Public Service Staffing Tribunal | Tribunal de la dotation de la fonction publique

File: 2012-1195
Issued at: Ottawa, March 26, 2014

BRUNO MAKOUNDI

Complainant

AND

THE DEPUTY MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

Respondent

AND

OTHER PARTIES

Matter:	Complaint of abuse of authority pursuant to section 65(1) of the *Public Service Employment Act*
Decision:	Complaint is dismissed
Decision rendered by:	Nathalie Daigle, Member
Language of Decision:	French
Indexed:	*Makoundi v. Deputy Minister of Transport, Infrastructure and Communities*
Neutral Citation:	2014 PSST 5

Reasons for Decision

Introduction

1 The complainant, Bruno Makoundi, alleges that the respondent, the Deputy Minister of Transport, Infrastructure and Communities (TIC), abused its authority in selecting him for lay-off. The complainant held an EC-06 Senior Evaluation Officer position within the Evaluation Directorate, Audit and Evaluation Branch, in Ottawa. The complainant alleges that the respondent acted in bad faith and abused its authority in his assessment as part of a process for the selection of employees for retention and lay-off (SERLO process). He also alleges that the respondent showed personal favouritism toward the person selected for retention and that the process was tainted by discrimination based on race, colour, or national or ethnic origin.

2 The respondent denies that any abuse of authority occurred. It states that it determined there was a necessity to eliminate one Senior Evaluation Officer (EC-06) position in the Evaluation Directorate. The respondent conducted a SERLO process at the end of which the complainant was selected for lay-off.

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 complaint is dismissed. The Public Service Staffing Tribunal (the Tribunal) finds that there was no abuse of authority in the selection of the complainant for lay-off.

Background

5 On June 27, 2012, the complainant was informed that a SERLO process would be conducted within the Evaluation Directorate where he worked because of a lack of work following the completion of various infrastructure programs and cuts to the Directorate’s operating budget. The complainant was therefore invited to participate in the SERLO process, the objective of which was to select, from the two affected employees, one employee for retention and one for lay-off.

6 In the SERLO process, 14 essential qualifications were identified and assessed. These qualifications were described as follows in the assessment plan:

> (1) Graduation with a degree from a recognized university with acceptable specialization in economics, sociology or statistics;
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> (2) Experience in planning and conducting evaluations, studies or reviews of federal programs, policies or initiatives;
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> (3) Experience preparing evaluations or reviewing reports;
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> (4) Experience in providing advice, and preparing briefs notes or presentations to senior management …;
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> (5) Knowledge of Treasury Board of Canada Secretariat's policies, directives and guidelines related to performance measurement strategies and frameworks and program evaluation;
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> (6) Knowledge of qualitative or quantitative methodologies used in evaluation;
>
> (7) Ability to analyze and synthetize information and complex issues and provide recommendations;
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> (8) Ability to communicate effectively in writing;
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> (9) Ability to communicate effectively orally;
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> (10) Ability to supervise a team;
>
> (11) Effective interpersonal skills;
>
> (12) Initiative;
>
> (13) Reliability; and
>
> (14) Judgment.
>
> [translation]

7 The first qualification was assessed using proof of education. The other qualifications were assessed by means of either a narrative assessment written by the employee, a written exam or a reference check.

8 It was established that the employee selected for retention would be the one who obtained a pass mark for each qualification, as well as the highest overall mark for qualifications 5 to 10 and 13.

9 The assessment board (the board) was chaired by Raymond Kunze, Chief Audit and Evaluation Executive, and also included Richard Larue, Director, Evaluation and Advisory Services, Transport Canada, and Carole Thériault, Human Resources Advisor.

10 In an email sent on the morning of September 26, 2012, to the complainant and the other affected employee, the respondent informed them that they would have to complete the narrative assessment form, which was attached to the email, and send it back no later than October 3, 2012. They were also informed that the written exam would take place on the morning of October 3, 2012.

11 The respondent sent a new email to the two participants in the afternoon of September 26, 2012, asking them to disregard the previous email and use the new narrative assessment form that was attached. The respondent also informed them that the deadline for completing and sending in the narrative assessment form was moved to October 4, 2012. The written exam would still take place on October 3, 2012.

12 The participants completed their narrative assessment forms and sent them to the respondent. The assessment board corrected the forms and determined that both participants met the three experience qualifications that were assessed (qualifications 2, 3 and 4).

13 On September 27, 2012, the respondent sent an email to the participants indicating the time and location of the written exam and informing them that the exam would assess qualifications 5 to 8 and 10. The participants completed the exam on October 3, 2012. The final step was to check the participants' references. Qualifications 9 and 11 to 14 were assessed by means of the reference check.

14 The board scored the qualifications assessed in the exam and reference checks, and once all the qualifications were assessed, the board found that one of the two participants, namely, the complainant, had not obtained the pass mark for qualification 5. He obtained a mark of 18 out of 42 for this qualification, whereas the pass mark was 24 out of 42 (60%).

15 The board also added up all the marks obtained by the participants for qualifications 5 to 10 and 13. The complainant obtained an overall mark of 73 out of 115, whereas the other person affected obtained a mark of 94 out of 115.

16 The respondent therefore selected the other employee for retention because this employee met all the qualifications and obtained a higher overall mark for the previously identified selection criteria. The complainant was selected for lay-off. On October 24, 2012, he received a letter informing him of the decision.

17 On November 5, 2012, the complainant made a complaint to the Tribunal under s. 65 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA), in which he alleged that the respondent abused its authority in selecting him for lay-off.

18 Pursuant to s. 78 of the PSEA, the complainant also notified the Canadian Human Rights Commission (CHRC) that he intended to raise an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). On November 19, 2012, the CHRC informed the parties and the Tribunal that it did not wish to make submissions in the matter.

Issues

19 The Tribunal must decide the following issues:

(I) Did the respondent abuse its authority when it assessed the complainant's qualifications during this SERLO process?

(II) Did the respondent abuse its authority when it assessed the person selected for retention, and did it show personal favouritism toward this person?

(III) Did the complainant's race, colour, or national or ethnic origin influence the decision to select him for lay-off?

Analysis

20 Section 65(1) of the PSEA provides for recourse in lay-off situations. This section reads as follows:

> 65. (1) Where some but not all of the employees in a part of an organization are informed by the deputy head that they will be laid off, any employee selected for lay-off may make a complaint to the Tribunal, in the manner and within the time fixed by the Tribunal's regulations, that his or her selection constituted an abuse of authority.

