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*Federal Public Sector
Labour Relations and
Employment Board Act, Federal
Public Sector Labour Relations Act
and Public Service Employment Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

YUDONG FANG

Complainant and Grievor

and

**DEPUTY HEAD
(Department of Industry)**

Respondent

and

**TREASURY BOARD
(Department of Industry)**

Employer

Indexed as

Fang v. Deputy Head (Department of Industry) and Treasury Board (Department of Industry)

In the matter of a complaint of abuse of authority - section 77(1) of the *Public Service Employment Act* and of an individual grievance referred to adjudication

Before: Ian R. Mackenzie, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant and Grievor: Lisa Dubé and Stacey Mirowski, The Professional Institute of the Public Service of Canada

For the Respondent and Employer: Christine Côté and Alexandre Toso, counsel

For the Public Service Commission: Alain Jutras

Heard by videoconference,
February 15 and 16 and March 3, 2023.

REASONS FOR DECISION

I. Complaint and grievance before the Board

[1] The complainant, Dr. Yudong Fang, made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”). He alleged abuse of authority in the application of merit by the respondent, the deputy head of the Department of Industry, in appointments made in June 2019 following a development program for research engineers at the EN-ENG-03 and EN-ENG-04 group and levels (the “ENG-03” and “ENG-04” positions). He also alleged a breach of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; “CHRA”).

[2] The complainant was one of four candidates being considered for promotion to an ENG-04 position.

[3] The respondent denied abusing its authority in the appointment process.

[4] The Public Service Commission did not attend the hearing and provided written submissions to address the applicable policies and guidelines. It did not take a position on the merits of the complaint.

[5] In his complaint, the complainant alleged that the respondent abused its authority in the application of merit by doing the following:

- exercising its discretion with improper intentions, bias, and bad faith;
- using inadequate material in the assessment;
- showing personal favouritism toward the appointees; and
- displaying differential treatment and discriminating against him.

[6] At the hearing, the complainant did not pursue the allegation of personal favouritism toward the appointed candidates.

[7] Dr. Fang also filed a grievance against the promotion process, which was referred to adjudication at the Board. The respondent objected to the Board’s jurisdiction to hear the grievance. I determined that since the grievance and complaint related to the same appointment process, they could be heard together. I reserved on the objection. For the reasons set out in the next section, I have determined that the grievance should be dismissed as the Board does not have jurisdiction over it.

II. Jurisdiction over the grievance (Board file no. 566-02-43917)

[8] Dr. Fang grieved the denial of a promotion for him, alleging that it constituted differential treatment, a violation of the no-discrimination article (article 44) of his collective agreement (for the Architecture, Engineering and Land Survey (NR) group that expired on September 30, 2018), and a breach of the *CHRA*. As corrective action, he requested a promotion as well as damages under the *CHRA*. This grievance was referred to adjudication under s. 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; “the *Act*”).

[9] The respondent objected to the Board’s jurisdiction over this grievance, as it relates to the same subject matter as the complaint under the *PSEA*, and the referral of the grievance to adjudication was prohibited under s. 208(2) of the *Act*. The grievor submitted that he disagreed with the respondent and stated that it was open to him to pursue both a complaint and a grievance.

[10] Section 208(2) of the *Act* provides that an employee “... may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament ...”. The applicable collective agreement states that the presentation of a grievance is subject to s. 208 (at article 35), which was originally enacted to address the possibility of duplicate proceedings under both the *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35) on one hand and the *PSEA* on the other (see *Chopra v. Canada (Treasury Board)*, [1995] 3 FC 445 at p. 452).

[11] As in *Burlacu v. Canada (Attorney General)*, 2022 FC 1112, this grievance, “at its core”, is related to an internal appointment process, and the *PSEA* provides an administrative process for redress for this category of complaint (at paragraph 28). Dr. Fang also made his complaint under the *PSEA*, which relates to the same appointment process.

[12] The Court in *Burlacu* noted that the issues raised in the grievance “relating to fairness and transparency” as well as the “... exemplification of the values and expected behaviours set out in the *Code* ...” could be considered under the *PSEA* complaint process (at paragraph 29).

[13] In the grievance, the grievor seeks damages for lost wages because he was not promoted. He seeks the same remedy in his complaint. As I have set out in the reasons

section of this decision, this remedy is not available in a complaint under the *PSEA*. As noted as follows in *Canada (Attorney General) v. Boutilier*, 1999 CanLII 9397 (FCA), the remedy available in the other administrative procedure need not be equivalent as long as it deals meaningfully and effectively with the substance of the grievance:

“Differences in the administrative remedy, even if it is a ‘lesser remedy’, do not change it into a non-remedy” (at paragraph 23). Otherwise, the grievor also seeks damages pursuant to the *CHRA* in both his grievance and complaint. In considering whether a complaint under s. 77 of the *PSEA* is substantiated, the Board may interpret and apply the *CHRA* and may order relief in accordance with ss. 53(2)(e) and 53(3) of the *CHRA*.

[14] I find that the Board does not have jurisdiction to hear the grievance as the *PSEA* complaint procedure provides an administrative procedure to address his concerns about the internal appointment process at issue and related allegations of discriminatory treatment under the *CHRA*. Accordingly, the grievance is dismissed.

III. Summary of the evidence

[15] Dr. Fang’s mother tongue is Mandarin. He was born in China and emigrated to Canada in 2000. He started his employment with the respondent in 2009.

[16] The complainant participated in a Communications Research Centre (CRC) development program for the ENG group, known as the “ENG Development Program” (ENGDP). He was in the first group of participants, and he started it in 2017. The ENGDP includes a recruitment strategy, a framework for professional development, and assessment, mentoring, training, and promotion based on defined criteria. The issue in this complaint relates only to the last phase of the ENGDP — a promotion based on defined criteria.

[17] The ENGDP was established under the direction of the CRC Development Programs Management Committee (DPMC or “the main committee”) chaired by the CRC’s president and including representatives of senior management and the CRC’s Human Resources branch. It oversees all development programs and gives the final approval for the advancement of participants. It meets annually.

[18] The Research Development Program Sub Committee (RDPSA or “the subcommittee”) was established under the DPMC’s direction and is chaired by a CRC research director. In 2018, the chair was Doris Camiré. The other members of the

RDPSC are all CRC research directors. It meets annually and is responsible for the following:

...

- *recruitment and advancement of participants;*
- *development and modification of the competencies required at each level;*
- *review of participant promotion submissions;*
- *first level approval for promotion;*
- *submission of recommendations to the DPMC; and*
- *submission of recommendations for program changes to the DPMC.*

...

[19] The ENGGDP recruits employees at the ENG-02 and ENG-03 group and levels. Successfully completing the ENGGDP results in a promotion to ENG-03 and ENG-04. The complainant was at the ENG-03 group and level at the beginning of the ENGGDP. Ms. Camiré testified that the ENGGDP's purpose was to take an engineer from graduation to the CRC's working level (ENG-04).

[20] Employees in the program advance "... by clearly, consistently and continually demonstrating competencies at defined proficiency levels ..." (see the *CRC Research ENG Development Program Guide*). The competency profile contained competencies for experience, knowledge, ability, and personal suitability. The relevant competencies in this complaint are "communicating orally" and "communicating in writing".

[21] The proficiency level for the ENG-04 level for "communicating orally" was set out as follows:

...

Ability to communicate technical information effectively and to make presentations to own work unit and to management; as well as to the organization or to clients.

Ability to represent the organisation and effectively present to management.

...

[22] Ms. Camiré testified that the expectation was that the CRC could trust an employee at the ENG-04 level to represent it outside the CRC.

[23] The proficiency level for the ENG-04 level for “communicating in writing” was, “Ability to communicate effectively in emails and to prepare final documentation with minimal revisions for clients, for senior management or for conference publications.”

[24] Ms. Camiré testified that the difference between the written-communication competency for ENG-03s and ENG-04s was the expectation that reports and other documents would not require many revisions.

[25] Once per year, participants in the ENGDP submit a promotion application that the subcommittee reviews. As part of that application, they are required to complete a document called a “workbook” in which they are required to demonstrate, with examples, how they meet the competencies required for promotion. The candidate’s supervisor and manager review each workbook section to determine if the written text is accurate.

