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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

GINETTE PATIENCE NGUEYO

Complainant

and

**DEPUTY HEAD
(Canada School of Public Service)**

Respondent

Indexed as
Ngueyo v. Deputy Head (Canada School of Public Service)

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

Before: Amélie Lavictoire, a panel of the Federal Public Sector Labour Relations
and Employment Board

For the Complainant: Herself

For the Respondent: Geneviève Brunet-Baldwin and Frédérique Jacquart-
Ducharme, counsel

For the Public Service Commission: Louise Bard, senior analyst

For the Canadian Human Rights Commission: Ikram Warsame, counsel

Heard by videoconference,
October 18 and 19, 2023.

Written submissions filed November 20, 2023.
[FPSLREB Translation]

REASONS FOR DECISION**FPSLREB TRANSLATION**

I. Complaint before the Board

[1] Ginette Patience Nguayo (“the complainant”) made a complaint alleging that the deputy head of the Canada School of Public Service (“the respondent” or “the School”) abused its authority during an advertised appointment process to staff a manager position in the Accounting, Operations, Policy, Systems, and Internal Control unit (“the unit”, at the FI-04 group and level; “the position”) in the office of the assistant to the School’s chief financial officer. The complainant took part in the process, but her application was eliminated after the written exam.

[2] The complainant made her complaint to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). She submits that the choice of process and the assessment of her application were tainted by discrimination, namely, discrimination based on race, colour, and sex. According to her, the respondent did not follow a practice of filling vacant positions by appointing School employees, to avoid appointing a Black woman to a management position. She claims that had she been promoted in the usual way, her appointment would have been the first time a Black woman had been promoted that way to a manager position. She claims that the choice of an advertised process was a mechanism that allowed the respondent to set aside her application, which it did.

[3] The complaint notified the Canadian Human Rights Commission (CHRC), as required under s. 78 of the *PSEA*. She does not allege that the person appointed through the process in question (“the appointee”) did not meet the merit criteria.

[4] The Public Service Commission and the CHRC did not attend the hearing, but they did provide written submissions. They did not take a position on the complaint’s merits.

[5] Despite my sympathy for the complainant, who felt excluded from the appointment process because she is a Black woman, the evidence presented to me at the hearing was insufficient to allow me to conclude that the choice of process or the assessment of her application was tainted by an abuse of authority, specifically discrimination. For the reasons that follow, I find the complaint unfounded.

II. Summary of the evidence

[6] Before describing the evidence, I wish to clarify the sources of information on which this summary of the evidence is based.

[7] During the hearing, it was discovered that the respondent had inadvertently failed to disclose its case law list to the Board and the complainant. She did not have the opportunity to review the case law on which the respondent based its position. For that reason, I allowed her to make arguments after the hearing on the respondent's cited case law, which she did. She made a 19-page written argument containing information that was not disclosed to me in the portion of the hearing reserved for adducing evidence. I considered her arguments on the respondent's cited case law, but I did not consider information that was not filed in evidence at the hearing.

[8] In the interest of conciseness, I will summarize only the evidence that I consider most relevant to the complaint of which I am seized. Five people testified at the hearing, including the complainant; Line Boudreau ("the delegated manager"), who was the assistant to the School's chief financial officer responsible for the appointment process; two managers from other departments (Carl Boisvert and Kurt Chin Quee) who were members of the selection committee; and Céline Vachon ("the executive director of staffing"), the School's executive director of staffing and labour relations at the time.

[9] Before going any further, since discrimination allegations are central to this complaint, it is important to state that the complainant and the appointee are Black women. The appointee did not testify at the hearing. As there is no allegation that she did not meet the merit criteria, she will not be identified in this decision.

[10] The complainant held a financial analyst position (at the FI-03 group and level) at the School from December 2017 to January 2021. The relevant period for this complaint is from December 2019 to the appointee's appointment in September 2020.

[11] In December 2019, the delegated manager assumed her position in the unit. The incumbent of the position that is the subject of this complaint reported to the delegated manager. As for the complainant, she reported to that incumbent.

[12] The incumbent was eligible for retirement. The complainant wanted to become a manager and to hold the position when it became vacant. She stated that she had

performed the position's duties, under the incumbent's supervision, for approximately one year before the delegated manager arrived, with the objective of preparing her to hold the position indeterminately when the incumbent retired. No concrete evidence was presented to me to demonstrate that the complainant performed the position's duties as part of a formal or informal succession planning program. She did not hold the position on an acting basis during that period.

[13] According to her, given her interest in the position, the complainant apparently completed the first of two phases of training for aspiring managers. According to her, before the delegated manager arrived, it was "[translation] obvious" that she would be appointed to the position once the position's incumbent retired.

[14] The delegated manager stated that when she assumed her duties, and after assuming them, no one told her that the complainant had performed the position's duties, to prepare her to occupy the position indeterminately when it became vacant. According to her, there was no indication that the complainant had already been identified as the incumbent's successor. The incumbent did not testify at the hearing.

[15] In the days after she assumed her duties, the delegated manager met with each unit member. Through those meetings, she learned that the incumbent was planning to retire in April or May 2020. She also learned that two others in the unit were eligible for retirement. During the individual meetings, the delegated manager also learned of the unit members' professional ambitions. One of the complainant's colleagues reportedly immediately expressed an interest in being appointed to the position once it was vacant, but he did not testify at the hearing. I will identify him by his initials, R.M.L. He and the complainant held the only FI-03 positions in the unit. According to the delegated manager, R.M.L. is a member of a visible minority.

