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



Before a panel of the
Public Service
Labour Relations
and Employment Board

BETWEEN

DANIELLE POND

Complainant

and

**DEPUTY MINISTER OF INDIAN AFFAIRS AND
NORTHERN DEVELOPMENT CANADA**

Respondent

and

OTHER PARTIES

Indexed

Pond v. Deputy Minister of Indian Affairs and Northern Development Canada

Complaint of abuse of authority pursuant to s. 77(1)(a) of the *Public Service Employment Act*

Decision: The complaint is dismissed

Before: Merri Beattie, Member

For the complainant: Raymond Brossard

For the respondent: Zorica Guzina

For the Public Service Commission: Louise Bard (written submissions)

Matter heard in Winnipeg, MB
on October 21 and 22, 2014

Introduction

1 Danielle Pond, the complainant, participated in an internal advertised appointment process for Indian Registration Officer/Trainer (IRO) positions and Estates and Band Governance Officer (EBGO) positions at the PM-02 group and level, in Aboriginal Affairs and Northern Development Canada (AANDC). The complainant alleges that the respondent, the Deputy Minister of AANDC, abused its authority when it employed improper staffing practices and misinformed her to the point of being deceptive. These allegations concern the entire appointment process, including acting appointments that were made prior to the indeterminate appointment at issue in this complaint. She also alleges that the respondent abused its authority by choosing inappropriate criteria when it selected a candidate from the pool for the indeterminate appointment.

2 The respondent denies the allegations. The respondent maintains that the complaint concerns only the indeterminate appointment, and asserts that the criteria used to select from the pool were chosen based on the work to be done and the needs of the organization.

3 The Public Service Commission (PSC) did not attend the hearing. It presented a written submission on its policies and guidelines related to the issues; however, it did not take a position on the merits of the case.

4 For the following reasons, the Public Service Labour Relations and Employment Board (the Board) finds that the complainant has failed to demonstrate that the respondent abused its authority.

Background

5 In July 2011, the respondent initiated internal advertised appointment process 11-IAN-IA-AO-MB-GOV-117998 to create a pool of candidates who were qualified for IRO and EBGO positions. One *Statement of Merit Criteria* was established for this process.

6 On October 28, 2011, a pool of qualified candidates was established for a period of one year. It was subsequently extended. The complainant and Sarah Chammartin

were both found to be qualified and were placed in the pool. The complainant was appointed from the pool twice on an acting basis. Sarah Chammartin was appointed from the pool three times on an acting basis.

7 In June of 2013, the respondent issued a *Notification of Appointment or Proposal of Appointment* for the indeterminate appointment of Ms. Chammartin (the appointee). The complainant filed a complaint of abuse of authority with the Public Service Staffing Tribunal (PSST) under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA) on July 4, 2013.

8 On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* came into force and created the Board, which is now performing the functions that were previously exercised by the PSST.

9 In her written allegations, the complainant alleged that the assessment board chair, Carmen Kardoos, Director, Governance and Community Development, had a conflict of interest in this process because of a prior working relationship with Sarah Chammartin. The complainant withdrew that allegation at the hearing and, accordingly, the Board will not address it in these reasons.

Issues

10 The Board must determine the following issues:

- (i) Did the respondent abuse its authority by misinforming the complainant and employing improper staffing practices in this appointment process?
- (ii) Did the respondent abuse its authority by choosing inappropriate criteria as the basis for its selection of the appointee for an indeterminate appointment?

Analysis

11 Section 77 of the PSEA provides that an unsuccessful candidate in the area of selection for an internal advertised appointment process may file a complaint with the Board that he or she was not appointed or proposed for appointment because of an abuse of authority. The complainant bears the burden of proof, which requires her to

present sufficient evidence for the Board to determine, on a balance of probabilities, that a finding of abuse of authority is warranted (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49, 50 and 55).

Issue I: Did the respondent abuse its authority by misinforming the complainant and employing improper staffing practices in this appointment process?

12 As noted in the introduction, these allegations, in part, concern prior acting appointments from this internal advertised process. The respondent submits that this complaint was made regarding only the indeterminate appointment. The complainant had the opportunity to file complaints regarding the acting appointments and did not. The respondent argues that it would be a contravention of the PSEA to allow her to complain about those appointments now.

