



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2012-1005
Issued at: Ottawa, February 26, 2014

CLAUDETTE BESNER

Complainant

AND

DEPUTY MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to s. 65(1) of the <i>Public Service Employment Act</i>
Decision	Complaint is substantiated
Decision rendered by	Nathalie Daigle, Member
Language of Decision	English
Indexed	<i>Besner v. Deputy Minister of Human Resources and Skills Development</i>
Neutral Citation	2014 PSST 02

Reasons for Decision

Introduction

1 The complainant, Claudette Besner, occupies the position of Administrative Co-ordinator, at the AS-02 group and level, with Human Resources and Skills Development Canada (HRSDC). She contends that the respondent, the Deputy Minister of HRSDC, abused its authority when it selected her for lay-off in a selection for retention and lay-off (SERLO) process. In her view, the respondent discriminated against her in the SERLO process on the basis of disability.

2 The respondent denies that an abuse of authority occurred. It states that it identified a need to eliminate one AS-02 Administrative Co-ordinator position in the Income Security and Social Development Branch (ISSD) of HRSDC. According to the respondent, it conducted a fair, thorough, and transparent process to determine who would be laid off and who would be retained. It submits that the complainant was selected for lay-off on the basis of the score she obtained in the SERLO process.

3 The Public Service Commission (PSC) participated in this hearing through written submissions addressing its policies and guidelines concerning SERLO processes.

4 For the reasons that follow, the Tribunal finds that the complainant has established that the respondent abused its authority by engaging in a discriminatory practice within the meaning of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). The complainant has established that the respondent's decision to lay her off was based at least in part on a prohibited ground of discrimination—disability.

Background

5 On April 30, 2012, the complainant received written notice that she was an affected employee whose services may no longer be required because of a work force adjustment. A SERLO process involving her and another employee at the AS-02 group and level working in Ottawa was to be conducted.

6 In the context of this SERLO process, the complainant was provided with information regarding the approach that would be followed to determine who would be retained or laid off. Participants were to be assessed by means of a letter of application, an interview, a written test, and a reference check. Although the assessment board had originally decided that an interview would be held with each of the participants, it decided at a later date to eliminate the interview from the process.

7 At the beginning of the process, the complainant submitted her letter of application. She was informed on June 1, 2012, that she met the essential experience qualifications and was invited to proceed to the next stage, a computerized written examination, which she completed on June 8, 2012. The written exam tested the participants' knowledge and their ability to carry out specific tasks. The complainant received a mark of 60 out of 70.

8 A reference check was then used to assess the following remaining qualifications: (1) effective interpersonal skills; (2) client focus; (3) initiative; (4) judgment; (5) reliability; and (6) attention to detail. Two of the complainant's supervisors provided references. The comments of the two referees were assessed by the assessment board and she obtained a score of 23 out of 60 for these qualifications. The complainant therefore received an overall score of 83 out of 130 in the SERLO process.

9 The two participants were ranked based on their overall scores. The complainant's score was lower than the other employee's score of 100.5 out of 130. On July 19, 2012, the complainant was informed that she had been selected for lay-off.

10 On August 3, 2012, the complainant filed a complaint of abuse of authority with the Public Service Staffing Tribunal (Tribunal) pursuant to s. 65(1) of the *Public Service Employment Act*, S.C., c. 22, ss. 12, 13 (PSEA).

11 On August 3, 2012, the complainant notified the Canadian Human Rights Commission (CHRC) that she intended to raise an issue concerning the interpretation or application of the CHRA, in accordance with s. 78 of the PSEA. On August 27, 2012, the CHRC notified the Tribunal that it did not intend to make submissions in this matter.

Issue

12 Did the respondent abuse its authority by discriminating against the complainant in this SERLO process?

Analysis

13 Section 65(1) of the PSEA provides that an employee who is selected for lay-off may make a complaint to the Tribunal that his or her selection constitutes an abuse of authority.

