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Citation: 2021 FPSLREB 92

*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

KAREN SCHWARZ

Complainant

and

DEPUTY MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT

Respondent

and

OTHER PARTIES

Indexed as

Schwarz v. Deputy Minister of Employment and Social Development

In the matter of complaints of abuse of authority – paragraph 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: Adam Feldman, counsel

For the Public Service Commission: Annie Guimond, counsel

Heard via videoconference,

April 6 and 7, 2021

REASONS FOR DECISION

I. Complaints before the Board

[1] On October 13, 2016, Karen Farmer, now Karen Schwarz by marriage (“the complainant”), applied online for a manager position classified at the PM-06 group and level at what was then Employment and Social Development Canada (“ESDC”). The selection process was numbered 2016-CSD-IA-NHQ-21723. The closing date for applications was October 14, 2016. According to the Public Service Commission (“PSC”), which administered the online applications, her application was retrieved a few minutes after it was submitted, and it was never resubmitted. Consequently, it was not transferred to ESDC.

[2] On June 24, 2017, the complainant filed a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) against the deputy minister of ESDC (“the respondent”), in which she alleged an abuse of authority under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the Act”). She also made another 16 identical complaints because there was a total of 17 appointment notifications. The files were consolidated; the lead file has Board file number EMP-2017-11282. A single decision is being issued, applying to all the files related to this complaint.

[3] The complainant alleged that by not considering all the circumstances of her case, the respondent abused its authority by refusing to accept her application, which she alleged was properly submitted.

[4] For the reasons that follow, the complaint is allowed.

II. Summary of the evidence

[5] The complainant testified and called as witnesses Ellen Oldfield, who is her mother, and Crystal Burke, her colleague. The PSC was represented at the hearing and called Céline Valin as a witness to speak about the online job application system. The respondent called Katleen Leblanc, the chair of the selection board in the impugned process.

[6] In October 2016, the complainant, who works in the National Capital Region, traveled to Nova Scotia to visit her mother. Mrs. Oldfield testified that at that time,

there was major flooding in Marion Bridge, where she lives, as well as power outages. This assertion was supported by a newspaper article dated October 10, 2016.

[7] Before she visited her mother, the complainant asked if she could use her computer to apply for a position as the deadline would occur during her visit. As confirmed by Mrs. Oldfield, the complainant spent several days perfecting her application. Both were greatly relieved once the application was submitted. When asked if she thought her daughter would have withdrawn her application, Mrs. Oldfield exclaimed, “No! she had just spent 3 days putting it in”.

[8] Mrs. Oldfield admitted in cross-examination that she did not watch her daughter at work and that she certainly could not testify to what might have appeared on the computer screen.

[9] The complainant testified that she spent considerable time preparing to fill out the application online. Applicants had to show that they had some 19 types of experience. The complainant prepared a CD of her material to take to Nova Scotia when she visited her mother for Thanksgiving. She arrived in Marion Bridge on October 9, and the floods began the next day. Because of the power outages, her brother set up a generator at their mother’s house; electricity throughout the house was somewhat unreliable during that time. The laptop that the complainant used to submit her application had a battery life of about one hour.

[10] From the CD, the complainant prepared a chart to help her complete the application. She then copied and pasted the information into the application form, which took about an hour. She received confirmation that her application was received, which was entered into evidence at the hearing.

[11] The document is clearly a copy of what appeared on-screen. It reads as follows:

1. Applicant number: S795164

Reminder – Job applications status

Submitted job applications

You have completed and submitted all mandatory sections required for the following job opportunities:

*· Manager **SEE IMPORTANT MESSAGES** Applied Date: 2016-10-13 Closing Date: 2016-10-14*

You may modify your application prior to the closing date by selecting Retrieve application.

After the closing date, you will only be permitted to modify your contact information (mailing address, e-mail address, and telephone number).

Date modified:

2016-09-29

[Emphasis in the original]

[12] The complainant testified that this was the only thing that appeared on her screen after she completed her application. She also testified that she did not choose to retrieve her application; rather, she viewed her application to verify that all the information was correct. As there was no need to edit the application, she did nothing further. She was convinced that the confirmation she received was sufficient to show that she had indeed applied to the process.

[13] The complainant testified that she reviewed the whole application, and she stated that the document she reviewed was the same one she included in her evidence. This archived document shows a completed application. For “Application Status”, it shows “In progress”. According to Ms. Valin, it should have shown “Submitted” for it to be considered complete. It does indicate “First submission date: 2016-10-13 18:31”, but as Ms. Valin testified, the event log showed “Retrieve” at 6:38 p.m. There was no further resubmission, according to the event log.

