Date: 20200304

File: EMP-2017-11112

Citation: 2020 FPSLREB 26

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

CRYSTAL SHURA

Complainant

and

THE CHAIRPERSON OF THE PAROLE BOARD OF CANADA

Respondent

and

OTHER PARTIES

Indexed as
Shura v. Chairperson of the Parole Board of Canada

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

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself and Satinder Bains, Union of Solicitor General Employees

For the Respondent: Patrick Turcot

For the Public Service Commission: Louise Bard

Heard at Ottawa, Ontario,
January 9, 2020.

REASONS FOR DECISION

I. Introduction

[1] This decision concerns the request of Crystal Shura ("the complainant") that I recuse myself from this case, along with the respondent's motion that her complaint be dismissed for lack of evidence. In accordance with s. 88 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), I was designated as a panel of the Federal Public Sector Labour Relations and Employment Board ("the Board") to hear and determine this complaint, bearing file number EMP-2017-11112. The complaint was filed against the deputy head of the "National Parole Board of Canada", the organization's former name. I will refer to it by its correct name, the Parole Board of Canada (PBC). The complaint concerns an appointment on an indeterminate basis by an internal advertised appointment process to the position of regional advisor, sentence verification, position, classified AS-02, in the Conditional Release Programs, Prairies region, of the PBC.

[2] A motion for recusal is always a matter of the utmost significance for the parties, the decision maker, and most importantly, the administration of justice. Accordingly, an allegation of real or apprehended bias must be taken seriously, and the decision maker called upon to make a determination in such a case owes it to all those interested in the outcome of a proceeding to approach the matter with transparency, integrity, and open-mindedness. I strove for that in reaching my decision.

[3] For the following reasons, after carefully considering the complainant's motion for my recusal, the respondent's motion to dismiss, the parties' submissions, and the applicable case law, her motion and her complaint are dismissed.

II. Background

[4] The complaint was made on April 12, 2017, under s. 77 of the *PSEA*. It alleged that the PBC's deputy head abused its authority under s. 30(2), specifically in the application of merit when it appointed the appointee. The complainant was found fully qualified in the process. On March 3, 2017, she was notified that she had been placed in a pool of qualified candidates that would remain valid until December 31, 2018. She moved to Ottawa, Ontario, at the end of 2017 on account of her husband's relocation with the Canadian Armed Forces. She remains employed in the public service.

A. Allegations of abuse of authority

[5] In summary, the complainant alleged the following:

- the establishment of the merit criteria and the tools used to assess the candidates were flawed in that they did not truly assess the requirements to perform the duties of the position;
- the assessment board was not qualified to assess the merit criteria because the national advisor, sentence verification, was not selected as assessor;
- the assessors could not perform the duties of the position due to the complexity of determining a sentence calculation formula, and therefore, all candidates found qualified were assessed incorrectly;
- in at least three earlier appointment processes, the deputy head established a pattern of bad faith, bias, and discrimination against her; and
- the real reason she was not appointed to the position was that she was pregnant.

B. The respondent's position

[6] The respondent maintained that all candidates were given due consideration and that all of them were assessed fairly against a detailed answer key. The assessment tools and the rating scale were established in accordance with the merit criteria. The same assessment tools were used for all candidates. The complainant was found qualified and was placed in a pool of qualified candidates to be considered for future opportunities.

[7] The respondent relied on *Sampert v. Deputy Minister of National Defence*, 2008 PSST 9, and *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, in which the former Public Service Staffing Tribunal determined that no provision in the *PSEA* requires a deputy head to either establish an assessment board or ensure it has a certain composition. It requires only that the assessment board be familiar with the work required of the position and that in the case of an advertised appointment process, it be free of any preconceived notion as to who should be appointed.

[8] The Board's role is not to reassess a complainant's marks on a given answer or to review responses given during an interview. Simply because a complainant does not agree with the decision on an interview question does not amount to a serious error or

omission equivalent to an abuse of authority. The merit criteria were established in line with the requirements of the position to be filled at the time. As determined in *Visca v. Deputy Minister of Justice*, 2007 PSST 24, under the *PSEA*, a manager has broad discretion to establish the necessary qualifications for the position he or she wishes to staff and to choose the person who not only meets the essential qualifications but also is the right fit for the job.

[9] With respect to the complainant's allegations of a pattern of bad faith, bias, and discrimination in past selection processes, the respondent maintained that the allegations fall outside the scope of the complaint. She never filed complaints or grievances about the past processes.

[10] Management considered all candidates in the pool. The right fit was established based on the highest overall score of the personal suitability criteria. The complainant merely provided an abstract belief that she was discriminated against. A mere assertion that a prohibited ground played a role in an assessment is not sufficient. There must be evidence to support the assertion. She did not discharge her burden of proving that on a balance of probabilities, the respondent engaged in a discriminatory practice.

C. Mediation, and scheduling the hearing

[11] In February 2018, the parties participated in a mediation session in Ottawa. The mediation failed, and the case was returned to the Secretariat of the Board ("the Secretariat") for scheduling, per its normal practice. From February 2018 to August 13, 2019, the file remained in a queue awaiting scheduling, along with a number of other cases.

III. Procedural matters before the hearing

A. Notice of hearing and the request for a change of venue

[12] On August 13, 2019, a notice of hearing was sent to all parties, informing them that the complaint was scheduled to be heard on January 9 and 10, 2020, in Edmonton, Alberta. As per the Board's *Procedural Guide for Staffing Complaints*, hearings are usually held in the community where the complainants work or live. However, the witnesses' residential location may also determine the location. On the same date, the complainant's representative requested that the hearing proceed in Ottawa.

[13] All requests from parties sent to the Secretariat are forwarded to the Board member seized of the matter, for directions. The Board member then reviews the requests. Directions are then given to a registry officer, who in turn informs the parties by letter decision.

[14] On October 15, 2019, the respondent was asked to respond to the complainant's request. On October 18, 2019, the respondent indicated that it would not cover the travel costs of her and her representative and maintained that it would be prejudiced if the hearing location were changed to Ottawa because its witnesses were located in Edmonton. Moreover, it would be unfairly burdened with costs. Its counsel was assigned to another matter in Edmonton that same week. It was not logistically feasible for him to travel from Edmonton to Ottawa to begin the hearing on January 9, 2020.

[15] I was scheduled to preside over a hearing in another matter in Edmonton from January 7 to 8, 2020.

[16] On October 21, 2019, the complainant's representative forwarded the complainant's detailed response, which indicated that the respondent had not raised this issue when it participated in the mediation session in Ottawa in 2018. She described her difficult financial situation and the multiple hardships she has endured. She described her family situation and stated that she would have to bring her young children to the hearing in Edmonton and find childcare. As for logistical considerations, she raised teleconferencing and videoconferencing as options.

[17] In contemplation of the complainant's videoconferencing request, on October 25, 2019, I asked the parties to provide the Secretariat with the number of witnesses they would call and a brief summary of the evidence they would adduce. On October 31, 2019, her representative forwarded her response of one witness and general information about the testimony she would provide.

[18] The complainant indicated that she would call a witness from British Columbia who would testify by affidavit and who would be available for cross-examination at the hearing by teleconference or videoconference. The witness would testify about prior processes and the pattern of discrimination, bias, and abuse of authority on the part of the deputy head. She would also provide expert testimony on the appropriate essential qualifications for the position at issue in one of the prior processes.

[19] The respondent replied that it would have two possible witnesses from Edmonton in addition to a potential third witness from British Columbia. It objected to the complainant's witness testifying by affidavit and proposed that she testify by teleconference or videoconference. It requested clarification as to whether she would be called as an expert witness and that if so, she be required to file a report in advance.

[20] On November 6, 2019, the respondent raised some objections on the information about the complainant's witness. In particular, it objected to her witness providing evidence by affidavit. It maintained that affidavit evidence is unsuitable because the complaint involves serious allegations of bias and discrimination. Oral evidence is necessary to assess witness credibility. It proposed that the witness testify by teleconference or videoconference.

[21] The respondent objected to the witness testifying as an expert because she had not been involved in the appointment process at issue. Furthermore, if the Board did qualify her as an expert, it requested that it be provided with her report before the hearing. It objected to the admission of evidence from the 2013 staffing process because it was outside of the scope of this complaint. That process did not result in an appointment and involved a secondment. Had the complainant suffered discrimination as a result of the secondment in 2013, she could have made a complaint with the Canadian Human Rights Commission (CHRC) or filed a grievance with her employer. The respondent would not be in a position to respond to those allegations, given the serious lapse of time. It reiterated its request for particulars on her discrimination allegations. It asked her to clarify whether she had alleged that it was personal or systemic discrimination.

[22] On November 7, 2019, the complainant confirmed that her witness would be called as an expert. She submitted that the evidence from prior processes was relevant to her complaint about the disputed process because it established a pattern of bad faith, bias, and discrimination. She referred the respondent to her Form 7, in which her allegations contained the dates and the specific details of the deputy head's personal and systemic discriminatory practices.