[16] The delegated manager knew R.M.L. before she assumed her School position. They had worked for another federal public sector employer. They were acquaintances but had not worked together and were not friends. Although the complainant alleged that R.M.L. acted as a reference for the delegated manager when she applied for the position of the assistant to the School's chief financial officer, the delegated manager denied it, and the complainant did not present any concrete evidence to support the allegation.

[17] The delegated manager stated that fairly soon after the individual meetings, she decided to fill the position through an advertised process and to proceed with R.M.L.'s acting appointment for four months less a day. It corresponded more or less to the period until the incumbent would retire.

[18] I will describe the delegated manager's testimony on these two themes, namely, the choice of process and the decision to offer an acting appointment to R.M.L., before returning to the complainant's testimony on them.

[19] The delegated manager testified that she believed that an advertised process would be the most fair, transparent, and accessible staffing mechanism, based on three factors. Two of those factors were described earlier. The first was that the delegated manager's team was small and that in addition to the position in question, other positions could become vacant soon. Two employees in the unit were eligible to retire, which suggested the possibility of retirements and thus other vacancies to fill. The second factor included the professional ambitions of several members of her team. The delegated manager knew that R.M.L. was interested in the position and that other employees in the unit could benefit from the experience gained from participating in an appointment process. Some might even qualify for a pool.

[20] The final factor that the delegated manager identified can be described as an unofficial practice of mutual assistance between departments and agencies with a small number of positions in the FI group by which managers from different departments and agencies worked together through advertised processes to establish pools that could be used by some or many of them. According to the delegated manager and the executive director of staffing, there was a known need for qualified candidates for FI-04 positions in other departments. The decision was made to launch an advertised process, in collaboration with other departments. The School's president approved the choice of an advertised process.

[21] At the hearing, the delegated manager also described her decision to make an acting appointment to the position in question. She felt that it would be beneficial to offer an acting appointment to the only person who had expressed an interest in it at that time, R.M.L. Her objective was to allow knowledge transfer between the incumbent and the person to be appointed to the position on an acting basis. At that time, the

delegated manager was hopeful that the appointment process would be completed by the incumbent's retirement date or shortly after it.

[22] When the complainant was informed of the delegated manager's decisions to proceed with an advertised process and to appoint R.M.L. to the position on an acting basis, she expressed her disagreement with R.M.L.'s acting appointment, her interest in the position, and her belief that she would be appointed to the position through a non-advertised process as soon as it became vacant. Apparently, she also expressed her opinion that she should have been appointed to the position on an acting basis given that she had been performing its duties for almost a year.

[23] After the complainant expressed her disagreement with R.M.L.'s acting appointment, the delegated manager changed her plan to provide two acting appointments instead of one. According to the revised plan, the complainant would hold the position for two months, after which R.M.L. would hold the position on an acting basis for the same period. The delegated manager explained that the change in direction was made because she became aware of the complainant's interest in the position and wanted to give an equal opportunity to the two who had expressed an interest. At the complainant's request, she did her acting assignment first.

[24] The complainant held the acting position from January 20, 2020, to March 14, 2020. R.M.L.'s acting position began after that.

[25] In April 2020, the incumbent retired. The position became vacant. Also in April 2020, while R.M.L. was in the acting position, the advertised process was launched.

[26] On May 7, 2020, the delegated manager emailed the unit members to inform them that R.M.L.'s acting appointment would be extended until the advertised appointment process was completed. At the hearing, she explained that she wanted to extend the acting appointment because the process was taking longer than expected, the period in question coincided with the end of the fiscal year, which was a very busy time of year, and there was a need to ensure some stability within the unit in the first months of remote work due to the COVID-19 pandemic.

[27] During a conversation with the delegated manager, the complainant expressed her profound disagreement with the decision to extend R.M.L.'s acting appointment.

She also argued that in her opinion, the decision lacked transparency and fairness. According to her, during that conversation, the delegated manager allegedly made a comment that the complainant was frustrated, which she interpreted as indicating a prejudice that Black women are more easily frustrated.

[28] During their conversation, the delegated manager allegedly raised an issue with the complainant's performance when she had previously held the acting position. According to the complainant, it was the first time she was told of any problems with her performance.

[29] At the hearing, the complainant explained that the issue brought up against her was about how she performed a task. In her opinion, her professional opinion on the suggested approach to carry out the task was different from the one that the delegated manager suggested. The complainant wanted to debate the merits of the delegated manager's suggested approach who at some point became impatient and allegedly told the complainant that she no longer wanted to talk to her. At the hearing, the delegated manager acknowledged that she did say that. According to her, the comment was made at the end of a discussion of over an hour about their difference of opinion. The complainant did not contest or contradict the delegated manager's testimony that the comment was made during a very long conversation that focused on that single topic.

[30] Shortly after that, the complainant asserted her intention to make a complaint that the School had changed its staffing practice to avoid promoting a Black woman to a management position.

