

Date: 20170116

Files: EMP-2015-9521 to 9523, 9587, 9592, 9593, 9736, 9737 and 9785

Citation: 2017 PSLREB 8

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



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

ROBERT BOIVIN

Complainant

and

PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

and

OTHER PARTIES

Indexed as

Boivin v. President of the Canada Border Services Agency

Complaints of abuse of authority pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*

Before: Marie-Claire Perrault, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Karen Clifford, counsel

Heard at Hamilton, Ontario,
November 15 and 16, 2016.

REASONS FOR DECISION

I. Introduction

[1] The complainant, Robert Boivin, applied for a position as a senior officer, trade compliance (SOTC), classified at the FB-04 group and level, with the Canada Border Services Agency (CBSA). He was eliminated from the process after failing a question on the written examination. He filed complaints under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), in which he alleges that the respondent, the president of the CBSA, abused its authority with respect to the application of merit. The complainant also alleges that he suffered discrimination on the prohibited ground of disability.

[2] The respondent denies these allegations.

[3] The Public Service Commission (PSC) filed submissions in this case but did not appear at the hearing.

[4] As the complainant alleged that he suffered discrimination as defined under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*), he advised the Canadian Human Rights Commission (CHRC) of his complaints as required by s. 78 of the *PSEA*. On March 24, 2015, the CHRC advised that it did not intend to make submissions on this matter.

[5] The complainant filed several complaints with respect to the same appointment process with the Public Service Labour Relations and Employment Board (“the Board”). The files were consolidated on February 18, 2015, with the lead file being EMP-2015 9521. This decision applies to all the complaint files.

[6] For the reasons that follow, I find that the complaints are not substantiated. The evidence does not support a finding of abuse of authority in the application of merit; nor does it support a finding of discrimination, as the respondent provided reasonable accommodation in response to the complainant’s needs.

II. Background

[7] The complainant testified at the hearing. The respondent called two witnesses, Reg McAuley, regional manager of compliance verification and chair of the assessment

board for the appointment process at issue; and Natalia Preiano, human resources specialist and advisor to the assessment board.

[8] The complainant testified that he had applied to several processes for an SOTC position. According to him, his present client service officer position (classified at the CR-04 group and level) is essentially the same thing, albeit classified at a lower level. He was successful in some processes, not so in others. He applied for the process at issue in this decision in early 2014.

[9] On June 9, 2014, he received an email from the respondent informing him that he had successfully passed the test entitled, “SJT-318” (the “Situational Judgment Test”, developed by the PSC), and he was invited to participate in a written exam on June 23, 2014. The invitation clearly described the content of the exam as follows: three parts on knowledge questions (the CBSA, trade, and legislation), and a fourth part to assess the “ability to communicate effectively in writing”. It also indicated that the last question would be evaluated as either “Met” or “Not Met”, with “Met” being the mark required to pass the exam.

[10] The complainant replied the same day by email, stating that he needed accommodation for a disability, in his words, “specifically vision impairment”. He provided a letter from Health Canada concerning his accommodation needs. In his exchanges with the respondent, he stated that he was used to being tested “... in a darkened room on the 3rd floor of 55 Bay Street North”. He also added that he preferred a morning examination.

[11] The complainant explained at the hearing that he has extreme light sensitivity, which often causes him migraines. As the day progresses, with exposure to light, tiredness sets in. The summer is a difficult time of year for him because of the bright sunlight. He is accommodated at work by teleworking from home, where he has a blacked-out room in which he can rest and recover. The respondent did not contradict this evidence, and I accept it entirely.

[12] The respondent referred the complainant’s accommodation request to the PSC’s Personnel Psychology Centre (PPC). The PPC established the necessary accommodations for the complainant’s written exam after consulting directly with him as to his needs and symptoms.

[13] On July 10, 2014, the PPC forwarded to Ms. Preiano the recommended accommodations. Farrah Alladina, an assessment board member, forwarded the recommendations to the complainant the next day, with the following comments:

Please find enclosed the recommended accommodations (AAE) from the Personnel Psychology Centre (PPC), in regards to the FB-04 Knowledge Test.

