Date: 20240514

File: 771-02-42901

Citation: 2024 FPSLREB 66

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

CHRISTINE MARTIN

Complainant

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

and

OTHER PARTIES

Indexed as
Martin v. Deputy Head (Correctional Service of Canada)

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: David Perron, counsel

For the Public Service Commission: Maude Bissonnette Trudeau, senior analyst

Heard by videoconference,

December 7 and 8, 2023.
[FPSLREB Translation]

REASONS FOR DECISION **FPSLREB TRANSLATION**

I. Introduction

[1] The Correctional Service of Canada ("the respondent" or CSC) conducted a non-advertised internal appointment process to fill a senior position for a consultant in conflict management and values and ethics ("the senior consultant position") at the AS-06 group and level at its Atlantic Regional Headquarters in Moncton, New Brunswick, in the Office of Conflict Management (OCM). The process number was 2021-PEN-INA-ATL-166978. On April 22, 2021, a notification of appointment or proposal of appointment was posted that specified, "[translation] Change in tenure from term to indeterminate" for Manon Porelle ("the appointee").

[2] On April 23, 2021, Christine Martin ("the complainant") made a complaint to the Federal Public Sector Labour Relations and Employment Board ("the Board"). The complaint is based on ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *Act*"). The complainant alleges abuse of authority in the application of merit and in the choice of a non-advertised process. During the hearing, she added a personal favouritism allegation on the respondent's part, in favour of the appointee.

[3] For the reasons that follow, I allow the complaint and find that on the preponderance of the evidence, the respondent violated the *Act* by abusing its authority when it assessed the appointee and in the choice of process.

[4] It should be noted that the Public Service Commission (PSC) did not attend the hearing but that it submitted its written, general, and specific arguments on its appointment policy.

[5] The notice of hearing was sent to all parties, including the appointee, on November 7, 2023, but the appointee did not attend the hearing or submit any arguments.

II. Summary of the facts

[6] The complainant holds a master's degree in psychology. She began her job with the respondent in 2009. She started as an intern and then progressed within the organization to a position as the head of the psychology department at the PS-04 group and level at Springhill Institution in Nova Scotia. Her position reported to the

Office of the Atlantic Region Deputy Commissioner as of the relevant facts, but since then, it has reported to the CSC's health section and now reports to its headquarters in Ottawa.

[7] The complainant lives in Moncton, New Brunswick. Moncton is about 100 km, or a one-hour drive, from Springhill. She stated that she travelled that distance, return, since the start of her job and that she sought to redirect her career to the respondent's regional office in Moncton. She was prepared to take a pay cut to work closer to her home, hence her interest in the position. She stated that she believed that she met the position's merit criteria but that if not, she would have deserved to be considered and assessed for the position.

[8] The complainant went on leave on May 1, 2021, and resigned from the CSC in May 2023. Although the reasons for her leave were not specified, the leave started nine days after the appointment and eight days after the complaint was made.

[9] The appointee started with the CSC in October 2019 as a casual employee. On December 12, 2019, under the signature of Roger Poirier, acting for Brian Chase, who was then the assistant deputy commissioner, integrated services, the appointee received a term-employment offer that was to run from December 12, 2019, to October 28, 2020, in the senior consultant position. The evidence set out that Mr. Chase initiated the appointment process as the assistant deputy commissioner but that Mr. Poirier concluded it, on an acting basis. Later on, the appointee received an indeterminate appointment to the same position, which is the subject of this complaint.

[10] The statement of merit criteria for the senior consultant position listed the essential qualifications that the candidate had to possess in terms of education, experience, knowledge, abilities, and core competencies. Certain assets in terms of other education and other experience and personal qualities were also listed.

[11] In her testimony, the complainant admitted that the appointee met several of the essential qualifications in the statement of merit criteria and that the complainant challenged only certain assessments of them. I do not intend to review the ones that she conceded. Instead, I will focus on the essential qualifications that are central to the dispute and necessary for analyzing the complaint.

[12] The respondent adduced into evidence a table entitled "[translation] Juxtaposed Candidate Assessment". The table is divided into two columns. The left one identifies the essential qualification to assess, and the right column is the appointee's response explaining how she meets the essential qualification. Admitted into evidence was that the appointee wrote the right-column text herself.

[13] As for education, the statement of merit criteria had two essential qualifications. The first required a university degree in one of the various sciences listed, including psychology. The appointee wrote, "Bachelor in Psychology (B.Ps.) 1998 from Université de Moncton"; "Masters in Psychology (M.A.Ps.) 2000 from Université de Moncton"; and "License [*sic*] to practice [*sic*] psychology in NB (CPNB no 403)".

[14] The second required essential qualification was to "[translation] [p]ossess a minimum of 75 hours of training in conflict management/alternative conflict management/mediation from a recognized institution." The appointee responded to it as follows: "Also, I am registered for a 6-day Mediation Training — A.C.E. Training (Addressing Conflict Effectively) at UNB University [*sic*] for the Spring of 2020." The text box containing this response was located directly below where the appointee added her university degrees, and I understand that the "also" at the start of her response implied that in addition to her university studies, she was registered in a conflict-management course.

[15] The contested essential experience qualification is as follows: "[translation] Recent experience* assisting employees and managers when handling sensitive and complex issues.**" The first asterisk indicated the following: "[translation] Recent is defined as being over the last five years". The two asterisks indicated the following: "[translation] Complex is defined as including multiple parties, sensitive issues, financial consequences, mental health issues, etc."

[16] The complainant represented herself. During her testimony, the facts and arguments intermingled, and the respondent objected, pointing out that some of her statements were not evidence but were instead opinion or argument. Additionally, during her arguments, she introduced facts that were not established in evidence. I noted the objection by acknowledging that for anyone unaccustomed to quasi-judicial proceedings, the distinction between evidence, opinion, and argument is sometimes

difficult. I upheld the respondent's objection and affirmed that I would differentiate between the evidence, opinions, and arguments during my analysis.

