Date: 20200406

Files: EMP-2016-10810, 10812, and 10874

Citation: 2020 FPSLREB 36

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

PAUL ABI-MANSOUR

Complainant

and

DEPUTY HEAD OF THE DEPARTMENT OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

and

OTHER PARTIES

Indexed as
Abi-Mansour v. Deputy Head 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: D. Butler, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Spencer Shaw, counsel

For the Public Service Commission: Claude Zoar (written submission)

Heard at Ottawa, Ontario,
October 30 and 31, 2019, and January 21, 2020.

REASONS FOR DECISION

I. Complaint before the Board

[1] The complainant, Paul Abi-Mansour, applied for a position as a researcher classified at the EC-04 group and level (selection process number 2016-CSD-IA-NHQ-14685) in the Skills and Employment Branch of Employment and Social Development Canada (ESDC) in Gatineau, Quebec. He was screened out of the appointment process at its initial stage for failing to meet two essential qualifications. His complaint, dated August 11, 2016, alleges that the respondent, the deputy head of ESDC, abused its authority in the conduct of the appointment process, in violation of s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). Section 77(1)(a) reads as follows:

> ***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);*
>
> …

[2] The complaint (identified as EMP-2016-10810) filed with the Public Service Labour Relations and Employment Board (PSLREB), as it was then known, on November 8, 2016, alleged as follows:

> …
>
> *Abuse of authority*
>
> *Using improper assessment tools*
>
> *Appointing candidates who do not meet essential qualifications, thus violating the merit principle*
>
> *Favoritism and nepotism*
>
> *Apprehended [sic] bias*
>
> *Racism and discrimination*

[3] By order of the PSLREB, two other files involving the same appointment process, identified as EMP-2016-10812 and 10874, were consolidated with EMP-2016-10810.

[4] The complainant restated his allegations on June 5, 2017, as follows:

…

a) Abuse of authority in conducting the screening and in screening the complainant out (including bad faith).

b) Unclear and poorly developed SOMC

c) Abuse of authority in setting the essential qualifications stated on the SOMC

d) Abuse of authority in appointing candidates who do not meet essential qualifications, thus violating the merit principle in s. 30(2) of the PSEA (s. 77(1)(a))

e) Reasonable apprehension of bias in favour of the appointees.

f) Unqualified selection board members

g) Discrimination against the complainant.

…

[5] He specified the following corrective action:

…

a. Setting aside the three appointments

b. Re-integrating the complainant into the competition

c. Common law damages for bad faith

d. Relief for discrimination in accordance with the relevant provision of the Human Rights Act.

e. Other corrective action that the complainant would have and that the Board permits

…

[6] The respondent denied the allegations. In particular, it explained that the complainant failed to meet the required essential qualifications of "[e]xperience in conducting research and analyzing both quantitative and qualitative economic or labour market data sources" and "[e]xperience in the use of tools to extract and transform data from various sources into useable datasets, databases and other useable formats."

[7] By virtue of s. 79 of the *PSEA*, the Public Service Commission (PSC) is entitled to be heard in any staffing complaint filed with the Board. The PSC declined to participate at the hearing but submitted a written summary outlining the operative "Appointment Framework in effect after April 1, 2016."

[8] The "Other Parties", three successful candidates in the process, also did not participate in the hearing.

[9] 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* (*FPSLREBA*).

II. Notice to the Canadian Human Rights Commission

[10] Because the complainant alleged discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), he notified the Canadian Human Rights Commission (CHRC) of his complaint, as required by s. 78 of the *PSEA*, which reads as follows:

> ***78*** *Where a complaint raises an issue involving the interpretation or application of the Canadian Human Rights Act, the complainant shall, in accordance with the regulations of the Board, notify the Canadian Human Rights Commission of the issue.*

[11] The CHRC subsequently advised the Board that it did not intend to make submissions in this matter.

[12] Section 20(1) of the *Public Service Staffing Complaints Regulations* (SOR/2006-6, as amended by SOR/2014-250; "the *Regulations*"), specifies content that must be included in the notice, known as Form 5. That provision reads as follows:

> ***20 (1)*** *If the complainant raises an issue involving the interpretation or application of the* **Canadian Human Rights Act** *in a complaint made under subsection 65(1) or 77(1) of the Act, the complainant must give notice to the Canadian Human Rights Commission under subsection 65(5) or section 78 of the Act. The notice must be in writing and must include*
>
> ***(a)*** *a copy of the complaint;*
>
> ***(b)*** *the complainant's name, telephone number and fax number, and a mailing address or electronic mail address that can be disclosed to all parties;*
>
> ***(c)*** *the name, address, telephone number, fax number and electronic mail address of the complainant's authorized representative, if any;*
>
> ***(d)*** *a description of the issue involving the interpretation or the application of the* **Canadian Human Rights Act** *and of the alleged discriminatory practice or policy;*

> ***(e)*** *the prohibited ground of discrimination involved;*
>
> ***(f)*** *the corrective action sought;*
>
> ***(g)*** *the signature of the complainant or the complainant's authorized representative; and*
>
> ***(h)*** *the date of the notice.*
>
> [Emphasis in the original]

[13] The *Regulations* require the complainant to provide a copy of the notice to the Board and to the other involved parties. Section 20(2) reads as follows:

> ***20 (2)*** *The complainant must give a copy of the notice to each of the other parties, to the Board and to each of the intervenors, if any. Those copies do not need to include copies of the complaint.*

[14] At a pre-hearing conference convened on September 6, 2019, I reminded the complainant that he had not filed a copy of his Form 5 notice with the Board as required by the *Regulations*, and I directed him to comply. He did not do so by the time the hearing opened on October 30, 2019. I again directed him to provide a copy of his Form 5 notice. Finally, after the hearing adjourned on October 31, 2019, he did so.

[15] The complainant's Form 5 notice bears the date of October 6, 2019, fully 26 months after he originally filed his complaint with the Board. Clearly, he met the requirement set by s. 78 of the *PSEA* only after I insisted that he do so.

[16] The only entry in the complainant's notice to the CHRC, dated October 6, 2019, reads as follows: "The complainant in file EMP-2016-10810 (hearing on October 30, 31 2019) will raise issues of discrimination. No action from the CHRC is required."

[17] The complainant's Form 5 does not conform to the requirements of s. 20(1) of the *Regulations*. Specifically, he did not describe the issue underpinning his complaint (s. 20(1)(d)), specify the prohibited ground of discrimination (s. 20(1)(e)), or outline the corrective action sought (s. 20(1)(f)).

[18] When the hearing reconvened on January 21, 2020, I asked the parties for their submissions as to what ruling, if any, I should make with respect to the complainant's discrimination allegation, given the non-compliant Form 5 notice.

[19] The complainant argued that absent an explicit statutory provision allowing the Board to dismiss an allegation in these circumstances, his failure to submit a

compliant Form 5 cannot have any impact. In his view, the failure was "just an irregularity" and, in fact, a "moot point" given that the CHRC indicated that it would not make submissions. He maintained as well that the respondent had not been prejudiced because it had been clear from his initial filing of the complaint that he intended to argue a discrimination allegation and that during the pre-hearing conference, he had elaborated the prohibited grounds of discrimination involved in his case (race, national origin, and ethnic origin).

[20] The complainant alleged that the CHRC has a problem with him and that it wants nothing to do with his complaints. He stated that he does not want the CHRC to participate in any Board hearing because of the CHRC's antipathy toward him. Indeed, he has filed several complaints against it. He also alleged that it never intervenes in Board hearings.

[21] The respondent argued that the complainant is an experienced litigant who knows the rules. At the pre-hearing conference, the Board directed him to provide a copy of his Form 5, but he did not. He chose not to comply with a simple requirement because, by his own admission, he did not want the CHRC to attend a hearing. He wished to deprive the CHRC of the opportunity to address issues in his case.

[22] The respondent contended that in effect, the complainant argued, "The CHRC didn't show up — what's the big deal?" It stressed that the CHRC must have an opportunity to analyze a complaint before making a decision as to whether to intervene but could not do so in this case because the complainant failed to provide adequate information.

[23] In view of the complainant's cavalier attitude toward Form 5, the respondent submitted that I should preclude him from pursuing a discrimination argument at the hearing.

[24] In rebuttal, the complainant contended that the respondent had not demonstrated how it had been prejudiced by his Form 5 and maintained that the CHRC, equally, was never prejudiced in any way and would never intervene. Citing his words, "the respondent and the Commission are happy; so should be the Board".

[25] After the submissions, I reserved my decision and stated that I would proceed to consider evidence and arguments about the discrimination allegation at the hearing, subject to my ruling.

[26] On reflection, I have decided to proceed and consider the complainant's discrimination allegation despite his non-compliant Form 5. I am not aware of Board case law that would guide me as to the appropriate action that could, or should, be taken when it is clear that a complainant has not respected the filing requirement stated in s. 20 of the *Regulations*. While I believe that the Board probably does have the authority to rule against the admissibility of an allegation in a staffing complaint given a party's failure to follow a regulatory provision that has the force of law, I have decided not to explore that authority further in this decision. I do so at least in part because I cannot find that the respondent's ability to defend against the discrimination allegation has been prejudiced. As for the CHRC, I must rely on its email of October 24, 2019, which states its intention not to participate in the hearing, and on its decision to close its file.

[27] In other future circumstances, it may be appropriate or necessary for the Board to examine further the consequences of a failure to comply with s. 20 of the *Regulations*, particularly if it forewarns complainants that a finding that a Form 5 does not comply with the *Regulations* may result in an adverse ruling.

[28] That said, I accept without reservation the respondent's argument that the complainant exhibited a cavalier attitude toward the Form 5 filing requirement. I am convinced by his actions and arguments that he believes that the requirement is trivial and that he need not bother to comply unless directed to by the Board.

[29] Under s. 79(2) of the *PSEA*, the CHRC has the right to make submissions to the Board. To determine whether it wishes to exercise that right, a complainant must supply it, through Form 5, with all the information required under s. 20(1) of the *Regulations*. Moreover, all parties to a complaint, as well as the Board, have a right to receive that information, to be certain of the line of argument with respect to discrimination prohibited by the *CHRA* a complainant is advancing.

[30] The complainant is an experienced litigant before the Board. There is no possibility that he is unaware of his filing obligations. His actions were intentional; he admitted that he did not want the CHRC to intervene. In my view, he displays

contempt toward the CHRC. He has also shown a lack of respect toward the Board by failing to follow its instructions about filing a Form 5 until the last possible opportunity. His attitude and actions are inappropriate and must not be repeated.

III. Preliminary matters and rulings

A. Anonymization

[31] At the hearing on October 30, 2019, the complainant requested an order anonymizing the style of cause of this decision, which the respondent opposed.

[32] The complainant testified that he has experienced difficulty obtaining a position through the numerous public service appointment processes to which he has applied. He indicated that since the decision in *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 53 ("*Abi-Mansour 2018*"), in which the Board dismissed his request to anonymize it, he had heard from more managers that his frequent litigation, as evidenced by the Board's published decisions, was viewed as a problem and affected his chances of employment.

[33] In cross-examination, the complainant elaborated that he had heard from one manager late in 2016, one in 2017, and one in 2018, advising him to stop making complaints because they were appearing on Google. He agreed that none of those managers had been members of the selection board.

[34] The complainant described himself as actively seeking employment in the external labour market since he has been on leave without pay since September 30, 2019. He believes that the Board's publication of decisions bearing his name allows potential external employers to Google his name and identify decisions on the Board's website that could cast him in a negative light. He also stated that he has the potential to work in the Middle East, where Canadian law "has no bearing", but that the ability of potential employers there, and elsewhere outside Canada, to access Board decisions through Internet searches jeopardizes his prospects.

[35] In cross-examination, the respondent offered documents, described in the following section, showing other information already accessible on the Internet that depicts the complainant in negative terms. That information relates to his employment experience. Given that he lists that experience on his résumé, the respondent contends

that he has effectively directed a potential hirer to the adverse information about his employment record already accessible on the Internet.

[36] The respondent also referred to the following reference in *Abi-Mansour 2018*, about the prospect that potential employers might be adversely affected by the Board's decisions: "the horse is out the barn door".

[37] The complainant returned to the anonymization issue at final argument. He maintained that the ruling in *A.B. v. Canada Revenue Agency*, 2019 FPSLREB 53 ("*A.B. v. Canada Revenue Agency*"), to anonymize the style of cause should apply to his case. He also contended that *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, cited as principal authorities in *Abi-Mansour 2018*, apply only when a motion is made to seal documents and thus do not have bearing on his anonymization request. He urged that I rely, instead, on *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 ("*A.B. v. Bragg*"), and *A.B. v. Canada (Citizenship and Immigration)*, 2018 FC 237 ("*A.B. v. Canada*"), in which the applicable test is whether failing to anonymize would cause "objectively discernable harm". (I note that he failed to provide copies of *A.B. v. Bragg* and *A.B. v. Canada*.)

[38] The complainant also maintained that no provision in the *PSEA* states that hearings are public.

[39] The evidence advanced by the complainant in support of his request does not differ materially from what the Board considered in *Abi-Mansour 2018*. In essence, he added only that he has heard from more managers about his litigation since *Abi-Mansour 2018* and that he is now seeking employment in wider markets, where potential employers could access Board decisions.

[40] I find that the complainant's evidence about comments made by managers constitutes hearsay. While I might accept this testimony as proof that the managers made comments about him, as reported, I cannot go further and consider it proof that the Board's decisions identifying him by name have adversely affected his chances in public service appointment processes. To be sure, were such proof advanced, it would not in itself justify an anonymization.

[41] The complainant argued that no provision in the *PSEA* states that hearings are public. As an independent quasi-judicial tribunal, it is uncontentious in the

jurisprudence that the constitutionally protected open court principle applies to Board proceedings.

