Date: 20200225

File: EMP-2017-11259

Citation: 2020 FPSLREB 22

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

KATHERINE KAROULIS NEWMAN

Complainant

and

CANADA BORDER SERVICES AGENCY

Respondent

and

OTHER PARTIES

Indexed as
Karoulis Newman v. Canada Border Services Agency

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

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

For the Complainant: Herself

For the Respondent: Amita Chandra, counsel

For the Public Service Commission: Claude Zaor

Decided on the basis of written submissions, filed November 21 and December 2 and 11, 2019.

REASONS FOR DECISION

I. Complaint before the Board

[1] By way of a non-advertised appointment process (15-BSF-INA-SOR-CPSD-PE-1137), the successful candidate ("the appointee") was appointed to a director of human resources position classified PE-06 with the Canada Border Services Agency ("the CBSA") in the Niagara Falls, Ontario, region.

[2] On June 9, 2017, Katherine Karoulis Newman ("the complainant") filed a complaint alleging abuse of authority in the application of merit and in the choice of process, pursuant to paragraphs 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"). The Deputy Head of the CBSA ("the respondent") denies that there was any abuse of authority related to either the application of merit or the choice of appointment process.

[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 to the Federal Public Sector Labour Relations and Employment Board ("the Board").

II. Summary of the complaint

[4] In her complaint, the complainant alleged favouritism and discrimination in the appointment of the appointee in the following manner, in part:

> …
>
> *There is a lack of fairness and transparency; this appointment was done in bad faith. I conclude it was done to facilitate the removal of the incumbent and facilitate the promotion of the actor. This is an example of overt favouritism which plagues this human resources office in the southern Ontario region. There is discrimination against employees who are not from /live /work in … the Windsor office which includes myself.*
>
> …
>
> [*Sic* throughout]

[5] After the exchange of information, the complainant filed her allegations on September 5, 2017, as follows:

> …

> *1- Favouritism was the main factor/ basis for the acting appointment.*
>
> *2- Information and communication of the acting appointment was not transparent; it was not timely or conducted properly.*
>
> *3- Developmental and career opportunities were denied other eligible employees in addition to myself in favour of continuing the acting of [the appointee] now ongoing over 2 years while she has gained significant benefits.*
>
> …

[6] On September 20, 2017, the respondent replied to the complainant's allegations, stating its position that there had been no abuse of authority concerning this appointment process. Addressing her favouritism allegation, it submitted the following:

> …
>
> *… in Glasgow* [v. Deputy Minister of Public Works and Government Services Canada] *[2008] PSST 0007, the former Tribunal noted that the word personal precedes the word favouritism, emphasizing Parliament's intention that both words be read together, and that it is personal favouritism, not other types of favouritism, that constitutes abuse of authority. In this case, the complainants did not put forward any evidence of a personal relationship between the appointee and the hiring manager.*
>
> *The acting appointment was required in order to temporarily replace the incumbent of the position while he was on assignment with Human Resources Branch in Headquarters. David Berardi, Director of Corporate and Program Services Division, Operations Branch (hiring manager) was aware of the personnel in the unit and was satisfied that the appointee was the right fit for this acting appointment. The hiring manager does not have any personal relationship with the appointee.*
>
> …

[7] Next, on the complainant's allegation of a lack of transparency, the respondent submitted the following in that reply:

> …
>
> *The respondent submits that proper NAA's [sic] were posted when the acting was extended beyond four months and again for each subsequent extension. The complainant was included in the area of selection and therefore had recourse rights for each extension. The complainant did not avail herself of these recourse rights, nor did she contact the hiring manager to discuss any concerns informally, despite the four notifications posted before she submitted her complaint at the fifth notification. The NAA against which the*

> *complainant submitted her complaint was timely; it was posted on May 30, 2017 which was only 2 working days after the extension took effect on May 25, 2017.*
>
> …