14 Section 65(7) provides that in determining whether a complaint is substantiated under s. 65(1), the Tribunal may interpret and apply the CHRA. The Tribunal will make a finding of abuse of authority if it concludes that discrimination was a factor in the process to which a complaint before it relates (*Rajotte v. President of the Canada Border Services Agency*, 2009 PSST 0025 at para. 144).

15 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. Pursuant to s. 3(1) of the CHRA, disability is a prohibited ground of discrimination. Section 25 of the CHRA defines disability as any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

16 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 described by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (O'Malley). 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 from the respondent. Once a *prima facie* case is made, the onus then shifts to the respondent to disprove the allegations or provide some other reasonable non-discriminatory explanation. The explanation cannot be a mere pretext for

discrimination. 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.

17 In addition, it is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. The complainant need only show that discrimination is one of the factors in the respondent's decision. See *Holden v. Canadian National Railway Company* (1990), 14 C.H.R.R. D/12 (F.C.A.) at para. 7. The standard of proof in discrimination cases is the civil standard of the balance of probabilities (*Public Service Alliance of Canada v. Canada (Department of National Defence)*, 1996 CanLII 4067 (FCA), [1996] 3 FC 789).

18 The Tribunal must therefore first determine whether the complainant has established a *prima facie* case of discrimination.

Did the complainant establish a prima facie case of discrimination?

19 The complainant is hearing impaired, and has been diagnosed with an anxiety disorder and environmental sensitivity. In 2008, she went on long-term disability leave and returned to work in June 2010. While she was away, the ISSD Branch hired an additional employee at the AS-02 group and level, and the complainant's duties were transferred to this new individual.

20 When the complainant returned to work in June 2010, she required accommodation and a Memorandum of Undertaking (MOU) entitled "Telework (Work at Home)" was signed. This MOU essentially states that the complainant can work from home five days per week and that the employer is responsible for supplying her with all computer equipment, furniture and supplies she needs to carry out her work. Unless otherwise advised by her supervisor, she does not have to report to her official workplace. The MOU also specifies that the complainant's productivity is expected to be the same as that of employees who work in the office. The doctor's note that the complainant provided indicated that the complainant's return to work needed to be gradual and that telework along with flexible working hours were recommended.

The complainant's return to work was gradual and in September 2010, she started working full-time.

21 The complainant described her job between June 2010 and December 2011 as that of a "floater" in the ISSD Branch, taking work from a variety of managers. Until August 2011, she reported to Ms. Holmes, Director, Grants and Contributions Policy who assigned her work from different sections of the ISSD Branch. When Ms. Holmes left on a one year leave of absence, the complainant started reporting to Shirley Dyck, Acting Director, Grants and Contribution Policy. As a result of the complainant's request to be assigned finance-related work, she began reporting to Amber Mousseau, Project Manager in the ISSD Branch in January 2012. The complainant was working for Ms. Mousseau when the SERLO process was conducted.

22 The complainant alleges that she was disadvantaged in the SERLO process for several reasons. Namely, the accommodation provided by the respondent upon her return to work (teleworking full-time) was inadequate because she continually encountered technical problems with her equipment. These problems were not fixed until after the SERLO process was over.

23 She adds that the board, in assessing the references that provided information about her, did not take into consideration the fact that she has disabilities. These disabilities force her to work away from the office and to rely on the equipment provided by the respondent. She submits that this equipment did not work well, which the respondent did not take into consideration when it evaluated her. The respondent instead assumed she had competency and behaviour problems and as a result gave her unreasonably low scores in the SERLO process.

24 In addition, she contends that her work environment was unstable and unpredictable during the two years preceding the SERLO process, following her return to work. She was assigned work from numerous sources requiring that she learn new tasks each time. This was not taken into consideration by the referees or the assessment board.