[31] A few days later, on May 11, 2020, the delegated manager informed the complainant that R.M.L.'s acting position would not be extended. Instead, an FI-03 from another School team would hold it until the appointment process was complete. That employee, a Black man, had been appointed to an FI-03 position a few months earlier. At the hearing, the delegated manager stated that she made that change in response to the complainant's expressed concerns. Specifically, she stated that she changed her mind about extending R.M.L.'s acting appointment, to avoid a perception that R.M.L. would be given an advantage in the appointment process were his acting appointment extended. She stated that had she offered the complainant a new acting appointment, it would have created a perception that the complainant was being given an advantage over R.M.L. in the process.

[32] The complainant interpreted that change as an attempt to offer an acting appointment to a Black man to conceal the discrimination that she had complained about a few days earlier.

[33] On the same day, the complainant wrote to the Treasury Board's president to express her deep concerns about the appointment process, specifically her belief that she was a victim of discrimination. Shortly after that, she was invited to a meeting with the director general of Human Resources, at the suggestion of the School's president. When she asked to be accompanied by a union representative, the director general first refused and then agreed after the complainant insisted that she had the right to be accompanied. The complainant testified that in her opinion, the initial denial of the accompaniment request was intended to intimidate her. The director general did not testify at the hearing.

[34] The deadline for applying for the position was May 19, 2020. The process was to staff the position within the unit and to create a pool that other departments could use. The complainant applied. Her application was selected during the screening stage.

[35] In June 2020, the complainant wrote an exam; its purpose was to assess candidates against five merit criteria related to knowledge and competencies.

[36] The selection committee was made up of four people, including the delegated manager and three managers from other departments, which conformed to the collaborative practice described earlier. All the selection committee members participated in marking the exams and the subsequent interviews. As I stated earlier, two of the three managers from other departments testified at the hearing, namely, Mr. Boisvert and Mr. Chin Quee.

[37] The delegated manager explained that the Human Resources section's management anonymized the exams before they were randomly shared between the selection committee members for marking. The executive director of staffing confirmed that the candidates' names had been replaced by numbers before the exams were distributed to the selection committee members. Mr. Boisvert and Mr. Chin Quee confirmed that the exams were anonymized. Since one selection committee member was not comfortable marking exams in French, those in French were shared randomly between the other three members, namely, the delegated manager, Mr. Boisvert, and Mr. Chin Quee. Once the exams were marked, all the selection committee members met

to share results and review the exams of those candidates who received a mark slightly below the pass mark.

[38] About two weeks after writing the exam, the complainant was informed that she had not passed it. She failed three merit criteria. Among other things, she requested an informal discussion, confirmation of the person's identity who marked her exam, and an independent marking of her exam.

[39] In an email to the complainant dated July 16, 2020, the delegated manager stated that she had randomly and unknowingly at the time marked the complainant's exam. At the hearing, the complainant argued that the delegated manager could have identified her exam when it was being marked. The exams were completed on a computer, and the digital files were sent to a selection committee member for marking. According to her, had the delegated manager saved the digital file of her exam, the manager — by a means that was not specified at the hearing — could have discovered that it was the complainant's exam, despite the steps taken to anonymize the exams. The delegated manager stated that she saved copies of all the exams that she marked but denied knowing those candidates' names. She stated more than once that she was not aware of any means by which she could have discovered the candidates' identities when marking the exams. She did not know that she had received the complainant's exam.

[40] In her testimony, the delegated manager stated that after the complainant requested an independent correction of her exam, Mr. Boisvert and Mr. Chin Quee reviewed her exam. Although they had access to the marking grid that the delegated manager used and her notes, they both stated that they reviewed the complainant's answers and reached their own conclusions as to whether they were satisfactory with respect to the assessed merit criteria. They both confirmed that the complainant did not meet certain merit criteria.

[41] At the complainant's request, the informal discussion did not take place with the delegated manager. Mr. Chin Quee took part in it. After the discussion, the complainant wrote to the delegated manager, to dispute the marking of her exam and the feedback that she received during the informal discussion. Unfortunately, she inadvertently sent her email to the wrong address. The delegated manager did not receive it.

[42] On August 19, 2020, a notice of appointment was published. According to the delegated manager, the appointee was the candidate who obtained the best results at all stages of the appointment process. She also met several asset qualifications. She was the only candidate with experience developing financial policies. That experience was a School priority at that time, which the complainant did not dispute.

[43] A few days later, the complainant made this complaint.

[44] I would add a few details about the retaliation allegations that the complainant described at the hearing to support the assertion that she was excluded from the process due to animosity between her and the delegated manager that according to her was based on prejudice and discrimination.

[45] According to the complainant, after failing the exam and expressing her disagreement with the different steps that the delegated manager took in the process, she was no longer invited to team meetings. She stated that she was deprived of performance appraisals. She also testified that she no longer received the information shared within the unit that was relevant to her work, which allegedly shut her out of the unit. She also testified that the delegated manager apparently refused her the required authorization to register for the second of two training phases for aspiring managers.