21 The term "abuse of authority" is not defined in the PSEA, but s. 2(4) stipulates that it includes bad faith and personal favouritism. It is clear from the preamble of the PSEA and from the PSEA overall that abuse of authority requires more than just errors.

22 Abuse of authority in a complaint made under s. 65(1) is interpreted the same way as a complaint made under s. 77 (see *Tran v. Commissioner of the Royal Canadian Mounted Police*, 2012 PSST 0033). Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question. Abuse of authority may also include improper conduct or omissions. The degree to which the conduct or omission is improper will determine whether it constitutes an abuse of authority.

Issue I: Did the respondent abuse its authority when it assessed the complainant's qualifications during this SERLO process?

23 The complainant first states that he meets all the merit criteria for the EC-06 position that he has held since 2008 and that the respondent abused its authority by determining that he does not meet one of the qualifications assessed in the SERLO process.

24 As provided for in the PSC's *Guide on the Selection of Employees for Retention or Lay-Off*, it is understood that all employees who participate in SERLO processes already meet the merit criteria established for their substantive position. However, the purpose of the SERLO process is to select, from these employees who are *a priori* qualified, those who should be selected for retention and those who should be laid off. The Tribunal therefore does not find that the respondent abused its authority solely because it determined that the complainant did not meet one of the qualifications assessed in the SERLO process.

25 The Tribunal will therefore review each of the arguments made by the complainant, who submits that several major errors were made in the assessment of his qualifications in this process.

First alleged error

26 The complainant alleges that the respondent committed an initial error in the letter dated June 27, 2012, in which the respondent informed the participants that a SERLO process would be conducted within the Audit and Evaluation Branch. In that letter, the respondent also referred, in the second paragraph, to another branch, the Policy and Communications Branch. The paragraph reads as follows:

> Since you hold a position similar to other positions in the Policy and Communications Branch, we will soon be providing you with information about the approach we will use to determine which employees will be selected for retention and which employees could be laid off.
> [translation]

27 The respondent conceded that an administrative error was made as this paragraph should have referred to the Audit and Evaluation Branch rather than the Policy and Communications Branch.

28 The Tribunal finds that this administrative error did not negatively affect the participants. Therefore, this error is not sufficiently serious to constitute an abuse of authority.

Second alleged error

29 The respondent conceded that a second error was made in the SERLO process. This second error is more significant than the first but the Tribunal finds that it did not negatively affect the participants and did not favour either one of them.

30 The narrative assessment was used to assess essential qualifications 2, 3 and 4. The narrative assessment form was sent to participants early on the morning of September 26, 2012. However, at around 10:30 a.m., the person selected for retention under the SERLO process notified Ms. Thériault that the English and French versions of the qualifications assessed on the form did not quite match.

31 Ms. Thériault consulted Mr. Kunze as soon as possible and together they found that the English and French versions of these qualifications were not identical. They decided to correct the errors on the spot. According to them, they ensured that the French version matched the English version and, at the same time, they clarified the English version of qualifications 2 and 4.

32 The corrections were made to the English and French versions of the qualifications in the early afternoon and, at around 3:30 p.m., Ms. Thériault sent the corrected form to the participants. In a new message, sent separately to each participant two minutes apart, she wrote: “Please ignore previous email and use this assessment form”.

33 However, Ms. Thériault noticed, long after the SERLO process had ended, that on September 26, 2012, at around 3:30 p.m., she had not sent the corrected form to the complainant, but instead had inadvertently sent the original uncorrected form. Since the corrected document had the same name as the uncorrected one, the error was not evident, and it was only after the complainant made his complaint to the Tribunal that the error was found. The person selected for retention received the corrected form.

34 The two participants therefore completed different forms. The complainant explained that he referred solely to the French version of the form to answer the questions. He found the questions to be clear and was not concerned that the same form had been sent to him twice. He did not compare the English and French versions of the qualifications.

35 The participants’ responses, in which they described their evaluation experience, were corrected with no errors found, and both participants received a mark indicating that they had met the three qualifications in question.

36 The complainant submits that the person selected for retention benefitted from greater flexibility to meet qualification 2, in particular because the French wording was changed. The original and corrected versions of the qualification read as follows (differences in bold):

(Qualification 2 - Original version)	(Qualification 2 - Corrected version)
Experience in **the design**, **conduct and** evaluations, studies or reviews of federal programs, policies or initiatives. Expérience de **la participation à la conception et à l'évaluation** de programmes, politiques ou initiatives du gouvernement fédéral.	Experience **in planning and conducting** evaluations, studies or reviews of federal programs, policies or initiatives. Expérience **à planifier et à mener des évaluations**, **des études ou la révision** de programmes, politiques ou initiatives du gouvernement fédéral.

37 According to the complainant, the changes to the French version gave the person selected for retention the option of using past experience, where this person planned and conducted not only "évaluations" of federal programs, policies or initiatives, but also "des études ou la révision" of federal programs, policies or initiatives. The complainant did not receive the corrected version of this qualification and demonstrated only that he had planned and conducted "évaluations" of federal programs, policies or initiatives.

38 Mr. Kunze explained that he did intend to include the words "des études ou la révision" in this qualification because he considered past experience in planning and conducting studies or reviews of programs to be appropriate. Since he worked in English, these words were included in the English version of the qualification. However, they were unfortunately not incorporated into the translation.

39 The Tribunal finds that the person selected for retention, who answered the questions in English, was not favored because the original French version of qualification 2, which omitted the words "des études ou la révision," was changed to better match the English version. The person selected for retention relied on the English version of the qualifications to answer the questions, and the original English version already gave this person the option of using past experience in planning and conducting studies or reviews of federal programs. Moreover, the evidence shows that Mr. Kunze intended to include the words "des études ou la révision" of programs in the qualification.

40 Similarly, the Tribunal concludes that the complainant was not disadvantaged by the fact that he had to meet a qualification that omitted the words “des études ou la révision” because he demonstrated that he met the qualification as stated in French and obtained a mark of “met” for this qualification. Furthermore, in his testimony, Mr. Kunze explained that, when he corrected the narrative assessment completed by the complainant, he checked whether the complainant met the requirements of the English version of the qualifications because he had written them in that language. Mr. Kunze stated that the complainant did indeed meet the requirements of the English version of the qualifications.

41 With regard to the change to qualification 2, from “design” to “planning,” Mr. Kunze explained that this change was made because “planning” is used more often than “design” in this area. He therefore made the change in order to be consistent.

42 The Tribunal is not convinced that the person selected for retention was advantaged by the fact that the word “design” in qualification 2 was replaced by the word “planning.” This person had to demonstrate having planned evaluations. With regard to the complainant, he demonstrated that he had experience in the design of evaluations. Planning evaluations and the design of evaluations are related. Lastly, this slight difference in language was inconsequential because both participants met the qualification.

