

Canadian Human  
Rights Tribunal



Tribunal canadien  
des droits de la personne

**Between:**

**Paul Marchand**

**Complainant**

**- and -**

**Canadian Human Rights Commission**

**Commission**

**- and -**

**Department of National Defence**

**Respondent**

**Decision**

**Member:** Athanasios D. Hadjis

**Date:** February 8, 2011

**Citation:** 2011 CHRT 3

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## **I. Introduction**

[1] The complainant, Paul Marchand, is a former member of the Canadian Forces (CF). In 2007, he applied to the respondent, the Department of National Defence (DND), to be employed in one of several temporary or indeterminate full-time cleaner positions at the Canadian Forces Base in Shilo, Manitoba (CFB Shilo). Several women were ultimately appointed to the positions and he was not hired. Mr. Marchand claims that DND refused to employ him because he is a man. He alleges that in so doing, DND engaged in a discriminatory practice within the meaning of s. 7(a) of the *Canadian Human Rights Act (CHRA)*.

[2] In the following decision, I find that based solely on Mr. Marchand's understanding and presentation of the facts relating to these appointments, he established on a *prima facie* basis that DND's failure to hire him was discriminatory. However, once all of the evidence regarding the appointments is taken into account, I conclude that DND has provided a reasonable and non-pretextual explanation. In particular, the evidence reveals that the temporary appointments were made after Mr. Marchand had already been screened out of the process due to his own failure to demonstrate on his application that he possessed the essential qualifications for the positions. With respect to the indeterminate position, the evidence shows that the person who was selected was assessed as a better candidate (or "right fit") for the job. Mr. Marchand's sex was not a factor in the decision not to appoint him.

## **II. Mr. Marchand's Evidence**

[3] Mr. Marchand was not represented by counsel and he did not have anyone other than himself testify at the hearing.

### **A. Mr. Marchand's work history**

[4] Mr. Marchand joined the CF in 1981 and was based for most of his career at CFB Shilo. He loved his work in the military but unfortunately had to retire in 1990, due to a work-related

injury. By this time, he considered Shilo as his home and he sought work at the base after he left the CF.

[5] Immediately following his retirement, he worked as a cleaner at the base for about five years in total, either on a casual basis or for a number of terms. His employer on these occasions was the German Army Training Establishment at Shilo (GATES), which was an operation administered by the German military that was using DND's facilities at Shilo. Over the same period, Mr. Marchand had applied for several indeterminate positions with DND at CFB Shilo but was never selected. He believes that there was favouritism involved in these employment processes and he eventually gave up applying for work there.

[6] After this initial period of employment on-site at the base, Mr. Marchand began working elsewhere in the Shilo/Brandon area, at a number of different jobs. Around 2005, however, he returned to work full-time as a cleaner at CFB Shilo. He was employed by a cleaning company that had a cleaning contract with DND. The company was owned by Cindy Brown, who is also employed by DND as the base accommodation supervisor at CFB Shilo. It is Ms. Brown who served as the technical expert and manager on the assessment board that dealt with the appointments that are at issue in this complaint.

[7] When another cleaning company took over the cleaning contract in 2006, it hired Mr. Marchand. As of the date of the hearing, he was still working for this company as a supervisor of cleaning operations at CFB Shilo.

## **B. Mr. Marchand's job application**

[8] In March 2007, Mr. Marchand saw a posting on a bulletin board at CFB Shilo for three temporary full-time cleaner positions with DND, classified as GS-BUS-02. The advertisement stated that any person residing or employed in Shilo, Manitoba or within a 100km radius of the city, could apply. The process was therefore external and not just limited to existing DND employees.

[9] The advertisement stated that job applicants had to apply on-line by computer. Hard copy applications, by fax or mail, were not accepted. Mr. Marchand applied from a computer that he accessed on the base. He testified that he was unable to properly fill out the application because he is not skilled in the use of computers. He described the process as so difficult that even those familiar with computers had a hard time completing the on-line form. He suspects that only portions of his application managed to be sent.

[10] A table generated from the information provided on-line by the candidates was used by DND's human resources staff to determine whether to screen them into the process. Mr. Marchand pointed out that the table relating to his application indicates he does not meet the essential criteria of experience in commercial cleaning and the use of various commercial cleaning equipment. He testified that this information is clearly wrong since at the time he applied, he had been working at the base as a cleaner, either as a casual employee or as an employee for a contractor, for almost two decades. Mr. Marchand pointed to this discrepancy as evidence that he was incapable of completing his application properly on line.