[14] The complainant testified that there were no further buttons or notifications that indicated that she needed to resubmit her application.

[15] On November 9, 2016, she learned that her colleague, Ms. Burke, who had applied to the same process, was invited to write an exam. The complainant was surprised that she did not receive any notice about the process, including whether she had been screened in for further assessment or screened out on the basis of her application. She checked the application system only to find that her application was no longer there.

[16] She contacted Ms. Leblanc, who was listed as the contact person in the process poster. Ms. Leblanc stated that the application had not been received and asked for any documentation to show that the application had been submitted. The complainant responded with the confirmation she had received at the time she applied.

[17] She then received the following email dated November 16, 2016:

...

Good morning,

*We communicated with the Public Service Commission who manages **jobs.gc.ca** and inquired about your application to see if an error had occurred in the system. They confirmed that they did in fact receive your application to 2016-CSD-IA-NHQ-21723 on **November 13** [the parties agreed at the hearing this should read October 13], **2016 at 6:31 pm**. However, their [sic] informed us that you had retracted your application **a few minutes later at 6:38 pm** but it was never resubmitted. Unfortunately, since you did not successfully submit your application before the deadline, we are unable to consider you for this selection process.*

*Please do not hesitate to contact us should you have any questions.
Kind regards,*

Evaluation Committee

[Emphasis in the original]

[18] Ms. Leblanc testified that she carefully considered the situation in consultation with her fellow board members and labour relations employees. The PSC was adamant that the application was retracted and never resubmitted. One of Ms. Leblanc's fellow board members stated that she had tried the process and that it was clear that when applying and retrieving, one had to resubmit. The PSC conducted the same exercise. No one had direct access to the complainant's file, and no one asked her what had happened, what the circumstances were, or exactly what she had seen on her screen at the time of the alleged retraction or retrieval. It was apparent from Ms. Leblanc's testimony that she considered the PSC's event log as the most important piece of information to decide the matter. That event log simply showed that the application was submitted at 6:31 p.m. and retrieved at 6:38 p.m.

[19] On November 28, 2016, Ms. Leblanc wrote to the complainant and stated the following:

...

Good day,

As indicated in the email dated as of November 16, 2016, the Public Service Commission confirmed that you retracted your application and you did not re-submit it before the deadline in order to be considered for this process. Therefore, in light of the information provided by Public Service Commission and which has

been provided to you, we regret to inform you that you cannot be considered for this process, as your candidacy was not received within the advertised deadline. Consequently, you do not have any right to make a complaint to the Public Service Labour Relations and Employment Board in regards to this process.

...

[20] Ms. Valin testified that the system was infallible. She was certain that the complainant retrieved her application and did not resubmit it. Therefore, there was no application to forward to ESDC.

[21] Ms. Leblanc testified that between the first (November 16) and second (November 28) emails, she hesitated about the proper course of action (i.e., whether to accept the application). One of the members of the selection board was of the view that the matter was highly technical and not to be decided by the selection board.

[22] Finally, Ms. Leblanc was convinced by the event log that the complainant had retrieved her application and had not resubmitted it. According to Ms. Leblanc, the complainant could have verified her application status before November 9, but she never did. The complainant also did not provide any additional explanation, including the power outages experienced in Nova Scotia at the time she applied.

[23] For her part, the complainant testified that once she received the November 16 email, she believed that the respondent was not interested in properly verifying what had happened, which is why she asked about her possible recourse. She did not verify the status of her application before November 9 because the confirmation message reassured her that her application had indeed been received.

III. Summary of the arguments

A. For the complainant

[24] The complainant submitted that she successfully applied to the process and that she never retrieved her application. The only notification she received was that she had successfully applied. No other warning or indication of progress appeared on her screen. The PSC, which administers the system, insisted that she “should have seen” further notification, but in fact, she did not.

[25] The PSC and the respondent seemed to imply that she was not attentive enough. On the contrary, because of the environmental conditions in Nova Scotia at that time, she was doubly cautious and careful.

[26] The complainant saw three issues in this matter: the Board's jurisdiction, the fact that the application tool was flawed, and the abuse of authority on the part of the respondent for acting on insufficient information and refusing to exercise its discretion.

