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Citation: 2021 FPSLREB 3

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 MINISTER OF FISHERIES AND OCEANS

Respondent

and

OTHER PARTIES

Indexed as
Abi-Mansour v. Deputy Minister of Fisheries and Oceans

In the matter of complaints of abuse of authority – ss. 77(1)(a) and (b) of the *Public Service Employment Act*

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Patrick Turcot, counsel

For the Public Service Commission: Louise Bard

Heard at Ottawa, Ontario,

March 28, 29 and April 5, 2019.
(Written submissions filed April 2, 5, 15, 26, May 3, 2019 June 6, 11, 14, August 19, September 4 and 9, 2020.).

REASONS FOR DECISION

I. Complaint before the Board

[1] On February 5, 2015, the Department of Fisheries and Oceans ("DFO") conducted an advertised internal appointment process (numbered 14-DFO-NCR-IA-HRCS-102099) to staff various information technology (IT) positions classified at the CS-02 group and level. The process included four streams. The job opportunity advertisement ("JOA") invited applications from DFO employees across Canada and employees of the Public Service of Canada occupying a position in the National Capital Region.

[2] Between February 3 and April 19, 2016, the complainant, Paul Abi-Mansour, an employee of the DFO, filed four complaints pursuant to s. 77 (1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; PSEA). One related to the Stream 1 appointment of Alain Liard to a security analyst position. The other three complaints were with respect to the Stream 3 appointments of Amy Wong, Justin Hollick, and Alexandre Voyer to programmer analyst positions. The complaints were consolidated.

[3] The assessment tools included the screening of applications, a written examination, an interview, and reference checks. The complainant passed the written exam in Stream 1 but because he did not meet any of the asset qualifications, he was not assessed further. He did not qualify for Stream 3 having failed both essential criteria (knowledge and ability) assessed by the written exam.

[4] The complainant alleged that the respondent had abused its authority in the application of merit and in the choice of process, and had discriminated against him. The complainant did not provide the Canadian Human Rights Commission ("CHRC") with prior notice that he intended to argue that he had been subject to discrimination, as required by s. 78 of the PSEA. At the Board's request, he did so on the first day of the hearing. The CHRC advised the Board that it did not intend to take part in the hearing.

[5] 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 and took no position on the merits. However, it filed a written submission describing PSC policies and relevant jurisprudence.

II. Complainant's preliminary arguments

A. The constitutionality of the *PSEA* complaint process; "standard of review"

[6] The complainant argued that an employee's right to seek redress via a complaint under s. 77 of the *PSEA* is in lieu of the constitutional right to judicially review a deputy head's decision. He challenged the constitutional validity of the *PSEA* on the grounds that it deprived him of direct access to the Federal Court to seek judicial review of a staffing decision. In his view, this forced him to meet a higher standard (abuse of authority) to prove his allegations before the Board. He argued that in contrast, a judicial review could be successful upon the discovery of a mere error or omission by the deputy head.

[7] The complainant put forward the same argument in *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 53 ("*Abi-Mansour, 2018*"). He also put forth a related argument in *Abi-Mansour v. President of the Public Service Commission*, 2016 PSLREB 53 ("*Abi-Mansour, 2016*") in which he postulated that a complainant could legally choose to proceed at either the Federal Court or the Board but that the Federal Court was feasible only for affluent litigants.

[8] In this case, the complainant argued that the *PSEA* limited him to filing a complaint under s. 77 against the respondent's decision and that, therefore, a Board hearing is essentially a judicial review of the respondent's decision. Therefore, the Board should apply standards of review similar to those applied on a judicial review.

[9] A Board hearing is not a judicial review; it is a hearing *de novo* (starting afresh) in which the Board weighs evidence and determines whether the complainant has met his burden of proof to show that the respondent abused its authority.

[10] In *Abi-Mansour,* 2018, the Board made it clear to the complainant that the constitutional validity argument would not be heard as notices to the attorneys general required by s. 57 of the *Federal Courts Act* (R.S.C., 1985, c. F-7) had not been served. Nor were they served in this case. This argument will not be considered further.

[11] I also note that, as the Board commented when faced with the same argument in a hearing subsequent to this one (*Abi-Mansour v. Deputy Head of Employment and Social Development*, 2020 FPSLREB 36 ("*Abi-Mansour, 2020*")), the complainant's real

concern underlying his constitutionality and standard of review argument is that, in his view, the Board defines "abuse of authority" too narrowly.

B. Abuse of authority under the *PSEA*

[12] Section 77(1) of the *PSEA* provides that an unsuccessful candidate in the area of selection for an internal appointment process may complain to the Board that he or she was not appointed because of an abuse of authority. "Abuse of authority" is not defined in the *PSEA*, but s. 2(4) states, "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[13] Both the respondent, and the PSC in its written submission, submitted that a finding of abuse of authority under the *PSEA* requires intentional serious misconduct on the part of the employer. They argued that the two types of abuse explicitly included in s. 2(4) (bad faith and personal favouritism) define the kind of intentional misuse of power that Parliament intended to be covered by the phrase "abuse of authority."

[14] In *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48, the Board noted that both it and the former Public Service Staffing Tribunal ("PSST") had established that s. 2(4) of the *PSEA* must be interpreted broadly and that it does not require an element of intent. The Board addressed the issue of intent at paragraphs 16 and 17 as follows:

> *16 The Board and the Tribunal have consistently held that a finding of abuse of authority does not require proof of intent. As stated in* Tibbs *at para. 74:*
>
> > To require that a finding of abuse of authority be linked to intent would lead to situations that clearly run contrary to the legislative purpose of the PSEA. It could not have been envisioned by Parliament that, for example, when a manager unintentionally makes an appointment that leads to an unreasonable or discriminatory result, there would be no recourse available under the PSEA. When a manager exercises his or her discretion, but unintentionally makes an appointment that is clearly against logic and the available information, it may not constitute bad faith, intentional wrongdoing, or misconduct, but the manager may have abused his or her authority.
>
> *17 The Federal Court of Canada has also confirmed that abuse of authority in the* PSEA *context does not require proof of intent. In* Makoundi v. Canada (Attorney General)*, 2014 FC 1177, the Court*

> *stated that there could be a finding of abuse of authority without proof that the abuse was intentional.…*

[15] The complainant argued that insisting that intent be part of the definition sets the bar too high and that abuse of authority could be found based on an error or omission by the respondent. I agree, in part, with the complainant on this point, as did the Board in *Abi-Mansour, 2018*, as follows:

> *[58] I agree with the complainant insofar as the PSC alludes to an abuse of authority being such a serious wrongdoing that it amounts to an intentional act. The Board has consistently found this too high a standard for a complainant to meet.*

[16] I concur with that conclusion and further note that it is not helpful that the PSC continues to make this argument which has been clearly and consistently rejected by the Board and by the courts.

C. Burden of proof

[17] In a complaint of abuse of authority, the complainant bears the onus of proving his or her allegations. This was confirmed in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 (*Tibbs*) 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.*
>
> …

[18] Nevertheless, the complainant submitted that the burden of proof in a complaint under s. 77 of the *PSEA* should be different and that it should not rest solely on the complainant. He proposed instead applying a "slight departure" from *Tibbs* in that a complainant should have to set out only a *prima facie* case, as in human rights matters, and that the burden should then shift to the respondent.

[19] The complainant based this proposal on his view that complainants have very little information and that the exchange of information process does not always provide sufficient information for a complainant to make his case. He argued that it

should be sufficient for the complainant to merely raise a belief that the appointees are unqualified in order to shift the burden to the respondent. He opined that: "We have tried *Tibbs* for 13 years, but all the cases are being denied left and right and maybe we need a new approach."

