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**Files:** 771-02-39058, 39086 to 39089, 39272, 39273, 39313, and 39686

**Citation:** 2023 FPSLREB 9

*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

**CLAUDE HUARD**

Complainant

and

**DEPUTY HEAD  
(Office of Infrastructure of Canada)**

Respondent

and

**OTHER PARTIES**

Indexed as

*Huard v. Deputy Head (Office of Infrastructure of Canada)*

In the matter of a complaint of abuse of authority under sections 77(1)(a) and (b) 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:** Nicolas Brunette-D'Souza and Stéphanie Rochon Perras,  
counsel

**For the Respondent:** Noémie Fillion, counsel

**For the Public Service Commission:** Louise Bard, analyst

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Heard by videoconference,  
March 23 and 24 and November 1 to 3, 2022.

[FPSLREB Translation]

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**REASONS FOR DECISION****FPSLREB TRANSLATION**

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**I. Complaints before the Board**

[1] Claude Huard (“the complainant”) made several complaints under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) with the Federal Public Sector Labour Relations and Employment Board (“the Board”), alleging abuse of authority in two selection processes, one advertised, process 2018-INFC-CS-IA-2076, and the other non-advertised, process 2018-INFCS-CS-INA-2177.

[2] The two processes were related because as part of the non-advertised process, the delegated manager with the Office of Infrastructure of Canada (“Infrastructure Canada”) (the deputy head being the respondent) appointed someone to one of the positions that had been planned to be filled through the advertised process. Financial advisor positions at the FI-03 group and level were to be filled.

[3] Therefore, I am seized with two complaints. In the advertised process, several appointments were made, and the complainant contested them all. The lead file bears number 771-02-39058; the decision on the lead file also applies to files 771-02-39086, 771-02-39087, 771-02-39088, 771-02-39272, 771-02-39273, 771-02-39313, and 771-02-39686. The complaint file for the non-advertised process is number 771-02-39089.

[4] For the following reasons, I find that abuse of authority occurred in the advertised process but not in the non-advertised process.

**II. Summary of the evidence**

[5] The two processes were held in 2018. The complainant has since been promoted to a position at the FI-04 group and level in another department. However, he considers the abuse of authority in the processes at issue in the complaints serious enough to merit pursuing the matter even though he is now in a higher-level position.

[6] The complainant was in an FI-02 position with the Department of Employment and Social Development when he was appointed to Infrastructure Canada in March 2018 to an FI-03 position on an acting basis, for a term of four months less one day. He worked as part of a project evaluation team under H el ene Payette’s direction. The team included an FI-03 employee with whom he worked very closely, Mary Ann Barros. For one year, she replaced Fen Liu, who was an employee on maternity leave until February 2019.

[7] The complainant and Ms. Barros had a good relationship. She spoke to him at length about her concern at not finding a permanent public service position. He advised her on several positions to which she could apply.

[8] At the end of March 2018, a selection process was advertised for FI-03 financial advisor positions with Infrastructure Canada. Ms. Payette was responsible for that process, given that the delegated hiring manager was her immediate supervisor, Nicole Thomas, who was the director of Infrastructure Canada's finance section. Several FI-03 positions were to be filled, including a vacant position on Ms. Payette's team. The complainant applied. He passed the screening as well as the interview.

[9] Certain skills were to be assessed through references. The two versions of the interview invitation email differed in that respect. In English, no number was specified. In French, two referees were mentioned. In both cases, a bilingual document was referred to in which three referees' names were requested, being the immediate supervisor and two former supervisors.

[10] The complainant provided 3 names, Stéphane Guénette, André Michel Couture, and Ms. Payette. Mr. Guénette had already provided favourable references for the complainant in the past. The complainant worked with Mr. Couture for only 9 months. As for Ms. Payette, he was somewhat worried about the fact that according to his calculations, she had supervised him for only 10 weeks. However, he felt obligated to comply with the request in the form.

[11] However, the complainant failed due to his references. According to the evaluator, Roch Langlois, who was another manager in the Finance Branch, the three referees provided references that did not result in him receiving a passing mark.

[12] The pass mark for the 4 questions was 6 out of 10. The questions measured the following skills: (1) demonstrate integrity and respect, (2) work effectively with others, (3) demonstrate initiative and be action oriented, and (4) think things through. For Mr. Guénette, Mr. Langlois assigned the following marks: question (1), 4; question (2), 5; question (3), 6; and question (4), 1.

[13] The complainant called Mr. Guénette to the hearing as a witness. He was the complainant's immediate supervisor from 2015 to February 2018. In fact, he provided a reference for the complainant when he obtained his acting FI-03 position with

Infrastructure Canada. He also provided a reference after that for other processes, which were always favourable to the complainant.

[14] Mr. Langlois contacted Mr. Guénette by telephone for the reference. When confronted with the notes that Mr. Langlois made during their telephone conversation, Mr. Guénette acknowledged that Mr. Langlois properly recorded his responses. However, according to him, the negative was emphasized rather than the positive. He did not agree in any way with the marks.

