



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2013-0075/0076  
**Issued at:** Ottawa, October 21, 2014

**ALDA BREEN**

Complainant

AND

**THE DEPUTY MINISTER OF CITIZENSHIP AND IMMIGRATION**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaints of abuse of authority pursuant to s. 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	The complaints are dismissed
<b>Decision rendered by</b>	Merri Beattie, Member
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Breen v. Deputy Minister of Citizenship and Immigration</i>
<b>Neutral Citation</b>	2014 PSST 17

## Reasons for Decision

### Introduction

**1** Alda Breen, the complainant, was eliminated from an internal advertised appointment process for PM-03 Team Leader positions at Citizenship and Immigration Canada (CIC). She alleges that the respondent, the Deputy Minister of CIC, abused its authority by discriminating against her when it failed to accommodate her disability in this process. She also alleges that the respondent abused its authority by pressuring her to write an assessment test before she was able to do so.

**2** The complainant had qualified in a previous PM-03 Team Leader appointment process. She submits that the respondent also abused its authority by arbitrarily deciding that the pool established in that process was no longer valid, thereby eliminating the possibility for her to be appointed from that process.

**3** The respondent asserts that the complainant did not inform management of a disability or request accommodation. The respondent maintains that it did not pressure her to write a test and that it decided not to make any further appointments from the previous PM-03 pool because the qualifications used to establish that pool no longer reflected the requirements for Team Leader positions.

**4** The Public Service Commission (PSC) did not attend the hearing. It presented a written submission on PSC policies and guidelines related to the issue. However, it did not take a position on the merits of the case.

**5** The Canadian Human Rights Commission (CHRC) also made written submissions, on human rights legislative provisions and principles for interpretation of human rights laws. It did not take a position on the merits of the case.

**6** For the following reasons, the Tribunal finds that the complainant has not demonstrated that the respondent abused its authority.

## **Background**

**7** In June 2007, the complainant was an applicant in an appointment process initiated by the respondent for PM-03 Team Leader positions (2007 process). On May 14, 2008, the complainant was informed that she had qualified in the 2007 process and had been placed in a pool of candidates for possible future appointment.

**8** The complainant was appointed several times, on an acting basis, from the 2007 process. As a result, she acted in a Team Leader position from December 15, 2008, until November 30, 2010.

**9** The internal appointment process for PM-03 Team Leader positions that is at issue in these complaints was advertised with a closing date of February 23, 2010 (2010 process). The complainant met the screening criteria. She did not have to write the Situational Judgement Test or the Written Communication Test as she had already passed those tests.

**10** During the summer of 2009, the complainant's husband had become seriously ill and was hospitalized. On May 26, 2010, she submitted a medical note and went on leave while she cared for her husband at home. Her husband passed away on June 10, 2010. The complainant returned to work on July 12, 2010.

**11** On July 15, 2010, the complainant received an invitation to write the Team Leader Simulation (TLS) test as part of her assessment in the 2010 process. She wrote the TLS on July 22, 2010, and, on November 9, 2010, she was informed that she had not passed and had been eliminated from the 2010 process.

**12** On November 24, 2010, the respondent sent an email to the qualified candidates of the 2007 process, advising them that the pool had expired.

**13** The respondent issued two letters on February 13, 2013, as notice that two persons had been appointed from the 2010 process. The complainant filed two complaints of abuse of authority with the Tribunal under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA) on February 26, 2013. The

complaints were consolidated in accordance with s. 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 as amended by SOR/2011-116.

**14** The complainant notified the CHRC in accordance with s. 78 of the PSEA, indicating that she intended to raise an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). As indicated above, the CHRC filed written submissions prior to the hearing.

### **Issues**

**15** Section 77 of the PSEA provides for recourse when an appointment or proposed appointment has been made in an internal appointment process. The present complaints relate to appointments that were made from the 2010 process. One of the complainant's allegations, however, is that the respondent abused its authority by arbitrarily deciding to abolish the pool of qualified candidates resulting from the 2007 process. This allegation is distinct from the complainant's allegations regarding the appointments from the 2010 process. Furthermore, the complainant has not argued that the decision to abolish the 2007 process pool is part of an overall pattern of behaviour that extends into the 2010 process.