[26] The RDPSC members’ knowledge of the candidates for promotion was also considered in the assessment process. Ms. Camiré testified that there are approximately 120 research staff at the CRC and that the subcommittee members knew everyone at the CRC.

[27] Ms. Camiré testified that the candidates were also required to provide an example of a “formal” document that they had prepared. Other RDPSC members (Geoff Colman and Marc-André Rochon) did not recall reviewing any submitted written documents. The documents provided by the respondent that related to the promotion process did not include writing samples. Mr. Colman was not sure if the subcommittee had asked for writing samples for this promotion exercise (2018) or if it was done only in subsequent years.

[28] In May 2018, each RDPSC member reviewed the candidates’ workbooks separately. Then, the RDPSC met to discuss their analyses. Ms. Camiré testified that when there were issues, the members would discuss “at length” and then would vote on the rating to give each competency. The RDPSC relied on a majority vote when making its promotion recommendations.

[29] At the RDPSC’s initial meeting, the complainant was found to meet all competencies, except for communicating in writing. Ms. Camiré testified that after the

subcommittee's initial discussion of his work, some of its members consulted supervisors who could comment on his written-communication skills.

[30] The complainant testified that Demin Wang, his former research director and a subcommittee member, asked him for his résumé after the subcommittee had held its first meeting. The complainant also testified that two subcommittee members observed a presentation he made on June 8, 2018, and he believed that they were evaluating him.

[31] Mr. Colman testified that he was involved in an appointment process with the complainant in 2015 in which the complainant failed the oral- and written-communication competencies. Mr. Colman noted that the complainant stated in his application that he was able to write documents without major revisions, and he referred to documents that he had authored in 2015. Mr. Colman testified that based on his experience from 2015, he had some doubts about the complainant's statement. He wanted to discuss with other research directors whether the complainant's written- and oral-communication skills had improved sufficiently from 2015 to qualify for the ENG-04 position.

[32] Mr. Colman discussed the complainant's communication skills with three people. One was not able to provide recent information about the complainant's capabilities. He spoke to a project manager who was working on one of the complainant's projects, Howard Chatterton. He also spoke with someone who worked closely with the complainant, Bernard Doray.

[33] In the final report with promotion recommendations that was prepared for the DPMC (discussed in more detail later in this section), Mr. Colman provided this summary of his conversation with Mr. Chatterton and Mr. Doray:

...

Howard commented that he has noticed a definite improvement in Yudong's spoken English. Especially when Yudong is reminded to slow down and speak clearly, he can be easily understood. Howard did not have good evidence of Yudong's recent formal writing skills, since all reports that Howard has seen have been through Bernard for review and editing before reaching him. Howard did, however, comment that Yudong's emails tend to be short, and contain errors, but they can be understood. Howard also mentioned that he needed to work with Yudong to help improve the quality of the written English in Yudong's ENG-04 application.

Bernard commented that he has had a frustrating time in the past as a co-author on Yudong's papers. The quality of Yudong's written English has required significant effort by Bernard to bring it to a level consistent with conference paper submission expectations. Bernard admitted that he was unsure whether this was caused by an inability to write effectively in English or if these documents simply did not get the level of attention that Yudong should have paid towards their revision before submitting them for review, or both. More recently, Yudong was tasked to write a document for one of the outputs of the BP2 project. When Yudong brought Bernard his initial draft, Bernard asked him, without looking at it, if Yudong could take it away and ensure that what he was submitting was polished. Yudong complied and worked, presumably on his own, to improve the quality of the work before Bernard looked at it for the first time. Bernard judged that this report was of good quality (he said he would rate it around a 7/10, and would rate typical writing from [others on his team] to be a 10/10). According to Bernard, for this specific report, Yudong showed that he had the ability to write effectively in English.

...

[34] Mr. Colman testified that Mr. Doray's comment that the complainant had the ability to write effectively in English was only an indication based on a single report and that the subcommittee was looking for the consistent demonstration of the ability to work at the ENG-04 level.

[35] Mr. Rochon was appointed the research director for the complainant's section on April 1, 2018 and had supervised the complainant only since then. He testified that he was aware of the complainant's English-language skills only once he was appointed research director. After the subcommittee's initial meeting, he spoke to Valerie Maier, the complainant's supervisor, and to Mr. Chatterton. He did not recall the details of these conversations. He testified that he had some concerns about the complainant's written communications in emails.

[36] After obtaining this further information on the complainant's communication skills, another subcommittee meeting was held. Although Mr. Rochon testified that there was another vote, both Mr. Colman and Ms. Camiré testified that after a discussion, the subcommittee members decided not to hold another vote on this competency. Ms. Camiré testified that the subcommittee decided to provide additional information in its report to the main committee, "so they could decide". Mr. Colman testified that the subcommittee members were asked to provide information that each one thought was pertinent to help senior management make its decision.

[37] The RDPSC provided its report to the main committee on its recommendations for promotion in June 2018. The report was prepared by Ms. Camiré. She testified that she took notes of the subcommittee's discussions and that she wrote a summary for each candidate to provide an "insight" into what was discussed. She testified that the summaries were also designed to provide feedback to the candidates. Although the report's cover page indicated an approval date of May 2018, Ms. Camiré was able to confirm at the hearing that the last revision date was June 13, 2018, after checking the date noted as "last revised" on the electronic copy of the report.

[38] In its report to the DPMC, the subcommittee did not recommend promoting the complainant, based on its conclusion that he did not meet the written-communication competency. The report contained the following assessment of him:

...

The sub-committee is reporting that the promotion assessment for Yudong Fang to move from ENG-03 to ENG-04 has been assessed with consensus as a "Borderline Fail".

The sub-committee recognized Yudong's strong technical experience and abilities with little discussion required. However, Yudong's ability to communicate effectively orally and in writing were subject to extensive discussions. On the subject of communicating orally all of the sub-committee members agreed that he can communicate technical information effectively. A slight majority of the sub-committee members were of the opinion that Yudong has the ability to represent the organisation and effectively present to management. On the subject of communicating in writing, almost all members determined that the available evidence does not support that Yudong meets the requirement to communicate effectively in writing. The evidence put forward consisted of anecdotal examples from sub-committee members, and included poorly written email to management, his supervisor having to provide extensive help when writing documentation, and in some cases his supervisor having to rewrite some of his documentation. All members voted "Borderline Fail" based on one competency not met.

Competency not met: Ability to communicate effectively in emails and to prepare final documentation with minimal revisions for clients, for senior management or for conference publications.

...

[39] On a separate page in the report, six subcommittee members' comments were provided, which the complainant testified he saw for the first time at the hearing.

[40] Mr. Colman's comments in the report noted that his assessment of the complainant was influenced by the rewriting of a document that the complainant prepared about two years before the promotion process. He also stated in his comments that he was aware that the complainant had been "working hard" to improve his English over the past two years, so to obtain a "... more updated reflection on his current communication ability ...", he spoke to Mr. Chatterton and Mr. Doray. Mr. Colman's summary of those conversations is set out earlier in this decision.

[41] Mr. Rochon's comments in the report were as follows:

...

I do not believe that Yudong has the ability to represent the organisation and effectively present to management. In the few conversations that I have had with Yudong since I became his Research Director, I have found him very difficult to understand. I often have to repeatedly ask him to repeat what he says and ask questions to try to clarify the meaning of what he is saying. This evidence is anecdotal and based on a handful of conversations, but based on this, I believe that he does not have the ability to communicate orally that is expected from an ENG-04.

...

[42] He testified that his comments were not meant to diminish his concerns about the complainant's written-communication competency.

[43] Ms. Camiré's comments in the report were as follows:

...

... From hearing lengthy discussions amongst the sub-committee members and anecdotal evidence with regards to the communication abilities of this applicant, I am not convinced that he has shown clear, consistent and continual demonstration of the verbal and written communication abilities at the proficiency level that we would expect of an ENG-04.

...