[15] For the fourth question, Mr. Guénette testified that the notes did not reflect either how he expresses himself or his ideas. Essentially, the question was about the ability to make decisions in a supervisor's absence. According to the notes, it was a difficulty for the complainant. According to Mr. Guénette, instead, he had said that the complainant was capable of acquiring the tools to deal with a situation. He completely disagreed with the mark given.

[16] Mr. Langlois testified at the hearing. He explained that he had interpreted the referees' responses to the best of his ability. In his 31 years as a financial advisor (progressing from FI-01 to FI-04 positions), he had several opportunities to participate in and had managed many hiring processes.

[17] He saw no reason to question his evaluations, which were based on what he received when interviewing the referees. In particular, he pointed out that the complainant failed the fourth question (decision-making ability) according to the three referees.

[18] In cross-examination, Mr. Langlois conceded that the referees' dearth of details contributed to the complainant's poor marks.

[19] Mr. Langlois was a referee for other candidates. He knew the assessment grid, so he knew what was expected in terms of answers to the questions asked of the referees. However, he said that he did not evaluate the references for those candidates; in fact, he evaluated only those of the complainant.

[20] On July 30, 2018, the complainant learned that he had failed the selection process. At the same time, the acting appointment for a term of four months less one day ended such that he ended up in an FI-02 position (even though, according to him, his duties did not change).

[21] Mr. Guénette testified that he was very surprised when he learned from the complainant that he had failed because of his references. His opinion was that for each question, the complainant deserved at least a pass mark, if not more. Around the end of August 2018, he corresponded with Ms. Thomas, the Finance Section director and the delegated manager for hiring the FI-03s, to further clarify his answers and to explain why, in his opinion, the complainant deserved a pass mark on each question.

[22] Ms. Thomas testified that in the end, despite Mr. Guénette's comments, she did not change the complainant's marks. Her conversation with Mr. Guénette, according to her testimony, confirmed what Mr. Langlois had noted for question 4, namely, the complainant's hesitation to make certain decisions. She had not been able to contact Mr. Couture, who was on vacation at the time, but a careful review of the entire file had confirmed to her that the complainant did not have all the qualities required for the FI-03 position. She communicated the confirmation of the complainant's failure to him on August 30, 2018.

[23] Ms. Payette evaluated all the candidates' references, except those of the complainant. He was the only one for whom Mr. Langlois evaluated references. The complainant was told that because Ms. Payette provided a reference for him, she could not also evaluate his references.

[24] The complainant submitted evidence that certain candidates, later appointed to FI-03 positions, had only two referees; one candidate who had been appointed had failed the evaluation of one referee's reference. Ms. Thomas testified that every case was unique; specific circumstances might have led to the selection committee's decisions.

[25] At the same time as the events at issue (in July and August 2018), Ms. Payette took steps to retain Ms. Barros in her section, she said in her emails to Ms. Thomas. So, she went ahead with a non-advertised process that led to Ms. Barros's indeterminate appointment to one of the FI-03 positions that were to be filled through the advertised process.

[26] Ms. Payette testified at the hearing. She was very frank; she knew Ms. Barros because they had worked together at the Royal Canadian Mint. She approached Ms. Barros in December 2017 to have Ms. Barros work in her section in February 2018 to replace Ms. Liu, and she wanted to retain Ms. Barros as an employee.

[27] Ms. Barros did not apply to the advertised process because she did not meet the positions' language requirement. All the FI-03 positions were bilingual, and she did not have a level of French sufficient to reach the BBB level, which was the minimum for that position.

[28] That barrier was removed in the non-advertised process. Ms. Payette obtained Ms. Thomas' approval to convert the position that would be assigned to Ms. Barros to a unilingual English position. Ms. Thomas testified that it had been difficult to fill all the FI-03 positions due to the bilingualism requirement. However, according to her, this requirement was important for all sections but not for all positions. In other words, it was important to maintain bilingual positions, but not all of them had to be bilingual. The Assistant Deputy Minister ratified the language-rating change for the position that was assigned to Ms. Barros.

[29] Given that Ms. Payette knew well Ms. Barros's professional history because she had worked with Ms. Barros in the past, Ms. Thomas instructed her to justify the appointment through the non-advertised process. In particular, she completed a document that set out the merit criteria. For each criterion, she provided examples of how Ms. Barros satisfied it.

[30] Ms. Payette also reviewed the appointee's references, which the referees had submitted in writing. The same four questions were posed as were asked in the advertised process. However, when she evaluated the references, Ms. Payette did not assign a mark to each question. She only gave an overall pass mark.

[31] When she was asked about it at the hearing, Ms. Payette replied that she had read the references but that because nothing jumped out at her that indicating a problem (she said, "[translation] I was looking for red flags"), she was satisfied that Ms. Barros was suitable for the position.