**16** The parties presented evidence and arguments related to this allegation. However, the Tribunal finds that the elimination of the 2007 process pool is not related to the present complaints regarding the 2010 process and that it is not a matter it can determine in the context of these complaints under s. 77 of the PSEA.

**17** Consequently, the issues that the Tribunal must determine in this case are whether the respondent abused its authority by discriminating against the complainant on the basis of a disability as well as by pressuring her to write an assessment test before she was able to do so.

### **Analysis**

**18** Section 77 of the PSEA provides that an unsuccessful candidate in the area of selection for an internal advertised appointment process may file a complaint with the

Tribunal that he or she was not appointed or proposed for appointment because of an abuse of authority.

**19** The complainant bears the burden of proof, which requires her to present sufficient evidence for the Tribunal to determine, on a balance of probabilities, that a finding of abuse of authority is warranted (See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49, 50 and 55).

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

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

**22** In order to establish that the respondent engaged in a discriminatory practice, the complainant must first establish a case of discrimination at first view or *prima facie*, as explained by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (*O'Malley*).

**23** A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, would be complete and sufficient to justify a finding in the complainant's favour, in the absence of an answer or explanation from the respondent. 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 at para 22.

**24** For the Tribunal to find a *prima facie* case of discrimination, the complainant must first establish that she had a disability at the time in question. Section 25 of the CHRA states that "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. For the following reasons, the Tribunal finds that the complainant did not

demonstrate that she had a disability within the meaning of the CHRA when she wrote the TLS test on July 22, 2010.

**25** The complainant maintains that her evidence shows that there were mental health implications for her as a result of the stress she suffered before and at the time she wrote the TLS test. She argues that the Tribunal can infer that she had a disability at that time.

**26** The complainant submitted into evidence the note prepared by a palliative care physician, dated May 26, 2010, which she had filed with the respondent prior to going on leave to take care of her husband after his release from hospital. The note states that the complainant was “required to be off work indefinitely for medical reasons.” For several months, the complainant had been trying to cope with her husband’s illness, as well as her responsibilities at work. When the note was written, the complainant’s husband had decided to leave the hospital and return home.

**27** The complainant claims that this note was related to her health. There is no evidence, however, that this physician ever examined or treated the complainant. The complainant testified that her personal physician was also concerned about her at that time, but she led no other evidence to support this claim. There is no evidence that her physician prepared any document at the time in relation to her health nor that any such information was provided to the respondent. Moreover, in her testimony at the hearing, the complainant did not describe any symptoms she had at the time in question that would indicate a disability.

**28** The complainant was certainly under a lot of stress throughout her husband’s illness. However, while the Tribunal finds that the evidence demonstrates that the complainant needed accommodation to manage her family situation, it does not demonstrate that the complainant suffered from a disability.

**29** The respondent did not refuse to accept the palliative care physician’s note from the complainant at the time, and the respondent granted the complainant leave from work to assist her husband. However, the Tribunal does not find that in doing so, the

respondent was acknowledging that the complainant had a disability that required accommodation.

**30** There is no dispute that the complainant grieved her husband's death. She testified that she was unable to function after he passed away, and she remained off work for one month afterward. However, there is no evidence that she had health-related issues, or notified the respondent of any such issues, which would have triggered a discussion about accommodation for a disability.

**31** The complainant submitted a note from her treating physician into evidence, dated June 9, 2014, which states that the complainant "has been under a substantial amount of stress for the past four years, which has required medical treatment." She testified that she has been receiving counselling and taking medication for anxiety and to help her sleep. The complainant did not say when her anxiety was diagnosed, or when treatment was prescribed or undertaken. The physician's note does not mention any specific limitations, or any indication of whether the medical treatment was sufficient or other, work-related measures were indicated. If the respondent had received this note in 2010, it may well have triggered a requirement to discuss a possible need for accommodation. However, it was not given to the respondent until just before this hearing in 2014.

**32** The evidence demonstrates that the complainant had significant family-related responsibilities between May 26 and June 10, 2010, and that she deeply grieved the loss of her husband.

