

Chapter 4

Promotional Tests and Interviews

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Basic Features

The establishment by the employer of tests to determine ability, or relative ability, raises a concern on the part of unions that the tests will be designed and administered so as to produce a result pre-determined by management, or will otherwise produce a misleading or unfair result. For this reason, some collective agreements contain provisions which specify the procedures by which such tests are to be conducted as well as the weight they are to be given.

The employer's assessment process will also frequently involve an interview of the applicants. While employers have the right to undertake some initial screening of the applicants based solely on application forms, résumés, or other employment records,¹ arbitrators have held that the refusal to grant an interview may be unreasonable in view of an applicant's seniority or where the applicant's experience demonstrates an ability to meet the minimum requirements of the position.² On the other hand, exclusive reliance on an interview, without a consideration of other factors, may invalidate the assessment process.

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- 1 *TWU v. Telus Communications Inc.*, [2008] C.L.A.D. No. 383 (QL) (Sullivan), application for judicial review dismissed, 2009 BCSC 1548 (CanLII), affirmed, 2010 BCCA 522 (CanLII), Lancaster's *Labour Arbitration*, March 2, 2011, eAlert No. 138. See also *IBEW, Local 258 v. British Columbia Hydro* (1985), 21 L.A.C. (3d) 422 (Munroe).
 - 2 *IBEW, Local 348 v. Alberta Government Telephones* (1992), 28 L.A.C. (4th) 426 (Ponak).

Applicable Legislation

For some occupations or professions, the successful completion of a test or examination is required by legislation or the by-laws of the professional association concerned. In a number of jurisdictions, legislation governing the public service, such as the federal *Public Service Employment Act*,³ provides that appointments “to or from within the public service” must be made on the basis of “merit”. Under the provisions of that Act (amended and in force on December 31, 2005), an appointment will be consistent with the merit principle where the chosen candidate “meets the essential qualifications for the work to be performed, as established by the deputy head”, taking into consideration, among other factors, “any current or future operational requirements of the organization”.⁴ However, the relative merit system, in which candidates are ranked against others and can appeal their ranking, has been abolished, and a section allowing competitions with only one candidate has been added. In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the essential qualifications for the work to be performed, as well as any additional qualifications that may be an asset for the work to be performed or the organization concerned, as determined by the deputy head.⁵

Employers must also ensure that the test and interview procedures they establish in assessing candidates for employment do not directly or indirectly discriminate on grounds prohibited by human rights statutes,⁶ and that reasonable accommodations

3 S.C. 2003, c. 22, ss.12, 13, 30(1).

4 See s.30(2).

5 See s.36.

6 In this regard, it is important to note that the scope of protection from discrimination under human rights legislation extends not only to an established employment relationship, but also to the pre-employment/hiring setting. See, for example, sections 23(1) and 23(2) of Ontario’s *Human Rights Code*, R.S.O. 1990, c. H.19, which deem to be discriminatory advertisements and applications for employment, or “written or oral inquir[ies]”, which “directly or indirectly classif[y] or indicat[e] qualifications by a prohibited ground of discrimination”. As the

are provided to candidates with disabilities or other protected characteristics to ensure they receive equal access to employment opportunities.⁷

Clauses and Comment

4.1 Tests and Interviews

- 1** Eligibility to participate in the promotional process for Captain shall be in accordance with the following criteria:
 - (a) a minimum of five (5) years of service with the Toronto Fire Services as of December 31st on the year of the competition, with at least the last two (2) years being service within the Section; and
 - (b) successful completion of, or enrolment in, relevant Ontario Fire College Courses, or equivalent, and relevant supplementary courses as may be determined by the Fire Chief acting reasonably, upon consultation with the Association. It is understood and agreed that “enrolment” for the purposes of this clause must result in successful completion of the Program(s).