[8] Still in its reply, the respondent addressed as follows the complainant's allegation that the length of the acting period gave the appointee an unfair advantage and that it hindered the complainant's access to developmental opportunities:

> …
>
> *The respondent submits that no act, regulation, policy or directive specifies the maximum length of an acting appointment period. In this case, the incumbent's assignment was extended several times which lead [sic] to the extensions of this acting appointment used to replace him. The hiring manager determined that the appointee was the right fit to continue the acting.*
>
> *The respondent submits that managers have broad discretion in managing their workforce including choosing the appropriate mechanism to staff positions within their organization either temporarily or permanently. Furthermore, as provided by subsection 30(4) of the PSEA, a manager is not required to consider more than one individual for an appointment to be based on merit and section 33 gives discretion to the Commission or its delegate to use either an advertised or a non-advertised appointment process and does not confer a preference on one over the other. In* Clout *[2008] PSST 0022, at paragraph 32, it is stated that: "…* there is considerable discretion when it comes to staffing matters. Clearly, a Deputy Head, as the Public Service Commission's delegate, has discretion to choose between an advertised and a non-advertised appointment process. Moreover, considering only one person, as was done in this case, is also discretionary and specifically authorized by subsection 30(4) of the PSEA." A complainant must prove, on a balance of probabilities, that the decision to choose a non-advertised appointment process was an abuse of authority (see Robbins, [2006] PSST 0017 and Kitsos, [2012] PSST 0035.*"*
>
> …

[9] The respondent also chose to address as follows the complainant's allegation of systemic discrimination against employees occupying positions elsewhere than in Niagara Falls:

> …
>
> *In* Baker *[2015] PSLREB 19, it is stated that "*to demonstrate that the respondent engaged in a discriminatory practice, the complainant first must establish a prima facie case of discrimination, as the Supreme Court of Canada stated in Ontario Human Rights Commission v. Simpsons-Sears Ltd., [1985] 2 S.C.R.

> 536 ("O'Malley"). A prima facie case is one that covers the allegations made and that, if the allegations are believed, is complete and sufficient to justify a finding in the complainant's favour, in the absence of an answer from the respondent. Once a prima facie case is made, the onus then shifts to the respondent to disprove the allegations or provide some other reasonable explanation that is not based on discrimination."
>
> *It is the respondent's view that the complainant has failed to properly make an allegation of a discriminatory practice, as set out in sections 7 and 8 of the CHRA. These sections stipulate that a discriminatory practice must be on a prohibited ground of discrimination, as specified in subsection 3(1) of the CHRA. Like in* Zhao *[2008] PSST 0030, the complainant makes no reference to a prohibited ground of discrimination, therefore no prima facie case of discrimination can be made.*
>
> *The respondent submits that the position in question is located in the Niagara Falls office, while the complainant's position is located in the Windsor office. Nevertheless, all NAAs posted for the previous acting extensions, including the one subject to this complaint, had an area of recourse which included the "Employees of the Canada Border Services Agency working within the geographic boundaries of the Southern Ontario Region." Therefore, this allegation is irrelevant since the complainant was in the area of selection and availed herself of her recourse rights. The respondent further submits that the authority to determine an area of selection is delegated to the deputy head by virtue of subsection 15(1) of the PSEA and that it is neither the Board's or the complainant's role to assess whether the area of selection is reasonable (see* Umar-Khitab *[2007] PSST 5).*
>
> …

[10] Finally, the respondent submitted that "… the choice of selection process and the application of merit respected the PSEA and staffing values."

[11] A hearing was scheduled for October 31 and November 1, 2019, in Windsor, Ontario. In preparation, I convened a pre-hearing conference. The "Notice of Pre-Hearing Conference" sent to the parties stated that "[t]he purpose of the pre-hearing conference is to streamline the hearing process" and that the parties had to be fully prepared to discuss, among other things, "identification and/or review of issues in view of simplifying and accelerating the hearing …".

