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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 JUSTICE

Respondent

and

OTHER PARTIES

Indexed as
Abi-Mansour v. Deputy Minister of Justice

In the matter of a complaint of abuse of authority - paragraph 77(1)(a) 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: Joel Stelpstra, counsel

For the Public Service Commission: Louise Bard, by written submission

Heard at Ottawa, Ontario,

May 22 and 23, 2019.

REASONS FOR DECISION

I. Complaint before the Board

[1] On March 31, 2016, Paul Abi-Mansour ("the complainant") applied unsuccessfully for an employment equity advisor position with the Department of Justice classified at the PE-02 group and level (selection process 2015-JUS-IA-KB-101252). He made complaints pursuant to s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) with respect to two appointments that were made under that appointment process.

[2] The complainant was screened in to the appointment process and passed the exam. However, his candidacy was eliminated after the interview and reference-check stages as he did not obtain the pass mark for the essential merit criterion of "judgment". He alleged that the respondent abused its authority in the application of merit and set out his allegations in that regard, as follows:

> *a) Abuse of authority in developing the interview questions and assessment grid*
>
> *b) Abuse of authority in setting the essential qualifications for the position (SOMC)*
>
> *c) Abuse of authority in assessing the complainant's answers at the interview and in assessing the complainant's reference checks*
>
> *d) Using assessment tools that present systemic barriers for minority groups (namely behavioural based and situational interviews)*
>
> *e) Appointing candidates who do not meet essential qualifications*
>
> *f) Adverse effect discrimination against the complainant*
>
> *g) One of the board members lacking the necessary skills to conduct a fair assessment of candidates.*

[3] The respondent denied the allegations.

[4] 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 Federal Public Sector Labour Relations and Employment Board ("the Board"). The PSC declined to participate in the hearing and took no position on the merits. It filed a written submission describing its policies and the relevant jurisprudence.

[5] The complainant did not notify the Canadian Human Rights Commission, as required by s. 78 of the *PSEA* whenever a complaint raises an issue involving the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6).

[6] For the reasons that follow, the complaints are not substantiated. The complainant failed to show that the respondent abused its authority in the application of merit and failed to make out a *prima facie* case of discrimination.

II. The complainant's evidence and submissions

[7] The complainant testified that he felt that he was set to be placed in this position; that it should have been easy for him to obtain, given his qualifications. He had worked on projects in a Human Resources department and had volunteered on employment equity committees in the workplace and with his union. In addition, while people in this field typically have only policy experience, he felt that his technical data-management skills would be a significant advantage.

[8] He also noted that it was the minimal possible promotion for him as it was the equivalent of moving from an AS-03 to an AS-04 position. A PE-02 position was in reality a junior position, for which he was overqualified. As to why he would apply for what he felt was a junior position, the complainant said that he had no "connections", that there were barriers to obtaining higher positions, that employment equity was an interesting domain for him, and that it would look good on his resume.

[9] The complainant submitted that "judgment", the criterion he failed to pass, is a matter of personal suitability, and that the assessment methods for such matters are very subjective. There is little room to prepare for an assessment of personal suitability factors like judgment. He alleged that the way personal suitability has typically been assessed has covered up nepotism and discrimination. In the past, it was used to simply select whomever managers wished to select, and it continues to be used that way today. The following summarizes the complainant's evidence and submissions in that regard.

A. The test was too easy

[10] The complainant described the written test as being "open book" and submitted that accordingly, no skill was required to pass it. All a candidate had to do was use the

Internet. Had it been a closed-book test, he still would have passed it, because he had passed other, more complex tests.

[11] However, the other candidates would not have passed it. He said that the Board could draw this inference because the respondent refused to produce the other candidates' tests and résumés. Also, there should be no presumption that they had passed just because the respondent said they did.

[12] He questioned the selection board's decision to interview 22 people for what he described as being a one-year assignment on an acting basis. He said that the respondent ensured that many candidates were screened in and passed the exam, which, in turn, allowed it to manipulate the rest of the process and choose whomever it wanted. It was a matter of supply and demand.