13 In *Brown v. Canada (Attorney General)*, 2009 FC 758, the Federal Court held that the evidence should be considered from a global perspective and relevant evidence of the events that occurred must be considered in determining if there has been an abuse of authority in an appointment process. Prior to the indeterminate appointment that is at issue here, Sarah Chammartin was appointed from the pool on an acting basis three times. The complainant did not file complaints regarding those prior acting appointments. However, she submits that because the respondent misinformed her about one of the acting appointments, she was denied her right to complain. The prior acting appointments are part of the sequence of events in this appointment process that culminated in Ms. Chammartin's indeterminate appointment, and are part of the Board's consideration in assessing this complaint of abuse of authority.

14 The complainant was notified by email on October 28, 2011, that she was qualified in this appointment process and had been placed in a pool from which appointments may be made. Although the email stated that the multiple recipients had been blind copied to protect their privacy, they were instead openly copied. The complainant did not refer to any legislation or regulation that imposes an obligation to protect the names of persons placed in a qualified pool. The Board finds that while what

took place may have been a break with normal protocol, as the complainant submits, it was not improper.

15 The complainant submits that the respondent seconded the appointee into a PM-02 position, although she was a CR-04 employee and secondments are supposed to be at-level. Mr. Kardoes testified that the appointee was initially selected from the PM-02 pool for an acting appointment. She was a CR-04 in Human Resources and Skills Development Canada (HRSDC) and, according to Mr. Kardoes, since this was a temporary appointment, a secondment was required so that she could be paid by AANDC for her acting appointment. Mr. Kardoes stated that the secondment and acting appointment occurred simultaneously, the appointee never worked at the CR-04 level in AANDC, and the secondment was necessary to resolve a pay issue.

16 In *Pugh v. Deputy Minister of Environment Canada*, 2007 PSST 3, the PSST held that a secondment is a temporary placement of a public servant in another department, to perform duties pursuant to a formal interdepartmental agreement, for a specified period. The person seconded remains an employee of the home department, is paid at their substantive group and level, and at the end of the specified period returns to their substantive position in their home department. In *Pugh*, the complainant was seconded at-level to another department and was also offered and accepted an acting appointment to a higher level position for the same period of time. As in that case, the Board finds that the respondent in this case used both at-level secondment and acting appointment simultaneously. The complainant did not refer the Board to any statutory provision that would preclude the respondent from taking this simultaneous staffing action. Moreover, no evidence was presented that contradicts Mr. Kardoes' explanation as to why this action was necessary.

17 The complainant testified that, in the spring of 2012, she was informed by the Director of Human Resources (HR Director) that all appointment processes would stop and pools of qualified candidates would cease due to the Government's Deficit Reduction Action Plan (DRAP) and a departmental restructuring exercise. Because of the potential for workforce reductions, all employees had to return to their substantive positions.

18 The complainant testified that her acting PM-02 appointment was ended in late March 2012, and she returned to her substantive CR-04 position in Corporate Services. However, the appointee, who was also acting in a PM-02 position, did not return to her substantive position in HRSDC. Ryan Young, Manager of Estates, Revenues and Band Governance, testified that there were no workforce implications for his unit and that HRSDC did not ask that the appointee return to her substantive position in that department.

19 The complainant did not provide any evidence that contradicted Mr. Young's testimony on this matter. The document she submitted from AANDC's intranet site states that an "operational freeze" was in effect. It does not, however, address employees of other departments working in AANDC, nor does it state that all AANDC employees had to return to their substantive positions. It does highlight that the complainant's home organization, Corporate Services, would be impacted; however, there is no specific mention of Estates, Revenues and Band Governance. While this evidence indicates why the complainant had to return to her CR-04 position in Corporate Services, it does not support a finding that there was anything improper about keeping the appointee in Estates, Revenues and Band Governance.

20 The complainant submits that the extension of the PM-02 pool after October 28, 2012, and its continued use "could be perceived" as a means for keeping the appointee in AANDC so she could apply for the indeterminate appointment process. The Board finds that this allegation is unfounded. While there were various processes for selecting candidates from the pool for appointment, there was only one appointment process to which candidates could apply, namely 11-IAN-IA-AO-MB-GOV-117988. The appointee was found to be in the area of selection for this process as a person employed in the federal public service in Winnipeg, MB, or within a 100 kilometer radius of Winnipeg. As an eligible candidate who was found qualified and placed in the pool, there was no requirement for the appointee to be working in or be an employee of AANDC to be selected for appointment from this appointment process. Although the respondent changed its position with respect to the continued use of the PM-02 pool, there is no evidence that this decision was improper. Moreover, the complainant benefitted from this decision in that after the pool was to have ceased, she was

appointed from it twice, which resulted in her acting in a PM-02 position continuously from November 5, 2012 until October 31, 2013.

