



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2011-0364

Issued at: Ottawa, June 17, 2013

LAHCEN BEN JAB

Complainant

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	The complaint is dismissed
Decision rendered by	Lurette Babin-MacKay, Member
Language of decision	French
Indexed	<i>Ben Jab v. the Commissioner of the Correctional Service of Canada</i>
Neutral citation	2013 PSST 0022

Reasons for Decision

Introduction

1 The complainant, Lahcen Ben Jab, participated in an internal advertised appointment process to staff correctional manager (CM) positions at the CX-04 group and level at the Correctional Service of Canada (CSC) institutions in the Québec Region. He was screened out because he did not meet two of the essential qualifications competencies, namely *strategic thinking* and *values and ethics*.

2 The complainant maintains that the respondent, the Commissioner of the CSC, abused its authority when it assessed him. More specifically, he maintains that his referee provided unfounded references covering an unreasonable period of time, i.e., over two years, and that he displayed bias against him. Finally, he believes that the references are tainted with discrimination based on his race or national or ethnic origin.

3 The respondent denies that it abused its authority and discriminated against the complainant. It states that the complainant was assessed in a fair and equitable manner and that the reference period was not limited to two years. It also maintains that the complainant failed to provide any evidence in support of the allegation of discrimination.

4 The complainant sent a notice to the Canadian Human Rights Commission (CHRC) to advise it that he intended to raise an issue related to the interpretation 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 attend the hearing or make any submissions.

5 The Public Service Commission (PSC) did not attend the hearing, but it provided written representations.

6 For the following reasons, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant did not show that the respondent abused its authority. In particular, the complainant failed to establish that prohibited grounds of discrimination were factors in the decision not to appoint him to the position at issue.

Background

7 On February 17, 2010, the respondent published a *Job Opportunity Advertisement* on the federal government's *Publiservice* Website to staff CM positions. The essential qualifications listed in this advertisement and in the Statement of Merit Criteria included the competencies of *strategic thinking* and *values and ethics*.

8 There were three people on the Assessment Board (the Board), including Cynthia Racicot, Chair of the Board and then Deputy Warden of Archambault Institution in Sainte-Anne-des-Plaines, Québec.

9 The candidate assessment process involved a number of steps, including screening applications, a written exam, an interview, and checking references with referees proposed by the candidates.

10 For the reference check, candidates had been asked, in November 2010, to provide the names of their current immediate supervisor and their previous immediate supervisor for the period from September 2009 to November 2010. The complainant proposed only one referee, Claude Bérard, Correctional Manager at Leclerc Institution, who had been supervising him for a year. Mr. Bérard provided his references on December 22, 2010, after notifying Ms. Racicot that he had validated them with his Deputy Warden, Marielle Normandin.

11 The Board assessed the competencies of *strategic thinking* and *values and ethics* by taking into consideration the candidates' answers to the interview questions and the references provided by their referees, who had received a structured document defining these competencies and the performance indicators. According to the instructions given to the referees, they had to "provide examples of behaviours" attesting to the candidates' performance at work.

12 The candidates received scores for each competency by Board consensus, based on a rating scale from 1 to 10 points. The passing mark for each competency was 6/10; according to the rating scale, a score of 4 or 5 points indicated that the

candidate “[translation] demonstrates weaknesses in the performance of the competency assessed”.

13 Fifty-five candidates successfully completed the entire assessment. The complainant did not receive a passing mark for the competencies *strategic thinking* and *values and ethics*. For this reason, he was deemed unqualified for the position.

14 On March 30, 2011, the respondent published a *Notification of Appointment or Proposal of Appointment* for Christiane Dubord’s appointment to one of the positions.

15 On April 14, 2011, the complainant filed a complaint of abuse of authority pursuant to s.77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA).

Issues

16 The Tribunal must decide the following issues:

- (i) Did the respondent abuse its authority in assessing the complainant with regard to the essential qualification competencies *strategic thinking* and *values and ethics*?
- (ii) Did the respondent discriminate against the complainant based on his race or national or ethnic origin?

