 3 out of 5. The reference check emails show that three of Ms. Morin's referees gave her a score of 4 and a fourth gave her a score of 5. According to Ms. Zhang's testimony, she followed up with the referees by telephone to discuss their reference emails. Both Ms. Zhang and Ms. Morin testified that based on the interview and the reference checks, the assessment board determined that Ms. Morin should receive a passing mark on effective interpersonal skills. Ms. Morin was subsequently included in the pool.

**98** Ms. Saulnier prepared the rationale for Ms. Morin's appointment. The rationale states that the key criteria for her appointment included two of the essential qualifications and the asset qualifications related to human resources business analysis/system impact identification and project management. The rationale also states that the position required someone with strength in analytical abilities around all (human resources) disciplines.

**99** According to Ms. Saulnier, Ms. Morin's résumé and the reference checks confirmed that she possessed these asset qualifications. She described where the project management experience can be found in Ms. Morin's résumé. She also testified that Ms. Morin provided structured answers to questions related to projects in her interview. Although the asset qualification of experience in PeopleSoft was not a requirement for this appointment, Ms. Saulnier testified that Ms. Morin's résumé states that she had experience with PeopleSoft version 8 when she worked at the Royal Canadian Mounted Police.

**100** Ms. Saulnier explained that the complainant had not demonstrated that he had the human resources business experience being sought for this appointment. Based on her knowledge of the MariTime system and a review of the complainant's résumé, Ms. Saulnier considered the complainant's human resources experience with MariTime to be primarily limited to training and the certification of training.

**101** The crux of the complainant's argument with respect to Ms. Morin's lack of qualifications is his contention that her references did not confirm the asset qualifications that were used by Ms. Saulnier in the appointment rationale.



The complainant claims that the referees did not confirm her experience in project management and human resources business analysis/system impact identification.

**102** The evidence shows that Ms. Morin provided the respondent with four referees. Two of the referees stated that she had very limited experience in project management, one stated that she worked on several projects and the fourth stated she was actively involved in a human resources information systems project. The Tribunal does not find evidence of an abuse of authority in the evaluation of Ms. Morin's project management experience. The SMC called for experience in project management. It did not specify the length or depth of experience required, and the references indicate that she has experience in project management.

**103** Regarding Ms. Morin's human resources business analysis/system impact identification experience, Ms. Morin's immediate supervisor confirmed that she does have this experience. Another referee initially said Ms. Morin was not involved in these activities but went on to explain how she was engaged in assessing the impact of moving to the next version of their human resources information system. The third referee said she could not comment on human resources business analysis but confirmed Ms. Morin's involvement in system impact identification. The fourth referee simply said she did not understand what was meant by system impact identification. At least one referee, Ms. Morin's immediate supervisor, confirmed that she had this experience. The Tribunal is satisfied that the evidence is sufficient to support the respondent's conclusion that Ms. Morin possessed the required experience.

**104** The complainant also submits that Ms. Morin only has a secondary school diploma and some university level courses in psychology and criminology. He has a university degree and his education qualifications are, therefore, superior to Ms. Morin's. However, the Tribunal notes that the SMC does not specify that a university degree is required for these positions. The SMC states that a college diploma or an acceptable combination of education, training and experience are required. It is up to the assessment board to determine whether a candidate meets this criterion.

*c) The assessment of Ms. Privalova*

**105** The appointment rationale for Ms. Privalova was signed by Ms. Zhang. It shows that the appointment was based on three asset qualifications – experience in PeopleSoft, in providing or facilitating training on PeopleSoft, and in HR business analysis and system impact identification. Ms. Zhang testified that at the time of this appointment they were responding to an audit of PeopleSoft and needed a candidate who knew the system well. Ms. Privalova was hired from Agriculture Canada where she had spent a number of years working on PeopleSoft as a Junior Business Analyst, AS-03. She testified that the required asset experiences were in Ms. Privalova's résumé and were confirmed in a telephone conversation with her supervisor.

**106** Ms. Zhang testified that since the complainant was in the pool, he could have been considered for this position. This appointment, however, was based on the need for PeopleSoft experience, so persons in the pool with PeopleSoft experience were considered preferable to persons with experience on an equivalent system.

