

Date: 20231121

File: 771-02-43588

Citation: 2023 FPSLREB 109

*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

SANDRA MCCONNELL

Complainant

and

DEPUTY HEAD

(Department of Foreign Affairs, Trade and Development)

Respondent

and

OTHER PARTIES

Indexed as

McConnell v. Deputy Head (Department of Foreign Affairs, Trade and 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: Herself

For the Respondent: Patrick Turcot, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard by videoconference,
June 27, 28, and 30 and July 20 and 21, 2023.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] On September 29, 2021, the Department of Foreign Affairs, Trade and Development (“the respondent” or “the department”) posted a Notice of Acting Appointment for one year, from July 1, 2021, to June 30, 2022, for Sandra Jacques-Loomer (“the appointee”) to a team leader, Sector Management Services, position at the AS-04 group and level, as part of the internal non-advertised acting appointment process numbered 21-EXT-ACIN-ED-1031343, Global Affairs Canada - Financial Management Advisor for NGM & OGM - SWAN in Gatineau, Quebec.

[2] Note that these letters (SWAN, NGM, and OGM) are not acronyms but symbols designating specific organizations in the department. During the hearing, the parties did not find it useful to specify a name for each symbol and referred only to those identifiers throughout the hearing.

[3] On October 1, 2021, Sandra McConnell (“the complainant”) made a complaint under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the Act”) with the Federal Public Sector Labour Relations and Employment Board (“the Board”) against the appointment.

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

[5] Note that the Public Service Commission (PSC) did not attend the hearing but that it submitted written arguments, both general and specific, on its appointment policy.

II. The allegations

[6] The original allegations were amended on May 24, 2022, after the complaint had been made and after the complainant obtained additional information under the *Access to Information Act* (R.S.C., 1985, c. A-1). Both the original and amended allegations may be summarized as follows:

- 1) The acting appointment of over four months was made without transparency through a non-advertised process, and the position should have been offered to all the team members.

- 2) The incumbent's return was scheduled for November 2021, while the acting appointment lasted until June 30, 2022.
- 3) There was a lack of transparency in the choice of appointment process, since other people in the two teams met the merit criteria.
- 4) The appointee's qualifications were not verified since the managers were unable to assess the statement of merit criteria because senior management had recently arrived and did not know the selected candidate.
- 5) Arbitrary treatment occurred, namely, abuse of authority by the appointee toward her work team, differential treatment toward the person appointed to the acting position for more than four months, unfair treatment in the choice of appointee, and differential treatment based on invalid and unjustifiable grounds due to discrimination against the complainant.
- 6) The complainant made a discrimination allegation under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; CHRA) based on disability on the grounds that the treatment that she suffered allegedly caused her a disability. The allegation was withdrawn at the hearing.

III. Summary of the complainant's evidence

A. Christina Bédard's testimony

[7] Ms. Bédard held an AS-02 financial officer position on the team for nine months, from January to September 2020. She testified that she left because she did not feel that there were any advancement opportunities in the unit. She is now a team supervisor at the Department of the Environment.

B. Thomas Éthier's testimony

[8] Mr. Éthier has been a team leader in SWAN, for NGM and OGM, since 2015. In that role, he has been responsible for, among other things, ensuring that the team functions properly and that the AS-02s are trained. He was on leave from September 2021 to early 2022. He testified that he felt that the complainant was a "[translation] strong" AS-02, believed that she was ready to assume the responsibilities of the AS-04 position, and that she could have pushed herself. He had proposed her for the acting appointment from January 20, 2021, to February 5, 2021, or for two-and-a-half weeks that was to end on the incumbent's return from sick leave on February 5.

[9] Mr. Éthier testified that he was surprised that the complainant was not reappointed to the acting position when the incumbent's sick leave was extended. He stated that he did not agree with the decision to terminate the complainant's acting appointment. He was surprised to learn that her supervisor during the acting appointment, Anick Bizimana, had found that the appointee was not right for the job. He stated that the end of the acting appointment hindered the complainant's career

development and made several team members discontent. He stated that the end of the acting appointment was the start of internal disputes that required meetings with a conflict-resolution consultant. He stated that the complainant worked under his supervision for six months, that he produced her performance evaluation report, and that he recommended her for an acting appointment. However, he never assessed her for an AS-04 team leader position.

[10] He acknowledged the existence of long-standing problems since the reorganization that led to creating two units. He also testified that there was much work to do and training to give. He now considers the complainant a friend, but before, he considered her an employee.

[11] Mr. Éthier was also the appointee's supervisor, for whom he produced several performance evaluations and who was always well qualified. Chantal Renaud, the second team leader, also assessed the appointee's qualifications and found that she met everything in the statement of merit criteria. Had he been able to, he would have appointed the appointee himself, since she met everything in the statement of merit criteria.

[12] He also stated that there was considerable burnout and that there were many tears on the team. He testified that Ms. Renaud and management had problems with each other. He never suggested to the complainant to make a complaint or file a grievance with the union.