[11] After filing his application, and sensing that it was incomplete, Mr. Marchand went to DND's human resources office to try to submit a hard copy of his résumé. He met with human resources officer, Shannon Barnes-Girourd, who advised him that this option was not available. He could only file it on-line.

[12] He was so upset with DND's response that he spoke to his Member of Parliament (MP) to complain about this policy. Several days later, Ms. Barnes-Girourd contacted him to explain that there was a flaw in the system and that DND would now accept his résumé in paper form. Mr. Marchand suspects that DND changed its position due to an intervention by his MP.

[13] Mr. Marchand followed through and filed his résumé in paper form. He was then invited to an interview, which was conducted by Ms. Brown, Ms. Barnes-Girourd and a third individual, who is not employed by DND but rather by the Canadian Forces Personnel Support Program. Mr. Marchand testified that he answered several questions relating to commercial

cleaning. He felt the interview went well. To his knowledge, he was the only candidate to have been interviewed by three persons instead of two. He questions why he was singled out in this way.

[14] Following the interview, Mr. Marchand heard from some of the cleaners at work that a woman (Dawn Cyr) had already been appointed to an indeterminate cleaner position even prior to his interview. He claims that he always suspected that Ms. Cyr would be hired. He testified that after learning of her appointment, he went to the human resources office and asked why he had not been notified of the outcome. The evidence suggests that this meeting took place on August 29, 2007. A human resources assistant, Rebecca Moorehead, informed him that although the employer was not required to notify him personally of Ms. Cyr's appointment, a letter regarding the appointment process had in fact been mailed to him more than two months earlier, on June 6, 2007.

[15] Several days after the meeting, he received a copy of that letter, which informed him that he was found qualified under the selection process and that his name had been placed in a pool of qualified candidates from which he may be contacted for future vacancies should they arise. The letter was accompanied by a cover sheet signed by Ms. Moorehead dated August 29, 2007, in which she explained that her office had mistakenly reversed the numbers of Mr. Marchand's post office box on the June 6th letter. It had not, however, been returned to DND and they were therefore unaware that he had never received it. Both letters were filed in evidence and Mr. Marchand confirmed in his testimony that his address had been mistyped on the June 6th letter.

[16] Mr. Marchand testified that despite being placed in the pool of qualified candidates, he has never been contacted to fill any vacancies. On the other hand, he is aware of two women (Amanda Pero and Vicki Carriere) who have been selected from the pool to work from time to time on a temporary basis. He questions how Ms. Carriere was chosen given that she does not hold a driver's licence, which he understands to be an essential qualification for the cleaner position at the base.

[17] To Mr. Marchand's knowledge, all but one of the ten cleaners employed on an indeterminate basis by DND are women, and the sole man is nearing retirement. The only other men that he has seen employed over the years, worked for GATES, not DND. He claimed in his testimony that since Ms. Brown began managing the cleaning services for DND at CFB Shilo, only women have been hired as indeterminate employees. He admitted in his evidence that he does not know how many men, if any, applied on the 2007 appointment process along with him, but he claims that males will generally not even bother to apply because they know that Ms. Brown will not hire them.

### **III. Analysis**

#### **A. What is the law regarding Mr. Marchand's claim of discrimination?**

[18] It is a discriminatory practice under the *CHRA* to refuse to employ a person on the basis of his sex (ss. 3 and 7(a)). A complainant must first establish a *prima facie* (literally, "at first face") case of discrimination (*Ont. Human Rights Comm. v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 28). A *prima facie* case, in this context, is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a verdict in the complainant's favour, in the absence of an answer from the respondent. Once the *prima facie* case is established, the onus then shifts to the respondent to disprove the allegations or provide some other reasonable explanation.

[19] It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. It is sufficient that the discrimination be one of the factors in the employer's decision (*Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12 at para 7 (F.C.A.); *Canada (Attorney General) v. Uzoaba*, [1995] 2 F.C. 569 (T.D.)).

[20] In *Basi v. Canadian National Railway Company* (1988), 9 C.H.R.R. D/5029 at para. 38481 (CHRT), the Tribunal stated that discrimination is not a practice that one would

expect to see displayed overtly. A tribunal should therefore consider all circumstances to determine if there exists a "subtle scent of discrimination".