[44] In cross-examination, Ms. Camiré stated that she had seen presentations made by the complainant but that she had not seen any of his written communications. She testified that she relied on the writing in the workbook provided for the appointment process as well as the other subcommittee members' observations. She testified that she mentioned oral communication in her comments because she had issues with the complainant's oral-communication competency.

[45] Mr. Wang did not testify at the hearing. He had been the complainant's research director for eight years before Mr. Rochon took over the position. Mr. Wang provided the following comments in the report:

...

I personally recommend promoting Yudong Fang to the level of ENG-04 based on the following reasons:

(1) Yudong fails for only one of the 32 criteria: communicating in writing. This was a voting result based [on] anecdotal examples. Recent evidences [sic] from Bernard and Howard (got after the vote) showed that Yudong had significantly improved his communication skill in both speaking and writing.

(2) Yudong is the strongest candidate in technologies among all candidates and has 23 years of relevant experience, longest among the candidates. He has made important contribution to CRC's Grand Challenges research.

(3) He has written three international papers in addition to project reports in the last 4 years, the most among the candidates. I consider him as a model example for people who complain that CRC does not do research and he has no time to write papers.

(4) Yudong is still the weakest among the candidates in terms of communication in both speaking and writing even though he has made a significant improvement.

[46] Francois Lefebvre did not testify at the hearing. He provided the following comments in the report:

...

Yudong Fang was voted "fail" by the majority of the committee. New supporting evidence was obtained and presented to the committee after the vote. This evidence would have changed my vote to support the promotion of Mr. Fang. However, the committee decided to maintain its decision. Members were invited to submit their comments in writing instead. During this process, we also learned that Mr. Fang has successfully qualified for a DRDC ENG-4 pool. From my perspective, Mr. Fang is a very strong technical candidate. This result of the CRC process will demotivate him and increase his interest for other opportunities elsewhere. I believe that this is not in the interest of CRC and recommend that our promotion criteria and our assessment methods be reviewed for the next cycle of the ENG development program.

...

[47] Adrian Florea did not testify at the hearing. His comments in the report were as follows:

...

I have agreed and voted with the majority sub-committee members that Mr. Fang has not demonstrated that he meets the “Communication in writing” criterion as stated in the Research ENG Development Program Competency Profile for ENG-4 level. My vote was based not on evidence presented by the candidate, but on anecdotal evidence presented by other members of the sub-committee. Additional anecdotal evidence on this issue was later brought forward to the attention of the sub-committee. However, the sub-committee decided that the matter was already concluded and no additional discussion or vote should be undertaken on this matter. Should [sic] the sub-committee have taken the new evidence into consideration, I would have likely changed my vote.

...

[48] Mr. Colman testified that the complainant was well-regarded at the CRC in terms of his technical abilities and that he was in demand to work on projects. He testified that Mr. Lefebvre and Mr. Florea liked to have him on their projects and that they did not want to lose him as they would have lost, in Mr. Colman’s words, “a good employee”. Mr. Colman’s opinion was that some subcommittee members wanted a “global view” of the candidate, while others were focussed on each candidate passing each single competency to qualify for a promotion.

[49] The RDPSC provided these comments on oral- and written-communication skills for one of the candidates recommended for promotion (Jiangxin Hu):

...

... Jiangxin has demonstrated that he has the ability to communicate effectively both orally and through writing. It is recommended that he continue to seek out [sic] opportunities to improve and use these skills. The sub-committee was pleased to see that he has recently joined the CRC toastmasters group and would like to encourage him to continue with this....

...

[50] Mr. Colman testified that he believed that Mr. Hu was born in China and that his first language is “Chinese”.

[51] The RDPSC also commented as follows on the communication skills of one other candidate (Martin-Pierre Lussier):

...

... Given Martin-Pierre's reserved nature, the subcommittee discussed evidence of his ability to communicate well and effectively. Evidence was brought up by sub-committee members that when required, Martin-Pierre demonstrates very good communications skills....

...

[52] Ms. Camiré testified that she sent the recommendations report to the CRC's Human Resources department and that it was then forwarded to the main committee. She testified that the main committee could either approve the recommendations or overrule the subcommittee. She stated that it would have received the subcommittee's report as well as the workbooks. She testified that she was not involved with its process. The respondent presented no direct evidence of the main committee's process, which in 2018 approved all the subcommittee's recommendations.

[53] The main committee provided its decision on the complainant's promotion through a letter sent under the signature of the CRC's president (Jean Luc Bérubé) on July 12, 2018. The letter stated that the main committee "... has determined that you do not meet all of the requisite criteria and therefore you will not be promoted to the ENG-04 level."

[54] After receiving the letter, the complainant wrote to his acting director, Ms. Maier, requesting a discussion about the promotion decision. She was acting for Mr. Rochon. He asked her for a confirmation of what competency he had failed. She was informed by Ms. Camiré that he had failed on "language". Ms. Maier then emailed Ms. Camiré, requesting confirmation in writing of the competency that the complainant did not meet as well as clarification on how he did not meet it. In an email to Ms. Maier and Mr. Rochon on July 17, 2018, Ms. Camiré stated that the failed competency was "communicating orally". Ms. Maier forwarded this email to the complainant.

[55] The complainant replied on July 18, 2018. He asked that the subcommittee provide the scope and measurements used to assess the oral-language competency. He stated that he had an accent and then mentioned this: "... that I've been working on very hard to eliminate." He also referenced his work representing the CRC at international conferences.

[56] Ms. Camiré testified that she erred when she referred to oral communication. She testified that she did not review the subcommittee's report before replying and

that she had relied on her memory. She testified that “in her mind”, the complainant had failed the oral-communication competency. She testified that as soon as she realized the error, she informed Human Resources.

[57] The complainant testified that he met with Stéphane Gagnon, a CRC vice president, after receiving the letter advising him that he had not been promoted. He testified that the vice president told him that his oral-language skills were good and that he would discuss the situation with senior management.

[58] Mr. Rochon testified that he was away on vacation for most of July 2018 and that he returned to the office on July 30, 2018. The complainant requested a meeting with him on his return. Mr. Rochon testified that as of the meeting, he was unaware that the decision not to promote him had been communicated to the complainant. He also testified that he did not know that Ms. Camiré had provided the wrong information to the complainant about the reason for the subcommittee’s recommendation not to promote him. He testified that he had not yet reviewed his emails when he had the first meeting with the complainant. He testified that the discussion was “uncomfortable” and that during the conversation, he tried to remember the subcommittee’s recommendation. He testified that the complainant asked questions about his ability to communicate orally. He stated that he did not fully answer the questions because he did not want to cause additional confusion.

[59] The complainant testified that at the meeting, Mr. Rochon mimicked his accent. In cross-examination, the complainant defined “mimicked” as repeating his words using “[his] accent”. He did not agree in cross-examination that Mr. Rochon was simply providing feedback. The complainant also testified that Mr. Rochon said, “this is Canada. You have to speak English or French”. The complainant testified that these comments hurt his feelings “very, very hard” and that he felt insulted. He also felt that the comments were discriminatory.

[60] Mr. Rochon testified that he likely did give the complainant feedback on his oral communication, as there were still improvements to be made. Mr. Rochon did not remember the details of their conversation. He stated that he did not necessarily make the statements that the complainant said he made. Mr. Rochon testified that he did not mimic the complainant’s accent. He testified that he did not understand one word that the complainant used and that he used that pronunciation as an example of how the

complainant's oral communication could be improved. He testified that he copied the pronunciation to demonstrate to the complainant that if he skipped a syllable in a word, it could have an impact on his effectiveness. Mr. Rochon testified that his comment about Canada was not quite as described by the complainant. Mr. Rochon said that the complainant told him that neither English nor French was his first language. Mr. Rochon then told him that they work for the public service of Canada and that they had a "certain obligation" to communicate in one or both official languages.

[61] Mr. Rochon met with the complainant on August 3, 2018, to provide his feedback on the ENGDP. Mr. Rochon testified that most of the meeting did not go well and that the complainant was upset. Mr. Rochon testified that it was difficult to have what he called "a constructive conversation" with the complainant.

