Date: 20221013

Files: 771-02-38749, 38750, and 41076

Citation: 2022 FPSLREB 86

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

JACQUELINE GABON AND DARLENE MARCHAND

Complainants

and

DEPUTY HEAD
(Department of the Environment)

Respondent

and

OTHER PARTIES

Indexed as
Gabon v. Deputy Head (Department of the Environment)

In the matter of complaints of abuse of authority - paragraphs 77(1)(a) and (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: Stephen Vanneste, labour relations officer

For the Respondent: Amita Chandra, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard by videoconference,
June 28, 29, and 30, 2022.

REASONS FOR DECISION

I. Preliminary withdrawal of one complaint

[1] At the opening of the hearing, the representative for Jacqueline Gabon and Darlene Marchand ("the complainants") informed the Federal Public Sector Labour Relations and Employment Board ("the Board") that Ms. Gabon wished to withdraw one of her complaints, the one with Board file no. 771-02-41076. The Board acquiesced, confirmed the withdrawal, and closed the file.

[2] The withdrawal left two complaints to be determined, Board file nos. 771-02-38749 and 38750. Although the complaints were joined, each complainant testified for her specific complaint.

II. Introduction

[3] In July 2015, the Department of the Environment ("the respondent") posted an anticipatory internal advertised appointment process, numbered 15-DOE-IA-MSC/SMC-NCR/RCN-AO-51575, for a planner/program coordinator (Meteorological Service of Canada (MSC)) position classified at the PC-02 group and level ("the planner position"). Subsequently, on June 6, 2018, the respondent published a "Notification of Appointment or Proposal of Appointment", with the same process number, appointing "Troy Beechinor Change in tenure from term to indeterminate".

[4] The purpose of the original selection process in 2015 was to staff two positions temporarily, with the possibility of deployments or indeterminate appointments and to establish a pool of qualified candidates that could eventually be used to staff similar positions with different tenures, linguistic profiles, and security requirements with the respondent.

[5] The complainants applied, were found qualified, and were placed in the pool of successful candidates. On December 5, 2016, the appointee was appointed to a term position, and on June 20, 2018, the tenure was changed to indeterminate. The appointee's indeterminate appointment is the subject of these complaints.

[6] For the reasons that follow, I conclude that on a balance of probabilities, the complainants failed to substantiate their claims that the respondent abused its authority, in contravention of ss. 77(1) (a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). Therefore, the complaints are dismissed.

[7] 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 complaints.

III. Summary of the facts and arguments

[8] The facts of this case are rather quite straightforward. The respondent ran an internal advertised appointment process, created a pool of qualified candidates, and appointed among others the appointee to a term position that lasted about 18 months before the tenure of his appointment was changed to indeterminate. Both complainants were found qualified and were placed in the pool.

[9] The complainants made their respective complaints with the Board in July 2018, alleging that the respondent contravened ss. 77(1)(a) and (b) of the *PSEA* because abuse of authority occurred both in the application of merit and in the choice of process.

A. For the complainants

[10] Ms. Gabon complained that she was not considered for the 18-month assignment and consequently was not considered for the indeterminate appointment. In her complaint, she stated that she participated in an informal discussion and that Christine Best, Director, Radar and Upper Air Division, who was the hiring manager ("the manager"), made administrative errors such that the list of qualified candidates in the pool might have been inaccurate. This statement arose from documents received from the respondent's Human Resources (HR) branch.

[11] She claimed that the manager had a poor recollection of how the pool candidates were considered. She claimed further that she was unclear as to what PC-02 pool information was given to the manager. Finally, the manager was aware that Ms. Gabon was interested in this development opportunity but that the manager was predisposed not to consider her for such opportunities, given the outcome of a staffing complaint she had made some time before.

[12] Ms. Marchand alleged this in her complaint: "I allege abuse of authority, not merely because of the omission of my results from the selection process, but because of improper conduct which is associated with intentional wrongdoing …". She claimed that this evidence appeared during the informal discussion process and in emails.