[42] The complainant has offered three decisions not argued in *Abi-Mansour 2018*. In the circumstances reviewed in *A.B. v. Canada Revenue Agency*, the Board found that a grievor had been subject to racist treatment in his daily life that was not related to the matters raised at the hearing. It accepted that publishing his name "… could significantly increase the risk of this racist treatment being exacerbated" and of being labelled a "terrorist sympathizer". Applying the *Dagenais-Mentuck* test to the specific circumstances faced by the grievor, the Board found (at paragraph 149) that "… the salutary effects of the [anonymization] order outweighed the deleterious effects on the rights and interests of the parties and the public …".

[43] The complainant's concern is essentially that publishing his name in an adverse Board decision increases the likelihood that potential employers, within and without the public service, may draw negative inferences about his candidacy. I cannot find that such an outcome, if realized, is comparable to what the grievor potentially faced in *A.B*, v. *Canada Revenue Agency.* The Board in that case described those circumstances as "exceedingly rare", particularly given that the evidence included prolific social media postings by the grievor that could be viewed as sympathetic to terrorist groups. In my opinion, no such "exceedingly rare" circumstances exist in the complainant's situation. The Board has already published several decisions reporting his name. His testimony suggesting the deleterious impact that may result from the publication of decisions bearing his name is only speculative; nothing before me proves such an impact or any "objective harm", were I to accept that as the test. The limited evidence before me certainly does not match the concrete evidence accepted in *A.B. v. Canada Revenue Agency* of a record of serious racist treatment experienced by the grievor.

[44] I also must note that while arguing that the *Dagenais-Mentuck* test applies only when a party seeks a sealing order, the complainant asked me to apply the finding in *A.B. v. Canada Revenue Agency*, based on the *Dagenais-Mentuck* test, in circumstances where there was no motion to seal.

[45] The Supreme Court of Canada's decision in *A.B. v. Bragg* considered the application of a 15-year old cyberbullying victim for an order requiring an Internet

provider to disclose the identity of a person or of persons who published fake and allegedly defamatory information about the victim on Facebook. In *A.B. v. Canada*, the Federal Court considered an application to overturn the denial of a refugee application about an 8-year-old child who had been sexually assaulted by her father.

[46] It is difficult to accept that the complainant's situation is in any way analogous to the circumstances faced by the exploited child in *A.B. v. Bragg* and *A.B. v. Canada*. That said, his argument is that the two decisions favour a different test for deciding an anonymization request based on the concept of "objectively discernable harm". In the case of *A.B. v. Bragg*, it is true that the Supreme Court of Canada's analysis touches upon court findings related to "objective harm", but it is not true that the decision somehow supplants the *Dagenais-Mentuck* test, as becomes clear at paragraph 11, which reads as follows:

> *[11] The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (Vancouver Sun (Re),* ***2004 SCC 43 (CanLII),*** *[2004] 2 S.C.R. 332, at para. 23) and is inextricably tied to freedom of expression. A.B. requested two restrictions on the open court principle: the right to proceed anonymously and a publication ban on the content of the fake Facebook profile. The inquiry is into whether each of these measures is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such alternatives exist, the inquiry turns to whether the proper balance was struck between the open court principle and the privacy rights of the girl: Dagenais v. Canadian Broadcasting Corp.,* ***1994 CanLII 39 (SCC),*** *[1994] 3 S.C.R. 835; R. v. Mentuck,* ***2001 SCC 76 (CanLII),*** *[2001] 3 S.C.R. 442.*
>
> [Emphasis in the original]

[47] Also, the Federal Court's decision in *A.B. v. Canada* invokes the *Dagenais-Mentuck* test, as is apparent as follows at paragraph 39:

> *[39] Proceedings before this Court are open to the public. Litigants are publicly identified by name. The openness of judicial proceedings is constitutionally guaranteed as a consequence of the freedom of the press (Edmonton Journal v Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 SCR 1326). Publicity, however, may be restricted to protect serious countervailing interests. In a number of cases, the Supreme Court of Canada has held that various forms of confidentiality orders may be appropriate where there is proof of the "necessity of the*

> *publication ban" and "proportionality between the ban's salutary and deleterious effects" (R v Mentuck, 2001 SCC 76 at para 32, [2001] 3 SCR 442; see also Dagenais v Canadian Broadcasting Corp, 1994 CanLII 39 (SCC), [1994] 3 SCR 835; Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41, [2002] 2 SCR 522).*

[48] Note that both *A.B. v. Bragg* and *A.B. v. Canada* address requests to anonymize a style of cause, not motions to seal. Clearly, they do not support the complainant's contention that *Dagenais-Mentuck* arises only in the context of sealing orders.

[49] Given the foregoing, I find that the case law argued by the complainant does not obviate the Board's use of the *Dagenais-Mentuck* test to rule on applications to anonymize a style of cause. It may be that the concept of "objective harm" can enter into the analysis, but the basic test remains one of balancing the salutary effects of an anonymization order against the deleterious effects of such an order on the parties and the public.

[50] I find further that it is unnecessary for me to repeat a detailed analysis using *Dagenais-Mentuck*. The evidence before me is essentially equivalent to the evidence considered by the Board in *Abi-Mansour 2018*. Therefore, I find it appropriate to associate myself fully with the Board's detailed and cogent reasoning in that case (at paragraphs 15 to 44). I endorse its reasoning and the vital open court principle that it protects as part of this decision.

[51] The Board's ruling in *Abi-Mansour 2018* has withstood judicial scrutiny. The complainant filed a motion before the Federal Court of Appeal for an order to stay its publication, leave to commence an application under the pseudonym "Mr. P.", and other stays (see Federal Court of Appeal file no. 18-A-32). The motion was dismissed with costs on August 24, 2018. He then filed for leave to appeal to a three-person panel of that Court, which was dismissed with costs on December 20, 2018. Finally, he filed for leave to appeal the decision in file 18-A-32 with the Supreme Court of Canada on May 31, 2019, seeking several orders, including one requesting anonymization (see Supreme Court of Canada file no. 38728). On October 31, 2019, the Supreme Court denied leave to appeal and dismissed the anonymization request, among other matters. As a result, the dismissal of the anonymization request in *Abi-Mansour 2018*, and the reasons for that dismissal, remain authoritative case law of the Board.

[52] There is no room for doubt about the disposition of the complainant's request for anonymization in this case. Based on *Abi-Mansour 2018*, the reasoning from which I have adopted, and the Supreme Court of Canada's decision in the leave application in its file no. 38728, the request is dismissed.

[53] The complainant has other outstanding complaints before the Board. His testimony confirmed that he continues to try to litigate the issue of anonymization in other cases. Unless there are clearly different material circumstances in those cases that justify the Board's consideration of a request for anonymization consistent with the test outlined in *Dagenais* and *Mentuck*, the complainant would be well advised not pursue the issue again. Doing so, in my view, could be construed as vexatious under s. 21 of the *FPSLREBA*.

B. Rulings on evidence during the hearing of October 30 and 31, 2019

1. The complainant's previous record

[54] In support of its argument opposing the complainant's request to anonymize the style of cause, the respondent submitted three exhibits during his cross-examination that pertained to his previous employment in Ontario and decisions made about his professional conduct by a regulatory authority and by the courts. The respondent submitted that the exhibits demonstrated that adverse information about him, unrelated to his experience as a litigant in the federal public administration, could readily be located on the Internet by potential employers.

[55] I provisionally admitted and marked the three documents as Exhibits R-1 to R-3, subject to this ruling on their admissibility.

[56] The respondent subsequently posed a series of questions about the events surrounding those exhibits.

[57] The complainant contended that the respondent was clearly trying to defame him, that his previous work experience has no relevance to the current case, and that hiring managers in the public service care only about activities involving the federal government.

[58] As I have found good reason to dismiss the complainant's application to anonymize the style of cause in the preceding section without reference to the three documents introduced by the respondent, they could be admitted in these proceedings

only if they have arguable relevance to the allegations in the complaint. I find that they do not. In my view, they relate exclusively to the issue of anonymization.

[59] The documents provisionally marked as Exhibits R-1 to R-3 are not admitted and will not form part of the record. I have not considered the complainant's answers to the respondent's subsequent questions about these in assessing his allegations.

2. The screening board's report - education requirement

[60] Referring to the screening board's report indicating the ratings given to all candidates (Exhibit C-17), the complainant asked that I require the respondent to provide unredacted information that would allow him to link the "yes" or "no" findings on the education requirement to specific individual candidates in a compendium of all applications in the appointment process (Exhibit C-16).

[61] The respondent objected to the request as a renewed fishing expedition in which the complainant was attempting to achieve what was denied three times before the hearing. It contended that the information on education was not arguably relevant because the complainant had met the education requirement.

[62] I denied the request. Unless other persuasive evidence were introduced that demonstrated that the complainant was screened out based on education despite the clear evidence to the contrary (Exhibits C-7 and C-17), the information he seeks is not arguably relevant to the issue of his failure on the essential experience requirements or to any another allegation (see, in particular, Issue 5 later in this decision).

[63] Earlier in the hearing, the complainant had pointed to a reference to the education criterion in an email from Marie-Annik Pelland, a member of the selection board (Exhibit C-8). The respondent stipulated at that time that he had not been screened out on the basis of education despite the reference, citing Ms. Pelland's official email notification to him, in which she explained his elimination from the appointment process for failing to meet the essential experience qualifications E1 and E4. No reference was made to the education factor (Exhibit C-7). Her subsequent testimony, summarized under Issue 1, provided additional context explaining the reference to education.

3. Reconsideration request concerning employment equity status

[64] The complainant applied for the reconsideration of a pre-hearing decision denying an OPI depicting the employment equity status of the candidates in the appointment process. The respondent opposed the application on two main grounds. The first was that he did not know whether the requested information would be useful, and he was only "fishing". The second was that there was no *prima facie* case of discrimination — one that would show that someone less qualified than he but lacking a "discriminatory dimension" met the requirements.

[65] I agreed to reconsider the earlier ruling since I had received more information about the context for the request. I indicated that I could not entirely exclude the possibility that evidence could be led during the hearing that might establish a *prima facie* case of discrimination even if the application for information at that point in the hearing did feel like a fishing expedition. In fairness to the complainant, and out of an abundance of caution, I requested that the respondent provide a version of the screening board's report that indicated the candidates' employment equity statuses (subsequently admitted as Exhibit C-18).

4. Ms. Papamarkakis' email

[66] The respondent argued that an email from the complainant to Peggy Papamarkakis, a selection board member, dated April 29, 2016 (earlier admitted as provisional Exhibit C-9), was not relevant, principally because it was sent four days after the respondent's decision to screen him out, and because it concerned a different appointment process. On review, I determined that the exhibit would be retained and no longer on a provisional basis because the complainant had used the email in his testimony as a link to a follow-up conversation with Ms. Papamarkakis. The evidentiary weight of the exhibit can be determined when considering that conversation, if necessary.

IV. Rulings on issues raised by the complainant on January 21, 2020

[67] Before focusing on the specifics of his allegations against the respondent in his final argument, the complainant offered a series of more general arguments bearing upon the Board's existing case law in staffing complaints and upon its proceedings. He premised his submissions by asserting that in a society that protects against cruel treatment, he lives "in a zone of cruel treatment or close to it". He alleged that the

respondent simply does not want him and that the avenues of recourse available to him have subjected him to adverse subjective assessments that he will oppose at every opportunity.

[68] It became clear to me that the complainant wished to use the opportunity of the hearing to promote his theory of what should underlie staffing recourse and how the Board should approach staffing complaints. Among his positions, I believe that I must address the following before proceeding to consider his specific allegations:

1. The Board's proceedings are equivalent to an exercise in judicial review of a deputy head's decision, and the Board should apply the standard of review used by the Federal Court of Appeal.
2. The Board must clarify the definition of "abuse of authority" to include errors or omissions.
3. The doctrine of *stare decisis* ("let the decision stand") does not apply to the Board. It should not consider earlier Board decisions that are in his words, "… the result of problems between decision makers and the complainant and not the results of fair and good faith decision making."
4. The burden of proof adopted in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, must be modified. As it applies to a discrimination allegation, a complainant need only present a *prima facie* case to support any other allegation of abuse of authority.
5. The test used by the Board to identify a reasonable apprehension of bias does not apply.
6. The only evidence that the Board may consider in a staffing complaint is evidence of the reasons for a decision as they appeared at the time the decision was made. The Board is not entitled to consider at a hearing retrospective *viva voce* (oral) testimony about the decision-making process.

[69] At one point, the complainant stated that a decision by the Board in this case to embrace what he called "a narrow definition of abuse of authority" would risk violating s. 12 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*), which enshrines the right of Canadians not to be subject to cruel and unusual treatment or punishment. The respondent intervened. It characterized his statement as a "threat" against the Board, argued that none of the notices had been given that are required when arguing a constitutional matter, and maintained that s. 12 simply does not apply. I asked the complainant to confirm whether he was placing a question before me that required constitutional interpretation and gave him time to consider his position. When we reconvened, he indicated that he would leave the question of s. 12 "to another time".

[70] I will now turn to each of the six positions argued by the complainant. In the course of the hearing, he advanced other ancillary propositions, but I do not judge it

necessary for me to address them to rule on the complaint. I feel compelled to add that it was not always easy to follow the lines of argument he offered, given his presentation style, but that I have attempted to summarize as faithfully as possible the essential points that he made.

[71] The respondent did not offer detailed counterarguments to each of the complainant's positions. For that reason, I have departed from normal practice, as a matter of efficiency, to report the respondent's general submissions first, rather than separately in each of the following sections. Those submissions contended as follows:

1. that the common law affords Board decision makers substantial discretion to make rulings that depart from existing case law when warranted but that nevertheless, decision makers should normally show deference to earlier decisions and ensure that similarly situated parties are treated similarly;
2. that the complainant has made it clear that he wants to be treated as a special case and that the Board should depart from its case law and make new rules for him, without any evidence substantiating why it should;
3. that the complainant misunderstands the roles of the Board and the Federal Court and conflates a *de novo* hearing process and a judicial review process;
4. that the Board should be guided by *Abi-Mansour 2018* and by *Abi-Mansour v. President of the Public Service Commission*, 2016 PSLREB 53 ("*Abi-Mansour 2016*"), which provide roadmaps for considering the complainant's novel arguments;
5. that established mechanisms of judicial review are available to the complainant if he alleges that there have been errors of law;
6. that his allegations against the Board members who decided *Abi-Mansour 2016* and *Abi-Mansour 2018* impugn those decision makers without evidence and are repugnant to our legal system; and
7. that the complainant has been warned before about abusive behaviour toward decision makers when their decisions do not meet his expectations (see *Abi-Mansour v. Canada (Attorney General)*, 2015 FC 882 at para. 117).

