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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

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BETWEEN

**STÉPHANIE HARNOIS**

Complainant

and

**DEPUTY HEAD**

**(Deputy Minister of Transport, Infrastructure and Communities)**

Respondent

and

**OTHER PARTIES**

Indexed as

*Harnois v. Deputy Head (Deputy Minister of Transport, Infrastructure and Communities)*

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

**Before:** Guy Giguère, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Francis Chaput, Canada Employment and Immigration Union

**For the Respondent :** Simon Ferrand, counsel

**For the Public Service Commission:** Louise Bard, senior analyst

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Heard by videoconference,  
October 23 and 24 and November 2, 2023.



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**REASONS FOR DECISION****FPSLREB TRANSLATION**

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**I. Introduction**

[1] On January 18, 2017, Stéphanie Harnois (“the complainant”) made a complaint under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) about two appointments involving the advertised appointment process numbered 16-MOT-IA-HRS-85093 (“the 2016 process”).

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board to the Federal Public Sector Labour Relations and Employment Board (“the Board”).

[3] The complainant alleges that the Deputy Minister of Transport, Infrastructure and Communities (“the respondent”) abused their authority when her application was assessed and demonstrated bias by using references to assess the “[translation] Teamwork” qualification. In addition, she argues that her ability to work with co-workers had already been assessed by the “[translation] Effective Interpersonal Relationships” qualification.

[4] In response to the allegations, the respondent argues that the information that the selection board had on hand allowed it to assess the complainant’s qualifications fairly and impartially. The information obtained through references did not set out that she met the “Teamwork” qualification. In addition, the “Effective Interpersonal Relationships” qualification assessed only the ability to work with the public.

[5] To address the complaint, first, I must determine whether the selection board abused its authority when it assessed the complainant’s references. Then, I must determine whether the “Effective Interpersonal Relationships” qualification assessed the ability to work with the public or with co-workers. Finally, I must determine whether the selection board demonstrated bias when it assessed the reference responses for the “Teamwork” qualification.

[6] For the following reasons, I find that the selection board abused its authority when it assessed the complainant’s references. In addition, I find that the ability to work with co-workers was assessed by the “Effective Interpersonal Relationships”

qualification and that the selection board demonstrated bias when it assessed the referees' responses for the "Teamwork" qualification.

## **II. Background**

[7] In 2014, the complainant applied to an external appointment process for an information analyst, operational support, position at the PM-04 group and level ("the analyst position") at Transport Canada. She went through every stage of the process. On May 1, 2015, she qualified for the pool numbered 15-MOT-EA-HRS-82680 ("the 2015 process").

[8] In an August 7, 2015, email, Émilie Bérubé, a senior operations officer, offered the analyst position to the complainant, who accepted it the next day. On August 11, 2015, Ms. Bérubé informed her that the employment start date was September 15, 2015, and that the offer letter would be signed at that time. After that, the complainant began searching for an apartment in Ottawa.

[9] On August 12, 2015, the complainant advised her supervisor, Amine Janbayne, of her intention to leave her job at Service Canada. She then made efforts to find an apartment in Ottawa and contacted Brookfield GRS, which is responsible for relocating federal employees.

[10] On August 26, 2015, the complainant notified Ms. Bérubé that she was going to Ottawa on the weekend to sign a residential lease starting on August 30, 2015. A Brookfield GRS advisor emailed her to open her Ottawa relocation file.

[11] The next day, on August 27, 2015, Pierre Mondor, the manager, operations, emergency preparedness, called the complainant to tell her that the analyst position offer was being withdrawn due to budgetary reasons. He told her that her name remained in the pool and that he would contact her about the position when the budget situation improved.

[12] After that, Mr. Mondor left his job, and in fall 2015, Laurent Bertrand, the senior analyst, operations, emergency preparedness, replaced him on an acting basis. Mr. Bertrand had administrative experience in staffing processes.

### **III. The 2016 process**

[13] In January 2016, the decision was made to launch a new process for the analyst position. This was the first process that Mr. Bertrand ran as an acting manager. The rating guide and the 2015 statement of merit criteria had to be amended because it became an advertised internal process that was open only to federal employees in the National Capital Region (the 2016 process).

[14] Mr. Bertrand also added two qualifications to the statement of merit criteria, which were teamwork and knowledge of the Public Safety emergency management continuum (“the emergency continuum”). The statement of merit criteria and the rating guide were amended and on February 3, 2016, were emailed to Shelley Palmer, a human resources advisor.

[15] On April 21, 2016, the 2016 process was announced. The complainant applied to it. On May 12, 2016, Victoria McGuire, a human resources assistant, notified her that she was not in the area of selection, namely, the National Capital Region. The complainant clarified that she was in the area of selection, since she held a position on an acting basis at the AS-04 group and level at Employment and Social Development Canada in Ottawa. However, she performed her duties remotely.