[13] In her complaint, Ms. Marchand made four allegations, which I have summarized as follows:

> 1. The manager exercised her discretion with an improper intention in mind. She established selection criteria while disregarding her results and screened Ms. Marchand out based on her education.
>
> 2. The manager acted on inadequate material and without considering relevant matters.
>
> 3. Ms. Marchand alleged that an improper assessment result occurred and that the manager was biased against her by stating that she was not qualified, hence exhibiting prejudice against her.
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> 4. Ms. Marchand alleged that the manager refused to exercise her discretion properly by adopting a policy that fettered her ability to consider Ms. Marchand's case with an open mind. The manager established final-selection criteria but disregarded her results to make the indeterminate appointment.

[14] It must be stated that the complainants were represented by a union representative and that all three contributed to presenting their case. I allowed them significant leeway when they presented their case, which caused some confusion during the testimonies given that facts and arguments were intertwined. Much hearsay testimony was heard, which was not always relevant to determining the case, and it led the respondent's representative to raise quite a few objections.

[15] I allowed most of the hearsay and documentary evidence to be entered into evidence, and I invited the parties to address in their closing arguments the issue of the weight to be given to any of the evidence.

[16] Ms. Gabon offered the opening statement on the complainants' behalf. She presented the arguments she wanted to rely on to support the complaints. She challenged the assessment method that the manager used for the term and indeterminate appointments, particularly this five-part assessment: candidate rank, right fit, formal interview, "articulation of selection", and conditions of employment.

[17] She challenged the assessment method's global ranking, the fact that knowledge was not assessed, the manager using a formal interview to establish the right fit, the requirement to be in the office four days per week, the appointment's tenure change, and the errors that were made. She argued that abuse of authority occurred when the complainants were assessed as not all merit criteria were assessed and there was bias against them.

[18] Ms. Marchand testified for a full day. I do not intend to reproduce all her testimony but only those parts pertinent to the case. Further to the selection process, she was found qualified and was offered an AS-03 assignment, but she would have preferred the planner position. She testified that the manager left on an 18-month assignment but that on her return, the manager would have told Ms. Marchand that she would not consider her for the planner position. She stated that that position was administrative and involved coordinating all aspects of the organization, as well as handling the budget and administration.

[19] At one point during Ms. Marchand's testimony, the complainants wanted to adduce into evidence a document entitled, "Workplace Violence Report". They wanted to use it to introduce the fact that that the work environment was toxic. The respondent objected.

[20] The document was illegible; its pages were double-printed, rendering it incomprehensible. The complainants had redacted it significantly, so much so that again, it was incomprehensible. Given the document's state, I find that it would have been prejudicial to the respondent since no sense could be made of it. I do not doubt that the respondent knew about it, but the complainants had the onus of making their case and producing cogent evidence to support it. They had ample time before the hearing to prepare and submit to the Board a legible version of the document, to have it admitted into evidence.

[21] I also concluded that the nature of the document tended toward staff-relations issues rather than addressing the issue at hand, the indeterminate appointment. I upheld the respondent's objection.

[22] Ms. Marchand then testified at length about her bad working relationship with the manager and relied on many emails to support her statement. Those emails were entered into evidence, but I find that they ultimately do not assist in addressing the dispute as they tend to demonstrate that the complainant could have been a good candidate for the position, not that there was abuse of authority in the appointment that was made. I will not delve further into those emails as they are not helpful to determining the issue.

[23] She testified that her marks in the selection process table were erroneously changed from those in the scoring tables that the complainants received from HR in

disclosure. She claimed that the manager changed the marks either deliberately or accidentally and that she was screened out because of the education criteria. She stated that the manager had ranked the candidates. She was ranked fifth and argued that ranking successful candidates is no longer allowed.