A. The Board's standard of review

[72] The complainant asserts that only one avenue of recourse is realistically available to a complainant to address abuse of authority — a complaint to the Board, under s. 77 of the *PSEA*. An investigation about a staffing process initiated by a deputy head or by the PSC under s. 67(2) is pointless because staffing decisions are made under the authority of a deputy head who cannot be impartial in matters related to actions taken in his or her name; nor does the PSC act impartially. A direct application for judicial review to the Federal Court, a second recourse mechanism, is not accessible because of the costs and the difficulty of the process. Moreover, Parliament has deprived public service employees of the right to seek judicial review from the Federal Court directly against a deputy head's decision because an alternate administrative

review exists under the *PSEA*. The Supreme Court has also warned against proceeding to the courts before exhausting the available administrative review process (see, for example, *Vaughan v. Canada*, 2005 SCC 11).

[73] If an employee proceeds by a complaint under s. 67(2) of the *PSEA*, the standard of review is "error" or "omission". If an employee proceeds directly to the Federal Court, the standard of review is correctness or reasonableness.

[74] As an unsuccessful candidate has no other avenue for recourse against a deputy head's decision other than complaining to the Board under s. 77(1) of the *PSEA*, the complainant maintains that the Board should apply standards of review commensurate with a judicial review process. This is from his submissions:

> …
>
> *… a judicial review is equivalent to a s. 77 complaint, with very little differences [sic]. The complainant submits that the standards of review used on judicial review can also be used to review, in a s. 77 complaint, the decision of a deputy head in a staffing process.*
>
> …

[75] The "little differences", according to the complainant, are that the review does not consider whether a deputy head made an erroneous finding of fact in a capricious manner, as per s. 18.1(4)(d) of the *Federal Courts Act* (R.S.C., 1985, c. F-7).

[76] For reference, I cite s. 18.1(4) of the *Federal Courts Act* in its entirety:

> ***18.1 (4)*** *The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal*
>
> ***(a)*** *acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;*
>
> ***(b)*** *failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> ***(c)*** *erred in law in making a decision or an order, whether or not the error appears on the face of the record;*
>
> ***(d)*** *based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;*
>
> ***(e)*** *acted, or failed to act, by reason of fraud or perjured evidence; or*
>
> ***(f)*** *acted in any other way that was contrary to law.*

[77] In sum, the complainant argues that the standard of review for the Board, essentially performing a judicial review of a deputy head's decision, is reasonableness or correctness and that it may examine decisions for errors and omissions.

[78] I found the complainant's submissions on standard of review somewhat difficult to follow at times, but nevertheless, two points are clear, which are (1) that he contends that the Board effectively sits in judicial review when considering a complaint under s.77 of the *PSEA*, and (2) that the standard of review that the Board must apply should replicate a judicial review process.

[79] The complainant is clearly wrong. The Board does not stand in place of the Federal Court or the Federal Court of Appeal. It does not apply the grounds for review provided under s. 18.1(4) of the *Federal Courts Act*. To the contrary, the Federal Court of Appeal applies those grounds when sitting in judicial review of a Board decision.

[80] The Board is an administrative tribunal that affords the parties to a complaint under s. 77 of the *PSEA* a *de novo* hearing. It receives evidence and weighs it on the balance of probabilities. It considers the parties' arguments on the application of the statute, informed by the existing case law, to determine whether the *PSEA* was breached.

[81] To that extent, it is probably misleading, or at least unhelpful, to talk about the Board's standard of review. It does not apply a standard of review in the sense that the Federal Court of Appeal does when examining Board decisions because a proceeding before the Board is not undertaken like a judicial review. In the case of a complaint filed under s. 77 of the *PSEA*, the Board considers *de novo* the circumstances that gave rise to the complaint and determines whether the party with the burden of proof has satisfied that burden on the civil standard of the balance of probabilities, based on the evidence. The Board asks whether the challenged decision complies with the requirements of the statute, respecting the specific wording of its governing provisions. There may well be room for argument about the meaning and application of those provisions, which will lead the Board to refer to case law for guidance.

[82] The complainant's real issue, in my view, is that the Board's decisions in staffing complaints have defined the key issue of abuse of authority in what he believes is too narrow a fashion. His argument that the Board stands in judicial review of a deputy head's decision is, at its core, a plea for broadening the concept of abuse of authority,

to which I turn next. He contends that abuse of authority should be "wide open" for interpretation.

B. Definition of "abuse of authority"

[83] The Board's case law has approached the concept of abuse of authority and the statutory framework along the following lines.

[84] Section 77(1)(a) of the *PSEA* accords a person in the area of selection the right to make a complaint that he or she was not appointed or proposed for appointment by reason of an abuse of authority, as follows:

> ***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) ….*

[85] The requirement that an appointment be based on merit is stated in s. 30(1) of the *PSEA*, as follows:

> ***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.*

[86] Section 30(2)(a) of the *PSEA* instructs the analysis of merit as follows:

> ***30 (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 ….*

[87] The term "abuse of authority" is not directly defined in the *PSEA*. However, s. 2(4) specifies that an abuse of authority includes "bad faith and personal favouritism". (The PSC, in its submission, specifies that bad faith and personal favouritism involve the deliberate misuse of statutory powers for an improper purpose.)

[88] The case law of the Board and of the predecessor Public Service Staffing Tribunal (PSST) has explored extensively the concept of abuse of authority. In *Abi-Mansour 2016*, for example, the Board summarized it as follows at paragraph 20:

> *[20] … 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) ….*

[89] The complainant bears the onus of proving on a balance of probabilities that the respondent abused its authority. (See, for example, *Tibbs*, at para. 50, and *Abi-Mansour 2016*, at paras. 21 to 24.)

[90] In arguing to modify the existing case law, the complainant cites with approval *Kane v. Canada (Attorney General)*, 2011 FCA 19. He maintains that *Kane* stands for the proposition that abuse of authority must be interpreted broadly. He contends that in addition to an error or omission, a broader approach to abuse of authority opens the analysis to considerations such as reasonableness and correctness that apply on judicial review.

[91] I am guided by *Tibbs* to the effect that 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", as cited earlier from *Abi-Mansour 2016*. I do not believe that the case law takes me further to embrace broader concepts, such as reasonableness and correctness, as advocated by the complainant based on *Kane*. To be sure, I note that in its brief, the PSC contended that the Supreme Court of Canada completely set *Kane* aside in *Canada (Attorney General) v. Kane*, 2012 SCC 64. The PSC continues to rely instead on *Lavigne v. Canada (Justice)*, 2009 FC 684, for the appropriate definition of abuse of authority. *Lavigne*, also cited favourably by the respondent, cautions that abuse of authority "… requires more than error or omission, or even improper conduct" (at paragraph 62). As found in *Finney v. Barreau du Québec*, 2004 SCC 36 at para. 39, unless there is such serious recklessness or carelessness to presume bad faith, an error or omission is not enough to establish an abuse of authority.

[92] Many other decisions have contributed to our understanding of abuse of authority under the *PSEA*. The respondent cites, for example, *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at para. 47, as follows:

> *[47] An allegation of abuse of authority is a very serious matter and must not be made lightly. In summary, in order to succeed before the Tribunal, a complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal's review and intervention.*

[93] The respondent also refers to *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at paras. 36 and 39, as follows:

> *[36] While the* PSEA *does not define abuse of authority, it certainly includes personal favouritism….*
>
> …
>
> *[39] … Parliament referred specifically to bad faith and personal favouritism to make certain that there would be no argument that these improper conducts constitute abuse of authority. It is noteworthy that the word* ***personal*** *precedes the word* ***favouritism****, emphasizing Parliament's intention that both words be read together, and that it is* ***personal favouritism****, not other types of favouritism, that constitute abuse of authority.*
>
> [Emphasis in the original]

[94] I need not explore the case law further at this point. Depending on the precise allegation or allegations in a complaint, other decisions may offer valuable guidance on interpreting abuse of authority. The important finding in this case is that the case law does not support bringing the concepts of reasonableness and correctness into the analysis as if the Board were sitting in judicial review. On this point, the complainant is mistaken.

C. *Stare decisis*

[95] The complainant argues that the doctrine of *stare decisis* does not apply to the Board; that is, as an administrative tribunal, the Board is not bound by its previous decisions. To that extent, his assertion is uncontroversial. However, he goes further to invite me not to consider earlier "incorrect decisions" involving him, by which he means principally *Abi Mansour 2016* and *Abi-Mansour 2018*. He alleges that those decisions "… are the result of problems between decision makers and the complainant and not the result of fair and good faith decision making."

[96] I concur entirely with the respondent's submission that the complainant's allegations against the Board members who decided *Abi-Mansour 2016* and *Abi-Mansour 2018* impugn those decision makers without evidence and are repugnant. It is completely within the complainant's prerogative to disagree with Board decisions and, as he sees fit, to seek judicial review of findings he contests. In effect, to maintain that an adverse ruling demonstrates that problems exist in his relationship with the decision makers and that the latter acted unfairly or in bad faith goes beyond acceptable commentary.

[97] As the respondent pointed out, the complainant has previously been warned about abusing decision makers. I note the comments of The Honourable Mr. Justice Leblanc of the Federal Court in 2015 FC 882, as follows:

> …
>
> *[100] The Applicant claims that the Tribunal "just wanted to rule in favour of the Crown" as evidenced by its decision. He says that when this is looked through by an informed person, it gives rise to a reasonable apprehension of bias.*
>
> *[101] In a decision rendered in this case on November 21, 2014, in relation to a preliminary matter, the Federal Court of Appeal found that the Applicant's "unsupported allegations of bias are an abuse of process" (*Abi-Mansour v Department of Aboriginal Affairs, *2014 FCA 272, at para* ***14****). To paraphrase the Federal Court of Appeal, the present allegations are just but another example of someone "who invoke a decision-maker's assistance in its capacity as an independent arbiter of disputes and who then repeatedly allege bias when the decision-maker's decisions do not meet his or her expectations" (idem).*
>
> *[102] Allegations of bias are very serious allegations as they constitute attacks on the integrity of the entire administration of justice (*Coombs v Canada (Attorney General), *2014 FCA 222, at para 14). They need to be made expressly and unequivocally and not simply on the basis of "elusive innuendoes". Here again, the Applicant's allegations of bias are unsubstantiated and amount to an abuse of process.*
>
> …
>
> [Emphasis in the original]

D. Burden of proof

[98] The complainant asks the Board to depart from *Tibbs* with respect to burden of proof. At paragraphs 49 and 50 of *Tibbs*, the PSST ruled as follows:

> *[49] The general rule in civil courts and in arbitration hearings is that the party making an assertion bears the burden of proving this assertion rather than the other side having to disprove it….*
>
> *[50] … The general rule in civil matters should be followed and the onus rests with the complainant in proceedings before the Tribunal to prove the allegation of abuse of authority.*

[99] Advocating a "slight" departure from *Tibbs*, the complainant maintains that there should be a shifting burden of proof in staffing complaints. As with discrimination allegations, the Board should require a complainant to only make out a *prima facie* case for an allegation, after which it becomes the respondent's burden to prove that it has not abused its authority. Using as an example his allegation that the successful candidates were not qualified (Issue 4 later in this decision), the complainant argues that it is "… sufficient for the complainant to merely raise a belief that the appointees are unqualified to shift the burden to the respondent."

[100] The complainant included in his submissions on burden of proof alleged reasons that the Board's process for obtaining an Order for the Production of Information (OPI) has proven "futile". He also offers comments about "adverse inferences", which he states the Federal Court has linked to the establishment of a *prima facie* case; see *Chippewas of Kettle and Stony Point First Nation v. Shawkence*, 2005 FC 823 at para. 43 ("*Chippewas*"). The complainant also referred me to *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509 at para. 3.

[101] I must confess that I have been unable to understand the link between "burden of proof" and "adverse inferences" that the complainant seeks to argue; nor is it apparent to me how *Chippewas* and *Ma* provide helpful guidance. I also fail to see how alleged problems with the OPI process usefully enter into the discussion. In the end, his failure to be clear in his argument on these points is unhelpful but does not deter deciding the question of the appropriate burden of proof.

[102] For that question, the weight of the case law is unmistakable. Other than in the case of a discrimination allegation in which it is uncontested that the complainant's evidentiary burden is to make out a *prima facie* case, the burden of proof for an allegation of abuse of authority lies squarely with the complainant, who must substantiate it through cogent and compelling evidence, on a balance of probabilities. Beyond the primary authority of *Tibbs* cited in most decisions, I have found very helpful the ruling in *Abi-Mansour 2016*, in which the Board addressed a previous

attempt by the complainant to make the same argument that he is advancing in this case. I cite the decision at length, as follows:

> …
>
> *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.*

…

[103] I confirm without reservation the Board's approach to burden of proof, as applied in *Abi-Mansour 2016* and throughout its case law on staffing complaints.

[104] As reported below, the complainant returned later in his arguments to the issue of burden of proof, citing *Burke v. Department of National Defence*, 2009 PSST at paras. 67 and 68 ("*Burke*") as supporting the proposition that the respondent bears the burden of proof. The complainant misrepresents *Burke*. In that decision, the complainant met his onus of establishing abuse of authority; the issue of what the respondent needed to establish arose only at the stage of determining the appropriate corrective action.