[16] On June 16, 2016, the complainant received an invitation for the examination. She replied, stating that she had already qualified in the 2015 process. Annie Grenier, a specialist advisor in human resources, then informed the complainant that she would not have to show up for the examination. Ms. Grenier told her that she would compare the process’s rating guides to determine whether the results of the 2015 process could be used for the 2016 process. On July 15, 2016, Ms. McGuire notified the complainant that the selection board had determined that she had qualified for the 2016 process and that her name was in the pool.

[17] On September 23, 2016, Nancy Lindor, a human resources advisor, notified the complainant that an error had occurred. Two new qualifications for the 2016 process had not been assessed: teamwork and the emergency continuum. Ms. Lindor stated that those qualifications were assessed through a written examination.

[18] On October 12, 2016, the complainant wrote to Michael Keenan, Transport Canada’s deputy minister (“the deputy minister”), to complain that Human Resources

wanted to close the pool for the 2015 process after she was offered the analyst position in August 2015. Furthermore, two additional qualifications had to be assessed for the 2016 process. According to her, the real reason for the additional qualifications was to create an obstacle to her appointment to the analyst position.

[19] On October 26, 2016, the complainant completed the written examination. She received a mark of 7 out of 10 for the “Teamwork” qualification.

[20] On November 1, 2016, Julie Spallin, the executive director, emergency preparations, replied to the complainant to follow up on her October 12, 2016, email to the deputy minister. She stated that due to budget constraints, Transport Canada was unable to finalize a formal offer for the analyst position in 2015. However, since she was an active participant in the 2016 process, Human Resources would contact her shortly.

#### **A. The assessment of references**

[21] On November 2, 2016, Ms. Lindor informed the complainant that as part of the 2016 process, she had to provide three references who were current and former supervisors. The complainant told her that she worked remotely and that she rarely saw her current supervisor. She provided Ms. Lindor with her previous supervisors (“the referees”) as references for the following positions: Amine Janbayne, Service Canada, for a client service officer position for a period of six months; Jocelyne Dupuis, Transport Canada, for an administrative assistant position for a period of four months; and Karine Lebel, Health Canada, for a laboratory receptionist position for a period of eight months. In late November 2016, Mr. Bertrand called the complainant’s referees, to assess the “Teamwork” qualification. First, he read them this teamwork definition:

- fosters innovation and creativity;
- creates team spirit;
- establishes and maintains good working relationships based on trust;
- promotes collaboration and interaction with others;
- shares information;
- considers others’ needs, feelings, and opinions;

- prioritizes the team's interests and cohesion;
- listens to others' points of view and considers their opinions; and
- participates in group decision making.

[22] Mr. Bertrand then read them the following preamble: "[Translation] It is often necessary to work in a team to complete a task. Can you tell us about the candidate's most recent experience working in a group?" He then asked these four questions:

- What was the task to be completed?
- Who was part of the work group?
- What difficulties, if any, arose in the group?
- What role did the candidate play in overcoming the difficulties?

[23] Afterward, Mr. Bertrand retyped his handwritten notes and sent the answers to the referees, for confirmation.

[24] Ms. Janbayne first replied that the complainant had not worked in a team since she worked with the public as a client service officer. But she added the following negative details. When checking files, the complainant encountered some difficulties interacting with her co-workers. She demonstrated that she was very assured of her work, but she did not always listen to her co-workers' points of view, unless she had concrete examples.

[25] Ms. Lebel stated that the complainant worked at reception, which did not involve much teamwork. But she added the following positive details. The complainant asked questions to properly understand needs and considered the answers. Everyone knew that they could trust her and was comfortable with her. She was willing to help when co-workers were absent. She took criticism well and did not hesitate to propose solutions. She took the initiative to learn more about the department.

[26] The rating scale was divided into 5 points, and each level had a maximum mark. It was developed to assess the responses of the candidates and referees: "Excellent" - 5 points, "Very Good" - 4 points, "Good" - 3 points, "Poor" - 2 points, and "Unsatisfactory" - 1 point. Excellent was assigned for exceptional qualifications. Very Good was assigned for above-average qualifications. Good was assigned when the qualifications met the minimum required to provide adequate performance. Low was

assigned when the qualifications were inadequate for certain items, such that the assessed person might not provide adequate performance, and Unsatisfactory was assigned for qualifications that were insufficient for effective performance.

[27] Mr. Bertrand assessed Ms. Janbayne's reference as neutral-negative. He marked her at 1.5, or Low, since he felt that her responses did not demonstrate the "Teamwork" qualification. Moreover, he also assessed Ms. Lebel's reference as neutral. He marked her also at 1.5, or Low, since he felt that she did not demonstrate the "Teamwork" qualification.

[28] Ms. Dupuis was slow to return Mr. Bertrand's call. Since two out of three references was enough to sign the rating guide, Mr. Bertrand decided to complete the complainant's assessment. On December 1, 2016, both selection board members, Mr. Bertrand and Ms. Spallin, had a meeting. They reached a consensus on the marking decision.

