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Citation: **2022 FPSLREB 21**

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

RAY DAVIDSON

Complainant

and

DEPUTY MINISTER OF JUSTICE

Respondent

and

OTHER PARTIES

Indexed as
Davidson v. Deputy Minister of Justice

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

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Marylise Soporan, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard via videoconference,
February 1, 2, and 17, 2022.

REASONS FOR DECISION

I. Summary

[1] Ray Davidson, the complainant, made a complaint of abuse of authority concerning an internal advertised appointment process for the PM-06 position of Chief, ATIP (Access to Information and Privacy) Operations ("the PM-06 position") with the Department of Justice – Access to Information and Privacy Office in 2017. He also alleged discrimination.

[2] He alleged that the respondent ignored his request to be hired outside the advertised appointment process. He wanted the respondent to appoint him through a non-advertised process on the basis that he was in a pool of qualified candidates at the PM-06 group and level at the Office of the Information Commissioner of Canada.

[3] He also alleges that in the assessment, the respondent incorrectly marked his examination, resulting in his elimination from the appointment process.

[4] The complainant further states that he identifies as a Black person and alleges that this influenced the respondent's decision not to appoint him for the PM-06 position. In his view, he suffered discrimination on the grounds of race and colour in this appointment process.

[5] The respondent denies that it abused its authority.

[6] The Public Service Commission (PSC) did not appear at the hearing. It presented a written submission, in which it discussed its relevant policies and guidelines. It took no position on the merits of the complaint.

[7] For the reasons that follow, the complaint is dismissed. It was not shown that the respondent's choice to use an advertised appointment process was an abuse of authority. Nor was it established that the respondent abused its authority when it corrected his answer to an exam question. Finally, it was not shown that the respondent discriminated against him.

II. Preliminary issues

[8] At the outset of the hearing, I advised the parties that I was familiar with the name of a witness called to testify at the hearing on behalf of the respondent. Between

1996 and 2001, I was legal counsel working for the Office of the Information Commissioner of Canada, and at that time, the respondent's witness was an employee of the Office of the Privacy Commissioner of Canada. Both offices were then located in the same building. I informed the parties that it was likely that our paths had crossed at some point but that we do not know each other personally.

[9] I asked the parties if they had any concern about my ability to impartially decide the issues in this case. They informed me that they did not have any reservations about my impartiality.

[10] On another matter, s. 23 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) provides the Federal Public Sector Labour Relations and Employment Board ("the Board") with general powers to help parties resolve issues in dispute. They may take the form of processes, such as mediations and settlement discussions. The section states that if the parties agree, the Board may "… assist the parties in resolving any issues in dispute at any stage of a proceeding and by any means that the Board considers appropriate, without prejudice to the Board's power to determine issues that have not been settled."

[11] In this case, I offered the parties the option of mediation on the second day of the hearing, and they accepted. They provided signed consent to that effect that included an express agreement that I would remain seized of the file if the attempt to resolve the matter by mediation did not result in a settlement. The signed consent also provided that "… all information exchanged during this mediation session shall be divulged on a without prejudice basis for the purposes of reaching a mutually satisfactory settlement."

[12] Therefore, a mediation took place, which I facilitated. However, it was not conclusive. In the absence of a settlement, the matter proceeded to a full hearing and to a decision to be made on the merits of the issues before me.

III. Background

[13] On May 12, 2017, the respondent initiated an anticipatory process to establish a pool of qualified candidates for the PM-06 position that could also be used later to staff other positions that might become vacant. The process was open to all persons employed in the public service across Canada.

[14] Four candidates qualified and were placed in the pool. The complainant was eliminated at the examination stage. He did not achieve the pass mark on one examination question.

[15] On December 21, 2017, the respondent posted the "Notification of Appointment or Proposal of Appointment" for the appointment of the person selected for the position.

[16] On December 24, 2017, the complainant made a complaint of abuse of authority about this appointment with the Board pursuant to s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*").

[17] The complainant gave notice to the Canadian Human Rights Commission (CHRC), informing it that he intended to raise an issue related to the interpretation or application of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; "the *CHRA*"). On January 10, 2018, the CHRC advised that it did not intend to make submissions in this matter.