43 With regard to qualifications 3 and 4, the original and corrected versions of these qualifications read as follows (differences in bold):

(Qualification 3 - Original version) Experience preparing evaluations or reviewing reports. Expérience de la préparation de **rapports d’évaluation** ou **de recherche.**	(Qualification 3 - Corrected version) Experience preparing evaluations or reviewing reports. Expérience de la préparation **de l’évaluation** ou **de la révision de rapports.**
(Qualification 4 - Corrected version) Experience in providing advice, and preparing briefs or presentations to senior management (senior management	(Qualification 4 - Corrected version) Experience in providing advice, and preparing briefs **notes** or presentations to senior management (senior management

defined as Director level and above). Expérience de la **préparation de documents d'information**, de notes de service ministérielles ou de présentations à l'intention de la haute direction (la haute direction comprend les directeurs et les postes de niveau supérieur).	defined as Director level and above) Expérience **à fournir des conseils et préparer,** des notes de service ou de présentations à l'intention de la haute direction (la haute direction comprend les directeurs et les postes de niveau supérieur).

44 In summary, the English version of qualification 3 remained the same. The French version of this qualification was corrected, however, because of a translation error. With regard to qualification 4, the word "notes" was added to the English version for clarification purposes, while the French version of this qualification was corrected because of a translation error.

45 The Tribunal finds that, despite the changes made to the text, the evidence shows that the assessment board determined that both the complainant and the person selected for retention met the requirements of these two qualifications. Therefore, neither of the participants was disadvantaged or advantaged by the fact that clarifications were made to the form or by the fact that the complainant based his answers on the original version of the form.

46 This matter differs from that in *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 0027. In *Chiasson*, the Tribunal found that having changed the instructions for the off-site written exam without following up constituted serious negligence tantamount to bad faith. The maximum length of the answer to each question was originally not to exceed two pages. However, this requirement was later removed and the complainant was not informed of the change. Ms. Chiasson therefore limited her answers to two pages. The Tribunal found that the respondent's unreasonable conduct had created an inequitable outcome for Ms. Chiasson because she had not been assessed on the same basis as the others and had been penalized as a result.

47 In this case, the respondent's conduct did not create an inequitable outcome for the complainant because the assessment board concluded that he met the qualifications. The Tribunal recognizes that the respondent corrected errors on the narrative assessment form along the way and failed, inadvertently, to provide a copy of the corrected version to the complainant. However, the Tribunal finds that these errors did not create an inequitable outcome for the complainant. They are therefore not sufficiently serious to constitute an abuse of authority.

Third alleged error

48 After assessing the participants in relation to qualifications 2, 3 and 4, the SERLO process continued, and the participants were assessed in relation to qualifications 5 to 14.

49 The participants had been informed on September 27 that the October 3 exam would serve to assess, among other things, their "[k]nowledge of Treasury Board of Canada Secretariat's policies, directives and guidelines related to performance measurement strategies and frameworks and program evaluation", that is, qualification 5 [Note: The French version of this qualification was : « [c]onnaissance des politiques, des directives et des lignes directrices du Secrétariat du Conseil du Trésor du Canada relié (sic) aux stratégies de mesures du rendement, des cadres et de l'évaluation des programmes »]. This is the qualification for which the complainant failed to obtain a pass mark.

50 To prepare for the exam, the complainant studied the TBS policies, directives and guidelines he felt were relevant based on the qualification statement. Three types of TBS documents were identified in the qualification: (1) policies; (2) directives; and (3) guidelines. Three subject areas were also mentioned in the qualification: (1) performance measurement strategies; (2) frameworks [in French: "cadres"]; and (3) program evaluation.

51 With regard to TBS *policies* concerning the three subject areas indicated, the complainant identified as relevant and studied the Policy on Evaluation and the Policy on Transfer Payments. He explained that he did not think there were any relevant

policies on “cadres.” He did not specify here whether by “cadres” he meant “managers” or “performance measurement frameworks.”

52 For TBS *directives* concerning the three subject areas indicated, the complainant identified as relevant and studied the Directive on the Evaluation Function and the Directive on Transfer Payments. He explained that he did not think there were any relevant directives on “cadres.”

53 With regard to TBS *guidelines* concerning the three areas indicated, the complainant identified as relevant and studied the guidelines related to performance measurement strategies, namely, (1) Guideline on Performance Management Strategy under the Policy on Transfer Payments; and (2) Supporting Effective Evaluations: A Guide to Developing Performance Management. He explained that he did not think there were any relevant guidelines on “cadres” or program evaluation.

54 In summary, since he concluded that there were no policies, directives or guidelines on “cadres,” he did not review any documents on this subject when preparing for the exam.

55 The complainant explained that, when he develops an evaluation plan, he regularly uses all the TBS policies, directives and guidelines indicated above, in addition to the Evaluation Standards for the Government of Canada.

56 The exam contained two questions intended to assess qualification 5. The first question was as follows:

> Describe the three elements outlined within the policy requirements of the Treasury Board Policy on Management, Resources and Results Structure (MRRS), and explain why they are important for evaluations.
> [translation]

57 The second question was as follows:

> Describe the core issues to be addressed in an evaluation as required under the Treasury Board Policy on Evaluation (2009).
>
> What are the possible challenges in implementing them?
> [translation]

58 The complainant was not able to provide an adequate answer to the first question because he had not, as he explained, reviewed the Policy on Management, Resources and Results Structure (MRRS) before the exam. The complainant explained that he does not regularly use the Policy on MRRS as part of his work and that is why he did not review this policy when preparing for his exam. He submits that asking a question about the Policy on MRRS was not in compliance with the instructions given because the statement regarding the qualification assessed ("[k]nowledge of Treasury Board of Canada Secretariat's policies, directives and guidelines related to performance measurement strategies and frameworks and program evaluation) does not include this policy (Policy on MRRS). Therefore, he submits that the assessed qualification was ambiguous. It did not specify that the participants had to study the Policy on MRRS.

59 Lastly, the complainant submits that the Policy on MRRS is not related to evaluation work. In his view, this policy serves rather to ensure that program outcomes will contribute to the organization's attainment of objectives.