[46] At the hearing, the delegated manager stated that she did not recall refusing a training request. No related documentary evidence was adduced in evidence. She explained the complainant's absence from meetings because they were management meetings that the complainant had attended while she held the acting position. Since she no longer held an acting management position, she was no longer invited to management meetings. After being appointed to the position, the appointee was invited to meetings and was tasked with sharing information with the complainant and the other team members that was relevant to their roles. The delegated manager stated that she was not informed that information provided at meetings was not then shared with the complainant. She also testified that it was not her job to conduct the complainant's performance appraisals. She had supervised the complainant only during the two months in which she held the acting position. The appointee was responsible for conducting the complainant's performance appraisal. According to the

delegated manager, if the complainant was deprived of performance appraisals, it was not due to any intervention on her part.

[47] The complainant left the School in January 2021. As of the hearing, she held an FI-03 position in another department.

A. Evidence on a practice of favouring promotions via non-advertised processes

[48] At the hearing, the complainant explained that in her opinion, there was a long-standing practice at the School that favoured promoting School employees through non-advertised appointments. She testified that specifically, under that practice, an employee who held a position one level below one to be filled was promoted through a non-advertised process.

[49] The complainant stated that the School's president issued a directive stating that School employees should be given preference for promotions through non-advertised processes. Minutes from a November 2019 National Labour-Management Consultation Committee meeting that were admitted into evidence indicate that the School's president reportedly requested "[translation] ... that [the School's] employees receive first consideration before hiring outside employees". The complainant expected that that practice would be followed in the process to fill the position in question and that she would be appointed to it through a non-advertised process.

[50] The complainant provided some non-advertised processes that she believed were examples of this practice, namely, promotions through non-advertised processes.

[51] According to the complainant, after the appointment process at issue, the School resumed the practice described earlier, namely, promoting School employees through non-advertised processes.

[52] The delegated manager and the executive director of staffing both testified that they had no knowledge of a School practice by which promotions were to be made primarily or exclusively through non-advertised processes. They also testified that there was no practice by which someone who held a position one level below one to be filled was automatically promoted through a non-advertised process. The executive director of staffing stated that the minutes of the National Labour-Management Consultation Committee meeting described earlier do not confirm the existence of such a practice. The document must be read as a whole. According to her, the minutes

also state that a bargaining agent expressed concerns about the School's use of non-advertised appointment processes and that it encouraged the School to favour advertised processes and creating qualified-candidate pools.

[53] The executive director of staffing testified that at the time relevant to this complaint, most of the School's staffing actions were appointments after advertised processes or transfers of individuals occupying positions at the same group and level at other departments or agencies. According to her, most non-advertised appointments at that time were not, as the complainant argued, promotions of an employee in a position one level below one to be filled. She explained that the examples that the complainant presented did not in fact constitute promotions of School employees through non-advertised processes. According to her, most of the notices of non-advertised appointments posted at the time were instead appointments of individuals who were in a pool, namely, a pool of the School or another department, appointments under a student-bridging program, or appointments of individuals participating in an FI development program.

B. Evidence on the representativeness issue

[54] The complainant stated that had she been promoted in accordance with the practice described earlier, she would have been the first Black woman to become a manager at the School.

[55] The executive director of staffing stated that at the relevant time, the composition of the School's workforce reflected the representativeness of women and visible minorities in Canadian society, at all groups and levels, including executives. No representativeness data or documentary evidence was presented at the hearing. According to the executive director of staffing, data on the number or percentage of School managers who self-identified as Black women collected through employment equity surveys or questionnaires is not available because the number of managers at the School is too small to allow disclosing such data while maintaining anonymity.

III. Summary of the arguments

[56] I considered all the arguments that the parties presented to me. However, I will deal only with those that in my opinion are most relevant to the issues in dispute. I will do the same with the parties' cited case law. I will deal only with those decisions that are most relevant to the issues in dispute.

[57] The complainant argued that the respondent abused its authority in its choice of appointment process and its assessment of her application. Specifically, she alleges that the choice of process and the assessment of merit were tainted by discrimination based on race and sex. She submits that the respondent did not follow a well-established staffing practice at the School, to avoid appointing a Black woman to a management position. Allegedly, it changed its staffing practice for the process in question and according to her allegedly resumed its practice of filling vacant positions through promotionally appointing School employees after that process. The complainant submits that had she been promoted in the usual way, her appointment would have been the first time a Black woman had been promoted that way to a manager position. According to her, the choice of an advertised process was a mechanism that enabled the respondent to set aside her application.

[58] The complainant argued that certain incidents and steps that the delegated manager took demonstrated that the complainant was excluded from the appointment process due to discrimination. The examples that she provided include the fact that R.M.L. was offered an acting appointment to the position; that after her complaint about R.M.L.'s acting appointment being extended, a third person was offered an acting appointment to the position; and that the delegated manager told her that she was frustrated and that the manager no longer wanted to talk to her. In addition to those examples is the complainant's allegation that the delegated manager sought to punish her by excluding her from certain meetings, denying her the authorization required to participate in training, and failing to conduct performance appraisals. The complainant also alleges that the respondent sought to intimidate her by denying her the right to be accompanied by a union representative at a meeting to discuss her concerns about the appointment process at issue.

[59] The complainant argued that a conflict arose between her and the delegated manager that was based on prejudice and discrimination. She submits that the delegated manager should have recused herself from marking the exam and that that manager allegedly used the written exam as a means to exclude her from the appointment process because she is a Black woman. According to her, her exam was not truly anonymized. She also argues that she was not entitled to an independent correction of her exam. The selection committee members who reviewed her exam would have been influenced by the comments that the delegated manager wrote on it and her assessment of it.

