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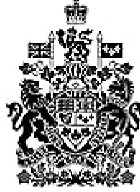
Public Service Labour Relations and Employment Board Act and *Public Service Employment Act*



Before a panel of the Public Service Labour Relations and Employment Board

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BETWEEN

PAUL ABI-MANSOUR

Complainant

and

PRESIDENT OF THE PUBLIC SERVICE COMMISSION

Respondent

and

OTHER PARTIES

Indexed as
Abi-Mansour v. President of the Public Service Commission

Complaints of abuse of authority pursuant to paragraphs 77(1)(a) and (b) of the *Public Service Employment Act*

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Ottawa, Ontario,
May 3 and 4, 2016.

I. Introduction

[1] The complainant, Paul Abi-Mansour, applied for a position as an analyst in Audit and Data Services, Data Services and Analysis Directorate, at the EC-04 group and level, within the Public Service Commission in the National Capital Region. He alleges that the respondent, the president of the Public Service Commission (PSC), abused its authority with respect to both the choice of process and the application of merit. The complainant also alleges that he suffered discrimination on the prohibited grounds of race and ethnic or national origin.

[2] The respondent denies these allegations.

[3] The PSC, by virtue of s. 79 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), is entitled to be heard in all staffing complaints filed with the Board under s. 77 of the *PSEA*. In this case, the PSC is the respondent.

[4] As the complainant alleges discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), he advised the Canadian Human Rights Commission (CHRC) of his complaints as required by s. 78 of the *PSEA*. On May 26, 2011, the CHRC advised that it did not intend to make submissions in this matter.

[5] Two complaints with respect to the same appointment process were filed with the Public Service Staffing Tribunal ("the Tribunal") on May 6, 2011 (file 2011-0399) and on July 28, 2011 (file 2011-0663).

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force, creating the Public Service Labour Relations and Employment Board ("the Board") to replace the Tribunal and the Public Service Labour Relations Board. The Board now deals with complaints filed under the *PSEA*. Consequently, this decision was rendered by a panel of the Board.

[7] For the reasons that follow, I find that the complaints are not substantiated. The evidence does not support a finding of abuse of authority in the choice of process; nor does it support a finding of abuse of authority in the application of merit. In addition, the complainant did not establish a *prima facie* case of discrimination.

II. Background

[8] The parties filed an agreed statement of facts, reproduced below:

> 1. *On November 26, 2010, an internal advertised process (10-PSC-IA-875) was posted on Publiservice by the Public Service Commission. The intent of the process was to staff one EC-04 Analyst position in the Audit and Data Services, Data Services and Analysis Directorate, with the option of staffing similar positions, requiring various language requirements, within the Public Service Commission in the National Capital Region.*
>
> 2. *The Statement of Merit Criteria & Conditions of Employment listed the essential qualifications for the position, including the educational requirements, which read:*
>
>   *Graduation with a degree from a recognized university with acceptable specialization in economics, sociology or statistics.*
>
>   *NOTE 1: 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.*
>
>   *NOTE 2: The acceptable specialization has been defined as follows: Completion of a minimum of four (4) courses at the university level in either economics, sociology and/or statistics.*
>
>   ***Please clearly specify in your resume the four (4) courses you completed at the university level in either economics, sociology and/or statistics. Note that you will have to provide the original copy of your high school diploma and official transcripts later in the staffing process.*
>
> 3. *Applications for the process were submitted by the complainant, Paul Abi-Mansour, and the two appointees, Geneviève Fournier and Alex Comtois Lococq* [sic] *on December 6, 2010, December 8, 2010, and December 9, 2010, respectively.*
>
> 4. *The screening board consisted of two members, Martin Gravel and Marianne Thibeault.*
>
> 5. *On January 20, 2011, the complainant was advised that he did not meet the following merit criteria identified for*

> *screening:*
>
> *Graduation with a degree from a recognized university with acceptable specialization in economics, sociology or statistics.*
>
> 6. *On April 18, 2011, a Notification of Consideration was posted on Publiservice indicating that the appointee, Geneviève Fournier, was being considered for the EC-04 analyst position.*
> 7. *On April 28, 2011, a Notification of Appointment or Proposal of Appointment was posted on Publiservice announcing the appointment of Geneviève Fournier.*
> 8. *On May 6, 2011, a Notification of Consideration was posted on Publiservice indicating that the appointee, Alex Comtois Lococq, was being considered for the EC-04 analyst position.*
> 9. *On May 10, 2011, the complainant filed a complaint with the former Public Service Staffing Tribunal.*
> 10. *On July 28, 2011, a Notification of Appointment or Proposal of Appointment was posted on Publiservice announcing the appointment of Alex Comtois Lococq.*
> 11. *On August 8, 2011, the complainant filed a complaint with the former Public Service Staffing Tribunal.*

[9] Although the complaints were filed in 2011, the hearing proceeded only in 2016. The complainant filed a judicial review of an interlocutory decision of the Tribunal denying his request to name the Treasury Board as a respondent. The Federal Court of Appeal upheld the Tribunal's decision (*Abi-Mansour v. Public Service Commission*, 2014 FCA 60). As the complainant was involved in a number of other judicial and quasi-judicial procedures related to staffing matters, he requested a number of postponements.