[13] On cross-examination, the complainant was referred to the exam instructions, which indicated that using the Internet to write the exam was forbidden

B. The interview question on judgment was not clear

[14] The complainant submitted that the question he failed lacked clarity as it just referred to judgment and did not elaborate on what that meant. He said that judgment can be anything — it can be about customer service or about decision making. He said that: "from what we got, I would say it was customer service". The complainant felt that the question did not assess judgment, that it was "more of a customer-satisfaction question". However, he also testified that he assumed that he was being assessed for judgment in decision making. He felt that his answer showed that he would take ownership of a problem and deal with it.

[15] The complainant submitted that he was used to facing different kinds of questions, including situational questions, in appointment processes. However, the interview questions in this process were all situational; therefore, he said that he was "dead in the water" because, in his view, one cannot prepare for such questions.

C. The interview answers and referee responses were not rated equitably

[16] The complainant produced the responses to the judgment question of all 16 candidates who were found qualified. He submitted that their answers were no better than his, that some of them had their weaknesses as well, but that they had received good marks nonetheless. He pointed to nothing specific in the responses that showed

such a discrepancy but simply felt that the other candidates had been marked generously, while he had been marked harshly. Based on how the other candidates' answers had been assessed, he felt that his mark on the judgment criterion should have been 8 or 9 out of 10.

[17] He also introduced the responses of the appointees' referees to the questions asked of them about the appointees' judgment. He criticized using references as an assessment tool because managers think that they do not have to provide them. He said that one of his referees had been his supervisor but was a very busy executive. It could have been anticipated that she would not write much. He also alleged that the references he provided were not properly reflected in the way they were rated.

D. Employment equity advisors do not need judgment

[18] As indicated earlier, the complainant submitted that he should not have failed the personal suitability criterion of judgment; that he should have been marked at 8 or 9 out of 10. However, he went further and argued that it was improper for the respondent to have included judgment as an essential merit criterion in the first place. The judgment criterion, quite simply, should not have been there at all.

[19] He argued that a PE-02-level position is junior and that the candidates for it would be in PE-01 positions. Therefore, the respondent could not expect employees in such low-level jobs to acquire judgment, as they would be expected to in PE-03 and PE-04 positions.

[20] He said that judgment should not have been used as a criterion because it was arbitrary. It was not related to the job duties. Nothing in the job description, which was the only formal documentation about the position in evidence, shows a need for judgment. The job simply involved implementing decisions made by others; it had a limited scope.

[21] He further suggested that in his view, "client service" would have been acceptable as a criterion, or perhaps "thinking things through", but not judgment. He did acknowledge that perhaps judgment could legitimately have been an asset, just not an essential qualification.

E. Selection board member lacked necessary skills to assess candidate

[22] The complainant raised the issue of Brittany Gagné's qualifications to act as a selection board member. He suggested that it was not established that she had the necessary skills and competency to make a fair and complete assessment. He said that department heads are exposed to and bound by the principles developed by the PSC. However, Ms. Gagné was simply the incumbent in the position.

[23] Being a selection board member was not part of her duties in that position. Having the skills to do the job did not necessarily give her the skills to assess someone. He asked how one could be sure that such a person on a selection board would know staffing principles and would respect the candidates' rights.

[24] He suggested that selection board members usually hold positions one or two levels higher than the position for which they are hiring. He commented that he was more qualified than she was, as he had been in a higher position, except for the last six months. This was based on his understanding that Ms. Gagné had been in the position for only six months. However, this was incorrect, she had been in the position for six years.

[25] He also noted that she was in a junior position on the selection board, and therefore, although they could discuss matters, she was not in a position to override the manager.

[26] He concluded that although another person was involved, Ms. Gagné was 50% of the selection board. Therefore, her presence tainted the entire composition of the board.