[21] A number of decisions have served to illustrate what type of evidence is needed to establish a *prima facie* case of discrimination depending on the circumstances of the particular case. In the case of complaints alleging that an employer has refused to employ the complainant, the Ontario Board of Inquiry held, in *Shakes v. Rex Pak Ltd.*, (1981), 3 C.H.R.R. D/1001 at para. 8918, that a *prima facie* case could be established by demonstrating:

- that the complainant was qualified for the particular employment;
- that the complainant was not hired; and
- that someone no better qualified but lacking the distinguishing feature, which is the gravamen (or basis) of the human rights complaint, subsequently obtained the position.

**B. Has Mr. Marchand established a *prima facie* case that DND committed a discriminatory practice within the meaning of s. 7(a) of the CHRA, in refusing to employ Mr. Marchand?**

[22] I am satisfied that Mr. Marchand has established a *prima facie* case that DND's refusal to employ him as a cleaner in the course of the appointment processes conducted in 2007 constituted a discriminatory practice within the meaning of s. 7(a) of the CHRA. The evidence he presented in support of his allegations, if believed, would be complete and sufficient to justify a verdict in his favour, absent an explanation from DND.

[23] Given that the complainant testified that he applied for a position with DND but was not hired, it is appropriate to apply the Shakes test to this case. Regarding the first element of the test, there is convincing evidence that Mr. Marchand is qualified for the position of cleaner. He testified that he worked as a cleaner in the facilities of CFB Shilo for at least 15 years. Moreover, DND itself confirmed in its letter to Mr. Marchand that he had been qualified in the appointment process and that his name had been placed in a pool of qualified candidates from



which he could be contacted for future vacancies. In its final submissions, DND did not dispute that Mr. Marchand was qualified. I therefore find that Mr. Marchand was qualified for the cleaner position.

[24] With respect to the second part of the *Shakes* test, Mr. Marchand testified that he was not selected by DND for the full-time indeterminate or term positions for which he had applied.

[25] Regarding the third component of the *Shakes* test, based on the evidence led by Mr. Marchand, the person hired to the indeterminate position (Ms. Cyr) and the others who were selected for term employment are women. Indeed, according to Mr. Marchand, over the last 20 years or more, DND has only hired women to indeterminate full-time cleaner positions at CFB Shilo such that nine out of the ten cleaners employed in these positions are women.

[26] However, Mr. Marchand must also establish that the women who were appointed from the process in which he participated were no better qualified than him? The posted advertisement for the positions contained a statement of essential merit criteria that candidates were required to meet in order to be qualified for the position. The assessment board found that Mr. Marchand met these requirements and he was placed in the qualified pool of candidates, presumably along with Ms. Cyr and the other women who were selected. He was thus at least as qualified as these women or, to paraphrase *Shakes*, the women who were hired were no better qualified than him. I am satisfied that the third aspect of the test has been met.

[27] I therefore find that the evidence led by Mr. Marchand is complete and sufficient to justify a verdict in his favour **in the absence of an answer from the respondent.**

**C. Has DND provided a reasonable explanation for its decision not to hire Mr. Marchand?**

[28] DND concedes that Mr. Marchand was, and remains, qualified in the pool for the cleaner positions at CFB Shilo, from which he has yet to be hired. It also acknowledges that the women who have been hired as a result of the appointment processes in which Mr. Marchand

participated were no better qualified than him. DND submits, however, that Mr. Marchand's sex was not a factor in the decision not to select him for employment. Instead, DND contends that those women were appointed because they were the "right fit" for the organization at that time, in accordance with the applicable staffing rules for the federal public service.

[29] Section 30(1) of the *Public Service Employment Act*, S.C., 2003, c. 22, ss. 12, 13 (*PSEA*) provides that appointments to, or from within, the public service must be made on the basis of merit and free from political influence. As the Public Service Staffing Tribunal noted in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 63, the *PSEA* provides managers with considerable discretion to choose the person for appointment who not only meets the essential qualifications for the position, but is the "right fit" because of additional asset qualifications, current or future needs, and/or operational requirements (see also *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 42).

[30] DND filed into evidence numerous documents related to the appointments at issue and called several witnesses who were involved in the appointment processes. Mr. Marchand was likely unaware of this evidence and the intricacies of public service staffing when he filed his complaint. This evidence, however, supports the respondent's explanation for not having hired Mr. Marchand and demonstrates that the explanation is reasonable and non-pretextual.