**107** The Tribunal notes that the reference from Ms. Privalova's client states that he is not in a position to provide a response because he did not work directly with her. Ms. Privalova's colleague referee could not provide any information on two of the three asset qualifications on which information was sought. Nevertheless, according to Ms. Zhang, the primary reference for Ms. Privalova was her immediate supervisor, who confirmed by telephone her experience in all three asset qualifications.

**108** Ms. Zhang acknowledged that she did not have any document confirming her telephone conversations with Ms. Privalova's supervisor. Ms. Zhang explained that because she had a structured list of reference questions, she did not think that she needed notes of these telephone conversations.

**109** The Tribunal notes that reference questions are a means to obtaining the information necessary to assess a candidate. It is not sufficient to document only the reference questions. It is the answers to those questions that describe the information relied upon by the assessment board in arriving at its assessment.

**110** The PSC document *Guidance Series – Assessment, Selection and Appointment*, states:

3.8 Staffing Documentation

In accordance with the Policy on Selection and Appointment, the reasons for an appointment decision must be documented. This documentation will help to ensure fairness and transparency and also reinforces the manager's accountability for decisions. This documentation will be useful during informal discussion, or in providing information during an investigation or in a complaint at the PSST. In addition, this information must be accessible for a period of five years from the last administrative action (as required by the Appointment Delegation and Accountability Instrument).

**111** The Tribunal has reviewed Ms. Privalova's résumé and finds that there is no reason to call into question the credibility of Ms. Zhang's testimony regarding the supervisor's reference. While the failure to record the reference information was an error, the Tribunal does not find that it is sufficiently serious to warrant a finding of abuse of authority in this case (see *Tibbs* at paras. 65 and 66), nor that it establishes that the complainant's race and national or ethnic origin were factors in the decision not to appoint him.

**112** The complainant testified that there is very little mention of PeopleSoft in Ms. Privalova's résumé. However, in her résumé she claims four years' experience working with PeopleSoft.

**113** The complainant also questioned whether Ms. Privalova met the educational qualifications for appointment. He noted that her degree is in arts, not in information technology. However, the SMC requires a college diploma and it does not specify that the education must be in a specific field of study. Ms. Saulnier testified that AS-04s in her directorate do some data retrieval but do not do programming; she described her directorate as engaged in a human resources function not an information technology function.

*d) The assessment of Ms. Verner*

**114** The complainant submits that Ms. Verner's experience relates to data entry and that she has no technical background or in-depth experience in human resource systems. He contends that her references do not support the respondent's claim in the

appointment rationale that she has the required experience in PeopleSoft training or in human resources business analysis.

**115** The appointment rationale for Ms. Verner was signed by Ms. Saulnier. It states that the Process Improvement Directorate is mandated to oversee the effective and efficient implementation of PeopleSoft 8.9. It also states that it is committed to implementing best practices resulting from the work of a public service-wide collaboration of subject-matter experts. As a result, the respondent was seeking to appoint a person with experience in PeopleSoft and in HR business/system impact identification.

**116** Ms. Saulnier testified that the Board Report for the appointment process shows that Ms. Verner meets these two asset qualifications. Ms. Saulnier identified where the asset qualifications could be found in Ms. Verner's résumé. She noted that the purpose of the reference checks was not to evaluate the asset qualifications but simply to confirm what was in the résumé.

**117** Ms. Saulnier acknowledged that the complainant had programming skills, but noted that this is not a requirement for appointment. She added that, in the absence of information in the complainant's résumé, she could not assume that he had additional asset qualifications. She acknowledged that the complainant had a higher level of education than Ms. Verner, but the SMC provides that these positions only require a college diploma or an acceptable combination of education, training and experience.

**118** As noted above, the Tribunal finds that the SMC does not specify that a technical background is required for appointment to these positions.

**119** The résumé shows that Ms. Verner had over four years' experience in positions involving the use of PeopleSoft at the time of her application. The SMC requires two years' experience in PeopleSoft or an equivalent system.

