Federal Court Cour fédérale

Date: 20150717

Docket: T-550-13

Citation: 2015 FC 882

Ottawa, Ontario, July 17, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

PAUL ABI-MANSOUR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision of the Public Service Staffing Tribunal (the Tribunal) dated March 6, 2013. The Tribunal dismissed the Applicant's complaint of abuse of authority made pursuant to section 77(a) of the *Public Service Employment Act*, SC 2003, c 22 (the Act) in relation to an internal appointment process held by the Department of Aboriginal Affairs and Northern Development Canada (the Department).

[2] The Applicant alleges that the Department, by using improper assessment methods and appointing persons who were unqualified or less qualified than him, has discriminated against him on the basis of race and national or ethnic origin and has, therefore, abused its authority within the meaning of section 77(a) of the Act.

[3] For the reasons that follow, the Applicant's judicial review application is dismissed.

I. Background

A. *The Appointment Process at Issue*

[4] In June 2010, the Department launched a process to fill a position of Human Resource Business Analyst at the AS-04 level and to establish a pool of candidates for potential future staffing of similar positions. The Applicant was one of 26 candidates to apply for the position. The Job Opportunity Advertisement (the JOA) and the Statement of Merit Criteria for this AS-04 Analyst position listed the following essential and asset qualifications:

> Essential Qualifications:
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> College diploma or an acceptable combination of education, training and experience;
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> Two year experience in PeopleSoft Version 8 and/or 8.9 or equivalent system application;
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> Two year experience in participating in data integrity activities such as data audit;
>
> Two year experience in PeopleSoft or equivalent system reporting.

> <u>Asset Qualifications:</u>
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> Experience in PeopleSoft version 8 or 8.9 or equivalent system;
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> Experience in providing or facilitating training on PeopleSoft;
>
> Experience in HR business analysing and system impact identification;
>
> Experience in project management.

[5] Through the JOA, candidates were advised that they "may be required to meet the asset qualifications or the organizational needs, depending on the requirements of the specific position being staffed". In terms of "organizational needs", the JOA provided that the selection "may be limited to candidates self-identifying as belonging to one of the following Employment Equity Groups: Aboriginal people and Visible Minorities".

[6] The candidates were also informed of the need to provide in support of their application a resumé as well as a cover letter describing how they meet the requirements for the position to be staffed. The JOA provided the details of the information the cover letter should contain:

> In the cover letter, candidates are to use the essential qualification experience and education statements from the Statement of Merit criteria as headers and then provide concrete examples demonstrating how they meet each of these requirements. Resumes will be used to validate the experience and education information provided in the cover letter. Failure to provide sufficient information may result in the candidate being screened out. Also in the cover letter, candidates should identify which of the asset criteria that they meet and provide concrete examples to demonstrate how they meet them. A person may be appointed to the position even though he/she does not meet any or all of the asset qualifications. However, meeting these criteria is desirable and may be a deciding factor in choosing the person to be appointed.

[7] Of the 26 candidates who participated in the appointment process, 11, including the Applicant, were screened into the process. The merit assessment of these 11 candidacies consisted of a review of their candidacy applications, an interview before a three-member assessment panel and reference checks. Following that process, the Applicant as well as five other people were found to meet the essential qualifications of the AS-04 Analyst position and placed in a pool of candidates. The five other people placed in the pool were Mr. St-Goerges, Ms. Privalova, Ms. Morin, Ms. Verner and Ms. Chauret.

B. *The Appointments and the Complaints*

[8] The first person from the pool to be appointed to an AS-04 Analyst position was Mr. St-Goerges, an Aboriginal person. This appointment was not challenged. Mss. Privalova, Morin and Verner, were then also appointed to AS-04 Analyst positions in the Department's Human Resources and Workplace Services Branch (HRWS Branch), leaving the Applicant and Ms. Chauret as the only remaining candidates in the pool.

[9] The Applicant challenged those three appointments by way of two complaints to the Tribunal that were eventually consolidated. The basis of his complaints that the Department abused its authority by discriminating against him was summarized as follows by the Tribunal:

> a. During the interview, one member of the assessment panel questioned him using a technique that is normally used when one thinks a person is lying while another member of that panel interacted with him in an intimidating manner;
>
> b. The assessment process was totally subjective, with the result that he was marked lower than appropriate on certain questions so that the assessment panel could justify the appointment of other

candidates than him; an objective written test would have permitted him to demonstrate his strength in a objective manner;

c. References are not a valid tool to assess qualifications and should only be used in the final stages of a selection process, not as a basic selection tool, as was the case here;

d. The personal suitability questions were based on the 'local culture' within the Department, with which he is not familiar as he had never previously worked in this Department;

e. Email correspondence between a member of the assessment panel and a senior human resources advisor shows that the Department was looking for ways to eliminate him from the process;

f. Of the six persons in the pool of candidates, only Mr. St-Goerges and him met the organization need set out in the JOA in furtherance of the Department's Employment Equity Plan but of the two, he was the only one belonging to an under-represented group in the Department; therefore, appointing Mr. St-Goerges and not him, was inconsistent with the Plan, so was the appointment of Mss. Privalova, Morin and Verner, three white women who do not meet the JOA's organizational need;

g. His technical experience, education and technical and analytical skills were superior to those of these three appointees; in addition, it is not clear from the resumés, references, rating guides and appointment rationales for these three persons how they met the qualifications for the appointment: Ms. Privalova made very little mention of PeopleSoft in her resumé and the information from her references is not consistent with the rationale for her appointment; Ms. Morin failed the interview and her references' information does not demonstrate that she had the experience described in the rationale for her appointment; as for Ms. Verner, she had no technical background or in-depth experience in human resources and her references did not support her appointment rationale that she had experience in PeopleSoft training or in human resources business analysis;

h. Ms. Verner's appointment was made in retaliation for having filed a complaint concerning the appointments of Ms. Privalova and Ms. Morin; and

> i. Reports show that in a majority of cases taken from a sample of 64 appointments at the Department, the documentation on file does not permit to determine whether all qualifications were assessed or that there was a clear link between qualifications and the assessment. They also show that the Department developed an Employment Equity Plan to ensure that it has fair employment systems and a representative workforce so as to meet the requirements of the *Employment Equity Act*, S.C. 1995, c. 44 and, therefore, remove employment equity barriers affecting visible minorities in particular and close the gap between visible minority representation and the workforce availability.

[10] Since his complaints raised an issue involving the interpretation or application of the *Canadian Human Rights Act*, RSC 1985, c H-6, the Applicant, as required by section 78 of the Act, notified the Canadian Human Rights Commission of the issue. However, the Commission informed the Tribunal that it did not intend to participate in the proceedings brought forward by the Applicant.

[11] Subsequently, two other persons – Ms. V and Mr. B - were appointed in AS-04 Analyst positions in the HRWS Branch to replace Ms. Privalova and Ms. Morin. One replacement was deployed from another position and the other was appointed from a different appointment process. At the same time, the Applicant was also eliminated from another appointment process initiated by the Department for an EC-04 position.

[12] The Applicant claimed before the Tribunal that the Department appointed these two persons from outside the pool to avoid appointing him to an AS-04 Analyst position. In particular, he contended that if Ms. Chauret was not appointed to replace Ms. Privalova or Ms. Morin, it was because he would stand out as being the only person left in the pool who had not

been appointed to a position. Finally, he contended that the decision to eliminate him from this other appointment process was made to retaliate against him.

C. *The Tribunal's Decision*

[13] The Tribunal examined the following three issues:

> a. What is the role of the Tribunal in addressing the Applicant's concerns regarding employment equity?
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> b. Did the Department abuse its authority by discriminating against the Applicant on the basis of race, national or ethnic origin? and
>
> c. Did the Department retaliate against the Applicant for having filed his complaints?