[27] In the case of an advertised internal appointment process, s. 77(2)(a) of the Act provides that a person must be an unsuccessful candidate in the area of selection to make a complaint. On the matter of jurisdiction, the complainant argued that she was in fact an unsuccessful candidate since she submitted an application. The fact that the application was somehow mishandled by the system does not take away the fact that she applied.

[28] The complainant cited *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27, to propose that if a flawed tool is used, the outcome cannot be considered reasonable or fair. In *Chiasson*, the respondent gave new instructions to answer a take-home exam after candidates had received it without ensuring that they had indeed received the new instructions. Ms. Chiasson, the complainant in that case, did not see the new instructions until after she had completed her exam and handed it in. The complainant in this case maintained that there was a system error that prevented her from seeing any warning or a resubmit button on her screen. She argued that the event log was the only evidence the respondent had; it did not establish what she saw on her screen.

[29] As stated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, one of the categories of abuse of authority is acting on inadequate material. At paragraph 73 of *Tibbs*, the Public Service Staffing Tribunal ("the Tribunal"), a predecessor to the Board, wrote the following:

73 While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.

[30] The complainant argued that this applies to her case. The respondent decided not to accept her application despite not knowing what had happened, and it did not ask her to provide her version of the events. The respondent never answered her query about whether the confirmation she received was sufficient; rather, it relied exclusively on the event log, which could not report on what was on-screen.

[31] The complainant submitted that the respondent abused its authority by refusing to exercise its discretion and fettered its mind to several options available. As stated at paragraph 154 of *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 12:

154 ... when a manager exercises his or her discretion, but eliminates a person from consideration for appointment in a manner that is clearly against logic and the available information, it may not constitute bad faith or intentional wrongdoing, but the manager may have abused his or her authority.

[32] The complainant argued that she was eliminated from the process in the absence of logic and available information.

[33] As a remedy, the complainant would like to have her application assessed. She is aware that the Board cannot order a new process, and she argued that this would be a continuation of the process, not a new one.

B. For the respondent

[34] The respondent submitted that the complainant did not have recourse before the Board since she was not a candidate; therefore, she was not an unsuccessful candidate.

[35] According to the respondent, since the complainant never submitted her application, she was never a candidate. As a matter of policy, if recourse was offered to people who did not submit an application, it would create an added and undue burden for respondents in general.

[36] Contrary to what the complainant asserted, the employer submitted that the selection board acted on adequate information. The complainant had the burden of proof. The respondent could not have the burden to disprove the complainant's allegations.

[37] The respondent was not informed of any circumstances that would have warranted the need to consider an application that was not submitted.

[38] As stated in *Portree v. Canada (Human Resources and Social Development)*, 2006 PSST 14, the Board must find such action or inaction on the part of the respondent that is serious enough to be considered an abuse of authority. A mere error or omission will not suffice. The Tribunal states this in the following terms at paragraph 47:

47 An allegation of abuse of authority is a very serious matter and must not be made lightly. In summary, in order to succeed before the Tribunal, a complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct that justifies the Tribunal's review and intervention.

[39] Ms. Leblanc did not take the complainant's application lightly. She consulted, she discussed, and she considered the evidence. She concluded rationally that the application was not submitted by the deadline, as others' applications were still "In progress" and were not considered.

[40] The respondent submitted a document before the hearing that the qualified pool of candidates for the process is now closed. The Board cannot order a new process. The only remedy available if the Board finds abuse of authority is a declaration.

C. For the Public Service Commission

[41] The PSC maintained that there was no evidence of malfunction on the day in question. As well, the retrieval must be done manually, otherwise it cannot occur. It is not contested that the complainant submitted her application. She said that she went back to look at it. At that point, the only possible explanation is that she retrieved it. The log showed clearly that this was done. It also showed that the application was never resubmitted. As in all other cases, in which applications are not completed, they cannot be transferred to the relevant department.

[42] The PSC also provided written submissions. In its view, abuse of authority must be intentional or of such serious carelessness and recklessness that bad faith can be presumed.

IV. Analysis

[43] There are two main issues I must decide: whether the complainant has recourse before the Board, and if so, whether her claim of abuse of authority is substantiated.

A. Does the complainant have recourse before the Board?

[44] The respondent argued that the complainant did not have recourse before the Board; only unsuccessful candidates do.

[45] The respondent cited *Casper v. Deputy Minister of Citizenship and Immigration*, 2016 PSLREB 49, as an example of a case in which the Board did not have jurisdiction because the complainant in that case was not an “unsuccessful candidate”. The circumstances were quite different. Mr. Casper was assessed as a priority, but he never applied for the process. The Board’s reasons in *Casper* follow:

...