[20] I do not disagree that typically, the employer has vastly more information at its disposal than does a complainant in a staffing complaint, and I can understand the complainant's frustration in that regard. However, this cannot be addressed by simply allowing complainants to make bare allegations that appointees are not qualified, in order to shift the burden of proof.

[21] Faced with the same argument in *Abi-Mansour, 2018*, the Board adopted the Board's previous comments in *Abi-Mansour, 2016*. This Board adopts them, as well:

> …
>
> *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.*
>
> *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.*
>
> *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.
>
> …

> [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… It is not in the public interest to divert extensive resources to disprove allegations which cannot be substantiated. […]
>
> …

D. Reasonable apprehension of bias

[22] The complainant also made a bid to lower the bar to find reasonable apprehension of bias. He challenged this legal test because it applied to his allegation that there was a reasonable apprehension of bias in favour of Mr. Liard, the Stream 1 appointee.

[23] He submitted that a different standard should apply, depending on who makes the decision. He cited *Baker v. Canada (Minister of Citizenship and Immigration*), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, as authority for that proposition and went on to note that the decision maker in *Baker* was "just an immigration officer," similar to a manager in the public service. He went further, suggesting that "We don't bring Board members off the street, but as for managers, sometimes we do." Therefore, the reasonable apprehension of bias for managers' decisions should be subject to a lower bar. He asked rhetorically why managers are assumed to be impartial and suggested that there should be no such assumption.

[24] The *Baker* decision considered a number of different contextual factors that would help a court determine whether an administrative decision-making process was fair. One of the factors considered was the nature of the decision-making body. The more closely it resembles a judicial decision-making process, the more likely it is that the duty of fairness will require procedural protections closer to the trial model.

[25] Certainly, managers trying to find the right person to appoint to a position operate in a different context than Board members or judges, and their decision-making process does not closely resemble the judicial model. Nevertheless, they have a statutory obligation to be unbiased and must be presumed so in the absence of any evidence to the contrary. I further note, as an aside, that the complainant's disdainful comments about both immigration officers and public service managers were uncalled for and inappropriate.

[26] In *Committee for Justice and Liberty v. National Energy Board,* [1978] 1 S.C.R. 369, the Supreme Court of Canada set out the test to apply to this question, as follows:

> …
>
> *… 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.…"*

[27] The PSST and the Board have reformulated this test in the staffing context, as follows: If a reasonably informed bystander can reasonably perceive bias on the part of one or more persons responsible for assessment, the Board can conclude that abuse of authority exists (*Drozdowski v. Deputy Head (Department of Public Works and Government Services)*, 2016 PSLREB 33, referring to *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10). The Federal Court also mentioned this reformulation of the test in *Makoundi v. Canada (Attorney General)*, 2014 FC 1177 at para. 51. I see no reason to depart from it.

E. *Stare decisis*; abuse of process

[28] The complainant submitted that the doctrine of *stare decisis* (judicial precedent) does not apply to the Board because it is an administrative tribunal and is therefore entitled to alter its precedents, distinguish its decisions, or depart from earlier interpretations, as appropriate. He opined that that is an important attribute of administrative tribunals and that they have significant flexibility to adopt new interpretations.

[29] With that in mind, the complainant asked the Board to ignore earlier or, as he put it, "incorrect" decisions involving him. He advised that all of the Board's previous decisions about him were wrongly decided. They did not result from fair and good faith decision-making, but rather from "problems" between Board members and himself. The decision makers in his earlier cases were biased against him.

[30] The complainant is correct that the Board is not bound to follow its prior decisions. However, his intemperate comments with respect to the Board members who have heard his previous complaints were entirely inappropriate. Not agreeing with a decision does not give a complainant licence to make unsubstantiated allegations

implying bias on the part of a decision maker. This is an extremely serious allegation. Making spurious accusations of this nature with no basis is vexatious and an abuse of the Board's process. Worse, this is not news to the complainant, whom the Board and the courts have already so advised, on more than one occasion.

III. Abuse-of-authority allegations

[31] The complainant alleged that the respondent abused its authority:

> · *in setting the Stream 1 qualifications and using the asset criteria as an assessment method for volume control*
> · *in developing the exam in Stream 3 and marking it unfairly;*
> · *in showing personal favouritism towards the Stream 1 appointee;*
> · *in being biased against the complainant;*
> · *in appointing candidates who were less qualified than him and who did not meet the essential and asset qualifications;*
> · *in choosing an advertised process; and,*
> · *by discriminating against him on the basis of a prohibited ground contrary to ss. 3 and 7 of the Canadian Human Rights Act (CHRA).*
>
> …

[32] The *PSEA* sets out the respondent's broad discretion, in exercising the authority delegated to it by the PSC, to determine the essential and asset criteria for a position and the assessment methods it will use to determine which candidates meet them:

> …
>
> ***Appointment on basis of merit***
>
> ***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.*
>
> ***Meaning of merit***
>
> *(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; and*
>
> *(b) the Commission has regard to*

> *(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,*
>
> *(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and*
>
> *(iii) any current or future needs of the organization that may be identified by the deputy head.*
>
> …
>
> ***Assessment methods***
>
> ***36*** *In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).*
>
> …

[33] The complainant testified on his own behalf and called no witnesses. Some of his allegations were expressed in vague terms, and it was not always clear when they were intended to relate to both streams or to just one. I have linked them to the stream to which they seemed most related and grouped the allegations as appropriate.

[34] The respondent called five witnesses: Richard Bastien, Manager, Application Development and Support, who directed the staffing process; three hiring managers, Patrick Martin, Bert Paulin, and Andrew Frost; and Julien Tremblay, who was a subject-matter expert in this process.

A. Establishing and applying the asset criteria (Stream 1)

[35] Both the JOA and the statement of merit criteria (SOMC) state the following:

> *The following Asset Criteria may be used to select applicants for specific positions. Consequently, candidates are required to clearly demonstrate on their application which of the education and experience ASSET qualifications they meet. Failure to do so may result in a candidate not being considered for positions requiring certain specific asset qualifications.*
>
> [Emphasis in the original]

[36] The respondent used the three specific asset criteria listed in the JOA and the SOMC as additional assessment tools for volume reduction. The complainant

acknowledged that he was aware from the JOA that asset qualifications could be used in the selection process. However, as he put it, "Even if I read it, I don't agree with it."

[37] The complainant's theory was that the Stream 1 essential qualifications and exam deliberately set a low bar, allowing many applicants to be screened in, so that the specific asset criteria could be invoked, allowing for the appointment of Mr. Liard, who was already acting in the position. He argued that the asset criteria were used as a pretext, they were too specific, were almost impossible to attain and that of all the candidates, only Mr. Liard could meet them. Previously, the respondent had appointed Mr. Liard to the position on an acting basis without those asset qualifications; therefore, they were not necessary for the job. He argued that the respondent had no rationale for insisting on them, yet Mr. Liard was appointed because of them. He asked rhetorically, "Were they really that important?"

[38] The complainant noted that even after making the exam too easy, the respondent still had other volume-control options and need not have insisted on those specific asset qualifications. For example, instead, it could have increased the education requirement, it could have started with just DFO employees, or it could have carried out further testing. The complainant believes that the use of any of those options to reduce the volume of screened in applicants would have increased his chances of success. Instead, the employer used the asset qualifications to reduce the numbers without a rationale for that approach. Therefore, the Board should draw an adverse inference that the purpose of the volume-control strategy was to ensure that Mr. Liard got the job.

