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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

MARSEL MUKA AND BART JUNIK

Complainants

and

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

and

Other Parties

Indexed as
Muka v. The President of the Canada Border Services Agency

In the matter of complaints of abuse of authority pursuant to sections 77(1)(a) and (b) of the *Public Service Employment Act*

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

For the Complainants: Themselves

For the Respondent: Adam Feldman, counsel

For the Public Service Commission: Louise Bard, representative

Heard via videoconference,
April 21, 2021.

REASONS FOR DECISION

I. Summary

[1] Marsel Muka and Bart Junik ("the complainants") were members of the Canada Border Services Agency (CBSA) holding substantive FB-05 positions at the times relevant to this matter. They had received above-level assignments on an acting basis and had enjoyed receiving exemplary performance reviews from their superiors. They were both stationed at Toronto Pearson Airport (YYZ) in Toronto, Ontario, which is one of the busiest border operations in the country and is unique in its sheer volume and complexity of activity.

[2] The complainants were disappointed when Nina Patel, their director ("the director"), who had just recently arrived to take over operations for the CBSA at YYZ, undertook a series of organizational changes and did not select them for two highly sought after FB-07 (chief of operations) developmental appointments on an acting basis.

[3] They alleged that the director was biased against them and that errors were made in the appointment processes that together constitute an abuse of authority in the application of merit and in the choice of a non-advertised process.

[4] After careful consideration, I conclude that I do not have sufficient evidence upon which a reasonably well-informed bystander could reasonably perceive bias on the part of the respondent generally or on the part of Ms. Patel in particular.

[5] While the evidence suggests that two defects arose related to one of the appointments, I do not find them of any real consequence and do not consider that they constitute an abuse of authority.

[6] Accordingly, I dismiss all the complaints.

II. Background

[7] Ms. Patel presented as professional, focused, and well organized during her testimony which I found to be credible.

[8] She testified that CBSA's national headquarters recruited her for a director position at YYZ with a clear and strong mandate for significant change.

[9] She explained that many organizational and operational changes at YYZ were urgently required based in part upon repeated negative feedback from stakeholders, such as the airlines that operate at YYZ, as well as the airport authority itself (GTAA).

[10] The director explained in great detail how the many changes she was tasked to implement required a culture change for the staff and the management team. She approached staffing appointments from the perspective of the culture she was working to achieve and of the urgent changes required. She also described a tragic situation as a "critical workplace incident", which occurred just before she arrived.

[11] She testified to the dire consequences this critical incident had upon the health and wellness of the staff and the resources that had to be dedicated not only at YYZ but also drawn upon from across the country to help the staff get through the incident and build a team focused upon the many organizational changes mandated by CBSA's national headquarters.

III. Analysis

A. The law

[12] Section 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*") provides that a person in the area of recourse for an internal appointment process may make a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board") that he or she was not appointed or proposed for appointment because of an abuse of authority in the application of merit.

[13] Section 77(1)(b) states that that person may also make a complaint that the Public Service Commission committed an abuse of authority in choosing between an advertised and a non-advertised internal appointment process.

[14] The complainants relied upon both paragraphs of s. 77(1) in their allegations.

[15] The complainants had the burden of proving that on a balance of probabilities, the respondent abused its authority (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49 and 55).

[16] Section 30(1) of the *Act* states that appointments to or from within the public service must be made on the basis of merit, and s. 30(2)(a) states that an appointment is made on the basis of merit when the person to be appointed meets the essential

qualifications for the work to be performed, as established by the deputy head, including official language proficiency.

[17] "Abuse of authority" is not defined in the *Act*; however, its s. 2(4) offers the following guidance: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

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

[19] In *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 21 and 38, the Federal Court confirmed that the definition of "abuse of authority" in s. 2(4) of the *Act* is not exhaustive and that it can include other forms of inappropriate behaviour.

[20] As noted in *Tibbs* and as restated in *Agnew v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 2 at para. 95, an abuse of authority may involve an act, omission, or error that Parliament could not have envisaged as part of the discretion given to those with delegated staffing authority.

[21] Abuse of authority is a matter of degree. For such a finding to be made, an error or omission must be so egregious that it could not have been part of the delegated manager's discretion.

[22] The Public Service Commission (PSC) was a party to these complaints by function of the *Act*. Their representative participated in the case management conferences and provided submissions on related law and policy. However, the PSC took no position on the merits of these complaints nor the allegations contained therein.

B. Allegations

1. Non-advertised appointments

[23] The complainants claimed that the respondent unfairly chose to use its authority granted in the *Act* to make non-advertised appointments. The complainants cited no evidence directly related to the choice of process to support this allegation.

[24] However, they made a broadly based allegation of bias against the respondent, which I will consider in support of this allegation. Bias alleged specifically against Ms. Patel will be analyzed later.

[25] Ms. Patel issued a written call for expressions of interest in advance of the two appointments at issue. Both complainants replied in the positive, stating their strong interest.

[26] Counsel for the respondent noted the fact that the director solicited expressions of interest from FB-05 staff to assist her consideration of all the relevant appointment opportunities on an acting basis.

[27] Counsel noted the very well and regularly cited authority on this topic, *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6, which found as follows:

> …
>
> *32 Neither the PSEA nor PSC's* Appointment Policy *guarantees an employee a right of access to every appointment opportunity. The PSC expressly promotes the application of reason and discretion with respect to the value of access and appointment decisions.*
>
> …

[28] Counsel also noted that the Board recently affirmed this again in *Dhalla v. Commissioner of the Correctional Service of Canada*, 2018 FPSLREB 12, in which Adjudicator Daigle found as follows:

> …
>
> *44 Section 33 of the* PSEA *is clear that the PSC or its delegate, in accordance with s. 15(1), may choose an advertised or non-advertised process to make an appointment. It reads as follows: "In making an appointment, the Commission may use an advertised or non-advertised appointment process."*
>
> *45* ***In the circumstances, the complainant cannot allege abuse of authority simply because a non-advertised process was chosen****. He has to prove that the decision to choose a non-advertised process constituted an abuse of authority.*
>
> …
>
> *48 I find that the decision to choose a non-advertised process was well explained and documented. Mr. German made it clear that the respondent needed to proceed quickly. It chose to select someone from the pool of qualified candidates that had resulted from the recent EX-02 national process for wardens and to assess that person, Ms. Turi, against the "Statement of Merit Criteria" for the*