E. Reasonable apprehension of bias

[105] The complainant submits that the test used by the Board to determine whether a reasonable apprehension of bias has been established by a complainant should not be used in his case. He calls for "a more relaxed" test, distinct from what is required under *Committee for Justice and Liberty v. National Energy Board*, [1978] 1. S.C.R. 369 ("*Committee for Justice and Liberty*") at 394. The respondent, in contrast, urged that I not depart from the definition of bias set out in that case.

[106] It is unclear why the complainant believes that he should be exempted from the test in *Committee for Justice and Liberty*, other than as indicated in his two following statements:

> *The complainant submits that in cases involving reasonable apprehension of bias, the standard of "apprehended bias" varies depending on the context and type of function performed by the administrative decision-maker [sic].*
>
> *Here, the decision maker(s) are managers, there are no provisions in the PSEA guaranteeing managers have expertise in administrative law and impartiality, as the case is for Board*

> *members. Therefore, there should be no presumption of impartiality on the part of hiring managers in the public service.*

[107] He suggests the following as indicators of bias that the Board should apply to weigh his allegation that the respondent abused its authority by demonstrating a reasonable apprehension of bias in favour of the appointees (see Issue 5 later in this decision):

> …
>
> *a) Unexplained hostility*
>
> *b) Decisions made after cursory inspection without documentation*
>
> *c) Ignoring the strengths of an applicant and focusing only on his/her weakness*
>
> *d) During the complaint process: (Aggressive litigation, opposing every motion, attempting to strike the complaint without a hearing)*
>
> *e) At the hearing (attempting to defame the complainant by any way, advancing allegations against a complainant irrelevant to the complaint)*
>
> *f) other behaviors that derogate from the normal*
>
> …
>
> [*Sic* throughout]

[108] The test in *Committee for Justice and Liberty* reads as follows:

> …
>
> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."*
>
> …

[109] I find it extraordinary that the complainant should believe that he is in a position to suggest his own criteria for finding a reasonable apprehension of bias, tailored obviously to his own circumstances, and by doing so, to cast aside the Supreme Court of Canada's direction that has been followed faithfully for so many years by administrative tribunals and other courts.

[110] I will take up purported evidence of hostility and cursory examination and of how the complainant was evaluated in my discussion of several of his allegations, but not because I accept that his suggested points a), b), and c) should supplant the test in *Committee for Justice and Liberty*. They clearly cannot. I know of no authority in the Board's case law that sets aside the *Committee for Justice and Liberty* test, and I will apply it in this case.

[111] The complainant's points d) and e) reflect his attempt to impugn how the respondent and its counsel have litigated the complaint. Apart from the fact that the history of litigation in this case, before and during the hearing, is not relevant when weighing the original staffing decision — it will be shown later in this decision that the complainant contends that only documented evidence from the time of the decision is pertinent — I have seen nothing in the conduct of this case that suggests impropriety by the respondent or its counsel. In my view, the complainant's accusations to the contrary are entirely without foundation.

[112] His point f) is completely subjective and vague. He may feel that there have been behaviours in this case that derogate from the normal, but he must prove in evidence specific behaviours relevant to the deputy head's staffing decision that allegedly indicate a reasonable apprehension of bias. At that stage, the test in *Committee for Justice and Liberty* will apply.

F. Limitation on *viva voce* evidence

[113] The complainant argues that the Board may only consider evidence about staffing decisions as it appeared at the time that the decisions were made. In this case, I believe that he means documented evidence contemporaneous to the original decision. Therefore, the Board may not consider oral testimony at a hearing by a witness who, in the complainant's words, "attempts to supplement a staffing decision" by answering questions about the decision-making process retrospectively. In support of that proposition, he cites *Khatun v. Canada (Citizenship and Immigration)*, 2011 FC 3 at para. 10, as follows:

> *[10] The respondent relies on [an] affidavit … as evidence of sufficient reasons. However, in my opinion, the respondent cannot use this affidavit to supplement the reasons provided in the decision letter. There has been consistence jurisprudence from this Court to the effect that the respondent cannot submit an affidavit*

> *during the judicial review proceedings to buttress the reasons provided in the decision ….*

[114] The complainant also cites *Barboza v. Canada (Citizenship and Immigration)*, 2011 FC 1420 at paras. 26 to 29, to support his argument.

[115] The complainant uses his assertion about the non-admissibility of supplementary evidence to support the argument that the *viva voce* testimony of the respondent's sole witness, Ms. Pelland, a member of the selection board, is inadmissible. With her "supplementary" evidence dismissed, nothing remains of the respondent's defence against the complainant's allegations, according to him, and the complaint must succeed.

[116] *Khatun* concerns the decision of a reviewing officer under the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), who determined that there were reasonable grounds to conclude that an applicant had misrepresented material facts. *Barboza* concerns the rejection under the authority of the same statute of an application for permanent residence by an applicant claiming to be a member of the skilled worker class.

[117] Beyond the distant policy and statutory domains involved in *Khatun* and *Barboza*, the crucial fact is that both cases involved the Federal Court sitting in judicial review. They were not *de novo* proceedings, as are Board hearings, and the rules of evidence are different. Once again, the complainant incorrectly attempted to cast Board proceedings as equivalent to judicial review. As a myriad of its decisions conclusively demonstrates, the Board has long been in the business of receiving and weighing *viva voce* evidence about how staffing decisions were made. Board members routinely rule on the admissibility of evidence, but the fact that a witness offers testimony looking back at a decision-making process does not stand in itself as a valid reason for ruling out such testimony. To be sure, if the complainant were correct in his argument, there would hardly be a requirement to convene hearings. Board members would be limited to assessing documentary records contemporaneous with a decision, a task that can normally be accomplished based on written arguments.

[118] Thus, in the circumstances of this case, I have no basis to rule against admitting Ms. Pelland's *viva voce* evidence based on the complainant's incorrect argument.

V. Allegations in support of the complaint

[119] The complainant submitted seven allegations in support of his complaint that the respondent abused its authority.

[120] The complainant testified on his own behalf and did not call any witnesses. The respondent led evidence through one witness, Ms. Pelland, who was the lead member of the selection board. In coming to these reasons, I have considered all the evidence led over two days of testimony, but I report only those parts of the testimony offered by the two witnesses that I consider most relevant to each specific allegation.

A. Evidence

1. Issue 1: The respondent abused its authority in conducting the screening and in screening the complainant out

[121] Four essential qualifications were identified for the position in the job opportunity advertisement (Exhibit C-5), as follows:

> …
>
> *E1.*
>
> *Experience in conducting research and analyzing both quantitative and qualitative economic or labour market data sources.*
>
> *E2.*
>
> *Experience in analyzing and integrating socio-economic, or geo-location or labour market data to support the development of service strategies, program or service delivery of a major website.*
>
> *E3.*
>
> *Experience in researching and organizing data and information in response to a variety of data and information requests to support delivery.*
>
> *E4.*
>
> *Experience in the use of tools to extract and transform data from various sources into useable datasets, databases and other useable formats.*
>
> …

[122] On E1 and E4, the two qualifications that the complainant was found not to have met, he submitted answers in his application (Exhibit C-4) as follows:

> [E1:]
>
> *This in one of my strengths. I am expert in using MSQuery to connect to huge Oracle10g relational database, using windows*

ODBC, and retrieve the needed data through SQL queries and import it to Excel to perform statistics and data analysis. I also import data from Access database. I use advanced features in Excel (regression graphs, linear correlation…) to conduct analysis and develop advanced reporting solutions to explain data in a meaningful way. I also develop scripts in Visual Basic to collect data from several spreadsheets and maintain one large dataset for data analysis. After the required data is imported, I start my analysis using Excel features like pivot tables, charts, filters, conditional formatting and/or applying statistical functions.

I work in a human resources unit and I am the one who is responsible for all the informatics and data analysis needs of my unit. After I complete my analysis, which can be financial, statistical or data analysis, I provide recommendations/next steps on how to deal with the issue being analyzed. Normally, I follow the following format: background, development, conclusion, next steps… This is done when we need the Director General's approval in order to grant an exemption for a marine officer. In this case, I would brief the DG with a briefing note and provide him advice on the details of the exemption application. I also provide recommendation on the informatics needs of my division and recommends strategic updates for the agency's (Coast Guard) IM system as well as recommendations on software solutions and ways to manage our electronic data in a secure manner and how to interpret this data in a meaningful way. The data is researched in several places, such as data bases, spreadsheets, web pages or other publications. I have also completed research on other issues such as policy and legal research and research regarding information systems.

I have also undergone tens of qualitative data analysis to tackle the quality of the data and recommended solutions to fix it. I have also took leadership on a project aiming to create a data quality plan for my group including ensure top quality data in the databases including a research and definition of terms and the total functionality of the systems. Then there is the question of the type of data I work on and extract. The answer is that there is a wide variety of types such as human resources data and socio-economic profiles of employees, operational data relative to delivering programs and services on ships, financial data and GIS data (lat, longs and geographic information) and legal data.

[E4:]

I indicated in the three previous experiences clearly the experience I have in extracting data from relational databases using tools like SQL developer, SQL Navigator, MS Query. I also develop databases in Access and manage those projects from A till Z. In addition to databases, I extract data from excel files, from websites, from publications, from legal decisions and transform these extractions into clean datasets that are ready to be analyzed and reported on. To achieve this, I use my skills in VBA to extract data from various

> *resources, clean the data, and arrange it in meaningful way to make it ready for reporting and summarizing.*
>
> [*Sic* throughout]

[123] The four members of the selection board evaluated the complainant's application against the four essential qualifications (Exhibit C-6) as follows: Etienne Philion for E1, Ms. Papamarkakis for E2, Ms. Pelland for E3, and Mina Riad for E4.

[124] On E1 and E4, the rating notes are as follows:

> [E1, rated by E. Philion:]
>
> ***Commented [E.P1]:*** *EXP.1 = Out, I need a second reviewer because I don't feel the candidate has demonstrated clearly how he did research and analysis. I see more data extraction and manipulation in here.*
>
> *I second that. (M.-A. Pelland)*
>
> [E4, rated by M. Riad:]
>
> ***Commented [MR5]:*** *EXP. 4 = OUT – Need a second reviewer. Answer is very short and doesn't include concrete examples.*
>
> *I second that. (M.-A. Pelland)*
>
> [Emphasis in the original]

[125] While he does not work in labour market analysis, the complainant maintained that he has broadly similar experience working with socio-economic data. Indeed, he described himself as overqualified for the position and stated that it was "too easy for [him]".

[126] The complainant testified that he had passed the screening stage in appointment processes for similar positions both before and since the process at issue in his complaint (Exhibits C-10 through C-15). The experience requirements in those processes were similar, including in at least one instance, experience analyzing labour market information (Exhibit C-10).

[127] The complainant reviewed a compendium containing the applications of all the applicants to the appointment process (Exhibit C-16) and contended that the information in many of the applications suggested that candidates who had been screened in often were less qualified than he was on either E1 or E4 or both or, unlike him, had educational qualifications from a Canadian university (see, for example, candidates 2, 5, 6, 9, and 12 to 16).

[128] In cross-examination, the complainant agreed that he submitted different applications for the other appointment processes (depicted in Exhibits C-10 through C-15) and that there were differences in the experience and education requirements in some of them. He explained that sometimes, he might have prepared an application afresh, but that he often resorted to a "cut-and-paste" approach, using stock answers.

[129] Ms. Pelland holds the position of policy analyst classified at the EC-05 group and level in the Job Bank Division in the Labour Market Information Directorate of ESDC. The division consists of over 70 full-time equivalent positions, and all employees work on the same floor. She was delegated by her manager to fill three vacant positions as the lead member of the selection board in the process numbered 2016-CSD-IA-NHQ-14685. She organized the board, developed the appointment process poster with the manager (Exhibit C-5), developed the assessment tools and rating guides (Exhibits C-3 and R-4, tab 2), and was the selection board member who communicated the results to the complainant.

[130] Ms. Pelland outlined that the selection board did not look at the education requirement at the screening stage. She explained that a selection board has the prerogative to reject candidates on the education factor at the beginning of the process but that in day-to-day practice, it may choose to, if necessary, after the screening stage on essential qualifications. In the appointment process in this case, the selection board did not consider education at the outset, and the screening report indicates "Yes" for all candidates on the education criteria.

[131] The selection board also did not look at the curriculum vitae at the screening stage.

[132] Ms. Pelland stated that the use of open-ended questions for essential qualifications at the screening stage is a common practice, as reflected on the PSC's website. She has successfully followed that practice many times.

[133] According to Ms. Pelland, the selection board members had agreed on an appropriate approach to assessment, and her job was to make sure that the three other members understood what to look for. The essential qualifications were rated pass or fail; no score was given. If a candidate failed on one or more essential qualifications, the application was rejected.

[134] Each selection board member was assigned one question to rate, to ensure the consistent assessment of each essential qualification across all candidates. If a member was unsure of an assessment, he or she could ask the opinion of a second member, to make the required determination. The applications were accessed and rated securely online and were not printed, to protect secrecy.

[135] Ms. Pelland stated that the onus is on an applicant to provide information that will convince the rater that he or she meets the essential qualification. The statement of merit criteria (SOMC) clearly specifies the "Information you must provide" and warns candidates that "… it is [their] responsibility to provide … examples that illustrate how [they] meet each qualification" (Exhibit C-5).

[136] When she was asked why the complainant did not qualify on E1, Ms. Pelland indicated that his response did not say very much about economic or labour market sources and did not address all the elements of the question posed. She explained that experience with economic and labour market data was crucial because the Job Bank site is a labour market platform that connects jobseekers and employers. Everything on that site is labour-market-related.

[137] As for E4, Ms. Pelland described the complainant's answer as very short and as failing to describe how he used tools to transform data. In his response, he referred to the response boxes for E1 to E3, but each box was assessed on its own by a different rater.

[138] When she was asked whether both E1 and E4 were technical and involved data, Ms. Pelland agreed that E1 required experience with data but that it also required additional analytical components and technical analysis. She said that, obviously, E4 involves data.

