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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

ANTHONY ALEXANDER BLAIR

Complainant

and

**DEPUTY HEAD
(Department of Public Works and Government Services)**

Respondent

Indexed as

Blair v. Deputy Head (Department of Public Works and Government Services)

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

Before: Caroline Engmann, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Patrick Turcot and John Maskine, counsel

Heard by videoconference,
December 6, 7, and 20, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] The deputy head of the Department of Public Works and Government Services (“the respondent” or “PWGSC”) posted a job opportunity advertisement (“the JOA”) for the position of Program Manager, Office Accommodation, classified at the AS-04 group and level, in the Accommodation Management unit in Toronto, Ontario. The JOA was for selection process number 2020-SVC-ONT-IA-375968 (“the selection process”) and had a closing date of October 2, 2020. Anthony Alexander Blair (“the complainant”) applied for the position specified in the JOA. On October 26, 2020, the respondent informed him that he had been eliminated from the selection process because he did not meet the requirements for two essential merit criteria.

[2] On December 22, 2020, the respondent posted the appointee’s notification of appointment or proposal of appointment.

[3] On December 24, 2020, the complainant made this complaint with the Federal Public Sector Labour Relations and Employment Board (“the Board”) under s. 77(1)(a) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “the *PSEA*”). He alleged that the respondent abused its authority in the application of merit by screening him out of the selection process. He also alleged discrimination based on race and colour, contrary to the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; “the *CHRA*”).

[4] The respondent denied abusing its authority in the selection process.

[5] The Public Service Commission (“the PSC”) did not attend the hearing; nor did it take a position on the merits of the complaint. It provided written submissions on the applicable policies and guidelines and the discrimination allegation.

[6] I must determine these two issues: 1) whether the respondent abused its authority by discriminating against the complainant based on race and colour during its assessment of him, and 2) whether it abused its authority in its assessment of him.

[7] I conclude that the complainant failed to demonstrate that the respondent discriminated against him based on his race and colour; however, I find that on the balance of probabilities, he demonstrated that the respondent abused its authority when it assessed his application. There was a reasonable apprehension of bias against

him by virtue of the role that the hiring manager played in the assessment of his application. Further, the respondent treated him differently from other applicants during the screening phase of the selection process by using formal and informal performance evaluation information to screen him out. Finally, I find that it abused its authority when it exercised its staffing discretion for an improper purpose.

[8] I allow the complaint and declare that the respondent abused its authority.

[9] In addition to declaring that the complaint is substantiated, I find that the abuses of authority in this case are so egregious as to warrant considering further corrective actions, including in the form of damages. I will therefore reconvene the parties to a hearing on the issue of an award of damages as a corrective action under s. 81(1) of the *PSEA*.

II. Summary of the relevant evidence

A. The JOA

[10] The JOA for the selection process stated that it was open to “[p]ersons employed in the public service occupying a position in the Greater Toronto Area.” The process was also open to eligible veterans and CAF (Canadian Armed Forces) members. The JOA was posted on September 22, 2020, and closed on October 2, 2020, at 23:59, Pacific time.

[11] The intent of the selection process was to establish a fully assessed pool of qualified candidates to staff current and future vacancies in PWGSC. The immediate use of the pool was to staff one indeterminate position.

[12] In addition to providing a résumé, the candidates had to clearly explain on their applications how they met essential criteria specified in the JOA. Six essential experience criteria were specified, as follows:

...

Experience:

- 1. Experience using a Financial Database system, preferably SAP*
- 2. Experience working with budgets including financial tracking of budgets, and/or expenditures*
- 3. Experience in financial analysis and providing financial recommendations to management*

4. *Experience creating reports used for management decision making*
5. *Experience leading a team or project*
6. *Experience in using spreadsheet software (at a minimum, the use of formulas, sorting and filtering) to create reports*

[13] The respondent screened out the complainant because he did not meet the third and fifth essential experience criteria listed in the JOA. In this decision, I will refer to experience criteria 3 and 5 as “Exp. 3” and “Exp. 5”, respectively. The JOA also listed additional criteria that would be assessed later, but they are not relevant for the purposes of this complaint.