> *ADCIS position. She was found qualified. Mr. German also considered the fact that her appointment addressed employment equity representation at the most senior levels of the regional management team for the CSC's Pacific Region. The respondent considered this choice of process the most appropriate course of action and prepared adequate documentation to support its decision.*
>
> *49 The complainant has not established that proceeding that way was unreasonable. The choice of process was within the parameters of legislative and policy requirements.*
>
> *50 Furthermore, s. 30 of the* PSEA *provides as follows that there is no need to go through a selection process and interview many people to make an appointment:*
>
> > **30(4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.**
>
> [Emphasis added]

[29] I agree with the Board's reasoning in *Dhalla*. In this case, I also find that the decision to choose a non-advertised process was well explained and was within the parameters of the legislative requirements. The complainants did not otherwise establish that proceeding by way of a non-advertised process constituted an abuse of authority.

[30] Ms. Patel's testimony established that the CBSA's operations at YYZ faced several challenges and that she felt that she needed stable leadership during these changes.

[31] She testified that any potential rotation of appointments on an acting basis in the FB-07 positions at issue could have had a significant and deleterious impact on her efforts to maintain a consistent, focused approach to delivering client outcomes and supporting staff after the critical incident.

[32] The complainants adduced evidence and argued that Ms. Patel ushered in many changes to the organization and suggested that this undermined her statement that she sought stability in her appointments.

[33] Ms. Patel replied to this in cross-examination and clarified that indeed, organization change had been mandated by the CBSA's national headquarters but that this change required stable leadership, which she sought to create and maintain through the two appointments on an acting basis at issue in this hearing.

[34] Ms. Patel provided clear and compelling testimony as to the operational needs supporting a non-advertised process for the two appointments. Her testimony was supported by emails contained in exhibits that she had sent to the same effect on January 27 and 31, 2017.

[35] While not being required to do so, she solicited interest from relevant members of staff to allow them to declare interest in appointments on an acting basis.

[36] Ms. Patel testified that she received approximately 15 replies to her solicitation of interest for above-level appointments on an acting basis. She stated that almost every one of those who replied was offered such an opportunity, other than 2 or 3, and she explained *bona fide* reasons why they were not offered one.

[37] Part of her justification for the acting extensions was that there was no current pool of candidates and that all persons that expressed interest in acting would be given opportunities.

[38] The complainants say this is not true and that neither of them was given such a meaningful acting opportunity. However, Ms. Patel testified and pointed to some human resources records of the respondent to show that each complainant received such offers.

[39] She also stated that she personally provided recommendations for each complainant so that each could receive assignments that he had sought.

[40] The facts before me show that Ms. Patel's reasoning on the choice of process was eminently reasonable, as the appointments were linked to legitimate operational needs of the organization.

[41] Accordingly, I dismiss this allegation.

2. Appointee Stergulc was not qualified for his appointment, which meant that his extended appointment lacked merit

[42] The complainants pointed to evidence that established that Mr. Stergulc wrote the first draft of his narrative assessment, which the respondent relied on to justify his non-advertised appointment.

[43] Ms. Patel testified that this was common practice, that she carefully reviewed the draft he provided, and that after making some changes to it, she finalized and signed it and accepted responsibility for it.

[44] The complainants also took issue with some of the statements within the narrative and pointed to their own testimony which they suggested showed false statements in the narrative.

[45] Mr. Muka testified that in fact, he had led a YYZ initiative that Mr. Stergulc took credit for "spearheading" in his narrative.

[46] When challenged with this fact in her cross-examination, Ms. Patel stated that while Mr. Muka was indeed responsible for the project at issue, Mr. Stergulc's narrative might have referenced continuing work on the project after Mr. Muka had moved to a different position at YYZ.

[47] The complainants also challenged Ms. Patel on another stated accomplishment listed in Mr. Stergulc's narrative and suggested that in fact, it was related to work performed after the narrative was written. In the same vein, the complainants argued that the assessment of Mr. Stergulc's performance as "excellent", as expressed by Ms. Patel as part of her selection decision to extend his acting appointment, did not reflect his actual performance.

[48] The complainants established that Appointee Stergulc received a performance appraisal from Ms. Patel that rated him as "succeeded - (minus)" in his duties in the FB-07 role on an acting basis. They cited a dictionary definition which suggested that "merit", as required for an appointment in the *Act*, was related to successful achievement.

[49] The implication was that the performance assessment suggested that Mr. Stergulc lacked success and thus did not merit the appointment, thus causing an abuse of authority as s. 30 of the *Act* requires that appointments be based upon merit.

[50] The relevant human resources documents state that this scoring means the following:

> *Performance **meets some** but not all expectations.*
> *The employee demonstrates the potential and motivation to achieve their work objectives; however, occasional lapses have*

> *been observed during the performance management cycle. Performance results indicate a* ***need for improvement*** *or development in some areas.*
>
> [Emphasis in the original]

[51] When challenged with this performance assessment in her cross-examination, Ms. Patel replied that the rating of "succeeded - (minus)" in no way suggested poor performance but rather reflected the reality of the person being in a relatively new and senior position.

[52] She explained that she considered it normal for a person faced with such challenges and developing and learning new skills and duties to receive such a rating while still doing well in the position.

[53] The complainants pointed to evidence of their own exemplary performance ratings and rapid career advancements (under previous senior management at YYZ), which included high-profile, important assignments. Thus, suggesting that they were more deserving of the FB-07 appointment than was Mr. Stergulc.

[54] Mr. Muka testified that before Ms. Patel's arrival, he had received chief-of-operations duties on an acting basis for lengthy periods and that he had received excellent performance assessments from doing so.

[55] Years ago, the federal government moved away from scoring candidates and awarding appointments based upon the highest score. Nothing in the evidence suggested that Mr. Stergulc did not meet the essential qualifications for the work to be performed as required by s. 30(2)(a) of the *Act* and as listed on his *Notice of Acting Appointment*.