[32] The complainant testified that Ms. Payette and Ms. Barros were very close — they frequently left the office for coffee or took walks. Ms. Payette said that she liked Ms. Barros professionally but that they did not get together outside the office or leave together very often during business hours.

[33] I will conclude this summary with the structure of the teams that reported to Ms. Thomas, which included Ms. Barros's and the complainant's positions.

[34] The parties adduced as evidence the organizational chart of the branch that reported to Ms. Thomas. According to that chart, five team managers reported to her. She testified that the teams managed by Donald Wong and Ms. Payette carried out similar work and that ultimately, the intention was to combine them.

[35] Four positions were under Ms. Payette's, two FI-02, and two FI-03. The complainant held an FI-02 position, which was temporarily converted to FI-03 from March to July 2018. Ms. Liu held one of the FI-03 positions, and Ms. Barros replaced her during Ms. Liu's maternity leave.

[36] The other FI-03 position was vacant. According to the complainant, he should have been appointed to it, and Ms. Payette wanted to appoint Ms. Barros to it. According to Ms. Thomas, indeed, he would have been appointed to it had he succeeded in the advertised process. Ms. Barros did not fill it; rather, someone from outside the section did through a deployment (a hiring process that cannot be subject to a complaint under the *PSEA*) in September 2018.

[37] In fact, the position assigned to Ms. Barros (after it was converted from a bilingual to a unilingual position) was one of two vacant FI-03 positions under Mr. Wong. Although she was in Mr. Wong's team for organizational-chart purposes, the evidence demonstrated that Ms. Barros continued to work in Ms. Payette's team until Ms. Liu returned. After that, Ms. Payette retired, and the two teams were combined.

### **III. Summary of the arguments**

[38] The Public Service Commission (PSC), which is always a party to complaints under s. 77 of the *PSEA*, filed a submission on the general concept of abuse of authority as well as on the appointment process. It emphasized that under its *Appointment Policy*, appointments must respect the principles of merit and transparency stipulated in the *PSEA*. Failing to comply with that policy's requirements could constitute an abuse of authority.

[39] The PSC did not comment on the merits of the complaint, given that it did not hear the evidence presented at the hearing. It presented the parameters of the Board's jurisdiction.



[40] In their submissions, the parties cited several decisions of the Public Service Staffing Tribunal (the Board's predecessor), the Board, and the federal courts. In my analysis, I will return to the case law that I consider relevant to my decision.

**A. For the complainant**

**1. Complaints 771-02-39058, 771-02-39086, 771-02-39087, 771-02-39088, 771-02-39272, 771-02-39273, 771-02-39313, and 771-02-39686**

[41] The complainant alleged abuse of authority in that the respondent demonstrated bad faith and favouritism and made serious procedural errors that tainted the selection process. He addressed the abuse of authority by presenting three questions at issue.

**a. Was there abuse of authority in the evaluation and validation of the complainant's references?**

[42] The reference checks were ambiguous. The French and English emails did not set out the same things, and without notifying all the candidates, the respondent accepted several variations of the references — some provided only two, and some even named former co-workers as referees. The complainant provided three references, as requested, in good faith and as he understood it, but doing so severely disadvantaged him. He had not worked for long with either Ms. Payette or Mr. Couture, whose supervision dated back some time.

[43] The reference checks were also inconsistent. In one case, only one referee's answers were taken into account. In another, despite a failure for the references for one referee, the candidate was successful.

[44] Ms. Thomas made no effort to truly verify the references once the complainant expressed his concerns. Despite Mr. Guénette's opinion, she did not change Mr. Langlois's mark. She made no effort to contact Mr. Couture, although he was available when he returned from vacation.

[45] No mechanism was in place to ensure consistency when validating references, and notably, the two evaluators, Mr. Langlois and Ms. Payette, did not consult to ensure that their evaluations were similar. The assessment grid did not provide a marking scale; marking was left to the evaluator's discretion.

[46] The complainant emphasized that Ms. Payette evaluated his references (which Mr. Guénette and Mr. Couture provided) before granting him an acting FI-03 position. His subsequent failure is even more surprising. Too much information was missing to make a valid decision. Mr. Langlois seemed to have misunderstood and therefore incorrectly have evaluated the responses provided, which Mr. Guénette's testimony confirmed.

**b. Was there abuse of authority in the evaluation and validation of the other candidates' references?**

[47] The candidates were not evaluated in the same way at the reference stage. The complainant followed the instructions to provide references from his immediate supervisor and two previous supervisors, but not all the other candidates followed that instruction. The evidence demonstrated that some had only two references and that others had co-worker references. In the end, one of the candidates was successful despite the reference from one of his two referees failing the evaluation.

[48] All these facts are more than simple errors or omissions. The processing was so different that it became arbitrary to the point of constituting abuse of authority.