[13] He testified that the complainant received an acting appointment to the FI-01 group and level in September 2021 and that after that, she was appointed indeterminately.

C. Chantal Renaud's testimony

[14] Ms. Renaud held an FI-03 and a team leader FI-04 position on an acting basis in the department for several periods between September 30, 2020, and December 2022. When she received her appointment with the respondent, she had come from the Competition Bureau. She stated that she was shocked at how Human Resources was managed. She cited examples of several appointments having been made through non-advertised appointment processes or even, as in this case, the appointee allegedly drafting the statement of merit criteria.

[15] Ms. Renaud stated that the complainant held two acting AS-04 positions, the first from January 20 to February 5, 2021, and the second from May 3 to 28, 2021. The complainant reported to her at that time, although she was appointed on an acting basis to a position to which the complainant no longer reported. Ms. Renaud stated that she did not know why the complainant's acting appointment ended after two-and-a-half weeks. She was shocked to see the complainant return to her substantive position without notice.

[16] Ms. Renaud stated that the appointee was extraordinary and that she had nothing to say against the appointee. She also stated that at that time, the units had a great need for staff.

[17] The appointee's assessment against the statement of merit criteria includes Ms. Renaud's signature using MyKey. She acknowledged that she signed it, no one else, but that she did not sign it willingly. She stated that she signed it under duress from "[translation] senior management". She defined senior management as the directors at the EX-01 group and level; they were her directors. She submitted that she signed it out of fear of reprisal and that the appointment breached the department's values and ethics. In addition, the appointment did not follow the principle of the complainant and appointee receiving alternating acting appointments.

[18] Ms. Renaud stated that the appointee went through the entire appointment process from start to finish, including drafting the statement of merit criteria. She also stated that the "[translation] department does not have a good reputation for staffing, and there is a major lack of transparency". She stated that she left the department due to the lack of senior management support, the unhealthy work environment, terror, and a lack of transparency in Human Resources management.

[19] The respondent objected to the testimony on the grounds that it was "[translation] inflammatory" and unfounded. It also requested a hearing postponement, to allow it to identify and call other witnesses to contradict that testimony. It also argued that the statement that Ms. Renaud allegedly signed under duress the assessment of the appointee's qualifications relative to the statement of merit criteria was a new allegation that it did not expect and that it was a surprise. It relied on the following, from *Massabki v. Deputy Head (Department of Foreign Affairs, Trade and Development)*, 2022 FPSLRB 79 at para. 16:

[16] If, in fact, the respondent was so surprised by the reference to another appointment process relied on to support the complaint, there were remedies to address it, the first being to request that the hearing be postponed, to enable it to develop a rebuttal. It did not....

[20] In this case, I rejected the postponement request and agreed that the testimony could continue. I acknowledge that the testimony might have surprised the respondent at the hearing, but I found that it was not a new allegation. The respondent was to cross-examine this witness. It would have had the opportunity to highlight other factors, to clarify the testimony. On the other hand, the complainant's evidence was not finished, and she still had a witness left to call, herself, and then, the respondent would call its witnesses. In light of what occurred, the hearing continued for an additional day in the same week and for two more days a week later. Therefore, the respondent had several days to improve its arguments and prepare its reply.

[21] In cross-examination, Ms. Renaud stated that she has pursued recourses before the Board that are not related to this case.

[22] She testified that she had 28 years of service, including 10 to 15 years in management positions and 4 years during which she had staffing subdelegation. She also conducted 3 to 5 appointment processes. She stated that in her experience, Human Resources people meet with an employee to develop the statement of merit criteria. In this case, she maintained that the appointee drafted the statement of merit criteria.

[23] She continued her testimony by acknowledging that the appointee had significant staffing experience and that she attested to it by signing the form for the candidate's assessment relative to the statement of merit criteria. She specified that the appointee wrote the contents, that they were accurate and valid, and that everything written in them was true. She stated that her opposition to signing the form came from the fact that the complainant and appointee should have been alternated and that that time, it was the complainant's turn to be appointed to the acting position, not that the appointee was not qualified.

[24] She also testified that she had a very good relationship with the appointee and that if tomorrow morning, she required "[translation] a good AS-04", she would look for her. She also stated that she had a very good relationship with the complainant.

[25] She acknowledged that indeed she signed the bottom of the form, using MyKey. She stated that the purpose of an acting appointment is to let a person learn and gain new experience and put it on a résumé.

[26] She testified that the complainant occupied an AS-04 position on an acting basis for two-and-a-half weeks, that the acting appointment was not renewed, and that that period was not long enough to allow for a fair assessment of the complainant. She maintained that it is not legitimate for a manager to expect an acting appointee to be fit to perform all the duties of the position.

[27] During her testimony, Ms. Renaud reported on several disputes in the organization and an unhealthy work environment. She stated that she, Mr. Éthier, and the complainant were on senior management's blacklist.

D. The complainant's testimony

[28] The complainant testified that she held a position in the Department of Canadian Heritage for 10 years before being declared surplus in 2013. She returned to the public service in 2015 and joined the department in 2020 in the financial services of the SWAN group, which served the NGM and OGM groups as its clients.