**33** The Tribunal finds, however, that the complainant has not demonstrated that she had a disability within the meaning of the CHRA when she wrote the TLS test on July 22, 2010. Accordingly, the complainant has not established a *prima facie* case of discrimination.

**34** The complainant contends that even if the Tribunal finds that the respondent did not discriminate against her, it still abused its authority by pressuring her to return to work and to write the TLS test when it knew or ought to have known that the complainant was not ready.

**35** The test schedule shows that candidates wrote the TLS test during a two-week period between June 11 and June 25, 2010. Both the complainant and her manager, Beth Keough, Citizen and Immigration Operations Manager, described a telephone conversation between them at the end of May 2010, where they spoke about the appointment process. Ms. Keough was the delegated manager for the advertised appointment process at issue here. Ms. Keough acknowledges that she told the complainant that her test would be scheduled. However, the complainant also confirmed Ms. Keough's testimony that she told the complainant that if she was unable to write the test when scheduled, the process would continue without her, and the board would "fit her in" later, when she was ready. In the Tribunal's view, this conversation does not amount to pressure. The complainant was on leave to care for her husband, and Ms. Keough informed her about the status of the appointment process and gave her the option of delaying her test. Nevertheless, the complainant chose to write the test with the other candidates.

**36** The complainant was scheduled to write the TLS test on June 16, 2010. When her husband passed away on June 10, her test was cancelled, and there is no evidence that the TLS test was mentioned again until after the complainant returned to work on July 12, 2010.

**37** The complainant and Ms. Keough both testified that Ms. Keough telephoned the complainant a number of times between June 10 and July 12, 2010. The complainant stated that Ms. Keough called her four times inquiring about how she was doing, and asking about when she would return to the office. She stated that when, on Friday, July 9, 2010, Ms. Keough asked her about returning to work, she replied she would return on Monday, July 12.

**38** Ms. Keough could not recall the number of times she called. She testified that she wanted to offer her support, and ensure that the complainant felt connected to the workplace. Ms. Keough stated that in her last call, on July 9, 2010, she asked the complainant about returning to work. She explained that the complainant's team had been without a Team Leader since late May, and she needed to determine whether she had to find a temporary replacement.



**39** Thus, according to the complainant and Ms. Keough, the latter did not raise the matter of the TLS test at all prior to the complainant's return to work. The Tribunal finds that the complainant has not established that Ms. Keough's discussions with her about her expected date of return to work constituted "pressure."

**40** Furthermore, the complainant's claim that she was unduly pressured by the respondent to return to work is not consistent with the evidence regarding the respondent's efforts to address her needs and support the complainant during this difficult period.

**41** The complainant's leave record shows that Ms. Keough granted her various types of leave while she was caring for her husband at home. In addition, the paid leave granted following her husband's death was four times the bereavement leave that is ordinarily available. The Tribunal notes that some of the leave throughout the entire period the complainant was absent was recorded as certified sick leave; however, as mentioned earlier, no medical certificates from that time were produced in evidence to demonstrate that the complainant was ill and under a doctor's care.

**42** The Tribunal concludes that the relationship between the complainant and Ms. Keough was such that the complainant was comfortable in stating her needs and confident that Ms. Keough would be supportive. If Ms. Keough asked the complainant about her plans for returning to work during the telephone conversations prior to July 9, 2010, clearly the complainant said she was not ready and Ms. Keough accepted that. Ms. Keough testified that on July 9, 2010, the complainant said that she wanted to get her life back to normal and focussing on work would be positive for her. The complainant did not contradict this testimony.

**43** The existence of a positive relationship between the complainant and Ms. Keough is also demonstrated by the complainant's testimony that Ms. Keough informed her in person that she had failed the TLS test, rather than have a letter issued by Human Resources as is normally done. The complainant testified that they were both very upset by the result, and that Ms. Keough allowed her time to tell her team before the results became known.