[139] Ms. Pelland indicated that after all the selection process stages were complete, five candidates had succeeded. The respondent offered positions within the Job Bank Division to three applicants, and the two other candidates secured jobs elsewhere, based on having qualified in the pool.

[140] Ms. Pelland communicated the complainant's results at the screening stage by email on April 25, 2016 (Exhibit R-4, tab 5). She described the format of the email as a standard template used by Human Resources (HR). The email offered the complainant

the opportunity of an informal discussion, to explain the results. After he took up the offer through a telephone conversation with Ms. Pelland, she acknowledged the discussion by email (Exhibit C-8), also a standard practice. In that email, she again referenced his failure to meet E1 and E4 and stated that the selection board would not accept further submissions.

[141] Counsel for the respondent asked Ms. Pelland why the email contained the words, “and also the Education criterion”. She replied that she had mentioned education in her informal discussion with the complainant in an effort to assist him in future appointment processes. She told him that perhaps he could provide more specific information about his educational background, such as the name of the degree-granting institution and the year of graduation, in a future application. She reported that he replied that she should refer to his résumé.

[142] In closing her examination-in-chief, Ms. Pelland reconfirmed that the selection board used the rating guide (Exhibit R-2, tab 6) to assess the essential qualifications, that it did not assess knowledge at the screening stage, and that the only factors considered to exclude the complainant were the experience qualifications E1 and E4.

[143] In cross-examination, Ms. Pelland stated her view that Ms. Riad was correct in finding that the complainant did not provide concrete examples in his response to the question posed with respect to E4. She indicated that in her experience, candidates were frequently screened out for failing to provide sufficient concrete examples or none at all. She also testified that the selection board could not accept his statement referring back to his answers to E1 to E3. The standard approach to rating, within the selection board’s prerogative, was to rate each factor using only the response of the applicant on that factor. In Ms. Pelland’s experience, all appointment processes proceed in that fashion. It was the approach that HR recommended by, and that was instructed in training courses. To look elsewhere would require more time. Ms. Pelland indicated that no other candidate in the selection process referred raters to his or her previous answers.

[144] Further on E4, Ms. Pelland stated that the complainant needed to be concrete in demonstrating his experiencing cleaning “data sets” but did not state examples. He did not show what he had done, what were the results, and what useable formats were involved. She acknowledged that he mentioned sources but that he did not make it

clear how he had transformed data from those sources into useable data sets. The selection board needed a real situation to confirm tangibly that he could meet the requirement of a position classified at the EC-04 group and level. She reiterated that it was each candidate's responsibility to provide appropriate examples and that it was up to the selection board to decide whether the information provided was enough. Essentially, the complainant needed to provide appropriate examples that showed "why, what and when".

[145] Ms. Pelland agreed that the selection board did not provide a detailed template on how a candidate should respond to E4. She also answered that there was no record of what specifically Ms. Riad had required.

[146] When she was asked why it would have been wrong to invite candidates to be tested, Ms. Pelland stated that there was nothing wrong with such an approach but that the selection board had decided on a different approach, as was its right.

[147] Directed by the complainant once again to the reference to the education criterion in her email (Exhibit C-8), Ms. Pelland reiterated that the complainant had not failed on that factor. She simply followed up on their telephone conversation in which she had advised him to make his next application more complete by specifying the educational establishment and year of graduation.

2. Issue 2: The respondent abused its authority by using an unclear and poorly developed SOMC

3. Issue 3: The respondent abused its authority when it set out the essential qualifications stated in the SOMC

[148] As both Issues 2 and 3 concern the SOMC used for the appointment process (Exhibit C-5), they will be addressed together.

[149] In my view, the evidence of possible relevance to Issues 2 and 3 was scant.

[150] In examination-in-chief, the complainant accepted that the job poster stated what the respondent wanted.

[151] In cross-examination, the complainant disputed that the directions for answers to the questions were clear. Although the directions indicated that each applicant should answer in about 300 words, he argued that they did not say, for example, what

would happen if an applicant used only 100 words. He maintained that the directions in general were "very limited".

[152] When he was asked in cross-examination whether he had ever developed an SOMC, the complainant indicated that he had done so once for a summer-student appointment process, had sat on the selection committee for that process, and had participated in selection committees for two other administrative positions.

[153] Referring to the work description for the position (Exhibit C-1), the complainant stated that experience with economic data may well be required to perform the outlined duties but that he did not see "much mention of labour market data".

[154] Ms. Pelland testified that she developed the SOMC with the hiring manager, Ms. Riad. In Ms. Pelland's opinion, the description of essential qualifications contained in the SOMC exactly mirrored what was required to perform the data analyst job. She stated that she referred to the work description, looked at other work descriptions and job posters, sought advice from corporate HR, and generally brought to bear lessons she had learned in previous selection processes.

[155] In cross-examination, the complainant asked Ms. Pelland how the rating tool was fair. She replied that all candidates were subject to the same process and answered the same questions and that more than one person was involved at the screening stage. She also stated that all public servants are expected to know how to apply to appointment processes.

4. Issue 4: The respondent abused its authority by appointing candidates who did not meet essential qualifications, thus violating the merit principle in s. 30(2) of the *PSEA*

[156] In my view, the complainant did not offer substantive evidence relevant to his claim that the successful candidates did not meet the essential qualifications.

5. Issue 5: The respondent abused its authority by demonstrating a reasonable apprehension of bias in favour of the appointees

[157] In an email dated April 25, 2016 (Exhibit C-7), Ms. Pelland informed the complainant that he had failed to meet the two essential qualifications, and she offered him an informal discussion to review his elimination from the appointment process. He described the subsequent telephone conversation with her as having "not gone so well". He described her as displaying "unexplained hostility" and a "bitchy

attitude" and stated that she had a closed mind and had been stubborn, suggesting that she had a problem with him.

[158] According to the complainant, Ms. Pelland refused his offer to supply further information to establish his qualifications, as confirmed in her email dated May 9, 2016 (Exhibit C-8).

[159] In cross-examination, the complainant stated that his recollection of the conversation with Ms. Pelland was not fresh. He stated that it was "possible" that he asked her to review his whole application or for her to receive more information. He repeated his recollection that she had had a closed mind and that she had displayed unexplained hostility.

[160] Ms. Pelland testified that she could not specifically recall the tone of the conversation but that she believed that nothing had been "out of the ordinary". The complainant posed a number of questions and wanted to add to his application. In cross-examination, she recalled explaining his failure to pass E1 and E4, using the opportunity to offer advice, and not accepting his request to submit additional information.

[161] The complainant testified that he emailed Ms. Papamarkakis on April 29, 2016, about another appointment process before he found out about her role on the selection board (Exhibit C-9). In a follow-up call that day, he testified that she displayed the same hostile attitude as had Ms. Pelland.

[162] When he was asked in cross-examination whether he had ever worked at ESDC or had previously met members of the selection board, the complainant replied in the negative.

[163] Ms. Pelland testified that she had never heard of the complainant before the appointment process. In cross-examination, she confirmed that she had not searched his name on the Internet and that doing so was not a common practice.

[164] Ms. Pelland confirmed that Ms. Riad was one successful candidate's manager but stated that she was unsure as to whether a second successful candidate also reported to Ms. Riad because she had changed positions.

6. Issue 6: The respondent abused its authority by empanelling unqualified selection board members

[165] In cross-examination, the complainant testified that he knew nothing about the qualifications of any of the selection board members at the time of the appointment process.

[166] In her examination-in-chief, Ms. Pelland related that her duties in the Job Bank Division focused on human resources, finance, and other administrative files. She testified that she had been responsible for leading recruitment activities for her division for 10 years and that she had been involved in approximately 30 selection processes from their launch, through the assessment phases, and to the implementation of the resulting staffing decisions. Ms. Pelland indicated that she had taken courses offered by the PSC and other providers on strategic planning, delegated authorities, classification, supervision, and objective approaches to assessing candidates.

[167] Ms. Pelland related that she had worked with data analysts for many years and that she understands their work.

[168] In cross-examination, Ms. Pelland outlined that although she occupied a policy analyst position, she spent 80% of her time working on human resources matters for her manager and that most of that time involved staffing. She holds a bachelor's degree in business administration, with a specialty in human resources.

[169] Ms. Pelland's public service career spans 23 years, with 15 in her current job. Over the latter period, she has gradually become more involved in staffing processes. For at least the last 7 or 8 years, she has managed 5 or 6 selection processes each year. Most of the training courses that she has taken have been oriented to human resources, the majority delivered by the Canada School of Public Service. She is formally certified as a human resources advisor.

[170] When she was asked if she has taken data analysis courses, Ms. Pelland replied, "Not recently."

[171] When she was questioned as to why she did not assign rating responsibilities to someone else who, unlike her, had primary expertise in data analysis, Ms. Pelland

responded once more that she was the member with HR experience and that she advised the other members on assessing qualifications.

[172] Ms. Pelland testified that Ms. Papamarkakis was the manager of a policy unit and that she was not part of the team in which the positions to be filled were located. Ms. Riad was the manager of that team, and Mr. Phillion reported to Ms. Riad.

[173] Ms. Pelland identified Ms. Riad and Mr. Phillion as the data-analysis experts. When she was asked why she provided a second opinion on E1 and E4 (Exhibit C-6) but not as an expert, she replied that her expertise was in assessing qualifications.

7. Issue 7: The respondent abused its authority by discriminating against the complainant

[174] The complainant testified that he identifies himself as "Arab or West Asian" for employment equity purposes.

[175] According to the complainant, the two successful applicants in the appointment process were part of employment equity groups.

[176] In addition to referencing the complainant's failure to meet the two essential experience qualifications, in her email dated May 9, 2016 (Exhibit C-8), Ms. Pelland also wrote that he had failed the education criterion. That reference led him to testify that the respondent discriminated against him based on his foreign educational qualifications.

[177] The complainant also referred to a report from the screening board, which was revised on my direction at the hearing (in response to his request) to indicate the employment equity statuses of the candidates in the appointment process (Exhibit C-18). He outlined that according to his calculations, 43% of the candidates (7 of 16) with visible minority status passed the initial screening, compared to 55% of the candidates (5 of 9) without that status.

B. Summary of the arguments

1. For the complainant

[178] The complainant critiqued many aspects of Ms. Pelland's testimony. He maintained that her training was limited to human resources. He noted that she knew two of the applicants who were hired and alleged that that was not a coincidence. He

contended that there were no corroborating file documents for her evidence about how she developed the SOMC and that in the screening process, she did not look beyond each experience factor. He qualified as vague and meaningless her testimony that the screening approach employed in the appointment process had been used successfully in other processes. He accused her of inexplicably displaying hostility during their post-process telephone conversation.

[179] The complainant argued that applicants were not forewarned that covering letters would be used to assess their attention to detail. The absence of clear instructions on the SOMC on attention to detail is problematic; see *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 3 at para. 52. That element would have been much better tested at an interview. The SOMC also said nothing about answer length.

[180] According to the complainant, the focus in the SOMC on labour market data was unduly narrow and favoured applicants who already worked at ESDC. Fully 87% (7 of 8) of ESDC applicants were successful, but only 29% (5 of 17) of the external candidates succeeded. He maintained that a candidate does not need to know anything about labour markets to do the job well.

[181] He alleged that two of the managers who rated experience factors did not know what to do and gave their decisions to Ms. Pelland, who essentially performed an appellate function. There was no due diligence in the screening process. The cursory examination of the experience factors indicates bad faith.

[182] As for the education criteria, the complainant maintained that he was the only candidate of the 25 who applied who was rejected on that factor. The fact that the screening board's report (Exhibit C-17) rated him "Y" (for "Yes") is meaningless, as proven by Ms. Pelland's follow-up letter to his request for an informal discussion (Exhibit C-8), in which she stated that he had failed on the education criteria. The respondent never addressed that point in its reply to the original complaint, which indicates that it tried to hide something. The complainant noted that never in his life has he been found to have failed on education criteria.

[183] The complainant urged me to give limited weight to the screening board's report (Exhibit C-17) as well as to the copy with the added column indicating the candidates' employment equity statuses (Exhibit C-18). In his submission, the best-

evidence rule requires that I depend instead on what Ms. Pelland stated contemporaneously in her letter (Exhibit C-8) about his failure on the education factor.

[184] According to the complainant, nothing in the evidence corroborates why two of the appointees passed the screening stage. Evidence indicating that they were unqualified exists somewhere in the hands of the deputy head but is not before the Board. Had the deputy head provided corroborating evidence at the hearing, the complainant stated that he would have withdrawn the allegation.

[185] The complainant described as "borderline applicants" candidates whose answers on the experience factors were referred to Ms. Pelland for a second opinion. Only he and one other candidate (number 21) were treated as borderline applicants; for the other borderline applicant, only one factor was referred to Ms. Pelland. The complainant accused Ms. Pelland, whom he characterized as "even less qualified" than the other raters, of performing a cursory examination in those cases; see *Pardy v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2012 PSST 14 at para. 109. He also alleged that she failed to adequately document her reasons; see *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83 at para. 93. He maintained that it was impossible for her to reverse the findings of her higher-level colleagues with technical expertise and that she should have instead referred the matter to a panel of data experts. He also argued that she should have invited the candidates to take a test to determine their standing on the experience factors.

[186] While the complainant argued that the comments of the two selection board members (whose ratings were reviewed by Ms. Pelland) revealed that they were unqualified, he stipulated that his allegation charging that the selection board members were unqualified (see Issue 6) applied only to Ms. Pelland.

[187] The complainant contended that the focus of the screening process should have been on merit rather than on rigid screening formalities; see *Canada (Attorney General) v. Allard*, 2008 FC 1294 at para. 77. He argued that the indicators used to assess E1 and E4 were not proper, violating the requirement that rating tools should effectively assess qualifications; see *Healey v. Chairperson of the Parole Board of Canada*, 2014 PSST 14 at para. 60, and *Ammirante v. Deputy Minister of Citizenship and Immigration*, 2010 PSST 3 at para. 111. If the Board concludes that the

complainant was marked severely on the experience factors, it may disregard those ratings; see *Hughes v. Transport Canada*, 2014 CHRT 19.