[29] The complainant testified that upon arriving at SWAN, she reported to the appointee. She said that many tasks had to be performed and stated that all communications were by email — very long ones, she specified. She acknowledged that it was difficult to manage a team by email. She stated that she received many requests from different parts of the organization and that she no longer knew whom she reported to. She acknowledged that there was much to learn and that everyone on the team had things to learn. She stated that she expressed an interest in a career progression to AS-04 and FI-01 positions.

[30] The complainant obtained an acting team leader position, the same position as the one at issue in this complaint, from January 20 to February 5, 2021, to cover a sick leave. The appointment was planned for two-and-a-half weeks, at the end of which the incumbent was to return to work. It was not renewed, and she stated that the appointment was not interrupted. However, on the morning of February 5, the incumbent wrote to the manager, stating that the sick leave had been extended. The appointee received an acting appointment of four months less a day.

[31] The complainant argued that how she was informed of her appointment not being renewed “[translation] was not humane” since the announcement was made to her after her appointment had ended.

[32] In May 2021, she received another acting appointment, lasting less than a month, which was not renewed. She stated that it was in the most difficult division because of the organization’s mandate and interaction with clients. She testified that she felt that she did a good job there.

[33] The complainant maintained that she was the subject of senior management’s internal discussions from February 8 to 25, 2021, due to her two-and-a-half-week acting appointment, but that at no time did anyone speak to her. According to her, management should have included her in the discussions.

[34] In her testimony, the complainant spoke of several times when certain people received acting appointments without going through advertised processes. She further stated that the appointee, who holds an AS-02 substantive position, received an acting AS-05 appointment. She said that the turnover rate of staff was very high among those who went on sick leave for longer or shorter periods or who received acting appointments.

[35] The complainant introduced as evidence the department’s *Values and Ethics Code*, which seeks to preserve humane values and the rule of law at all levels. She read several excerpts from it and stated that it applies to senior management, which is responsible for enforcing it.

[36] She stated that there was ambiguity as to who held the signing subdelegation for staffing and that she felt bullied by the fact that the appointment was not made through an advertised process.

[37] She said that OGM experienced several labour relations problems, to such an extent that a conflict resolution facilitator intervened with the team, to try to resolve the disputes.

IV. Summary of the respondent's evidence

A. Elizabeth Lee's testimony

[38] When she testified, Ms. Lee indicated that she held an internal controls manager position at the FI-03 group and level and that previously, she was an advisor on the department's financial policy team. She joined SWAN as an assistant director and managed the OGM and NGM teams from April to September 2021.

[39] As of Ms. Lee's arrival, Ms. Renaud had held the same position for a month and a half. Ms. Lee stated that when she arrived, the OGM team was in more difficulty than was the NGM, and it struggled to offer the expected services to clients. The team exhibited significant fatigue and exhaustion. She stated that several team members lacked training. She recognized that she did not have the necessary staffing subdelegation.

[40] In response to the assertion about the climate of terror in the organization, she acknowledged that several team members were unhappy, that the team was divided in two with the AS-02s on one side and the FI-02s on the other, and that the FI-02s did not receive the necessary training from the manager. The AS-02s complained mainly about the extra overtime work, from which they were exhausted.

[41] Ms. Lee stated that the complainant made a request to have overtime authorized in April 2021, which was denied. Ms. Lee asked her if it was really necessary to carry out that work on a Saturday and stated that she would have liked to discuss it beforehand. In addition, in the days before the authorization request was made, a communication was sent to the team members, informing them that the number of overtime hours would be reduced. She stated that at that time, she had known the complainant only for three weeks, that she had no negative preconceived opinion of her, and that the purpose of reducing the overtime hours was to reduce the team members' exhaustion.

[42] Ms. Lee stated that a "[translation] clique" had developed, that Ms. Renaud and Mr. Éthier seemed to lead all the team's activities, that some other members did not feel included, and that it all allegedly contributed to creating a negative work environment. She stated that she had difficulty integrating into the team.

[43] Ms. Lee stated that her role was to support the request for an appointment process for her two managers, Ms. Bizimana and Ms. Renaud. Ms. Bizimana proposed the appointee's appointment and stated that the two managers had carried out the assessment. She did not remember seeing the appointee's assessment document with respect to the statement of merit criteria and therefore could not have forced Ms. Renaud to sign it. In cross-examination, she acknowledged that she was copied on the document and so she would have seen it, but she persisted in stating that she would not have forced Ms. Renaud to sign it. She also stated that she did not complete the document attesting to the appointee's qualifications, since she did not know her well enough to assess her. She believed that Ms. Renaud completed it because Ms. Renaud supervised the appointee.

