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Citation: 2018 FPSLREB 53

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

PAUL ABI-MANSOUR

Complainant

and

DEPUTY MINISTER OF FISHERIES AND OCEANS

Respondent

and

OTHER PARTIES

Indexed as
Abi-Mansour v. Deputy Minister of Fisheries and Oceans

In the matter of a complaint of abuse of authority - paragraphs 77(1)(a) and (b) of the *Public Service Employment Act*

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Richard Fader, counsel

Heard at Ottawa, Ontario,
April 17 and 18, 2018,
Written submissions filed April 30, May 3 and 11, 2018.

I. Introduction

[1] The complainant, Paul Abi-Mansour, was in the area of selection for two appointment processes, but he was unable to apply because the respondent, the Deputy Minister of the Department of Fisheries and Oceans (DFO), chose non-advertised processes.

[2] The respondent made the appointments to two programmer/analyst positions (classified at the CS-02 group and level) with the Canadian Coast Guard, in its Integrated Technical Services Branch. The processes were numbered 15-DFO-NCR-INA-CCG-122635 and 15-DFO-NCR-INA-CCG-123167. The area of selection was limited to DFO employees occupying positions in the National Capital Region.

[3] The complainant alleged that the respondent abused its authority as follows:

- by choosing non-advertised processes;
- by allowing personal favouritism to influence the appointments;
- by setting the essential qualifications for the two positions; and
- in the application of merit, by appointing two candidates who did not meet the essential qualifications.

[4] The respondent denied all the allegations and maintained that the assessment board acted appropriately at all times and that the successful appointees met the essential qualifications.

[5] The Public Service Commission (PSC) did not attend the hearing. It submitted written submissions about the regulatory and policy framework of the appointment processes. It took no position on the merits of the allegations in this matter.

[6] For the reasons that follow, I find that the complainant did not meet his burden of proof on a balance of probabilities that the respondent abused its authority by choosing a non-advertised process, by setting the essential qualifications, by finding that the appointees met those qualifications, or by allowing personal favouritism to influence the appointments.

[7] 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*.

II. Preliminary matters, and frivolous arguments by the complainant

A. The constitutional validity of the *Public Service Employment Act* complaint process and the burden of proof

[8] During the hearing, the complainant stated that he wished to challenge the constitutional validity of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*") on the grounds that it deprived him of direct access to the Federal Court to seek judicial review of staffing decisions, which he argued caused him to face a higher standard of proving his allegations before this Board. He argued that such a judicial review could be upheld upon the discovery of a mere error or omission.

[9] The complainant's constitutional validity argument will not be pursued in this decision as the notices required in such a case pursuant to s. 57 of the *Federal Courts Act* (R.S.C., 1985, c. F-7) were not served upon the various attorneys general.

[10] The complainant also argued that in fact, the burden of proof had shifted to the respondent rather than resting solely upon him.

[11] Adjudicator Perrault considered and rejected these same matters in concise detail at a hearing in 2016 of two of the complainant's files. See *Abi-Mansour v. President of the Public Service Commission*, 2016 PSLREB 53 ("*Abi-Mansour* 2016") at paras. 14 to 17, as follows:

> …
>
> *[14] In his submissions, the complainant argued that the Board's jurisdiction was in fact much larger than that stated at s. 77 of the* PSEA*, under which it may hear a complaint of abuse of authority in an appointment process. According to the complainant, litigants have the choice between the Board and the Federal Court to be heard on staffing matters — the choice depends on their financial resources. It would be unfair, following that reasoning, to grant further grounds of*

judicial review and further remedies to the more affluent litigant. Therefore, the Board should keep in mind s. 18.1 of the Federal Courts Act*(R.S.C., 1985, c. F-7) (which deals with judicial reviews of federal administrative decisions) when deciding abuses of authority. Further proof of the possibility of choice can be found, still according to the complainant, in the fact that complaints about external appointment processes, which are not within the Board's purview, proceed directly to the Federal Court.*

[15] Since the complainant went on at some length with these arguments, I wish to dispel any misunderstanding immediately.

[16] When Parliament provides for an administrative recourse against a decision of the federal public administration, litigants must first seek redress through that administrative process. The courts will not allow litigants to bypass this recourse, save in exceptional circumstances. The Federal Court of Appeal stated as much as follows in Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras. 30 and 31:*

> [30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point ….
>
> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative

> processes until after they are completed, or until the available, effective remedies are exhausted.
>
> …
>
> [Emphasis added]
>
> *[17] As to complaints about external appointment processes proceeding directly to the Federal Court, the* PSEA *in fact provides for an administrative recourse at s. 66.*

[12] In that same case (at paragraphs 21 to 24), the Board replied to the complainant's argument about the burden of proof as follows:

> …
>
> *[21] Concerning the burden of proof, the complainant, invoking* Canada (Attorney General) v. Lahlali*, 2012 FC 601 at para. 29, argues that it reverses once a prima facie case is established. The respondent argues that a proper reading of* Lahlali *shows that the burden of proof remains with the complainant throughout.*
>
> *[22] The complainant does have the burden of proof throughout the analysis. However, as stated in* McGregor v. Canada (Attorney General)*, 2007 FCA 197, the respondent may have a tactical burden to answer the complainant's case.*
>
> *[23]* McGregor *precedes the changes to the* PSEA *under which the Tribunal was created. Nevertheless, the principles of the burden of proof described as follows at paragraphs 27 to 29 of* McGregor *still apply in the present context:*
>
> > [27] For a section 21 appeal to be feasible, the appellant must direct his evidence to the particular elements of the selection process which he believes involved a departure from the merit principle. As the strength of the appellant's case grows, the hiring department will develop what may be referred to as a "tactical burden" to adduce evidence to refute the evidence on which the appellant relies, for fear of an adverse ruling. However, this tactical burden does not arise as a matter of law, but as a matter of common sense. Throughout, the legal and evidential burden of convincing the Appeal Board that the selection board failed to respect the merit principle rests with the appellant: see John Sopinka et al., *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1999) at §§ 3.47-3.48.
> >
> > [28] The fact that inquiries under section 21

