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



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

BETWEEN

CHANTAL DAOUST

Complainant

and

DEPUTY MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

and

OTHER PARTIES

Indexed as

Daoust v. Deputy Minister of Public Safety and Emergency Preparedness

In the matter of a complaint of abuse of authority in the application of merit -
paragraph 77(1)(a) of the *Public Service Employment Act*

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and
Employment Board

For the Complainant: Herself

For the Respondent: Amita R. Chandra, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard at Ottawa, Ontario,
October 18, 2017.

REASONS FOR DECISION

I. Introduction

[1] This decision deals with a submission presented by the respondent, the Deputy Minister of the Department of Public Safety and Emergency Preparedness, that the complaint be dismissed because the complainant, Chantal Daoust, did not attend the hearing and thus did not meet her burden of proof by failing to adduce any evidence.

[2] A “Notification of Appointment or Proposal of Appointment” for an ATIP (access to information and privacy) analyst (classified PM-04) at Public Safety Canada in Ottawa, Ontario, was issued on January 26, 2016. The complainant made a complaint about this appointment under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) to the Public Service Labour Relations and Employment Board on February 2, 2016.

[3] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the title of the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board (“the Board”) and the *Federal Public Sector Labour Relations and Employment Board Act*.

[4] The complainant alleges in her complaint and in her written allegations that the respondent abused its authority in the application of merit. Specifically, she contends that it engaged in preferential and other scoring anomalies on the exams for the assessment process at issue. She maintains that for some of the exam questions, the assessment board withheld points for her failure to provide information that had not been requested in the exam, and that for other questions, it did not award points for information that she provided. She suggests that the reason for the scoring anomalies is preferential treatment and favouritism towards the appointee. She also suggests that the hiring manager abused her authority and discretion, with improper intentions.

[5] The respondent replies that the appointment process was conducted in a fair and transparent manner and that there was no abuse of authority. It submits that the appointee was assessed against pre-established assessment tools that were applied consistently to all candidates. It further states that the complainant has not submitted any facts to support the allegations that the assessment board exhibited favouritism

and that the hiring manager engaged in bad faith by abusing her authority and discretion. In support of its position, the respondent called Jennifer Schofield as a witness at the hearing, who entered into evidence several documents prepared during the staffing process.

[6] The Public Service Commission (PSC) did not appear at the hearing. However, it presented a written submission in which it discussed relevant PSC policies and guidelines. It took no position on the merits of the complaint.

[7] For the reasons that follow, the complaint is dismissed. It has been established that the complainant did not submit any evidence during the hearing, and therefore, she did not meet her burden of proof.

II. Background

[8] On August 11, 2017, the “Notice of Hearing” was sent to the parties. The hearing was scheduled for October 18 and 19, 2017, in Ottawa, with a 9:30 a.m. start.

[9] On October 18, 2017, the hearing was convened as scheduled at 9:30 a.m. When the complainant did not appear, the hearing was briefly adjourned in case she had been inadvertently delayed. After repeated efforts were made to communicate with her, the hearing reconvened at 1:00 p.m. The complainant was not in attendance. There is no record that she communicated with the Board or its registry to indicate any issue with the date or with her attendance.

[10] The respondent submitted at the hearing that the complaint be dismissed, as the complainant did not show up at the hearing to produce any evidence to support her allegations, and as a result, there is no case to which to respond.

[11] After the hearing, the complainant asked the Board to consider her “evidence”, in the form of documents, even though she had not introduced any material at the hearing. She said that she thought that the Board would consider these documents even though she did not appear at the hearing.

III. Analysis

A. Whether the Board may dispose of the matter despite the complainant’s absence from the hearing

[12] Section 29 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6;

“the *Regulations*”) provides that if the Board is satisfied that a notice of a hearing was sent to a party, it may proceed with the hearing and decide the complaint even if that party did not attend. The provision reads as follows:

29 If a party, an intervenor or the Canadian Human Rights Commission, if it is a participant, does not appear at the hearing of a complaint or at any continuance of the hearing and the Board is satisfied that notice of the hearing was sent to that party, intervenor or participant, the Board may proceed with the hearing and dispose of the complaint without further notice.