60 Mr. Larue explained that, from an administrative point of view, there are three major TBS policies that every evaluator should know: (1) the Policy on Evaluation; (2) the Policy on Transfer Payments; and (3) the Policy on MRRS. According to him, in any evaluation, there are two components. The "relevance" of a program must be evaluated, as well as its "performance." In evaluating a program's "relevance," the Policy on MRRS is relevant in that a program must align with the department's strategic outcomes. In evaluating a program's "performance," the Policy on MRRS is also relevant because the program must attain its objectives. The Policy on MRRS states, in short, what to evaluate but not how.

61 The Policy on MRRS was filed as evidence. It aims to ensure that the government and Parliament receive integrated financial and non-financial program performance information for use to support improved allocation and reallocation decisions in individual departments and across government. The three requirements of the Policy on MRRS for deputy heads are to ensure that their MRRSs include the following: (1) clearly defined and measurable strategic outcomes; (2) a program activity architecture (PAA) that is explained in sufficient detail to reflect how a department

allocates and manages its resources to achieve their intended results; and (3) a description of the current governance structure for each program in the PAA. A copy of the exam completed by the complainant was filed as evidence. This copy demonstrates that the complainant was not able to name these three requirements of the Policy on MRRS in response to question 1.

62 According to Mr. Kunze and Mr. Larue, the assessed qualification, as stated, clearly included the Policy on MRRS because this policy is related to performance measurement frameworks. Therefore, they explained, it was clearly included in the statement of qualification, which read as follows: "[k]nowledge of Treasury Board of Canada Secretariat's policies … related to *performance measurement strategies and frameworks* and program evaluation" (Emphasis added). Mr. Kunze stated that a senior evaluation officer (EC-06) should know this policy because the incumbent of such a position is called on to conduct program evaluations and advise others on them. Moreover, Mr. Kunze specified that it is important for a senior evaluation officer to examine overall program performance since this task is not the responsibility of subordinate evaluators.

63 Mr. Larue also specified that there is a clear link between the Policy on Evaluation and the Policy on MRRS. Similarly, the Directive on the Evaluation Function directly stipulates in section 6.1.3 that heads of evaluation are responsible for ensuring that their departmental evaluation plans "align with and support the departmental Management, Resources and Results Structure" (MRRS).

64 The guideline entitled "Supporting Effective Evaluations: A Guide to Developing Performance Measurement," which was filed as evidence, also refers to the Policy on MRRS. Section 6.3 entitled "Performance Measurement Frameworks and the Performance Measurement Strategy Framework" states that the Policy on MRRS "requires the development of a departmental Performance Measurement Framework (PMF), which sets out the expected results and the performance measures to be reported for programs identified in the PAA" (Program Activity Architecture). The Performance Management (PM) Strategy Framework is intended to more effectively support both day-to-day program monitoring and delivery and the eventual evaluation of

that program. Accordingly, the guideline stipulates that the PM Strategy Framework may include expected results, outputs and supporting performance indicators beyond the limits established for the expected results and performance indicators to be included in the MRRS PMF.

65 The Tribunal finds that the allegation that the respondent abused its authority by asking a question on the exam about the Policy on MRRS is not substantiated. The respondent showed that three TBS policies were relevant according to the three subject areas specified, not just two as indicated by the complainant. Furthermore, the respondent showed that the Policy on MRRS is related to the Policy on Evaluation through the Directive on the Evaluation Function. The guideline entitled “Supporting Effective Evaluations: A Guide to Developing Performance Measurement” also refers to the Policy on MRRS. These are all documents that evaluators should know.

66 The Tribunal therefore concludes that, as stated, qualification 5 clearly included the Policy on MRRS because this policy is related to performance measurement frameworks. The Tribunal is therefore satisfied that there is a policy on performance measurement frameworks that was relevant to program evaluation.

67 Lastly, the complainant submits that qualification 5 refers to a policy on “cadres” but that it was not clear that this policy was associated to “performance measurement” [Note: the French word for frameworks is “cadres” which may also mean an executive cadre in the government]. However, the term “cadres,” taken in context, could refer only to performance measurement frameworks. It was clear that this term did not refer to “cadres” as persons belonging to the management category.

68 The complainant also acknowledged that he reviews the Policy on MRRS yearly as part of his job when he develops departmental evaluation plans. He consults this policy and the PAA to prepare his evaluation plans.

69 The Tribunal therefore finds that the respondent did not make an error or abuse its authority in asking a question on the exam about the Policy on MRRS. The essential qualification, as stated, had a clear and rational connection to the Policy on MRRS.

Fourth alleged error

70 The respondent used a previous exam from an appointment process conducted in 2010 for another EC-06 position to develop the exam used for the SERLO process. In the previous exam, the respondent asked a question to determine whether participants were familiar with the Policy on MRRS, and the same question was asked on the exam prepared for the SERLO process. It was question 1: “Describe the three elements outlined within the policy requirements of the Treasury Board Policy on Management, Resources and Results Structure (MRRS), and explain why they are important for evaluations” [translation].

71 However, in the exam used in 2010, this question was used to assess the following qualification: “[k]nowledge of federal performance measurement policies.” The complainant submits that the respondent should not have changed the statement of this qualification if it wanted, again, to assess participants’ knowledge of the Policy on MRRS. It should have kept the original qualification statement (“[k]nowledge of federal performance measurement policies”).

72 According to Mr. Kunze, qualification 5, as stated for the purposes of the SERLO process, gave more information to the participants and better described what the assessment board was looking to assess, for example, the participants’ knowledge of the three relevant TBS policies related to evaluation.

73 In the Tribunal’s view, the allegation that the respondent made an error by changing the statement of this qualification is not substantiated. The respondent simply used phrasing that is broader than what was previously used, but that is still reasonable and acceptable.

74 Furthermore, no policy or regulation that would prevent the respondent from using a former exam as a model for preparing a new exam was submitted to the Tribunal. The respondent therefore had the right to make changes to the exam used as a model in order to make it more suitable for the SERLO process. That is what it did. Based on the evidence submitted to the Tribunal, Mr. Kunze, working with the human resources advisor, identified the essential qualifications that would be assessed during

the SERLO process and selected the assessment tools that would be used. The qualifications and tools were included in the assessment plan that was prepared for the SERLO process. Mr. Larue was also consulted during the preparation of the exam.

75 Deputy heads have broad discretion in the selection of essential qualifications (see s. 30(2) of the PSEA) and in the use of methods that they consider appropriate to determine whether a person meets these qualifications (see s. 36 of the PSEA). For the Tribunal to find that there was an abuse of authority in the selection of the essential qualifications or assessment tools and methods, the complainant must show that the essential qualifications are not related to the duties of the position and, in the case of tools, that they do not allow the qualifications stipulated to be assessed, that they are not connected to these qualifications, or that they are discriminatory. See *Bédard v. Deputy Minister of National Defence*, 2010 PSST 0015, at paragraphs 46 to 50.

