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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

ANNABELLE FARQUHARSON

Complainant

and

**DEPUTY HEAD
(Department of Justice)**

Respondent

and

OTHER PARTIES

Indexed as

Farquharson v. Deputy Head (Department of Justice)

In the matter of a complaint of abuse of authority under sections 77(1)(a) and (b) of the
Public Service Employment Act

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Jena Russell, Union of Safety and Justice Employees

For the Respondent: David Labelle, counsel

For the Public Service Commission: Maude Bissonnette Trudeau

Heard via videoconference,
September 28 and 29, 2023.

REASONS FOR DECISION

I. Summary

[1] Annabelle Farquharson (“the complainant”) was placed in the pool of qualified candidates but did not receive the AS-02 appointment that she sought (process numbered 2019-JUS-IA-122755; notice of appointment dated June 30, 2020). She made a complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and 77(1)(b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the Act”). However, her allegations and evidence focused exclusively on s. 77(1)(a). That is, she alleges that an abuse of authority occurred in the application of merit and requests that the appointment be ordered rescinded.

[2] It was alleged that the appointee’s immediate supervisor demonstrated bias against the complainant and personal favouritism toward the appointee. However, the supporting evidence was inconclusive. Racial discrimination had been alleged in the process pleadings, but at the start of the hearing, the complainant’s representative expressly stated that that allegation was not being pursued.

[3] Also alleged were that improprieties occurred in the assessment process and that the appointee’s supervisor provided a positive reference for the appointee. That supervisor was also involved in the assessment process.

[4] The Public Service Commission was a party to this proceeding by means of statute. It provided written submissions on its *Appointment Policy* but took no position on the merits of the complaint.

[5] The complaint is dismissed for the reasons that follow.

II. Summary of the relevant evidence

[6] The strongest element of the complainant’s case arose from her allegation of bias against herself and in favour of the appointee from the office supervisor, Laura Cosentino. The complainant testified to being slighted by things like trying to approach Ms. Cosentino at her office door and being ignored or being told to book a meeting. The complainant also testified to observing the appointee regularly coming and going from Ms. Cosentino’s office and hearing them laughing and discussing personal matters. The complainant shared other examples of what she felt were

hostilities from Ms. Cosentino, like being given a cold look in the file room when offering to hold the door for her.

[7] The complainant testified that each member of her team received an award for excellent performance on a project while she was away on leave and that she never received any recognition upon her return, despite that she had been an integral part of the team effort.

[8] The complainant also described an earlier instance in which Ms. Cosentino's superior, Carla Lyon, spoke to her in a cold and unfriendly manner on an office elevator. The complainant testified that she felt that these and other similar interactions were evidence of hostility and bias against her from her supervisor and senior management.

[9] More importantly, the complainant testified that the appointee would bring gifts for management and would regularly have lunch alone with the supervisor, Ms. Cosentino. The complainant testified that she was never invited to coffee or lunch with the supervisor and that it was some kind of special arrangement afforded only to the appointee. She added that their special relationship had been growing since 2018.

[10] In her examination-in-chief, Ms. Cosentino testified that she never socialized in a one-on-one manner with staff, including having lunch with any of her subordinates unless they all were invited. She mentioned a special lunch event, such as a holiday-themed celebration, as an example of such a rare occasion. She also said that sometimes, several staff members would bring back small gifts or trinkets from a vacation and share one with her, but that that was not something unique between her and the appointee. She also recalled at least one occasion when the appointee made some crafts at home and gave them as little gifts to everyone on the team.

[11] Quite unfortunately, the complainant's assertion that Ms. Cosentino had regular private lunches with the appointee was not put to Ms. Cosentino in cross-examination.

[12] The complainant also testified that 14 months before this appointment process, she received two merit awards for her excellent work and received two gift cards as part of this recognition. The gift cards were to be used in the retail concourse of the office building she worked in. However, she sought and received special approval from her supervisor's superior, Ms. Lyon, to use the gift cards at a different retailer, to

purchase an item of higher value than the gift cards, and she paid the cost difference out of her own pocket.

[13] She explained that she could not seek this approval from her immediate supervisor, Ms. Cosentino, because she was away from work at that time. The complainant testified that upon her return to work, Ms. Cosentino let it be known that she was unhappy with what had happened with respect to the gift cards. She felt that Ms. Cosentino was displeased because she had gone over Ms. Cosentino's head and had dealt directly with Ms. Lyon. She said that it left animosity toward her in Ms. Cosentino's mind.