III. Preliminary matters

A. Employment equity

[10] At the hearing, the complainant sought to introduce evidence related to employment equity matters. He also sought an order from the Board to have the respondent provide information on the implementation of employment equity plans within the PSC.

[11] In a previous decision (*Abi-Mansour v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2013 PSST 6) with the same complainant but a different respondent, the Tribunal stated (see paragraphs 15 to 17) that its role is not to enforce the *Employment Equity Act* (S.C. 1995, c. 44) (EEA), a role Parliament has reserved for the CHRC. However, later in that case, at para. 20, the Tribunal stated that "[a]lthough the CHRC has the role of enforcing compliance with the EEA, employment equity matters **may nonetheless be relevant to complaints made before the Tribunal under s. 77"** (emphasis added). In that case, the deputy head established an organizational need in the Statement of Merit Criteria that stated that it may limit selection to candidates self-identifying as belonging to two employment equity groups. The Tribunal ruled that the employment equity evidence was relevant in that case to the issue of whether the respondent abused its authority when it had regard to the organizational need in that appointment process.

[12] I did not allow evidence at the hearing on employment equity matters, save for a general document, *Public Service Commission of Canada 3-year Employment Equity Action Plan (2010-2013)*, which shows the PSC's various objectives and actions with respect to employment equity.

[13] I do not believe employment equity figures can help me decide whether discrimination occurred in this case. As I explained to the complainant, this evidence is not relevant to the issue at hand, which is whether the respondent's decision to screen him out at the preliminary screening stage for failing to meet the education requirement was tainted by discrimination. I understand that discrimination can be difficult to prove and that circumstantial evidence can be used to infer that discrimination probably occurred in a particular case. However, this case is not akin to that of *Abi-Mansour v. Chief Executive Officer of Passport Canada*, 2014 PSST 12, in which the complainant alleged that he was eliminated from the appointment process because he was educated outside Canada. In the case before me, as both the agreed statement of facts and the evidence set out later in the decision highlight, the issue is whether the respondent abused its authority in screening the complainant out of the appointment process for failing to have the requisite specialization in economics, sociology or statistics. The fact that some of the complainant's university education was acquired outside Canada, which he alleged is related to discrimination based on national or ethnic origin, is not an issue in this case. I have determined that employment equity evidence is not relevant to the issue before me.

B. <u>Jurisdiction of the Board and of the federal courts</u>

[14] In his submissions, the complainant argued that the Board's jurisdiction was in fact much larger than that stated at s. 77 of the *PSEA*, under which it may hear a complaint of abuse of authority in an appointment process. According to the complainant, litigants have the choice between the Board and the Federal Court to be heard on staffing matters — the choice depends on their financial resources. It would be unfair, following that reasoning, to grant further grounds of judicial review and further remedies to the more affluent litigant. Therefore, the Board should keep in mind s. 18.1 of the *Federal Courts Act* (R.S.C., 1985, c. F-7) (which deals with judicial reviews of federal administrative decisions) when deciding abuses of authority. Further proof of the possibility of choice can be found, still according to the complainant, in the fact that complaints about external appointment processes, which are not within the Board's purview, proceed directly to the Federal Court.

[15] Since the complainant went on at some length with these arguments, I wish to dispel any misunderstanding immediately.

[16] When Parliament provides for an administrative recourse against a decision of the federal public administration, litigants must first seek redress through that administrative process. The courts will not allow litigants to bypass this recourse, save in exceptional circumstances. The Federal Court of Appeal stated as much as follows in *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras. 30 and 31:

> *[30] <u>The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted.</u> The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point ….*
>
> *[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are*

> *dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.*
>
> [emphasis added]

[17] As to complaints about external appointment processes proceeding directly to the Federal Court, the *PSEA* in fact provides for an administrative recourse at s. 66.

IV. Issues

[18] The complainant submits a number of grounds that in his view support a finding that an abuse of authority occurred: the respondent did not recognize the validity of his inclusion in a previously constituted pool of candidates for an EC-04 position, the "Job Opportunity Advertisement" (JOA) was confusing and misleading, his education credentials were not properly assessed, the appointees were treated more favourably, and both discrimination and retaliation played a role in the respondent's refusal to reconsider its decision to screen him out. I will reformulate the issues, for the purposes of my analysis, as follows:

> Issue I: Did the respondent abuse its authority in the choice of process?
>
> Issue II: Did the respondent abuse its authority when it assessed the complainant's qualifications?
>
> Issue III: Did the respondent abuse its authority when it assessed the appointees' qualifications?
>
> Issue IV: Did the respondent discriminate or retaliate against the complainant?