A. For the complainant

[17] The complainant testified that she watched the opportunity for this position closely. She discussed it with her manager, and on December 10, 2019, she emailed Mr. Chase, to whom the position reported, to express her interest to him, but no reply was ever received to the email.

[18] During her testimony, the complainant stated that she met Mr. Poirier during training in 2018 and that she told him about her interest in a position in Moncton, although not specifically the position at issue in this case. He stated that he did not recall the encounter or meeting her before this complaint was made and that he was unaware of the interest that she had expressed. He was never her manager.

[19] The day after the appointment notice was published, the complainant expressed her wish for an informal discussion about the position, but none took place. The respondent argued that there was no evidence of that informal-discussion request since there was no email to that effect. It argued that her April 16, 2021, email to Mr. Poirier, the acting assistant deputy commissioner, which concluded with, "I would like to grieve this non-advertise [*sic*] process", was not a proper informal-discussion request.

[20] During the hearing, I acknowledged that it was possible that the informal-discussion request had been unclear. However, in its July 19, 2021, email entitled, "[translation] Respondent's response to the allegations", the author writing for it removed all doubt or ambiguity when she wrote this: "[translation] Although the complainant requested an informal discussion on April 16, 2021, the respondent confirms that unfortunately, the discussion did not take place." Therefore, I accept the complainant's testimony that she did in fact request an informal discussion but that she was unable to benefit from one.

[21] The complainant argued that the appointee occupied the position for two years before she was appointed indeterminately, first as a casual and then for a term.

[22] The complainant argued that her good work performance had earned her the benefit of a talent management plan. The administration puts such plans in place to

recognize good talent that it can support that will benefit the organization in the future. They sometimes lead to acting assignments and help with career progression. She stated that Mr. Poirier could have had access to it had he requested it.

[23] The complainant stated that the appointee did not meet the education criteria that set out 75 hours of conflict-management training since, clearly, the appointee indicated that she was registered for a 6-day training course in spring 2020, which was after her appointment.

[24] The complainant also testified that the appointee did not meet the essential qualification of recent experience, which consisted of assisting employees and managers when handling sensitive and complex issues. Relying on the response in the Juxtaposed Candidate Assessment, she stated that her experience was from the education field and that it dealt with student-teacher or student-parent dyads, while the requested experience was for the employee-manager dyad. She stated that they are two different groups.

[25] The complainant noted that the Juxtaposed Candidate Assessment document, which Mr. Poirier signed, was not dated.

[26] The complainant stated that positions in Moncton are more sought after than those in Springhill, which are more difficult to fill, and once appointed to one, it is difficult to leave because it is difficult for the organization to find someone to fill the vacated position. She stated that the prison had become a real prison for her.

[27] Ms. Breau is a senior analyst in the OCM. She holds the same position as the appointee and Tammy Carroll, who was the incumbent of the position to be filled when she left. She testified that she participated in the appointee's assessment interview and that Ms. Carroll was the selection board chairperson. Ms. Breau testified that she reviewed the exam answers and that she took part in role playing. She did not participate in the Juxtaposed Candidate Assessment. She stated that she did not remember the moment when Ms. Carroll announced that she was leaving the OCM. She said that often, the person leaving must find their replacement. She also stated that she did not know who contacted the appointee about the casual position.

[28] Ms. Breau testified that she knew the appointee before her arrival at the CSC, that they both had children of the same age, and that they spoke during the summer

before her arrival. However, she stated that they were not friends as such and that they were only acquaintances. She knew that the appointee worked in the private sector and that she had been looking for a CSC position. Ms. Breau testified that she did not know whether Ms. Carroll knew the appointee on the outside. She stated that she knew that the appointee had discussions with CSC's Health Services but did not know with whom or when. According to Ms. Breau, the appointee was the only person considered for the position.

B. For the respondent

[29] Both parties called Mr. Poirier to testify, and I chose to put his testimony in the respondent's section because the complainant's examination-in-chief took the form of a cross-examination.

[30] Mr. Poirier is currently the assistant deputy commissioner, integrated services, for the respondent's Atlantic Region and has 35 years of service with the CSC. He stated that he has been involved in about 100 appointment processes during his career and about 15 in the last 4 years. He testified that he has taken training on human resources management and that he has collaborated with Human Resources Services as part of appointment processes.

[31] The complainant questioned Mr. Poirier about the respondent's response to her allegations, specifically with respect to the following phrase: "[translation] The operational context when the position was staffed justified his decision [that of Mr. Poirier]." She asked him to explain the meaning of the expression "[translation] operational context" in this context. He testified that he had to take several factors into account, including the position's remote location, consider employment equity needs, seek to increase inclusivity, and respect general staffing principles. He stated that in this case, the appointee's experience justified her appointment. He added that the OCM required stability. He stated that that office was responsible for managing conflicts between employees and managers.

[32] Mr. Poirier stated that the position's incumbent, Ms. Carroll, left on assignment for a year and that her final departure created the vacancy that allowed the position to be staffed indeterminately. He confirmed that the appointee occupied Ms. Carroll's position during her assignment. He stated that he did not know whether she would

return to her position after her assignment, which is why he appointed the appointee for a term before appointing her indeterminately.

[33] Mr. Poirier stated that he ran many appointment processes in the past in which no one came forward. His experience demonstrated to him major difficulties with recruiting personnel. He argued that for administrative positions, creating a pool of prequalified candidates works, but that it is different for positions that require more specialized qualifications, like in this case or with senior financial officers. He stated that the Moncton regional office has about 300 employees.