[29] The pass mark was 6 points, which demonstrated experience and the "Teamwork" qualification. The selection board assigned a mark of 3 out of 10, or Poor, by adding the points assigned to the complainant's two referees' responses. The selection board stated in the rating guide that the referees' responses were insufficient and that they did not demonstrate teamwork. It signed the rating guide.

[30] On December 9, 2016, Ms. Dupuis returned Mr. Bertrand's call. He took note of her answers to the questions, although the rating guide had already been signed. He was open to amending the result if Ms. Dupuis demonstrated that the complainant fulfilled the qualification.

[31] Ms. Dupuis replied by providing an example of a team task and by identifying the difficulties encountered and the complainant's role in solving the problem. She stated that the complainant had to prepare a table with a colleague for a presentation. Although they both had strong characters, the complainant found a way that they could work well together. Thanks to her efforts, the presentation was a success.

[32] However, Mr. Bertrand decided not to consider Ms. Dupuis's reference, since he considered that it did not demonstrate that the complainant fulfilled the "Teamwork" qualification. He found that Ms. Dupuis' response deserved a mark of no more than 1.5, or Poor, which was the mark assigned to the other two references.



**B. The complainant's elimination**

[33] On December 16, 2016, an email informed the complainant that she had failed the "Teamwork" qualification. On December 21, 2016, Ms. Lindor notified her that that qualification had also been assessed using questions for the referees and that she did not receive a passing mark. Ms. Lindor told her that she could contact Ms. Spallin if she wanted to discuss it.

[34] On December 21, 2016, the complainant wrote to Ms. Spallin to ask her why she did not receive a passing mark. On December 23, Ms. Spallin replied that the "Teamwork" qualification had been assessed by a test question and by the references. She provided her with the teamwork definition used in the rating guide. On December 28, 2016, the complainant wrote to Ms. Spallin for more details on her mark and on the pass mark. On January 10, 2017, the complainant wrote her again because she had not received a reply.

[35] Only on January 24, 2017, did Ms. Spallin reply by simply stating that the pass mark for the "Teamwork" qualification was 12 out of 20 and that the complainant received only 10 out of 20.

**C. The posting on GCconnex**

[36] On January 9, 2017, on the GCconnex platform, Mr. Bertrand stated that he was seeking qualified people to occupy analyst positions that were for a secondment or an assignment for those already at the PM-04 level.

[37] On January 16, 2017, the complainant wrote to Mr. Bertrand, to inform him of her interest in the assignment. She stated that she was in a position at the AS-04 group and level, which was equivalent to the PM-04 level. She asked him whether the pool for the 2015 process was still open and whether it was possible for him to staff the position using that pool.

[38] On January 24, 2017, Mr. Bertrand replied to the complainant, stating that the 2015 process pool had been closed since November 30, 2016, and that it was not possible to staff from it.

[39] The complainant testified as to the impact that the events had on her morale and her health. She said that her reputation was tarnished, as she had found during a staffing process in 2018 ("the 2018 process"), since Transport Canada's aviation world

is small; everyone knows everyone else. She was not able to work in the aviation field after that, although she qualified in the 2018 process. Her goal and her dream at the start of her federal public service career was to work in the aviation field, but she had to reorient her career to marine transportation.

#### **D. The 2018 process**

[40] The complainant wanted to adduce evidence about an appointment process that took place in 2018. Although it arose after the complaint, the evidence was permitted, for the purposes of context to her allegations.

[41] In December 2018, the complainant participated in the selection process numbered 18-MOT-EA-HRS-93101 for a regional inspector position, transportation security (the 2018 process). Its purpose was to create a pool of qualified persons for positions at the TI-05 and TI-06 group and levels at the regional office in Dorval, Quebec.

[42] On September 20, 2019, the complainant was notified that she had passed all the selection steps. On September 25, 2019, Marie-Josée Lépine, from Human Resources, called her to offer her a permanent, full-time position at the TI-06 group and level starting on November 4, 2019. The complainant explained to her that she had just experienced serious financial problems following pay errors caused by the Phoenix pay system that still had not been resolved. She asked Ms. Lépine whether it would be possible to be seconded to the position, initially, to allow her to sort out the pay errors with the Phoenix pay system before being appointed to the position.

[43] The complainant informed her manager at the Canada Border Services Agency of the job offer. On September 30, 2019, her secondment was approved, for a period of four months. On October 1, 2019, she notified Ms. Lépine about it, who replied that a four-month secondment was too short. On October 2, 2019, she called Ms. Lépine to inform her that she had not received the medical examination form. She noticed that Ms. Lépine's tone had changed and that she was in a hurry to end the call.