21 The complainant submits that the respondent tampered with the notices of *Information Regarding Acting Appointment* (IRRAs) for the appointee's acting appointments, and they were not posted in a timely manner. She referred the Board to the "Date Published" that appears on each IRRA. The Board finds, however, that those dates are not reliable evidence of when the IRRAs were posted. For example, two copies of the IRRA for the appointee's acting appointment from April 1, 2012 until September 28, 2012, were submitted into evidence. They are both from *Publiservice* and are identical except for the "Date Published", one of which is November 7, 2013, while the other is February 19, 2014. The complainant also submitted a composite listing from *Publiservice* of all notices related to this appointment process, which includes seven IRRAs, as well as the *Job Opportunity Advertisement*, the *Notification of Consideration*, and the *Notification of Appointment or Proposal of Appointment* (NAPA) for the indeterminate appointment at issue in this complaint. There is one "Date Published" on that document, which is January 28, 2014. Clearly that is not the date that all those notices were posted. The "Date Published" on the *Publiservice* IRRAs that were tendered is not evidence that the respondent tampered with those notices, as alleged by the complainant.

22 The Board accepts the complainant's submission that the IRRA for the appointee's second acting appointment was posted late. The appointment was from April 1, 2012 until September 28, 2012, and the IRRA was not issued until July 26, 2012, with a complaint period ending August 10, 2012. Section 13 of the *Public Service Employment Regulations*, SOR/2005-334, states that notification of an acting appointment of four months or more must be given at the time that the acting appointment is made or proposed. Failure to provide notice of recourse for this acting appointment in a timely manner demonstrates carelessness. Nevertheless, the delay did not deprive the complainant of an opportunity to file a complaint while the acting appointment was still in effect.

23 The complainant testified that she did not file a complaint when this IRRA was issued because she was only interested in an EBGO position and the IRRA stated that the appointee's acting appointment was to an IRO position. According to the complainant, she learned later that the appointee was in an EBGO position during that time; however, the complaint period had ended. She submits that by posting the wrong position title, the respondent deprived her of her right to file a complaint.

24 The IRRA in question is for an acting appointment to an IRO position from April 1, until September 28, 2012. An *Employee Out Request* form indicates that, on September 28, 2012, Ms. Chammartin left AANDC, where she had been in an EBGO position. As well, a *Workforce Management Board Request for Staffing Actions* (WMB Request) was tendered. It is a request for approval to extend a secondment and acting appointment from June 29, to September 28, 2012, in an EBGO position. Although no name appears on the WMB Request, the dates correspond to part of the period of time that the appointee was acting, and do not match the dates of any other appointments made from this appointment process for which there is any evidence before the Board.

25 The Board finds that there was an error in the position title, which shows further carelessness with respect to the IRRA that was posted for the appointee's second acting appointment. While this error had consequences for the complainant, she had applied to an appointment process for both IRO and EBGO positions, and it was her decision not to file a complaint or even inquire about this acting appointment, although she testified that she had seen the appointee working in Estates, Revenues and Band Governance.

26 Finally, the evidence establishes that in the spring of 2013, the appointee was acting in EBGO position 5700 and the complainant was acting in EBGO position 25016. As a result of appointing Ms. Chammartin to EBGO position 25016, the complainant was moved into EBGO position 5700 on an acting basis, and her acting pay was disrupted. The Board accepts the respondent's explanation that the indeterminate appointment could only be made to position 25016, which had no indeterminately appointed incumbent. The complainant's acting appointment was switched to position

5700, which was only temporarily vacant, since the incumbent was on leave. While it was disruptive, there is no evidence that the switch of positions was improper.

27 The Board finds that the complainant has failed to establish that the respondent abused its authority by employing improper staffing practices. The respondent demonstrated carelessness with respect to the IRRA for one of the acting appointments from this process. However, the Board is not satisfied that the two errors identified were sufficiently serious to reach the level of an abuse of authority. The PSST has consistently held since *Tibbs* that much more than mere errors or omissions are required to constitute an abuse of authority. The Board further notes that any consequence to the complainant as a result of these errors has now been corrected, since she was allowed the opportunity to fully present her case before the Board, including her concerns related to the acting appointment.

Issue II: Did the respondent abuse its authority by choosing inappropriate criteria as the basis for its selection of the appointee for an indeterminate appointment?