[62] The complainant provided an email after the meeting to Mr. Rochon, reiterating his concerns about being found not to have met the oral-communication competency. He also stated that Human Resources had advised him that the RDPSC would review its decision in the third week of August. Mr. Rochon replied that since some management staff were not in the office, it would not be discussed before September 2018.

[63] On August 21, 2018, Mr. Rochon advised the complainant by email that a mistake had been made in identifying the failed competency. He told the complainant that the failed competency was written communication. He noted that the subcommittee had determined that his emails to management "... were often poorly written, and in some cases the wrong words were used which made sentences very difficult to understand." He also stated that the subcommittee had determined that some of his present and past supervisors, technical authorities, and project managers "... often had to help [the complainant] write final documentation ...", including having to rewrite parts of documentation for him. The email continued with this:

...

As indicated in the CRC Research ENG Development Program Guide, the ENGDP participant "must have clearly, consistently and continually demonstrated" the competency in the day-to-day work that they carry-out [sic]. In the case of the aforementioned competency, the RDPSC has determined that this was not the case.

The Development Programs Management Committee (DPMC) and the RDPSC do not intend to revisit their decision.

We apologize for the error and the inconvenience it may have caused.

...

[64] The complainant testified that he was successful in an appointment process for an ENG-04 position at the Department of National Defence (DND) before May of 2018 and that he had been placed in a pool. He stopped working for the respondent in November 2020 and began working for DND at the ENG-04 level.

[65] He testified that the respondent's actions led to him having a high blood-pressure condition and that they affected his family.

IV. Summary of the arguments

A. For the complainant

[66] The complainant submitted that his assessment of merit was biased and that it was made in error. He submitted that the result of the assessment process was not reasonable or fair.

[67] The complainant submitted that initially, the respondent relied on failing to pass the oral-communication competency as justification for not granting him a promotion. He submitted that it was not a minor error on the part of the respondent — the reason provided for not granting the promotion was changed only after multiple emails and conversations about oral communication, and over six weeks passed before the change was made. The complainant submitted that the change in rationale was made only after he had a conversation with the vice president about his language skills. He submitted that if the error was so minor, as the respondent contends, it should have been corrected earlier.

[68] The complainant submitted that even if he was given the wrong information in error, this error, combined with the assessment methods in the promotion process, amounted to bad faith and an abuse of authority.

[69] The complainant submitted that his competencies were questioned much more closely than others' were. In addition, he submitted that the comments of his direct supervisor and manager were dismissed. Although the deputy head has broad discretion in staffing processes, it must be exercised fairly and reasonably (see *Rochon v. Deputy Head of Fisheries and Oceans*, 2011 PSST 7 at para. 72).

[70] The complainant submitted that the evidence showed that he was assessed differently than were the others. In his case, others were consulted about his qualifications.

[71] The complainant also submitted that the decision not to conduct a second vote on his promotion candidacy further demonstrated that the process was not fair and reasonable.

[72] The complainant stated that comments about his oral communication were included in the recommendations to the main committee and were designed to influence it, even though he had passed this competency.

[73] The complainant submitted that the merit principle is not respected when it is applied inconsistently to different candidates (see *Huard v. Deputy Head (Office of Infrastructure of Canada)*, 2023 FPSLREB 9 at para. 90). He also submitted that attributing equal weight to the divergent opinions about him and failing to reconcile that information with those with more knowledge of him, was arbitrary and that it fettered the respondent's discretion (see *Ostermann v. Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28). The complainant submitted that the views of Mr. Rochon, who had supervised him only for a short period, were given equal weight to those of his former supervisor. The complainant also submitted that two other RDSPC members relied on Mr. Rochon's views.

[74] The complainant submitted that Ms. Camiré testified that documents prepared by each candidate were reviewed but that she could not explain why they were not included in the disclosure of the assessment process. Others contradicted that evidence, he stated.

[75] The complainant stated that his manager and supervisor agreed that his oral- and written-communication skills were good enough. He also stated that nothing in the assessment criteria required communication to be almost perfect. He also noted that he was found fully qualified for an equivalent position at another department.

[76] The complainant submitted that discrimination by the respondent on the basis of ethnic origin was also an abuse of authority. He relied on the following test for discrimination set out in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33:

[33] ... to demonstrate *prima facie* discrimination, complainants are required to show that they have a characteristic protected from discrimination under the Code; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact. Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice, within the framework of the exemptions available under human rights statutes. If it cannot be justified, discrimination will be found to occur.

[77] The complainant noted that the jurisprudence has recognized that it can be difficult to prove discrimination by way of direct evidence. He referred me to *Premakumar v. Air Canada*, 2002 CanLII 23561 (CHRT), with respect to using inferences or “the subtle scent of discrimination” to establish a *prima facie* case of discrimination (at paragraph 79).

[78] The complainant submitted that his accent is directly tied to his ethnic origin. He noted that Mr. Rochon stated that his accent was difficult to understand and mimicked it in a meeting. He also alleged that Mr. Rochon told him that “this is Canada” and that he had to speak English or French. He submitted that Mr. Rochon had played an important role in the denial of his promotion and that Mr. Rochon had used his discriminatory beliefs to question the complainant’s merit.

[79] The complainant submitted that the denial of the promotion for a discriminatory reason affected his health and family. He submitted that he suffered income loss because of the denial and that he is still suffering from the respondent’s discrimination. He did not specify the human-rights damages he seeks but did note that they should be higher than the amounts awarded in *Nadeau v. Deputy Minister of Employment and Social Development*, 2019 FPSLREB 9 (\$5000), and *Spruin v. Deputy Minister of Employment and Social Development*, 2019 FPSLREB 33 (\$4000).

B. For the respondent

[80] The respondent submitted that sufficient facts were not established to support a claim of abuse of authority or discrimination. It submitted that most of the complainant’s testimony was argumentative and based on beliefs or opinions, which it submitted should be considered when assessing his credibility.

[81] The respondent submitted that Mr. Rochon acknowledged that he did not know the complainant well, but he sought additional information from other committee

members to help him make up his mind. The respondent submitted that the allegations against Mr. Rochon are serious and are only bald allegations.

[82] The respondent submitted that RDPSC members assessed each candidate's workbook and that it only carried out a reference check to confirm the complainant's rating on the written-communication competency.

[83] The respondent submitted that the RDPSC's decision on the competencies never changed, as the complainant alleged. It submitted that Ms. Camiré made a mistake by communicating the results to him and that she provided a credible explanation for her mistake. It stated that she corrected her mistake in a timely manner. It submitted that Mr. Rochon met with the complainant promptly after his return from vacation. It stated that Mr. Rochon had to verify the results of the promotion process and that with others absent from the office, he was able to verify them only by August 21, 2018.

[84] The respondent submitted that Mr. Rochon had discussions with the complainant about his overall communication skills and that he never intended to make discriminatory comments. In addition, it submitted that Mr. Rochon did not mimic the complainant's accent. It submitted that the complainant did not raise these issues with Mr. Rochon at the time and that it is not credible that the complainant was fearful of reprisals.

[85] The respondent noted that the complainant bears the burden of proof in a staffing complaint (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49 and 55).

[86] The respondent submitted that there was no abuse of authority in this promotion process. It submitted that managers have broad discretion in an appointment process (see *Lavigne v. Canada (Justice)*, 2009 FC 684 at paras. 53 and 57). It stated that to make a finding of an abuse of authority, the error must be so egregious that it could not be considered part of the delegated authority (see *Gulia v. Canada (Attorney General)*, 2021 FCA 106 at para. 7). It submitted that the complainant's opinion about what was fair was an opinion and did not constitute evidence.

[87] The respondent submitted that the deputy head had the authority to include written communication as an essential qualification for the appointment process. It

also submitted that the deputy head had the power to choose the method of assessing this qualification. It submitted that the Board should defer to the subcommittee's recommendations, as its members can be presumed to have known the duties of the ENG-04 position as well as relying on their personal knowledge.

[88] The respondent also submitted that the subcommittee was permitted to obtain additional information from references when it assessed whether the complainant met this qualification (see *Visca v. Deputy Minister of Justice*, 2007 PSST 24). It submitted that most of the assessments in federal public service staffing processes are done without personal knowledge of the candidates, which does not mean that the assessors are not able to assess the candidates.