[14] On the first issue, the Tribunal concluded that although it had no jurisdiction to consider whether a government department is fulfilling its responsibilities under the *Employment Equity Act*, a role vested in the Canadian Human Rights Commission, employment equity matters could nonetheless be relevant to an abuse of authority analysis under section 77 of the Act where such matters were established as an organizational need as permitted by section 30(2)(b)(iii) of the Act. The Tribunal ruled that in such cases, it had the authority to consider whether or not the department concerned had regard to the identified organizational need when it selected a particular candidate for a particular position.

[15] As to the second issue, the Tribunal, applying the tests developed in human rights jurisprudence, found that the Applicant had established a *prima facie* case of discrimination. In particular, it found that if believed and in the absence of an answer from the Department, the

Applicant's evidence would demonstrate that the Department (i) tried to unfairly eliminate him from the appointment process when one of his references was unavailable, (ii) used assessment tools that were highly subjective, (iii) appointed unqualified persons to positions, all of whom were neither Middle Eastern, of Lebanese origin or visible minorities, (iv) included him in the pool of qualified candidates with no intention of appointing him to a position, (v) appointed women who are not underrepresented in the Department rather than an underrepresented visible minority person, (vi) recruited from outside the pool rather than to appoint him, and (vii) refused to appoint Ms. Chauret so that he would not be the only person left in the pool without an appointment.

[16] Being satisfied that a *prima facie* case of discrimination had been established, the Tribunal stated the burden was on the Department to rebut the allegations upon which the *prima facie* case of discrimination was based. It found that this burden had been successfully met as it was satisfied that the Department had led convincing evidence establishing that the Applicant's race or national and ethnic origin were not factors in its decision to appoint persons other than him. In particular, that evidence showed, according to the Tribunal, that the Applicant was not appointed to the AS-04 Analyst position because he did not have experience in PeopleSoft and did not demonstrate on his application materials that he met the other asset qualifications that were legitimately considered by the Department in making the appointments at issue.

[17] Finally, with respect to the third issue, the Tribunal found that the Applicant's allegations of retaliation were either unfounded or entirely speculative.

II. Issues

[18] The Applicant claims that the present judicial review application raises the following four issues:

> a. Did the Tribunal breach procedural fairness by refusing to deal with the allegation of abuse of authority in appointing candidates who do not meet essential qualifications by being bias, not thorough and neutral?
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> b. Did the Tribunal commit a jurisdictional error in finding that it has no jurisdiction to deal with employment equity matters?
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> c. Did the Tribunal err in dealing with the discrimination allegation? and
>
> d. Did the Tribunal err in dealing with the retaliation allegation?

[19] The Department contends that the sole issue to be determined in this case is whether the Tribunal's decision that the Applicant failed to establish any abuse of authority, including that there was no discrimination in the appointment process at issue, is reasonable.

[20] Apart from the bias allegation, I agree that the issues raised by the Applicant all come down to determining whether the Tribunal's decision is reasonable.

[21] The parties have also raised a number of preliminary matters which I will address first.

III. Analysis

A. *Preliminary Matters*

(1) Style of Cause

[22] The Department requests that the style of cause be amended to remove "Department of Aboriginal Affairs" as the respondent and replace it by the "Attorney General of Canada" as the sole respondent. It claims that government departments are not legal entities and are not to be made parties in proceedings before the Court. The Applicant did not respond to that preliminary matter.

[23] The Department is correct: government departments are not legal entities and cannot therefore be named as parties (*Gravel v Canada (Attorney General)*, 2011 FC 832, at para 6; *Mahmood v Canada* (1998), 154 FTR 102, at para 14, 82 ACWS (3d) 898). Since, according to Rule 303(1)(a) of the *Federal Courts Rules*, SOR/98-196 (the Rules), it is not proper to name the Tribunal as the respondent in these proceedings, the Department shall be replaced by the Attorney General of Canada, as contemplated by Rule 303(2). The style of cause will be modified accordingly.

(2) Notice of Constitutional Question

[24] Less than a week prior to the hearing of the present proceedings, the Applicant served on the Department a Notice of Constitutional Question raising issues under the *Canadian Charter of*

Rights and Freedoms. The Department opposed the filing of that Notice both because of its lateness and its lack of specificity. At the hearing, I upheld the Department's objection to filing. Here are my reasons.

[25] The filing of the Notice of Constitutional Question in this case faces at least two insurmountable obstacles. First, there was no constitutional argument before the Tribunal. In *Boshra v Canada (Attorney General)*, Docket T-789-10, December 21, 2011, the Court held that constitutional questions should not be addressed on judicial review when they were not raised with the Tribunal (*Boshra*, at para 7). This stems from the well-established principle that constitutional issues, specially *Charter* issues, should not – and must not – be decided on a factual vacuum (*Worthington v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1546, 258 FTR 102 at paras 24-25; aff'd in 2006 FCA 30).

[26] Second, the Notice did not comply with Section 57(2) of the *Federal Courts Act* which requires such notice to be filed at least 10 days before the day on which the constitutional question is to be heard. The notice requirement is mandatory, with two possible exceptions: where Attorneys General consent, which is not the case here, or where there has been *de facto* notice which, again, is not the case here. Apart from those limited circumstances, this requirement cannot be ignored or waived by the Court.

[27] Here, not only was the Notice of Constitutional Question not served and filed within the prescribed timeline, but it provided no details whatsoever as to the basis of the constitutional challenge. This total lack of specificity is fatal as courts "cannot deal with constitutional

arguments raised in a random and unstructured manner" (*Canada (Attorney General) v Misquadis*, 2003 FCA 473, [2004] 2 FCR 108, at para 50). At a minimum, a notice of constitutional questions must set out the material facts and the legal basis for the constitutional question (*Gitxsan Treaty Society v Hospital Employee's Union*, [2001] 1 FC 135 (C.A.), [1999] FCJ No. 1192 (QL), at para 11).

[28] Here, the Notice of Constitutional Question met neither of these requirements and was not filed within the 10-day delay contemplated by section 57(2) of the *Federal Courts Act*. It was therefore not acceptable for filing.

(3) The Applicant's affidavits in support of the present proceedings

[29] The Department claims that certain parts of the two affidavits filed by the Applicant – a self-represented litigant - in support of the present judicial review application go beyond statements of facts and contain argument and opinion. It contends that this is the case of paragraphs 8, 14, 17, 18, 20, 23, 24, 25, 26, 27, 28 of the June 14, 2013 affidavit and of paragraphs 8, 14, 21, 22, 24, 25, 28, 29, 30, 31, 32, 33 and 34 of the August 28 affidavit. The Department requests that these paragraphs be struck out.

[30] According to Rule 81(1), affidavits are to be confined to facts within the personal knowledge of the deponent. Affidavits are not the proper vehicle to provide opinion or to argue the case. The usual remedy for an affidavit that contains portions that are opinionated and argumentative is to strike those portions out. It is also open to the Court to exercise its discretion

by giving no weight or probative value to opinionated and argumentative assertions in an affidavit (*McEwing v Canada (Attorney General)*, 2013 FC 525, 433 FTR 59, at para 107).

[31] Here, I am satisfied that all the paragraphs of the Applicant's affidavits that the Department has identified as amounting to opinion or argument are in fact opinionated and argumentative. I have opted to give them no weight or probative value.

