

Date: 20231017

File: 771-02-42815

Citation: 2023 FPSLREB 92

*Federal Public Sector
Labour Relations and
Employment Board Act and
Public Service Employment Act*



Before a panel of the
Federal Public Sector
Labour Relations and
Employment Board

BETWEEN

JOCELYN TREMBLAY

Complainant

and

**DEPUTY HEAD
(Department of Employment and Social Development)**

Respondent

and

OTHER PARTIES

Indexed as

Tremblay v. Deputy Head (Department of Employment and Social Development)

In the matter of a complaint of abuse of authority under ss. 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 Complainant: Himself

For the Respondent: Laetitia B. Auguste, counsel

For the Public Service Commission: Louise Bard, senior analyst

Heard by videoconference,
June 12 and 13, 2023.

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On March 19, 2021, the Department of Employment and Social Development (“the respondent”) posted a notification of appointment or proposal of appointment for Myra Cree-Bernier (“the appointee”) to an indeterminate senior business expertise manager position, classified at the PM-06 group and level, in the Strategic Services Directorate, through the non-advertised internal appointment process numbered 2020-CSD-INA-QC-0079988.

[2] On April 6, 2021, Jocelyn Tremblay (“the complainant”) made a complaint 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; “the Act”) against that appointment. He alleged that among other things, the appointee did not meet at least two merit criteria, “[translation] Recent and Significant Experience Managing Personnel or Several Projects” (“Management Experience”), which he referred to as “Management Excellence”, and the “Values and Ethics” capability. He also alleged that abuse of authority occurred in the choice of process.

[3] For the following reasons, I find that the complainant did not demonstrate on the preponderance of the evidence that the respondent violated the *Act* by abusing its authority when it assessed the appointee and in the choice of process.

[4] Note that the Public Service Commission did not appear at the hearing but that it submitted its written, general, and specific arguments about the appointment policy.

II. Summary of the evidence

[5] The complainant has worked in the Strategic Services Directorate since 2010. On March 26, 2018, a notification of an acting appointment was issued for the senior manager, business expertise, position that specified the CBC linguistic profile and indicated the appointee’s name. The acting appointment was renewed twice. For the final renewal, on December 6, 2019, the linguistic profile was reduced to BBB. Note that the title of the senior manager position for the first acting appointment did not contain the words “business expertise”. The complainant argued that the language requirement was reduced to accommodate the appointee and that it created an anomaly in the organization, since all the other bilingual positions required a CBC

linguistic profile. On the other hand, he stated that the series of three consecutive acting appointments for the appointee was itself an abuse of authority by management because since it gave her an advantage that the other employees could not have.

[6] The complainant testified that the appointee did not meet the Management Experience merit criterion, since three people who were appointed to acting positions on October 28, 2021, December 3, 2021, and December 16, 2021, did not receive their acting pay within a reasonable time. He argued that the delay compensating them resulted from the appointee's operational negligence and that it could not be attributed to the Phoenix pay system. He stated that the cumulation of the three negligence events demonstrated that the appointee did not have Management Experience and that her appointment constituted an abuse of authority.

[7] He also stated that the appointee was a year late completing performance evaluations and that his had also been completed late, in May for 2019-2020 and June for 2020-2021. He alleged that the delays demonstrated that the appointee did not meet the Management Experience criterion.

[8] The complainant related an event that took place during the COVID-19 pandemic. A reception to celebrate a baby's upcoming birth was held at one team member's home. Some attended by videoconference, as did the complainant, and others attended in person, as did the appointee. During the reception, the appointee reportedly hugged the person being celebrated, which breached the just-announced health guidelines. According to the complainant, this lapse of conduct, given the circumstances, was another demonstration of the absence of Management Experience and the Values and Ethics capability, since she ignored the health guidelines.

[9] Sébastien Laflamme was the executive director from July 2019 to March 2020, including when the appointee's acting appointment was made and when the language criterion was reduced to BBB. He justified that decision by the fact that the criterion reflected the then-current job requirements. According to him, the position's temporary nature justified lowering the rating to BBB.

[10] Annie Fa Kazadi, Acting Director of Planning, who succeeded Mr. Laflamme, made the decision to use a non-advertised appointment process. On June 2, 2020, she wrote to him, asking for concrete examples of projects that the appointee had launched. She also asked about the appointee's leadership, since he had supervised her

for a significant amount of time. Mr. Laflamme asked for a copy of the statement of merit criteria before providing the examples to Ms. Fa Kazadi.

