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File: EMP-2016-10442

Citation: 2020 FPSLREB 39

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

YOGINDER GULIA

Complainant

and

CHIEF ADMINISTRATOR OF THE COURTS ADMNISTRATION SERVICE

Respondent

and

OTHER PARTIES

Indexed as
Gulia v. Chief Administrator of the Courts Administration Service

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: Patrick Turcot, counsel

For the Public Service Commission: Claude Zaor, by written submissions

Heard at Toronto, Ontario,
September 11 and 12, 2019.

REASONS FOR DECISION

I. Summary

[1] Yoginder Gulia ("the complainant") holds several university degrees, including two at the master's level. He also stated that he is a member of the Law Society of Ontario. He joined the public service in 2004 and at the times material to this matter worked at the Courts Administration Service (CAS). He applied for a senior registry officer (PM-04) position in the Tax Court of Canada in the selection process numbered 15-CAJ-IA-0398.

[2] The complainant was unsuccessful and alleged that the choice of process and the area of selection constituted an abuse of authority. He also alleged that errors were made in the marking of his written work in the assessment and that the rating guide was incorrectly applied, which both amount to an abuse of authority. He alleged that he suffered retribution in the process due to his union activity. He also alleged that he suffered racial bias in the appointment process.

[3] For the reasons set out in this decision, I find that the complainant failed to discharge his burden of proof to establish that an abuse of authority occurred. I dismiss the complaint.

II. Analysis

[4] Section 77(1)(a) and 2(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*") provides that an unsuccessful candidate in the area of selection for an advertised internal appointment process may make a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board") that he or she was not appointed or proposed for appointment because of an abuse of authority in the application of merit. Section 77(1)(b) states that a person in the area of recourse as set out by the *Act* may make a complaint to the Board that he or she was not appointed by reason of an abuse of authority that occurred in the choice between an advertised and a non-advertised process.

[5] 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). Section 30(1) of the *Act* states that appointments to or from within the public service must be made on the basis of merit, and s. 30(2)(a)

states that an appointment is made on the basis of merit when the person to be appointed meets the essential qualifications, as established by the deputy head.

[6] "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." As Chairperson Ebbs noted in *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 14, s. 2(4) of the *Act* must be interpreted broadly. That means that the term "abuse of authority" must not be limited to bad faith and personal favouritism.

[7] 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.

[8] As noted in *Tibbs*, at paras. 66 and 71, and as restated in *Agnew v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 2 at para. 95, an abuse of authority may involve an act, omission, or error that Parliament cannot have envisaged as part of the discretion given to those with delegated staffing authority. Abuse of authority is a matter of degree. For such a finding to be made, an error or omission must be so egregious that it could not have been part of the delegated manager's discretion.

III. Issues

A. Was there abuse of authority in the choice of process and area of selection?

[9] The complainant alleged that the position available at the Tax Court should have been open only to existing employees of the CAS rather than to all persons employed in the public service occupying a position in the Greater Toronto Area.

[10] The complainant called Jenna Russell, a registry officer at the Federal Court in Toronto. She is also the president of his union local. She testified that many registry officers sought a position in the Tax Court registry. She explained that they also sought cross training to gain competency in the technical aspects of Tax Court registry duties. She testified that many registry officers were disappointed that the position was opened to all members of the public service and that the rumours in the office were that the area of selection was chosen to allow for the recruitment of a specific person. Ms. Russell stated that since 2010, the Tax Court registry has selected only registry members with at most five years of experience to fill its vacancies.

[11] In Ms. Russell's cross-examination, I refused questions from respondent counsel related to whether grievances or other complaints were filed in response to Tax Court appointments as such questions were not relevant to the matter before me.

[12] The complainant then called Sandy Wilson to testify. She was also a registry officer at the Federal Court in Toronto at the material times. She testified that she also applied for the PM-04 appointment but that she chose to withdraw from it. She testified that in her opinion, the Tax Court registry does not think that Federal Court registry staff is good at its work. She added that a person on the selection board of the appointment at issue told her that it did not want to appoint someone from the Federal Court registry.