(4) The attachments to the Department's affidavit

[32] In support of its position in the present proceedings, the Department has filed an affidavit from Ms. Isabelle Larose, who is one of its Senior Staffing Advisors. The Applicant claims that the attachments to this affidavit should be struck as they are duplicative of his own exhibits related to the complaint process and therefore irrelevant or as they consist of cases and jurisprudence.

[33] This claim has no merit. Duplication of court materials is no ground for striking out exhibits. Information on the complaint process must have been relevant as the Applicant himself speaks to it in his own affidavits. Furthermore, in the absence of any transcript of the proceedings before the Tribunal and given the nature of the Applicant's challenge to the Tribunal's decision, that information was, in my view, relevant. Finally, I have not been able to locate exhibits to Ms. Larose's affidavit in the nature of cases and jurisprudence. I can only speculate that the Applicant is referring to the cases and jurisprudence that were included at volumes VI and VII of the "Respondent's Record" which, again, is no ground for striking these materials from the record.

B. *Statutory Framework*

[34] Appointments in the federal public service are the exclusive purview of the Public Service Commission (PSC). The PSC may delegate that authority to deputy heads of federal departments who in turn, may authorize any person to exercise or perform any of the powers and functions delegated to them by the PSC (sections 11, 15 and 24 of the Act).

[35] Section 30 (1) of the Act provides that appointments to or from the federal public service "shall be made on the basis of merit and must be free from political influence". These principles are the cornerstones of the appointment process in the federal public service (*Samatar v Canada (Attorney General)*, 2012 FC 1263, [2014] 2 FCR 43, at para 83). Section 30(2) defines when an appointment is made on the basis of merit. It reads as follows:

Meaning of merit	*Définition du mérite*
(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 work to be performed, as established by the deputy head, including official language proficiency; and	a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;
(b) the Commission has regard to	b) la Commission prend en compte :

(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,	(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) any current or future operational requirements of the organization that may be identified by the deputy head, and	(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,
(iii) any current or future needs of the organization that may be identified by the deputy head.	(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.

[36] The Act provides that different geographic, organizational or occupational criteria can be established by the PSC or the person holding the appointment authority for "designated groups" within the meaning of section 3 of the *Employment Equity Act* than for other persons (section 34 of the Act). Designated groups within the meaning of the *Employment Equity Act* are women, aboriginal peoples, persons with disabilities and members of visible minorities.

[37] For the purposes of determining whether a person meets the qualifications referred to in sections 30(2)(a) and 30(2)(b)(i) above, the PSC - or the person to whom PSC's appointment authority has been delegated - can use any assessment method, such as a review of past performance, interviews and examinations, that it considers appropriate (section 36 of the Act).

[38] In *Kilbray and Wersch v Canada (Attorney General)*, 2009 FC 390, 344 FTR 203, the Court described this statutory scheme as giving a deputy head "considerable discretion when it

comes to staffing and in making appointments" (*Kilbray and Wersch*, at para 39). Then it described, at paragraph 41, the objective of the reform that was brought to the Act in 2003:

> The objective of the new PSEA was to reform the previous service staffing regime because it was too complex and slow. The new staffing system is directed at enabling managers to fill vacancies in a timely fashion with qualified people. The new system no longer uses competitions or relative merit concepts. Rather, the focus is on finding a person who is a good fit for the job. This determination is made by the Deputy Head of each department on delegation from the Public Service Commission. The Deputy Head may then delegate to departmental directors or managers.

[39] The Act's new philosophy is echoed in the Act's preamble, which states that "delegation of authority should be as low level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to head their personnel to achieve results for Canadians" (see also *Attorney General of Canada v Lahlali*, 2012 FC 601, 411 FTR 245, at para 16-17).

[40] Section 77 of the Act provides that a person who has not been appointed or proposed for an appointment can make a complaint to the Tribunal when the person was not appointed or proposed for an appointment by reason of an "abuse of authority" by the Commission or the deputy head in the exercise of its or his/her authority under section 30(2).

[41] The Act does not provide an exhaustive definition of the concept of "abuse of authority" but it stipulates that reference to this concept in the Act "shall be construed as including bad faith and personal favouritism" (subsection 2(4)). According to the Federal Court of Appeal's decision in *Kane v Canada (Attorney General)*, 2011 FCA 19, at para 66, Parliament's intent in "limiting the Tribunal's jurisdiction to adjudicate employees' complaints to instances of abuse of

authority" was to "reduce the staffing delays, and overly intrusive surveillance, associated with was effectively *do novo* appellate review under the former Act". Although the concept of abuse of authority shall not be limited to instances of serious misconduct carrying a moral stigma or requiring an element of intention, it requires more than an error or omission, or even improper conduct (*Lavigne v Deputy Minister of Justice and Public Service Commission*, 2009 FC 684, at para 62; *Lahlali*, above at para 38).

[42] Abuse of authority complaints are determined by a single member of the Tribunal "as informally and expeditiously as possible" (section 98). When the Tribunal finds a complaint to be substantiated, it may order the PSC or the deputy head to revoke the appointment or not to make the proposed appointment and to take any corrective action that it considers appropriate. The Tribunal is not empowered however to order the Commission to make an appointment or to conduct a new appointment process (sections 81 and 82).

[43] The Act provides for some interplay with the *Canadian Human Rights Act*. Section 80 empowers the Tribunal to interpret and apply the *Canadian Human Rights Act* in considering whether a complaint under section 77 is substantiated. Section 3 of that Act lists prohibited grounds of discrimination as including race, and national or ethnic origin and section 7 provides that it is a discriminatory practice to, directly or indirectly, refuse to employ any individual or, in the course of employment, differentiate adversely in relation to an employee, on a prohibited ground of discrimination.

[44] The reliefs listed in sections 53(2)(e) and 53(3) of the *Canadian Human Rights Act* are also available to the Tribunal when ordering the Commission to take a corrective action (section 81(2)). Finally, complainants raising an issue involving the interpretation or application of the *Canadian Human Rights Act* are obliged to notify the Canadian Human Rights Commission of the issue (section 78). When so notified, the Commission has the right to make submissions to the Tribunal with respect to that issue (section 79(2)).

C. *Standard of Review*

[45] In a challenge of similar nature brought by the Applicant against an appointment decision of the Department of Foreign Affairs (*Abi-Mansour v Department of Foreign Affairs*, 2013 FC 1170), Justice Richard Boivin, as he then was, at paras 54-55, held that the standard of reasonableness was applicable to issues concerning abuse of authority, including where issues of discrimination are the basis of the alleged abuse of authority:

> With respect to the other three (3) issues, the reasonableness standard applies. In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] the Supreme Court of Canada held that a reviewing court does not have to conduct a standard of review analysis where jurisprudence determined in a satisfactory manner the standard of review applicable to the question before the court (*Dunsmuir*, above at para 62). The three questions concerning abuse of authority can qualify as questions of mixed fact and law. They involve the interpretation of the *PSEA* as well as provisions of the *CHRA* concerning employment discrimination, that the PSST is allowed to interpret and that they are closely related to its function. The jurisprudence has indicated that such decisions by the PSST are reviewable under the reasonableness standard (*Lavigne v Canada (Deputy Minister of Justice)*, 2009 FC 684 at paras 42, 45, 46, 50,]2009} FCJ No 827 (QL)]Lavigne}; *Alexander v Canada (Attorney General)*, 2011 FC 1278 at para 44, [2011] F.C.J. No. 1560 (QL) [*Alexander*]; *Kilbray v Canada (Attorney General)*, 2009 FC 390 at para 33, [2009] F.C.J. No. 531 (QL) [*Kilbray*]; *Kane v Canada (Attorney General)*, 2011 FCA 19

> at para 40, [2011] F.C.J. No. 79 (QL); *Jalal v Canada (Minister of Human Resources and Skills Development)*, 2013 FC 611 at para 31, [2013] F.C.J. No. 640 (QL); *Canada (Attorney General) v Lahlali*, 2012 FC 601 at paras 22-23 [2012] F.C.J. No. 591 (QL) [*Lahlali*]; *Smith v Canada (Attorney General)*, 2011 FC 1401 at para 21, [2011] F.C.J. No. 1709 (QL).
>
> The Court recalls that the role of reviewing courts, when applying the reasonableness standard, is not to reweigh the evidence that was before the decision-maker. They have to limit their examination to "[...] the existence of justification, transparency and intelligibility within the decision-making process" and should be concerned with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 15-16, [2011] 3 S.C.R. 708 [*Newfoundland Nurses*].

