Date: 20190313

File: EMP-2015-9686

Citation: 2019 FPSLREB 33

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

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

WILLIAM SPRUIN

Complainant

and

THE DEPUTY MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA

Respondent

and

OTHER PARTIES

Indexed as
Spruin v. Deputy Minister of Employment and Social Development

In the matter of a complaint of abuse of authority - paragraph 77(1)(a) of the *Public Service Employment Act*

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Sharon Barbour

For the Respondent: Allison Sephton, counsel

For the Public Service Commission: Kimberley Jessome, counsel

Heard at Halifax, Nova Scotia,
May 2 and 3 and July 20 and 21, 2017.

I. Introduction

[1] William Spruin ("the complainant") participated in an internal advertised appointment process at the Department of Employment and Social Development Canada ("EDSC") for the position of service manager, classified at the PM-05 group and level.

[2] The complainant self-identifies as having a hand-eye spatial coordination learning disability, which is fully mitigated by using a computer and keyboard for his work.

[3] When the complainant was to complete the mandatory Middle Manager Simulation Exercise ("PSC 757") as part of the evaluation for the appointment he sought, he was informed that he had to use a pen and paper. When he reminded the person administering the assessment that he had required a computer and keyboard since starting in the office in 2001, he was told that it was too late and that he should have requested an accommodation before attending. He replied that he did not know that a pen and paper would be the method of assessment as that information had not been available. Therefore, he could not have known to ask for an accommodation.

[4] The complainant testified that after some consideration, the assessment board told him that he had to perform the exercise with a pen and paper or withdraw his application. He suffered stress and vexation from that treatment and did not do well on the exercise, despite having passed it previously.

[5] After approximately three months of stress and consternation about the lack of accommodation of his disability and about his poor performance on the exercise, the complainant was allowed to rewrite the PSC 757 with a computer and keyboard, which again resulted in a poor performance and him being screened out.

[6] The complainant argued that the lack of notice of the tools to be used in the assessment and then the lack of being accommodated in a timely manner constituted abuse of authority and violated the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). The Deputy Minister of Employment and Social Development Canada ("the respondent") denies that there was any abuse of authority in this appointment process.

[7] For the reasons set out in this decision, I find that the respondent discriminated against the complainant on the prohibited ground of disability when he was denied

any reasonable accommodation upon first attending the PSC 757 test in March 2014.

[8] I order financial compensation to him of $2000 for pain and suffering under s. 53(2)(e) of the *CHRA*. I also award the complainant compensation in the amount of $2000 under s. 53(3) of the *CHRA* for the respondent's reckless conduct.

[9] Finally, I recommend that where a determination has been made prior to the administration of a written test that pen and paper will be the only tools used in writing the test, that this information be clearly disclosed to prospective candidates on the job opportunity advertisement ("JOA") or, at the very least, well in advance of the assessment.

II. Facts

[10] The complainant began his career with EDSC in 2001 and was hired through a program for equity for persons with disabilities. The complainant self-identifies as having a learning disability and explained that he was diagnosed with this condition in Grade 2. That caused him to be placed in a special-needs classroom, where he received special instruction on learning how to write. He further testified that he suffered years of physical and emotional abuse due to his learning challenges, and among other things, he was called a "retard" by his schoolmates.

[11] The complainant testified that this harassment has forever affected him as he feels labelled and stated that he still finds it very difficult to talk about his challenges. He explained that he has worked very hard to adapt to his special needs, that he is driven to be seen as an equal, and that he must work much harder and do better than others just to feel equal to them. He added that while he self-identifies as having a disability, he experiences no impediments when working in a barrier-free environment.

[12] The complainant testified that his handwriting is very slow and that it has been assessed at a Grade 6 level of proficiency but that he has adapted and is competent at writing using a computer and keyboard via word processing. When he is forced to use a pen or pencil to write, he stated that he feels shame and embarrassment over his poor writing, which triggers memories of being harassed as a child and causes him stress and anxiety.

[13] The complainant applied to an internal advertised appointment process for a PM-05 service manager position, in process number 2014-CSD-IA-NB-10933.

The appointment opportunity closed on February 19, 2014.

[14] The complainant wrote the test and later filed this complaint under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*"), alleging that the respondent abused its authority in the assessment of merit by failing to accommodate him, thus discriminating against him.

[15] The respondent did not question or contest the complainant's disability and need for accommodation. The complaint was made with the Public Service Labour Relations and Employment Board (PSLREB) on April 7, 2015.

[16] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c.9) received Royal Assent, changing the name of the PSLREB and the title of the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations and Employment Board Act*.

III. Analysis

[17] I must determine whether the respondent discriminated against the complainant in this appointment process and if so, whether the necessary accommodation of the complainant's needs would have amounted to an undue hardship upon the respondent.

[18] Section 77 of the *Act* 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 because of an abuse of authority. As the Board has held, the seriousness and nature of any errors or omissions and the degree to which any conduct is improper may determine whether an abuse of authority occurred.

[19] The complainant bore the burden of proof, which required him to present sufficient evidence for the Board to determine that on a balance of probabilities, 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).