> are designed to ensure the merit principle was respected does not warrant a transfer of the onus from the appellant to the respondent. Mr. McGregor fastens on a statement by this Court in *Charest v. Attorney General of Canada*, [1973] F.C. 1217 at page 1221, wherein it stated that an appeal under section 21 "is not to protect the appellant's rights, it is to prevent an appointment being made contrary to the merit principle." According to Mr. McGregor, this purpose warrants a shifting of the burden of proof to the hiring department to establish that the merit principle was respected. I disagree.
>
> [29] As canvassed above, it is not feasible to have the selection board prove in each case that the process employed followed the merit principle in all respects. This factor remains whether or not section 21 has a broader public interest purpose of ensuring that the merit principle is respected throughout the Public Service. It is not in the public interest to divert extensive resources to disprove allegations which cannot be substantiated. […]

> *[24] The complainant alleges that an abuse of authority occurred and that he suffered discrimination. He must present evidence to support those allegations. The respondent must answer the case with its evidence. Once both parties have stated their cases, the Board must decide, on the balance of probabilities, whether the complainant's evidence is sufficient to conclude in his favour.*

…

[13] I will not indulge the complainant in another analysis of these same issues as I have read and concur with the analysis and outcome in *Abi-Mansour* 2016. However, I will add that it is not a good use of the Board's time to reconsider the same failed arguments from the complainant. *Black's Law Dictionary* (Abridged 6th edition) defines "frivolous" as follows: "A pleading is frivolous when it is clearly insufficient on its face…"

[14] The Board's repeated hearing of these frivolous submissions that I have just noted by this complainant should not be presented to this Board again without supporting appellate court jurisprudence that has not already been considered and rejected by this Board.

B. Request to anonymize the decision

[15] The complainant requested that this decision be anonymized. He then requested permission to make written submissions after the hearing. Despite the respondent's opposition to the request to delay all arguments and then to proceed by written submissions, counsel indicated that he was less-strongly opposed to a delay for written submissions on this one issue of anonymizing this decision.

[16] In support of this request, the complainant pointed to his testimony stating that he had been told that hiring managers were refusing to consider him for appointment because of his notoriety of being a frequent litigant before this Board.

[17] The complainant testified that he has argued four cases before this Board (including its predecessor, the Public Service Staffing Tribunal (PSST)) and that the resulting written decisions, which are memorialized in the public domain, continue to be unfairly held against him.

[18] The respondent opposed this request, citing the deeply entrenched and constitutionally recognized right in Canada to an open court, which includes public access to court and quasi-judicial decisions.

[19] The respondent noted that the Supreme Court of Canada has stated in *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 and *R. v. Mentuck* [2001] 3 S.C.R. 442 that given the common law and *Charter* protection of the open court principle that confidentiality orders should only be granted when:

> - such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and,
>
> - the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[20] In *Re Vancouver Sun*, [2004] 2 S.C.R. 332, the Supreme Court reconfirmed the *Dagenais/Mentuck* test, noting that openness is integral to the independence and impartiality of courts, as well as to both the public's confidence in the justice system and its understanding of the administration of justice.

[21] In considering the open court principle in the context of a quasi-judicial administrative tribunal, the Federal Court of Appeal stated in *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 the following at paras. 35-37:

> *[35] In determining whether or not it was appropriate to limit the application of the open court principle in each of these matters, the courts adopted the approach taken by the Supreme Court in* Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 and* Mentuck *(the so-called* Dagenais/Mentuck *test). This test was described in* Toronto Star Newspapers*, at paragraph 4, as follows:*
>
> > *Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would* subvert the ends of justice or unduly impair its proper administration.
>
> *Stated another way, the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation.*
>
> *[36] Another important consideration is whether the open court principle applies only to courts or whether it also applies to quasi-judicial tribunals.*
>
> The Agency and the Open Court Principle
>
> *[37] In this application, all parties are agreed that the open court principle applies to the Agency when it undertakes dispute resolution proceedings in its capacity as a quasi-judicial tribunal. Support for this proposition can be found in* R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726 (CanLII), 327 D.L.R. (4th) 470, at paragraph 22, where Sharpe J.A. stated:*
>
> > *[22] The open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. The strong public policy in*

> *favour of openness and of "maximum accountability and accessibility" in respect of judicial or quasi-judicial acts pre-dates the Charter:* Nova Scotia (Attorney General) v. MacIntyre, *1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 184 S.C.R. As Dickson J. stated, at pp. 186-87 S.C.R.: At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance"*.
>
> *[Emphasis added]*

[22] And finally, I note the Supreme Court of Canada's application of the *Dagenais/Mentuck* test in determining whether a confidentiality order should be granted to a Crown corporation in respect of certain documents. The Supreme Court emphasized the importance of considering whether the request for confidentiality in the court proceedings was necessary to prevent a serious risk to an important interest and whether this outweighs the deleterious effects including the public interest in open and accessible court proceedings (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.R. at 53).

[23] The PSC noted in its submission in response to this request that the PSST considered this same issue in *Boivin v. President of the Canada Border Services Agency,* 2010 PSST 6 and determined at para. 157 as follows:

…

> ***157*** *This Tribunal is of the view that, given its mandate and its quasi-judicial nature, it is bound by the rules governing the open court principle. The Tribunal applies legal principles and evidence in making its determinations. Hearings are held in public. Complaints to the Tribunal are made by individual employees, and the Tribunal's decisions are of interest to the parties in conflict. In addition, there are other stakeholders with a valid interest in these decisions. The mandate of the Tribunal is such that issues and interests in conflict between the individual parties have an impact on the public service and the public at large. The values found in the preamble to the* PSEA *underline the spirit and letter of the legislation, and the Tribunal has a significant role in demonstrating to the public that those values are upheld.*

…

[24] As noted by the respondent in their reply to this motion, all employees who are considering filing a complaint under the *Act* are advised by the Board's *Policy on Openness and Privacy* that, "they are embarking on a process that presumes a public airing of the dispute between them, including public availability of decisions." It further states that, "Board decisions identify parties and their witnesses by name."