B. The assessment board

[14] The assessment board for the selection process comprised these three individuals: Michelle Hanlon, Regional Manager, Accommodation Management (“the hiring manager”); Andres Kolga, Client Accommodation Services Advisor; and Philip August, Client Accommodation Services Advisor. The human resources advisor for the selection process was Christine Louie.

C. The assessment tools

[15] The JOA informed the applicants that several assessment methods might be used in the selection process, such as self-assessment with reference verification and past-performance assessment. The JOA also stated that applicants would be notified of the assessment methodology throughout the process. The assessment tool for the essential criteria listed in the JOA was the application. The pass mark used to assess the essential criteria was “Meet/Not meet”.

[16] The application form included a primary question for each essential criterion and a complementary question, in the following format:

Question:	<i>Do you have experience [essential qualification]?</i>
The applicant’s answer:	<i>Yes</i>
Complementary question:	<i>If yes, in no more than 400 words, please provide clear and concrete EXAMPLES and DETAILS, including WHEN, WHERE and HOW you obtained the experience.</i>

D. Summary of the results

[17] There were 41 applicants, of whom 15, including the complainant, were screened out, so 26 were screened in. There was no data for 4 of the 15 applicants who were screened out. For the remainder, only the complainant failed to meet Exp 5. Six applicants, including him, failed to meet Exp 3.

[18] On October 26, 2020, the respondent notified the complainant that he had been screened out of the selection process for failing to meet the requirements for two of the six experience merit criteria, namely, Exp 3 and Exp 5.

E. The testimony

[19] In addition to the documentary evidence, I heard evidence from four witnesses. The complainant testified on his own behalf and called Marguerite Jean-Baptiste to testify on the racial discrimination allegation. The respondent called Michelle Hanlon as its main witness, who was also the delegated authority for the selection process. I also heard evidence from Mr. August, who was an assessment board member.

1. Ms. Jean-Baptiste

[20] Ms. Jean-Baptiste currently works as a business and systems management officer, classified at the AS-03 group and level, in the respondent's Accommodations Unit. She has worked for the federal government in several capacities since 1979. Her current duties include training and making presentations, and she has received several awards and commendations for her work.

[21] She enjoyed a relatively positive work environment until she started reporting to Ms. Hanlon. Under the Ms. Hanlon's supervision, all she received was negativity. When she asked questions, she was labelled as incompetent. She was given very few work assignments, and only when she complained. It was very frustrating working under Ms. Hanlon's supervision. Ms. Hanlon told her that she was not meeting deadlines and started to performance-manage her. When asked if she received any support, she testified that it was "an exercise in denigration and being dragged down."

[22] When asked if she was treated differently, she answered in the affirmative. She explained that of the three employees who joined the Accommodation Unit from the Compensation Unit, only the white employee received promotions. She and the complainant were sidelined. She was given two weeks to fix a system that was a total

mess and that required at least five months to fix. Working with an expert from Ottawa, Ontario, she was able to fix it in half the time. Her supervisor questioned her ability to do her job. She has seen people whom she trained be promoted while she has been threatened with demotion and even termination. She believes that the treatment she received from her supervisor was based on her race.

[23] On cross-examination, she stated that she was unsure of whether she applied to the selection process, and she was not part of the assessment board. She testified that she had an ongoing human rights complaint against Ms. Hanlon. She did not accept the investigation report because it was flawed. She no longer reports to Ms. Hanlon; she is now on a different team, and her work environment is better. She did not have a good experience working under Ms. Hanlon's supervision.

2. The complainant

[24] The complainant graduated from the University of Toronto in 1992 with a Bachelor of Science degree with majors in psychology and criminology plus a minor in sociology. He joined the PWGSC in 1997 as a training specialist in the Accounting, Banking and Compensation section. In 2001, he was successful in a staffing process for a chief, pay and pension, position classified at the AS-04 group and level, which was his substantive position until 2015, when he moved to the Accommodation Section as a program manager. He also took on assignments during that period. He has 25 years of service with the federal public service.