[24] The complainants called Paige Gilmore to testify. She works as an AS-02 at the respondent's GNC Office; she is also the president of Local 00709 of the Union of Health and Environment Workers. She has never worked in the personnel classification group (PE); nor was she involved in the selection process. The complainants wanted her to testify and to draw conclusions as an expert witness.

[25] I explained the rules about having an expert testify and added that that witness could not qualify as an expert. Ms. Gilmore provided opinion testimony about the circumstances of the appointment process at issue but no factual testimony that was not also provided in the complainants' testimonies.

[26] Ms. Gabon wanted to testify off-camera in the videoconference. She claimed that the presence of the manager affected her. The respondent objected, stating that Ms. Gabon had to be visible while testifying. I upheld the objection, stating that her testimony was to be given in open court and that the reason she provided did not support testifying off-camera. She turned her camera back on.

[27] She testified both in support of Ms. Marchand's complaint and her own. She testified that she was present during both informal discussions held after the appointment was made. She claimed that there was an apprehension of bias because of the requirement of being in the office four days per week, since she knew that the complainants could not comply with that, for medical reasons. She claimed that Ms. Best put her name as the contact person on the Notice of Appointment or Proposal of Appointment to intimidate the complainants. Normally, an HR contact should be listed.

[28] In his closing arguments, the complainant's representative argued that there was an apprehension of bias; even if it was unintended, it still constituted an abuse of authority (see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29). He also referred to *Gabon v. Deputy Minister of Environment Canada*, 2012 PSST 29, to show Ms. Best's negative reference for the complainant, to demonstrate a pattern of negative behaviour.

[29] He further argued that candidate ranking is no longer allowed, per *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20 at para. 56, and *Aucoin v. President of the Canada Border Services Agency*, 2006 PSST 12. He also argued that Ms. Best manipulated the marks, to avoid appointing one of the complainants, Ms. Marchand, hence contravening the right-fit requirement. He argued that the respondent also tailored the requirement to favour the appointee, constituting favouritism. He argued that the teleworking issue was the source of the breakdown of the relationship between Ms. Best and Ms. Marchand. He claimed that the comment that the appointee did a "great job" was not a selection criterion for determining the best fit. He argued that Ms. Best had an unconscious bias in favour of the appointee because he had a military background as did other people she knew, such as a brother-in-law.

[30] Both Ms. Gabon and Ms. Marchand asked that their first names be removed from the title page of this decision. They felt that having their first names published would provide too much information about them, that one of them had been stalked, and that it would raise a privacy issue in a frightening digital environment.

B. For the respondent

[31] The respondent called only one witness, Ms. Best, who was the manager. She testified that she has been a manager for many years and an EX-01 since 2010 and that she has managed or participated in more than 60 staffing actions. She testified that the planner position was administrative and that it dealt with scientists at wind farms.

[32] She explained the process that she followed to make the indeterminate appointment from the pool of qualified candidates. Once she obtained approval from the MSC Director General Committee to proceed with the indeterminate appointment, she contacted HR about using the PC-02 pool.

[33] The screening report was entered into evidence and referenced as the "coffee-stained report". Ms. Best testified that the term and indeterminate appointments were drawn from that pool based on that report. She testified that she was not involved in creating the selection process table and that it had come from HR. That handwritten notes in the coffee-stained report are hers; she made them while assessing the candidates from that pool.

[34] Since the candidates in the pool had already been found qualified, she did not reassess their essential qualifications, such as knowledge, but instead focussed on the competencies, of which there were five: communication, adaptability, working with others, client focus, and thinking. She determined that three of them were key assets: adaptability, working with others, and thinking. She defined "adaptability" as being able to adapt to constantly changing scenarios, "working with others" as the focus of the position, and "thinking" as judgement.

[35] She proceeded to determine those on the list who had received an average of 80% for the five assets; she then identified those who had received 80% or more on the three assets she emphasized. She claimed that she did it to narrow the list of potential candidates. She also determined as an operational requirement that the successful candidate had to work in the office four days out of five.