**c. Did the respondent demonstrate abuse of authority toward certain candidates, and did it demonstrate personal favouritism or bias toward them?**

[49] The complainant maintained that Ms. Thomas's treatment of him was biased. In his opinion, she did not want to question his failure, to favour Ms. Barros as a candidate in the non-advertised process.

**2. Complaint 771-02-39089**

[50] The complainant's theory, and the reason these two complaints were heard together, is that in his opinion, he was failed in the advertised process so that room could be made to appoint Ms. Barros through a non-advertised process.

[51] The complainant set out two questions at issue, which are detailed as follows.

**a. Was there abuse of authority in the choice of a non-advertised appointment process?**

[52] The choice of a non-advertised process in this case was abusive in itself. It allowed for bypassing the language requirement in the advertised process, with the specific aim of appointing Ms. Barros.

[53] Ms. Thomas tried to justify the non-advertised process by stating that the candidates to the advertised process did not have an important asset for the position. But it appeared that 7 of the 12 candidates effectively had the asset in question. Therefore, there was no need to resort to a non-advertised process given that the advertised process could have provided qualified candidates.

[54] In brief, Ms. Barros's appointment through a non-advertised process was predetermined and appears to have been the result of Ms. Payette's bias.

**b. Was there abuse of authority in the application of merit, including due to personal favouritism and bias?**

[55] The complainant disputed that the essential qualification of experience providing advice verbally and in writing to senior management was truly evaluated for Ms. Barros. Nothing in her curriculum vitae indicated that experience.

[56] According to the complainant, Ms. Barros's and Ms. Payette's friendship should have prevented Ms. Payette from evaluating Ms. Barros's qualifications, out of concern for bias. Given that Ms. Barros would be on Mr. Wong's team, at least structurally, and given that he had not participated, it would have been logical that he evaluate Ms. Barros as part of the non-advertised process.

**B. For the respondent**

[57] Overall, the facts do not demonstrate abuse of authority in the two processes, and the complainant did not establish it. Based on the case law, abuse of authority is serious misconduct, which cannot be found in this case.

**1. Complaints 771-02-39058, 771-02-39086, 771-02-39087, 771-02-39088, 771-02-39272, 771-02-39273, 771-02-39313, and 771-02-39686**

[58] According to the respondent, for the advertised process, these questions are at issue: Did the selection committee abuse its authority in evaluating the references? Did it demonstrate bias? Was there personal favouritism in the advertised process?

**a. Evaluating the references**

[59] The Board's mandate does not include re-evaluating candidates. Its jurisdiction is limited to determining whether the evaluation was conducted reasonably. There are no obligations related to the distribution of tasks within the selection committee. Two people evaluated the references, Mr. Langlois and Ms. Payette, but they made the same

assessment, using the same assessment grid. A complainant disagreeing with the marks does not mean that abuse of authority occurred.

[60] Mr. Langlois testified to his reasoning behind his evaluation of the complainant's references. It is clear that he took that task seriously. Mr. Guénette's opinion on the assigned mark was irrelevant; he was not a member of the selection committee and was not informed as to the criteria applied. It is normal for referees to have bias in favor of those for whom they provide references, hence the importance of a further, objective check.

[61] The complainant accused the respondent of some inconsistency in the reference checks. Ms. Thomas explained that different situations result in different solutions. All the candidates had references from their current supervisors. The other referees might have varied, but the objective was always the same: to be able to evaluate the candidate. If mistakes were made, they did not constitute abuse of authority.

#### **b. Bias**

[62] Nothing in the selection committee's actions indicated bias. The complainant did not end up in the position, but it was not done to favour Ms. Barros because the position he would have occupied remained vacant.

#### **c. Personal favouritism**

[63] The same argument applies to the personal favouritism allegation. Furthermore, this case has no sign of personal favouritism as defined by the case law.

### **2. Complaint 771-02-39089**

[64] According to the respondent, the questions at issue with respect to the non-advertised process are as follows: Was there abuse of authority in the choice of process? Was there personal favouritism, bias, or bad faith in Ms. Barros's appointment?

#### **a. Abuse of authority in the choice of a non-advertised process**

[65] The *PSEA* sets out the deputy head's discretionary power to choose the type of process, either advertised or non-advertised. The case law confirms the employer's discretion to fill a position, provided that the merit criterion is respected.

[66] Ms. Barros was duly appointed. Her qualifications were evaluated, the delegated manager justified the choice of a non-advertised process, and the notification of appointment was posted.

[67] The justification of the process indicated that no candidates were both qualified and interested in the position, the workload was increasing, and Ms. Barros was qualified. The only other person who would have been qualified based on the advertised process was the complainant, but he had failed. The two vacant positions on Mr. Wong's and Ms. Payette's teams were staffed through deployments and not from the candidates in the advertised process, who were either uninterested or unavailable.

**b. Personal favouritism, bias, or bad faith**

[68] Nothing in the evidence supported these allegations. The appointment was based on merit. The *PSEA* affords great discretion when evaluating essential qualifications, and personal knowledge is an accepted method.