[12] The pre-hearing conference took place via teleconference at 9:30 a.m. on October 4, 2019. All parties were present, including the Public Service Commission (PSC). I confirmed with the complainant her continuing desire to proceed to a hearing,

despite her retirement from the public service in May 2019. The respondent stated that it was unable to adequately prepare for the hearing given the vague nature of her allegations. I ordered that the parties exchange documents, including the further particularization of the complainant's allegations, by October 17, 2019. The parties identified the witnesses to be called, and I instructed them to contact the Board's registry officer to arrange for summonses for any witnesses.

[13] On October 18, 2019, both the PSC and the respondent confirmed that they had satisfied their obligation with respect to the disclosure and exchange of documents. On that date, the complainant advised the Board of the following:

> …
>
> *This is to confirm October 17 I advised the respondents I am unable at this time to provide documents and I have emailed* [the appointee] *to request her attendance at the proceeding as a witness I wish to call and I have received documentation from the respondents.*
>
> …

[14] I instructed the Registry Officer to write to the complainant about the attendance of witnesses. The complainant was sent the following on October 18, 2019:

> …
>
> *Further, as discussed on the teleconference, the complainant is reminded that if she wishes to ensure the attendance of a witness she must send the Board a request for a summons, in writing that includes the following information:*
>
> *(*a*) the Board's file number,*
>
> *(*b*) the name and address of the person who must appear;*
>
> *(*c*) the date, the time and the place where this person is required to appear, if known; and,*
>
> *(*d*) a detailed description of the documents or other things that this person must produce at the hearing, if any.*
>
> …

[15] The complainant did not request a summons for any witness. On October 25, 2019, one week before the hearing was set to commence, she sent the Board the following message: "I have not received a response from [the appointee] to my request for her to attend as [sic] witness. It is my understanding she is on long term leave due to stress. I am not certain how this impacts the proceedings."

[16] On October 28, 2019, I delivered the following message to the parties, which restated the earlier instructions on the attendance of witnesses and added the following:

> …
>
> *Despite these clear instructions, the complainant seems to have chosen to simply send her witness an email message requesting her attendance at this week's hearing. This is unsatisfactory as it does not compel attendance. Equally unsatisfactory is the complainant's refusal to further particularize, or at least to quantify in some manner, her allegations of favouritism and bias. A deadline of October 17, 2019 was imposed, at which time the complainant advised she was "unable to provide documents".*
>
> *These very late developments have caused me to question the legitimacy of using public resources to fund a formal hearing into the matter. I am therefore postponing the hearing scheduled for Thursday and Friday of this week, October 31 and November 1, 2019, in Windsor, Ontario. This matter is hereby adjourned* sine die, *which is a latin [sic] term meaning "without a date". I am now ordering that these pleadings be conducted by way of written submissions. If the evidence of witnesses is desired, please consider the use of an affidavit as an alternative to in-person testimony.*
>
> *The complainant carries the burden of proof. This requires clear, convincing and cogent evidence, sufficient to prove, on the balance of probabilities, that an abuse of authority occurred in the appointment made pursuant to an internal non-advertised appointment process, number 15-BSF-INA-SOR-CPSD-PE-1137. The complainant is to provide her written submissions and any other form of documentary evidence, if any, along with affidavits, if any, by close of business Friday, November 22, 2019. The written submissions are to be provided to Ms. Caitlin Foster, the Case Management Officer for this matter, who will in turn provide a copy to the respondent.*
>
> *I will then give the respondent one week to prepare written submissions in response, along with documentary and/or affidavit evidence, if any. Again, please provide these to Ms. Foster who will ensure their transmission to the complainant. The deadline for submission is one week from the receipt of the complainant's pleadings.*
>
> *The complainant has a right of rebuttal. The deadline for rebuttal is one week from the receipt of the respondent's submissions.*
>
> *Both parties are to please acknowledge the receipt of this message and to confirm your clear understanding that this matter is NOT proceeding as scheduled in Windsor this week.*
>
> …

III. Summary of the arguments

[17] On November 21, 2019, the complainant provided the Board with her submissions, which opened with a paragraph complaining of the delay in bringing the matter forward for a hearing as well as an explanation as to the continuing absence of her witness, the appointee.