IV. Issues

[18] The Board must decide the following issues:

- Did the respondent fetter its discretion when it decided not to hire the complainant outside the advertised appointment process?
- Did the respondent abuse its authority when it determined that the complainant did not achieve the pass mark on an exam question?
- Did the respondent abuse its authority by discriminating against the complainant because of his race and colour?

V. Analysis

[19] Section 77(1)(a) of the *PSEA* provides that an unsuccessful candidate in the area of selection for an advertised internal appointment process may make a complaint to the Board that he or she was not appointed or proposed for appointment because of an abuse of authority in the application of merit. Section 77(1)(b) of the *PSEA* states that a person in the area of recourse may make a complaint to the Board that he or she was not appointed by reason of an abuse of authority that occurred in the choice between an advertised and a non-advertised process.

[20] The complainant has the burden of proving that on the balance of probabilities, the respondent abused its authority (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49 and 55). Section 30(1) of the *PSEA* states that appointments to or from within the public service must be made on the basis of merit, and s. 30(2)(a) states that an appointment is made on the basis of merit when the person to be appointed meets the essential qualifications, as established by the deputy head.

[21] "Abuse of authority" is not defined in the *PSEA*; however, s. 2(4) offers the following guidance: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism." As Chairperson Ebbs noted in *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 14, s. 2(4) of the *PSEA* must be interpreted broadly. That means that the term "abuse of authority" must not be limited to bad faith and personal favouritism.

[22] In *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 21 and 38, the Federal Court confirmed that the definition of "abuse of authority" in s. 2(4) of the *PSEA* is not exhaustive and that it can include other forms of inappropriate behaviour.

[23] As noted in *Tibbs*, at paras. 66 and 71, and as restated in *Agnew v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 2 at para. 95, 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 such a finding to be made, an error or omission must be so egregious that it could not have been part of the delegated manager's discretion.

A. Did the respondent fetter its discretion when it decided not to hire the complainant outside the advertised appointment process?

[24] On May 16, 2017, the complainant submitted his application for the advertised staffing process. In his email to the contact person named on the job application advertisement, he also requested to be "… pulled from an active Pool for an ATIP Manager PM-06 with the office of the Information Commissioner, selection process 2016-OIC-IA-055."

[25] The matter was discussed during the informal discussion.

[26] The complainant testified that managers have great discretion when hiring employees. He argued that the respondent has a policy that allows for appointing

qualified individuals from another pool but that it did not apply that policy in his case. He noted that the former Public Service Staffing Tribunal ("the Tribunal") found that it could find that an assessment board abused its authority in an appointment process when, instead of exercising its discretion, it strictly applied a guideline, thus fettering its discretion (see *Tibbs*). The complainant asserted that the respondent never applied that policy as it related to him and that this rigid approach was an abuse of authority.

[27] The complainant testified that during the informal discussion following his unsuccessful candidacy, he told the respondent's representatives that on November 17, 2016, he had qualified for an PM-06 ATIP position with the Office of the Information Commissioner of Canada ("the OIC position"). He requested an appointment to the PM-06 position based on that result.

[28] The complainant argues that the respondent exercised its authority with improper intent. He submits that staffing authority is to be exercised to identify qualified people for public service positions. The complainant argues that the respondent abused its authority by mechanically and rigidly ignoring his request to be hired outside the advertised staffing process, thus fettering its discretion.

[29] Francine Farley served as the ATIP director at the Department of Justice from 2008 until her retirement. She has staffing experience and has overseen at least 30 to 40 staffing processes over the years. She was the delegated manager for the appointment process.

[30] Ms. Farley testified that she worked in the ATIP field for more than 20 years. She explained the PM-06 position's role and why she initiated an advertised appointment process. Several PM-06 positions reported to her, and it was decided that it was necessary to create a pool of qualified candidates to fill PM-06 positions that were opening up. One vacancy was to occur shortly. Therefore, the respondent chose to conduct an advertised staffing process to create a pool of qualified candidates for the anticipated vacancies.