Ontario Human Rights Commission notes in its Policy on employment-related medical information, “[t]he prohibition . . . in subsection 23(2) . . . is qualified by subsection 23(3), which allows an employer to ask at a personal interview whether an applicant has any disability-related needs that would require accommodation to enable her or him to do the essential duties of the job”.

7 See, for example, *Norrena v. Primary Response Inc.*, 2013 HRTO 1175 (CanLII), *Lancaster’s Disability and Accommodation*, May 12, 2014, eAlert No. 200, in which an employer was found liable for discrimination under Ontario’s *Human Rights Code*, among other reasons because it failed to accommodate a hearing-impaired applicant during a pre-screening orientation session for the job, which affected his performance on a written test; and *CUPE, Local 4400 v. Toronto District School Board*, 2016 CanLII 85741 (ON LA) (Albertyn), in which an employer was found to have unlawfully discriminated against a caretaker on religious grounds when it denied him a promotion allegedly on the basis that his request for a shortened work week to allow him to conduct missionary work could not be accommodated without undue hardship.

Examination and Passing Grade

The written examination will normally be held for all eligible applicants on the same day, subject to operational requirements. Applicants must achieve at least 75% in the written examination to qualify to participate in the Oral and Practical components of the competition, if applicable, and achieve 75% overall.

To qualify for placement on the Promotional List, applicants must achieve 70% in each of the Oral and Practical components, if applicable. Applicants who fail any one of the minimum percentages specified above will not be placed on the Promotional List.

For those who qualify for placement on the Promotional List, all the marks shall be calculated into a final mark based on the weightings below.

In a three component process the weightings will be as follows:

- (i) Written Examination 50%
- (ii) Oral 30%
- (iii) Practical 20%

In a two component process the weightings will be as follows:

- (i) Written Examination 70%
- (ii) Oral or Practical 30%

In each of the components the final component marks will be rounded to the nearest whole number (up or down) for purposes of determining pass/fail. The actual, not rounded, final component marks will be totalled to reach an aggregate mark. The aggregate mark will be rounded to the nearest whole number (up or down) to determine pass/fail.

An Association representative may be present as an observer during the written examinations and Oral and Practical components. The representative shall have no role in the process and his/her absence shall not delay any examination or component.

Placement on the Promotional List – List Type “A”

Placement on the promotional list shall be determined by length of service, with the longest service receiving the highest placement in the group. Where two or more have the same

length of service, the overall mark shall determine placement. If the mark is the same, a draw will be held to determine the order of placement.

[Toronto Professional Firefighters' Association (IAFF) and City of Toronto]

- 2** If passing an assessment is required to qualify for a particular position, such examination shall be conducted in a manner that will provide a fair evaluation in accordance with Article 9.

[CUPE and City of Toronto]

- 3** A Joint Apprenticeship Committee will be established within sixty (60) days of the execution of this Agreement.

The Joint Apprenticeship Committee will:

- (a) Be composed of three (3) members selected by the Union and three (3) selected by Interfor.
- (b) Develop the Apprenticeship Selection Procedure and test that will have a passing requirement of seventy-five percent (75%) or other such test as agreed upon. Tests may include areas such as reading, comprehension, computer literacy, writing ability, inspections, process monitoring, problem solving, accuracy, checking, mechanical/electrical aptitude, spatial relations and shop math.
- (c) Develop standard Interview questions and techniques for the purpose of Section 2 (f) below.
- (d) Develop self-evaluation tests.
- (e) Develop appropriate physical requirements for each trade for the purpose of Section 2 (g) below.

[USW and Interfor Corporation (Hammond Cedar Division)]

- 4** Interview

To promote trust in the interview process, as well as to promote personal development, IBEW member participation is encouraged on the panel interview team. Typically, the interview team will consist of the hiring supervisor, an IBEW member and an HR representative. However, the mix of interview teams may vary depending on the vacancy and level of the interview team's experience.

For a typical interview team, roles are defined as follows:

Supervisor (management exempt)

Reviews Human Resources file data, receives input from interview panel colleagues, and is accountable for overall selection process and decision.