[25] He never had any issues with his performance until his arrival in the Accommodation Section in 2015 and 2016. He arrived as a substantive AS-04 and occupied the position of Program Manager, Office Accommodation, Accommodation Management, Ontario Region. In this position, he reported to the regional manager, accommodation management, classified at the AS-07 group and level. According to the work description for his position, the incumbent was "[r]esponsible for hiring, training, and coaching employees reporting to the Program Manager position." The team had three AS-03s. The key activities of the work description included the following:

*Coordinates and manages the activities of the Office
Accommodation support team including staffing levels, budgets,
workload management and training requirements.*

...

Directs staff in the development, analysis, and preparation of reports used by Accommodation Managers / Client Accommodation Services Advisors (CASA's) to manage client portfolios and to provide ad hoc reports to other business lines within PWGSC including Owner Investor, Leasing, AFMS and Project Management/Implementation.

...

[26] The incumbent of the position was responsible for supervising staff; however, when he came into the position, the complainant was not allowed to perform its supervisory duties.

[27] In 2019, he applied for an AS-06 position, and he cut and pasted portions of his job description into his application. The respondent accused him of fraud and caused the PSC to investigate. The PSC concluded that he had committed fraud. He successfully appealed that decision, and the Federal Court overturned the PSC's investigation report.

[28] He referred to his performance assessment for the 2015-2016 performance appraisal cycle. The respondent objected to the assessment's admissibility on grounds of relevance and because the assessment was not one of the tools used in the selection process. It argued that if the Board admitted the assessment, then it should be allowed to present additional assessments up to the 2019-2020 assessment cycle, to provide a full picture of the complainant's performance.

[29] I overruled the respondent's objection for these reasons:

I find that the respondent used an evaluation of the complainant's performance in the Program Manager AS-04 position, whether formally or informally, to assess the complainant's candidacy in the selection process. The document is therefore relevant and admissible. I reject the respondent's request to present or submit additional performance assessments at this juncture. The respondent had every opportunity to provide such information but chose not to do so, ostensibly to delineate the distinction between this process and the grievances that are currently pending before this Board. I do not make this ruling lightly, but I make it specifically considering the respondent's existing objection to the nature and scope of my jurisdiction in this complaint. I believe that it would be prejudicial to both parties for me to accept evidence of performance evaluation related to the demotion and other grievances before this Board. My assessment in this matter as far as the use of personal knowledge by members of the assessment board, which clearly speaks to an evaluative assessment of the

complainant's performance in that role is very narrow and limited. In other words, the question I must ask is whether at the assessment stage of the selection process, the respondent used any performance evaluation information to screen out the complainant from the selection process.

[30] The complainant testified that at the end of 2019, he was placed in an AS-02 position, and he stopped receiving pay at the AS-04 level in September 2020.

[31] On October 26, 2020, the respondent informed him that he did not meet two of the six experience merit criteria, namely, essential experience merit criteria numbers three and five (Exp. 3 and Exp. 5).

[32] The complainant testified that he received a glowing performance assessment from his previous manager for the full scope of the position. He referred to portions of his performance assessment covering April 1, 2015, to March 30, 2016. It was noted throughout the document that the competencies assessed were for a previous position. The manager's comments included the following:

...

Since joining Accommodation Management in September Anthony has worked hard to learn his new job. Anthony has taken on all work assigned to him with eagerness. He asks good questions and is detail oriented which is vital to the financial management role he has. Anthony's positive attitude fits in well within the team. Anthony is very eager to continue to take on additional work (supervising staff). This demonstrates his initiative and desire to keep learning. Anthony will need to work diligently to learn his role in a fulsome way. He seems to be up for the challenge. Keep up the good work Anthony!

...

... Anthony works well with his colleagues. He grows more confident and comfortable questioning the team on the information they provide him. He also collaborates well with the Senior CASAs which has allowed him to learn the financial aspect of his role. Anthony understands the importance of working well with others and this will lead to success as he continues learning this role.

...

... Anthony has learned a great deal in his first six months on the job. His eagerness to learn, attention to detail and ability to take constructive criticism and learn from it, show that he is fully committed to his position. Being action-oriented is evident as he

*always provides the financial reporting on time with accuracy.
Good work Anthony!*

...

[33] He acknowledged on cross-examination that he had read the requirement on the application form that for each essential criterion, the applicant was required to provide clear and concrete and examples and details of when, where, and how they obtained the experience.