[89] The respondent relied on the test for *prima facie* discrimination set out as follows in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4 at paras. 49 and 50:

[49] ... there is a difference between discrimination and a distinction. Not every distinction is discriminatory. It is not enough to impugn an employer's conduct on the basis that what was done had a negative impact on an individual in a protected group. Such membership alone does not, without more, guarantee access to a human rights remedy. It is the link between that group membership and the arbitrariness of the disadvantaging criterion or conduct, either on its face or in its impact, that triggers the possibility of a remedy. And it is the claimant who bears this threshold burden.

[50] If such a link is made, a *prima facie* case of discrimination has been shown. It is at this stage that the Meiorin test is engaged and the onus shifts to the employer to justify the *prima facie* discriminatory conduct. If the conduct is justified, there is no discrimination.

[90] The respondent also referred to the tests set out in *Abi-Mansour v. President of the Public Service Commission*, 2016 PSLREB 53 at paras. 76 and 77, which refers to the tests set out in *Shakes v. Rex Pak Ltd.*, (1981) 3 C.H.R.R. D/1001 ("the *Shakes* test"), and *Israeli v. Canada (Canadian Human Rights Commission)*, (1983) 4 C.H.H.R. D/1616 ("the *Israeli* test"). The *Shakes* test is as follows:

...

- the complainant was qualified for the particular employment;
- the complainant was not hired; and

- *someone no better qualified but lacking the distinguishing feature, which is the basis of the discrimination complaint, subsequently obtained the position.*

...

[91] The *Israeli* test is as follows:

...

- *the complainant belongs to one of the groups that is subject to discrimination under the CHRA, e.g., race or national or ethnic origin;*
- *the complainant applied and was qualified for a job the employer wished to fill;*
- *although qualified, the complainant was rejected; and*
- *thereafter, the employer continued to seek applicants with the complainant's qualifications.*

...

[92] The respondent submitted that the complainant has not met these tests as he did not establish that he was qualified for promotion to the ENG-04 position. It also referred me to *Agnaou v. Canada (Attorney General)*, 2014 FC 850 (appeal dismissed in 2015 FCA 294).

[93] The respondent submitted that language is not a prohibited ground of discrimination under the *CHRA* (see *Howard v. 407 ETR Concession*, 2011 HRTO 1511, and *Fletcher Challenge Canada Ltd. v. British Columbia (Council of Human Rights)*, 1992 CanLII 1119 (BC SC) ("*Fletcher*"). It stated that no link was established between language and ethnic origin in this case. It submitted that a language-skill requirement is not necessarily discriminatory and that a language-proficiency requirement is not discriminatory. It stated that all the other candidates were treated the same way. It submitted that objective criteria were used in the assessments of all candidates, which was not discriminatory.

[94] The respondent submitted that the onus was on the complainant to present sufficient facts to support a finding that language was being used as a proxy for racial or ethnic discrimination (see *Jack v. Ontario (Community Safety and Correctional Services)*, 2018 HRTO 144 at para. 34). It submitted that he did not meet the onus. It also referred me to *Chau v. Olymel*, 2009 HRTO 1386 at para. 35, and *Nash v. Commissioner of the Correctional Service of Canada*, 2014 PSST 10 at para. 54.

[95] In the alternative, the respondent submitted that it had an explanation as to why the complainant did not qualify for the promotion. It submitted that the decision not to promote him should not have come as a surprise to him as he knew at the time that his language skills needed improvement. It noted that he admitted in cross-examination that he had to work on his English-language skills.

[96] The respondent submitted that a remedy for lost salary is not available to the complainant under the *PSEA*, as it would constitute an appointment, which is prohibited (see *Spruin*, at para. 117). It also submitted that there is no evidence of an impact on his health. It submitted that if damages are awarded, they should be at the low end, and that there should be no damages for wilful or reckless behaviour.

C. The complainant's reply

[97] The complainant submitted that there was no reason to question his credibility.

[98] The complainant stated that although the deputy head had the authority to choose the assessment method, it had to be used consistently and should have been documented. He noted that in *Visca*, the candidates were made aware of the different assessment methods but that in his case, he was not made aware that reference checks would be conducted.

[99] The complainant submitted that his discrimination allegations are not based solely on his beliefs — there is evidence of discriminatory comments, and Mr. Rochon testified about their conversations.

V. Reasons

[100] I have determined that the respondent abused its authority in the promotion process and that it discriminated against the complainant, for the reasons set out in this section.

A. Preliminary observation

[101] The complainant requested an order for the production of information from the Board in 2019 seeking, among other things, further details of the communications between subcommittee members and his supervisors after their initial meeting to discuss his qualifications. He requested any documents related to these discussions. The respondent advised the Board at that time that the existing documents had

already been provided and that no further documentation existed. Accordingly, on September 20, 2019, the Board denied the request for further information related to this issue.

[102] As noted earlier, the complainant testified that the additional comments about his oral- and written-communication competencies provided by subcommittee members and attached to the report to the main committee were not provided to him until the hearing. As will be discussed later in this decision, those comments are relevant to the issues in this complaint. The respondent provided no explanation for its failure to disclose those relevant documents.

[103] I accept that the subcommittee's recommendation for not promoting the complainant was that he did not meet the written-communication competency. In other words, I do not accept his allegation that the reason for not recommending a promotion changed from oral communication to written communication. However, I do understand his confusion over the reason for the denial of a promotion. For over a month, the subcommittee chair and Mr. Rochon told him that he had failed the oral-communication competency.

[104] Both of the respondent's oversights indicate a carelessness about the appointment process and its impact on employees. Deputy heads should take the staffing-complaint process seriously. The document that was not disclosed was not difficult to find — it was attached to the report that went to the main committee. Similarly, at the hearing, Ms. Camiré was able to quickly retrieve the report with recommendations, yet she decided to answer the question of what competency the complainant had failed at the time he originally asked “off the top of [her] head”. This careless attitude of the respondent resulted in much anguish for the complainant. I will address the consequences of this carelessness when I assess the appropriate damages to award. However, this behaviour would have been reprehensible even had the complaint not been successful.

B. Abuse of authority

[105] Any person in the area of selection for a non-advertised internal appointment process can make a complaint with the Board that he or she was not appointed or proposed for appointment because of an abuse of authority (see s. 77 of the *PSEA*). The *PSEA* does not define “abuse of authority”, although it does state that it includes bad

faith and personal favouritism; see s. 2(4). 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 (see *Tibbs*, at paras. 66 to 71). Abuse of authority is a matter of degree — for such a finding to be made, an error or omission must be of such an egregious nature that it cannot be part of the delegated manager’s discretion; see *Portree v. Deputy Head of Service Canada*, 2006 PSST 14.

[106] There is no requirement that a deputy head’s actions be intentional to find that there was an abuse of authority (see *Tibbs*, at paras. 73 and 74).

[107] The abuse-of-authority allegations in this complaint centre on the subcommittee’s assessment of communication skills — both written and oral. By a majority vote, it agreed that the complainant met the oral-communication competency. Also by a majority vote, it determined that he did not meet the written-communication competency. However, there were divergent opinions on those competencies which manifested itself both in its recommendations report to the main committee and in the interactions with two of its members after the main committee made its promotions decision. I will first address the assessment of the written-communication competency before examining the impact of the subcommittee’s comments on oral communication.

[108] The criteria for the written-communication competency related to email communication and report writing. A successful candidate was required to demonstrate an ability to communicate “effectively” in emails. In addition, a successful candidate was required to demonstrate an ability to prepare final documentation for clients, senior management, or conferences with “minimal revisions”.

[109] The recommendation in the subcommittee’s report is misleading. It states that all its members voted for “Borderline Fail” based on the complainant not meeting the writing competency. The conclusion was unanimous only because the subcommittee decided not to hold another vote. From the additional comments provided by Mr. Wang, Mr. Lefebvre, and Mr. Florea, it is clear that the recommendation was not unanimous. However, a majority of the subcommittee members did not recommend promotion. This mischaracterization of the subcommittee’s recommendation is not an abuse of authority.