[31] Ms. Farley stated that she was informed during the informal discussion of the complainant's request to be appointed to the PM-06 position through a non-advertised appointment process on the ground that he had qualified for the OIC position on November 17, 2016.

[32] Ms. Farley detailed in her testimony the reasons she did not feel that making that appointment was a possibility. She had already committed the resources to conduct the advertised staffing process. Candidates had applied, been assessed, and been found qualified. She would not have considered it fair to them to cancel the process to appoint the complainant. Moreover, she had a need for a pool of qualified candidates for upcoming vacancies.

[33] Furthermore, she explained that being qualified for a certain PM-06 position does not guarantee that the person meets the merit criteria for a different PM-06 position. She explained that essential qualifications vary from one PM-06 position to the next, as was the situation in the present case, where some essential qualifications for the Manager position at the Office of the Information Commissioner (the OIC position) were different than the ones for the PM-06 position at the Department of Justice.

[34] For example, she explained that five experience qualifications were assessed in the appointment process for the OIC position. They were summarized as follows: experience in interpreting legislation, experience in providing advice to management, experience in providing advice on privacy impact assessments, experience in human resources management and experience in dealing with complaints filed under the legislation. For the PM-06 position at the Department of Justice, four experience qualifications were assessed. They were summarized as follows: experience in interpreting legislation, experience in providing advice to management, experience in developing policies and experience in providing training.

[35] The respondent's notes of the informal discussion were entered into evidence during the hearing. They record the following about the issue of the choice of process:

> …
>
> • [The complainant] *informed that he had provided a separate application CV (not using PSRS) that included a proof he was qualified on another PM-06 process. He questioned why that we did not proceed with contacting him for a pool appointment instead of continuing with the process. It was explained to him the intent of the process was to create a pool. That we had looked at candidates at level first, as identified in the poster, but because the number of candidates was low that it was preferable to give all candidates a consideration and to continue with a staffing process. It was also explained that because that the general pool of candidates in this field is limited, turnover can be high, that the best outcome*

> *possible (a pool) would be desirable to optimize the best scenario of find the right fit best candidate for the job. Candidate stated that he would resend the email he had sent regarding his CV and qualified status in another pool.*
>
> …
>
> [*Sic* throughout]

[36] Following the informal discussion, the complainant wrote himself an email, capturing his notes of the meeting. On the choice of process, he wrote the following:

> …
>
> • *I inquired with* [Ms. Farley] *why she did not simply pull me from the PM-06 pool at the OIC as I requested when I submitted my application. She responded that she did not recall receiving that request. I advised that I would send her a copy. Notwithstanding, they expressed that they first looked for candidates at level but did not find a sufficient amount and therefore decided to run the process.*
>
> …

[37] On November 25, 2017, the complainant wrote to the respondent. One thing raised were his qualifications for the OIC position. The respondent replied on November 29, 2017, stating, in part, as follows: "As discussed during the informal discussion on Friday, November 24, 2017, the intent of the process was to create a pool of candidates thus the board members chose to consider all applicants for the staffing process."

[38] At the hearing, Ms. Farley confirmed that even had she known at the application stage that the complainant requested the cancellation of the advertised staffing process in favour of his non-advertised appointment to the PM-06 position, she would not have made that appointment.

[39] The objective of the advertised appointment process was to create a pool of qualified individuals for future positions. The job posting stated as follows:

> …
>
> ***** ANTICIPATORY PROCESS ***** A pool of partially or fully qualified candidates may be established from this process which may be used to staff similar positions within the Department of Justice with various tenures (such as: indeterminate, acting/acting extension, specified period, assignment/secondment, deployment, etc.), various linguistic profiles (bilingual imperative CBC/CBC or

> *CCC/CCC) and various condition of employments [sic], which may vary according to the position to be staffed.*
>
> *Employees at the same group and level or equivalent may be considered for deployment or assignment/secondment. If no deployment or assignment/secondment is made, all applicants will be considered in the advertised appointment process.*
>
> …

[40] Section 33 of the *PSEA* states as follows: "In making an appointment, the Commission may use an advertised or non-advertised appointment process." Thus, the respondent had the discretion to choose between an advertised or a non-advertised appointment process.