[44] On October 3, 2019, Ms. Lépine told the complainant that management wanted to proceed with an indeterminate appointment, for budget and priority reasons. The complainant told Ms. Lépine that she wanted the position, whether on secondment or for an indeterminate period. Ms. Lépine told her that the offer was conditional on a

satisfactory medical examination and a Secret security clearance. The complainant told her that she already had that clearance and that she was in very good health. She then sensed less interest in her appointment in Ms. Lépine's responses.

[45] The next day, October 4, 2019, Ms. Lépine informed the complainant that management had decided to withdraw the job offer. The complainant's name remained in the pool. She testified that Ms. Lépine had told her that management felt that she had not demonstrated enough enthusiasm for the position and that she did not have team spirit.

[46] On June 30, 2023, the complainant was finally appointed as a regional inspector of transportation security (TI-06), marine safety and security, through a process (numbered 23-MOT-IA-HRS-01174).

#### IV. Analysis

[47] In the complainant's opinion, the selection board committed two types of abuse of authority when it assessed her references, which are identified at paragraph 70 of *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, listed items 1 and 2; that is, the respondent abused its authority by acting on inadequate information and by demonstrating bias against her. To support her arguments, she submitted several decisions on abuse of authority, namely, in assessing references (see *Bazinet v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 82; *Hammond v. Canada (Attorney General)*, 2009 FC 570; *Rizqy v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 12; and *Lavolette v. Commissioner of the Correctional Service of Canada*, 2015 PSLREB 6).

[48] According to the respondent, the complainant did not discharge the burden of proof that on a balance of probabilities, an abuse of authority occurred. Her references did not demonstrate that she had teamwork experience. In addition, the selection board did not act in bad faith, and no such intention could be attributed to it.

[49] The respondent maintained that it was not necessary for Mr. Bertrand to go further when searching for information with respect to references. He did not do it for the others, and it would not have been appropriate to do it for the complainant. To support its arguments, the respondent submitted several decisions on abuse of authority, namely in assessing references (see *Visca v. Deputy Minister of Justice*, 2007

PSST 24; *Ben Jab v. Commissioner of the Correctional Service of Canada*, 2013 PSST 22; *Oddie v. Deputy Minister of National Defence*, 2007 PSST 30; and *Dionne v. Deputy Minister of National Defence*, 2008 PSST 11).

[50] **Question 1:** Did the assessment of the complainant's references allow evaluating whether she had the teamwork competency?

[51] The complainant argues that the selection board relied on insufficient information to assess the "Teamwork" qualification. This highlights the second category of abuse of authority identified in the staffing-related case law, notably in *Tibbs*, when a delegate acts on insufficient factors, mainly without evidence or without considering relevant matters.

[52] The complainant stated that the November 2, 2016, email led to confusion, since she believed that she was fully qualified after the examination. She believed that the requested references were general in nature, and she was never informed that teamwork would be assessed by the references. Had she known, she would have provided other references for positions in which she had worked on a team.

[53] Mr. Bertrand testified that he assessed the referees' replies based on whether they used items from the teamwork definition and whether their response demonstrated that it was teamwork.

[54] The instructions given to the candidates about references did not specify that they would be used to assess the "Teamwork" qualification. In fact, on September 23, 2016, Ms. Lindor told the complainant that "Teamwork" would be assessed by a written examination but did not specify that it would also be assessed by the references.

[55] That was why Ms. Janbayne stated from the start that the complainant did not work on a team. Ms. Lebel also replied that reception involved very little teamwork.

[56] In *Hammond*, the Federal Court stated that when a selection board uses references to assess whether candidates have the desired qualifications, it must ensure that it has the items required to conduct the assessment; that is, the references make it possible to assess whether the candidate has the desired qualification. If the selection board determines that the references before it do not enable it to conduct the assessment, it must seek other references.

[57] However, Mr. Bertrand found himself with insufficient information to assess this qualification for the complainant. Faced with that error, he could have corrected it by asking her to provide references from jobs in which she did work on a team. However, he did not and assessed the qualification based on insufficient information.

**A. Ms. Janbayne's reference**

[58] The complainant submits that during conversations with Ms. Lindor, she mentioned the problems encountered with Service Canada management. After the employment offer in the 2015 process was withdrawn, the complainant had to notify her supervisor that she was no longer leaving her Service Canada job. After that, management informed her that it was unhappy with that change. Ms. Lindor knew of the problems, and the selection board should have considered them when it assessed Ms. Janbayne's reference.

[59] According to the respondent, the complainant had problems with management and not Ms. Janbayne. It states that had the complainant had reservations about Ms. Janbayne's reference, she should not have included it in the list of referees. Mr. Bertrand testified that he was not advised that the complainant had concerns about her referees.

[60] On that matter, the preponderance of the evidence demonstrated that the selection board was not aware of the complainant's difficulties with Service Canada's management or with Ms. Janbayne.