[34] Mr. Poirier referred to the document that justified as follows choosing a non-advertised appointment process, which was titled *Articulation of Selection Decision*, to explain the choice of process:

> *Mme Porelle has been working with CSC for over a year and has been able to mor [sic] the OCM agenda forward with new initiatives/workshops and assisting sites in improving workplace wellbeing. This position is critical to ensure CSC's people management accountabilities are met.*

[35] Mr. Poirier confirmed that the OCM paid for the appointee's 6-day mediation training "for the Spring of 2020", to which she referred in the Juxtaposed Candidate Assessment, to develop her personal skills. He testified that the training consisted of 6 hours per day for 6 days. He stated that the appointee had demonstrated that she met the essential training qualification of the 75 hours of conflict-management training by listing the courses that she took as part of her university studies. He referred in particular to course PS 2800 — "[translation] Human Relations 1", which the appointee described as follows: "[translation] Communication strategies and attitudes that foster relationships with others, awareness of self and others, listening, assertiveness, collaboration, and conflict resolution." She stated that she had 36 hours of training.

[36] Mr. Poirier stated that the proposed response to "[translation] recent experience* designing and facilitating training and awareness sessions in an adult learning environment", in which she demonstrated her experience in facilitation, to which the other listed university courses were added, allowed her to meet the required essential qualification of 75 hours of conflict-management training.

[37] Mr. Poirier acknowledged that in the appointee's Juxtaposed Candidate Assessment, the response to "[translation] [r]ecent experience* assisting employees and managers when handling sensitive and complex issues" that the appointee proposed did not demonstrate that she met that criterion, but he added that he considered her résumé and his personal knowledge of her. He testified that he accepted her candidacy based on his personal knowledge, to meet operational and stability requirements. He also stated that according to his and Ms. Carroll's staffing experience, the staffing possibilities were not good. He acknowledged that he did not remember whether in the past an unproductive process had been run to staff the position. He also consulted Ms. Breau, who is also a senior consultant, to confirm that the appointee met the essential qualifications in the statement of merit criteria.

[38] Mr. Poirier testified that "asset qualifications" are not mandatory but that they are used to select a particular candidate from several qualified ones. In this case, the education asset qualifications were a master's degree in psychology and a conflict-management certificate. The appointee met two of the three experience factors listed in the asset qualifications.

[39] Mr. Poirier testified that before 2019, he did not know the appointee, but that since her appointment, she has moved several files forward. She was appointed on a casual basis in October 2019 before her position was converted into a term appointment. He testified that he could not speak of nepotism but that the respondent had the current practice of appointing people on a casual basis before converting the position to a term position and then to indeterminate. He testified that he knows that casual positions last 90 days and that they should be used to fill temporary or even replacement positions. As an example, he cited cleaner positions. He stated that that way of doing things is permitted if a position is vacant and funded within the organization; in those circumstances, a casual position could be converted into a term position. He stated that proceeding that way allowed filling positions more quickly than undergoing the long 3- or 4-month processes that could end without a result.

[40] Mr. Poirier testified that no formal assessment took place when the appointee was recruited for the casual position but that one took place during the appointment to the term position. He stated that the statement of merit criteria was the same for the term and the indeterminate positions. Also, no break in service occurred between

the casual and the term positions. He stated that the appointee's appointment to the term position constituted an external appointment.

[41] Mr. Poirier replied that he did not see any drawback to appointing someone who was already in the department and outside Moncton, as in the complainant's case, to a position at regional headquarters, as she had suggested.

[42] Mr. Poirier stated that he did not see the complainant's email to his predecessor about her expression of interest in a position in Moncton; he stated that he received 200 emails per day, so it is possible that he did not see it.

[43] Mr. Poirier referred to the complainant's April 16, 2021, email in which she expressed her disappointment at seeing the appointee's notice of appointment. She concluded by stating that she wanted to file a grievance against the appointment. He stated that after considering it, his April 20, 2021, email was not the right choice of reply. In it, he wrote the following: "Christine, Thank you for your message. Your resume will be maintained for any future opportunities. Roger J Poirier CPA, CGA."

[44] Mr. Poirier stated that he did not know the complainant before this process and that he never communicated with her superiors about her.

[45] Mr. Poirier testified that when the appointee was appointed to the term position, her qualifications were assessed. She wrote an examination, was interviewed, and completed the Juxtaposed Candidate Assessment form. The results that she received as part of the appointment process for the term position were also used for her assessment for the indeterminate position. He stated that he had the required subdelegation required to proceed with appointing the appointee.

III. Summary of the arguments

A. For the complainant

[46] The complainant argued that the respondent demonstrated abuse of authority in the appointee's assessment and in the choice of appointment process. She also argued that the appointment process was tainted with favouritism, bias, and bad faith, which violated the values of the Canadian public service.

[47] In her arguments, the complainant argued that Mr. Poirier was blinded by the appointee's candidacy because she presented herself well and was known in the region

and that he accepted her qualifications at first glance. She argued that when he read the Juxtaposed Candidate Assessment, he should have seen that the appointee did not meet all the essential qualifications for the position. The complainant stated that the appointee's experience was in the education field and that student-teacher dyads are very different from employee-manager dyads. She submitted that Mr. Poirier should have known that and should have acknowledged that they are not equivalent or interchangeable.

[48] The complainant stated that Mr. Poirier did not have the necessary knowledge to validate and properly assess the appointee in terms of the demands that the psychology domain requires. She submitted that the College of Psychologists of New Brunswick requires specific training when a psychologist moves from one clientele to another.

[49] The complainant argued that the fact that the appointee held the position for two years allowed management to prepare her, which allowed her to acquire the experience to meet the merit criteria. She also asserted that the fact that she was denied an informal discussion demonstrates management's lack of transparency.