76 In this case, the complainant failed to show that the selected qualifications were not related to the duties of the position, that the outcome of the SERLO process was inequitable or that there was an error in the use of the assessment tools. He also failed to demonstrate that the assessment tools did not allow the essential qualifications to be assessed. Rather, the evidence shows that Mr. Kunze exercised his discretion appropriately in selecting the essential qualifications and the assessment methods and tools used.

77 The Tribunal therefore finds that there was no abuse of authority in the selection of the essential qualification or the assessment methods and tools, nor in the decision to change the phrasing of qualification 5.

Fifth alleged error

78 Two references were initially requested from each of the participants in the SERLO process. Later, a third reference was requested. The references had to have been supervisors of the participants in the last three years and, if possible, one of these individuals had to have worked with the participant at Infrastructure Canada. The two participants in the SERLO process provided the names of three references. This requirement was later modified once again because the assessment board decided that

two references would be sufficient. The board was able to obtain only one reference for the complainant, while it obtained two for the person selected for retention. According to the complainant, this shows that the SERLO process was unfair and that the respondent abused its authority.

79 However, the members of the assessment board explained that, to ensure fairness, they decided that only one reference for the complainant was required. Out of the three references put forward by the complainant, the first provided a positive reference. The second referee explained that she did not know the complainant well enough to give him a reference. The third referee was not contacted because the complainant explained to Mr. Kunze that this referee might have a biased perception of him. According to the complainant, this person had harassed him in the past.

80 It was thus to preserve the impartiality of the SERLO process that the assessment board decided not to consult the third referee. Moreover, the complainant had specifically requested that this referee not be contacted. Ms. Thériault and Mr. Kunze stated that they found the responses of the first referee sufficient to assess the qualifications being assessed. The responses of the first referee were therefore assessed using a rating scale that had been prepared beforehand. Since the response provided by the first referee was very positive, the complainant was given the mark of 4 out of 5 for qualifications 8, 11 and 14, all qualifications assessed by means of the references. He obtained the mark of “meets” for the other qualifications assessed by means of references, namely, qualifications 12 and 13. Furthermore, Mr. Larue explained that the assessment board did not lower the complainant’s marks on the ground that he had only one reference.

81 The Tribunal finds that the respondent did not abuse its authority by limiting itself to a single reference for the complainant, even though it was able to obtain two references for the person selected for retention. The assessment board exercised its discretion and found that it had enough information to assess the complainant. It was to avoid disadvantaging the complainant that it declared itself satisfied with only one reference for him. This decision did not negatively affect the complainant, who, moreover, received good marks for all the qualifications assessed by means of the

references. In addition, even if he had been able to obtain three additional points for the qualifications assessed by means of the references (the maximum number of points for these qualifications was 5 out of 5), it would not have changed his ranking in the SERLO process because he obtained an overall mark of 73 out of 115, while the person selected for retention received a mark of 94 out of 115.

Allegation of bias

82 The complainant submits that the respondent demonstrated a bias against him when it assessed him as part of the SERLO process because, at the same time that the SERLO process was taking place, the complainant was the subject of disciplinary action by his manager, Mr. Kunze, following some emails that he had sent to certain people.

83 The complainant maintains that he was harassed between 2008 and 2010. He thereafter filed a harassment complaint against an employee in his department and an administrative investigation was conducted.

84 Following this investigation, the complainant sought to obtain the testimonies given against him by certain witnesses as part of the investigation. He filed an access to information request with his department, and on September 21, 2012, he received information in response to this request. This set off a series of events in September and October 2012, which led to disciplinary action being taken against the complainant. These events can be summarized as follows:

September 24	The complainant sends an initial email to the witnesses in which he states that he noticed that certain witnesses lied in their testimony during the investigation that was conducted following his harassment complaint. He reminds the witnesses that he has initiated proceedings with the Federal Court as a result his harassment complaint and finishes by writing: “As this is the last email that I am writing to each of you, as witnesses and investigators, I say to you [translation], “Adieu!””
September 27	Mr. Kunze, accompanied by the Departmental Security Officer, meets with the complainant regarding his email. He explains to the complainant that the recipients of the email found the language used in the email threatening and intimidating. Mr. Kunze explains to the complainant that sending such emails is against the *Values and Ethics Code for the Public Service*. Mr. Kunze asks the complainant

	to stop communicating with the witnesses by email. Mr. Kunze informs him that he may instead contact the Department of Justice Civil Litigation Section's lawyer who is in charge of the legal proceedings resulting from his harassment complaint and the grievances that he has filed.
October 1	The complainant sends a second email to the witnesses because, according to him, there is reason to initiate proceedings against these individuals. According to him, some of these people are not covered by his legal proceedings with the Federal Court and, thus, are not, at this time, clients of the Department of Justice's lawyer. The complainant therefore alleges that he has the right to communicate with them directly, particularly if he has to notify them in person of an application to institute proceedings. In this second email, the complainant writes verbatim, among other things, the following: I spend 836 hours of sick leave due to your racism, discrimination and harassment. Do you believe that I would not bring you before the justice? Come on! We will have the fun before the Superior Court of Justice of Ontario. All people who ploted against me will be brought before the justice . . . . See you before the Superior Court of Justice of Ontario in Ottawa.
October 3 (morning)	The complainant completes his exam as part of the SERLO process.
October 3 (afternoon)	Mr. Kunze, accompanied by the Departmental Security Officer, meets with the complainant and gives him a letter regarding the emails that he sent on September 24 and October 1. The letter instructs the complainant to stop communicating with the witnesses. Mr. Kunze reminds the complainant that the individuals who received these emails found them to be threatening. He repeats that the only person the complainant has permission to communicate with regarding his legal proceedings is the Department of Justice's lawyer. The letter states that the complainant must comply with the *Values and Ethics Code*, that it is a condition of employment and that a violation may result in disciplinary action up to and including dismissal.
October 3 (evening)	The complainant writes to a manager at the Department of Justice to ask if he has to notify the three witnesses directly of his application to institute proceedings against them or if he has to notify the lawyer involved in his existing legal proceedings before the Federal Court.
October 4 (morning)	A manager from the Department of Justice responds to the complainant that someone will look into this.