IBEW member

Observes for technical abilities and team fit, contributes input and ensures procedural fairness for interview component of overall selection process.

HR Representative

Assists panel colleagues to identify relevant questions to assess critical dimensions. An IBEW peer or subordinate may be substituted for the Human Resources representative.

Behavioural Interview Process

All interview panel members will be trained in the EN MAX Behavioural Interview Process. IBEW panel members will be rotated through their respective areas.

Confidentiality

All interview panel members will commit to confidentiality as a precondition of participation. Breaches of confidentiality will be taken very seriously.

Selection Process

The selection process will consist of two parts, an interview and a panel review of the candidate[']s work history including performance history, references, and Human Resources file information. The interview panel will give equal consideration to both the interview results and the overall review of the candidate[']s work history, in making their final decision on the successful candidate.

[IBEW and ENMAX Corp.]

- 5** The content for a job interview should be relevant to the duties of the job. Where a competition has three (3) or more internal candidates, the unsuccessful candidates may request the list of scores of the applicants interviewed. Such information shall be provided in a manner that does not identify individual interviewees.

[CUPE and Corporation of the Town of Oakville]

6 The Search Committee shall normally consist of: the Chair; three (3) Members from, and elected by, the Department; and up to two (2) persons appointed by the Chair. At least two (2) of the three (3) elected Members must hold tenure.

For joint appointments, the Search Committee shall normally consist of: the Chair of the major Department; three (3) Members from, and elected by, the major Department; and up to two (2) persons appointed by the Chair. At least two (2) of the three (3) elected Members must hold tenure.

To ensure the Search Committee is reflective of the diversity of the University, the composition of the Search Committee will include one or more representative members from the designated groups.

...

Qualified Members, as determined by the Search Committee, who apply shall be placed on the short list and be interviewed for the position.

After reviewing the complete file of each candidate and seeking input from all Committee members, the Search Committee shall provide the Dean with a recommended short list of candidates to be interviewed.

The Dean shall decide which of these candidates, if any, will be interviewed by the Search Committee.

The Dean shall facilitate the seeking of input from members of the Department.

After interviewing the short-listed candidates, the chair of the Search Committee shall make written recommendation(s) to the Dean. The recommendation(s) shall include a ranked order of the acceptable candidates. This recommendation(s) shall clearly state the reasons for the recommendation(s). If a member of the Search Committee requests a secret ballot vote on the recommendation(s), such vote shall occur.

While the Dean and Provost are not constrained by the ranking of the candidates, any appointment must be made from this list. The Dean and Provost have the option of continuing the search.

**[University of Guelph Faculty Association
and University of Guelph]**

Tests may be used for two purposes: to determine whether the senior applicant can perform the job, or to ascertain the relative ability of applicants. The type of test permitted will depend upon whether, under the vacancy or promotion clauses of the collective agreement, seniority is to be the governing factor provided the senior applicant can perform the job (*i.e.*, a threshold or sufficient ability clause), or whether seniority governs only where ability is relatively equal (*i.e.*, an equal or relative ability clause). Whatever the type of test, arbitrators have established standards which include reasonableness, adequacy of the preparation that is allowed, consistency of application, fairness of administration, reliability of marking, and relevance of the test to the work to be done.⁸

Discussion

In the absence of collective agreement language to the contrary, arbitrators have held that, while management has the right to establish tests, such tests must be fairly designed and fairly