[41] The complainant's position is that the respondent abused its authority when it failed to appoint him, on a non-advertised basis, to the PM-06 position. His argument is that his qualification for the OIC position ought to have convinced the respondent to make his non-advertised appointment or to at least add him to the pool for the PM-06 position without assessing his qualifications.

[42] However, the respondent declined to exercise its discretion to cancel or bypass the advertised process and to appoint the complainant on that basis. The choice of process was made before it advertised the process or received applications. It chose an advertised appointment process to generate a pool of qualified candidates to fill anticipated vacancies, which was a relevant consideration to choosing an advertised appointment process.

[43] The Board and the Tribunal have examined abuse of authority many times, notably as follows in *Tibbs*, at para. 70:

> *70 As highlighted in the complainant's submissions, Jones and de Villars,* supra, *have identified five categories of abuse found in jurisprudence. As the learned authors note at page 171, these same general principles of administrative law apply to all forms of discretionary administrative decisions. The five categories of abuse are:*
>
> 1. *When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).*

> 2. *When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).*
> 3. *When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).*
> 4. *When the delegate exercises discretion on an erroneous view of the law.*
> 5. *When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.*

[44] The respondent's choice of an advertised appointment process does not reflect an abuse of authority. There is no evidence of bad faith or improper purpose. Ms. Farley knew of anticipated vacancies, and she chose an advertised process to generate a pool of qualified candidates for those PM-06 positions. This was a serious and relevant consideration. There is no evidence of a desire to exclude the complainant. The decision was made before the process was advertised and before the applications were received. There is no suggestion of an erroneous view of the law or of a closed mind.

[45] Moreover, in *Abi-Mansour v. President of the Public Service Commission*, 2016 PSLREB 53, when faced with a similar allegation, the Board held that "… 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." In that case, the Board went on to state that holding an advertised process so that an appointment opportunity may be offered to more than one candidate is not an abuse of authority.

[46] It remains that the complainant qualified in a different process for a position with a different federal agency. The respondent was not required to examine the OIC position's assessment process to determine whether the qualifications and results of his assessment met its requirements.

[47] In *Canada (Attorney General) v. Kane*, 2012 SCC 64, Mr. Kane argued that he was entitled to be appointed to a reclassified position without considering an advertised process. In rejecting the argument, the Court held at paragraph 8 that "… Mr. Kane was seeking to restrict the … employer in a way that does not accord with the purposes or wording of the [*PSEA*]."

[48] Similarly in this case, the respondent was not obliged to abandon its choice of an advertised appointment process. The complainant could not restrict the respondent's exercise of its discretion under s. 33 of the *PSEA* merely by relying on his qualification for a similar position elsewhere.

[49] I find no evidence that the respondent applied a rigid guideline, fettered its discretion, or failed to use an open mind in reaching its decision to continue with the advertised appointment process.

[50] Based on the evidence, I find that the respondent did not abuse its authority. It exercised its discretion to conduct an advertised appointment process based on relevant considerations, in particular its need for a qualified pool of candidates to fill anticipated vacant positions.

[51] According to s. 33 of the *PSEA*, the respondent was permitted to exercise its discretion to choose between an advertised and a non-advertised appointment process. I am not persuaded that the respondent improperly exercised its discretion when it chose to proceed with an advertised appointment process.

[52] Finally, I observe that while the respondent could have provided an earlier response to the complainant with respect to his inquiry about a non-advertised appointment when he applied for the PM-06 position, this omission does not amount to abuse of authority.

[53] To conclude, the complainant has not established that the respondent abused its authority when it chose an advertised appointment process in this case.

B. Did the respondent abuse its authority when it determined that the complainant did not achieve the pass mark on an exam question?

[54] The complainant's view is that the respondent incorrectly marked his answer to Question 2 of the examination administered in this process.