[39] The complainant noted that s. 33 of the *PSEA* states that asset qualifications do not have to be met and that therefore the respondent could have appointed him even if he did not have them. He also argued that he was more qualified than the appointee because he had more education, training, and general experience and because he had qualified in a pool before the appointee.

[40] Mr. Bastien testified that he had participated in four staffing processes over a period of 10 years, as a subject-matter expert in two of them, and as the lead in two others. He was asked to be the lead on this one. He coordinated the teams for the different streams and managed the process.

[41] He testified that the essential and asset qualifications were not determined unilaterally or in bad faith but rather were developed in collaboration with the hiring managers, Human Resources (HR), and subject-matter experts. There were at least four managers, one for each stream, as well as supervisors and technical people; the effort involved more than 15 people. The goal was to make sure that they had a SOMC that everyone supported, and that HR approved.

[42] Mr. Bastien stated that a SOMC outlines the qualifications for a position that are required to meet operational needs. It advises how the candidates should explain and demonstrate their experience and knowledge. It is important that HR review the SOMC to ensure that the qualification section is clear and that the educational requirements meet government standards. He said that HR reviews each SOMC both for content and for how it is written. If HR raises any issues, the teams make adjustments. Mr. Bastien did not recall any major issues with this one.

[43] There are two components to a SOMC: essential qualifications and asset qualifications. The essential qualifications are the first gate. Candidates who are assessed for these qualifications and found not to meet one or more of them are not considered qualified and their candidacies are eliminated at that stage. If the candidates meet the essential qualifications, the asset criteria can be used to further assess them.

[44] Mr. Bastien testified that asset qualifications are often quite important, depending on the position, and that managers often rely on them to make their selection decisions. They usually target more specific experience or technical qualifications. If specific or technical experience is listed as an essential qualification, it can often screen out many candidates. In this process, the respondent was careful to keep the more specific needs as asset qualifications. The goal was to screen out candidates who clearly did not meet the basic qualifications but, equally important, to avoid screening out those who may have had desirable assets to offer.

[45] When this kind of approach results in the screening in of too many applicants it is sometimes necessary to implement further volume-control strategies. In this case, of the more than 100 applicants, 72 were initially screened in to Stream 1, having been found to meet those essential qualifications that were assessed by the written exam. At that point, in consultation with the directors and managers, the decision was made to

implement a volume-control strategy based on the three asset qualifications, only one of which had to be met to proceed to the interview stage. They were as follows:

> ***A4:*** *Experience in the Certification and accreditation (C & A) process of*
>
> *Information Systems, including performing Statement of Sensitivity (SoS) and Threat Risk Assessments (TRA) IT Systems*
>
> ***A5:*** *Significant * and recent**experience in one or more of the following IT Security areas:*
>
> *Performing Vulnerability Assessments on IT Systems Application Security*
>
> *Network Security*
>
> *Security Incident Management*
>
> *IT Security Testing and Evaluation*
>
> ***A6:*** *Experience in using one or more of the following IT Security principles methods practices or tools:*
>
> *ITSG – 33 – Security Assessment and Authorization methodology*
>
> *Harmonized TRA (Threats and Risk Assessment) methodology Security Architecture and IT Security Zones (ITSD –02)*

[46] I see nothing wrong in the respondent's development of the specific asset criteria, which clearly address the skills and experience required to do the job. Nor was the respondent obligated to interview 72 candidates. Applying an additional assessment method after the initial screening process falls within the employer's statutory discretion outlined in sections 30(2) and 36 of the *PSEA*. The respondent had the authority to consider any additional qualifications that it considered to be an asset for the work to be performed or for the organization currently or in the future.

[47] There was no evidence that the employer set the essential requirements and the exam level low to give itself the ability to manipulate the process in order to appoint the acting candidate. I accept the respondent's rationale that the goal was to avoid prematurely weeding out candidates who might have had the assets the respondent needed. It is the respondent who decides what work needs to be done and who must find the right candidate to do that work well. Focusing on specific asset qualifications for the specific work to be done is not an unreasonable approach.

B. Personal favouritism (Stream 1)

[48] The complainant challenged Robert Luther's role in the appointment of Mr. Liard. Mr. Luther was the team leader and the appointee's direct supervisor in his acting role. He provided a reference for Mr. Liard and, at Mr. Martin's direction, drafted the right-fit justification for Mr. Liard's appointment. The complainant argued that Mr. Luther was Mr. Liard's "wingman" and that he simply wanted him to get the job.

[49] Mr. Martin was the hiring manager for Mr. Liard's appointment. He had worked in IT for 20 years, 10 of which were at DFO, and he was responsible for the security group. He described his involvement as being mainly a consumer of the pool and indicated that he had no relationship with Mr. Liard, who as a CS-01 reported to his team leader, Mr. Luther. Their offices were physically close, so they would greet each other, but there was no direct reporting or working relationship. Mr. Martin also said that he had never met the complainant and that until recently had never heard his name.

[50] Mr. Martin denied showing any personal favouritism to Mr. Liard. He said that he needed someone with a background in IT security and that it takes a long time to acquire those skills. It was decided to make the essential requirements quite low because sometimes asking for extensive experience results in no applicants. Too much emphasis on essential qualifications can weed out people who might have the assets needed. The exam was set at a fairly low level, focused on general knowledge. The selection process was aimed more at finding the specific asset qualifications needed.

[51] Mr. Martin testified that he took into account Mr. Luther's observations as Mr. Liard's direct supervisor, to determine if he would be the right fit for the position. He had been performing well in the acting role and had the kind of skills and hands-on experience that were needed. Mr. Martin reviewed and concurred with Mr. Luther's observations, and signed the right-fit justification as the responsible manager. He testified that he would not sign something with which he did not agree.

[52] Asked in cross-examination about Mr. Liard's lack of IT security experience when he was appointed to the acting position, Mr. Martin responded that if someone with IT security experience cannot be found, then a candidate with service-desk experience is sought. That kind of background will help the person get up to speed on

IT security within a reasonable period. Mr. Liard had had service desk experience when he obtained the acting position.

[53] Asked about the quality of Mr. Liard's work in the acting role, Mr. Martin said that he had performed well. He had exceeded the work requirements and had proposed improvements. Although Mr. Liard was not his direct report, Mr. Martin could see those achievements through emails that had been shared with him from time to time, and the team leader had informed him about Mr. Liard's performance. He had good hands-on experience for this type of security work from his acting role and from his previous service desk experience.

[54] Mr. Martin agreed that the second-place candidate was classified CS-03, a higher level than Mr. Liard, but explained that that candidate did not have the specific IT security experience, which was most important at the time. What was needed was someone with experience in certifying applications, threat and risk assessment, and especially incident management. The CS-03 candidate had experience in threat assessment which entails assessing an application, how it was built, whether there are enough confidentiality safeguards, and whether it is mission critical. That was, in part, what was needed, but the combination was important — finding someone with experience in both threat and risk assessment and also in incident management. And, at that point, of the two, incident management was the most important need.

[55] Mr. Martin indicated that deep knowledge is required for incident management. When an incident occurs, it is not clear what you are facing so experience in different areas is required. A person with these skills is somewhat opposite to a hacker. It is stressful because an incident is typically occurring as attempts are made to deal with it. If the person on duty cannot quickly identify the problem, things can go very badly; for example, a virus will continue spreading. It takes several years to gain these skills and to be proficient. Mr. Liard was the only candidate with this combination of IT security skills and experience.