[23] On the same day, the complainant's representative forwarded her unsolicited response to the respondent's position. She indicated that her witness would testify via

affidavit evidence and that she would be available for cross-examination at the hearing via teleconference or videoconference, whichever the Board was prepared to arrange.

[24] She accused the respondent of attempting to distract her and to occupy her limited time and resources before the hearing. She indicated that she was still waiting on information pertaining to her *Privacy Act* (R.S.C., 1985, c. P-21) request, which she filed in 2017 about prior appointment processes. She requested that the respondent advise her if it would fulfil her request or if she would have to request an order for the production of information (OPI).

B. Notice of settlement conference

[25] On November 4, 2019, the Secretariat reminded the parties to provide dates to schedule a settlement conference, which was then scheduled for December 19, 2019. The hearing was scheduled for January 9 and 10, 2020. Settlement conferences are chaired by a Board member other than the one who will preside at the hearing of the complaint, if the matter does not settle.

[26] On November 13, 2019, a "Notice of Settlement Conference" was sent to the parties detailing the issues to be discussed. As in all such notices, the Board explained as the reason for holding it that "… when the parties resolve a complaint the outcome is often preferable to one decided by a third party."

[27] On November 18, 2019, the Board informed the complainant and her representative that their request was granted to have a boardroom reserved in Ottawa for the settlement conference that would be conducted via teleconference and that one had been reserved. She and her representative were to participate from that room.

C. Videoconferencing from three different locations

[28] On November 14, 2019, I contacted the Board's Legal Services branch to see if it would be possible to accommodate videoconferencing technology for three different locations, being Ottawa for the complainant, British Columbia for her witness and potentially one of the respondent's witnesses, and Edmonton for the physical hearing location. Given that it would be a first for the Board, in having witnesses testify from potentially three different locations, several inquiries involving the Board's Registry and the Information Technology Services (ITS) of the Administrative Tribunals Support

Service of Canada (ATSSC) had to be made to determine the most cost-effective approach to accommodating the complainant's request.

[29] On November 18, 2019, because I still did not have all the information on the possibility that witnesses would testify from three different locations, and in light of the settlement conference scheduled for December 19 and the possibility that the parties could reach a settlement, I rescheduled the pre-hearing teleconference to December 20, 2019.

[30] On November 19, 2019, in the notice of the pre-hearing teleconference, I directed a registry officer to inform the parties that the request for a change of venue would be discussed in the call. Before making any final determination, I wanted to hear from all the parties. I then forwarded my request to the Board's Registry and requested that immediate inquiries be made.

[31] On November 19, 2019, the Secretariat's manager informed me that neither the Canada Industrial Relations Board nor the ATSSC had available hearing space in Edmonton or in Kaleden, British Columbia. The Registry did not have the resources to organize it. It would have had to book conference rooms in three different hotels, one in Edmonton for the hearing, one in Ottawa for the complainant, and one in Kaleden for her witness. I asked that a special request be made of ITS to determine other options.

D. Disclosure requests

[32] On November 25, 2019, the complainant's representative forwarded her email about documents from prior staffing processes that had not been disclosed, along with the documents for the settlement conference scheduled for December 19, 2019.

[33] The complainant refused to sign a non-disclosure agreement for any settlement that could be reached through the settlement conference. In her email to her representative, she indicated that she had just discovered another instance of abuse of authority in the application of merit that was specific to assessing the essential qualifications, specifically knowledge of s. 742.7 of the *Criminal Code* (R.S.C., 1985, c. C-46). Her email was brought to my attention on December 2, 2019. Her representative did not ask to amend her allegations.

E. WebEx

[34] On November 29, 2019, it was determined that the ATSSC would provide WebEx Internet conferencing to facilitate the complainant's participation in the hearing from Ottawa and that of her witness from Kaleden. As per the Board's practice, the parties would be informed that they were responsible for all costs and equipment relating to their participation and that of their witnesses at the hearing. The Board would be responsible only for the hearing facilities in Edmonton and Ottawa.

[35] On December 2, 2019, I directed the Registry Officer to inform the complainant's representative that if he wished to request an OPI for documents from former processes, he should do so as soon as possible, and that the request for the change of venue would be discussed during the pre-hearing conference call on December 20, 2019. I further directed that the parties should be prepared to discuss the possibility of having her and her witness testify via videoconference. The Registry Officer sent the directions to the parties on December 3, 2019.

[36] On December 4, 2019, a notice of venue was sent to the parties, indicating the time and location of the hearing as January 9 and 10, 2020, in Edmonton.

F. The complainant's first OPI request and her request to amend her allegations

[37] On December 5, 2019, the complainant's representative sent the OPI request about the prior appointment processes.

[38] On December 11, 2019, the respondent responded to the complainant's request. It reiterated its request for further particulars. Although the facts of her allegations are detailed in her Form 7, it lacks specific details about her discrimination allegations. The respondent requested dates, reasons, witness names, and clarification of the grounds of bias. It objected to her new allegation, requested that she submit the required form, and asked for 10 days to respond. It maintained that she did not meet the arguable relevance test in that there was no clear link between the requested documents and the complaint. Her request was overly broad because it was about staffing processes that were not the subject of the complaint. Furthermore, the request for the production of all documents in the three former staffing processes was overly onerous.

[39] On December 11, 2019, the complainant sent a Form 8 and her request to add to or to amend her allegations. On December 12, 2019, the Secretariat informed her representative of technical issues with his email address. That same day, it acknowledged receiving her OPI request, the respondent's reply, and her request to amend her allegations. The parties were provided until December 17, 2019, to reply to her request.

G. Documents for the settlement conference

[40] On December 12, 2019, the Secretariat reminded the complainant's representative that the completed settlement conference brief and the signed terms and conditions agreement form were due on December 9, 2019. It requested that her representative submit them as soon as possible.

[41] On December 13, 2019, at 3:34 p.m., the complainant wrote to her representative, voicing her concerns about not receiving all the documentation requested from the respondent and stating her reluctance to sign the "Settlement Conference - Terms and Conditions Agreement Form" and the "Terms of Settlement Form" due to their non-disclosure clauses. The representative forwarded this email to the Board and other parties.

[42] She claimed that the Board had not answered any of the procedural concerns that the parties had raised and stated that it "… appears to be doing little more than encouraging the ongoing, unproductive prattle between [her] and the respondent." She was perturbed by the dysfunction that had transpired since she filed her complaint in April 2017. She had waited a year-and-a-half to have it heard. She wished to receive an explanation from the Board as to its prudence in proceeding with a settlement conference and, similarly, with the hearing scheduled for the next month when procedural concerns remained unaddressed. She did not wish to waste public funds or take leave from her job to participate in unproductive proceedings.

H. Notice to the CHRC

[43] On December 17, 2019, the Secretariat was informed that the CHRC had not received the Form 5 notice required under the *PSEA*. The complainant indicated that she had sent it when she filed her complaint and that she had followed up with the CHRC to ensure that it was on her file. The Board directed her and her representative

on how to send it. As will be discussed later in this decision, it was in fact sent on December 17, 2019.

I. Response to the videoconferencing request, the OPI requests, the change of venue request, the amended allegations, and the postponement request

1. The complainant's position

[44] On December 17, 2019, I denied the hearing location change. I allowed the complainant to testify by video from Ottawa via the federal public service WebEx portal and allowed her witness to testify via WebEx from Kaleden. I denied her OPI request because she did not establish the arguable relevance of the requested information to her allegations. I determined that her request for **all documents** about the prior selection processes, without any further explanation or justification, amounted to a fishing expedition.

[45] On December 17, 2019, the complainant's representative forwarded an email from her, advising as follows: "… I have received no response from the [Board] to my concerns… It is unreasonable to expect that a settlement can occur when I have yet to receive the information I have requested for my case." Therefore, she was not prepared to go forward with the settlement conference scheduled for December 18. It is my understanding from her email that she had little confidence that the respondent will approach further settlement mechanisms in good faith given its abrupt termination of the prior attempted mediation process, especially given their refusal to provide the requested information.

[46] She indicated that she did not wish to participate "… in … further forms of arbitration with the respondent", that she would focus on preparing for the upcoming hearing, that she would refile her information request through the Office of the Privacy Commissioner of Canada, and that she would note that the respondent did not fully comply with her 2017 request.

[47] She indicated that she suspected that her OPI request and her request to amend her allegations, along with her refiling to the Office of the Privacy Commissioner, would compound the delay. Therefore, she requested that the Board postpone the hearing scheduled for January 9 and 10 until those filings were fully processed. Because this concerned the settlement conference, of which I was not seized, it was never brought to my attention.

2. The respondent's position

[48] On December 18, 2019, the respondent replied to the complainant's postponement request. It maintained that the Board's denial of the OPI request could not justify the postponement. Her privacy request was filed in 2017, and she waited two years to refile her request for the provision of information.

