

Date: 20210726

File: 771-02-43007

Citation: 2021 FPSLREB 85

*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

JOCELYN LEES

Complainant

and

DEPUTY MINISTER OF FISHERIES AND OCEANS

Respondent

and

OTHER PARTIES

Indexed as

Lees v. Deputy Minister of Fisheries and Oceans

In the matter of a complaint of abuse of authority – s. 77(1) 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: Stéphanie Mailhot on behalf of Lynette Mitchell, deputy head representative

For the Public Service Commission: Alain Jutras, senior analyst

Decided on the basis of written submissions,
filed June 7, 10, and 14, 2021.

REASONS FOR DECISION

I. Motion to dismiss the complaint

[1] On May 17, 2021, the complainant, Jocelyn Lees, made a complaint under s. 77(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*), alleging that the respondent, the Deputy Minister of Fisheries and Oceans, abused its authority in an acting appointment of more than four months to the position of Inshore Rescue Board (IRB) Coxswain (SC-DED-03; “the IRB position”) by advertised process 20-DFO-WCCG-IA-CCG-300847. Before this staffing action, the substantive position of the person appointed (“the appointee”) was classified at the SC-DED-02 group and level.

[2] According to s. 77(1) of the *PSEA*, a person in the area of recourse may make a complaint to the Board when an **appointment** has been made or proposed in an internal appointment process. On June 7, 2021, the respondent made a motion to dismiss the complaint, alleging that the staffing action involving the appointee was not an acting **appointment** and that as a result, the complainant has no right to make a complaint under s. 77(1).

[3] According to s. 1 of the *Public Service Employment Regulations* (SOR/2005-334; *PSER*), an acting appointment is “... the temporary performance of the duties of another position by an employee, if the performance of those duties would have constituted a promotion had they been appointed to the position.”

[4] The respondent relies on the definition of “promotion” set out in the Treasury Board’s *Directive on Terms and Conditions of Employment* (“the TB Directive”), at Part 2 of its Appendix, section 2.2.3, to argue that the appointee was assigned and was not promoted to the IRB position. The TB Directive sets out a formula for determining if a staffing action is a promotion. For the purposes of the IRB position, for which there is only one rate of pay, the formula requires calculating if the maximum rate of pay for the IRB position is greater than the substantive position’s maximum rate of pay, by an amount equal to or greater than 4% of the substantive position’s maximum rate of pay. The respondent provided a spreadsheet in which it claims to have made the calculation in this case and to have determined that the difference is less than 4%; consequently, the appointee’s movement from one position to the other was not a promotion.

[5] The Public Service Commission agrees that if the respondent's calculations are correct, the complainant had no right to complain to the Board under s. 77(1) of the *PSEA*.

[6] The complainant acknowledges that according to these calculations, the differences between the rates of pay amount to less than the 4% threshold. However, she rejects the respondent's submission that moving from a position at the SC-DED-02 group and level to SC-DED-03 is not a promotion. She contends that going from the 02 level to the 03 level within the same occupational group is "clearly" not an assignment but rather a promotion. She points out that it is well recognized within the Department of Fisheries and Oceans that moving to the higher position is promotional in terms of career development. The IRB position offers increased responsibility and management experience and is seen as a steppingstone to further opportunities. She indicates that an appointment process is conducted each year for SC-DED-03-level positions, while employees are frequently moved laterally within the Department without a "formal" process.

[7] I note that the *PSEER* do not define what a promotion is; nor does the *PSEA*, for that matter. The notion of promotions is partially addressed in Part 3 (ss. 51 to 53) of the *PSEA*, which deals with deployments. Section 53(1) explicitly states that deployments are not appointments, which means that complaints cannot be made about a staffing action by which someone was deployed. No definition of "deployment" is provided in the *PSEA*, but s. 51(5)(a) defines what is **not** a deployment, as follows:

51(5) The deployment of a person may not

(a) constitute a promotion, within the meaning of regulations of the Treasury Board

51(5) Aucune mutation ne peut :

a) constituer une promotion — au sens des règlements du Conseil du Trésor

[8] In fact, the Treasury Board has adopted regulations pursuant to this provision in the form of the *Definition of Promotion Regulations* (SOR/2005-376). The formulas set out in the TB Directive are virtually identical to those found in the *Definition of Promotion Regulations*. Section 3 of those regulations reads as follows:

Promotion

3(1) For the purposes of subsection 51(5) of the Public Service Employment Act, promotion means the assignment to an employee of the duties of a position for which the maximum rate of pay is more than the maximum rate applicable to the employee's substantive level immediately before the assignment of the duties, by an amount equal to or greater than

(a) the smallest increment on the pay scale for the new position, if it has more than one rate of pay; or

(b) 4% of the maximum rate of pay for the previous position, if the new position has only one rate of pay.