[25] The complainant argued that the unsuccessful complaints that he has presented to this Board and pursued later in judicial review applications to the Federal Court have created a notoriety, which he claimed he has been told by two managers now follows him to appointment processes, in which hiring managers refrain from offering him appointments due to the fear of being caught-up in quasi-judicial hearings with the complainant later.

[26] The complainant suggests that he is at serious risk of not being able to find any job from now until retirement. In particular he suggests that this risk of joblessness will follow him from the Canadian public sector, to the private sector, to United Nations agencies and to employers in the Middle East which, he says, is his home region.

[27] The complainant argued that the open court principle does not automatically apply to this Board. This argument directly contradicts the long line of cases from the Supreme Court of Canada and Federal Court of Appeal which have been relied upon by the PSST and subsequently by this Board which allows open hearings, makes complaint files available for public scrutiny at the Board registry and publishes Board decisions to be open to public and news media scrutiny.

[28] The complainant specifically points to the fact the Board makes all its decisions available on an open website. It should be noted that in fact, the Board's database of decisions is protected so that internet search engines are blocked from name searches so that a person searching a name of a litigant or witness before this Board will not be directed to their decisions of this Board on its website.

[29] The complainant also cites s. 8(1) of the *Privacy Act* (R.S.C., 1985, c. P-21) as affording him protection of personal information held by the Board. He also notes the exception in s. 8(2)(m)(i) which allows the disclosure of information where the public interest in disclosure outweighs any invasion of privacy that could result from the disclosure.

[30] The complainant argues that neither the *Federal Public Service Labour Relations and Employment Act* nor the *Public Service Employment Act (*the *Act)* state that Board hearings shall be open to the public. He also cites s. 103.1 of the *Act* which states that the Board shall render a decision on a complaint and then provide a copy of it to the parties to the complaint.

[31] In reply to the respondent's reliance upon the previously noted *Lukács* case from the Federal Court of Appeal, the complainant suggests that case arose from a decision of the Canadian Transportation Agency (CTA) which he argues "functions exactly as a superior court" due to s. 25 of the *Canada Transportation Act* (S.C. 1996, c. 10), which states:

> *The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.*

[32] The complaint argues that the Board has no such grant of powers and thereby should not feel obliged to hold open hearings and make its decisions public.

[33] The Federal Court of Appeal was clearly addressing the role of quasi-judicial administrative tribunals when it spoke of the importance of the open court principle applying to them as noted previously.

[34] The complainant also submitted arguments and case law addressing the protection of economic interests and a right to employment under s. 7 of the *Charter*. I don't find these arguments either persuasive or relevant.

[35] The respondent notes the exception to the protection of personal privacy contained in s. 69(2) of the *Privacy Act*, which exempts information that is publicly available.

[36] Given the weighing of interests required in a request to anonymize and seal the records of a case as set out in the *Dagenais/Mentuck* test, I have no hesitation in concluding that such an order should not be granted under both parts of the test. An order limiting the open court principle is unnecessary in the context of this litigation to prevent a serious risk of an important interest. In addition, the salutary effects of the order would most certainly not outweigh its deleterious effects on the

public's right to open and accessible adjudication proceedings. The harm to the public interest in open court hearings before this Board far outweigh the benefit the complainant seeks to escape the notoriety he has created for himself by his frequent appearances before this Board.

[37] The harm the complainant speaks of and his risk of being unemployable is speculative in nature. More importantly, if in fact he is suffering from loss of employment opportunities, this cannot be reversed retroactively.

[38] I rely upon years of consistent jurisprudence from our Supreme Court, Federal Court of Appeal and practice of this Board holding hearings and publishing decisions that are open to the public, transparent and accountable in guiding my decision to reject the complainant's arguments to seal the records of this hearing and anonymize this decision.

[39] The complainant is aware that every time he files a complaint under the *Act* that it will result in a public hearing and public Board decision of the matter. He has no right to privacy of the subject matter of his complaint and the decision arising therefrom.

[40] I believe Canada enjoys an unsurpassed robust Parliamentary democracy which is founded upon the rule of law. While citizens enjoy many rights and freedoms appurtenant with our open and democratic government, there is a concomitant responsibility that comes with exercising one's rights.

[41] A person who chooses to file 48 separate complaints against the government should be responsible enough to accept the accountability that he may become known as a frequent litigant. This is a natural outcome of exercising a right to access the system of justice that is available as part of Canada's constitutional democracy and our respect for the rule of law.

[42] Furthermore, if I were to grant the complainant's request, then literally every complainant appearing before this Board could reasonably request that his or her case not be published out of the fear that some ill will could arise from putting public service managers through a hearing process.

[43] And finally, given the extensive history of litigation involving 48 complaints under the *Act* that the complainant has undertaken, and the fact that the many resulting decisions of tribunals and courts are all available on the Board website, the fact is that it is too late for him to worry about a stigma being attached to his name by legal proceedings against the federal government.

[44] As we say on the Prairies, "the horse is out the barn door" on that issue.

C. Request to postpone arguments and to proceed later, by written submissions

[45] The complainant requested additional time after the hearing to research and submit written arguments on the matter of the definition of "abuse of authority". The respondent opposed his request.

[46] I had already refused his request to conduct the entire hearing by means of written submissions, which the Board received approximately two weeks before the hearing. The request was received well after the pre-hearing conference, at which such a request would have properly been raised for discussion.