[56] It is not unusual that acting positions allow employees the opportunity to acquire or strengthen skills and experience that can make them more desirable candidates when the acting positions are posted. The evidence indicated that the acting role had likely benefited Mr. Liard in this way. However, this in itself does not

mean that the complainant was personally favoured in the decision to appoint him in this process.

[57] The right-fit justification document includes excerpts from the applications of each of the top four candidates, which describe in detail their varied experience relating to the asset qualifications. Mr. Liard was not the only candidate who had some of the required asset qualifications, as the complainant alleged. However, he had the best combination of desired experience and, most importantly, was skilled in incident management as the right-fit justification states:

> *Other candidates also demonstrate similar levels of these traits with minimal differences between the top scoring candidates. We feel this variance is not great enough to elevate one candidate over another. We do however believe the direct experience of IT Security Incident Management and Security Assessment and Authorization (SA&A) experience demonstrated by the candidates can be used as a deciding factor. In this context Alain Liard has demonstrated the greatest degree of applicable experience.*

[58] Mr. Liard had performed well in the acting position. His direct supervisor was happy with his work and provided a positive reference. That is not personal favouritism, which must be based on a personal relationship of some kind, either with the candidate or with someone else who can influence the hiring decision. See *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7, at paragraph 39: "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 constitutes abuse of authority" [emphasis in the original].

[59] To prove personal favouritism, it must be shown that factors other than merit influenced the hiring decision. If the appointee's direct supervisor wanted him in the position because he had the appropriate experience and produced good work, and if no other candidate had equivalent experience, then the purpose of the staffing process was met, which was to find the right candidate with the ability to do the job well. This is not evidence of personal favouritism.

[60] Consequently, the complainant did not meet his burden of proof to show that the respondent abused its authority by showing personal favouritism towards Mr. Liard.

C. Developing and marking the exam; bias against the complainant (Stream 3)

[61] The complainant argued that the Stream 3 exam was unfair because the appointees were not qualified; they were less qualified than him; the exam marker was biased against him; and because he had already qualified in an equivalent pool and should not have had to qualify again in this process.

[62] The complainant had written to seek information before writing the exam, as follows:

> *I have received the notices for the 3 streams. The problem I am facing in preparing for these exams is that the knowledge that will be assessed is stated in a very broad or general way. It is therefore very hard to prepare effectively for this test. Can you please connect me to the hiring manager because I will have some questions to [sic] him on this point?*

[63] The complainant was advised that to maintain the integrity of the process and fairness to the other candidates, additional information could not be provided to him.

[64] The complainant alleged that the exam was subjective; that it was not used to determine knowledge but simply to determine who was a friend of the manager. He described the exam variously as follows: "The instructions were not clear," "For me, it was a poetic exercise, and I don't like poetry," "It was not a serious exam for the CS-02 level," and "It was very unfair." He argued that the test was arbitrary; its real purpose was to give the respondent full power over who passed and who failed. The complainant said that he should have passed the test because he had passed others that were much more difficult and complex, such as one from a later process that he entered into evidence.

[65] With respect to the discrimination allegation, the complainant submitted that because the test was unclear and subjective, it presented a barrier to members of visible minorities. He did not elaborate.

[66] The test consisted of one question designed to assess knowledge and ability, specifically, ("K3") knowledge of trends and best practices with respect to application design and development, and ("AB3") ability to communicate effectively in writing. The complainant did not discuss his answer to the knowledge question in any detail but did comment that he did not remember ever failing at writing and that no one had ever

raised an issue with his writing. He alleged that Mr. Tremblay was biased against him because of an interaction during a previous staffing process. He suggested that because of this, Mr. Tremblay should have recused himself from participating as a subject-matter expert and from marking his exam.

[67] Mr. Bastien testified that the Stream 3 subject-matter experts who work in the field designed the exam. The goal was to be able to evaluate whether candidates had a good general grasp of the expertise required for the position. The experts take care not to ask too many questions, to ensure that the questions are easily understood and to not make the exam too long. They crafted several questions based on one technical scenario to streamline the process. The experts were responsible for determining the questions and acceptable answers.

[68] HR provided a rating guide developed by Fasttrack Staffing, a human-resources consulting company hired to help administer the process. HR verified the exam to ensure that it met the appropriate government standards. The other hiring managers involved, approved it. All candidates received the same exam and had the same amount of time to write it.

[69] The markers looked for specific, predetermined items in the candidates' answers using the answer sheet and rating guide. Of the 67 candidates screened in, 63 wrote the exam, of these 32 failed and were eliminated. The complainant failed both the knowledge and communication sections by one point.

[70] The evidence showed that Mr. Tremblay was considering whether he should revise and raise the complainant's mark for the latter section by one point. He asked the other subject matter experts if one of them could do a second review. Justin Mundy was one of the subject matter experts who received the request. He was mistakenly identified at the hearing as the second marker. However, in post-hearing evidence that I allowed following a request from the complainant (*Abi-Mansour v. Deputy Minister of the Department of Fisheries and Oceans*, 2020 FPSLREB 91), it was clarified that another subject matter expert, Étienne Beaule, had provided the second review.

[71] Mr. Beaule recommended leaving the mark as it was and gave detailed reasons for that response. His reasons were partially redacted as they were obtained through an ATIP request. However, he had summarized them as follows:

> *So, in a nutshell, I have to use my own knowledge to fill the gaps in his answer which leads me to the following conclusion:*
>
> *1. Candidate failed to clearly answer the first part of the question.*
>
> *2. Candidate failed to clearly demonstrate how the new design will address at least 3 requirements.*
>
> *I would give that one a 2.*

[72] Mr. Paulin was a hiring manager for the Canadian Coast Guard. He had worked in IT since 2002 and was responsible for providing mission-critical IT solutions. He was a consumer of the pool and had no part in creating the SOMC. His role began after the staffing process was completed. He asked for a list of candidates who had qualified and interviewed them

[73] He was looking for a programmer analyst, specifically someone with experience with .NET, a web-programming tool used to create custom applications. Mr. Paulin explained that .NET is a skillset that is learned and must be known to do the job. The risks that may arise if someone does not have the appropriate skills can be serious; for example, if a system ceases to function, or in contexts such as trying to locate objects at sea during a search-and-rescue operation. In such circumstances, things can quickly degenerate.

[74] Mr. Paulin appointed Ms. Wong and Mr. Hollick to programmer analyst positions. He stated that he had no personal or professional relationship with either of them; he met them for the first time at their interviews. Nor did he have any personal or professional relationship with the complainant, but he had met him once before in a mediation process arising out of a previous staffing complaint. Mr. Paulin had testified before the Board in the context of that complaint.

[75] Mr. Frost was also a hiring manager. He appointed Mr. Voyer as a programmer analyst. He testified that he had worked with him a few times and that he had been Mr. Voyer's team leader for a short time but he had no personal relationship with him outside work. He testified that he had never worked with and did not know the complainant. He was a consumer of the pool and had no role in the screening process.

[76] Mr. Tremblay had been a manager at DFO for 9 or 10 months. Before that, he had been a team leader, supervising a team of CS-01 and CS-02 employees for about 10 years. He had 15 years of experience, which he testified gave him the knowledge and

ability to understand IT solutions and to assess them according to the rating guide. He was one of the subject-matter experts. He was not involved in developing the exam but was tasked with reviewing it. He was assigned to mark the complainant's exam, he believed by Mr. Bastien. The process was to use the rating guide provided by HR that had been developed by Fasttrack Staffing.