[14] In her examination-in-chief, Ms. Cosentino discussed this gift-card incident and explained that it created a "sticky situation" since the finance rules would have required disclosing that the complainant's purchase exceeded the gift-card total, and it would have appeared as improper spending. She admitted that it had made her nervous. She denied having any personal animosity toward the complainant, generally or specifically, from this incident. And she added that she had a good professional work relationship with the complainant and all her other direct reports. Ms. Cosentino said that she found the complainant to be a very good and conscientious worker and that she had no problems with her.

[15] The complainant also testified that the appointee would receive favourable treatment from Ms. Cosentino in the form of having her workload reduced, thus causing more work to be given to the complainant and the other staff members. The complainant then said that when she sought help with her workload, to deal with childcare needs that had arisen suddenly, she was rebuffed and faced several questions from Ms. Cosentino about her child that she felt were quite unfair and that implied that her supervisor lacked trust in her.

[16] In her examination-in-chief on this point, Ms. Cosentino testified that she always tried to ensure an even workload between the staff members in her office. She said that she met with every staff member individually once per week to discuss workload and that she would always try to respond favourably if someone expressed a workload problem, although it was rare. She also stated that she recalled one time when she did take work from the appointee and reassign it to another staff member but that it was not unique to the appointee as others had received the same assistance from her.

[17] In her testimony, when she spoke of the assessment process, the complainant stated that in her meeting after the fact, she was told that she was placed in the pool of qualified candidates but that she did not receive the appointment. She testified that she had many more years of experience in the department than had the successful appointee. She said that she was told that there was no marking or ranking but that the right fit was given to the appointee.

[18] She also testified that Ms. Cosentino, her direct supervisor and that of the appointee, was on the assessment committee. In her examination-in-chief, the complainant opined that the marking sheets included comments and marks written by Ms. Cosentino. However, in cross-examination, the complainant admitted that she could not identify the handwriting on the assessment notes with any certainty.

[19] In her examination-in-chief on her involvement in the assessment process, Ms. Cosentino stated that she had been asked and that she had provided one written question dealing with travel and hospitality expenses and the National Joint Council's directive on such expenses. She added that she had no input into the rating guide that was used to assess the candidates.

[20] Ms. Cosentino also testified that she did participate in the assessment committee marking the written tests but added that its members did not mark their own direct reports. She said that all the members discussed their marking, to seek consistency in how the rating guide was being applied to each candidate's written replies. She added that she did not lower any scores on any of the candidates' papers. She also added that she did not attend the oral interviews and that she did not participate in any way in marking the interview answers.

[21] In cross-examination of her role in assessing the candidates, Ms. Cosentino added that she did add her own evaluation to all candidates, including those from her staff, but only on the assessment committee's second or third review. And she repeated her earlier statement that she did not do a first assessment.

[22] When presented with the "Screening and Board Report", Ms. Cosentino testified that it showed that the complainant and the appointee received almost the same marks on the essential-qualification questions. However, the complainant received one "Good" mark, while the appointee received a "Very Good" mark for the same questions. In cross-examination, she also stated that it was her decision to offer the appointment

to the eventual appointee because the appointee had received a better mark on those questions.

[23] In her examination-in-chief, Ms. Lyon testified that she knew of the complainant through their work in the office and stated that they had a normal, professional, and cordial relationship. When asked about the possible elevator incident that the complainant mentioned, she replied that she had no memory of any such incident. She added that her relationship with the appointee was also normal, cordial, and professional, that it was a small office organization, and that she knew that all staff members said hello or offered greetings in occasional meetings.

[24] In cross-examination, Ms. Lyon recalled a situation in which the complainant did not want to sit near some other staff members. Ms. Lyon said that the complainant was upset about something and that for that reason, they allowed her to stay in her preferred seating arrangement.

[25] In her questioning on the matter of providing a reference for the appointee, Ms. Cosentino testified that a member of the assessment committee had asked her to answer some questions and to provide a reference for the appointee. She explained that this is a common occurrence; an assessment committee will call her and ask for information on a reference check for one of her staff members who applied for an appointment. She stated that she is always pleased to see her staff members succeed in advancing their careers.

