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



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

BETWEEN

MICHEL POTHIER

Complainant

and

**DEPUTY HEAD
(Department of Natural Resources)**

Respondent

and

OTHER PARTIES

Indexed as

Pothier v. Deputy Head (Department of Natural Resources)

In the matter of a complaint of abuse of authority under ss. 77(1)(a) and (b) of the
Public Service Employment Act

Before: Guy Grégoire, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Complainant: Himself

For the Respondent: Christine Côté, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard by videoconference,

October 11 and 12, 2023.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On April 18, 2018, the Department of Natural Resources (“the respondent”) posted a “Notification of Appointment or Proposal of Appointment” for Mathieu Turgeon-Pelchat (“the appointee”) to an indeterminate professional project officer position at the EN-SUR-02 group and level through a non-advertised appointment process that was numbered 2018-RSN-INA-PROM-SPRS-183460. The position is in the Strategic Policy and Results Sector at the Canada Centre for Mapping and Earth Observation in Sherbrooke, Quebec.

[2] On April 19, 2018, Michel Pothier (“the complainant”) made a complaint against that appointment under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the *Act*”) to the Federal Public Sector Labour Relations and Employment Board (“the Board”). He alleged that the respondent abused its authority in the application of merit and in the choice of process. His complaint is also based on an allegation of illegal discrimination based on age, in contravention of s. 3(1) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; “the *CHRA*”).

[3] For the following reasons, I find that the complainant did not demonstrate that on a balance of probabilities, the respondent violated the *Act* by abusing its authority when it assessed the appointee or in its choice of process or that it contravened the *CHRA*.

[4] Note that the Public Service Commission (PSC) did not attend the hearing but that it submitted its written general and specific arguments about the appointment policy.

II. The treatment of the documentary evidence

[5] In this case, the complainant adduced a large quantity of documentary evidence. The respondent wished to object to some documents due to, among other things, a lack of relevance. I recognized that in fact, at first glance, several documents were not necessarily relevant but that given the quantity, it would not have been economical in terms of time to validate the relevance of each one individually. Thus, the parties agreed that I would receive all the documents in evidence as a bundle, knowing that some would not have been admissible had they been analyzed normally after an

objection. Those documents will not be part of my analysis. In the circumstances, all the documentation that the complainant submitted was admitted as evidence, considering my remarks on relevance.

[6] The respondent's book of documents was also received in evidence.

III. Summary of the evidence

[7] The appointment that is the subject of the complaint followed consecutively an employee development program entitled "[translation] EN-SUR Professional Project Officer Training and Development Program" (TDP or "the program"). The program guide ("the guide") states the following: "[translation] The development program ... is designed to provide a structured development mechanism to advance EN-SUR project officers from the first level, EN-SUR-01, to the work level, EN-SUR-02."

[8] According to the guide, the program's purpose is to address the difficulty of finding personnel who are already trained, due to the scientific level of the operations, the uniqueness of its mandate, and the regional location. The program provides employees with the experience and knowledge required to gain the necessary skills and aptitudes to fully carry out the duties of an EN-SUR-02 project officer. Finally, the program and the recruitment process are "[translation] ... aligned with the Departmental Appointment Framework, NRCan 2008-10-14 (NJC 2008-10-14)".

[9] The guide defines "[translation] program eligibility" as, "[translation] All EN-SUR-01 employees at the offices of CIT-S [the other name of the respondent's organization] working as Professional Project Officers in Training shall be part of the Program." It also states, "[translation] External collective staffing processes will be used as the main mechanism for future admission to the Program."

[10] The complainant was never admitted to the TDP and was never in the EN-SUR group. He is in the EG group.

[11] In his opening remarks, testimony, and arguments, the complainant complained that he had never been appointed to a position at the EN-SUR-02 group and level. Essentially, this is his complaint. He stated that he was not complaining about the program's validity but about how it is applied. He also did not challenge the appointee's qualifications or state that the appointment did not respect the principle of merit or that he would like the appointee to lose their position.

