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*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

SABRINA BERGERON-QUIRION

Complainant

and

**DEPUTY HEAD
(Department of Agriculture and Agri-Food)**

Respondent

and

OTHER PARTIES

Indexed as

Bergeron-Quirion v. Deputy Head (Department of Agriculture and Agri-Food)

In the matter of a complaint of abuse of authority under s. 77(1)(a) of the *Public Service Employment Act*

Before: Gorette Fukamusenge, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself

For the Respondent: Karl Chemsy, counsel

For the Public Service Commission: Alain Jutras, senior analyst

Heard via videoconference,
May 3, 4, and 30, 2023.

[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Request before the Board

[1] Sabrina Bergeron-Quirion (“the complainant”) challenged the advertised appointment process 19-AGR-QC-IA-ST-65 launched in September 2019 by the deputy minister of Agriculture and Agri-Food (“the respondent”). The purpose of the process was to fill a plant manager position classified at the EG-06 group and level. The complainant met all the essential qualifications but was not selected for appointment.

[2] On July 17, 2020, she made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under the provisions of s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). Under that provision, a person who was not appointed or proposed for appointment in an advertised internal appointment process may make a complaint of abuse of authority.

[3] When the complaint was made, the complainant held a research assistant position, classified at the EG-04 group and level, at the St. Hyacinthe Food Research and Development Centre, Science and Technology Branch, Department of Agriculture and Agri-Food.

[4] The complainant alleges that she was intimidated and harassed before and during the appointment process and that the respondent’s actions to address those issues resulted in stigmatizing her and limiting her chances of acquiring experience relevant to the plant manager position, which caused her hardship “[translation] connected with this case”. She also submits that the respondent denied her opportunities to be appointed on an acting basis to that position, contrary to the appointee. She added that the selection committee was biased, that abuse of authority occurred in her application’s evaluation particularly with respect to references, and that there was a lack of transparency.

[5] Finally, the complainant considers that the respondent abused its authority by removing a question from the exam.

[6] For its part, the respondent maintains that it acted within the *PSEA*’s limits. It points out that that Act gives it considerable discretion to appoint the person who, according to it, is best suited to the position. It argues that to make the appointment, it used the tools that it legitimately could use.

[7] The Public Service Commission (PSC) did not make any arguments, although it provided its response to the complainant's allegations during the process.

II. The questions at issue

[8] While the complainant challenges the entire appointment process, including the written exam stage, the respondent maintains that the only question at issue is determining whether the delegated manager abused her authority by selecting the appointee from among the qualified candidates.

[9] The appointment decision was made on the basis of several factors in the process, and in the light of the arguments presented, I believe that the following questions should be considered:

- (1) Did the respondent abuse its authority by removing a question from the test?
- (2) Did the intimidation that the complainant allegedly suffered influence the respondent in its decision to not appoint her to the position at issue?
- (3) Did the respondent grant an unfair advantage to the appointee by giving them the opportunity to hold the position in question on an acting basis and by denying the complainant such an opportunity?
- (4) Did the respondent demonstrate any bias or appearance of bias against the complainant in the appointment process?
- (5) Was there a lack of transparency that constituted an abuse of authority in the appointment process at issue?

[10] For the reasons set out later in this decision, the complaint is allowed. The circumstances of this case indicate an appearance of bias and a lack of transparency.

III. Summary of the evidence

A. The appointment process

[11] On May 8, 2018, as part of the introduction of a new management structure, the respondent announced the creation of a new management position classified at the EG-06 group and level and entitled, “[translation] plant manager”, which was to be formally staffed in 2019.

[12] At the same time, the respondent called for applications for successive acting appointments (of 4 months less a day) for a period of 12 to 16 months. The evidence demonstrated that the appointee received an acting appointment and that 2 other

candidates, who did not pass the written exam or the simulation exercise, which was a standardized PSC exam, were also appointed on an acting basis.

[13] The complainant applied and reiterated her interest several times, but she was not appointed for those acting opportunities.

[14] In September 2019, the respondent finally launched the appointment process to staff the plant manager position. Six candidates applied.

[15] At the beginning of the process, a three-member selection committee was established.

