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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

BETWEEN

XIUXIA SONG

Complainant

and

DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

and

OTHER PARTIES

Indexed as

Song v. Deputy Minister National Defence

In the matter of complaint of abuse of authority pursuant to paragraph 77(1)(a) of the
Public Service Employment Act.

Before: Merri Beattie, a panel of the Public Service Labour Relations and Employment
Board

For the Complainant: Louis Bisson

For the Respondent: Kétia Calix, counsel

For the Public Service Commission: Claude Zaor (written representations)

Heard at Ottawa, Ontario,
November 3, 4 and December 8, 2015.

REASONS FOR DECISION

I. Introduction

[1] Xiuxia Song, the complainant, participated in an internal advertised appointment process for Outreach/Return to Work/Casualty Tracking Coordinator (Service Coordinator) positions at the AS-04 group and level, in the Department of National Defence (DND). She alleges that the respondent, the Deputy Minister of DND, discriminated against her, failed to properly accommodate her during her assessment and was biased.

[2] The respondent denies all the allegations.

[3] The Public Service Commission (PSC) did not attend the hearing, but filed written submissions. The PSC did not take a position on the merits of the complaint.

II. Background

[4] The complainant submitted her application to the appointment process on December 5, 2013. On February 25, 2014, she was informed that she had been eliminated from the process for failing to demonstrate that she had experience negotiating and working with senior level officers/management. Following an informal discussion, the complainant was notified on March 6, 2014, that she had been reintegrated into the process.

[5] The complainant was invited to attend an assessment on March 25, 2014, consisting of a presentation, a written test, and an interview. She gave her presentation and wrote the test; however, her assessment ended before the interview was completed.

[6] On May 16, 2014, the complainant was informed that she had been eliminated from the appointment process because she had failed to demonstrate the ability to communicate effectively orally and in writing.

[7] A *Notification of Appointment or Proposal of Appointment* (NAPA) from this appointment process was issued on June 2, 2014.

[8] The complainant filed a complaint of abuse of authority with the Public Service Staffing Tribunal (Tribunal) under s. 77 of the *Public Service Employment Act* S.C. 2003, c. 22, ss. 12 and 13 (PSEA). On November 1, 2014, the *Public Service Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, came into effect and created the

Public Service Labour Relations and Employment Board (the Board). The Board replaces the Tribunal and the Public Service Labour Relations Board, and is responsible for handling complaints filed under the *PSEA*. Consequently, on November 3 and 4, and December 8, 2015, this complaint was heard by the Board.

[9] When the hearing was reconvened for closing arguments on December 8, 2015, the complainant withdrew her allegations that the respondent did not mark her written test in accordance with the established assessment guide, and wrongly identified spelling and grammatical errors in her test.

III. Issues

[10] The complainant alleges that:

- The respondent discriminated against her based on her disability and her race or her national or ethnic origin
- The respondent failed to accommodate her medical condition during her assessment
- The respondent demonstrated bias toward her in this appointment process

IV. Analysis

[11] Section 77 of the *PSEA* provides that an unsuccessful candidate in the area of selection for an internal advertised appointment process may file a complaint with the Board that he or she was not appointed or proposed for appointment because of an abuse of authority. As held by the Tribunal, the seriousness and nature of any errors or omissions, and the degree to which any conduct is improper may determine whether there is an abuse of authority. The complainant bears the burden of proof, which requires her to present sufficient evidence for the Board to determine, on a balance of probabilities, that a finding of abuse of authority is warranted (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49, 50, 55, 65 and 66).

[12] The complainant's allegations concern the respondent's actions on the day of the complainant's presentation, written test and interview (the assessment). In closing arguments the complainant submitted that she should not have been allowed to proceed to the assessment, given that there is nothing to support a finding that she met all the essential experience qualifications. Although she stated that this was not

part of her allegations, the Board finds that the respondent erred in its decision to include the complainant in the assessment.