[55] Question 2 asked, "What is the role of the Treasury Board Secretariat in relation to the application of the *Access to Information Act* and the *Privacy Act*?" It assessed the essential merit criterion of knowledge of central agencies' mandates and roles with respect to ATIP. The anticipated response was as follows:

…

> • *Supports the President of TB who is responsible in part for the administration of the Act*[.] *Administers the Access to Information Policy, the Policy on Privacy and Data Protection and the Privacy Impact Assessment Policy.*
>
> • *Provides strategic advice, assistance and direction to institutions ensuring consistent application of the Acts, regulations and policies.*
>
> • *Develops policies and guidelines.*
>
> • *Other acceptable answers.*

[56] This is the complainant's response, transcribed verbatim from his examination:

> *The Treasury Board Secretariat is responsible for:*
>
> *Publishing the annual index that describes the government institutions,*
>
> *Reviewing and publishing updates of government institutions in Info Source,*
>
> *Advising members of the ATIP community on updates to the policy instruments,*
>
> *Working closely with the Canada School of Public Service to determent [sic] the extent to include knowledge elements related to policy on ATIP be [sic] integrated into the required training programs.*

[57] The pass mark for question 2 was set at 3 out of 5. The complainant received 2 out of 5 for his response. According to the rating scale, this indicated a weak answer, in which the "[c]andidate's qualifications are inadequate in some aspects of this element. Some important issues/criteria not addressed. Some major or numerous minor weaknesses identified."

[58] Ms. Farley explained that the key elements sought in a candidate's response were drawn from the *Access to Information Manual* ("the Manual"). She described them as providing support to the Treasury Board's president, providing advice in the field to federal institutions, and developing policies and tools for institutions.

[59] She explained that it is essential that the incumbent of the PM-06 position be familiar with these three important elements of the Treasury Board Secretariat's (TBS) role. They are specified in the Manual and are used regularly by those working in the field.

[60] Ms. Farley explained the complainant's mark. He listed the TBS's activities enumerated in section 8.1 of the *Policy on Access to Information* to support the three roles. By focussing on activities at the application level, he did not show an understanding of the TBS's broad role in the context of access and privacy. As such, the answer was considered weak, and it received only 2 marks.

[61] Ms. Farley also presented the responses of four qualified candidates to Question 2, each of whom received full marks for identifying the major elements of the TBS's role. They are as follows.

[62] Candidate JF responded with this:

> *While the President of the Treasury Board is a designated Minister for the purpose of certain sections of the Act (along with the Department of Justice Minister), the Treasury Board Secretariat's Information and Privacy Policy Division assists the President in developing policy instruments, offering training opportunities, and providing support to the ATIP community. What's more, they are responsible for publishing the InfoSource yearly, as well as keeping it updated. Also, they ensure that the Policy on Access to information remains current, and advises [sic] institutions of changes. Finally, they liaise regularly with Canada's [sic] School of Public Service to update them on changes to the Policy so that the courses given on ATIA are relevant.*

[63] The following is an excerpt from the answer of candidate AS, who received full marks for it:

> …
>
> *The Information and Privacy Policy Division of Treasury Board of Canada Secretariat assists the President of the Treasury Board in carrying out his or her duties. To that end, the Division develops policy instrument, offers training and professional development opportunities, and provides advice and leadership for the ATIP community. In this light, the Treasury Board Secretariat is responsible for issuing direction and guidance to government institutions with respect to the administration of the Access to Information Act and interpretation of this policy.*
>
> …

[64] This response also included the list of activities found in the complainant's answer.

[65] Candidate AC responded, in part as follows:

> *The President of the Treasury Board is responsible for overseeing the government wide application of the Access to Information Act and the Privacy Act. Under this authority, TBS has developed polices and guidelines related to both Act [*sic*] that apply to all federal institutions to ensure the consistent and correct application of the Act [*sic*] across government.*
>
> *Treasury Board Secretariat assists the President in carrying out their duties. TBS works closely with all government institutions to develop policy instruments, guidelines, training, and professional development opportunities.*
>
> …

[66] Candidate AC also included the list of activities found in the complainant's answer.

