



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2012-1156

Issued at: Ottawa, December 2, 2013

ALAN JONES

Complainant

AND

THE DEPUTY MINISTER OF FISHERIES AND OCEANS

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority under section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	Complaint is dismissed
Decision rendered by	Eugene F. Williams, Member
Language of Decision	English
Indexed	<i>Jones v. Deputy Minister of Fisheries and Oceans</i>
Neutral Citation	2013 PSST 32

Reasons for Decision

Introduction

1 Alan Jones, the complainant, applied in an internal advertised appointment process for a position as Supervisor, Compensation Services, on an acting basis, at the AS-03 group and level with the Department of Fisheries and Oceans Canada (DFO). The complainant was eliminated from the appointment process. He alleges that the respondent, the Deputy Minister, DFO, abused its authority by showing favouritism in relation to candidates, Pina Cocozzoli and Kathleen Melnichuk, who were appointed (the appointees), by compromising the integrity of the appointment process in a number of significant ways, and by discriminating against him based on disability.

2 The respondent denies that there was an abuse of authority in the appointment process. It asserts that the complainant was eliminated from the process because he failed to meet an essential qualification that was assessed during the interview and the reference check phase of the appointment process.

3 The Public Service Commission (PSC) did not attend the hearing, but presented a written submission on PSC policies and guidelines relating to the issues in this case. It took no position on the merits of the case.

4 The complainant provided notice to the Canadian Human Rights Commission (CHRC) in accordance with s. 78 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss.12, 13 (PSEA) that he intended to raise an issue involving the interpretation and application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). Prior to the hearing, the CHRC informed the Public Service Staffing Tribunal (the Tribunal) that it did not intend to make submissions.

5 For the reasons set out below, the Tribunal finds that the complainant has not established that the respondent abused its authority by showing favouritism towards the appointees, compromising the integrity of the appointment process, including demonstrating bias against him, or discriminating against the complainant on the prohibited ground of disability.

Background

6 Between June and October 2012, DFO conducted an internal advertised appointment process to fill two positions of Supervisor, Compensation Services, on an acting basis at the AS-03 group and level. Further to an announcement at a staff meeting on May 24, 2012, a written notice advertising an acting opportunity was distributed on June 5, 2012. It was sent by email to employees of DFO in Sarnia, Ontario occupying positions in Compensation Services. The closing date was June 8, 2012. A revised notice was distributed to the same group on July 10, 2012, with a closing date of July 20, 2012. There were no additional applications resulting from the second notice.

7 Three candidates, including the complainant, applied and were assessed by way of an initial screening of their applications, a written exam, an interview and a reference check. All three applicants were from the same work unit and reported to Debbie Elliott, Manager, Compensation Services. Each of them passed the initial screening and were interviewed for the position. The complainant was successful until the interview and reference check phase of the appointment process. On October 15, 2012, the complainant was informed that he had been eliminated from further consideration in the process because he failed the essential qualification, effective interpersonal skills.

8 On October 24, 2012, DFO posted a Notification of Appointment or Proposal of Appointment (NAPA) for the appointees. The complainant immediately filed his complaint with the Tribunal.

9 The assessment board for this appointment process was chaired by Ms. Elliott. The other members of the board were: Steven Carlaw, Human Resources (HR) Advisor and Sarah Gilpin, Crewing Office.

Issues

10 The Tribunal must determine the following issues:

- (i) Was the integrity of the appointment process compromised by the actions of the respondent?
- (ii) Did the respondent abuse its authority by discriminating against the complainant?
- (iii) Did the respondent abuse its authority by showing favouritism to the appointees?

Assessing Credibility

11 To the extent that this complaint requires the Tribunal to assess the credibility of the witnesses who testified, the Tribunal is guided by the principles established in *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at 357:

Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

12 In its consideration of the evidence advanced by the complainant, the Tribunal had considerable doubts about the complainant's credibility and the reliability of his perception of events. Performance issues provide a contextual backdrop to the events described in the evidence. Entered in evidence was a March 22, 2011, letter relating to a March 21, 2011, meeting between the complainant and his manager to discuss performance issues. The highlights of the discussion, including management's expectations of the complainant's performance, were described in the document. Following that meeting the complainant asked for a fitness to work evaluation in April 2011. On July 7, 2011, the results of that evaluation indicated that the complainant was fit for his substantive position.

13 However, the complainant had a different recollection of the event. The complainant testified that he could not recall whether he had been placed under performance management, but noted that it was “after the fit to work came in March 28, 2011”. He maintained that his manager, Ms. Elliott, raised issues about his performance after his fit to work evaluation in an email and in person. He also referred to a September 2012 meeting with the Director of HR, Barb Charlebois. The complainant provided no evidence, other than his testimony, to support his version of these events.