[49] The complainant provided no explanation as to why she waited over two years. A postponement would have prejudiced the respondent because it had secured the presence of its witnesses and had spent a significant amount of time preparing for the hearing. It objected to her new allegation because it did not meet the test set out in s. 23(2) of the *Public Service Staffing Complaints Regulations* (SOR/2006-6), which states that complainants may add a new allegation to their complaints only if the information could not have been obtained before they submitted their original allegations or if doing so is in the interests of fairness.

J. Second letter decision

[50] By email from the Secretariat, on December 19, 2019, I was informed of the complainant's refusal to sign the necessary confidentiality agreements for the settlement conference scheduled for that day. An email in the Board's file indicated that the Board Member presiding over the settlement conference cancelled it.

[51] On December 19, 2019, the Secretariat provided me with two requests from the complainant. One, made on December 11, 2019, was to amend her allegations. The other, made on December 17, 2019, was to postpone the hearing. Also included was the respondent's December 18, 2019, response to her amendment request. Included in that email was the position of the Public Service Commission (PSC) vis à vis the postponement request and the respondent's response to it.

[52] On December 19, 2019, the Secretariat informed me that the complainant completed the mandatory Form 5, "Notice to the Canadian Human Rights Commission", in May 2017 but that she sent it to the CHRC only on December 17, 2019. The Board was then waiting for a response from the CHRC to inform it of the hearing dates. The Secretariat then informed the CHRC of the hearing dates, and the CHRC indicated that it would not participate in the hearing.

[53] After receiving the parties' positions on the complainant's requests, on the morning of December 20, 2019, I directed the Secretariat to issue a response to her request to amend her allegations, her disclosure request, and her postponement request.

[54] I allowed the complainant's request to amend her allegations. I determined that the allegation was not new in that it flowed from her original complaint. I denied the motion to postpone the hearing on the grounds that she had not received the documents pursuant to her OPI request. Having denied the OPI request for documents pertaining to prior selection processes and having granted the amendment, I determined that the postponement issue was moot. I accepted the respondent's position that it would be prejudiced by a postponement. The complainant did not provide clear, cogent, and compelling reasons to justify one, as required by the Board's postponements policy. I determined that the hearing would proceed as scheduled on January 9 and 10, 2020, in Edmonton and by WebEx for her and her witness, as ordered, on December 17, 2019.

K. The pre-hearing teleconference

[55] In the afternoon of December 20, 2019, I held the pre-hearing teleconference with all the parties. The complainant attended with her representative, Satinder Bains. Attending for the respondent were, from Treasury Board Legal Services, Patrick Turcot, Legal Counsel, and April Conn, Paralegal. Also present were Zoe Alshuler of the Treasury Board's Centre of Expertise, Louise Bard from the PSC, and from the PBC, Shauna Murphy, Benoit Lamarche, and Eric McMullen. The teleconference notice indicated that it was being held in preparation for the upcoming hearing set for January 9 and 10, 2020. As do all such notices, it indicated that the purpose was to streamline the hearing process.

[56] The participants were explicitly informed that they had to be fully prepared to discuss all the following issues:

- the identification of witnesses, of the nature of the evidence to be presented, and of the lengths of the testimonies;
- the identification of uncontested facts and of documents that could be produced by consent;

- the identification and review of issues in view of simplifying and accelerating the hearing;
- a settlement;
- the hearing (a paper hearing);
- the order of the proceedings;
- the time limits to present arguments;
- the exchange of documents that would be produced at the hearing as exhibits;
- the jurisprudence;
- the requirement for interpretation services;
- any accommodation requests;
- the time and length of the hearing; and
- any redress and remedies.

[57] The notice indicated that the teleconference would take place on December 20, 2019, at 1:30 p.m. Ottawa time, or 11:30 a.m. Edmonton time, and that it would last approximately 60 minutes. Details were provided as to how to join in. The participants were notified that they should be fully prepared to discuss the issues identified in the "Notice of Pre-Hearing Conference".

[58] The representatives were reminded that their clients could attend the pre-hearing conference as observers but that they could not participate in any exchange. Only the other parties who filed a reply to the allegations could participate. It lasted approximately 1 hour and 30 minutes. Because the complainant's representative was not fully prepared to discuss her complaint, I allowed her to actively participate.

[59] During the course of the pre-hearing teleconference, the parties discussed all of the matters identified in the notice of pre-hearing teleconference. She objected to discussing her complaint in detail and indicated that her representative told her that the pre-hearing teleconference was simply a formality that all staffing matters before the Board are subjected to. Much of the complainant's motion to recuse relies on what transpired during the pre-hearing teleconference, specifically: preferential treatment to the respondent; the denial of accommodation to her witness; questioning the complainant on her allegations of discrimination; and soliciting a motion to dismiss

her complaint. I will set out those allegations in greater detail and address them later in my reasons.

[60] After that teleconference, I emailed the Secretariat and informed it that a new notice of hearing had to be sent, that the respondent would present a motion to dismiss by December 27, 2019, and that the complainant would have until January 3, 2020, to respond.

[61] Given that the other case I was to preside over in Edmonton had settled, I decided that I would conduct the hearing from Ottawa via WebEx with the complainant present and with the respondent and its witnesses in Edmonton. The complainant informed me that her witness required accommodation and could not travel to testify. I determined that her witness would testify from her home in British Columbia. Her representative was unsure whether he would be present in Ottawa for the hearing dates. I suggested that her representation might be facilitated were he present with her in Ottawa.

[62] On December 23, 2019, the complainant's representative forwarded an email he received from her informing him about her concerns about her friendship with her witness and one of the respondent's witnesses. On the same date, I directed the Registry Officer assigned to the matter to acknowledge the unsolicited information and to return it to her and her representative, and I directed that her representative raise these matters at the start of the hearing on January 9, 2020.

L. The respondent's request to move the hearing to Ottawa and for the witnesses to testify via WebEx from Edmonton and Abbotsford

[63] On December 24, 2019, the respondent emailed the Board indicating that upon reflection, it and its representative wished to participate in the hearings in Ottawa and that its witnesses would testify from the Edmonton location. It sought the parties' input and approval from the Board for a change to the hearing location. It requested that one of its witnesses be allowed to testify from her location in Abbotsford, B.C., on account of her family obligations.

[64] On December 24, 2019, a new notice of hearing was sent to the parties. It indicated that the Board Member would preside over the hearing from Ottawa with the complainant. Her witness would testify via WebEx. Among other things, it reminded the parties of the following:

- they were responsible for ensuring that the witnesses testifying via WebEx had the necessary equipment;
- the Board would contact the parties to test the technology;
- the parties were required to inform their witnesses of the hearing date and time;
- the Board could proceed with the hearing despite the absence of any party or other participant; and
- the Board does not pay or reimburse costs for any party, representative, or witness.

M. The motion to dismiss the complaint

1. The respondent's position

[65] On December 27, 2019, the respondent presented a motion to dismiss the complaint, in advance of the hearing. It maintained that the complainant did not have the requisite evidence to establish a *prima facie* case of discrimination. The fact that she could not respond to my questions during the pre-hearing conference with respect to the particulars of her discrimination allegations, along with her lack of response to the respondent's request for particulars, indicated that she could not discharge her burden that and it would not be an appropriate use of the Board's resources or in the interests of justice to proceed with a hearing.

[66] It maintained that the other allegations in the complaint, aside from those based on discrimination, were not properly before the Board or not relevant to the merits of the complaint because the complainant was found qualified in the process. In any event, it was also apparent that she had no evidentiary basis for those allegations.

[67] The respondent pointed out that on November 6 and 15 and December 11, 2019, the respondent requested particulars and a detailed description of the allegations on which the complainant intended to rely, along with full particulars of the relevant facts. When she was given the opportunity at the pre-hearing conference to provide an outline of any evidence upon which she would rely to substantiate her discrimination allegations, she was unable to provide anything other than her own belief that she had been discriminated against. She did not present any information to show how her pregnancy had been linked to not being appointed to the position.

[68] The respondent submitted that with respect to the complainant's ongoing references to other staffing processes, the *PSEA* establishes the statutory and regulatory conditions for making a complaint. By constantly referring to those processes, she attempted to do what she did not or could not do directly.

[69] Her allegations of bias should also be dismissed because she did not provide any evidence of actual bias related to the choice to appoint the appointee instead of her. She alleged that there had been bias against her because of changes to her work description, which removed some of the responsibilities of employees at the substantive CR-05 level, and because a past selection process had been cancelled. She also stated that she was subjected to biased treatment because she had filed an acting-pay grievance, which had been settled. She did not demonstrate the relevance of these allegations to her complaint. She was screened into the process and was part of a qualified pool.