[77] Mr. Tremblay stated that he had no personal or professional relationship with the complainant and had never supervised or worked with him. He had been part of a review board several years prior, when the complainant had unsuccessfully applied for an acting CS-01 position, and he had had the post-process informal discussion with him. Responding to the complainant's suggestion that he and Mr. Tremblay had a "bad relationship" arising out of that encounter, Mr. Tremblay said that he would not characterize it as bad but as just a bit awkward. As for the complainant's view that Mr. Tremblay did not want him on his team, he acknowledged that that would have been a bit awkward after the previous staffing process, but was clear that he had been open to it at that time — but only for a CS-01, not a CS-02 position.

[78] Asked in cross-examination for the source of the awkwardness, Mr. Tremblay identified the complainant's comment in the previous process that he would not take Mr. Tremblay to court over a CS-01 position. When questioned as to why he would remember that comment made several years earlier, Mr. Tremblay replied that it was just a comment and not important, however, it was the first time anyone had said something like that to him in a staffing process, so he remembered it. He did not recuse himself on that basis because, in his words, "I didn't see our previous interaction as anything that would impact my judgment."

[79] As to whether the complainant believed correctly that Mr. Tremblay would not want him on his team now, Mr. Tremblay candidly acknowledged that given the present situation, and after this complaint, the complainant's view on that would be fairly accurate, but that it had not been so before this process. He responded forthrightly to the complainant as follows: "It's a bit awkward and at this point I don't think I could support you probably, but I could provide career advice."

[80] On its face, the exam question was clearly written and was specific to a programmer analyst's work. The Board's role is not to reassess or to re-mark the exam. However, I reviewed the complainant's answers and the comments of Messrs. Tremblay

and Beaule, as well as other candidates' exams which the complainant entered as evidence. I saw nothing that would suggest unfair or biased marking; nor did the complainant point me to anything specific in that regard.

[81] The bias claim relates generally to the complainant's view that he and Mr. Tremblay had a bad relationship due to the prior interaction. Mr. Tremblay acknowledged some awkwardness due to the complainant's previous comment that he would not take him to court over a CS-01 position, however, he was clear that he did not feel that it was anything that would prevent him from doing his job properly. His evidence to that effect was credible. His candid answer that he probably would not be able to support the complainant for a position now, but could provide career advice is not relevant to this process. At the time of this selection process, Mr. Tremblay was open to having the complainant on his team, but only as a CS-01. That qualifier was clearly based on his assessment of the complainant's skill and ability and not on any bias against him from the previous process.

[82] The complainant misrepresented Mr. Tremblay's evidence in his submissions on the discrimination allegation by stating, "Tremblay testified at the hearing that he had a previous negative contact with the complainant." In fact, Mr. Tremblay denied that suggestion at least three times. The complainant then argued that because Mr. Tremblay acknowledged a negative relationship (which he had not) "… the contact between Tremblay and the complainant's test in Stream 3 is tainted with discrimination. This is a reasonable inference."

[83] The complainant's argument is unclear. He had not previously suggested that any negativity (as he described it) or awkwardness (as Mr. Tremblay described it) had anything to do with discrimination. It was strictly about the previous staffing process and the complainant's comment to Mr. Tremblay. There was no suggestion of any link between his bias claim and discrimination in his complaint, allegations, testimony, cross-examination of Mr. Tremblay, or in his closing statement. Only in his post-hearing written submission on discrimination did he attempt to link his bias argument to the discrimination allegation, as follows:

> *One of the allegations in this file is discrimination. Not wanting the complaint [sic] in Tremblay's team is, at least*

> *in part, retaliation within the meaning of s.14.1 of the CHRA,*
> *which protects against the most serious forms of discrimination.*
> ***He who commits retaliation, can easily commit discrimination.***
>
> [Emphasis added]

[84] That is quite a leap. Accusing someone of discrimination on human-rights grounds is serious, especially when based on such logic. I find that even if believed, the complainant's evidence of any negativity or awkwardness between him and Mr. Tremblay does not establish that it had anything to do with a prohibited ground of discrimination.

[85] I also note that it was Mr. Tremblay who had considered raising the complainant's mark to a pass. It was Mr. Beaule who recommended against it. There was no evidence that Mr. Beaule knew the complainant or had ever had any interaction with him. The complainant raised no suggestion of bias or discrimination against Mr. Beaule.

[86] The complainant also alleged that the Stream 3 appointees were less qualified than he was. And, that they did not meet the essential and asset qualifications, that is, they were not qualified for the positions to which they were appointed. He agreed that he did not have any of the appointees' applications when he filed his complaint in which he made those allegations, and he acknowledged that it was based solely on his own belief and self-confidence. Nor did he have the appointees' corrected exams when he alleged that the exams were marked inequitably. As noted earlier in this decision, the complainant believes that he should be able to raise a *prima facie* case simply by saying that the appointees were not qualified and then the burden of proof should switch to the respondent. That conviction provides the only explanation for these allegations – the complainant knew nothing of the appointees' qualifications when he made them.

[87] The hiring managers testified that the appointees were selected for their qualifications and experience. They praised the quality of their respective appointees' work. Mr. Paulin advised that Ms. Wong and Mr. Hollick were such good programmers that they were both promoted to CS-03 positions within a year of their appointments. Mr. Frost told the Board that Mr. Voyer was a very good programmer and a dynamic self-learner. He too was promoted to a CS-03 position about a year later. I find that the complainant did not establish that the Stream 3 appointees were not qualified. To the contrary, they were well qualified for the positions to which they were appointed.

[88] Overall, the complainant did not meet his burden of proof to demonstrate that the respondent abused its authority in the way that it developed or marked the Stream 3 exam, that it was biased, or that it discriminated against him.

D. Choice of process (both streams)

[89] The complainant alleged that the respondent abused its authority by advertising the positions when it could have used a non-advertised process and simply appointed him because he had qualified in a CS-02 pool with Immigration, Refugees and Citizenship Canada. He noted that non-advertised processes were allowed, but said of the DFO that "…they do the opposite — at most they send out an expression of interest and then go outside." He said that the respondent could easily have hired him as early as June 2015 when he had first qualified in the other pool but that instead, it continued to search for candidates, even looking outside the DFO.

[90] He noted further that the DFO's *Non-Advertised Appointment Process Policy* indicated that one of its criteria for a non-advertised appointment was "[t]he appointment of a member of a designated group, made pursuant to DFO's Employment Equity Plan or a Human Resources Plan and where an under-representation exists for the occupational group to be staffed." The DFO could have relied on that to appoint him.

[91] Mr. Bastien testified that the respondent chose to proceed with an advertised process as there was not enough staff to do the work, and an internal process does not build the organization. A pool was required, especially for the future. Running a staffing process requires considerable time and effort, so it is preferable to use it to acquire the largest pool possible. He stressed that it is essential to always look to the future.

[92] The complainant countered that other departments and organizations do not look to the future but rather take care of their own employees and that DFO should do the same. He said that always appointing internally, if possible, before looking outside the organization is an established principle that was echoed in DFO's *Employment Equity and Diversity, 2014-2017 Strategic Departmental Action Plan* ("*Action Plan*"). He could and should have been appointed from the other pool.

[93] It is hard to know what to make of this argument. It is true that s. 33 of the *PSEA* allows for choosing either process; however, opting for an advertised process can have its advantages for an organization. As Mr. Bastien testified, the DFO needed a pool of qualified candidates to draw from, to build its future organization.