[188] The complainant submitted that the respondent bears the burden of proof; see *Burke (*commented on in para. 104 above).

[189] Bias is demonstrated by the fact that some of the successful candidates wrote answers similar to those of the complainant but passed the criteria. Ms. Pelland's hostility toward him during their telephone conversation also proves bias. Finally, the respondent's efforts to defame him at the hearing further substantiate bias and can be used to make an inference about the deputy head's views at the time of the screening process.

[190] The complainant maintained that the respondent discriminated against him on the grounds of race (Middle Eastern, Arab), national origin (Lebanese), and ethnic origin (Arab, Middle Eastern). Two of the appointed candidates do not share those characteristics; the status of the other appointed candidate is unknown. The appointed candidates also do not share the complainant's foreign education credentials.

[191] The screening board's report (Exhibit C-17) indicates that the success rate at the initial screening stage for visible minority candidates (45%) was less than that of the other candidates (55%). That fact directly establishes a *prima facie* case of discrimination; see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT). The respondent's actions before and at the hearing are also relevant as they bear the "subtle scent" of discrimination; see *O'Bomsawin v. Abenakis of Odanak Council*, 2017 CHRT 4.

[192] No matter which test is used for assessing whether a complainant has made out a *prima facie* case of discrimination, the Board will reach the same finding in favour of the complainant; see *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.R.R. D/1616. Given the use of subjective determinations to screen out candidates, the Board must scrutinize even more carefully the respondent's actions, to detect discrimination; see *Premakumar v. Air Canada*, 2002 CanLII 23561 (CHRT) at para. 88, and *Kasongo v. Farm Credit Canada*, 2005 CHRT 24 at paras. 18 to 22.

[193] The complainant concluded by referring to *Breast v. Whitefish Lake First Nation*, 2010 CHRT 10, to the effect that the Board may accord weight to his belief that he is qualified but that it is better to demonstrate that he is qualified through objective information. He maintained that he has done so through the evidence of his experience in other appointment processes (Exhibits C-10 to C-15).

2. For the respondent

[194] The respondent asked the Board to examine the evidence the complainant offered that was beyond speculation. It characterized his testimony as sometimes imprecise and hard to follow, but early on, he did admit to not having labour market experience, which was an essential qualification in the selection process (Exhibit C-5).

[195] The evidence submitted by the complainant about his experience in other appointment processes (Exhibits C-10 to C-15) provides little help. The SOMCs in them were different; different qualifications were sought. His opinion that he was qualified in the selection process at issue, based on his experience in the other processes, should be given very little weight.

[196] The respondent maintained that the employment equity information added to the screening board's report (Exhibit C-18) has little statistical relevance. The successful candidates' employment equity statuses are not known; nor is it known how they identified themselves. The complainant could have summoned them to provide evidence but did not. As a result, he failed to meet his evidentiary burden. The respondent discounted any suggestion that the report with the statuses could have been changed after the fact, implying fraud.

[197] In cross-examination, the complainant showed that he has limited experience in staffing, no experience with the hiring department, and no experience with its Job Bank. Thus, he has no basis for his opinion about the appropriateness of the SOMC.

[198] In contrast, according to the respondent, Ms. Pelland has a great deal of experience in staffing and has served for over 15 years in her position. She provided straightforward evidence about the development of the SOMC based on the input of the hiring manager, who was the best person to identify the skills required for the job. The work involves the Job Bank, a website that connects employers and job seekers.

The role of the successful applicant is to take different types of labour market data and develop useable online tools for job seekers.

[199] The respondent contended that it was entirely appropriate for the selection board to use experience factors E1 and E4 to screen applicants. On each of those factors, one selection board member marked all the candidates, to ensure consistency. When a rater found that a candidate had failed, the candidate's answer was referred to a second reviewer, to ensure fairness.

[200] Ms. Pelland testified clearly that the selection board did not screen the complainant out on education, a fact reinforced by the screening board's official report (Exhibit C-17). In that report, every candidate received a "Y" on education. The compendium (Exhibit C-16) provides the detailed content of his application and contains complete information about his educational qualifications. None of the rater's comments screened him out on education (Exhibit C-6). The formal notification stated that he was found to have failed E1 and E4 and that he was screened out for that reason (Exhibit C-7). There is no mention of education. The only mention of it occurs in Ms. Pelland's follow-up to his request for an informal discussion (Exhibit C-8). She testified that she mentioned education in the informal discussion only because she wanted to advise him about providing information about educational qualifications that more closely conformed to what was asked of the applicants.

[201] On the foregoing evidence, the respondent maintained that the Board should accept that the complainant was not screened out on education (a conclusion that I had drawn in a ruling during the evidentiary phase of the hearing; see section III(B)(2) earlier in this decision).

[202] Ms. Pelland did not know the complainant at the time the screening decision was made. She did know two of the three successful candidates because they worked in her department, but her relationships with them were not close.

[203] The respondent referred me to *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hopital Général de Montréal*, 2007 SCC 4, for the proposition that not every distinction comprises discrimination. It argued that the complainant has not made out a link between his identifying characteristics and the screening decision. Considering the selection board's report with the employment equity statuses (Exhibit C-18), as well as the complainant's testimony,

there was little difference between the experience of applicants with employment equity status and those without it. There was no distinction with respect to education. The respondent submitted that weighing the evidence on the balance of probabilities, the complainant has not made out any link between his visible minority status and being screened out in the selection process.

[204] *Lablack v. Deputy Minister of Health Canada*, 2013 PSST 7 at para. 45, outlines a complainant's burden to establish a *prima facie* case of discrimination, based on *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2. S.C.R. 536 ("*O'Malley*"). The complainant has not met that burden. If the Board uses the test in *Shakes* instead, it will reach the same conclusion. Two qualified candidates were successful in the selection process. There is no evidence about their identifying groups for purposes of drawing any link under the *Shakes* test.

[205] Citing *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11, the respondent contended that hiring managers enjoy wide discretion in establishing and assessing qualifications. Ms. Pelland's testimony established that the selection process was based on rational criteria for evaluating merit and that appropriate selection tools were used. The exercise of discretion in the selection process should be respected.

[206] The respondent offered in its words, the following "final points":

1. that the complainant provided no evidence other than conjecture to make out his claims;
2. that the screening-out decision was correct, whether the complainant is found not to have provided fulsome answers and could not be assessed or alternately that he did not have the experience to meet the essential qualifications;
3. that the SOMC made it clear that a failure by an applicant to demonstrate how he or she met each essential qualification could result in him or her being screened out;
4. that while the complainant suggested that attention to detail was not a required qualification, an applicant should not be appointed if he or she cannot read and follow the instructions on the requirements for the candidates;
5. that it is natural that internal candidates may benefit from their knowledge of the organization and that promotion within the ranks is encouraged; and
6. that the complainant has not made out a case for nepotism, given that Ms. Pelland did not know the internal candidates well and that one successful candidate was external.

[207] The respondent urged me to find that the selection process was normal, that there was no serious wrongdoing or flaw, and that no element of the exercise of discretion during the process warrants intervention by the Board. The complainant did

not demonstrate abuse on the balance of the evidence in the screening process or with respect to the SOMC. He did not show that selection board members were unqualified and did not offer any evidence establishing bias. He failed to establish the required nexus to make out a *prima facie* case of discrimination and led no evidence of nepotism.

[208] For all of the foregoing reasons, the Board should dismiss the complaint.

3. The complainant's rebuttal

[209] In his rebuttal, the complainant returned to critiquing the recourse options available to someone who wishes to challenge an alleged abuse of authority in a staffing process. He stated that it was a "joke" that action can be obtained before the Federal Court of Appeal; in his words, "see what happened last time". He again complained about the decision makers in *Abi-Mansour 2016* and *Abi-Mansour 2018*, alleging that they had not only made mistakes but also that they had attacked him personally. He noted in particular that the decision maker in *Abi-Mansour 2018* "had a problem" with the number of complaints that the complainant had filed, contending that the Board should be "very, very careful" about following that example.

[210] The complainant objected to the respondent's contention that his presentation had more to do with speculation than with hard evidence. In his submission, the application form, the email from Ms. Pelland, the compendium, and the selection board's report with the employment equity statuses (Exhibits C-6, C-8, C-16, and C-18, respectively) corroborate his testimony and provide more than what is required to prove his allegations. The credibility of his testimony should be assessed as outlined in *Faryna v. Chorny*, [1952] 2 D.L.R. 354.

[211] The complainant maintained that his work experience was "almost equivalent" to labour market experience. The fact that he had been screened-in to many other selection processes at the EC-04 group and level involving policy or data analysis strongly supports his contention that he clearly met the experience qualifications in the selection process at issue.

[212] The complainant submitted that his staffing experience was extensive, that he had been involved in a summer-student appointment process in his home department,

that in his words he had "lots of other selection board experiences", and that he was comparable to Ms. Pelland in that respect.

[213] The complainant noted on the basis of the compendium and the selection board report with the employment equity statuses (Exhibits C-16 and C-18, respectively) that two of the successful candidates self-identified as members of an employment equity group and that the third did not. For his part, the complainant identifies himself as an immigrant and a visible minority. On the available evidence, he submitted that the Board must view the successful appointees as lacking the differentiating characteristic that sets him apart and that constitutes the nexus in support of his *prima facie* case of discrimination. That said, he later argued that the report with the statuses (Exhibit C-18) does not matter because it does not offer the "best evidence", which, in his submission, is not before the Board.

[214] The complainant contended that Ms. Pelland's follow-up email (Exhibit C-8), which mentions the education criterion, is not an "orphan document". His phone conversation with her also proves that education was a consideration in the selection board's decision. Both her email and the telephone conversation are more reliable evidence than the screening report (Exhibit C-18).

[215] The complainant submitted that the Board can use *Shakes*, *Israeli*, or *O'Malley* to determine whether he has made out a *prima facie* case of discrimination. Regardless of which test the Board uses, in examining the *prima facie* case, it must strike any of the respondent's arguments and decide only whether the evidence he provided is sufficient to meet the test; see *Kasongo*, at para. 2.

[216] The respondent did not offer any reasonable explanation in response to the complainant's successful *prima facie* case. Based on *Lavigne*, it incorrectly argued that an element of intent is required, contrary to *Abi-Mansour 2018*. Because in his words it is "so unfounded in law", the respondent should not be allowed to argue *Lavigne* again.

[217] The complainant argued several final points, which were

1. that the respondent did not address many of his allegations;
2. that any direction on the number of words (300) for a response on the experience qualifications was irrelevant and could not be enforced;
3. that attention to detail was not mentioned in the SOMC; and

4. that he should have enjoyed an equal opportunity with internal applicants given that ESDC chose an appointment process open to external candidates.

[218] In summary, the complaint is founded.

VI. Post-hearing Motion

[219] On February 27, 2020, a month after the close of the hearing, the complainant sought leave from the Board to file additional final reply arguments in writing. The respondent opposed the request in a reply dated March 4, 2020, citing supporting case law. The complainant commented further on March 6, 2020.

[220] I subsequently dismissed the complainant's request.

[221] I stated my reasons as follows:

> *The hearing in this matter ended on January 21, 2020, with a full day of final arguments by the parties. The parties received full opportunity to place their arguments before the Board. The complainant did not indicate at that time that his submissions were incomplete or insufficient for the Board to render a decision.*
>
> *In support of his motion, the complainant identified issues that, in his view, require additional final reply arguments.*
>
> *He contends that the respondent only revealed at the final argument stage that employment equity data disclosed during the evidentiary phase of the hearing in October 2019 ''does not belong to visible minorities but rather to all employment groups''. The Board does not believe that there was any doubt during the tendering of evidence in October that the information disclosed by the respondent, by order of the Board, added a final column reflecting the employment equity status of applicants. At no time did the respondent purport that the disclosed employment equity data depicted the visible minority status of applicants. The complainant could have, but did not, seek an order from the Board for additional information about the visible minority status of applicants.*
>
> *The Board is satisfied that the complainant had ample opportunity at the hearing to explore or challenge the evidence and to argue its significance. It sees no compelling reason why it should take the exceptional step of reopening the hearing process for further arguments on this element.*
>
> *The complainant also makes submissions regarding the purported intent behind proposed Exhibits R-1, R-2 and R-3, the alleged ''cowardly attempt to turn the Board member against the complainant'', the issue of anonymization and the question of whether the Board's hearings are 'public proceedings''. On all of these matters, the Board considers that it has understood the arguments made on January 21, 2020, and in October, and that*

> *they provide a full and sufficient basis on which to make the required rulings. Following the case law, the Board does not believe that proceeding to make decisions on the basis of the arguments already made, without reopening the case, risks causing any substantial injustice to the complainant.*
>
> *A decision on the merits of the complaint and on all ancillary issues necessary to the Board's determination will be issued in due course.*

VII. Analysis

[222] The parties presented a considerable number of decisions at the hearing, both to inform my interim rulings and at final argument. For this analysis, I reviewed all the cases submitted and address many of them later in this decision. However, I have not commented on several of them because to me, they appeared less important to the parties' arguments.

A. The issues

1. Issue 1: Did the respondent abuse its authority in conducting the screening and screening the complainant out?

[223] In an evidentiary ruling during the hearing, I denied the complainant's request for further information that would identify the educational qualifications of specific candidates (see section III(B)(2) earlier in this decision). I did so on the basis of the respondent's stipulation that the complainant had not been screened out on the education factor and on oral testimony and exhibits that in my view, confirmed the point.