[34] He explained that for Exp. 3 (experience in financial analysis and providing financial recommendations to management), he believed that his response to the complementary question satisfied the requirements. It read as follows:

In my role as Program Manager at PSPC (September 2015 to December 2019), on a regular basis I would analyze financial information and then provide recommendations to management. For example on a biweekly basis, I would review all financial information contained in SAP. From my review and analysis, I would provide recommendations to management. A few other areas that I would analyze information and provide recommendation is the monthly FMC report. In preparation for said report all financial information would be reviewed and analyzed. Based on the analysis recommendations would be made as to whether additional funds were warranted, funds can be returned, etc.

[Sic throughout]

[35] On cross-examination, counsel for the respondent disputed the complainant's claim that he had reviewed financial information biweekly and suggested that he did not actually perform the duties outlined in his response. He did not agree with counsel on this point and stated that he did perform the biweekly review as stated.

[36] The complainant's response to the complementary question for Exp. 5 (experience leading a team or project) was as follows:

In my role as Program Manager at PSPC (September 2015 to December 2019), I would lead various projects and teams. In the Budget Planning Exercise that I led, I met with each individual in order to review his or her project. Firstly though, I put in place a plan whereby I would ensure that the project was completed on time. Regular meetings were scheduled with the CASAs and their seniors in order to review their projects and to ascertain their needs for the upcoming fiscal year. In the end the project was completed on time.

Other teams and projects that I have led include the monthly ESDC/PSPC meeting. In the meetings I am the chair and the leader of the team. I ensure that the meetings are conducted efficiently and effortlessly.

[37] On cross-examination, with respect to Exp. 5, the respondent's counsel suggested to the complainant that he did not actually perform the duties described in his response and that his meetings with the client accommodation services advisors did not qualify as "leading a team or project". The complainant disagreed with that suggestion.

[38] He testified that he was not given the full scope of the program manager position's duties and that he was assigned the same work as were the AS-03s. He believed that it was discrimination. He believed that he was treated differently in the screening of his application, as no other candidate was subjected to the same scrutiny that his application received.

[39] In terms of his performance, he testified that he continually asked for details of the gaps in his performance and how to address them, but he received no constructive feedback. He felt that as a Black person, he was expected to just accept wherever the respondent placed him. He believed that he was not allowed to perform the full scope of the duties in the program manager job description because he is a Black man.

[40] He explained how he felt belittled, maligned, denigrated and besmirched by the process. He testified that he came out of the informal discussion convinced that he had been singled out and had been treated differently. The respondent was not able to explain to him how his responses to the Exp. 3 and Exp. 5 question failed to meet the mark. He felt he was treated "less than a human" and drew an analogy with what happened to George Floyd in the United States.

3. Mr. August

[41] Mr. August was a member of the assessment board. He testified on behalf of the respondent. His substantive position is a client accommodation services advisor in the Accommodation Unit, which he joined in spring 2019. He responded to a callout for interest in participating on the assessment board for the selection process. He was interested because he had worked on assessment boards in his previous department before joining PWGSC.

[42] There were three assessment board members, including the hiring manager. For the screening portion of the selection process, each member reviewed the applications and came to an individual determination as to the outcomes.

[43] He recalled reviewing the complainant's application form. He determined that more details were required for his responses to be successful. He was not responsible for the ultimate decision to eliminate the complainant from the selection process.

[44] The complainant showed Mr. August an email exchange dated October 14 and 15, 2020, between Human Resources and Ms. Hanlon with respect to "AS-04 Screening/Case". He was not aware of this email exchange; nor was he involved in any discussion of the complainant's performance.

[45] Mr. August testified that he did not rely on any personal knowledge of the applicants when he reviewed their applications. He was relatively new to PWGSC and although he had crossed paths with the complainant, their interaction was purely collegial and did not extend beyond the office.

4. Ms. Hanlon

[46] Ms. Hanlon is currently the regional manager of the Quality Management Office, Ontario Region, PWGSC. She has been in that position since May 2018. She is responsible for overall human resources management, salary forecasting, and supervising her direct reports. She was the hiring manager for the selection process at issue.

[47] She has taken many courses on running a selection process and has received training on bias and discrimination. Between 2017 and 2022, she led about 15 selection processes. The standard process, once a poster closes, is that the electronic system screens all the applications, and then, the assessment board members individually review the applications and meet and discuss their determinations.