[11] On June 11, 2020, Mr. Laflamme sent an email of almost three pages, outlining the appointee's different accomplishments. Although he was no longer her manager, he replied to the request because he had been, recently. In summary, he testified that the appointee had moved between projects and that her projects had progressed smoothly because of her leadership. He pointed out that the performance evaluations were staggered over time due to COVID-19 and that he personally had been responsible for setting up the Canada Emergency Response Benefit (CERB).

[12] Mr. Laflamme confirmed that a complaint was made against the appointee about her conduct in handling performance management and that the complainant made it since he was not satisfied with his performance evaluation and the time required to complete it. Mr. Laflamme stated that he believes that a manager must have the courage to complete performance evaluations properly and that in this case, he had the impression that the appointee had done them properly. Mr. Laflamme recalled that the performance evaluation follow up with the complainant went well and that measures were proposed to ensure that no operational action was overlooked. He stated that as a manager, he encouraged supervisors to be close to their employees, to encourage dialogue and to conduct ongoing evaluations.

[13] Mr. Laflamme testified that the delays completing the annual performance evaluations, due to COVID-19 circumstances, did not constitute a serious breach of human resources management and that they would not have warranted sanctioning a manager.

[14] Mr. Laflamme acknowledged that the appointee could have been more diligent about monitoring the acting pay for the three people mentioned earlier, but he considered the events anecdotal, since the other human resources management actions were carried out normally. He stated that it is possible that not everything was perfect but that overall, the appointee deserved the performance evaluation rating that she received, which was "succeeded +".

[15] Caroline Harès testified that she occupied a director general position from August 4 to November 15, 2020, and that she was briefly involved in the appointment process but that she did not complete it due to a lack of time at the end of her term.

[16] Élaine Chatigny held a director general, strategic services, position for four years until 2019 and has been with Citizen Services since 2022. In the meantime, she has been assigned to the Passport Office.

[17] She stated that she chose a non-advertised appointment process in response to a strategic need, since the organization had to expand from 3600 employees to its current 7000 since the pandemic. The organization became an “[translation] employer of choice” and had to fill PM-01 entry-level positions and focus on professional development to advance the new employees from the PM-01 group and level to PM-03. She also wanted to offer those already on staff the opportunity to enhance their competencies and grow within the organization and to offer a future in the department. There was a strong fear of employee turnover from her organization to others in the federal government.

[18] Ms. Chatigny stated that the choice of a non-advertised appointment process was also motivated by a recognition of the appointee’s expertise and experience. An advertised appointment process would have jeopardized all the existing initiatives. On the other hand, the appointee was part of an employment equity group as an Indigenous woman. The “[translation] Articulation of Selection Decision” form was adduced in evidence. The boxes checked were “[translation] Difficulty filling the position, employment equity, immediate need and talent management”.

[19] Ms. Chatigny signed the statement of merit criteria, and Ms. Fa Kazadi and Mr. Laflamme contributed to its development. She explained that the appointee’s candidacy was assessed against the statement of merit criteria. The respondent adduced the “[translation] Evaluation of Merit Criteria” form in evidence. Ms. Chatigny confirmed that the appointee met all the criteria it set out.

[20] In her testimony, she acknowledged that a pool of prequalified PM-06 candidates had been in place from which she could have staffed the position. However, the candidates did not have the appointee’s breadth of experience and knowledge. The appointee’s appointment lent more credibility and continuity to existing projects. She explained that the appointee’s organization managed cross-functional projects, while the pool candidates came from organizations that worked in silos. Finally, the appointee was the best person for the position.

[21] She acknowledged that she received a complaint from the complainant about the incident that occurred during the birth celebration. She investigated it but found no other witnesses to support it. She stated that the incident occurred 10 days after the health guidelines came into force and that it was not necessarily a malicious act. In addition, no other complaints were made about it, and no grievances were filed after it. She acknowledged that the complainant brought the incident to her attention in accordance with his values; he specified that he felt that the appointee did not deserve the appointment. She stated that no one else in the organization raised issues about the appointee's appointment.

III. Summary of the arguments

[22] The corrective measures that the complainant requested were the revocation of the appointment and any other measure that the Board deems appropriate.

[23] In his complaint, the complainant stated the following:

[Translation]

...

My allegations include numerous and serious breaches of at least two of the merit criteria, management excellence and values and ethics, by the candidate with her team members since the start of her acting appointment by non-advertised process that was extended and now has been transformed into a promotion.

...

[24] The complainant made the complaint as a matter of principle, since he found that an abuse of authority occurred in the choice of appointment process and in the appointee's assessment.

[25] He relied on *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, considering that more than mere errors or omissions and improper conduct occurred.

[26] He cited *Rizqy v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 12, to argue that an abuse of authority need not be intentional (at paragraph 10). He stated that the respondent did not follow up as necessary with respect to the birth celebration and that it relied only on the fact that no grievance was filed to find that the appointee did not breach anything, which constituted an abuse of authority by the respondent.