[18] The complainant then proceeded to address the substantive merits of her complaint. She stated, "Abuse of authority in the choice of process as non-advertised [sic] cannot be defended when the incumbent regional HR Director [A.C.] was working on a 'special assignment' for an extended period." She maintained that there had been ample time to conduct an advertised process.

[19] The complainant then provided two very lengthy paragraphs on administrative realignments affecting the respondent's Niagara Falls office and complaints filed by others with respect to a perceived lack of career opportunities.

[20] The complainant then returned to the merits of her complaint with the final two paragraphs of her submission, as follows (some portions not included to protect privacy):

> *Further the abuse of authority in the application of merit I can attest to personally. Her deficiencies in the duties of director as I experienced included the following. As my director* [the appointee] *in 3 years to the time of my retirement, never completed a single Performance Management Agreement for me or for her other Team Leaders. She offered little direction in program areas as her knowledge was limited to LR. There were few meetings scheduled or minutes taken and distributed. Infrequent visits to the Windsor office where she often did not give any notice or make time for any meaningful interaction with HR staff.*
>
> *It was commented that I had other opportunities to make complaints on the previous acting notices but did not… I was off work for periods of time and I did not see those other notices. Her ineptness and lack of consideration as a manager is evident even when it came to her completing my … paperwork. I had to send her reminders … for her to submit the completed forms … because she had not competed them properly and they had to be sent back. At a long term service (LSA)award ceremony held in December 2016 that she attended along with Director Berardi and the RDG, CBSA employees with 35 years of service up to July of that year were acknowledged. The CBSA LSA policy changed after this and 35 years was no longer acknowledged with a gift/certificate. I told her I had achieved 35 years in August of that year and the gift*

> *wasn't important but I would have expected some recognition, a handshake or a congratulations from Director Berardi and or the RDG. She said that the CBSA policy said they didn't have to recognise 35 years of service reached after July any longer and so I wouldn't be recognised not even with an informal congratulation. This was the person appointed to an HR Director position with limited knowledge and even more limited skills in dealing with and managing people.*
>
> …
>
> [*Sic* throughout]

[21] The respondent's submissions, dated December 2, 2019, open and close with reiterations of the request to dismiss the complaint for a lack of specificity. It characterized the complainant's November 21, 2019, submissions as "… an opinion letter expressing her overall dissatisfaction with CBSA." It noted that she still had not supported her allegations with cogent evidence.

[22] The respondent referred to *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 49, where it states that "… the party making an assertion bears the burden of proving this assertion rather than the other side having to disprove it."

[23] The respondent reiterated that "… managers have broad discretion in managing their workforce including choosing the appropriate mechanism to staff positions within their organization either temporarily or permanently" and again referred to s. 33 of the *PSEA*.

[24] By way of a rebuttal dated December 11, 2019, the complainant made additional observations on the delay and on the difficulty compelling a witness who is on an undetermined leave of absence. She commented about a lack of opportunities for personnel in the respondent's Windsor office. She concluded by reiterating that the hiring manager "… has used as permission to exercise bad faith/favoritism [sic] in the appointment process." She did not elaborate.

IV. Reasons

[25] Pursuant to s. 22 of the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), I have the power to decide this complaint without holding an oral hearing. For the reasons stated earlier in this decision, I determined that the complaint should proceed by way of written submissions.

[26] It is trite law that the complainant bears the burden of proving an abuse of authority on the balance of probabilities (see *Tibbs* at para. 53). I find that she has not met that burden, for the reasons that follow.