[13] In cross-examination, Ms. Wilson testified that in fact, she had no personal knowledge of the two appointments she had opined upon during her examination-in-chief that were examples of bias against the Federal Court registry.

[14] Counsel for the respondent called to testify Donald MacNeil, Registrar, Tax Court of Canada. He explained that he had heard the staff rumour that Federal Court registry staff were not welcome in the Tax Court. He said it is not true. Rather, he testified that he was aware of several Federal Court registry staff who had been hired to work in the Tax Court.

[15] Mr. MacNeil also testified that in fact, the appointment at issue was actually given to an employee of the Federal Court registry.

[16] When asked about the area of selection, Mr. MacNeil testified that he wanted to ensure that as many applicants as possible would seek the appointment. Therefore, he decided to open it to all members of the public service employed in the GTA.

[17] Given that the testimony that the complainant relied on to suggest that the area of selection involved an abuse of authority was unattributed gossip, which Mr. MacNeil contradicted, and more importantly, given that the appointee was in fact from the Federal Court, I conclude that the complainant failed to establish evidence upon which I could conclude that on a balance of probabilities, an abuse of authority occurred in the choice of process.

[18] Counsel for the respondent objected to me hearing evidence on the allegation that an abuse of authority occurred in the choice of area of selection. The complainant

sought to rely upon correspondence between his management and his union as evidence of recalcitrance on management's part to consult the union and to encourage career development and promotion from within the organization. He also alleged that the respondent biased this choice due to an anti-union animus directed at him due to his union activity. He also sought to show that the respondent failed to properly follow Public Service Commission policies.

[19] Counsel for the respondent argued that the *Act* does not grant jurisdiction to the Board for a complainant to challenge an area of selection. I was referred to *Baragar v. Chairperson of the Immigration and Refugee Board*, 2016 PSLREB 50, as authority for the argument that Parliament has not granted jurisdiction for me to hear complaints about areas of selection. *Baragar* found as follows:

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> *43. … In* Umar-Khitab v. Deputy Head of Service Canada, *2007 PSST 5, the Tribunal held that it is not its role to assess whether the area of selection in an appointment process is reasonable or meets the criteria and considerations in the PSC's "Area of Selection Policy" and "Guidelines". The authority to determine the area of selection is found in s. 34 of the* PSEA. *Section 77 of the* PSEA, *which provides for recourse to the Board for appointment processes, does not refer to s. 34. In accordance with s. 88(2) of the* PSEA, *the Board's mandate is to consider and dispose of complaints made under ss. 65(1), 74, 77, and 83. None of these sections allows complaints about an area of selection.*
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> …

[20] I concur with that passage, which notes with approval *Umar-Khitab*. I do not have jurisdiction to consider the allegation about the area of selection.

[21] If I am mistaken in this conclusion, I have previously noted the testimony which amounted to unattributed gossip surrounding this issue of the respondent's decisions being biased and would similarly find here that the complainant has failed to adduce sufficient evidence upon which I could make any conclusion such as he alleges in this allegation.

B. Was the written evaluation marked in an erroneous and biased manner?

[22] The complainant alleged that he wrongly received a failing grade on his mandatory written examination. He further alleged that the successful candidate

unfairly received bonus marks that amounted to abuse of authority. He also alleged that all this was contrary to the rating guide, thus amounting to an abuse of authority.

[23] The uncontradicted evidence established that the complainant received the written exam and that his answer to the question assessing the "Ability to plan, set and assign priorities and to make decisions" was given a score of 6.5. This mark caused him to be removed from any further consideration in the appointment process, as the passing grade was 8.

[24] The complainant testified that in his opinion, his answer deserved a higher mark, and that he believed that the rating guide was applied improperly.

[25] In examination-in-chief and again in cross-examination, Mr. McNeil explained in precise detail each mark that he gave or chose not to give when he compared the complainant's work and marks against the appointee's. Many questions focused upon the fact that he awarded bonus marks to the appointee.