14 The documents and testimony at the hearing contradict the complainant’s account of this issue. The testimony of Ms. Elliott reveals that the complainant was under performance management in 2006 and again in 2011. In fact, the 2006 incident and the March 22, 2011, letter discussing management’s performance expectations precede the complainant’s request for a fitness to work evaluation.

15 The altering of documents tendered at the hearing also raises questions about the complainant’s credibility. At the hearing, the complainant tendered a document that he obtained through an Access to Information and Privacy (ATIP) request. The document was a series of emails authored by Tara Broad, Regional Leader, Labour Relations, DFO. In it, she provided advice to her regional director with copies to other managers in HR, including the complainant’s manager. The copy of the document tendered by the complainant was incomplete. The complainant acknowledged under cross-examination that he had made redactions to the document in addition to those made by the ATIP office. These redactions involved the removal of phrases that were either uncomplimentary to him or contained statements attributed to others whose viewpoints were at odds with his own. When asked why he redacted the document, the complainant stated that he deleted portions that contained derogatory remarks. In submissions made on his behalf by his representative, the redactions were justified because “... certain items were baseless, misleading and derogatory”. In addition, the complainant did not accept responsibility for his redactions but chose to include his former union representative who reviewed the documents. The complainant acknowledged in his submission that he had “redacted small areas to avoid confusion...”. The complainant further stated:

“Performance management was redacted as it is not in place, confirmed by the respondent”. As well, in the complainant’s written submissions at the hearing, words were added to the quoted portions of exhibits.

16 The explanation for redacting documents tendered as exhibits without notice seriously affects the complainant’s credibility. The justification for altering the contents of the document and the attempt to shift responsibility to a former union representative raises questions about the weight to be given to the testimony and evidence of the complainant.

17 The complainant’s perception of events was not supported by the documentary evidence. For example, in response to questioning by the respondent’s counsel about the number of harassment complaints he had filed and their outcomes, the complainant testified that the results of the first harassment complaint were inconclusive. He maintained that the investigator had stated that she was unable to determine whether harassment occurred or not. Yet, the report that was tendered in evidence disclosed that the investigator had found that each of the complainant’s six allegations were “not substantiated”.

18 Applying the *Farnya v. Chorny* test in light of the incidents noted above, where there was conflicting testimony on an issue, the Tribunal carefully examined and gave little weight to the evidence provided by the complainant unless the evidence was confirmed by other sources of information.

Analysis

19 Section 77(1) of the PSEA provides that a person in the area of recourse may file a complaint with the Tribunal that he or she was not appointed or proposed for appointment because of an abuse of authority. As noted in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at para. 66, “abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority”. The complainant has the burden to prove, on a balance of probabilities, that there was an abuse of authority.

Issue I: Was the integrity of the appointment process compromised by the actions of the respondent?

20 As explained in *Ammirante v. Deputy Minister of Citizenship and Immigration*, 2010 PSST 0003, the Tribunal's role is to examine whether or not there was any impropriety in the assessment process. A review of the relevant evidence in this case leads the Tribunal to conclude that the complainant has not established, on a balance of probabilities, that the integrity of the appointment process was compromised. Thus, there was no abuse of authority in the appointment process.

21 The complainant raised allegations that the integrity of the appointment process was compromised in a number of significant ways, namely: by the perception of bias raised as a result of the composition of the assessment board; by improperly assessing his candidacy with respect to the essential qualification "effective interpersonal skills"; by using references that were selected by management; by distributing his application to fellow applicants and asking them to provide information that would screen him out; and, by failing to investigate in a timely manner his concerns about improprieties in the appointment process. The complainant asserted that these breaches contravened PSC policies and demonstrated a failure to respect the staffing values of fairness, transparency, access, and representativeness.

Composition of the Assessment Board

22 There is no provision in the PSEA that sets out who should be a member of an assessment board. As the Tribunal held in *Sampert v. Deputy Minister of National Defence*, 2008 PSST 0009 at para. 53: "Whether an assessment board is improperly constituted is a question of fact which depends on the specific complaint and the evidence presented at the hearing".

23 No concern was raised by the complainant about the participation of Ms. Gilpin on the assessment board. The complainant alleges bias on the part of the other two board members, Ms. Elliott and Mr. Carlaw.

24 The Tribunal has held in a number of decisions that a reasonable apprehension of bias on the part of one or more members of an assessment board

can constitute an abuse of authority. As was pointed out in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010 at paras. 72-74, in staffing matters, where a reasonably informed bystander can reasonably perceive bias on the part of one or more persons responsible for assessment, the Tribunal can conclude that abuse of authority exists.