(2) An assignment described in subsection (1) does not include the assignment of an employee to the duties of another position in the same occupational group and subgroup and at the same or a lower level.

[Emphasis added]

Promotion

3(1) Pour l'application du paragraphe 51(5) de la Loi sur l'emploi dans la fonction publique, promotion s'entend de l'attribution à un fonctionnaire des fonctions d'un poste dont le taux de rémunération maximal dépasse celui de son niveau de titularisation, au moment de l'attribution, d'une somme égale ou supérieure, selon le cas :

a) à la plus faible augmentation de l'échelle de rémunération du nouveau poste, si celui-ci compte plus d'un taux de rémunération;

b) à 4 % du taux de rémunération maximal de l'ancien poste, si le nouveau poste compte un seul taux de rémunération.

(2) N'est pas visée par le paragraphe (1) l'attribution à un fonctionnaire des fonctions d'un autre poste de mêmes groupe et sous-groupe professionnels, et de même niveau ou de niveau inférieur.

[9] That is the only definition of “promotion” in the *Definition of Promotion Regulations*. These regulations and their formulas were explicitly adopted for the purposes of defining “promotion” strictly in the context of the PSEA provision relating to deployment.

[10] The term “promotion” appears in the definition of “acting appointments” found at s. 1 of the *PSEER*, which simply states that an acting appointment is “... the temporary performance of the duties of another position by an employee, if the performance of those duties would have constituted a promotion had they been appointed to the position.” It does not allude to any salary rate comparisons or any other calculations. That definition does not refer to or incorporate the *Definition of Promotion Regulations*.

[11] I also note that the TB Directive is just that, a directive, and that it has no binding force under the *PSEA* or the *PSEER*. Moreover, the purpose of the formula in section 2.2.3 is apparently not to determine what an acting appointment is but rather to calculate employees’ rates of pay. The provision is found in the section of the TB Directive’s Appendix entitled, “A.2.2 Rate of Pay”. The introductory paragraph to that section explains that the rates of pay for persons appointed to positions are determined in accordance with the section. It makes no suggestion or reference anywhere that its provisions have anything to do with acting appointments.

[12] On the other hand, “acting appointment” is mentioned and defined elsewhere in the TB directive, in Appendix A.1, Part 1 — Definitions, as follows: “... where a person is required to substantially perform the duties of a higher classification level ...”. Notably, no mention is made of salary or promotion. There is no question that SC-DED-03 is a higher classification level than SC-DED-02.

[13] Accordingly, there is no basis in the *PSEA* or the *PSEER* for using the formulas found in either the TB Directive or the *Definition of Promotion Regulations*, which apply only to deployments, to determine what a promotion is within the meaning of s. 1 of the *PSEER*.

[14] Given this fact, there is no reason I should not apply an ordinary meaning to the term “promotion” as used in the *PSEER*. As the complainant rightly argues, by any ordinary measure of understanding, being moved from a position at level 02 to a position at level 03, within the same occupational group, coupled with an increased pay rate, albeit less than 4%, is a promotion, especially considering the career opportunities that the higher position offers, which she also pointed out. In any event, according to the TB Directive’s definition, it does constitute an acting appointment.

[15] It may be helpful in some instances to rely on formulas such as those found in the *Definition of Promotion Regulations* and the TB Directive to determine if a given staffing action is a promotion, particularly when the person moves from one occupational group to another. However, these formulas are not binding with respect to the definition of “acting appointment” under s. 1 of the *PSER*. Moreover, the Board need not rely on them to determine if a promotion has occurred when the use of such a tool seems unnecessary, as in this case, when an upward change of level occurs within the same occupational group.

[16] For these reasons, I am satisfied that the staffing action of temporarily moving the appointee from her substantive SC-DED-02 level position to perform duties at an SC-DED-03 level position was an acting appointment and not an assignment.

[17] Consequently, the complainant has a right to make a complaint about this appointment under s. 77(1) of the *PSEA*. The respondent’s motion to dismiss the complaint is denied.

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

(The Order appears on the next page)

II. Order

[19] The motion to dismiss the complaint is denied.

[20] The timelines for the complaint are reinstated.

[21] The date by which the exchange of information must be completed is extended to 7 days from the date of this decision.

[22] All parties must consult the *Public Service Staffing Complaints Regulations* (SOR/2006-6) and the Board's *Procedural Guide for Staffing Complaints* to calculate the amended deadlines resulting from the extension and ensure that they make the necessary adjustments to the timelines applicable to them.

July 26, 2021.

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