[26] I find that Mr. MacNeil's testimony showed that the marking was objective. His testimony and use of the materials at issue was convincing in how he showed marks were assessed against the guide and that the same marking method was applied equally to all the assessments presented as exhibits.

[27] I allowed the complainant to call Nathalie Debonville from the respondent's head office in Ottawa, in reply evidence. He posed questions to her about what role she and the other panel members had in writing and marking the written test. The complainant argued that her answers helped him establish untruthful testimony from other witnesses as to their true role in the process. After careful review of the testimony and argument on this point I find this issue to be of no probative value. Mr. MacNeil had conduct of the test and nothing turns on whether the other two members had input or conduct of or merely reviewed it.

[28] Nor do I find any evidence that the guide was mistakenly applied or that it was applied unequally between candidates. I cannot conclude that the Board was acting in a biased manner to arrive at a pre-determined outcome as there is insufficient evidence before me to make such conclusion given the detailed examination of marking and references made to the marking guide established in evidence.

[29] The Board has consistently held that it is not wise to attempt to grade assessments again by means of these hearings and that short of egregious errors in the marking, the work of assessment boards be respected.

[30] See, for example, *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11 at paras. 25 to 27, which states that the deputy head has the authority to use any assessment method it considers appropriate (see the *Act*, at s. 36) to determine whether a person meets the stated qualifications.

C. Was the appointment process predetermined to select the appointee?

[31] The complainant alleged that the entire appointment process and area of selection were set up to allow the appointment of a predetermined candidate. There was no evidence to support this allegation. Ms. Russell repeated this allegation in her examination-in-chief when she stated that she had heard that the appointment process had been predetermined to appoint a specific person. I asked her to explain how she came to know this. To her credit, she candidly admitted that she had heard it only through "office gossip".

[32] Given the fact that this allegation was supported solely by unattributed gossip, which I do not consider evidence, I conclude that the complainant did not meet his burden of proof on this aspect of his case. I will not consider it further.

D. Allegation of racial bias

[33] The complainant testified that several times, he asked to be considered for positions in the Tax Court registry but that he was refused. He testified that Barbara Tanasychuk, the Tax Court's human resources advisor, is biased and that a person of Indian ethnic origin (as the complainant self-identifies) has never been hired there. He also stated that only in the last two years has any person of colour been hired in the Tax Court registry in Toronto and that it is "not racially balanced".

[34] The complainant went on to state that Ms. Tanasychuk had been in that position during the entire time of his attempt to obtain an appointment in the Tax Court registry. He alleged that he unfairly received a failing mark on the written test as part of a sham process to ensure that he could not be appointed.

[35] In her cross-examination, Ms. Tanasychuk confirmed that there were no self-declared visible-minority employees within the Tax Court registry in Toronto in 2015.

[36] In cross-examination, she was asked whether any workplace complaints had been made against her. Counsel for the respondent objected and argued that such matters had no relevance to the appointment process under consideration. Later in the hearing, the complainant requested to recall Ms. Russell to testify to this same matter. Counsel for the respondent objected. Out of an abundance of caution to allow the complainant every possible opportunity to bring relevant evidence to support his allegations, I allowed the questions and the witness recall but reserved my ruling on the objections.

[37] The complainant asked Ms. Tanasychuk a series of questions about whether staff had ever made written complaints of filed grievances about her. A process exists for harassment complaints to be made and investigated with a goal to achieve resolution of them. Additionally, the matter of harassment can be taken up by grieving and alleging a breach of the clause of the collective agreement prohibiting harassment. These questions were asked in rapid succession and the complainant became argumentative with the witness as she tried to answer. The witness also stated that she could not hear or understand the questions being put to her at different times during this sequence. I interjected several times to try and assure myself that I had heard each separate question and the related response.

[38] Ms. Russell testified that there had been one or more harassment complaint(s) and at least one grievance related to Ms. Tanasychuk. The complainant argued in closing that Ms. Tanasychuk had not been forthright in answering to whether a complaint or grievance had been filed against her and if so, how many. He stated that in her recall examination, Ms. Russell contradicted the testimony of Ms. Tanasychuk. The complainant argued that Ms. Tanasychuk had been caught in a lie and that all her testimony lacked credibility.