[56] Nor did the fact that Ms. Patel asked the appointees to write the first draft of their narratives. She occupied a demanding position and undoubtedly works long hours. Using such techniques as having others prepare a first draft of their narratives for her to review and approve makes eminently good sense.

[57] The complainants cited the decision of the Public Service Staffing Tribunal (PSST) in *Patton v. Deputy Minister of National Defence*, 2011 PSST 8, which found that an abuse of authority occurred due to a failure to assess the appointee against an essential qualification that was stated in the statement of merit criteria.

[58] They also cited *Robert v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24, as authority for when errors and recklessness are found to have led to a finding of abuse of authority.

[59] The dispute over whether an exaggerated claim was present in Mr. Stergulc's narrative was not clearly established in evidence. I don't even find the allegation itself, even if proven, necessarily amounts to anything of concern with respect to whether the appointee meets the essential qualifications for the work to be performed in this case.

[60] I am not impressed that any one of these allegations and pieces of evidence or all of them taken together are persuasive of an abuse of authority.

[61] While the complainants diligently researched Board jurisprudence to rely upon in argument, I find that the facts established in the evidence before me are different, thus rendering the many cases cited by the complainants as less than persuasive.

[62] For the reasons I have just noted, I reject the allegations of abuse of authority in the application of merit in Mr. Stergulc's appointment.

3. Ms. Szplitgeiber was not qualified for her appointment to a bilingual position, and procedural errors occurred in how the respondent dealt with this, which caused an abuse of authority

[63] The evidence established that shortly after Ms. Szplitgeiber's appointment on an acting basis at issue, the respondent became aware that her bilingual language certification, which required a periodic renewal, had expired.

[64] Ms. Patel was then advised that steps would have to be taken to move Ms. Szplitgeiber to a unilingual position at the same level or to have her recertify her language skills for a reappointment.

[65] Ms. Szplitgeiber did recertify her language credentials and was then reappointed to her bilingual position. An email from Human Resources (HR) was cited in evidence that advised Ms. Patel that it would require issuing another notice of appointment, with the concomitant recourse available to staff members wishing to challenge it.

[66] Ms. Patel acknowledged all this and testified that at all times, Ms. Szplitgeiber was fully functional in both official languages. When challenged in cross-examination that Ms. Szplitgeiber's reappointment, once her language credentials were re-

established, failed to include the requisite notice and opportunity for recourse, she testified that she had thought that HR would have taken care of it.

[67] The complainants submitted that all the actions related to Ms. Szplitgeiber's language credentials were errors contrary to the *Act* and that they should be found to have been an abuse of authority.

[68] They noted the PSST's decision in *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 21, as authority for the proposition that changing essential qualifications and basically making an appointment process fit one desired candidate does not result in an appointment based upon merit and constitutes an abuse of process.

[69] The complainants also cited the PSST's decision in *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 7, which found that an appointment process lacked transparency, did not properly adhere to appointment process rules, and showed bias as it was designed to favour one person, thus showing personal favouritism.

[70] The complainants skillfully noted the administrative law rule as enunciated in *Tibbs* that a delegate of statutory authority must exercise that authority within the bounds of what Parliament could have foreseen as being within its delegation. I have kept this in mind in my careful review of all the allegations in this decision.

[71] I disagree with the complainants' submissions.

[72] Ms. Szplitgeiber was moved to an already existing, vacant English essential position. The notice of appointment was posted following this move, with the English essential requirement. The essential qualifications for the English position were not modified and, in fact, they are the same as those of Mr. Stergulc. There is no allegation or evidence suggesting that Ms. Szplitgeiber does not meet those essential qualifications.

[73] Unlike the situations in *Ayotte* and *Beyak*, the evidence does not suggest that the respondent intended to appoint Ms. Szplitgeiber regardless of whether she met the essential qualifications for the position; or that the essential qualifications were tailored to her without regard to the actual requirements of the position.

[74] The Board has found in the past that a failure to provide timely and appropriate notification can constitute serious carelessness and neglect, and can support an allegation of bad faith and abuse of authority (see for example, *Rajotte v. President of the Canada Border Services Agency*, 2009 PSST 25; and *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24).

[75] However, failing to provide this notification does not, in and of itself, amount to an abuse of authority (see *Brown v. Deputy Minister of National Defence*, 2008 PSST 5; and *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 44).

[76] In this case, there is no evidence to establish that any failure to provide a separate notification once the appointee was moved back to a bilingual position amounted to more than an error, as explained by Ms. Patel.

[77] The evidence clearly establishes that Ms. Szplitgeiber was qualified in all respects and that she performed her duties in both official languages.

[78] Ultimately, while some errors may have been made in the appointment process, taken as a whole, the errors are not of a serious nature nor indicative of wrongdoing that could constitute an abuse of authority.

[79] The matters identified by the complainants speak to their studious research skills but are without consequence in the broader picture of the *Act* and delegated authorities to make appointments under it.

[80] I reject the allegations that the matters just noted and related to this appointment amount to an abuse of authority.

4. Bias

[81] The complainants made two separate allegations of bias. An allegation, especially when made directly against one's manager, is serious as it necessarily implies a lack of professionalism in that person.

[82] I will assess them together for ease of reference.

[83] The complainants broadly alleged bias against the respondent on the very thin suggestion that they were far-superior performing members of CBSA staff when

compared to the appointees; therefore, there must have been bias. This implied that no other valid reason could explain them being passed over for the appointments at issue.

[84] The complainants also sought to establish that Ms. Patel passed them over for an above-level appointment on an acting basis.