[70] The respondent argued that the allegations about those earlier stages of the selection process do not form part of the rationale as to why the complainant was not appointed and hence are not linked to her complaint of abuse of authority. With respect to the exam, the *PSEA* gives delegated managers broad discretion in the choice of assessment methods as long as they properly assess the qualifications established in the statement of merit criteria (SMC). Her disagreement with the assessment cannot constitute an abuse of authority. The exam and answer key were developed in consultation with the national advisor, sentence verification. The exams were then marked by the board members consistently, using an answer key. She provided no indication of any evidence to the contrary. She did not take issue with the fact that the assessment board found her qualified. She succeeded at every step of the staffing process and was placed in the pool of qualified candidates.

[71] The respondent concluded that given that the complainant was found qualified and was placed in the pool, logically, the assessment criteria cannot be an issue. Instead, the issue is the determination that the appointee was the right fit. However, the complainant did not indicate that there is evidence to contradict that determination; nor does she seek the revocation of the appointment in question. Thus, it is a moot point.

2. The Board's decision on the respondent's request to participate from Ottawa

[72] On December 27, 2019, the Secretariat acknowledged receiving the respondent's motion to dismiss. It informed the complainant that the Board would render a decision on the motion based on the information it would receive. As her representative confirmed at the pre-hearing teleconference, the Board requested that she provide her response to the motion by January 3, 2020.

[73] On December 30, 2019, I granted the respondent's request to have its representative participate in the hearing from the Ottawa location and to have its witnesses testify via WebEx from Edmonton and Abbotsford, respectively. The Secretariat reminded the parties of their responsibility to ensure that their witnesses were available and ready to testify on January 9 and 10 and that all documents they would refer to in their testimony were sent to the other parties before the hearing. The parties were also asked to ensure that the witnesses who would testify from the Edmonton, Kaleden and Abbotsford location had the necessary equipment, including copies of all documents that would be introduced at the hearing.

[74] On the same day, the complainant's representative emailed the Secretariat, informing it that they would respond to the motion to dismiss but that he had "… a concern [as to] how a discussion can be rendered without a full presentation of evidence or a proper **hearing**" [emphasis added]. During the pre-hearing teleconference, when I asked him if he would be in a position to respond to the motion by January 3, 2020, he said, "It should be fine." He did not follow up and did not ask for more time to respond. He did not request an extension of time to respond or ask that the issues be addressed at the hearing.

[75] On December 30, 2019, the Registry Officer mistakenly sent an email indicating that the hearing had been moved from Edmonton to Ottawa and to cancel the WebEx arrangement for the respondent's witnesses in Edmonton. I indicated to the Officer to email all the parties and inform them to disregard her earlier email and that further directions from the Board would follow. The complainant responded that she would not disregard the email because it spoke "… a significant message that [she felt] that they are now realizing and attempting to recover." She provided no other details to support her claim. Her representative did not follow up or make any inquiries.

[76] Later that day, I sent clear instructions to the Registry Officer along with the directions to provide to the parties. Because all the representatives and their clients would participate in the hearing in Ottawa and because their witnesses would participate via WebEx at their respective locations, I decided to cancel all hearing arrangements in Edmonton, including the audiovisual services. I also directed the Secretariat to send an updated Notice of Hearing and to cancel my travel arrangements.

[77] On January 3, 2020, the PSC informed the Board that it did not take a position on the motion to dismiss.

3. The complainant's response to the motion to dismiss

[78] On January 3, 2020, at 8:58 p.m., the complainant forwarded her response to the motion to dismiss to her representative. He then forwarded it to the Board and indicated the following:

> …
>
> *Attached is the Second Motion to Dismiss on this FPSLREB File 2017-11112 (Shura). My concern is I will be in Ottawa on the January 7th to prepare for the Hearing with Ms Shura. I feel the board have not given us reasonable time to respond to the Motion to Dismiss or are pressured into presenting our case by email during the holidays season when many of us are not available. For this and many other reasons the Motion to Dismiss be denied.*
>
> …
>
> [*Sic* throughout]

[79] The complainant's 10-page response focuses on the prior staffing processes and events, which she asserted were a culmination of a pattern of events demonstrating the bias, bad faith, and discrimination that occurred from 2013 to 2017. Although she did not explicitly say it, my understanding is that she maintained that they are linked to the selection process in dispute. She stated that some of the alleged abuses were covert and that others were blatant. Through her investigation, she uncovered abuses that initially were suspicions. A hiring manager pressured an assessment board member to change a candidate's exam score from a fail to a pass, and a hiring manager cancelled an advertised appointment process, to select a candidate who had failed the exam.

[80] She accused the Board and the respondent of making contemptuous assertions that characterized her efforts to access information as simply a fishing expedition, when earlier efforts in fact uncovered evidence to support her allegations. That gives credence to her efforts and her stance that it is unreasonable, in this case, to assume the existence or non-existence of evidence that may support any of her allegations before the requested documents have been thoroughly reviewed.

[81] Regardless of the Board's denial of the complainant's OPI requests, she referred to her request to obtain the requested documentation pursuant to the *Access to Information Act* (R.S.C., 1985, c. A-1). She maintained that the respondent's refusal to provide this information was unlawful and was highly suggestive that it withheld this information to conceal its abuses of authority and to protect itself from liability. She indicated that on December 18, 2019, she resubmitted her requests for this information under both the *Privacy Act* and the *Access to Information Act*.

[82] She indicated that on December 19, 2019, she made a complaint to the Office of the Privacy Commissioner of Canada about her initial April 2017 request, with which the respondent did not fully comply. She indicated that she would exhaust all means available to her, including contacting her member of parliament, if necessary, to gain access to the information to inform her decision on whether to proceed with or withdraw her discrimination complaint, which was also filed separately and directly with the CHRC. She claimed to have responded to the respondent's request for particulars about her complaint by directing it to refer to her Form 7 and her allegations.

[83] She indicated that twice, in 2013 and 2017, she was denied appointment to the same position while she was in her third pregnancy trimester. She referred to her analysis of the demographics in the Edmonton office. She claimed that the entire time she was employed there, she observed that disproportionately few staff had any children, let alone small children. She was the only pregnant person in the Case Review Clerk unit and the only one with small children. In the Case Review Officer unit, only two women were pregnant and had small children, and one other had "tween" or teenaged children.

[84] The Hearing Officer unit had no women pregnant or with young children, but two men there had young children. In reality, the proportion of staff members who

were pregnant or who had small children was significantly lower than the already low proportion taken from a simple comparison to the number of positions. Also, she was unaware of any staff with small children receiving acting or promotional opportunities during this period.

[85] Through her evaluation of the information she received, she concluded that discrimination was a factor in the staffing decision that led to her complaint. She wished to review the documentation she would receive under the *Access to Information Act* and from the Privacy Commissioner, and she wanted another opportunity to amend her allegations once compelling evidence emerged.

[86] She referred to the PBC's "Renewal Initiative", which reallocated sentence-management duties from the case review clerk position to the regional advisor, sentence verification, position. The PBC did this in bad faith. It demonstrated contempt and bias against the case review clerks by designing the advertised appointment process for the regional advisor, sentence verification, position as only a deployment. Because the case review clerks were not at-level, they were precluded from applying to positions having duties that they had performed for years.

[87] Despite the deployment restriction, she applied for the position. The National Advisor, Sentence Verification, had urged her to apply and had hinted about recommendations to the hiring manager to review the restrictions on the area of selection. The advertisement was extended to other groups. She passed the initial screening. However, the advertised appointment process was cancelled, and instead, the hiring manager announced a secondment. The complainant found out later that the seconded employee had not passed the essential selection criteria and that a board assessor had been coached into passing that employee. She stated that she had the aptitude for and had shown strong performance in sentence management and as a case review clerk.

[88] There was no evidence of administrative uncertainty in staffing the position. The real reason the employee was seconded was that it was an accommodation. The employee in question informed the hiring manager that she was unsure if she would accept an indeterminate position. The respondent offered no other plausible reason as to why the complainant was not considered for this position in 2013, before the advertised appointment process was cancelled. In her mind, this left as the only

plausible conclusions bias, bad faith, and discrimination on the basis that she was pregnant at the time.

[89] She added that the hearing officer position, the non-advertised acting appointment, and the advertised selection process numbered 2015-NPB-IA-PRA-102970-A are further evidence of bias, bad faith, and discrimination. In 2015, she returned to work after maternity leave. An informal call for expressions of interest was sent through the Edmonton office for an acting opportunity of under four months. Because of her strong writing skills and her interest, she applied and was invited to write an exam. She received vague affirmative feedback about her results but no indication that she had not qualified. She heard nothing further about being considered.

[90] Two case-review officers received acting appointments from the call for interest. They did not have children. They had weak writing skills. It was clear that she had been denied the opportunity in favour of someone with inadequate writing skills. She stated that this was more evidence of bias, bad faith, and discrimination.