[69] Ms. Barros was already at the FI-03 group and level when she arrived in the finance section. She had the essential qualifications, and the mechanisms of an advertised process do not apply to a non-advertised process. Therefore, it was not necessary for Ms. Payette to evaluate the references in the same way as was done in the advertised process.

[70] The merit criteria were evaluated before the appointment, and Ms. Barros satisfied them all. Nothing indicates that personal favouritism was a factor. The criteria were not modified to favour her. The only modified qualification, the language rating, was changed out of the department's need. It had long been difficult to find qualified candidates who were also bilingual. The Assistant Deputy Minister, who did not know Ms. Barros personally, approved the change, to facilitate recruiting personnel.

[71] In brief, the complaints should be dismissed.

**IV. Analysis**

[72] It is of value to begin this analysis with the legislative text that enables recourse against an internal hiring process. Section 77 of the *PSEA* reads as follows:

**77 (1)** *When the Commission [PSC] 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 [CFP] 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);*

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

**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;*

**(c)** *the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).*

**c)** *omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).*

...

...

[73] The complaints about the advertised process (771-02-39058 and others) were based on paragraph (a): the complainant alleged abuse of authority in the evaluation of merit based on the references. On one hand, his evaluation was inadequate, and on the other hand, other candidates were evaluated differently, such that it is not certain that they satisfied the merit criteria.

[74] The complaint about the non-advertised process (771-02-39089) was based on paragraphs (a) and (b). According to the allegations, the merit criteria were improperly evaluated for Ms. Barros, and the use of a non-advertised process was itself an abuse of authority.

[75] I must comment at this point on the exchange of documents that took place as part of the two complaints. The complainant demonstrated to my satisfaction that the respondent lacked transparency in its disclosure. Only a few days before the second part of the hearing, in November 2022, did the complainant receive all the details of Ms. Barros's appointment.

[76] That lack of transparency cannot be part of these complaints, which are about the lack of appointment for abuse-of-authority reasons. They are not about the respondent's subsequent actions. That said, it seems to me that greater transparency at the exchange-of-documents stage (2018) would have been far more preferable and perhaps would have avoided the complaint about the non-advertised process.

[77] Before determining whether an abuse of authority occurred in the two processes in question, the concept of abuse of authority should be defined.

[78] The concept of abuse of authority is not defined in the *PSEA*, except for a clarification in s. 2(4), which reads as follows:

*For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.*

*Il est entendu que, pour l'application de la présente loi, on entend notamment par **abus de pouvoir** la mauvaise foi et le favouritisme personnel.*

[Emphasis in the original]

[79] Based on that clarification, the Board as well as its predecessor, the Public Service Staffing Tribunal, have found that abuse of authority consists of serious misconduct and not a simple error or omission. The misconduct must be so serious that it could not have been part of the discretion granted to the delegated manager (see *Agnew v. Deputy Minister of Fisheries and Oceans*, 2018 FPSLREB 2 at para. 95).

[80] It is not necessary to prove intent for the Board to find abuse of authority (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 74, and *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 16).

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**A. Complaints 771-02-39058, 39086, 39087, 39088, 39272, 39273, 39313, and 39686****1. Question at issue: Was there abuse of authority in the evaluations of the references?**

[81] It is clear that the complainant failed the process due to the evaluation of his references. It is a matter of determining if that evaluation was an abuse of authority.

[82] I find that there was no bias or personal favouritism in the respondent's evaluation as conducted. I did not note any animosity or bias with Mr. Langlois or Ms. Thomas, as was noted in *Rizqy v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 12.

[83] Conversely, the reference process seemed so arbitrary that it bordered on bad faith, and I find an abuse of authority in the reference evaluations.

[84] The number of referees varied from one candidate to the next. The complainant followed the instructions on the form; i.e., two former supervisors and the current supervisor, unlike other candidates who only provided two referees, who were sometimes co-workers.

[85] Mr. Langlois criticized the complainant about the fact that his referees did not provide many details, which caused him to fail several questions. One could ask who is being evaluated in that case, the candidate or the referee?

[86] The extraordinarily negative evaluation of Mr. Guénette's reference is problematic, given that Mr. Guénette testified that he supported the complainant's application. However, I cannot describe it any other way; Ms. Thomas appeared completely uninterested. She did not make notes of her conversation with Mr. Guénette, and despite him giving details and corrections, they in no way changed Mr. Langlois's assigned mark. Ms. Thomas made no effort to contact Mr. Couture, despite his imminent return from vacation.

[87] When some referees play the dual roles of referee and evaluator, it is a fundamental injustice. Care was taken to ask Mr. Langlois to evaluate the complainant's references, to avoid Ms. Payette having to evaluate her own reference. However, Mr. Langlois was also in a conflict — he evaluated the references based on an assessment grid that he had seen before providing references for certain candidates. In other words, he did better on the test because he knew the answers, unlike Mr. Couture



or Mr. Gu  nette. Again, I emphasize that evaluating essential qualities through references often comes back to the evaluation of the referee, not the candidate.