Analysis

17 The expression *abuse of authority* is not defined in the PSEA, but s. 2(4) states that it includes bad faith and personal favouritism.

18 Similarly, it is clear from the PSEA as a whole that minor errors do not generally constitute abuse of authority. Whether or not an error constitutes abuse of authority therefore depends on the nature and the seriousness of the error. Abuse of authority can also involve an omission or improper conduct. The scope of the omission and the degree to which the conduct is improper will determine whether or not they constitute

abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

19 As stated by the Tribunal in a number of decisions, the complainant bears the burden of proving, on a balance of probabilities, that the appointment process is tainted by an abuse of authority (see *Tibbs*, para. 49).

Issue I: Did the respondent abuse its authority in assessing the complainant with regard to the essential qualification competencies *strategic thinking and values and ethics*?

20 The complainant is a Correctional Officer I, at the CX-01 group and level, employed at Leclerc Institution in Laval, QC. Throughout his career with the CSC, he has also acted in Correctional Officer II positions, at the CX-02 group and level.

21 The complainant maintains that the respondent abused its authority by assessing him based on Mr. Bérard's references. He claims that Mr. Bérard acted in bad faith and provided "[translation] malicious and unreasonable" references to tarnish his reputation. He therefore believes that Mr. Bérard is biased against him and harbours "[translation] clear animosity" towards him. Lastly, the complainant maintains that these references improperly cover a period of more than two years.

22 In his testimony, the complainant stated that he was not challenging the Board's assessment of his interview and that his complaint addresses only the references provided by Mr. Bérard.

23 The complainant called Mr. Bérard to testify. Mr. Bérard stated that he had been the complainant's supervisor twice, first from about 2000 to 2002, as Unit CM, and then for nearly a year in 2010, as Operations CM. Although he was not always the complainant's immediate supervisor, he said that he was able to observe the complainant's performance in certain tasks when the complainant worked in his area of responsibility. Mr. Bérard explained that, to prepare the references, he reviewed the complainant's entire personal file. If he found any documents indicating problems, he took note of it. He wanted to identify the instances when the complainant did not behave as expected, despite the action taken by his managers. He also consulted a CM who

had been one of the complainant's supervisors to obtain examples of his behaviour. Finally, he informed the Deputy Warden of Leclerc Institution of the nature of the references he was going to provide. Mr. Bérard said that he had not been told that he had to limit his references to a two-year period; he did not do so.

Assessment of "strategic thinking"

24 The assessment documents describe the competency *strategic thinking* as follows: "[Translation] Advises, plans, analyzes issues. Studies the environment, develops informed strategies that take into account the needs of stakeholders and partners and reflect strategic policy. Positions the organization for success".

25 According to Mr. Bérard, the complainant has some great qualities, is very respectful of authority and works well in dynamic positions, but he is sometimes less appreciated by his colleagues when he works in static positions. Dynamic positions involve direct contact with inmates and their families, while static positions do not. Mr. Bérard noted that the complainant's behaviour had now improved.

26 Mr. Bérard explained each paragraph of his references in detail. They include comments such as: "[Translation] indicates clear involvement" in "operations related to Pavilion life . . . [but I] cannot recall any tangible results"; or "no example of involvement comes to mind ... in advancing the Unit as a whole" except "an idea to rearrange the furniture in the inmates' common rooms [and the] project was ambitious and very costly". Mr. Bérard confirmed that a cup holder had been installed in one unit, but not as a result of the complainant's actions.