[12] In his testimony, the complainant highlighted his qualifications, experience, knowledge, and skills. He had wished to adduce in evidence his annual performance evaluations from years past, but in an earlier interlocutory decision, the Board declared them inadmissible.

[13] He greatly emphasized the fact that the respondent had recognized his expertise by agreeing to pay for 100% of his computer science bachelor degree studies to complete his academic training and eventually make him eligible for the EN-SUR group. He repeated several times that he did not understand why the respondent had never offered him a position in the EN-SUR group through a non-advertised appointment process.

[14] He testified that he made this complaint against the appointment mentioned earlier but that he would have liked to have made the same complaint against all the EN-SUR-02 appointments, as he had never been appointed even though he should have been.

[15] He stated that other employees, who were younger, had courses reimbursed at only 50% and had been admitted to the TDP, while he did not receive the same treatment, as an EG-05. He submitted that an EG-05 was paid more than an EN-SUR-01 but less than an EN-SUR-02, which is why he was prepared to accept an EN-SUR-01 position, in the hopes of eventually being promoted to the EN-SUR-02 group and level.

[16] The complainant stated that appointment processes had been advertised over the years at the EN-SUR-01 and 02 group and levels but that he did not qualify for any of them. He submitted that since he obtained his bachelor's degree in computer science, more than 10 appointments have been made in the EN-SUR group. He also took part in an EN-SUR-03 process but was unsuccessful as well. He did not dispute any appointment that followed those appointment processes.

[17] The complainant asserted that the respondent had run an EN-SUR-02 staffing process without specifying when and that he passed the exam but failed the interview. However, the candidate who qualified was the oldest candidate. The process was cancelled because, the complainant submitted, the candidate was the oldest. After that incident, he noticed that the appointees to the TDP were younger and that those who were older and already in the organization, including him, were not appointed. That is the basis of his discrimination allegation based on age. The respondent discriminates

against older people in its organization. He claimed that one reason for it is that it is harder to control and manipulate those more mature people.

[18] The respondent continually refused to admit him into the TDP and the EN-SUR-01 group, and the complainant submitted that all those admitted are younger and never older. He alleged that the respondent should have exercised its discretion to appoint him to an EN-SUR position through a non-advertised process and that its refusal to comply with his request was an abuse of authority in that it refused to exercise its appointment discretion.

[19] The complainant also asserted that the respondent insists on recruiting younger people to the TDP who have obtained their geomatics degrees, which requires four years of education, while he has a three-year bachelor's degree in computer science. He testified that he demonstrated to the respondent that his qualifications were entirely sufficient to be appointed to an EN-SUR position. He asserted that he has much more experience than does the appointee, that he has far more knowledge of the computer systems used in the organization, and that he has even trained people in the EN-SUR-01 group and level.

[20] The complainant pointed out several complaints and grievances that are in progress, including a grievance about his job description and classification and a harassment complaint, the report from which found that there had been no harassment against him. He is disputing that report. I reminded him that I do not have jurisdiction, as part of this complaint, to decide those grievances and complaints.

[21] The complainant's brief cross-examination revealed that at least two people of about his age had been appointed to the EN-SUR group.

[22] The respondent called Sylvain Vallières as a witness, who was a manager and supervised the TDP in 2018. He indicated that he has been in the EN-SUR group since he was hired. He explained that the TDP's purpose is to help staff recent talent in the geomatics field. He defined "recent talent" as people in advanced fields such as artificial intelligence and networking, which are skills that the organization lacked. The TDP has existed since 2010.

[23] He explained that as part of the TDP, the organization recruited people at the EN-SUR-01 group and level from inside or outside the organization.

[24] People were admitted to the TDP for two years, during which time they took part in two or three internships, had monthly assessments from their manager, were required to take training courses, and had to prepare an internship report, after which they were offered a position at the EN-SUR-02 group and level through a non-advertised appointment process. That happened in this case.