V. Analysis

[19] The relevant provisions of the *PSEA* for the purpose of these complaints are the following:

> ***77 (1)*** *When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of*
>
> > ***(a)*** *an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);*
> >
> > ***(b)*** *an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process ….*
>
> …
>
> ***30 (1)*** *Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.*
>
> ***(2)*** *An appointment is made on the basis of merit when*
>
> > ***(a)*** *the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency ….*

[20] The complainant alleges abuses of authority in the choice of process and in the application of merit. As stated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 71, an abuse of authority may involve an act, omission or error that Parliament cannot have envisaged as part of the discretion given to those with delegated staffing authority. Abuse of authority is a matter of degree. For a finding of abuse of authority to be made, an error or omission must be of such an egregious nature that it cannot be part of the delegated manager's discretion (see, for example, *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26 at para. 32). The complainant has the burden of proof (*Tibbs*, at para. 50).

[21] Concerning the burden of proof, the complainant, invoking *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at para. 29, argues that it reverses once a prima facie case is established. The respondent argues that a proper reading of *Lahlali* shows that the burden of proof remains with the complainant throughout.

[22] The complainant does have the burden of proof throughout the analysis. However, as stated in *McGregor v. Canada (Attorney General)*, 2007 FCA 197, the respondent may have a tactical burden to answer the complainant's case.

[23] *McGregor* precedes the changes to the *PSEA* under which the Tribunal was created. Nevertheless, the principles of the burden of proof described as follows at paragraphs 27 to 29 of *McGregor* still apply in the present context:

> *[27] For a section 21 appeal to be feasible, the appellant must direct his evidence to the particular elements of the selection process which he believes involved a departure from the merit principle. As the strength of the appellant's case grows, the hiring department will develop what may be referred to as a "tactical burden" to adduce evidence to refute the evidence on which the appellant relies, for fear of an adverse ruling. However, this tactical burden does not arise as a matter of law, but as a matter of common sense. Throughout, the legal and evidential burden of convincing the Appeal Board that the selection board failed to respect the merit principle rests with the appellant: see John Sopinka et al.,* The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at §§ 3.47-3.48.*
>
> *[28] The fact that inquiries under section 21 are designed to ensure the merit principle was respected does not warrant a transfer of the onus from the appellant to the respondent. Mr. McGregor fastens on a statement by this Court in* Charest v. Attorney General of Canada*, [1973] F.C. 1217 at page 1221, wherein it stated that an appeal under section 21 "is not to protect the appellant's rights, it is to prevent an appointment being made contrary to the merit principle." According to Mr. McGregor, this purpose warrants a shifting of the burden of proof to the hiring department to establish that the merit principle was respected. I disagree.*
>
> *[29] As canvassed above, it is not feasible to have the selection board prove in each case that the process employed followed the merit principle in all respects. This factor remains whether or not section 21 has a broader public interest purpose of ensuring that the merit principle is respected throughout the Public Service. It is not in the public interest to divert extensive resources to disprove allegations which cannot be substantiated. […]*

[24] The complainant alleges that an abuse of authority occurred and that he suffered discrimination. He must present evidence to support those allegations. The respondent must answer the case with its evidence. Once both parties have stated their cases, the Board must decide, on the balance of probabilities, whether the complainant's evidence is sufficient to conclude in his favour.

A. <u>Issue I - Did the respondent abuse its authority in the choice of process?</u>

[25] Before applying to the appointment process at issue, the complainant emailed the respondent and asked to be selected from another EC-04 pool for which he had already qualified at the Department of Citizenship and Immigration Canada (CIC). He received notice that he was qualified for that pool on October 13, 2010. The notice indicated that the pool was valid until April 13, 2011.

[26] The respondent answered that this would not be fair to other applicants to the appointment process, and it encouraged the complainant to apply, which he did on December 6, 2010. In his application, he repeated the fact that he was already in an EC-04 pool.

[27] The complainant submits that the respondent should have appointed him from the Citizenship and Immigration pool or at least that it should have qualified him for the appointment process based on that fact.

[28] The respondent's position is that it had very specific objectives in mind for the appointment process and that it wanted to review all candidates equally, based on its requirements.

[29] Martin Gravel, the delegated manager who was responsible for the appointment process, testified that he was seeking an analyst at the EC-04 level who would be able to design and interpret different employment demographics studies for the PSC. The essential qualifications were set with this in mind.

[30] In addition, the idea was to provide an opportunity to PSC employees to apply for the position, to foster a positive atmosphere of encouragement and opportunity. In the end, the appointees were not selected from the PSC. Nevertheless, it was important to Mr. Gravel to offer the opportunity, which would not have occurred had the appointment been done on a non-advertised basis by simply taking someone from another pool.