[67] Candidate MN responded in French. The response has been translated, as follows:

> [Translation]
>
> *The TBS is the delegated minister and is responsible for administering the two Acts, the ATIA and PA, government-wide. It writes the directives, guidelines, and policies necessary to applying the two Acts and their regulations. It sets out the forms to use when administering the two Acts. It collects statistics to assess compliance under both Acts and oversees Info Source's decentralization program with federal institutions subject to both Acts by developing decentralized-publication requirements. It reviews new and modified personal information files and assigns them registration numbers. It publishes the bulletins Info Source - Statistics and Info Source - Federal Court Decision Summaries. It also determines the form and content of the reports to present to Parliament.*

[68] This response also received 5 marks of 5.

[69] Ms. Farley stated that had the complainant at least submitted the information available in the *Policy on Access to Information*, she would have awarded him enough marks to pass. However, his answer did not mention the most important elements of the TBS's assigned role. Therefore, she could not legitimately award him enough marks to pass.

[70] The qualified candidates' answers are distinct from the complainant's response. Each answer demonstrated that those who qualified offered very complete answers by presenting the role in an explicit way.

[71] The complainant's answer was different; it did not address the question, as it did not address the TBS's role in the stated context. It provided a micro-level response covering activities at the application level. Therefore, the assessment board found it inadequate, and he was not awarded enough marks to pass it.

[72] The Board's role is not to reassess a candidate's qualifications because he or she disagrees with a given answer. The Board must determine whether there was an abuse of authority in the appointment process, such as in the assessment made by the assessment board.

[73] I find that the complainant has not demonstrated that the respondent abused its authority when it assessed him.

C. Did the respondent abuse its authority by discriminating against the complainant because of his race and colour?

[74] The complainant explained that the Clerk of the Privy Council had issued a "call to action" to resolve discrimination. The message recognized discrimination, its very real effects on people of colour, and systemic issues. According to the complainant, the courts also must be clever.

[75] The complainant explained that discrimination is subtle but that the effects are concrete. He is of the view that the broad discretion given to managers is used to favour white people.

[76] The complainant submitted that the Board may find that an assessment board abused its authority in an appointment process when, instead of exercising its discretion, it strictly applied a guideline, thus fettering its discretion.

[77] The complainant argued that addressing racism in federal institutions is recognized as a priority by the leadership of the public service. In his view, discretion in government is always exercised in the same way, to favour white people. He argued that the fact that the assessment board always exercises its discretion in favour of white people is a way of strictly enforcing a guideline. As such, it fetters its discretion. In his view, this is a *prima facie* case of discrimination against him. It is a kind of barrier that disadvantages people of colour.

[78] The complainant asked Ms. Farley whether any qualified candidate was Black. She responded that one qualified candidate self-identified as a person of colour.

[79] The complainant suggested to Ms. Farley that she had an obligation to select him since he was a person of colour who self-identified as such when applying for the PM-06 position. This conformed to the job posting, which encouraged a candidate to indicate whether the candidate is a woman, an Aboriginal person, a person with a disability, or a member of a visible minority group.

[80] Ms. Farley replied that the respondent could not select a candidate solely on the basis of self-identification. For the PM-06 position, a candidate first had to meet the position's essential qualifications.

[81] To support the discrimination allegation, the complainant argued that during the informal discussion, the respondent asserted that he had plagiarized his answer to Question 2.

[82] According to the complainant, in the informal discussion, the respondent's representatives mentioned to him that several candidates appeared to have copied and pasted the texts of their answers. The respondent also advised him that ultimately, the assessment board decided not to pursue this line of inquiry. All candidates were assessed, and none was eliminated.

[83] The complainant asserted that because he is a person of colour, the respondent suspected him of plagiarism even though he could prove that his answer to Question 2 was not identical to the text from which he drew it, which is available on the Internet. He suggested that those who actually pasted certain parts of their texts were not accused of plagiarism, probably because they were not people of colour.