[61] Nevertheless, Ms. Janbayne's negative reference is isolated and is the opposite of Ms. Lebel's positive reference, as well as all the references provided for the 2015 process to assess the complainant's qualifications. Mr. Bertrand had to consider that fact, which would have called into question the reliability of the information that a referee provided. He had to reconcile those differences in the references, and he could not assign more weight to the negative reference than to the other ones (see *Ostermann v. Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28 at paras. 33 to 41; and *Ben Jab*, at para. 41).

[62] Mr. Bertrand should have gone further and sought more information to assess the quality of Ms. Janbayne's reference (see *Bazinet* and *Laviolette*). It would have been wise to talk to Ms. Janbayne and to read the performance evaluation that she had

prepared of the complainant. In that evaluation, Ms. Janbayne considered that after 10 months on the job, the complainant fully met her objectives and frequently demonstrated the desired qualifications. Although Ms. Janbayne had suggested that the complainant be more tolerant of herself and her co-workers, Ms. Janbayne was more nuanced about the complainant's teamwork competency. Mr. Bertrand would then have been in a better position to assess Ms. Janbayne's reference.

[63] Those factors set out that Mr. Bertrand was not diligent when he assessed Ms. Janbayne's responses. He abused his authority by assessing that reference using insufficient information.

#### **B. Ms. Lebel's reference**

[64] Mr. Bertrand noted Ms. Janbayne's responses by assigning a mark of 1.5, since he determined that her response did not use items from the teamwork definition. He assigned the same mark, 1.5, to Ms. Lebel's responses. He considered the response poor, since she did not use items from the definition. Although he did not take note of Ms. Dupuis' response, he testified that he would have assigned it 1.5, or the same as the other references.

[65] It is clear that Ms. Janbayne's responses were negative and that they did not demonstrate the "Teamwork" qualification. Mr. Bertrand said that Ms. Lebel's responses did not use items from the definition and did not demonstrate the qualification or experience of teamwork. He assessed the reference as poor and assigned her a mark of 1.5 points.

[66] That is surprising since Ms. Lebel's responses listed several items from the teamwork definition, as requested in the rating guide. Although at reception, there was not much teamwork, Ms. Lebel stated in her responses that the complainant demonstrated several items from the definition with her co-workers and her team.

[67] Mr. Bertrand also stated that he did not consider her responses because teamwork was not part of the complainant's reception duties. He also testified that her responses did not demonstrate teamwork experience. However, the rating guide did not require it. On the contrary, it stated that it is often necessary to work in a team to complete a task. That allowed for assessing the candidates who occasionally had to work in a team without it being part of their main duties.

[68] In particular, the rating guide specified that the responses were assessed based on the items from the teamwork definition that were relevant to assessing the responses, to ensure fair and transparent assessments. Yet, Mr. Bertrand did not consider the relevant items identified in the teamwork definition.

[69] Parliament gave managers considerable discretion in staffing matters. However, this does not mean that they can take any action in staffing matters for any reason and on any pretext. That discretionary power is exercised as part of fair and transparent employment and staffing practices (see *Visca*, at para. 34).

[70] The Board's role is not to reassess candidates but to review the assessment that was done, to determine whether there was an abuse of authority. The Board considers how the reference check was conducted. In this case, the selection board made a serious error by not considering relevant factors when it assessed Ms. Lebel's responses. Its assessment of them was arbitrary (see *Canada (Attorney General) v. Lahlali*, 2012 FC 601 at paras. 42 to 46; and *Elazzouzi v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 11 at paras. 49 to 53).

[71] The Board concludes that Mr. Bertrand abused his authority and that he acted unreasonably by not considering relevant factors in his assessment of Ms. Lebel's responses. That course of action in the staffing matter was neither fair nor transparent.

### **C. Ms. Dupuis's reference**

[72] Mr. Bertrand testified that he would have accepted Ms. Dupuis's reference and changed the evaluation result had she demonstrated that the complainant had teamwork experience. In addition, Ms. Dupuis's responses did not use items from the teamwork definition.

[73] In her responses, Ms. Dupuis used a few items from the teamwork definition, but her responses were shorter than were those of Ms. Lebel. She explained that the complainant had to prepare a table with a colleague for a presentation. Given that they both had a strong character, the complainant found a way for them to work well together. Thanks to her efforts, the presentation was a success.

[74] Mr. Bertrand testified that he expected the referees to use the items from the teamwork definition in their responses. He found that a person had the "Teamwork"

qualification only if items from the definition appeared in the referees' responses. However, the referees received no instruction specifying it, and he did not verbally indicate it when he took the references. If the responses were brief or incomplete, he did not ask the referees to elaborate because he did not do it for the other candidates.

[75] In cross-examination, Mr. Bertrand also stated that he did not ask Ms. Dupuis to elaborate her response because he had not done so for the other candidates.

[76] Although all the candidates were treated the same way, it does not rule out that abuse of authority could have occurred in an individual case. If the references' assessment includes a fundamental flaw affecting certain individuals, the delegated manager must correct the error as soon as possible and without prejudice to the candidates (see *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27 at para. 56 and those that follow).