[85] Mr. Muka's written statement of fact tendered in advance of the hearing contains several reports of discussions with Ms. Patel that are concerning and that are quoted as follows in their entirety:

> …
>
> *Though she and I met once to discuss a file in October, I had not met with Ms. Patel to discuss my performance or my career until November 1, 2016. During this meeting,* ***Ms. Patel, who didn't know me and had only briefly met me once before, raised concerns about my relationship with the staff and some of the rumours she had heard about me. Without providing me with any evidence or specific examples, she told me that she believed I was responsible for the poor morale in the district****. When I attempted to tell her my side of the story, about how I was vilified and blamed for things for which I was not responsible,* ***Ms. Patel did not take note but remarked "there was still hope"*** *for me. At this time, Ms. Patel offered me an assignment as Superintendent of a new unit which would be responsible for "projects".* ***Ms. Patel did not want me to work "the line" anymore and thought this would be my opportunity to redeem myself.*** *It was unclear to me what I had to be redeemed from. Admittedly, I did not feel like I had much of a choice in the matter. Ms. Patel made my position sound as if I would not be permitted to return to the regular operation. Further to this,* ***Ms. Patel said she would still "let [me] travel to Amsterdam",*** *leading me to believe that this particular opportunity had, at some point, been in jeopardy as well.*
>
> *Once I returned from Amsterdam, I began working on my new team as the only member of it, reporting to Ms. Jennifer Nicholson, Chief of Operations. I was later joined by another Superintendent, Mr. Darryl Dalton.*
>
> *On November 21, 2016, Ms. Patel sent a "call letter" for Superintendents who wished to be considered for acting opportunities in the district. Ms. Patel indicated that the management team was "committed to assisting employees with their career mobility aspirations, by providing access to employment opportunities including acting appointments, through transparent communication." This was an open-ended application process with no deadline. Having met all of the requirements listed in the poster, I submitted my application following the instructions on November 23, 2016. I was not offered any opportunities as a result of this call letter.*

I continued my assignment in Projects, working first for Ms. Nicholson and, when she went on leave, Ms. Maria Pacheco. My relationship with Ms. Nicholson was productive, though I felt that Ms. Patel had tremendous influence in Ms. Nicholson's general perception of me. I continued to give my best efforts at work, achieving several regional and national objectives during my tenure.

Though we co-existed professionally, my relationship with Ms. Patel did not improve from the November 1st meeting. ***News of the November 1st meeting was spread by Ms. Patel to my colleagues and even subordinates. She told members of the customs and immigration union (CIU) that she put me in my place and "banished [me] to the basement", not being permitted to be on the floor with the staff. She created the perception that my assignment was my punishment.***

Once I filed this complaint with the Board, Ms. Patel began to eavesdrop on my conversations *with Mr. Bart Junik, my co-complainant, as well as those I had with other persons unrelated to the complaints. On more than one occasion, after I had met one of the chiefs of operations for coffee,* ***Ms. Patel approached that Chief and asked her to inform on what I had said about Ms. Patel and whether I had said anything negative about her.*** *This* ***happened at least twice*** *during 2017. In addition, while I shared my office with my colleague, Mr. Darryl Dalton, Ms. Patel, on at least one occasion, asked him to leave the room while I was still inside and asked him what I was talking to Ms. Pacheco about. Ms. Patel never directly asked me these questions.* ***I am aware of rumours she spread about me, and engaging in gossip with officers regarding my personal and professional life****. She began to give credence to the CIU's labelling of my group of friends as the "Fab 5" and often referred to this group in front of me, contributing to the* ***CIU's bullying behaviour towards me.***

The "Fab 5" as [sic] a term which CIU had coined in a ***derogatory*** *way to refer to myself and four (4) other Superintendents in the District. Due to our performance excellence, a small group of Superintendents, myself included, had been recognized in the past with developmental opportunities. However, this also came with more labour relations work which meant, of course, more friction with the union. Given the union's position, they began to label the high achieving Superintendents in a derogatory fashion, with terms like "Fab 5", meant to distinguish us and treat us different from the rest. I wasn't alone in this group. None of the other members of this group were given opportunities during Ms. Patel's tenure either.*

In addition, ***Ms. Patel expressed displeasure with my previous assessment for 2015-2016, in which I achieved the score of surpassed for my outstanding performance****. Yet* ***she never held these discussions with me directly****. Nor did she make any attempts to seek out information regarding my performance or behaviour from my previous directors, Ms. Doxey and*

Ms. Durocher. ***She made up her mind about me strictly on rumours and gossip*** *she heard about me and the "Fab 5" and never sought to corroborate or negate the rumours. Instead, she fuelled them.*

During 2016-2017, Ms. Patel offered acting opportunities even to individuals who had not expressed interest in acting assignments, such as Mr. David Berndt. Mr. Berndt was offered an opportunity and subsequently told to put in his interest in writing. Yet I was never offered. In fact, during January 9 – 13, 2017, when my manager Ms. Nicholson took leave, I wasn't even offered an acting opportunity on my own team – instead, Mr. Marko Stergulc [sic] was parachuted in for several days to be the chief for projects. This made me feel like I had done something wrong – despite my stellar assessments and previous experience, I was not considered even for a few days of acting simply because Ms. Patel had decided that I should not have any opportunities.

Although she never asked me to provide my version of the events which led to her creating an erroneous opinion of me, I did provide her with some personal background on March 31, 2017 which gave significant insight into what made my reputation in the district. ***Ms. Patel asked me what she was expected to do with the information, and said I didn't want anything – I just wanted her to be aware to get a better understanding of things from my perspective.*** *This was something she should have done without my asking, in my opinion. But she hadn't. And to this day, I don't know what she did with that information. She never mentioned it again.*

Not seeing a positive future in my district, on October 31, 2017, I made an application for an acting opportunity at the FB-06 level with Headquarters. I then went on a five week vacation and, when I returned, I was told by Ms. Patel that I had been offered the job and suggested she had accepted on my behalf. And so, on December 10, 2017, I began my assignment with Headquarters which has led to the position I now hold.

I have had an outstanding 15 year career with the CBSA with several significant accomplishments. By all accounts, I am an exemplary employee and manager. My performance assessments from 2014 to 2018 are below. Since 2018, I have surpassed my expectations for both 2019-2020 and 2020-2021. I am not an average employee.