[25] Mr. Vallières also explained that as the TDP's manager, he ensured that the managers who received program participants were ready to receive interns, hold monthly meetings with them, and follow-up on internship reports. The recruited candidates were already at the EN-SUR-01 group and level; management targeted them. They were often students who had obtained their geomatics degrees through the co-op program at the Université de Sherbrooke. No calls for applications were posted. To be eligible for the TDP, a person had to have obtained their geomatics degree within the last two years at the most. He stated that the TDP is a staffing process that complements the regular staffing process for EN-SUR-01 and EN-SUR-02 recruiting.

[26] Mr. Vallières explained that the complainant was not in the EN-SUR group, was never considered for the program, and therefore was never part of it.

[27] He testified that he knew the complainant since he had worked with the complainant in Sherbrooke but that he had never been the complainant's manager, and they had never worked on the same team. He knew the complainant enough to say hello, but that was it.

[28] Mr. Vallières stated that about 80 employees were in Sherbrooke, including 15 in the EN-SUR group, while over 100 employees were in Ottawa, including 7 or 8 in the EN-SUR group.

[29] The respondent used Mr. Vallières' testimony to introduce in evidence the statement of merit criteria (SMC), the narrative assessment of the appointee with respect to the SMC, the rationale for using a non-advertised appointment process, and the notifications of consideration and appointment.

[30] In cross-examination, Mr. Vallières stated that he did not know why the complainant never received a job offer to join the EN-SUR group or to be part of the TDP. He submitted that there were other opportunities apart from the TDP to secure an appointment to the EN-SUR group, including regular staffing processes.

[31] The respondent wanted to call a second witness to attest to the appointee's narrative assessment, but the complainant confirmed that he did not question the appointee's competencies, that he did not want the appointee to lose the position, and that he did not want the appointment process cancelled. So, the witness was not called to testify.

IV. Summary of the arguments

[32] In his arguments, the complainant submitted that the fact of not appointing him was an abuse of authority. With respect to the non-advertised process, he questioned why he had not been appointed. The employer paid 100% of his university education. Clearly, this management decision was based on operational needs and the difficulty recruiting EN-SURs. Thus, clearly, his education met an operational need; so, he should have been appointed.

[33] The complainant submitted that management discretion was hindered because it refused to exercise its discretion to appoint him to an EN-SUR position. He stated that his colleagues had benefited from that discretion by being appointed and that the next logical step in his paid education would have been appointing him as had been his colleagues.

[34] He stated that he was a victim of age-based discrimination and that the respondent caused him to be aggrieved due to his age. He relied on evidence that only those with a geomatics degree granted within the last two years were admissible to the TDP; thus, only younger people. Still, he acknowledged that there were older individuals but that most were younger. In addition, as there were no other EN-SUR-01 processes, he questioned how he could obtain a position in that group.

[35] He acknowledged s. 30(4) of the *Act* and did not challenge the appointment. He stated that he had the same qualifications, if not more, than the appointee and that the TDP is not a pretext for appointing younger people.

[36] In its arguments, the respondent acknowledged that the complainant had many grievances about his employer but that this complaint's subject is based on the *Act* and that my jurisdiction involves this specific appointment. The complainant was not in the TDP, so he was not considered for the appointment. The respondent also submitted that I am not required to determine why he was not included in the process.

[37] The respondent argued that the allegations of abuse of authority in the appointee's assessment of merit and in the choice of the process involve how the program is applied and not the appointment as such. It argued that the issues of the job description and classification that the complainant raised exceed my jurisdiction. It reiterated that he does not challenge the appointment but, rather, how the TDP was used.

[38] The respondent stated that it does not deny the complainant's competencies but that that recognition should not give rise to a precedent in other cases or in establishing his competencies.

[39] The respondent cited *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, to assert that the complainant did not discharge his burden of proof and that there was no factual element to support his allegations. It cited *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, to assert that he did not demonstrate serious misconduct on its part, to support his allegations.