[60] According to the complainant, the respondent appointed a Black woman to conceal the racial discrimination against the complainant.

[61] The complainant cited the following decisions to support her arguments: *Abenakis of Odanak Council v. O'Bomsawin*, 2018 FC 112; *Canada (Attorney General) v. Canadian Human Rights Commission*, 2003 FC 1373; and *Shakes v. Rex Pak Ltd.*, 1981 CanLII 4315 (ON HRT).

[62] The respondent denied abusing the authority delegated to it under the *PSEA*. Its position can be summarized briefly as follows. The complainant's allegations are based on inferences, not on facts and evidence. The dissatisfaction of a complainant who wanted a position and who believed that she was being considered for the position but was eliminated from the process because she failed the exam does not constitute evidence of abuse of authority or, specifically, discrimination.

[63] The respondent argued that there was no practice of filling vacancies through the non-advertised promotional appointments of School employees. It was up to each manager to choose a process based on the relevant needs and circumstances at the time. The delegated manager chose to proceed with an advertised process due to operational needs and the fact that more than one unit employee had expressed an interest in the position.

[64] The respondent submits that the delegated manager was attentive to the complainant's concerns. She offered the complainant an acting appointment when the complainant argued that it was unfair for R.M.L. to hold the position throughout the appointment process. She also abandoned her plan to extend R.M.L.'s acting appointment as a reaction to the complainant's complaint that R.M.L. would have had an advantage in the process were his acting appointment extended.

[65] With respect to the assessment of the complainant's application, the respondent argued that she did not obtain a passing mark on three merit criteria on the written exam. Although the delegated manager marked her exam, the exams had been anonymized. In addition, two other selection committee members reviewed her exam and confirmed that her responses to the three merit criteria were insufficient.

[66] The appointee was the candidate who obtained the best results at all stages of the appointment process. The fact that she is also a Black woman is merely a happy coincidence, not an indication of an attempt to conceal discrimination.

[67] The respondent cited over a dozen decisions to support its arguments. In its arguments, it dealt at length with the following decisions: *Kane v. Canada (Attorney General)*, 2009 FC 740; *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8; *Robbins v. Deputy Head of Service Canada*, 2006 PSST 17; *Thompson v. Deputy Head (Department of Employment and Social Development)*, 2022 FPSLREB 90; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 (“Bombardier”); *Abi-Mansour v. President of the Public Service Commission*, 2016 PSLREB 53; and *Davidson v. Deputy Minister of Health*, 2020 FPSLREB 56 (judicial review application dismissed in *Davidson v. Canada (Attorney General)*, 2021 FCA 226 (“Davidson FCA”)).

IV. Analysis

[68] The complainant argued that the choice of an advertised process and the assessment of her application were tainted with discrimination.

[69] The complainant had to establish on a balance of probabilities that the respondent abused its authority by choosing an advertised process and in its assessment of her application. A finding of abuse of authority requires evidence of an act that is inconsistent with Parliament’s intention when delegating the discretionary power set out in s. 33 of the *PSEA* to the respondent (see *Davidson FCA*). Discrimination, if established in evidence, constitutes such an act.

[70] Section 80 of the *PSEA* gives the Board the authority to interpret and apply the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). Specifically, the Board has the authority to determine whether the *CHRA* has been violated in its analysis of whether a complaint is founded. Section 7 of the *CHRA* provides that it is a discriminatory practice, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 3 of the *CHRA* lists the prohibited grounds of discrimination, including the grounds cited by the complainant, namely, race and sex. A violation of the *CHRA* is, in itself, an abuse of authority within the meaning of the *PSEA*.

[71] For the Board to conclude that the appointment process was tainted by discrimination, the complainant first had to establish *prima facie* evidence of discrimination. She relied on *Shakes* in her arguments. However, *Shakes* is not the decision on which the Board must base its analysis of the discrimination allegations that she raised. I must conduct my analysis in accordance with the criteria that the Supreme Court of Canada set out in *Moore v. British Columbia (Education)*, 2012 SCC 61. As the Federal Court of Appeal stated in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2005 FCA 154 at para. 25, *Shakes* is an example of applying the basic rules for establishing *prima facie* evidence of discrimination that were set out in *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, and reiterated in *Moore*, at para. 33.

[72] In *Moore*, the Supreme Court of Canada set out a three-step test for establishing discrimination at first glance.

[73] First, the complainant had to demonstrate that she has a characteristic protected from discrimination, which she did, as stated previously. She has the protected characteristics of race and sex.

[74] The complainant then had to demonstrate that she experienced an adverse impact and that the protected characteristics were a factor in the adverse impact. Those are the second and third steps of the *Moore* test. In other words, the complainant had to demonstrate that she suffered an adverse impact due to the choice of process or the assessment of her application and then demonstrate that one of the protected characteristics — in this case, race and sex — or both was or were a factor in the choice that led to that adverse impact. The complainant had to demonstrate it on a balance of probabilities.

[75] Once *prima facie* discrimination has been established, the respondent may either present evidence to refute the *prima facie* discrimination allegation or justify its conduct by demonstrating an explanation justifying the discrimination, or both (see *Bombardier*, at para. 64).

