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*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

OMAÏMA RIZQY

Complainant

and

DEPUTY MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

and

OTHER PARTIES

Indexed as

Rizqy v. Deputy Minister of Employment and Social Development

In the matter of a complaint of abuse of authority under section 77(1)(a) of the
Public Service Employment Act

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour
Relations and Employment Board

For the Complainant: Herself

For the Respondent: Philippe Giguère, counsel

For the Public Service Commission: Louise Bard

Heard by videoconference,

October 14, 15, and 26, 2020.
(FPSLREB Translation)

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On March 17, 2017, Omaïma Rizqy, the complainant, made a complaint under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the Act”) with the Public Service Labour Relations and Employment Board alleging abuse of authority by the Department of Employment and Social Development (“the respondent”) in an internal appointment process. There are several files, due to the number of persons appointed to positions, but it is the same complaint. The complainant did not dispute the validity of the appointments.

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board to the Federal Public Sector Labour Relations and Employment Board (“the Board”).

[3] The complainant alleged abuse of authority by the respondent because according to her, there was bias in the assessment of her candidacy in both the interview and the references checks. For the reasons that follow, I find that an abuse of authority occurred due to bias in the appointment process with respect to the complainant.

II. Background

[4] The complainant testified, as did Laurène Gagné, who was then a senior official at Service Canada. She played a significant role in the appointment process. Ms. Gagné is now retired. Overall, the evidence was not contradictory.

[5] In November 2015, the complainant participated in a process for a services manager position at the PM-05 group and level (2015-CSD-IS-QUE-29102). In December 2016, she learned that she had failed two merit criteria, namely, “Engagement” and “Values and Ethics”. She requested an informal discussion to learn why she failed. The discussion took place in February 2017 with Ms. Gagné and Bertrand Duclos, the other assessor present at the interview.

[6] During the informal discussion, the complainant learned that her failure was due in part to the assessment made at the interview and in part to the supervisors’

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references. She received a mark of 7 out of 10 (6 was the pass mark) for the Engagement criterion in the interview, but the references caused her to fail this criterion. As for the Values and Ethics criterion, she received a mark of 4 out of 10 in the interview, and the references also caused her to fail.

[7] After the informal discussion, the complainant sent a long email to the selection committee detailing what she considered were the flawed parts of the process, particularly the weight given to the references from referees who were hostile to her and Ms. Gagné's bias against her candidacy. She requested an opportunity to supply names of other referees and asked that someone other than Ms. Gagné reassess her candidacy. The respondent acknowledged receiving the email but never replied to it.

[8] The complainant alleged that Ms. Gagné was biased throughout the process and that the respondent failed to correct the references issue. The two questions at issue in this dispute are the following: Did the respondent abuse its authority in how it dealt with the referees' references? Did the respondent abuse its authority by way of Ms. Gagné's bias? I will deal with these two issues separately, taking into account the adduced evidence, the parties' arguments, and the related case law.

III. Analysis

A. Did the respondent abuse its authority in how it dealt with the referees' references?

[9] First, abuse of authority must be defined. *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, is the leading case of the former Public Service Staffing Tribunal ("the Tribunal"), one of the Board's predecessors, on the concept of abuse of authority. It defines what abuse of authority consists of by reviewing established administrative law categories, as follows:

...

[70] As highlighted in the complainants' submissions, Jones and de Villars, supra, have identified five categories of abuse found in jurisprudence. As the learned authors note at page 171, these same general principles of administrative law apply to all forms of discretionary administrative decisions. The five categories of abuse are:

- 1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).*

2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).

3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).

4. When the delegate exercises discretion on an erroneous view of the law.

5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

...

[10] It is important to note that the Tribunal specified that the abuse of authority does not have to be intentional. However, the action alleged as an abuse of authority must be objectionable to the point that it is inconceivable that the legislator would have wanted the decision maker to exercise its discretion in that way. A mere error or omission does not constitute an abuse of authority.

[11] The *Act* gives the Public Service Commission, or the deputy head to whom it has delegated its authority, broad powers with respect to determining the required qualifications for a position (s. 31), the choice of process (s. 33), and the method of assessing candidates for public-service positions (s. 36). These powers must be exercised reasonably.