[36] At that point, she invited the candidates to interviews, which some turned down. The appointee agreed to be interviewed. He was found to meet the competency requirements and to have transferable skills. Ms. Best stated that he had "stellar" references. Ms. Best testified that she did not know the appointee before the selection process for the term appointment. He was found to be the right-fit candidate.

[37] Ms. Best confirmed that she used a group system to assess the candidates, but she did not rank them, as the complainants alleged. She testified about other screening tables that HR provided to the complainants in disclosure and the discrepancies in them. She stated that she did not prepare them, was not responsible for the discrepancies, and did not use them in her assessment. She claimed that she used only the coffee-stained report, that she did not manipulate the results in any way, and that she took them as she received them from HR.

[38] She testified that the original appointment was made a term because at that time, the position was encumbered; had it not been, the indeterminate appointment would have been made then.

[39] The respondent's representative raised in argument that the complainants' definition of favouritism did not fall under what the *PSEA* sets out and that it requires more than a mere error. She claimed that allegations are not evidence. She argued that Ms. Best demonstrated sound judgment in the assessment process and acted within her discretion and authority.

IV. Reasons

[40] Section 77 of the *PSEA* states 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 not proposed for appointment because of an abuse of authority.

[41] "Abuse of authority" is not defined in the *PSEA*. However, s. 2(4) provides as follows: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism." As indicated in *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, abuse of authority may also include improper conduct or significant omissions. In a complaint of abuse of authority, the burden of proof rests with the complainant (see *Tibbs*, at paras. 48 to 55, and *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 27).

1. Did the respondent abuse its authority in the application of merit?

[42] The complaints were made under s. 77(1)(a) of the *PSEA*, which refers to s. 30(2). Those provisions read 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*	***77 (1)*** *Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :*
(a) *an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2) ….*	***a)*** *abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);*
…	**[…]**

30 (2) *An appointment is made on the basis of merit when*	***30 (2)*** *Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*
(a) *the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and*	***a)*** *selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;*
(b) *the Commission has regard to*	***b)*** *la Commission prend en compte :*
(i) *any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,*	***(i)*** *toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,*
(ii) *any current or future operational requirements of the organization that may be identified by the deputy head, and*	***(ii)*** *toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,*
(iii) *any current or future needs of the organization that may be identified by the deputy head.*	***(iii)*** *tout besoin actuel ou futur de l'administration précisé par l'administrateur général.*

[43] As a panel of the Board, my role is not to reassess candidates but rather to determine whether there was an abuse of authority in the appointment process (see *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19 at para. 65, and *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20 at para. 54).

[44] When making appointments, s. 36 of the *PSEA* allows a hiring manager to use the assessment method that he or she considers appropriate to determine that a person meets the required qualifications. It reads as follows:

> ***36*** *In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).*
>
> ***36*** *La Commission peut avoir recours à toute méthode d'évaluation — notamment prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).*

[45] In *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11, the Board's predecessor, the Public Service Staffing Tribunal (PSST), stated this:

> ***77*** *Section 36 of the PSEA provides that the deputy head may use any assessment method that he or she considers appropriate in an internal appointment process. For the Tribunal to find that there was abuse of authority in the selection of the assessment methods, the complainant must prove that the result is unfair and that the assessment methods are unreasonable, do not allow the qualifications stipulated in the statement of merit criteria to be assessed, have no connection to those criteria, or are discriminatory.*

[46] The original selection process is not the subject of the complaints and was beyond the scope of the hearing. The complaints are solely against the appointee's indeterminate appointment.

[47] *Visca v. Deputy Minister of Justice*, 2007 PSST 24, sheds quite a bit of light on the analysis of the circumstances of this case. It recognizes that Parliament chose to move away from its previous staffing regime and to provide managers with considerable discretion.