[48] She and the complainant were colleagues in 2015 when he first joined the Accommodation Unit as part of a workforce adjustment exercise. To her knowledge, he applied to four selection processes for AS-05 and AS-06 positions. She testified that of her own volition, she recused herself from any assessment with respect to him in 2018, 2019, and 2021 because of a threat or an accusation of harassment that he had made against her and her supervisor.

[49] However, for the selection process at issue, she did not think that it would be reasonable or ethical to recuse herself. She explained that the complainant had just been demoted from that position; therefore, she felt that it would be unreasonable for her to not provide her information about his performance in it.

[50] The assessment tools for the selection process were the application form, an examination, an interview, and a reference check. For the application, the grading scheme was a mark of either “Meet” or “Not meet”. There were no other criteria for the application screening exercise. The staffing advisor to the assessment board was Ms. Louie. She consulted Ms. Louie as often as required because Ms. Louie had helped develop the assessment tools and worked closely with the assessment board throughout the process.

[51] All three members took part in the screening exercise. They all agreed that the complainant’s application did not meet the essential criteria in Exp. 3 and Exp. 5.

[52] For Exp. 3, she explained that the complainant provided no details on the topic he discussed, so she used her personal knowledge to determine what he referred to. She testified that the duties had not been assigned to him and that she never received any weekly analyses from him. They had a discussion in January 2019, and only in June 2019 did she receive biweekly reports from him. She used her personal knowledge to assess that he had performed poorly in those tasks. She provided very detailed examples to explain the deficiencies in his work, as well as certain stakeholder feedback.

[53] For Exp. 5, she did not understand the complainant’s response to the complementary question, so she used her personal knowledge to decipher what he meant. Based on her personal knowledge, she concluded that his answer was incorrect. She had not observed him leading a project, and she had never heard of a budget-plan exercise as a project. She had had the lead on the budget-plan exercise, and she had done the work, not him; he had simply acted as the secretariat. She had found his work wanting in that capacity; for instance, he had incorrectly completed forms and had asked many unnecessary questions.

[54] She testified that performance appraisals were not used as tools in the selection process; however, in this case, she used her personal knowledge of the complainant’s performance because she had informally and formally discussed the contents of the

responses, and she knew that he was not performing those duties. To support this testimony, she referred to an email dated January 16, 2019, which was a summary of a meeting that she had held with him about his performance action plan. With respect to Exp. 3 and Exp. 5, she recorded as follows:

...

- *Anthony has not been completing the forecast/budget/actuals/commitments review weekly. Anthony plans to undertake this weekly moving forward. ACTION ITEM — Anthony to complete a weekly review of the program (all funding votes) starting the week of January 21*
- *ESDC Forecasting meeting has not happened in a few months. There appears to be confusion over what ESDC requires as there is a new deliverable. There needs to be clarification on what ESDC requires including specific timelines. ACTION ITEM — Anthony will follow up the new deliverable and will set up a meeting with Brian, Natalie and the new ESDC contact to clarify required information*

...

[55] The poster closed on October 2, 2020. Within two to three business days, she received the list of applicants, and she noticed the complainant's name, which is when she started the discussion with Human Resources that was summarized in an email dated October 14, 2020, from Ms. Louie to Ms. Hanlon, as follows:

...

As discussed, it's recommended that you screen the candidate out at the application stage.

To consider for elimination:

- as the candidate's previous manager, you have working knowledge of the candidate's performance and abilities*
- one of the reasons why there is an LR case file on the candidate for this particular AS-04 position is because of their performance, that resulted in the demotion*
- the candidate may say "yes" to experience qualifications, but does not necessarily meet the depth and breadth you are looking for in this AS-04 position*
- the LR case and demotion just recently wrapped up, so not enough time has passed for the candidate to gain experience, complete training, etc. to meet the AS-04 threshold*

Recommendation:

- screen out at application stage*

-keep decisions consistent — if you know the candidate does not meet the experience factors, why allow to proceed on to assessment (difficult to justify as staffing process progresses)

-have informal discussion before HR sends the screening results to the candidate; can be communicated by email, so have record of communication for file

Let me know if you'd like to discuss further.