[16] The evidence demonstrates that the process was carried out in two steps. The first step included requests for applications, a written exam, and a supervisor simulation exercise. That step established a pool of four partially qualified candidates for appointment. Also, a second-language evaluation was to come.

[17] The second step was to select the person to be appointed from the candidates who qualified for the pool. This step was carried out by Julie Bernier, the then newly hired associate director.

[18] In a letter dated January 22, 2020, which followed the first step, the complainant was informed that the selection committee had found her partially qualified and that she was included in the pool of candidates that would be in effect until January 31, 2022.

[19] The letter also stated that a reference check could be considered when selecting a candidate from the partially qualified pool. To that end, she was asked to provide two references, consisting of a supervisor and a colleague.

[20] In addition, the letter informed the complainant that she would be invited to an informal discussion with the associate director. The informal discussion seemed to be an interview to get to know the partially qualified candidates and to discuss the position's expectations rather than an informal discussion within the meaning of s. 47 of the *PSEA*. The letter also stated that the merit criterion that had not yet been evaluated was “[translation] Bilingual Imperative second-language evaluation ...”.

B. The testimonies

[21] The complainant testified on her own behalf and called Mr. Villeneuve to testify. He was her supervisor during the events. He was also on her list of references in the appointment process at issue.

[22] In addition, the complainant called on the three members of the selection committee to testify, Mr. Gagnon, Mr. Di Campo, and Mr. Robert. She also called to testify the new associate director at the relevant time, Julie Bernier, and the outgoing director, Sonia Ringuette.

[23] The respondent planned to have only one witness testify, Ms. Bernier, who was the associate director who made the appointment decision. Since the complainant wished to present Ms. Bernier as her witness, the respondent established her evidence by cross-examination.

[24] At the beginning of her testimony, the complainant wanted to introduce into evidence a document that she had prepared entitled, “[translation] Chronology of Intimidation Incidents ...”. She stated that the document contained information on the intimidation events that would have directly affected the appointment process.

[25] The respondent challenged the document’s admissibility. It objected that the document was irrelevant. The objection was upheld.

[26] The complainant strongly emphasized the intimidation and harassment allegations. She stated that once the new position’s creation was announced in March 2018, the workplace became competitive and negative and that her colleagues intimidated her. She reported that it continued during the appointment process and that management was aware of the situation but did not address it.

[27] In her testimony, the complainant also stated the following:

[Translation]

- *On May 8, 2018, management announced that there were actings. They are to give people a chance. The actings are related to the staffing process, because they were given a chance; a knowledge transfer.*
- *November 2018: I was officially dismissed; management removed from me all the pilot plant tasks. It caused me prejudice because I*

could no longer gain experience. I was prevented from acquiring knowledge for the plant manager position.

- *On November 19, 2018, 21 research assistants signed a letter of intimidation about my appointment to an indeterminate position as a research assistant.*
- *Management appointed me to work in an EG-05 position on an acting basis, but due to the intimidation events, I was not allowed to complete the acting appointment. On November 21, 2018, the assignment was terminated; this caused me hardship.*
- *November 29, 2018: in an interview, Sonia Ringuette mentioned that the situation that Sabrina Bergeron-Quirion experienced could be viewed as intimidation;*
- *I was sent home while the situation settled down.*
- *December 17, 2018: When I returned to work, I was sent to microbiology. I was separated from the research centre;*
- *After the exam was corrected, one question was removed. All candidates failed the question. Removing it changed the candidates' final results and the number of successful candidates.*
- *The selection committee made some unacceptable remarks about me.*

[28] In cross-examination, the complainant stated that she did not file a grievance or make a harassment complaint. She explained that she consulted her union representative but that that person did not intervene.

[29] As for Mr. Villeneuve's testimony, he was referred to the comments in the references form. He testified that he had stated that the complainant was the only person with the calibre for the plant manager position. In cross-examination, he explained that he did not see each candidate's file and that he did not know all the candidates' knowledge and work skills.

[30] Mr. Villeneuve also revisited the intimidation allegations. For example, he cited the letter challenging the complainant's appointment in a non-advertised appointment process for a research assistant (EG-04) position that involved transferring from a term position to an indeterminate position. Apparently, 21 colleagues signed the letter, which was addressed to Human Resources.

