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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

SOPHIE LEANG

Complainant

and

COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

Respondent

and

OTHER PARTIES

Indexed as

Leang v. Commissioner of the Correctional Service of Canada

In the matter of a complaint of abuse of authority - paragraphs 77(1)(a) and (b) of the
Public Service Employment Act

Before: Joanne Archibald, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Frank Janz, Public Service Alliance of Canada

For the Respondent: Patrick Turcot, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard via videoconference,
February 25 and 26, 2021.

REASONS FOR DECISION

I. Introduction

[1] Sophie Leang (“the complainant”) made a complaint of abuse of authority about the appointment of a person (“the appointee”) to the position of Assistant to Warden, classified AS-01, with the Correctional Service of Canada (CSC) at Matsqui Institution in Abbotsford, British Columbia (“the position”).

[2] The complainant’s view is that the Commissioner of the CSC (“the respondent”) abused its authority in the application of merit through bad faith, favouritism, discrimination, and personal interest.

[3] In the initial complaint, the complainant also alleged abuse of authority in the choice of a non-advertised appointment process. During the hearing, she acknowledged that the appointment at issue resulted from an anticipatory internal advertised appointment process, numbered 2016-PEN-IA-PAC-114069 (“the appointment process”), for the position, described on the poster as “AS-01 Assistant to Warden/District Director”. She asked to withdraw her complaint of abuse of authority in the choice of appointment process. The withdrawal of that part of the complaint was accepted, and it was not considered further.

[4] The respondent denied that an abuse of authority occurred in the application of merit. It stated that the appointee was assessed and was found to meet the qualifications for the position. She was appointed based on right fit criteria.

[5] The Public Service Commission did not appear at the hearing. It provided a written submission addressing its relevant policies and guidelines. It took no position on the merits of the complaint.

[6] For the reasons that follow, the complaint is dismissed. It was not established that the respondent abused its authority in the application of merit.

II. Background

[7] The following chronology provides the relevant background for this matter.

[8] The complainant has been a term employee of the respondent since 2012.

[9] On July 15, 2016, the respondent launched the appointment process.

The posting stated that the intent was to create a pool of qualified candidates for the CSC's Pacific Region that could be used to staff positions of varying tenure, including acting, assignment, deployment, and indeterminate appointments. The complainant and the appointee applied and were assessed.

[10] The complainant was appointed to the position on an acting basis on December 19, 2016 and continued until February 14, 2018.

[11] On February 2, 2017, the complainant received notification that she was found qualified in the appointment process.

[12] In August 2017, Bobbi Sandhu became the Warden at Matsqui Institution ("the Warden") and the complainant's supervisor. The complainant continued in the position on an acting basis.

[13] On October 19, 2017, the Warden submitted a request to CSC Headquarters to staff the position on an indeterminate basis from the qualified pool for the appointment process. During October or November 2017, she received a list of the names of individuals in the qualified pool.

[14] On November 20, 2017, the complainant advised the Warden that she would be absent on maternity leave in 2018.

[15] On December 12, 2017, the Warden asked Marilyn Boonstra, human resources advisor ("the human resources advisor"), to scan the pool of qualified candidates from the appointment process for interest in occupying the position on an acting basis from January 8, 2018, to December 14, 2018. One candidate expressed interest in the opportunity.

[16] On December 15, 2017, clearance was given to staff the position indeterminately.

[17] On December 18, 2017, the Warden was absent from Matsqui Institution, and Theresa MacNeill, Deputy Warden ("the Deputy Warden"), acted for her. The Warden directed the Deputy Warden to staff the position indeterminately.

[18] On December 19, 2017, the Deputy Warden, identified these three right-fit criteria to be applied to select the highest scoring candidate from the pool:

- *Ability to manage records;*
 - *Ability to set priorities;*
 - *Ability to control incoming/outgoing correspondence.*
- (right fit criteria)*

[19] In addition, an employment equity criterion was applied, and only women were considered.

[20] On December 19, 2017, the human resources advisor identified the appointee as the candidate with the highest total score. The appointee had received 25 marks out of 30 for the right-fit criteria. The complainant's score was 18 marks.

[21] On December 28, 2017, a "Notification of Consideration" (NOC) was posted for the appointee.

[22] On January 3, 2018, a "Notification of Appointment or Proposal of Appointment" was posted.

[23] On January 8, 2018, the complainant made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board") pursuant to ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) alleging abuse of authority in the application of merit and in the choice of process in relation to the appointment process.