25 Finally, she adds that her needs as a disabled person were not taken into account in this SERLO process. In her view, nothing was done to counterbalance the fact that she, as a disabled employee, worked under different conditions than the other participant in the process.

26 The complainant explained that she continuously had technical problems with her home office equipment including the computer, printer and voice mail provided to her by the respondent. She alleges that this caused her difficulties in performing her duties, and required her to consult the respondent's Information Technology (IT) support group on numerous occasions. She presented evidence that 86 IT requests or "tickets" were opened between July 2010 and June 2012. In addition, she explained that she often had difficulty entering data in the respondent's Case Management System (CMS) and that she had problems viewing some screens because access was not always given to her prior to receiving an assignment.

27 A document containing the history of all the tickets the complainant opened was put into evidence. The complainant contacted the IT support group 20 times in 2010, 28 times in 2011 and 49 times in the first nine months of 2012. The document summarizes the problems that arose. She encountered problems with her computer hardware, printer, fax, voicemail and mouse, as well as with her operating software and Web applications. On occasion, she forgot the passwords needed to access programs and Web sites.

28 The assessment board for this SERLO process consisted of Ms. Dyck and Ms. Mousseau. The written examinations and the references were initially assessed by a consultant and Ms. Mousseau, but Ms. Dyck was responsible for the final decision. Since Ms. Mousseau was a member of the board, her references, which she provided for both participants, were only assessed by Ms. Dyck. The board awarded the complainant marks of 3, 4 or 5 out of 10 for each of the six qualifications at issue. According to the rating guide, a mark of 3, 4 or 5 out of 10 is equivalent to "weak". The complainant's final score for these qualifications was 23 out of 60. The other employee was given a score of 51.5 out of 60.

29 The complainant therefore met the seven essential qualifications assessed by the written examination but did not meet the six essential qualifications assessed by the references checks.

30 The participants' referees for the SERLO process had to be their current and most recent previous supervisors. Ms. Mousseau, who works for Ms. Dyck, provided a reference for the complainant because she supervises her. Ms. Holmes was also asked to provide a reference for the complainant because she was the complainant's most recent previous supervisor before Ms. Dyck. Ms. Dyck did not provide a reference for the complainant because she did not know her very well.

31 The complainant contests her scores for each of the qualifications she failed. She provided her views regarding her assessment and how her performance or behaviour was linked directly to her disabilities or her telework situation, which arises from her disabilities.

32 With respect to effective interpersonal skills, for example, the references were designed to obtain information on whether the employee had established and maintained good working relationships both internally and externally. The references were also to address how the employee handles conflict and gets along with others, and what areas need improvement. The complainant received a low score for this qualification in part because the referees indicated that the complainant continuously required assistance and support to perform her work and had been uncooperative in the past with those assisting her. The complainant states that she maintained good working relationships with everyone in the office even though she worked from home. She concedes that because she worked from home and had to regularly learn new tasks, she did send many emails and often called for assistance. They are her means of communication. To her knowledge, however, she did not have any conflict with anyone. She points out that she has always been cordial and courteous, particularly in relation to all the IT tickets she opened. She filed copies of her email exchanges with IT staff in evidence.

33 With respect to client focus, the referees addressed whether the employee tries to meet the needs of those requiring their services and whether they regularly go beyond what is expected of them in meeting these needs. Referees were also asked if the employee was clear on who their clients are and what services they can provide. Ms. Mousseau indicated that the complainant was dependant on others to complete her tasks, to answer questions, complete the transaction requirements and print the necessary reports. The complainant explained that following her return to work, she was assigned work from numerous sources requiring that she learn new tasks each time. She recognizes that she needed guidance and often emailed or phoned colleagues. However, in her view, this was linked directly to her telework situation, which arises from her disabilities. She also pointed out one email in the evidence where a client wrote that she was doing a fabulous job.