[31] The issue of the alleged intimidation and harassment was raised again later, in Ms. Bernier's testimony. She stated that she was informed of a colleagues' letter against the complainant about a non-advertised appointment process. She stated that

that created “[translation] scratches and splashes” and that a workplace assessment took place. She stated that she was not influenced by those events when making the appointment decision.

[32] Ms. Bernier started in her position in November 2019. She replaced Ms. Ringuette, the outgoing associate director. They provided about a six-week transition period. Ms. Ringuette retired in December 2019.

[33] In her testimony, Ms. Bernier also spoke about her role in the appointment process. She stated that she had the staffing file after the written exam and the simulation exercise had been done.

[34] She added that when she took over, she sought other information for the purposes of the appointment. She explained that she had the following things: the summary results grid, the answers for the references, and the meetings with the candidates to learn of their expectations of the position and other information, without specifying that information.

[35] She stated that the following factors tipped the balance between the four qualified candidates in the pool:

[Translation]

... leadership, someone who knows how to serve clients. I wanted someone who knew the research community, and not all the candidates had that notion; as for the rest, each participant had qualities. I was looking for someone from the scientific community

[36] As to whether a candidate who was not from the scientific community was disqualified, she replied as follows: “[translation] It’s about who I am; having a lab is an asset; was it part of the appointment criteria? It’s the overall process.”

[37] She added that according to her, some skills were a critical factor for someone who had to be a supervisor. She did not specify those skills.

[38] As to why she did not wish to appoint the complainant as a plant manager on an acting basis, she explained the following:

[Translation]

A series of actings had begun; a gap had to be filled. It was somewhat difficult; the situation was sensitive. It was for operational requirements. The mandate was very short term. I had to continue operations quickly; I needed someone already running operations in this position instead of taking on a new person.

[39] The issue of acting appointments in the position that the complaint covers was raised again in Ms. Ringuette's testimony. She stated that she met with the complainant and explained that she had favoured "[translation] people from the plant". She added that the plant offers 24-hour service to the general public and that "[translation] therefore, it was necessary that the person acting was able to deal with different issues, even when alone after 17:00."

[40] Ms. Ringuette was also referred to a meeting that Mr. Gagnon initiated on December 17, 2019, to which she had been invited, for the purpose of discussing an approach to "[translation] choose the best fit". She stated that she did not recall attending the meeting. She stated that she did not participate in the appointment step, although supposedly, Ms. Bernier asked her to.

[41] In addition, she was referred to the handwritten comments that she apparently made about the complainant during the appointment process that read as follows: "[translation] Sonia: Sabrina: not ready, lacks strength; lacks analytical skills." Ms. Ringuette stated that those comments did not come from her.

[42] As for the three selection committee members' testimonies, Mr. Gagnon, the committee's chairperson, stated that he worked with Ms. Ringuette to prepare the written exam. He also stated that he combined and transcribed the selection committee members' evaluation notes and comments into the document entitled, "[translation] Candidate's Evaluation Profile". The fact that the document is not dated or signed raised many questions.

[43] However, Mr. Di Campo confirmed that Mr. Gagnon combined the evaluation notes and the comments in the document. He added that the comments on the assignment of the marks were written in a manner consistent with the consensus from the committee members' conversation and that that approach was the same for all candidates.

[44] As for the question that was removed from the test, Mr. Gagnon explained that it was necessary to remove it, to keep the process moving, because, he said, had the question been retained, no candidate would have attained a passing mark. On that point, Mr. Di Campo explained that he did not recall whether an exam question was removed. As for Mr. Robert, he stated this: “[translation] If a question was removed, I have just learned of it.”

[45] In his testimony, Mr. Robert was also referred to his handwritten comments about the complainant during the appointment process. Based on them, the complainant would be a great employee but not a supervisor. He explained that he did not know why he wrote them and that as he remembered it, the complainant held a research assistant position with duties that did not include supervision.

IV. Summary of the arguments

A. For the complainant

[46] The complainant revisited the allegations cited in her testimony. She insisted that she was intimidated and harassed. She explained that Ms. Bernier supposedly refused to address the intimidation, which influenced the decision not to appoint her to the plant manager position. She explained that she was isolated, that her appointments were revoked, and that it all would have occurred during the appointment process at issue.