F. Discrimination allegation

[27] The complainant introduced excerpts from chapters three and four of a document entitled, *Visible Minorities and the Public Service of Canada*, a report submitted to the Canadian Human Rights Commission by John Samuel & Associates Inc. of Ottawa and dated February 1997. It contained information gathered through interviews and focus-group discussions with members of visible minority groups about their experience in the public service. The complainant pointed to certain passages of the report as circumstantial support for his submission that he had been discriminated against.

[28] He referred to the section on hiring, which discusses a tendency of those hiring to seek like-minded individuals; a phenomenon known as “mirror image” recruitment. The report notes that managers have a responsibility to ensure that designated group members take part in selection boards, so that the boards reflect the diversity of the workforce. The complainant noted that this selection board consisted of two white women and that it was not diverse.

[29] He had voiced a concern that the interview consisted entirely of situational questions and he felt that the selection board members did not appreciate hearing that concern. He said that he has raised similar issues with deputy heads, Board members, and judges and that they retaliate. He said that this is Canadian culture and that this has been his experience.

[30] He mentioned that he had had a debate with Ms. Brownlee, the senior selection board member, about how to attract Indigenous lawyers to departments and that she did not like anything he had to say. Ms. Gagné, in his view, was looking for adverse answers. She often made only one note when many notes should have been taken. He said that there was a weird atmosphere in the room and that the selection board members were very strict about the rules. However, the complainant said that he felt that he left the interview on good terms with them.

[31] He referred to the problem of personal suitability, which also relates to the mirror-image issue. The report noted that personal suitability criteria can negatively impact visible minority employees due to a lack of familiarity with government processes or due to cultural differences that may render them less suitable in the eyes of non-diverse selection boards. The complainant alleged that this entire selection process was conducted based on personal suitability.

[32] The report also noted that the interviews and focus-group discussions indicated that while statements of qualifications serve as the basis to assess candidates, they do not always reflect the essential duties of a position. The complainant noted that that was so in this case with the judgment criterion; it had no relevance to the position that would justify it being an essential criterion. At most, judgment could have been considered only as an asset.

III. The respondent's evidence

A. Barbara Brownlee, Acting manager of the Employment Equity unit

[33] Barbara Brownlee was the manager of employment equity on an acting basis at the Department of Justice at the time. She headed the unit and was responsible for ensuring that employment equity was foremost in the department's mind. This entailed engaging with the legislation, reporting on employment equity, managing the team, and liaising with senior management.

[34] Ms. Brownlee started her career with the CBC in the mid-1970s in labour relations and employment equity staffing. She worked on the first employment equity policy created for the CBC and managed employment equity units in its Ontario region and at its headquarters. She joined the federal public service 13 years ago and retired in October 2017.

[35] As the acting manager she was responsible for staffing the unit, so she chaired the selection board. The unit was very small, consisting of just her, two employment equity advisors, a duty-to-accommodate advisor who worked out of Toronto, Ontario, and a small, shared administrative staff.

[36] She testified that one of the posted positions was to replace Ms. Gagné, who was to go on maternity leave for 18 months. The other was to replace an employee who was leaving for another government department. As well, the goal was to create a pool for future vacancies.

[37] She testified that to create the SOMC, she began with the generic PE-02 work description and then looked at the unit's specific operational requirements and the competency needed at that level. She said that the education component is standard. For the knowledge component, an understanding of employment equity principles was required. She developed the SOMC with input from Ms. Gagné.

[38] The incumbent was responsible for the advisory committees representing two of the designated groups — women and Indigenous people. She frequently dealt with and advised employment equity champions, who are usually in senior management, typically regional directors. As well, the position involves significant contact with high-level management; for example, preparing briefing notes for the deputy minister level.

[39] Judgment was a relevant criterion because the unit often has to respond to questions that come up in Parliament or from a deputy minister or the Canadian Human Rights Commission, if it is doing an audit. The person in such a position must be able to respond to inquiries from more senior positions correctly and within the bounds of employment equity legislation and departmental operations.