[44] As for the choice of appointment process, Ms. Renaud signed as the manager, and Sandra Lopes, the director, signed as the person with subdelegated staffing authority. Ms. Lee reiterated that she did not force Ms. Renaud to sign it and that the appointment decision belonged to Ms. Lopes. Ms. Lee did not know what Ms. Renaud referred to when she expressed her fear of reprisal. She stated that she never worked with Ms. Renaud and that she did not know her before she started in her position. She considered the AS-04 applications from a pool of pre-qualified candidates and conducted interviews with Ms. Renaud and Ms. Lopes and found that none of the candidates met the expected requirements. She went on to say that together, they reached a decision on the process, and that Ms. Renaud took the lead in the process. She confirmed that the statement of merit criteria was the same for all team leader positions.

[45] Ms. Lee stated that it was a difficult period, that client relations were also difficult, and that it would have been too complicated for an outside person to take up a position temporarily. She acknowledged that the appointee occupied the position for a month on an acting basis just before her one-year acting appointment that is at issue in this complaint.

[46] Ms. Lee stated that the complainant had received two acting appointments before that, but apparently, her performance did not reach the level expected. She noted it herself during an audit of the work performed and some analysis reports that were reportedly not done when they should have been done. In addition, Ms. Lee found

that the complainant's communications could lack sensitivity and that they were not at a team-leader level.

[47] The duration of the acting appointment that is the subject of the complaint exceeded the return date of the employee being replaced, but Ms. Lee stated that it was not a problem, since there were other vacant AS-04 positions in the organization.

[48] Ms. Lee denied that the complainant was subjected to differential and unfair treatment. She argued the opposite, since both the appointee and the complainant had opportunities to hold team leader positions and were given the same opportunities.

[49] To conclude her testimony, Ms. Lee stated that had she been asked to continue her SWAN assignment, she would have refused, although she worked two weeks longer than expected.

B. Anick Bizimana's testimony

[50] Ms. Bizimana is currently a senior analyst at the FI-03 group and level at the Courts Administration Service and has been since January 2023. Before that, she held a senior financial analyst position from February 2016 to November 2022 in the department. During that time, she was on a mission abroad from August 2018 to March 2020. She testified that she reported to four different supervisors, all appointed to acting positions, from January 2021 to May 2021. In her position, she was not even the subdelegated staffing signer; it fell to the EX-01 director position.

[51] Ms. Bizimana and Ms. Renaud were managers in equivalent positions and OGM and NGM operational teams, each offering the same services to different clients in the department. The complainant held a position on Ms. Renaud's team (NGM), but she received an acting appointment on Ms. Bizimana's team (OGM). She explained that the appointment was to end when the incumbent returned from sick leave on Friday, February 5, 2021.

[52] Ms. Bizimana said that it was a very busy time, with much to do. She stated that the acting appointment went well but that the complainant lacked basic concepts and that there were gaps in delivering client services.

[53] On the morning of February 5, the incumbent informed Ms. Bizimana that the sick leave was being extended. At that moment, she reportedly spoke with her director,

Sandra Lopes, to conclude that the acting appointment would not be renewed because the complainant was not the best person for the position at that moment. She and her former director opted for the appointee. Parallel to those events, Ms. Renaud mistakenly informed the complainant of the incumbent's extended sick leave and allegedly promised her that her acting appointment would be renewed. That same day, Friday, February 5, at the end of the day, Ms. Bizimana's former director went on a mission abroad, with the result that the complainant was not informed about the end of her acting appointment, or that it was not renewed, until early in the following week.

[54] The new director, Sandra Lopes, whose testimony follows, asked her to describe the circumstances of the complainant's acting appointment from January 20, 2021, to February 5, 2021, or two-and-a-half weeks. Confusion arose as to whether the appointment was terminated or whether in fact it was simply not renewed. According to Ms. Bizimana, it was always clear that the acting appointment was to end on February 5 and that she had never promised the complainant an extension. She maintained that that period might have been used as a trial period for the future but that it did not work out. The director then proceeded to appoint the appointee on an acting basis for four months less a day. The acting appointment went very well; it preceded the one-year appointment that is the subject of this complaint. The complainant apparently took the news badly that her acting appointment was not renewed.

[55] Those circumstances created the interpersonal conflict between Ms. Bizimana, Ms. Renaud, and the complainant. The conflict escalated; hurtful words were exchanged, and Ms. Bizimana vehemently denied saying things about the others involved in the conflict. There is no point repeating those words in this decision.

[56] With the organizational atmosphere deteriorating, Ms. Bizimana had to take three weeks of leave. During the leave, she wrote to her director and complained about the toxic work environment and the fact that there were many vacant positions and a great deal of pressure on the workers' shoulders. She attributed the toxicity's cause to the fact that the team had been neglected and without permanent directors for three or four years. And while she was on a mission, a reorganization took place and did not go well, which contributed to the work environment's toxicity.

[57] Ms. Bizimana stated that she did not remember the appointee's acting appointment causing any discomfort for Ms. Renaud, since she signed the form for the choice of the process. She stated that she contributed to the decision to appoint the appointee but that ultimately, the decision rested with the director, Ms. Lopes. According to Ms. Bizimana, the complainant was not the victim of differential treatment; she even received two more acting appointments a short time afterward.