[47] She maintained that she was not selected for acting opportunities in the position that was appointed to, even though they were beneficial and an integral part of the appointment process.

[48] According to the complainant, Ms. Ringuette’s alleged comments, as well as Mr. Robert’s, demonstrate that they displayed bad faith and bias toward her.

[49] She argued that the process was not transparent because, according to the notes that Mr. Villeneuve took at the selective-disclosure meeting about the standardized PSC exam, some documents were missing; which ones, she did not specify. She added that allegedly, Ms. Bernier confirmed that she had used unsigned and undated documents for the selection.

[50] Additionally, the complainant explained that the respondent removed a question from the exam, to her detriment, and she stated that the removal did not follow the rules and that the impact remains unknown.

[51] She also argued that the respondent ignored her references. She reiterated that her evaluation was done subjectively and that her application was not evaluated fairly.

[52] To support her argument, the complainant submitted the following decisions: *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10; *Ryan v. Deputy Minister of National Defence*, 2014 PSST 9; *Gomy v. Deputy Minister of Health*, 2019 FPSLRB 84; and *Denny v. Deputy Minister of National Defence*, 2009 PSST 29.

B. For the respondent

[53] The respondent argued that the complainant's presentation consisted of a series of facts thrown out one after the other in the hope that some of the facts would satisfy the concept of abuse of authority. Most of the facts were not connected, and they have no bearing on the issue in dispute. It is not enough to provide a series of unproven facts.

[54] The evidence showed that two steps took place. The selection committee put together the first step, which comprised the PSC's written exam and simulation exercise. That first step in the process had nothing to do with the second step, selecting and appointing someone. Different people completed the two steps. Ms. Bernier took over; she had newly arrived in November 2019. She replaced Ms. Ringuette, and the evidence set out that Ms. Ringuette decided not to become involved in the appointment step.

[55] The respondent emphasized that the question at issue is whether Ms. Bernier abused her authority when she selected the appointee. It insisted that the delegated manager, Ms. Bernier, made the appointment alone. It was not Ms. Ringuette, Mr. Gagnon, Mr. Di Campo, or Mr. Robert. They did not influence Ms. Bernier.

[56] According to the respondent, Ms. Bernier used the tools that she legitimately had to use to form an idea of who she thought was the right person. She took the three selection committee members' combined comments and the summary results grid, conducted reference checks, and had informal discussions with the candidates. She

stated that she prioritized skills and that she wanted someone from the scientific community. It was legitimate for Ms. Bernier to proceed that way.

[57] The complainant did not demonstrate that the fact that she was not appointed on an acting basis impacted the appointment. One other person who had held a position on an acting basis was not appointed.

[58] The respondent referred to a dozen decisions, including *Lavigne v. Canada (Justice)*, 2009 FC 684; *Ben Achour v. the Commissioner of the Correctional Service of Canada*, 2012 PSST 24; *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11; *Soccar v. the Commissioner of the Royal Canadian Mounted Police*, 2013 PSST 14; *Stamp v. Commissioner of the Correctional Service of Canada*, 2014 PSST 4; *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8; and *Portree v. Deputy Head of Service Canada*, 2006 PSST 14.

C. For the Public Service Commission

[59] In its response to the complainant's allegations, the PSC confirmed the following information:

- (1) The PSC approved using the Supervisor Simulation Exercise.
- (2) Evaluation specialists from the PSC's Personnel Psychology Centre trained the members of the respondent's evaluation committee on administering and marking the simulation exercise.
- (3) The members of the respondent's evaluation committee administered the simulation exercise, and the PSC did not participate in the evaluation.
- (4) Members of the PSC's Personnel Psychology Centre participated in the simulation exercise's selective-disclosure meeting with the complainant and the respondent's representatives on February 14, 2022.

V. Analysis

A. Summary of the basic principles

[60] Under s. 77(1)(a) of the *PSEA*, a person who has not been appointed or proposed for appointment in an advertised appointment process may make a complaint with the Board on the grounds of abuse of authority. For the purposes of applying the *PSEA*, s. 2(4) states that "abuse of authority" includes bad faith and personal favouritism. At paragraph 38 of *Canada (Attorney General) v. Lahlali*, 2012 CF 601, the Federal Court

considered a judicial review application against a decision in an abuse-of-authority complaint. It confirmed that the description of abuse of authority in s. 2(4) is not exhaustive and that it may include other forms of inappropriate conduct, more than mere errors or omissions.