[27] With respect to the discrimination aspect of the complaint, the complainant has not identified a prohibited ground of discrimination under s. 3(1) of the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; "the *CHRA*"), which is a necessary precondition for her to pursue a human rights issue in her complaint (see, for example, *Zhao v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 30 at paras. 52-60). Therefore, I find that there is no allegation of discrimination that I can consider. Accordingly, the complainant's allegation of discrimination is unfounded.

[28] The complainant feels the hiring manager's appointment was inconsistent with the values of fairness, access, transparency, and representativeness. She did not provide any evidence or make any argument pertaining to access or representativeness, but she clearly feels that the process at issue was neither fair nor transparent. As the former Public Service Staffing Tribunal (PSST) explained in *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24 at para. 59: "Thus, for non-advertised appointment processes, persons in the area of recourse may complain to the Tribunal on the ground of abuse of authority. The *PSEA* requires that persons in the area of recourse be notified of appointments made or proposed."

[29] With respect to transparency, in addition to the respondent's (uncontested) submission that the notifications of acting appointment were posted properly and on time, the Notification of Acting Appointment pertaining to this appointment process has been provided and confirms the respondent's position. I am satisfied that this non-advertised appointment process conformed with the value of transparency enshrined in the preamble to the *PSEA*. Similarly, I am not persuaded that the appointment contravened the staffing value of fairness. Section 33 of the *PSEA* allows a hiring manager to use either an advertised or a non-advertised appointment process to make an appointment. This Board and the predecessor PSST have repeatedly held that merely choosing to conduct a non-advertised appointment process is not an abuse of authority (see, for example, *Clout* at para. 34 below).

[30] The respondent's reference to *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22 (*Clout*), is relevant to the aspects of the complaint involving the respondent's choice of an advertised versus a non-advertised appointment process.

[31] *Clout* may also be relevant to the issue of the appointment of the appointee instead of the complainant. In the absence of any illumination from the complainant about the precise nature of her allegations, though, I can only assume that the complainant feels she was more qualified than the appointee. In any case, it is helpful to turn now to *Clout* at paragraphs 30 to 34:

> *[30] Under the former PSEA, appointments without competition were permitted. However, relative merit still applied in that the ground for appeal was that relative merit had not been achieved. Practically speaking, once an appeal was filed, the respondent had to conduct an assessment and determine whether the appellant or the appointed person was more qualified. This complaint has been framed and presented based on the staffing and recourse system that existed under the former PSEA.*
>
> *[31] There is no dispute that the complainant may well be qualified for the Senior Policy/Research Advisor position. There is also no dispute that* Ms. Jory *was the only one considered for appointment. These facts, in and of themselves, do not contravene the* PSEA*, and do not individually or collectively equate to abuse of authority.*
>
> *[32] The former system of mandatory relative merit no longer exists. There is considerable discretion when it comes to staffing matters. Clearly, a Deputy Head, as the PSC's delegate, has discretion to choose between an advertised and a non-advertised appointment process. Moreover, considering only one person, as was done in this case, is also discretionary and specifically authorized by subsection 30(4) of the* PSEA*.*
>
> *[33] However, this does not mean that the* PSEA *provides absolute discretion. Paragraph 77(1)(*b*) of the* PSEA *provides for a direct challenge of the discretionary choice between an advertised and a non-advertised appointment process, on the ground of abuse of authority.*
>
> *[34] The Tribunal has established that merely choosing to conduct a non-advertised process is not an abuse of authority in itself. A complainant must establish, on a balance of probabilities, that the decision to choose a non-advertised appointment process was an abuse of authority. See, for example,* Rozka et al. v. Deputy Minister of Citizenship and Immigration Canada et al., *[2007] PSST 0046.*

[32] The complainant produced no evidence, despite my clear invitations, to support a finding that the hiring manager's decision to choose a non-advertised appointment

process to appoint the appointee constituted an abuse of authority. She stated only that there had been ample time to conduct an advertised appointment process. That may well be true, but this in and of itself does not amount to an abuse of authority.