[50] The complainant noted that the Juxtaposed Candidate Assessment document, which Mr. Poirier signed, was not dated, which demonstrates laissez-faire practices and a lack of rigour by management with respect to human resources management. She wondered if anyone even read the appointee's assessment or whether only Mr. Poirier's personal knowledge of her was relied on.

[51] The complainant argued that the appointee should not have received the position due to her casual-employee status, which violated s. 50 of the *Act*. She stated that the appointee worked continuously, with no break in service, between her casual job and her term appointment.

[52] The complainant argued that Mr. Poirier demonstrated that he was very busy, that he did not like being slowed down by administrative processes, and that the appointment process was an obstacle to staffing a position quickly. She argued that no urgent reason justified using a non-advertised process, since the departure of the position's incumbent was foreseeable, and that there was ample time to conduct an advertised appointment process and to give everyone the opportunity to express their

interest. She argued that using a non-advertised appointment process, in the circumstances, demonstrated Mr. Poirier's personal favouritism for the appointee.

[53] The complainant submitted that the justification for the choice of appointment process was tainted by bad faith, which was a serious error by the respondent, since the appointee was in the position for only a year-and-a-half, and there was no risk to organizational stability. She stated that Mr. Poirier signed his assessment of the appointee and his justification for the choice of appointment process and that he did not have the required subdelegation to sign the staffing action. He had level 3, but he should have had level 2. She cited *Morris v. Commissioner of the Correctional Service of Canada*, 2009 PSST 9 at para. 14, to support her argument, which states that the delegation instrument forms part of the documentary evidence, along with this:

> *[14] … The complainant testified that this document shows that a Deputy Warden has level 4 delegation, and that a level 2 delegate is required to "[m]ake appointments to the public service following a non-advertised appointment process."*

[54] That demonstrates a conflict of interest involving bias, since Mr. Poirier approved his request even though he did not have the appropriate delegation.

[55] The complainant argued that none of the grounds for justifying the choice of process mentioned in *Morris* were cited in the justification for using a non-advertised process, which demonstrates abuse of authority. Among other things, the respondent did not set out its fruitless earlier attempts to staff the position.

[56] The complainant submitted that the respondent had the common practice of making non-advertised external appointments and stated that it constituted a lack of transparency. She argued that Mr. Poirier recruited 15 people that way in the last 4 years because that process is simpler; it simplifies managers' work and is less tedious. She argued that it does not respect the principles of the public service and that it is neither transparent nor equitable.

[57] The complainant argued that the respondent must try to develop its employees' talents in accordance with s. 4.1.23 of the *Policy on People Management*, entitled "Employee performance, learning, and talent management", to optimize organizational performance. According to *Morris*, acting appointments should be the exception.

[58] The complainant pointed out that the absence of an informal discussion represents management's lack of transparency in its appointment process and illustrates the manager's indifference. She submitted that refusing her the informal discussion and not halting the indeterminate appointment process when she stated her intention to make a complaint demonstrates that the manager acted for his benefit.

[59] The complainant submitted that the respondent divulged three different versions of the Juxtaposed Candidate Assessment, one signed by Mr. Chase, another signed by Mr. Poirier, and a third, which was unsigned. She argued that that illustrates the respondent's lack of transparency. It acted that way to confound anyone interested in the appointment process. The three versions reflect a lack of clarity and bad faith. Note that the Board received only two versions of the document, the one signed by Mr. Poirier and the unsigned one, and that neither was dated.

[60] Additionally, the complainant argued that the respondent was opposed to Ms. Breau testifying. The complainant claimed that that was done to maintain a vague timeline of events. She supported this point by noting that Mr. Poirier and Ms. Breau had defective memories and that when she questioned them, they stated several times in their testimonies that they did not remember events.

[61] The complainant argued that in the respondent's response to her allegations, it stated that the appointee's appointment proved the best option in the circumstances. She submitted that that was the only option that it considered.

[62] In response to the respondent's arguments, the complainant argued that if the respondent did not want the Board to consider the 2019 appointment process, it should not have used the 2019 assessment for the 2021 appointment. It should have reassessed the appointee. In addition, she stated that no notice was published for the 2019 appointment. She contended that the respondent sought to create confusion in the management of this appointment process, to camouflage public service values.

[63] The complainant argued that bias and a lack of transparency were mentioned only afterward, to demonstrate the characteristics of abuse of authority. She submitted that intention is not required to commit an abuse of authority. She stated that discretionary power does not provide the right to ignore the *Act*.

[64] The complainant requested that her complaint be allowed, that the Board make a declaration of abuse of authority, that it compel the respondent to return to advertised appointment processes, and that the appointee's appointment be revoked.

B. For the respondent

[65] The respondent argued that the complaint covered only the appointee's appointment to the indeterminate position on April 22, 2021. It stated that no complaint was made about the appointee's appointment to the term position on December 12, 2019. It relied on *Canada (Attorney General) v. Cameron*, 2009 FC 618 at paras. 13 to 21, to state that I am limited to the complaint against the appointment that is before me and not past appointments.

[66] The respondent also argued that the appointee's appointment to her term position was an external appointment that bore the number 2019-PEN-ENA-ATL-159262. The code "ENA" means "External Non Advertised". It stated that it could not have been otherwise since s. 50(4) of the *Act* specifies that a casual worker cannot be appointed in an internal appointment process. To support the argument that the appointment was external, it asserted that the appointee had to undergo a 12-month probationary period, and it referred to the appendix of the offer letter dated December 12, 2019, which confirmed it under s. 61 of the *Act*.

[67] The respondent argued that the complainant made her complaint alleging abuse of authority in the appointee's assessment, abuse of authority in the choice of process, and the absence of an informal discussion. It asserted that the personal favouritism, bias, and lack of transparency allegations are new and that they should not be considered in this complaint. It cited *Cyr v. Chairperson of the Immigration and Refugee Board of Canada*, 2007 PSST 37 at paras. 8 to 11, to support its argument, which states that the complainant required the Board's approval to amend her allegations.