27 Mr. Bérard also explained that after the complainant passed the written exam, he had invited the complainant to sit in the Operations CM's chair so that he could experience what it was like to perform the duties of a CM. Mr. Bérard gave a few other candidates this opportunity. Mr. Bérard stated that he was at the complainant's side for the full seven hours of the experience, which had allowed him to observe the complainant and, as he indicated in the references, "[Translation] to assess his ability ... to manage a heavy workload ... [and] the quality of his decisions". Mr. Bérard noted that the complainant, despite all of his years of experience in operations, had difficulty

leading and delegating tasks to officers for whom the CM is responsible. Mr. Bérard stated that he was aware of the complainant's lack of experience in managing personnel, but that the complainant did not seem to see the scope of his responsibilities in managing human and financial resources. He seemed to have slightly more difficulty than other officers who had taken part in the same experience. This led Mr. Bérard to conclude that the complainant "[Translation] would need close supervision" in correctional operations.

28 Ms. Racicot stated that in his answers to the interview question intended to assess strategic thinking, the complainant had not addressed most of the suggested indicators, had not given any examples in support of these indicators, or had given examples that did not support them. In reviewing his references, the Board considered favourable a comment by Mr. Bérard to the effect that the complainant had consulted him to ensure that he fully understood the meaning of a policy or a directive. However, Ms. Racicot said that the rest of the references pointed out the complainant's difficulties in recognizing the accountability and scope of responsibility of a CM, and indicated that he would need to be closely supervised despite his years of experience.

29 Commenting on the references addressing *strategic thinking*, the complainant said that Mr. Bérard had falsely stated that he had failed to demonstrate participation with his colleagues in advancing the unit as a whole. He claimed that this comment was contradictory because Mr. Bérard himself had indicated, in his performance evaluation for 2009-2010, that he had played a constructive role in advancing the units by suggesting that a cup holder be installed in one unit. The complainant mentioned a number of other suggestions he claimed to have made as part of his work and named certain managers with whom he had discussed his ideas. He also emphasized that, in July of 2010, the Commissioner of the CSC, Don Head, had thanked him for participating in the *Commissioner's National Consultation with Visible Minority Employees*, which was another example of a contribution he had made to advance the organization. He had also received good performance evaluations, and his evaluation for the period from October 2004 to September 2005 (2004-2005) indicated that he is an officer who requires "normal supervision," not close supervision as Mr. Bérard had stated in his references. Lastly, the complainant denied that Mr. Bérard had given him

the opportunity to sit in the Operations CM's chair, as Mr. Bérard had said in his references. The complainant stressed that only those who received the necessary training could sit in the CM's chair.

30 At the interview, the Board had awarded the complainant a temporary score of 4.5/10. After the reference check, the complainant received a final score of 4/10 for this competency.

Assessment of "values and ethics"

31 The assessment documents describe the competency *values and ethics* as: "[Translation] Ensuring integrity in personal and organizational practices by respecting people and practices, including values".

32 Mr. Bérard agreed with the complainant that his performance evaluations generally showed that he had met his objectives most of the time or surpassed them some of the time. However, Mr. Bérard said that he had seen in the complainant's file indications of behaviours that did not reflect the competencies assessed. His file had shown poor attendance at work from 2003 to 2009, and the complainant had been subject to absenteeism monitoring twice. The complainant had neglected to do security rounds in February 2009 and had not completed the narrative reports required to explain these deficiencies. In addition, a CM had caught him sleeping during a work shift in September 2009. Certain incidents had resulted in disciplinary action, including an incident during a target practice in March 2010 where the complainant had failed to follow safety procedures by pointing his loaded weapon towards two instructors while he had been ordered to keep it in the holster.

33 The complainant stated that he does not agree with Mr. Bérard's comments regarding his attendance and other alleged shortcomings. He had always submitted his medical certificates in time to justify his absences, except on one occasion, which had not been his fault. He had taken many sick days because he had been having health problems and had only rarely been absent since 2009. The complainant acknowledged that he had neglected to do a few security rounds in the past, but stated that other officers also failed to do them from time to time, without consequence. Regarding the

incident that occurred during a target practice in March 2010, the complainant said that it was a new weapon that he was learning to use and he had simply handled it wrong. He denied pointing his loaded weapon at the instructors, as Mr. Bérard had claimed.