(i) *Debbie Elliott*

25 The complainant testified that despite assurances from Barbara Wyant, A/Regional Director, that HR would be utilizing people on the assessment board from outside Compensation Services and HR, Ms. Elliott was involved in selecting the questions that the selection board used for the written exam and also identified referees for all of the candidates. He noted that he had two outstanding grievances naming Ms. Elliott. Previously, he had received a decision in relation to one grievance, but there was a second grievance at the third level of review that was outstanding.

26 Mr. Carlaw explained that Ms. Elliott was the chair of the board because she was the sub-delegated manager and, at the end of the process, she would be responsible for the results. However, he confirmed that Ms. Elliott did not participate in the initial screening of the candidates, nor did she participate in any of the subsequent assessment stages of the appointment process. She prepared the Statement of Merit Criteria (SMC) that Mr. Carlaw reviewed.

27 Mr. Carlaw added that, in consultation with Ms. Elliott, he developed the assessment tools used in the appointment process: a written exam, an interview, and reference checks. He finalized the assessment tools and completed the rating guide in late September, 2012.

28 The essential experience qualifications were assessed at the initial screening stage by a review of the candidates' cover letters and resumes. Mr. Carlaw stated that he and Beth Campbell, a Superintendent from outside the section, screened the candidates in August 2012, without involvement by Ms. Elliott. The complainant was screened into the appointment process. A written test was used to assess the

candidates' ability to establish goals and priorities. Mr. Carlaw used an in-basket exercise to assess the essential qualification "ability to plan". Effective interpersonal skills, leadership and initiative were assessed by interview and reference. He selected interview questions from a bank of examples used by DFO. Mr. Carlaw testified that he and Ms. Gilpin marked the candidates' written exams, conducted the interviews, and marked the reference checks. Once they tallied the results, they reported these results to Ms. Elliott.

29 Mr. Carlaw stated that he and Ms. Gilpin interviewed all candidates on the same day. The interview was preceded by a written test, which the candidates were permitted 45 minutes to complete. Mr. Carlaw noted that for each candidate, they started with the planning question, followed by interview questions and, finally, reference checks. Both he and Ms. Gilpin made notes during the interview, discussed each candidate's answers and reached a consensus on the mark to be assigned each question for the candidates.

30 Mr. Carlaw's testimony concerning the involvement of Ms. Elliott in the assessment of candidates was not contradicted by any evidence at the hearing. As the manager of the unit to which these acting AS-03 employees would be reporting, it is understandable that Ms. Elliott was consulted by Mr. Carlaw in the preparation of some questions used for the assessment. However, there was no evidence presented at the hearing that Ms. Elliott was involved in any way in the assessment of candidates at any stage of the appointment process. On the contrary, the evidence establishes that she was not involved.

31 The Tribunal finds that Mr. Carlaw took the steps necessary for developing the assessment tools. To understand the rationale for the position, and the tasks to be performed, he needed to consult with Ms. Elliott. As a result, he could ensure that the appropriate qualifications had been described in the SMC and he could choose suitable assessment tools to assess those qualifications.

32 The complainant further claims that Ms. Elliott identified referees for the candidates, and this also gave rise to a perceived bias.

33 Mr. Carlaw testified that a decision was taken to select referees from within the compensation unit because it was difficult to get references for compensation advisors. The unit was comprised of seven individuals managed by Ms. Elliott. Since three of the employees had applied for the position they were excluded. Of the remaining employees, Pat Maughan was selected because she had supervised all of the candidates over the years. At the time, Ms. Maughan was on leave without pay and Mr. Carlaw felt that since she was not in the unit "it would be more open".

34 Ms. Elliott approached Ms. Maughan to see if she would be willing to answer a reference questionnaire for each candidate. Management did not advise any of the candidates that referees would be approached. Since it was an internal process and Ms. Maughan is a public servant, Mr. Carlaw felt that it was permissible to proceed in this fashion.

35 Based on the evidence presented at the hearing, the Tribunal finds that a reasonably informed bystander would not reasonably perceive bias on the part of Ms. Elliott. In the circumstances of this case, neither Ms. Elliott's involvement in establishing assessment tools or the fact that she approached Ms. Maughan to determine whether she would provide a reference for each of the three candidates could reasonably be perceived as bias.

36 It would have been more prudent not to give any assurance that the assessment board would be comprised of people from outside Compensation Services and HR. A hiring manager should be participating in staffing positions that report to them unless there are compelling reasons for why they should not participate.