[46] In a Judgment released on May 29, 2015 (*Abi-Mansour v Deputy Minister of Foreign Affairs and International Trade Canada,* 2015 FCA 135), the Federal Court of Appeal upheld Justice Boivin's Judgement. On the standard of review issue in particular, the Court of Appeal held, at paragraph 6, that the issues of abuse of authority and discrimination had properly been reviewed on a standard of reasonableness.

[47] This pretty much settles the issue. In particular, it disposes of the Applicant's argument that less deference should be owed to the Tribunal when it considers a discrimination-based complaint because of a lack of expertise in human rights matters.

[48] To the extent the Applicant raises procedural fairness concerns, the applicable standard of review is correctness (*Abi-Mansour v Deputy Minister of Foreign Affairs and International Trade Canada,* above at para 6). There is no disagreement between the parties on this issue.

D. *The Tribunal's finding that the Applicant failed to establish that the Department abused its authority in the appointment process at issue is reasonable*

[49] As the Department correctly points out, in a reasonableness analysis, it is not enough to disagree with the Tribunal's findings. The Applicant must demonstrate that the Tribunal's finding that the Department did not abuse its authority in the appointment process at issue is not rationally supported by the evidence. More particularly, he must show that the Tribunal's finding that the Department has rebutted the allegations upon which he based his *prima facie* case of discrimination by persuasively explaining that the Applicant has failed to establish that he possessed the qualifications being sought by the Department for the positions at issue, including experience with the PeopleSoft software application, falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[50] It is worthy of note that in conducting a reasonableness analysis, one has to be mindful that in considering a complaint, the Tribunal may examine the assessment process but it is not its role to reassess candidates or redo an appointment process (*Lahlali*, above at paras 39 and 42).

[51] As in *Abi-Mansour v Department of Foreign Affairs*, above, the Applicant is raising a myriad of arguments against the Tribunal's decision.

[52] First, he contends that the Tribunal refused to exercise its jurisdiction by not considering his Employment Equity concerns as a separate issue from the discrimination issue. Then he claims that the Tribunal committed a series of reviewable errors in its assessment of the explanations provided by the Department to demonstrate that the Applicant's race or national

and ethnic origin were not factors in its decision to appoint persons other than him. The Applicant essentially contends in this respect that the impugned decision is unreasonable to the extent the Tribunal:

- ignored evidence that the “right fit” discretion is being generally used to commit disguised discrimination;
- found that a candidate to an appointment process is not qualified if he or she does not possess the asset qualifications which, by definition, are arbitrarily chosen by the employer;
- accepted that his own application had been objectively and properly assessed;
- found that Ms. Morin met the essential qualifications for the positions at issue;
- failed to take into consideration that he was a stronger candidate that Mss. Morin, Privalova and Verner and the two persons appointed from outside the pool of the appointment process at issue;
- failed to give any weight to the fact the Department did not apply organizational needs despite the existence of gaps in the representation of visible minorities in its workforce; and
- found that he failed to establish that the Department retaliated against him for having filed complaints with the Tribunal.

(1) The jurisdictional argument

[53] The Applicant claims that the Tribunal had to consider Employment Equity as a separate issue and not, as it did in this case, as a component of the discrimination analysis. By failing to

conduct a separate Employment Equity analysis, the Applicant contends that the Tribunal declined to exercise its jurisdiction, committing thereby a fatal jurisdictional error.

[54] This argument cannot succeed. It is correct to say that the Federal Court of Appeal, in *Lincoln v Bay Ferries Ltd.*, 2004 FCA 204, made it clear that the *Employment Equity Act* was intended to apply independently from the *Canadian Human Rights Act* and to impose on employers "duties and obligations that are specific to that legislation, that are to be enforced pursuant to that legislation and that are unrelated to a complaint under section 7 of the Canadian Human Rights Act" (*Lincoln*, at para 27).

[55] However, this does not require the Tribunal to do more than what is required by the Act in terms of Employment Equity. In my view, the Tribunal, in the present case, properly described its role in this respect. It first reminded that the responsibility of enforcing compliance with the *Employment Equity Act* has been bestowed by Parliament to the Canadian Human Rights Commission, not the Tribunal, meaning that the Tribunal has no authority to consider whether a government department is fulfilling its obligations under the *Employment Equity Act*. Second, it stated that although the role of enforcing compliance with the *Employment Equity Act* belongs to the Canadian Human Rights Commission, equity matters may nonetheless be relevant to complaints made under the section 77 of the Act where a department establishes an organizational need as a merit criterion, as it is permitted to do under subsection 30(2)(b)(iii). In such instances, the Tribunal has the authority, pursuant to subsection 77(1)(a) of the Act, to determine whether the identified organizational need was duly taken into consideration in the appointment process.

[56] Contrary to the Applicant's assertion, this mirrors the position adopted by the Tribunal in *Brown v Commissioner of Correctional Services of Canada*, 2011 PSST 0015. In that case, the Tribunal provided useful guidance on the interaction between the Act and the *Employment Equity Act*:

> [68] It is useful at this point to examine the purpose of the *EEA* and how that Act operates to better understand the relation between that Act and this appointment process. The purpose of the *EEA* is to correct conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities (the designated groups) (s. 2). The Act sets out several obligations on the employer in order to reach those goals. Among them is the obligation to identify and eliminate barriers to employment for employees in the designated groups and institute policies and practices that will achieve a degree of representation in each occupational group in the employer's workforce that reflects their representation in the workforce in the country (s. 5). The CHRC is responsible for enforcing the *EEA* (s. 22). It does so through compliance audits. When the employer does not comply with the *EEA*, the CHRC may issue a direction to the employer to remedy the non-compliance (s. 25(2)). The employer may ask for a review of the direction by an Employment Equity Review Tribunal established by the Chairperson of the CHRC (s. 28 (1)).
>
> [69] The *EEA* and the PSEA are coordinated to ensure that both EE and merit are respected in appointments. Section 30(2)(*b*)(iii) of the PSEA allows the deputy head to establish organizational needs as a merit criteria. It is uncontested that EE can be an organizational need and that "[m]ember of a designated Employment Equity group" was identified as an organizational need in this appointment process. The PSEA also contributes to EE goals by allowing the deputy head to limit the area of selection to designated groups, or to have a broader area of selection for those groups (s. 34). The *EEA* ensures that merit is respected in appointments since the employer is not required to hire a person who does not meet the merit criteria within the meaning of the PSEA where merit applies (s. 6(c)).

[57] The Tribunal made it clear in *Brown*, at paragraph 71, that it will consider whether or not an employer has had regard to an organizational need only when such a need has been

established as a merit criterion. This is consistent with the jurisprudence of this Court which establishes that the language used at subsection 30(2) of the Act confers on deputy heads discretion to identify current or future organizational needs as a merit criterion (*Abi-Mansour v Department of Foreign Affairs*, above at para 87).