**44** The Tribunal has been presented with conflicting evidence about the interactions between the complainant and Ms. Keough during the week of July 12, 2010, with respect to the TLS test. The evidence shows that on July 13, Ms. Keough and the complainant spoke about the test and the complainant said she was not yet ready to write it. According to the complainant, Ms. Keough initiated that discussion and asked her again on July 15, if she would be ready to write the test in one week. The complainant testified that she said she “might as well get it over with.” According to Ms. Keough, the complainant spoke to her on her own initiative on July 15, and said that she was ready to write the test.

**45** The complainant submits that Ms. Keough’s version of the events on July 15, 2010, was not included in the respondent’s official reply to the complainant’s written allegations, and was offered for the first time at the hearing. When the complainant was cross-examined, the respondent’s counsel did not tell her that Ms. Keough was expected to later give evidence that could contradict the complainant’s version of what occurred on that day and offer her the opportunity to respond to this submission in her evidence. However, the complainant, who was represented, did not make any objection to the Tribunal when Ms. Keough gave her contradictory account of what took place on July 15, 2010. Furthermore, the complainant did not ask to be recalled as a witness to testify regarding Ms. Keough’s evidence.

**46** The Tribunal finds that Ms. Keough’s testimony about the events that led to the complainant writing the test on July 22, 2010, is consistent with the other evidence in this case. The complainant had suffered the loss of her husband and continued to grieve after she returned to work. However, the evidence shows that throughout the time before and after her loss, she had repeatedly made her needs known and made her own decisions concerning testing and returning to work. Moreover, Ms. Keough had consistently supported those decisions.

**47** Ms. Keough testified that she told the complainant that there was no urgency to write the test, and the complainant replied that she was feeling pressured to write the test by people in the work unit and by other candidates. According to Ms. Keough, she told the complainant that she should only write the exam when she was ready, and she

should not be pressured by anyone. The complainant testified that she was feeling pressured, and that she knew “there had been talk about others who delayed their tests.” The Tribunal cannot attribute any pressure to the respondent. Although in final arguments the complainant stated that the respondent pressured her to write the TLS test, she did not testify that Ms. Keough or any other manager pressured her. Any pressure the complainant felt arose from her own impressions of how her colleagues would perceive a further delay of her test.

**48** The complainant testified that the respondent allowed another candidate to delay an assessment test in this process until October 2010. In the Tribunal’s view, this is consistent with Ms. Keough’s testimony that the board was prepared to be flexible in addressing candidates’ circumstances, including the complainant’s.

**49** The TLS test requires that candidates be given a package one week in advance of the test. The complainant received the package and a written invitation to the test on July 15, 2010. The complainant stated she believed that, since her test had already been postponed once, she could not ask for another postponement. However, the invitation clearly states that she could ask for a postponement for reasons including a death in the family, medical reasons and other exceptional circumstances. The complainant had the invitation in her possession for a week before writing the test, but she did not inquire about or request a postponement. In addition, immediately before the test, the administrator read aloud the instructions, which informed candidates that alternate testing arrangements could be made if before or during the test session they experienced “a physical or psychological condition or illness” that could “interfere with” their test performance. Again, the complainant did not raise any issues or ask for a postponement of her test.

**50** In addition, Ms. Keough’s uncontested testimony was that when the complainant made her presentation to the board as part of the TLS test, she did not appear to be more stressed than usual for a candidate in a test situation.

**51** The complainant did not act on the option to delay her test, which was offered twice, and there is no evidence indicating that the respondent needed to go further to ensure that the complainant was ready to write the TLS test on July 22, 2010.

**52** The Tribunal finds that the complainant has not demonstrated that the respondent abused its authority by improperly pressuring her to write the TLS test on July 22, 2010.

### **Decision**

**53** For all these reasons, the complaints are dismissed.

Merri Beattie  
Member

### **Parties of Record**

<b>Tribunal Files</b>	2013-0075/0076
<b>Style of Cause</b>	<i>Alda Breen and the Deputy Minister of Citizenship and Immigration</i>
<b>Hearing</b>	June 24 and 25, 2014 Sydney, NS
<b>Date of Reasons</b>	October 21, 2014
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Sharon Barbour
<b>For the respondent</b>	Kétia Calix
<b>For the Public Service Commission</b>	Claude Zaor, by written submissions
<b>For the Canadian Human Rights Commission</b>	Jonathan Bujeau, by written submissions