[110] When it failed the complainant on the written-communication competency, the subcommittee relied on 1) anecdotal examples, 2) poorly written emails, and 3) the

supervisor providing extensive assistance writing documentation, including rewriting some of it.

[111] The only subcommittee member with direct experience and knowledge of the complainant's writing abilities was Mr. Wang. He recommended the complainant's promotion and was of the view that the complainant met the written-communication competency requirements. The other members who voted that the complainant failed to meet the competency relied on anecdotal evidence or limited experience with his written communication.

[112] The information that Mr. Colman obtained after the first vote was viewed differently by different subcommittee members. Mr. Chatterton stated that the complainant's emails contained errors but that they could be understood and told Mr. Colman that he did not have any evidence of the complainant's formal writing skills, although he had to work with the complainant to improve the quality of the writing in his promotion application. Mr. Doray told Mr. Colman that the most recent example of the complainant's report writing showed that he had the ability to write effectively in English. Mr. Doray also referred to past reports, for which significant revisions were required. The respondent did not call Mr. Doray as a witness to explain his comments. However, on their face, the comments state that the complainant had by then met the competency in his report writing. Mr. Colman testified that it was just one report and that the subcommittee was looking for consistency. Mr. Wang interpreted this new evidence differently; he said that it showed that the complainant had significantly improved his communication skills. Mr. Lefebvre and Mr. Florea agreed with Mr. Wang.

[113] Mr. Rochon also spoke to other people about the complainant's oral- and written-communication skills. However, he had no recollection of those conversations, and in his comments attached to the subcommittee's report, he did not mention anything about the complainant's written-communication skills.

[114] Section 36 of the *PSEA* gives the respondent considerable discretion in the assessment of candidates. The deputy head can use "... any assessment method, such as a review of past performance and accomplishments ... that it considers appropriate to determine whether a person meets the qualifications ..." of the position. However, this discretion is not absolute, and a person who was not appointed can complain that

there was an abuse of authority in the selection and use of an assessment method (see *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at paras. 26 to 28).

[115] It is undisputed that a selection-board member's personal knowledge is an accepted assessment method and that it may be treated as a reference check (see *Visca*, at para. 53). However, a finding of an abuse of authority may be made if the complainant can prove that the methods used were unreasonable or did not allow the assessment of the qualifications set out in the statement of merit criteria (see *Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada*, 2008 PSST 15). An assessment tool must also truly assess what has to be assessed — if the tool is flawed, the outcome cannot be considered reasonable or fair; see *Chiasson v. Deputy Minister of Heritage Canada*, 2008 PSST 27.

[116] The assessment method used to evaluate written communication in this appointment process for all candidates relied on the following: their workbooks (essentially, their applications) and the personal knowledge of the subcommittee's members. Although Ms. Camiré thought that writing samples were required, I find that they were not obtained from the candidates. The respondent's other witnesses had no recollection of reviewing writing samples, and the documents that the respondent disclosed did not contain any writing samples.

[117] The subcommittee's report recommendations did not refer to the direct knowledge of Mr. Wang, the complainant's former research director, but instead relied on anecdotal examples from subcommittee members, including poorly written emails. Mr. Colman recognized that his preliminary assessment of the complainant was based on outdated information, yet he appeared to maintain his previous outdated assessment even when provided with new information that suggested an improvement in the complainant's written communication. Mr. Rochon's comments in the subcommittee's report do not refer to written communication, but he testified that he had received only a handful of emails from the complainant at the time of the assessment. Ms. Camiré testified that she had no direct knowledge of the complainant's written communication and that she relied on the observations of other subcommittee members. Mr. Florea also stated that he had relied on the observations of other subcommittee members in the initial discussion of the written-communication competency.

[118] The assessment method used to assess the written-communication competency was flawed. It is not the Board's role to identify the perfect or ideal assessment method. However, if that assessment method is incapable of assessing the stated qualification or competency, it will be found to be flawed and an abuse of authority. The written-communication competency required a candidate to demonstrate the ability to prepare final documents, with minimal revisions. The only subcommittee member with direct knowledge of the complainant's work, Mr. Wang, was of the view that the complainant had met this competency requirement. Mr. Colman based his opinion on this part of the competency requirement on his experiences of approximately two years before. There is no evidence of any other subcommittee member having knowledge of the complainant's document-writing skills.

[119] Clearly, the subcommittee had concerns about the complainant's oral- and written-communication skills and decided to pursue another assessment method only for him — reference checks, which showed that there were no concerns about his ability to communicate effectively in email. The reference check with the supervisor indicated that the most recent report prepared by the complainant demonstrated that he had the ability to write effectively in English. Mr. Doray's comments, as summarized by Mr. Colman, refer to past frustrations reviewing the complainant's writing, but give no indication of the timing of those frustrations. Mr. Doray also referred to helping the complainant complete the workbook. The subcommittee did not assess the level of assistance required for other candidates in preparing their workbooks.

[120] The subcommittee relied on inadequate materials in its assessment of the complainant. As noted in *Tibbs*, at para. 73, doing that can amount to an abuse of authority. I find that in this case, the reliance on inadequate materials to assess the complainant's written-communication competency was an abuse of authority.

[121] If an assessment is clearly against logic and the available information, it can also be an abuse of authority (see *Tibbs*, at para. 74). The subcommittee's conclusion on the written-communication competency did not logically flow from the findings of the assessment process. The anecdotal evidence that the subcommittee relied on to assess the preparation of final documents, before seeking outside references, consisted of Mr. Colman's recollection. He admitted that his experience with the complainant's writing was outdated. The anecdotal email evidence is not specified in the subcommittee's report, but Mr. Rochon testified that he had seen a handful of

emails from the complainant. After receiving references from the complainant's mentor and supervisor, the subcommittee learned that his emails contained errors but that they could be understood. The updated information on final documentation included an assessment that in his most recent report, he had demonstrated the ability to write effectively in English. The negative information about his writing included a comment by his mentor that he had helped the complainant write his workbook and by his supervisor that he had had to rewrite papers for the complainant in the past.

[122] The subcommittee ignored the knowledge of Mr. Wang, the complainant's former research director, who concluded that the complainant had met the written-communication competency requirement. It ignored the comments of the complainant's mentor that the complainant's emails could be understood. It also ignored the comments of his supervisor that his most recent report writing demonstrated the ability to write effectively in English. It relied on evidence that he had received some assistance writing his workbook, without making the same inquiry of the other candidates. It emphasized his supervisor's comments that referred to past experiences without balancing it against more recent evidence that his writing had reached an acceptable level that met the competency requirement.

[123] Mr. Colman testified that the subcommittee was looking for consistent results, not just one report. However, there was evidence that the complainant was at the required level of competency at the time of the promotion assessment. The subcommittee ignored the recommendation of the complainant's former research director (who had direct knowledge of the complainant's competency) and the most recent evidence that his written communication met the competency requirement. On a balance of probabilities, I find that the assessment method used for assessing written communications was flawed and that it did not allow the competency to be assessed. The subcommittee also ignored evidence that supported a finding that the complainant met the competency requirement. By failing to consider this evidence, the subcommittee abused its authority.

[124] Witnesses for the respondent testified that the promotion process was a two-step process. The subcommittee saw its role as providing a recommendation to the main committee and as providing additional information to allow the main committee to decide whether the complainant should be promoted. The respondent provided no evidence about the main committee's deliberations. Ms. Camiré testified that the main

committee was provided with the candidates' workbooks and the subcommittee's report. Its role was the final approval of promotions. Therefore, I have assumed that it reviewed and considered the subcommittee's report of recommendations and the candidates' workbooks in its determination on whether to promote the candidates.

[125] Although the subcommittee determined that the complainant met the oral-communication competency, it included negative comments about his oral-communication skills in its report and in the attached comments that were not only inaccurate but also highly prejudicial. In *Rizqy v. Deputy Minister of Employment and Social Development*, 2021 FPSLRB 12, the Board found that it was an abuse of authority not to reconsider an assessment when the complainant raised sufficient doubts about an assessment by referees. The Board noted that in "... the absence of a correction to a process that appeared highly prejudicial to the complainant, despite a record that contradicted her referees' remarks ...", an abuse of authority was founded.

