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Files: 771-02-40646, 40689, 40690, and 40700

Citation: 2023 FPSLREB 39

*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

RICARDO SILVA

Complainant

and

**DEPUTY HEAD
(Canada Border Services Agency)**

Respondent

Indexed as

Silva v. Deputy Head (Canada Border Services Agency)

In the matter of complaints of abuse of authority under ss. 77(1)(a) and (b) of the
Public Service Employment Act

Before: Audrey Lizotte, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: No one appearing

For the Respondent: Ryssa Ndabihore, paralegal, Treasury Board Legal Services

For the Public Service Commission: Alain Jutras, senior analyst

Decided on the basis of written submissions
filed December 16, 2022.

REASONS FOR DECISION

I. Motion to dismiss complaints

[1] In June and July 2019, Ricardo Silva (“the complainant”) made four complaints with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13) alleging abuse of authority by the president of the Canada Border Services Agency (“the respondent”). All four complaints relate to the advertised internal appointment process (numbered 2018-IA-QC-900-FB_04-212) for a senior officer trade compliance position classified at the FB-04 group and level. The four complaints were consolidated under the lead Board file no. 771-02-40646.

[2] The complainant claims that the respondent rejected his application due to a misleading selection process and due to the respondent’s perception of his accented English, despite his proven proficiency and previous work experience. He claims that the respondent rejected his candidacy partially due to his race (Latino) and/or national or ethnic origin (Brazilian).

[3] The respondent denied abusing its authority in the appointment process and any other wrongdoing.

[4] The complaints were scheduled to be heard on February 16 and 17, 2023. On December 13, 2022, the Board’s registry wrote to the parties to schedule a pre-hearing conference. On December 14, 2022, the complainant informed the Board that he would not be able to attend the hearing and it, or any other proceeding, should proceed without him.

[5] On December 16, 2022, the respondent made a motion to dismiss the complaints. It argued that the complainant’s decision not to attend the hearing meant that he would not be able to discharge his burden of proof and it amounted to the abandonment of his complaints. For those reasons, the respondent requested that the hearing scheduled for February 16 and 17, 2023, be cancelled and that the complaints be dismissed.

[6] On January 13, 2023, the Board cancelled the hearing and informed the parties that a written decision on the respondent’s motion would follow.

[7] For the detailed reasons that follow, the Board finds that the respondent's motion should be allowed and that the complaints should be dismissed.

II. Background

[8] On September 25, 2018, the respondent posted the advertised selection process, to create a pool of candidates for the senior officer trade compliance position.

[9] On October 9, 2018, the complainant submitted his application and subsequently participated in the selection process.

[10] On April 16, 2019, the complainant was advised that his candidacy would not be considered further as he did not obtain a pass mark for the requirements of "Ability to communicate effectively orally" and "Adaptability" during the interview phase. The pass marks were, respectively, 7/10 and 6/10, and he achieved marks of 6/10 and 3.5/10.

[11] On June 6 and 13, and July 3 and 17, 2019, the respondent posted a "Notice of Appointment or Proposal of Appointment" ("NAPA") for the promotional appointments of six individuals.

[12] Each NAPA resulted in a separate complaint (Board file nos. 771-02-40646, 40689, 40690, and 40700), however, the grounds for each complaint are identical.

[13] As the complaints included discrimination allegations, the Canadian Human Rights Commission was notified. On July 18, 2019, it indicated that it would not participate or provide submissions.

[14] The Canada Employment and Immigration Union (CEIU) ceased representing the complainant in this matter on July 15, 2020.

[15] On July 16, 2020, the complainant, to support his complaints, provided a detailed 8-page description of his allegations and arguments, as well as 25 supporting documents.

[16] On August 7, 2020, the respondent responded to the allegations. It denied any abuse of authority or wrongdoing on its part. In its response, it challenged the complainant's claims about the selection process being misleading and the improper

perception of his accent. It submitted that he did not meet the merit criteria and that for that reason, his candidacy was rejected.

[17] On October 26, 2022, the Board's registry notified the parties by email that the hearing of the complaints would be held on February 16 and 17, 2023, by videoconference. The notice included a copy of the Board's *Policy on Postponements of Hearings*.

[18] On November 28, 2022, the respondent emailed the Board's registry, copying the complainant, and requested interpretation services at the hearing.