34 The claimant admitted to being monitored for absenteeism a few times over the years. He also acknowledged that he had been suspended for various incidents, including the incident at the firing range. He agreed that, aside from the comment on this incident, Mr. Bérard had written him a positive performance evaluation for 2009-2010.

35 Ms. Racicot stated that Mr. Bérard's references showed that the complainant had significant weaknesses and contained examples of conduct that went against what was expected. In addition, the incident at the firing range demonstrated that the complainant had acted unethically by failing to comply with orders as part of his work. That was not what was expected of a CM, who must always make sure that safety procedures are followed to ensure the safety of employees and inmates.

36 Ms. Racicot indicated that the complainant's temporary score after the interview was 8/10, but the references led the Board to conclude that the complainant did not satisfy the *values and ethics* competency. The Board awarded him a final score of 5/10.

Reasonable apprehension of bias

37 The complainant also maintains that Mr. Bérard's bias against and "clear animosity" towards him explain the scope of the references that Mr. Bérard provided. The complainant described two situations that are "probably" at the root of this bias. First, in 2009, when the complainant was a candidate in this process, he had filed a complaint with the Tribunal with regard to another GC-04 appointment process which had resulted in Mr. Bérard's appointment to his current position. In addition, a few years earlier, when the complainant was a member of the union local executive, he and his executive colleagues had reported an instance of unethical behaviour by Mr. Bérard to the warden of Leclerc Institution, where Mr. Bérard had asked a junior colleague to pick up his daughter at the pool during working hours and bring her to the penitentiary. The complainant emphasized that it was against regulations to ask that of an employee.

For these reasons, the complainant feels that Mr. Bérard was in a conflict of interest situation and should not have provided him with references for the *values and ethics* competency. The complainant believes that Mr. Bérard was upset with him for filing these complaints and that it had an impact on the references he provided.

38 The complainant acknowledged that he did not tell the Assessment Board about these two events. He agreed that he and Mr. Bérard had always respected one another.

39 In his testimony, Mr. Bérard stated that these complaints had no impact on the references he provided for the complainant and that he always tries to act with as much integrity as possible with people around him. Mr. Bérard provided background on each of these complaints. First, he was not the appointed person involved in the first complaint, and this complaint did not concern him. The other complaint involved an emergency at work that had prevented him from leaving the institution to pick up his 12-year-old daughter at the pool. He had had no other choice but to ask a correctional officer on duty to bring her to the institution; otherwise, she would have been left there alone. He had informed management of the situation at the time and did not suffer any negative consequences.

40 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, [1992] S.C.J. No. 21 (QL), the Supreme Court of Canada described reasonable apprehension of bias as follows, in paragraph 22 (QL): “The test to ensure fairness is whether a reasonably informed bystander would perceive bias on the part of an adjudicator”. The objective criteria set out by the Supreme Court also apply to assessment board members as part of appointments made under the PSEA. See also *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010, at paras. 72-74.

41 The purpose of reference checks is to obtain information that the Board will use to assess a candidate’s qualifications. Referees must provide a frank appraisal, which may or may not show the candidate in a positive light. Referees do not have the authority to make decisions; this is entirely within the Board’s jurisdiction. While an assessment board must consider all elements that could call into question the reliability

of the information provided by a referee, the fact that a candidate merely disagrees with the referees' accounts of incidents involving him does not necessarily establish that the reference is not reliable. See *Pellicore v. President of the Canada Border Services Agency*, 2010 PSST 0023, at paras. 49-50.

42 The Tribunal finds that, in this case, there is no evidence that the information provided by Mr. Bérard was unreliable and the Board had no reason to question the validity of his comments.

43 The Tribunal notes that the complainant proposed Mr. Bérard as a reference because he was his supervisor. That said, the complainant gave the Board no indication that there might be a conflict of any kind or other concerns between him and Mr. Bérard. According to the complainant, they have a mutually respectful relationship. In addition, the complainant confirmed that most of the incidents mentioned by Mr. Bérard took place. In fact, some of the documents submitted as evidence by the complainant himself also mention the issues raised by Mr. Bérard (e.g., attendance, incident at the firing range).

