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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

SHANNON-MARIE SONI, CATHERINE NAGI, AND FAYAZ MANJI

Complainants

and

**DEPUTY HEAD
(Department of Foreign Affairs, Trade and Development)**

Respondent

and

OTHER PARTIES

Indexed as

Soni v. Deputy Head (Department of Foreign Affairs, Trade and Development)

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

Before: Guy Grégoire, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainants: Bertrand Myre, Professional Association of Foreign Service Officers

For the Respondent: Theresa James, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard by videoconference,
November 8 and 9, 2021.

REASONS FOR DECISION

I. Introduction

[1] In December 2017, an indeterminate appointment to the position of Director (Rotational) (EX-01 group and level) was made by way of a non-advertised process at the Department of Foreign Affairs, Trade and Development, which is also publicly designated as Global Affairs Canada (GAC). Shannon-Marie Soni, Catherine Nagi, and Fayaz Manji (“the complainants”) alleged that the choice of a non-advertised process, which they claimed was contrary to GAC’s normal practice of promoting individuals by way of a collective advertised process, constituted an abuse of authority on the part of the respondent, the deputy head of GAC. They filed a complaint pursuant to s. 77(1)(b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; “PSEA”).

[2] For the reasons that follow, I find that the fact that GAC normally staffs by advertised appointment process does not negate the flexibility in the choice of appointment process afforded by s. 33 of the PSEA. I conclude that on a balance of probabilities, the complainants failed to substantiate their claims. Therefore, the complaints are dismissed.

[3] Note that the Public Service Commission did not appear at the hearing but instead provided written submissions addressing its relevant policies and guidelines. It took no position on the merits of the complaint.

II. History of the case

[4] On December 19, 2017, GAC posted a Notification of Appointment or Proposal of Appointment to the position at issue, further to a non-advertised process. The appointment process was numbered 17-EXT-INA-GP-1016856.

[5] Ms. Soni, one of the complainants and the first witness, testified that she has been with GAC for 18 years and that she currently serves at the Privy Council Office at the EX-02 level. She stated her extensive experience in different assignments with GAC. Of pertinence to this matter was her assignment to the Canadian embassy in Washington, D.C., from 2010 to 2013.

[6] She explained that GAC uses a promotion process and has positions that are somewhat different compared to the rest of the federal public service — they are called “rotational positions”. The rotational category at GAC consists of those

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employees (Canadian diplomats) who, as a condition of employment, must be willing to relocate outside Canada, to work at a Canadian embassy abroad. These positions are pool managed; they are not specific to any employees or job descriptions. As such, employees rotate into, and out of, the positions they occupy every two to five years.

[7] Ms. Soni further explained that the promotion of a foreign service officer (“officer”) to an EX-01 rotational position at GAC is normally done via a collective staffing process. All successful candidates are placed in a pool. From the pool, an officer could receive an appointment to the EX-01 group and level, and hence, a promotion. These processes for promoting officers occur only sporadically and not necessarily every year.

[8] The complainants’ representative entered into evidence a job opportunity advertisement dated April 16, 2014, for “Various Director Positions” at the EX-01 group and level, to create a pool of qualified candidates to staff rotational positions. It listed the essential qualifications that a candidate had to meet to qualify.

[9] Ms. Soni claimed that all positions abroad are rotational and therefore should be based on the Statement of Merit Criteria (SOMC) of the previously advertised process of 2014 and that the appointment at issue should have been made from that pool.

[10] She then referred to a chain of emails, beginning with one from the Executive Services and Pool Management Division (identified by GAC’s internal code “HFR”) to Denis Stevens, the staffing manager, dated August 9, 2017. These emails discussed some amendments to be made to the SOMC.

[11] Ms. Soni testified that the amendments added specific knowledge that was not normally required for a rotational officer but rather for mobile employees’ positions, hence making it appear as if the SOMC were tailored for one specific person. She claimed that the amendments were designed for the appointee.