[88] Finally, one can only be troubled to note that a failure based on references resulted in a failure for the complainant but not for another candidate, who was appointed to a position. Mr. Langlois justified the complainant's failure largely based on question 4, which was about decision-making ability. However, two of the three referees (Ms. Payette and Mr. Couture) stated frankly that they could not evaluate that ability. As for Mr. Gu  nette, he maintained that his comments were misinterpreted. Even though he provided Ms. Thomas with additional information, the mark did not change.

[89] Confronted in cross-examination with the fact that the failed reference checks were not fatal for one candidate but were fatal for the complainant, Ms. Thomas replied that everything was evaluated "[translation] case-by-case". Flexibility is a good thing until it arbitrarily penalizes a candidate.

[90] The merit principle is not respected when it is applied so inconsistently to different candidates. Therefore, I find abuse of authority in the evaluations of the references. I must add that I find it deplorable that essential qualifications are evaluated through references, which is an opinion that I expressed previously, in *Rizqy*.

[91] Complaints 771-02-39058, 771-02-39086, 771-02-39087, 771-02-39088, 771-02-39272, 771-02-39273, 771-02-39313, and 771-02-39686 are allowed.

## 2. Remedies

[92] In addition to a declaration, the complainant requested that the appointments made as part of the advertised selection process be revoked. Certainly, one may have doubts about the evaluation of merit when one notes that a candidate is appointed despite failing the references stage.

[93] The *PSEA* states the following:

...	...
<b>81 (1) If the Board finds a complaint under section 77 to be substantiated, the Board may order the Commission or the deputy head to</b>	<b>81 (1) Si elle juge la plainte fond��e, la Commission des relations de travail et de l'emploi peut ordonner �� la Commission ou ��</b>

*revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Board considers appropriate.*

*l'administrateur général de révoquer la nomination ou de ne pas faire la nomination, selon le cas, et de prendre les mesures correctives qu'elle estime indiquées.*

...

...

[94] However, I am not prepared to exercise that discretion to revoke the appointments that were made, for several reasons.

[95] First is the time that has passed. The appointments date to 2018. Revoking them would cause turmoil in the lives of those appointed, which would be a disproportionately punitive consequence, since it is the respondent who is at fault.

[96] Next is the evaluation of merit itself. The evaluation of the references was defective, but I cannot rule on the qualifications of the candidates who succeeded in the selection process. I do not have sufficient evidence to declare that they did not merit the positions that they obtained. One of the candidates did not achieve the pass mark with one of their referees, but I cannot impose such a grave consequence without knowing anything about their situation aside from that fact.

[97] Finally, there is revocation as a remedy in this context. It is stipulated in the *PSEA*, and it could make sense if imposed immediately. The deputy head would then suffer the consequences of a wrongful act; the selection process on which the deputy head spent energy would be cancelled. In addition, the person who complained could have a chance to obtain the position.

[98] Four years have passed, and the appointed persons would be punished severely for the respondent's wrongful action. The complainant has since moved on; he is now in a position at a higher level than that was the one to which he applied in 2018. Revocation would have no consequence for him.

[99] In brief, revocation appears to me unjust and unjustified. It solves nothing and penalizes people about whom nothing is known.

[100] The complainant also asked that I recommend training for the managers and that I award him compensation.

[101] Recommending training for the managers is wishful thinking. Of course, one hopes that the respondent corrects its methods to ensure a more consistent and fair reference process. I leave it to the respondent to take the necessary steps in the future.

[102] As for compensation, I cannot grant it. The Board cannot decide the appointment of a government employee (s. 82 of the *PSEA*). In fact, only the PSC, or by delegation the deputy head, can make an appointment. The reference process was defective, but I cannot say whether the complainant would have been appointed had it not been defective. Despite the Board's power of revocation to sanction abuse of authority, it does not have the power to appoint the complainant to the desired position. So, compensation has no merit because it would mean compensating a theoretical loss.

### **B. Complaint 771-02-39089**

[103] The complainant's theory, that he was failed in the advertised process so that Ms. Barros could be appointed as part of a non-advertised process, has an air of reality. The two processes coincided in time, and the language requirement of a position was changed so that Ms. Barros could access it. Ms. Payette, who had already recruited Ms. Barros externally for a temporary position, was responsible for evaluating her. However, despite these indicators, I cannot find abuse of authority.

[104] Three questions are at issue: Was the non-advertised process abuse of authority? Was Ms. Barros's appointment tainted by personal favouritism or bias? Did her appointment satisfy the position's merit criteria?

#### **1. Was the non-advertised process abuse of authority?**

[105] The *PSEA* affords much latitude in staffing to the PSC and, by delegation, to deputy heads.