Year	***Work Objectives***	***Core Competencies***	***Overall Rating***
2014-2015	*Succeeds +*	*Succeed*	*Succeed*
2015-2016	*Surpassed*	*Surpassed*	*Surpassed*
2016-2017	*Succeed +*	*Succeed*	*Succeed*
2017-2018	*Succeed +*	*Succeed +*	*Succeed +*

My assessments include things like: "highly valuable member of the management team", "excellent management skills", "extremely effective", "performed excellently", "great leadership role", "works with new superintendents to provide mentorship and guidance",

> *"excelled", "good communicator […] very detail oriented", "strategic thinker", etc. In 2016 I was recognized for my work on a project with a Regional Director General Award for Innovation. In 2018, I received the District Director's Award for Partnership. I have received two (2) Above and Beyond Awards from the President of the CBSA (2016 and 2020). I imagine this is the type of person the federal public service would want to promote. If appointments are based on merit, this sounds like a good candidate for a promotional appointment.* ***Yet I was never considered****.*
>
> *During a meeting which took place between me and her on December 20, 2017,* ***I asked Ms. Patel if she thought I would make a good chief. She said she couldn't answer because she had not had the opportunity to see me in that role "because of stuff that's gone on". It was never clear to me what had gone on, but it appeared to me that Ms. Patel had made a decision not to promote me without considering my qualifications, my assessments, my references or my experience.*** *I was obviously interested in the position – I expressed interest in it in writing at least twice. I was obviously qualified given my assessments, my experience and my skill set. What I can't explain is why it didn't happen for me or what the "stuff that's gone on" is.* ***I can only conclude this references Ms. Patel hearing rumors about me and making up her mind about me based on those, rather than my merit. And without ever having been given a chance to properly explain my side of the rumours, I never had a fair chance to advance in my career while Ms. Patel was my Director.***
>
> [Emphasis added]

[86] Mr. Junik addressed the same allegation of bias related to Ms. Patel. He wrote the following in his statement of fact:

> …
>
> *From July of 2013 I worked as a superintendent on a variety of shifts at POD, in many cases on late or overnight shifts during which I was responsible for a large portion of the CBSA's operations at POD. During my time as a superintendent I was gradually assigned duties which expanded my depth and breadth and broadened my managerial horizons. My attention to detail, knowledge and discretion were relied upon in many cases as I was often assigned labour relations files which necessitated careful investigations and determinations of culpability. Prior to Director Patel's arrival, I was selected for many developmental opportunities, often exceeding those offered to my colleagues, based on my performance and abilities. I was assigned to coordinate district scheduling, district leave planning for multiple peak leave periods, provide intermittent acting chief of operations coverage, work in the terminal operations superintendent role and worked on the development and successful implementation of the*

international to domestic baggage transfer program in the district, which lead to a Regional Director General's award for innovation.

During Director Patel's tenure at POD, on November 29th, I brought forward an initiative to better approach the integration of new employees in the District which was not acted on. ***Director Patel noted that she was concerned that during my presentation of the proposal I mentioned that I did not feel engaged****. Director Patel stated she would welcome the opportunity to discuss but ultimately, I was not offered any new taskings or developmental opportunities, despite my eagerness to develop and advance my career.*

On multiple occasions I rose to the challenge, during Director Patel's tenure, ensuring that even during times of crisis or great challenge, CBSA operations at the largest port of entry in the country continued without interruption. I received praise from superiors and colleagues alike for my ability to coordinate operations, see the bigger picture and for performing at a level exceeding what is expected.

On November 21, 2016, Ms. Patel sent a "call letter" for Superintendents who wished to be considered for acting opportunities in the district. Ms. Patel indicated that the management team was "committed to assisting employees with their career mobility aspirations, by providing access to employment opportunities including acting appointments, through transparent communication." This was an open-ended application process with no deadline. Having met all of the requirements listed in the poster, I submitted my application following the instructions on November 24, 2016. I was not offered any opportunities as a result of this call letter. During 2016-2017, Ms. Patel offered acting opportunities even to individuals who had not expressed interest in acting assignments, such as Mr. David Berndt. Mr. Berndt was offered an opportunity and subsequently told to put in his interest in writing.

It is my belief that Director Patel formed an opinion of me based on hearsay and rumours*, stemming from discussions with members of the union local. During my time as a superintendent, a number of complex and difficult labour relations files were assigned to me by my superiors, which involved senior members of the local union executive. I did not seek these files, but once assigned I acted to the best of my ability and assessed culpability in situations of misconduct. It is during this time that the term "Fab 5" began to see use in the district. The "Fab 5" as a term which CIU had coined in a derogatory way to refer to myself and four (4) other Superintendents in the District. Due to our performance excellence, a small group of Superintendents, myself included, had been recognized in the past with developmental opportunities. However, this also came with more labour relations work, as stated above.* ***Given the union's position, they began to label the high achieving Superintendents in a derogatory fashion, with terms like "Fab 5", meant to distinguish us and treat us different from***

> ***the rest. I wasn't alone in this group. None of the other members of this group were given opportunities during Ms. Patel's tenure either.***
>
> …
>
> [Emphasis added]

[87] At this juncture, I note that the complainants' suggestions that Ms. Patel did not offer them opportunities to act in positions above-level, despite their written expressions of interest, excellent qualifications, and career development plans that were consistent with such opportunities, were found not entirely accurate.

[88] During the hearing, both complainants clarified these claims by stating that in fact, they were offered such assignments on an acting basis as established by documents provided by the respondent.

[89] However, they explained during their *viva voce* testimonies that the opportunities they were offered were not meaningful in either their substance or their brief durations.

[90] Ms. Patel testified that in fact, she had recommended both complainants for positions that they had sought after her arrival at YYZ and after they were passed over for the two positions at issue in this case. In her cross-examination, she denied that these recommendations or any other of her actions were intended to "get the complainants out of Pearson."

[91] The more serious allegation directed personally at Ms. Patel also involved the testimony of a co-worker, Kris Chartrand. He has enjoyed a lengthy and successful CBSA career and has been promoted to many senior management positions at YYZ.

[92] He presented as a consummate professional of the CBSA and provided credible, uncontested testimony focused solely on this allegation. His written statement of fact and subsequent *viva voce* testimony at the hearing confirmed that within the first few months of Ms. Patel's arrival at YYZ, and before the appointments at issue in this matter were made, she invited him to a meeting.