[48] In this case, the manager used a pool of qualified candidates that included both complainants and made an analysis to find the right-fit candidate. She averaged all five competencies and then emphasized three of the five that she determined most relevant to the position. Then she made a list, contacted the candidates for interviews, and finalized her decision. It was noted that some candidates declined the invitation to be interviewed and that others accepted it. Eventually, the manager made an indeterminate appointment.

[49] I find nothing in the assessment methodology that even hints of an abuse of authority. The complainants did not prove on a balance of probabilities their allegation that the manager adapted the asset requirements. It was within her discretion to determine the key competencies for the position, and she emphasized them by seeking those candidates who achieved a mark of 8 out of 10. The competencies she used were the same ones assessed initially; she did not change them in any way.

[50] *Visca* states that there is no longer a requirement to rank candidates but that a manager is not precluded from doing it. In the old regime, ranking was used to apply the merit principle in that the one ranked first would be appointed, then the second one, and so on. Today, it is no longer so — a manager may choose, from all qualified candidates, "… the person that in the manager's judgement is the **right fit** for the job" [emphasis in the original] (see *Visca*, at para. 44).

[51] Relying on *Broughton*, the complainants argued that ranking the candidates in a selection process is no longer permitted. However, paragraph 56 of that decision states, quoting paragraph 43 of *Aucoin*, "The *PSEA* no longer requires the establishment of a rank between candidates …". That is quite different from prohibiting candidate ranking. Also, *Visca* reiterates that a manager ranking candidates is not precluded.

[52] A manager has the discretion to set the operational requirements, which in this case were being physically present in the office four days per week. The complainants did not convince me on a balance of probabilities that that requirement was aimed at disqualifying them because they might have needed accommodation in the form of teleworking. Instead, the manager explained why the appointee being present in the office was required.

[53] I find no evidence that the respondent applied a rigid guideline, fettered its discretion, or failed to use an open mind in reaching its decision. The evidence established that the appointee was chosen from a pool of qualified candidates. The manager chose to emphasize the competencies that she determined were required to identify the right-fit candidate and then made the appointment. The onus of establishing abuse of authority on a balance of probabilities was on the complainants. I find that they failed to demonstrate that the requirement of being physically present in the office four days out of five each week constituted bias in favour of the appointee.

[54] Furthermore, I find that I may not substitute my opinion for that of the manager; she had the discretion, and it was her decision. Only if I am convinced on a balance of probabilities that an abuse of authority occurred may I intervene; in this case, I am not convinced. Based on the manager's methodology, the complainants were not contacted for interviews for the indeterminate appointment because they did not achieve a mark of 80% or more on the three competencies that the manager emphasized (adaptability, working with others, and thinking). I conclude that there was no abuse of authority.

[55] Ms. Marchand claimed that an error was made with respect to her education. The respondent confirmed that it was remedied and that eventually, she was placed in the pool of qualified candidate in the original selection process. I find that this error had no impact on the case at hand; nor was it determinative of the appointment that was made.

[56] In *Tibbs*, the PSST stated this:

> …
>
> ***65*** *It is clear from the preamble and the whole scheme of the* PSEA *that Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority. For example, under section 67 of the* PSEA*, the grounds for revocation of an appointment by a deputy head after an investigation are error, omission and improper conduct. These grounds for revocation are clearly less than those required for a finding of abuse of authority. Parliament's choice of different words is significant: Sullivan and Driedger,* supra *at 164. Abuse of authority is more than simply errors and omissions.*
>
> …
>
> ***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.*
>
> …

[57] In this case, the error involving Ms. Marchand, as it pertained to the education criterion, was identified and corrected, as mentioned. Therefore, the argument of abuse of authority does not stand, and I cannot find that it establishes an abuse of authority.

[58] The test for a reasonable apprehension of bias is well established. When setting up an appointment process, the question to be answered is whether a reasonably informed bystander could reasonably perceive bias on the part of one or more of the persons responsible for the assessment; if so, the Board can conclude that abuse of authority exists (see *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10; *Drozdowski v. Deputy Head (Department of Public Works and Government Services Canada)*, 2016 PSLREB 33, and *Hansen v. Deputy Head (Department of Justice)*, 2022 FPSLREB 9).