[91] In October of 2015, an advertised anticipatory selection process appeared for an AS-03 hearing officer position for which she qualified as part of a pool of qualified candidates. Again, preference was given to persons without children. The conditions of employment for this position were willingness and ability to travel and to work overtime. Because both conditions could be challenging for people with children, particularly women, who are generally the primary caregivers of small children, it was unsurprising that the appointed candidates did not have children. This maintained the status quo of only two male hearing officers with children, which is more evidence of bias and discrimination.

[92] In October 2017, she was offered an acting appointment at the AS-03 level. However, it was decided that she would be remunerated at the AS-02 level. According to management, in the past, casual workers performed this work for AS-02-level pay. She disputed management's refusal on the basis that two former case review clerks had been offered acting pay at the AS-03 level in the past and on the fact that she was in the hearing officer pool. This was more evidence of bias against her.

[93] In October 2017, she informed her employer that she was in the early stages of her second pregnancy and that because she was feeling ill, she requested pregnancy-

related leave, to visit her specialists. Her pregnancy was determined high risk, and it required her to attend frequent specialist appointments. Her acting appointment was terminated on October 28, 2017, without further opportunities for more acting appointments, even though a work backlog remained.

[94] In April of 2016, another selection process was advertised for the regional advisor, sentence verification position. It was open to employees of the PBC, the Correctional Service of Canada (CSC), and the Office of the Correctional Investigator of Canada, but only for deployment. She claimed that again there was bias against the case review clerks because they were not at deployment level. There was a strong bias in favour of CSC employees.

[95] The PBC displayed further bias and bad faith by omitting the clause to consider other groups and levels. It was done specifically to exclude her and was retaliation against her for raising concerns about how the 2013 advertised selection process was handled. She did not bother submitting her application for this position because she certainly would have been screened out before any assessment.

[96] The complainant was asked to perform sentence-management duties and to backfill the regional advisor, sentence verification, duties in her office until the position was staffed. She courteously agreed to perform them temporarily. After several months, it became clear to her that she would be expected to perform the duties indefinitely without compensation because management offered no solutions and no opportunities to permanently staff the position. This was evidence of bias and bad faith. She requested retroactive acting pay. The Manager did not acknowledge the request until a month later, which left her under continued duress. The Regional Director General denied her acting-pay request. The tactics employed by the Manager and the Regional Director General in their prolonged avoidance, followed by a cavalcade of dismissals and commands, were careless, bad faith, intimidating, and akin to bullying.

[97] This was more evidence of bad faith, reprisal, and undue imposed stress upon the complainant, with no consideration for the fact that she was already under significant personal stress due to her high-risk pregnancy. In an attempt to mitigate the stress it put on her, she wrote to the manager to request that she be allowed to

focus on her other duties and to not perform the function of preparing new provincial files.

[98] She communicated her interest in performing the duties of the regional advisor, sentence verification, position in an acting capacity until the position was filled through the anticipated selection process. She received no positive response. In bad faith, the Manager delegated the duties to the national advisor, sentence verification, and an untrained case review clerk. With the exception of an informal discussion with the Manager, which happened later, the Manager and the Regional Director General ignored her from then on. She filed an acting-pay grievance for the time she spent performing the duties of the regional advisor, sentence verification, position.

[99] The Regional Director General denied her grievance on the basis that the duties she performed were in the description of her case review clerk position. Because the classification had not been downgraded, there was no obligation to compensate her at the AS-02 level. This was more evidence of bias and discrimination against her. When the regional advisor, sentence verification, position was filled in 2013, the duties and training were removed from the case review clerks, without consideration. It was unreasonable to expect those clerks to perform those duties in 2016 without consideration or retraining simply because the PBC had been negligent in removing the duties from their position description in a timely manner. The sentence verification officers are responsible for covering each other's duties during absences. Her grievance was settled in May 2017.

[100] When the position in dispute was advertised, the complainant's acting-pay grievance was ongoing. It was the first time the advertisement had an expanded area of selection, which allowed the case review clerks to apply. The qualification criterion with respect to a specific section of the *Criminal Code* applied only to federal rather than provincial sentences.

[101] The SMC and the terms and conditions of employment had changed significantly and did not reflect sentence-management experience as an essential qualification, which was contrary to the Hiring Manager's statement in 2013 that it was necessary for the position. This essential qualification had been inexplicably relegated to an asset qualification. In her view, it was ludicrous that a regional advisor position would not require sentence-management experience as an essential qualification. She

was surprised to hear that the National Advisor, Sentence Verification, had not prepared the advertisement and had not been invited by the Hiring Manager to be on the assessment board. This demonstrated bad faith and bias. The National Advisor, Sentence Verification, agreed with her that the criterion was questionable, and the advertisement was amended the following day. The asset experience was not reinstated to the essential qualifications. The complainant applied, was found successful at all levels, and was placed in the pool of qualified candidates.

[102] The appointee was a CSC employee. Two CSC employees were offered appointments before any PBC employees, which demonstrated bias and bad faith. She requested an informal discussion with the Hiring Manager, who stressed that there was a strong pool of seven applicants and that selecting the best fit was the ultimate objective. She was appalled when she learned that the asset qualifications were not even considered in the appointment decision. That demonstrated bad faith.

[103] The Hiring Manager could not explain how the asset qualifications were considered. Although they were considered somewhat, he indicated that they were not a strong advantage and that they were not weighed heavily. He indicated that personal suitability was given the most weight; it was the only essential qualification not quantifiably measured. All the quantifiable essential qualifications of any relevance were ranked lower than the subjective personal suitability qualification. This was clear evidence of bias and bad faith.

[104] If the candidate pool was so strong, it would logically justify invoking the asset qualifications to determine the ultimate best fit. The complainant had shown strong performance at all levels of the selection process, and she possessed all the asset qualifications. Moreover, she had introduced several initiatives into the workplace that had streamlined the processes and had improved efficiencies. All her accomplishments were provided as concrete examples to demonstrate her qualifications, but it was to no avail.

[105] The Hiring Manager appointed a candidate with no sentence-management experience based on the subjective perception of character. In the complainant's view, it was evident that the Hiring Manager decided to use personal suitability rather than assets to determine the best fit. Therefore, the appointment was not made in good

faith. Personal suitability was used as a tool to appoint whom he wanted or to reject whom he did not want. Again, it was evidence of bad faith and bias against her.

[106] The Hiring Manager indicated that the appointee was highly educated and that despite her lack of experience in completing sentence calculations, she scored very well in that ability area. Through this single statement, he completely abandoned the importance of sentence-management expertise and invalidated his justification for his previous manoeuvers in staffing the position in 2013. This demonstrates bias and bad faith. The high level of education he cited was neither an essential qualification nor an asset qualification on the SMC and therefore was irrelevant to selecting the most suitable candidate.

[107] The fact that the National Advisor, Sentence Verification, was not on the assessment board as the sentence management subject-matter expert for this process was imprudent given the unique specialization required for the position. The pool of qualified candidates was not properly assessed, and the respondent appointed an unqualified candidate.

[108] The essential qualification of knowledge of s. 742.7 of the *Criminal Code* was about a conditional sentence order that has been suspended. Only one of the exam questions referenced such an order. However, it involved a terminated one for which knowledge of s. 742.7 could not be demonstrated. Terminating such an order converts it to a fully custodial sentence and removes all the complex considerations and formulae necessary to calculating a sentence containing a suspended conditional sentence order.

[109] Therefore, the pool of qualified candidates was not adequately assessed, and the respondent appointed an unqualified candidate. This constitutes abuse of authority on the basis of incompetency and a serious error or omission. The Hiring Manager was not competent to assess the qualifications. The fact that the complainant does not seek the revocation of the appointee indicates nothing about the issues in her complaint. Since none of the candidates was properly assessed for all the essential qualifications, the resulting pool is not fully qualified, and the respondent unlawfully appointed a candidate from a partially assessed pool. It is impossible for the respondent to guarantee that the same pool or appointment would have resulted had all the essential qualifications been properly assessed. The complainant's candidacy

was overlooked in 2013 when she was pregnant and again in 2016 when she was again pregnant, with her second child, despite her solid qualifications and performance reviews.

[110] The complainant went on to add that based on the manner in which the pre-hearing teleconference of December 20, 2019, was conducted, it would not be an appropriate use of the Board's resources or in the interests of justice to proceed given that the Board Member seized with the matter contravened the Board's "Code of Conduct". For that reason and more, she said that she would file a motion for a decision without a hearing, or a paper decision, to be rendered by a Board member who could demonstrate knowledge and respect for all Board policies and who had no prior knowledge of the complaint. She elaborated the full reasons for her motions in her submission. No further communications were received from her or her representative.

4. Decision on the respondent's motion to dismiss

[111] On January 7, 2020, I issued a letter decision with respect to the respondent's motion to dismiss. I determined that I did not have sufficient information to warrant dismissing the complaint, given the contradictory positions and the fact that the case was at a preliminary stage, before the hearing had started and before any evidence had been adduced.