[27] The complainant argued that a non-advertised appointment process was an abuse of authority and that the merit criteria assessment was abusive, since the appointee did not demonstrate any management experience.

[28] In its arguments, the respondent replied that s. 33 of the *Act* does not impose a preference between an advertised and a non-advertised appointment process and that the simple fact that an appointment process is non-advertised does not constitute an abuse of authority. The respondent submitted that the complainant must prove it. It also stated that I have no jurisdiction to consider the merits of the appointee's three earlier acting appointments.

[29] The respondent submitted that the choice of process was indeed justified, that the appointment was made in accordance with the merit principle, and that the appointee met all the merit criteria. In addition, it stated that the complainant's subjective and personal assessment of the appointee was insufficient to establish abuse of authority.

[30] The parties presented jurisprudence to support their arguments. I will not list it all but will refer to the cases I consider relevant to support my findings.

IV. Reasons

[31] For greater convenience, I will reproduce the sections of the *Act* to which the parties referred during the hearing or on which I base my decision, as follows:

...	[...]
<i>30 (1) Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.</i>	<i>30 (1) Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.</i>
<i>(2) An appointment is made on the basis of merit when</i>	<i>(2) Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :</i>
<i>(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,</i>	<i>a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par</i>

<i>including official language proficiency; and</i>	<i>l'administrateur général pour le travail à accomplir;</i>
(b) <i>the Commission has regard to</i>	b) <i>la Commission prend en compte :</i>
(i) <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>	(i) <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,</i>
(ii) <i>any current or future operational requirements of the organization that may be identified by the deputy head, and</i>	(ii) <i>toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,</i>
(iii) <i>any current or future needs of the organization that may be identified by the deputy head.</i>	(iii) <i>tout besoin actuel ou futur de l'administration précisé par l'administrateur général.</i>
(3) <i>The current and future needs of the organization referred to in subparagraph (2)(b)(iii) may include current and future needs of the public service, as identified by the employer, that the deputy head determines to be relevant to the organization.</i>	(3) <i>Les besoins actuels et futurs de l'administration visés au sous-alinéa (2)b(iii) peuvent comprendre les besoins actuels et futurs de la fonction publique précisés par l'employeur et que l'administrateur général considère comme pertinents pour l'administration.</i>
(4) <i>The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.</i>	(4) <i>La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite.</i>
...	[...]
33 <i>In making an appointment, the Commission may use an advertised or non-advertised appointment process.</i>	33 <i>La Commission peut, en vue d'une nomination, avoir recours à un processus de nomination annoncé ou à un processus de nomination non annoncé.</i>
...	[...]
36 <i>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</i>	36 <i>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</i>

a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).

...

[...]

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);*

(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;*

[32] In ss. 77(1)(a) and (b), the Act allows someone in the area of recourse to make a complaint alleging abuse of authority by the deputy head in the exercise of its or his or her authority under s. 30(2) and abuse of authority in the choice of appointment process.

[33] The complainant made his complaint against the appointee's appointment under the first two sections of s. 77 of the Act. The case law has long established that the complainant has the onus of demonstrating that on the preponderance of the evidence, the deputy head abused his or her authority. The complainant must discharge the burden of proof.

[34] *Tibbs* held that the complainant has the burden of proving that abuse of authority occurred. In addition, the Act's preamble and its entirety make it clear that

much more is required than mere errors or omissions to constitute abuse of authority. “Abuse of authority is more than simply errors and omissions” and will always include improper conduct (see paragraphs 65 and 66).

A. Was there abuse of authority in the choice of process?

[35] Section 33 of the *Act* clearly and unequivocally states that the respondent may use an advertised or non-advertised appointment process. Thus, the complainant could not simply allege that abuse of authority occurred because the respondent chose a non-advertised process. He had to prove that the respondent’s decision to choose that process constituted an abuse of authority.

[36] The complainant argued that the appointee benefitted from three acting appointments and that from them, she received an advantage that reportedly resulted in an abuse of authority. The evidence demonstrated that no complaints were made against those appointments. Choosing a non-advertised process is not in itself an abuse of authority. During her testimony, the Director did not indicate why the appointee was appointed three times. However, she testified that she focused on her employees’ professional development.

[37] There is no doubt that the appointee gained new experience and competencies during her acting appointments. However, they never led to complaints, and it is not for me to determine their legitimacy. That being so, did the appointee benefit from an advantage, to the complainant’s detriment, which would have led to an abuse of authority?