[40] Ms. Brownlee described the appointment process as follows. The poster is issued, then applications come in and are screened for the essential criteria of education and knowledge. A letter is sent to those screened out. The remaining résumés are reviewed, and screened-in applicants are invited to write the exam.

[41] The exam had two questions. The board members marked the exams independently, then sat together and reviewed their marks, for consistency. Candidates who passed the exam went on to the interview and reference-check stages. At this point, the judgment criterion was assessed by questions in both the interview and the reference check.

[42] In the interviews, Ms. Brownlee and Ms. Gagné alternated asking the questions and noting the answers.

[43] To assess their oral communication capabilities, the candidates were asked to make a presentation consisting of four or five slides explaining why they had made certain recommendations. The selection board noted their answers and determined their marks.

[44] To assess judgment, they used a scenario that occurred fairly often in the unit to illustrate what they would look for at the PE-02 level. The candidates were asked to respond to this situational question:

> *The Associate Deputy Minister's office calls asking for clarifications regarding a briefing note that you had prepared related to the employment equity strategy and that was approved by the director general. The Director General is out of the office for the day. How would you resolve the matter?*

[45] The rating-guide tool provided a range; for example, for a manager or a more-senior level, there were different assessment criteria. They based the assessment on this standardized tool, which outlined the applicable assessment criteria for the position as follows:

> *Defines the nature and scope of the problem or situation;*
>
> *Gathers all the pertinent information before making decisions on an issue;*
>
> *Compares and weighs all the possibilities before making a decision or recommending a solution to a problem;*
>
> *Is willing to request and accept advice;*
>
> *Understands what lies behind a particular situation; Other acceptable answers.*

[46] To assign the marks, they considered whether the candidate had responded to the majority of the criteria listed. They determined if the answers, in their opinion and based on their knowledge of the job, responded to the question and met the assessment criteria.

[47] They concluded that the complainant's answer did not meet the criteria, primarily because it lacked the thought process. In Ms. Brownlee's mind, his answer did not really respond to the question. They were looking for something more definitive with respect to the steps to take. Other candidates answered the question more specifically, as determined according to the assessment criteria. As well, they were concerned about the complainant's comment that he would challenge the person who called.

[48] On cross-examination, the complainant put to Ms. Brownlee that he would not have said that he would challenge the caller and suggested that perhaps she had had difficulty following him, as he speaks very quickly. Perhaps she misunderstood what he said. Ms. Brownlee indicated that she wrote down what he said and that he said it. She did not recall if she had difficulty following him but stated that if she had, she would have asked him to clarify.

[49] As to why Ms. Gagné did not note this comment, Ms. Brownlee testified that they had alternated the note-taking responsibility for each question and that she had been responsible for recording the answer to that one.

[50] When she was asked if the result would have been the same had the comment not been made, Ms. Brownlee responded that it would not have made a difference in this particular question. It was only part of the outcome; part of what the assessment was based on.

[51] For the reference check, the referees were asked the following: "Overall, does the candidate demonstrate the ability to demonstrate judgment? Does he/she have the ability to demonstrate proper judgment when faced with a difficult situation? Please provide example [*sic*] to support your comments."

[52] Ms. Brownlee testified that the referees were emailed a document to complete. She and Ms. Gagné marked the responses individually and then discussed any differences between their marks. They reviewed the assessment criteria to ensure that they assessed everyone fairly and with the same criteria.

[53] On cross-examination, Ms. Brownlee testified that she and Ms. Gagné agreed on the mark assigned to the complainant on the judgment criterion. She testified that they always had a further discussion about any mark below the pass level, to ensure that they were confident about the result.

B. Brittany Gagné, Employment Equity Advisor

[54] The appointment process was run, in part, to replace Ms. Gagné during her maternity leave. She was one of the incumbents and therefore was very familiar with the duties of the position.