[68] The respondent argued that the complainant had the burden of proof and that it was up to her to establish her allegations on a preponderance of the evidence. It cited *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, and *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8.

[69] It cited *Lavigne v. Canada (Justice)*, 2009 FC 684 at paras. 53 to 55 and 60 to 62, which acknowledges that abuse of authority is not defined in the *Act* and states that a complaint of abuse of authority will be deemed founded if bad faith or personal favouritism is established. The respondent argued that in this case, bad faith was not intended because Mr. Poirier did not know the complainant, so he could not have acted in bad faith.

[70] The respondent argued that the complainant did not prove that she requested an informal discussion with management. It maintained that she was responsible for expressly making such a request. It argued that the discussion would not have changed the appointment decision in any way. It cited *Henry v. Deputy Head of Service Canada*, 2008 PSST 10 at para. 60, which states that informal discussions are not a mandatory step in the complaint process.

[71] With respect to the essential education qualification that required a minimum of 75 hours of conflict-management training, the respondent argued that Mr. Poirier verified the Juxtaposed Candidate Assessment and considered that she fulfilled this essential qualification. Since a recognized institution had to have provided the training, it concluded that the university was a recognized institution. Mr. Poirier also consulted Ms. Carroll, the incumbent of the position who was to be replaced and who validated the appointee's essential education qualification of conflict-management training. It argued that the addition of training hours as part of the appointee's education set out that she easily met the essential qualification of 75 hours of conflict-management training. In addition, it noted that the appointee indicated that she was registered in such training in "the Spring of 2020".

[72] With respect to delegation authority, the respondent argued that *Morris* was valid in 2019 and that there is no evidence that the subdelegation rules and policies that it sets out apply to this case. The bulletin that *Morris* refers to did not form part of the evidence and has no impact, and I should not assign it any weight in this analysis.

[73] The respondent argued that Mr. Poirier was a credible witness. He properly assessed the appointee and signed her Juxtaposed Candidate Assessment. He did not know whether the position's incumbent, who had left for an assignment, would return. Only once he received confirmation of the incumbent's definitive departure did he

request and receive approval to launch the appointment process. The respondent indicated that the justification behind the choice of a non-advertised appointment process supported the decision to proceed that way.

[74] The respondent stated that there was no evidence of personal favouritism and that the complainant's allegations were instead conjecture and presumptions. Although Ms. Breau testified that she knew the appointee before her appointment, it was not evidence of personal favouritism toward the appointee, particularly since she did not make the decision to appoint the appointee. The respondent relied on *De Souza v. Deputy Head (Royal Canadian Mounted Police)*, 2023 FPSLREB 114 at para. 47. That decision sets out the criterion for determining the presence of personal favouritism, which it stated the complainant did not meet.

[75] The respondent provided an overview of the statement of merit criteria and the appointee's qualifications. It argued that Mr. Poirier assessed all the merit criteria during the appointee's assessment for the term position in October 2019 and that she met all the essential qualifications. It argued that since the appointee met all the essential qualifications and no abuse of authority occurred, the appointment should not be revoked, especially since the complainant has moved on to other things by leaving the public service.

C. For the Public Service Commission

[76] As mentioned earlier, the PSC did not attend the hearing but submitted its "[translation] General and specific observations about the PSC's Appointment Policy". It reviewed its mandate, explained its role in a staffing complaint before the Board, and recalled that the purpose of its observations is to examine the questions that arise from applying s. 77(1) of the *Act*. It conducted a brief analysis of its *Appointment Policy*. That policy sets out deputy heads' obligations in appointment processes and recalls the legal requirement set out in s. 30(1), which is that appointment decisions shall be made on the basis of merit and shall comply with the spirit of the *Act*. It listed the important points of that spirit, including conducting appointment processes fairly, transparently, and in good faith and correcting errors and omissions in a timely way.

[77] The PSC recalled that deputy heads and everyone with delegation authority must comply with its guidelines. It noted that when a requirement of its policy is not respected, then that is a problem, but it does not automatically equate to an abuse of

authority. It specified that deputy heads must ensure that those to be appointed possess each identified essential qualification. It also specified that s. 47 of the *Act* deals with informal discussions.

IV. Reasons

[78] The complainant made her complaint against the appointee's appointment under ss. 77(1)(a) and (b) of the *Act*. Section 77(1)(a) deals with abuse of authority in the application of merit with respect to an appointee, and s. 77(1)(b) deals with abuse of authority in the choice of appointment process.

[79] The case law has established that the complainant has the onus of demonstrating that on a preponderance of the evidence, the deputy head abused its authority. The complainant must discharge the burden of proof.

[80] *Tibbs* held that the complainant bears the burden of proving that abuse of authority occurred. In addition, it is clear from the preamble and the entirety of the *Act* that much more is required than mere errors or omissions to constitute abuse of authority. "Abuse of authority is more than simply errors and omissions" and will always include improper conduct (see *Tibbs*, at paras. 65 and 66).

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

[81] Sections 30(1), 33, and 36 of the *Act* define the application of the merit principle in the framework of appointments. According to those provisions, the respondent may choose the type of appointment process and determine the method for assessing a candidate.

[82] Section 36 provides that the respondent may use any method to assess candidates against the statement of merit criteria. It also establishes that I cannot substitute my assessment of the merit criteria for that of the respondent. Instead, my role is to determine whether the respondent abused its authority when it assessed the merit criteria.