[38] Section 30(4) of the *Act* stipulates that in a non-advertised appointment process, management is not required to consider or assess anyone other than the person appointed. Thus, there was no need to conduct a comparative assessment between the complainant and the appointee. And the complainant did not demonstrate that the appointee’s successive acting appointments were, in this case, an unfair advantage that would have led to an abuse of authority.

[39] The director explained that the choice of appointment process met a strategic need, given the organization’s needs and the planned significant and rapid growth in the number of employees. She also mentioned the risks that the organization would have faced had it proceeded with an advertised appointment process. On the other

hand, the respondent adduced in evidence a document entitled “[translation] Articulation of Selection Decision”, which set out the reasons for using a non-advertised appointment process. It specified the difficulty filling the position, employment equity reasons, immediate needs, and talent management as reasons. From those factors, I find that the choice of a non-advertised appointment process was the result of reasonable reflection based on the organization’s needs at the time and that it was not a gratuitous or an arbitrary decision. In the circumstances, the complainant did not demonstrate on the preponderance of the evidence that abuse of authority occurred in the choice of a non-advertised appointment process.

B. Was there abuse of authority in the application of merit?

[40] I quoted earlier an excerpt from the complainant’s complaint about the numerous and serious breaches of at least two merit criteria, which I will reproduce as follows:

[Translation]

...

My allegations include numerous and serious breaches of at least two of the merit criteria, management excellence and values and ethics, by the candidate with her team members since the start of her acting appointment by non-advertised process that was extended and now has been transformed into a promotion.

...

[41] To support his allegation, the complainant referred to delays processing the three co-workers’ pay in acting positions. He also mentioned the delay of more than a year completing his performance evaluation. He also testified that at least one employee complained about how their performance evaluation was handled; it turned out to be the complainant himself, which is a detail that he failed to mention. Finally, he spoke about an incident during which the appointee apparently hugged someone, which breached the health guidelines that were instituted due to the COVID-19 pandemic. He claimed that those factors are sufficient to demonstrate that the appointee did not meet the criteria of Management Experience and Values and Ethics.

[42] The three incidents, as described by the complainant, occurred or were reported after the appointee’s appointment. He based his assessment on them to conclude that the appointment did not meet the merit criteria. Mr. Laflamme explained that the

delays completing the annual performance evaluations, due to COVID-19 circumstances, did not constitute a serious breach of human resources management and would not have warranted sanctioning a manager. Thus, this factor was not a negative factor in the appointee's assessment.

[43] The complainant cited *Rizqy*, in which the Board discussed the Values and Ethics merit criterion. However, this case differs from that one. The Board was seized with an allegation challenging how references received from referees were treated after the complainant raised doubts about their veracity. And an allegation of bias was made with respect to the senior manager who had the referees' observations validated.

[44] In this case, at issue is whether the respondent abused its authority when it assessed the appointee. The respondent had two former directors testify, Mr. Laflamme, who produced information on the appointee's performance, and Ms. Chatigny, who assessed the appointee's application and determined that she met the merit criteria as of her appointment.

[45] The evidence demonstrated that Mr. Laflamme sent an email at Ms. Chatigny's request. The three-page email detailed the appointee's accomplishments. He also had much to say about the appointee in his testimony; he described as anecdotal the events that the complainant mentioned and added that the appointee had accomplished a great deal in her position. Ms. Chatigny used the email to assess the appointee's candidacy against the statement of merit criteria. She also commented on birth-celebration incident; she explained that there had been no need to act on it.

[46] The respondent adduced the "[translation] Evaluation of Merit Criteria" in evidence. It consisted of a table with three columns and one row per merit criterion. The first column was entitled "[translation] Merit Criteria", the second "[translation] Rationale for Assessment", and the third "[translation] Additional Information (if any)". All the columns were filled in, specifying for each merit criterion how the assessment was observed and adding a lengthy justification to support the assessment.

[47] Specifically, it is evident that the Values and Ethics and Management Experience capability criteria were assessed and demonstrated using the *Public Service Performance Management* application for the 2018-2019 fiscal year as provided by their director, Mr. Laflamme.

[48] As for assessing candidates, my role is not to reassess the appointee but instead to determine whether abuse of authority occurred in the appointment process.

[49] In this case, the preponderance of the evidence clearly indicates that the candidacy was indeed assessed against the statement of merit criteria. The assessment also appeared objective and honest to me. I do not see the slightest suggestion of abuse of authority. On the contrary, when the complainant stated that a complaint was made with his director about a performance evaluation for the appointee after her appointment, he failed to specify that he had originated it. That omission undermined somewhat the credibility of his testimony. In any event, he failed to prove that on the preponderance of the evidence, abuse of authority occurred in the appointee's assessment.

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

(The Order appears on the next page)

V. Order

[51] The complaint is dismissed.

October 17, 2023.

FPSLREB Translation

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