[47] Given the complainant's testimony that he has become notorious within the federal public service, I asked him how many staffing complaints he has already argued. He replied that he has argued four or five cases. Counsel for the respondent interjected and suggested that he thought that the number was higher, given his experience with the complainant's previous cases, before both this Board and the Federal Court.

[48] The Board's Registry advised me that the complainant has made 48 complaints under the *Act* that, as he stated, have to date resulted in 5 written decisions, of which 2 were pursued on judicial review to the Federal Court. He has 27 open complaints in the Board's scheduling queue, which will result in another 22 hearings, given the consolidation of some of those files.

[49] The two complaints before me in this consolidated hearing were made on June 4, 2015, and are included in that total.

[50] Given the extensive experience the complainant has before this Board arguing abuse of authority cases, the respondent's objections that it was prepared to argue the case at the hearing and that postponing it to be argued later in writing would create an

additional burden with scheduling and work to draft the submissions, and the fact that the complainant has had nearly three years since filing these complaints to prepare his arguments, I rejected his request for a postponement to present written arguments later and instead granted his alternate request for a 90-minute break to prepare with his bargaining agent representative, who the complainant advised had been assigned to the file only on the previous day.

III. Background

[51] The complainant began to work with the DFO in 2009 and has been working in the data management area of its Fleet Planning branch since 2012.

IV. Issues

[52] I must determine the following issues:

- Did the respondent commit an abuse of authority by electing to fill the two positions at issue by non-advertised processes?
- Did the respondent commit an abuse of authority by using the same statement of merit criteria as was used by a different federal agency?
- Did the respondent commit an abuse of authority by allowing personal favouritism to influence the appointment decisions?
- Did the respondent commit an abuse of authority by finding that the appointees met all the essential merit criteria?

V. Analysis

A. The definition of "abuse of authority"

[53] Section 77(1) of the *Act* provides that an unsuccessful candidate in the area of selection for an internal appointment process may make a complaint to the Board that he or she was not appointed or proposed for appointment because of an abuse of authority.

[54] The complainant had the burden of proving that on a balance of probabilities, the respondent abused its authority (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49 and 55).

[55] "Abuse of authority" is not defined in the *Act*; however, s. 2(4) offers the following guidance: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[56] The PSC's written submission speaks to the definition and scope of abuse of authority at paragraphs 13 to 30 inclusive of its book of general and policy-specific submissions. It cites case law and academic literature to support its submission that Parliament intended for an abuse of authority to be different from an error or omission (at paragraph 28), and in cases involving issues other than discrimination that very serious misfeasance such as bad faith and personal favouritism involves a deliberate misuse of power (at paragraph 19) that could include corruption or extreme lack of care, as well as dishonesty and personal hostility (at paragraph 20).

[57] In his arguments, the complainant took issue with the PSC's written submissions on the definition of "abuse of authority". He argued that its suggestion that the Board should look for intent behind some form of wrongdoing to justify a finding of abuse of authority is far too high a threshold.

[58] I agree with the complainant insofar as the PSC alludes to an abuse of authority being such a serious wrongdoing that it amounts to an intentional act. The Board has consistently found this too high a standard for a complainant to meet.

[59] The complainant submitted that an error or omission should be seen as potentially justifying an allegation of abuse of authority and that the severity of the error or omission's impact upon a person with standing to complain should be considered when determining whether an abuse of authority occurred.

[60] As Chairperson Ebbs of the Board noted in her recent decision, *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 14, the Board and the former PSST have established that s. 2(4) of the *Act* must be interpreted broadly.

[61] This means that the term "abuse of authority" must not be limited to bad faith and personal favouritism. In *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 21 and 38, the Federal Court confirmed that the definition of "abuse of authority" in s. 2(4) of the *Act* is not exhaustive and that it can include other forms of inappropriate behaviour.

[62] And as this Board consistently finds, the nature and seriousness of the improper conduct or omission will determine whether it constitutes an abuse of authority. See *Tibbs*, at para. 66.

[63] Additionally, s. 30(1) of the *Act* states that appointments from within the public service must be made on the basis of merit. Section 30(2)(a) requires that to be appointed, a person must meet the essential qualifications as established by the deputy head.

B. Did the respondent commit an abuse of authority by choosing non-advertised processes?

[64] The complainant argued that I must read the relevant sections of the *Act* in the context of its preamble, which in his submission mentions the principles of accountability, transparency, and fairness, and the need to be representative of Canada's diversity.

[65] The complainant argued that I should interpret the *Act* to find that delegated hiring managers are required to exercise their discretion in a more focused manner, to place more emphasis upon the principles noted in the preamble.

[66] I note the Federal Court's direction on the *Act*'s statutory purpose. Mr. Justice de Montigny wrote in *Lahlali*, at paras. 16 to 19, as follows:

…

> *A.* Legislative framework
>
> *[16] The PSEA came into force on December 31, 2005, and was the first wide-ranging legislative reform of its kind in over 35 years. The objective of the new Act was to reform the old staffing system, which was thought to be too complex and slow. The new staffing system allowed managers to fill vacancies with qualified people in a timely fashion so that the public service could carry out its role of serving Canadians.*
>
> *[17] To achieve this efficiency objective, Parliament decided to give managers increased discretion with respect to staffing issues. This new philosophy is echoed in the preamble to the PSEA and specifically in the following recognition:*
>
> > *Recognizing that*
> > *…*

> *delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians.*

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

30. (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.	*30. (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.*
Meaning of merit *(2) An appointment is made on the basis of merit when*	*Définition du mérite* *(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*
(a) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and	*a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;*
(b) the Commission	*b) la Commission prend en compte :* *(i) toute qualification*

has regard to *(i) any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,* *(ii) any current or future operational requirements of the organization that may be identified by the deputy head, and* *(iii) any current or future needs of the organization that may be identified by the deputy head.*	*supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,* *(ii) toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,* *(iii) tout besoin actuel ou futur de l'administration précisé par l'administrateur général.*

[19] In addition, the assessment board has considerable discretion in the selection and use of assessment methods. In this regard, section 36 of the PSEA states:

36. 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 qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).	*36. La Commission peut avoir recours à toute méthode d'évaluation — notamment prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).*

…

[67] The complainant also argued that hiring managers should be guided and found to be required to give more emphasis to the *Employment Equity Act* (S.C. 1995, c. 44).