18 Although the term “unsuccessful candidate” is not defined, it is used in s. 77(2)(a) of the PSEA to describe those who have recourse in an internal advertised appointment process. The Tribunal and the Board have consistently held that to be an unsuccessful candidate, a complainant must have been a candidate in the advertised appointment process at issue (see Dayton v. Deputy Minister of National Defence, 2009 PSST 20 at para. 22). In most cases, confirmation of whether a complainant submitted an application during the application period is sufficient to determine whether he or she was a candidate in the process.

19 In this case, there is no dispute that the complainant did not submit an application when process 13-20 was open for applications between May 6 and 17, 2013. However, he argues that in the course of the referral process described earlier in these reasons, he applied and was assessed in the context of process 13-20, which made him a candidate in that process.

20 The evidence shows that on January 6 and 9, 2014, the respondent informed the complainant of PM-03 positions that were going to be staffed. In both instances, the SMCs that were attached to the referral were the same as the SMC for process 13-20; in fact, the French SMCs had “13-020” in the heading.

21 It is well established that to be a candidate in an advertised process, a person must submit an application during the application period. The application period for process 13-20 closed on May 17, 2013, and the complainant had not applied. If he did apply, as he argues, it would have been after he had been referred in January 2014.

...

[46] There is no issue that the complainant in this case did submit her application by the deadline. Rather, the issue is whether she retrieved it to void the submission or whether something else occurred that retracted her application without her will and consent. If she retrieved her application and failed to resubmit it, then I agree with the respondent that, in those circumstances, she would not have put her candidacy forward for consideration and, therefore, would not be a candidate nor an “unsuccessful candidate”. However, if she submitted her application during the application period, did not retrieve it, and her application was otherwise rejected by the respondent, then I would consider her to have put her candidacy forward, but to have ultimately been unsuccessful in that regard: an “unsuccessful candidate”.

[47] The respondent previously told the complainant (as Ms. Leblanc did in her November 28, 2016 email) and now argues that the complainant does not have recourse before this Board; only unsuccessful candidates do. I cannot see how the respondent can tell the complainant that she has no recourse before the Board. The question of having recourse under the *Act* and whether the complainant is an unsuccessful candidate is ultimately for the Board to decide.

[48] To decide this issue, I have three pieces of hard evidence: 1) the event log of the PSC’s application system that shows that the application was submitted at 6:31 p.m. on October 13, 2016 and was retrieved at 6:38 p.m.; 2) the completed application that showed “In progress” as the status, which would confirm the PSC’s position that the application was not resubmitted; and finally, 3) the confirmation that the complainant printed from her computer screen when she submitted her application.

[49] At the prehearing conference, the complainant had announced two character witnesses, people she had worked with and who would testify to her attention to detail. I told her this evidence would be of little use; what was important was what had happened after she had applied online, and these witnesses could not testify to that.

[50] They did not need to. I was completely convinced by the complainant’s testimony and evidence, as well as by her meticulous organization in preparing for the hearing and her dignified composure throughout. I believe her when she says she did not see the screens the PSC and the respondent said she should have seen. I also believe her when she says that she relied on the confirmation she had received and

that there was no further indication that she had to resubmit or input any other command. It goes against everything I heard from her that she would have been inattentive to the point of failing to resubmit her application.

[51] Ms. Valin testified that no system error was reported on that day. It may be that the system error was precisely not to report such an error. I have no idea what happened to the complainant's application, but I believe her version that she did not knowingly retrieve it and that if she did, there was no indication that she had done so or that she had to resubmit. As such, I find it more likely than not that the complainant submitted an application during the application period and that she did not retrieve it. She was therefore an unsuccessful candidate in the appointment process as her application was subsequently eliminated from consideration by the respondent. The question remains whether, in doing so, the respondent abused its authority.

B. Did the respondent abuse its authority by not exercising its discretion and by fettering its mind?

[52] Abuse of authority is not defined in the *Act*. An abuse of authority can include bad faith and personal favouritism (see s. 2(4) of the *Act*), or when a delegate acts on inadequate materials or refuses to exercise its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind (see *Tibbs* at para. 70; see also *Bowman* and *Chiasson*). The decision in *Tibbs* recognized that the *Act* does not support an interpretation that a finding of abuse of authority requires improper intent (at paras. 72-74). That said, more is required than mere errors and omissions to constitute an abuse of authority. As the respondent pointed out, a complaint for abuse of authority must demonstrate on a balance of probabilities a serious wrongdoing or flaw in the process that is more than a mere error, omission or improper conduct (see *Portree* at para. 47).

