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Citation: 2020 FPSLREB 91

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

PAUL ABI-MANSOUR

Complainant

And

DEPUTY MINISTER OF THE DEPARTMENT OF FISHERIES AND OCEANS

Respondent

and

OTHER PARTIES

Indexed as
Abi-Mansour v. Deputy Minister of the Department of Fisheries and Oceans

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Patrick Turcot

For the Public Service Commission: Louise Bard

Written submissions filed August 19, September 4 and 9, 2020.

REASONS FOR DECISION

I. Background

[1] This matter involves four complaints made pursuant to s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13) alleging an abuse of authority in the application of merit. They relate to an internal advertised appointment process for several information technology positions classified at the CS-02 group and level (process number 14-DFO-NCR-IA-HRCS-102099). The process had four streams. Paul Abi-Mansour ("the complainant") challenged four appointments made in Streams 1 and 3. This decision is with respect to his motion to admit evidence after the hearing.

[2] On June 6, 2019, after the hearing of these complaints had ended but before a decision was rendered, the complainant requested 30 days to review a voluminous access to information and privacy (ATIP) package that he had received three years earlier but had misplaced. The time was requested to enable him to identify documents that he might ask the Federal Public Sector Labour Relations and Employment Board ("the Board") to admit as post-hearing evidence. The employer objected to the request, and the Public Service Commission (PSC) took no position.

[3] By a letter decision of August 5, 2020, the Board granted the complainant 10 days to review the package, identify the documents he wished to admit, and make his motion to admit them, which he did on August 19, 2020. On September 4, 2020, the employer responded to the complainant's motion. The PSC advised that it had nothing further to submit. On September 9, 2020, the complainant replied to the employer's response.

[4] The complainant submitted that the documents he wishes to have admitted come from the respondent and are, therefore, credible. They support the positions he took at the hearing and are highly relevant to the determination of this matter.

[5] In its response, the employer relied on *Whyte v. Canadian National Railway*, 2010 CHRT 6, which sets out the following three criteria to be considered before a tribunal exercises its discretion to reopen a hearing and allow a party to adduce

additional evidence (as confirmed in *Murray v. Canada (Attorney General)*, 2013 FC 49):

> …
>
> - *… the evidence could not have been obtained with reasonable diligence for use at the [hearing];*
> - *The evidence … if given, would [likely] have an important influence on the result of the case, although it need not be decisive; and*
> - *The evidence … must be apparently credible, although it need not be incontrovertible.*
>
> …

[6] The respondent argued that the complainant did not act with due diligence. He had the ATIP package since 2016 and had no reasonable explanation for failing to produce it at the hearing. He had ample time, nearly three years, to review the documents and prepare his case. He had misplaced the compact disc containing the documents and found it only after the hearing, while preparing for another matter. The respondent argued that it could not be held accountable for the complainant misplacing his documents.

[7] The respondent also submitted that the proposed new evidence would not have an important influence on the result of the case. It speaks to matters which were fully addressed during the two-and-a-half-day hearing and it provides no new information. The respondent's witnesses testified about the development of the selection process, the volume strategy (how it was applied and why it was implemented), and why the complainant's candidacy was eliminated. The complainant is attempting to relitigate issues about which he and the respondent's witnesses gave evidence at the hearing. He had the opportunity to cross-examine the respondent's witnesses with respect to these matters and did so at length.

II. Reasons for Decision

A. Due diligence

[8] The respondent argued the first element of the *Whyte* test (due diligence) in its initial objection to the complainant's request for time to review the ATIP package. Accordingly, the Board fully addressed this issue in its letter decision of August 5, 2020, granting that request.

[9] In summary, the Board found that the complainant had shown due diligence by making two requests for orders for the provision of information (OPI), which is the appropriate procedure to use to obtain disclosure in a staffing matter. Both requests resulted in orders to produce documents, which the complainant now seeks to have admitted as evidence, after discovering them in the ATIP package. The respondent did not disclose these documents and, in some cases, indicated that they did not exist. It had no credible explanation for this and simply stated that the documents were not in its staffing file. That explanation is not sufficient.