[68] I note that a very similar argument appears to have been made to this Board in *Abi-Mansour* 2016 at paras. 11 to 13. At the hearing for that case, the complainant sought to introduce evidence on employment equity matters. The Board found as follows:

…

> *[11] In a previous decision (*Abi-Mansour v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2013 PSST 6) (Abi-Mansour* 2013*) with the same complainant but a different respondent, the Tribunal stated (see paragraphs 15 to 17) that its role is not to enforce the* Employment Equity Act*(S.C. 1995, c. 44) (EEA), a role Parliament has reserved for the CHRC. However, later in that case, at para. 20, the Tribunal stated that "[a]lthough the CHRC has the role of enforcing compliance with the EEA, employment equity matters* ***may nonetheless be relevant to complaints made before the Tribunal under s. 77"*** *(emphasis added). In that case, the deputy head established an organizational need in the Statement of Merit Criteria that stated that it may limit selection to candidates self-identifying as belonging to two employment equity groups. The Tribunal ruled that the employment equity evidence was relevant in that case to the issue of whether the respondent abused its authority when it had regard to the organizational need in that appointment process.*
>
> *[12] I did not allow evidence at the hearing on employment equity matters, save for a general document,* Public Service Commission of Canada 3-year Employment Equity Action Plan (2010-2013)*, which shows the PSC's various objectives and actions with respect to employment equity.*
>
> *[13] I do not believe employment equity figures can help me decide whether discrimination occurred in this case. As I explained to the complainant, this evidence is not relevant to the issue at hand, which is whether the respondent's decision to screen him out at the preliminary screening stage for failing to meet the education requirement was tainted by discrimination. I understand that discrimination can be difficult to prove and that circumstantial evidence can be used to infer that discrimination probably occurred in a particular case. However, this case is not akin to that of* Abi-Mansour v. Chief Executive Officer of Passport Canada*, 2014 PSST 12, in which the complainant alleged that he was eliminated from the appointment process because he was*

> *educated outside Canada. In the case before me, as both the agreed statement of facts and the evidence set out later in the decision highlight, the issue is whether the respondent abused its authority in screening the complainant out of the appointment process for failing to have the requisite specialization in economics, sociology or statistics. The fact that some of the complainant's university education was acquired outside Canada, which he alleged is related to discrimination based on national or ethnic origin, is not an issue in this case. I have determined that employment equity evidence is not relevant to the issue before me.*
>
> …
>
> [Emphasis in the original]

[69] While the facts are somewhat different, as the matter before me involves a choice of process that denied the complainant an opportunity to seek an appointment, the complainant's argument before me is consistent between this case and also as argued in *Abi-Mansour* 2016.

[70] Given his assertion that the managers in this matter should have been more guided by employment equity considerations when considering an advertised process, which would have allowed employment equity candidates such as the complainant to apply, he adduced statistical evidence to support his assertion.

[71] The complainant tendered as evidence (in Exhibits E-23 and E-24) brief excerpts from two DFO reports. The copy of the first report did not even have its actual full page, but the respondent made no objection as to its authenticity, so I allowed it. It is titled *Department of Fisheries & Oceans National Employment Equity Workforce Analysis Estimate - 2006 Census and the Participation and Activity Limitation Survey (PALS) - March 31, 2014*.

[72] The complainant drew my attention to this small portion of the document, which in the few un-redacted numbers left visible on the page shows a gap (noted as "-1") for the Computer Systems (CS) group under the visible minority column. Both parties concurred that this statistic represented the CS group as a whole in the DFO's national workforce as denoting that it was short one person from some unstated target or quota for proper representativeness at that time.

[73] The second document appears to be a page from the DFO's *National Employment Equity Workforce Analysis - 2011 National Household Survey and Canadian Survey on Disability 2012 - March 31, 2016*. It lists the CS group as having a gap of "-2".

[74] Counsel for the employer questioned the two managers who appeared at the hearing, Bertin (Bert) Paulin, Manager of Enterprise Solutions, and Sam Ryan, Director General, Integrated Technical Services, DFO. They provided independent but consistent testimony that over the past three years, the Technical Services group has expanded rapidly after the DFO's information technology (IT) support services branch was significantly restructured to create a centralized group.

[75] Mr. Paulin testified that the number of staff in the office grew from 8 to 40. Of them, Mr. Ryan testified that 20% self-declared as visible minorities. He added that out of approximately 30 new positions that have been filled, only 4 were done through non-advertised processes. He explained that he and the department both take their representativeness responsibilities very seriously in appointment decisions and that it was on his mind while the reorganization led to the rapid expansion of positions in the branch.

[76] When asked about these matters, Mr. Ryan testified that it was his knowledge that 10% of the positions the branch had recently filled during its expansion were done through non-advertised appointments. He added that he preferred to use advertised processes as he believed in the importance of recruiting diversity into the staff. He added that there were currently no under-representations in the IT branch.

[77] The complainant pointed out that the respondent's two witnesses failed to bring corroborating documentary evidence to support their testimonies about relying mostly upon advertised processes and about representativeness. He argued that I should make an adverse finding due to the respondent's lack of that evidence.

[78] While their testimony would have been helpfully bolstered by them adducing supporting documentary evidence confirming the statistics that they stated they had achieved, I will not make an adverse finding of fact due solely to the lack of that additional documentary evidence.