[19] On December 13, 2022, the Board's registry informed the parties by email that a pre-hearing conference was to be scheduled in advance of the hearing, to discuss matters pertaining to the file. The parties were provided with potential dates during the first two weeks of January 2023 and were requested to confirm their availability on those dates.

[20] All of the above noted email communications were sent to the email address that the parties and the Board had previously used to communicate with the complainant. On December 13, 2022, the email to him was returned as undeliverable.

[21] On December 14, 2022, the Board's registry wrote to the respondent and the CEIU to inform them that it had been attempting to contact the complainant by phone and email, without success, and asked for any known updated contact information. The respondent provided the Board with a personal email address for him later that day.

[22] On December 14, 2022, the complainant responded to the Board's email of December 13, 2022, and provided new contact information to reach him. He added the following:

...

*As for **Pre Hearing Conference (PHC)**, would it be possible to do it virtually by MS Teams? Possible time of the day?*

Your answer will help me decide which day to choose.

Nota bene : I will be away from Canada from Friday February 10 2023 until Saturday March 04 2023.

...

[Emphasis in the original]

[23] On that same date, the Board emailed the parties as follows:

...

I acknowledge receipt of an e-mail sent by Ricardo Silva on December 14, 2022, providing the Board with his updated contact information.

Pre-hearing conferences are currently being held via videoconference. We typically use zoom, however, we are able to accommodate MS Teams if a party is unable to use zoom. As for the time of day, please confirm your availability, including time of day your available, on the following dates provided by the Board.

- *Wednesday, January 4, 2023*
- *Thursday, January 5, 2023*
- *Thursday, January 12, 2023*
- *Friday, January 13, 2023*

*Please be advise the board has scheduled a hearing for the above mentioned matters on **February 16 to 17, 2023**.*

Can the complainant please advise whether he is going to attend the hearing?

The hearing is set to be heard via videoconference. If the complainant is not able to attend, the complainant needs to request an adjournment and provide the reasons for his request as per the Board's Guidelines on Adjournment requests. Otherwise, the hearing will proceed as scheduled.

...

[Sic throughout]

[Emphasis in the original]

[24] On the same day, the complainant replied by email, as follows:

...

Please note that I am not able to take time off from work to attend the hearing. I was not aware that it was going to be an entire day, sorry.

I consent that the hearing and any other proceedings will be [sic] continue as scheduled without my attendance.

...

[25] On December 16, 2022, the respondent made its motion, requesting that the hearing be cancelled and that the complaints be dismissed as the complainant

indicated that he would not attend the hearing or any other proceeding related to this matter. The respondent included detailed submissions in support of its motion that are summarized later in this decision.

[26] Of note, the submissions stated that on December 15, 2022, the respondent informed the complainant that it would consent to postponing the hearing should he choose to request it, however, the complainant responded that he would not request a postponement and maintained that the hearing should proceed without his presence.

[27] On December 16, 2022, the Board's registry wrote to the parties and provided the complainant an opportunity to respond to the motion to dismiss his complaints. It gave him until January 6, 2023, to provide written submissions and the respondent until January 13, 2023, to respond. It informed the parties that the Board would render a written decision based on those submissions. This communication was sent to the last email address that the complainant provided and used on December 14 and 15, 2022.

[28] The complainant did not provide a response by the January 6, 2023, deadline, or any other acknowledgement.

[29] On January 9, 2023, the respondent wrote to the Board's registry and the complainant, indicating that it had not received the complainant's response to its motion and, therefore, did not have a reply to submit. The complainant did not acknowledge or respond to this communication.

[30] On January 13, 2023, the Board's registry advised the parties that the hearing scheduled for February 16 and 17 was cancelled, and a written decision on the respondent's motion would follow. The complainant did not acknowledge or respond to this notification.

III. Summary of the arguments

[31] The respondent argues that a hearing is not necessary in these circumstances and that the Board should dismiss the complaints based on the following:

- The complainant has indicated that he will not attend the hearing or any of the proceedings in this matter.

- Section 29 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6) empowers the Board to proceed with a hearing and dispose of a complaint without further notice if one of the parties does not appear at a hearing.
- The complainant has the burden of proof. To meet this burden, he must lead evidence at the hearing since allegations alone are not evidence. Previous Board decisions have held that when a complainant fails to attend a hearing of a staffing complaint, they fail to meet their burden of proof, and the matter can be dismissed.
- The complainant's lack of interest in his complaints clearly demonstrates that he has abandoned them. The Board has held that a complainant's failure to cooperate with it, along with failing to appear, is sufficient to constitute the abandonment of a complaint. The Board has also held in similar instances that the public interest and the efficient administration of justice lean in favour of treating the complaints in this case as abandoned.