37 The fact that the complainant had named Ms. Elliot in two grievances is not by itself a reason to exclude her from an appointment process, especially in the limited role she had. No evidence was provided by the complainant to raise any concerns with her limited involvement in the process.

38 Given the assurance made concerning the composition of the board, it was an error not to replace Ms. Elliott as the board chair. However, Ms. Elliott's role as the

board chair was very limited. In the circumstances of this case, the error was not serious enough to constitute an abuse of authority. See *Tibbs*, at para. 65.

(ii) *Steven Carlaw*

39 The complainant alleges that since Mr. Carlaw was a member of HR, he was involved in the complainant's grievance. According to the complainant, Mr. Carlaw should not have participated in his assessment because there existed a perceived bias by Mr. Carlaw against him. As well, Mr. Carlaw's participation went against the assurances from Ms. Wyant that HR would be utilizing people from outside Compensation Services and HR to conduct the assessments. The complainant produced a document identifying several individuals, including Mr. Carlaw, whom he named as respondents in an ongoing grievance related to his request for accommodation in the form of telework.

40 Mr. Carlaw testified that in May 2012, Ms. Broad sent him an email to advise that the complainant required accommodation in the workplace. Ms. Broad explained the situation and asked Mr. Carlaw to keep the matter confidential. Mr. Carlaw stated that he was responsible for letting other sections know that the complainant was available for work. This began with adding the complainant's name in Peoplesoft, an information system that stores and enables the processing of departmental HR information. He added that the email from Ms. Broad did not affect his marking of the complainant. According to Mr. Carlaw, he did not recall the email when he was assessing the complainant.

41 Mr. Carlaw also testified that he was unaware that he had been named in a grievance filed by the complainant and only learned of it at the hearing. He stated that he used the same approach to marking with all candidates. When questioned about the assessment of the complainant, he acknowledged that Ms. Gilpin and Ms. Campbell were on the board to avoid the perception of bias since they both work outside Compensation Services and HR.

42 Based on the evidence presented at the hearing, the Tribunal has no difficulty in finding that a reasonably informed bystander would not reasonably perceive bias

on the part of Mr. Carlaw with respect to the complainant. The assessment board included members who were not connected to either compensation or HR and, thus, was consistent with Ms. Wyant's assurance with respect to the composition of the board. A review of the complainant's grievances filed in evidence indicates that among the numerous headings of alleged wrongdoing, there were no complaints lodged specifically against Mr. Carlaw. His only prior involvement with the complainant, as mentioned, related to his inclusion of the complainant's name in the database of employees who required accommodation. Outside of the working relationship, he had no involvement with any of the candidates. The only basis for the perceived bias attributed to Mr. Carlaw stems from the fact that he is a staffing advisor and thus a member of HR.

43 Mr. Carlaw's testimony about how he carried out his functions does not reveal any errors, omissions, or improper conduct. In the circumstances of this case, the mere fact that he is a member of HR does not give rise to a reasonable apprehension of bias.

Use of references and assessment of effective interpersonal skills

44 The complainant contends that the assessment board failed to comply with PSC policies and guidelines concerning references: by failing to inform candidates that references would be used; by refusing to allow the complainant to play an active role in selecting referees, and, thereby preventing the complainant from refreshing the referee's knowledge of his interpersonal skills; and, by selecting one referee for all applicants.

45 The complainant also contends that the process did not effectively assess the essential qualifications fairly because his interview marks were adjusted downward due to negative remarks from a referee. In that regard, the complainant stated that the referee's comments had focused on performance issues rather than on interpersonal skills. Hence, the complainant believes that the respondent allocated improper weight to the information provided by one referee.

46 The complainant testified that he had provided testimonials from three co-workers with his application to confirm that he had recent experience providing instruction and guidance. These individuals were Jayson Briscoe, Faye Sinclair and Pat Maughan. He was not, however, asked to provide referees and thus could not play an active role in their selection.

47 The Tribunal notes at the outset that nothing requires the assessment board to select the people suggested by a candidate to act as referees. See, for example, *Dionne v. Deputy Minister of National Defence*, 2008 PSST 0011, and *Gabon v. the Deputy Minister of Environment Canada*, 2012 PSST 0029, at para. 48.

48 However, there must be a proper basis for selecting the referees used. In *Dionne*, at para. 55, the Tribunal explained that “[w]hat is important is that the referee is familiar with the work of the candidate, and can provide sufficient information to allow the board to conduct an adequate assessment of a candidate’s qualifications”.