[12] In this case, it seems to me that the respondent refused to review the complainant's objections with an open mind and that it acted on inadequate material to determine that she did not meet the Engagement and Values and Ethics criteria.

[13] After passing the pre-selection and the written examination, the complainant had an interview, which she passed except for the issue of the Values and Ethics criterion. Ms. Gagné explained that even if they failed an interview question, the candidates still had a chance. It was possible that the references would raise the mark, despite the interview failure. In other words, the file was assessed as a whole to determine whether the candidate met the merit criteria.

[14] The candidates had to provide their most recent supervisors' names as referees. It was expected that any supervisors who were also candidates in the process could not provide a reference, out of concern for a conflict of interest. According to the complainant, this rule worked against her because both supervisors from the year

before the process were also candidates in the process, so they were excluded. Eventually, out of the list she provided, which included people who were candidates in the process, two referees were kept, Line Vaillant and Michel Riopel.

[15] At the hearing, the complainant submitted her performance evaluations from the two years before the process. The evaluations described an active participant who was engaged and interested in her work. In one evaluation, a conflict with one of the two referees could be perceived. It is impossible to judge who was right and who was wrong.

[16] A committee of two conducted the reference checks using a form. They called the referees and asked questions about the following criteria: Values and Ethics, Client Service Excellence, and Engagement.

[17] Based on the notes of the committee responsible for referees during the interview with Ms. Vaillant, a dual portrait of the complainant emerged. On one hand, she was very successful with her team, but on the other, she had a conflictual relationship with authority. In addition, according to Ms. Vaillant, the other team leads complained that the complainant did not listen and that she wanted to impose her ideas. With respect to ethics, Ms. Vaillant spoke about an incident in which the complainant consulted Labour Relations Services to find out whether an appointment with a mechanic could be considered a professional appointment within the meaning of the collective agreement. At the hearing, the complainant argued that all her requests to Labour Relations Services had solely to do with her employees' concerns.

[18] The interview with Mr. Riopel was also marked by contradiction. According to him, the complainant took good care of her team and was on top of things, but she was too authoritarian. She communicated well with her team, but the relationship with other team leads was more problematic. With respect to the Values and Ethics criterion, Mr. Riopel spoke of her difficulty with respecting her work schedule. At the hearing, she confirmed her conflicts with him on this issue, but she insisted on the fact that she had worked all the required hours. He ended the interview by stating that the complainant was "[translation] a character". "[Translation] She delivers, but ...".

[19] After the two interviews, the assessment of the committee responsible for references was as follows:

...

[Translation]

Values and Ethics

The candidate does not meet all the expected behaviours. Unfortunately, she broke several rules related to the values and ethics code: lack of respect for her managers several times, failure to respect her TL work schedule; despite several warnings from her supervisor, she did not change. Served her personal interests by intervening in support of her case with labour relations without her manager's authorization. She wanted to obtain paid leave for a personal family obligation, having her tires changed, when she was in a management position. Ultimately, the candidate does not lead by example in terms of values and ethics.

Engagement

Showed that she is able to mobilize her employees by virtue of her authority through team and individual meetings. However, she is unable to mobilize or engage her colleagues or supervisors because she focuses only on her ideas. She has demonstrated obstinate behaviour, even apparent aggression towards management committee members. Because of these abnormal behaviours, she isolates herself and loses credibility with her colleagues and supervisors.

...

[20] Ultimately, the complainant received marks of 2 out of 10 for the Values and Ethics criterion and 3 out of 10 for the Engagement criterion.

[21] In her email sent after the informal interview, the complainant suggested names of other referees, who were not chosen. She also outlined her achievements and successes; it significantly contradicted the referees' statements.

[22] The complainant alleged that the remarks were untrue. Ms. Gagné consulted both referees' manager, Anne-Marie Signori, who testified at the hearing.

[23] At the hearing, as she had to Ms. Gagné, Ms. Signori confirmed that both referees had spoken with her about their difficulties with the complainant, who did not deny the difficulties; quite the opposite. Her argument was that those difficulties gave rise to untrue statements. Ms. Signori could not confirm the referees' statements, only that there had been conflict.