[55] At the time, she had been an employment equity advisor for six years. She provided support, advice, and guidance to four employment equity committees and had corporate reporting responsibilities with respect to two, the advisory committees for Indigenous people and for women. She also had some background in staffing, as well as frequent exposure to it in her daily role as an employment equity advisor.

[56] Ms. Gagné stated that she might have looked over the questions and provided comments but that she was not otherwise involved with developing the tools. She was mainly involved with the interviews and reference checks.

[57] Ms. Gagné noted that the rating guide provided an assessment map. It contained the questions that they would ask and the assessment criteria that outlined the expected answers or behavioural indicators. Like Ms. Brownlee, she described their pattern of alternating asking the questions and noting the answers. She said that they both tended to jot down some notes even when it was not their turn, but they made sure that one of them was solely tasked with the responsibility to comprehensively note each answer.

[58] She said that the complainant's interview started very well. For example, his familiarity with employment equity terms was notable as a number of the candidates lacked it. However, some of his responses in other areas were not what they were looking for, especially in the area of judgment.

[59] Ms. Gagné testified that his response to the judgment question was one of the shortest they received and that it spoke more to taking initiative than to judgment. They wanted the reasoning and the steps. They used a situational question because the scenario described something that happens frequently — employment equity champions are often very senior people. Lacking from the complainant's answer was the in-between action; that is, the steps to take before responding.

[60] For example, in such a situation, it is important to consult colleagues and to gather all the information before responding. And those in between in the hierarchy must be spoken to because senior people will ask their subordinates about the issue. Therefore, they need to be in the loop. The complainant's response did not reflect an understanding of these important aspects of responding to the situation.

[61] Once the interview and reference-check stages were completed, Ms. Gagné's involvement lessened. She discussed the candidates with Ms. Brownlee and had input, but selection of the successful candidates was not her decision to make.

[62] On cross-examination, the complainant asked Ms. Gagné how the judgment question related to the job. She reiterated that the situation described occurred frequently on the job. Often, departmental champions are asked to report about an employment equity initiative, and they contact the unit for information, so that they can respond. The information given to them must be timely and accurate. As the champions are often very senior people or their representatives, determining how to handle these requests calls for the exercise of judgment.

[63] The complainant asked what would happen if an advisor provided no answer to the Associate Deputy Minister ("ADM"). Ms. Gagné responded that it would depend on the sensitivity of the question at hand but that the point of the question was for the candidates to elaborate on their thought processes, not just to say that they would respond. For example, they were looking for answers that indicated that the candidate would make sure that he or she had all the information, would consult with colleagues, and would consider any possible sensitivity. The complainant's response went only as

far as determining what the ADM's office needed clarification of; it did not describe the steps to take after that. Judgment entails being able to assess a situation and its scope.

[64] Ms. Gagné elaborated that judgment goes hand in hand with almost everything an employment equity advisor does and that an advisor must know when to push advice and when not to. She stated further that in her opinion, judgment is important for every public-service position; that judgment is being exercised, no matter what is being done.

[65] Ms. Gagné testified that the complainant's reference checks were positive but that they did not contain much information. For example, one said that his judgment was good, but the referee could not think of an example. They were looking for a demonstration of judgment, not just an attestation. Accepting that without more would mean just taking the referee's word; examples were very important.

[66] The reference from the complainant's former supervisor was more detailed and spoke a bit more to judgment, but the provided example spoke more to initiative. There was also an example about volunteering initiatives, which was excellent, but again, it did not speak to judgment. A lack of concrete examples showing good judgment affected the selection board's ability to assess the complainant on the judgment criterion.

[67] To determine the mark, they referred to the rating scale and tried to accurately reflect the referees' information. Ms. Gagné explained that they tried not to penalize a candidate simply because their referees failed to provide much detail. Therefore, if the referee's statement was positive but was not detailed enough or lacked examples, they would mark it as three out of five, which was a pass. The complainant's referee did say that he had good judgment. Therefore, they considered that a pass, but they were looking for more, for an example that concretely demonstrated it.