[20] Section 80 of the *Act* provides that when considering whether a complaint is substantiated under s. 77, the Board may interpret and apply the *CHRA*. Section 7 of

the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 3 of the *CHRA* lists the prohibited grounds of discrimination, which include disability.

[21] To prove that the respondent engaged in a discriminatory practice, the complainant must first establish a *prima facie* case of discrimination. The Supreme Court of Canada stated as follows in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*"): "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] In cases such as this, a respondent can answer an allegation of *prima facie* discrimination by showing that it reasonably accommodated the employee or that accommodating the employee's needs would have imposed undue hardship on it (see s. 15(2) of the *CHRA* and *Boivin v. President of the Canada Border Services Agency*, 2017 PSLREB 8 at para. 59).

[23] Where the Board finds that a respondent has engaged in a discriminatory practice in an appointment process, a complaint of abuse of authority will be substantiated. (See, for example, *Murray v. Chairperson of the Immigration and Refugee Board of Canada*, 2009 PSST 33, at para. 125.)

[24] The complainant pointed to his online application for the position, which was submitted on February 14, 2014. He stated as follows on it:

…

> *As indicated in the poster, you have requested that equity members should self-identify. I was brought into HRSDC as part of an equity competition related to my learning disability. I am fully able to accommodate the disability in the workplace and it has no impact on my current duties.*

…

[25] In the appropriate space on the application form titled, "Declaration Form for Members of Employment Equity Designated Groups", the complainant selected "yes", in that he is a person with a disability, and noted that it was under

"(23) Other disability Learning".

[26] After he applied, the complainant was screened in and invited via an email sent on March 12, 2014, to attend an evaluation a week later on March 19, at which the PSC 757 would be administered. The invitation did not provide detail of the fact that the exercise had to be performed using a pen and paper, but it did contain the following text in an email signed by Arlene van Diepen, who was the chair of the assessment board:

> …
>
> *If you have any health or physical limitations, which may adversely affect your performance during any phase of the selection process, or should you require accommodation during the assessment you are strongly encouraged to contact Jacinta Campbell …* ***as soon as possible.***
>
> …
>
> [Emphasis in the original]

[27] To prepare for the PSC 757, the complainant testified that he carefully read the JOA and found that it stated only that a "written examination may be administered". He explained that that did not concern him, as he performed written work every day at his job while using a computer and keyboard, and he expected that those tools of his everyday work would be available at the examination.

[28] The complainant testified that he then searched the Public Service Commission's (PSC) website to ascertain the tools to be used for the PSC 757. He testified that he did not find any information that said that it would be administered with a pen and paper.

[29] I note that the JOA also stated the following:

> …
>
> *The Public Service of Canada is committed to developing inclusive, barrier-free selection and appointment processes and work environments. If contacted in relation to this process, please advise the organization's representative of your need for accommodation measures which must be taken to enable you to be assessed in a fair and equitable manner.*
>
> …

[30] The complainant testified that already in two appointment processes, he had performed the same PSC 757. He stated that in the first process, he asked for and was provided with a computer and keyboard and that in the second, all candidates were offered a choice of either a pen and paper or a computer and keyboard.

[31] In cross-examination, the complainant stated that he did not recall if he had asked in advance of those two exercises whether a computer and keyboard would be available for his use. He was then presented with his email correspondence of March 21 and 22, 2011, from a 2011 PM-05 process, in which the same issue of the assessment tool had arisen.

[32] The complainant acknowledged writing the emails. They showed that in that process, he emailed a human resources representative a few days before the assessment exercise, to begin a dialogue about his disability and his assumption that the exercise would reflect the workplace and allow using work tools, which were unstated but in his mind meant his computer and keyboard. He stated as follows:

…

> *I have a learning disability which affects hand eye coordination which makes my handwriting ineligible. I had assumed that the test would be reflective of the workplace and allow for the use of work tools – but I believe that I may be mistaken. As handwriting is neither an essential or asset criteria on competitions, it does not occur for me to identify this as an accommodation.*
>
> [*Sic* throughout]

[33] The Human Resources representative replied and specifically asked if he was requesting an accommodation, and if so, specifically what kind. The complainant replied as follows:

> *Sorry for the confusion – when I first reviewed the on-line data and noted the requirement for three paged written report, I had assumed that I could use a computer. When I took the test last year I typed three pages.*
>
> *I have a learning disability that affects hand eye coordination and specifically handwriting – the net effect is that my handwriting is not legible. Since it does not impact on my capacity on the job and most testing environments allow for computers, I no longer think about it as a disability. As I now utilize a computer almost 100% of the time, my handwriting has deteriorated further though lack of use. If the three page hand written document will be used as part of the*

> *assessment, I need to use a computer.*
>
> *I am sorry that I did not raise this sooner, but I will need an accommodation.*
>
> …

[34] When he was asked in cross-examination why he did not make inquiries and expressly request an accommodation in the process at issue as he had done in 2011, the complainant replied that he chose not to (in 2014) because he wants, and expects, to be treated equally and not to face barriers at the workplace.