44 Mr. Bérard's references pointed out worrisome incidents that occurred on a frequent enough basis between 2003 and 2010 that they have remained on file and Mr. Bérard has mentioned them. Some of them resulted in disciplinary action. According to Mr. Bérard, they showed that the complainant failed to demonstrate strategic thinking and respect of values and ethics, both of which are essential qualifications for a correctional manager.

45 The Tribunal finds that a relatively well informed bystander could not reasonably perceive bias on the part of Mr. Bérard against the complainant.

46 Moreover, it was the Board, not Mr. Bérard, that determined the complainant's final scores. The Board deemed the information from the references detailed enough for it to complete its assessment. The Board had no reason to believe that it should not rely on the references. The complainant had not shared any concerns with the Board, and Mr. Bérard had informed Ms. Racicot that he had validated his references with his deputy warden.

47 The Board consensus document sets out the deficiencies in the complainant's answers to the interview questions and explains the conclusions drawn by the Board after reviewing the references. The Board felt that the scores below the passing mark of 6/10 for the competencies *strategic thinking* and *values and ethics* were appropriate. In her testimony, Ms. Racicot provided a sound explanation as to why the Board came to that conclusion.

48 With regard to the claimant's assertions that the references improperly covered a period of more than two years, the Tribunal notes that the Board had not given the referees any specific instructions in this regard. In addition, the PSC *Appointment Policies' Structured Reference Check Guide* simply indicates that an appropriate referee "will have worked with the applicant recently and for a sufficient period of time". Therefore, it was not improper or abusive for the references to cover a period of more than two years.

49 The Tribunal finds that the complainant has not established a reasonable apprehension of bias in this appointment process. In addition, the complainant has failed to demonstrate that the respondent abused its authority in assessing the essential qualification competencies *strategic thinking* and *values and ethics*.

Issue II: Did the respondent discriminate against the complainant based on his race or national or ethnic origin?

50 The complainant alleges that "maybe" Mr. Bérard provided him with negative references because of his race and national or ethnic origin. The complainant is a person of Arab origin from Morocco.

51 In his complaint, the complainant states that, although the respondent does not want to admit that it chooses "only whites," it uses unethical methods "by keeping any incidents in [my] personal file, even minor ones, to exaggerate them and make a big fuss," thereby preventing him from accessing a position. The complainant seems to be referring to the fact that Mr. Bérard mentioned in his references some incidents and situations that were indicated in the complainant's personal file.

52 In support of his allegation that he was discriminated against on prohibited grounds, the complainant submitted as evidence the report entitled *Working towards Achievement of a Barrier-free and Inclusive CSC*, developed following a series of Commissioner's national consultations with visible minority employees in 2010. According to the complainant, this report notes that visible minorities cannot move beyond the entry level of positions despite their university degrees, that they rarely receive promotions, and that a number of them end up resigning because of the pressure, discrimination and racism to which they are subjected.

53 The complainant also called Guy Villeneuve to testify. Mr. Villeneuve is a colleague of the complainant and has worked as a correctional officer at the CSC for about 27 years. Mr. Villeneuve stated that he has "noticed many problems," and he feels that the complainant has been "singled out" since his arrival at the CSC. According to Mr. Villeneuve, people like the complainant "but not that much," and his reputation is linked to the "biases of all the staff, who are not very well educated for their positions". Mr. Villeneuve did not give any examples to explain his statements.

Analytical framework for an allegation of discrimination

54 Pursuant to section 80 of the PSEA, the Tribunal can interpret and apply the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA) to determine whether the complaint is well-founded under section 77 of the PSEA.

55 Section 7 of the CHRA stipulates that refusing to employ or continue to employ an individual or to adversely differentiate an individual in the course of employment, directly or indirectly, is a discriminatory practice if it is based 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.

