Date: 20200522

File: EMP-2016-10599
EMP-2016-10617

Citation: 2020 FPSLREB 56

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
RAY DAVIDSON

Complainant

and

DEPUTY MINISTER OF HEALTH

Respondent

and

OTHER PARTIES

Indexed as
Davidson v. Deputy Minister of Health

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

Before: Linda Gobeil, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Judy Hough, senior paralegal, and Josh Alcock, counsel

For the Public Service Commission: Louise Bard

Heard at Ottawa, Ontario,
May 7 and 8, 2019.

REASONS FOR DECISION

I. Complaint before the Board

[1] Ray Davidson ("the complainant") was an unsuccessful candidate in an advertised internal appointment process at the Department of Health (DH).

[2] On July 21 and August 14, 2016, the complainant made complaints against the Deputy Minister of Heath ("the respondent") alleging abuse of authority in the application of merit under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*"). The complaints were consolidated in September 2016 under the file number EMP-2016-10599.

[3] The complainant also filed notices with the Canadian Human Rights Commission (CHRC), which responded that it did not intend to make submissions in this matter.

[4] For the reasons that follow, I find that the complainant did not establish that the respondent abused its authority. Therefore, I dismiss the complaints.

II. Background

[5] The complainant was in a position classified PM-05 with Immigration, Refugees and Citizenship Canada when he made his complaint. He testified that he has extensive experience in the access to information and privacy (ATIP) field. He applied to an advertised internal process with the respondent for a chief, access to information and privacy position, classified PM-06. The purpose of the process was to fill three indeterminate positions and establish a pool of screened-in candidates.

[6] Initially, Cynthia Richardson screened-in the complainant. She is the respondent's ATIP director and was the hiring manager, since the PM-06 position reported to her. The complainant was invited, with 11 others, to participate in an in-basket exam. The assessment board members were her and Kathy Rae, who was then an experienced PM-06 in the ATIP field with the respondent.

[7] The in-basket exam had 10 questions. The assessment board reviewed each one using a rating guide established in advance that included several competencies. The competencies that the respondent was looking for included, among others, manage communications, analytical abilities, planning skills, ability to organize, and ability to

mobilize (Exhibit R-1, tabs 5, 6, and 7). The assessment board reviewed the 12 candidates' answers and concluded unanimously that the complainant did not obtain the passing mark for those 5 competencies (Exhibit R-1, tabs 8 to 12). The respondent then posted the notification of appointment on July 20 and August 4, 2016, for 2 successful candidates. I will refer to them as "the appointees".

III. Issues

[8] The complainant alleged the following:

1. that the respondent assessed him unfairly;
2. that personal favouritism was shown toward the appointees;
3. that the respondent was biased against him; and
4. that he was discriminated against because of his race or colour.

[9] As remedy, the complainant asked that I revoke the two appointments and that the questions and all the candidates' answers be reviewed independently. Alternatively, he asked that he be compensated for the salary difference between a PM-05 and a PM-06 position and that he receive the compensation under ss. 53(2)(e) and (3) of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*).

IV. Analysis

[10] Section 77 of the *Act* provides that an unsuccessful candidate in an advertised internal appointment process may make a complaint with 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.

[11] "Abuse of authority" is not defined in the *Act*. However, s. 2(4) provides, "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism." As per *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, an abuse of authority could also include improper conduct or important omissions.

1. Did the respondent assess the complainant unfairly?

[12] In his testimony, the complainant insisted that the answers he provided were exactly on point and that in some cases, they should have received higher marks. During his testimony, and while he cross-examined the respondent's witnesses, he painstakingly reviewed the 10 questions and his answers and pointed out where he

thought the respondent's comments were unjustified or plainly wrong (Exhibit R-1, tab 8).

[13] He also compared some of his answers to those of the appointees and maintained that his compared favourably with theirs and often included more substance than theirs did (Exhibits 9 and 10 and R-1, tab 8). He insisted that his answers reflected the fact that he has great ATIP expertise and that he was deliberately not considered. He also maintained that the two appointees did not demonstrate that they met the required qualifications.

[14] I do not agree with the complainant's position. First, the respondent's witness, Ms. Richardson, explained the choice of questions and stated that she had prepared the rating guide in advance, which included the competencies as well as the answers she was looking for (Exhibit R-1, tabs 5 and 6). In her testimony, she also reviewed in detail each question, explained the answers she was looking for, and explained why the complainant's answers were marked as they were. And she explained the reasons behind the assessment board's marking of some of the two appointees' answers.

[15] On that point, the respondent referred me to the following comments in *Portree v. Deputy Head of Service Canada as part of the Department of Human Resources and Social Development Canada*, 2006 PSST 14 at para. 52: "Therefore, the Tribunal's role is not to reassess a complainant's marks on a given answer or review responses given during an interview simply because a complainant does not agree with the decision regarding an interview question."