[58] In other words, Employment Equity concerns engage the Tribunal's jurisdiction only when Employment Equity is identified as an organizational need under subsection 32(2) of the Act in relation to an appointment process that is the subject of a complaint pursuant to section 77 of the Act. Therefore, I see no reason to interfere with the Tribunal's approach to the Applicant's Employment Equity concerns.

(2) The Department's rebuttal of the prima facie case of discrimination

[59] The Tribunal held that the Department led convincing evidence establishing that the Applicant's race or national and ethnic origins were not factors in its decision to appoint persons other than him. In particular, it was satisfied that the Department had established that although the Applicant may have met the essential qualifications for the advertised positions, he did not have experience in PeopleSoft and did not demonstrate on his application that he possessed the other asset qualifications that were legitimately considered in making the appointments at issue.

[60] In arriving at that conclusion, the Tribunal considered the following evidence:

i. The appointment process at issue was preceded by an unsuccessful process where experience in PeopleSoft was an essential qualification. As a result, the essential

qualification in the process at issue was changed to two years experience in PeopleSoft "or an equivalent system";

ii. Four asset experience qualifications were then established : (i) experience in PeopleSoft version 8 or 8.9 or equivalent system, (ii) experience in providing or facilitating training on PeopleSoft, (iii) experience in Human Resources Business analysing and system impact identification, and (iv) experience in project management. Some but not necessarily all of the asset qualifications would be needed for certain of the positions to be filed;

iii. Although it was prepared, if necessary, to hire a person with experience in another human resources information system, the Department preferred to appoint persons with PeopleSoft experience, who would be "quickly up and running on the job", because it is the only human resources system in use in the Department and because it would take two to three years to train a person to become a fully qualified business analyst in PeopleSoft;

iv. The MariTime system, with which the Applicant had experience, although it takes some data from PeopleSoft, is a separate system than the PeopleSoft system with which he had no experience according to his application materials;

v. The Applicant testified that he forgot to provide the asset qualification information in his application materials, admitting that he had not read the portion of the JOA stating that candidates may be required to meet the asset qualifications or organizational needs to be appointed to a specific AS-04 Analyst position.

[61] The Tribunal found that it was the Applicant's responsibility to provide all the information requested in the JOA and that the Department was under no obligation to infer that a candidate has certain qualifications or to seek further information from candidates concerning their qualifications, especially where the JOA'S instructions are clear that such information must be provided in the application.

[62] It was therefore satisfied that the Applicant had not demonstrated that he possessed the asset qualifications sought in making the appointments at issue and that the Department had abused its authority in finding that he was not the "right fit" for the positions to be filed through the process at issue.

[63] My role is not to re-assess or re-weigh the evidence and substitute my own findings to those of the Tribunal. The function of the Court is limited to determining whether the Tribunal's finding that the Department has rebutted the allegations upon which the *prima facie* case of discrimination was based by persuasively explaining that the Applicant has failed to establish that he possessed the qualifications being sought in the appointments at issue, including experience with the PeopleSoft software application, falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. This standard of review recognizes that there can be more than one reasonable outcome to the determination of mixed questions of facts and law.

[64] Here, I am of the view that the Tribunal's finding that the Department has persuasively demonstrated that the Applicant had failed to establish that he possessed the qualifications being sought in the appointments at issue, is rationally supported by the evidence on record and falls, as a result, within the range of possible and acceptable outcomes. It was ultimately the Applicant's responsibility to clearly demonstrate in his application that he met the required essential and asset qualifications and that he complied with the JOA's instructions (*Abi-Mansour v Department of Foreign Affairs*, at para 88). The Tribunal was satisfied that the Department had

convincingly established that he failed to make that demonstration. The Applicant vehemently disagrees with the Tribunal's finding, but this is not enough to establish its unreasonableness.

(3) The alleged errors

[65] The Applicant's contentions that the Tribunal erred in the ways I summarized at paragraph 52 above, have no merit.

(a) *The* "right fit" *discretion*

[66] The Applicant first claims that the Tribunal ignored evidence that the "right fit" discretion is being generally used to commit disguised discrimination. However, this does not oust the principle that each case has to be considered on its own merits. Here, the Tribunal was satisfied that the Applicant had established a *prima facie* case of discrimination. It then considered the Department's explanations aimed at rebutting this *prima facie* discrimination and was satisfied that these explanations were reasonable and not just a pretext to camouflage discrimination against the Applicant. In concluding as it did, the Tribunal applied the correct legal test and carefully reviewed and considered the evidence that was before it. As I already indicated, on the facts of this case, the Tribunal's conclusion that the explanations provided by the Department were not a disguise for an otherwise discriminatory conduct, was reasonable. The fact that the "right fit" discretion might have serve as a pretext for discrimination in other instances is irrelevant in the circumstances of the present case.

(b) *The role of the asset qualifications*

[67] Also, there is no merit to the Applicant's proposition that it was an error on the part of the Tribunal to find that a candidate to an appointment process does not qualify if he or she does not possess the asset qualifications. As the Tribunal correctly pointed out, subsection 30(2) of the Act allows the appointment authority to have regard for any additional qualifications that it considers to be an asset for the work to be performed. It was therefore appropriate for the Department to consider the asset qualifications in determining who among the qualified candidates, was the right fit for appointment in the appointment process at issue. This is in accord with the language of subsection 30(2) as well as with the Act's main objective, which is to afford public service managers flexibility in staffing, managing and heading their personnel to achieve results for Canadians.

(c) *The assessment methods*

[68] I see no reason either to interfere with the Tribunal's findings regarding the assessment of the Applicant's application. First, it was open to the Tribunal to conclude, on the basis of section 36 of the Act, that the Department was under no duty to require a written test in order to objectively assess candidates. Indeed, the language of section 36 is clear: it provides deputy heads with the authority to use "any assessment method" that "it considers appropriate" to determine whether a person meets the qualifications for a given position. It imposes no obligation to use a particular method. The evidence before the Tribunal in this regard was that the Department considered the review of résumés as an objective assessment tool as it was based on what is written by the candidates. The information in the résumés was then confirmed by

reference checks and while the Department conceded that the third assessment method used for the appointment process at issue – the interview - could be considered as subjective, the Tribunal noted that the assessment panel had developed a rating guide in which each question in the interview was linked to a qualification in the Statement of Merit Criteria.

[69] Second, the Tribunal was satisfied that there was no obligation to use reference checking only in the final stages of an assessment process and that it could therefore be used in earlier stages of the process to verify the accuracy of information provided by candidates on applications forms , résumés and interviews. The Tribunal found that contrary to the Applicant's assertion, the PSC Guide, when read as a whole, does permit an appointment authority to conduct reference checks at various stages in the assessment process to assess qualifications and to verify information provided by job applicants.

[70] Finally, the Tribunal held that there was no evidence to support the Applicant's assertion that the referees, in this case, were generally biased and lacked integrity by providing false or misleading information in the references.

[71] The Applicant has failed to establish that the Tribunal's conclusion that the assessment methods used by the Department were appropriate and did not contribute to a discriminatory outcome in this case was unreasonable. This finding is rationally supported by the evidence and the law.

(d) *The assessment of the Applicant's candidacy*

[72] As for the assessment of the Applicant's own application, the Tribunal found that the Applicant's assertions that he was the victim of an attempt to unfairly eliminate him from the appointment process or that his main referee was not contacted by the Department were unsubstantiated. I find that it was open to the Tribunal to conclude as it did on this point. The emails on which the Applicant is relying to claim that an attempt was made to eliminate him from the process can reasonably be read as referring to his main referee, not him, as this referee appeared unavailable, when first contacted, to provide the requested reference. Also, the evidence before the Tribunal was that although the Applicant's main referee appeared unavailable, based on an "out-of office" message indicating that he would not be back in the office for a period of two weeks, the main reference did read his emails despite being away and offered to provide the requested reference.