C. Sandra Lopes' testimony

[58] Ms. Lopes has been the director of SWA, which has overseen, among others, SWAN and the two OGM and NGM teams, since May 31, 2021. In that position, she holds the subdelegations for actions involving Human Resources and finance. She testified that when she arrived, the team was experiencing significant instability, a high turnover rate for managers and assistant managers, and a high number of acting appointments and that the employees were "[translation] working twice or even three times as hard!" The situation was very difficult.

[59] Ms. Lopes attributed the unhealthy work environment to the high staff turnover rate, the many on sick leave, the numerous acting appointments, and the downward delegation of certain tasks that should have been done at higher levels in the hierarchy. She stated that she did not witness the breaches of trust that reportedly contributed to the bad climate.

[60] Ms. Lopes stated that her role in the non-advertised appointment process was to sign the forms, along with Ms. Lee and Ms. Renaud. She justified the choice of appointment process by mentioning the very difficult environmental context, her desire to bring stability to the team, the operational needs, the advice of Ms. Lee and Ms. Renaud, the fact that the appointee was doing a good job, her desire to maintain the status quo, and the fact that the appointment process was expected to be collective.

[61] Ms. Lopes stated that Ms. Renaud never expressed any opposition or concern about the choice of process, the choice of appointee, or the appointment's one-year duration. It was quite the opposite; she supported it.

[62] Ms. Renaud prepared and carried out the appointee's assessment against the statement of merit criteria since she was her immediate superior. Ms. Renaud did so

with full knowledge of the facts. Ms. Lopes stated that she did not pressure Ms. Renaud in any way given that she wanted her because she appreciated her greatly. Ms. Lopes stated that the previous director left in May 2021 and that she was no longer in her role when the appointee's assessment was signed, so she could not have pressured Ms. Renaud to sign it. She added that the Human Resources subdelegation was not required to sign a candidate's assessment. In addition, Ms. Renaud's electronic signature was at the bottom of the assessment form. She reiterated that Ms. Renaud assessed the appointee with full knowledge of the facts at the appropriate level and approved by the appropriate level.

[63] The statement of merit criteria identified the essential criteria for taking on the AS-04 position. The supervisor created it, and it is a standard and generic position that management uses to staff such positions. Ms. Lopes stated that in the circumstances, it was impossible for her to commit an abuse of authority because she had just arrived in the position, she wanted to maintain stability and the status quo, and because it was a temporary measure. She submitted that the fact that the acting appointment's end date exceeded the incumbent's return date was not a factor at issue. A longer acting appointment prevents another process from being run if the incumbent's absence is extended. In addition, management can terminate the appointment at any time, since its temporary character defines it.

[64] Ms. Lopes submitted that the complainant was not subjected to differential treatment. She did not witness any lack of fairness in the appointee's favour. She stated that each employee had the opportunity to hold an acting position simply because the unit was under capacity. She stated that when she arrived, she did not know anyone on the team — neither the employees, the team leaders, nor the assistant directors. She relied entirely on the supervisors' assessments to appoint the appointee. She heard only positive things about the appointee.

V. Summary of the complainant's arguments

[65] The complainant focused on management's lack of humane values toward her with respect to the treatment that she received when her two-and-a-half-week acting appointment was not renewed. She felt that the treatment that she received at that moment "[translation] was not humane". She argued that the two-and-a-half weeks were insufficient for a proper assessment. She claimed that it should have been three

months at minimum. She felt that the incident affected her “[translation] merit status” and that it hindered, if not blocked, her career development.

[66] She claimed that the respondent abused its authority by proceeding with a non-advertised appointment process and that it had a negative snowball effect on the entire organization.

[67] She supported her argument by referring to fairness and justice in human resources, according to the *Act* and the acting appointment guide, and by referring to shortcomings with respect to the pool of prequalified candidates. She did not refer to any particular section of legislation.

[68] The complainant argued that Ms. Lopes did not yet have the staffing signing subdelegation and that the former director should have signed. Consequently, the appointment was based on an abuse of authority.

[69] The complainant argued that the appointee received an advantage because of the acting appointments that she had received at the complainant’s expense. In addition, she argued that operations were sufficiently busy and that management could have made two appointments.

[70] The complainant rejected the respondent’s claim that there would be opportunities for advancement in the organization because she had received an acting appoint to a higher FI-01 position that then changed to an indeterminate appointment. She argued that it was due not to management’s goodwill but to Ms. Renaud, who helped her find a position and who acted as a warrior to support her application. She showed an interest in supporting her employees.

VI. Summary of the respondent’s arguments

[71] At the start, the respondent referred to the acting appointment guide, which specifies that such an appointment can be used to meet temporary operational needs. It also indicated that the guide confirms that acting appointments of four months less a day are not subject to the merit principle. It also specified that the complainant’s acting appointments are not at issue in this recourse and that they should have no weight in determining the complaint in this case.