[31] The other objection to selecting someone from another pool was that the process for that pool might have been quite different. EC-04s have the same generic work description throughout the public service, but Mr. Gravel had very specific requirements; namely, people who would be comfortable with conducting analytic studies of some depth and breadth. Hence the additional requirement of specialized

university courses in sociology, statistics, or economics, a requirement that was not found in the appointment process at the Department of Citizenship and Immigration in which the complainant qualified. Mr. Gravel explained that this was done to allow people to apply who held university degrees from areas beyond the specializations, provided they had some university-level exposure to the required specializations.

[32] It is clear that the *PSEA* gives discretion to the deputy head to choose an advertised or a non-advertised process (s. 33). (See *Canada (Attorney General) v. Kane*, 2012 SCC 64 at paras. 6 and 7.)

[33] The PSC has taken the position, under its mandate to appoint within the public service, that delegated managers should be encouraged to use advertised rather than non-advertised processes, although it concedes that in some instances a non-advertised process may better suit the situation. In its *Choice of Appointment Process Policy*, dated June 8, 2007, at page 4, it states: "When choosing between an advertised and a non-advertised process for making an appointment, managers are encouraged to first consider an advertised process (distinct or collective)." And on page 5, one reads that "[t]he criteria for the use of non-advertised processes are not prescriptive or all-inclusive. The applicability of a criterion does not imply that a non-advertised appointment process is the best staffing option."

[34] The complainant argued that one of the criteria was that a person who was a member of a designated group under the *Employment Equity Act* "would be" appointed. In the context, this criterion could justify using a non-advertised process. This may be true, but the complainant has not referred me to any legislative provision or policy that makes it mandatory for the delegated manager to apply this criterion. (See, e.g., *Pugh v. Deputy Minister of Justice*, 2012 PSST 31 at paras. 34-44.)

[35] It is true that the choice of process may lead to a finding that an abuse of authority occurred (s. 77(1)(b)). However, I can find no fault in the respondent's decision to conduct an advertised process to offer the opportunity to more than one person. Moreover, there is no obligation for the respondent to choose from another pool, in another department, where people were selected with a different set of educational requirements. As in *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46, I find that there was a clear and cogent reason for the respondent to choose an advertised process and that the choice was not an abuse

of authority.

B. Issue II - Did the respondent abuse its authority when it assessed the complainant's qualifications?

[36] The complainant had a number of criticisms of the assessment of his qualifications that led to him being screened out. To ease reading, I have grouped them under several subheadings.

1. Note 1 and Note 2

[37] In the JOA, the educational requirements under "Essential Qualifications" appeared as follows:

> *Graduation with a degree from a recognized university with acceptable specialization in economics, sociology or statistics.*
>
> *NOTE 1: 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.*
>
> *NOTE 2: The acceptable specialization has been defined as follows: Completion of a minimum of four (4) courses at the university level in either economics, sociology and/or statistics.*
>
> ***Please clearly specify in your resume the four (4) courses you completed at the university level in either economics, sociology and/or statistics. Note that you will have to provide the original copy of your high school diploma and official transcripts later in the staffing process.*

[38] The complainant argued that the wording was ambiguous because it seemed that the specialization could be an acceptable combination of training and experience and argued that a "combination of education, training and/or experience" should be applied to his case.

[39] I believe it is useful to compare the JOA for the EC-04 position in the appointment process at CIC, in which the complainant was screened in, for its educational requirements:

> *Graduation with a degree from a recognized university with acceptable specialization in Economics, Sociology or Statistics.*
>
> *NOTE: 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.*

[40] Under s. 31 of the *PSEA*, the employer, which for the PSC is the Treasury Board, sets the minimum qualifications for all positions in the public service for which the Treasury Board is the employer. For the EC-04 position, for example, a university degree is always required, with "acceptable specialization in Economics, Sociology or Statistics". For a given position, the deputy head sets the essential qualifications (s. 30(2)(a) of the *PSEA*). Thus, nothing precludes the deputy head of a department or agency from increasing the essential qualifications, as long as they are logically necessary to performing the duties of the position to be filled.

[41] In this case, Mr. Gravel explained that he had added Note 2 to find people who might not have had a specialization in one of the three areas but who at least had university-level exposure to the rigours of research in one of the three fields.

[42] The complainant submitted that it was unfair to insist on the four courses as they were irrelevant to the position to be filled. Mr. Gravel's explanation for the required four university-level courses was reasonable. He was seeking to fill a position for which the person had to be knowledgeable about the requirements for conducting demographic studies on trends. Such knowledge could be acquired, according to Mr. Gravel, in university courses in statistics, sociology or economics.

[43] The complainant also argued that, as in *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 3, the ambiguity created by Note 1 was such that it amounted to an abuse of authority.

[44] In *Poirier*, the applicant misinterpreted the directions on the job advertisement and was screened out as a result. The Tribunal found that the misinterpretation was legitimate. More importantly, the respondent in that case simply refused to acknowledge the ambiguity and offered the applicant no chance to correct his mistake.