[61] At paragraph 20 of *Muka v. The President of the Canada Border Services Agency*, 2021 FPSLREB 53, referring to *Tibbs*, the Board noted that "... an abuse of authority may involve an act, omission, or error that Parliament could not have envisaged as part of the discretion given to those with delegated staffing authority." However, abuse of authority must be so serious that it could not have been part of that discretion (see *Huard v. Deputy Head (Office of Infrastructure of Canada)*, 2023 FPSLREB 9 at para. 79).

[62] Note that s. 77(1)(a) of the *PSEA* refers to s. 30(2). Section 30(2) gives broad discretion to the deputy head to appoint the person who, according to it, not only possesses the essential qualifications but also is the right person who is best suited to the position to be filled (see *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at paras. 34, 42, and 44; and *Stamp*, at para. 30). A similar authority is also provided in s. 36 of the *PSEA* with respect to the choice of evaluation methods. It should be mentioned that those authorities are not absolute.

[63] It was also established that the burden of proof rests with the complainant (see *Tibbs*, at paras. 48 to 50).

B. Applying the basic principles to facts

1. Did the respondent abuse its authority by removing a question from the exam?

[64] The complainant contends that the respondent removed a question from the exam and opposed communicating the complete correction of her written exam, including the removed question. According to her, by removing a question from the exam, the respondent changed the candidates' final results and thus changed the number of successful candidates. At the hearing, she stated that she was unaware of the impact of the removal.

[65] The respondent submits that this abuse-of-authority complaint involves only the appointment process step, which Ms. Bernier made alone. She took over after the written exam had already been completed. Her task was to make a decision to appoint

one of the people in the pool. According to the respondent, essentially, this decision is the subject of the complaint. The written exam is not relevant to the complaint, as the Board already decided that question in its November 5, 2020, order.

[66] I consider that the whole process is at issue. The evidence revealed that the written exam was one of the items used when making the appointment decision, which creates a link to the complaint. The November 5, 2020, order was issued before the hearing, based on the information available at that time.

[67] The subject of the written exam was indeed the topic of another debate in an application for an order for the production of information. The complainant asked for, among other things, “[translation] [h]er written test and the complete correction (including the exact information and clarifications as to whether one or more questions were removed from the test, which question or questions, and her mark on that questions or those questions).” In its response to that request, the respondent stated that the written exam was irrelevant to the complaint and that its results were not considered in the selection decision. In the November 5, 2020, order, the Board found that the complainant did not demonstrate a direct link or the relevance of that information to her complaint.

[68] However, the respondent’s explanation of the use of the written exam in the appointment decision was inconsistent throughout the Board’s proceedings. Although the respondent stated that the written exam was not considered in the appointment decision in the response to the disclosure request and in its response to the allegations, Ms. Bernier’s testimony at the hearing contradicted that explanation. She stated that one of the tools that she considered was the summary results grid, which contained the results of the written exam and the simulation exercise; those are the only results recorded in it. That lack of consistency in the respondent’s explanation of the use of the written exam in the appointment decision constitutes negligence that adversely affected the Board’s proceedings.

[69] That being so, the question in this case is whether the respondent abused its authority by removing a question from the exam, which, on its own, does not indicate an abuse of authority. The respondent had the discretion to determine the written exam questions, and I did not receive evidence that removing a question tainted the appointment process. However, the refusal to disclose to the complainant the

correction of her exam on the grounds that it was not relevant to the complaint although it was considered in the decision-making process constitutes a lack of transparency that could otherwise have led to abuse of authority.

2. Did the intimidation that the complainant allegedly suffered influence the delegated manager's decision not to appoint her to the position in question?

[70] There is no evidence to conclude that the complainant was a victim of bias based on the intimidation or harassment that she reportedly experienced.

[71] To illustrate the consequences of the alleged intimidation and harassment, the complainant cited actions that the respondent took with respect to her, including removing pilot plant duties, the decision to remove her from the workplace for some time after the letter from the 21 colleagues, the decision to isolate her from the research centre, the revocation of her appointment to an acting position, and the respondent's alleged inaction with respect to colleagues' microaggressions.