...

[56] She testified that she provided support to the complainant to address his performance gaps. Specifically, she brought in the program manager for the respondent's Western region to train him for three full days. She continued to discuss task-management priorities that he had to address, but he declined all her provided support and training.

[57] She disagreed with the complainant's view that the information that she used to exclude him from the selection process was biased and inaccurate. He did not thoroughly answer the questions, and his answers were false. For instance, if the assigned tasks require five steps, and a person undertakes only two of them, then that person cannot truthfully say that they have the required experience.

[58] According to her, everything was done openly, fairly, transparently, and equitably. She did not treat the complainant differently from any other applicant. She denied that she excluded him from the selection process because of the colour of his skin.

[59] On cross-examination, she explained that she contacted Human Resources when she received the list of applicants and saw the complainant's name on the list. She did not recuse herself from the selection process because he had been demoted from the very same position three weeks prior, so it was important for her to bring the relevant facts to the process. She had an obligation to do it, to ensure the accuracy of the information. She could not recall how many of the other 41 applicants she discussed with Human Resources. She used her personal knowledge with respect to the applicants whom she knew; however, she did not take any steps to validate any other applicant's responses.

III. Summary of the arguments

A. For the complainant

[60] In addition to his oral submissions, the complainant referred to the following cases: *Denny v. Deputy Minister of National Defence*, 2009 PSST 29; *Snelgrove v. Deputy Minister of Fisheries and Oceans*, 2013 PSST 35; *Fang v. Deputy Head (Department of Industry)*, 2023 FPSLREB 52; and *Premakumar v. Air Canada*, 2002 CanLII 23561 (CHRT).

[61] The complainant argued that all he had ever wanted was to be treated fairly; however, he was maligned, besmirched, and denigrated. In the selection process, the respondent assessed his performance and not his experience. The respondent conflated experience with performance. To support that argument, he referred to the section of the “Deputy Head Reply” (“the DHR”) that acknowledged that Exp. 3 and Exp. 5 were in fact functions of his previous position as a program manager, classified AS-04. He also pointed to Human Resources’ email that recommended that he be screened out of the process, based on his performance.

[62] He argued that Ms. Hanlon should have recused herself from assessing his application because of their history of conflict. Rather, she consciously chose to be on the assessment board and to specifically screen his candidacy. Relying on *Denny*, he argued that her participation rendered the selection process unfair and biased, as she was in a conflict of interest. He argued that his case is uncannily like the facts in *Denny*. The respondent failed its duty to conduct a fair appointment process.

[63] The selection process was not transparent. He requested information about the appointee, specifically whether the appointee was treated similarly to how he had been, but he received no information from the respondent. There is a veil of secrecy. He argued that the fact that pertinent information was withheld from him demonstrated the lack of transparency.

[64] He argued that there was no good faith in the selection process. The respondent wanted a particular outcome, and it did not matter how it was achieved. Ms. Hanlon solicited concurrence from Human Resources to exclude him from the process. No laws prevented him from applying to federal government jobs, and the fact that he had been demoted did not prevent him from applying. Referring to the portion of Human Resources’ email that stated, “... the LR case and demotion just recently wrapped up,

so not enough time has passed for the candidate to gain experience, complete training, etc. to meet the AS-04 threshold”, he argued that it was a clear case of abuse of authority.

[65] On the discrimination issue, he argued that the respondent did not allow him to perform the supervisory functions of his position, even though he had worked for 14 years as supervisor. He was the only person in that role who was not allowed to perform the supervisory functions; others who acted in the position were allowed to supervise. He was the only Black person, and he was not allowed to supervise. The respondent had treated him differently since he joined the Accommodations Unit in 2015. He was probably the first and only person demoted at PWGSC. Again, he requested information on persons who had been demoted and did not receive an answer from the respondent. He felt that he was treated like a leper and as being less than human, but he stated that he was “just a Black man trying to make a living.” He was treated differently through the demotion from AS-04 to AS-02.

[66] As for relief, he should be entitled to damages under the *CHRA*. He argued that the Board should grant several types of relief as did the Canadian Human Rights Tribunal in *Premakumar*.