**120** The rationale for Ms. Verner's appointment states that her appointment is based on the asset qualifications related to experience in PeopleSoft and experience in human resources business analysis and system impact identification. It does not require experience in providing or facilitating training on PeopleSoft. References from

Ms. Verner's immediate supervisor and a colleague confirm that she has experience in PeopleSoft. Her immediate supervisor's reference confirms that she acquired human resources business analysis and system impact identification experience while working on a PeopleSoft team in the Department of Canadian Heritage.

*e) Finding regarding the assessments of Ms. Morin, Ms. Privalova and Ms. Verner*

**121** The Tribunal is satisfied with the respondent's explanation regarding the qualifications of the appointees. The respondent established that its human resources information system, PeopleSoft, is a complex application and that it therefore preferred to hire persons with PeopleSoft experience rather than persons with experience in an equivalent system who would require two to three years of training to become proficient in PeopleSoft.

**122** The initial appointment of Mr. S was not challenged by the complainant. Two of the three other appointments made from the pool (Ms. Verner and Ms. Privalova) were to positions requiring experience in PeopleSoft or an equivalent system. Both of these appointees had PeopleSoft experience and were, for the reasons stated above, the right fit for appointment in preference to the complainant who had experience in an equivalent system but did not have PeopleSoft experience. The remaining appointee (Ms. Morin) possessed asset qualifications that the complainant had not demonstrated. These three persons were appointed for their specific asset experience, not to avoid appointing the complainant.

**123** The Tribunal therefore finds that the complainant has not demonstrated that Ms. Morin, Ms. Privalova and Ms. Verner were not qualified for appointment.

*Why did the respondent appoint Mr. B and deploy Ms. V instead of appointing the complainant or Ms. Chauret from the pool?*

**124** Ms. Zhang testified that Ms. Privalova left her position in June 2011, creating a vacancy. As noted above, experience in PeopleSoft was a key requirement for that position. Ms. Chauret had PeopleSoft experience but when she was contacted she said that she had another offer and was no longer interested in a position at AANDC. The complainant did not have PeopleSoft experience so he was not considered the right fit

for this appointment. Ms. Zhang considered conducting a new appointment process but was informed by Human Resources staff that she first had to consider existing pools before commencing a new process. She found Mr. B in a pool from an appointment process in another Branch at AANDC. She determined that the SMC for that process met her needs and Mr. B had the required PeopleSoft experience.

**125** Ms. Saulnier testified that Ms. V was deployed to replace Ms. Morin who left her position in May 2011. The deployment took place on September 6, 2011. She said that she needed someone with experience in human resources for this position. Ms. V had been working as a Business/Office Manager (AS-04) on the Human Resources Business Solutions Pilot in the Chief Information Officer Branch and had the required experience.

**126** The Tribunal finds this a reasonable non-discriminatory explanation for Mr. B's appointment and Ms. V's deployment. There is no evidence to indicate that this explanation was a pretext for discrimination.

*Did the respondent interview the complainant in an intimidating manner?*

**127** Ms. Saulnier acknowledged that Mr. Paradis intervened in the complainant's interview when he felt that the candidate was getting off track in his answers. These interventions may have involved probing questions. She stated that the assessment board intervened in the same fashion during the interviews of other candidates. All members of the assessment board asked questions for clarification when they did not understand a candidate's answers. The purpose of the interventions was to help the candidates provide their best answers and demonstrate their qualifications.

**128** Ms. Saulnier said that the complainant asked a few questions during the interview when he did not understand a question posed to him by the assessment board.

**129** While the complainant may have perceived the assessment board's interventions to be discriminatory or intimidating, the Tribunal finds that this allegation lacks specificity. Other than the comment made by Mr. Paradis on the way into the interview, no specific example was provided to the Tribunal of what the complainant considered to

be an improper or intimidating question. The complainant had an opportunity to elicit information in support of his allegation when he cross-examined Ms. Saulnier; however, he did not ask her any questions about his interaction with her during the interview.

**130** The Tribunal finds that the assessment board's interventions were merely an attempt to manage time and elicit relevant information from the complainant and other candidates. There is nothing in the evidence to support the complainant's assertion that probing is a technique that is used when an assessment board suspects a candidate of lying or that the assessment board had any reason to think that the complainant was lying to them during his interview.