[72] According to the respondent, it was insufficient for the complainant to provide a series of facts of harassment and intimidation, without any evidence. Even if there was the slightest tinge of intimidation, there is no connection with Ms. Bernier.

[73] My role in this case is not to consider whether the complainant was a victim of intimidation or harassment, but I can examine whether the context deprived her of a fair chance in the appointment process.

[74] The complainant submits that the respondent's actions to address the labour relations issues, including the intimidation and harassment that she allegedly experienced, prevented her from gaining experience and knowledge for the position at issue and that it would have affected the appointment process. She had the burden of demonstrating a link between the intimidation and harassment that she allegedly suffered and the decision to not appoint her to the position at issue in the complaint. She adduced no direct or circumstantial evidence to demonstrate that on a balance of probabilities, Ms. Bernier screened out her application because of the intimidation and harassment that she alleged.

3. Did the respondent grant an unfair advantage to the appointee by giving them the opportunity to hold the position in question on an acting basis and by denying the complainant such an opportunity?

[75] The complainant did not establish a link between the acting appointment processes and the appointment process at issue in the complaint.

[76] The complainant submits that the respondent denied her opportunities to hold on an acting basis the position to be appointed to. She maintains that acting appointments were part of the appointment process at issue as the purpose was to enable a transfer of knowledge related to that position.

[77] The respondent maintains that the complainant did not demonstrate that the fact that she did not receive an acting appointment affected the appointment to the position at issue. One other person who received an acting appointment was not appointed.

[78] Note first that not only am I not seized with a complaint about past acting appointments but also that I do not have jurisdiction over those acting appointments. However, I can review the acting appointments to determine whether there was a link between those processes and the one that led to the appointment at issue in the complaint.

[79] The first acting appointment was made in May 2018 with the creation of the position, and several people were appointed until the notification of the successful candidate was published in July 2020. During that period, the complainant was denied any opportunity to hold the position on an acting basis, even after she qualified in the pool of candidates selected for the position at issue.

[80] I agree that acting appointments enable individuals to gain new experience in positions in which they are appointed and that they can impact the careers of those concerned. Acting appointments may also enable a manager to learn more about people who may be called upon to be appointed indeterminately. Certainly, delegated managers have the discretion to make such appointments, and that discretion must be exercised objectively, transparently, fairly, and equitably. Often, a person appointed on an acting basis ends up being the person appointed after an appointment process. That happened in this case.

[81] In *Ben Achour*, the former Public Service Staffing Tribunal (“the Tribunal”) considered a similar issue and at paragraphs 54 to 56 concluded that having held an acting position did not guarantee success in an appointment process. I agree with that reasoning. The complainant did not demonstrate that the fact that the appointee had held the position on an acting basis would have given the appointee an unfair advantage in this appointment process.

4. Did the respondent demonstrate bias or the appearance of bias in the appointment process?

[82] A person who is well informed of the circumstances of this case may believe that there is a reasonable apprehension of bias with respect to the respondent’s conduct.

[83] According to the complainant, the selection committee made unacceptable comments about her. The comments that she is apparently “[translation] not ready, [that she] lacks strength, [and that she] lacks analytical skills”, which Ms. Ringuette reportedly made, as well as those of Mr. Robert that she was a “[translation] great employee, [but] not ... a supervisor” demonstrate that Ms. Ringuette and Mr. Robert were biased against her. She referred to *Gignac*, to draw a parallel.

[84] The respondent submits that none of Ms. Ringuette, Mr. Gagnon, Mr. Robert, or Mr. Di Campo made the appointment decision. Different people evaluated the two steps of the process, and only Ms. Bernier decided who she thought was the right person for the plant manager position.

[85] The question that I must determine is whether the respondent was biased in the process at issue.

[86] The test for a reasonable apprehension of bias was set out in the Supreme Court of Canada’s decision in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at page 394, and was reiterated in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623. The Tribunal and the Board have endorsed that test, which for example is set out as follows at para. 74 of *Gignac*:

[74] ... Where bias is alleged, the following test can be used to analyse this allegation, while taking into account the circumstances surrounding it: If a relatively informed bystander

can reasonably perceive bias on the part of one or more persons responsible for assessment, the Tribunal can conclude that abuse of authority exists.