[79] If the complainant had any doubt about the veracity of their testimonies, it was available to him to challenge them in cross-examination and to confront them with contradictory evidence through his own research and alternate statistics, which he did not do.

[80] Similar to the outcomes for the complainant in *Abi-Mansour* 2016, which in turn cited *Abi-Mansour* 2013, I am not convinced that the general statements and statistics cited in the matter before me can be used to find an improper choice of appointment process as he argues. The *Act* clearly provides significant discretion to delegated managers in establishing appointment processes, as well as providing them with flexibility to select the right-fit candidate, based upon merit criteria. If this flexibility is to be constrained for reasons such as a department being at a "-1" in representativeness in a particular job classification, I will leave such a change to the PSC and Parliament to consider.

[81] The evidence clearly established that in the rationale justification documents that the DFO required managers to use in a non-advertised process, the matter of representativeness was identified as a guiding principle.

[82] The DFO guides its managers in making appointments by a published *Non-Advertised Appointment Process Policy*. It states on pages 1 and 2 that a non-advertised appointment process must meet all the following principles:

…

> · ***Fairness:*** *decisions are made objectively, free from political or personal favouritism; policies and practices reflect the just treatment of employees and applicants;*
>
> · ***Access:*** *having a reasonable opportunity to apply and be considered for Public Service employment;*
>
> · ***Transparency:*** *information about decisions, policies and practices is communicated in an open and timely manner; and*
>
> · ***Representativeness:*** *Appointment processes are conducted without bias and do not create systemic barriers to help achieve a public service that reflects the Canadian population it serves.*
>
> [Emphasis in the original]

[83] The managers were further guided in their consideration of non-advertised appointments by a DFO "Rationale" form, which they were required to follow. Among other things, the form lists criteria that may warrant the use of non-advertised appointments. Of the 10 options provided, Mr. Ryan selected the 7th to justify his choice of non-advertised processes to appoint to the 2 positions at issue. That option states as follows:

…

> *The appointment of a person who is in a pool of qualified candidates as a result of a selection process conducted by a federal organization subject to the PSEA or an organization whose staffing regime is approved by the Public Service Commission for mobility purposes in which DFO employees could participate. The candidate must have qualified in a process with similar essential merit criteria and at the same group and level of the position to be staffed.*
>
> [Emphasis added]

[84] Mr. Ryan signed the form on April 23, 2015. However, the evidence clearly shows that the two appointees were not notified that they had been placed in a pool at the Immigration and Refugee Board (IRB) until May 15, 2015. Mr. Paulin confirmed in his testimony that in fact the two were placed into that pool on May 15, 2015.

[85] Furthermore, the complainant adduced in documentary evidence and confirmed in his cross-examination of Messrs. Ryan and Paulin that they had decided as early as April 15, 2015, to make the two appointments at issue. In an email on that date, Mr. Paulin wrote to Mr. Ryan and asked to proceed with the non-advertised indeterminate appointments to the two CS-02 positions in question. He stated that the appointees had recently qualified in a CS-02 process at the IRB, which intended to create a pool of qualified candidates reserved only for its use.

[86] The complainant also adduced in evidence email correspondence that established that the "Notifications of Consideration" (NOCs) for the two proposed appointments at issue in this matter were issued retroactively. They were both dated May 5, 2015, and ran to May 11, 2015, but an email adduced in evidence shows that on May 12, 2015, someone from Human Resources asked if the NOCs would be ready that day.

[87] When questioned about the rationale form stating that the two candidates being proposed for non-advertised appointments were not actually in a pool on the date on which the form was signed and completed, Mr. Paulin stated that the IRB's pool was at an early stage, that the two candidates kept him updated at every stage of the IRB's appointment process, and that they had advised him that they were receiving very positive feedback and were progressing through the stages of the appointment process.

[88] Most importantly, both Messrs. Paulin and Ryan testified that in their view, there was an urgent need to retain the expertise of the two candidates, who they believed would soon be offered indeterminate positions elsewhere. They explained that with the direction they had received to reduce budget expenditures on external consultants and with the fact that the candidates held the organizational memory for the operation of two mission-critical IT programs, which the DFO's operations relied upon to assign staff at sea and for related human resource functions, it would have been unacceptably risky to lose their expertise due to their probable departure because they did not have indeterminate positions at the DFO.

[89] Mr. Ryan testified that new indeterminate positions had been approved for the IT branch but that he was very concerned that if management did not make a special effort to accelerate the normal appointment process, it would be too late to retain the two candidates, as the IRB's process could have concluded, and it could have offered them indeterminate positions before his DFO branch could. He testified that for that reason, he supported Mr. Paulin's request to accelerate non-advertised processes that anticipated that the two candidates would eventually be placed in the IRB's pool, to have all the papers ready. He testified that if they had not been placed in the IRB's pool, all that paperwork would have been shredded.

[90] The complainant also adduced evidence that a certain member of the IRB staff had formerly been part of the DFO staff and was communicating with the DFO about the two candidates at issue. The complainant suggested that this was evidence of something untoward. I disagree. I do not find it of any relevance to the complaints before me.

[91] The complainant argued that backdating the NOCs and the misstated rationale that the appointees were in the IRB's pool approximately one month before it happened were errors that amount to an abuse of authority.

[92] The complainant cited *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 21, in which the PSST found that a closed-minded effort to appoint one person had led to an egregious departure from the staffing values of fairness and transparency found in the preamble to the *Act* and the department's choice of appointment policy guide. In upholding the complaint, the PSST found that the delegated manager had wanted to hide the fact that she had made an appointment without ensuring that the appointee met all the essential qualifications, and it was done based on personal favouritism (see paragraph 149).