[13] Linda Brady was the hiring manager and the chairperson of the assessment board for this appointment process. She reviewed the complainant's application and determined that the complainant had not demonstrated one of the essential experience criteria, namely, experience in negotiating and working with senior level officers/management. As a result, she screened the complainant out of the process. She testified that the complainant then provided additional examples of her experience by email, they discussed them by telephone, and she agreed to allow the complainant to proceed to the assessment.

[14] Under s. 30(2) of the *PSEA*, anyone that is to be appointed must meet the essential qualifications established for the work. The respondent submits that Ms. Brady accepted the examples provided by the complainant after initially being screened out, as demonstration that she met the requirement for experience in negotiating and working with senior level officers/management. However, Ms. Brady testified that the examples were weak and were not what she was looking for.

[15] The respondent did not appoint the complainant and, therefore, did not actually breach s. 30(2) of the *PSEA*. Ms. Brady testified that her decision to allow the complainant to proceed to the assessment was based on the complainant's request that she be given the opportunity to compete in an interview. However, the respondent's letter of March 6, 2014, informed the complainant that she had been reintegrated into the appointment process, thereby indicating that she had a chance of being appointed.

[16] During her testimony about the reversal of her decision Ms. Brady also spoke about the small number of candidates in the process and the possibility of increasing the size of the pool of qualified candidates. In the Board's view, this is not a sufficient reason to justify reintegrating an unqualified candidate into the appointment process.

[17] Ms. Brady also stated that as a candidate progressed through the assessment stages, she expected to obtain more information about his or her experience. This approach is problematic because the established Assessment Protocol states that experience was to be assessed based on candidates' applications, during the screening

stage of the process. It further states that applicants who passed the initial screening would be invited to attend the assessment.

[18] In the Board's view, the only legitimate reason for advancing the complainant beyond the application screening stage was if she had met all the essential screening requirements. Ms. Brady was not satisfied that the complainant met the essential experience qualification, and it was not open to her to further assess that qualification at a later stage of the process. The Board finds that it was a serious error to reintegrate the complainant into the appointment process.

A. Discrimination

[19] Section 80 of the *PSEA* provides that in determining whether a complaint is substantiated under s. 77, the Board may interpret and apply the *Canadian Human Rights Act (CHRA)*.

[20] Section 7 of the *CHRA* makes it a discriminatory practice to directly or indirectly refuse to employ or continue to employ any individual or, in the course of employment, differentiate adversely in relation to an employee, on a prohibited ground of discrimination. Section 3 of the *CHRA* lists the prohibited grounds of discrimination, which include disability and race, national and ethnic origin.

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

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

[22] If the complainant establishes a *prima facie* case of discrimination, the onus shifts to the respondent to provide a reasonable non-discriminatory explanation for its actions.

B. Disability and accommodation

[23] The Board is satisfied that the complainant was disabled due to a medical condition at the time of her assessment. The complainant argued that there was a duty to accommodate her based on this medical condition. There is a dispute between the parties as to whether the complainant told the assessment board members that she was unwell, and whether she exhibited signs of being ill throughout her presentation and during her written test, or only after the test was completed. In any case, there is no dispute that she became visibly ill during the assessment. The evidence clearly shows that after the written test the complainant was weak and pale, the respondent helped her to a couch to lie down, brought her water and felt her pulse. Nevertheless, although the board members were concerned enough that they considered calling for an ambulance, after about 30 minutes the assessment resumed.

[24] The parties also disagree as to who decided to continue with the assessment. The complainant denies the respondent's assertion that she participated in a discussion of options and that she decided to partially complete her assessment by answering questions about the presentation she had already given, but to defer the interview portion. She maintains that Ms. Brady made the decision to continue and gave her no choice.

[25] The Board finds that the complainant suffered from a medical episode during her assessment. Even if the complainant wanted to, in the circumstances, it was an error to proceed. In order to properly accommodate the complainant, more information was required and more thought and discussion of appropriate measures was needed.

C. Race and national or ethnic origin

[26] The complainant's only case in support of her allegation of discrimination based on race or national or ethnic origin is that she is Chinese and Ms. Brady noted in writing that her presentation was "occasionally difficult to follow since using non mother tongue." The Board notes that the same document confirms that the complainant passed this part of the assessment.