B. For the respondent

[67] In addition to its oral submissions, the respondent relied on the following cases: *Attorney General of Canada v. Cameron*, 2009 FC 618; *Bah v. Deputy Head (Canada Boarder Services Agency)*, 2022 FPSLREB 55; *Brown v. Commissioner of Correctional Service of Canada*, 2012 PSST 17, *Charter v. Deputy Minister of National Defence*, 2007 PSST 48; *Denny*; *Drozdowski v. Deputy Head (Department of Public Works and Government Services Canada)*, 2016 PSLREB 33; *Jalal v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 38; *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11; *Lavigne v. Canada (Justice)*, 2009 FC 684; *Murray v. Chairperson of the Immigration and Refugee Board of Canada*, 2009 PSST 33; *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *Portree v. Deputy Head of Service Canada*, 2006 PSST 14; and *Visca v. Deputy Minister of Justice*, 2007 PSST 24.

[68] Abuse of authority is a very serious allegation that must not be made lightly. A complainant must demonstrate that on a balance of probabilities, the respondent abused its authority. The complainant failed to meet his burden of proving that the

selection process result was unfair, that the assessment methods were unreasonable, or that the respondent discriminated against him.

[69] The Board's role is not to investigate or reassess candidates. A simple disagreement with an outcome does not constitute an abuse of authority.

[70] The two assessment board members who testified both agreed that the complainant did not provide sufficient information in his responses to the complementary questions for Exp. 3 and Exp. 5, which resulted in him being screened out of the selection process. Ms. Hanlon testified that she relied on her personal knowledge to decipher his answers to the two questions. Based on her personal knowledge, she knew that his answers were not accurate. Assessment board members have considerable leeway to assess what constitutes a satisfactory answer (see *Drozdowski*, at paras. 36 and 51).

[71] The use of personal knowledge is an acceptable assessment method (see *Visca*, at paras. 53 and 54). The respondent argued that the candidates were notified on the JOA that several assessment means would be used; therefore, the complainant ought to have known that Ms. Hanlon would know the quality of his answers.

[72] The respondent distinguished the facts of the *Snelgrove* case and argued that in this case, the assessment board members independently assessed the complainant. There was no evidence that there was any undue influence on the other assessment board members. In *Snelgrove*, the Public Service Staffing Tribunal ("the Tribunal") found that the assessment board members did not act independently. The evidence in this case shows that they independently assessed the complainant's application.

[73] Citing *Denny*, the respondent argued that the complainant failed to meet the applicable test for establishing a reasonable apprehension of bias. The facts in *Denny* that led to a finding of bias do not exist in this case. In *Denny*, the finding of bias was based on a history of animosity between the complainant and the assessment board member as well as a finding that the assessment itself was flawed.

[74] The facts in this case are like those in *De Souza v. Deputy Head (Royal Canadian Mounted Police)*, 2023 FPSLRB 114, in which the Board ruled that the strained relationship between the complainant and the hiring manager, given the fact that the complainant had acted in the position for six years, was not enough to perceive bias.

[75] The respondent did not contest that the relationship between Ms. Hanlon and the complainant was strained but that alone, it argued, was insufficient to perceive bias. Ms. Hanlon assessed him fairly. She based her decision on his responses to Exp. 3 and Exp. 5. Mr. August also confirmed this in his testimony. The fact that Ms. Hanlon recused herself in other processes does not satisfy the reasonable-apprehension-of-bias test. She was transparent about her work relationship with the complainant, and she engaged Human Resources staff to ensure that her decision was appropriate. She was not required to recuse herself.

[76] On the discrimination issue, the complainant failed to establish a *prima facie* case of discrimination. The test is set out in *Simpsons-Sears*. Also, in *Bah*, the Board held that the evidence must be tangibly related to the impugned decision. As in *Brown* (paras. 47 and 48), the complainant still had to demonstrate a nexus to establish a *prima facie* case. He did not demonstrate a link or nexus between his race and colour and the decision to screen him out of the selection process. That decision was solely based on his responses to the screening questions.