[126] I find that it was an abuse of authority to include negative information about the complainant that was not related to a failed competency. The subcommittee's stated role was to make promotion recommendations — it was not to provide a performance evaluation. The negative comments about a competency that he had been found to have met would not have helped the main committee make a determination on whether, in its opinion, he had met the written-communication competency. In fact, these negative comments about a passed competency were not only irrelevant but also highly prejudicial.

[127] I find that the extensive comments in the subcommittee's report about the complainant's oral-communication skills were meant to influence the main committee in its deliberations on whether to promote him. Ms. Camiré testified that the subcommittee's purpose in providing the additional comments of its individual members only for the complainant was to help the main committee reach a decision on whether to recommend his promotion. The comments on the oral-communication competency could, then, have been intended only to influence the main committee in its consideration of the recommendation on the written-communication competency. It is an abuse of authority to rely on irrelevant information when assessing a candidate, especially so when that information is highly prejudicial.

[128] In conclusion, the allegation of abuse of authority in this promotion process is founded.

C. Discrimination

1. Introduction

[129] The complainant alleged discrimination based on ethnic origin. In particular, he alleged discrimination based on the opinions of the subcommittee's members with respect to his language competencies and accent.

[130] Section 80 of the *PSEA* provides that when considering whether a complaint is substantiated under s. 77, the Board may interpret and apply the *CHRA*. Section 7 of the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 3 of the *CHRA* lists the prohibited grounds of discrimination, which include ethnic origin.

[131] The parties recognized that a complainant must first demonstrate *prima facie* discrimination. In *Moore*, the Supreme Court of Canada set out the elements that a complainant must meet to establish *prima facie* discrimination as follows (at paragraph 33):

- he or she has a characteristic protected from discrimination;
- he or she experienced an adverse impact; and
- the protected characteristic was a factor in the adverse impact.

[132] Once a *prima facie* case has been established, the burden shifts to the respondent to justify the conduct or practice within the framework of the exemptions available under the *CHRA*. If the conduct cannot be justified, discrimination will be found to have occurred.

2. *Prima facie* case

[133] Language is not a prohibited ground of discrimination. However, it can be a defining characteristic of a place of origin, an ethnic origin, or an ancestry, all of which are grounds protected under the *CHRA* (see *Tahmourpour v. Royal Canadian Mounted Police*, 2008 CHRT 10).

[134] In an early case on accent and discrimination (*Fletcher*), the British Columbia Supreme Court stated (at paras. 32 to 38) that although language was not included in *Federal Public Sector Labour Relations and Employment Board Act*, *Federal Public Sector Labour Relations Act* and *Public Service Employment Act*

the prohibited grounds of discrimination, there could be some situations in which, “when scrutinized”, discrimination based on language could be discrimination on a prohibited ground. The Court noted that discrimination “... can and usually does, take on more subtle forms.” Based on the facts in that case, the Court stated that a refusal to hire someone based on language deficiency, when the ability is not necessary to perform the job, “... would obviously be a veiled attempt to discriminate on the basis of race, colour, ancestry or place of origin.”

[135] In *Macasiab v. Cypress Railing and Gates Ltd.*, 2022 BCHRT 69 at paras. 60 and 61, the British Columbia Human Rights Tribunal (“the Tribunal”) noted that a requirement that an employee have a certain level of language skills is not inherently discriminatory — a complainant must demonstrate that the requirement, or how their language skills are perceived, is connected to their place of origin. The Tribunal provided these three examples of how that connection could be demonstrated:

- 1) the requirement is not necessary to do the work;
- 2) the respondent’s view of the language skills is not accurate or fair, but it perceived the complainant as less skilled than they actually are; and
- 3) if the complainant’s accent is criticized in a derogatory way.

[136] In *Kennedy v. British Columbia (Ministry of Energy & Mines) (No. 4)*, 2000 BCHRT 60, the Tribunal noted that discrimination based on language ability might adversely affect those who, due to their ancestry, do not speak English as a first language, stating, “Comments related to a person’s race, colour or ancestry could constitute discrimination if they create a hostile environment or are connected to other adverse employment consequences” (at paragraph 71).

[137] In Ontario, the Human Rights Tribunal of Ontario (HRTO) has noted that although language is not a prohibited ground of discrimination under the Ontario *Human Rights Code* (R.S.O. 1990, c. H.19), it can be a defining characteristic of a place of origin, an ethnic origin, or an ancestry, all of which are grounds protected under that legislation. The onus is on a complainant to establish the connection between the respondent’s action and a prohibited ground of discrimination — the complainant’s perception of discrimination is insufficient (see, for example, *Liu v. Everlink Services Inc.*, 2014 HRTO 202 at para. 9).

[138] The respondent has agreed that the complainant has the necessary oral-language skills to meet the competency requirement for an ENG-04 position. This is

not a case of an employee not being promoted because of a language-fluency requirement. The respondent's view of his oral-language skills as expressed in the subcommittee's report is clearly inaccurate and unfair, in the context of a promotional process, since the subcommittee accepted that he met the oral-communication competency. The comments of Mr. Rochon and Ms. Camiré indicate a perception that he was less skilled than he was.

[139] The subcommittee members' additional comments were designed, according to Ms. Camiré, to assist the main committee in its decision as to whether to accept the recommendation not to promote the complainant. The comments of Ms. Camiré and Mr. Rochon about the complainant's oral communication were not necessary for the main committee's deliberations since the complainant had already been found to meet this competency. Of particular concern are Mr. Rochon's comments, in which he did not refer to written-communication issues at all.

[140] In addition, Mr. Rochon criticized the complainant's accent in a derogatory way. He not only copied the complainant's accent, but also, he referred to how people communicate in Canada. Copying someone's accent is not feedback, as Mr. Rochon suggested. It was mocking someone's ability to speak English when the respondent had found his oral-language skills sufficient for a promotion. Similarly, clearly, the comment that "this is Canada, you have to speak English or French" was hurtful. It was not a situation in which the complainant was speaking Mandarin to work colleagues in the workplace — it was a direct comment on the complainant's English-language skills.

[141] As I previously determined, in evaluating the complainant's written-communication skills the subcommittee evaluated the complainant differently, including pursuing reference checks and relying on evidence that he had received some assistance writing his workbook, without making the same inquiry of the other candidates. The subcommittee also relied on inadequate materials and a flawed assessment method in assessing the complainant's written-communication skills. The respondent's view of the complainant's written language skills was not accurate or fair and, again, it perceived the complainant as less skilled than he was.

[142] The comments about the complainant's oral communication were not necessary. The respondent's view of complainant's language skills, both oral and written, was not accurate or fair and it perceived the complainant as less skilled than he was. Finally,

the complainant's accent was criticized in a derogatory way. Therefore, I find that the comments on the complainant's oral-communication skills were related to his ethnic origin. He has established that there was a connection between the comments related to his English-language skills and his ethnic origin.

[143] The complainant also experienced an adverse impact — the failure to be promoted after participating in a developmental program.

[144] I now turn to whether the complainant's ethnic origin was a factor in the adverse impact of not being promoted. These five propositions are relevant to this complaint, and they have long been established in human rights jurisprudence (see *Peel Law Association v. Pieters*, 2013 ONCA 396 at paras. 111 to 114):

[111] ...

- (a) *The prohibited ground or grounds of discrimination need not be the sole or the major factor leading to the discriminatory conduct; it is sufficient if they are a factor;*
- (b) *There is no need to establish an intention or motivation to discriminate; the focus of the enquiry is on the effect of the respondent's actions on the complainant;*
- (c) *The prohibited ground or grounds need not be the cause of the respondent's discriminatory conduct; it is sufficient if they are a factor or operative element;*
- (d) *There need be no direct evidence of discrimination; discrimination will more often be proven by circumstantial evidence and inference; and*
- (e) *Racial stereotyping will usually be the result of subtle unconscious beliefs, biases and prejudices.*

[145] The complainant's ethnic origin, tied to his ability to communicate in English, was a factor in the appointment process. The subcommittee's report included references to his ability to communicate orally for the sole purpose of helping the main committee make its decision on whether to promote him. I do not accept Ms. Camiré's other rationale of providing feedback to the candidates. This is demonstrated by the respondent's failure to provide the comments attached to the report to the complainant until the hearing of his complaint.