Please review this document and let us know if you agree with their recommendations or have any concerns.

After we get your response we can schedule you for a testing session.

[14] The recommendations were as follows: a darkened separate room that could be closed to avoid distractions; a low-wattage lamp; and an electronic copy of the test, in 12-point font and formatted for use on a computer, with a paper copy for reference. Testing should be done in the morning, the complainant should be given the opportunity to arrive early, and short breaks should be allowed (with the test time stopped).

[15] The document also included a section titled "Important Notes". Its five notes can be summarized as follows:

- 1) Any accommodation not mentioned is not recommended.
- 2) The candidate should be informed of the accommodations, in writing, with sufficient time to provide feedback.
- 3) If the candidate experiences any physical or psychological indisposition that might hinder his test performance, before or during the test, it is his responsibility to inform the test administrator that he cannot continue. If that occurs, another date will be set for the test, and the candidate will not be penalized.
- 4) The recommendations are from the PPC, but the hiring manager is accountable for their final implementation.
- 5) The respondent must ensure that a test administrator will be accessible for the entire testing session.

[16] The complainant responded on the same day as follows: "Everything looks okay, and it shouldn't be a problem. I would like to recommend that I arrive early and we can make final lighting adjustments prior to testing if it [sic] necessary."

[17] On July 16, 2014, at 1:51 p.m., the complainant was advised that his written exam would be administered the next day, at 9:00 in the morning. The complainant replied as follows: "I will attend, however, this is very little notice." At the hearing, he

explained that having had less than 24 hours to prepare himself mentally for the test was, for him, an additional hurdle.

[18] The complainant did attend the next morning. He had been told to wait in the main lobby. However, that bright, noisy space was very difficult for him to deal with, so he found the examination room. A laptop had been set up, instead of a computer with a regular keyboard, monitor, and mouse. The respondent's IT services were contacted; they provided a keyboard and a mouse. Before the test started, the complainant told the test monitor, Ms. Preiano, that he had a migraine.

[19] According to the complainant, Ms. Preiano then told him he could reschedule the test but that he would need a doctor's note. She testified that she never mentioned a doctor's note, since in the case of a medical accommodation, the applicant can reschedule without penalty, as was stated in the document received from the PPC. Ms. Preiano did suggest that if he was feeling unwell, he might wish to consult a doctor, but that was not a condition for rescheduling the exam, which was an option open to the complainant at any time before or during the exam.

[20] The complainant testified that he felt that once he started the exam, there was no turning back. Several problems occurred during the exam. The lines that appeared on the printed copy also appeared on the computer screen, which was not only a distraction but also a problem, given his visual impairment, as the lines caused a visual disturbance. He removed the lines by deleting them.

[21] It appears from the printed copy of his exam that the font size changed for the answers in parts 3 and 4 of the exam, from 12-point to 10-point. The answer to the question evaluating the ability to effectively communicate in writing is therefore in 10-point font. The complainant testified that this caused him a problem, as it was difficult for him to reread his answer. He did not attempt to change the font, as he had understood that nothing could be changed on the template.

[22] Ms. Preiano testified that a number of functions had been restricted, such as spellcheck, but that it would have been possible to change the font. She also testified that the complainant did not mention the font size during the exam. He testified in cross-examination that she was probably right. He stated that he had asked about italics. Ms. Preiano had no recollection about that.

[23] The complainant mentioned noise that occurred during his test. The room was beside the elevator, and some people coming out of the elevator spoke rather loudly. At one point, he heard crunching. This all added to the visual strain he was suffering.

[24] Ms. Preiano explained that there had been one occurrence of noise from people stepping off the elevator, which did not last long. At one point, the complainant took a break and stepped outside the room. While he was out, she munched on some carrots. When he came back, she quickly finished her snack.

[25] Ms. Preiano testified that at the end of the test, she went with the complainant to make a printout from a USB key, so that he could sign the printed copy. He remarked at that time that he thought he had done well.