[112] Therefore, I deferred the motion to the hearing and allowed the respondent to present its request to dismiss again if it so chose once the hearing had commenced and the complainant had presented her evidence. She had provided sufficient detail and particulars to her allegations to justify an oral hearing. Given the gravity of her allegations and the evidence that she claimed to possess, I felt it was justified to allow her to present her evidence and to rule on the motion to dismiss afterwards, if the respondent chose to present it.

[113] I reminded the complainant of my earlier findings in her two OPI requests, which were that the complaint I am seized of is the one related to the 2016 appointment of the appointee to the regional advisor, sentence verification, position in the Prairies region.

[114] In response to her request to proceed by way of a paper hearing, I reminded her of our discussion during the pre-hearing teleconference that discrimination allegations raise credibility issues that can be dealt with only by way of oral (*viva voce)* evidence. I found that given the contradictory factual allegations and the claims being made, the matter would proceed by way of an oral hearing, on the scheduled dates, as provided in the most recent amended notice of hearing sent to the parties on January 2, 2020.

5. The PSC's submissions

[115] On January 7, 2020, the PSC provided its written submissions along with its book of authorities and documents. It restated its position that it would not participate in the hearing but reserved the right to present additional documents and case law before it.

6. Notice to the CHRC

[116] On January 7, 2020, the CHRC informed the Board that it had received the complainant's Form 5, Notice to the Canadian Human Rights Commission, that it had advised the Board that it did not intend to make submissions or participate in this matter, and that therefore, it would close its file.

7. WebEx testing

[117] By email dated January 7, 2020, the Secretariat informed the parties and all witnesses that a WebEx test would be conducted to prepare for the hearing on January 9 and 10. The witnesses would be able to access the test via a hyperlink. It was to be held at 11:00 a.m. EST, which would be 9:00 a.m. MST and 8:00 a.m. PST. The witnesses would need laptops for the test. The email included detailed participation instructions. The complainant's representative did not contact the Board to indicate that the testing time was inconvenient for her witness.

[118] On January 7, 2020, at 17:29, the complainant's witness emailed the Secretariat, informing it that if the only option the Board could offer was participating via laptop, she would not be able to participate because she did not have one. On January 8, 2020, the Secretariat responded that she could participate using a smartphone and again provided detailed instructions on how to use WebEx on that device.

[119] No further communication was received from the complainant, her witness, or her representative. Her representative did not request accommodation for the witness.

He did not inform the Board that he could not provide the witness with the required equipment and did not request that the witness participate in the hearing via teleconference.

8. The respondent's request that its client in Edmonton assist witnesses there

[120] On January 8, 2020, the respondent provided more details about its witnesses and their location. It requested that one of its representatives be present during the entire hearing to help the witnesses in Edmonton with any technical issues and to call them when it was time to testify. I granted the request.

9. WebEx testing

[121] On January 8, 2020, the Secretariat and ITS conducted the WebEx test. The respondent and its witnesses all participated, and the test was successful. The complainant's witness did not participate in the test at the scheduled time.

[122] I asked the Registry Officer to contact the complainant's witness. He left a voicemail asking her to call him to arrange to test her participation through WebEx. He then attempted to contact the complainant's representative to inquire about the witness's status. He did not answer. Her representative called the Officer back at approximately 11:30 a.m. and informed him that it was difficult for him to reach the witness because he was in Ottawa and she was in British Columbia.

[123] The complainant's representative asked the Registry Officer if he or the Officer had to contact the witness. The Officer clearly informed him again that the complainant had the responsibility of ensuring that her witness had the proper equipment to participate in the hearing via WebEx. Her representative then told the Officer that he would try to contact the witness and that he would update the Board. The Officer indicated that the Board could test WebEx with only the witness anytime later that afternoon. The representative indicated that he would look into it. After the call, the Officer ended the WebEx test session with the respondent's witnesses.

[124] At 12:22 p.m., the Registry Officer sent a follow up email to the complainant, her witness, and her representative, informing them that her witness did not participate in the WebEx testing. He indicated that the Board needed to test WebEx with her witness before the hearing. He requested that the witness provide a time that she was available for the test. He also reminded them that the parties were responsible

for making the necessary arrangements to participate in the full two hearing days, including making sure that their witnesses had the arrangements to participate. The complainant, her representative, or her witness did not respond to the Officer's email.

[125] Later on that afternoon, the Registry Officer again followed up with the complainant, her representative, and her witness for a status update. Her representative indicated that they were still trying to work things out with the witness. No other responses were received from the complainant, her representative, or her witness.

[126] During the pre-hearing teleconference, I informed the parties that witnesses and the equipment they required to participate in the hearing was their responsibility. The complainant's representative indicated that the Union of Solicitor General Employees (USGE), a component of the Public Service Alliance of Canada (PSAC), and the PSAC did not have offices in the witness's region and that the complainant's witness would be unable to travel to any location to testify or to participate in the hearing. I asked if she would be able to testify from her home. The complainant indicated that she did not know if her witness had the required equipment, such as a laptop with a camera. I invited her representative to verify with the witness and to contact the USGE and PSAC to attempt to obtain the required equipment for her.

[127] On January 8, 2020, the Registry forwarded to the complainant the CHRC's letter informing the Board that it would not participate in the hearing and that it would close its file.

[128] At no time did the complainant or her representative inform the Secretariat or the Registry that she would not attend the hearing or that her witness would not participate. At no time did her representative request accommodation for her witness at the hearing, per the Board's Policy on Accommodation Requests. He did not request that the witness testify by teleconference. He did not request a postponement to obtain the proper equipment for her.

IV. The hearing

A. The motion for recusal

[129] On January 9, 2020, I opened the hearing in Ottawa as scheduled. The respondent and its clients were present, and all its witnesses were on standby. ITS and

the Secretariat had set up the equipment to allow all the witnesses to testify via WebEx. The technology was functional. The complainant's witness did not participate.

[130] The only person present for the complainant was her representative; she did not appear. When I asked her representative if she would attend, he indicated that she would not participate. I asked him why, and he replied that he did not know. He requested that the hearing proceed by way of a paper hearing. Again, I denied the request for the reasons I provided in the letter decision of December 20, 2019. Her allegations of being discriminated against and of systemic discrimination in the PBC's appointment processes required oral evidence.

[131] I asked if the complainant's witness would participate in the hearing. The complainant's representative said that she would not. He indicated that he had a letter from the complainant that he wished to read to the Board and that he would bring a motion for my recusal. I asked if he had provided the respondent with a copy of the recusal motion. He confirmed that he had, just before the hearing began. I directed him to summarize why the complainant asked for my recusal. He could not summarize the reasons and again asked to read her document. I asked him to provide me with a copy of the motion and called a 20-minute break so that I could read it.

[132] The complainant sent the recusal motion to her representative at 12:00 p.m. on Wednesday, January 8, 2020. He did not contact the Board at that time to inform it of the motion; nor did he mention it to the Registry Officer during the Board's attempt to contact the complainant's witness to set up the WebEx testing. The recusal motion was emailed to the Board and the respondent at 10:13 a.m. on the hearing day of January 9, 2020.

[133] During the break, I took notice of the motion and its four pages. I reconvened the hearing and again asked that the complainant's representative explain the reasons for and provide evidence to substantiate the recusal. He could not provide a summary of the reasons. He asked that I reply to the motion without providing the respondent with an opportunity to respond first. I denied his request on the basis that it would be procedurally unfair for me to deny the respondent the opportunity to respond.

[134] The complainant made the following allegations in support of her motion:

- the significant delay in the procedural handling and scheduling of her complaint had imposed undue prejudice upon her case;
- the Board's prolonged decision making on procedural matters imposed barriers to her participation and to that of her witness;
- I imposed later-than-normal hours for the hearing days (10:00 a.m. to 7:00 p.m.), even though I was aware of the fact that she has small children and that she lived an hour from the hearing location;
- I violated the Board's Code of Conduct and its guidelines by reviewing case materials in advance of the hearing, as evidenced by the several letter decisions on procedural matters that I reviewed before the hearing;
- I demonstrated wilful ignorance and disregard for the legislation and the Board's policies, which provoked serious concerns of conflict of interest in my ability to render an impartial decision;
- I refused to accommodate her witness by not letting her testify by way of affidavit evidence;
- the Board's delayed decision on how her witness would testify "… hindered [her] intent to follow the steps of the FPSLREB's Policy on Accommodation, since not knowing what would be required of [her witness] made it impossible to know the type of accommodation measures to request"*;*
- I demonstrated no compassion towards her witness and refused to receive any additional information on her health issues;
- I completely disregarded the Board's accommodation policy, shamefully disrespected her witness, and violated her human rights under the *CHRA*;
- I inappropriately and fervently questioned and pressured her during the pre-hearing teleconference to provide unprepared testimony about her discrimination allegations in advance of the hearing, thus prejudicing her case;
- I inappropriately stated my opinions on the merits of her allegations and solicited the respondent to submit a motion to dismiss by December 27, 2019, before the hearing, despite the fact that it had already submitted one, on June 27, 2017;

- I implored her to participate in the settlement conference to reach a settlement to her complaint, and I forced her and her representative to stay on the phone after the teleconference ended, even though she had refused to participate;
- I granted the respondent's request to participate in the hearing in Ottawa and then attempted to retract an email indicating that directions from the Board would follow;
- the respondent benefited from the Board supplying it with the venue and information technology (IT) equipment for the majority of its witnesses to appear via WebEx; and
- I denied her adequate accommodation, time, and support, which forced her to forsake having her witness appear.