[24] It is impossible for me to decide who is right, but I find that the selection committee was just as incapable of determining the veracity of the referees' remarks.

All that's left are the complainant's comments, which raise the issue that if her conduct was as poor as the referees alleged, there would have been traces of it somewhere in a letter of expectations, a disciplinary file, or a performance evaluation. Yet, there is nothing of the sort.

[25] I find it quite curious that the complainant passed the Engagement criterion question during the interview but that she failed that criterion based on the referees' replies, despite the record of her diverse contributions and successes, which was uncontradicted, even by Ms. Signori.

[26] The complainant was right to raise the issue of a lack of references for the year before the process, due to her immediate supervisors also being candidates in the process. Contrary to her opinion, I do not think that the respondent was wrong to refuse such references. Putting one candidate in the position of promoting or hindering another candidate is too delicate, given the person's interest in the position.

[27] The complainant did not report in advance her difficulties with the two referees, but nothing could have prepared her for their virulence against her. She might have expected them to highlight her accomplishments but not their negative perceptions. Ms. Vaillant conducted one of the performance evaluations adduced at the hearing. She described the complainant's integration into her new team, her energy, and her ability to motivate the team she was responsible for. So, it is difficult to understand why the complainant failed the Engagement criterion that she had already passed in the interview. The performance evaluation did not mention any communication difficulties.

[28] Ms. Gagné did not correct the references issue. She directed the entire process, including checking the references. In *Laviolette v. Commissioner of the Correctional Service of Canada*, 2015 PSLREB 6, the Board found that abuse of authority had occurred because the selection committee had made decisions despite a lack of information. The complainant questioned the veracity of the reference provided by the referee, and the committee failed to investigate.

[29] In its decision, the Board clearly stated that disagreeing with references is insufficient; other indicators are required. It emphasized in particular the importance of considering things that could cast doubt on the reliability of references, in the following terms:

...

[70] As the former Tribunal noted in Pellicore v. The President of the Canada Border Services Agency, 2010 PSST 23 at paras. 49-50, a referee's alleged bias does not necessarily demonstrate that the assessment board abused its authority, as it was not to the referee that the PSC delegated its appointment authority. Following is an excerpt from Pellicore:

However, in any event, a reference's alleged bias does not necessarily demonstrate that the assessment board abused its authority. The purpose of a reference check is to convey information that is used by the board in its assessment of a candidate's qualifications. References do not exercise any decision-making authority in the affairs of an assessment board and are therefore not expected to act without any bias, as is required of decision-makers [sic]

This is not to say that an assessment board should ignore any evidence that may call into question the reliability of the information provided by a reference.

[Emphasis added]

[71] According to Pellicore, an assessment board should therefore consider any evidence that may call into question the reliability of the information provided by a referee. As such, the Board finds that to determine that the assessment board abused its authority, the complainant must demonstrate that the assessment board had reason to question the reliability of the referee's observations.

[72] It therefore remains to be determined, in this case, whether the complainant has demonstrated that the assessment board had reason to question the reliability of the referee's observations.

...

[30] In *Hill v. Deputy Minister of Public Works and Government Services*, 2017 FPSLREB 21, the Board wrote the following at paragraph 63:

[63] Thus, the real question is the following: when a candidate communicates to an assessment board an apprehension that the reference provided by his or her direct supervisor, which is often mandatory, may be influenced by a tense relationship that exists between them, based on a series of events, should the assessment board agree to consider an alternate reference?

[31] In this case, the selection committee wondered about the negative nature of the references. On her own initiative, Ms. Gagné contacted Ms. Signori to validate the referees' observations. However, as the complainant indicated in her email after the informal discussion, Ms. Gagné's bias could be called into question. In my view, the complainant raised sufficient doubt in her email about her referees' assessments and

about Ms. Gagné's bias to oblige the respondent to reconsider the assessment of her candidacy.

[32] In the absence of a correction to a process that appeared highly prejudicial to the complainant, despite a record that contradicted her referees' remarks, I believe that the respondent abused its authority.

B. Did the respondent abuse its authority by way of Ms. Gagné's bias?

[33] From the start, it should be noted that Ms. Gagné played an outsized role in this matter, due to the size and structure of the process.