[40] The respondent also referred to s. 33 of the *Act* to argue that the employer may select the appointment process of its choice, advertised or not. It submitted that the fact of choosing a non-advertised appointment process does not constitute an abuse of authority (see *Robbins v. Deputy Head of Service Canada*, 2006 PSST 17) and that the fact that the complainant could not have applied was not unfair (see *Jack v. Commissioner of the Correctional Service of Canada*, 2011 PSST 26).

[41] The respondent cited *Visca v. Deputy Minister of Justice*, 2007 PSST 24, to argue that the employer has the discretion to choose the right person, not necessarily the most qualified, even if the most qualified person expected to receive the position.

[42] The respondent acknowledged my jurisdiction to apply the *CHRA* under s. 80 of the *Act*. It referred to ss. 3 and 7 of the *CHRA* to assert that if discrimination occurred, the complaint should have been made against the appointments to the TDP at the EN-SUR-01 group and level, not against this appointment to the EN-SUR-02 group and level.

[43] It referred to *Leang v. Commissioner of the Correctional Service of Canada*, 2021 FPSLREB 66, and *Lablack v. Deputy Minister of Health Canada*, 2013 PSST 7, to assert that the complainant had to establish *prima facie* evidence of discrimination by

the respondent. If such evidence is established, the respondent must then provide a reasonable explanation as to why its conduct was not discriminatory.

[44] The respondent submitted that the complainant relied on the fact that an EN-SUR-02 staffing process was cancelled because, in his opinion, the candidate who would have been appointed was older. It argued that his assertion was based solely on his suspicions about that staffing process. It relied on *Rosenthal v. President of the Federal Economic Development Agency for Southern Ontario*, 2011 PSST 22, to submit that general allegations or suspicions are not enough to establish a *prima facie* case. The respondent asserted that regardless, the reasons for cancelling that process were in no way related to the appointment referred to in this complaint.

[45] The respondent also noted that in fact, people at least the same age as the complainant were appointed to the EN-SUR group, so the discrimination allegation cannot stand.

[46] The respondent also submitted that there are other possibilities apart from the TDP for obtaining an appointment to the EN-SUR group. Advertised staffing processes have been held for the EN-SUR group in the past; the complainant took part in them and unfortunately did not qualify after failing the interview on current issues.

[47] Relying on *Vani v. Chief Statistician of Canada*, 2008 PSST 29, the respondent also asserted that there was no nexus between the appointee and the complainant and that he had never referred to the appointee's age to support his allegation of age-based discrimination. It submitted that the appointment was based on the SMC and not on the person's age. It asserted that consequently, the complainant did not discharge his burden of establishing a *prima facie* case.

[48] However, the respondent asked that if I conclude otherwise, I consider that its actions are considered reasonable and did not constitute discrimination within the meaning of *Rosenthal*. It reiterated that the complainant was not part of the TDP and therefore could not be considered for an appointment under that program. It reasserted that his age was not a factor considered for his admissibility, or not, to the TDP.

[49] The respondent also submitted that the TDP itself was not based on any prohibited grounds of discrimination such as age but on merit criteria based on

education. It asserted that the TDP did not serve as a pretext to hire only younger people and referred to the guide and the rationale that it presented, in which it states that specific competencies are sought that are entirely unrelated to age. The respondent submitted that the criterion requiring a geomatics degree within the last two years at the most was not discriminatory because the that criterion's objective was to recruit people at the leading edge of technology.

V. Reasons

[50] At the hearing, the complainant repeated many times that he does not dispute the appointee's qualifications or merit. He also does not seek the revocation of the appointee's appointment. He also acknowledged that the TDP itself is valid. He contests how the TDP is applied because he never has been admitted to it. The fundamental subject of his complaint is that he was not appointed to an EN-SUR position through a non-advertised appointment process.

[51] At the start of the hearing, I advised the complainant that my role was to determine if the respondent's appointment of the appointee contravened the *Act* since it committed an abuse of authority when assessing the appointee or by the choice of process. I will return to the discrimination allegation.