[94] This is not the first time the complainant has made this kind of argument, as outlined in *Abi-Mansour, 2016*:

> …
>
> *[25] Before applying to the appointment process at issue, the complainant emailed the respondent and asked to be selected from another EC-04 pool for which he had already qualified at the Department of Citizenship and Immigration Canada (CIC)….*
>
> *[26] The respondent answered that this would not be fair to other applicants to the appointment process, and it encouraged the complainant to apply, which he did on December 6, 2010. In his application, he repeated the fact that he was already in an EC-04 pool.*
>
> *[27] The complainant submits that the respondent should have appointed him from the Citizenship and Immigration pool or at least that it should have qualified him for the appointment process based on that fact.*
>
> *[28] The respondent's position is that it had very specific objectives in mind for the appointment process and that it wanted to review all candidates equally, based on its requirements.*
>
> …
>
> *[35] It is true that the choice of process may lead to a finding that an abuse of authority occurred (s. 77(1)(b)). However, I can find no fault in the respondent's decision to conduct an advertised process to offer the opportunity to more than one person. Moreover, there is no obligation for the respondent to choose from another pool, in another department, where people were selected with a different set of educational requirements.…*
>
> …

[95] The same analysis applies equally in this matter. The respondent had specific needs and sought candidates who had the experience, skills, and ability to respond to them. It was not obligated to appoint the complainant or to find him qualified for the appointment process simply because he had qualified in a different process with a different organization.

[96] I also note that while the complainant made the same choice-of-process argument in *Abi-Mansour, 2016*, he made the opposite argument in *Abi-Mansour, 2018*.

In that case, he argued that the same respondent, DFO, had abused its authority by choosing a non-advertised process.

[97] I find that the complainant did not establish that the respondent abused its authority in opting to use an advertised process to make these appointments.

E. Discrimination (both streams)

[98] Pursuant to 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. The complainant referred to ss. 3 and 7 of the *CHRA*, which read as follows:

> ***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.*
>
> …
>
> ***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.*

[99] The complainant did not specify on which prohibited ground of discrimination he bases his complaint. However, I note that in other decisions involving staffing complaints filed by the complainant he identifies as an immigrant from Lebanon of Middle Eastern descent and has alleged that he has been discriminated against based on race and national or ethnic origin (see, for instance, *Abi-Mansour v. Deputy-Minister of Aboriginal Affairs and Northern Development Canada*, 2013 PSST 6 (*Abi-Mansour, 2013*).

[100] The complainant noted that to prove discrimination, he first had to establish a *prima facie* case. He referred to *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 ("*O'Malley*") and submitted that his direct evidence, if believed, was sufficient to justify a finding in his favour, absent any answer from the respondent. He argued that he met the *Shakes* and *Israeli* tests (see *Shakes v. Rex Pak Ltd.* (1982), 3

C.H.R.R. D/1001 (Ont. Bd. Inq.), and *Israeli v. Canada (Human Rights Commission* (1983), 4 C.H.R.R. D/1616) (C.H.R.T.), aff'd (1984), 5 C.H.R.R. D/2147 (C.H.R.T. – Rev. Trib).

[101] The *Shakes* decision held that a *prima facie* case of discrimination can be made out where a complainant 1) was qualified for the particular employment, 2) was not hired, and 3) someone no better qualified but lacking the distinguishing feature, which is the essence of a human rights complaint, subsequently obtained the position.

[102] Applying *Shakes,* the complainant argued that he had passed the Stream 1 exam and, therefore, was qualified for the position. He was more qualified than the appointee because he had more education, training, and general experience and had qualified in a pool before the appointee. And, the appointee lacked his distinguishing feature. As the complainant put it: "He (Mr. Liard) is not Arab, Middle Eastern, or even minority." As for Stream 3, he was marked unfairly and should have passed the exam which would have qualified him for the position. And, he was more qualified than the appointees, all of whom lacked his distinguishing feature, which is the essence of a human rights complaint.

[103] He also noted that he met the *Israeli* test because the DFO continued to look elsewhere and ran the selection process when it could have qualified him in either stream any time after June 2015 when he had qualified in the other pool.

[104] The complainant argued that all of that amounted to a *prima facie* case of discrimination for which the respondent had no credible explanation. He further argued that the testimony of the respondent's witnesses was "… self-serving, uncorroborated, and argumentative as opposed to factual … displayed an apparent animosity against the complainant ... and should be given no weight." He submitted that the *CHRA* was enacted to protect individuals who have historically faced barriers attempting to find employment and gain experience. The asset skills required in the Stream 1 process were very specific and almost impossible to obtain. Were the Board to place weight on them, it would frustrate advancing the purpose of the *CHRA*.

[105] The complainant asked the Board to consider employment equity data as circumstantial evidence to help determine if discrimination occurred in this staffing process. In that vein, he introduced two documents: DFO's *Employment Equity & Diversity, 2014-2017 Strategic Departmental Action Plan* ("*Action Plan*") referred to

earlier and a one-page chart entitled, "Department of Fisheries and Oceans, *National Employment Equity Workforce Analysis, 2011 National Household Survey and Canadian Survey on Disability 2012, March 31, 2016 **OFFICIAL***" ("*Workforce Analysis*").

[106] Discrimination is, without a doubt, difficult to prove. There is most often a lack of direct evidence. Accordingly, I agree with the complainant that circumstantial evidence is relevant to such an allegation and should be considered. See *Abi-Mansour, 2013*, *Abi-Mansour, 2016*, and *Premakumar v. Air Canada*, (2002 CanLII 23561; [2002] C.H.R.D. No. 3 (QL) (C.H.R.T.), the latter of which outlined the following:

> …
>
> *79 The jurisprudence recognizes the difficulty in proving allegations of discrimination by way of direct evidence. As was noted in Basi:*
>
> > *Discrimination is not a practice which one would expect to see displayed overtly, in fact, there are rarely cases where one can show by direct evidence that discrimination is purposely practiced.*
>
> *Rather, it is the task of the Tribunal to consider all of the circumstances to determine if there exists what was described in the Basi case as the "subtle scent of discrimination".*
>
> *80 Statistical evidence regarding systemic issues in a workplace may constitute circumstantial evidence from which it may be inferred that discrimination probably occurred in an individual case.*
>
> *81 The standard of proof in discrimination cases is the ordinary civil standard of the balance of probabilities. In cases of circumstantial evidence, the test may be formulated as follows:*
>
> > *An inference of discrimination may be drawn where the evidence offered in support of it renders such an inference more probable than the other possible inferences or hypotheses.*
>
> *82 It is not necessary that discriminatory considerations be the sole reason for the actions in issue for a complaint to succeed. It is sufficient if Mr. Premakumar's race, his color or his national or ethnic origin were factors in the decision not to hire him.*

[107] The complainant's submission based on statistical employment-equity considerations reads as follows:

> *In Stream 1, assuming as the respondent submits, 100 individuals apply. If we infer that the workforce availability of visible minorities ranges from 10 to 20%, then out of the 100 candidates, there should be 10 to 20 candidates (visible minorities) qualified.*

> *However, none of them were hired or even made it to the pool. The hired person was white local.*
>
> *In Stream 3, it is unclear how many individuals apply. If we assume there were 70 applicants. [sic] Seven to fourteen visible minority individuals are presumably qualified to be hired. However, those who were hired (Voyer, Hollick, Amy Wong) are white local.*

[108] This submission is based on four incorrect premises: 1) that DFO's workforce availability rate for visible minorities was 10 to 20% in 2015; 2) that based on that, it can be assumed that 10 to 20% of the applicants to this staffing process were visible-minority candidates; 3) that it can be further presumed that each visible-minority candidate was qualified; 4) that no visible-minority candidates were appointed or even made it to the pool.