[24] On January 9, 2018, the complainant filed notice to the Canadian Human Rights Commission (CHRC) that her complaint to the Board alleged discrimination in employment on the ground of sex (pregnancy).

[25] On January 18, 2018, the complainant started her leave.

[26] On September 1, 2018, the complainant made a human rights complaint with the CHRC, alleging discrimination in relation to the appointment to the position.

III. Summary of the evidence

[27] The complainant testified about her time in the position on an acting basis. She had been hopeful that she would be appointed to it indeterminately.

[28] The complainant recalled telling the Warden in November 2017 that she was pregnant. She felt that the Warden's response was robotic and that it did not constitute a positive acknowledgement. She remembered asking about the indeterminate appointment to the position and said that the Warden's response was vague.

[29] Shortly after Christmas, the complainant learned from a co-worker that a NOC had been posted for the appointee's indeterminate appointment. The complainant stated that she was shocked and frustrated by the news. She felt that the respondent had not held a discussion with her and that it had no accountability or communication about the staffing decision. She thought that her experience in the position should have favoured her for the appointment.

[30] The complainant considered that had she not become pregnant, she would still be in the position on an acting basis. She also felt that she had been punished for insisting on professionalism and boundaries with the Warden in August 2017 when she was asked to wash the Warden's coffee cup and expressed her discomfort at doing so.

[31] The complainant agreed that the three right fit criteria were important to the position but she felt that her experience should also have been important.

[32] In the complainant's opinion, the appointment resulted from the Warden's manipulation of events. She guessed that the Warden might have looked at the qualified pool of candidates and then chosen the right fit criteria that would ensure that the appointee was selected from the pool.

[33] Laura Belal is the Deputy Warden's assistant. She recalled seeing private correspondence sent to the Deputy Warden on December 15, 2017, giving clearance to staff the position on an indeterminate basis. She also saw correspondence in which the Warden later advised the Human Resources Advisor that the direction had been given to the Deputy Warden to move forward to staff the position.

[34] The Warden testified that she has occupied her position at Matsqui Institution since August 2017. When she is absent, the Deputy Warden acts for her.

[35] The Warden stated that she had a pleasant working relationship with the complainant and that they worked well together. The Warden acknowledged that in August 2017, the complainant had identified tasks that made her uncomfortable, such as bringing water or coffee to the Warden. The Warden testified that she apologized to the complainant and that she never again asked the complainant to do it.

[36] The Warden explained that upon her arrival at Matsqui Institution, she prioritized stabilizing the workforce with indeterminate appointments to replace acting appointments. The complainant was in the position on an acting basis, which was encumbered indeterminately by a person who had been working elsewhere since 2015 and was not expected to return.

[37] This led to the Warden's request of October 19, 2017, for approval to staff the position indeterminately.

[38] When the request was submitted, it included the following rationale:

Request approval to risk staff the position to provide stability in the Warden's office. The substantive incumbent, Erika Holtzman has been assigned/acting at RHQ since 2015, and she is not expected to return to her substantive position. There is regional support to risk staff this position. Staffing will be from the AS-01 Assistant to Warden/District Director qualified pool 2016-PEN-IA-PAC-114069. I am interested in hiring for the AS-01 qualified pool and would like a representative from the Employment Equity group.

[39] The Warden recalled that in November 2017, before clearance was received to proceed with indeterminate staffing, the complainant told her of her pregnancy and her upcoming maternity leave. The Warden said that she was very happy for the complainant. Any suggestion otherwise was not true. She agreed that she did not hug the complainant and added that in her culture, overt displays like hugs do not occur outside of a family.

[40] The Warden testified that when she learned that the complainant would be on leave, it became a priority to find a replacement for her during that period. As permission to staff the position indeterminately had not yet been granted, the Warden decided to ask for expressions of interest in an appointment on an acting basis.

[41] On December 15, 2017, the Human Resources Advisor notified the Warden and the Deputy Warden that clearance had been received to staff the position indeterminately. At that time, the Warden was absent from Matsqui Institution, and the Deputy Warden was acting for her. The Warden testified that likely she had been working from her mobile phone and did not have access to the statement of merit criteria (SOMC) to identify the right fit criteria to use to identify a suitable candidate.