**131** Furthermore, with respect to Mr. Paradis' question about the origin of the complainant's accent, given the Tribunal's findings regarding the interview and the context in which the question was asked during their walk to the interview room, the Tribunal concludes that the conversation was nothing more than small talk. The Tribunal finds that the respondent has provided a reasonable explanation for its approach to questioning candidates during the interview process and there is no basis upon which to find that this explanation was a pretext for discrimination.

**132** The complainant testified that when he left the interview, he felt that even if he passed, his marks would be so low that the respondent would be able to justify appointing other qualified candidates, with presumably higher marks, instead of him.

**133** As explained above, the interview only assessed the essential qualifications. There is no evidence that the respondent used the relative scores of the candidates on the essential qualifications in selecting candidates. In fact, the appointment rationale for Ms. Privalova only mentions asset qualifications.

**134** The appointment rationales for Ms. Morin and Ms. Verner mention two essential qualifications and two asset qualifications as key to their appointments. Even if the complainant had obtained a higher score than the appointees on these essential qualifications, he did not demonstrate that he possessed the asset qualifications that were considered in making these appointments. This being the case, the complainant's relative scores on the essential qualifications are not relevant.

*Did the respondent fail to properly apply the Organizational Needs qualification in the SMC?*

**135** Ms. Zhang acknowledged that the organizational needs section of the JOA stated that selection for appointment “may” be limited to Aboriginal people and visible minority persons. However, she testified that this was not a “targeted” appointment process and therefore there was no requirement to give preference to someone from one of these designated employment equity groups. Ms. Zhang explained that the organizational need would be used as a tie-breaker where two candidates were otherwise equally qualified.

**136** The Tribunal finds that the organizational needs section of the JOA clearly states that the respondent “may” give preference to Aboriginal or visible minority persons. The complainant did not point to any provision in the PSEA, or any regulations or applicable policy that prohibits this approach. Moreover, even if the application of the organizational needs section was mandatory, the complainant still lacked the asset qualifications to be the right fit for the three appointments at issue.

**137** The Tribunal therefore finds that the respondent has provided a reasonable explanation for its decision not to apply the organizational needs section of the JOA, and to appoint three women, rather than the complainant. There is no evidence to show that this explanation was given as a pretext to discriminate against the complainant.

*Does the additional documentary evidence support the complainant’s allegations that he has been discriminated against on the basis of race, national or ethnic origin?*

**138** The respondent introduced a document showing the employment equity distribution in AANDC for the period April 1, 2011, to March 31, 2012. The complainant acknowledged that it shows the representation of visible minority persons in the department increased from 9.47% to 9.85% during this period.

**139** The respondent submits that the PSC audit of staffing in AANDC’s regional offices does not have any probative value in this case, as the PSC also stated in its written submissions. The respondent argues that the audit did not include the



National Capital Region (NCR) where this appointment process took place, and no one familiar with the audit was called to testify. It states that the complainant's interpretation of the audit is purely speculative.

**140** It also argues that the EE Plan is a general document and does not apply specifically to this appointment process. It notes that no one familiar with the document was called to speak to its relevance in this case.

**141** The respondent noted that Ms. Zhang and Ms. Saulnier testified that Mr. S is an Aboriginal person, Ms.V is a non-status Indian and Mr. B is a visible minority person. Ms. Privalova is an immigrant with a degree from a university in Russia. Ms. Saulnier testified that of the 15 staff in her directorate, three are Aboriginal persons and three are visible minority persons. These employees constitute 40% of her staff.

**142** The Tribunal is not persuaded by the submissions of the respondent and the PSC that the audit of staffing in AANDC's regional offices is necessarily without probative value simply because the audit did not cover the NCR. The NCR and the other regions are under the same deputy head, and there is no basis to assume that the NCR is free from the problems found in the regions. Nevertheless, the Tribunal finds that while the problems found in the audit relate to inadequate tools, processes or documentation of appointments, there is nothing in the audit to suggest that the staffing problems in AANDC's regions are linked to discrimination.