28 The complainant submits that when the respondent selected a candidate for appointment to an EBGO position, emphasis should have been placed on client service qualifications, particularly experience in delivering client services, as opposed to presentation skills. She testified that, as an acting EBGO, she had rarely done presentations. She stated that EBGOs did do some presentations to First Nations band membership clerks, but only rarely in the communities. She also stated that the desire to increase the number of presentations was hampered by restrictions on travel. The complainant tendered the rationale for one of her acting appointments to an EBGO position, which lists several criteria under the heading “Client Service Skills”, but does not include the ability to prepare and deliver presentations.

29 In *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, the PSST confirmed the broad discretion provided to managers in establishing qualifications and in choosing the person who is the right fit for the job. The term “right fit” is not found in the PSEA; it is used in the human resources community to describe the basis for deciding who will be appointed from among qualified candidates. In the PSC’s *Guidance Series* for its

Appointment Policy, managers are advised that they can “apply different criteria to different appointments in the context of the same advertised appointment process.” Accordingly, evidence that the criteria used for the indeterminate appointment were different from those used to appoint the complainant on an acting basis does not, in itself, support a finding of abuse of authority.

30 The five criteria that were used to appoint Ms. Chammartin indeterminately were all listed in the *Statement of Merit Criteria* for the internal advertised appointment process. Mr. Young testified that he chose the criteria for selecting candidates from the pool for appointment based on the needs of the organization and in consultation with Human Resources and Mr. Kardoes. With respect to the indeterminate appointment, Mr. Young chose the ability to prepare and deliver presentations because he had identified presentation skills as a weakness in the organization, and he needed to build capacity and improve delivery in that part of the program.

31 Mr. Kardoes testified that EBGOs give presentations on estate and investment issues in First Nations communities several times in a year. Mr. Young testified that EBGOs make presentations when there is an election in a First Nations community, which is often 20 to 30 times in a year. EBGOs assist him in giving electoral presentations, give them with a PM-02 colleague, and deliver them on their own. Mr. Young explained that these situations can be very difficult and even hostile when issues of fraud and mistrust have arisen, and when elections have been appealed and overturned. He estimated that an EBGO would be the lead on a presentation in such a situation between two and 10 times in a year. Mr. Young agreed that experience would be helpful, but he was looking for someone who demonstrated the skills, abilities and confidence required to perform the work.

32 The Board finds that the evidence does not support a finding of abuse of authority. On the contrary, Mr. Young properly exercised his authority to choose the right fit criteria for this appointment.

Other Issues

33 The complainant initially alleged that the appointee did not meet the qualifications for appointment to an EBGO position. The respondent's evidence demonstrates that the appointee met all the essential qualifications for the work, and the complainant did not present any evidence or argument to refute Ms. Chammartin's qualifications.

34 During the hearing, the complainant raised the fact that different panels assessed candidates during the interviews. In *Visca*, the PSST held that the use of different assessment panels in an appointment process falls under the broad discretion given to managers under the PSEA. The complainant did not present any evidence of inconsistencies or other problems arising from the use of different assessment panels.

35 The complainant submits that she had to request an informal discussion and Mr. Young did not have the information she was seeking. Although the Board strongly encourages departments to conduct informal discussion with unsuccessful candidates, s. 47 of the PSEA does not set out a requirement to offer informal discussion. This section clearly states that informal discussion can be held at the candidate's request:

47. Where a person is informed by the Commission, at any stage of an internal appointment process, that the person has been eliminated from consideration for appointment, the Commission may, **at that person's request**, informally discuss its decision with that person.

(emphasis added)

36 Mr. Young acknowledges that, when he met with the complainant for informal discussion he could not answer all her questions, and he wanted clarification from Human Resources about what he could tell her. The primary purpose of informal discussion is to communicate the reasons a candidate was eliminated from a process or, as in this case, not selected for appointment. (See, for example, *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46, at para. 76.)

37 Mr. Young stated that, during informal discussion, the complainant inquired about how the appointee was chosen, which would be precisely the purpose of informal discussion in this case. If Mr. Young did not address this matter with the complainant, the informal discussion would have had little meaning for the complainant. However, the

evidence before the Board is not clear as to whether this subject was discussed. Based on the testimony of both Mr. Young and the complainant, the complainant's primary concern when she met Mr. Young for informal discussion was the situation with her acting pay. In the Board's view, that is not the purpose of informal discussion and the outcome of this complaint does not turn on whether Mr. Young provided an explanation for the disruption to the complainant's acting pay.

38 With respect to these other issues, the Board finds that there is no evidence that the respondent conducted itself improperly.

Decision

For all these reasons, the complaint is dismissed.

Merri Beattie
Member