[45] That was not so in this case. When the complainant was screened out, he complained to the respondent about the ambiguity. The respondent then explained that it was necessary for each applicant to specify four university-level courses and offered him the opportunity to specify courses. He then submitted his list, which the respondent determined was insufficient (I will return to this subject). The point is that the reasoning in *Poirier* cannot apply in this case — the ambiguity, if it existed, was resolved, and the complainant was given the opportunity to add to his application.

[46] Despite that opportunity, and probably because his list of courses was not accepted, the complainant insists that the respondent should be held to a narrow reading of Note 1 and that his experience should be sufficient for him to be screened in, as he was in the other process.

[47] The respondent acknowledged that Note 1 should have been modified so as not to give false hopes to applicants. Still, despite that admission, I find that a candidate, applying to both jobs, would notice immediately the difference between the two advertisements and would see that "acceptable specialization" referred to in the introductory sentence had been clearly defined in Note 2. Thus, while Note 1 should have been clearer, I find that any lack of clarity caused by Note 1 was rectified by Note 2.

[48] Note 1 states that the specialization may be obtained through an "… acceptable combination of education, training and/or experience" [emphasis added]. In the first appointment process (with Citizenship and Immigration Canada), the complainant's combination of education, training, and experience was considered acceptable specialization.

[49] The JOA for the appointment process at issue is very different. It defines at Note 2 what "acceptable" will be. It adds a note requesting that the applicants specify the four courses completed. The complainant argues that the acceptable combination in one process should be acceptable in another. However, the respondent defined the word "acceptable" in the JOA. Adding the definition and specifying further essential qualifications, when these measures are consistent with the position to be filled, is not an abuse of authority.

2. <u>Four required courses and credentials as shown in transcript</u>

[50] The complainant submits that the four required courses were arbitrarily imposed but that, in any event, he satisfies this criterion.

[51] According to the complainant, it makes no sense to require courses that could be in statistics or sociology or economics or any combination thereof. What would be the similarity between four courses in sociology and four courses in statistics?

[52] Mr. Gravel had the delegated authority from the deputy head to set the essential qualifications for the appointment process. Mr. Gravel provided testimony that demonstrated that he had a very clear idea of what qualifications were required for the work to be performed.

[53] Mr. Gravel explained that requiring four university-level courses in one of the three areas of specialization was designed for applicants to show a certain depth of knowledge and analysis in the field of demographic data manipulation. A university course requires a certain level of sophistication and imparts knowledge in the fields required. At the same time, the person appointed to the EC-04 analyst position would not direct the research, as he or she would work under the direction of a supervisor in an EC-06 position.

[54] The Tribunal has held that s. 30(2) of the *PSEA* gives broad discretion to establish the necessary qualifications for a position (see, for example, *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 42). Moreover, the Tribunal has confirmed in many decisions that managers are required to establish qualifications for the work to be performed (see, for example, *Haarsma v. Deputy Minister of National Defence*, 2013 PSST 5 at para. 17). The evidence provided by Mr. Gravel supports a finding that the education qualification was established for the work to be performed in the EC-04 analyst position. The complainant has not proven that requiring four university-level courses in one or several of the specialization areas identified constitutes an abuse of authority.

[55] The complainant did submit his list of four courses: “Probability and Statistics” (from his degree in applied mathematics) and three courses from his degree in education: “Schooling and Society”, “Social Justice and Global Education”, and “Teaching in Catholic Separate Schools”. The respondent decided that the last course

did not meet the required sociology content, since it was a course in education. Therefore, the list was judged insufficient to screen him in to the process.

[56] The complainant challenged the decision on many fronts. The statistics course he took lasted two semesters, and therefore should have counted as two courses. The course on teaching in Catholic separate schools could properly be considered a sociology course, as the issue of teaching in a specific context has a sociological dimension. The complainant submitted a transcript for his degree in applied mathematics to show that several courses were relevant.

[57] The Tribunal has often stated that it is not tasked with reassessing candidates. I concur. The complainant was asked to present a list of four courses that would meet the criteria. He chose the courses. I do not think the same course should count twice, whether it lasted one or two semesters. The complainant has not established that it was unreasonable for the respondent to consider that a course taken as part of teacher training on Ontario Catholic separate schools was not a course in sociology. Mr. Gravel explained that this decision was made on the basis that a teaching course was not a sociology course, for the purposes of a position that dealt with data analysis. While the complainant has argued that this course had a "sociological dimension," he has not led any evidence that would allow me to find that the respondent made an egregious error in determining that the course was not a course in sociology.

3. Mr. Gravel's qualifications to judge essential qualifications

[58] The complainant questioned Mr. Gravel's credentials to decide whether his list of courses met the requirements. Mr. Gravel is an industrial psychologist, with a specialization in advanced applied statistics. Mr. Gravel had the delegated authority from the deputy head to set the essential qualifications for the appointment process. Mr. Gravel had a very clear idea of what he was looking for and why.