49 The respondent’s thought process in identifying referees for the candidates and the rationale for using Ms. Maughan has already been addressed earlier in these reasons. Since 2006, the complainant was supervised by Ms. Elliott, who is the subject of an as yet unresolved grievance. The controversy between the complainant and his manager excluded her from being a referee. Thus, the only persons who had an adequate opportunity to observe the complainant in job-relevant situations, had in-depth and direct knowledge of his work and could answer specific questions about his achievements and strengths and had worked with him recently for at least six months within the last five years were the persons he identified in his application letter. Two of these people were the same persons that management chose to be referees.

50 While the respondent could have alerted candidates that references would be used and given them an opportunity to identify referees, it was not obliged to do so. The decision to use one referee, who was not the manager, for all applicants was appropriate, given the narrow pool of individuals who had the opportunity to observe the candidates in job-relevant situations.

51 In relation to the contention that the process did not properly assess “effective interpersonal skills,” the Tribunal notes that Mr. Carlaw provided a detailed account of the process he used to assess each of the complainant’s interview responses and the information in the reference check. In particular, he described the methods used to assess all candidates and explained the basis for the marks the complainant received.

52 Contrary to the complainant’s assertion, there was no evidence to suggest that the board deducted marks from the complainant. The uncontroverted evidence is that the mark was a combination of the interview answers and the reference check.

53 Section 36 of the PSEA confers discretionary authority to delegated managers in the selection and use of assessment methods. However, this authority is not absolute. Thus, the Tribunal may find that there is abuse of authority if, for example, it is established that the assessment method has a fundamental flaw. Assessment methods that do not assess qualifications or are unreasonable, discriminatory or produce a result that is unfair can constitute an abuse of authority. See *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 0026.

54 Pursuant to s. 36, the respondent was entitled to use reference checks as one, or the only, assessment tool to assess the essential qualification “effective interpersonal skills”. See, for example, *Gabon* at para. 43.

55 The Tribunal finds that the decision to combine the interview scores with the scores from the references fell within the broad discretion managers have in choosing and using assessment methods to determine whether an individual possesses the required qualifications for a position.

56 When Ms. Maughan submitted the reference questionnaire, Mr. Carlaw noted that she was unable to answer some questions about the complainant. Consequently, another long-term employee, Ms. Sinclair, was also asked to complete the reference questionnaire for the complainant. The complainant had named both Ms. Maughan and Ms. Sinclair as referees in his application to support his assertion that he was qualified for the position.

57 The evidence further establishes that the assessment board did not need to contact Ms. Sinclair for the other two candidates since Ms. Maughan was able to answer all of the reference questions for these candidates.

58 The Tribunal finds, therefore, that the complainant has not established that the respondent exercised its discretion improperly when it chose referees from his work unit. The evidence demonstrates that the referees were familiar with the complainant's work and their combined knowledge was sufficient for Mr. Carlaw and Ms. Gilpin to complete an adequate assessment of the complainant's qualifications.

59 The complainant also alleges that Mr. Carlaw improperly deducted marks previously awarded for interpersonal skills when he mistakenly used comments relating to performance in assessing his interpersonal skills.

60 The complainant contends that the answer provided by Ms. Sinclair concerning interpersonal skills should not have been relied on because it related to performance. The referee was asked to comment on how the candidate gets along with people in his workplace. The referee provided an answer that, as Mr. Carlaw acknowledged, had a performance component. Mr. Carlaw stated that the complainant's performance affected how the complainant got along with his co-workers. Thus, performance and interpersonal skills were intertwined.

61 The Tribunal finds that Mr. Carlaw's explanation for using the response and the weight he attached to it was appropriate in the circumstances of this case. The questions in the reference questionnaire were appropriately related to the qualification that the assessment board sought to assess. The complainant has not proven that the assessment board abused its authority by linking performance to the assessment of the qualification, effective interpersonal skills.

Distribution of the complainant's application

62 The complainant alleges that Ms. Elliott distributed his application to the appointees with a request to provide her with information to allow her to screen out the complainant.

63 The Tribunal notes at the outset that the complainant was screened into the appointment process.

64 At the hearing, the complainant called witnesses who were declared adverse and he was permitted to cross-examine them on this issue. The evidence provided by the complainant in the form of an exchange of emails between his co-workers, coupled with the testimony of Ms. Melnichuck, indicates that the appointees became aware of certain portions of the complainant's application through co-workers who the complainant had contacted for information for use in his application. However, both appointees denied that Ms. Elliott had distributed the complainant's application to them. Moreover, there is no evidence before the Tribunal that the appointees had any contact with the board members who screened the candidates.

65 The fact that aspects of his application came to the attention of the appointees does not, in light of this evidence, support the complainant's allegation that the source of this information was his manager.