[52] For greater convenience, I have grouped the sections of the *Act* and the *CHRA* to which the parties referred during the hearing or on which I base my decision. First, the relevant provisions of the *Act* are as follows:

...

30 (1) *Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.*

...

...

30 (1) *Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.*

...

(2) *An appointment is made on the basis of merit when*

(2) *Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*

(a) *the Commission is satisfied that the person to be appointed meets the essential qualifications for the*

a) *selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la*

work to be performed, as established by the deputy head, including official language proficiency; and

(b) the Commission has regard to

(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,

(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and

(iii) any current or future needs of the organization that may be identified by the deputy head.

...

(3) The current and future needs of the organization referred to in subparagraph (2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization.

...

(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

...

33 In making an appointment, the Commission may use an advertised or non-advertised appointment process.

...

36 (1) In making an appointment, the Commission may ... use any

compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;

b) la Commission prend en compte :

(i) toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,

(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,

(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

...

(3) Les besoins actuels et futurs de l'administration visés au sous-alinéa (2)b)(iii) peuvent comprendre les besoins actuels et futurs de la fonction publique précisés par l'employeur et que l'administrateur général considère comme pertinents pour l'administration.

...

(4) La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite.

...

33 La Commission peut, en vue d'une nomination, avoir recours à un processus de nomination annoncé ou à un processus de nomination non annoncé.

...

36 (1) [...] la Commission peut avoir recours à toute méthode

assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

...

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

...

80 In considering whether a complaint under section 77 is substantiated, the Board may interpret and apply the Canadian Human Rights Act, other than its provisions relating to the right to equal pay for work of equal value.

...

d'évaluation — notamment la prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).

...

77 (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

...

80 Lorsqu'elle décide si la plainte est fondée, la Commission des relations de travail et de l'emploi peut interpréter et appliquer la Loi canadienne sur les droits de la personne, sauf les dispositions de celle-ci sur le droit à la parité salariale pour l'exécution de fonctions équivalentes.

...

[53] The relevant provisions of the *CHRA* are as follows:

...	...
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	3 (1) Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.
...	...
3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.	3.1 Il est entendu que les actes discriminatoires comprennent les actes fondés sur un ou plusieurs motifs de distinction illicite ou l'effet combiné de plusieurs motifs.
...	...
7 It is a discriminatory practice, directly or indirectly,	7 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, par des moyens directs ou indirects :
(a) to refuse to employ or continue to employ any individual, or	a) de refuser d'employer ou de continuer d'employer un individu;
(b) in the course of employment, to differentiate adversely in relation to an employee,	b) de le défavoriser en cours d'emploi.
on a prohibited ground of discrimination.	
...	...

[54] At ss. 77(1)(a) and (b), the Act allows people in the area of recourse to make a complaint alleging abuse of authority by the deputy head in the exercise of its respective authority under s. 30(2) and abuse of authority in the choice of appointment process.

[55] The complainant made his complaint against the appointee's appointment under the first two paragraphs of s. 77 of the *Act*. He also based it on an allegation of age-based discrimination. The case law has long established that the onus is on the complainant to demonstrate that on a balance of probabilities, the deputy head abused its authority or committed a discriminatory act. The burden of proof is on the complainant.

[56] *Tibbs* held that the complainant bears the burden of proving that there was abuse of authority. In addition, it is clear from the preamble and the entire scheme of the *Act* that much more is required than mere errors or omissions to constitute abuse of authority. "Abuse of authority is more than simply errors and omissions" and will always include improper conduct (see *Tibbs*, at paras. 65 and 66).

A. Was there abuse of authority in the choice of process?

[57] Section 33 of the *Act* clearly and unequivocally states that the respondent may use an advertised or a non-advertised appointment process. Thus, the complainant could not simply allege that abuse of authority occurred because the respondent chose a non-advertised process. He had to prove that the decision to choose such a process constituted an abuse of authority.