**(i) The first appointment process – temporary full time positions**

[31] In early 2007, Ms. Brown determined that several extra cleaners needed to be hired at the base, on a term basis. She and Ms. Barnes-Girouard, the human resources officer, initiated an appointment process, as a result of which the job advertisement that Mr. Marchand saw posted on a bulletin board was prepared. The assessment board was made up of Ms. Brown and Ms. Barnes-Girouard. Ms. Brown testified that the intended outcome of the process was the establishment of a pool of qualified candidates from which positions that would be opening up could be staffed.

[32] The advertisement stated that three temporary full time vacancies were to be filled. Candidates had until March 6, 2007, to apply. The advertisement was amended two weeks later, to no longer require possession of a Class 5 driver's licence as an essential qualification for the position. As a result applicants now had until March 19, 2007, to file their applications. Anyone who had responded to the first advertisement was automatically included in the modified process.

[33] A total of 45 applications were ultimately received, 32 from women and 13 from men. 14 of those candidates cleared the initial screening into the process (12 women and two men). On March 27 and 28, 2007, the board interviewed these candidates. With the assistance of human resources staff, Ms. Brown had developed the questions that were asked of all candidates. Following the interviews, the candidates' references were consulted and verified.

[34] Within a week, the board had completed its assessment of the candidates and on April 4, 2007, it sent letters to 11 of the screened in candidates (nine women and two men), including Ms. Cyr, Ms. Pero, and Ms. Carriere, informing them that they met the essential qualifications outlined for the selection process and that their names had therefore been placed in a pool of qualified candidates. They were also advised that they may be contacted for future vacancies should they arise.

[35] On April 12, 2007, Ms. Barnes-Girouard sent a letter to Ms. Cyr offering her the first of the positions that the board was staffing under the appointment process, for a term ending on February 1, 2008. The board's interview notes were filed in evidence. Both Ms. Barnes-Girouard's and Ms. Brown's assessments of Ms. Cyr's answers during the interview ranged from very good to excellent (the top two available ratings). Ms. Brown produced the notes from the follow-up reference checks that she conducted with respect to Ms. Cyr. She described the references as "excellent all around". Ms. Barnes-Girouard testified that Ms. Cyr demonstrated in the interview that she was thoroughly prepared and provided "strong" responses.

[36] Similar letters were also sent on April 12, 2007, to Ms. Pero and Ms. Carriere, offering them appointments to cleaner positions for terms ending respectively on September 14, 2007, and February 1, 2008. The assessment board's notes from Ms. Pero's interview show that her answers were assessed as ranging from good to very good. The reference checks were assessed as being very good. Ms. Carriere's answers were rated very good to excellent, and her references were also found very good.

[37] Ms. Brown testified that after assessing these women, she concluded that they would be a right fit for the positions. She was particularly impressed by their work ethic and initiative as identified in all their reference checks. Ms. Brown pointed out that in these cleaner positions, the employees worked without supervision, so a candidate's initiative was an important asset.

**(ii) Mr. Marchand's candidacy**

[38] Ms. Barnes-Girouard testified that prior to the closing date for the filing of applications, Mr. Marchand called her asking for confirmation that his application had been received. She advised him that he could log into the Public Service Commission's (PSC) website and view the status of his application. If he had any difficulty accessing the information, he could call her back. She did not hear from him again until March 22, 2007, three days after the deadline for applying, when he called to complain about having been required to file his application on-line. During the conversation, she verified the status of his on-line application and informed him that he had been screened out.

[39] Ms. Barnes-Girouard explained in her testimony that because Mr. Marchand's on-line application did not describe any of his employment experience, human resources staff had screened out his application as not meeting the essential experience qualifications for the position. All that he had provided in his application was a list of his prior employers without any description of his job duties or experience.

[40] Mr. Marchand was clearly displeased upon learning that he had been eliminated from the process. He told Ms. Barnes-Girouard that it was unfair and unacceptable, adding that he would bring the matter to the attention of his MP.

[41] Given Mr. Marchand's reaction, Ms. Barnes-Girouard spoke to her supervisor about the conversation. Since Mr. Marchand had initially complained about the on-line process before the closing date of the selection process, the supervisor decided to allow him to file his application and résumé in paper form. Ms. Barnes-Girouard contacted Mr. Marchand to advise him of her supervisor's decision.