56 In human rights proceedings, the onus is on the complainant to establish a *prima facie* (based on first impression) case of discrimination. In *Ont. Human Rights Comm. v. Simpson-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. . . .

57 If the complainant successfully establishes a *prima facie* case of discrimination, the onus then rests with the respondent to provide a reasonable explanation demonstrating that the alleged discriminatory act did not occur or that the purported conduct was, in one way or another, not discriminatory. See *Ben Achour v. the Commissioner of the Correctional Service of Canada*, 2012 PSST 0024, at para. 72.

Did the complainant successfully establish a prima facie case of discrimination?

58 The complainant's allegation is based on three pieces of evidence: the report entitled *Commissioner's National Consultation with Visible Minority Employees -- Working towards Achievement of a Barrier-free and Inclusive CSC*; Mr. Villeneuve's testimony; and Mr. Bérard's negative references.

59 As stated by the Federal Court in paragraphs 17 to 22 of *Canada (Human Rights Commission) v. Canada (Department of National Health and Welfare)*, 1998 CanLII 7740 (F.C.T.D.), if no direct evidence of discriminatory practices exists, it is possible to infer the existence of such practices using circumstantial evidence consisting in a series of facts which, taken together, could justify it. In paragraph 18 of this decision, the Court states that a complainant can produce evidence related to general personnel policies or to the overall composition of the employer's workforce to establish that the employer's conduct demonstrates a trend or a standard practice of discrimination. If proved, the tribunal hearing the matter will then be asked to infer from such general circumstances and other supporting evidence that discrimination probably occurred in the complainant's case as well.

60 There is no doubt that the CSC Commissioner's report raises some concerns about the way in which members of visible minority groups are treated at the CSC.

61 The complainant must, however, demonstrate a link between this general circumstantial evidence and the evidence relating to the alleged discrimination in order

to prove that discrimination likely occurred in his case as well, particularly by showing a connection to Mr. Bérard's references, on which the Board based its decision to screen out the complainant. The complainant did not submit any evidence demonstrating that the references provided by Mr. Bérard are tainted with discrimination or that the complainant's race or national or ethnic origin was a factor in the respondent's conclusion that he failed to achieve a passing mark for two essential qualifications. The references are based on facts in the complainant's file and on Mr. Bérard's observations in the workplace. The complainant acknowledged that disciplinary action was taken against him for some of the incidents reported by Mr. Bérard. A number of these uncontested incidents occurred before Mr. Bérard became his supervisor. In addition, Mr. Bérard said that he was not the subject of the other complaint that the complainant filed with the Tribunal, and the complainant did not state otherwise. Also, there is no evidence that Mr. Bérard retaliated against him following the complaint of unethical behaviour (the date of which the complainant did not specify) filed by the correctional officers' union local executive.

62 Mr. Villeneuve's testimony was vague. He did not state what led him to conclude that the complainant has been "singled out" since his arrival at the CSC. Mr. Villeneuve also failed to describe the problems he said he had noticed and in what context, and he did not explain the complainant's "reputation" and how it relates to the biases of the entire staff who are "not very well educated." In addition, the complainant did not question him any further on this matter.

63 The Tribunal concludes that all of these elements, taken separately or together, fail to show that the complainant was discriminated against in the process at issue and that his race or national or ethnic origin was a factor in the decision not to appoint him.

64 Therefore, the Tribunal finds that the complainant's evidence does not show a *prima facie* case of discrimination.

Decision

65 For these reasons, the complaint is dismissed.

Lurette Babin-MacKay
Member

Parties of record

Tribunal file	2011-0364
Style of cause	<i>Lahcen Ben Jab and the Commissioner of the Correctional Service of Canada</i>
Hearing	January 15 and 16, 2013, and March 12 and 13, 2013 Montreal, QC
Date of reasons	June 17, 2013
APPEARANCES:	
For the complainant	Lahcen Ben Jab
For the respondent	Anne-Marie Duquette
For the Public Service Commission	Marc Séguin (Written representations – January 10, 2013)