[53] The evidence I received from Ms. Leblanc is that there was no attempt whatsoever to ask the complainant what she had seen on her screen. Rather, both a selection board member and Ms. Valin conducted the exercise on their own, in an application form wholly distinct and separate from the complainant's application form. As she argued, they simply did not see what she saw; nor did they ask her about it.

[54] In argument, the respondent invoked the spectre of further disputes if this complaint is allowed. I find the circumstances so particular that I do not think this is a danger. The application was fully completed, it was submitted by the deadline, and there is confirmation that it was received. These facts support the complainant's right to have her application considered. If the system is as flawless as Ms. Valin states it is, then this must be a rare occurrence. As a matter of fact, the PSC could find no precedent.

[55] I must say that to me the case comes down to believing a person or a machine – the complainant or the event log? The respondent did not ask for further information from the complainant beyond the initial confirmation document, but rather concluded on its own what must have appeared on her screen at the time of the application. The complainant strenuously objected to that conclusion, emphasizing that she had not been asked to provide further information on what happened when she submitted her application.

[56] The respondent countered that the complainant never provided additional information. In fact, the complainant testified that from the initial response received on November 16, 2016, she understood that the respondent's mind was already made up, which is why she immediately asked what her recourse could be.

[57] The respondent was aware of the confirmation the complainant had received and which had led her to believe all was in order. As a matter of fact, both in her correspondence with the PSC and fellow selection board members and her testimony, Ms. Leblanc did wonder what the impact of this confirmation could be, and whether the complainant should be given “the benefit of the doubt”. Yet there was no follow-up, despite the complainant's clear statement that she was certain she had properly applied to the process.

[58] In previous decisions, the Tribunal and the Board have found that by fettering its discretion, the respondent may commit an abuse of authority. As stated in *Bowman*:

[127] ..., in the context of the PSEA, where recourse is now focussed [sic] on the exercise of discretion in appointment processes, an assessment board should not refuse to exercise its discretion through strict application of a guideline which fetters its ability to assess each candidate with an open mind. Where the Tribunal determines that the assessment board has fettered its discretion in

this way, it may find that the assessment board abused its authority.

[59] By not seeking further information from the complainant and by not trying to understand more in-depth what exactly happened and what she saw on her screen, the respondent acted on inadequate information. It made the decision to eliminate her candidacy without providing her with the opportunity to explain that, despite the event log, she did not retrieve her application. As previously explained, I find it more likely than not that the complainant submitted her application by the deadline and that she did not retrieve it. As recognized in *Chiasson*, the respondent is responsible to ensuring the integrity and fairness of the appointment process. When an error occurs, the respondent is required to ensure that the error is rectified (see *Chiasson* at para. 55). In this case, the respondent failed to even consider whether there was an error as it did not engage with the complainant to fully understand the situation. In the circumstances, the respondent's actions were unfair and resulted in the elimination of the complainant's candidacy based on inadequate information.

[60] Similarly, to the extent that the respondent relied exclusively on the PSC and the online job application system to make its decision, it did not consider the complainant's candidacy with an open mind. It refused to exercise its discretion by not examining the complainant's individual case and any response she may have had to the event log. The respondent simply disregarded the complainant's confirmation that her application had been submitted and went ahead with the process without regard for her candidacy.

[61] For these reasons, I find that the respondent abused its authority. The evidence shows that the respondent relied on inadequate information and fettered its discretion in determining that there were no circumstances that warranted the need to consider the complainant's application. The respondent's actions were more than mere errors or omissions. In all the circumstances, they amounted to a serious flaw in the process that resulted in an outcome that was unfair to the complainant.

[62] Unfortunately, time has gone by, the process is finished, and the pool is closed. I cannot correct that aspect of the complaint, as requested by the complainant. This decision does find that the complainant was a candidate in the appointment process and that there was an abuse of authority by the respondent. A declaration to that

effect is included in the order below. I hope it brings some solace to the complainant that this decision will be the precedent for inquiring further when an employee presents cogent evidence that contradicts a machine-derived conclusion.

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

(The Order appears on the next page)

V. Order

[64] The complainant was a candidate in the appointment process and had recourse to file a complaint under s. 77 of the *Act* as an unsuccessful candidate.

[65] The complaint is allowed. The respondent abused its authority pursuant to s. 77(1)(a) of the *Act*.

August 10, 2021.

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