[76] There is no question that racism, including anti-Black racism, is present in Canadian society. Courts have recognized it for decades (see, for example, *R. v. Parks* (1993), 15 OR (3d) 324 at 342; *R. v. S. (R.D.)*, [1997] 3 SCR 484 at paras. 46 and 47; *R. v. Spence*, 2005 SCC 71 at para. 32; and *R. v. Morris*, 2021 ONCA 680 at para. 1). It is also

well established that racism and discrimination are often displayed through subtle and unconscious prejudices. It is often not through overt actions or words (see *Turner v. Canada Border Services Agency*, 2020 CHRT 1 at paras. 106 and 107). For that reason, it can be difficult to establish discrimination by means of direct evidence.

Circumstantial evidence may be sufficient to found a conclusion that discrimination took place. The Board must consider all the circumstances to determine whether there is a “subtle scent of discrimination” (see *Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)).

[77] First, I will address the complainant’s discrimination allegation with respect to the choice of process. I will then address her discrimination allegation with respect to her application’s assessment.

A. Choice of process

[78] Section 33 of the *PSEA* gives a delegated deputy head — in this case, the respondent — the discretion to choose an advertised or a non-advertised appointment process. However, this authority is not absolute. The respondent’s choice may be the subject of a complaint under s. 77(1)(b) of the *PSEA*.

[79] The complainant argued that the respondent chose an advertised process to avoid appointing her to the position and to be able to exclude her from the process because she is a Black woman. According to *Moore*, the complainant had to show that she experienced an adverse impact due to the choice of an advertised process and that her protected characteristics were a factor in the adverse impact.

[80] According to the complainant, before the appointment process at issue, the respondent preferred to staff positions through non-advertised appointments that constituted promotions. In her testimony, she stated that there was a long-standing practice by which School employees who held a position one level below one to be filled were promoted through non-advertised processes. Had the practice been maintained in the context of the appointment process that is the subject of this complaint, she would have been appointed to the position, because she was the only employee in the unit who expressed an interest in the position and was the most qualified employee at the FI-03 group and level in the unit. According to her, she would have been the first Black woman appointed to a management position through a non-advertised process.

[81] The complainant also submits that there was systemic discrimination at the School at the time. According to her, the respondent's choice to proceed with an advertised process was an effort to hinder her career progression.

[82] There is a significant deficiency in the complainant's discrimination allegation. The choice of an advertised process did not prevent her from applying. She applied, and her application was retained at the screening stage. She did not experience an adverse impact due to the choice of an advertised process and because she was able to apply. She did not satisfy the second step of the *Moore* test.

[83] Even were I wrong on this point, the circumstantial evidence that the complainant presented is insufficient to find that the respondent would have chosen an advertised process to avoid appointing a Black woman to the position.

[84] The complainant had the burden of proof. The vast majority of her evidence involved her sincere belief that there was a practice by which an employee who occupied a position one level below one to be filled would be promoted through a non-advertised process, her belief that she would be promoted that way, and her impression that the respondent chose an advertised process to avoid appointing her to a management position because she is a Black woman.

[85] The complainant did not present any evidence to support her allegation that no Black woman was ever appointed to a management position. She did not dispute the respondent's evidence that the composition of the School's workforce reflected the representativeness of women and visible minorities in Canadian society, at all groups and levels, including management.

[86] The evidence that the complainant presented also did not demonstrate the existence of a practice by which an employee who held a position one level below one to be filled was promoted through a non-advertised process and that she could have expected to be promoted in that way.

[87] What the complainant described as a "[translation] directive" from the School's president that School employees should be given preference for promotions was merely the minutes from a meeting that indicate that the president apparently requested that School employees be considered first before hiring employees from elsewhere. The president's request seemed to be in the context of a discussion on

advertised appointment processes. The minutes indicate that a bargaining agent encouraged the School to give greater preference to advertised processes and to creating qualified-candidate pools. Nothing indicates that the president's comments, as described in the minutes, constituted a request or an expectation that promotions through non-advertised processes were or should be the norm.

[88] Although many notifications of successful applications from the School in the years before and after the process at issue, namely, notifications indicating a “[translation] non-advertised process”, were admitted into evidence, the complainant did not demonstrate that they were promotions of employees who occupied a position one level below one that was filled. The respondent's evidence revealed that when certain staffing actions, including transfers, appointments of people who qualified for pools through advertised processes, people who participated in an FI development program, and people appointed under a student-bridging program were advertised on the jobs.gc.ca site, they were identified with the help of the words “[translation] non-advertised process”, to distinguish them from advertised processes. According to the executive director of staffing, those staffing actions were not promotional appointments through non-advertised processes. The complainant did not present any evidence to contradict it.

[89] The only evidence that the complainant presented to support her allegation that the respondent prepared her for the indeterminate position was her testimony about her subjective belief. Although she stated that she performed the duties of the position, under the incumbent's supervision, for approximately one year, to prepare her to hold the position indeterminately, she did not call the incumbent as a witness to corroborate her testimony. Also, her belief that she was the only employee in the unit interested in the position is not determinative in itself, and the delegated manager testified that R.M.L. expressed an interest in it shortly after that manager took office.