[72] The respondent argued that Ms. Renaud did not have staffing subdelegation and that it was not up to her to make promises that she knew she did not have the authority to keep. Only Ms. Lopes, the director, had the power to appoint. The respondent stated that management supported the complainant in her advancement quest since it authorized her acting appointment to the FI-01 position; it had the authority to refuse her. The appointment later became indeterminate.

[73] The respondent referred to *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, which stated that abuse of authority is a serious allegation that must not be taken lightly. That decision established that employees who allege abuse of authority or a contravention of the *Act* must present convincing arguments to be successful, not just a perceived injustice.

[74] The respondent referred to *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11, which referred to *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8. That case determined that the burden of proof rests with the party alleging the abuse of authority. It is not enough to make allegations and argue abuse of authority; the complainant must provide convincing evidence to support his or her allegations.

[75] The respondent also referred to *D'Almeida v. Royal Canadian Mounted Police*, 2020 FPSLREB 23 at para. 55, to note that “[t]he choice of an advertised or non-advertised appointment process rests with managers.” However, it states that the decision must “... be justified and free of favouritism or bias.”

[76] The respondent then cited *Lavigne v. Canada (Justice)*, 2009 FC 684 at paras. 61 and 62, which discussed the concept of abuse of authority. It stated that abuse of authority “... will be deemed founded where bad faith or personal favouritism was established. The principle of bad faith requires an element of intent.” It further stated that “[a]buse of authority requires more than error or omission, or even improper conduct.” The respondent submitted that based on the testimonies of Ms. Bizimana, Ms. Lee, and Ms. Lopez, the evidence sets out that the decision to proceed using a non-advertised appointment process was motivated by operational needs, the need for stability, and the work environment circumstances. The respondent also added that the preponderance of the evidence indicated that Ms. Renaud did not sign the choice-of-process forms under duress but of her own free will and that she assessed the

appointee's application. It added that Ms. Renaud sought to make the respondent look bad, in anticipation of her own recourse.

[77] The respondent reviewed the allegations. With respect to the choice of process and the duty to offer it to all the team members, it referred to *Visca v. Deputy Minister of Justice*, 2006 PSST 16, which stated that a "... complaint cannot be about how other ... candidates were treated, but how the merit criterion of recent experience was established and applied to the complainant" (at paragraph 24). The respondent returned to Ms. Lopes' testimony. She relied on Ms. Renaud's assessment of the appointee and insisted on her qualities for completing tasks and fulfilling responsibilities.

[78] The respondent also relied on *Chaves v. Commissioner of the Correctional Service of Canada*, 2008 PSST 3, which found that the respondent's decision was based on operational needs and recognized that there were urgent needs to be met and that the use of an acting appointment was justified (at paragraph 55). *Tibbs* acknowledged that s. 30(2) of the *Act* provides managers with considerable discretion "... to choose the person who not only meets the essential qualifications, but is the right fit ..." (at paragraph 63).

[79] The respondent also referred to *Robbins v. the Deputy Head of Service Canada*, 2006 PSST 17 at para. 36, which recognized that s. 33 of the *Act* grants the PSC or its delegate the discretion to select between an advertised or a non-advertised appointment process. That decision also stated that the complainant cannot allege that an abuse of authority occurred simply because a non-advertised process was chosen. The complainant "... has to prove that the decision itself to choose a non-advertised process constitutes an abuse of authority."

[80] As for the allegation that the appointment exceeded the incumbent's return date, the respondent submitted that it met operational needs at that time, that a complete statement of merit criteria was prepared, and that the appointee's assessment did not identify any deficiencies but demonstrated that the appointee met all the criteria in the statement of merit criteria.

[81] The respondent cited *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7, which set out the test for determining whether favouritism occurred in an appointment. It stated that an appointment must

not be tainted by personal favouritism, such as a personal relationship between the appointee and the person making the appointment, or even done as a personal favour or in expectation of a favour in return for the appointment. The question to be determined is which of the versions, the complainant's or the respondent's, is in harmony with the preponderance of the evidence that a practical and informed person would readily recognize as reasonable in the circumstances (at paragraph 46).

[82] The respondent argued that the complainant was not subjected to differential or unfair treatment, that there was no personal relationship between the appointee and Ms. Renaud, and that all relationships with Ms. Lee and Ms. Lopes were professional. Consequently, it also seeks that this allegation be dismissed.

[83] The respondent cited *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at para. 35, to address the lack of transparency in the appointment process. It argued that in that decision, "... the lack of opportunity [in an appointment process] cannot reasonably be the basis for determining an absence of fairness." Consequently, it seeks that this allegation be dismissed.

[84] Ultimately, the respondent requested that the allegations and the complaint be dismissed.

VII. Reasons

[85] For greater convenience, I have grouped these sections of the Act, to which the parties referred at the hearing or on which I base my decision:

...	[...]
<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</i>	<i>a) selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les</i>

established by the deputy head, including official language proficiency; and

langues officielles — établies par l'administrateur général pour le travail à accomplir;

(b) *the Commission has regard to*

b) *la Commission prend en compte :*

(i) *any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,*

(i) *toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,*

(ii) *any current or future operational requirements of the organization that may be identified by the deputy head, and*

(ii) *toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,*

(iii) *any current or future needs of the organization that may be identified by the deputy head.*

(iii) *tout besoin actuel ou futur de l'administration précisé par l'administrateur général.*

(3) *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.*

(3) *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.*

(4) *The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.*

(4) *La Commission n'est pas tenue de prendre en compte plus d'une personne pour faire une nomination fondée sur le mérite.*

...