[84] To support his argument, the complainant provided the respondent's written reply to the discrimination allegation, which was filed pursuant to s. 24(1) of the *Public Service Staffing Complaints Regulations*, (SOR/2006-6), in which it stated as follows:

> *…*
>
> *…the complainant was advised that his answer to question 2 of the written exam was very similar to the reference material and may have been considered as a copy/paste answer. That being said, the departmental representatives informed the complainant that a decision had been made to score his response instead of considering it as invalid. In fact, a similar decision was made for other candidates who were in the same situation.…*
>
> *…*

[85] The respondent's summary of the informal discussion was also entered into evidence. It states as follows:

> …
>
> *• Candidate was informed that on a side note with the intent of the informal discussion to provide candidates as much information that could serve them as a learning experience to help them in future processes, that the question that his response provide to question 2 was very similar to the information on the website. With the copy that he had brought with him (same bullets as provided below) and showed him side by side his exam response that both were very similar. That changing simply the verb tense could result that this may be seen as copying and pasting a response. He was shown this exam participation survey and the instructions provided. He said that he did not remember but that that he believed that copying and pasting in the system (Fluid Survey) was not possible and thus he had not not followed the exam instructions as the exam instructions said copy and pasting, not typing. He was explained that typing the answers in the exam could also be seen as the same practice. In regards to questioning that whether or not his response could be perceived as an invalid response due to possible as 'copy paste response' the question that the instructions may or may not have been sufficiently clear was not being questioned further but that the score of 2/5 would however remain.*
>
> …
>
> [*Sic* throughout]

[86] Section 7 of the *CHRA* provides that it is a discriminatory practice to refuse to employ or to continue to employ an individual based on a prohibited ground of discrimination. Section 3 includes race and colour among the prohibited grounds of discrimination.

[87] To demonstrate that the respondent committed a discriminatory act, the complainant must show *prima facie* (meaning at first view) evidence of discrimination, namely, evidence that " … 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" (from *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536).

[88] To establish a *prima facie* case of discrimination, the complainant had to demonstrate that (1) he possesses a characteristic protected against discrimination

under the *CHRA*, (2) that he suffered an adverse employment-related impact, and (3) that the protected characteristic was a factor in the adverse impact. See *Moore v. British Columbia (Education)*, 2012 SCC 61. A complainant is not required to prove that the respondent intended to discriminate, as discrimination may involve multiple factors. Furthermore, this practice is not ordinarily displayed openly. Therefore, a decision maker must be alert to the “subtle scent of discrimination” (See, for example, *Turner v. Canada Border Services Agency*, 2020 CHRT 1.)

[89] Turning to the first point, it is clear that as a person who self-identifies as Black, the complainant has a characteristic protected from discrimination on the grounds of race and colour.

[90] Secondly, the complainant suffered an adverse employment-related impact when he was not found qualified for the PM-06 position.

[91] As for the third element, the complainant claims that he was accused of plagiarism, which, according to him, was a factor in his result of not passing Question 2 of the written exam for the PM-06 position. The respondent states that it informed him about his answer as a matter of coaching.

[92] In the written invitation, the candidates were informed that “**PLAGIARISM WILL RESULT IN AN AUTOMATIC ELIMINATION FROM THIS PROCESS**” [emphasis in the original]. Furthermore, “**A copy/paste answer will not be considered a valid response**” [emphasis in the original].

[93] The respondent observed that the complainant’s response to Question 2 was markedly similar to the text found at section 8.1 of the *Policy on Access to Information*:

[94]

Complainant's response to Question 2	**Section 8.1 of the *Policy on Access to Information***
The Treasury Board Secretariat is responsible for:	*8.1 Treasury Board Secretariat is responsible for issuing direction and guidance to government institutions with respect to the administration of the* Access to Information Act *and interpretation of this policy. As such, TBS:*
Publishing the annual index that describes the government institutions,	*• Publishes an annual index that describes government institutions, their responsibilities, programs and information holdings;*
Reviewing and publishing updates of government institutions in Info Source,	*• Reviews and publishes updates to government institutions' chapters in* Info Source *and prescribes forms to be used in the administration of the Act, as well as the format and content of reports made to Parliament;*
Advising members of the ATIP community on updates to the policy instruments,	*• Advises all members of the Access to Information and Privacy community of any updates to the policy instruments; and*
Working closely with the Canada School of Public Service to determent [sic] the extent to include knowledge elements related to policy on ATIP be [sic] integrated into the required training programs.	*• Works closely with the Canada School of Public Service to determine the extent to which knowledge elements related to the* Policy on Access to Information *will be integrated into the required training courses, programs and knowledge assessment instruments.*

[95] The respondent submitted that it appropriately used the informal discussion to coach the complainant in a way to promote his future success. In this respect, it relied

on the PSC's *Guide on Informal Discussions*, which states that an informal discussion may provide such an opportunity.