III. Issues

[26] The complainant submits a number of grounds that in his view support a finding that an abuse of authority occurred in the application of merit, as follows: the question testing the writing ability had an inherent bias, it was confusing and did not measure the ability it purported to assess, and the marking was inconsistent and arbitrary. He also alleges that the respondent discriminated against him by not providing proper accommodation for the exam. I will reformulate the issues, for the purposes of my analysis, as follows:

Issue I: Did the respondent abuse its authority in the application of merit when it assessed the question of effective communication in writing?

Issue II: Did the respondent discriminate against the complainant?

IV. Analysis

A. Issue I: Did the respondent abuse its authority in the application of merit when it assessed the question relating to effective communication in writing?

[27] Section 77 of the *PSEA* provides that an unsuccessful candidate in the area of selection for an internal advertised appointment process may file a complaint with the Board that he or she was not appointed or proposed for appointment because of an abuse of authority. As stated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 71, an abuse of authority may involve an act, omission, or error that Parliament cannot have envisaged as part of the discretion given to those with delegated staffing authority. Abuse of authority is a matter of degree. For a finding of abuse of authority to be made, an error or omission must be of such an egregious

nature that it could not have been part of the delegated manager's discretion (see, for example, *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26 at para. 32). The complainant has the burden of proof (*Tibbs*, at para. 50).

[28] The complainant alleges that an abuse of authority occurred in the application of merit. He failed the question on the written exam that tested the ability to communicate effectively in writing, which was worded as follows: "What traits or attributes do you think are important in a team player? Explain why you think they are important."

[29] I shall consider in turn the complainant's three allegations concerning that question.

1. The question had an inherent bias

[30] The complainant argued that the question was biased by seeking to have people identify traits that might distinguish them from others. According to him, having candidates identify traits that distinguish people is in itself discriminatory, or at least biased, in this case against those who do not think in terms of teamwork, such as himself, since he works at home as an accommodation measure.

[31] It is not sufficient for the complainant to make this assertion. He must explain how the question is discriminatory or biased and provide evidence in support of his assertion. He has not linked his allegation of discrimination to any prohibited ground of discrimination, nor has he demonstrated how the question is biased. The question was not related to teamwork as such. It was generic, in that it sought a logical answer, based on common knowledge. The complainant succeeded in a PSC situational test that according to his testimony tests team working abilities. He cannot claim that he has no notion of what a team is or that he has so little imagination that he cannot come up with a few attributes and why they are important. Mr. McAuley stated that the content was unimportant; what was sought was a capacity to articulate thoughts and support them. The allegation relating to bias is dismissed.

2. The question was confusing and did not measure the ability it purported to assess

[32] According to the complainant, the question was confusing. Why use both "traits" and "attributes", when they are synonyms? The question was not properly worded, which caused him some difficulty in the exam.

[33] Moreover, the complainant was of the view that the question did not measure effective written communication. More objective tests, such as the writing skills tests developed by the PSC, should have been used. The problem is that the act of correcting an essay question is too often subjective.

[34] Mr. McAuley testified that the question was designed so that those being tested could demonstrate logical thinking in response to an everyday situation. It had been decided at a higher level than Mr. McAuley's that the PSC writing tests were too expensive to use. In any event, Mr. McAuley was confident that the question was a good way to assess effective written communication.

[35] Mr. McAuley had formulated a short essay-type question on a generic subject that required no special knowledge. Its purpose was to test the applicants' ability to logically organize their answers by stating an introduction, advancing various thesis statements, justifying those statements, and closing with a conclusion.

[36] Mr. McAuley explained the importance for the SOTCs to communicate clearly and effectively in writing. Their work consists essentially of writing, for two main purposes: either documenting files to justify decisions made about duties and remittances and other trade obligations according to the applicable legislation and regulations, or communicating with clients, mainly by email, to provide them with information on their legal obligations and other matters. This often means distilling rather complex issues into language that can be understood by a layperson. That communication is not supervised by managers, which means that managers have to trust that the SOTCs will be able to relay clear, targeted messages.