[68] Ms. Gagné explained that the first reference had no example and therefore did not really warrant a mark of three. However, the second one had a bit more detail. Therefore, they gave the complainant the benefit of the doubt and assigned a combined mark of three to both references.

[69] She reiterated that all the candidates' references were marked the same way. They were careful to be consistent in how they assessed them, as the information submitted by the referees was not always as complete as it ideally would have been.

C. Employment equity data

[70] In response to an "Order for Provision of Information" from the Board, the respondent provided the following statistics for different stages of the appointment process. This information was introduced into evidence.

[71] Of the 50 candidates who applied to the appointment process, 22 self-identified as members of a visible minority group. Of the 36 candidates who wrote the exam, 14 self-identified. Of the 24 who passed the exam, 7 self-identified. Of the 22 who went on to the interview and reference-check stages, 7 self-identified. And of the 16 found qualified, 5 (32%) self-identified.

[72] The respondent pointed out that some other candidates might have been members of visible minority groups. However, the statistics reflect only those who self-identified.

IV. The respondent's submission

[73] The respondent submitted that the onus was on the complainant to prove his allegations, on a balance of probabilities.

[74] The staffing process was conducted in an objective manner; it followed the regime set out for such processes. The process involved screening, an examination, an interview, and reference checks. The respondent has the statutory authority to use any reasonable assessment methods and to apply wide discretion in the appointment process.

[75] Two witnesses gave detailed evidence as to how they treated candidates consistently and that, at times, the complainant got the benefit of the doubt. The evidence demonstrated why both the complainant's interview answer and his referees' responses to the judgment question were found lacking.

[76] If the situational question eliminated the complainant's candidacy it was not on the basis of race. This type of question is designed to screen out those who can memorize answers, by presenting a candidate with a problem to see if they can think

their way through it. To suggest that it is an abuse of authority to require judgment, critical reasoning and the ability to think things through for an advisory position is absurd.

[77] There was no proof of discrimination in the evidence, just a bare assertion.

[78] The complainant failed to show that an abuse of authority had occurred and had failed to demonstrate a *prima facie* case of discrimination.

V. Reasons for decision

[79] The respondent has wide discretion to establish the essential qualifications for any position and to decide the assessment methods to be used to determine if a candidate meets them (see ss. 30 and 36 of the *PSEA*).

A. The judgment criterion

[80] Each of the judgment questions was allotted a possible mark of 5, of which 3 was the pass mark. Accordingly, there were 10 total marks for judgment, of which 6 was a pass. The complainant failed the criterion by only 1 mark, receiving 5 out of 10.

[81] Cogent evidence was presented with respect to the complainant's response to the interview question. The respondent's witnesses explained why his answer was considered lacking and how it did not provide the thought process or reflect an understanding of the important steps to take before responding to the kind of question presented by the scenario.

[82] However, the evidence was contradictory, in one respect. Ms. Brownlee testified that the complainant answered that he would first challenge the caller or challenge who called. It was clear that Ms. Brownlee found this answer inappropriate.

[83] The complainant testified that his memory of the events was not strong. In fact, this was one of the first statements he made in his opening.

[84] However, he did not believe that he said this or that he would have said such a thing. He suggested that Ms. Brownlee might have had difficulty following him, as he speaks quickly, and that she might have misheard him. However, he did not indicate anything that she said or did to suggest that. Her response to that suggestion was that she did not recall having difficulty following him but that if she had, she would have

asked him to clarify. She was very clear that he said that he would challenge the caller, as reflected in her notes.

[85] The complainant pointed out that Ms. Gagné did not note this comment, although he did not dispute that the note-taking task was alternated and that it had been Ms. Brownlee's responsibility to notate this question. However, Ms. Gagné took some notes on the question anyway. In his view, her notes, in general, were more meticulous, and therefore, it was likely that she would have noted it had he said it.