[93] At that time, he was in a substantive superintendent position and was often put into chief positions on an acting basis. He said that the few conversations or meetings he had with her since her arrival had all been positive.

[94] He testified that he found it odd that despite working across the hallway from each other, he was told to report to a meeting room located a very long distance away on a different floor of the building. He said that he found this formality out of the ordinary.

[95] When he arrived for the meeting, he found that no other members of staff were present, and that Ms. Patel turned the discussion towards asking him if she had his support in her efforts to "reshape" the organization.

[96] He then testified that she expressed her opinion that the CBSA in the Toronto region was an "old boys club". He said that he replied that in fact, five of the six current directors in the region were female. He said that then, she commented about the subject of minority women in positions of power.

[97] Mr. Chartrand then testified that Ms. Patel then began to ask him about certain members of the management team. He explained that she asked him about people by name, but then instead of mentioning the two complainants by name, she asked him about "the Fab 5".

[98] Mr. Muka testified that in his opinion, "the Fab 5" was a pejorative epithet that began with union representatives who resented a group of 5 managers (including the complainants) who were seen as highly successful and upwardly mobile in the CBSA.

[99] As part of this success, the complainants had been assigned oversight of some challenging labour relations files and apparently had drawn the ire of the union.

[100] Mr. Chartrand continued his testimony on this point by stating that the discussion had made him uneasy. He recounted advice he had once received from a very senior member of management who said that it was unwise to engage in discussions about co-workers' performance.

[101] He explained that he told Ms. Patel that he did not want to speak about any of his co-workers in a bad way and that he felt that the "Fab 5" phrase might be insensitive.

[102] He added that "without making assumptions, it appeared that Ms. Patel was looking for information that could potentially impede that group's development."

[103] Neither party really pursued this conversation in any detail in their *viva voce* examination of Mr. Chartrand. Given the significance of this allegation in the complaints before me, I asked the witness several questions, myself to seek greater clarification of any important context that he might have been able to remember of Ms. Patel's comments. He replied, quite understandably, that this event had taken place several years ago and stated that he did not have a clear memory of any more details of the discussion.

[104] The complainants chose not to pursue this matter of Ms. Patel's bias and the comments attributed to her, in their otherwise lengthy and well-prepared cross-examination of her.

[105] This would have been a serious error had the complainants been represented by counsel.

[106] When such an allegation necessarily challenges the integrity of a witness, fairness demands the party relying upon the attributed comments to allow the witness to respond to it.

[107] By doing so, the hearing is provided with a more well-informed version of events, especially with respect to the comments attributed to the witness.

[108] However, as self-represented parties, I do not hold them to this same standard of proper conduct as I would an attorney with respect to witness examination.

[109] I have carefully reviewed the complainants' statements of fact and have added emphasis to the more disconcerting aspects of them related to the allegation of bias.

[110] In particular, I note the testimony that implied that Ms. Patel somehow relied upon office gossip and some undefined information of a personal nature (about Mr. Muka) as particularly concerning.

[111] I also note the complainants' detailed evidence that apparently, Ms. Patel viewed them as responsible for problems at YYZ. I also acknowledge their vigorous submissions in argument that these concerns were completely contradicted by the many very successful performance evaluations tabled as exhibits showing that they were considered excellent employees by the respective managers who signed the evaluations.

[112] Ms. Patel testified that in fact, the previous director had appointed Ms. Szplitgeiber and that Ms. Patel had only extended her appointment.

[113] She explained that being so new to YYZ, she did not know much about the FB-05 group, which had approximately 60 people in a total of 80 positions (including vacancies). She said that she did not directly supervise these positions and that she relied heavily upon the recommendations of her FB-06 managers to make appointments on an acting basis from that group.

[114] She testified that she had no relationship with either appointee. In fact, she had only heard of one of them previously when she interacted briefly with her during training many years earlier and had not had any contact with her since.

[115] She further explained her rationale for each appointment and gave detailed testimony as to the many positive professional and personal attributes of each appointee that led her to conclude they were the right fits for the two appointments at issue.

[116] The complainants presented diligently researched, relevant case law and recited the test for the apprehension of bias. They cited the PSST's decision in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, as follows:

> …
>
> ***72*** *A test was established by the courts to determine whether there is reasonable apprehension of bias. It consists in determining whether a relatively informed bystander could reasonably perceive bias on the part of an adjudicator. It is not enough to suspect or assume bias; it must be real, likely or reasonably evident. See Jones,* Administrative Law, *pages 237 to 238, 395 and onwards;* Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities*), [1992] 1 S.C.R. 623, page 636.*
>
> ***73*** *The Tribunal finds that this test applies to abuse of authority complaints in staffing matters. It is particularly useful in analysing a complaint, because it is flexible and reasonable, and makes it possible to take into account the context of a staffing decision. The decision in* Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, explains it thus:*
>
> > *[…] [T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. […] [T]hat test is "what would an informed person, viewing the matter realistically and*

> *practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the adjudicator], whether consciously or unconsciously, would not decide fairly?*
>
> …

[117] I also note the Board's decision in *Johnston v. Director of Public Prosecutions*, 2018 FPSLREB 65, in which I addressed issues of bias in an appointment process as follows:

> …
>
> *[33] The complainant noted in argument on this allegation the fact that this Board has found that it is not necessary that actual bias be found, as a reasonable apprehension of bias may constitute abuse of authority (see* Ryan v. Deputy Minister of National Defence*, 2014 PSST 9 at para. 25, which cites* Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 125, referring to* Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394).*
>
> *[34] In its original form, in* Committee for Justice and Liberty*, at 394, the Supreme Court of Canada enunciated the test for the apprehension of bias as follows:*
>
> > … "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> *[35] In* Ryan*, relying on* Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, which in turn relied upon* Committee for Justice and Liberty*, the PSST adapted that test, as follows:*
>
> …
>
> > Where bias is alleged, the following test can be used to analyze this allegation, while taking into account the circumstances surrounding it: ***If a reasonably well informed bystander can reasonably perceive bias on the part of one or more persons responsible for assessment, the Tribunal can conclude that abuse of authority exists.***
>
> …
>
> [Emphasis in the original]