8 *Oil, Chemical & Atomic Workers, Local 9-14 v. Polymer Corp. Ltd.* (1968), 19 L.A.C. 386 (Weatherill); *CWA, Local C-9 v. Northern Electric Co. Ltd.* (1969), 20 L.A.C. 222 (Palmer). See generally, J. Rose, "The Employment Interview: An Analysis of Canadian Labour Arbitration Decisions" in *Labour Arbitration Yearbook, 1999-2000* (Toronto: Lancaster House). Testing that is overly intrusive or instituted for an improper motive may also run afoul of the collective agreement. Thus, in the 2016 award *LIUNA, Local 607 v. Aecon Mining Inc.*, 2016 CanLII 6800 (ON LRB), Lancaster's *Health and Safety/Workers' Compensation Law*, July 13, 2016, eAlert No. 195, the Ontario Labour Relations Board held that, while an employer is entitled to require its employees to undergo a reasonable and relevant fitness test before commencing job duties, the employer's testing protocols in this case were not appropriate or reasonable, since they included overly intrusive demands for medical information that were not relevant to the employee's ability to perform his or her duties, suggesting the employer had an illegal motive of weeding out employees based on perceived risk factors for future illness or injury. See also *USW, Local 834 v. Goodyear Canada*, 2001 CanLII 25731 (ON LA) (Slotnick), and *ATA v. Calgary Board of Education*, 2010 CanLII 96482 (AB GAA) (Jones), Lancaster's *Education Employment Law*, March 2, 2011, eAlert No. 38.

conducted.⁹ In particular, tests must be objective, uniform for all employees, and relevant to the job in question.¹⁰

Employees must be advised in advance of the examination rules, given adequate preparation, and notified beforehand of the material on which the test will be based. An employer cannot rely on a test administered years before the promotional opportunity arose as a valid indication of current ability.¹¹ Where test results or methods are challenged, employees may be entitled, through the grievance and arbitration process, to obtain test papers and gain access to the marking scheme used by the employer.

At least one arbitrator has held that tests, while important, cannot be the only factor taken into account by an employer in making a promotional decision.¹² Similarly, arbitrators have held that employers cannot rely exclusively on interviews with candidates: a balanced assessment requires a consideration of all relevant factors, including test and interview results, on-the-job performance, related courses and performance appraisals.¹³ On

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- 9 *Oil, Chemical & Atomic Workers, Local 9-14 v. Polymer Corp. Ltd.* (1968), 19 L.A.C. 386 (Weatherill); *CUPE, Local 79 v. Metropolitan Toronto (Municipality)* (1992), 26 L.A.C. (4th) 71 (Springate); *ATA v. Calgary Board of Education*, 2010 CanLII 96482 (AB GAA) (Jones), Lancaster's *Education Employment Law*, March 2, 2011, eAlert No. 38.
 - 10 *IAFF, Local 268 v. Halifax (City)* (1991), 19 L.A.C. (4th) 392 (Outhouse); *CWA, Local C-9 v. Northern Electric Co. Ltd.*, [1969] O.L.A.A. No. 3 (QL) (Palmer); *LIUNA, Local 607 v. Aecon Mining Inc.*, 2016 CanLII 6800 (ON LRB), Lancaster's *Health and Safety/Workers' Compensation Law*, July 13, 2016, eAlert No. 195.
 - 11 *UE, Local 561 v. Domtar Inc.* (1986), 22 L.A.C. (3d) 247 (Solomatenko); *Employees' Assn., Computing Devices Co. v. Computing Devices Co.* (1990), 12 L.A.C. (4th) 264 (Fraser).
 - 12 *CUPE, Local 500 v. Winnipeg (City)* (1990), 12 L.A.C. (4th) 231 (Freedman).
 - 13 *OPSEU, Local 227 v. Headwaters Health Care Centre*, [2010] O.L.A.A. No. 75 (QL) (Marcotte); *ONA v. Greater Niagara General Hospital* (1997), 60 L.A.C. (4th) 289 (Devlin); *USWA, Local 8059 v. Acadian Platers Co. Ltd.* (1997), 68 L.A.C. (4th) 344 (Knopf). See also *IWA, Local 1000 v. MacMillan Bathurst* (1997), 69 L.A.C. (4th) 59 (Brault), in which it was held that an employer made an unreasonable decision in relying exclusively on records and on its supervisor's personal knowledge of candidates, without assessing the candidates' skills — through an interview or a test — vis-à-vis the position's requirements; and *CAW, Local 4600 v. Cape Breton District Health Authority*, [2004] N.S.L.A.A.