[16] While I agree with those comments, I also have in mind, as the complainant pointed out, those of the panel of the Board in *Clark v. Deputy Minister of National Defence*, 2019 FPSLREB 8 at para. 58, as follows: "… I do not have the jurisdiction to reassess the complainant's exam answers. However, I do have jurisdiction to assess whether the exam answers were correctly evaluated."

[17] As indicated, in this case, Ms. Richardson provided satisfactory answers to the issues the complainant raised. She reviewed each question and answer and provided reasonable explanations as to why the assessment board concluded as it did. Therefore, contrary to what happened in *Clark*, I am satisfied that the complainant's answers were properly evaluated.

2. Was personal favoritism shown to the two appointees?

[18] I am also not convinced that the respondent favoured in any way the appointees' answers. In his questions to Ms. Richardson and later in his testimony, the complainant unsuccessfully tried to point out that his answers were better than those of the appointees. As I indicated, Ms. Richardson reviewed in detail the answers of not only the complainant but also those of the two appointees, and again, she provided a reasonable explanation for the assessment board's conclusions and decisions.

[19] In her testimony, Ms. Richardson explained that for its review of the written exam, the assessment board used the rating guide established in advance to evaluate all the candidates. The evidence is that the guide was impartial and neutral.

[20] Ms. Richardson testified that she has known the complainant for several years. She hired him and one of the appointees as PM-04s in 2005, when she spent one year at the Department of Finance. She indicated that she had a good relationship with him and pointed out that he works hard and has good ideas.

[21] Ms. Richardson also indicated that in 2009, while she was at the Canadian Food Inspection Agency, one of the appointees reported to her and that she went to that appointee's wedding. Ms. Richardson indicated that she also had dinner once with that appointee, again in 2009. Ms. Richardson testified that she had no other contact of any sort after 2009 with that person until the 2016 staffing process, or seven years later.

[22] Ms. Richardson also testified that while initially, she saw that the exams carried the names of the 12 candidates, she asked Human Resources (HR) to remove all the names and replace them with numbers so that she would not be able to identify the candidates when the assessment was done. She indicated that Ms. Rae never saw any name. So when the assessment board reviewed all the candidates' answers, they were anonymous. In other words, the assessment board members did not know who was assessed, including the complainant. In my view, this made it very difficult to align the results in such a way as to favour one candidate.

[23] The complainant argued that despite the fact that the exams were anonymous when marked, it was still possible to guess a given candidate, since the number of candidates was limited, and given the specific area of expertise covered by the staffing process, ATIP, it was not difficult to guess who wrote any given answers.

[24] While I agree that the knowledge area covered by the appointment process was specific and that it is always possible that an assessment board member may have an idea as to who wrote the answers being marked, nevertheless, I conclude that there is simply no evidence to support the allegation that the two assessment board members knew whose exam was being corrected. Moreover, I am satisfied that while at the beginning, Ms. Richardson might had have a chance to see the names on each of the 12 exams, she testified that she asked HR to remove the names and replace them with numbers.

[25] Ms. Rae also testified and confirmed that the exam copies she received had only a number on them and that she had no idea who had written any given exam. In addition, she testified that Ms. Richardson had applied no pressure whatsoever in favour of or against a given candidate. They both worked from anonymous exams and debated the merit of each one using the evaluation grid prepared in advance that included the competencies they were looking for in a candidate. Ms. Rae's testimony was not disputed.

[26] In my view, by choosing to correct the exam using only numbers instead of names and the rating guide prepared in advance, the respondent addressed the process very impartially and neutrally.

[27] As for the fact that in 2005 Ms. Richardson had hired one of the appointees, had gone to her wedding in 2009, and had once had dinner with her that year, I would point out simply that Ms. Richardson also hired the complainant in 2005. As for attending the wedding and going to the dinner, it appears to me that those events go back seven years before the hiring process was launched and that the evidence is that no contact of any sort took place after that.

[28] Therefore, I am satisfied that the evidence does not support the allegation that the respondent favoured the two appointees.

3. Was the respondent biased against the complainant?

[29] The complainant testified that in his opinion, the respondent demonstrated an unfair bias against him in the staffing process at issue. First, he insisted that he was not assessed but instead "attacked" by certain of the assessment board's comments on his answers and its tone. As an example, he pointed out its comments on question 3,

which read, “very simplistic on HR issues”, and “very basic+ not enough depth” (Exhibit E-12, page 1). While perhaps the choice of words could have been less direct, nevertheless, this is not enough to conclude that there was a reasonable apprehension of bias against the complainant or, as he stated, he was the victim of a concerted and targeted approach by the assessment board to discredit him.

[30] In his testimony, the complainant also referred to a complaint he made to the CHRC in 2008 against the DH about not being selected in another staffing process (Exhibit R-1, tab 17). According to him, in the process at issue in this complaint, the respondent retaliated against him for filing the 2008 complaint.

[31] On that point, the evidence is that one of the assessment board members, Ms. Richardson, was not even at the DH in 2008 when that complaint was made. As for Ms. Rae, while she was at the DH then, she testified that she had absolutely no knowledge of that complaint and that like Ms. Richardson, she found out about it only while preparing for these proceedings. In light of the evidence, I simply cannot conclude that the respondent held a grudge against the complainant for making that complaint some eight years earlier. The complainant did not establish that his previous human rights complaint was a factor in his elimination from the appointment process.