[83] In this case, the respondent proceeded with an external appointment for a term in October 2019, to appoint the appointee. It had her undergo an appointment process that consisted of a written examination, an oral examination that included role playing, an interview, and a juxtaposed assessment that she was to complete. The entire process's purpose was to assess whether she met all the essential qualifications for the

senior consultant position. By the end of the exercise, the respondent deemed that she met all the essential qualifications, and it appointed her to the position. The complainant testified that no notification postings were made that the application was retained. No complaint was made to challenge the appointment, which I will name the "first appointment".

[84] When it made the appointee's internal appointment for the same position but indeterminately, the respondent chose to use the same assessment tools as in the previous appointment. It concluded that once again, the candidate met all the essential qualifications, and it appointed her, which I will name the "second appointment".

[85] In her complaint, the complainant asserted that the appointee did not meet two essential qualifications during the first appointment. One was education, which indicated that the candidate had to "[translation] [p]ossess a minimum of 75 hours of training in conflict management/alternative conflict management/mediation at a recognized institution." The other was experience, which required "[translation] [r]ecent experience assisting employees and managers when handling sensitive and complex issues."

[86] In the Juxtaposed Candidate Assessment as of the first appointment, for the essential education qualification, the appointee wrote that she was registered in a 6-day conflict-management training course in spring 2020. For his part, Mr. Poirier testified that the appointee's university training demonstrated that she met that essential qualification. He also referred to a 36-hour course, PS 2800 — "[translation] Human Relations 1", about which the following can be read: "[translation] Communication strategies and attitudes that foster relationships with others, awareness of self and others, listening, assertiveness, collaboration **and conflict resolution**" [emphasis added]. Although he did not refer to it specifically, the appointee also took course PS 3820 — "[translation] Human Relations 2", which is described as follows: "[translation] In-depth look at communication strategies and attitudes that foster relationships with others, awareness of self and others, listening, assertiveness, collaboration **and conflict resolution**" [emphasis added].

[87] When the appointee's list of the courses she took, which was adduced into evidence, is examined, it stands out that all the courses were intended for her psychology-related university training. The training set out in the essential education

qualification specifically identified one of the several conflict-resolution methods and was added to one of the required university trainings. A master's degree in psychology (among others) and specifically a "[translation] [c]ertificate in conflict management from a recognized educational institution" were considered asset qualifications.

[88] The appointee stated in her juxtaposed assessment that she was registered for a six-day mediation training course "for the Spring of 2020". Mr. Poirier testified that that training was six hours per day for six days.

[89] The complainant also argued that as of the first appointment, the appointee did not meet the essential experience qualification of assisting employees and managers when handling sensitive and complex issues. In her arguments, the complainant argued that the employee-manager dyad is very different from the student-teacher dyad found in educational environments. She even asserted that the College of Psychologists of New Brunswick requires specific training to change clientele. No evidence supports that assertion, and the respondent stated that the complainant was not qualified as an expert witness.

[90] For this experience-related essential qualification, the appointee stated that as a psychologist, most of her relationships with her clients dealt with sensitive and complex issues. She also stated that in her practice, she had helped many adult clients manage work-related stress and work-family balance. Mr. Poirier deemed that that response met the qualification that was sought.

[91] However, the complaint is not against the first appointment but the second, which was for the indeterminate position. I do not have the authority to intervene in the first appointment. As the respondent indicated when citing *Cameron*, I cannot consider casual or term appointments that are not the subject of a complaint before me.

[92] For the second appointment to the position, which was indeterminate and is the subject of the complaint before me, the respondent essentially used the same assessment tools as for the first appointment. The same Juxtaposed Candidate Assessment, which Mr. Poirier's personal observations of the appointee as part of her work had improved, was used for the assessment. In addition, in an email exchange with Human Resources Services, Mr. Poirier was asked whether he wanted to comment on the statement of merit criteria. He wrote the following:

[Translation]

…

According to her résumé, Manon was able to develop her skills as a mediator, facilitator, and coach through her role as a senior conflict management and values and ethics consultant. She meets the requirements of this position, as indicated in the statement of merit.

…

[93] The complainant made the same allegations mentioned earlier.

[94] With respect to the essential-education qualification, the respondent provided the same evidence; that is, the appointee was to take a 6-day conflict-management training course, and I accept Mr. Poirier's testimony that she did in fact take it in spring 2020. In addition, he maintained that the university training was still equivalent. He also testified that Ms. Carroll accepted that university training, whether a bachelor's or master's degree, was equivalent to the requirement of 75 hours in conflict management.

[95] In the circumstances, although Mr. Poirier and Ms. Carroll agreed to recognize the equivalency between the appointee's university training and the required essential criteria of 75 hours of conflict-management training, my conclusion differs completely.

[96] The statement of merit criteria clearly requested specific training in conflict management/alternative conflict management/mediation that was separate from what could be obtained through a university program. The two 36-hour human-relations training courses each had only a conflict-management component and not 36 hours dedicated solely to conflict management.

[97] The fact that a conflict-management certificate from a recognized institution was designated as an asset qualification ensures that the respondent truly wanted to distinguish conflict-management training from formal university training that leads to a master's degree. Otherwise, my opinion is that it would have included it in the same category as university degrees. I conclude that the 75 hours of conflict-management training was aimed specifically at this specialty. In addition, Mr. Poirier's testimonial evidence indicated that the appointee took a 6-day training course of 6 hours per day for a total of 36 hours, while the essential qualification required a minimum of 75 hours.

[98] The short text that Mr. Poirier proposed to Human Resources was a free affirmation that does nothing to support the respondent's claim that the appointee met the merit principle with respect to the statement of merit criteria. The mere mention of the fact that someone met an essential qualification is not sufficient. It must be supported by facts, at least to establish it on a preponderance of evidence. In the circumstances, the respondent did not establish that the appointee met the essential education qualification requiring 75 hours of training in conflict management/alternative conflict management/mediation.