[42] The Human Resources Advisor recalled that the Warden originally foresaw in November that she would staff the position on an acting basis if clearance to staff it indeterminately were not received before the complainant's leave. When clearance was received, the Warden cancelled the request for an appointment on an acting basis, and indeterminate staffing proceeded. The Human Resources Advisor confirmed this decision with the Warden on December 18, 2017.

[43] The Deputy Warden confirmed that on December 18, 2017, the Warden directed her to proceed to staff the position indeterminately. The Deputy Warden then prepared and submitted a request through the respondent's human resources portal. She identified the right fit and the employment equity criteria to be applied to the candidates in the qualified pool.

[44] In evidence, the complainant, the Warden, and the Deputy Warden each testified that the right fit criteria reflected the bulk of the work performed daily in the position.

[45] Every person in the qualified pool was eligible to be considered. The appointee was identified as the candidate with the highest score for the right fit criteria, and she met the employment equity criterion. The Warden, Deputy Warden, and Human Resources Advisor each testified that no candidate's name was identified by them or to them before the right fit criteria were applied. None of them was a member of the assessment board.

[46] The Warden denied any personal relationship with the appointee. She knew her as an employee when she was the Warden at Kent Institution as the appointee was the Deputy Warden's assistant. She testified that the appointee also provided clerical support at Ferndale Institution when the Warden worked there in 2012.

[47] The Warden testified that had the complainant been the person selected for appointment, someone else would have been appointed to perform the duties during

the complainant's leave. It would not have impacted the complainant's appointment to the indeterminate position. The Human Resources Advisor corroborated the Warden's evidence.

IV. Analysis

[48] Section 77 of the *PSEA* provides that an unsuccessful candidate in an advertised internal appointment process may make a complaint to the Board that he or she was not appointed or proposed for appointment because of an abuse of authority.

[49] "Abuse of authority" is not defined in the *PSEA*. However, s. 2(4) provides, "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism." *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, held that an abuse of authority could also include improper conduct, serious errors, or omissions. As noted in *Tibbs*, at para. 50, the complainant bears the burden of proof in a complaint of abuse of authority.

[50] The complainant alleged that all of bad faith, favouritism, discrimination, and personal interest occurred.

A. Bad faith

[51] I find no convincing evidence that bad faith influenced the appointment for the following reasons.

[52] The assessment process was complete by February 2017, when the complainant was notified that she was found qualified. The result of that process has not been challenged.

[53] The Warden denied preselecting the appointee. The Deputy Warden and Human Resources Advisor confirmed that the Warden did not put forward a name. Neither the Warden nor the Deputy Warden assessed candidates for the indeterminate appointment to the position. The complainant claimed that specific right fit criteria were selected to ensure that the appointee had the highest score. However, the evidence showed that it was the Deputy Warden who selected the right fit criteria, not the Warden, and there is nothing to suggest that selection was inappropriate. Indeed, the evidence of the complainant, the Warden, and the Deputy Warden supported the selected right fit criteria as reflective of the daily work of the Warden's assistant.

[54] The resulting appointment was based on the assessment of qualified candidates in the process. There is no dispute that the appointed person was the qualified candidate who scored highest on the right fit criteria.

[55] Nothing in the evidence suggests any exceptional aspect of the appointment that was inexplicable or incomprehensible in a way that a finding of bad faith would require. See *Cameron v. Deputy Head of Service Canada*, 2008 PSST 16 at para. 56. Instead, it shows that an orderly process was followed to make an appointment relying on the results of the candidates' assessment in a qualified pool.

[56] The complainant argued that her experience in the position ought to have been considered. I note that the SOMC for the appointment process required candidates to demonstrate two experience criteria: experience supporting managers, and experience providing administrative and financial support services. There has been no dispute as to whether the complainant and the appointed person demonstrated this experience to the assessment board.

[57] If, as suggested, the respondent added experience performing the duties of the position, it would mean grafting an additional criterion onto the concluded appointment process. It would risk undermining the results of the appointment process by providing an unfair advantage to the complainant or others who had occupied the position. It could also constitute abuse of authority.

[58] The allegation of bad faith is dismissed.

B. Personal favouritism

[59] The *PSEA* explicitly refers to personal favouritism, which is distinct from favouritism. *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at para. 39, emphasized the difference as follows:

*[39] ... It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament's intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.*

[Emphasis in the original]

[60] At paragraph 41 of *Glasgow*, the Public Service Staffing Tribunal further explained as follows:

[41] *Where there is a choice among qualified candidates, paragraph 30(2)(b) of the PSEA indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organisational needs. The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.*

[61] In this case, the evidence established that the appointee was chosen based on an objective standard: the total score for the assessment of the right fit criteria. The complainant did not establish that a personal relationship or any personal favour or gain influenced the selection.