[33] In its September 20, 2017, reply, the respondent stated, "The acting appointment was required in order to temporarily replace the incumbent of the position while he was on assignment with Human Resource Branch in Headquarters." I agree with the respondent, there is no statutory or other restriction on how long a temporary acting appointment period can last. I find this to have been a legitimate exercise of discretion on the part of the hiring manager. Moreover, as I stated at the outset of my decision, the complainant bears the onus of proving that the respondent abused its authority by choosing a non-advertised process. Her evidence falls woefully short in this regard.

[34] The complainant chose not to clarify her allegation about the appointee's appointment other than, in her submissions of November 21, 2019, offering the general impression that she feels that she was equally (or perhaps better) qualified. In the absence of any evidence on the appointee's failure to meet the merit criteria, I find that her complaint likely falls within the parameters described in the paragraphs from *Clout* cited earlier. She may well be labouring under the misapprehension that the "relative merit" process still applies. If so, it bears mentioning that it no longer applies with respect to appointments.

[35] The respondent's September 20, 2017, reply, as well as its December 2, 2019, submissions, both remain unchallenged by the complainant on the issue of the hiring manager's consideration of the appointee's qualifications.

[36] In the Notice of Acting Appointment, the criteria used to select the appointed person are listed as follows, under the heading "Essential qualifications":

> *English essential*
>
> *Graduation with a degree from a recognized university with acceptable specialization in human resources management, labour or industrial relations, psychology, public or business administration, organization development, education services, social sciences, sociology or in any other field relevant to the work to be performed….*
>
> *Experience in coordination of multiple projects at one time;*
> *Experience in delivery of Human Resources programs;*

> *Experience in the management of human and financial resources.*
>
> *Knowledge of CBSA policies and procedures.*
>
> *Ability to multi-task in a fast paced environment;*
> *Ability to exercise sound judgement in dealing with complex Human Resources issues;*
> *Ability to provide advice on alternative Human Resources strategies and approaches.*
>
> *Communication skills, both written and oral*
> *Judgement*
> *Influence*
> *Teamwork & Cooperation*

[37] No evidence was presented to suggest that the appointee did not meet the merit criteria. The complainant did not produce any evidence to challenge the appointee's candidacy with respect to any of the above-noted qualifications. On that basis, I find that the complainant has failed to prove that the respondent abused its authority in the application of merit.

[38] Instead of providing evidence suggesting that the appointee did not meet the merit criteria, the complainant embarked upon a character assassination campaign. She cited examples of what she considers poor managerial practices post-appointment. Complaints about an individual's performance are completely different from complaints about that person's appointment. It is not clear what the complainant hoped to gain, in this forum at least, by casting aspersions upon the appointee's management style well after she was appointed.

[39] With respect to the complainant's allegation of favouritism, I agree with the respondent's reference to *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7, on the issue of personal favouritism. Despite receiving clear invitations, the complainant provided no evidence of a personal relationship between the hiring manager and the appointee and no evidence of personal favouritism of any kind.

[40] Finally, I also agree with the respondent's suggestion that the complainant seems to be concerned more with making a series of complaints about the respondent generally than with the non-advertised process at issue. However, the fifth extension notice for the acting appointment was undoubtedly the catalyst, and it obviously triggered some latent hostility surrounding perceived injustices at the respondent's Windsor office.

[41] As was confirmed in *Silke v. Deputy Minister of National Defence*, 2010 PSST 9 at para. 68, "The complaint cannot be filed on another person's behalf and cannot be about how other unsuccessful candidates were treated." The complainant dedicates a considerable portion of her submissions to the perceived plight of others in the respondent's Windsor office.

[42] I conclude that the complainant has failed to prove abuse of authority in either the application of merit or choice of process concerning non-advertised appointment process 15-BSF-INA-SOR-CPSD-PE-1137.

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

(The Order appears on the next page)

V. Order

[44] The complaint is dismissed.

February 25, 2020.

James R. Knopp,
a panel of the Federal Public Sector
Labour Relations and Employment Board