[32] The respondent relies on *Tibbs v. Canada (National Defence)*, 2006 PSST 8 at paras. 49 and 50; *Patwell v. Deputy Minister of Employment and Social Development*, 2018 FPSLREB 37 at paras. 31, 34, and 35; *Sharma v. Chief Public Health Officer of the Public Health Agency of Canada*, 2011 PSST 27 at para. 12; *Portree v. Deputy Head of Service Canada*, 2006 PSST 14 at para. 49; *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20 at paras. 24, 33, and 50; *Kerr v. Chief Statistician of Canada of Statistics Canada*, 2012 PSST 1; *Taticek v. President of the Canada Border Services Agency*, 2019 FPSLREB 18 at para. 12; *Tshibangu v. Deputy Head (Canadian Food Inspection Agency)*, 2011 PSLRB 143 at para. 15; *Smid v. Deputy Head (Courts Administration Service)*, 2014 PSLRB 24 at paras. 24 to 26; and *Champagne v. Treasury Board (Correctional Service of Canada)*, 2017 FPSLREB 44.

IV. Reasons

[33] The respondent argues that the hearing should be cancelled, and the complaints dismissed on the basis that the complainant's decision not to attend the hearing means that he cannot discharge his burden of proof and amounts to the abandonment of his complaints. I agree for the reasons detailed below.

[34] First, it is my opinion that for these complaints to be determined, an oral hearing would be necessary.

[35] The *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) provides that the Board may decide any matter before it without holding an oral hearing (see s. 22). I do not believe it is possible to do so in this case.

[36] I have carefully reviewed the detailed allegations and supporting material that the complainant submitted, as well as the respondent's reply to the allegations. It is clear that the facts in this case are in dispute. That is why an oral hearing was scheduled.

[37] Having determined that an oral hearing would be necessary in this instance, the second issue to address is whether the complainant could nonetheless discharge his burden of proof without attending the hearing.

[38] On this point, the respondent referred to a number of decisions of the Board and its predecessors. I find the facts of this case most resemble those in *Taticek*. In that decision, Mr. Taticek had requested that the Board render a decision based solely on the Board record. The Board held, at paras. 12 and 13, that complaints and allegations do not constitute evidence:

12 As set out above, the complainant requested that the Board proceed directly to a decision on the basis of the record. He consequently decided to not present evidence at a hearing. The description of the complaint on each complaint form and the corresponding allegations on file for each proceeding are the basis of the abuse-of-authority complaints. However, the complaint descriptions and the allegations on record do not constitute evidence before the Board, which may come before it by way of, for example, affidavits or testimony at a hearing. A simple assertion is not sufficient; there must be some evidence to support it (see Drozdowski v. Deputy Head (Department of Public Works and Government Services), 2016 PSLREB 33).

13 Without evidence, the Board has no basis to make a finding as to the validity of the complaints. For this reason, the complaints must be dismissed.

[Emphasis added]

[39] In *Portree*, the former Public Service Staffing Tribunal ("the Tribunal") explained that for a finding of abuse of authority to be made, convincing evidence is necessary to support this determination:

...

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

improper conduct that justifies the Tribunal's review and intervention.

...

49 Employees who allege that there has been an abuse of authority and, thus, a contravention of the PSEA and who wish to obtain a remedy for that contravention must present convincing evidence and arguments to be successful. ...

[Emphasis added]

[40] Similarly, when alleging discrimination, the complainant bears the burden of establishing a *prima facie* case (see *Lablack v. Deputy Minister of Health Canada*, 2013 PSST 7).

[41] The consequence of a complainant's failure to attend a hearing was also reviewed in *Patwell* where the Board, at paras. 34 to 36, commented as follows:

34 In a staffing complaint, the complainant bears the burden of proving, on a balance of probabilities, the allegations of abuse of authority he or she raises (see Tibbs v. Deputy Minister of National Defence, 2006 PSST 0008 at paras. 49 and 50). In the present case, the complainant submitted allegations but did not tender any evidence to support them.