[135] The complainant maintained that those allegations demonstrate a remarkable and unacceptable bias in favour of the respondent. She stated as follows about my conduct: "… contravened the FPSLREB Code of Conduct and produced a reasonable apprehension of her conflict of interest." For all those reasons, she did not have confidence in the procedural fairness of her case or in my ability to render an impartial decision. Being forced to forsake her witness's appearance at the hearing prejudiced her case to the extent that her appearance was rendered meaningless. She requested that I recuse myself and that I "… concede the matter to be decided upon by an alternate board member" by way of a paper hearing.

B. The respondent's response

[136] The respondent stated that it did not agree with the motion and that it was fully confident in my ability to hear the complaint impartially. It disagreed with the complainant's assertion that it had advantageously objected to her witness testifying via affidavit without considering ethical and human rights considerations. The discrimination allegations against it involved matters of credibility, and it was not opposed to the witness testifying via WebEx from her home. It was not opposed to any accommodation measures for her. The parties had been informed multiple times that they were responsible for ensuring that their witnesses were available, with the necessary equipment.

[137] With respect to the complainant's assertions that I imposed later-than-normal hours for the hearing days, the respondent was of the view that it was an

accommodation for her and the witnesses. Had the hearing begun at 9:30 a.m., as hearings normally do, it would have meant a 6:30 a.m. start time for her witness. The respondent and its witnesses made themselves available to begin the hearing at 8:00 a.m. (Edmonton time). The Board did not refuse any accommodation requests for the complainant's witness. In fact, it reiterated that it would provide as many breaks as necessary for her, if she required them.

[138] The respondent did not understand the complainant's objection to holding the hearing in Ottawa. Initially, the Board had scheduled the hearing for Edmonton and had allowed her to testify via videoconference. Because of changes to party and witness availabilities, the Board changed the hearing location to Ottawa and allowed all witnesses to testify via WebEx.

[139] The respondent disagreed with the complainant's allegations as to my conduct and conflict of interest. During the pre-hearing teleconference, it was apparent that her representative had not prepared her to discuss the issues listed in the notice of the teleconference. The notice clearly listed the matters that would be discussed, and the parties were put on notice that they should be fully prepared to discuss them. It was not inappropriate to discuss them.

[140] The complainant misinterpreted the Board's affidavits policy. If affidavit evidence is allowed, the Board grants it the same weight as oral testimony. However, the request to allow her witness to testify via affidavit evidence was denied because the Board determined that the allegations involved matters of credibility. That was the Board's prerogative. Had the request been granted, the Board would have given the right weight to the testimony. Nothing prescribes that the Board must allow affidavit evidence.

[141] The respondent disagreed that I demonstrated disrespect and that I violated the rights of the complainant's witness under the *CHRA* by failing to accommodate her. It also disagreed that the Board's delayed decision on how that witness could testify hindered their intent to follow the steps of the Board's accommodation policy because she did not know what would be required of her witness. The respondent maintained that the Board accommodated the witness by providing her with the ability to testify via WebEx from her home and by providing her with all necessary breaks. On the

contrary, the respondent found that I was considerate of the witness's accommodation needs.

[142] The complainant accused me of soliciting the respondent to submit a motion to dismiss. The respondent maintained that I did not so solicit it. It maintained that it would have made a motion to dismiss her discrimination allegations at the start of the hearing or after she presented her evidence on the grounds that she did not meet her burden of establishing a *prima facie* case of discrimination. Several times, from the complaint's filing, the respondent asked for particulars, and she always refused to provide the requested information and simply referred to her allegations. Her response, which was obtained on January 3, 2020, contained additional information and particulars that were not in her Form 7.

[143] In the respondent's view, the discussion around the merits of the complainant's allegations and my questioning with respect to the particulars of her discrimination allegations was more helpful to her than a hindrance. It was fair warning to her that if she did not have more information and could not provide further particulars, it was likely that she would not meet her burden.

[144] In response to the complainant's allegations with respect to settlement discussions, it was not demonstrative of a bias against her to present settlement options to the parties. As indicated in the Board's correspondence to the parties, settlements are always more favourable to them than is a Board decision.

[145] The respondent is unclear as to the complainant's allegation that holding the hearing in Ottawa prejudiced her but favoured the respondent. She stated that it benefitted from the Board providing it with the venue and IT equipment for the majority of its witnesses to appear via WebEx. Its witnesses testified from the PBC's location in Edmonton and used its technical equipment to participate via WebEx. The Board did not provide technical assistance or equipment to the respondent. The Board's decisions to allow her witness to testify via WebEx and to move the hearing to Ottawa were made to accommodate her.

[146] Finally, the motion for recusal was a stalling tactic. The complainant requested the postponement to obtain documents through an access-to-information (ATIP) request she filed in 2017 that she could not obtain from the Board because it determined that they were not arguably relevant. The Board Member did not violate

any Board policies and the respondent was confident in her ability to hear the case and remain seized of the matter. For these reasons, the respondent asked that the motion be rejected.

C. The complainant's reply

[147] I then asked the complainant's representative if he had anything further to add in his reply to the respondent's response; he said that he had nothing to add. I asked him if he had any evidence to support the motion for recusal. He stated that he did not. I informed the parties that the motion was denied and that more fulsome reasons would follow.

D. The motion to dismiss the complaint for lack of evidence

[148] The respondent made a motion that the complaint be dismissed for lack of evidence. I asked the complainant's representative if he understood what was happening and the consequences of not presenting evidence. I reminded him that the complainant had the burden of demonstrating that the PBC's deputy head abused its authority. I directed him to take the time to telephone her, discuss it with her, and inform her that I would not recuse myself and that I would give her time to appear if she wished to continue with the hearing. I also informed him that I would provide her witness with any accommodation she might need to participate.

[149] I asked him about the steps he had taken to contact the complainant's witness since the pre-hearing teleconference. He said that he had taken none. The complainant had communicated with her witness. I asked him if he had made any inquiries to obtain the necessary equipment for the witness. He said that he had not.

[150] I adjourned the hearing for an hour to allow him time to discuss with the complainant my decision to deny the recusal motion and the respondent's dismissal motion. Once we reconvened, he said that she would not appear before the Board.

V. Reasons

[151] Before getting into why I dismiss the motion for my recusal and this complaint, I wish to clarify that at no point in the processes leading to the hearing, in the pre-hearing teleconference, and in the letter decisions did I make any determinations or issue any directions or orders about the merits of the complaint or the motion to

dismiss. I did not exert undue pressure on the complainant and her representative to participate in a settlement conference or to settle the complaint.

[152] Requests for recusal presented to the Board have always been handled by the decision maker who heard the case. For instance, that practice was followed in these cases: *Bialy v. Public Service Alliance of Canada*, 2012 PSLRB 125, *Nelson v. Canadian Security Intelligence Service*, 2012 PSLRB 65, and *Singaravelu v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 8.

[153] The Supreme Court of Canada first developed the test for determining whether reasonable cause exists for the apprehension or a reasonable likelihood of bias as follows in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394:

> *The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded [sic] persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude"….*

[154] Therefore, the question to be asked is, "Would reasonable and right-minded persons, applying themselves to the question and thus obtaining the required information, have a reasonable apprehension of bias?" Or, based on the Federal Court of Appeal's language in *Canadian Arctic Gas Pipeline Ltd.* (Re), [1976] 2 F.C. 20 (C.A.), "What would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?"

[155] Although the Board is not a court of law, its proceedings are quasi-judicial. The principles and legal test that determine the concept of a reasonable apprehension of bias apply to the Board and its proceedings. The Supreme Court of Canada also discussed those principles as follows in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at para. 113:

> *113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire*

> *administration of justice… Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations.…*

[156] The onus of demonstrating bias, real or apprehended, lies with the person who alleges it. This is so because courts have recognized that judges and administrative decision makers will carry out their duties with integrity and impartiality. By virtue of the fact that they are decision makers, there is a strong presumption that they will carry out their duties with impartiality.

[157] In addition, in *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228, the British Columbia Court of Appeal raised the question of the nature of the evidence required to demonstrate an appearance of bias as follows:

> …
>
> *… An accusation of that nature … ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that … the person against whom it is made will not bring an impartial mind to bear upon the cause… suspicion is not enough.…*
>
> …

[158] The former Public Service Labour Relations Board applied this test in *Bialy*, *Nelson*, and *Singaravelu*. In those cases, it determined that a mere suspicion of bias in an administrative tribunal member is insufficient to conclude that he or she is biased.