[106] Thus, the *PSEA* stipulates that the deputy head may proceed with a non-advertised appointment (s. 33), and more than one person need not be considered for an appointment, provided that the person is qualified (s. 30(4)).

[107] The complainant cited *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83, in which the Board found abuse of authority in the choice of a non-advertised process. In fact, the two situations have some similarities, but as the Board said in *Hunter*, it

could be that despite some shortcomings, the abuse-of-authority threshold is not reached.

[108] It seems clear to me in this situation that the non-advertised process was chosen to appoint Ms. Barros. However, the justification for the non-advertised process appears reasonable to me. The advertised process did not yield any candidates interested in the vacant position on Ms. Payette's team, as illustrated by the fact that no qualified candidates in the advertised process were in the end appointed to that team (but were placed elsewhere). Ms. Barros already knew the tasks, she was already at level, and she did not displace an existing pool. All those facts distinguish this situation from that in *Hunter*.

[109] The respondent emphasized the broad discretionary power afforded to hiring managers and specifically cited *Tibbs*, in which the following can be read at para. 63:

*[63] ... The definition of merit found in subsection 30(2) of the PSEA provides managers with considerable discretion to choose the person who not only meets the essential qualifications, but is the right fit because of additional asset qualifications, current or future needs, and/or operational requirements.*

[110] The fact of proceeding with a non-advertised process is not in itself abusive. The non-advertised process is necessarily a choice made for one person. The ideal person is found, and provided that the person satisfies the merit criteria, nothing is amiss. Delegated managers are not required to consider more than one candidate. It would have been abuse of authority in that choice had it been demonstrated that it was used specifically to exclude other qualified persons. That was not so.

## **2. Was Ms. Barros's appointment tainted by personal favouritism or bias?**

[111] It is clear that the reason for the non-advertised process was that Ms. Payette wanted to retain Ms. Barros on her team. However, in my view, it was not personal favouritism. Based on the presented evidence, I find that it was a professional relationship.

[112] The complainant maintained that it was a personal favour and that it resembled favouritism. In fact, according to Ms. Payette, it was a simple calculation. She was afraid to lose Ms. Barros because Ms. Barros was actively looking for a permanent public service position.

[113] According to *Desalliers v. Deputy Head (Department of Citizenship and Immigration)*, 2022 FPSLREB 70, personal favouritism has been defined as follows in the case law:

...

[140] *Personal favouritism is one of the most serious forms of abuse of authority (see Glasgow [v. Deputy Minister of Public Works and Government Services Canada, 2008 PSST 7]). It is important to specify that personal favouritism, not any other type of favouritism, amounts to abuse of authority.*

[141] *The case law has recognized examples of personal favouritism, including selecting a person based on undue personal interests, as a personal favour, or to gain personal favour with someone (see Glasgow, at para. 41). Changing a statement of merit criteria based on a candidate's profile and modifying the essential qualifications of a position to appoint an employee without considering the actual requirements of the position are also examples of personal favouritism (Ayotte (2009) [v. Deputy Minister of National Defence, 2009 PSST 21]). Appointing a person who does not meet the essential requirements of the position may also amount to personal favouritism when the appointment is made to reward the appointee (see Beyak v. Deputy Minister of Natural Resources Canada, 2009 PSST 35, at para. 185 ("Beyak (2009 PSST 35)").*

[142] *From that case law, I note that to date, the Board and Tribunal have concluded that personal favouritism exists when undue personal interests, such as a personal relationship between the person selecting and the appointee, were the reason for appointing the person (see Glasgow, at para. 41, and Drozdowski v. Deputy Head (Department of Public Works and Government Services Canada), 2016 PSLREB 33). It also includes appointments that are made as a personal favour or reward or to gain personal favour with someone (see Glasgow, at para. 41, and Beyak (2009 PSST 35)).*

...

[114] However, a friendship or a good professional relationship does not imply personal favouritism. The Board explained it is follows in *Desalliers*:

...

[146] *The fact that the delegated manager and the appointee were friends and had worked together does not in itself amount to personal favouritism.*

[147] *During his or her career, a manager might become friends with former colleagues who, one day, could be worthy candidates for appointment on his or her team. I cannot conclude that any*

*appointment of a friend or former colleague would amount to personal favouritism. Such an appointment can be based on merit if the selected candidate meets all the merit criteria....*

...

[115] In this case, as in *Desalliers*, the appointment was not made as a personal favour, as compensation to the appointed person, or to favour the manager's interests. Ms. Payette found the person she considered ideal from a professional perspective. I did not note any other interest.

[116] According to the complainant, after determining that she wanted to hire Ms. Barros permanently, Ms. Payette evaluated her so that she would be favoured. If it was not favouritism, it could have been bias, which could constitute abuse of authority as the Public Service Staffing Tribunal (the Board's predecessor) found in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, in the following terms:

...