[37] Mr. McAuley testified to his considerable experience in teaching and assessing writing skills, especially writing skills to be applied to specific technical subjects. Before becoming regional manager with the respondent 9 years ago, he served with the armed forces for 25 years as an intelligence officer. In that capacity, he wrote innumerable reports, but more importantly, he taught writing skills and assessed them. In his present capacity, he supervises 11 SOTCs directly, and every day, he reviews their written work. The other assessment board members were also regional managers that had SOTCs reporting directly to them, except for one, who was a SOTC and thus was well informed of the job requirements.

[38] I believe the question could be used as a valid measurement of effective writing, in conjunction with the following rating criteria, which served as the assessment guide:

Clear

Is the message clear, direct and easily understood?

Concise

Is [sic] message brief and to the point?

Logic

Are ideas logically developed and presented in a reasonable sequence?

Vocabulary

Is an appropriate level of vocabulary used?

Grammar/Format

Are the rules of grammar observed? Are grammatically correct structures used including spelling and punctuation?

[Emphasis in the original]

[39] As stated in *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at para. 77, s. 36 of the *PSEA* provides that the deputy head may use any assessment tool provided it is appropriate to the essential qualifications being assessed. In *Sampert v. Deputy Minister of National Defence*, 2008 PSST 9 at para. 54, the Public Service Staffing Tribunal (PSST) stated that “[t]hose who conduct the assessment should be familiar with the work required in the position to be staffed ...”. It seems reasonable to have a short essay question to test the applicants’ ability to structure an answer in a logical way, with those who assess the answers knowing exactly the type of writing required in the job.

[40] As for the confusing nature of the question, the use of synonyms is a common feature of the English language (aid and abet, cease and desist, etc.), and I see the use of both traits and attributes as a way to clarify the question for the reader. The complainant did not point to any evidence to show that the question is confusing. There is no possibility, as there was in *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 3, to wrongly answer the question because of doubt about what it asks. The question is straightforward: What are the traits or attributes of a team player, and why are they important?

[41] In answer to a question as to whether he would change anything in the assessment, with the benefit of hindsight, Mr. McAuley did state that he would specify a number of words for the answer. Some answers were very brief, others rather long. Mr. McAuley testified that the assessment board discussed the matter and decided not to penalize for brevity or verbosity. Instead, it concentrated on each answer's logic as a proper response to the question posed. Since the applicants were not penalized for the length of their answers, that ambiguity is not in play.

3. The marking was inconsistent and arbitrary

[42] The complainant endeavoured to show that the test had been marked inconsistently. He had received copies of all 143 tests. However, there was no indication on the tests as to whether they had received a passing grade. Some had "Met" written in the margin. Some had "FA" written in the margin or at the bottom of the page. The complainant assumed that "FA" meant failure and proceeded to analyze the inconsistencies on that basis.

[43] At the hearing, it was explained that "FA" were the initials of one of the assessment board members, Ms. Alledina. They were unrelated to a passing or failing mark. It became clear that the complainant had taken some marks as significant that were not. For example, in a number of copies, the symbol "&" had been circled. In other copies, it was not. When asked if such an abbreviation had been penalized, Mr. McAuley replied that it had not. Each assessment board member had his or her way of marking (or not marking) the papers. As will be explained later, at least two assessment board members had to agree on the grading.

[44] The complainant asked for an adjournment of the hearing so that he could receive the marks for each of the 143 tests, which would have allowed him to redo his analysis and show inconsistencies in the marking.

[45] I denied that request. Without knowing the assessment board's reasoning, such an analysis becomes pointless. What is important to the Board's review of the assessment process is not an exact match of every single error from exam to exam. What matters is that the assessment board approached the exercise in a reasonable manner and that it applied the same criteria to all applicants.

[46] In the present case, recognizing the subjectivity of the assessment of an essay-type question, the assessment board built in safeguards to ensure fairness for all candidates. It applied the same criteria to all exams: clarity, conciseness, logic, vocabulary, and grammar. Mr. McAuley testified that logic was the main point.

[47] Each paper was marked by two assessment board members. If they both agreed on a pass mark for the written ability question, there was no further review. If one or both gave a failing grade, then the question was reviewed by four assessment board members. All four had to agree to the failing grade. A single vote for the pass mark would earn the applicant a pass mark on that question. This rather cumbersome process was set up to ensure that the marking would be as fair as possible.