[96] The respondent also pointed to the test from *Shakes v. Rex Pak Ltd.*, (1981) 3 C.H.R.R. D/1001, as it was formulated in *Abi-Mansour*, at para. 76. One element of the test is that the complainant, although qualified, was rejected for a position. However, in this case, the complainant was not qualified for the position for the reasons discussed earlier involving the assessment of Question 2.

[97] On reviewing the evidence, it is clear that the complainant's response was considered sufficiently similar in formatting and wording to draw the respondent's attention but that any concern for plagiarism was eliminated when the decision was made to accept his answer and assess it. According to the evidence, other, similar answers from other candidates were also accepted and assessed.

[98] While the complainant maintains that his answer was scrutinized because of his race and colour, he did not demonstrate that they were a factor in the outcome of his candidacy. He was eliminated from consideration because he failed to meet the essential merit criteria, based on the substance of his answer to Question 2.

[99] In support of his allegation of discrimination, the complainant also introduced evidence of his job search and asked the Board to infer that he has been a victim of systemic racial discrimination. For example, he referred to a cancelled advertised appointment process and notices for a dozen non-advertised appointments to PM-05 and PM-06 positions from 2010 onward. He asserted that the cancelled advertised process was cancelled in order to appoint a person through a non-advertised process. His goal was to demonstrate that many people were appointed through a non-advertised process.

[100] As the Tribunal explained in *Ben Achour v. the Commissioner of the Correctional Service of Canada*, 2012 PSST 24, the complainant must establish a link between the circumstantial evidence and the evidence of individual discrimination against him:

> *…*
>
> ***75*** *Even if the Tribunal finds that there is sufficient circumstantial evidence to establish the existence of discrimination, the complainants must still demonstrate a link between that circumstantial evidence and the evidence of individual*

> *discrimination against them in order for a* prima facie *case of discrimination to be established. See the following decisions:* Swan v. Canadian Armed Forces, *(1994) 25 C.H.R.R. 312, para. 30 (C.H.R.T.);* Hill v. Air Canada, *2003 C.H.R.T. 9, para. 133;* Chopra v. Canada (Department of National Health and Welfare), *2001 CanLII 8492 (C.H.R.T.), para. 211 (*Chopra *C.H.R.T.). Thus, the issue the Tribunal must decide is whether the discrimination on prohibited grounds was a factor in the appointment process. Ultimately, the complainants must establish a link between the evidence of a discriminatory act and the complainants' particular experience. See* Ogunyankin v. Queen's University, *2011 HRTO 1910 (CanLII), para. 221.*
>
> …

[101] The complainant's bald assertion of systemic discrimination, without more, does not lead me to conclude that systemic discrimination was a factor in the appointment process.

[102] As the evidence does not support a finding that race or colour was a factor in the adverse impact, it follows that the third part of the test for a *prima facie* case of discrimination was not made out.

[103] Therefore, I conclude on a balance of probabilities that a *prima facie* case of discrimination was not established. The complainant's race and colour were not factors in his elimination from the process. It was insufficient for him to simply claim that he was treated unfairly. The allegation had to be supported by evidence to suggest that discrimination on the grounds of race and colour were factors in the alleged unfairness that occurred.

[104] I would add that the complainant's failure to meet the essential merit criteria for the PM-06 position would equally bar him from any appointment to the position, whether advertised or non-advertised. It would contravene s. 30 of the *PSEA*, which requires all appointments to be based on merit. The "call to action" placed in evidence did not create an exception to the merit principle.

[105] Consequently, the complainant has not established that the respondent abused its authority. The complainant was eliminated from the process because he failed to meet the essential merit qualification assessed in Question 2, not because of his race or colour.

VI. Conclusion

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

(The Order appears on the next page)

VII. Order

[107] The complaint is dismissed.

March 29, 2022.

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board