[35] He added that he tries as much as possible to not self-identify as disabled as he feels that doing so diminishes him. He testified that every time he has to self-identify that way, it "ruins" his self-esteem. The complainant testified that without notice of a barrier, he expects barrier-free treatment from his employer and from government agencies.

[36] The complainant pointed to PSC policy documents in support of his contention that the JOA and the administration of the PSC 757 were discriminatory against him.

[37] The PSC's *Appointment Policy* in effect at the time relevant to this complaint directs deputy heads that assessments must not create systemic barriers. Deputy heads are informed that in addition to being accountable for respecting the policy statement, they must inform persons to be assessed, in a timely manner, of the assessment methods to be used, their right to accommodation, and how to exercise that right. They must ensure that those responsible for assessments use tools that do not create systemic barriers to employment.

[38] Specifically with respect to persons with disabilities, the PSC's *Appointment Policy* states that deputy heads must accommodate the needs of persons through all stages of the appointment process to address, up to the point of undue hardship, disadvantages arising from prohibited grounds of discrimination. They must use assessment tools and processes that are designed and implemented without bias and that do not create systemic barriers.

[39] The PSC's *Guide to Implementing the Assessment Policy*, at the section entitled "VI. Policy Requirements", states that deputy heads must do the following:

…

> ***i. inform the persons to be assessed, in a timely manner, of the assessment methods to be used, their right to accommodation and how to exercise that right;***
>
> *It is important that persons be advised, at an appropriate time, of the methods that will be used for assessment. This will improve transparency and will allow the person to prepare for the assessment. Inviting a person to a test, and providing as much information as is reasonable on the administration of that test, would meet this requirement…*
>
> *It is important to note that it is not necessary for the person to have a disability or to have completed the "self-identification" form in order to request accommodation during the appointment process. At first contact with the applicant, the sub-delegated person or person(s) responsible for assessment (this could be the HR advisor) should obtain the necessary information regarding the person's needs with respect to accommodation (if any). This will allow necessary time to determine how best to accommodate the person, before the assessment takes place, and could also result in preventing any undue delays in the assessment process.*
>
> …
>
> [Emphasis in the original]

[40] The complainant spoke with strength and eloquence as to why he chooses not to live or work in a way such that he constantly declares himself as having a disability.

[41] The PSC materials examined at the hearing speak to its efforts to present barrier-free assessment and evaluation tools.

[42] The complainant testified that previously, he had been allowed to write the PSC 757 using a computer and keyboard and requested that the respondent be held to that same approval in this matter. He also requested that his past good performance of the PSC 757 be allowed to stand in the place of repeating such a good performance again in the process at issue.

[43] The PSC participated in the hearing. Its counsel called David Forster of its Personnel Psychology Centre to testify. He has a PhD in psychology. His qualifications and competencies were examined, and he was qualified for expert testimony on the matters of occupational testing and standardized skill assessment. These testing and assessment tools are developed in his office and administered with his office's advice and guidance to client departments and agencies throughout the public service.

[44] Materials that the PSC tendered as exhibits state that the PSC 757 assesses six key supervisory competencies, which are communication, human resources management, thinking skills, leadership, team building, and service orientation.

[45] The exercise takes three hours, in which the candidates complete a three-page written summary of decisions and propose solutions and recommendations, prepare a 30-minute oral presentation, identify organizational problems, make decisions leading to possible solutions, explore alternate solutions, and outline the implications for each alternative.

[46] Mr. Forster testified about the details of the PSC 757 and stated that it can be performed with a computer and keyboard. But in his opinion, all candidates in the process would need to use a keyboard to ensure that no bias arose within the process as for example, someone with superior keyboard skills could gain an advantage over others using pen and paper.

[47] Clearly stated in the "Candidate Information" for the PSC 757 is the following:

> ***If you have a disability*** *and you require testing accommodations, be sure to notify those in charge of the test administration well in advance of the testing date so that they can take the necessary steps to determine the appropriate accommodation.*
>
> [Emphasis in the original]

[48] When he was asked in cross-examination why he thought the *Guide to Implementing the Assessment Policy* stated that the deputy head must inform the persons to be assessed in a timely manner of the assessment methods to be used, Mr. Forster replied that it was so candidates can determine if they need accommodation.

[49] Counsel for the respondent called Ms. van Diepen to testify. She was the director of service delivery (now retired) who had been retained on contract to lead the corporate support for the hiring process in Atlantic Canada to create a pool of qualified PM-05 staff. She developed the JOA and the statement of merit criteria and helped management create three evaluation committees across the Maritime Provinces to run three parallel processes. She testified that standard human resources forms were used to invite candidates who had been screened in to participate in the PSC 757.

She also confirmed that the invitation did not provide notice that the exercise would be conducted with pen and paper.

[50] Ms. van Diepen stated that the PSC provided her and the rest of the evaluation teams with training resources to help them prepare to administer the assessment and appointment process. She also confirmed that the PSC 757 could be done with pen and paper.

[51] She explained how the evaluation process was being run concurrently in three different cities. She stated that it was decided that it would be best to avoid the extra work of trying to provide all candidates in the three cities with computers and keyboards that would be locked out of online resources that were not permissible for the PSC 757.