[12] The complainants’ representative then called Ms. Nagi to testify. She is currently the director of GAC’s Southeast Asia Division and has been with GAC for 31 years. For a time, she was the head of mission in Dusseldorf, Germany. She stated that in 1988, she was initially hired as an FS-02, and that later, she was promoted to FS-03 and then to FS-04 positions, always by way of advertised appointment processes.

[13] The complainants' representative presented her with a redacted and undated memo from HFR sent via GAC's Human Resources (HR) section to the deputy minister. Ms. Nagi stated that it explains the sensitive nature of the appointee's appointment to the "rotational EX-01 pool (RPEX)." The memo states as follows:

...
... Our analysis of pool data shows that there is currently no need for additional EX-01 employees; there are presently 20 EX-01 employees on SAP; the general approach to staffing rotational pools favours collective advertised processes, thus non-advertised appointments are usually avoided. The EX-01 feeder groups may not understand the business need behind a non-advertised appointment.

The above sensitivities and advice have been shared with the mission....
...

[14] The complainants also contend that Mr. Stevens did not have the proper delegation of authority at the Canadian embassy in Washington to sign this staffing action from start to finish. Ms. Nagi referred to an email exchange between Mr. Stevens and HR dated September 14, 2017, claiming it establishes that he signed the document even though he was no longer at the Washington embassy.

[15] Mr. Stevens testified that at the relevant period, he was the deputy head of mission at the Canadian embassy in Washington. He is currently the assistant secretary to the Treasury Board for international affairs, security and justice.

[16] He testified that as appears from the "Choice of Appointment Process and Appointment Decision Summary Form", which he signed on September 26, 2017, he decided not to appoint from the pool of qualified candidates created by the 2014 process but rather to proceed by way of a non-advertised process.

[17] The form stated that among many reasons, the choice of process was based on an assessment of business needs at the EX-01 level, notably in energy and environmental cooperation within North America. It further stated that there was a gap for this expertise within GAC. Finally, it stated that the manager wanted to ensure increased gender balance and to enhance the representation of women within the senior ranks.

[18] In the same form, the manager stated that the appointee had been acting in the position since August 2014 (three years at the relevant time), had received excellent performance evaluations, met all the items in the SOMC, and was the manager of the Energy and Environment Section at the Canadian embassy in Washington. Finally, he stated that there was a gap of 22 women executives at the EX-01 level compared to men within GAC.

[19] On November 17, 2017, GAC posted a Notice of Consideration for the non-advertised process at issue. It listed the qualifications that the appointee had to meet to qualify, which were similar to those identified in the April 2014 job opportunity advertisement. It added experience specific to “Canada’s energy and environment priorities” and advancing “... Canada’s bilateral priorities with the United States and/or trilateral priorities within North America.” It also added, “Knowledge of Canada’s national and international environment priorities, including with respect to climate change, clean energy, and the Arctic.”

[20] The appointee was offered an indeterminate appointment to the EX-01 rotational pool (position EXT-406054) by letter dated December 19, 2017.

III. For the complainants

[21] The complainants’ representative alleged that GAC abused its authority by choosing a non-advertised process, that it was unable to substantiate its claim of an immediate organizational need, and that the non-advertised process had a real or perceived element of favouritism.

[22] The complainants’ representative argued that there was no immediate need for more EX-01s, as is indicated in HR’s undated memo. The second paragraph of it reads as follows:

This file is sensitive for several reasons. Our analysis of pool data shows that there is currently no need for additional EX-01 employees; there are presently 20 EX-01 employees on SAP; the general approach to staffing rotational pool favours collective advertised processes, thus non-advertised appointments are usually avoided. The EX-01 feeder groups may not understand the business need behind a non-advertised appointment.

[23] He also referred to the *Global Affairs Canada 2017-18 Corporate Human Resources Plan*, which he claimed makes no mention of a need for EX-01s in GAC's human resources plan.