Therefore, I find that the complainant has failed to prove that the respondent abused its authority when it assessed the complainant's education credentials, and determined that he did not meet the education qualification for this appointment process.

C. Issue III - Did the respondent abuse its authority when it assessed the appointees' qualifications?

[59] The complainant argued that the two appointees' assessments showed bias since they were French Canadians, as was Mr. Gravel. Aside from this bare assertion, the complainant did not lead any evidence to support the bias allegation.

[60] In addition, the complainant alleged that one of the appointees, Geneviève Fournier, was not qualified since she did not meet the education requirement for the position, and her appointment should be revoked. I shall consider each appointee in turn.

[61] When considering the appointees' qualifications, I looked only at their applications, and in the case of the second appointee, Alex Comtois Lecocq, the email exchange he had with the respondent about the required courses he had taken. Because the complainant was screened out, only the qualifications contained in his application were assessed. Thus, the comparison with the appointees is on that basis.

[62] The complainant submitted that Ms. Fournier was not qualified because her university degrees were in business management and special education, with a minor in biology. She also listed the following four courses: "Microeconomics Analysis", "Macroeconomics Analysis", "Problems and Policies in Economics", and "Policy Analysis and Taxation", which the respondent deemed were satisfactory for the purposes of the required specialization.

[63] The complainant argued that the last course, Policy Analysis and Taxation, was not relevant. Moreover, it did not appear on her transcript from the HEC (École des hautes études commerciales, affiliated with the Université de Montréal). Therefore, according to the complainant, I should rule that she was not qualified.

[64] Again, I will not reassess the applications. Mr. Gravel stated at the hearing that he considered that "Policy Analysis and Taxation" was sufficiently related to economics to be acceptable, because it dealt with data analysis and economic trends. The issue was not explored further.

[65] The course does not appear on Ms. Fournier's transcript from HEC. At the preliminary screening stage, as Mr. Gravel explained, the applicants' statements are taken at face value. The fact that one is screened in or screened out is therefore based on the adequacy of the stated courses, not on transcripts.

[66] In the case of Mr. Comtois Lecocq, he stated in his application that his university degree was specialized in statistics, one of the three areas of required specialization. Even so, the respondent also asked him in a follow-up email to specify what courses he had taken. He had already indicated in his application 12 courses in probabilities and statistics, including five theoretical courses, one sampling and surveys course, and one biostatistics course.

[67] The complainant emphasized the fact that Mr. Comtois Lecocq had been asked to specify his courses, while in his case, he had simply received a letter stating that he had been screened out.

[68] Mr. Gravel explained that Mr. Comtois Lecocq had already indicated his specialization in statistics and that asking him to specify the titles of his courses was a follow-up. In the complainant's case, he had indicated that he held degrees in applied mathematics and education. There did not seem to be any specialization in statistics, economics, or sociology, and he had not given any course titles in his application.

[69] Nevertheless, as explained earlier, when the complainant reacted to the screening out letter, the respondent offered him the chance to list four specialized courses. Consequently, I fail to see how his treatment differed from that given to Mr. Comtois Lecocq.

[70] I find that the complainant has failed to prove abuse of authority in the way the appointees were screened into the appointment process.

D. Issue IV - Did the respondent discriminate or retaliate against the complainant?

[71] Under s. 80 of the *PSEA*, the Board may interpret and apply the *CHRA* in its analysis of a complaint of an abuse of authority under s. 77. In this case, the complainant referred to ss. 7 and 14.1 of the *CHRA*, which read as follows:

> ***7*** *It is a discriminatory practice, directly or indirectly,*
>
> ***(a)*** *to refuse to employ or continue to employ any individual, or*
>
> ***(b)*** *in the course of employment, to differentiate adversely in relation to an employee,*
>
> *on a prohibited ground of discrimination.*
>
> …

> ***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.*

[72] The complainant claims that he suffered discrimination and that he was retaliated against based on race and national or ethnic origin, which are prohibited grounds under s. 3 of the *CHRA*.

[73] Similar to what was noted by the Tribunal in *Abi-Mansour v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2013 PSST 6, the parties before me did not make submissions regarding the Board's jurisdiction to interpret s. 14.1, despite the fact that I am not hearing a complaint filed under Pat III of the *CHRA*. However, as the Tribunal stated in that case, at para. 151, "evidence of retaliation could be relevant to a complaint of abuse of authority under the PSEA."

[74] To make a finding of discrimination, the Board must first determine whether the complainant has established a *prima facie* case of discrimination. If so, the respondent must provide a reasonable non-discriminatory explanation for the otherwise discriminatory practice, failing which, a finding of discrimination will be made (see *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*").