[90] I have concluded that the complainant did not meet her burden of proof of demonstrating abuse of authority or discrimination in the choice of appointment process. As for the respondent, it provided complete, concrete, and credible evidence to explain its choice of appointment process. The delegated manager testified as to why she decided to proceed with an advertised process. The complainant did not contest or contradict the delegated manager's testimony that the staffing needs extended beyond the position and made a non-advertised process unattractive. Other

employees were eligible to retire, which raised concerns that other positions could soon become vacant. And only an advertised process would have enabled the School to create a pool to staff those positions should they have become vacant and to collaborate with other departments with FI-04 position staffing needs.

[91] Given all the evidence, I conclude that nothing indicates that the choice of an advertised process was tainted by discrimination. Nothing indicates that the respondent chose an advertised process so that it could then eliminate the complainant's application. Rather, the evidence presented to me at the hearing indicated that it was the respondent's exercise of discretion recognized in s. 33 of the *PSEA*.

B. The assessment of merit

[92] Before addressing the complainant's allegation that her application's assessment was tainted by discrimination, I will say a few words about the assessment of merit with respect to the appointee's application.

[93] The complainant submits that the delegated manager appointed the appointee to conceal the discrimination against her. I note that no evidence was presented to me to support this allegation, which the delegated manager denied. In her testimony, the delegated manager stated that the appointee was selected because that person obtained the best results in the appointment process, which the complainant did not dispute.

[94] The complainant argued that her application was eliminated at the written exam stage for a discriminatory reason. At the hearing, she also stated that she felt that she and the delegated manager had animosity because she expressed her opinion that certain decisions that that delegated manager had made were tainted by discrimination.

[95] As stated earlier, to satisfy the *Moore* test, the complainant had to present evidence that she suffered an adverse impact. I accept that her application was eliminated from the process after the exam and that it might constitute an adverse impact. What about the final step the *Moore* test, in which she had to demonstrate that her protected characteristics were a factor in her elimination from the appointment process?

[96] The complainant's main argument was on the marking of her written exam. She argued that the delegated manager sought to exclude her from the process by giving her a failing mark on it. Once again, the evidence that she presented was her testimony about her belief that the delegated manager knew that she was marking the complainant's written exam, that she failed the complainant for discriminatory reasons, and that she influenced Mr. Boisvert and Mr. Chin Quee when they recorrected the complainant's exam. Apart from her belief, the complainant did not present any evidence to support that allegation. The respondent provided complete, concrete, and credible evidence to counter it.

[97] The selection committee was made up of four people. Three of them testified at the hearing. Their testimonies were consistent with each other. They all stated that the exams were anonymized and randomly distributed. They all stated that they did not know that it would have been possible to identify the person who wrote the exam by saving the digital document. They were also all of the view that the complainant failed the exam. The only selection committee member who did not testify was unable to correct an exam in French.

[98] At the complainant's request, her exam was marked a second and a third time. The two members of the selection committee who marked it those times worked in other departments, did not know the complainant, and did not know the delegated manager very well. They stated that they reviewed her exam and that they drew their own conclusions about her answers. It would have been preferable had those responsible for the subsequent marking not had access to the delegated manager's correction. However, I cannot conclude that the fact that the delegated manager's assessment was forwarded to those selection committee members, namely, two experienced managers, flawed the assessment of the complainant's application.

[99] The evidence presented at the hearing sets out that the complainant was eliminated from the process because she failed the written exam and not — in whole or in part — because of one or any of her protected characteristics. Thus, she did not satisfy the last step of the *Moore* test.

[100] Given the difficulty that complainants may have proving discrimination, I find it important and necessary that I consider the complainant's allegations that several separate incidents and events, taken together, make it more likely than not that her

application was eliminated from the process due to discrimination. I will briefly address those incidents and events.

[101] In her testimony, the complainant stated that she had disagreements with the delegated manager as to decisions that that manager made in the appointment process at issue, particularly with respect to the choice of process and acting appointments to the position. The complainant sensed animosity toward her. The delegated manager denied it. She testified that she had no bad feelings toward the complainant. Those perceptions on both sides, of themselves, are not determinative. More is required to found a conclusion of abuse of authority.

[102] At that time, as at the hearing, the complainant argued that the delegated manager's initial decision to offer an acting appointment of four months less a day to R.M.L. — and not to her — was discriminatory. She allegedly expressed that opinion, as well as her opinion that the choice of process was tainted with discrimination, in a meeting with the delegated manager at which that manager allegedly told the complainant that she seemed frustrated, which she interpreted as indicating a prejudice that Black women are more easily frustrated.

[103] I recognize that there are prejudices against Black women. No evidence or doctrine was presented to me at the hearing to suggest that there is a prejudice that Black women are more easily frustrated that is of such public notoriety that I could take judicial notice of it. However, for the purposes of this decision, I accept without deciding that prejudice against Black women may include prejudice that they are more easily frustrated.

[104] The complainant's testimony demonstrated that she was indeed frustrated during the conversation in which the delegated manager allegedly made the comment in question. That manager acknowledged making the comment but denied that it reflected any prejudice on her part. A third party was present during their verbal exchange and could likely have enlightened me further on this matter. However, the complainant did not call that person to collaborate her testimony that the comment was tainted by prejudice and that it was not merely the delegated manager's simple observation of the complainant's emotional state.