[118] I also note *Bain v. Deputy Minister of Natural Resources Canada*, 2011 PSST 28, which examined as follows the finding of a reasonable apprehension of bias:

> …

> ***134*** *In examining issues of bias and of reasonable apprehension of bias, the courts have acknowledged that it* ***is difficult to establish direct evidence of actual bias****.…*
>
> …
>
> ***139*** *Candidates in an assessment process must be able to trust that the process will be run in a fair manner. A reasonable apprehension of bias taints the process and raises doubts about its integrity. Fairness requires that board members be diligent in avoiding situations that could give rise to an apprehension of bias of the decision-maker [sic] as an individual.*
>
> …
>
> [Emphasis added]

[119] While I accept that Mr. Chartrand's testimony was sincere and entirely reliable, I cannot base a finding of bias and abuse of authority solely upon the inference arising from Ms. Patel's use of the phrase "the Fab 5" and her mention of "the old boy's club".

[120] While the several comments attributed to Ms. Patel in the complainants' evidence are also concerning, on the evidence before me, I cannot conclude that they are inaccurate or unfair or that they were made out of some bias against the complainants.

[121] While the evidence stating that Ms. Patel relied upon gossip and some undefined personal information is troubling, it stands as uncorroborated and is less than the clear and compelling standard required to make a finding, especially of such a serious nature as bias.

[122] The other aspects of the complainants' testimony about Ms. Patel's statements and actions can be viewed within the broad perspective that she was assigned by the CBSA's national headquarters to effect far-reaching culture change and significant service improvement at YYZ.

[123] Such deep changes within an organization can include changes to management assignments. They can drastically impact people who have been working very hard and who are deeply committed to the organization.

[124] I cannot conclude that a reasonably well-informed bystander, aware of all the evidence before this hearing, could reasonably perceive bias on the part of one or more persons responsible for the two appointments at issue.

[125] Both parties noted the seminal decision in *Tibbs* for the direction it provides for the flexibility granted by Parliament to deputy heads exercising discretion under the *Act*, along with the related limits.

[126] *Tibbs* also stands as the foundational authority for complaints under the *Act* to establish that the Board requires more than mere errors to uphold an allegation of an abuse of authority.

[127] The following relevant paragraphs of *Tibbs* speak directly to the core of the complaints in the case before me as well as to the respondent's reply:

> …
>
> *[62] An examination of the preamble of the* PSEA *helps to reveal its legislative purpose. The preamble of the* PSEA *is clear and of considerable assistance in interpreting the concept of abuse of authority.* ***The following section is of particular note: "delegation of staffing authority (…) should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians."***
>
> *[63] This section of the preamble reinforces one of the key legislative purposes of the* PSEA*, namely, that managers should have considerable discretion when it comes to staffing matters. To ensure* ***the necessary flexibility,*** *Parliament has chosen to move away from the previous staffing regime with its rules-based focus under the former* PSEA*. The old system of relative merit no longer exists. The definition of merit found in subsection 30(2) of the* **PSEA** ***provides managers with considerable discretion to choose the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements.***
>
> *[64] However,* ***this does not mean that the*** **PSEA** ***provides for absolute discretion****. The preamble clarifies the values and ethics that should characterize the exercise of discretion in staffing. It also supports another key legislative purpose of the* PSEA*, establishing new recourse mechanisms on appointment issues before a neutral and independent body, the Tribunal. The relevant section of the preamble reads as follows: "the Government of Canada is committed to a public service that (…) is characterized by fair, transparent employment practices, respect for employees, effective dialogue and recourse aimed at resolving appointment issues."*
>
> *[65] It is clear from the preamble and the whole scheme of the* PSEA *that* ***Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority****. For example, under section 67 of the* PSEA*, the grounds for revocation of an appointment by a deputy head after an investigation are*

error, omission and improper conduct. These grounds for revocation are clearly less than those required for a finding of abuse of authority. Parliament's choice of different words is significant: Sullivan & Driedger, supra *at 164. Abuse of authority is more than simply errors and omissions.*

[66] As the complainant has acknowledged, abuse of authority requires wrongdoing. Accordingly, abuse of authority will always include improper conduct, but the degree to which the conduct is improper may determine whether or not it constitutes abuse of authority.

[67] Parliament has identified in the PSEA *the recourse available to those concerned about the exercise of discretion in staffing processes. For example, a person in the area of recourse can complain to the Tribunal under paragraph 77(1)*(a) *of the PSEA that he or she was not appointed or proposed for appointment because there was abuse of authority when the selection board exercised its discretion under subsection 30(2) and made a selection from those candidates who applied for a particular position.*

[68] Discretion in staffing processes must be exercised in accordance with the nature and purpose of the PSEA. *As Justice Rand wrote in the landmark case of* Roncarelli v. Duplessis, *[1959] S.C.R. 121 at 140; [1959] S.C.J. No. 1 (QL):*

> *(…)* ***there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose****, however capricious or irrelevant, regardless of the nature or purpose of the statute.*

[69] More recently, in Baker v. Canada (Minister of Citizenship and Immigration), *[1999] 2 S.C.R. 817 at 853; [1999] S.C.J. No. 39 (QL), the Supreme Court of Canada reaffirmed that discretion in administrative decisions must be "****exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre****" contemplated by Parliament as outlined in* Roncarelli, supra. *The Court also indicated, at 854, that discretionary decisions should be reviewed only on limited grounds according to the "general principles of administrative law governing the exercise of discretion and consistent with the* Canadian Charter of Rights and Freedoms."

[70] As highlighted in the complainant's submissions, Jones & 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.*
>
> *[71] What these five types of abuse all have in common is that* ***Parliament could not have intended to delegate the authority to act in such an outrageous, unreasonable or unacceptable way:*** *Jones & de Villars,* supra*, at 169; Macauley & Sprague,* supra*, at 5B.3(a). As the Supreme Court explained in* Roncarelli, supra*, unless there is express language in the legislation to indicate the contrary, it is implied* ***that Parliament could not have intended the delegate to exercise discretion in these ways.***
>
> …
>
> [Emphasis added]

[128] The complainants presented skillfully researched and well-prepared submissions upon this aspect of administrative law. It is important for this decision to acknowledge these submissions and to affirm that each allegation and all of them together have been carefully assessed against the well-established authority that I have just quoted from *Tibbs*.