66 Moreover, the allegation that Ms. Elliott wanted the appointees to assist her in eliminating the applicant at the beginning of the process is inconsistent with the surrounding evidence. The evidence of Mr. Carlaw is clear and uncontroverted that Ms. Elliott had no role in either screening or assessing the applicants. According to Mr. Carlaw, the screening of candidates was performed by Ms. Campbell and himself. Apart from the bare assertion presented by the complainant, there is no evidence to support this allegation. Since Ms. Elliott played no role in screening applicants, it does not stand to reason that she would solicit the views of the appointees to screen out the complainant.

67 The Tribunal finds that the complainant has not established that Ms. Elliott provided the complainant's application to the appointees in order to screen out the complainant.

Concerns about improprieties in the appointment process

68 The complainant alleges that management was careless in failing to investigate his concerns about improprieties in the appointment process. The complainant testified that he wrote to Guy Belizaire, Director of Recruitment and Staffing, on July 26, 2012, and asked corporate staffing at the Ottawa headquarters to investigate his claims of staffing violations. This request was based on several serious allegations concerning a conflict of interest by his manager and accusations that his co-applicants and his manager had been guilty of serious staffing improprieties.

69 Mary Claude Asselin, A/Manager Corporate Staffing, DFO, testified that she works in the office of Mr. Belizaire in Ottawa. As a Senior HR Advisor, Ms. Asselin's primary role involves providing advice to regional managers on the interpretation of acts and regulations regarding staffing. The office is responsible for the corporate function and has no line responsibilities for the regions.

70 Ms. Asselin stated that she was asked by Mr. Belizaire to investigate some of the claims and to provide him with information in order to respond to the complainant. Ms. Asselin testified that she reviewed the materials that the complainant provided. She also contacted Ms. Elliott to find out the status of the AS-03 appointment process. She stated that she wished to find out where they were in the appointment process in order to craft an appropriate response to the complainant's claims. When she discovered that the appointment process was ongoing, she knew that it was too early to suggest that the complainant contact the Tribunal because no complaint can be made without an appointment.

71 Ms. Asselin indicated that in his response to the complainant Mr. Belizaire explained the Tribunal's complaint process. Since some of the complainant's allegations related to matters within the purview of the Tribunal, the complainant was

advised to await the outcome of the appointment process and then to file a complaint with the Tribunal. Ms. Asselin also stated that Mr. Belizaire further informed the complainant that the PSC is responsible for cases of fraud in the staffing process and provided him with information to enable him to launch a fraud complaint with the PSC.

72 Ms. Asselin stated that her office can initiate an investigation. She looked at the complainant's document to Mr. Belizaire and determined that there were no grounds for an investigation. She reached that conclusion because the complainant had referred to abuse of authority in relation to the application of merit and abuse of process, which were matters within the jurisdiction of the Tribunal.

73 In addition, Ms. Asselin testified that she received a copy of a letter dated July 16, 2013, from Guillaume Fontaine, A/Director, Investigations Branch, PSC. In it, Mr. Fontaine noted that his office had considered the possibility that fraud may have occurred in an advertised internal appointment process for an acting assignment as a Supervisor, Compensation Services at the AS-3 group and level with DFO in Sarnia, Ontario. The letter summarizes the complainant's allegations and noted that on May 3, 2013, the complainant had written to the PSC's Investigations Branch indicating that he had additional information to provide. The Investigations Branch asked him to provide the information no later than May 9, 2013, but no additional information was forthcoming.

74 The complainant testified that he alerted the PSC in the fall of 2012 about fraud allegations relating to the staffing improprieties, but said he did not send the evidence because he had not prepared it. He stated that he was asked to provide the evidence in May or June 2013 but did not do so because he felt that it was "duplicitous". Since the complainant did not provide the information requested by the PSC, its file was closed.

75 In concluding that no further action would be taken, the PSC found that the allegations that fraud had occurred in the appointment process were not substantiated by factual evidence.

76 The Tribunal finds that the actions taken by corporate staffing in responding to the complainant's allegations were appropriate in the circumstances. Accordingly, there is no merit to the suggestion that management's response in handling the complainant's concerns about improprieties in the appoint process was careless in any way.

77 The Tribunal concludes that the evidence presented by the complainant does not establish that the integrity of the appointment process was compromised by the actions of the respondent. The complainant has not proven that the allegations presented, whether considered singly or collectively, establish that the respondent abused its authority with respect to the integrity of the appointment process.

Issue II: Did the respondent abuse its authority by discriminating against the complainant?

78 Section 80 of the PSEA states that in determining whether a complaint is substantiated under s. 77, the Tribunal may interpret and apply the CHRA. Section 7 of the CHRA makes it a discriminatory practice to directly or indirectly refuse to employ or continue to employ any individual, among other things, on a prohibited ground of discrimination. Disability is included in the list of prohibited grounds of discrimination in s. 3 of the CHRA.