[105] In her testimony, the complainant explained her belief that R.M.L. acted as a reference for the delegated manager, who tried to reward him by offering him an

acting appointment. That belief is based on hearsay. The complainant did not present any concrete evidence to support this allegation, which the delegated manager denied. The complainant did not call R.M.L. as a witness. In addition, the delegated manager explained that initially, she offered the acting appointment to R.M.L. because he was the only one who expressed an interest in the position. When the complainant expressed interest in the position, the delegated manager reacted and changed her plans to offer acting appointments of equal duration to R.M.L. and her.

[106] While the appointment process was underway, the complainant also expressed her disagreement with the delegated manager's decision to extend R.M.L.'s acting appointment. At the hearing, she stated her belief that the delegated manager wanted to extend R.M.L.'s acting appointment, to deny her increased experience and to give R.M.L. an advantage in the appointment process. She also argued that the delegated manager's decision to abandon her plan to extend R.M.L.'s acting appointment and offer an acting appointment to a third person after the complainant made a discrimination allegation was also tainted by discrimination. No evidence was presented to me to support those allegations, which the delegated manager denied.

[107] The delegated manager testified about the operational needs that initially led her to want to extend R.M.L.'s acting appointment. At the hearing, she explained that once the complainant objected to her way of doing things, she reacted and changed her plans, to offer an acting appointment to another person, who was an FI-03 from another team. The complainant stated that the delegated manager offered the acting appointment to the third person because he is Black and because doing so could conceal the discrimination against the complainant. No evidence was presented to me to support this allegation, which the delegated manager denied. The manager explained that she offered the third person an acting appointment to avoid creating a perception that she favoured the complainant or R.M.L. by offering either of them a longer acting appointment. I have no reason to doubt the truth of the delegated manager's testimony in this respect.

[108] At that time, as at the hearing, the complainant also stated that she had a disagreement with the delegated manager about a task that she had to perform in a discussion that ended when the delegated manager allegedly told her that she no longer wanted to talk to her.

[109] I recognize that it can be surprising and even shocking for an employee to hear her manager tell her that she no longer wants to talk to her. However, the comment must be considered in context, specifically in the context of a very lengthy conversation about a difference of opinion about how the complainant should perform a task, a subject for which the delegated manager had final decision-making authority. Without more, I cannot conclude that this comment can support a finding of discrimination that tainted the assessment of the complainant's application.

[110] It was evident from the complainant's testimony that she believed that she was being prepared for the position. She expected to be promoted to it through a non-advertised appointment. When she learned that the respondent would conduct an advertised process, she had — and still has — the distinct impression that the School's management did not appreciate her and that her work was not valued. Her failure on the written exam and thus her exclusion from the appointment process affected her health and well-being. The emotions that she experienced when she recounted her evidence were palpable.

[111] In that respect, the complainant's emotions were particularly strong when she described what she characterized as retaliation after she expressed her opinion that she had been discriminated against, including being excluded from meetings, a criticism of her performance, and a refusal to approve training for aspiring managers.

[112] Under s. 80 of the *PSEA*, the Board may interpret and apply the *CHRA* when it analyzes an abuse-of-authority complaint. As stated in *Abi-Mansour v. Deputy Minister of Aboriginal Affairs and Northern Development Canada*, 2013 PSST 6 at para. 151, "... evidence of retaliation could be relevant to a complaint of abuse of authority under the *PSEA*." Unfortunately, the evidence that the complainant adduced at the hearing was insufficient to allow me to conclude that retaliation occurred because she expressed her intention to make a complaint alleging discrimination.

[113] The complainant did not demonstrate that on a balance of probabilities, her application's assessment was tainted by discrimination or that the respondent otherwise abused its authority in the assessment of merit.

C. Conclusion

[114] As the Supreme Court of Canada stated in *Bombardier*, the use of the expression “*prima facie* discrimination” does not constitute, and should not be taken as, a relaxation of the complainant’s obligation to satisfy the Board that on the standard of a balance of probabilities, she was discriminated against in this appointment process (see *Bombardier*, at para. 65). Proof of *prima facie* discrimination requires more than the complainant’s belief without something upon which it could be based (see *Abi-Mansour v. Deputy Minister of Justice*, 2021 FPSLREB 16 at para. 101). Unfortunately, the evidence that the complainant presented to support her allegations was primarily her testimony about her beliefs and impressions.

[115] Despite my sympathy for the complainant, who felt excluded from the appointment process in question because she is a Black woman, the evidence that was presented to me at the hearing was insufficient to support a conclusion that the choice of process or the assessment of her application was tainted by abuse of authority, specifically discrimination.

[116] Despite the complainant’s clear impression that she was discriminated against in the appointment process in question, the evidence to support that impression was clearly insufficient. In the evidence that the complainant presented to me at the hearing, I did not detect any sign — however subtle — of discrimination in the appointment process. However, I must point out that this does not mean that she was not discriminated against in other workplace contexts, which was not the subject of this complaint and that I will not address.

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

(The Order appears on the next page)

V. Order

[118] The complaint is dismissed.

August 12, 2024.

FPSLREB Translation

**Amélie Lavictoire,
a panel of the Federal Public Sector
Labour Relations and Employment Board**