[129] None of the allegations, nor all of them together are found to involve actions that could not have been intended to be within the exercise of the discretion that Parliament granted (as per David Philip Jones and Anne S. de Villars in *Principles of Administrative Law*, as noted in *Tibbs*).

IV. Application to amend the allegations

[130] As the parties discussed in detail in a March 29, 2021, case-management videoconference ("CMC") that I chaired, the complainants filed a Form 8, pursuant to s. 23(2) of the *Public Service Staffing Complaints Regulations* (SOR/2006-6; "the regulations"), requesting that the Board allow an amendment to their allegations.

[131] Section 23 states:

> **New or amended allegation**
>
> **23 (1)** The Board must, on request, permit the complainant to amend an allegation or provide a new allegation if
>
> **(a)** the amendment or new allegation results from information obtained that could not reasonably have been obtained before the complainant submitted his or her original allegations; or
>
> **(b)** it is otherwise in the interest of fairness to do so.
>
> (emphasis mine)

[132] It was discussed in the CMC that the complainants wished to allege that Ms. Patel held personal animosity towards them. They wished to present evidence to the effect that she made statements to them and also other comments to a third (named) person, that she sought information that would cast the complainants in a poor light. The insinuation being that she wished to use this unflattering information against them.

[133] The respondent's representative then asked for particulars from the complainants about this allegation, which were provided. I then engaged the parties in a discussion about the allegation. I inquired as to who the witnesses would be that had personal knowledge of it, and we discussed how they might provide their testimony should amending the allegations be allowed.

[134] I informed the complainants that it was their right to request such an approval, and they were directed to do it in writing through the mechanism provided on the Board's website.

[135] The respondent's representative voiced concern in possibly objecting to such a request. I informed the respondent that its reply to any such request would be sought and that it was now on notice to prepare to call evidence and reply to the allegation should the request be made and approved.

[136] Written submissions were filed, and oral submissions on the matter were again solicited in a second CMC, on April 13.

[137] The complainants applied to add the allegation that their manager, Ms. Patel, was biased against them, which had a detrimental impact upon their applications for the appointments at issue and resulted in an abuse of authority.

[138] The second CMC was held to discuss the particulars of this proposed new allegation and to receive oral arguments from all the parties on it.

[139] The complainants submitted that it was in the interests of fairness and justice that the Board allow their request as they said that this new allegation was a key part of their case.

[140] They noted that the respondent had approximately 3.5 weeks of notice before the hearing to prepare its case to answer the bias allegation as it had been disclosed and discussed in detail at the first CMC.

[141] The respondent's representative replied that the respondent opposed the application on the grounds that it caused the respondent prejudice. It also submitted that the complainants knew of the facts underlying the proposed new bias allegation when the complaint was made and that no explanation had been given for why it was not included in the allegations at that time.

[142] The respondent did not address the matter of fairness in the request; nor did it provide particulars of the prejudice it claimed would be suffered should the application be granted.

[143] Through the second CMC, I was able to inquire of the respondent's representative at that time as to the particulars of her claim of prejudice arising from the new allegations.

[144] She said that with only a week remaining before the hearing, it would be difficult for respondent's counsel to prepare to respond to the new allegation. She added that the respondent's counsel was also busy at another hearing that would limit counsel's preparation time for this matter.

[145] The respondent relied upon Board jurisprudence in its objection to the application, namely, the cases of *Cyr v. Chairperson of the Immigration and Refugee Board of Canada*, 2007 PSST 37, *Desaulniers v. Deputy Minister of Environment*

Canada, 2011 PSST 18, and *De Santis v. Commissioner of the Correctional Service of Canada*, 2016 PSLREB 34.

[146] *Desaulniers* is not relevant to the facts before me as it addressed a complainant who was nearing the end of his testimony and sought to table a new allegation of a human rights violation that had not yet been served in the proper form to the Canadian Human Rights Commission.

[147] The *Cyr* decision is now out of date as it relied upon an earlier and significantly different version of the regulations, as amended in May 2011, which at that time did not include the "fairness" criteria as it does now.

[148] The *De Santis* decision was issued after the noted amendment was made to the regulations, but considers a request made to add a new allegation during the hearing. Such is not the case in the matter before me.

[149] The purpose of this Board convening hearings is to consider and dispose of complaints under the *Act*. An important aspect of this dispute resolution is that each party has the satisfaction of fully presenting its case.

[150] Within the broad boundaries of fairness, so as not to prejudice one party, an amendment is a critical function that allows complainants a chance to be fully heard and through that possibly find closure in the presentation and hearing of their complaints.

[151] The matter of parties being self-represented is also a critical factor when considering an application to amend allegations.

[152] Under the heading, "*Promoting Equal Justice*", the Canadian Judicial Council (CJC) has directed in its *Statement of Principles on Self-represented Litigants and Accused Persons* (2006) that:

- *Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis, regardless of representation.*

- *Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.*

[153] This boarder perspective noted by the CJC is reflected in the mandatory language in s.23(1) which states that I "must" permit the complainant to amend an allegation when it is "in the interest of fairness" to do so.

[154] Also critical in this analysis is that the respondent is represented by legal counsel. Other than that counsel was busy, which is a normal aspect of legal practice, the respondent identified no actual prejudice.

[155] Some new allegations may well place a respondent in the bad position of not being able to fully respond due to evidence related to the new allegation being unavailable or time being required to research the matter.

[156] Such circumstance can be addressed possibly by a recess or a postponement of the proceeding.

[157] Extreme cases which do more than present the mere fear of prejudice and risk the ability of the respondent to conduct a fair hearing, may fail the mandatory test of fairness to the complainant.

[158] For these reasons, the application to amend and add to the allegations, the particulars of which were provided in writing, was approved prior to the hearing. It being in the interest of fairness to the hearing to do so.

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

(The Order appears on the next page)

V. Order

[160] I order the complaints dismissed.

May 19, 2021.

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