[93] The complainant also relied upon *Spirak v. Deputy Minister of Public Works and Government Services Canada*, 2012 PSST 20, which found that the delegated manager's claim of an urgent need and of a desire for operational continuity was not supported by fact in concluding that a non-advertised appointment had not been justified. The PSST also found fault with the changes to the statement of merit criteria (SOMC) and with the fact that the delegated manager did not consider how other employees might have been eligible had the process been advertised. And finally, the PSST found fault with the delegated manager's self-assessment in the appointment process as to whether in fact it had respected the stated criteria of transparency and access.

[94] And finally, the complainant cited *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 35, which found that the delegated manager in that case acted with deceit by providing an untrue and a deceptive rationale justification to evade the *Act* and to break a continuous acting appointment into two, to avoid notice requirements that trigger a right to file a complaint under the *Act* (see paragraphs 127, 136, and 147).

[95] I also note that *Beyak* affirmed that managers are not required to consider more than one person to make an appointment but that this discretion is not absolute and must be exercised in accordance with the legislative purpose of the *Act* (see paragraph 125).

[96] Considering the merits of the non-advertised processes, the two managers explained how the IT branch had been significantly reorganized after the Deficit Reduction Action Plan (DRAP) exercise resulted in several changes, which saw the branch take in several positions that had previously been spread across regional operations. Along with the rapid deployment of many new software applications, this created what the two witnesses saw as an urgent need to identify and recruit IT specialists to the growing branch.

[97] Mr. Ryan testified that the two appointees were both originally recruited and appointed to temporary positions, one via an assignment from within the DFO and the other via a secondment from outside. He also testified that their recruitment was part of a much broader reorganization in a human resources plan that arose from the DRAP. This plan tasked his branch with developing staff expertise for important IT programs and reducing its reliance on external consultants, who had previously been almost completely relied upon for such programming help.

[98] Mr. Ryan testified that he had been directed both to reduce the costly expenditures on external consultants and to reduce the risk to the sustainability of critical program infrastructure by having in-house staff capable of programming.

[99] Both Mr. Ryan and Mr. Paulin testified that the dual and complementary tasks of reducing reliance upon external consultants to achieve budget savings and increasing in-house capability were the reason that non-advertised processes were selected when the two incumbents sought appointments outside the DFO.

[100] Both Messrs. Ryan and Paulin testified that when management became aware that the two incumbents were progressing through an appointment process outside the DFO, they firmly believed that they would have to act very quickly or face a high probability that both would leave the DFO to secure the indeterminate appointments that they had applied for elsewhere.

[101] Through cross-examination of the respondent's managers, the complainant adduced as evidence that if the two appointed employees had left, then something else would have had to be done through external consultants or training other staff, which he argued showed the fallacy of the managers' testimony that the non-advertised appointments were so urgently needed. This was a finding in *Spirak*.

[102] After carefully reviewing the evidence and reading all the cases the parties submitted, I have no hesitation finding that the complainant failed to meet his burden of proof of showing that an abuse of authority arose from the respondent's decision to make the appointments at issue through non-advertised processes.

[103] The matter admitted by Mr. Paulin that he misstated the fact that the candidates were in a pool when they prepared the paperwork prospectively to justify the use of a non-advertised process is an irregularity.

[104] I note the testimony of Mr. Ryan that had the two candidates in fact, not been successful in being placed into the IRB pool, that the paperwork stating otherwise would have been destroyed and not acted upon. He also testified that had this occurred, he would have simply waited until the candidates were in another pool.

[105] Given the evidence set out above, in the circumstances of this case, I am not prepared to conclude that this prospective staffing paperwork which I have found to be an irregularity, was so serious as to amount to an abuse of authority.

[106] The evidence clearly established that the respondent exercised its ability under s. 33 of the *Act* to select non-advertised processes for valid reasons related to the stable and continued operation of its important IT programs.

[107] The respondent responded reasonably and for reasons related only to its *bona fide* operational needs when it was advised that two important employees were in an appointment process, which had a reasonable probability of them leaving the DFO.

[108] While the complainant was effective in showing that the respondent's rationale form was incorrectly written to state that the two employees were in a pool when in fact it occurred approximately one month later, I do not consider this imperfection of a magnitude that is in any way similar to what was argued in *Ayotte* or *Beyak*, in the latter of which the PSST found that the delegated manager's actions had been deceitful.

[109] In the evidence before me, the hiring managers were in fact transparent in explaining that they felt that they had to prepare all the staffing papers to retain the two employees for valid reasons in case these employees were successfully placed in the IRB's pool and received employment offers.

[110] Unlike in *Ayotte* and *Beyak*, the respondent in this case did not use deceit to carry out its plan if its two employees were not placed in the IRB's pool. I have un-contradicted evidence before me that the staffing actions would not have occurred had these two appointees not been placed in the IRB pool.

[111] The complainant also argued that the PSC and the related DFO policy statements that managers are required to follow to choose non-advertised processes do not include operational requirements; therefore, the respondent should not have been allowed to rely upon its operational needs to justify using non-advertised appointment processes.

[112] This is an absurd argument. His suggestion that managers are not allowed to rely upon the operational needs of their offices when making appointments is completely devoid of any logic or common sense.

[113] As Justice de Montigny noted about the *Act*'s statutory purpose and preamble, the whole reason public service staffing appointments are made is to help deliver government services. He wrote as follows of the *Act*'s preamble (at para. 16): "The new staffing system allowed managers to fill vacancies with qualified people in a timely fashion so that the public service could carry out its role of serving Canadians."

[114] The whole reason a manager makes an appointment is to contribute to fulfilling the role of serving Canadians. When doing so, the manager is to be guided by the principles in the policies that I have described earlier. I am satisfied that the relevant principles were respected in the two appointments at issue before me. More broadly, as the testimonies of Messrs. Paulin and Ryan clearly established, they take their responsibilities to follow those principles seriously, as witnessed by what they testified was the attainment of the proper levels of representativeness and their rather modest 10% rate of relying on non-advertised appointment processes.