**143** The EE Plan is a document AANDC is required to prepare under the EEA. The excerpts of the EE Plan cited by the complainant outline problems faced by immigrants and visible minority persons in Canada, and possible issues of discrimination in the Public Service of Canada and in AANDC. The complainant also cited passages showing that the promotion rate of visible minority persons in AANDC **exceeds** their representation within the department, and describing the steps that AANDC plans to take to close the gap between visible minority representation in AANDC and in the workforce. Although it was not part of the complainant's evidence, the Tribunal notes that other sections of the EE Plan outline the benefits of a diverse and representative workforce and that the purpose of the EE Plan is to attract, retain and promote members of designated groups. Nothing in the EE Plan admits to

discriminatory behaviour in AANDC or in the appointment process that is the subject of these complainants. The conclusion that the Tribunal reaches from examining the EE Plan is that AANDC recognizes that it has an employment gap with respect to visible minority persons and that it is taking steps, as noted in the section entitled *EE Plan Objectives*, to close that gap and to create an inviting work environment for visible minority persons.

**144** Although the HRWSB Human Resources Plan covers a subject area that is broader than employment equity, having reviewed the document, the Tribunal reaches the same conclusion with respect to this document as it does regarding the EE Plan.

**145** The employment equity data presented by both the complainant and the respondent demonstrates that visible minority persons are underrepresented in AANDC. The complainant submits that the data he presented should take precedence because it covers the period of April 1 – December 31, 2010, when the assessment process took place. The respondent's data, which covers the period of April 1, 2011 – June 30, 2012 shows an improving trend in visible minority representation. The Tribunal notes that although the assessments under this appointment process took place in 2010, the appointments of Ms. Verner and Mr. B, as well as the deployment of Ms. V took place in 2011. Therefore, the EE data for both time periods have some relevance to this appointment process.

**146** This data adds specificity to the information contained in the EE Plan of AANDC, discussed above. It confirms that there is a gap in visible minority representation and show that AANDC's efforts to close the gap are bearing some fruit. By June 30, 2012, the gap between workforce availability and visible minority representation in AANDC had been reduced to 0.65%. The Tribunal notes that within AANDC, the representation for the other three employment equity designated groups (Aboriginal persons, disabled persons and women) exceeds workforce availability. Given this relatively small gap, which has been narrowing in recent years, the Tribunal does not find that the data is of assistance in determining whether discrimination was a factor in the decision not to appoint the complainant. The data is particularly inconclusive when considering the diverse characteristics of the appointees and the person deployed. Furthermore, according to the uncontested testimony of Ms. Saulnier,

of the 15 employees in her directorate, three are visible minority persons and three are Aboriginal persons. Taking all of this evidence into account, the Tribunal finds that discrimination against visible minorities was not a factor in this appointment process.

*Conclusion regarding the respondent's explanation*

**147** The Tribunal, therefore, concludes that the respondent has provided a reasonable explanation in answer to the complainant's *prima facie* case.

**148** Having considered all of the evidence, individually and collectively, the Tribunal finds that neither the complainant's race nor his national or ethnic origin were factors in the respondent's decision not to appoint him. The respondent has provided a reasonable explanation of the circumstances that resulted in the appointments in question, and it has not been demonstrated that any part of the explanation was a pretext for an otherwise discriminatory practice. The complainant was not appointed to an AS-04 position because he did not have experience in PeopleSoft and did not demonstrate on his application that he met the other asset qualifications that were legitimately considered by the respondent in making these appointments.

**Issue III: Did the respondent retaliate against the complainant for having filed his complaints?**

**149** The complainant alleges that the respondent's appointment of Ms. Verner was made in retaliation for his having filed a complaint before this Tribunal concerning the appointments of Ms. Morin and Ms. Privalova. He also alleges that the decisions to appoint Mr. B and to eliminate him from an EC-04 appointment process were made to retaliate against him. He claims that this retaliatory action is in breach of s. 14.1 of the CHRA.

**150** Section 14.1 of the CHRA reads as follows:

**14.1** It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

**14.1** Constitue un acte discriminatoire le fait, pour la personne visée par une plainte déposée au titre de la partie III, ou pour celle qui agit en son nom, d'exercer ou de menacer d'exercer des représailles contre le plaignant ou la victime présumée.