[86] It cannot be determined with any certainty whether the complainant made that statement. I think that it is more probable than not that he did not use the word "challenge" or that if he did, he did not mean it in the way Ms. Brownlee heard it. From the rest of the notes taken of his answer, I deduce that he was likely trying to convey that he would first determine the level and role of the person making the inquiry on the ADM's behalf, as that would, in part, determine his approach.

[87] Nevertheless, in cross-examination, Ms. Brownlee was asked if the outcome would have been different had the statement not been made. She was very clear in her response that whether or not he said it, it would have made no difference to the result for that particular question; it was only part of the assessment.

[88] Both selection board members were clear that apart from the contested statement, the complainant's response overall, was short and incomplete and that he did not provide his thought process or outline the steps he would take. Ms. Gagné's notes show that he did not indicate that he would consult colleagues or his manager or that he would inform the director general of the discussions. These important aspects should have been detailed in his answer.

[89] The complainant's testimony also indicated that he was focussed more on a "client service" or "client satisfaction" type of response and on "taking initiative". These are good and important attributes to show in an interview, but they do not address the judgment criterion. It is notable too that an example of judgment provided by one of the complainant's referees also spoke more, in the selection board's view, to initiative, rather than to judgment. The complainant himself agreed in his closing that he may have "overlapped" different criteria, for example "judgment and client service" and "judgment and problem solving."

[90] I am satisfied that there was no abuse of authority in how the selection board rated the complainant's answer to the interview judgment question or in how it rated the referees' responses to the questions posed to them about his judgment.

[91] The complainant challenged Ms. Gagné's view that judgment is important for any public-service job. He asked me to draw the inference that judgment is not required for other public-service positions because he had introduced SOMCs that did not specifically list it as a requirement. He repeatedly asserted that good judgment is not required to be an effective employment equity advisor, that a person could excel in the job without it, and that it should not be required for the job.

[92] It should go without saying that there is no merit to this argument.

B. Selection board member's qualifications

[93] The complainant challenged Ms. Gagné's qualifications to act as a member of a selection board, primarily based on the fact that she was an incumbent in the position and not the department head or someone in a position a level or two higher. His comments were entirely speculative and were based on nothing but his own opinions.

[94] The former Public Service Staffing Tribunal considered an allegation of an improper composition of a selection board in *Sampert v. Deputy Minister of National Defence*, 2008 PSST 9, as follows:

> …
>
> ***53*** *There is no provision in the* PSEA *which requires a deputy head to establish an assessment board or that it have a certain composition (for example, to have a human resources officer on the board). Whether an assessment board is improperly constituted is a question of fact which depends on the specific complaint and the evidence presented at the hearing.*
>
> ***54*** *Those who conduct the assessment should be familiar with the work required in the position to be staffed and, in the case of an advertised appointment process, should not have any preconceived notions as to who should be appointed. In some cases, managers will choose to conduct the assessment completely on their own. In other cases, a manager might invite an individual from another department or another area within the department, who has a particular expertise, to participate as a board member.*
>
> …
>
> ***56*** *The complainants have the burden of proving abuse of authority. In this case, they have merely stated that the assessment*

> *board should have had a third party, such as a human resources officer, on the board, but have not provided any cogent evidence to show that the board, as constituted, acted improperly in any way. Moreover, they have not pointed to any statutory authority that requires a specific person, be it human resources officer or otherwise, to be a member of the assessment board. Therefore, this allegation of abuse of authority is not substantiated.*
>
> …

[95] Ms. Gagné testified that she had knowledge of and experience with staffing matters, some of which she had acquired by her frequent exposure to them as an employment equity advisor. I also note that her detailed understanding of what the job entailed based on her six years (not six months as the complainant alleged) in the position was clearly very helpful to the process.

[96] As the Board noted in *Sampert*, there are no specific requirements for the composition of a selection board and in the absence of any evidence to show that the board, as constituted, acted improperly, this allegation of abuse of authority is not substantiated.

C. Discrimination

[97] 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.