the other hand, using an interview as the primary assessment tool may be appropriate in determining whether an applicant has the ability to succeed in certain jobs, such as a telephone advice nurse.¹⁴

An employer's failure to interview an applicant may invalidate the job selection process, particularly where the applicant has a high seniority ranking and is able to meet the minimum requirements of the position.¹⁵ Similarly, while an employer may not be required to offer all job applicants within the bargaining unit an opportunity to sit qualifying examinations for a vacant position, different considerations may apply where an internal applicant is competing against an applicant from outside the bargaining unit. Thus, in one case, an arbitrator held that, while under the applicable collective agreement the grievor (an alarm room operator) was not entitled as of right to sit the qualifying exams for the vacant position of fire prevention officer, he was entitled to have his qualifications determined by the exams before the employer could consider an applicant from outside the bargaining unit.¹⁶

An employer has an obligation to take reasonable steps to accommodate a disabled employee who is writing an examination, *e.g.* by providing extra time to an employee with an arm injury, so that he or she can compete on an equal basis in job

No. 5 (QL) (Ashley), Lancaster's *Labour Arbitration*, September/October, 2004, in which the arbitrator held that the selection process was unreasonable as the employer had relied exclusively on interviews in assessing candidates — interviews which were marred by irrelevant questions and “consensus marking” (where the interviewers discuss each question that was asked of the interviewee after the interview and arrive at a consensus mark), a practice that has been criticized as depriving the candidates of the benefit of being evaluated by different individuals: *CAW – Canada, Locals 4600 and 4603 v. Cape Breton Healthcare Complex*, [2002] N.S.L.A.A. No. 17 (QL) (Veniot).

14 *SUN v. Regina Qu'Appelle Health Region* (2005), 139 L.A.C. (4th) 244 (Pelton), Lancaster's *Health Care Employment Law*, May/June, 2005.

15 *OPSEU, Local 262 v. Halton Adolescent Support Services* (1994), 44 L.A.C. (4th) 129 (Simmons); *IBEW, Local 348 v. Alberta Government Telephones* (1992), 28 L.A.C. (4th) 426 (Ponak).

16 *Niagara Falls Professional Fire Fighters Assn. v. Niagara Falls (City)*, [1999] O.L.A.A. No. 1000 (QL) (Knopf), Lancaster's *Firefighters/Fire Services Employment Law*, January/February, 2000.

competitions.¹⁷ In this regard, it is the employer's responsibility to determine through an analysis tailored to the circumstances of the disabled employee what reasonable measures can be adopted to modify the testing process in order to accommodate the employee.¹⁸ This may require the employer to consult a specialist about the effects of an employee's disability.¹⁹

In applying the duty to accommodate to competitions for public-service positions, where the merit principle governs, the Federal Court has held that the test is not whether the employer has taken every step short of undue hardship to accommodate an individual's disability in a job competition,²⁰ but rather whether the accommodations provided to the disabled individual allow him or her to compete on an equal footing with other candidates.²¹ Employers must remain responsive to the particular needs of individual candidates when deciding on accommodations. A case-by-case analysis may be required to understand what is

17 *Rutman, Mazepa and Leung v. Revenue Canada*, unreported, July 21, 1998 (Public Service Appeal Board), Lancaster's *Public Service and Crown Agency Employment Law*, September/October, 1998. See also *Norrena v. Primary Response Inc.*, 2013 HRTO 1175 (CanLII), Lancaster's *Disability and Accommodation*, May 12, 2014, eAlert No. 200, in which an employer was found liable for discrimination under Ontario's *Human Rights Code*, among other reasons because it failed to accommodate a hearing-impaired applicant during a pre-screening orientation session for the job, which affected his performance on a written test.