[77] In this case, although she had the qualification, a candidate was penalized because a referee did not provide details or elaborate and did not use items from the definition. The problem with that approach, as pointed out in *Rizqy*, at para. 66, is that the selection board that assesses the references assesses the quality of the referees' responses rather than the candidates' qualifications. Even if they have the qualification, candidates are assessed as not having it because the referee did not provide an example, replied too briefly, or did not use items from the definition (see also *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 12).

[78] Mr. Bertrand fettered his discretion by refusing to acknowledge that the instructions to the candidates and referees had serious flaws and by failing to take action to mitigate the impact of his error on the complainant's application because he did not do it for the other candidates. The complainant's application was later eliminated due to insufficient information about the "Teamwork" qualification (see *Bowman and Poirier v. Deputy Minister of Veteran's Affairs*, 2011 PSST 3).

[79] The Board finds that Mr. Bertrand abused his authority by basing his assessment on insufficient information and by adopting an inflexible rule that prevented him from exercising the discretionary power delegated to him.



[80] **Question 2:** Did the qualification “Effective Interpersonal Relationships” allow assessing the ability to work with the public or with co-workers?

[81] There are two relative versions with respect to the scope of the “Effective Interpersonal Relationships” qualification and the requirement to add the “Teamwork” qualification to the 2016 process. According to the respondent, Mr. Bertrand added the “Teamwork” qualification because he felt that it was necessary, since it was not assessed in the 2015 process. According to the complainant, the “Effective Interpersonal Relationships” qualification had already assessed teamwork during the 2015 process.

[82] I must assess the credibility of these two versions of the facts and determine which must be accepted. When credibility is at issue, the test to apply is well established. In effect, I must determine, on the preponderance of the probabilities, the version that a practical and informed person would readily recognize as reasonable in the circumstances (see *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 35 at para. 102; *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at paras. 45 and 46; *Stene v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 36; *Lyons v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLREB 122 at para. 300; and *Faryna v. Chorny*, [1952] 2 DLR 354 at 357).

[83] Mr. Bertrand testified that he added the “Teamwork” qualification to the 2016 process because it assesses the ability to work with co-workers, which is very important in a government response centre. In cross-examination, he explained that that was not so for the “Effective Interpersonal Relationships” qualification, which assesses the ability to work with the public.

[84] From the start, Mr. Bertrand’s testimony on this matter was not credible and was contrary to what the rating guide indicates. The definition of the “Effective Interpersonal Relationships” qualification and the questions asked of the referees dealt with the ability to work with co-workers. The definition and the questions were of the same nature as those that he added for the “Teamwork” qualification.

[85] The English version of this qualification, “Effective Interpersonal Relationships”, certainly includes relationships with co-workers. The French version, *Entregent*, was possibly less clear to some. However, it could not explain Mr. Bertrand’s error; he is

very comfortable with English. He testified that he took his notes in English, even when taking a reference in French.

[86] Mr. Bertrand is very familiar with the definition of and questions for “Effective Interpersonal Relationships”, which was also a qualification for the 2016 process. He checked the candidates’ references and read the definition to and asked the questions of all the referees. At that time, he could not have been unaware that the definition of “Effective Interpersonal Relationships” specified, at the very beginning, “[translation] Establishes and maintains good working relationships based on listening and respect, to the organization’s benefit.”

[87] The definition then stated these general aspects of “Effective Interpersonal Relationships”: “[translation] Recognizes the human aspect of issues and the need to maintain good relationships with people. Obtains good results by interacting and collaborating with others. Deals with others in difficult situations, avoids the risk of dissent, and helps attain a common goal.” To conclude, “Effective Interpersonal Relationships” could also be used with the clients that the response centre dealt with, as follows: “[translation] Develops and maintains solid and productive relationships with clients.”

[88] It is reasonable to believe that the managers who preceded Mr. Bertrand had initially established and maintained the “Effective Interpersonal Relationships” qualification because it helped identify the candidates who worked well with their co-workers. It was important and remains so in the government response centre. However, nothing about the importance of working with co-workers changed when Mr. Bertrand became the manager.

[89] The question that the referees were asked with respect to “Effective Interpersonal Relationships” was to provide an example in which the candidate had been involved in a conflict. But for teamwork, the referees were asked to identify the difficulties that arose for the group, if any, and the candidate’s role in resolving them.

[90] It was reasonable to expect that the referees, through the nature of their relationships with the candidates, would generally describe situations with co-workers for both qualifications. Furthermore, the complainant’s referees answered the questions on “Effective Interpersonal Relationships” and “Teamwork” by describing situations with co-workers.

[91] Ms. Dupuis was one of the complainant's two referees in 2015 for the "Effective Interpersonal Relationships" qualification. In cross-examination, Mr. Bertrand testified that her response in 2015 was good and demonstrated teamwork.