[99] In this case, I conclude that, relying on the preponderance of the evidence, the fact of accepting general university training as equivalent to what was specifically requested, in conflict management, in the statement of merit criteria was an abuse of authority by the respondent.

[100] The complainant alleged that the appointee did not meet the essential experience qualification of assisting employees and managers when handling sensitive and complex issues. She argued that Mr. Poirier did not have the required knowledge to properly assess this essential qualification.

[101] When I read this criterion, it in fact states assisting employees and managers, which directly links the position's context to employee-manager relations. I accept the complainant's argument. Even though she was not qualified as an expert, she argued that those two dyads are different and that experience in an educational environment is very different from that encountered in a workplace environment and especially in a correctional environment.

[102] Nevertheless, the appointee had by then occupied the position for more than a year, and it is plausible to believe that she would have gained that experience. Mr. Poirier's testimony on this subject was that the appointee advanced the program and made presentations. He did not specify the presentations or for whom they were intended. He did not indicate any links between the presentations and the experience that the essential qualification sought. If preparing and making presentations allows one to conclude that she gained experience assisting employees and managers when handling sensitive and complex issues, it was not demonstrated.

[103] I do not accept the complainant's argument that Mr. Poirier did not have the knowledge to assess this essential qualification. In fact, the experience sought was

assisting employees and managers, thus establishing a class of particular people. The essential qualification could also have set out assisting people without specifying the environment, which would have then included the educational setting. I do not believe that this distinction falls under particular expertise in the science of psychology but that it is within the ordinary meaning given to the words. However, since the essential qualification specified assistance to employees and managers, the respondent abused its authority by concluding that the employee-manager dyad was equivalent to the student-teacher dyad in an educational setting.

[104] I have concluded that experience in an educational environment is different from that sought in a work environment. The respondent did not think that redoing the appointee's assessment for the second appointment was right; it believed incorrectly that the first assessment would suffice to assess her. The time that elapsed between the first appointment and the second certainly gave the appointee the opportunity to gain new experience, but that was not adduced as evidence. Mr. Poirier's testimony was insufficient to convince me that on a preponderance of the evidence, the appointee met that essential qualification when the second appointment was made. In the circumstances, given my conclusions, I consider that the respondent abused its authority in the application of merit to the appointee as part of a non-advertised appointment process, which violated s. 77(1)(a) of the *Act*.

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

[105] Section 33 of the *Act* states that the respondent may use an advertised or a non-advertised appointment process. Thus, a complainant cannot simply allege that abuse of authority occurred because the respondent chose a non-advertised process. He or she must prove that the respondent's decision to choose such a process constituted an abuse of authority.

[106] At paragraphs 61 to 63, *Tibbs* held that the *Act*'s preamble sets out its key legislative purposes. It includes recognition that staffing authority should be delegated to as low a level as possible "… and should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians …". As a means for using this flexibility, Parliament adopted s. 33. *Tibbs* also stated that managers have considerable discretion at the moment of choosing the type of appointment process to use.

[107] Section 30(4) of the *Act* states that in a non-advertised appointment process, management is not required to consider more than one person for an appointment to be made based on merit. Thus, there was no need to conduct a comparative assessment of the complainant and the appointee. Moreover, denying an opportunity to be considered for a position is not in itself an abuse of authority.

[108] In its observations, the PSC submitted that its *Appointment Policy* sets out the obligations with respect to "key decision points" as part of the appointment process. It stated that the expected results comply with the spirit of the *Act*. Among the expected results, it lists "… [a]ppointment processes conducted in a fair and transparent manner and in good faith …" and the timely correction of errors and omissions. It also stated that under s. 16 of the *Act*, deputy heads must comply with PSC guidelines when exercising their delegated powers. It concluded that when a requirement in the policy is not respected, then that is a problem, but it does not automatically equate to an abuse of authority.

[109] From the start, the respondent argued that I cannot consider earlier appointments and that only the second appointment is the subject of this complaint. The fact remains that the last appointment was part of a chain of them made in a short time that involved the same position and person. These facts are part of the general context that is relevant to the issue of whether abuse of authority occurred in the choice of process.

[110] The evidence demonstrated that the appointee was appointed to a casual position and then for a term in the same position and finally, still in the same position, indeterminately.

[111] Mr. Poirier testified that casual positions last 90 days and that they should be used to fill temporary or even replacement positions. As an example, he cited cleaner positions. He stated that this method is permitted if there is a vacant and funded position in the organization; in those circumstances, a casual position could be transformed into an indeterminate position. He stated that proceeding that way allows filling positions more quickly than undergoing long, 3- or 4-month processes that could end without results. He also testified that he did not want to speak of nepotism but that it was a current practice at the respondent.

[112] The complainant argued that Mr. Poirier was very busy and that he did not want to be delayed by long and tedious administrative processes like those in advertised appointments. She also argued that there was no urgent reason that would have supported the choice of process. Finally, she argued that the choice of appointment process was motivated by Mr. Poirier's personal favouritism for the appointee. The respondent has wide discretion in the choice of process.

[113] The text of the justification was cited earlier. In it, it can be seen that the appointee had worked for the CSC for more than a year, that she was able to advance the OCM's "[translation] agenda" thanks to new initiatives and workshops, and that she contributed to workplace well-being. Mr. Poirier finished by stating that the position is critical to ensuring that people-management-responsibility objectives are met. He also testified to support his choice of process, stating that the OCM required stability and that the appointment allowed achieving that stability. In its response to the complainant's allegations, the respondent referred to the operational context to support its choice of process. When the complainant asked about the meaning of the expression "operational context", Mr. Poirier was rather evasive before he concluded that the appointee's experience justified her appointment.