34 As for initiative, the referees were addressing whether the employee seeks out work on her own or waits to have work assigned. The referees were also asked to give an example where the employee displayed initiative, for instance, by giving suggestions to improve a work process. The complainant disagrees with the assessment that she showed poor initiative in her work. She submits that every time she completed a task, she sought work on her own and was continuously in touch with the different managers to make sure she had sufficient work to accomplish. To demonstrate this, she pointed out that in her reference, Ms. Holmes specifically noted that when she joined her group, she showed a desire to learn, to do meaningful work, and sought out work. She explained that she also offered to help and assist others and suggested ways as to how she could help, in particular with the administration of the budget.

35 With respect to judgment, the referees were asked to describe and provide examples of the employee's ability to exercise sound judgment in the workplace. The referees noted that the complainant's judgment could use some improvement and stated that she can be quick to react to situations, like accessing documents in emails, the operations of software and Web applications and the performance of her computer hardware. The complainant explains that it is because she continuously experienced problems with her home office equipment that she took actions (opened tickets) when her equipment did not work. She claims that she solicited help in a polite and cordial

way. According to her, she exercised sound judgment in asking for assistance because had she not done so, she would not have been able to accomplish her work.

36 For reliability, the referees were asked to indicate whether the employee does what is asked of her in the time assigned, is reliable in terms of attendance at work, and is consistent in performing as required. Ms. Holmes noted that the complainant's work is not reliable. As for Ms. Mousseau, she noted that the complainant, herself, is not reliable because she does not participate in work-related events. The complainant submits that she has an excellent attendance record and that it is not true that she does not participate in work-related events. She acknowledges that she does not attend birthday celebrations or pizza lunches but says that she does attend other staff events. She submits that it was not reasonable for the assessment board to give her a 4.5 out of 10 score for her reliability based, in part, on Ms. Mousseau's reference because, as Ms. Mousseau wrote, it is her "preference" not to participate in work-related events, even though she can be accommodated. She points out that due to her hearing impairment, it can be difficult for her to attend all-staff meetings by teleconference as there can be many deafening noises over the phone. But, she states that she does generally participate in work-related events.

37 For attention to detail, the referees were asked whether the employee's work is complete and accurate, whether the work needs to be checked and corrected, and how careful the employee is in doing her work. Ms. Holmes and Ms. Mousseau gave the complainant a poor reference for this qualification because the complainant's work must regularly be reviewed and corrected. The complainant admits that she may have required step by step directions in the past on how to complete certain tasks but it is because she was always performing new tasks as a "floater". Were it not for the fact that she has disabilities, she says, she would have continued to fulfil her normal duties as an AS-02 and would have been able to provide more dependable work, as she did in the past.

38 The Tribunal finds that the complainant's evidence is complete and sufficient to establish a *prima facie* case of discrimination. She has led evidence that establishes that she has disabilities, within the meaning of s. 25 of the CHRA, which forced her to

work from home where the only equipment to which she had access was not reliable. Her performance was affected and, based on her evidence, it is one of the reasons why she received bad references and obtained low scores in the SERLO process and as a result, was selected for lay-off.

39 The onus now shifts to the respondent to provide a reasonable non-discriminatory explanation for its decision to lay-off the complainant.

Has the respondent provided a reasonable, non-discriminatory explanation for its decision to select the complainant for lay-off?

40 For the respondent to rebut the *prima facie* case of discrimination established by the complainant, it must lead sufficient and convincing evidence to demonstrate that the explanation being provided is reasonable and non-discriminatory. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at paras. 36-37 (“Morris”).

41 In answer to the complainant’s allegations, the respondent submits that the complainant’s disabilities were not in any way a factor in the decision to select her for lay-off. It submits that the complainant was selected for lay-off as a result of the scores assigned to her references by the assessment board in the SERLO process. Ms. Holmes and Ms. Mousseau testified that they gave the complainant what they considered a “balanced reference”. In the section entitled “Referee’s Assessments and Comments,” the referees described the complainant’s strengths and weaknesses for each qualification they assessed. The respondent did not call into question, however, the complainant’s evidence regarding her disabilities and their impact on her behaviour and ability to function.