[92] In her answer to the question on "Effective Interpersonal Skills", Ms. Dupuis stated that the complainant was in a team of 6 people and that she always got along well with her co-workers, even though she did not share the same interests. She replied that the complainant was cheerful and that she liked working with people. The responses from Ms. Dupuis and the other referee for "Effective Interpersonal Skills" were marked at 6 out of 10, or Good.

[93] An informed and practical person would also immediately conclude that it would be reasonable in the circumstances on a balance of probabilities that the "Effective Interpersonal Relationships" qualification assessed the ability to work with co-workers and not the ability to work with the public, as Mr. Bertrand claimed. In addition, an informed and practical person would immediately recognize it as reasonable in the circumstances on a balance of probabilities that the complainant's references for "Effective Interpersonal Relationships" demonstrated that she worked well with her co-workers.

[94] For those reasons, I find that Mr. Bertrand's testimony was not credible with respect to the necessity to add the "Teamwork" qualification, since the "Effective Interpersonal Relationships" qualification already assessed the ability to work with co-workers.

[95] **Question 3:** Did the respondent demonstrate bias when it assessed the complainant's references with respect to the "Teamwork" qualification?

[96] The complainant argues that the selection board demonstrated bias when it assessed her references because it did not want her and that it was vexed by her complaint to the deputy minister. According to her, Ms. Spallin's tone in her November 1, 2016, reply demonstrated that she was displeased with the complaint to the deputy minister. The complainant had the impression that she bothered and irritated Ms. Spallin.

[97] The complainant argues that the selection board did not consider Ms. Lebel's responses, even though she used several items from the teamwork definition. It seems

odd that the selection board did not consider Ms. Dupuis's responses, given that she provided examples that includes aspects of teamwork.

[98] According to the respondent, the selection board acted impartially, and the complainant did not establish that it acted in bad faith. The respondent argues that any allegation involving bad faith requires proof of intent, which the complainant did not establish (see *Lavigne v. Canada (Justice)*, 2009 FC 684).

[99] According to the courts' former interpretation, bad faith supposes the existence of an illegitimate or dishonest intent. However, the meaning assigned by the case law to bad faith has long since been expanded. As the Supreme Court of Canada stated, evidence of an illegitimate intent is not required when the facts reveal serious carelessness or recklessness (see *Finney v. Barreau du Québec*, 2004 SCC 36 at paras. 37 and 39; *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10; *Chase v. Commissioner of Correctional Services of Canada*, 2010 PSST 2; and *Campbell v. Deputy Minister of Transport Canada*, 2010 PSST 14).

[100] In addition, the staffing case law is unanimous in that a reasonable apprehension of bias is a form of bad faith that does not require establishing intent to demonstrate it (see *Gignac*; *Denny v. Deputy Minister of National Defence*, 2009 PSST 29; *Ryan v. Deputy Minister of National Defence*, 2014 PSST 9; *Drozdowski v. Deputy Head (Department of Public Works and Government Services Canada)*, 2016 PSLREB 33; and *Monfourny v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 37).

[101] Those tasked with making an assessment have the duty to do so impartially in a way that does not give rise to a reasonable apprehension of bias. A test was established to determine whether there is a reasonable apprehension of bias. It consists of determining whether a reasonably informed bystander could reasonably perceive bias from one or more of a selection board's members (see *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLII 2 (SCC); and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC)).

[102] In her responses, Ms. Lebel stated that the complainant demonstrated teamwork when she worked at reception. Several items from the teamwork definition could be found in her responses. Thus, the complainant fostered collaboration and interaction by asking questions to determine needs, by considering answers, and by proposing

solutions. By taking criticism well and by seeing it as an opportunity to improve, she considered others' needs, along with their feelings and opinions. She established good working relationships because everyone knew that they could trust her and be at ease with her. By being willing to help when co-workers were absent, she prioritized the team's interests and cohesion. By asking for more information about the department from her co-workers, she listened to others' points of view.

[103] Ms. Dupuis replied briefly but directly to the questions by providing an example, as requested, of a team task, the difficulties encountered, and the complainant's role. She explained that the complainant worked on a team with her co-worker to prepare a presentation, which was a success. By finding a way to work well together despite their characters, she demonstrated that she maintained good working relationships and considered others' needs, points of view, and feelings, while fostering cooperation. Even more, Mr. Bertrand was not credible when he testified that the "Effective Interpersonal Relationships" qualification assessed the ability to work with the public and not co-workers. His testimony was not credible and demonstrated bias when he stated that he added the "Teamwork" qualification because the ability to work with co-workers was not assessed in the 2015 process.

[104] In the 2016 process, Mr. Bertrand read the definition of "Effective Interpersonal Relationships" and asked the questions of all the referees. An impartial member of a selection board cannot be, as he was, unaware that that definition specified, "[translation] Establishes and maintains good working relationships based on listening and respect, to the organization's benefit."