[87] I find that an observer with reasonable knowledge of the circumstances of this case might perceive a reasonable apprehension of bias in Mr. Robert's comments, who was among those in charge of the evaluation, as well as comments that unidentifiable people made that appear in the appointment-process documents.

[88] Mr. Robert made comments about the complainant (great employee, not a supervisor). One is not born a supervisor; one becomes one. In his testimony, he explained that as he remembered it, the complainant held a research assistant position with duties that did not include supervision. However, holding a supervisory position was not part of the merit criteria, and there was no indication that the other candidates held supervisory positions. If that was important for the purposes of appointment to the position at issue, the respondent would have indicated as much in the merit criteria and thus would have limited the process to only those holding supervisory positions. Those comments support the complainant's argument that her application was assessed subjectively and not on its merits.

[89] As a selection committee member, Mr. Robert played an important role in the appointment process. Not only was he among those who corrected the written exam and the simulation exercise but also, according to Ms. Bernier's testimony, she consulted him and Mr. Di Campo to "[translation] gather further information". Mr. Robert's comments raise a reasonable apprehension of an unfair, biased evaluation.

[90] In that way, those comments should be considered in the particular context of this case. The complainant's testimony, supported by that of Mr. Villeneuve, revealed that she experienced workplace events and that certain events led to a series of the respondent's actions with respect to her, including removing pilot plant duties, the decision to remove her from the workplace for some time, the decision to isolate her from the research centre, and the revocation of her appointment to an acting position. In such a context, comments that the complainant "[translation] is not a supervisor" could be perceived as biases.

[91] The complainant referred me to *Ryan*. In that case, a person who was a member of the selection committee in charge of the written exam and interview and was also one of the people consulted to select the appointee had told the complainant this: “the only way I would give you this job is if I am ordered to.”

[92] Mr. Robert’s comments were not as direct as those made in *Ryan*. However, bias is not always obvious; it can also be very subtle and appear only in the eyes of someone with an open mind. In addition, as noted in *Bain v. Deputy Minister of Natural Resources Canada*, 2011 PSST 28 at para. 134, it is difficult to find direct evidence of bias.

[93] On the other hand, the other comments (“[translation] not ready, lacks strength, lacks analytical skills”) were not in any way related to essential qualifications; for example, a qualification such as analytical skills, which would be aimed at evaluating someone’s ability to analyze, was not one of the merit criteria. In addition, the fact that they are not dated and that the author cannot be identified demonstrates a lack of transparency.

[94] The respondent submits that no one, other than Ms. Bernier, was involved in deciding whom to appoint. However, Ms. Bernier stated that because she had been newly appointed and did not know the candidates, she consulted Mr. Di Campo and Mr. Robert for information as selection committee members, and that they provided her with their comments on the candidates. Ms. Bernier’s decision was not made in a vacuum outside the overall context of the appointment process.

[95] Furthermore, it was not necessary for the complainant to establish the existence of bias but simply that there was a reasonable apprehension of bias. As noted in *Amirault v. Deputy Minister of National Defence*, 2012 PSST 6 at para. 57, “... it is usually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind ...”.

5. Was there a lack of transparency that constitutes an abuse of authority in the appointment process at issue?

[96] I find that there are factors that when taken together set out a lack of transparency that was not simply an error in the appointment process at issue. Apart from the anonymous comments mentioned earlier and the contradictions about the use of the written exam in the selection is also the failure to record the evaluations in

writing at the second step of the appointment process, as well as the addition of new criteria along the way. I will deal with the last two factors in the following passages.

a. The failure to record the evaluations in writing at the second step of the appointment process

[97] When the summary results grid that was adduced into evidence is examined, it can be seen that it contains several evaluation methods, including the request for applications, the written exam, and the simulation exercise as well as the essential qualifications that those methods were to evaluate. For the latter two, there are pass marks, cut marks, and candidate marks.