[48] The complainant attempted to introduce psychology literature to establish the notion of bias, as in confirmation bias. I did not allow it. There was no expert report and no expert to testify to such concepts. I am satisfied that the assessment board's process was sufficient for its ends, i.e., for determining fairly if the answer to a straightforward question was logical and comprehensible.

[49] The complainant answered the question in the following manner:

My opinion of the characteristics that are important in a team player are based on the concept that the sum of the parts of a team are greater than the whole of the team, and that a team's members will have unique skills and abilities that will add value to the team, even if they are not readily apparent.

I believe that it is important for team members demonstrate [sic] the CBSA Values in their work practices, and that it is equally important for team members to be honest with each other particularly when it pertains to issues that may affect the entire team. This builds trust.

I also believe that it is important for team members to feel comfortable in expressing their ideas, and that they are open to the ideas expressed by others and that all team members will work to expand on the ideas that are expressed by members.

These traits are what I believe to be essential building blocks to effective teams who will work together toward a common goal, and achieve that goal with success. Teams comprised of members with these traits are more efficient, less prone to error, and improve overall moral and job satisfaction.

[50] Mr. McAuley explained as follows the failing grade given to the complainant's answer to the question testing the ability to communicate effectively in writing.

[51] The answer was unclear. Traits or attributes were not listed or stated. The complainant referred to “CBSA values” without saying what they were; the same applied to “unique skills and abilities” — he provided no explanation of them.

[52] Another example of an undefined trait or attribute was the need to feel comfortable expressing one’s idea. Being open might be a trait, but it was unclear, and nothing indicated why it was important.

[53] All in all, the answer did not follow the logic that was expected, which was a list of attributes and an explanation as to why they were important. The question asked the candidate to express an opinion, i.e., what he or she thought were important traits or attributes. The complainant did not answer that question.

[54] There were no right or wrong answers, in the sense that certain traits or attributes were sought. The whole exercise consisted of presenting arguments and supporting them.

[55] I find that Mr. McAuley presented a satisfactory explanation of why the answer received a failing grade. It simply did not answer the question. The resulting mark was the unanimous judgment of four experienced assessment board members, who had dealt with hundreds of exams. None of them knew the complainant.

[56] Having reviewed the complainant’s allegations and the evidence, I am satisfied that there was no abuse of authority in the application of merit.

B. Issue II - Did the respondent discriminate against the complainant?

[57] Under s. 80 of the *PSEA*, the Board may interpret and apply the *CHRA* in its analysis of a complaint of an abuse of authority under s. 77. In this case, the complainant referred to ss. 7 and 10 of the *CHRA*, which read as follows:

7 It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in
relation to an employee,
on a prohibited ground of discrimination.

...

10 It is a discriminatory practice for an employer, employee
organization or employer organization

(a) to establish or pursue a policy or practice, or
(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[58] The prohibited grounds of discrimination listed at s. 3 of the *CHRA* include disability. To establish that discrimination occurred, the complainant has the onus to first show he has a *prima facie* case of discrimination. The Supreme Court of Canada set out the test in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, in the following terms: “A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant’s favour in the absence of an answer from the respondent-employer.”

[59] Under s. 15 of the *CHRA*, an employer can answer a case of *prima facie* discrimination by showing there was a *bona fide* occupational requirement that justified its action; this analysis includes considering reasonable accommodation to the point of undue hardship.

[60] There was no dispute that the complainant had medical reasons for his accommodation request, and the respondent never denied its accommodation obligations. Consequently, I take the first part of the analysis in a discrimination case, which is establishing *prima facie* discrimination, as a given. The complainant suffers from extreme light sensitivity, and when noise is added, the strain increases. I accept his uncontradicted evidence on that point. An exam administered in a bright room, surrounded by other applicants, would have placed him at a disadvantage and would have denied him a fair opportunity to perform. The conditions of the test, if applied without modification to him, would have constituted an obstacle to his participation and would have amounted to *prima facie* discrimination. Therefore, the issue in this case is the sufficiency of the accommodation.