[34] Ms. Gagné explained that the process was huge (there were approximately 550 interviews), at the scale of the province of Quebec, and that it was to serve to create pools from which appointments could be made. Several steps were taken to ensure that the assessments were as consistent and impartial as possible.

[35] Several two-person committees conducted the interviews. Other such committees gathered and assessed the references. The same tools were used for the interviews and the reference gathering, but to ensure the greatest possible uniformity, a calibration committee was also created and tasked with reviewing all the results of the interviews and references to ensure a uniform assessment. Ms. Gagné played two roles in assessing the complainant's candidacy. She was part of both the committee conducting the interview and the calibration committee. When she received the rather negative references about the complainant, she decided to call Ms. Signori to validate what the supervisors said.

[36] In the interview, the complainant failed the Values and Ethics criterion question. It involved a scenario and was worded as follows:

[Translation]

One of your teams has had 4 different team leads over the past year. This is one of your most efficient teams.

When you introduced the new team lead 3 months ago and said that you wanted her closer to the employees, one of them expressed displeasure and stated that they were efficient and that they did not need monitoring. You hesitated but ultimately decided with your team to wait a while before acting.

Three weeks ago, the new team lead told you that she had noticed information officers arriving late or leaving early. She commented

on it to one of them, who responded quite curtly and brusquely that the employees were independent and efficient, that they made up their time as needed, and that they did not need anyone monitoring them. The team lead then increased her monitoring and noted that one of the senior officers almost never arrived on time, and she had no information on how he made up his time. The other regularly left before the end of the scheduled hours, without informing anyone or providing an explanation. She met with him that morning and asked him about it. He replied that he never took his breaks.

Since this is her very first team-lead position, she asks you for help, because she noticed that the situation seems to be the same in the other teams. She saw several employees take long meal breaks or leave early. She is uncomfortable and doesn't want to set a precedent for nothing because the other team leads have not spoken with her about it and do not seem concerned with the situation. However, she seriously believes that administrative action is required.

[37] The candidate was asked how she would address the situation and for her advice and actions. Recall that the scenario assessed candidates for the services manager position, which thus was the team-lead supervisor. According to the marking guide, the candidate's response should have included the following:

[Translation]

*Meet with the TL and review the facts with the TL. Ask the TL to:
Validate the previous and current situation.*

*Contact labour relations about possible steps that could be taken
Support my TL in planning and preparing an individual meeting
with the employee who responded curtly about respect between
colleagues (employee and TL)*

*I check with other SMs [services managers] and plan a meeting
with all TLs and suggest a reminder to employees about common
expectations*

I inform my director about the situation and the actions taken.

*Ensure a reminder by TLs and SMs with all employees to review
organizational values and ethics. Remind and explain expectations
with respect to respecting schedules.*

Individual fact-finding meeting with the employee

Specific expectations of the employee

Ongoing follow-up

Regular V&E review in team meetings

[38] According to the notes of the two committee members leading the interview, Ms. Gagné and Mr. Duclos, the complainant reportedly responded as follows (of course, the notes are in point form):

[Translation]

[Ms. Gagné's notes]:

...

(real) time with TL

better time for her

let her speak

Ask: when you say facts or perceptions

Pay attention to perceptions

Very efficient team. Wants (or not) to destabilize.

If real issue must act.

Reminder re: roles - Who are you? How do you want us to communicate? Way of operating? Leader? Are the employees satisfied with this mode?

[illegible]: from the beginning - explain Q - no accusations. Trust in the opposite.

not a climate of control, not a police state

But I have a role - 10 minutes late. My job is to explain the role, connection with section, [illegible]

stewardship, expectation

How did you address the employee?

in the employee's office, elsewhere

TL coaching need

spoke with TL myself. Testing the waters. Abuse or not. Tricks, tips for observing employees.

Subject in TL meeting. Collaboration.

How do you ensure the employees are on time? Breaks?

Reminder to employee - breaks

Cannot just

TL - other needs, potential solutions.

Consulted GS - Questions - Comments

How did they address the subject?

Recommendations of union - employee spokesperson, help find solution - LR.

Tone - if I were you, go back over the incident. Awkward (excuse), the art of expression. Wants to have cordial communications. How does he want to be approached? In my office, email, room. Must adapt.