[73] The Applicant also complained that the assessment panel interviewed him in an intimidating manner. The Tribunal also found this complaint to be unsubstantiated. Again, I see no basis for interfering with this finding.

[74] As for the outcome of the assessment of the Applicant's application, the Tribunal found that the Department had successfully established that the Applicant did not meet the asset qualifications for the positions that were being filled. As I have indicated previously, this finding was, in my view, entirely within the range of possible and acceptable outcomes.

(e) ***Ms. Morin***

[75] The Applicant further claims that Ms. Morin did not met the essential qualifications for the AS-04 Analyst positions at issue as she failed her interview on one personal suitability qualification. As result, he contends that she ought to have been eliminated from the appointment process and since she was not, her appointment ought to have been revoked by the Tribunal. The evidence before the Tribunal was that the assessment panel did not make a reference check and did think of eliminating Ms. Morin from the appointment process but was advised by a Department's Human Resources advisor to proceed to the reference check as it might lead them to reconsider the failing mark. Following the reference check, it was determined that Ms. Morin should receive a passing mark on this personal suitability qualification and be, as a result, included in the pool.

[76] The Applicant may have had a point if the assessment of the candidates would have been limited to an interview. As we have seen, it was not the case and there was therefore nothing illegal or inappropriate in Ms. Morin's candidacy being assessed through the three methods – review of application forms/résumés, interview and reference checking - chosen by the Department for the appointment process at issue. The Applicant further claims that Ms. Morin's referees did not confirm the asset qualifications that were used by the assessment panel to justify her appointment. Although the Tribunal noted that there were some discrepancies in the references provided for Ms. Morin, it was nevertheless satisfied that there was sufficient evidence supporting the assessment panel's conclusion that she did possess the asset qualifications identified in her appointment rationale. The Applicant has not shown that the

Tribunal's finding in this respect was not rationally supported by the evidence and warranted the Court's intervention.

(f) *The other appointees*

[77] The Tribunal was also satisfied that Mss. Privalova, Verner, V and Mr. B met the essential qualifications as well as the asset qualifications sought for the positions to which they were appointed. Contrary to the Applicant, Ms. Morin possessed key asset qualifications, whereas Mss. Privalova, Verner, V and Mr. B all had PeopleSoft experience. The Tribunal concluded that these were reasonable non-discriminatory explanations for not appointing the Applicant to the positions at issue.

[78] The Applicant claims however that he was a stronger candidate than these individuals and that, accordingly, he should have been appointed to one of these positions. This argument does not assist the Applicant. In *Lahlali*, above, the Court emphasized that under the new staffing regime established under the Act, an appointment authority is no longer required to appoint to a position the best qualified candidate:

> [18] Parliament also distanced itself from the old system by using a version of the merit principle that emphasizes individual merit rather than comparative merit, as section 30 of the PSEA shows. From that point forward, a manager would no longer be required to appoint the best qualified candidate to a position; it would be enough that a person would have the essential qualifications established by the deputy head to be appointed to a position. Paragraph 30(2)(b) of the PSEA specifies that the Public Service Commission (the Commission) may also take into account any additional qualifications considered an asset to the work to be performed, any current and future organizational need and any current and future operational requirements.

[79] Therefore, it is clear that even if the Applicant was to be considered as more qualified for the positions at issue than those who were appointed to these positions, there was no obligation on the part of the Department to appoint the Applicant to one of these positions as long as the Department could reasonably explain that those individuals were the right fit for the organisation. As we have seen, the Tribunal was satisfied that Mss. Morin, Privalova, Verner, V and Mr. B all met the essential qualifications as well as the asset qualifications legitimately considered by the Department in making the appointments at issue and that the Applicant was not appointed because he had no experience in PeopleSoft and did not possess the other asset qualifications. This finding, as I have already indicated, is rationally supported by the evidence.

[80] In the course of the proceedings before the Tribunal, the Applicant insisted that the performance reviews of these appointees and of those who occupied the positions at issue before them be provided to him, as this information "may be relevant" to prove that the Department's explanation that certain asset skills were essential for the safe performance of these positions was "a pretext or a plain lie". The Tribunal denied the Applicant's request in interim orders rendered in the course of the proceedings before it on the ground that the Applicant's request was based on mere suspicion that the performance reviews of these employees may contain relevant information and that, in any event, this information was irrelevant as the asset qualifications were not assessed in the present case through the use of performance reviews.

[81] According to subsection 17(2) of the *Public Service Staffing Complaint Regulations*, SOR/2006-6, adopted pursuant to section 109 of the Act, the issuance of an order for the provision of that information was conditional upon the Applicant establishing that the said

information was relevant to the case at hand and not just a "fishing expedition". I find that the Tribunal's discretion under that provision to determine whether information is relevant or not was properly exercised and that there is, therefore, no basis to disturb its decision in this regard.

(g) *Organizational needs*

[82] The Applicant also contends that the Tribunal failed to give any weight to the fact the Department did not apply organizational needs despite the existence of gaps in the representation of equity groups in its workforce, especially visible minorities. First, as the Tribunal correctly pointed out, the JAO clearly stated that the Department "may" give preference to Aboriginal or visible minorities. There was no obligation on the part of the Department to limit the selection for appointment to someone from either designated group. Subsection 30(2) of the Act is clear that hiring managers were granted discretion to consider, once a candidate has been found to meet the essential qualifications for a position, "other qualifications that might be assets for their organizations and current or future needs that may have been identified" (*Abi-Mansour v Department of Foreign Affairs*, above at para 87).

[83] The evidence before the Tribunal was that the wording of the JOA reflected the fact that the appointment process at issue was not intended to be a "targeted" process and that therefore, there was no requirement to give preference to someone from one of these designated employment equity groups although in case of a tie-breaker between two equally qualified candidates, the organizational need would be used. I am satisfied, therefore, that the Tribunal's finding that the Department has provided a reasonable explanation for its decision not to apply

the organizational needs section of the JOA in the present case falls well within the range of possible, acceptable outcomes defensible in respect of the fact and the law.

[84] As the Tribunal also rightly pointed out, even if the application of the organizational needs section of the JOA had been mandatory, the Applicant still lacked the asset qualifications to be the right fit for the appointments at issue. This is entirely consistent with the provisions of the *Employment Equity Act* that provides that the obligation to implement employment equity does not require an employer of the federal public sector to hire or promote persons without basing the hiring or promotion on merit in cases where the *Public Service Employment Act* requires that hiring or promotion be based on merit (subsection 6(c) of the *Employment Equity Act*).

[85] The Tribunal then looked at the reports introduced by the Applicant, including the Department's Employment Equity Plan as well as the HRWS Branch Human Resources Plan, in support of the argument that the Department abused its authority by not applying organizational needs to the appointment process at issue given the gap in the representation of equity groups in its workforce. The Tribunal noted that the Department recognizes that it has an employment gap with respect to visible minorities but that this gap, through initiatives it had developed in its Employment Equity Plan, had been reduced by June 30, 2012, to 0.65% while at the same time the representation of the other three employment equity designated groups – Aboriginal persons, women and disabled persons – exceeded workforce availability. The Tribunal also noted that in the HRWS Branch in particular, where all but one of the appointments at issue were made, visible minority persons and Aboriginal persons, with three representatives each, accounted for

40% of the Branch workforce. It concluded from this evidence that discrimination against visible minorities was not a factor in the appointment process at issue.