[61] The complainant alleges that the respondent failed to accommodate him on the day of the test by continuing with the assessment despite the fact that he was unwell, as he was suffering from a migraine. His visual sensitivity was accentuated by the

defects in the electronic test, namely, the lines left in and the 10-point font for some of his answers, including the answer to the writing ability question. In addition, other elements of the accommodation left much to be desired. The complainant received very short notice of the exam, the room was noisy, and the computer was a laptop.

[62] In his submissions, the complainant stated that he relied on the PSC's submissions and that he entirely agreed with them.

[63] The PSC presented submissions on its guidelines and policies as they apply to accommodation in the context of assessments for appointment processes. In this case, the PSC noted that because the respondent had developed the exam and it was not a standardized PSC assessment tool, there was no obligation to consult with the PPC. However, the respondent did consult with the PPC and received its recommendations.

[64] The PSC emphasized that the deputy head's obligation to provide accommodation was matched by the obligation on the part of the person seeking accommodation to make his or her needs known. Since the PSC did not attend the hearing and did not hear the evidence, it did not pronounce on the merits of the case. Its concluding statement on the obligation to respect its accommodation policies reads as follows:

67. It is crucial to underline that because the PSC does not have the benefit of all of the evidence, in particular the testimony, it is not possible for the PSC to conclude whether the PSC policies were respected. Whether a policy was respected will depend on the context of the situation at the time the decisions were made as well as on the testimony and credibility of witnesses. The PSC leaves it to the PSLREB to determine, based on the evidence and testimony provided at the hearing, whether the values and the PSC policies were respected for this appointment.

[65] By seeking the PPC's advice and recommendations, and by following them entirely, I find that the respondent did respect the PSC's applicable accommodation policy in the context of the assessment.

[66] The complainant raised *Song v. Deputy Minister National Defence*, 2016 PSLREB 73, in argument and provided additional written comments, to which the respondent replied. In that case, Ms. Song became ill during an assessment, yet the assessment was continued. The Board found that continuing the assessment had been a serious

error amounting to abuse of authority on the part of the employer. The complainant in this case sought to have his situation seen as analogous.

[67] The respondent replied that the two situations were very dissimilar. In *Song*, the examiners were well aware that the candidate was ill, to the point of discussing calling an ambulance. The Board found that in that case, the candidate "... exhibited somewhat serious signs of illness during the assessment ...", of which the assessment board was fully aware.

[68] In the complainant's case, the matter was not so clear. Ms. Preiano testified that he did not ask to stop the test; nor did he ask for a postponement. I agree with the respondent that this situation was very different in that the respondent was not made aware that the complainant was unwell. He did tell Ms. Preiano that he had a migraine that day, but he also told her that his migraines could last for days and that he preferred to just go ahead with the test.

[69] Several times in the course of giving his evidence and making his submissions, the complainant referred to starting the written test (once the clock starts) as "crossing the Rubicon", as if it were a point of no return. In answer to cross-examination questions that asked whether he had sought to stop the test because he was feeling unwell, he replied that having "crossed the Rubicon", he did not feel he could stop the test. He has asked me to rule on when a test should be stopped and whose responsibility it is to stop it.

[70] The answer to those questions depends on the circumstances. There can be no absolute rule, and both the candidate and the respondent's agent monitoring the exam must be willing to be flexible and to truly communicate.

[71] I accept the complainant's evidence that the accommodation was imperfect. He had very little notice of the test. However, Ms. Preiano explained that the assessment board was concerned with appearances. The complainant first received notice of the exam on June 9 and had then been informed of the knowledge requirements. That gave him more time than others had to prepare for the knowledge questions. She also testified that when an exam is rescheduled for medical reasons, the usual practice is to reschedule it as soon as the assessment board learns that the medical issue is resolved, which is usually within 24 hours. Therefore, the complainant was not treated differently from other candidates for whom a medical reason had required delaying

the test after the first date. The notice period was not ideal; it was rather short (less than 24 hours), but I note that the complainant agreed to take the exam as scheduled.