42 Ms. Mousseau confirmed that the complainant encountered problems with her home office equipment, but explained that actions were taken to resolve these problems. She described the steps she took to help the complainant with her equipment while supervising her on a regular basis. But according to the evidence, most of these measures were taken after the SERLO process was completed. For example, Ms. Mousseau explained that in July 2012 and the following months, she went to the

complainant's house twice, once to check her printer and another time for the installation of a new computer. During that period of time, Ms. Mousseau also hired private sector computer specialists ("office doctors") to go to the complainant's house to try to solve the problems with her "all-in-one" phone, fax, printer and scanner. From the moment the complainant returned to work, her voice mail did not work and interfered with the scanner and fax machine. The respondent sent many technicians to solve this problem but it is only after several months that one specialist discovered the cause as being an incompatibility between the fax machine and the voice mail. The problem was then fixed, but it was after the SERLO process had been completed.

43 In essence, the respondent submits that the technical issues the complainant encountered did not impede her ability to perform her work and that she was properly assessed in the SERLO process. In other words, the complainant's computer issues were only minor, according to the respondent. For example, Ms. Holmes testified that, to her knowledge, the complainant did not experience any "significant technical difficulties" while she was her supervisor (between June 2010 and August 2011).

44 However, the documentary evidence shows that the complainant opened 39 tickets during the period when Ms. Holmes supervised her, in relation to important matters such as an inability to log on to her applications and to access forms. Between August 2011 and July 2012, the complainant opened an additional 47 tickets for similar reasons. Thus, it is clear that the complainant experienced significant problems from the time she returned to work and that these problems were not fixed until after the SERLO process was completed.

45 In the Tribunal's view, the complainant would not have needed to rely on this equipment or deal with IT staff to the extent that she did were it not for the fact that she worked from home due to her disabilities. In other words, but for the fact that the complainant was required to work away from the office due to her disabilities, she would not have encountered these challenges presented by using electronic equipment to access her work remotely.

46 The Tribunal notes, in particular, that the references highlighted these difficulties that the complainant experienced with her IT equipment and her interaction with IT staff. For instance, for the effective interpersonal skills qualification, Ms. Holmes remarked that the complainant was easily frustrated with IT staff and, according to Ms. Mousseau, the IT Manager complained that the complainant yelled and was argumentative with IT staff over the telephone.

47 Ms. Mousseau testified that on May 29, 2012, two weeks before she provided the reference for the complainant, a manager of IT support services told her that the complainant had opened 16 tickets in April and May 2012. The manager told her that the complainant's behaviour was inappropriate and that Ms. Mousseau had to deal with the matter before additional support services would be provided to the complainant. A memo summarizing the manager's concerns was filed into evidence. According to this document, the IT manager raised one incident where the IT staff involved had noted that the complainant had been uncooperative and become upset and yelled. In another instance it was indicated that the complainant had hung up on one desk agent taking her call and had later yelled at the IT team leader who called her back. In the memo, the IT manager informed Ms. Mousseau that any individual providing service to the complainant through the national service desk had been instructed to end the conversation if anything inappropriate arose.

48 After receiving these comments from the IT manager, Ms. Mousseau scheduled a fact-finding meeting to try to resolve the problem. The complainant was invited to present any clarification or extenuating circumstances that she thought should be addressed in the course of the administrative investigation. Ms. Mousseau did not clarify whether this meeting took place before or after she prepared the reference on June 12, 2012.