[75] The complainant and the respondent disagreed on the test I should apply to determine whether the complainant had met the *prima facie* case requirement. The complainant based his arguments on *Shakes v. Rex Pak Ltd.*, (1981) 3 C.H.R.R. D/1001 and *Israeli v. Canada (Canadian Human Rights Commission)*, (1983) 4 C.H.H.R. D/1616; the respondent based its arguments on *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4. I find that in the circumstances of this case, all the tests would lead to the same conclusion, which is that there is no *prima facie* case of discrimination.

[76] As stated in *Abi-Mansour v. Deputy Minister of Foreign Affairs and International Trade Canada*, 2012 PSST 8, the *Shakes* test can be summarized as follows:

- the complainant was qualified for the particular employment;
- the complainant was not hired; and

- someone no better qualified but lacking the distinguishing feature, which is the basis of the discrimination complaint, subsequently obtained the position.

[77] The *Israeli* test was applied in *Abi-Mansour v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2013 PSST 6, and it states as follows:

- the complainant belongs to one of the groups that is subject to discrimination under the *CHRA*, e.g., race or national or ethnic origin;

- the complainant applied and was qualified for a job the employer wished to fill;

- although qualified, the complainant was rejected; and

- thereafter, the employer continued to seek applicants with the complainant's qualifications.

[78] In *McGill*, at paras. 49 and 50, Justice Abella summarized the test for *prima facie* discrimination in the following manner:

> *[49] What flows from this is that there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.*
>
> *[50] If such a link is made, a* prima facie *case of discrimination has been shown. It is at this stage that the* Meiorin *test is engaged and the onus shifts to the employer to justify the* prima facie *discriminatory conduct. If the conduct is justified, there is no discrimination.*

[79] Justice Abella adds the following at paragraph 53: "There is no need to justify what is not, *prima facie*, discriminatory."

[80] In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 ("*Morris*"), the Federal Court of Appeal dealt with the issue of the proper

legal test for determining whether a *prima facie* case of discrimination has been established in the staffing context. Mr. Morris complained that he had not been promoted, contrary to his expectations, because of age discrimination. The Federal Court of Appeal restated the *O'Malley* test of a *prima facie* case as follows at paragraph 14: "… the evidence adduced by the Commission was sufficient, if believed and not satisfactorily explained, for the complaint to be made out."

[81] In the same decision, the Federal Court of Appeal made the following comments about *Shakes* and *Israeli*:

> *[26] In my opinion,* Lincoln [Lincoln v. Bay Ferries Ltd., *2004 FCA 204*] *is dispositive:* O'Malley *provides the legal test of a* prima facie *case of discrimination under the* Canadian Human Rights Act. Shakes *and* Israeli *merely illustrate what evidence, if believed and not satisfactorily explained by the respondent, will suffice for the complainant to succeed in some employment contexts.*

[82] Given that the Tribunal has, as mentioned above, used the *Shakes* and *Israeli* tests in previously referenced *Abi-Mansour* decisions, I am prepared to apply these tests in the case before me. Whichever iteration is used, *Shakes* or *Israeli*, the result is the same. The respondent determined that the complainant did not meet the educational qualifications. I have shown earlier that the complainant has failed to prove that this decision constituted an abuse of authority. The complainant states that his education is sufficient, that in any event the four courses required are irrelevant to the position, and that he would be fully qualified to do the work.

[83] Since I have found that the complainant has failed to prove that he met the essential education qualification that the respondent required at the application stage, he has not established that he was qualified for the position. Thus, he failed to meet one of the essential criteria required under both *Shakes* and *Israeli*. The complainant has not established that he was indeed qualified for the purposes of the appointment process. He was disqualified at the start because the respondent determined he did not have the educational requirements.

[84] Nothing in the evidence presented by the complainant points to discrimination based on race or national or ethnic origin. The distinction is made between those who listed the required courses and the complainant, who did not. It is not sufficient to claim that the rejection of one course or not taking into account his experience shows

discrimination. There is simply no evidence, whether circumstantial or other, to indicate discrimination on the part of the respondent. I would apply the same reasoning as stated in *Nash v. Commissioner of the Correctional Service of Canada*, 2014 PSST 10 at para. 54, as follows:

> ***54*** *Although the Tribunal can accord weight to the complainant's belief, it must consist of more than just a "bare possibility", as the Canadian Human Rights Tribunal has stated that "an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough." See* Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 41; aff'd: 2006 FC 785.*

[85] From the start, the complainant took the view that his screening out was discriminatory, as evidenced by the first email (dated January 20, 2011) he sent in response to the screening-out email that stated that he did not meet the following merit criteria: "Graduation with a degree from a recognized university with acceptable specialization in economics, sociology or statistics":

> *Hi,*
>
> *Without entering in lots of details, your screening skills is demagogical and terribly inferior. If you read NOTE1 in the job ad, it says that a degree in Statistics in not always required, but a university degree is. Anyways, I am already in a pool EC-04 found at this address ….*
>
> *Obviously, you screened me out not because I do not meet the skills as you claim, the real reaon behind the screen out is discrimination and you are just covering it up. If you wanted to hire me you could just pulled me out of the pool. You do not need to run a competition. You organization is known for its racism since many many years. I am fed up with these practices.*
>
> *Either you put me back in the competition or I am going to wait till you publich the results on PubliService and take legal action against you and against the manager, even if it will take me 10 years in courts. That is all I have to say for now.*
>
> [*Sic* throughout]

[86] Every other action by the respondent served only to reinforce the complainant's initial impression.