[86] I find that this conclusion is rationally supported by the evidence and I see no need to interfere with it although, again, the issue of whether an employer has met its obligation to eliminate barriers to employment for employees in the designated groups and institute policies and practices that will achieve a degree of representation of these groups in its workforce is first and foremost a matter falling under the *Employment Equity Act* and within the exclusive purview of the Canadian Human Rights Commission.

[87] The Applicant further contends that the Tribunal's finding in this regard might have been different if it had ordered, as he had requested the Tribunal to do, the provision of an audit report performed by the Canadian Human Rights Commission on the Department's staffing processes. The Tribunal refused to order the provision of this audit report on the ground that the Canadian Human Rights Commission not being a "party" to the proceedings before it, it had no authority, pursuant to section 17 of the *Public Service Staffing Complaints Regulations*, above, to make such an order. Subsection 17 empowers the Tribunal to make an order for the provision of information where "a party refuses to provide information". A "party" is defined in these Regulations as "anyone who has the right to be heard under subsection 65(3), section 75, subsection 79(1) or section 85 of the Act". The Canadian Human Rights Commission does not possess such a right although, as we have seen, it is entitled under subsection 79(2) of the Act to make submissions to the Tribunal with respect to an issue involving the interpretation or application of the *Canadian Human Rights Act*, when notified that such an issue is being raised

in a proceeding before the Tribunal. In the present case, as we have also seen, the Canadian Human Rights Commission was notified of the Applicant's complaints but declined to make submissions.

[88] As a result, on a plain reading of section 17 of the *Public Service Staffing Complaints Regulations*, the Tribunal was entitled to refuse to order the Canadian Human Rights Commission to provide the audit report requested by the Applicant. However, the Applicant argues that the Tribunal's decision in this regard is flawed as subsection 99(e) of the Act empowers the Tribunal to "compel, at any stage of a proceeding, any person to produce any documents and things that may be relevant". Section 109 of the Act provides that the Tribunal may make regulations respecting the disclosure of information obtained in the course of an appointment process or a complaint proceeding under the Act. Section 17 appears to be the regulatory provision enacted by the Tribunal pursuant to section 99(e) of the Act. To the extend the Applicant sought to be provided with a copy of the audit report through a request for the provision of information made under section 17 of the *Public Service Staffing Complaints Regulations*, he has to accept that the Tribunal did not have the authority, under that provision, to issue an order compelling the Canadian Human Rights Commission to provide that information.

[89] Be that as it may, even assuming that it was open to the Tribunal to compel the Canadian Human Rights Commission to produce that audit report pursuant to subsection 99(e) of the Act, one wonders what its immediate relevance to the issues the Tribunal had to determine in the present case might be. I find there is none. First, there is no indication on record that the report comments on the appointment process at issue. The Applicant insists that he may have found in

that report evidence supporting his claim of abuse of authority as there were some references to it in the Department's Employment Equity Plan he had previously obtained through a request for the provision of information under section 17 of the *Public Service Staffing Complaints Regulations*. This is clearly in the nature of a fishing expedition. Second, this audit report was in all likelihood prepared in the context of the implementation of the *Employment Equity Act*, which, as I already indicated, has no direct bearing on the application of the Act or on the jurisdiction of the Tribunal.

[90] I therefore find that even if it was open to the Tribunal to compel the production of the audit report requested by the Applicant, the fact it did not do so is immaterial as the report was not relevant to the issue the Tribunal had to determine, which was whether the Department had abused its authority in conducting the appointment process at issue and in making the appointments at issue.

(h) ***Retaliation***

[91] Finally, I am satisfied that the Tribunal's finding that the Applicant has failed to established that the Department retaliated against him because he had filed complaints, is reasonable. The Applicant was alleging before the Tribunal that as a result of the filing of these complaints, the Department had taken "all measures to assure that he would never get any position with them". This was evidenced, according to the Applicant, by the appointments of Mss. Verner, V and Mr. B, who were candidates that had "nothing more than I have", and further evidenced by the fact he was screened out of a separate appointment process.

[92] The Applicant says that the Tribunal in not dealing "with all the elements I raised in support of the retaliation allegation". There are two problems with that proposition. First, there is no obligation on an administrative decision-maker to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para 16) or to list, as the Department points out; "every conceivable factor which may have influenced the decision" (*McEvoy v Canada (Attorney General)*, 2013 FC 685, at paras 79-84).

[93] Here, the Tribunal reiterated the evidence that Mss. Verner, V and Mr. B were appointed because they were the right fit for a position which included experience in PeopleSoft, an asset qualification the Applicant failed to demonstrate that he possessed. The Tribunal also dismissed the Applicant's claim that Mr. B was appointed instead of Ms. Chauret in order to avoid, as he would otherwise had been the only one left in the pool, the appearance that the Department was discriminating against him. This claim was rejected on the ground that there was non-contradicted evidence on record showing that Ms. Chauret was approached when Ms. Privalova and Ms. Morin left their positions but indicated that she had another offer and was no longer interested in these positions. Finally, the Tribunal held that any claim that the Applicant was screened out of the separate appointment process for extraneous reasons was entirely speculative and that if he thought that he had been unfairly eliminated from that process, he had recourses under the Act.

[94] These findings meet the test of transparency, intelligibility and justification and are well within the range of acceptable outcomes.

[95] The other difficulty with the Applicant's proposition that the Tribunal overlooked some of his arguments is that there are no precise indications in his written submissions as to what these overlooked "elements" are. The Court is therefore called upon to guess what those might be. This does not sit well with the principle that the burden is on the Applicant to show that the Tribunal's decision is unreasonable. Here, the Applicant has failed to meet his burden in this regard.

[96] The Applicant also submits that the Tribunal's approach to the retaliation issue is flawed. He contends that retaliation being a form of discrimination, the Tribunal was bound to determine first whether there was a *prima facie* case of discrimination and only then to proceed to determine whether the Department's explanations were reasonable, something it did not do.

[97] In *Lincoln*, above, the Federal Court of Appeal held that although the Canadian Human Rights Tribunal had adopted an incorrect approach for determining the existence of a *prima facie* case of discrimination, the Tribunal's "overall conclusion" that the respondent in that case had put forward a reasonable explanation for not hiring the appellant and that this explanation was not a mere pretext for discrimination, was supported by the evidence and did not require, as a result, judicial intervention (*Lincoln*, at para 23).

[98] Here, the Tribunal's ultimate conclusion is that the Department has come up with a reasonable explanation that the appointments of Mss. Verner, V and Mr. B to the positions at issue instead of the Applicant did not amount to retaliation and were not, therefore, a mere pretext for discrimination. The Applicant's contention that the Tribunal arrived at that conclusion without first determining whether he had established a *prima case* of discrimination is, in these circumstances, immaterial.

[99] In sum, I am satisfied that the Tribunal's findings that the Applicant failed to establish that the Department abused its authority in the appointment process at issue or retaliated against him for having filed complaints in relation to that process, were reasonable.

E. *The Bias allegations*

[100] The Applicant claims that the Tribunal "just wanted to rule in favour of the Crown" as evidenced by its decision. He says that when this is looked through by an informed person, it gives rise to a reasonable apprehension of bias.

[101] In a decision rendered in this case on November 21, 2014, in relation to a preliminary matter, the Federal Court of Appeal found that the Applicant's "unsupported allegations of bias are an abuse of process" (*Abi-Mansour v Department of Aboriginal Affairs*, 2014 FCA 272, at para 14). To paraphrase the Federal Court of Appeal, the present allegations are just but another example of someone "who invoke a decision-maker's assistance in its capacity as an independent arbiter of disputes and who then repeatedly allege bias when the decision-maker's decisions do not meet his or her expectations" (idem).