49 The complainant participated in the meeting with her union representative. She also prepared a seven-page response in which she described her interaction with the IT support group. This document appears to have been submitted after the meeting took place as it starts with the following sentence "[t]he following facts and statements were made by myself [sic] in discussing the above with [all persons present] at the fact finding

meeting towards IT allegations toward their perceived inappropriate behavior.” The complainant explained in her response that she was cordial and courteous with IT staff and pointed out that while she does not yell or get angry, the fact she is hearing impaired, coupled with her anxiety, cause her voice to occasionally rise. She also explained in her response that she had no choice but to open the numerous tickets because she needed to do her job and was prevented from doing so as a result of the frequent problems she had with her equipment.

50 Ms. Mousseau claims that she took the complainant’s perspective into account in the fact-finding exercise, as well as the IT manager’s views and prepared a report which included recommendations. However, only a two-page document entitled “Summary of the findings” dated May 30, 2012 (the day after which the IT manager brought the issue to Ms. Mousseau’s attention) was filed into evidence, and it appears to include only the allegations made by the IT manager.

51 In the Tribunal’s view, there is no indication that Ms. Mousseau took the complainant’s explanation into account when she mentioned this incident in her reference. As mentioned previously, the complainant’s explanation is that she has been moderately to severely hearing impaired in both ears since the age of nine. As a result of this impairment, and her anxiety disorder, her voice sometimes rises, unbeknownst to her. She explained that some people perceive this raised tone as yelling and anger. Given that Ms. Mousseau prepared her reference on June 12, 2012, it is unclear whether she had met with complainant or read the complainant’s explanation when she wrote about her alleged bad behaviour in the reference. Copies of email exchanges at the time indicate that the fact-finding meeting with the complainant originally scheduled for June 1, 2012, was postponed to a later unspecified date. The complainant’s written response following that meeting does not bear any date.

52 Ms. Mousseau also based herself on two other incidents to give the complainant a bad reference for effective interpersonal skills. She said that in February of 2012, an instructor from the Canada School of Public Service, who had given training to the complainant on salary data analysis, reported to her that the complainant’s behaviour had been problematic. In her report to Ms. Mousseau, the trainer noted that the course

she had given to the complainant was normally a 22.5 hour course that was shortened to nine hours. In the circumstances, she had tried to manage the time carefully but had found it difficult to do so given the complainant's behaviour. The complainant had requested that some chapters be skipped, at other times she had asked many questions, and she had forgotten her password the first day of the training. The trainer informed Ms. Mousseau that she had not been able to finish the training.

53 The complainant explained in an email to Ms. Mousseau that she had asked the trainer to skip a certain chapter. She felt that, given that the usual 22.5 hour training had been condensed to nine hours, they should spend more time on her weaknesses with the system. She also noted that when the trainer was not being clear on certain things, she asked questions to clarify. She also explained that the day before the training she had been requested to change her password. The next day, she simply forgot it. In the end, the complainant successfully finished the training with another instructor.

54 Ms. Mousseau also testified that on another occasion, an employee training the complainant to do financial work came to see her in tears and explained she could no longer handle training the complainant because she was calling too often for assistance. The complainant was never informed of this and did not know her calls were considered excessive.

55 The Tribunal notes that these last two incidents described by Ms. Mousseau in her reference mention the perception of the two trainers that the complainant's behaviour was problematic; the first found her uncooperative and the other said she called too often for assistance. However, no evidence was presented by the respondent that the trainers, Ms. Mousseau, or the assessment board as a whole took the complainant's disabilities into account regarding these incidents.

56 In the Tribunal's view, the complainant received poor references with respect to effective interpersonal skills because the IT staff, her managers and her trainers found that she spoke too loudly, and took up too much of their time by asking questions and seeking help. The assessment board gave her a score of 4.5 out of 10 in part for these reasons. Yet, the tone of her voice is affected by her disabilities. Further, it is because

of her telework situation, which arose from her disabilities, that she needed assistance when her equipment malfunctioned or had to perform unfamiliar work assignments. The Tribunal therefore finds that the respondent has not demonstrated that its decision to give her a very low score for this qualification was unrelated to her disabilities.

57 Another consideration in the weak references given to the complainant by Ms. Mousseau was her alleged poor reliability. Ms. Holmes wrote that the complainant is “generally reliable in meeting deadlines, but the quality and correctness of her work is not always reliable.”

58 As for Ms. Mousseau, she specified at the beginning of her reference that the complainant is a teleworker, which makes physical attendance hard to monitor. She explained at the hearing that it is not for this reason that the complainant obtained a poor score. The written reference goes on to state that the complainant is good at informing her manager when she has appointments but that she does not participate in work-related events, for which attendance is mandatory, such as all employee meetings. Ms. Mousseau specified that people with disabilities and environmental sensitivities can be, and are, accommodated at such events. In the reference, she noted that she held meetings with the complainant to inform her that the department would make every effort to accommodate her so that she could participate. According to Ms. Mousseau, however, the complainant indicated that her “preference” was not to partake in these events. The evidence is not clear on how many meetings the complainant missed or whether she was formally asked to attend these meetings. The assessment board gave the complainant a score of 4.5 for this qualification.

59 Ms. Mousseau centred her poor reliability assessment on the complainant’s failure to participate in work-related events, stating that it is the complainant’s preference not to participate. The complainant challenges this assertion. According to the evidence, only two ISSD branch-wide meetings are normally held each year. The complainant testified that in the period during which she was under Ms. Mousseau’s supervision, she could not attend one of the meetings because she was on training at the same time, and with respect to the other meeting—a half-day annual meeting—she was unable to attend due to her environmental sensitivities. While she could have

attended by teleconference, she explained that it becomes deafening, over time, to follow large groups' conversations over the phone. She points out that she was nonetheless able to attend an additional special meeting on the Work Force Adjustment Directive via teleconference.

60 The assessment board found that the complainant is not reliable, in part because she does not participate in work-related events and prefers not to attend some meetings. According to the evidence, however, the complainant appears to have only missed two meetings. She missed one for the valid reason that she was on training and the second ostensibly for reasons related to her disabilities. In the circumstances, the Tribunal finds that the respondent has not demonstrated that its decision to give her a very low for this qualification was unrelated to her disabilities. It is as a result of her disabilities, or her telework situation, which arose from her disabilities, that she did not attend some work-related events and preferred not to participate by teleconference in some meetings involving large groups of people.

61 Thus, the Tribunal finds that the complainant's disabilities were factors in the assessment of the above mentioned qualifications. With respect to the other qualifications, i.e. client focus, initiative, judgment and attention to detail, the respondent has provided a reasonable explanation for its decision to give the complainant low scores for these qualifications.

62 For initiative, for example, Ms. Holmes testified that the complainant showed poor initiative because she sometimes resisted doing some types of work that she felt were not relevant to her finance background. Ms. Holmes explained that she attempted to assign the complainant tasks that interested her and that about 70% of her work was related to finance. Ms. Holmes said that the more time passed, unfortunately, the more the complainant became picky about the work assigned to her and resisted helping out as she did not find the work relevant.

63 Similarly, for judgment, Ms. Holmes noted in her reference that the complainant's judgment "could use some improvement". She described a situation where in the past she was given several tasks and did them in the order given rather than evaluating the importance of each one and assigning it a priority.

64 With respect to attention to detail, Ms. Holmes noted that the complainant "is still learning and developing as a finance officer." She added that the complainant's "effort is excellent," but that her work "almost always needs to be checked by a supervisor, and quite often needs to be corrected." Ms. Holmes explained that she wrote this comment because the quality of the complainant's work was not satisfactory. Her work required regular review and frequently needed to be redone. As an example, she testified that after employees in her directorate had completed their Performance and Learning Agreement, the complainant had been assigned the task to indicate "completed" in the CMS system. Ms. Holmes said she explained the task to the complainant, answered all her questions and later checked in with her to see if she was completing this work assignment correctly. Even though the complainant reassured her that she was doing fine, Ms. Holmes later found that the assignment had not been done correctly. The complainant had to restart the task. Ms. Holmes also explained that, one time, the complainant had not properly booked the facilities for an all-staff meeting, as requested, which created problems.