[114] What I retain from the employer's proposed rationale is that someone was already in the position, that she did good work, and that the position was critical to the OCM. In addition, Mr. Poirier's testimony on the organization's need for stability and the operational context was not explained or supported with any evidence.

[115] However, standing out from the complainant's allegation and Mr. Poirier's testimony was the importance placed on the need to appoint the appointee quickly. The evidence did not demonstrate any operational imperative or any threat weighing on the organization were the position not filled indeterminately and quickly. Those factors are not specifically required when the time comes to choose a non-advertised appointment process. However, they are factors to consider when justifying the choice. In this case, I conclude that the justification did not objectively support the decision to proceed by a non-advertised appointment. It appears to me that the respondent's complacency of selecting the simplest and quickest process, as is its current practice, was the true justification for the choice.

[116] Deputy heads enjoy wide discretion in the choice of an appointment process, whether or not it is advertised. However, when an allegation of abuse of authority is made, a deputy head must be able to justify their choice, to convince the Board that the preponderance of the evidence supports their decision that the choice was not an abuse of authority.

[117] In this case, the choice of the non-advertised process that led to the appointee's appointment to the indeterminate position was an abuse of authority. There is no doubt that the final appointment was the logical outcome for the appointee from the moment she was appointed on a casual basis to her final appointment to an indeterminate position. Mr. Poirier stated that he did not want to speak of nepotism, but the fact remains that that manner of proceeding significantly resembles it.

[118] In this case, the preponderance of the evidence indicates that the respondent abused its authority in the choice of process, which violated s. 77(1)(b).

C. Personal favouritism, and the absence of an informal discussion

[119] At the hearing, the complainant alleged that Mr. Poirier demonstrated personal favouritism toward the appointee. The respondent objected to the allegation's late introduction, relying on *Cyr*. Section 23(1) of the *Public Service Staffing Complaints Regulations* (SOR/2006-6) establishes that on request, the Board must allow a complainant to amend an allegation or to make a new one if doing so is otherwise in the interests of fairness. In this case, the Board did not authorize beforehand adding that allegation, and it arose too late in the process to allow the respondent to properly address it. In the circumstances, the allegation is dismissed.

[120] The complainant asserted that the absence of an informal discussion helped establish the lack of transparency in this appointment. The respondent objected, citing *Henry*. I subscribe to the principle stated in it, according to which informal discussions are not a mandatory step in the complaint process. I also support the idea that "… informal discussions are an opportunity for an assessment board to correct errors …". I will go even further: informal discussions, provided in s. 47 of the *Act*, are an opportunity for the employee and the manager to meet and discuss the disappointed employee's assessment and to discuss their aspirations and the opportunities that the organization can provide them. In his testimony, Mr. Poirier acknowledged that his choice of response was not correct when he replied to the

complainant on April 20, 2021. The absence of an informal discussion was not in itself an abuse of the respondent's authority.

D. Signing authority delegation

[121] The complainant asserted that Mr. Poirier did not have the required authority to sign the appointee's appointment. According to her, it demonstrated a conflict of interest involving bias since he approved his request without having the appropriate delegation. In the circumstances, it was up to her to demonstrate it through a preponderance of evidence. She relied on *Morris* to do it. Using case law demonstrates a tribunal's interpretation in given circumstances. The facts that arise in case law are not automatically proven before another tribunal. This evidence should have been proven perhaps by introducing the manager's delegation instrument or any other document that supported the allegation.

[122] The preponderance of the evidence in the circumstances and Mr. Poirier's testimony indicate that he had level 3, which was the subdelegation level required to sign the appointment. Therefore, this allegation is dismissed.

E. Conclusion

[123] The respondent abused its authority when it assessed the essential education qualification, which required that the candidate "[translation] [p]ossess a minimum of 75 hours of training in conflict management/alternative conflict management/mediation from a recognized institution". The same was true for the assessment of the essential qualification that stated, "[translation] Recent experience assisting employees and managers when handling sensitive and complex issues."

[124] For all those reasons, I conclude that the complaint is substantiated and that the respondent violated ss. 77(1)(a) and (b) of the *Act*.

F. Corrective measures

[125] Sections 81 and 82 determine the extent of my power in circumstances such as these. I can effectively direct the respondent to revoke the appointment and, as the case may be, take the correctional measures that I deem appropriate.

[126] At the conclusion of her arguments, as corrective measures, the complainant asked for a declaration of abuse of authority, for the respondent to return to

advertised appointment processes in the future, and for the appointee's appointment to be revoked.

[127] Given my conclusions, I declare that the respondent abused its authority in the application of merit by appointing the appointee. I also declare that the respondent abused its authority in the choice of process.

[128] The complainant requested that I direct the respondent to conduct advertised appointment processes in the future. Section 33 of the *Act* allows the respondent, when making an appointment, to use either an advertised or a non-advertised appointment process. Consequently, I cannot direct such a course of action.

[129] I cannot rule on the merits of any other appointment, past or future, which the respondent made. However, the evidence set out that the respondent has a current practice of appointing people from outside the public service to casual positions and then converting them to term positions and later to indeterminate positions. This practice risks giving rise to appointments that are tainted by nepotism and personal favouritism. I recommend that the PSC investigate the respondent's regional branch to determine whether casual appointments have been used as a pretext to circumvent the *Act* in terms of external appointments.

[130] The complainant also requested revoking the appointee's appointment. The respondent asserted that it should not be revoked since she met the statement of merit criteria. Moreover, it stated that the complainant has moved on to something else because she left the public service.

[131] I have concluded that the respondent abused its authority in how it handled the appointee's merit and that she did not meet all the essential qualifications in the statement of merit criteria as of the second appointment. In these circumstances, I must order the respondent to revoke the appointee's appointment.

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

(The Order appears on the next page)

V. Order

[133] The complaint is allowed.

May 14, 2024.

FPSLREB Translation

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