[109] The complainant referred to *Annex A* of the *Action Plan*, however this document does not show a DFO workforce availability rate for members of visible minorities of 10-20%, but rather a rate of 6.4%. It shows a representation rate of 5.9%. For the Administration and Foreign Service category (which includes the CS group) it shows a workforce availability rate of 7.4% and a representation rate of 9.3%. *Annex C - Occupational Groups for Use of PSEA Employment Equity Targeting (March 31, 2014 - March 31, 2015* highlights those occupational groups that had a representation shortfall of minus 5% or greater as of March 2014, which were to be targeted for *PSEA* employment equity flexibilities. It lists a number of occupational groups with such shortfalls in visible minority representation, but the CS group is not one of them.

[110] The complainant also referred to the one-page *Workforce Analysis* chart which appears to be an excerpt from a larger document. The chart was not very informative. However, in its explanatory notes, it states that gaps were calculated using 2013 workforce availability data and that negative gaps indicated a lack of representation (a shortfall). The chart appears to indicate that CS group visible minority representation was 31 individuals and that there was a gap of -2.

[111] The complainant assumes, in his submission as excerpted above, that the number of visible-minority individuals who applied to this appointment process directly correlates with the workforce availability rate. However, there is no evidence as to the actual number of visible minority applicants. It cannot be simply assumed that a correlative number of visible minority individuals applied to this process.

[112] The complainant's submission further assumes that all visible-minority candidates were qualified. Most of the 100 or so candidates in one stream, and seventy in the other, were eliminated from the process because they were not qualified.

[113] The complainant's submission also assumes that all the appointees were "white, local," as he describes non-visible-minority candidates. However, the assessment board's report indicates that Ms. Wong, one of the four appointees, seemingly self-identified as a woman and visible minority for employment-equity purposes ("W/VM").

[114] As for no visible-minority candidate making it into the pool, there was no evidence about the success rate of any of the other candidates. The only information we have is about the four appointees.

[115] The complainant also alleged that: "[a]ll the selection board members, out of whom 5 testified at the hearing, were "white, local". There was no diversity in the composition of the selection boards." Mr. Bastien testified that more than 15 people were involved in the staffing process. Three of the five witnesses were hiring managers not involved in the selection process for the pool. We know that Mr. Tremblay was a subject matter expert who marked the complainant's exam and Mr. Beaule was correctly identified post-hearing as the second marker. Apart from that, there was no evidence as to who was on the selection board, let alone how they self-identified for employment-equity purposes.

[116] I note that the complainant submitted very similar employment-equity evidence in *Abi-Mansour, 2018*, including the same *Workforce Analysis* document entered in this matter. However, in that case, he was challenging non-advertised appointments and so argued the opposite to his submissions in this case. He argued that the DFO should have been guided more by employment-equity considerations and the need to be representative of Canada's diversity, by advertising that position to allow more employment-equity candidates, such as him, to apply. In this matter, he argued that the respondent should have met its employment-equity obligations by simply appointing him, without requiring that he qualify as he was already qualified in another pool. I note that such an approach would have denied other visible-minority candidates the opportunity to apply.

[117] Much of the complainant's discrimination argument consisted of his assumptions and beliefs. It was not based on the evidence, direct or circumstantial. He

repeatedly stated that all the appointees were "white, local," ignoring Ms. Wong's apparent self-identified status as a visible-minority appointee. He stated that all the selection board members were "white, local" without knowing who they were. His submission on employment-equity considerations was not based on the data he presented but rather on numerous incorrect assumptions.

[118] The data presented was only marginally helpful. However, to the extent that it provided some insight into the employment-equity profile of DFO's CS group at the time of this selection process, it did not support his argument that discrimination was likely a source of his failure to qualify. One document indicated a slight over-representation of visible-minority employees in the CS group at the time, and the second document indicated a slight under-representation.

[119] I also note that the CHRC might have been able to contribute to this part of the discussion. However, the complainant did not notify the CHRC until requested to do so by the Board on the first day of hearing. When he did so, he advised the CHRC that, "No action is needed from the CHRC" making it clear that he would not seek its assistance.

[120] The respondent relied on *Basi v. Canadian National Railway Company*, 1988 CanLII 108; [1988] C.H.R.D. No. 2 (QL) (C.H.R.T.), which reiterates and applies the same *Shakes* and *Israeli* tests put forth by the complainant. It argued that the complainant was eliminated from the Stream 1 process because he did not have the required asset qualifications and from the Stream 3 process because he failed the exam. Unlike the complainant in *Basi* he was not "qualified for the particular employment." Since the complainant did not meet this first step to establish a *prima facie* case, the onus did not shift to it, and the allegation should be dismissed.

[121] In both his testimony and written submission, the complainant acknowledged that his allegation that he was more qualified than the appointees in both streams was based on his "own beliefs and self-confidence." The respondent noted that there was a significant lack of an evidentiary foundation to support these allegations and referred to *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, aff'd 2006 FC 785, in which the Canadian Human Rights Tribunal found the following:

…

> *[41] … There must be something in the evidence, independent of the Complainant's beliefs, which confirms his suspicions. I am not saying that a Complainant's beliefs do not have any evidentiary weight. It depends on the circumstances. But an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough.*
>
> …

[122] To find discrimination, the Board must first determine whether the complainant has established a *prima facie* case. 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. The Federal Court of Appeal reaffirmed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154, ("Morris") that a *prima facie* case of discrimination under the *CHRA* is demonstrated using the *O'Malley* test: that the evidence adduced, if believed and not satisfactorily explained, is sufficient for a discrimination complaint to be made out. The Court also addressed the decisions in *Shakes* and *Israeli*, as follows:

> …
>
> *[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.*
>
> …

[123] In *Abi-Mansour,* 2016, the Board noted that whether the *Shakes* or *Israeli* test was applied, the result would be the same, as the complainant had not shown that he was qualified for the positions, as required by both tests and stated the following:

> …
>
> *[84] Nothing in the evidence presented by the complainant points to discrimination based on race or national or ethnic origin. The distinction is made between those who listed the required courses and the complainant, who did not. It is not sufficient to claim that the rejection of one course or not taking into account his experience shows discrimination. There is simply no evidence, whether circumstantial or other, to indicate discrimination on the part of the respondent. I would apply the same reasoning as stated in* Nash v. Commissioner of the Correctional Service of Canada*, 2014 PSST 10 at para. 54, as follows:*
>
> **54** Although the Tribunal can accord weight to the complainant's belief, it must consist of more than just a

> "bare possibility", as the Canadian Human Rights Tribunal has stated that "an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough." See *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, at para. 41; aff'd: 2006 FC 785.
>
> …

[124] In this case, too, applying either *Shakes* or *Israeli* would lead to the same conclusion for the same reason. As in *Abi-Mansour, 2016*, nothing in the evidence, either direct or circumstantial, pointed to a prohibited ground of discrimination as a factor in the complainant's failure to qualify. As he argued, it is a low bar to establish a *prima facie* case; however, it requires more than the complainant's belief without something upon which it could be based.

[125] There was no evidence of discrimination in the respondent's choice or application of the asset criteria in Stream 1 or in the development and marking of the exam in Stream 3. There was no evidence upon which the complainant could base his assertion that he was qualified and that the appointees were less qualified than him. Therefore, he did not meet the first step required by both *Shakes* and *Israeli*.