[72] The test had not been perfectly formatted for the computer, as lines remained, which he had to remove. It is obvious too from the reproduction of the complainant's test that the font did change for his answers, from 12-point to 10-point, starting with part 3, so that his answer in part 4 (writing ability) was also in 10-point font. I also accept Ms. Preiano's evidence that she was unaware that the lines were causing a problem and that the font had changed. She testified that the complainant did not inform her of those problems and that it would have been possible to change the font.

[73] The respondent did follow the recommendations that had been given. The room was darkened, the exam was in electronic form, and a mouse and keyboard were procured. The complainant was the only candidate, and Ms. Preiano remained in the room as per the PPC's instructions, to respond to any need that might arise.

[74] I accept that the room was not perfectly quiet and that people were heard stepping off the elevator that was just outside the exam room. It happened once, from the evidence I heard. Also, there was some crunching, but I believe it was brief. I think the respondent did as much as it could to ensure as much quiet as possible.

[75] I accept that the complainant had a migraine that day. He could have rescheduled the test, but he did not. The PPC's notes were very clear, and he was expected to have read them and understood them. They gave him the right to stop the test at any moment and reschedule it, without penalty.

[76] Based on the complainant's image of crossing the Rubicon, I believe that once he started the test, he made up his mind to just forge ahead. On the balance of probabilities, I find that he did not inform Ms. Preiano during the exam that the lines or the font size were problematic. He did not ask to reschedule the exam. He did not contradict Ms. Preiano's statement that at the end of the test, when they printed the test from the USB key, he told her he thought he had done well.

[77] The complainant filed another complaint before the PSST that also alleged discrimination in an assessment (*Boivin v. President of the Canada Border Services Agency*, 2010 PSST 6). In that case, the oral interview included a question that required some reading, and the PSST found that indeed, because of the complainant's

visual impairment, there was *prima facie* discrimination. However, the employer had provided as much accommodation as had been required. In that case, as in this one, the complainant failed to inform the respondent during the assessment that the accommodation was deficient. The PSST stated the following at paragraph 133:

133 The process of accommodation, therefore, requires the communication and engagement of both parties. The steps that establish that the parties have met their obligations in the accommodation process are not immutable, nor can they be rigidly compartmentalized. This is precisely because of the need, at times, to fine-tune how the requirement for accommodation is met, and the need for dialogue and cooperation from both the respondent and the employee. The process of accommodation cannot always result in perfection, particularly when it is clear that the party who must address the request does not know that there is a problem.

[78] That decision serves to illustrate the well-established principle, found in *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970, which states that reasonable accommodation is a concern not only for the employer but also for the employee (and when applicable, for the bargaining agent). Both the employer and the employee have a role to play to ensure reasonable accommodation — the employer, by providing the means of accommodation, and the employee, by providing the necessary information and by cooperating in the search for reasonable solutions.

[79] In the case before me, the respondent fulfilled all the accommodation requirements specified by the PPC. The standard in the case law is reasonable accommodation, not perfect accommodation. The lack of notice was unfortunate, but the complainant agreed to attend the next day. The room was not perfectly quiet, but it was reasonably quiet for an office setting. It had been darkened according to the directions. The lack of a keyboard and a mouse was a defect in the accommodation that was solved before the exam started. Leaving the lines in the computer version of the exam was a problem, as was the change of font. Had Ms. Preiano been made aware of those problems during the test and not acted upon them, I might have found that the respondent had not accommodated the complainant adequately. Had the complainant asked to suspend the exam and had that request been denied, again, I might have found discrimination. However, the respondent cannot be made responsible for things it was unaware of.

[80] The fact that the exam was not perfectly formatted or that it was not stopped despite the complainant feeling unwell are not examples of discrimination; they illustrate the fact that genuine attempts to accommodate may be imperfect. Those imperfections can be corrected only with the help of those who seek to be accommodated.

[81] Therefore, I find that there was no abuse of authority and no discrimination on the part of the respondent.

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

(The Order appears on the next page)

V. Order

[83] The complaints are dismissed.

January 16, 2017.

**Marie-Claire Perrault,
a panel of the Public Service Labour
Relations and Employment Board**