October 4 (afternoon)	A lawyer from the Department of Justice responds as follows to the complainant: > We cannot accept the notification of the claim to which you are referring in your email. Until the time when you initiate your proceedings, the persons involved cannot ask the Department of Justice to represent them. It is only once we are given this mandate that we can act . . . > [translation]
October 4 (evening)	The complainant sends an email to Mr. Kunze to request a quadripartite meeting. He writes as follows: > . . . [T]he harassment directed at me is still happening and . . . the threats of disciplinary action up to and including my dismissal contained in your letter and the things you said in your office warrant discussion. > [translation]
October 5	The complainant sends another email to Mr. Kunze to inform him that he would like to meet with him in the coming weeks. Mr. Kunze does not reply immediately to this request.
October 12	The complainant sends a third email to two witnesses. He writes that a document will be sent to them directly. He adds the following: > In conclusion, in Mr. Kunze's letter dated October 3, 2012, it is indicated that my two emails dated September 24 and October 1, 2012, "contained threatening and intimidating language". Once again, if this is true, I ask that you report this to the Ottawa Police. Threats and intimidation are recognized as offences under the *Criminal Code of Canada*. Failure to report these facts and continue to imply that I am threatening or intimidating you will be considered as defamation. > [translation]
October 17	A disciplinary hearing is held regarding the complainant's emails. The complainant has the opportunity to explain his behaviour. A union representative and an employee from human resources are present.
October 22	The assessment board meets to finish correcting the exams and the references obtained for the two participants in the SERLO process. The board completes the employees' overall score sheet.
October 24	The complainant receives a letter informing him that he has been selected for lay-off. He learns that he did not obtain the pass mark for one of the exam questions.

October 30	An informal discussion is held between the parties. The issue is that the complainant failed qualification 5. At this meeting, the complainant states that the question asked was not appropriate given that it involved a policy that, in his opinion, should not have been included in the exam.
October 31	Mr. Kunze gives the complainant a reprimand letter written following the disciplinary hearing held on October 17. In this letter, Mr. Kunze reminds the complainant that, on October 12, 2012, he sent an email to two individuals with whom he did not have the right to communicate. Therefore, he disobeyed the orders that he had received on October 3, 2012. The letter also states that the complainant had the opportunity to explain his behaviour. However, Mr. Kunze concludes that: "Your justifications have proven unsatisfactory and I find that you have behaved in a manner that cannot be tolerated." The letter also reminds the complainant that he is prohibited from communicating with the witnesses and that he must realize the gravity of his conduct and his behaviour and understand that any subsequent misconduct may result in more severe disciplinary action up to and including dismissal. Representatives from human resources and from the complainant's union are present when this letter is given to the complainant.

85 Mr. Kunze stated that the fact that disciplinary proceedings were under way against the complainant did not have an effect on the assessment board's work on October 22. In fact, he explained, he did not inform the other assessment board members of the disciplinary hearing held with the complainant on October 17.

86 The complainant stated that he was not surprised to learn, on October 24, that he would be laid off, given the language used by Mr. Kunze on October 3, according to which disciplinary action up to and including dismissal could be imposed if he continued sending emails that were considered "threatening and intimidating" [translation].

87 The complainant relies on the events that occurred between September 27 and October 31, 2012, to show that Mr. Kunze wanted him to leave and that the board showed a bias against him when it assessed him as part of the SERLO process.

88 The complainant did not follow up on his comments that he was taking legal action against certain individuals with the Ontario Superior Court of Justice and did not

send them an application to institute proceedings. Rather, he chose to file two grievances in this regard.

89 In addition, the complainant did not ask his director, Mr. Kunze, to withdraw from the SERLO process on the ground that he may not be impartial. Finally, Mr. Kunze explained that he had never had problems with the complainant beforehand and that he was a good worker, but that he had had to take into consideration some of the worrisome aspects of the emails and intervene.

90 Persons assigned to assess candidates in a SERLO process have the duty to conduct an unbiased assessment, which does not give rise to a reasonable apprehension of bias. In *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010, the Tribunal has adapted the test set out in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, to questions of bias in an appointment process, as follows: If a relatively well informed person can reasonably perceive bias on the part of one or several of the persons responsible for the assessment, the Tribunal may conclude that there was an abuse of authority.

91 The Tribunal finds that the case law that applies to questions of bias in an appointment process also applies to questions of bias in a SERLO process, given the clear similarities between the two processes and the absence of any provision to the contrary in the PSEA or the *Public Service Employment Regulations* SOR/2005-334.

92 In this case, the Tribunal is satisfied that a relatively well informed person assessing the evidence as a whole would not perceive bias on the part of Mr. Kunze in his assessment of the complainant. Mr. Kunze, as chair of the assessment board, did not act in any way that could lead a relatively well informed person to perceive such a bias.

93 The Tribunal finds that even though Mr. Kunze gave a reprimand letter to the complainant on October 31 regarding his emails, which were deemed threatening and intimidating, the action of providing this letter did not negatively affect the SERLO process, which ended on October 24. Mr. Kunze, as a manager, had to intervene in September and October to deal with these emails because it was a pressing issue.

However, it was an issue that was totally independent of the SERLO process. There is no evidence that Mr. Kunze's intervention had a negative effect on the complainant's assessment in the SERLO process. Mr. Kunze explained that he managed the issue of the emails independently from the SERLO process. He did not even mention to the other members of the assessment board on October 22 that a disciplinary hearing had been held with the complainant on October 17. Mr. Larue and Ms. Thériault, who did not work with Mr. Kunze regularly, confirmed that they were not informed of the disciplinary hearing. They explained that, during the meeting on October 22, 2012, they simply finished correcting the exams and the references of the two participants, and completed the score sheet without being made aware of the disciplinary hearing on October 17. The complainant did not provide any evidence contradicting the testimony of Mr. Kunze, Mr. Larue and Ms. Thériault. As a result, the Tribunal is satisfied that the complainant's assessment was conducted in the usual manner.

94 Thus, the Tribunal concludes that the complainant did not establish that the respondent had a bias against him. Even if the Tribunal's finding was challenged, the Tribunal is satisfied that the assessment board's finding that the complainant did not meet qualification 5 was based on an objective criterion. The complainant, moreover, acknowledged that he had not studied the MRRS policy before the exam.

95 Therefore, the complainant did not establish that the respondent abused its authority in the assessment of his qualifications.

Issue II: Did the respondent abuse its authority when it assessed the person selected for retention, and did it show personal favouritism toward this person?

Allegation that the assessment board assessed the person selected for retention inappropriately

96 The complainant alleges that the assessment board assessed the person selected for retention inappropriately. He submits that the person did not meet the qualifications for an EC-06 position and that the board was more flexible with this person, particularly with regard to the assessment for qualifications 1 and 2.