79 In the human rights context, the complainant has the onus to prove a *prima facie* case of discrimination. In *Ontario Human Rights Commission v. Simpson-Sears*, [1985] 2 SCR 536 (known as the *O'Malley* decision), the Supreme Court of Canada set out the test for establishing a *prima facie* case of discrimination:

28 [...] The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. [...]

80 The complainant need only show that discrimination was one of the factors, not the sole or even the main factor, in the respondent's decision not to select him in

this appointment process for a *prima facie* case to be met. See: *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12, at para. 7 (FCA).

81 The Tribunal is required to determine whether the complainant's evidence of discrimination, if believed, justifies a finding in his favour in the absence of an answer from the respondent. Thus, at this stage of the analysis, the Tribunal cannot take into consideration the respondent's answer before determining whether a *prima facie* case of discrimination has been established. See: *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, [2004] F.C.J. No. 941 (QL), at para. 22 (FCA).

82 If the complainant establishes a *prima facie* case of discrimination, the onus shifts to the respondent to provide a reasonable non-discriminatory explanation for not selecting the complainant as the successful candidate in this appointment process, or otherwise to justify its conduct within the framework of statutory exemptions available under s. 15 of the CHRA. See *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33.

Has the complainant established that he suffered from a disability within the meaning of the CHRA?

83 The allegation of discrimination is based on the respondent's failure to accommodate the complainant. The complainant's position is that, because of a medical condition, he needed to be accommodated in the form of a telework arrangement. Since the respondent had determined that it could not offer telework due to the supervisory responsibilities of the AS-03 position, the complainant submits that he was discriminated against in this appointment process.

84 Under section 25 of the CHRA, disability "means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug". The complainant bears the onus of establishing that he suffers from a previous or existing disability within the meaning of the CHRA. If he is unable to do so, then his allegation of discrimination based on disability can be dismissed without further analysis.

85 Based on the evidence presented by the complainant, the Tribunal does not have a sufficient basis to make a finding that he had a previous or existing disability during the time that he was a candidate in this appointment process.

86 The complainant did not identify a disability when he testified, nor did he describe his medical condition in any way. He simply relies on the following documents that were tendered into evidence, namely: written correspondence between Dr. Gary Shapiro and Tara Broad, Leader, Labour Relations, DFO, dated July 7, 2011, July 21, 2011, and July 26, 2011 respectively; and, three medical notes from Dr. John O'Mahony dated August 17, 2011, December 21, 2011, and April 17, 2012, respectively.

87 From these documents, the only reference to a possible disability was a reference to "stress" in the July 21, 2011 correspondence. The following passage from the arbitrator's decision in *Re Skytrain and CUPE, Local 7000* (Olsen), (2009) 99 CLAS 4, which considered whether a grievor had a mental disability protected under human rights legislation that required accommodation by the employer, at paras. 68 and 69, is important to reproduce:

The problem is that "stress" is not by itself a term of art that can be given great weight as a diagnosis...There is no doubt that stress can be disabling.

...

... I have some difficulty in finding that "stress" by itself is cogent evidence of a medical disability... In order to come under the important protection of human rights legislation there needs to be a diagnosis with some specificity and substance. References to "stress" and other symptoms by an applicant is not sufficient to establish a mental disability within the meaning and protection of the *Code*.

88 While the arbitrator's analysis set out in *Re Skytrain* was made in the context of the *Human Rights Code*, R.S.O. 1990, c. H-19, as amended, the analysis applies with equal force to the consideration of an allegation of discrimination based on disability under the CHRA.

89 The documents that were tendered revealed that the complainant was fit for his substantive position. More importantly, there is nothing in either the documents

tendered by the complainant, nor in his testimony, that indicates a diagnosis of a disability in any detail whatsoever.

90 There is insufficient evidence to provide a basis for the Tribunal to make a finding that the complainant had a disability within the meaning of the CHRA.

91 Accordingly, the Tribunal concludes that the complainant has failed to establish a *prima facie* case of discrimination in this appointment process on the basis of disability. The Tribunal's finding makes it unnecessary to analyze the complainant's allegation that he was discriminated against in this appointment process based on the respondent's failure to accommodate his disability. The complainant has not proven that the respondent abused its authority in this appointment process by discriminating against him.

Issue III: Did the respondent abuse its authority by showing favouritism to the appointees?