[52] Mr. Forster testified about why a past passing mark on a PSC 757 in a different appointment process should not be used later in a future evaluation. He said that each assessment board may seek to assess different skills or seek different emphasis on some aspects of the exercise that would make the result inapplicable to a different process. Mr. Forster testified that his office would never allow the results of the PSC 757 to be used again in a later appointment process.

[53] When he was challenged on past results in cross-examination, Mr. Forster testified that consistent with the complainant's experience, the PSC has no expectation of receiving the same results when the same person performs the PSC 757 in different processes. He explained that it is entirely possible that one assessment board can seek different evidence of particular criteria than what might have occurred in a previous process. He also described that the PSC 757 was first launched in the 1990s and that it is performed only with a pen and paper. He added that it is now being launched only for online use and that accommodation requests, such as what arose with the complainant, have to be assessed and decided individually.

[54] In his argument on this issue, the complainant alleged that it was unfair for the respondent to fail to accept his previous good performance on the PSC 757 as satisfying that requirement in the process at issue. He also alleged that the respondent's staff had not been properly trained. I need not consider that training, as I will instead focus upon the outcome of the process. I will consider the past results of the PSC 757 later on.

[55] The complainant relied on *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at para. 77, which states as follows:

> *[77] Section 36 of the* PSEA *provides that the deputy head may use any assessment method that he or she considers appropriate in an internal appointment process. For the Tribunal to find that there was abuse of authority in the selection of the assessment methods, the complainant must prove that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria, or are discriminatory.*
>
> [Emphasis added]

[56] The complainant also cited *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24 at para. 69, which found that "… there is a clear obligation under the *PSEA* for deputy heads, and their delegates, to comply with PSC policies established under subsection 29(3)."

[57] The complainant submitted that the pen and paper assessment was not barrier-free, that the assessment method was not properly disclosed, and that the staff administering the PSC 757 did not take steps to accommodate him just before the exercise began. All those are mandated in the PSC's *Guide to Implementing the Assessment Policy* and *Guide to Implementing the Policy on Employment Equity in the Appointment Process.*

[58] At the outset of her argument, counsel for the respondent stated that it was the complainant's responsibility to indicate that he needed an accommodation, as he had done in the past. She submitted that on the evidence before me, I should find that those administering the test were not aware that he had a disability that could impact his ability to perform it.

[59] The respondent cited *Visca v. the Deputy Minister of Justice*, 2007 PSST 24, in support of its assertion that broad statements such as "various means" have been found sufficient to encompass assessment methods and that it should not be held to the standard of a perfect and barrier-free process. Its counsel pointed out that the JOA in the matter before me stated that a "written examination" and oral interview were part of the test, which fully satisfies the broad range of notice upheld in *Visca*.

[60] I distinguish *Visca* on its facts as it did not consider the important issue of someone with a learning disability trying to ascertain if he or she faces barriers in a

prospective evaluation process. Were I to accept the respondent's submission on *Visca*, it would render meaningless the PSC's *Guide to Implementing the Assessment Policy*, which states that it is necessary to "inform the persons to be assessed, in a timely manner, of the assessment methods to be used, their right to accommodation and how to exercise that right…".

[61] The respondent noted *Costello v. Deputy Minister of Fisheries and Oceans Canada*, 2009 PSST 32, which in turn relied on *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 4. *Neil* decided that failing to inform candidates of a specific definition related to a merit criterion does not in and of itself amount to abuse of authority. I find neither case, dealing with the sufficiency of information about merit criteria and assessment tools, of sufficient relevance to merit further explanation.

[62] The respondent noted the evidence that the complainant had inquired about the potential for him to need an accommodation in the form of a keyboard for the PSC 757 in a previous appointment process and that he should have done so again in the matter at issue. Its counsel further noted that the PSC "Candidate Information" and the email invitation to the complainant clearly indicated that those in need of an accommodation should notify the test administrator of it.

[63] I accept the complainant's testimony that when he approached the evaluation, he wanted to be equal to the other candidates. Without a notice of a barrier to his equal participation, he did not see a need to request an accommodation in addition to self-declaring in his application that he has a disability. He should have been able to rely upon the PSC's *Appointment Policy*, which states that the employer must "inform the persons to be assessed, in a timely manner, of the assessment methods to be used…".

[64] While the complainant characterizes the assessment method as one of pen and paper, this is inaccurate. The assessment method is not in itself what is problematic. The assessment method at issue is the written test, i.e. the PSC 757. What is problematic is the decision, as I have learned through Ms. van Diepen's testimony, that to avoid the extra work of trying to provide all candidates with computers and keyboard, pen and paper would be used instead. It is the lack of notice to prospective candidates of what tools would be used in conjunction with the chosen assessment method that I find troubling. If the respondent had simply informed prospective candidates on the JOA or, at the very least, well in advance of administering the

PSC 757, that the assessment would be done by paper and pen, and candidates would not have use of a computer and keyboard, then not only Mr. Spruin, but anyone else with a disability that required accommodation, would have been properly notified.