[98] However, with respect to references, there is no pass mark or result. The same is true of the informal discussion that served as an interview. It is not even mentioned. There are also no indicators of the second-language evaluation (bilingual imperative), which was the so-called merit criterion. However, the part of the process that the respondent felt was decisive was the one including the reference checks, the informal discussion, and the collection of other information, the content of which is unknown. For example, the reference-check questionnaire includes the following question: “[translation] Based on your experience and knowledge ... how would you describe the candidate in terms of: Independence ... Reliability ... Professionalism ...”.

[99] Those criteria are reflected in the document containing the rationale for the appointment decision, entitled “[translation] Articulation of Selection Decision” and signed by Ms. Bernier, which states, “[translation] [the appointee] is an independent, reliable, and professional person, which are qualities that I am looking for in a key position and in an ever-evolving team.”

[100] Regardless of the evaluation method used and the outcome, it is good practice to determine the pass mark and to document the results and reasons for an appointment decision. Without pass marks or results, the evaluation is not transparent.

[101] Initially, the respondent established an evaluation grid that identified the essential qualifications, the methods that would be used to evaluate them, and how the results would be recorded. Its failure to continue that approach for the rest of the process was contrary to the principles set out in the *PSEA*'s preamble, which sets out values of transparency, fairness, and respect that have been discussed and affirmed in

Tribunal and Board decisions. For example, in *Haller v. Deputy Head (Department of National Defence)*, 2022 FPSLREB 100 at para. 87, the Board stated that transparency is the key staffing value. It "... requires that assessments and decisions be properly documented contemporaneously with the appointment process ...". That was not so in this case.

[102] Transparency is essential to prevent abuse of authority. It also ensures confidence in an appointment process. Because of the lack of transparency, the appointment decision was tainted by abuse of authority.

b. The addition of essential qualifications along the way

[103] Note that the respondent added criteria during the process, which it shared with the candidates when it posted the position. However, this practice is questionable because some candidates might or might not have applied based on the new essential qualifications. In addition, not being informed of the essential qualifications from the start may put respondents of references in the difficult situation of not knowing which essential qualifications will be evaluated, to be able to provide relevant examples.

[104] For example, the rationale for the appointment decision states that the reference checks and the informal discussion suggested that the appointee "[translation] ... could tackle multiple files head-on due to a great ability to organize a team, staff, and records to achieve the objectives or mandates given to them." However, this qualification is not included in the reference-check questionnaire, and if it was evaluated during the informal discussion, it is also unclear how it was evaluated. But that qualification was one of the factors that tipped the balance to the appointee.

[105] Clearly, the *PSEA* gives managers broad discretion. However, there is no absolute discretion (*Lavigne*, at paras. 58 and 59). It would be inconceivable to think that Parliament considered unlimited discretion that could be exercised capriciously and without considering the essential values of fairness, transparency, and respect in employment practices.

[106] Taken as a whole, I find that the lack of transparency and the addition of certain key criteria, combined with the appearance of bias in the particular circumstances of this case, indicate an abuse of the discretionary power that Parliament vested in the

respondent. I find that abuse of authority occurred in the appointment process at issue.

VI. The corrective measures

[107] The Board cannot order the respondent to make an appointment or to undertake a new appointment process as provided in s. 82 of the *PSEA*. However, the Board may consider corrective measures. Under s. 81(1) of the *PSEA*, if the Board considers the complaint founded, it may order the respondent to revoke the appointment and to take any corrective measures that it considers appropriate.

[108] In her complaint, the complainant requested that appropriate corrective measures be applied, without any other clarification. In her allegations, she added the revocation of the appointee's appointment. At the hearing, this request was withdrawn.

[109] In the particular circumstances of this case, I find that the appropriate remedy is a declaration that the respondent abused his authority.

[110] As noted, the written exam was relevant to the complaint, but it was not the only thing considered in the appointment decision. The November 5, 2020, order was made based on the information available on the record at that time. I believe that a declaration that the respondent lacked transparency during the Board's proceedings is also an appropriate measure.

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

(The Order appears on the next page)

VII. Order

[112] The complaint is allowed.

[113] I declare that abuse of authority occurred in the appointment process at issue.

[114] I declare that the respondent demonstrated a lack of transparency during the Board's proceedings.

February 14, 2024.

FPSLREB Translation

**Goretti Fukamusenge,
a panel of the Federal Public Sector
Labour Relations and Employment Board**