92 The complainant alleges that the respondent favoured the appointees by awarding them acting opportunities shortly after the deadline for submitting applications closed. He asserts that this is a continuation of a pattern that excluded him from acting opportunities. He also alleges that Ms. Elliott coached the appointees in the preparation of their applications. He notes that although he repeatedly asked Ms. Elliott to be given an acting assignment, his requests were ignored.

Interim acting opportunities

93 The complainant learned on June 12, 2012, that Ms. Cocozzoli and Ms. Melnichuk had been offered and accepted interim acting appointments for the Supervisor, Compensation Services position. As a result, he sent an email to Ms. Elliott requesting that he be considered for an interim acting appointment as well. He repeated his request on July 11, 2012, and on September 4, 2012, but he received neither an interim acting appointment nor a reply to his requests.

94 Ms. Elliott testified that she appointed Ms. Cocozzoli and Ms. Melnichuk to act in the positions because a new program had been introduced and she needed people

right away. She stated that she appointed them because they were capable. She said that she only needed two people and they had previously expressed an interest in acting and had acted in other positions. She also stated that she did not appoint the complainant to replace Ms. Melnichuk or Ms. Cocozzoli when they were on vacation because those were one-week periods and she could easily perform this work for that time.

95 When asked why she did not reply to the complainant's emails, Ms. Elliott explained that she was advised to limit her communications with the complainant because of the outstanding grievance. She stated that before this appointment process began, he had not expressed an interest in any acting appointments and she had already made appointments to cover the interval between advertising the process and filling the positions when she received his request. Ms. Elliott also stated that she would have considered rotating the acting appointments if the appointment process had extended beyond October.

96 As the Tribunal held in *Ship v. Deputy Minister of National Defence*, 2010 PSST 0025, at para. 46, "[t]he question of whether providing an acting opportunity constitutes an abuse of authority will depend upon the particular facts and circumstances of a given case". The Tribunal finds that the complainant had not requested an acting opportunity prior to the commencement of this appointment process. The Tribunal further finds that the respondent has provided a reasonable explanation for both the interim acting appointments, and why rotating acting appointments were not considered prior to the completion of the appointment process, namely, the operational requirements identified by Ms. Elliott. The complainant has failed to establish that the respondent abused its authority by providing acting appointments to the appointees prior to the completion of this appointment process. See, also, *Pardy v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2012 PSST 0014, at paras. 40-43.

Coaching the appointees in preparing their applications

97 In support of his allegation that Ms. Elliott coached the appointees in preparing their applications, the complainant testified that he overheard a conversation between Ms. Melnichuk and Ms. Cocozzoli. He stated that sometime before the appointment process ended he saw Ms. Cocozzoli leave Ms. Elliott's cubicle. Then he overheard her speak with Ms. Melnichuk. He heard Ms. Melnichuk say that she would approach Debbie and ask: "Can you look at my cover letter to see if I have to add anything".

98 Ms. Cocozzoli, Ms. Melnichuk and Ms. Elliott all denied that Ms. Elliott assisted the appointees in preparing their applications. Ms. Melnichuk testified that she did not discuss her application with Ms. Elliott either before or after she submitted it. She also testified about her conversation with Ms. Cocozzoli that the complainant overheard concerning the reference to "Debbie".

99 Ms. Melnichuk acknowledged that she had spoken with Ms. Cocozzoli about the latter's cover letter and resume. She learned that Ms. Cocozzoli had her application reviewed by Deb Hicks, Chief of Staffing. Ms. Melnichuk followed suit and also asked Ms. Hicks to review her cover letter and resume. The email exchange between Ms. Melnichuk and Ms. Hicks that occurred at that time supports the account provided by Ms. Melnichuk.

100 The Tribunal finds that the complainant has not established that Ms. Elliott coached the appointees in the preparation of their applications. The complainant wrongly assumed that his co-workers were referring to Ms. Elliott. The testimony of Ms. Melnichuk and her email correspondence with Ms. Hicks concerning her cover letter clearly establishes that the "Deb" mentioned in the conversation overheard by the complainant was not their manager but Ms. Hicks, Chief of Staffing.

101 The Tribunal concludes that the complainant has failed to establish that the respondent abused its authority by showing favouritism to the appointees.

Decision

102 For all these reasons, the complaint is dismissed.

Eugene Williams
Member

Parties of Record

Tribunal File	2012-1156
Style of Cause	<i>Alan Jones v. the Deputy Minister of Fisheries and Oceans</i>
Hearing	September 4, 5 and 13, 2013 Sarnia and Ottawa, Ontario
Date of Reasons	December 2, 2013
APPEARANCES:	
For the complainant	Mary Anne Walker
For the respondent	Allison Sephton
For the Public Service Commission	Louise Bard (written submissions)