[65] Unfortunately, the respondent did not avail itself of this simple communication and then compounded the situation in Mr. Spruin's case as we will see in the rest of my analysis.

[66] The complainant testified that upon his arrival at the location where the PSC 757 was to be administered on March 19, 2014, he was met by Yvonne Hartlin, who was helping the committee as a test administrator. She greeted the candidates and prepared the room and materials. The complainant stated that she saw him enter and that she said, "You need a computer, don't you." He testified that he replied, "Yes, I do," to which Ms. Hartlin replied, "Computers are not allowed."

[67] The complainant further testified that she then asked him, "Why didn't you ask for an accommodation?" and then said, "It's too late to ask for an accommodation now," to which the complainant replied that he did not know that he needed one.

[68] The complainant testified that Ms. Hartlin consulted the evaluation committee and returned to advise him that he had two options, which were to perform the evaluation on paper in handwriting or to withdraw from the appointment process. He said that that upset him considerably, as he thought it could take some years before such a position would become available again for him to seek appointment to. Ms. Hartlin testified that she did not recall that ultimatum.

[69] In her testimony, Ms. Hartlin confirmed that she had worked for 14 years in the same location as the complainant and that she knew him "to say hello". When she was asked, she stated that she did not know that he was in an employment equity group or that he had a learning disability and that she had not administered any tests for him before. She further stated that she had no knowledge of whether he needed an accommodation when he arrived to perform the PSC 757.

[70] Ms. Hartlin testified that when the complainant arrived to perform the PSC 757, he went to the test room, read the instructions, and saw that he was required to do it with a pen and paper.

[71] She then stated that the complainant said that he required a computer and keyboard. She then testified that she said to him, "You're asking to use a PC?" and that

he replied, "Yes."

[72] Ms. Hartlin testified that she then went to the assessment board to inform it that the complainant had requested a PC. She then stated that Ms. van Diepen told her that if he required an accommodation, he should have asked for one in advance. She then testified that she told the assessment board that he had told her that his handwriting is lousy so the Board would not be able to read it if he did not use a PC.

[73] Ms. Hartlin further testified that when she received the assessment board's answer about an accommodation, it was the first time she had heard that phrase used in that manner as she thought it meant staying at a hotel or something similar. She also explained that she was told to advise Human Resources of this matter. She then testified that she returned to the complainant and told him that if he required an accommodation, he should have asked for one in advance.

[74] In an email dated March 19, 2014, and sent at 12:34 p.m. to a human resources advisor, Donna Bolton, Ms. Hartlin wrote as follows:

…

> *Bill Spruin is taking the simulation exercise now.*
>
> *He wants to write his presentation on a computer – not by hand written notes.*
>
> *He has taken this simulation before and he was always able to prepare his presentation electronically.*
>
> *He did not ask for an accommodation because the method of presenting the notes was not provided in the invitation. He expected he would be able to type his responses as he has done in the past.*

…

[75] Ms. Bolton replied in an email 36 minutes later and stated as follows:

…

> *… [I]t was my understanding that it was the boards [sic] decision to have all candidates complete the exercise by hand and computer access would not be set up. Others have requested to use computer but the requests have not been granted. Therefore, he should not be provided computer access….*

…

[76] Two minutes later, Ms. Hartlin replied again, stating, "[h]is point is that he wasn't advised how he would have to complete the exercise, so he couldn't ask for 'an accommodation'."

[77] The complainant testified that the day after writing the PSC 757, he wrote to Ms. Bolton, whom he said he was acquainted with since they had worked together. He informed her that he felt that he had performed the PSC 757 under duress and that he should have been accommodated but had not been informed of the assessment methods and therefore could not have requested an accommodation.

[78] Later in the trail of the many emails that ensued, on March 24, 2014, at 8:08 p.m., Ms. van Diepen, the chair of the assessment board, wrote as follows to Ms. Bolton and others:

…

> *Bill had advised the admin support, Yvonne Hartlin, that he wanted to use a computer. Yvonne checked with the assessment team and we asked her to contact HR. Donna Bolton provided us with some input. The board reviewed the information from Donna and agreed that Bill had several opportunities to indicate that he required an accommodation. We also agreed that it was the candidate's responsibility to clarify if the exercise was to be handwritten or by computer. Therefore, we determined that the client should continue in writing and asked Yvonne to advise the candidate accordingly.*

…

[79] After approximately a three-month wait, on June 19, the complainant was finally allowed to perform the PSC 757 with a keyboard and computer. He testified to his anxiety during that long period and stated that he did not do well on the assessment. He testified that he was informed on June 26 that he had been removed from consideration for the PM-05 appointment that he had sought due to his poor performance on the PSC 757.