[42] Ms. Barnes-Girouard testified that there was no connection between the supervisor's decision and any intervention from the MP, as Mr. Marchand had suggested in his testimony. She recalled receiving a telephone call from an "ombudsman" who had been asked by an MP to look into Mr. Marchand's case. She added, however, that this call came well after her office had already accepted his hard-copy application. The ombudsman's involvement had no bearing on the decision to allow him to file his application in paper.

[43] After receiving the hard-copy of Mr. Marchand's application, his candidacy was reassessed for screening purposes. The screening guide used by the assessment board indicates that Mr. Marchand had again neglected to describe his work experience in detail on the application or indicate whether he met the essential requirement of experience using various commercial cleaning equipment. Ms. Barnes-Girouard testified that Ms. Brown nonetheless stepped in at this point and provided the assessment board with her personal knowledge to the effect that he possessed this experience. The board therefore screened him in.

[44] Since Mr. Marchand was screened back into the appointment process, the assessment board invited him to an interview, which took place on May 24, 2007. By this time, DND had already sent Ms. Cyr, Ms. Pero and Ms. Carriere letters offering them employment.

[45] Ms. Brown testified that although the other candidates who applied on the process had been interviewed only by her and Ms. Barnes-Girouard, she asked a third person to also sit in on Mr. Marchand's interview and contribute to his assessment. According to Ms. Brown, since his application had been originally screened out due to insufficient information in his application and he seemed to have concerns regarding the integrity of the appointment process, she believed that he would feel "more comfortable" if a third person was added to the assessment board. Ms. Barnes-Girouard added in her testimony that due to her prior dealings with Mr. Marchand where he had complained about how the appointment process was being run, and in order to reassure him that the process was transparent and that nothing "underhanded" was taking place, it was decided to add another person to the assessment board for his assessment. Ms. Moorehead confirmed the degree to which Mr. Marchand was upset with the employment process and his overall attitude in this respect. She testified that he was often "belligerent" when he would visit the human resources office and seemed unwilling to listen to the information she would provide him. As a result, she felt uncomfortable in his presence and testified that whenever he would come to her office, she would make sure to have two of her colleagues keep their office doors open to monitor her meeting with him.

[46] The three assessment board members' notes on the questionnaires that they used during Mr. Marchand's interview were filed in evidence. Each of the interviewers wrote that Mr. Marchand met all of the qualifications assessed by the questions. However, the notes from his interview differ significantly from those entered by Ms. Brown and Ms. Barnes-Girouard with respect to Ms. Cyr, Ms. Pero and Ms. Carriere. Both of the interviewers wrote "very good" and "excellent" in the margins for most of these individuals' answers to the questions. A grading table that accompanied the questionnaire indicates that only if a person is rated good to excellent is he or she considered to have met the required qualification.

[47] Ms. Brown testified that she would add notes in the margins whenever she found that a candidate stood out as having provided a very good or excellent response. Similarly, as appeared from the questionnaires filed in evidence of a female candidate who was found unqualified,

Ms. Brown would write “poor” next to questions where the candidate had clearly failed to demonstrate that she met the qualification.

[48] Following Mr. Marchand’s interview, the board conducted a reference check. He had included two reference letters with his résumé, one of which had been signed by Ms. Brown in 1994 with respect to his work at the time as a cleaner at CFB Shilo. The second letter was from a former employer in an industry that was unrelated to building maintenance, and was dated from 2004. The person who had signed the letter had ceased working for that employer and the board was therefore unable to trace him for additional information about Mr. Marchand.

[49] Ms. Brown and Ms. Barnes-Girouard had shared the task of contacting the references for all the candidates, depending on their respective availabilities. The checks consisted of asking a series of prepared questions and writing down the responses on a form. Ms. Barnes-Girouard contacted Mr. Marchand’s three other references whose names he had provided, and reported the information back to the board. She testified that all of the references were positive, and his current manager’s comments were particularly “strong”. One of the other references, however, was fairly dated, relating to work that Mr. Marchand had performed 12 years earlier. The third reference came from someone who had not personally supervised Mr. Marchand’s work. All of the persons contacted rated Mr. Marchand between good and very good in response to the questions asked.