35 A complainant cannot merely rely on the statements made in a complaint or allegations to establish abuse of authority. These contentions must be supported with evidence from witnesses, facts, or documents (see Broughton v. Deputy Minister of Public Works and Government Services, 2007 PSST 0020 at para. 50). A failure to present evidence in support of the allegations may result in the complaint being dismissed (see Kerr v. Chief Statistician of Canada of Statistics Canada, 2012 PSST 0001, and Sharma v. Chief Public Health Officer of the Public Health Agency of Canada, 2011 PSST 0027).

36 As the complainant has failed to present evidence in support of his allegations, his complaint must be dismissed. He has not established an abuse of authority.

[Emphasis added]

[42] I believe the same conclusions apply here.

[43] Indeed, for the Board to find an abuse of authority, the complainant must present convincing evidence and arguments that prove the complaints on a balance of probability. In the present case, the consequence of the complainant's decision not to attend the hearing is that, were one held, no evidence would be introduced to support

his case. Again, the statements and allegations made in the complaints are disputed and cannot be determined without evidence. As a result, by not providing evidence, the complainant cannot meet his burden of proof.

[44] This brings me to the next issue of whether the complainant has effectively abandoned his complaints.

[45] The complainant was notified of the hearing and of the proposed pre-hearing conference. He did not provide his availability for the pre-hearing conference. Rather, he indicated that he would not attend the hearing or any other proceedings. He was provided with the opportunity to request a postponement of the hearing but declined to. He was made aware of the motion brought by the respondent that the hearing scheduled for February 16 and 17, 2023, be cancelled and that his complaints be dismissed. He was provided with an opportunity to respond. He was further informed that the Board would render a decision on the motion to dismiss his complaints based on the submissions it received. He chose not to respond or to provide any submissions.

[46] In *Patwell*, at para. 31, the Board made the following remarks when concluding that a complaint had been abandoned:

[31] ... the Board finds that the complainant has displayed all the hallmarks of abandoning his case. His lack of communication with the Registry, the Board, and the respondent and his failure to inform the Board of any change to his contact information, as demonstrated in the events before the hearing together with his failure to appear, are sufficient to constitute the abandonment of his complaint. The public interest and the efficient administration of justice also lean in favour of the complaint being treated as abandoned.

[47] I find the abandonment reasoning in *Patwell* is also applicable in this case. The complainant failed to notify the Board of a change in his contact information, failed to provide his availability to attend the pre-hearing conference, failed to request a postponement, and failed to respond to the respondent's motion. His lack of interest in the proceedings is reinforced by his last communication, in which he indicated that he would not attend the hearing or any other proceedings and requested that the Board proceed with the hearing without his attendance.

[48] Section 29 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6; “*Regulations*”), which is the only provision of the *Regulations* that contemplates the failure to attend a hearing, provides that:

29 If a party, an intervenor or, if they are a participant, the Canadian Human Rights Commission or the Accessibility Commissioner does not appear at the hearing of a complaint or at any continuance of the hearing and the Board is satisfied that notice of the hearing was given to that party, intervenor or participant, the Board may proceed with the hearing and dispose of the complaint without further notice.

29 Dans le cas où une partie, un intervenant ou, s'ils ont le statut de participant, la Commission canadienne des droits de la personne ou le commissaire à l'accessibilité, omet de comparaître à l'audience ou à toute continuation de celle-ci, la Commission des relations de travail et de l'emploi peut, si elle est convaincue que l'avis d'audience a bien été donné, tenir l'audience et statuer sur la plainte sans autre avis.

[Emphasis added]

[49] Section 29 provides that the Board may proceed with a hearing and dispose of a complaint if a party “does not appear”. It does not explicitly address a case such as this, in which a complainant clearly indicates — in advance of a hearing — that he will not attend and then ceases communications.

[50] As previously stated, convincing evidence from the complainant is required for me to be able to make a finding of abuse of authority. As the complainant has informed the Board that he will not attend the hearing, no such evidence will be lead.

[51] There is no point in going through the motions of holding a hearing, with the attendant cost and inconvenience to the parties, witnesses, and the Board, simply to confirm that the complainant will not appear. I am of the view that it would be against the public interest and the efficient administration of justice to proceed with a hearing in these circumstances.

[52] Consequently, the respondent’s motion is allowed, and the complaints are dismissed for lack of evidence and for abandonment.

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

(The Order appears on the next page)

V. Order

[54] The complaints are dismissed.

April 18, 2023.

**Audrey Lizotte,
a panel of the Federal Public Sector
Labour Relations and Employment Board**