[26] She added that she would have been pleased to provide a reference for any of the candidates but that she was only asked to provide one for the appointee. She also testified that she had no input into the criteria to be used to assess the references; nor did she mark the interview replies. She also testified that she had no role in the assessment committee's assessments of the references.

[27] On reviewing the "Screening and Board Report" on the candidate assessments, Ms. Cosentino testified that she wished that both the appointee and the complainant could have been appointed. But the appointee had received slightly better marks.

III. Analysis of issues

[28] According to s. 77(1)(a) of the *Act*, in an internal appointment process, a person in the area of recourse may make a complaint to the Board that he or she was not

appointed or proposed for appointment because of an abuse of authority in the application of merit. The complainant has the burden of proving that on a balance of probabilities, the respondent abused its authority (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at paras. 49 and 55).

[29] Section 30(1) of the *Act* states that appointments to or from within the public service must be made on the basis of merit, and s. 30(2)(a) states that an appointment is made on the basis of merit when the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head.

[30] “Abuse of authority” is not defined in the *Act*; however, s. 2(4) offers the following guidance: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.” The former Public Service Staffing Tribunal (“the Tribunal”) considered that phrase, and in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at paras. 39 and 40, it determined the following, with which I concur:

*39 Moreover, the words “for greater certainty” found at the beginning of subsection 2(4) are placed there for a purpose. Parliament referred specifically to bad faith and personal favouritism to make certain that there would be no argument that these improper conducts constitute abuse of authority. It is noteworthy that the word **personal** precedes the word **favouritism**, emphasizing Parliament’s intention that both words be read together, and that it is **personal favouritism**, not other types of favouritism, that constitutes abuse of authority.*

40 Bad faith and personal favouritism are some of the most serious forms of abuse of authority which the public service as a whole should diligently strive to prevent. When it does occur, all necessary action should be taken to correct the abuse. Clearly, the purpose of subsection 2(4) is to ensure that there is no argument that these improper conducts constitute abuse of authority. See, e.g., Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4^{thed.} [sic] (Markham: Butterworths, 2002), at 180-182...

[Emphasis in the original]

A. Bias and favouritism

[31] In support of her allegation of bias against her and in favour of the appointee, the complainant relied upon *Denny v. Deputy Minister of National Defence*, 2009 PSST 29, which cites an oft-cited Supreme Court of Canada decision, as follows:

...

125 *In Committee for Justice and Liberty v. Canada (National Energy Board), [1978] 1 S.C.R. 369, at 394, the reasonable apprehension of bias test is set out as follows:*

[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...[T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

...

[32] She pointed to her testimony as noted of having felt slighted by both Ms. Cosentino and Ms. Lyon. She noted how her whole team received an award while she was away on leave but that she never received her merit award despite being an integral part of that team. She submitted that all this, together, proves that those two managers had a bias against her.

[33] The complainant relied upon *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10, which found the following:

...

70 *Indeed, the policies state that persons responsible for assessment must act fairly. The Guide to Implementing the Assessment Policy explains the importance of the process being fair and being perceived as such. It states that assessment board members must minimize any appearance of bias:*

Since the integrity of an assessment process could be the subject of review, it is important not only that it be fair but that it also be seen to be fair. For example, assessment board members should make reasonable efforts to minimize any appearance of bias in the process and the assessment board members should not let personal favouritism influence the outcome of the appointment process.

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

...

[34] The complainant referenced her testimony that suggested that Ms. Cosentino regularly had private workday lunches with the successful appointee. They also had frequent personal visits in the office, and the appointee often gave gifts to the supervisors. She argued that this was clear and obvious evidence of personal favouritism and that it fell within what was decided in *Gignac* as it meant that the selection process could not be seen as fair.

[35] The deputy head of the Department of Justice (“the respondent”) replied on this topic and said that the evidence on these matters falls far short of being clear and compelling to the level that a finding could be made that would support the allegations. Counsel also pointed out that the issue of workday lunches was not mentioned at all in Ms. Cosentino’s cross-examination and that I should not make an evidentiary finding about it, especially given the lack of cross-examination, when the witnesses gave directly contradictory evidence on the lunch issue.

[36] In light of the directly contradictory testimonies of the complainant and Ms. Cosentino on the issue of the appointee having private lunches with Ms. Cosentino, and especially because this topic was not raised in the complainant’s cross-examination of Ms. Cosentino, I cannot make an evidentiary finding that the lunches actually occurred. More evidence might have been available to support such a finding, but without the benefit of vigorous, or any, questions on the topic being put to Ms. Cosentino, I am unable to conclude that she and the appointee actually had workday lunches together.