[105] The complainant argues that the selection board did not want her after she complained to the deputy minister. The preponderance of the evidence effectively sets out that the selection board did not want her and that it demonstrated bias against her. Mr. Bertrand's testimony was not credible when he explained that the "Effective Interpersonal Relationships" qualification assessed the ability to work with the public and not co-workers. Adding the "Teamwork" qualification allowed the selection board to reassess the complainant and her references. Mr. Bertrand then demonstrated bias by ignoring the responses of Ms. Lebel and Ms. Dupuis when they used items from the teamwork definition. In addition, he did not follow the rating guide.

[106] A reasonably informed bystander could reasonably perceive bias on the part of Mr. Bertrand, who did not respect the rating guide and did not consider that Ms. Lebel and Ms. Dupuis used several items from the teamwork definition in their responses.

[107] For those reasons, I find that Mr. Bertrand abused his authority by demonstrating bias in his assessment of the referees' responses for the "Teamwork" qualification.

## **V. Conclusion**

[108] Only Mr. Bertrand testified, even though he and Ms. Spallin made up the selection board. He said that he assessed the references but that he kept Ms. Spallin up to date on the process. He told her about his assessments, and by consensus, they assigned the marks for the reference assessments. Finally, they both signed the rating guide.

[109] I find that Mr. Bertrand was delegated certain tasks in the 2016 process, but in the end, the selection board endorsed the reference assessments, assigned the marks, and signed the rating guide.

[110] Consequently, the Board finds that the selection board abused its authority by basing its assessment of the referees' responses on insufficient information. It also abused its authority by adopting an inflexible rule that prevented it from recognizing that the instructions to candidates and referees presented serious flaws and by failing to take action to mitigate the impact of its error. In addition, the Board finds that the selection board demonstrated bias when it assessed the references for the "Teamwork" qualification.

## **A. Recommendations**

[111] It is well established that the Board can inform the respondent of the concerns that arise from the hearing of an abuse-of-authority complaint. Recommendations can then be made to the respondent to avoid repeating an underlying problem (see *Ayotte v. Deputy Minister of National Defence*, 2010 PSST 16; and *Canada (Attorney General) v. Beyak*, 2011 FC 629).

[112] I believe that the selection board's structure and operating method for the 2016 process favoured the abuses of authority that were committed. Mr. Bertrand assessed the references alone and reported his assessments to Ms. Spallin so that they could

reach a consensus on the marks to assign. No human resources advisor was on the selection board, and the evidence did not set out that one was consulted at that stage.

[113] I recommend that the respondent revise that procedure, to regularly involve human resources advisors on selection boards or if not that they be consulted at the reference and reference-assessment stages. Notably, those advisors can guide managers, to ensure sound staffing practices, and tell them what may be perceived as an abuse of authority.

[114] In addition, I find that a lack of manager training may also be the source of the abuses of authority committed in this case. I recommend that manager training be reviewed, to emphasize the types of abuse of authority identified in the case law.

## **B. Corrective measures**

[115] As corrective measures, the complainant requests a declaration that abuse of authority occurred and the payment of \$35 000 in damages. This request includes damages for the pain and suffering that hurt her reputation and the impact on her psychological health, along with punitive damages. To support her damages request, she relies on *Lyons v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLREB 95 (“*Lyons 2022*”).

[116] The respondent states that the pool of qualified individuals no longer exists. It also points out that in 2023, the complainant was appointed to a position at the TI-06 group and level with a wage differential that is greater than that of the PM-04 position.

[117] I find that revoking the appointments is not appropriate. The complainant did not request it. There is no indication that the appointees did not satisfy the merit criteria.

[118] I also find that reinstating the complainant into the pool of qualified individuals cannot be considered after so many years. The pool no longer exists, and since 2023, she has held a TI-06 position, with greater compensation.

[119] The respondent argues that *Lyons 2022* cannot apply in this case, since it dealt with a grievor’s dismissal in extraordinary circumstances. In its opinion, the complainant’s situation does not lend itself to such compensation. The hardship that

she allegedly suffered is not proportional to that of the grievor in *Lyons 2022*. In addition, no intent or bad faith was established in this case.

[120] Awarding damages as a corrective measure under the *PSEA*'s framework has rarely been requested or considered. I find that the circumstances of this case are so particular and the abuses of authority so flagrant that this request requires taking a serious look into it. I believe that the parties should return for a second hearing, as in *Lyons 2022*, solely for this issue, and that they should present more in-depth arguments at it.

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

*(The Order appears on the next page)*



**VI. Order**

[122] The complaint is allowed. The Board declares that the respondent abused its authority when it assessed the complainant.

[123] The parties will be reconvened in the coming months to a hearing on the possibility of awarding damages as a corrective measure in this complaint.

August 2, 2024.

FPSLREB Translation

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