18 *Tremblay v. Canada (Attorney General)*, 2003 FCT 465 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, March/April, 2003; *Schut v. Canada (Attorney General)*, 1998 CanLII 8071 (FC), Lancaster's *Public Service and Crown Agency Employment Law*, September/October, 1998.

19 *Tremblay v. Canada (Attorney General)*, 2003 FCT 465 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, March/April, 2003.

20 The test for reasonable accommodation in a human rights proceeding was established by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGEU*, 1999 CanLII 652 (SCC) ("Meiorin"), Lancaster's *Human Rights and Workplace Privacy*, September/October, 1999.

21 *Canada (Attorney General) v. Girouard*, 2002 FCA 224 (CanLII); and *Tremblay v. Canada (Attorney General)*, 2003 FCT 465 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, March/April, 2003.

necessary to accommodate the candidate.²² At the same time, the accommodations proposed must be fair not only to the individual in question, but also to the other candidates.²³

Accommodation may involve modifying a test used to assess qualifications in order to ensure that persons with disabilities have the same access to employment opportunities. In this regard, the Federal Court of Canada has ruled that a test used by the government to assess an employee's ability to learn a second language discriminated against an employee who suffered from dyslexia in auditory processing. By focusing on the employee's weaknesses, and not evaluating her compensatory strengths, the test did not permit her to demonstrate her aptitude to learn a second language.²⁴

Can an employer institute a physical fitness test that fails to take into account the physiological differences between men and women? The Supreme Court of Canada in the *Meiorin* case²⁵ ruled that a fitness test (in that case, for forest firefighters) based on an aerobic standard which women are physiologically unable to achieve discriminates against women. Moreover, the Court held that such a standard cannot be justified as a *bona fide* occupational requirement where it has not been demonstrated that it is necessary for the safe and efficient performance of the job, or that men and women require the same minimum level of aerobic capacity to perform their duties.

Checklist

- Does the collective agreement limit the right of management to conduct tests, *e.g.* by providing that employees

22 *Tremblay v. Canada (Attorney General)*, 2003 FCT 465 (CanLII), Lancaster's *Public Service and Crown Agency Employment Law*, March/April, 2003.

23 *Canada (Attorney General) v. Girouard*, 2002 FCA 224 (CanLII).

24 *Canada (Attorney General) v. Green*, 2000 CanLII 17146 (FC), Lancaster's *Human Rights and Workplace Privacy*, September/October, 2000.

25 *British Columbia (Public Service Employee Relations Commission) v. BCGEU*, 1999 CanLII 652 (SCC), Lancaster's *Human Rights and Workplace Privacy*, September/October, 1999.

cannot be required to re-qualify for jobs which they already hold?

- Does the collective agreement provide that, where tests are conducted, they must be designed and administered fairly?
- Does the collective agreement specify the purpose of the test, *i.e.* whether it is to be used to determine whether an applicant can perform the job in question or to rank applicants?
- Does the agreement specify the weight to be given to the test as opposed to other factors such as seniority?
- Is the examination clause consistent with the seniority provisions in the vacancy and promotion clauses?
- Has provision been made to ensure that employees are entitled to review their test papers in conjunction with the expected answers, the marks and the marking scheme?
- Does the collective agreement require that tests be:
 - (1) relevant to the job;
 - (2) based on material provided to the applicants in advance;
 - (3) preceded by advance notice of the rules of the test, the standards to be applied, and the time when and place where it will be conducted;
 - (4) comprised of questions for which answers have been validated in advance;
 - (5) pre-tested to determine reliability, *e.g.* of the passing mark, the marking scheme, etc.;
 - (6) administered on a uniform basis to all applicants and in such a manner as to ensure the secrecy of test papers before the test is given, and to preserve the anonymity of the applicants (*e.g.* by assigning code names) so that the tests are marked impartially;

- (7) designed so as to enhance objectivity, *e.g.* by setting multiple-choice questions in order to limit subjective judgments in marking, or by emphasizing written tests as opposed to oral interviews?