[50] Ms. Brown noted in her testimony, however, that while Mr. Marchand was working for her cleaning company between 2005 and 2006, a senior military officer responsible for the administration of some of the base’s facilities informed her that an allegation of harassment had been made by one of the employees against Mr. Marchand. The incident allegedly occurred while he was cleaning the base’s kitchen area. At the officer’s request, Ms. Brown assigned Mr. Marchand to work elsewhere on the base while the incident was being investigated and offered him the opportunity to receive sensitivity training at her company’s expense. Mr. Marchand refused the training. Although Mr. Marchand conceded in his testimony that the harassment charge was made and that he turned down the course, he denied the allegations of

harassment, claiming that he merely happened to have become involved in a dispute between his wife (who was one of the kitchen staff) and the other “girls” who were working there. No evidence was led as to the ultimate outcome of the investigation.

[51] With respect to the references for Ms. Cyr, Ms. Pero and Ms. Carriere, the interviews were conducted by Ms. Brown. The persons contacted gave ratings for all three women that ranged between very good and excellent. All the information provided was recent. These ratings stood out from those of all the other candidates, including Mr. Marchand’s.

[52] After completing Mr. Marchand’s assessment, the board determined that he met the essential qualifications outlined for this appointment process. Ms. Barnes-Girouard sent a letter on June 6, 2007, to inform him of this finding and that his name would be placed in a pool of qualified candidates as a result of which he could be contacted for future vacancies should they arise. This was the letter where Mr. Marchand’s post office box number had been mistyped (the last two digits had been inverted). As mentioned earlier, Ms. Moorehead testified that human resources staff only realized the error when Mr. Marchand visited them in August seeking an update on his file, following which a copy of the board’s initial letter was sent to him.

[53] Mr. Marchand’s name remains in the pool of qualified candidates under that appointment process for temporary full-time positions from which he could still be hired to fill vacancies.

**(iii) The second appointment process – a single permanent full-time position**

[54] According to Ms. Brown and Ms. Barnes-Girouard, some months after the first appointment process had been launched, management decided to staff a permanent cleaner position that was being occupied by a person who was about to retire. Since the advertisement for the first appointment process referred only to the possibility of employment in temporary full-time positions, it was decided to initiate and advertise a separate appointment process for the indeterminate position. Applications under the second process had to be received by June 20, 2007.



[55] Management also decided, however, that any persons who had qualified under the first process would be automatically screened into the second process. They would not have to reapply. Ms. Barnes-Girouard testified that her staff contacted the candidates who were in the existing pool, including Mr. Marchand, and asked them if they were interested in participating in the establishment of the second pool of qualified candidates, from which the appointment to the indeterminate position would be filled. Ms. Barnes-Girouard testified that she spoke to Mr. Marchand and he confirmed that he wanted his candidacy to be included in the second process. Of the 12 persons who had qualified under the first process, nine (seven women and two men) agreed to be considered under the second process. Nine new applications were received in response to the second process' advertisement (seven women and two men) of which seven were assessed as qualified (five women and two men). Thus, a total pool of 19 persons (14 women and five men), including Mr. Marchand, was established of candidates who were qualified for appointment to the cleaner positions in all tenures (i.e., indeterminate and term).

[56] On August 17, 2007, after the enlarged pool of qualified candidates had been finalized, Ms. Brown wrote an email to Ms. Barnes-Girouard and Ms. Moorehead confirming that Ms. Cyr should be selected for appointment to the indeterminate position. In the email, Ms. Brown set out the rationale for the appointment. She stated that based on the references and Ms. Brown's own "dealings" with her, Ms. Cyr would be the "best fit" for the position, an obvious reference to the "right fit" principle mentioned in the jurisprudence relating to public service staffing. Ms. Brown added that the decision had also largely to do with Ms. Cyr's excellent interpersonal skills and the fact that she worked very well with all the cleaners and other peers as well as the CF members residing on the base. Ms. Brown also noted that Ms. Cyr's work ethic was excellent, that she showed tremendous initiative, had organizational skills and was able to prioritize. Ms. Brown added she was very dependable, cooperative and extremely thorough, concluding that the candidate was "a definite asset".

[57] As a result, on August 23, 2007, Ms. Barnes-Girouard sent a letter to Ms. Cyr offering her a full-time indeterminate position as a cleaner at CFB Shilo.