[80] The testimony and email correspondence within the complainant's office and with the PSC covers several weeks in April in which the respondent tried to determine if he needed an accommodation, and if so, whether the PSC would approve it. The following is an example of that correspondence from April 21, 2014, at 2:25 p.m., in which the complainant wrote the following to his superior:

…

> *This is the second occasion where I have been asked by my department to push for an accommodation instead of being supported to use the common tools of my workplace. Most people I speak to are amazed that the federal government even uses 'pen and paper' testing in the first place. I am being forced to advocate disability issues when in effect, all I want is for every candidate to have the freedom to use the tool available in the workplace. This issue has deep seated impacts on me as each time it brings me back to a very difficult time in my life which I had overcome years ago.*

…

[81] The respondent relied upon the PSC's administration manual binder for the PSC 757. Its manager, Ms. Hartlin, testified that she used the instruction in it to respond to the complainant when he voiced his concern about not being able to perform the exercise without a computer and keyboard. The binder states as follows at section 2.2:

> *You are about to begin the Manager Simulation (757). If, before or during the test session, you experience a physical or psychological condition or illness that could interfere with your test performance, it is your responsibility to inform me of that immediately so that alternate arrangements can be made. You will not be asked to disclose the details of your condition or illness at this time. Similarly, if you have concerns about the testing conditions, you must raise them immediately. If you choose to proceed with the test without informing me of an illness, a perceived problem with test conditions or any other physical or psychological condition, you must accept the test results and the accompanying retest restrictions.*

…

[82] Mr. Forster also acknowledged being aware of the PSC's policies cited earlier, which state that those to be assessed should be informed in a timely manner of the assessment methods to be used as well as their right to request accommodations and how to do it. He also acknowledged the PSC's policies, which state that the assessment tools should not create systemic barriers and that his office does indeed seek to create barrier-free tools, which cannot be 100% successful. He added that the PSC admitted that the pen-and-paper assessment method for the PSC 757 is not barrier-free.

[83] When he was asked about the complainant's experience with the PSC 757, Mr. Forster confirmed that the PSC keeps records of accommodations approved for

assessments but stated that candidates must request accommodation each time they participate in an assessment and face a barrier. He said that specific accommodations for a person may change over time and can vary, depending upon the assessment method, and he stressed that each candidate requiring an accommodation has the duty to request it.

[84] The complainant relied on *Song v. Deputy Minister National Defence*, 2016 PSLREB 73 at paras. 23 and 25, which found that an abuse of authority occurred when an applicant became visibly ill during an assessment and after a brief break continued the test, even though the assessment board members considered calling an ambulance due to her illness. The parties in that case disputed how much she told the assessment board members about her illness. The PSLREB found that the respondent in that case should have sought more information and should have engaged in more thought and discussion of the appropriate measures to take.

[85] I find that the facts in the matter before me are quite different such that *Song* is not a helpful authority.

[86] The complainant also relied upon a decision from the Board's predecessor, the Public Service Staffing Tribunal (PSST), in *Rajotte v. President of the Canada Border Services Agency*, 2009 PSST 25 at paras. 128, 131, and 166. In that case, by cross-examining her managers, the complainant had been able to adduce evidence that they had assumed that she would not be available to regularly work overtime due to her well-known parental responsibilities, which might have impacted the decision to proceed with a non-advertised appointment process that excluded her. The PSST found that in so doing, she made out a *prima facie* case of discrimination, which the respondent did not rebut.

[87] The PSST concluded that the complainant should have had the benefit of an individualized assessment of her needs, to not be deprived of opportunities for advancement, based on the respondent's assumption about her availability to work flexible hours due to her family commitments.

[88] Again, I find the facts of *Rajotte are* so different from those in the matter before me as to render it unhelpful.

[89] In her argument on this matter, counsel for the PSC stated that contrary to the complainant's submission, nothing improper or discriminatory arose from the fact that

his earlier successful performance on the PSC 757 could not be relied upon later in the appointment process at issue. Counsel pointed to the testimony of Mr. Forster, which stated that every evaluation can be administered differently, to seek different aspects of the stated skills and facilitate the right fit for a particular position.

[90] I accept the PSC's submission on this point. Managers may seek different skill sets for a particular appointment, and a candidate's abilities may change over time. Allowing a past successful performance on a standardized test to be relied upon again in the future, perhaps in perpetuity, seems unwise and contrary to the principles of merit upon which the *Act* is based.

[91] Counsel for the respondent spoke to the broad context of human-rights jurisprudence in Canada. She referenced the reasons written by Justice Abella in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paras. 40, 48, 49 and 53, as follows:

> *40 An employer has a duty to provide a discrimination-free workplace. It is important, therefore, to be clear about what discrimination is — and what it is not — so that employers know their duties and employees know their rights.*
>
> …
>
> *48 At the heart of these definitions is the understanding that a workplace practice, standard, or requirement cannot disadvantage an individual by attributing stereotypical or arbitrary characteristics. The goal of preventing discriminatory barriers is inclusion. It is achieved by preventing the exclusion of individuals from opportunities and amenities that are based not on their actual abilities, but on attributed ones. The essence of discrimination is in the arbitrariness of its negative impact, that is, the arbitrariness of the barriers imposed, whether intentionally or unwittingly.*
>
> *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.*
>
> …

> *53 There is no need to justify what is not,* prima facie, *discriminatory. Unlike Deschamps J., then, the issue for me is not whether the employer has made out the justification defence of having reasonably accommodated the claimant, but whether the claimant has satisfied the threshold onus of demonstrating that there is* prima facie *discrimination, namely, that she has been disadvantaged by the employer's conduct based on stereotypical or arbitrary assumptions about persons with disabilities, thereby shifting the onus to the employer to justify the conduct.*

[92] The respondent cited *Martin v. Carter Chevrolet Oldsmobile*, 2001 BCHRT 37 at para. 28, for the finding that an employer can assume that employees with disabilities are able to perform their jobs unless they inform the employer otherwise or unless it is evident from the nature of the work or how they perform it that the disability has some effect on their performance. It is well established that employees have a duty to bring to their employers' attention their need for accommodation.