[126] There was no evidence of discrimination in the respondent's choice of an advertised process. The complainant's suggestion that the job should simply have been given to him in a non-advertised process would have denied a very large group of applicants, undoubtedly including among them other visible-minority candidates, the opportunity to apply.

[127] The complainant failed to establish a *prima facie* case of discrimination.

IV. Conclusion

[128] The complainant did not meet his burden of proof to show that the respondent abused its authority in setting and applying the asset criteria for Stream 1, or by showing personal favouritism towards the Stream 1 appointee. He did not show abuse of authority in the development or the marking of the Stream 3 exam, or any bias against the complainant in the Stream 3 process. Nor did the complainant show any abuse of authority in the respondent's choice of an advertised process, or make out a *prima facie* case that the respondent had discriminated against him.

V. Anonymization request

[129] The complainant requested an order anonymizing the style of cause of this decision. He advised that the same request had been denied in *Abi-Mansour, 2018*, and that he had challenged that ruling by judicial review.

[130] The complainant submitted that he has applied to many public service appointment processes but that he has been unsuccessful in landing a position. At the time he made his previous request to the Board in April 2018, two managers had warned him that his frequent litigation before the Board and the courts on staffing matters was likely having a negative impact on his chances of securing employment. The complainant submitted that since then, he had heard this from more managers. However, he specified only one. In March 2019, a team leader in the Crown corporation where he was temporarily employed on an interchange offered the same observation.

[131] The complainant also said that he had travelled to the Middle East and had Googled his name there, as well as during a stopover in London, England. He discovered that in both places, Google retrieved the same information as it did in Canada, that is, it brought up his previous board and court decisions.

[132] Between May and June 2018, the complainant actively sought employment and had a number of informal interviews exploring the possibility of being chosen from a pool in which he had qualified. However, no job offers were forthcoming. In September 2018, he qualified in another pool related to data and statistics, and in January 2019, he was called for an informal interview for an employment possibility. He explained that: “The manager in question was even looking to hire only members of an employment equity group. No job offer was made, and no answer was ever given.”

[133] The complainant is concerned that the Board’s publication of decisions bearing his name allows potential employers in the federal public service, elsewhere in Canada, and in the Middle East where he could also work, to find those decisions that reflect poorly on him and negatively affect his chances of being hired. As he put it:

> *Given this factual matrix, the more probable inference is that the complainant, through his long job search experience, has demonstrated that publishing his name on the public record is at least a factor in depriving the complainant from landing employment.*

[134] The complainant argued that the open court principle does not apply to the Board in a s. 77 complaint and that the ruling in *Abi-Mansour, 2018* was "… wrongly decided and riddled with errors of fact and law. The said decision is not made by an impartial adjudicator given his negative language against the complainant throughout the decision."

[135] The complainant submitted that the correct legal test for anonymization is not the open court principle. Rather, he argued that the *Privacy Act* (R.S.C., 1985, c. P-21) prevails in that a litigant's name is personal information collected by a government institution that cannot be disclosed without consent, except when the public interest clearly outweighs the invasion of privacy. He also argued that if the open court principle does apply, then the test to be used should not be the *Dagenais/Mentuck* test but rather the "objectively discernible harm" test as discussed in *A.B. v. Canada (Citizenship and Immigration)*, 2018 FC 237 at para. 40, referencing *A.B. v. Bragg Communications Inc.*, 2012 SCC 46. He further argued that anonymizing the style of cause would only minimally impair the open court principle.

[136] The respondent argued that the *Dagenais/Mentuck* test is applicable to all discretionary decisions that limit access to judicial proceedings. The test for anonymization is that it must be necessary to prevent a serious risk to an important interest. The salutary effects of such an order must outweigh the deleterious effects, including the public interest in open and accessible judicial proceedings. To prove the element of serious risk required by the first stage of the test, a party must demonstrate that the threat of injury is "real, substantial, and well grounded in the evidence" (see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras. 27, 30, and 31, and *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 30 and 31). The second stage deals with proportionality by balancing the resulting positive and negative effects.

[137] The respondent submitted that the facts provided to support the complainant's request were based on hypothesis, speculation, and conjecture rather than on a true evidentiary foundation. The alleged warnings from managers about the complainant's legal proceedings were nothing but hearsay. It is possible that a potential employer could become aware of decisions involving the complainant, which may or may not impact his employability. However, there is no real and substantial basis, well grounded in evidence, to suggest that any violation of his privacy amounts to a serious

risk to an important interest or that the salutary effect of concealing his name would outweigh the public interest.

[138] I agree that the vague references to managers who gave him warnings do not amount to the kind of substantial evidence of harm that would be required to meet the test. The equally vague evidence that the complainant was invited to several informal interviews to be chosen from a pool, only to receive no job offers, is also unhelpful. While it would surprise no one to learn that those job opportunities might have evaporated following a Google search by a hiring manager, there was no evidence to that effect. And even had there been, this is not the kind of serious harm to an important interest that can form the basis for anonymization.

[139] The complainant sought to make the case that things had worsened since the ruling in *Abi-Mansour, 2018*, stating: "Since then, there have been many developments." However, there is in fact very little difference between the basis for his *Abi-Mansour, 2018* request and this one. He received one more warning from a team leader, for a total of three. And he focused slightly more on the possibility of employers in the Middle East accessing his information after Googling his name in London and Beirut, Lebanon. However, he raised that issue in *Abi-Mansour, 2018*, as well.

[140] The evidence and arguments with respect to the complainant's anonymization request are essentially the same as those put before the Board in *Abi-Mansour, 2018*. I adopt the reasoning in that decision at paragraphs 15 to 44, and specifically the following:

> …
>
> *[37] The harm the complainant speaks of and his risk of being unemployable is speculative in nature. More importantly, if in fact he is suffering from loss [sic] of employment opportunities, this cannot be reversed retroactively.*
>
> …
>
> *[39] The complainant is aware that every time he files a complaint under the* Act *that it will result in a public hearing and public Board decision of the matter. He has no right to privacy of the subject matter of his complaint and the decision arising therefrom.*
>
> *…*

> *[41] A person who chooses to file 48 separate complaints against the government should be responsible enough to accept the accountability that he may become known as a frequent litigant.…*
>
> *…*
>
> *[42] Furthermore, if I were to grant the complainant's request, then literally every complainant appearing before this Board could reasonably request that his or her case not be published out of the fear that some ill will could arise from putting public service managers through a hearing process.*
>
> *[43] And finally, given the extensive history of litigation involving 48 complaints under the* Act *that the complainant has undertaken, and the fact that the many resulting decisions of tribunals and courts are all available on the Board [sic] website, the fact is that it is too late for him to worry about a stigma being attached to his name by legal proceedings against the federal government.*
>
> *[44] As we say on the Prairies, "the horse is out the barn door" on that issue.*

[141] I concur with this finding.

[142] Furthermore, in *Abi-Mansour, 2020*, the Board also concurred with and adopted this ruling and noted that it had withstood judicial scrutiny. That decision succinctly outlines as follows the sequence of judicial events by which this occurred:

> …
>
> *[51] …The complainant filed a motion before the Federal Court of Appeal for an order to stay its [the* Abi-Mansour, 2018 *decision's] 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.*
>
> …

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

(The Order appears on the next page)

VI. Order

[144] The complaints are dismissed.

[145] The request to anonymize the style of cause of this decision is denied.

January 22, 2021.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board