[59] The evidence indicates that the manager did not know the appointee before the original selection process. Also, the manager reconsidered the qualified candidates from the pool, based on their achievements on three key competencies. To me, the methodology appears objective. In this case, I find that the complainants failed to establish on a balance of probabilities that a reasonably informed bystander could reasonably perceive bias on the part of the respondent. I find that there is no evidence to support a claim of bias either for the appointee or against the complainants.

[60] 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]

[61] At paragraph 41 of *Glasgow*, the PSST 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.*

[62] The complainants alleged that the respondent had a favourable bias in favour of the appointee because he had served in the military. They stated that the manager had a brother-in-law that had also served and that she drew a favourable conclusion in favour of the appointee. I find that this comment does not amount to the level required to meet a bias of personal favoritism. The evidence is that the manager used an objective methodology and that it led to the appointment.

[63] On a balance of probabilities, I find that there was no personal favouritism in favour of the appointee.

[64] Ms. Gabon submitted a PSST decision involving her, *Gabon v. Deputy Minister of Environment Canada*, 2012 PSST 29, to establish a pattern of negative behaviour from Ms. Best toward her. At the hearing, I explained that previous decisions are presented to the Board to demonstrate a principle of law or a particular interpretation of a given item, be it an event or a legislative interpretation. As such, a previous decision cannot, in itself, be factual proof in this case.

[65] Ms. Gabon had the opportunity to cross-examine Ms. Best at the hearing, to demonstrate the negative behaviour she alleged. Through her representative, she failed on a balance of probabilities to adduce convincing evidence that would have established the alleged negative behaviour toward her. I find that a previous decision rendered by the Board does not in itself demonstrate on a balance of probabilities that the behaviour persists. Each case is different, and the complainants had to establish on a balance of probabilities that abuse of authority occurred. I find that they failed to.

2. Did the respondent abuse its authority in the choice of process?

[66] The complaints were also made under s. 77(1)(b) of the *PSEA*, which provides the following right of recourse when the choice of appointment process is in dispute:

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*	***77 (1)*** *Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de*

that he or she was not appointed or proposed for appointment by reason of	*travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :*
…	[…]
(b) *an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process ….*	***b)*** *abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;*

[67] Section 33 of the *PSEA* further states, "In making an appointment, the Commission may use an advertised or non-advertised appointment process." In this case, the respondent relied on a pool of qualified candidates to make a term appointment. I find that it was reasonable and open the respondent to proceed as it did in making the second appointment, which it termed "change in tenure". Again, the complainants had the onus of establishing on a balance of probabilities that the respondent's decision to proceed as it did was an abuse of authority. I find that the complainants failed to meet their onus.

3. Anonymization request

[68] The complainants asked that their first names be removed from the title page of this decision. As mentioned, they felt that having their first names published would provide too much information about them, that one of them had been stalked, and that it would raise a privacy issue in a frightening digital environment.

[69] The Board adheres to the open court principle and applies the "*Dagenais/Mentuck*" test (per *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76) to determine if granting a confidentiality order is in the interests of justice.

[70] The test to grant a confidentiality order was stated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, and was recently recast by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25, in the following terms:

…

> *[38] ... the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:*
>
> *(1) court openness poses a serious risk to an important public interest;*
>
> *(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,*
>
> *(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.*
>
> *…*

[71] Considering the arguments that the complainants raised to support an order to partially anonymize this decision, I found no serious risk to an important public interest by having their first names published, beyond the discomfort of the publicity of having one's name linked to a matter. Therefore, I dismiss the request to partially anonymize the style of cause.

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

(The Order appears on the next page)

V. Order

[73] The complaints are dismissed.

October 13, 2022.

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