[...]

33 *In making an appointment, the Commission may use an advertised or non-advertised appointment process.*

33 *La Commission peut, en vue d'une nomination, avoir recours à un processus de nomination annoncé ou à un processus de nomination non annoncé.*

...

[...]

36 *In making an appointment, the Commission may use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers*

36 *La Commission peut avoir recours à toute méthode d'évaluation — notamment prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée*

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

pour décider si une personne 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;*

...

[...]

[86] The complainant made a complaint under s. 77 of the Act, which allows people in the area of recourse to make a complaint alleging abuse of authority by the deputy head in the exercise of its authority under s. 30(2) and an abuse of authority in the choice of appointment process. The complainant must demonstrate that on a preponderance of the evidence, the respondent abused its authority (see *Tibbs*, at paras. 48 to 55, and *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 27).

[87] Abuse of authority is not defined in the Act except to specify what it includes, namely, bad faith and personal favouritism (s. 2(4) of the Act). The former Public Service Staffing Tribunal and the Board have concluded that abuse of authority must

necessarily be a serious and reprehensible act; a mere error or omission is not abuse of authority (*Langlois v. Deputy Head (Department of Employment and Social Development)*, 2023 FPSLRB 24 at para. 24).

[88] Before beginning the formal analysis of the decision, I would like to discuss the complaint's origins and the motivation behind it. The complainant and her witnesses made much her two-and-a-half-week acting appointment not being renewed. The complainant herself repeatedly returned to point out the absence of humane values in the organization. For its part, the respondent pointed out the high volume of operations, the staff turnover, and the need for stability. Both parties used different adjectives to describe the work environment.

[89] The one that I would use is that the work environment was, and perhaps still is, hectic; in constant turmoil. I cannot comment on the cause, but I can see its state. Except for Ms. Lopes, all the witnesses, at one point or another, held an acting position in the organization. The complaint was made in the context in which the complainant's acting appointment was not renewed and the appointee later received a one-year acting appointment.

[90] It is useful to recall that I have no authority to judge the circumstances of the termination of the complainant's two-and-a-half-week acting appointment. My role is to determine, based on the preponderance of the evidence, whether the respondent abused its authority when it appointed the appointee.

[91] I will put the allegations into three groups. The first group, which I will label "[translation] Abuse of authority in the choice of process", concerns the following allegations: the choice a non-advertised appointment process and its lack of transparency and the fact that its duration exceeded the incumbent's expected period of absence. The second group concerns the absence of an assessment of the qualifications in the appointee's application. Finally, the third group concerns the allegation that the complainant was subjected to differential treatment in the appointee's favour. The discrimination allegation was withdrawn at the hearing, as the complainant acknowledged that it was unrelated to a prohibited ground of discrimination under the *CHRA*. Therefore, it will not be dealt with.

A. Abuse of authority in the choice of process

[92] Section 33 of the *Act* states that the Public Service Commission or a person with delegated authority may, when making an appointment, use an advertised or a non-advertised appointment process. Thus, the choice of opting for one process or the other is not in itself an abuse of authority. For a complaint under s. 77(1)(b) of the *Act* to succeed, the complainant must demonstrate that the choice to use a non-advertised process was an abuse of authority. The circumstances surrounding the choice can lead to an abuse of authority (see *Jarvo*, at para. 7, and *Massabki*, at para. 100).

[93] In her argument, the complainant contended that simply choosing a non-advertised appointment process was abuse of authority. The *Act* does not set out a preference for either process. The simple fact of using a non-advertised process is not in itself abusive (*Huard v. Deputy Head (Office of Infrastructure of Canada)*, 2023 FPSLREB 9 at para. 110). The complainant did not demonstrate how the respondent's decision to use such a process constituted an abuse of authority.

[94] The director explained that the purpose of choosing a non-advertised appointment process was to respond to a very difficult work context, provide stability, and respond to operational needs. Additionally, the appointment was temporary, as the respondent was waiting for a collective appointment process. The respondent adduced as evidence a document entitled "Choice of Appointment Process and Selection Decision Summary Form", which sets out the reasons that justify using a non-advertised appointment process, notably the absence of a qualified candidate from a pool at the AS-04 group and level and the large number of vacant positions. It also specifies the need to maintain the service level to clients. Therefore, I conclude that the choice of a non-advertised appointment process was made after careful consideration based on the organizational needs at that moment and that it was not an abuse of authority.