Review it to clear the air. 1st point of contact - imp. role, not demobilize.

Attention - performance management.

Office - Interesting - Monitoring - Imp. to explain before doing it - not control, monitor, Accessibility. Opinion, respond Q. Org issues (e.g., not office)

Follow up with director and speak one-on-one.

TL - follow up with her. close eye, as team has gone through many changes - instability.

Government - change of TL, GS, procedures dir.

[illegible]

Attitude + look to the future, what can I do to adapt?

Work with TL - solution in her - how she identifies strengths/weak.

Lack of training, coaching.

Validate her need.

Performance issue, [illegible]

humility, acknowledge [illegible]

lend support

continuity

Vigilant

[Mr. Duclos's notes:]

Take a moment with the team lead and let her explain herself.

Perceptions or facts. Pay attention to perceptions.

Very efficient team, but if there is a values and ethics issue, action is required.

Examine her communications with her employees. If that has not been done, do it and establish a way of operating with the employees and provide feedback to the manager

Trust unless proven otherwise.

We're not in a control situation, but we have responsibilities.

Link with code and ethics. Monitoring that he worked 37.5 hrs.

See whether the TL needs coaching.

Talk to the other team leads about it. Do you see abuse.

Wants to collaborate with the TLs. How do you ensure that they are all on time.

Issue a reminder about breaks per the collective agreement.
Ask the TL if she has any solutions.
I could ask people from other lines [illegible].
Consult labour relations and the union, maybe in collaboration.
Incident with employee - try to get back to the employee
Might have been awkward.
Perhaps apologize to the employee. Must adapt and avoid tension.
Employees must have confidence and understand their roles and responsibilities.
Explain to employees before moving the team lead's workstation.
Reassure them and explain the [illegible].
I will speak with my director about it.
Follow up with the TL and consider that there have been 4 team leads.
Prepare employees psychologically "Don't be frustrated by the change. How our colleagues do it.
Work with the TL, does she need training and coaching.
[illegible] and challenges - acknowledge improvements, encourage them.

[39] To justify the mark of 4 out of 10 for that response, Ms. Gagné wrote the following:

[Translation]

Madam seems to have a bias in favour of her employees. Her support for her TL is not optimal in the sense that she questions her training and coaching (she even mentioned that if she was tactless, she needed to apologize). In her discourse, she references the union and labour relations, but the sense is that it is not really integrated. She [illegible] that employees must follow the collective agreement and the Code.

In conclusion, Madam's performance was slightly below the criteria. However, Madam does not manage the situation according to the expected criteria. She does not validate the facts or support the TL in planning and organizing a meeting. She checks with the other TLs, GSs and informs her director about schedules.

[40] At the hearing, Ms. Gagné testified that in her response, the complainant did not sufficiently support the team lead and seemed instead to be biased in favour of the employee. According to Ms. Gagné, she should have been entirely on the team lead's

side, and she should have brought her employees back into line by talking about the *Values and Ethics Code for the Public Sector*.

[41] According to the complainant, during the informal discussion, Ms. Gagné spoke about her almost-condescending tone. That version was confirmed at the hearing. In fact, Ms. Gagné found that the complainant spoke with too much assurance, which risked making others uncomfortable.

[42] The interview notes are extremely detailed for the first question, which involved a fairly complex scenario for which Ms. Gagné first gave the complainant 10 out of 10 but then reduced the mark to 9 “[translation] because she was too confident”, according to her testimony at the hearing.

[43] Ms. Gagné crossed paths with a manager in the section in which the complainant obtained a position that was being staffed for an indeterminate period (PE-3) as part of a second process conducted at almost the same time as the process in this case. In that second process, the complainant passed all the steps and obtained the position.

[44] The manager told the complainant that someone responsible for the appointment process (whom he did not name, but the facts show that it was Ms. Gagné) had told him about the complainant’s failure in the process for the position at the PM-5 group and level and had asked him all sorts of questions about the complainant, notably about how she had managed to obtain the position at the PE-3 group and level. The manager told Ms. Gagné that he was not the complainant’s manager, that additionally she had indeed passed the process, and that the entire section was very happy with her work.