[24] The complainants' representative cited *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 ("Ross"), as an example of circumstances that the Federal Public Sector Labour Relations and Employment Board ("the Board") had previously accepted as immediate needs to justify the use a non-advertised process. He claimed that in the present case, "immediate need" had not been established; nor is there any documentation to support the immediate-need rationale. He further argued that since the appointee was already acting in the position, the respondent could not argue that an immediate need existed to justify its recourse to a non-advertised process.

[25] The complainants' representative further argued that during the informal discussion with management, the complainants were told that the specific skill set may not be needed in a "future pool competition." They claimed that that contradicted the rationale used to justify the selection process and that it supported the assertion that the selection process was tailored for one candidate and hence constituted an abuse of authority.

[26] He also argued that were a specific knowledge required for this position, it should have been made non-rotational, in which case a non-advertised process would have been appropriate.

[27] The complainants' representative recognized that although there is a gender gap across all EX-levels at GAC, where 22 to 47 women are needed to meet its employment-equity targets, the gap is much smaller at the EX-01 level, where women make up to 42% of the workforce. However, he did agree that a gap exists. He claimed that promoting one woman would not have significantly reduced the gap and that it was "disingenuous for the Department to use this as a justification."

[28] Finally, based on information obtained by an access-to-information request that the complainants made, the complainants' representative affirmed that Mr. Stevens did not have the proper delegation of authority at the Canadian embassy in Washington to sign this staffing action from start to finish. He claimed that Mr. Stevens had

completed his assignment in Washington when the appointment was made and that the staffing action had nothing to do with his new assignment.

IV. For the respondent

[29] Mr. Stevens addressed the complainants' allegation that GAC had not established the need for another EX-01 because it already had too many EX-01s for the number of positions available, according to its documents. He stated that although those documents may show in effect that there was no need to use an advertised process, this did not preclude the option of using a non-advertised process to address a specific EX-01 need.

[30] He testified that the appointment was made to support the new priorities that senior management identified following a change to the American government's foreign policy. This staffing action was not identified in the 2017-2018 HR plan since the need for it arose in June 2017, when the United States withdrew from the *Paris Agreement* on climate change.

[31] Mr. Stevens testified that he chose a non-advertised process to staff the position because the "context matters; those were challenging times with the Trump presidency beginning," and he felt that energy and the environment would be the number one trade issue. He stated that GAC was under-resourced in the field of energy and resources, and he had to find someone with expert knowledge.

[32] The respondent's representative replied to the allegation that the delegation of authority was not respected by stating that establishing the merit criteria and assessing and appointing the candidate were all done in accordance with the GAC's table of HR delegated authority.

[33] Mr. Stevens testified that his position equated to a level 3 manager and that in accordance with the delegated authority table, he could determine the choice of selection process (i.e., advertised or non-advertised), determine the assessment method, and assess the persons in the selection process. The authority to appoint to the EX-01 group and level lies with GAC's deputy head (known by GAC's internal code as "USS" identifying the deputy minister of foreign affairs). That person signed the letter of offer and indeed, the letter of offer to the appointee dated

December 19, 2017, which was entered into evidence, was signed by Ian Shugart, Deputy Minister of Foreign Affairs.

[34] The complainants' representative objected to this evidence on the basis that the letter's author was not present at the hearing and could not be cross-examined. I overruled the objection, as the Board is authorized to accept any evidence, whether admissible in a court of law or not, and explained that both parties would have the opportunity to argue the weight that should be assigned to this evidence.

[35] Mr. Stevens reiterated that there were pressing operational needs to proceed by way of a non-advertised process, that the appointee was highly qualified, and that the merit principle was applied.

V. Decision

[36] The complaints were made under s. 77(1)(b) of the *PSEA*, which reads as follows:

77 (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of

...