[146] No evidence was called about the main committee's deliberations. However, direct evidence of discrimination is not required, and in cases of discrimination based on ethnic origin, circumstantial or indirect evidence is often all that is available. In this

case, an inference can be drawn that the complainant's ethnic origin was a factor in the main committee's decision not to promote him. The subcommittee drew the main committee's attention to the complainant's oral communication to assist it in its deliberations, even though it had already determined that he met this competency. The respondent established no link between oral- and written-communication competencies that would justify relying on oral-communication skills to assess written-communication skills. At the same time, I have found that the complainant was treated differently from the other candidates in the evaluation of his written communication skills and that the resulting evaluation was inadequate and flawed, including that the subcommittee ignored evidence that supported a finding that the complainant met the written competency requirement. Added to this is Ms. Camiré and Mr. Rochon's actions following the denial of the promotion, including failing to consult or provide the subcommittee's report, emphasizing the complainant's failure based on his oral communication skills and criticizing the complainant's accent in a derogatory way. On this last point, the respondent maintained that Mr. Rochon did not intend to engage in discriminatory conduct. However, it is not necessary to establish intent or motivation on the part of the respondent. Therefore, the inference is that the subcommittee's actions were tied to the complainant's ethnic origin and were a factor in the denial of a promotion for the complainant.

[147] I find that the complainant has established a *prima facie* case of discrimination based on ethnic origin.

3. The justification for the discriminatory conduct

[148] After the *prima facie* case has been established, the respondent must justify the conduct or practice within the framework of the exemptions available under the *CHRA*.

[149] The respondent did not raise an exception pursuant to s. 15 of the *CHRA*. Otherwise, the respondent provided no real justification for the discriminatory conduct. It submitted only that the decision not to promote the complainant should not have come as a surprise to him since he knew that his language skills needed improvement. This is not a valid justification for discriminatory conduct and does nothing to address the *prima facie* evidence of discrimination put forward by the complainant. Although the complainant agreed that his language skills needed improvement, the subcommittee clearly concluded that his oral communication was adequate for an ENG-04-level position. The evidence also indicated that the

subcommittee's evaluation of the complainant's written communication skills was based on anecdotal, outdated, and inadequate information, and that based on evidence that was ignored, his written communication skills had improved to the point that some members wished to change their vote.

[150] Consequently, I find that the complainant was discriminated against on the basis of ethnic origin.

D. Remedies

[151] The complainant requested damages for lost salary. Although I am sympathetic to this request, this remedy would have the same effect as an order that he be appointed to the ENG-04 level, which I am clearly not permitted to do under s. 82 of the *PSEA* (also, see *Spruin*, at para. 117).

[152] The *PSEA* allows the Board to make orders for a substantiated complaint under ss. 53(2)(e) and 53(3) of the *CHRA*. Section 53(2)(e) allows for an order of an award of up to \$20 000 for any pain and suffering experienced because of the discriminatory practice. Section 53(3) allows for an order of an award of special compensation of up to \$20 000 if it is found that the respondent engaged in the discriminatory practice wilfully or recklessly.

[153] The complainant specified only that the damages awarded should be more than \$5000, while the respondent submitted that any damages should be at the low end of the range.

E. Damages for pain and suffering

[154] There must be evidence of pain and suffering to justify damages under s. 53(2)(e) of the *CHRA*. In this case, the respondent's initial focus on the complainant's accent and oral-communication skills upset him. I accept his testimony that he found the interactions with the respondent about his accent humiliating. The focus on his oral-communication skills in the subcommittee's report, although he was not aware of the full extent of those comments at the time, was also upsetting since they had no relevance to the objective criteria for a promotion. The full extent of those negative comments did not come to his attention until the hearing of his complaint, and I accept that the additional comments were upsetting to him.

[155] The complainant testified that the respondent's actions impacted his health and family. However, no evidence was presented that would support any findings related to either his health or the impact on his family.

[156] Although I find that the complainant experienced pain and suffering, I do not find that he established that it was significant. In *Spruin*, the Board ordered \$2000 in damages for pain and suffering that arose out of a failure to accommodate a complainant in a staffing process. In *Nadeau*, \$5000 was awarded in damages for pain and suffering. In that decision, the Board considered the humiliation and stress experienced by the complainant. In this decision, I have found that in addition to ethnic origin being a factor when assessing the complainant, his supervisor mocked his accent, and that he was misled about the reason for not being promoted. Under these circumstances, I find that an amount of \$5000 is appropriate compensation for pain and suffering.

F. Special damages

[157] In *Canada (Attorney General) v. Johnstone*, 2013 FC 113 at para. 155, the Federal Court noted that s. 53(3) of the *CHRA* is a punitive provision "... intended to provide a deterrent and discourage those who deliberately discriminate." The Court held that "wilfulness" required that the discrimination be intentional. The Court stated that "[r]ecklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly." The Federal Court of Appeal in *Canada (Attorney General) v. Douglas*, 2021 FCA 89 at para. 8, stated that it agreed with this characterization of recklessness.

[158] I find that there is no evidence of intentional discrimination on the part of the respondent. The issue in this complaint is whether its actions were reckless.

[159] In *Douglas*, the Federal Court of Appeal found that the Board had not established recklessness because the employer acted quickly in its attempts to accommodate the grievor. In that case, the employer acted to remedy the discrimination within two weeks of the grievor filing a grievance. The Court stated that the employer's actions showed that it was "... alive to the [grievor's] needs and was diligent in attempting to accommodate her" (at paragraph 13). Accordingly, the Court found no basis to support a finding of recklessness that would warrant such a punitive award.

[160] In *Canadian National Railway Company v. Seeley*, 2013 FC 117, the Federal Court upheld an award of special compensation on the basis that the respondent “steadfastly ignored” the basis of the complainant’s accommodation request. On appeal of that decision (2014 FCA 111), the Federal Court of Appeal agreed and added that the respondent’s failure to provide any significant information to the complainant that could have helped her determine her childcare needs was a form of reckless conduct (at paragraph 68).

[161] In *Kirby v. Treasury Board (Correctional Service of Canada)*, 2015 PSLREB 41, special compensation was awarded in recognition of the employer’s wilful and reckless disregard of its human-rights obligations and for not taking every reasonable step to accommodate the grievor. However, the amount awarded was at the lower end of the range of damages (\$2500) based on the employer’s subsequent attempts at accommodation that mitigated its conduct (at paragraph 151).

[162] In the case before me, the respondent was careless in informing the complainant of the reason for not promoting him. Despite having easy access to the subcommittee’s report with recommendations (as demonstrated by her ease locating it on her computer during the hearing), Ms. Camiré provided the inaccurate information to the complainant that he had failed the oral-communication competency. This simple error was not corrected for over four weeks. He had discussions with Mr. Rochon based on this erroneous information, during which the derogatory comments were made about his accent, and without Mr. Rochon confirming what he already should have known, since he was a member of the subcommittee. I find that this behaviour on the part of the respondent was reckless, that it perpetuated the discrimination and that it showed disregard for the complainant. However, the respondent did correct the false information within a month, so its reckless conduct was mitigated. In the circumstances, I find that an award of special compensation of \$2500 is appropriate for the respondent’s recklessness.

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

(The Order appears on the next page)

VI. Order

[164] The grievance is dismissed.

[165] The complaint is substantiated.

[166] The Board declares that an abuse of authority occurred in the application of merit and that the respondent discriminated against the complainant in the appointment process at issue.

[167] Damages are awarded to the complainant for pain and suffering in the amount of \$5000 pursuant to s. 53(2)(e) of the *CHRA*.

[168] Damages of \$2500 are awarded to the complainant for special compensation under s. 53(3) of the *CHRA*.

[169] The payments for pain and suffering and special compensation are to be made to the complainant within 60 days of this decision.

May 23, 2023.

**Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board**