[45] The complainant complained about this intrusion into her private life. An investigation within the department found a breach of confidentiality and invasion of privacy. The investigation confirmed what the manager said to the complainant.

[46] The informal discussion took place on February 16, 2017. The complainant was surprised at being offered an in-person discussion because she expected a phone call instead. One of her colleagues, who had requested an in-person discussion, had not been granted one.

[47] According to the complainant, Ms. Gagné told her that she had met her manager and that he had not seemed surprised at her failure in the PM-05 position process. Ms. Gagné appeared surprised that it was not the complainant's manager, even though the manager himself had so informed her.

[48] At the hearing, Ms. Gagné did not recall saying that the manager was not surprised at the failure, but her explanation of the conversation with the manager — she was worried about the effect the failure would have on the complainant, and she wanted her manager to support her — does not really align with the rest of the facts. It appears implausible to me to announce a failure to a third party and to ask questions about success in another process out of concern for someone's well-being, when the manager told her that he was not the complainant's manager.

[49] It also appears implausible to me that Ms. Gagné was concerned about the complainant's reaction to her failure to the point of discussing it with the manager, given that Ms. Gagné criticized the complainant — and continued to criticize her at the hearing — for having an excess of self-confidence. This incident appears to me to confirm Ms. Gagné's negative attitude towards the complainant.

[50] Ms. Gagné's notes, taken as part of the informal discussion, read as follows:

[Translation]

... Madam engages in limited introspection with respect to the interview. Although she failed the values and ethics skill in the interview, she considers that it was the references provided in bad faith that caused her failure.

Madam has no idea of her impact on her environment. She cried out of rage and ego during the informal discussion.

[51] In cross-examination at the hearing, Ms. Gagné agreed that she did not see the complainant cry. The complainant left the room and returned "[translation] with puffy eyes". Therefore, she deduced that she had been crying. As for the mention of ego and rage, Ms. Gagné stated that she had worked for 20 years in penitentiaries. She knew how to read emotions.

[52] I do not doubt that the complainant reacted emotionally in the informal discussion, during which Ms. Gagné told her that she had failed the interview because she had too much self-confidence and seemed to look down on others, and during which Ms. Gagné announced that she had indeed spoken of her failure with the

manager and that her referees agreed that she did not meet the Values and Ethics criterion. It is a big step from there to interpreting emotion in terms of rage, ego, and insensitivity by the complainant, which reflects a clearly prejudicial attitude.

[53] In the email addressed to the selection committee a few days after the informal discussion, the complainant requested that her candidacy be reassessed by someone other than Ms. Gagné. She wrote about Ms. Gagné's indiscretion in her email in that Ms. Gagné had spoken about her failure with a manager in her new section. Recall that despite a receipt notice, the email was not followed up.

[54] Judging by Ms. Gagné's behaviour throughout this process, including her negative assessment of a response that nevertheless met a number of the required factors, her breach of confidentiality, and her attitude at the hearing, I do not doubt that she took a dislike to the complainant in the interview. After the first question, when she was obviously struck by the ease with which the complainant expressed herself and organized her thoughts (spontaneously assigning her a mark of 10 out of 10, which she then lowered due to an excess of confidence), she hardened in her assessment of the Values and Ethics criterion question. This assessment seems incomprehensible to me. I am well aware of the fact that it is not up to the Board to conduct the assessment and that the employer can use any assessment tool, but the tool still must reasonably measure what it is intended to measure. The items in the complainant's response seem to me to substantially correspond to the expected items.

[55] In my view, Ms. Gagné's bias reaches the threshold of abuse of authority. The respondent structured the process to allow for a consistent assessment of a number of candidates. That said, it was a mistake to give the same person the power to assess and then to review the assessment. Ms. Gagné developed a bias in the interview; the references served to confirm her bias. Her conversation with the manager in the section in which the complainant had obtained a position was, and it cannot be characterized otherwise, malicious.

[56] In the complainant's email after the informal discussion, she reported Ms. Gagné's indiscretion and requested that another person assess her. She also requested that other referees be considered, because the referees' negative assessments did not correspond to the feedback in her performance evaluations and

from a number of other managers. The email remained unanswered. I think that the allegations in the email could have been considered more seriously.