[95] The complainant reportedly wanted to apply or to have the position offered to all the team members. However, the *Act* allows managers to proceed with a non-advertised process. The case law has established that there is no guaranteed right of access to all job opportunities (see *Jarvo*, at para. 32, and *Jack v. Commissioner of the Correctional Service of Canada*, 2011 PSST 26 at para. 18). The fact that the position was not offered to the complainant was not in itself an abuse of authority.

[96] Section 30(4) of the *Act* states that in a non-advertised appointment process, management is not required to consider or assess any persons other than the appointee. This implies that management was not required to consider all the team members before appointing the appointee. There was no need to conduct a comparative assessment between the complainant and the appointee or some other team member.

[97] The complainant alleged that the acting appointment's duration exceeded that of the incumbent's absence and that it constituted an abuse of authority. This allegation has no legal basis, and the complainant did not cite any case law to support it. The director justified the decision by the fact that the appointment was acting and temporary and that based on needs, management could end it at any time. The fact that the duration of the appointee's acting appointment exceeded the incumbent's return date is in no way a defect that would constitute an abuse of authority. The evidence set out that the director had several alternatives available in the event that the incumbent returned from leave. Consequently, this allegation is also dismissed.

[98] The complainant argued that Ms. Lopes did not receive the subdelegation authorizing her to sign forms for staffing actions and that the former director should have signed. However, Ms. Lopes, the director, testified that she had the subdelegation required to proceed with the appointee's appointment. The preponderance of the evidence is that Ms. Lopes did indeed have the necessary authority. Therefore, this allegation is dismissed.

[99] In the circumstances, the complainant did not establish that on the preponderance of the evidence, the respondent committed an abuse of authority by choosing a non-advertised appointment process.

B. Abuse of authority in the appointee's assessment

[100] My role is not to reassess the appointee but instead to determine whether abuse of authority occurred in the appointment process (*Bérubé v. Deputy Minister of Industry*, 2021 FPSLRB 78 at para. 158).

[101] The complainant alleged that the respondent abused its authority by failing to assess the appointee's qualifications.

[102] The preponderance of the evidence indicates that the appointee was indeed assessed with respect to the statement of merit criteria. In light of that, Ms. Renaud's testimony proved most perplexing and paradoxical. There is no doubt that in fact she signed the appointee's assessment. She testified that she did it under duress. In cross-examination, she specified that she signed it of her own accord but that now, she was opposed to proceeding with appointing the appointee and not the complainant on a non-advertised basis. She favoured a process of alternating between the complainant and the appointee, hence her statement that she signed under duress. On the other hand, she acknowledged that all the information in the performance evaluation was true and that "[translation] the appointee was extraordinary and that if she needed a good AS-04, she would go look for her!" Ms. Lee's and Ms. Bizimana's consistent testimonies supplemented it; they also validated the appointee's assessment.

[103] The documentary evidence set out that the candidate's assessment with respect to the statement of merit criteria was completed well and that every indication is that the appointee's qualifications were assessed. The appointee's qualifications have clearly been demonstrated. In fact, no evidence was presented to demonstrate that the assessment was deficient in any way that could have supported an allegation of abuse of authority. This allegation is dismissed.

[104] Before concluding, in her testimony, Ms. Renaud affirmed that the appointee drafted the statement of merit criteria. Ms. Lopes affirmed that that statement was a generic document that a supervisor had created. At the hearing, the complainant did not make any allegations of abuse of authority with respect to the document's author or in establishing the merit criteria. Consequently, I will not consider it.

[105] In the circumstances, the complainant did not establish on a preponderance of the evidence that the respondent committed an abuse of authority in the appointee's assessment.

C. Differential treatment

[106] The complainant alleged that she was subjected to differential treatment, which she described as discriminatory. She specified that her allegation was not about discrimination within the meaning of the *CHRA* but about the differential treatment that she experienced or from which the appointee benefited in terms of the acting appointments that she received.

[107] As noted, the complainant had the burden of proof. She had to demonstrate that on a preponderance of the evidence, indeed, differential treatment took place that led to an abuse of authority.

[108] *Healey v. Chairperson of the Parole Board of Canada*, 2014 PSST 14, held that merely receiving acting appointments is not sufficient to constitute an unfair advantage in itself.

[109] The evidence set out that both the complainant and the appointee received acting appointments to the position in question. As I mentioned earlier, many people in the organization benefited from it. The complainant herself received another acting appointment shortly after the appointment in this case, which was converted into an indeterminate appointment at the FI-01 level. The appointment was a promotion for the complainant. Although no documentary evidence supported the complainant's testimony, the appointee is apparently on an AS-05 assignment. In addition, the preponderance of the evidence indicates that no personal relationship connected the appointee to the managers with respect to the appointment or even to Ms. Renaud, her former supervisor.

[110] In the circumstances, I find that the simple fact that the appointee received acting appointments is insufficient in itself to constitute differential treatment that led to an abuse of authority.

[111] Consequently, in light of all the evidence before me, I find that the complainant did not demonstrate that the respondent abused its authority.

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

(The Order appears on the next page)

VIII. Order

[113] The complaint is dismissed.

November 21, 2023.

FPSLREB Translation

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