[39] After carefully considering this matter, I conclude that the questions put to Ms. Tanasychuk about past complaints against her were irrelevant to the matter of the appointment process at issue in this complaint. Therefore, I allow the respondent's objection. I decline to make any finding on witness credibility as the witness was

interrupted so often that any of her answers that were later contradicted by Ms. Russel most likely arose from miscommunication.

[40] The complainant's allegation of suffering racial bias required him to first establish a *prima facie* case.

[41] Ms. Tanasychuk testified that she is Indigenous, that she watched her Indigenous mother suffer from racism, and that in turn, she would never treat anyone with racial bias. She said little else other than making a blanket denial of bias of any sort against the complainant. The complainant then argued that because she testified in cross-examination that she did not recall ever saying that she would not hire a registry officer from the Federal Court, it in fact was a sidestep of the question.

[42] To determine if an employer engaged in a discriminatory practice, a complainant must first establish a case of discrimination at first view, or *prima facie*, which means one that covers the allegations made and that if the allegations are believed, would be complete and sufficient to justify a finding in the complainant's favour in the absence of an answer from the employer. An employer faced with a *prima facie* case can avoid an adverse finding by providing a reasonable explanation that shows that its actions were in fact not discriminatory or by establishing a statutory defence that justifies the discrimination (see *A.B. v. Eazy Express Inc.*, 2014 CHRT 35 at paras. 11-13).

[43] The former Public Service Staffing Tribunal (PSST) also considered alleged racial discrimination in a staffing appointment process, and it made the following findings in *Brown v. Commissioner of Correctional Service of Canada*, 2012 PSST 17:

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> ***45*** *In the context of human rights, a complainant has the onus of establishing a* prima facie *case of discrimination. The Supreme Court of Canada, in* Ontario (Human Rights Commission) v. Simpson Sears*, [1985] 2 S.C.R. 536 (known as the* O'Malley *decision) established a test for showing a* prima facie *case of discrimination as follows:*
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> > 28 […] The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A *prima facie* case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the

> complainant's favour in the absence of an answer from the respondent employer […]

46 *It is only necessary for the complainant to show that the alleged discrimination was one of the factors, not the sole or even main factor, in the decision to eliminate him from the appointment process. See* Holden v. Canadian National Railway Company *(1990), 14 C.H.R.R. D/12 (F.C.A.), at para. 7.*

47 *If the complainant establishes that there was a pattern of discriminatory conduct in CSC, it is still necessary for him to demonstrate a link or nexus between that discriminatory behaviour and evidence, both direct and circumstantial, of individual discrimination in the appointment process in order for a* prima facie *case to be made. See* Chopra v. Canada (Department of National Health and Welfare), *2001 CanLII 8492 (C.H.R.T.), at para. 211.*

48 *The Tribunal is required to determine whether the complainant has established a* prima facie *case of discrimination before it considers the respondent's explanation. If the complainant establishes a* prima facie *case of discrimination, then the burden shifts to the respondent to provide a reasonable non-discriminatory explanation for its conduct. See* Lincoln v. Bay Ferries Ltd., *[2004] F.C.J. No. 941; 2004 FCA 204 (QL).*

49 *The complainant presented three types of evidence in support of his allegation of a pattern of individual racial discrimination: a) a report on the Commissioner's consultations with members of visible minority groups at CSC; b) evidence regarding six non-advertised appointments in the Ontario Region of CSC; and c) other evidence regarding the representation of members of visible minority groups in CSC.*

…

72 *As the* Federal Court indicated in Canada (Human Rights Commission) v. Canada (Department of National Health and Welfare), *1998 CanLII 7740 at paras. 17-22 (F.C.T.D.), where direct evidence of a discriminatory practice is unavailable, it can be established by way of inference through the use of circumstantial evidence, consisting of a series of facts, each of which, when combined, may justify it. Citing Beatrice Vizkelety,* Proving Discrimination in Canada, *(Toronto: Carswell, 1987), the Court added, at para. 18 of the decision, that a complainant may introduce evidence of general personnel practices or of the overall composition of the employer's workforce to demonstrate that the employer is engaging in a pattern or standard practice of discrimination. If proved, the tribunal hearing the matter will then be asked to infer from such general circumstances and other supporting evidence that discrimination probably occurred in the complainant's case as well.*