[98] 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.

[99] The Court also addressed the *Shakes* and *Israeli* tests argued by the complainant (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). The Court commented that:

> …

> *[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.*
>
> …

[100] 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 position, 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.

[101] In this case, too, applying *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 the complainant 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.

[102] The complainant did not make out a *prima facie* case of discrimination on the basis of race or ethnic or national origin. To do so, he could have shown that he was qualified for the position, that someone no better qualified than him was appointed, and that the appointee lacked the distinguishing feature that is the essence of a

human-rights complaint (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)). Had he done so, the burden of proof would have shifted to the respondent to establish that it had a reasonable, non-discriminatory reason for its impugned actions. However, the complainant was unable to meet the first step. He did not show that he was qualified for the position.

[103] With respect to the complainant's submissions about circumstantial evidence of discrimination, I have no doubt that the problem of mirror-image recruiting exists and that it is best when selection boards can reflect the diversity of the workforce. However, there was no evidence that a diverse selection board was possible in this very small unit or that it would have made a difference to the outcome, in the circumstances of this case.

[104] I also have no doubt that unfamiliarity with government processes or cultural differences in expression can, at times, turn personal suitability criteria into barriers for some candidates. However, the complainant cannot claim unfamiliarity with government appointment processes. As he testified, he has participated in many appointment processes.

[105] As for cultural differences, he noted that the selection board did not appreciate his criticism of the situational interview questions. He related that in his experience, raising such concerns is often unappreciated, not only by selection boards but also by deputy heads, Board members and judges. In his view, this is the Canadian way, and in his experience, it leads to retaliation. It was not clear if the complainant was suggesting that such criticism would have been better tolerated by a more diverse selection board. Regardless, the board not appreciating his critical comments does not amount to discrimination. There was no evidence of retaliation or bad faith.

[106] The complainant mentioned that the selection board members were very strict about the rules. He said that there was a weird atmosphere in the room, that they did not like what he had to say, but that he left the interview on good terms. The implication seemed to be that, in his view, there were cultural differences at play. However, he drew no link between these observations and discrimination.

[107] The complainant's view that the use of personal suitability criteria can create barriers for members of visible minority groups is undoubtedly true in some cases. And mirror image recruiting certainly does occur and can negatively impact candidates

who are members of visible minority groups. However, four other personal suitability criteria were used in this process that posed no barrier to the complainant, as he passed them all. They were initiative, effective interpersonal relationships, discretion, and reliability. The only one he failed was judgment.

[108] I am satisfied that the use of personal suitability criteria did not pose a barrier to the complainant's candidacy in this appointment process.

[109] As for the suggestion that barriers are created when selection criteria fail to reflect the essential duties of a position, certainly, the selection criteria must reflect the job duties. However, the complainant's assertion that judgment is not a relevant criterion for the essential duties of an employment equity advisor is not a credible position. As an aside, in my view, repeatedly making that assertion, in itself, demonstrates a lack of good judgment.

VI. Conclusion

[110] I find that the complainant did not establish that the respondent abused its authority by requiring good judgment as an essential merit criterion or that it inequitably assessed his interview and reference-check questions on that criterion. I further find that he failed to make out a *prima facie* case of discrimination.

[111] The complainant requested that his name be anonymized in this decision. I dealt with the same request in *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2021 FPSLREB 3. I refer to my comments in paragraphs 129-142 of that decision, in which I concur with and adopt the Board's comments in *Abi-Mansour v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 53 and *Abi-Mansour v. Deputy Head of Employment and Social Development*, 2020 FPSLREB 36

[112] I further note that repeatedly raising issues which the Board has already addressed and has found to have been without merit, is an abuse of the Board's time and resources. It negatively impacts the ability of other complainants and grievors to have their cases heard by the Board in a timely way.

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

(The Order appears on the next page)

VII. Order

[114] The complaint is dismissed.

[115] The decision will not be anonymized.

February 19, 2021.

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