[58] To summarize, therefore, DND's explanation for what transpired regarding the staffing of the cleaner positions at CFB Shilo in 2007, referred to in Mr. Marchand's complaint, is as follows:

- a) Mr. Marchand did not properly complete his on-line application for the first appointment process, leaving out any information about his work experience. He thereby failed to demonstrate that he met the essential qualifications for the position and was screened out of the process.
- b) Mr. Marchand expressed his dissatisfaction with the outcome and complained that he should have been allowed to file a hard copy of his application.
- c) DND accordingly changed its position and agreed to allow Mr. Marchand back into the process, by enabling him to file a paper version of his résumé.
- d) By this time, the first employment process had run its ordinary course, the other candidates had been assessed and several appointments to term positions had been made.
- e) After Mr. Marchand's assessment was completed, he was screened into the pool of qualified candidates, from which he could still be appointed if any future opportunities arose.
- f) When the second appointment process was initiated, for the indeterminate position, Mr. Marchand was automatically placed into a pool of qualified candidates along with all the other previously qualified candidates (men and women alike).
- g) Ms. Cyr was ultimately selected for the indeterminate position because the results of her assessment were outstanding and the assessment board determined that she

would be the right fit for the position, in accordance with applicable public service staffing principles.

- h) While Ms. Cyr and the other persons appointed were assessed variably from good to excellent, Mr. Marchand's ratings merely indicated that he met the criteria.
- i) Mr. Marchand's sex was not a factor in the appointments referred to in his complaint. Regarding the April 2007 appointments to the term positions, he was not even a candidate due to his incomplete application. With respect to the single indeterminate appointment, Ms. Cyr was clearly the best candidate and the right fit for the position.

[59] I find this explanation reasonable and fully supported by the evidence. Mr. Marchand was obviously mistaken in his impressions of how the staffing of the term and indeterminate positions took place in 2007. The documents that were filed at the hearing demonstrate that DND initiated two distinct appointment processes. His candidacy was not even considered for the first series of appointments because he had been screened out due to the inadequate information he had provided on his initial on-line application. Mr. Marchand had genuine and likely legitimate concerns about having been forced at first to apply on-line. The PSC has apparently since changed the policy. Lyle Borden, a senior staffing policy officer at DND testified that people are today permitted to either file applications on-line or in hard-copy format. Regardless of the obstacles created by the on-line application procedure, however, the fact remains that Mr. Marchand's initial exclusion from the appointment process was not related to his sex, but rather his failure to include essential information in his application.

[60] In fact, he ended up omitting this information even on his written résumé, which he was by exception allowed to file later on. The only reason he was able to be screened back into the process was because Ms. Brown stepped in and personally confirmed that he met the essential experience qualifications.

[61] When the time came to appoint someone to the indeterminate position, Mr. Marchand was automatically placed into the new pool of candidates, with his consent. The person who was selected, Ms. Cyr, was an outstanding candidate when compared to the other candidates in the pool, which was composed of both women and men. Of note, Ms. Cyr was found to have excellent interpersonal skills, which helped make her the right fit for the position. Ms. Brown testified that this was an important consideration for the position since the employee would have frequent interactions with the persons residing on the base and other workers. In this respect, Ms. Cyr stood in contrast to the impression Ms. Brown would have had of Mr. Marchand. She was aware that a harassment allegation had been made against Mr. Marchand in the past and the assessment board along with the staff at the human resources office were equally mindful that he used a fairly aggressive tone in expressing his disapproval as to how the appointment process was being run. In the circumstances, it was more than reasonable to conclude that Ms. Cyr would make for more of a “right fit” than Mr. Marchand, particularly with respect to the attribute of good interpersonal skills.

[62] Mr. Marchand pointed to a number of elements in the evidence to argue that DND’s explanation is just a pretext for its otherwise discriminatory conduct towards him. For instance, he questioned why he was the only candidate to have a third person participate in his interview. However, the explanation provided by both Ms. Brown and Ms. Barnes-Girouard was entirely reasonable in the circumstances. Mr. Marchand had raised important objections to the requirement that he apply on-line, which he claimed impacted unfairly on persons like him who had limited computer skills. He questioned the legitimacy of the appointment process and had openly expressed his disapproval. He threatened to call his MP and spoke with a tone that prompted Ms. Moorehead to take certain security measures when he visited her office. Given these facts, the assessment board’s opting to add a third party to help provide Mr. Marchand with some additional confidence in the process’ transparency was understandable.

[63] In addition, Mr. Marchand suggested that Ms. Brown appointed Ms. Cyr and the other women because they are her friends. Yet, he mentioned that he had considered himself to be a friend of Ms. Brown’s as well. It is to be expected that among what appears to be a relatively

modestly sized workforce of cleaners at the base, some friendships would develop. Nonetheless, even if Ms. Brown had exhibited any personal favouritism towards Ms. Cyr or the other selected candidates, it does not contribute to a finding that sex was a factor in the decision to appoint them.