**151** None of the parties made any submissions regarding the Tribunal's jurisdiction to interpret s. 14.1 given that it is not hearing a complaint filed under Part III of the CHRA. Nevertheless, evidence of retaliation could be relevant to a complaint of abuse of authority under the PSEA.

**152** The complainant's allegation of retaliation is based principally on the fact that Ms. Verner was appointed after he filed his initial complaint. He contends that he should have been appointed instead, arguing that Ms. Verner was unqualified or, at best, less qualified than him. He therefore infers that the appointment of Ms. Verner must have been in retaliation for his initial complaint.

**153** The evidence, however, shows that Ms. Verner was appointed solely because she was the right fit for the position. The appointment rationale for Ms. Verner states that the respondent needed someone who would be assigned with the task of documenting detailed human resources business processes and related system processes in order to implement best practices resulting from the work of a public service-wide collaboration of subject-matter experts. Ms. Verner met the essential and asset qualifications for the position, which included experience in PeopleSoft. The complainant did not have PeopleSoft experience. Consequently, he was not considered the right fit for appointment.

**154** The complainant also raised Mr. B's appointment from outside the pool as further evidence of retaliation. He says that if the respondent wanted someone with PeopleSoft experience they could have appointed Ms. Chauret who had such experience. He points out, however, that if the respondent had appointed Ms. Chauret, he would have been the only one left in the pool who had not been appointed. He suspects that the respondent deliberately appointed Mr. B instead of Ms. Chauret, in order to avoid the appearance that it was discriminating against him.

**155** The evidence demonstrates, however, that the basis for this claim is unfounded. Ms. Zhang testified that the respondent did in fact approach Ms. Chauret before appointing Mr. B, but Ms. Chauret stated that she had another offer and was no longer interested in one of these positions. This testimony was not contradicted and there was no evidence presented to call it into doubt. Ms. Zhang also testified that Mr. B was

found to be the right fit for the position as he had the desired PeopleSoft experience, whereas the complainant did not.

**156** The complainant referred to the circumstances surrounding another appointment process unrelated to the two present complaints as further evidence of retaliation. He testified that he applied for a Human Resources Planning Analyst position at the EC-04 group and level in AANDC in May 2011. He failed the qualification *strategic thinking* and was screened out of the appointment process. He alleges that this is a further example of retaliation because the position is also in the HRWSB, under the same director general, albeit in a different directorate. He also notes that the interview took place at the same location as his interview for the appointment process at issue. He believes that the responsible managers in the branch know and talk to each other and that they conspired to blacklist him from jobs in AANDC. Ms. Saulnier testified that she had no involvement in the EC-04 appointment process.

**157** The Tribunal finds that the complainant's allegations regarding the EC-04 appointment process are entirely speculative. It would not be surprising if senior managers in the same branch of the same department knew each other or held interviews at the same location. Aside from making these points, however, the complainant did not lead any evidence to suggest that his complaint before this Tribunal was in any way a factor in his having failed in the assessment of an essential qualification in an entirely different process. If the complainant believed he was unfairly eliminated from that appointment process, he had recourse to file a complaint concerning that process.

**158** The complainant has failed to demonstrate that the respondent retaliated against him for having filed his complaints with the Tribunal.

### *Credibility*

**159** During the course of the hearing, the parties led evidence the purpose of which was to challenge the complainant's and other witnesses' credibility. The Tribunal finds, however, that the determination of the issues in this case, except to the extent already

described in this decision, do not hinge on the credibility of any witness and, therefore, the evidence relating thereto need not be addressed to dispose of these complaints.

## Decision

**160** For all of the above reasons, the complaints are dismissed.

Kenneth J. Gibson  
Member

## Parties of Record

<b>Tribunal Files</b>	2010-0778 and 2011-0144
<b>Style of Cause</b>	<i>Paul Abi-Mansour and the Deputy Minister of Aboriginal Affairs and Northern Development Canada</i>
<b>Hearing</b>	September 26-28, 2012 and October 15, 2012 Ottawa, Ontario
<b>Date of Reasons</b>	March 6, 2013
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Paul Abi-Mansour
<b>For the respondent</b>	Christine Langill
<b>For the Public Service Commission</b>	Kimberley J. Lewis (written submissions)