[115] As I noted, Parliament has given managers flexibility to make staffing decisions that meet the demands placed upon them to serve the federal government and in turn the citizens of Canada. The Board's role is not to second-guess what the evidence shows were *bona fide* decisions made for reasons related to organizational needs and merit-based appointments.

[116] Despite the rationale form being signed one month early and stating that the appointees were in a pool when in fact they were not, in my view this fact alone is insufficient to constitute a finding of abuse of authority in the respondent's choice of process. I do not consider this an abuse of authority given the clear and compelling evidence before me of this process being solely based upon principles of merit.

B. Did the respondent commit an abuse of authority by using the same statement of merit criteria as had been established by a different federal agency for the two positions?

[117] The complainant pointed to the fact confirmed by the respondent's managers in testimony that the same SOMC used by the IRB was used to establish the SOMC for the two positions at issue.

[118] The complainant also pointed out a slight difference in the "Notifications of Appointment" when the appointees were first hired in acting term positions as opposed to the duties listed on the final versions of their notices.

[119] The complainant alleged that it was an improper exercise of discretion to use the IRB's SOMC and that the SOMC did not properly meet the needs of the DFO positions.

[120] It is well established that a hiring manager has wide latitude to establish essential and asset qualifications tailored to the workplace's specific operational needs. The deputy head also has considerable flexibility to determine the right-fit criteria and the candidate that best fits them.

[121] The respondent noted that each manager that testified stated that he firmly believed that the work done in the two positions, supporting IT computer programs, was captured entirely accurately, so that they could use the same SOMC as the IRB had relied on for its CS positions. The managers testified that computer programming in both organizations required the same ".NET" knowledge and that the positions in each essentially did the same work.

[122] The respondent relied upon the Federal Court's decision in *Lavigne v. Canada (Justice)*, 2009 FC 684 at para. 70, which held that creating essential qualifications was entrusted to managers and that it was not for the PSST (or this Board) to establish them for a position.

[123] In *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at para. 25, the PSST similarly found that deputy heads are specifically empowered to establish essential and additional qualifications and to specify any operational requirements or current or future needs of the organization.

[124] The complainant's assertion that managers must independently write each and every SOMC for an appointment for which a position elsewhere has the same tasks and requires the same qualifications makes no sense as it would amount to a complete waste of public resources.

[125] I conclude that the complainant has not established on a balance of probabilities that the respondent abused its authority by using the same SOMC as the IRB used in its appointment process to fill CS-02 positions.

C. Did the respondent commit an abuse of authority by allowing personal favouritism to influence the appointment decisions?

[126] In a word, the answer to this allegation is, "No". The managers' testimony clearly established that their decision to retain the two eventual appointees through non-advertised processes was based solely on merit and the desire to retain them for the stability and operational effectiveness of the DFO's IT branch.

[127] The complainant alleged personal favouritism tainted the appointments. Messrs. Paulin and Ryan both testified that at no time did they ever have any interaction or relationship with the two appointees outside management's normal interaction with staff in the workplace. There was no evidence whatsoever of any personal relationship between DFO management and the two appointees.

[128] The respondent pointed to the fact that it has been well established before this Board that personal favouritism must be proven on clear evidence of factors other than merit bearing upon an appointment (see *Carlson-Needham v. Deputy Minister of National Defence*, 2007 PSST 38). And, further, that a manager's reliance upon his or her personal knowledge of a candidate is entirely acceptable (see *Visca v. Deputy Minister of Justice, 2007 PSST 24*).

[129] As I stated in *Warford v. Commissioner of the Royal Canadian Mounted Police*, 2016 PSLREB 56 at para. 21, workplace actions that may appear to favour one employee in preparing that person for appointment can be reasonably justified by

evidence showing that the impugned workplace actions were in fact required for the office's operational requirements.

[130] That is so in this case, in which there was no evidence whatsoever of anything other than merit and workplace operational requirements influencing the decision to select the non-advertised processes and to make the two resulting appointments.

[131] The complainant offered his opinion that based upon past use of consultants the DFO could again rely upon consultants if the two appointees had left the department, and not suffer any reductions in IT service.

[132] This opinion of the complainant is contrary to the evidence of the good and valid reasons of reduced budgetary reliance upon consultants and greater in-house knowledge to enhance reliability that DFO sought to achieve by the reorganization that began this whole matter.

[133] Given the lack of evidence to support this allegation, I conclude that the complainant has failed to establish that personal favouritism influenced the appointment decisions. Therefore, I find that there was no abuse of authority related to this allegation.

D. Did the respondent commit an abuse of authority by finding that the appointees met all the essential merit criteria?

[134] The answer to this allegation is also simple — it did not. Mr. Paulin's uncontested testimony was that the appointees were assessed against the SOMC and that they were found to meet all the criteria. He also stated that he had personally observed their performance and had found them very experienced and extremely well qualified. Mr. Ryan testified that he personally reviewed the SOMC and the appointees' qualifications and that he found that they exceeded every stated criterion for the position.

[135] The complainant pointed out that the appointment process documentation for the two appointees differed slightly between their initial 2014 acting appointments and their 2015 indeterminate appointments despite them working in the same jobs. Mr. Paulin explained this was due to the previous notice referencing one particular computer program that in the later notice was subsumed in a broader statement of computer programming skills, which he said included that program. I find this

difference of no relevance to determining whether an abuse of authority arose in the matters before me.

[136] The complainant adduced no evidence to support this allegation. Therefore, I conclude that he did not meet his burden of proof that would allow me to find that an abuse of authority arose from this allegation.

[137] I conclude that the complainant has failed to establish on a balance of probabilities that his allegations and supporting evidence, taken individually or collectively, constitute an abuse of authority by the respondent in the two appointments that were the subject of these complaints.

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

(The Order appears on the next page)

VI. Order

[139] I order the complaints dismissed.

June 21, 2018.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board