[Emphasis added]

[13] A review of the record confirms that the complainant was aware of the date, time, and location of the hearing and that she actively communicated and participated with the Board and parties in the lead-up to the hearing. She remained engaged in the process up to the week before the hearing, when she corresponded with the Board and the parties about a variety of topics, including the exchange of information, roles of parties in the hearing, and authorities to be relied on in the hearing.

[14] The Notice of Hearing, which the parties received on August 11, 2017, stated that they had to bring sufficient copies of documentation that they intended to rely upon and that the Board could proceed with the hearing despite the absence of any party or other participant.

[15] A pre-hearing conference took place on September 6, 2017, at 10:00 a.m. The complainant appeared on her own behalf. At the start, I reminded the parties of the hearing date. In addition, I explained to them what an adjudication hearing involves. I explained that it begins with opening statements. Then, each party must present its evidence in support of its case or must respond to the other party’s case. I highlighted that that is the most important part of the hearing since the Board can consider only the evidence presented during that part of the hearing. Once each party has presented all its evidence, each has an opportunity to argue its case or, basically, to show the Board that its point of view is valid.

[16] A date for exchanging documents and jurisprudence was set during the pre-hearing conference. I explained that to allow the parties to better prepare, each was required to send the others copies of the documents it would present at the hearing. I emphasized that the documents had to be sent at least two weeks before the

hearing. Since it was to begin on October 18, 2017, all parties were required to send their documents to the others by October 4, 2017.

[17] During the pre-hearing conference, the PSC indicated that it would not attend the hearing but instead that it intended to present written submissions following the exchange of documents and jurisprudence. I requested that it send its written submissions to the Board and the parties by October 11, 2017, to allow the parties to respond.

[18] On September 18, 2017, the details of the hearing location were sent to the parties.

[19] Before the hearing, on October 3, 2017, the complainant provided the Board and the other parties with a list of documents and attachments that she intended to rely on at the hearing. Her correspondence showed that she intended to present them at the hearing. She used the words “discuss” and “speak about” when referring to them.

[20] On October 5, 2017, in response to the list of documents and attachments the complainant sent on October 3, 2017, the Registry Officer involved emailed the complainant, stating that the Board would not receive this material before the hearing.

[21] The hearing was convened as scheduled at 9:30 a.m. on October 18, 2017. When the complainant did not appear, the hearing was briefly adjourned in case she had been inadvertently delayed. Between 9:45 a.m. and 11:45 a.m., the Registry Officer tried phoning her multiple times at the two telephone numbers on file and left two voice messages asking her to call back as soon as possible. The Registry Officer also called the complainant’s workplace and reached a colleague, who said that he or she had not seen the complainant in a couple of days.

[22] At 11:45 a.m., the Registry Officer emailed the complainant’s two addresses and left her a voicemail advising her that the hearing had been adjourned until 1:00 p.m. that day and that if she were not present at that time, the hearing would resume. In those emails, the complainant was asked to advise as soon as possible if she would attend the hearing.

[23] The complainant did not respond to the Registry Officer, and the hearing resumed at 1:00 p.m. without her presence or that of a representative.

[24] The Board is satisfied that the complainant received proper notice of the hearing of her complaint.

[25] As the former Public Service Staffing Tribunal (PSST) noted in *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20 at para. 24, its authority under s. 29 of the *Regulations* to “dispose of a complaint” refers to the portion of the complaint process in which it will decide the complaint based on the available information.

[26] In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, the PSST determined that the complainant bore the burden of proof in hearings before it (see paragraphs 49, 50, and 55). For the complainant to meet this burden, it was necessary for her to present sufficient evidence before the Board to allow it to determine, on a balance of probabilities, whether a finding of abuse of authority was warranted.

[27] In addition, in *Broughton*, the PSST found as follows at paragraph 50: “It is not sufficient for a complainant to make bold statements in the complaint and allegations claiming abuse of authority without supporting these allegations with evidence from witnesses, facts and/or documents.”

[28] In the present case, the complainant tendered no evidence at the hearing to support her case. She has not discharged her burden of proof. Accordingly, the Board finds that the evidence before it does not demonstrate an abuse of authority in the application of merit.