[62] It is equally important to examine whether there has been bias against the complainant. She stated her concern about tasks that she did not want to perform. The Warden acknowledged the complainant's discomfort, and there is no evidence that she was asked to perform them again. This occurred in August 2017. In November 2017, the complainant was disappointed by the Warden's response when the complainant announced her pregnancy. The Warden testified about her cultural norms.

[63] I do not see evidence that either incident created a bias against the complainant that influenced the outcome. It remains the case that the appointee was selected based on performance in an appointment process that concluded months earlier.

[64] I have not overlooked that the complainant alleged personal favouritism. In the strict sense of section 77 of the *PSEA*, the complainant has a personal interest as a candidate in the appointment process. She was entitled to file a complaint as she has done. It is my view that in alleging personal favouritism, the complainant intended to indicate that the appointee had been favoured. As indicated above, I find that the evidence does not support the allegation of personal favouritism.

[65] The allegation of personal favouritism is dismissed.

C. Human rights discrimination

[66] Section 7 of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6 (*CHRA*)) provides that it is a discriminatory practice to refuse to employ or to continue to

employ an individual based on a prohibited ground of discrimination. Section 3 of the *CHRA* states that sex is among the prohibited grounds of discrimination.

[67] To demonstrate that the respondent has committed a discriminatory act, the complainant must show *prima facie* (meaning at first view) evidence of discrimination, namely, evidence that "... covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer" (from *Ontario Human Rights Commission. v. Simpsons-Sears*, [1985] 2 S.C.R. 536).

[68] To establish a *prima facie* case of discrimination, the complainant had to demonstrate that (1) she possesses a characteristic protected against discrimination under the *CHRA*, (2) that she suffered an adverse employment-related impact, and (3) that the protected characteristic was a factor in the adverse impact. See *Moore v. British Columbia (Education)*, 2012 SCC 61.

[69] The chronology of events set out in the background is an important indicator of whether discrimination as alleged influenced this appointment.

[70] The assessment of the essential and asset criteria was completed by February 2017. Eight months later, in October 2017, clearance to staff the position was requested. In November 2017, the complainant announced her pregnancy. In December 2017, clearance for staffing was received, followed shortly by the application of the right fit criteria to the candidates in the qualified pool.

[71] The complainant was not selected for appointment. The candidate who scored highest for the right fit criteria and who met the employment equity criterion was selected from the qualified pool.

[72] Turning to the test for *prima facie* discrimination, firstly, it is clear that at the time of the appointment, the complainant possessed a characteristic that was protected from discrimination, namely, sex (pregnancy).

[73] Secondly, the complainant suffered an adverse employment-related impact when she was not selected for the indeterminate appointment to the position.

[74] Thirdly, objective criteria assessed at an earlier time formed the basis for the choice of the appointee. The appointee outscored the complainant and met the

employment equity criterion. The complainant claimed that her pregnancy influenced the Warden in the decision not to appoint her, and she relied on the Warden's allegedly poor response when she announced that she was pregnant. However, the evidence shows that the Warden initiated the process with a request for clearance to staff the position on an indeterminate basis weeks before learning of the pregnancy. Even though the right fit criteria were selected after news of the pregnancy had been shared, it was the Deputy Warden who made that selection and there is no evidence to suggest that the Warden has involved. Further, as noted earlier, the complainant acknowledged that the right fit criteria reflected the daily work of the Warden's assistant.

[75] Thus, the evidence does not support the assertion that discrimination was a factor in the adverse impact and, accordingly, the third branch of the test for a *prima facie* case of discrimination has not been established.

[76] Therefore, I conclude that a *prima facie* case of discrimination has not been made out by evidence. It was insufficient for the complainant to claim that she was treated unfairly. The allegation had to be supported by evidence to suggest that discrimination on the ground of sex (pregnancy) was a factor in the alleged unfairness that occurred.

[77] Because the complainant did not demonstrate a *prima facie* case of discrimination, the respondent was not required to answer the allegation of discrimination.

[78] The discrimination allegation has not been substantiated.

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

(The Order appears on the next page)

V. Order

[80] The complaint is dismissed.

June 14, 2021.

**Joanne Archibald,
a panel of the Federal Public Sector
Labour Relations and Employment Board**