[93] I follow the same line of logic as the British Columbia Human Rights Tribunal did in *Martin* when I conclude that as much as employers should be able to assume employees are fit to work until informed otherwise, I find that public servants should be free to assume that appointment assessment exercises are barrier-free unless they are informed otherwise through the JOA and an invitation to participate by the disclosure of any detailed assessment methods that are not fully accessible.

[94] In terms of the *O'Malley* test, I conclude that the complainant established a *prima facia* case of discrimination as he was treated differentially, to his detriment, based upon the prohibited ground of his physical disability as the only tools available (pen and paper) provided a significant barrier to his participation.

[95] In response, as noted earlier, while essentially admitting that nothing was done to properly provide notice of what tools would be available for candidates to complete the PSC 757, the respondent is of the view that the complainant should have done even more to ascertain this information and to self-declare his need for an accommodation without knowing he needed one (see *O'Malley*, at para. 28).

[96] The respondent referred to the Supreme Court of Canada's decision in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R 970 at 994, which found that a human-rights claimant had a duty to be an active participant and to assist in the process to find a proper accommodation. The Court stated as follows:

…

> *To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.*
>
> *This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution… … When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal…*
>
> …

[97] The PSST considered *Renaud* in the context of a s. 77(1) complaint under the *Act* that alleged discrimination and a failure to accommodate in *Boivin v. President of the Canada Border Services Agency*, 2010 PSST 6 at paras. 133 and 134. In that decision, the PSST found the following:

> ***133*** *The process of accommodation therefore, requires the communication and engagement of both parties. The steps that establish that the parties have met their obligations in the accommodation process are not immutable, nor can they be rigidly compartmentalized. This is precisely because of the need, at times, to fine-tune how the requirement for accommodation is met, and the need for dialogue and cooperation from both the respondent and the employee. The process of accommodation cannot always result in perfection, particularly when it is clear that the party who must address the request does not know that there is a problem.*
>
> ***134*** *The parties are expected to act in a reasonable and cooperative manner in finding solutions to requests for accommodation. If there is a breakdown in the accommodation process, the issue becomes who is responsible for the breakdown and the outcome of the complaint will be determined by the answer to that question. The matter that the Tribunal must determine therefore, is where and how the process of accommodation broke down in this case.*

[98] The respondent also cited the Federal Court's decision in *Kandola v. Canada (Attorney General)*, 2009 FC 136, which considered the judicial review of the sole issue of whether the applicant's right to procedural fairness was breached during the investigation of a workplace complaint (see paragraph 12). In the introduction paragraph to that decision, paragraph 1, the Court states the following:

> *[1] An employee who requires accommodation for a disability*

> *must inform his employer of the fact of the disability, unless it is self-evident, and then co-operate in the accommodation process; if not, it is he who must bear the consequences. Admitting to a disability and seeking the employer's assistance is difficult for some. However, when disclosure and a request for accommodation have not been made, the employee cannot later ask that the employer's assessment of his performance, made in ignorance of the disability, be set aside ….*
>
> [Emphasis added]

[99] Counsel for the respondent sought to apply *Martin* to the facts by submitting that the staff administering the PSC 757 on the day the complainant arrived to perform it had no idea that at that time, he was suffering from a disability that would affect his performance.

[100] The complainant has a learning disability that had been diagnosed and reported to EDSC. His evidence is that the test as administered to him placed him at a disadvantage, given his disability, and that it denied him a fair opportunity to demonstrate that he was qualified for the position. This obstacle resulted in him being adversely differentiated in the course of his employment and amounted to *prima facie* discrimination.

[101] I am persuaded by the complainant's testimony that upon his arrival at the test, the staff recognized him as needing a computer. Even if Ms. Hartlin was not aware at this moment, she certainly was made aware of the complainant's need prior to him commencing the test. The evidence is unequivocal that she then brought this to the attention of the assessment board members, and they began discussing whether he needed and should receive an accommodation. I note importantly, that it was the assessment board members themselves and not the complainant who began discussions about the matter of his accommodation.

[102] The respondent's position is that the complainant did not request an accommodation when he was first asked to do the PSC 757. I have already addressed the lack of proper notice of the tools that were to be used to complete the PSC 757 test, and I need not belabour these points again here.

[103] Even if I were to have found that the respondent was not required to bring this to candidates' attention well in advance, the respondent's witnesses stated that the test administrator and the assessment board discussed the issue of an accommodation for him. Clearly, there was sufficient awareness of his disability and need for

accommodation if I need to attribute that knowledge to the respondent, as the Federal Court noted in *Kandola*.