4. Was the complainant discriminated against because of his race or colour?

[32] Throughout his testimony, the complainant, who identified as a black male, maintained that he is very experienced in the ATIP field and that he might not have answered the questions as the others did but that still, his answers were similar and were good. He indicated that despite his experience, he has not succeeded in advancing in his career, despite trying several times and despite the fact that there is a shortage of qualified people in the ATIP field. He testified that over the years, he has seen people who once were in positions classified at a lower level than his advance in their careers. According to him, there is only one explanation: he has been the victim of discrimination.

[33] I can certainly understand that at times, staffing processes could seem frustrating and even unfair. While I agree with the complainant that discrimination is very often insidious and that there is not always, as he pointed out, a “smoking gun”, it remains that he had to establish a *prima facie* case of discrimination before the burden would shift to the respondent to explain its decision. He had to do more than make a

statement that the reason he was not selected had to be discrimination. The affirmation had to be backed up by evidence, and he had to establish a *prima facie* case of discrimination.

[34] In *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33, the Supreme Court of Canada described the following test on how to establish a *prima facie* case of discrimination:

> *[33] … to demonstrate* prima facie *discrimination, complainants are required to show that they have a characteristic protected from discrimination under the* Code*, that they have experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact….*

[35] In this case, the characteristic is protected under the *CHRA* (as opposed to the British Columbia *Human Rights Code,* R.S.B.C. 1996, c. 210), and the adverse impact is with respect to the appointment process (as opposed to the service).

[36] There is no dispute that the complainant's race and colour are characteristics protected under the *CHRA*. As the complainant identified as a "black male", I also note that s. 3.1 of the *CHRA* states that "…a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds". There is also no dispute that he experienced an adverse impact in that he was not successful in the written exam. The only question that remains is whether the protected characteristics were a factor in the respondent's assessment that he was not qualified.

[37] As I said, the complainant insisted on the fact that he has years of experience in the ATIP field, and he cannot explain why other employees have passed him in their careers. He claimed that it has to be because of discrimination since in his opinion, there is no other valid explanation. I agree with the complainant that the fact that in the past, Ms. Richardson hired him for a PM-04 position, which therefore means that she would not engage in a discriminatory practice, may not be a convincing argument.

[38] Therefore, a Board member reviewing the respondent's decision must look beyond this type of affirmation to determine whether there are other signs that may lead to the conclusion that there is a *prima facie* case of discrimination. If so, it would then be up to the respondent to refute the allegations or to offer a reasonable

explanation. It must be remembered that discrimination is frequently practiced in a very subtle manner.

[39] In this case, the complainant did not show that any protected characteristics were a factor in the respondent's decision. Again as mentioned, the detailed evidence demonstrated that several times, he failed to answer the questions that the respondent had prepared impartially and neutrally. While the respondent did not dispute that the complainant was experienced and that he was knowledgeable in the ATIP field, he did not demonstrate that the respondent's approach was unfair, unreasonable, or discriminatory. Nor did he demonstrate that the appointees did not meet the qualifications for the PM-06 positions. A mere allegation is not sufficient. In addition, as mentioned, the respondent's witness, while comparing the complainant's answers with those of the appointees, provided a reasonable explanation for the marking difference. As stated as follows in *Tajitsu v. President of the Canada Border Service Agency*, 2013 PSST 30 at para. 27:

> ***27*** *Although the Tribunal can accord weight to the complainant's belief that he felt he was subject to discrimination because he is of Japanese descent, the Canadian Human Rights Tribunal has stated that "an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough."… In the present case, the complainant has been found unqualified for the position and has shown no link between this decision and the prohibited grounds of discrimination on which he relies.*

[40] As indicated, I am of the opinion that the complainant did not establish that any protected characteristics were a factor in the respondent's decision. In addition, the respondent provided a reasonable and impartial explanation for his assessment.

[41] The complainant had to prove that on the balance of probabilities, the respondent abused its authority. He did not meet that burden. As stated as follows in *Tibbs*, at paras. 49 and 50:

> *[49] The general rule in civil courts and in arbitration hearings is that the party making an assertion bears the burden of proving this assertion rather than the other side having to disprove it….*
>
> *[50] … If the onus was with the respondent to prove that there was no abuse of authority, this would lead to a presumption of abuse of authority in all appointments, which without a doubt is not what Parliament intended. The general rule in civil matters should be followed and the onus rests with the complainant in proceedings before the Tribunal to prove the allegation of abuse of authority.*

[42] Therefore, I conclude that the complainant did not demonstrate that the respondent abused its authority.

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

(The Order appears on the next page)

V. Order

[44] The complaints are dismissed.

May 22, 2020.

Linda Gobeil,
a panel of the Federal Public Sector
Labour Relations and Employment Board