IV. Remedies

[57] The complainant requested the following corrective measures in her complaint:

- a new assessment of her candidacy;
- the possibility of references from November 2015 to November 2016 from others than the referees;
- the denouncement of Ms. Gagné's actions;
- recommendations on a mechanism for checking references and using those references;
- compensation for loss of salary as a result of not being appointed to the PM-05 position; and
- apologies for the defamatory and derogatory statements about her.

[58] At the hearing, the complainant stated that she no longer wishes to participate in the process. She is content with the progress of her career since then. She simply asked for an assertion of her rights and recommendations from the Board for resolving this type of situation.

[59] It is clear that the Board cannot grant an amount for loss of salary or require the respondent to apologize. Therefore, the remedy in this case takes two forms, being a declaration that there was abuse of authority due to bias and a flawed process with respect to referees, and recommendations to ensure more objectivity in appointment processes.

[60] My recommendations are twofold, to take account of what I deem are the two main failures of the process, which are the importance granted to the referees, and the failure to consider the allegations based on the complainant's record.

[61] The *Act* allows the employer to use any assessment method it considers appropriate, according to s. 36, which reads as follows:

36 In making an appointment, the [Public Service] Commission [or the employer] may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

[62] On a review of past performance and accomplishments, the Board (and before that, the Tribunal) confirmed the possibility of using references as a source of

information to assess candidates in a staffing process. However, this case illustrates the problem that arises when using references to assess essential qualifications.

[63] The record of the complainant's past achievements and performance was mainly presented to me at the hearing through her performance evaluations. They are very positive, except for a few reservations, which still do not correspond to the highly negative tone of the provided references. The respondent did not resolve that contradiction. That is a mistake.

[64] It seems unfair to assess a candidate's essential qualifications using a questionnaire addressed to someone else. It is not the candidate who is assessed but instead the referee. A referee may be loquacious, taciturn, well disposed, or malicious, which is all independent of the candidate.

[65] In my view, references should be used only to help the hiring manager decide whether the qualified person is in fact the right person for his or her team; that is, who will meet the section's specific needs. Once candidates are qualified and put into a pool, it is completely appropriate for a manager to want to find out from the last manager about the candidate's specific qualities. Someone very independent, or instead, someone who loves working as part of a team may be desired. These are legitimate concerns, and there are grounds for asking questions.

[66] It appears less legitimate to me to decide that someone does or does not possess the desired skills (i.e., the essential qualifications) based on an external opinion when nothing is known about the referee. Once again, reference questionnaires assess the referee, not the candidate. Even if the candidate has all the required qualifications, he or she could fail because the referee does not provide examples, replies too briefly, or is still angry with the candidate over some past conflict. When the best referees cannot be questioned due to a conflict of interest, as in this case, the candidate is unfairly harmed in comparison to candidates who can call on the supervisors with whom they get along well. (In this respect, see *Hammond v. Canada (Attorney General)*, 2009 FC 570, in which the Federal Court allowed the judicial review of a Tribunal decision about the insufficiency of information provided by references.)

[67] Therefore, my recommendation would be to use references for final selection purposes, once the candidate is otherwise qualified, and not as a tool to assess whether the candidate has the essential qualifications.

[68] My second recommendation deals with the follow-up to the informal discussion, and more broadly, with how to deal with the concerns of a candidate who has failed. I understand that the disappointment of a candidate who has failed cannot be grounds for reassessing the candidate's candidacy. However, it may be in the employer's interests to avoid pointless procedures by seriously considering a candidate's challenge of the process when the candidate presents evidence that contradicts the selection committee's decision (in her email, the complainant broadly outlined her easily verifiable achievements). It is paramount that the concerns raised by the candidate be reviewed by someone other than a selection committee member, to ensure the objectivity of that second look. The candidate is always free to make a complaint, as was done in this case, which I would point out might be preferable for the employer to avoid.

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

(The Order appears on the next page)

V. Order

[70] The complaint is allowed.

[71] I declare that the respondent abused its authority when evaluating the complainant's candidacy as part of the process numbered 2015-CSD-IS-QUE-29102 due to the bias of the selection committee and the failure to correct the references issue.

February 2, 2021.

FPSLREB Translation

**Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board**