[27] The Board finds this insufficient to establish a *prima facie* case of discrimination.

D. Bias

[28] Both direct bias and a reasonable apprehension of bias can lead to a finding of abuse of authority (see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29, at para. 125, referring to *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369, on page 394.)

[29] The complainant submits that Ms. Brady demonstrated severe bias against her during the assessment. However, the Board finds the complainant's description of Ms. Brady's behaviour during the assessment is unreliable.

[30] There are inconsistencies within the complainant's testimony. The complainant stated that Ms. Brady essentially ordered her to continue with the assessment after she had felt ill. According to the complainant, Ms. Brady told her that she did not care whether the complainant was ill, saying that she had to get the assessment done that day. Conversely, however, she also testified that Ms. Brady refused to allow her to complete the entire assessment.

[31] The complainant's testimony is also inconsistent with that of other witnesses. According to the complainant, Ms. Brady came into the room where she was writing the test alone, yelled at her to take her coat off and tried to physically remove her coat. As well, the complainant stated that, back in the interview room with the other board members present, Ms. Brady ended her assessment by yelling that she was not suitable for the job and ordering her to leave. However, another assessment board member, Jacqueline Charron, testified that she did not witness any such behaviour. She also stated that she had known Ms. Brady for 20 years and found her to be professional and caring. Ms. Brady denies the complainant's assertions and stated that she was never alone with the complainant on that day.

[32] The complainant wrote an email to Ms. Brady the evening of her assessment, which she copied to the President of her union. She asked to be treated as a priority, but made no mention of any mistreatment during her assessment and, in fact, thanked Ms. Brady for inviting her to the assessment.

[33] In the Board's view Ms. Brady's decision to reintegrate the complainant into the appointment process is inconsistent with bias against the complainant. The Board finds that there is no credible evidence to support a finding of bias or a reasonable

apprehension of bias. Adapting the test in the *Committee for Justice and Liberty v. National Energy Board*, the Board finds that a relatively informed bystander who reviewed all the evidence could not reasonably perceive bias on the part of the assessment board in its assessment of the complainant.

V. Decision

[34] The respondent ignored its own assessment and its assessment guide, and improperly reintegrated the complainant into this appointment process. Furthermore, although the complainant exhibited somewhat serious signs of illness during the assessment, the respondent failed to stop the assessment and make a proper determination of the situation and the required accommodation. The Board finds that the respondent abused its authority.

VI. Corrective measures

[35] Since the complainant failed to meet the essential experience qualification, the Board will not order any reassessment in this case.

[36] The complainant has requested \$20 000 for pain and suffering, in accordance with s. 53(2)(c) of the *CHRA*. She also requests an additional \$18 000 under s. 53(3) of the *CHRA*. She submits that Ms. Brady may have acted deliberately and placed the complainant in a bad position by inviting her to the assessment, although she maintained that the complainant had failed the experience qualification.

[37] The Board is not satisfied that there was any malice or willful intention to cause suffering by inviting the complainant to the assessment. The complainant wanted to participate in the assessment. She challenged her initial elimination from the appointment process and accepted the invitation to the assessment. At the hearing she argued, in part, that she should have been allowed to complete the assessment. No award is ordered under s. 53(3) of the *CHRA*.

[38] Although s. 53(2)(e) of the *CHRA* gives the Board discretion in granting this remedy when a complaint is substantiated, that discretion must be exercised judiciously and in light of the evidence before the Board. (See *Canadian Human Rights Commission v. Dumont*, 2002 FCT 1280 (CanLII) at para 14). In the present case, the complainant did not provide any evidence to support her claim for compensation under s. 53(2)(e) of the *CHRA*.

[39] Accordingly, the Board will not order any award to the complainant for pain and suffering.

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

(The Order appears on the next page)

VII. Order

[41] The complaint is substantiated.

August 10, 2016.

**Merri Beattie,
a panel of the Public Service Labour
Relations and Employment Board**