97 With regard to qualification 2 (“Experience in planning and conducting evaluations, studies or reviews of federal programs, policies or initiatives”), the Tribunal has already found that the original French version of this qualification, which omitted the words “des études ou la révision”, was amended to better correspond to the English text and did not favour the person selected for retention. Therefore, this does not constitute evidence that the person was assessed inappropriately in this process.

98 With regard to qualification 1 (“Graduation with a degree from a recognized university with acceptable specialization in economics, sociology or statistics” [translation]), the complainant submits that the person selected for retention did not meet this qualification, which requires that the person have a degree from a recognized university with acceptable specialization in economics, sociology or statistics. The Statement of Merit Criteria also included this clarification:

> *Candidates must always have a university degree. The courses for the specialization do not necessarily have to be part of a degree program in the required specialization. The specialization may also be obtained through an acceptable combination of education, training and/or experience.
> [translation]

99 Ms. Thériault explained how the assessment board assessed the education qualification of the person selected for retention and how it determined that the person met the qualification standard for the EC (Economics and Social Sciences Services) professional group established by the TBS. A form titled EC Education Screening Form was prepared in 2011, when the person selected for retention arrived at the department. The board consulted this form before making its decision and found that the person met the qualification. This type of form is currently used in appointment processes for positions at the EC-06 group and level. The form sets out that there are three ways to determine whether a participant’s education may substitute for acceptable specialization in economics, sociology or statistics. The participant must either have a degree in one of the specialized fields, **or** have a degree as well as three full courses (or six half courses) in one of the specialized fields, **or** have the following:

> Degree + acceptable combination of education, training and/or experience; must consist of **at least 2 of the following:**
>
> *Education:* min. 2 full course (4 half courses) in any combination of the specialized areas (Econ, Soc or Stats); AND/OR

> *Training:* an acceptable combination of university/college courses in a field related to the position's work description . . . and/or acceptable level of training courses related to the position's work description . . . AND/OR
>
> *Experience:* min. 2 yrs experience working in an area related to the position's work description (e.g. policy analysis, policy development or program delivery)

100 The board did not complete a new EC Education Screening Form but found that the person selected for retention met the education qualification because the person had an acceptable combination of education and experience, which substituted for the specialization. Mr. Kunze explained in detail how he found that the person selected for retention met this requirement. He explained that this person possessed, in addition to an acceptable degree, five half courses in economics and statistics (the requirement was four) and that, at the time of the SERLO process, this person had 12 years of experience (the requirement was a minimum of two years) in fields relating to the position's job description. The person's résumé described the previous work experience. Therefore, in his opinion, the person met the required criteria.

101 The complainant failed to establish that the respondent incorrectly assessed the person selected for retention by finding that the person met the education qualification. The Tribunal finds that the person met the education and experience criteria. Finally, it was unnecessary for the board to complete a new EC Education Screening Form as part of the SERLO process. The form already on file could be used to determine whether the person met qualification 1 of this process.

Allegation of personal favouritism

102 The complainant also states that the assessment board showed favouritism toward the person selected for retention and that it overestimated this person's performance given that this person joined the TIC Department on August 8, 2011. According to him, the person has a lot less experience in conducting evaluations than he has as he joined the department in July 2008.

103 According to s. 2(4) of the PSEA, abuse of authority includes personal favouritism. The complainant alleges that the appointment of the person selected for retention is due to personal favouritism.

104 The complainant's argument is based on four grounds: (1) the person selected for retention has less experience in conducting evaluations than he has; (2) when the person selected for retention arrived at the department, this person was appointed as a result of a shorter process (a deployment) than the process used when he joined the department (an appointment); (3) the person selected for retention did not have any labour relations issues within the department, whereas he did; and (4) when the person selected for retention brought it to the attention of the respondent that the English and French versions of qualifications 2 to 4 did not match, the respondent immediately corrected its error, while, when he pointed out to the respondent that qualification 5 was ambiguous, the respondent did not acknowledge or correct its error.

105 First, the fact that the person selected for retention was kept in the position even though this person had less assessment experience than the complainant is not an indicator that this person benefitted from personal favouritism. In this case, the two participants affected by the SERLO process were the subject of a comprehensive assessment. The person selected for retention met all the essential qualifications and obtained the highest mark in the process. The Tribunal is satisfied that the respondent decided to retain this person for these reasons. The fact that this person had less experience with the department than the complainant was an irrelevant factor in the assessment.

106 Second, the fact that the person selected for retention was initially appointed following a deployment rather than another type of process is not an indicator that this person benefitted from personal favouritism in the SERLO process. The evidence indicates that, for the SERLO process, the respondent proceeded with a new assessment of the two participants, and that the participants were assessed the same way and with the same thoroughness.

107 Third, the fact that the person selected for retention did not have any labour relations problems within the department and the complainant did is not an indicator that the respondent showed personal favouritism toward the person selected for retention. As the Tribunal has already found, the complainant's labour relations problems had no impact on his assessment.

108 Fourth, the fact that the respondent corrected an error raised by the person selected for retention but did not correct an error alleged by the complainant is also not an indicator that the person selected for retention benefitted from personal favouritism in this process. The error raised by the person selected for retention during this process was obvious and the respondent acted diligently by correcting it immediately. As for the error alleged by the complainant, which was well after the end of the SERLO process and which involved the ambiguous phrasing of qualification 5, the respondent did not agree that an error existed. Rather, the respondent believed that qualification 5 was clear. As a result, the respondent did not act differently in the face of two identical scenarios, but instead, it acted differently in the face of two different scenarios, and this does not constitute proof of personal favouritism.

109 In conclusion, the evidence provided to the Tribunal does not establish that the person selected for retention was assessed inappropriately or that the SERLO process was tainted by personal favouritism. The Tribunal therefore finds that the respondent did not abuse its authority when it assessed the person selected for retention, nor did it show personal favouritism toward this person.

Issue III: Did the complainant's race, colour, or national or ethic origin influence the decision to select him for lay-off?

The analytical framework for the allegation of discrimination

110 Section 65(7) of the PSEA authorizes the Tribunal to interpret and apply the CHRA in its consideration whether a complaint filed under s. 65(1) of the PSEA is substantiated.

111 Under s. 7 of the CHRA, it is a discriminatory practice, directly or indirectly, to refuse to employ or continue to employ any individual on a prohibited ground of discrimination. Section 3 of the CHRA lists the prohibited grounds of discrimination, which include the grounds cited by the complainant, namely, race, colour, and national or ethnic origin.

112 To show that the respondent discriminated against him, the complainant must show a *prima facie* case of discrimination, as established by the Supreme Court of Canada in *Ontario Human Rights Commission. v. Simpsons-Sears*, [1985] 2 SCR 536 (*O'Malley* decision).