[224] Because in his arguments the complainant returned to contend that he was screened out on education and not just the essential qualifications E1 and E4, I reviewed the evidence once more to determine if my interim ruling remained sound. The complainant bases his position primarily on his telephone conversation with Ms. Pelland on May 9, 2015, and on the main paragraph of her email (Exhibit C-8), which reads as follows:

> *As mentioned at the end of our conversation, the selection board has made a decision not to accept further explanation or submissions to complement your application after you were found unsuccessful in 2 of the 4 Essential Experience criteria and also the* ***Education criterion****.*
>
> [Emphasis added]

[225] Ms. Pelland's email (Exhibit C-8) is troubling if viewed in isolation. However, I am satisfied on the balance of the evidence that its reference to the education criterion was a mistake. Most determinative of the issue is the formal notification to the complainant that he was found to have failed E1 and E4 and that he was screened out for that reason (Exhibit C-7). The screening board's report (Exhibit C-17) supports that finding, documenting that every candidate received a "Y" on education. Ms. Pelland was clear and emphatic in her testimony that the education factor was not used to screen out the complainant. She related that she mentioned education in her telephone conversation with him to advise him that for future purposes, he should provide more information about his educational qualifications. I assess her evidence about the telephone conversation as credible. For his part, the complainant testified that his recollection of his conversation with her "was not fresh". Notably, he did not testify that she confirmed during the conversation that he had been screened out on education but rather that he had referred her to his résumé if further information about his qualifications was required. The latter recollection, if accurate, suggests that Ms. Pelland might have found something lacking with respect to education in his application, but it falls substantially short of undermining other concrete evidence that he failed on factors E1 and E4, not on education.

[226] In view of the totality of the evidence, I am satisfied that my earlier evidentiary ruling that accepted that the complainant was not screened out on the education factor remains sound. Therefore, in considering Issue 1, I will focus on determining whether there is evidence of the alleged abuse of authority in the screening process, without referring further to education. (My ruling on education also informs an aspect of my examination to follow of the discrimination allegation.)

[227] Following *Tibbs* and other authorities, the question becomes whether there is evidence of bad faith, of an error or omission, or of some other flaw in the screening process and in the decision to screen out the complainant sufficiently egregious as to prove the allegation of abuse of authority.

[228] Setting aside questions relating to the SOMC, to the qualifications of the selection board members, and to alleged bias, which are examined separately later in this decision, the basic element to review, in my opinion, is the approach followed by the selection board to assess the complainant's answers with respect to experience qualifications E1 and E4. The Board's role is not to substitute its judgment about the

adequacy of the complainant's answers on those two factors but rather to examine how the selection board went about its task of screening him out based on those answers. To borrow from *Portree*, was there, on a balance of probabilities, "… a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct …"?

[229] Ms. Pelland outlined in detail how the selection board proceeded. Each rater assessed one question for all the candidates, to ensure consistency. They all considered only what was written in the answer space provided for a question. If they felt a need for a second opinion on an answer, to confirm an assessment, it was referred to Ms. Pelland. Candidates were forewarned "… to provide appropriate examples that illustrate how [they] meet each qualification" and that failing to "… could result in [their] application being rejected" (Exhibit C-5). Ms. Pelland described the process as conforming to past practice in many appointment process, as consistent with training on how to conduct processes, and one in which the selection board's exercise of discretion fell well within management's prerogatives.

[230] Nothing in the process *per se* strikes me as seriously problematic. For example, the complainant argued that the raters should have been able to draw from other answers when rating E1 and E4 or from the totality of his application. While I might be inclined to agree that limiting an assessment strictly to the contents of a specific answer box seems somewhat restrictive, or to discount the concern that doing otherwise would require more time and effort, I cannot find that the approach followed by the selection board was fatally flawed or that it was "cursory", as alleged by the complainant. To be sure, what the selection board did should be viewed as falling within the authority granted to a deputy head under s. 36 of the *PSEA* to "… use any assessment method … that it considers appropriate to determine whether a person meets the qualifications …".

[231] As to the evaluation of the complainant's answers to E1 and E4, Ms. Pelland's evidence suggests that the judgments made, while necessarily subjective in some respects, nonetheless referred to deficiencies of substance. For example, she indicated that the complainant did not concretely demonstrate his experience cleaning data sets, did not make clear how he had transformed data from sources into useable data sets, and did not describe "a real situation" that demonstrated his ability to meet the work requirements of an EC-04 position. Distilled, her testimony held that the complainant

failed E1 and E4 because he did not provide satisfactory examples that showed "why, what and when".

[232] It is not without significance that the complainant conceded that he did not have substantial experience using labour market data. Instead, he based his claim that he was qualified, at least in part, on the proposition that his experience in other fields of policy and data analysis was "almost equivalent" and that it equipped him to perform the work. I cannot judge whether that is true, but I must respect that it was within the selection board's legitimate discretion to require direct experience with labour-market data analysis as a requirement for work involving the Job Bank.

[233] Once more, the Board's role is not to substitute its judgment about the complainant's standing on E1 and E4 for the selection board's opinion but only to ask whether the evidence indicates an abuse of authority when it formed that opinion. In my view, it does not. The complainant's submissions that he was more than qualified for the position, that he was better qualified than the other successful candidates, and that his record of success at the screening stage in other selection processes proves his standing do not alter my conclusion. In that respect, I accept the respondent's submission that each of the other processes was distinct and involved distinguishing qualifications and assessments. There may well be similarities among the appointment processes, but my analysis must focus essentially on the assessment of qualifications within the confines of the selection process at issue. I also hold that the Board should not engage in an exercise of comparing the complainant's qualifications to those of the successful candidates, even if it were possible to identify the latter with confidence, which it is not. That is not the Board's responsibility in this case. It fell instead to the complainant to demonstrate in the evidence before the Board that less-qualified candidates than he were screened in. In my opinion, the complainant did not meet that burden.

[234] Citing *Allard*, the complainant argued that the focus of the screening process should have been on merit rather than on rigid screening formalities. The guidance given in *Allard* is important but, to apply it, it requires that I find that the screening process was so seriously rigid as to prevent an assessment of merit. I do not believe that to be so in this case. I also note that the circumstances examined in *Allard* were rather different, as suggested as follows by paragraph 79:

> *[79] Without a doubt, most of the candidates who were rejected during screening were rejected due to a failure to notify the candidates of the importance of specifying their past positions in a detailed manner. The initial qualifications in the competition notice that required the candidates show "extensive experience" in case management and escorting. There was no mention of specific positions, which the Screening Board imposed once the applications were received.*

[235] There is no suggestion in the selection process at issue that the candidates were not notified of the importance of providing details about their experience or that the selection board changed requirements after the fact.

[236] As to *Ammirante*, *Hughes*, and *Pardy*, also cited by the complainant to impugn the screening tool and process, I find that they can be distinguished. *Ammirante*, at para. 111, found that the selection board in that case did not demonstrate how the application of the assessment criteria led to the assigned rating. To my satisfaction, Ms. Pelland's testimony explained why the complainant failed E1 and E4. *Hughes* stands for the proposition that evidence of "severe" marking on experience factors can justify a decision to disregard the marks. In the case at issue, I also do not detect in the evidence sufficient proof that the selection board's assessments were severe to the extent of invalidating them. *Pardy* addresses circumstances that in part at least, involve alleged ambiguity and errors in the assignment of scores to candidates. No scores were assigned in the case at hand.

[237] The complainant further directed me to the Board's more recent decision in *Hunter*, which concerns, among other issues, the alleged failure of a hiring manager to properly document and retain information about an appointment process. In that case, the Board found that the hiring manager wrote the rationale for his decision only after the appointment notice was issued and that he could not provide clear evidence of how it was compiled at the hearing. *Hunter* states as follows at paragraphs 67 to 69:

> *[67] With respect to allegation (a),* [the hiring manager] *initially testified that he wrote the rationale in May 2016. However, when he was confronted with the sequence of events and Mr. Hunter's testimony, he eventually agreed that he probably wrote it after the informal discussion on June 14, 2016. In any event, the written rationale is not dated.*
>
> *[68] Overall, I give far more credence to Mr. Hunter's testimony and evidence. Following many questions,* [the hiring manager] *simply could not recall the details of meetings and did not have notes or documents to back up his assertions. Mr. Hunter had a*

> *clear recollection of the events of 2016, which were backed up by the detailed notes he included in his complaint and in the September 2016 allegations document.*
>
> *[69] Based on the evidence before me, I conclude that the rationale was written between June 14 and 20, 2016. The fact that the rationale was not dated and that the respondent could not produce a coherent narrative of how it was constructed is a significant omission that undermines the principle of transparency of employment practices outlined in the preamble of the* PSEA*.*

[238] In my view, there was no comparably serious flaw in the documentation tendered at the hearing of the complaint at issue in this case. There is no allegation before the Board that the primary documents outlining the rating results were not prepared at the time the screening decision was made; nor have I found that Ms. Pelland's recollection of the process was impaired or that her narrative about the reasons for the complainant's failure was incoherent.

[239] The complainant contended that the selection board should have resolved any concerns about his answers to E1 and E4 either by referring them to an expert panel or by calling applicants for further testing. Such options could possibly have been used to good effect, but the selection board chose not to use them, which was a determination made legitimately within its discretion. That it was appropriate that Ms. Pelland provided a second opinion about an answer to E1 or E4 could be debated, but she explained that her role, as an assessment method expert, was to ensure consistency and conformity with the selection board criteria. She did so on the basis of her experience in many previous appointment processes, her knowledge of the hiring manager's requirements, and her familiarity with the data analyses typical of work in the Job Bank Division. I accept that testimony.

[240] For the foregoing reasons, I find that the complainant has not proven the allegation in Issue 1, on the balance of the evidence.

2. Issue 2: Did the respondent abuse its authority by using an unclear and poorly developed SOMC?

3. Issue 3: Did the respondent abuse its authority when it set out the essential qualifications stated in the SOMC?

[241] The complainant contends that the SOMC was unclear and poorly developed and argues to that effect that the SOMC did not forewarn that covering letters would be

used to assess candidates' attention to detail; nor did it specify the length of the answers.

[242] The complainant was not screened out of the appointment process because of his covering letter but rather because of his answers in the body of his application to the questions posed in E1 and E4. Whether or not a SOMC specifically emphasizes attention to detail seems to me of little importance. The candidates were assessed on how they responded to questions in the application form. The detail of their responses on the form, or lack of it, is what mattered. The applicants could not reasonably have assumed that they did not have to be attentive to detail when filling out the form. In my view, the complainant's argument in this respect clearly does not prove an abuse of authority.

[243] The complainant cited *Poirier*, at para. 52. It reads as follows:

> *52. These policies establish that candidates are entitled to a fair and reasonable opportunity to be considered for positions in the public service. A reasonable opportunity for consideration includes the provision of clear instructions that are consistently applied and appropriate steps to correct errors or other problems that occur during the assessment process.*

[244] Clearly, there is nothing contentious about what *Poirier* requires. The complainant's challenge, following *Poirier*, was to prove that the instructions were unclear. The evidence he offered, in my opinion, does not meet that bar. Nor, referring to Issue 1, was I convinced that how the selection board applied instructions and conducted the screening process reveals an abuse of authority. I note as well that the applicant in *Poirier* misinterpreted the directions on the job advertisement and was screened out as a result. To the best of my recollection, the complainant in this case did not maintain that he had misinterpreted instructions.

[245] On the issue of answer length, the applications reviewed in the process (Exhibits C-4 and C-16) show that the candidates were instructed for each experience factor to "… explain how [they] meet this experience in about 300 words." With that instruction, the candidates could not have been in doubt about the general parameters for their responses. The fact that the SOMC is silent on the length of answers certainly cannot be viewed as a serious omission sufficient to establish an abuse of authority.

[246] The complainant pointed to the absence of definitions of the qualifications being assessed as an indicator of abuse of authority, citing *Healey*, at para. 60. It is true that the SOMC states the qualifications sought in E1 and E4 and in the other essential qualifications, without offering a more detailed definition. The application form (Exhibit C-6) repeats the same statements in the form of questions. Was that a serious flaw comprising an abuse of authority? The dearth of more detailed definitions can be criticized, but failing further evidence that candidates actually misunderstood what was required because of brevity or the lack of definitions, it is hazardous to declare conclusive proof of an abuse of authority. Certainly, the complainant's testimony, taken as a whole, showed that he had a good appreciation of what was sought in the selection process. His arguments that he fully met the required qualifications also do not suggest any lack of understanding of what E1 and E4 specifically involved.

[247] I also note *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 4 at para. 51, which reads follows:

> *[51] However, failure to inform candidates of a specific definition related to a merit criterion does not, in and of itself, amount to abuse of authority. The qualification established by the managers and against which candidates would be assessed was set out in the Statement of Merit Criteria. The Tribunal finds that the qualification itself was sufficiently detailed so that candidates knew what they had to demonstrate.*

[248] According to the complainant, the focus in the SOMC on labour market data was unduly narrow, and it favoured applicants who already worked at ESDC. Fully 87% (7 of 8) of ESDC applicants were successful, but only 29% (5 of 17) of those from outside ESDC succeeded. He maintained that a candidate does not need to know anything about labour markets to do the job well.

[249] The complainant is entitled to his opinion that he did not need to know about labour market data to perform the job well, but his opinion does not determine the matter. It is uncontested that the *PSEA* authorizes deputy heads to establish merit criteria, provided that essential qualifications relate to the work to be performed and meet the qualification standard issued by the employer (ss. 30(2)(a), 31(1), 31(2), and 36). The case law has frequently confirmed the latitude given to a deputy head to fashion assessment methods; see, for example, *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 51, or *Jolin*, at para. 77, which reads 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.*

[250] In the selection process at issue, experience with labour market data was emphasized, legitimately reflecting the deputy head's discretion. The complainant did not offer substantive evidence to prove that the work of the position did not require experience with labour market data; nor was the employer's selection standard ever made an issue. The emphasis on labour market data appears to have been neither unfair, unreasonable, nor discriminatory.

[251] For the foregoing reasons, I find that the complainant has not established on the balance of the evidence that the deputy head abused its discretion with respect to the SOMC. The allegations in Issues 2 and 3 are not founded.

4. Issue 4: Did the respondent abuse its authority by appointing candidates who did not meet essential qualifications, thus violating the merit principle in s. 30(2) of the *PSEA*?