[102] Allegations of bias are very serious allegations as they constitute attacks on the integrity of the entire administration of justice (*Coombs v Canada (Attorney General)*, 2014 FCA 222, at para 14). They need to be made expressly and unequivocally and not simply on the basis of "elusive innuendoes". Here again, the Applicant's allegations of bias are unsubstantiated and amount to an abuse of process.

IV. <u>The costs</u>

[103] The Applicant is claiming costs, including full disbursements as well as compensation for leave from work to complete the Record, regardless of the outcome of the proceedings. He contends that as a person of limited means, he should not be expected to pay costs, particularly in a context where the present proceeding raises questions of public importance.

[104] The Department contends that costs should be awarded against the Applicant and fixed at a higher rate given the unsubstantiated allegations of bias made by the Applicant in the course of these proceedings and the unfounded accusations of perjury he made against the Department's witnesses. It claims a total of $9,551.00 in fees and disbursements.

[105] Rule 400 of the *Federal Courts Rules* provides the Court with "full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid". In exercising this discretion, the Court may consider various factors such as the result of the proceeding and the conduct of the parties. It can also take into consideration any other matter that it considers relevant. It further has to be mindful of the objectives of an award of costs, which are to provide compensation, promote settlement and deter abusive behaviour.

[106] Here, I find that there is no reason to depart from the general rule that costs should follow the event and be awarded, as a result, to the Respondent. Under Rule 407, costs are to be assessed in accordance with column III of the table to Tariff B of the Rules, unless the Court orders otherwise. The Respondent has used column IV to Tariff B's table to assess its fees. Column III concerns cases of average or usual complexity and represents a compromise between awarding full compensation to the successful party and imposing a crushing burden on the unsuccessful party (*Air Canada v Thibodeau (*2007), 375 N.R. 195, 2007 FCA 115, at para 24). Given that in the present case, the Applicant has already been ordered by Justice Roy and the Federal Court of Appeal to pay costs in the amounts of $250 and $500 respectively, I find that costs shall be assessed in accordance with Column III of the table to Tariff B.

[107] A further amount of $250 with respect to costs needs to be considered. On August 22, 2013, Madam Prothonotary Aronovitch ordered the Applicant to pay the costs of a motion at a fixed amount of $250 in any event of the cause. The Applicant has appealed that Order under Rule 51 and the appeal was heard at the outset of the hearing of the present judicial review application.

[108] This Order stems from successive motions brought by the Applicant to perfect his application record, in particular with respect to the filing of his affidavit. His deadline for doing so was first extended by Madam Prothonotary Tabib by Order dated June 13, 2013. The Applicant was able to meet that extended deadline.

[109] However, a few weeks later, he brought a motion for leave to file an amended affidavit. In his motion materials, the Applicant argued that "this motion was forced by Prothonotary Tabib" and "could have been avoided if there was a reasonable Prothonotary in place of Tabib". The Department opposed the Applicant's motion.

[110] In her Order, Madam Prothonotary Aronovitch, although barely justified in her view, allowed the motion. Her reasons for awarding costs against the Applicant read as follows:

> I do not take the Respondent to have unnecessarily opposed the motion. In any case, the intemperate language directed at counsel for the Respondent is inappropriate, as is the baseless allegation of abuse against the Court, and, in my view, calls for sanction by way of an order of costs. I note that the applicant has already been cautioned in that regard. (Abi-Mansour v Public Service Commission, Reasons for Order on Motion, 2013 FCA 116).
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> Pursuant to Rule 410(1) costs of an amendment are ordinarily awarded against the amending party unless the Court orders otherwise. In the circumstances, I see no basis to exercise my discretion to avoid the application of the general rule.

[111] As is well established, orders of Prothonotaries ought not to be disturbed unless the questions raised in the motion are vital to the final issue in the case or the impugned order is clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts (*Merck & Co. v Apotex Inc,* 2003 FCA 488, [2004] 2 FCR 459).

[112] It is clear that the Applicant's appeal does not raise a question which is vital to the final disposition of the case. It is clear also that Prothonotary Aronovitch's exercise of discretion in awarding costs against the Applicant was not based on a wrong principle or upon a

misapprehension of the facts. As the Respondent points out, quoting the Supreme Court of Canada decision in *Sun Indalex Finance v United Steelworkers*, 2013 SCC 6, costs awards are quintessentially discretionary and should only be set aside if the court below "has made an error in principle or if the costs award is plainly wrong" (*Sun Indalex Finance,* at para 247).

[113] Here, although it is not clear that Rule 410(1) applies to amendments brought to an affidavit with leave of the Court, it is clear that the costs award, when Prothonotary Aronovitch's Order is read as a whole, was in response to the baseless allegations of abuse being directed at the Court. This was, as the Respondent puts it, the crux of the costs Order and there was ample authority in the Rules to support it. According to Prothonotary Aronovitch, the Applicant's motion to amend his affidavit was barely justified. Coupled with what she perceived, correctly in my view, to be abusive behaviour on the part of the Applicant, Prothonotary Aronovitch was entitled, in the exercise of her discretion, to award costs against the Applicant.

[114] Regardless of Rule 410(1), it was open to her, in these circumstances, to award costs against the "successful" party, as per Rule 400(6), and to use her discretion to award costs in order to deter abusive behaviour and unacceptable conduct, which Rule 400 clearly permits (*Air Canada*, above at para 24; *Jean-Pierre v Agence des Services Frontaliers du Canada*, 2014 FC 637, at para 21; *McMeekin v Canada (Minister of Human Resources and Social Development)*, 2011 FCA 165, at para 32).

[115] The Applicant claims that Prothonotary Aronovitch's costs award should be overturned because the Respondent did not seek costs on this specific point. There is no such obligation on

a party to seek costs in this manner. The Respondent did seek its costs on the Applicant's motion. This was sufficient to trigger Prothonotary Aronovitch's "full discretionary power" to award costs on the said motion.

[116] Finally, the Applicant contends that Prothonotary Aronovitch's costs award must not stand as "it will put litigants under undue pressure in writing factums because of fear of costs sanctions merely if a prothonotary does not like their choice of words" , hindering as a result "the litigants ability to fiercely and fearlessly advance their cases".

[117] The Applicant misses the point. The only limit to a litigant's ability to fiercely and fearlessly advance his or her case, be it before this Court or any other court, is abuse of process. Again, the Applicant's unacceptable comments regarding Prothonotary Tabib, which prompted the impugned award of costs, is yet another example of the Applicant seeking the Court's assistance in its capacity as an independent arbiter of disputes and then repeatedly attacking its members when the Court's decisions do not meet his expectations. The Applicant has now been warned on several occasions that this is abusive behaviour. It ought not to be tolerated.

[118] The Applicant's appeal against Prothonotary Aronovitch's cost award is therefore dismissed, with costs to the Respondent in the amount of $250.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to remove "Department of Aboriginal Affairs" as the Respondent and replace it by the "Attorney General of Canada";

2. The application for judicial review is dismissed, with costs to the Respondent to be assessed in accordance with Column III of the table to Tariff B;

3. The appeal against the order of Prothonotary Aronovitch, dated August 22, 2013, is dismissed with costs to the Respondent in the amount of $250.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-550-13
STYLE OF CAUSE:	PAUL ABI-MANSOUR v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 25, 2014
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	JULY 17, 2015

APPEARANCES:

Paul Abi-Mansour	FOR THE APPLICANT (On his own behalf)
Christine Langill	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Self-represented	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT