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Citation: 2019 FPSLREB 51

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

JASON LYSAK

Complainant

and

COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondent

and

OTHER PARTIES

Indexed as
Lysak v. Commissioner of the Royal Canadian Mounted Police

In the matter of a complaint of abuse of authority - paragraph 77(1)(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: Satinder Bains, Public Service Alliance of Canada

For the Respondent: Joel Stelpstra, Counsel

For the Public Service Commission: Claude Zaor, written submissions

Heard at Winnipeg, Manitoba,
April 10 and 11, 2019.

I. Summary

[1] Jason Lysak ("the complainant") worked as a mechanic technician at the Royal Canadian Mounted Police (RCMP and respondent) post garage in Winnipeg, Manitoba, when an internal advertised appointment process was conducted to fill two business/accounting positions in Edmonton, Alberta. The area of selection was limited to persons employed in the Public Service of Canada occupying a position or residing in Edmonton, Alberta and within a 40 km radius, so he did not apply as he was outside the area of selection. Shortly after that, he learned that a clerk from the Winnipeg post garage had been appointed on an acting basis to one of the positions in Edmonton via a non-advertised internal appointment process.

[2] The complainant was on a priority list for appointment when the appointment on an acting basis was made. He felt that he had been unfairly denied the opportunity to apply to the position, so he filed his complaint alleging that bias, among other reasons, arose from long-standing conflicts at his workplace.

[3] Despite the evidence showing some acrimony amongst some of the staff at the Winnipeg post garage, the evidence did not show anything untoward in how the appointment was made, either in the choice of a non-advertised internal appointment process or in the eventual Appointee's assessment. Therefore, and for the reasons explained in this decision, I dismiss the complaint.

II. Facts

[4] The complainant earned his grade 12 diploma and then obtained his mechanic licence. He worked in that trade at a car dealership for approximately 15 years before joining the RCMP as a mechanic (first classified GLVAG-08 and later GLVAG-10). He enjoyed nearly 14 years of work dealing with mechanical and technical repairs and improvements to RCMP moveable and motorized assets. He testified that during his 14 years in the post garage, he had one three-week opportunity to serve in an acting-manager capacity.

[5] The complainant testified that one thing that led to his complaint was what occurred when he had gone on leave without pay for 14 months. He explained that just days before he returned to work, he received written notice that his position had been "backfilled" and that he no longer had a position to return to. Instead, he was placed on a priority list for consideration for other public service positions that might become available.

[6] I heard testimony, and viewed emails from one of the complainant's co-workers were tendered as exhibits. Counsel for the respondent objected to these questions and emails being tendered as exhibits. He suggested that the matter of backfilling the complainant's position was the subject of a grievance, and that it was not relevant to the appointment that is the subject of his complaint.

[7] In order to give the complainant every reasonable opportunity to present his case, I allowed the questions and answers his representative posed to him but did not allow the co-worker's emails. The emails in question were prejudicial to the respondent's case. The author of those emails would have had to have been present to testify to what he wrote and to allow counsel for the respondent to cross-examine him.

[8] Since the co-worker did not testify, I could not rely simply on the emails alone as reliable evidence to establish the truth of their contents.

[9] After explaining that to the complainant, I recessed the hearing to allow his representative to try to contact the author of the emails as I had been told that he had been expected to appear as a witness. After the recess, the co-worker was still not available to testify, so the hearing continued. For the reasons noted previously, I cannot place any weight on the co-worker's emails.

[10] I rejected the respondent's objections to several questions that were posed to the complainant in his examination-in-chief. I then listened as he testified to how he had enjoyed his work very much. Over the years, he had helped several co-workers file a grievance over back pay. He testified that later on, he requested a lengthy leave without pay, which his manager initially refused. He stated that he had been aware of his collective agreement rights and that he had challenged his manager about that refusal. He was successful. He testified that later on, he felt as though he had suffered repercussions from management for exerting his collective agreement rights.

[11] When the complainant was cross-examined on the necessary qualifications for the fleet-clerk position that he claims he was unfairly denied a chance to apply for, he testified that he had not seen the essential qualifications for the position. When he was asked about his experience managing a business or an office budget, he testified that he had done that to some extent at his car-dealership position.

[12] As for his work with the RCMP, the complainant testified that the vehicles he repaired were on a life-cycle budget and replacement schedule, which he worked with.

He had to monitor their mileage and place them on a replacement list.

[13] When he was asked if he had any financial management experience, the complainant did not provide a clear answer. Neither party asked him if he had any education or training in accounting, budgeting, or business and fleet management.

[14] The complainant testified at length about how management provided him with no support in finding a new position when he was on the priority list. In cross-examination, he admitted that in fact, government officials had contacted him more than once about matters related to his search for a new position.

[15] The complainant called Neil Bogen, a co-worker, to testify. Mr. Bogen testified that a co-worker had told him at work that on an unknown date, an unknown person had told the co-coworker that management would never assign the complainant to the fleet-clerk position. Counsel for the respondent objected to the question that elicited that testimony.

[16] Again, in an effort to allow the complainant every reasonable opportunity to present his case, I allowed the question and answer, but for the same reasons that I explained earlier about declining to accept emails from a co-worker, I cannot accept this statement. It is highly prejudicial. I place it at the level of gossip. Without knowing who made it, and without being able to question that person at the hearing to allow him or her to give their own version of events under oath, which would have allowed me to assess his or her credibility, I cannot place any weight upon that testimony and I disregard it completely.

[17] Mr. Bogen also testified that he attended a staff meeting with members of management from the regional corporate offices and that one manager, whom he named, referred to the complainant as the "infamous Mr. Lysak".

[18] The complainant called another co-worker, Richard Klassen, who is the lead-hand mechanic technician at the shop and has enjoyed 29 years working with the RCMP. He shared his opinion that the workplace is a hostile environment, which began after a new manager arrived in 2014.

[19] Mr. Klassen shared an example of what he said was management's obvious bias against the complainant. He described how the workers in the post garage had a whiteboard and that a countdown number had been written on it that had been updated daily. It tracked the number of days remaining until the complainant returned

from leave without pay. He testified that when the complainant was told that he would not return to work, their manager wiped the countdown off the whiteboard.

[20] Mr. Klassen also described how the complainant visited the shop one morning with donuts for the crew. The Manager was away on leave, but within a few minutes of the complainant's arrival, the Manager arrived at the shop. He was agitated and said that the complainant should not have been there.

III. Issues

1. Did bias taint the choice of appointment process to fill the vacant fleet-analyst position on an acting basis through a non-advertised process?

[21] All three witnesses called by the complainant, including himself, testified as to what they saw as positions being filled by people who knew the hiring manager or that were simply filled in a way that did not give them a chance to apply. The complainant spoke of several appointments that he said he would have been interested in but for which he was not invited to apply, despite being on the priority list.

[22] While in the final analysis, the respondent did not need to call any evidence, as the burden was on the complainant to prove his allegations, the respondent did call one witness, Stephanie Benson, who explained her rationale for choosing a non-advertised process and then making an offer to the eventual Appointee from Winnipeg for the Edmonton position.

[23] Ms. Benson (first classified AS-04 and later AS-06) is the senior fleet manager, based in Edmonton, who oversaw the work of the AS-02 fleet analysts and the three regional western Canadian post garages, including the one in Winnipeg. She testified that she and her direct report AS-02 fleet analysts are financial administration specialists responsible for managing budgets and cash flow, purchasing vehicles and other moveable motorized assets, and carrying out life-cycle cost analyses, along with administering contract partners. The total budget they manage is $32 million. She also described the analysts' function of advising senior management on matters of financial management guidelines, the status of branch budgets, and life-cycle calculations for the equipment under their management.

[24] Ms. Benson testified that late in 2017, her division found itself with only one of five staff at work. The other four were away on secondment or leave or had left for other positions. She explained that the busiest time of year was rapidly approaching, in which all final year-end purchases of vehicles and related equipment had to be

processed and accurate budget and cash-flow projections had to be made, to ensure that all tasks were completed on budget. She testified that the office could not function with only one of five staff present.

[25] She testified that two AS-02 positions were posted that accepted applications from employees within 40 km of Edmonton. The complainant and his co-workers said that they did not apply as they had been outside the area of selection. She said that while these two appointments were made, shortly after being appointed, one of the appointees abruptly informed her that she would leave very soon on maternity leave, for at least one year.

[26] Ms. Benson testified that this left her in a very difficult position and that to ensure operational integrity and to ensure that the office's tasks would be completed before the end of the fiscal year, she felt that she had no option but to conduct a non-advertised appointment process. She offered the position to someone who declined it. She then contacted the eventual Appointee in Winnipeg.

[27] When she was asked about her search to fill the position, Ms. Benson testified that she did check for qualified people who had indicated that they were available to work in Edmonton. She decided that with only two of seven fleet-analyst positions filled in her division, there would be no capacity for on-the-job training. That led her to consider the eventual Appointee from Winnipeg.

[28] She testified that she had had some contact each month with the Appointee strictly to discuss work issues, in the normal course of their duties, and that she had had no contact at all with her outside those duties. She testified that the eventual Appointee had experience in the analyst duties from her work as a clerk and at times, acting in the analyst capacity for four months and that she had offered and was assigned extra work at times assisting with analyst duties. Ms. Benson said that she was confident the Appointee would not need training but could immediately contribute upon arrival in Edmonton.

[29] Ms. Benson testified that the Appointee possessed the essential qualification of having experience maintaining a budget-tracking system, which she said was required to ensure that the cash flow with contractors could be managed and that all necessary equipment would be purchased and delivered before year-end, to fulfil operational and budget requirements. She testified that had she not urgently filled the vacant AS-02 analyst position as she did, the division would have lapsed in terms of the budget, and

orders for new police vehicles and related equipment would have gone unfilled.

[30] In his argument on this allegation, the complainant pointed to what he submitted were the many instances of poor treatment he received from his manager and the fact that the respondent neglected his priority status.

[31] In response, counsel for the respondent cited the recent decision of Adjudicator Daigle in *Green v. Deputy Minister of National Defence*, 2018 FPSRLEB 69, as follows:

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> *[87] Having considered the testimony and documents submitted by the parties, I find no evidence of actual bias on the part of the assessment board. Therefore, I must determine whether the evidence is sufficient to support the complainant's allegation of a reasonable apprehension of bias.*
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> *[88] In* Denny, *the PSST referred to* Committee for Justice and Liberty v. National Energy Board, *[1978] 1 S.C.R. 369, which sets out the test for a reasonable apprehension of bias as follows at page 394:*
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> > … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information… that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
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> *[89] The PSST in* Denny *applied the test for a reasonable apprehension of bias in a staffing complaint. In the staffing context, it noted that the test could be formulated as follows: Would a reasonably informed bystander looking at the process reasonably perceive bias on the part of one or more of the persons involved in the assessment of the complainant?*
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> *[90] Likewise, in* Drozdowski v. Deputy Head (Department of Public Works and Government Services), *2016 PSLREB 33, the test was stated as follows:*
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> …
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> Given the history of the terminology, I think the test can be reworded as follows: If a reasonably informed bystander could reasonably perceive bias on the part of one or more of the persons responsible for assessment, the Board can conclude that abuse of authority exists.
>
> …

[32] Having carefully considered all the evidence, I conclude that an informed bystander could only view the actions of the respondent as being motivated by organizational needs and that there was no bias whatsoever involved in the choice of process. The incidents testified to that involved alleged ill-will towards the complainant at his workplace were each on their own, and cumulatively, insufficient to sustain an allegation of bad faith and bias and more importantly, were completely divorced in an organizational sense from the staffing appointment process at issue in this complaint.

2. Did the respondent improperly fail to consider the complainant as a priority for appointment on an acting basis to the AS-02 position?

[33] The un-contradicted evidence established that at least as early as February 1 or 8, 2018, through an email from the complainant, Ms. Benson was made aware that he was on a priority list for appointment. She testified that by early January 2018, she had identified the eventual Appointee as her preferred candidate for appointment but that the appointment duration was dated effective February 12, 2018, meaning the complaint closing date was February 23, 2018.

[34] The complainant argued that the fact that Ms. Benson was aware of his status on the priority list before the effective date of the appointment on an acting basis somehow made it improper, unfair, or biased.

[35] I disagree. As counsel for the respondent pointed out, s.33 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) allows for non-advertised appointments to be made, and s. 12 of the *Public Service Employment Regulations* (SOR/2005-334) specifically exempts appointments on an acting basis from the sections of the *PSEA* dealing with priorities.

[36] The complainant's representative cited one case in his closing argument. He submitted that similar to my finding in *Goncalves v. Commissioner of the Royal Canadian Mounted Police*, 2017 FPSLREB 2, of many errors in the appointment process in that case that amounted to an abuse of authority, I should also find that errors occurred in this case and declare that an abuse of authority occurred both in the choice of appointment process and in the application of merit. I distinguish this case on its facts, as unlike in *Goncalves*, I have not found that errors of any kind occurred on the evidence before me in this matter.

[37] Counsel for the respondent noted the fact that the Board and its predecessor,

the Public Service Staffing Tribunal, regularly found that when valid justification exists, an employer may use a non-advertised appointment process, along with the corollary that no member of staff is entitled either to be appointed or even to apply for any one position. While someone, such as the complainant, may not consider a non-advertised appointment process fair, nevertheless, the *PSEA* allows them and each complaint on a given non-advertised appointment process is determined on its merits. (See *Stroz-Breton v. Deputy Minister of National Defence*, 2013 PSST 13 at para. 44; *Soccar v. Commissioner of the Royal Canadian Mounted Police*, 2013 PSST 14 at para. 36; *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at para. 35; and *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19 at para. 51-544.)

3. Did personal favouritism taint the choice of the appointment process and the choice of appointee?

[38] In a word, no. No evidence was adduced that showed personal favouritism of any kind. The complainant argued that the respondent's decision to offer the non-advertised appointment to whom it did showed personal favouritism.

[39] No evidence showed any link between Ms. Benson and the Appointee other than the fact that they had occasionally spoken during the workday about work issues. As such, I conclude that there was no evidence whatsoever to support the allegation of personal favouritism.

[40] The bald allegation of personal favouritism would receive more credence than it deserves were I to proceed to cite Board jurisprudence in support of my conclusion that when no evidence is adduced, the bald allegation itself is insufficient to sustain a finding.

[41] It is self-evident that when an allegation is not supported by evidence, it must fail.

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

(The Order appears on the next page)

IV. Order

[43] The complaint is dismissed.

May 7, 2019.

Bryan R. Gray,
a panel of the Federal Public Sector

Labour Relations and Employment Board