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process

[37] There is essentially one issue in this case, accompanied by many allegations to support it.

VI. Issue - Did the choice of a non-advertised selection process constitute an abuse of authority, and did the justification support that choice?

[38] As was noted in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 61 to 63, the preamble of the *PSEA* sets out that Act's key legislative purposes. It includes a recognition that the 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 ...". As one of the means to exercise this flexibility, Parliament enacted s. 33, which states, "In making an appointment, the

[Public Service] Commission [or a delegated authority] may use an advertised or non-advertised appointment process.”

[39] The complainants submitted that GAC’s normal staffing practice for rotational positions is by way of advertised appointment processes and by establishing pools of qualified candidates. This is demonstrated by the HFR’s undated memo to the deputy minister (USS), informing that “... the general approach to staffing rotational pools favours collective advertised processes, thus non-advertised appointments are usually avoided. The EX-01 feeder groups may not understand the business need behind a non-advertised appointment.”

[40] In his testimony, Mr. Stevens recalled that a similar non-advertised appointment was made in 2010. I find that this goes to show how rarely such appointments are made.

[41] That said, the respondent was not precluded from using non-advertised staffing processes, as prescribed by s. 33 of the *PSEA*. In *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22, the former Public Service Staffing Tribunal (“the Tribunal”) determined that merely choosing to proceed by a non-advertised process is not an abuse of authority in itself.

[42] In *Lahaie v. Deputy Minister of National Defence*, 2009 PSST 30, the Tribunal went on to state, “The mere fact that choosing a non-advertised process is not common practice is not in itself evidence of abuse of authority.” I concur.

[43] In *Kane v. Deputy Head of Service Canada*, 2007 PSST 35 (upheld in 2012 SCC 64) (“*Kane*”), the Tribunal similarly observed that “... the deputy head has the discretion to use an advertised or a non-advertised appointment process.” *Kane* involved a claim by the complainant that the new position to which the appointment had been made was in fact a reclassification of his own substantive position. *Kane* found that whether the position was new or reclassified, there was no distinction when it came to the deputy head’s authority to choose between an advertised or non-advertised process. In the present case, the fact that the position in question is rotational has been highlighted. Nevertheless, the *PSEA* does not make any distinction between appointments to a rotational or a non-rotational position when it comes to the choice of process. There is no requirement to prefer an advertised process over a non-advertised one.

[44] The complainants' representative relied on *Ross* in arguing that the respondent had not met an immediate need. I disagree. Although the circumstances in *Ross* differ from those in this case, the principle followed in *Ross* applies to this case. In both instances, a manager assessed a situation that needed addressing; in *Ross*, it was scheduling issues, and in this case, it was a change in international policies. In neither case was the decision to proceed by way of a non-advertised process arbitrarily motivated to favour anyone but rather to respond to an organizational need.

[45] The fact that the position was already being filled by the appointee on acting basis does not negate the respondent's submission that there was a need to fill the position on a more permanent basis given the changing circumstances in Washington.

[46] Those changing circumstances were highlighted in the amendments made to the SOMC. The complainants' representative argued that the amendments were tailored to match the qualifications of the appointee, hence establishing favouritism.

[47] However, I find the justification and the testimony offered by Mr. Stevens reasonable, as the amendments were based on the changes brought forth by the election of a new American president and the upcoming changes in his foreign policy on energy and the environment. He identified the need "to shore up the energy and environment file." Canada's interests in the United States were being challenged. The *North American Free Trade Agreement* would likely be renegotiated, and the area of energy and environment would be an important policy element.

[48] The manager accordingly determined the position's requirements. He testified that in amending the SOMC, he emphasized the need to focus on increased energy and environment expertise that went far beyond that found within the persons occupying generic EX-01 positions. He explained that he struck out of the original SOMC the requirements for international development priorities and programs or corporate services because there was no need for them as they pertained to the United States. He stated that he also struck out the knowledge portions related to key trends and best practices in Canadian government and to Canadian government plans, priorities, policies, and initiatives in foreign policy, trade, development, or management. He explained that he did so because he already had someone in the GAC's Trade Section who covered that area quite adequately.