[64] Mr. Marchand had also questioned in his evidence why Ms. Carriere was hired given that she does not hold a driver's licence. He may not have been aware, however, that the statement of merit criteria for the term positions had been modified two weeks after the original job posting. Ms. Barnes-Girouard testified that the possession of a driver's licence was converted from an essential condition of employment to an operational requirement, which meant that the necessity to have a licence would depend on the requirements of the particular position being staffed. Ms. Barnes-Girouard testified that this change was not made to favour a specific person. Management had informed her that the cleaning jobs at the base did not all require a driver's licence. Ms. Brown confirmed in her testimony that in recent years, cleaners have been assigned to work at fewer locations on the base. As a result, the ability to drive from one location to another is no longer necessary to perform the job. Ms. Barnes-Girouard stated that the requirement was therefore removed as an essential qualification because by maintaining it, potential candidates without a licence may have "self-screened" themselves out of the process and decided not to bother applying. She added that amending advertisements for this type of reason is not an uncommon occurrence in a staffing process, a point that was reiterated by Mr. Borden in his testimony. Consequently, since possessing a licence ceased being an essential qualification, Ms. Carriere was not precluded from being qualified for the position.

[65] Finally, it should also be mentioned that Mr. Marchand raised some questions regarding DND's obligations to promote employment equity within its workforce. The job advertisements for the cleaning positions stated that the appointments may be limited to the selection of members from designated employment equity groups (Aboriginal persons, persons in a visible minority group, persons with disabilities, and women). In the paper version of his application, Mr. Marchand had identified himself as a member of a designated group (disabled person). His human rights complaint did not, however, allege discrimination on the basis of disability.

[66] Mr. Borden testified that all job postings at DND contain a similar employment equity clause and that, as in the present instance, it is usually not included as one of the essential merit criteria for the appointment process. As a result, it is entirely within a hiring manager's discretion whether or not to consider this factor when deciding whom to appoint. Managers will typically take into account the organization's human resources, business, and employment equity plans, and the existence of any gap between the proportion of individuals from a designated group employed within a given workforce and the corresponding proportion of qualified individuals from the group found in the job market outside the federal public service. In 2007, all four of the abovementioned designated groups were underrepresented in the GS-BUS-2 category at DND for the Manitoba region (excluding Winnipeg). By 2009, the figures show that persons with disabilities were no longer underrepresented and were in fact, overrepresented. Mr. Borden noted, however, that even where a gap exists, a manager is entitled to place more emphasis on the skills that the organization is seeking in order to ensure that the "right fit" candidate is selected, than on employment equity considerations.

[67] DND was thus not required to apply the employment equity criteria in deciding who would be the right fit for the appointments. In any event, had it done so, it is highly speculative to presume that Mr. Marchand would have been appointed, as all four designated groups (not just persons with disabilities) were under-represented in 2007, and there still remained the outstanding questions regarding his interpersonal skills relative to the other candidates, like Ms. Cyr. Moreover, he has not demonstrated how the decision not to limit the staffing of the positions to members of the designated employment equity groups would constitute proof of discrimination against him on the ground of sex, which is the basis of his complaint.

#### **IV. Conclusion**

[68] For all the above reasons, I find that Mr. Marchand's sex was not a factor in DND's decision not to appoint him to one of the term and indeterminate positions. DND has provided a complete and reasonable explanation for the circumstances that gave rise to the women's appointments to the cleaner positions and Mr. Marchand has not established that the explanation is in fact just a pretext for an otherwise discriminatory practice.

[69] The complaint has therefore not been substantiated and is dismissed.

*Signed by*

Athanasios D. Hadjis  
Tribunal Member

Ottawa, Ontario  
February 8, 2011

**Canadian Human Rights Tribunal**

**Parties of Record**

**Tribunal File:** T1413/3909

**Style of Cause:** Paul Marchand v. Department of National Defence

**Decision of the Tribunal Dated:** February 8, 2011

**Date and Place of Hearing:** December 14 to 16, 2009

Brandon, Manitoba

**Appearances:**

Paul Marchand, for himself

No one appearing, for the Canadian Human Rights Commission

Kirsty Elgert, for the Respondent