65 The complainant did not lead any evidence that would contradict the testimony of these witnesses on these points.

Conclusion

66 The Tribunal finds that the complainant's disabilities were a factor in the assessment of her interpersonal skills and reliability. The respondent has not provided a reasonable, non-discriminatory explanation for the poor references in those qualifications upon which the assessment board relied.

67 There is no evidence in this case that the respondent intended to discriminate against the complainant; however, evidence of intent to discriminate is not necessary to make a finding of discrimination. See *O'Malley* at para 14.

68 For these reasons, the Tribunal finds that the respondent's decision to lay-off the complainant, was based at least in part on a prohibited ground of discrimination—disability. This constitutes a discriminatory practice within the meaning of s. 7(a) of the CHRA, and the Tribunal therefore finds that the selection of the complainant for lay-off constitutes an abuse of authority.

Decision

69 The complaint is substantiated.

Order

70 Section 65(4) of the PSEA grants the Tribunal the authority to set aside the decision to lay off the complainant and to order the deputy head to take any corrective action that the Tribunal considers appropriate. According to s. 65(8) of the PSEA, corrective action may include an order for relief in accordance with s. 53(2)(e) or s. 53(3) of the CHRA. Under s. 53(2)(e), the Tribunal can order the person found to have engaged in a discriminatory practice to compensate the victim by an amount not exceeding \$20,000, for any pain and suffering that the victim experienced as a result of the discriminatory practice. Section 53(3) provides that an additional order for compensation not exceeding \$20,000 may be made if the Tribunal finds that the respondent engaged in the discriminatory practice wilfully or recklessly.

71 The complainant has asked that the Tribunal set aside the decision to lay her off and order \$20,000 in compensation. The complainant did not specify which of the two CHRA remedial provisions she is invoking, but based on her submissions, it is apparent that she is making her claim pursuant to s. 53(2)(e) of the CHRA.

72 Although s. 53(2)(e) of the CHRA gives the Tribunal discretion in granting this remedy when a complaint is substantiated, that discretion must be exercised judiciously and in light of the evidence before the Tribunal. See *Canadian Human Rights Commission v. Dumont*, 2002 FCT 1280 (CanLII) at para 14. In the present case, the complainant did not adduce any detailed evidence regarding her claim for compensation under s. 53(2)(e) of the CHRA other than testifying generally that she felt stressed and

frustrated at being selected for lay-off, without elaborating any further on the pain and suffering she experienced. The complainant went on a period of extended medical leave following the SERLO process. While the stress may have been a contributing factor in her subsequent medical condition, there is insufficient evidence before the Tribunal to draw such a conclusion.

73 Accordingly, the Tribunal finds that the complainant has demonstrated that she experienced some stress following the decision to lay her off, but given her failure to adduce any additional evidence in support of her claim for compensation, an award to the complainant of \$2,000.00 for pain and suffering is justified (s. 53(2) e)).

74 The Tribunal therefore orders that the respondent's decision to lay off the complainant be set aside and orders the respondent to pay the complainant within 60 days following this decision, the sum of \$2,000.00 in compensation, pursuant to s. 53(2)(e) of the CHRA.

Nathalie Daigle
Member

Parties of Record

Tribunal Files	2012-1005
Style of Cause	<i>Claudette Besner and The Deputy Minister of Human Resources and Skills Development</i>
Hearing	August 15, 16, October 10 and 11, 2013 Ottawa
Date of Reasons	February 26, 2014
APPEARANCES:	
For the complainant	Sharon Barbour and Ian Thompson
For the respondent	Martin Desmeules and Musset Pierre Jerome
For the Public Service Commission	Luc Savard (written representations)