[87] The problem is that the initial screening out simply reflects the essential

qualifications that the respondent set for educational requirements, including Note 1 and Note 2, and the added note asking applicants to specify the courses they had taken. Those requirements were also imposed on the appointees. Although Mr. Comtois Lecocq claimed to have a specialized degree in statistics, he was still asked to provide the titles of four courses. When the complainant protested that his degrees in applied mathematics and education did include courses specialized in one of the three areas of specialization, he was asked to provide the titles of four of those courses.

[88] In its email dated January 24, 2016, the respondent explained its decision to screen the complainant out and offered him the possibility of providing additional information, as follows:

> …
>
> *Unfortunately, your application was screened out because you did not clearly demonstrate in your résumé that you successfully completed a minimum of 4 courses at the university level in either economics, sociology and/or statistics. Your résumé indicates the following information regarding your education:*
>
> *"B.Ed in Secondary Education (teaching subjects: Computer Science, Mathematics and French Second Language), University of Ottawa, 2006-2007 Master of Science in computer sciences, Laval University, Quebec, QC, 2003 (50% completed) B.sc. in applied mathematics, Lebanese University, 2001 (I have equivalence from Laval University)(Honor graduate)"*
>
> *If you have completed a minimum of 4 courses at the university level in either economics, sociology and/or statistics, please provide us with a list of the courses. We will take this information into consideration and will review your application. Please note, should your candidacy be accepted, you will be asked to provide the original copy of your degrees and official transcripts later on in the staffing process.*
>
> …

[89] The complainant did forward the list of four courses mentioned earlier that the respondent deemed insufficient. He submits that not recognizing his courses was discriminatory. He has not shown how it was discriminatory to apply the criteria clearly stated in the JOA.

[90] It seems to me that contrary to what the complainant asserts, the respondent gave him the opportunity to correct his application. The respondent applied the same requirements to him and to the appointees and granted him leeway to show whether, in fact, he did satisfy the criteria.

[91] Therefore, I find that the complainant has not established a *prima facie* case of discrimination as required by the *O'Malley* test.

[92] Even if a *prima facie* case of discrimination had been established, I would find that the respondent has provided a sufficiently reasonable non-discriminatory explanation for its screening-out decision, as explained earlier in the section on abuse of authority in the assessment of the complainant's qualifications.

[93] The complainant also submits that the respondent retaliated against him because starting with the first exchange, he mentioned legal action.

[94] The retaliation, according to the complainant, can be seen from the exchanges between the respondent and the Treasury Board Secretariat concerning Note 1 and how it should be interpreted. The respondent wanted to confirm with the Treasury Board that Note 1 simply gave the manager the discretion to use an acceptable combination of education and experience, which in this case had been defined by Note 2.

[95] The respondent did acknowledge that it was unfortunate that Note 1 could lend itself to misinterpretation. I find that throughout the process, the respondent never changed its mind as to what it was seeking and it applied the same requirements to the complainant and the appointees. The complainant submitted that the updating of the "Qualification Standards" on February 28, 2011, was an attempt to justify his exclusion. Following that change, the "Frequently Asked Questions" were also modified by the addition of the phrase "At the discretion of the manager" to the following question and answer (Exhibit 21):

> *16b. Can the specialization be acquired through an acceptable combination of education, training and/or experience?*
>
> *Yes. At the discretion of the manager, the specialization* ***may*** *be obtained through an acceptable combination of education, training and/or experience. When used, it must be specified*

> *on the Statement of Merit Criteria for transparency purposes….*
>
> [Emphasis in the original]

[96] The exchanges and the subsequent precisions can be explained by a need for clarification. Again, I do not find that throughout the process, the respondent changed its mind or its standards. From the start, the appointment process, from the JOA, required a specialization in one of three areas, established by taking four courses, which represented the "acceptable combination" referred to in Note 1. As a further note, Note 2 had to be interpreted as specifying the content of Note 1.

[97] The complainant has presented no evidence of retaliation. The respondent acknowledges that the text of Note 1, read alone, could create some confusion. But the inherent discretion in the word "may" suggests that the manager will have to decide whether a given combination is indeed acceptable. It cannot be that the applicant will decide what "may" be acceptable, as the complainant seems to imply. Given the presence of Note 2 from the start, allowing the manager to exercise his discretion and adding language to clarify the concept without changing it is not a sign of retaliation.

[98] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[99] The complaints are dismissed.

June 21, 2016.

Marie-Claire Perrault,
a panel of the Public Service Labour
Relations and Employment Board