[104] Since I have found that the complainant has established *prima facie* discrimination, and made the respondent aware of his need for accommodation prior to taking the test, the onus shifts to the respondent to satisfy me that it offered the complainant reasonable accommodation. What did the respondent do when faced with the complainant informing them, through Ms. Hartlin, that he needed a PC?

[105] According to the complainant, they offered him one of two options: complete the test using pen and paper, or withdraw from the appointment process. While Ms. Hartlin did not recall that ultimatum, she did not deny it. I find as a fact that these were the only two options presented to the complainant.

[106] I also completely accept the complainant's explanation for why he proceeded to take the test that day; he thought it could take some years before such a position would become available again. Based on the evidence presented at the hearing, I find that the respondent failed to provide the complainant with any reasonable accommodation at the time of his request. To offer him a retest using a computer and keyboard some three months later does not fulfill the respondent's duty to accommodate. Providing him with a computer and keyboard approximately three months after his first attempt to perform the test was untimely and, therefore, was not a reasonable accommodation of his needs.

[107] I conclude that the failure to provide the complainant with a timely accommodation to perform the PSC 757 (enhanced as indicated by the lack of proper notice to candidates as to the tools to be used to complete the written test) constitutes a discriminatory practice and, thus, an abuse of authority under the *Act*. Those failures lead to him being owed compensation under the *CHRA*.

IV. Corrective Action

[108] The complainant requested $20 000 in damages under the *CHRA*, split evenly between the two compensatory heads available under the *CHRA*, which are pain and suffering and special compensation for wilful or reckless conduct. He also asked for financial compensation for what he argued were lost wages.

[109] The complainant argued that but for the respondent's mishandling of his PSC 757 evaluation, he would have been promoted to the PM-05 position with an

increase in pay earlier than he eventually was. He testified that even after having been screened out of the process at issue, he was later promoted in an acting capacity to the PM-05 position. As of the hearing, he was in fact acting in a PM-07 position, which his counsel submitted was proof that he would have been promoted at the earlier opportunity had the PSC 757 been administered properly.

[110] The respondent argued that it made no errors and that it provided a reasonable accommodation when the complainant belatedly, after the first writing of the PSC 757, requested an accommodation. Alternately, the respondent submitted that if I find an error in how the PSC 757 was depicted in the advance materials that the error did not amount to an abuse of authority. It also submitted that there is insufficient evidence before me to justify awarding compensation under the *CHRA*.

[111] Pursuant to s. 81(2) of the *Act*, corrective action may include an order for relief under paragraph 53(2)(e) and subsection 53(3) of the *CHRA*.

[112] I conclude that the respondent should have provided more precise detail to allow the complainant to determine if he required an accommodation. Given the detailed PSC policy of providing information about assessment methods, and given the serious problems that lack of information caused him.

[113] I recommend that where a determination has been made prior to the administration of a written test that pen and paper will be the only tools used in writing the test, that this information be clearly disclosed to prospective candidates on the job opportunity advertisement ("JOA") or, at the very least, well in advance of the assessment.

[114] I also find that the respondent had sufficient knowledge of the complainant and his need for accommodation in the form of a computer and keyboard to use at the PSC 757 that upon his attendance or, at the very least, when he raised the matter of his needing a keyboard, with the assessment board through Ms. Hartlin, the respondent should have more adequately responded to his accommodation needs. I find as a fact that at that material time, the respondent did nothing to accommodate the complainant's disability.

[115] Given this finding of the knowledge of the complainant's disability and his need for an accommodation by the assessment board and their lack of response, I find that these actions fall within the definition of reckless under the *CHRA* as established by

the Federal Court in *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at paragraph 155, aff'd 2014 FCA 110:

> [155] *In making an order for special compensation under subsection 53(3) of the Act, the Tribunal must establish the person is engaging or has engaged in discriminatory practice wilfully and recklessly. This is a punitive provision intended to provide a deterrent and discourage those who deliberately discriminate. A finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the Act is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.*
>
> [Emphasis added]

[116] I also note that while the complainant testified as to the anxiety and frustration he suffered due to the incident and the fact that he was forced to wait anxiously for approximately three months to perform his PSC 757 again but with a computer and keyboard, his pen-and-paper test was an isolated incident. I took these matters into account when determining his financial compensation.

[117] I am not willing to consider the complainant's claim for compensation for lost wages. It requires that I order him appointed to the position he sought in the process at issue, which I clearly am not empowered by Parliament to do (see s. 82 of the *Act*), or that I ignore the speculative nature of any person's efforts to be appointed from a process.

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

(The Order appears on the next page)

V. Order

[119] The complaint is substantiated.

[120] I declare that the respondent discriminated against the complainant in this appointment process and, thus, an abuse of authority occurred in the application of merit.

[121] I order that $2,000 in compensation be paid to the complainant under s. 53(2)(e) and $2,000 for special compensation under s. 53(3) of the *CHRA* within 60 days of this decision.

March 13, 2019.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board