*71 The Tribunal finds that for all these reasons, those responsible for assessment in an appointment process have a duty to carry out an assessment that is unbiased and that does not generate a reasonable apprehension of bias. Furthermore, if their conduct gives rise to a reasonable apprehension of bias, the Tribunal can consider that this represents bad faith, within the meaning of section 2(4) of the PSEA, and constitutes abuse of authority.*

...

*72 A test was established by the courts to determine whether there is reasonable apprehension of bias. It consists in [sic] determining whether a relatively informed bystander could reasonably perceive bias on the part of an adjudicator. It is not enough to suspect or assume bias; it must be real, likely or reasonably evident....*

...

[117] In *Desalliers*, the Board found abuse of authority in the evaluation of the merit criteria due to the manager's bias in the appointed person's evaluation. The manager in that case overlooked the fact that the appointee lacked a skill. A reasonable and well-informed person would have seen bias.

[118] In this case, I have no evidence that Ms. Barros did not satisfy the merit criteria, unlike the situation in *Desalliers*. Ms. Payette relied on her personal knowledge of

Ms. Barros, but that is not prohibited (see *Bérubé-Savoie v. the Deputy Minister of Human Resources and Skills Development Canada*, 2013 PSST 2 at para. 47).

[119] I am also of the opinion that there is a difference between an advertised and a non-advertised process. In the latter, the hiring manager is not required to consider several candidates; the manager may choose to consider only one (see s. 30(4) of the *PSEA*). Friendship necessarily taints a selection process in which all candidates should be on even ground at the start (see *Myskiw v. Commissioner of the Correctional Service of Canada*, 2019 FPSLRB 107). That consideration does not necessarily apply to a non-advertised process, provided that, of course, the merit criteria are respected.

[120] The complainant maintained that out of caution, it would have been preferable had Mr. Wong evaluated Ms. Barros's application. Indeed, I agree that it would have been preferable to ask Mr. Wong if not to evaluate at least to verify Ms. Barros's evaluation. However, this failure did not constitute abuse of authority. Mr. Wong did not know Ms. Barros. He had never worked with her. It was understandable that Ms. Thomas would defer to Ms. Payette for the evaluation.

[121] The process is not perfect, but because the choice of a given person in a non-advertised process is permitted, I do not think that there was bias constituting abuse of authority. Ms. Payette considered the application of only one person, Ms. Barros, for the purposes of the non-advertised appointment, which is permitted under the *PSEA*. The reasons were professional and not dependent on their friendship.

### **3. Did Ms. Barros's appointment satisfy the position's merit criteria?**

[122] The deputy minister decides the required skills, including the language of the position (s. 31(1) of the *PSEA*).

[123] A candidate may be evaluated in different ways (s. 36 of the *PSEA*), including via personal knowledge (see *Bérubé-Savoie*).

[124] Ms. Payette considered the application of a single person, Ms. Barros. That does not mean that Ms. Barros was unqualified. According to the evaluation that was carried out, she satisfied the criteria. The references were not checked very thoroughly, but nothing indicates that Ms. Barros would not have received a pass mark.

[125] The complainant contested that Ms. Barros demonstrated experience providing verbal and written advice to senior management. However, Ms. Payette testified that in fact, Ms. Barros had that experience, both at Infrastructure Canada, where she briefed the assistant director and the assistant deputy minister, and with her last employer, where she provided senior management information about high-level financial transactions. Therefore, I do not see a similarity with *Desalliers*, in which the Board found that the appointed candidate did not have one of the required qualifications.

[126] Ms. Barros did not meet the language criteria of the advertised process. That fact did not apply to the non-advertised process.

[127] Ms. Thomas explained that there was a lack of FI-03 financial advisors and that the department's needs could also have been filled with a unilingual position. The possibility of changing the language rating exists, and the respondent availed itself of it. I cannot find abuse of authority.

[128] I am satisfied that Ms. Barros had the essential qualifications required for the position, in addition to an asset that the respondent sought.

### **C. Conclusion**

[129] In conclusion, I now return to the wording of s. 77 of the *PSEA*, which offers recourse to a person who was not appointed as a result of abuse of authority. The complainant was not appointed as part of the non-advertised process not because of abuse of authority but because he failed in the advertised process. He wanted the two connected — according to him, he was failed so that Ms. Barros could take his place. But the organizational chart and Ms. Thomas' testimony demonstrated the opposite. Had the complainant succeeded in the advertised process, he would have obtained the vacant FI-03 position under Ms. Payette — which was and remained bilingual. It was not staffed by either process. It was staffed through a deployment. Therefore, complaint 771-02-39089, about the non-advertised process, is dismissed.

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

*(The Order appears on the next page)*



**V. Order**

[131] Complaints 771-02-39058, 39086, 39087, 39088, 39272, 39273, 39313, and 39686 are allowed.

[132] The respondent committed abuse of authority when it evaluated the complainant's references in the advertised process 2018-INFC-CS-IA-2076.

[133] Complaint 771-02-39089 is dismissed.

January 27, 2023.

FPSLREB Translation

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