73 *However, a link must be established between this evidence and the evidence, both direct and circumstantial, of individual discrimination in the complainant's situation in order for a* prima

> facie *case to be established (See* Chopra*, para. 211). The Canadian Human Rights Tribunal found in* Filgueira v. Garfield Container Transport Inc.*, [2005] C.H.R.D. No. 13; 2005 CHRT 32, at para. 41 (QL); confirmed by [2006] F.C.J. No. 1005; 2006 FC 785(QL), that "an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough".*
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> ***82*** *In the Tribunal's view, the complainant's circumstantial evidence is insufficient to lead to a finding that discriminatory systemic barriers exist for members of visible minority groups at CSC. Even if this evidence was sufficient to establish that systemic barriers to the advancement of visible minority employees exist at CSC, the complainant has not established a link between his evidence and any evidence of individual discrimination in his case. The complainant has not adduced any evidence that would establish or lead to the inference that his race or colour or ethnic origin were factors in the respondent's determination that he did not achieve the pass mark for two of the essential qualifications. He has not challenged the assessment board's determination that he did not meet the two essential qualifications. None of his evidence relates to discrimination in the appointment process that is the subject of his complaint.*
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> ***83*** *For these reasons, the Tribunal finds that the complainant has not established a* prima facie *case of discrimination. There is no evidence to establish that the complainant's race, colour or ethnic origin was a factor in his elimination from the CX-04 appointment process.*
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[44] As the PSST decided in *Brown*, I find that the evidence in this matter, which amounts to the fact that none of the three registry officers in the office sought by the complainant were racialized individuals, is insufficient for me to conclude that he discharged his burden of proving, on a balance of probabilities, a *prima facie* case of discrimination based on race.

[45] This circumstantial evidence, on its own, does not establish that the complainant's race was a factor in his elimination from the appointment process. Nor when considered as part of the complainant's broader evidence, as addressed in the preceding pages, am I led to the inference that his race played a part in him not achieving a pass mark for the particular question at issue from the written examination.

[46] The parties provided me with numerous other cases to support their arguments. While I have read each one, I have referred only to those of primary significance."

IV. The complainant's conduct

[47] The complainant's conduct in representing himself was of such departure from any reasonably acceptable standard that it requires mention.

[48] Several times during the proceedings, I had to repeatedly ask the complainant to refrain from interrupting, hectoring, and debating with a witness or counsel.

[49] Several times, the complainant interrupted me in my duties as the hearing chairperson. Three times, he objected when I tried to affirm a witness participating by telephone. He objected to my administering a solemn affirmation for the witness to tell the truth. The complainant wanted the witnesses sworn or affirmed in person.

[50] Of greater concern was the churlish approach to closing argument, in which the complainant impugned the personal and professional integrity of the respondent witnesses by saying they lied under oath and that Mr. MacNeil's position showed his and the organization's lack of respect for the merit-based staffing system as his position was obtained by means of an unadvertised appointment.

[51] Those comments were uncalled for, and they arose from a matter of no probative value to the outcome of the case.

[52] It is unbecoming of a member of the public service to make such personal attacks upon members of his employer's management. Filing a staffing complaint and appearing before the Board gives no licence to treat others with disrespect.

[53] *A fortiori*, as a self-declared member of a law society, Mr. Gulia should be aware of and better conform to his professional code of conduct.

[54] If Mr. Gulia appears before this Board again, he will be well-served to find a representative to conduct the hearing on his behalf. If he is self-represented again, he will be required at all times to show respect to the presiding member, the opposing counsel, the respondent's representative, and all witnesses.

V. Conclusion

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

(The Order appears on the next page)

VI. Order

[56] I order the complaint dismissed.

April 20, 2020.

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