[58] Section 30(4) of the *Act* states that in a non-advertised appointment process, management is not required to consider or assess any persons other than the appointee. Thus, there was no need to conduct a comparative assessment between the complainant and the appointee.

[59] The complainant acknowledged many times that the TDP was valid. That program provides that an individual who completes it is offered an appointment to the EN-SUR-02 group and level through a non-advertised process. Therefore, I conclude that since the complainant acknowledged the validity of the program and thus the validity of the resulting appointment, the allegation of abuse of authority in the choice of the process cannot stand. Therefore, the allegation is dismissed, as he did not demonstrate abuse of authority in the choice of process.

[60] I believe that it is important to emphasize that at the hearing, I gave the complainant considerable latitude to express himself and to argue all the points that he felt were useful. He stressed his education, his knowledge acquired in his 20 years

with the organization, his experience, and the computer programs to which he contributed. He also raised his differences with the respondent about the tasks that he carried out, his job description, and his classification, for which grievances are still in progress. He also mentioned a harassment complaint that he made and that is still in judicial proceedings. He had desired to submit his annual performance evaluations, but in an interlocutory decision, the Board found them inadmissible.

[61] For its part, many times, the respondent wanted to object to the relevance of the testimony that the complainant offered and, on my suggestion, agreed to limit them to a few.

[62] During the hearing, I also stated many times to the complainant that I believed his testimony that he had the experience that he said he had. I acknowledged that even though I did not see the annual performance appraisals, I took it for granted that they were good. I accepted those testimonies because they were not relevant and had no probative value to determining the issues; that is, the presence of abuse of authority or discrimination. But that evidence should not be accepted as proven in other cases; each must assess its own evidence.

B. The allegation under s. 77(1)(a) of the Act

[63] Since the complainant agreed that the appointment followed the merit principle and that the appointee's assessment after participating in the TDP was not abusive, I also conclude that there is no need to demonstrate an abuse of authority in the application of merit. Therefore, this allegation is dismissed.

C. The allegation of age-based discrimination

[64] Section 7 of the *CHRA* states that “[i]t is a discriminatory practice ... to refuse to employ or continue to employ any individual ... on a prohibited ground of discrimination.” Section 3 of the *CHRA* includes age as a prohibited ground of discrimination.

[65] The complainant had to present a *prima facie* (at first view) case, including 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 CanLII 18 (SCC), [1985] 2 S.C.R. 536). If such evidence is

established, the respondent must then provide a reasonable explanation that its conduct was not discriminatory.

[66] At paragraph 68, *Leang* reiterates the criteria for establishing a *prima facie* case of discrimination as follows:

[68] To establish a prima facie case of discrimination, the complainant had to demonstrate that (1) she possesses a characteristic protected against discrimination under the CHRA, (2) that she 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.

[67] In this case, the complainant did not convince me of a *prima facie* case. Indeed, the *CHRA* recognizes age as a prohibited ground of discrimination. However, *Vani*, at para. 54, states the following:

[54] Similarly, in this case, it is not enough for the complainant to allege age discrimination. He must allege facts that, if proven, would establish that he has been in some way adversely affected by reason of his age. That nexus is missing on [sic] the facts alleged by the complainant. Accordingly, his allegation of abuse of authority based on age discrimination cannot be substantiated.

[68] The same is true in this case. The complainant alleged that he was a victim of discrimination but acknowledged that other persons of his age had in fact been appointed to the EN-SUR group and that older and younger people had been appointed. In addition, the age of the appointee in this complaint was not subjected to any proof to determine whether the appointee was younger than the complainant. And even if it were so, as in *Vani*, the complainant did not establish a nexus between the alleged facts to satisfy me of a *prima facie* case of age-based discrimination.

[69] Therefore, I conclude that the complainant did not establish a *prima facie* case of discrimination. Consequently, he did not demonstrate that the respondent abused its authority.

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

(The Order appears on the next page)

VI. Order

[71] The complaint is dismissed.

March 26, 2024.

FSLREB Translation

**Guy Grégoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**