[37] When I assess the complainant’s testimony in which she mentioned being slighted or treated badly in the office and not receiving her award, I am unable to find that any of them or all of them together are sufficient for me to find on a balance of probabilities that an informed person, viewing the matter realistically and practically — and having thought the matter through — would reasonably apprehend bias on the part of Ms. Cosentino or Ms. Lyon, whether consciously or unconsciously.

[38] While the complainant clearly honestly believes that management has a bias against her, the evidence before me at the hearing was simply not clear and convincing such that I could conclude that there was an apprehension of bias in a manner consistent with the Tribunal’s decision in *Gignac*.

B. Assessment and reference

[39] The complainant submitted that Ms. Cosentino showed personal favouritism toward the appointee, which led to an unfair assessment of the candidates. She pointed to the fact that Ms. Cosentino provided a positive reference for the appointee and that it was admitted that her handwriting was on the assessment rating guide. And further that Ms. Cosentino admitted to making the decision to offer the appointment to the appointee. The complainant also submitted that the marks were predetermined, to favour the appointee.

[40] Given all the examples that she testified to and the fact that Ms. Cosentino admitted to being involved in marking and assessing candidates, the complainant argued that this clearly falls within the appearance of bias noted in *Gignac*.

[41] The respondent argued that the evidence tendered by the complainant was far short of being clear and compelling with respect to demonstrating bias and personal favouritism. It noted the fact that the “Information for Candidates” on the “Assessment and References” form asks each candidate to provide the name of their current supervisor and states that she or he will be contacted to validate the information provided in the form. Given this evidence, the respondent submitted that it is common and indeed good practice for a candidate to have their reference information checked with the current supervisor and that nothing untoward occurred in this process by having Ms. Cosentino provide that information about the appointee, despite that she was involved in the assessment process of the written test.

[42] Counsel noted that contrary to the facts in *Gignac*, the manager at issue in this case was not involved in the entire assessment process.

[43] Counsel also noted the decision in *Myskiw v. Commissioner of the Correctional Service of Canada*, 2019 FPSLREB 107, and said that unlike the facts in that case, in this one, there is no clear and compelling evidence to support a finding of personal favouritism. *Myskiw* considered a supervisor who met on a near daily basis for coffee or lunch with and also spent a summer vacation with a subordinate who was later given a promotional appointment.

[44] Counsel also relied upon *Sproule v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 34, which stated as follows:

...

*43 ... The evidence shows that candidates had to provide a reference from their current supervisor, which consequently put Ms. Lalonde in a dual role of referee and chair of the assessment board. In this particular case, Ms. Lalonde did not participate in interviewing Ms. Iazzetta or assess the reference check responses for the appointee. The fact alone that Ms. Lalonde was the appointee's supervisor, as well as the chair of the assessment board cannot lead to the immediate conclusion of personal favouritism. Tribunal decisions have held that board members can use their personal knowledge of a candidate in the assessment process (see for example *Visca v. Deputy Minister of Justice 2007 PSST 0024 at para. 53*)...*

...

49 The complainant also alleges that not all the answers provided by the appointee satisfied the qualification of Engagement. The Tribunal notes that the evidence provided by the respondent indicates that a final score was determined by the entire board, after the interview and the reference checks were conducted. On the whole of the evidence, the Tribunal is satisfied that the assessment board had sufficient evidence based on the interview and the reference checks to determine whether the appointee met the qualification.

...

[45] Counsel for the respondent submitted that similarly, the facts in this case demonstrate that the supervisor, Ms. Cosentino, was not involved in interviewing the candidates, that an assessment committee member asked her to provide a reference, and that the full committee carried out the final assessments and marking of all candidates and that it was not in any way determined by Ms. Cosentino.

[46] I agree with the respondent's submissions that there is insufficient evidence to support a finding of personal favouritism. On its own, the fact that Ms. Cosentino provided a positive reference for the appointee is not sufficient to conclude personal favouritism.

[47] For all of the above reasons, I find that the complainant did not establish that an abuse of authority occurred in the application of merit and the Board makes the following order:

(The Order appears on the next page)

IV. Order

[48] The complaint is dismissed.

February 9, 2024.

**Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board**