[159] At paragraph 27 of *Singaravelu*, the following was determined:

> *[27] … a person seeking the recusal of a decision maker must demonstrate that, beyond mere suspicion and in all probability, a reasonable and well-informed person would believe that the decision maker is biased and would not decide the case fairly.*

[160] Applying that test, I will summarize the complainant's allegations and deal with each one separately.

A. Allegations of bias pertaining to procedural handling and the scheduling of the complaint

[161] The complainant alleged that a significant delay arose in the procedural handling and scheduling of her complaint, which imposed undue prejudice upon her case. She maintained that the Board's prolonged decision-making on procedural matters imposed barriers to her participation and to that of her witness. She did not provide details as to how her case was prejudiced.

[162] From the Board's perspective, the complaint was treated in the same manner as all other staffing matters before it. There were no delays in its procedural handling. If some occurred, the complainant did not demonstrate how she was prejudiced by them.

[163] As for her claim of unequal treatment in the granting of the respondent's request for change of venue, the respondent was not given any preferential treatment. Because of changes to party and witnesses availabilities, the Board changed the hearing location to Ottawa and allowed all witnesses to testify via WebEx. In relation to her claim that the Board provided technical assistance to the respondent, the Board did not provide any technical assistance to the respondent. The respondent utilised the PBC's facilities in Edmonton and used its own technical equipment to participate via WebEX. As mentioned before, the parties are responsible to ensure that they have all the proper equipment available to them to participate in the hearing.

[164] The complainant took issue with the fact that I imposed later-than-normal hours for the hearing days (10:00 a.m. to 7:00 p.m.) even though the Board was aware that she has small children and that she lived an hour from the hearing location. During the pre-hearing teleconference, I asked her if she was in a position to make arrangements for childcare for the two hearing days so that the hearing could complete. If she could not make those arrangements, I informed her to write to the Board and that we would schedule continuation dates.

[165] The complaint was filed in April 2017. A mediation was scheduled for February 2018. Finally, the complaint was scheduled for a hearing in August 2019. If the hearing on January 9 and 10, 2020, did not complete, the continuation dates would have been in July 2020. As discussed at the pre-hearing teleconference, my objective was to expedite the matter and complete the hearing within the two scheduled days. Staffing complaints are normally heard in two days. Neither the complainant nor her representative informed the Board that she had been unable to secure the necessary childcare or request that we proceed with the Board's usual hearing hours of 9:30 a.m. to 4:30 p.m. Moreover, witnesses testified in two different time zones, which also was a significant factor.

[166] She alleged that the Board's delayed decision on how her witness would testify prevented her from following the Board's accommodation request policy because she did not know what would be required of her witness, which made it impossible to

know the type of accommodation measures to request. With respect, I do not find this allegation credible. Nothing prevented her from submitting a timely accommodation request for her witness. As was mentioned, her representative was fully aware of the Board's accommodation request policy. When an oral hearing is scheduled, the expectation is that witnesses will be testifying orally.

[167] The use of affidavit evidence is the exception. Even if I had accepted affidavit evidence for the complainant's witness, the witness would have needed the proper equipment to be cross-examined, regardless of me denying her to testify by affidavit evidence.

B. Inappropriate comments and the complainant being prompted at the pre-hearing teleconference

[168] At no time did I act in a manner that was biased against the complainant or unduly favourable to the respondent. Any comments I made during the pre-hearing teleconference were nothing more than frank and forthright discussions of the relevant issues to be addressed at the hearing and an explanation of her burden of proof. It was fair warning to her that if she could not provide sufficient details and information about her discrimination allegations, she would not meet the burden of proof of establishing a *prima facie* case of discrimination.

[169] The discussions during the pre-hearing conference were about procedural matters, narrowing the issues, and the evidence to be presented. The complainant alleges that I persistently questioned her on her allegations of discrimination and forced her to provide testimony. That was not the case. Any questioning on my part was to serve the purpose of assisting her to ensure that she understood the burden that she had to meet and the evidence required to meet that burden.

[170] At all times, it was a sincere effort on my part to accommodate an under-represented complainant. Although she was represented, it had been apparent since the filing of her complaint that she was representing herself, and her representative offered little to no assistance preparing her for the pre-hearing teleconference, explaining the purposes of the settlement conference, submitting OPI requests in a timely manner, providing notice to the CHRC as required by the *PSEA*, or responding to the motion to dismiss and the respondent's request for particulars.

[171] Throughout this process, the representation consisted of purely forwarding all of the complainant's communications directly to the Board. She prepared all her submissions, requests, and responses on her own. Her representative would simply forward them to the Board. This was also exhibited at the hearing when the motion for recusal was presented.

C. The refusal to accommodate the complainant's witness

[172] Before and at the hearing, it was and became apparent that the complainant's representative did not take any measures or steps to ensure that her witness would be able to participate in the hearing. Although he has appeared before this Board with respect to several abuse-of-authority complaints and is familiar with the Board's processes on staffing matters, he did not make any requests for accommodating the witness before or at the hearing.

[173] As mentioned, in all the Board's correspondence about the hearing, the parties were repeatedly informed that witnesses and their appearances were the parties' responsibility. The complainant's representative did not take steps to contact her witness before the WebEx testing. During the pre-hearing teleconference, I suggested that he contact the USGE to obtain the required equipment for the witness to testify from her home. At the hearing, he admitted to not taking any steps to contact her.

[174] During the pre-hearing teleconference, the complainant informed me that her witness required accommodation. Without providing specific information on the witness's health issues, I asked the complainant to provide me with general information, which the Board could use to accommodate the witness. The complainant stated that her witness's main issue was her lack of stamina, and she was concerned about the length of time her witness would be required to testify. The complainant indicated that she would testify by affidavit and that she would be available to be cross-examined.

[175] Because she made serious discrimination allegations against the PBC's deputy head that involved matters of credibility, I indicated that I would not allow affidavit evidence. Although in relation to any matter before it, the Board has the power to accept any evidence, whether or not admissible in a court of law, including affidavit evidence, it is not a matter of right. The parties do not decide how a hearing will unfold and the manner in which it presents evidence. That is the role of the Board to

determine. I again denied her request to present affidavit evidence but informed her that I would ensure that her witness would receive any accommodations she needed. I informed her that it was not necessary for her to provide the Board with additional information about her witness's health and that I would ensure that the witness would receive all breaks necessary to allow her to participate in the hearing.

[176] At no point did I deny any accommodation measures for the complainant's witness or refuse to entertain such a request. The Registry went above and beyond the call of duty in its attempts to contact her to help her participate via WebEx. The complainant and her representative did not present an accommodation request pursuant to the Board's accommodation policy.

D. Soliciting a motion to dismiss

[177] As stated, at no time did I solicit the respondent to provide the Board with a motion to dismiss. In her form 7, the complainant provided no particulars in support of her allegation that the real reason she was not appointed to the position was that she was pregnant. The respondent made several requests in writing for the particulars of her discrimination allegations.

[178] At no time did I force the complainant to testify with respect to her discrimination allegations. The purpose of the pre-hearing teleconference was to narrow the issues, ensure that the hearing would unfold smoothly, and ensure that all the parties were aware of the allegations made and the evidence that would be presented to support those allegations. During the pre-hearing teleconference, it was apparent that she could not provide particulars or reasons for believing that she had been discriminated against. The respondent had already filed a motion to dismiss in June of 2017. In anticipation of the respondent's response, I asked if it intended to submit a motion to dismiss. Ultimately, as demonstrated in the letter decision on that motion and because the complainant finally provided details about her allegations, I determined that I would not rule on the motion at that time and that the respondent could present its motion to dismiss after she presented her evidence.

VI. Conclusion

[179] The allegation that I would not be able to decide the complaint fairly was based on false accusations, misrepresentations, and misconceptions. The complainant's representative filed no cogent evidence that could displace the presumption of

impartiality. I believe that a reasonable and right-minded person, well informed of all the facts, would conclude that there was no reasonable apprehension of bias on my part.

[180] Disqualification must rest either on an actual or a reasonable apprehension of bias. In light of all the facts laid out in these reasons, I strongly believe that a reasonable person would not conclude that I cannot adjudicate this matter with an open mind and without prejudice.

[181] The respondent made a motion to dismiss the complaint on the grounds that the complainant failed to appear and that she did not present any evidence to establish that the PBC's deputy head abused its authority in the appointment of the appointee. She did not appear, and her representative did not make any submissions on this motion. Given that the complainant has failed to present any evidence in support of her allegations, the complaint cannot be substantiated. For these reasons, the complaint is dismissed. The file is ordered closed.

[182] The Board makes the following order:

(The Order appears on the next page)

VII. Order

[183] The recusal motion is denied.

[184] The complaint is dismissed for lack of evidence. The file is ordered closed.

March 4, 2020.

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board