B. Whether the Board should consider the complainant’s documents after the hearing

[29] After the hearing, the complainant showed frustration about the process for bringing evidence before the Board and for the consequences of her failure to appear at the hearing.

[30] On October 23, 2017, the complainant wrote to the Board, stating that she was “still quite ill”, and apologized for not making it to the hearing. She offered no further information about this illness. She said that she thought that the hearing would proceed regardless of her attendance and that her “evidence” would be considered in spite of her absence, because she had provided it in advance of the hearing. The Registry Officer responded the next day, reminding the complainant that when she sent her documents to the Board on October 3, 2017, the Registry Officer had written

to her, stating that the Board would not receive the material before the hearing and that the Board did not have the evidence that she referred to.

[31] On October 25, 2017, the complainant replied to the Board, stating that she felt that it was unjust that only verbal evidence presented at the hearing would be considered, since there was a deadline for exchanging information for the parties, and that documents had been exchanged before the hearing. She felt that it was not fair that the PSC had been allowed to submit written arguments without attending the hearing. In the same email, the complainant said that although she was told that the Board would not receive her evidence before the hearing, she had not been told that the Board would not be provided with her evidence during the hearing.

[32] On October 26, 2017, the Registry Officer asked the other parties for a written response to the complainant's email of October 25, 2017. They were asked to comment on the issue raised by the complainant, namely, whether the Board could consider her documentation in spite of her absence from the hearing, in deciding her complaint.

[33] The PSC responded on November 3, 2017. It submitted that the complainant was responsible for providing evidence to the Board and that she should not rely on other parties to forward it to the hearing. It also confirmed that its written submission did not include factual evidence and that it was simply a review of the *PSEA* and related policy issues. The PSC confirmed that the Board had been advised in advance that it would not attend the hearing. It argued that the Board's *Procedural Guide for Staffing Complaints* states that if an individual submits documents to the Board before the hearing, they will not form part of the official record and will not be considered by the Board member before he or she hears the case.

[34] The respondent also responded on November 3, 2017. Its position was that the complainant's documents should not be considered as the hearing had already been heard and concluded. Introducing the documents post-hearing would prevent it from testing the evidence by cross-examining the complainant, and it would deny the respondent the opportunity to introduce rebuttal evidence. It submitted that the complainant's failure to attend should not be taken lightly.

[35] The respondent noted that the complainant had been included in pre-hearing communications from the Board to the parties, including the Notice of Hearing (which stated that the hearing could proceed despite the absence of a party) and the "Notice

of Pre-Hearing Conference” (which stated that parties had to be prepared to discuss the evidence to be presented at the hearing). The respondent also noted that it provided the complainant with the link to the *Procedural Guide for Staffing Complaints* on October 10, 2017, and that its Chapter 20 outlines how an oral hearing is conducted and how evidence is presented and the Board’s discretion to proceed in the event of an absent party.

[36] The respondent also noted that the complainant had failed to provide sufficient information about her inability to attend the hearing or any exceptional circumstances that would justify a postponement or the opportunity to present evidence after the hearing.

[37] The complainant was given until November 14, 2017, to reply to the responses of the respondent and the PSC to her request. She provided none.

[38] The *Procedural Guide for Staffing Complaints* states, at page 39, that “... if a complainant is not present at the hearing ... the Board may continue without him or her and render a decision based on the evidence provided by the parties who were present at the hearing” [emphasis added]. In the Board’s view, the plain interpretation of this section does not allow concluding that evidence could be provided to the Board outside the hearing; nor does it allow presuming that another party would present the evidence of an absent party.

[39] The Board is satisfied that it is not possible to accept the complainant’s documents outside the hearing. The Registry Officer informed her that the Board would not accept her documents before the hearing. She has not offered sufficient information about her absence that would justify the opportunity to present evidence after the hearing. The *Procedural Guide for Staffing Complaints* states that the Board may render a decision based only on evidence provided by the parties present at the hearing. Finally, the difficulties of testing evidence outside a hearing risks breaching basic principles of procedural fairness.

[40] For these reasons, the complainant’s request to submit her evidence for the Board’s consideration outside the hearing is denied.

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

(The Order appears on the next page)

IV. Order

[42] The complaint is dismissed.

February 5, 2018.

**Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board**