[10] Although the complainant was clearly not diligent in his management of the ATIP package, he was not obliged to be. Since he followed the appropriate procedure, he should not have been forced to have recourse to an ATIP request to obtain full disclosure.

B. Important influence on the result of the case

[11] While it is true that as the respondent submitted, evidence was adduced and its witnesses were cross-examined on these matters, it cannot fairly be said that the proposed exhibits contain no new information.

[12] In particular, the complainant should have had the opportunity to cross-examine the respondent's witnesses with respect to the concerns raised by Human Resources personnel about using asset criteria to eliminate applicants in the Stream 1 process.

[13] As well, the respondent previously advised that Justin Mundy had carried out a second review of the complainant's Stream 3 exam. Although it was twice ordered, no marks or comments from Mr. Mundy were disclosed. However, the ATIP package shows that the second reviewer was Etienne Beaule, who was never previously identified as having been involved in the process. His role as the second reviewer and his (redacted) comments about the complainant's exam were revealed to the complainant only through the ATIP package.

III. Conclusion

[14] The three elements of the *Whyte* test have been met, as follows:

1. The complainant was unable through due diligence to obtain the information before the hearing, because the employer did not disclose it.

2. Some of the documents are likely to have an important influence on the result of the case, specifically, those containing information about the decision to apply asset criteria in the screening process in Stream 1 and those containing information about the marking of the complainant's test in Stream 3.
3. The respondent has acknowledged that the proposed evidence is credible.

[15] *Whyte*, at paragraph 30, relies on *Vermette v. Canadian Broadcasting Corporation*, [1994] C.H.R.D. No. 14 (affirmed in [1996] F.C.J. No. 1274), which adopted the test noted earlier in this decision for admitting post-hearing evidence from *Gass v. Childs* (1958), 43 MPR 87 (N.B.C.A.). At paragraph 31, *Whyte* quotes from *Vermette* as follows:

> *Where an application to re-open is received after a decision has been rendered, the principles that should guide the exercise of this discretion are described by Sopinka and Lederman, The Law of Evidence in Civil Cases in the following manner at page 542:*
>
> *"Except in the case of fraud or surprise, the evidence must be newly discovered evidence which reasonable diligence could not have discovered during the trial, and it must be of such a character that it would have formed a determining factor in the result."*
>
> *Where the application to reopen is received prior to a decision being rendered, a broader discretion to reopen has been recognized. Sopinka and Lederman, The Law of Evidence in Civil Cases at page 541 suggest that a case may be reopened "where the interest of justice requires it"….*

[16] I find that even if the three *Whyte* criteria were not satisfied, given that the request was made before a decision was rendered, and given the lack of disclosure that necessitated the request, this evidence should still be admitted, in the interests of justice.

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

(The Order appears on the next page)

IV. Order

[18] The complainant's motion to admit post-hearing evidence is granted, in part. As the documents emanate from the respondent and the respondent has acknowledged their credibility, they will be admitted as evidence in this matter, without further proof.

[19] The documents to be admitted have been reproduced chronologically and are marked as PHE (post-hearing exhibit) 1 to PHE 6. The remaining documents do not meet the second *Whyte* criterion – they would not likely have an important influence on the result of the case, and are, therefore, not admitted.

[20] Given the admission into evidence of new documents, the parties will have the opportunity to examine any witnesses or adduce any additional evidence in relation to and arising from the new exhibits. The parties must advise the Board if they intend to exercise this option by October 16, 2020.

[21] The parties will also have the opportunity to make additional submissions with respect to what conclusions they would like the Board to draw from the new evidence. If neither party elects to examine witnesses or adduce additional evidence, the complainant may file his additional submissions by October 23, 2020. The respondent will provide its response to those submissions by October 30, 2020, and the complainant will provide his final reply by November 6, 2020.

October 13, 2020.

Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board