[252] I noted earlier my view that the complainant did not offer any substantive evidence in support of this allegation. He confirmed my observation in his final argument by stating that evidence demonstrating that the successful candidates were unqualified exists somewhere in the hands of the deputy head but that the respondent did not provide it at the hearing.

[253] It is the complainant's burden to prove the allegation and not the respondent's role to offer evidence that might support the complainant's position. It is clear from his words that he advanced his fourth allegation without any proof. He could have called the successful candidates to testify, but he did not. In that respect, he acted irresponsibly. He impugned the successful candidates on a purely speculative basis by placing an allegation before the Board that unnecessarily required its attention and that of the respondent. Were that the only allegation in his complaint, I would have dismissed it on the grounds of bad faith, citing the authority of s. 21 of the *FPSLREBA*, which reads as follows: "The Board may dismiss summarily any matter that in its opinion is trivial, frivolous, vexatious or was made in bad faith."

[254] I find that the complainant has not proven the allegation in Issue 4 on the balance of the evidence.

5. Issue 5: Did the respondent abuse its authority by demonstrating a reasonable apprehension of bias in favour of the appointees?

[255] The principal arguments advanced by the complainant in support of his allegation of bias were as follows:

1. that some of the successful candidates wrote answers similar to his but were screened in;
2. that the process favoured internal applicants;
3. that Ms. Pelland displayed hostility toward him in their telephone conversation; and
4. that the respondent had tried to defame him before as well as at the hearing and that such evidence can be used to infer the deputy head's views at the time the screening process was carried out.

[256] In section IV(E), I confirmed that the test for demonstrating a reasonable apprehension of bias remains as originally outlined in *Committee for Justice and Liberty*, as follows:

> …
>
> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."*
>
> …

[257] None of the arguments offered by the complainant, in my view, meets the test.

[258] Given the available information, it is not possible to compare directly the responses given by successful candidates (who have not been conclusively identified) to those provided by the complainant; nor is that the Board's role. His argument on this point is instead an opinion or conjecture that lacks reliable evidence. Thus, there is no opportunity for a "reasonable and right-minded" person to conclude that the pattern of the ratings reveals a reasonable apprehension of bias.

[259] The evidence on the comparative success of internal and external applicants is, at best, inconclusive. The reasonable observer would note that both internal and external applicants succeeded in the process.

[260] As to the complainant's contention that Ms. Pelland displayed "inexplicable hostility" toward him during their telephone conversation, which she cannot recall, I am reminded again that he testified that his recollection of the conversation "was not fresh", raising the possibility that he overstated the tone and tenor of her remarks. If indeed it were accepted that she did display hostility during the call, would it raise a reasonable apprehension of bias?

[261] I think not. In all likelihood, our right-minded person would conclude that hostility displayed by one member of the selection board during a conversation that occurred well after the board decided to screen the complainant out on E1 and E4 could not reasonably be accepted as proving bias at the time that decision was made. Moreover, the balance of the evidence would challenge the possibility of bias by the raters at the time they assessed the complainant given that there is no evidence that any of them knew him then. To be sure, Ms. Pelland testified directly that she did not know him when the screening was conducted.

[262] I have previously ruled that the respondent's approach to and its conduct at the hearing did not reveal defamation. The complainant strenuously opposed the respondent tendering documentation related to his previous career — which ultimately, I did not admit — but he opened the door to that type of evidence when he attempted to prove the need for an order anonymizing the style of cause, given the possibility that potential hirers might find negative information about him when searching the Internet. The fact that the respondent walked through that door and identified negative information about him that was readily available through a Google search did not prove defamation. It reported documented material about him that was clearly in the public realm, as a tactic in cross-examination. Given that I did not admit the material on grounds of relevance, the tactic had no impact on my decision. Moreover, and more to the point, the oral evidence indicated that Ms. Pelland did not know anything about the complainant when she screened him out and that at that time, she never searched the Internet for information about him.

[263] Had I accepted that there was a defamatory element in the respondent's approach to the hearing, which, clearly, I have not done, I cannot accept the complainant's position that it would constitute evidence of bias that could be used to infer the deputy head's views at the time the screening process was carried out. That logic would certainly escape a reasonable observer. How can actions or statements in the lead-up to a hearing and then at the hearing reliably prove bias by selection board members more than three years earlier? They cannot.

[264] Parenthetically, I note that the broad legal sense of "defamation" refers to harming another person's reputation by making a false written or oral statement about that person to a third party. Had I admitted the respondent's proposed exhibits, it would have fallen to the complainant to demonstrate that the written content was false.

[265] I find that the complainant has not proven the allegation in Issue 5 on the balance of the evidence, using the test in *Committee for Justice and Liberty*.

6. Issue 6: Did the respondent abuse its authority by empanelling unqualified selection board members?

[266] The complainant stipulated that his allegation on the selection board members' qualifications applies only to Ms. Pelland.

[267] I must note that in his final argument, the complainant cast considerable doubt about his allegation. At one point, he submitted that his staffing experience was extensive and, in that respect, was comparable to Ms. Pelland's experience. How then was she unqualified if she, like the complainant, had "extensive" experience?

[268] The answer is clear. Ms. Pelland's extensive experience conducting staffing processes for the Job Bank Division was well documented, as was her broader training relevant to such processes. The complainant's evidence about his staffing experience hardly suggested comparable qualifications.

[269] The only element possibly in question about Ms. Pelland's qualifications to perform her role on the selection board concerns the complainant's contention that she is not a data-analysis expert or, at least, does not have the level of expertise in analyzing data that others could bring to bear.

[270] The complainant offered no persuasive, concrete evidence to support his contention. On the other hand, Ms. Pelland testified that she had worked for many years in the Job Bank Division and that she knew the nature of its work. She also testified that her understanding of the data-analysis skills required for the position was informed both by the detailed job description (Exhibit C-1) and by the hiring manager's input when developing the SOMC.

[271] On balance, the complainant has not met his burden of proving the allegation in Issue 6.

7. Issue 7: Did the respondent abuse its authority by discriminating against the complainant?

[272] Under s. 80 of the *PSEA*, the Board may interpret and apply the *CHRA* in its analysis of a complaint of abuse of authority under s. 77. Section 7 of the *CHRA* reads 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.*
>
> [Emphasis in the original]

[273] The prohibited grounds of discrimination under the *CHRA* are outlined as follows in s. 3(1):

> ***3 (1)*** *For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.*

[274] The Board's case law in deciding allegations of discrimination in staffing complaints is extensive. The basic approach, requiring that a complainant first make out a *prima facie* case of discrimination, is well known to the complainant; it was fully described by the learned decision maker in *Abi-Mansour 2016*. That decision canvassed *Shakes*, *Israeli*, and *O'Malley*, among others. In *Abi-Mansour 2016*, unlike in this case, the parties disagreed on which specific case to follow to determine whether there was a *prima facie* case of discrimination. I find it useful to quote *Abi-Mansour 2016* at some length, as follows:

…

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.

…

[275] The complainant submitted that the Board can use either *Shakes*, *Israeli*, or *O'Malley*, all of which will take it to the same conclusion. The respondent, in its argument, referred primarily to *O'Malley*.

[276] I have decided to be guided by *O'Malley* because, unlike *Shakes* and *Israeli*, it does not require a finding that the complainant was qualified or an assumption to that effect. (For example, note that the lack of evidence establishing that the complainant met the essential qualifications led the decision maker in *Abi-Mansour 2016* to conclude that he had failed to meet one of the elements of the *Shakes* and *Israeli* tests.)

[277] *O'Malley* leads me to pose these three questions: Did the complainant have a characteristic protected by the *CHRA*? Did he experience an adverse impact? Was his protected characteristic a factor in the decision?

[278] The answer to the first question is that the complainant does have a characteristic protected by the *CHRA*, whether it be race, national origin, or ethnic origin. He variously self-identifies as Arab, West Asian, Middle Eastern, or of Lebanese national origin. He also described himself as an "immigrant" to distinguish himself from the other candidates. The *CHRA* does not identify being an immigrant *per se* as a prohibited ground of discrimination.

[279] Did the complainant experience an adverse impact? Yes. He was screened out of the selection process, which denied him the possibility of employment at ESDC.

[280] Was the complainant's protected characteristic a factor in the decision? Or, to use the respondent's term, was there a nexus linking the decision to screen him out to the protected characteristic or characteristics under the *CHRA*?

[281] The complainant's burden under the *prima facie* test is to offer evidence that if assumed true, sufficiently establishes a case of discrimination.

[282] The complainant argued that the respondent discriminated against him on the grounds of race, national origin, and ethnic origin because two of the appointed candidates do not share his identifying characteristics — Middle Eastern, Arab, and Lebanese. He acknowledged that the status of the other appointed candidate is unknown.

[283] The problem is that there is no direct, reliable evidence that specifies the identifying characteristics of the successful candidates. Their names are known, but the names alone do not conclusively establish their identities. The candidates' employment equity statuses are available (Exhibit C-18), but it is not possible to identify directly who among them were appointed. The complainant could have resolved the matter by calling the successful candidates to testify, but he did not.

[284] Only two other items of information are available. First, at the beginning of the proceedings, the respondent confirmed that two of the appointed candidates self-identified as being from employment equity groups. Although the complainant argues that only evidence that he offered should be used to determine whether he made out a

prima facie case, it seems fair to include information initially stipulated by the respondent for that purpose. The second item of information argued by the complainant (based on Exhibit C-18) is that the success rates at the initial screening stage for the visible minority candidates (45%) was less than that of the other candidates (55%). In the complainant's submission, this fact directly establishes a *prima facie* case of discrimination. He cited *Basi* in support.

[285] Regrettably, the complainant did not identify exactly what in *Basi* supports his submission; nor did he cite particular paragraphs that should guide the Board. I have read *Basi* and have noted that the decision maker found that the evidence showed that the complainant in that case met all elements of the *Shakes* test, including that he was qualified for the position. That is not the case in this complaint before the Board.

[286] Does the evidence cited by the complainant establish that his identifying characteristics were a factor in the screening decision? (Note that the case law is clear that they need only be one factor of possibly several. I also concur with him that the case law holds that intent need not be demonstrated.) Because two successful applicants shared his self-identification as being members of employment equity groups, this characteristic in and of itself does not seem to have been a factor in the screening decision. The complainant proceeds to quantify what he describes as the difference in success rates between visible minority candidates and the other candidates. While I cannot accept that it is possible to infer visible minority status based on the available evidence about employment equity status, I would not otherwise be persuaded that the size of the difference calculated by the complainant would be sufficient to establish a clear pattern. Had 1 more candidate with alleged visible minority status succeeded at the screening stage (out of 16) and 1 more without that alleged status failed (out of 8), the comparative outcome would be reversed; that is, candidates with alleged visible-minority status would have enjoyed a higher success rate than the other candidates. In the end, all that the evidence reliably establishes is, as I have stated, that self-identification as a member of an employment equity group appears not to have been a factor in the screening decision.

[287] The complainant argued that, seemingly in the alternative, the successful candidates did not share his identifying characteristic as an immigrant. That could perhaps be the case, but he did not offer evidence to that effect, only conjecture. For purposes of the *prima facie* test, an asserted fact can be considered true, but there

must at least be some sense that there is a basis for asserting it. In this case, simply, nothing is known about the immigration statuses of any of the other applicants. Moreover, as indicated, the prohibited grounds of discrimination under the *CHRA* do not include one's status as an immigrant *per se*. The national origin of applicants, if known, might suggest their immigration status, but the complainant offered no reliable information on that distinguishing characteristic.

[288] Finally, the complainant briefly canvassed the question of foreign credentials in the course of his arguments, alleging that his educational qualifications from a foreign institution comprised an identifying characteristic that distinguished him from the successful candidates and, by inference, was a factor in the screening decision. As I have found as a matter of fact that the respondent did not screen out the complainant on the education factor, I need not consider this allegation.

[289] I conclude from the foregoing that the complainant has not established that a protected characteristic was a factor in the screening-out decision within the meaning of *O'Malley*. As a result, the Board cannot find that he has made out a *prima facie* case of discrimination.

[290] Therefore, the complainant has not met his burden of proving the allegation in Issue 7.

VIII. Conclusions

[291] My analysis of the first six allegations advanced by the complainant found that in each case, he failed to prove abuse of authority on the balance of the evidence. As for the seventh allegation, I found that he did not make out a *prima facie* case of discrimination.

[292] Given my findings, the complaint must be dismissed.

[293] I wish to note that in these reasons, I have not addressed the back-and-forth remarks during the hearing about the complainant having been barred from certain premises of the respondent. I accorded those exchanges no significance for the purposes of my decision, either as purported proof that the respondent somehow defamed him or to substantiate any allegation of bias in the original screening process.

[294] I must also observe that while the complainant was quick to accuse the respondent of defaming him, he was not loath to attack Board decision makers personally, to criticize the Federal Court of Appeal, to imply that the deputy head's representatives hid or altered information, and — perhaps most critically — to launch what was essentially a broadside against the entire recourse process, elements of which he characterized at one point in the proceedings as a "joke".

[295] In my view, the complainant's approach to litigating his complaint at the hearing stage, and sometimes before it, raises questions about his good faith. More than once during the hearing, I wondered whether he was more interested in advancing general themes of discontent about the recourse system and promoting his alternate views about how it should work than in arguing the specific merits of his allegations. It is clear from the number of complaints that he has filed with the Board that he does not shy away from litigation. That is certainly his right, but it does open the possibility of repetitive arguments. When previous decisions or the weight of the case law weighs clearly against an argument, raising it again in the absence of materially new circumstances is problematic. It may unnecessarily extend and complicate litigation and, in the worst case, may open the litigant to a finding of vexation or bad faith.

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

(The Order appears on the next page)

IX. Order

[297] The complainant's request to anonymize the style of cause is dismissed.

[298] The three documents provisionally entered and identified as Exhibits R-1 to R-3 are not admitted and shall be removed from the record.

[299] The complaint is dismissed.

April 6, 2020.

D. Butler,
a panel of the Federal Public Sector
Labour Relations and Employment Board