[49] He justified the SOMC amendments by relating them to operational needs. They read as follows:

...

Significant experience in developing and implementing policy advice, negotiating strategies and advocacy plans that advance Canada's energy and environment priorities abroad.*

Experience engaging stakeholders and government officials to advance Canada's bilateral priorities with the United States and/or trilateral priorities within North America.

...

Knowledge of Canada's national and international environment priorities, including with respect to climate change, clean energy and the Arctic.

...

[50] Another challenge linked to the environment was the American government's announced intent to leave the *Paris Agreement*. He stated that the status quo would not endure and that he needed someone who could analyse and offer policy advice on such topics. He justified the SOMC's amendments by relating them to operational needs.

[51] He emphasized the need to focus on increased expertise about energy and the environment, which far exceeded that found within the generic position as it related to that expertise area.

[52] Based on the evidence before me, I find that the SOMC, as amended by the manager, reflects the operational concerns identified, which are supported by the explanations provided. They do not demonstrate favouritism for the appointee, and there certainly was no evidence adduced of any *personal* favouritism as contemplated at s. 2(4) of the *PSEA* (see *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7).

[53] The manager justified his decision to make this non-advertised appointment by the present and urgent need he identified to adapt and respond to changes affecting his organization. There was no evidence to substantiate that he might have acted arbitrarily.

[54] The complainants' argument that the HR plan stated that no more EX-01s were required was also not persuasive. As Mr. Stevens testified, this staffing action was not identified in the 2017-2018 HR plan since the need arose in June 2017 when the United States withdrew from the *Paris Agreement* on climate change. The HR plan considered GAC's need for EX-01 rotational positions as a whole. It did not preclude specific staffing actions that could have arisen with time, due to unforeseen circumstances. Although non-advertised appointments were rare, the exceptional character of this appointment justified the use of this type of process under s. 33 of the *PSEA*.

[55] The complainants' representative argued that it was disingenuous for the manager to state that he wanted to address the gender gap with this appointment. It is clear from Mr. Stevens' testimony that his main concern was with operational needs. There was no specific plan to address the gender gap by this action. It just so happened that the appointment of that specific individual allowed reducing the gap. That being the case, I find that on a balance of probabilities, this argument does not establish abuse of authority by the respondent.

[56] In final submissions, the complainants' representative referred to an email exchange that occurred between the appointee and HR about two months prior to the appointment, a redacted copy of which had been entered into evidence, to argue that this constituted proof that the respondent had engaged in personal favouritism in making the appointment. The respondent objected, pointing out that in their allegations the complainants had only made a passing reference to favouritism in their conclusion. I accept that it would be unfair to entertain this new and unalleged argument as the hearing was closing. Besides, even if the allegation was properly before the Board, I would find there is no merit to it. A mere exchange of emails in the context of the candidate's completing a self-assessment form does not demonstrate, on a balance of probabilities, the existence of any personal favouritism from the manager toward the appointee.

[57] Finally, in relation to the appropriateness of the delegation of authority to the manager, based on the evidence before me, I find that the proper delegations of authority were respected with respect to this selection process. Mr. Stevens was at level 3, and thus, according to the *Global Affairs Canada Table of Human Resources Management Delegated Authorities* delegation instrument, he was authorized to

initiate the process, define the SOMC, and assess the candidate. The deputy minister signed the letter of offer and possessed the appropriate delegated authority.

[58] For all of the above reasons, I find that the complainants have not established that the respondent abused its authority in the selection of a non-advertised appointment process. The Board makes the following order:

(The Order appears on the next page)

VII. Order

[59] These complaints are dismissed.

April 26, 2022.

**Guy Grégoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**