113 A *prima facie* case is one that 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. When such evidence is established, the onus turns to the respondent to refute the allegations or provide another reasonable explanation. Discrimination can be proven by means of direct or circumstantial evidence, or a combination of the two (see *Hammouch v. Deputy Minister of National Defence*, 2012 PSST 0012 at para. 75). 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* (1990), 14 C.H.R.R. D/12, (F.C.A.), para. 7.

114 The Tribunal cannot take into account the respondent's answer before a *prima facie* case of discrimination has been established. See *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, para. 22.

Did the complainant succeed in establishing a prima facie *case of discrimination and, if so, what is the respondent's explanation?*

115 The complainant submits that he was treated differently than the person selected for retention during the SERLO process because of his race, colour, or national or ethnic origin. He is a black person and he was born in the Congo. The person selected for retention is not black and there is no indication in the evidence that this person's national or ethnic origin is similar to the complainant's. The complainant pointed out that, according to s. 3.1 of the CHRA, it is understood that a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.

116 He also submits that the lay-off was intended as retaliation by the respondent because he filed a harassment complaint against a department employee. He made this argument under s. 14.1 of the CHRA, which states as follows:

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

117 However, the Tribunal notes that s. 14.1 of the CHRA cannot apply in this case as a review of this section shows that it only covers retaliation following the filing of a complaint under Part III of the CHRA. There is no evidence that a complaint of this kind was filed by the complainant.

118 The complainant explained that, starting in 2008, certain members of the management team said rude things about him and insulted him because he is black. He participated in a mediation session with these individuals but the alleged behaviours continued. Therefore, he filed a harassment complaint with his department against one of the respondent's employees. Then, management punished him by withdrawing certain projects from him. He thus filed grievances for harassment and discrimination against various people. This harassment stopped following the arrival of Laura Ruzzier, in March 2011, as the chief executive of the Audit and Evaluation Branch. Mr. Kunze then replaced Ms. Ruzzier on August 13, 2012. The complainant stated that he was the victim of retaliation for coming forward about the harassment he received at the department.

119 According to the complainant, the respondent's scheme (harassment and retaliation) led to his having health problems. He had to take sick leave three times for periods ranging from one to four months starting in February 2010 and up to the time of the SERLO process.

120 He submits that he is also the victim of stereotyping in this process. According to him, his director, Mr. Kunze, knew that he had labour relations problems because, at their first meeting, in August 2012, the complainant explained his interpersonal problems to him. The complainant submits that the reprimand letter that he received on October 31, 2012, is evidence that the respondent wanted him to be laid off. He

received the reprimand letter because the recipients of his emails found the emails threatening. However, the complainant stated that his director did not conduct any investigation on the issue, but simply believed the statements of the email recipients who felt threatened. This shows, in his opinion, that his director was perpetuating a stereotype, that is, that black people are violent. In doing so, his director simply presumed that all members of a given group (in this case, black people) are identical (are violent). This is another reason why, in his opinion, he was selected for lay-off.

121 The Tribunal finds that the complainant has not established a *prima facie* case of discrimination based on race, colour, or national or ethnic origin. The complainant did not provide any evidence that he was penalized or that he was the subject of retaliation in the SERLO process because he had had labour relations issues between 2008 and 2010. With regard to the qualification effective interpersonal skills, for example, which might have been influenced by labour relations issues, the evidence shows that the complainant obtained a good mark (4 out of 5).

122 The complainant also raised concerns about stereotypes involving black people. However, he did not provide any evidence to the effect that Mr. Kunze presumed that persons of colour are violent or that a similar presumption exists in society in general.

123 Consequently, the Tribunal finds that, even if the evidence relating to the complainant's allegations is believed, it is not complete and sufficient to justify a verdict in his favour.

124 Finally, even though the finding above is sufficient to dismiss the complainant's allegation of discrimination, the Tribunal finds that the respondent also presented convincing evidence that would refute the complainant's allegation if it were accepted. In other words, the respondent showed that the complainant's race, colour, and national or ethnic origin did not have an impact on its decision to select him for lay-off.

125 First, with regard to the complainant's argument that there is a link between the incidents from 2008 to 2010 and the results of the SERLO process, the respondent established that the persons with whom the complainant experienced conflict were not

involved in the process. Mr. Kunze joined the department in August 2012 and he explained that he did not know the complainant before he arrived in the department. The other members of the assessment board, Mr. Larue and Ms. Thériault, also explained that they did not know either of the participants in the SERLO process. The Tribunal is therefore satisfied that the process was conducted by individuals who had no relationship with the complainant.

126 In addition, with regard to the complainant's allegation that it was because Mr. Kunze was influenced by a stereotype that he decided to send him a reprimand letter and that this letter shows that the respondent wanted him to lose his job, the evidence shows that the recipients of the complainant's emails were worried about and alarmed at being threatened with *legal action* before the Ontario Superior Court. The Tribunal cannot find that Mr. Kunze wanted the complainant to lose his job on the ground that he could be violent. In short, the evidence shows that there is no link between the complainant's emails and the assessment board's decision to select him for lay-off. The Tribunal is satisfied that it was, rather, because of the fact that he failed qualification 5, which involved knowledge of TBS policies, that he was selected for lay-off.

127 Therefore, the respondent provided a reasonable non-discriminatory explanation for its decision. The Tribunal is satisfied with this explanation. Thus, there is no link between the complainant's race, colour, or national or ethnic origin and his lay-off.

Conclusion

128 The Tribunal finds, first, that the complainant failed to show that his assessment as part of the SERLO process constituted an abuse of authority. Second, he failed to show that the assessment of the person selected for retention as part of the SERLO process constituted an abuse of authority. Third, he failed to show that his selection for lay-off was related to his race, colour, or national or ethnic origin. Whether viewed separately or as a whole, the Tribunal finds insufficient evidence to support a finding of abuse of authority in the complainant's selection for lay-off.

Decision

129 For all the above reasons, the complaint is dismissed.

Nathalie Daigle
Member

Parties of Record

Tribunal File:	2012-1195
Style of Cause:	*Bruno Makoundi and the Deputy Minister of Transport, Infrastructure and Communities*
Hearing:	July 15-16; October 16-17, 29 and 30; and November 27-28, 2013, Ottawa, Ontario
Date of Reasons:	March 26, 2014
APPEARANCES:	
For the complainant:	Matthew Létourneau
For the respondent:	Anne-Marie Duquette
For the Public Service Commission:	Melanie Bowen (written submissions)