[77] The respondent distinguished the two cases that the complainant relied on to support his discrimination argument, namely, *Fang* and *Premakumar*. In *Fang*, there was clear evidence of criticism of the complainant's language proficiency and skills, and his proficiency in English was a factor in the decision at issue. There is no evidence that the complainant's personal characteristics played any role in the decision to screen him out. Unlike in *Premakumar*, the complainant in this case did not provide any statistical evidence. The respondent acknowledged that he requested information on the number of Black candidates considered in the selection process; however, it did not have that information, given that self-identification was voluntary.

C. For the PSC

[78] As noted, the PSC did not attend the hearing; instead, it provided written submissions on its policies and guidelines. I have reviewed and considered its submissions, as appropriate. It referred to the following cases with respect to the discrimination issue: *Spruin v. Deputy Minister of Employment and Social Development*, 2019 FPSLRB 33 at para. 21; *Meneguzzi v. Director of Public Prosecutions*, 2019 FPSLRB 77 at paras. 100 to 114; *Kasongo v. Farm Credit Canada*, 2005 CHRT 24 at para. 21; *Abi-Mansour v. Deputy Minister of Justice*, 2021 FPSLRB 16 at paras. 97 to 101; and *Premakumar*, at para. 78.

IV. Reasons and issues

[79] I must determine these two issues:

- 1) Did the respondent abuse its authority by discriminating against the complainant based on race and colour during its assessment of his application?
- 2) Did the respondent abuse its authority in its assessment of the complainant?

A. The salient facts

[80] The respondent posted a JOA for the position of Program Manager, Office Accommodation, classified at the AS-04 group and level, in its accommodations management unit in Toronto. The complainant occupied that position until September 2020, when the respondent demoted him from it and launched the selection process to staff it indeterminately.

[81] The selection process was open to persons employed in the public service occupying a position in the Greater Toronto Area and eligible veterans and CAF members.

[82] The hiring manager and the chair of the assessment board for the selection process was Ms. Hanlon, who was also the complainant's supervisor. As his supervisor, she had personal knowledge of his performance and was also instrumental in his demotion.

[83] The respondent used the applicants' application forms as the tool to assess them on the six essential experience criteria, which were evaluated by a mark of "Meet" or "Not meet". The evaluation rubric was found in the questionnaire: the candidates were required to provide clear and concrete examples and details, including when, where, and how they acquired the experience.

[84] I find that the complainant's responses on all the essential experience questions were of similar length, depth, and breadth. Of the six experience criteria, only two of his responses were unacceptable to the assessment board. Given the evaluation rubric described in the last paragraph, there appears to be no rhyme or reason to what the assessment board deemed to "Meet" and "Not meet" the criteria.

[85] Mr. August testified that he did not find that the complainant's responses were detailed enough, but he was unable to explain why the responses to Exp. 3 and Exp. 5 differed in quality from the complainant's responses to the other questions that were acceptable to the assessment board.

[86] Mr. August was not aware of the discussion between Ms. Hanlon and the human resources officer about the complainant's demotion from the position that was to be staffed.

[87] Ms. Hanlon testified that she believed that the complainant was untruthful in his responses to the two questions because she knew that he did not carry out those duties. For Exp. 3, she explained that he did not provide details and that she had to use her personal knowledge of his work to understand his answer. The following were the questions and answers relating to Exp. 3:

Question	The complainant's answer
<i>Do you have experience in financial analysis and providing financial recommendations to management?</i>	<i>Yes</i>
<i>If yes, in no more than 400 words, please provide clear and concrete EXAMPLES and DETAILS, including WHEN, WHERE and HOW you obtained the experience.</i>	<i>In my role as Program Manager at PSPC (September 2015 to December 2019), on a regular basis I would analyze financial information and then provide recommendations to management. For example on a biweekly basis, I would review all financial information contained in SAP. From my review and analysis, I would provide recommendations to management. A few other areas that I would analyze information and provide recommendation is the monthly FMC report. In preparation for said report all financial information would be reviewed and analyzed. Based on the analysis recommendations would be made as to whether additional funds were warranted, funds can be returned, etc.</i> <i>[Sic throughout]</i>

[88] According to Ms. Hanlon, she had to use her personal knowledge of the complainant's duties to understand what he referred to because his answer provided no details of the topic being analyzed. Using her personal knowledge, she surmised that he referred to the Financial Management Committee ("FMC") report. She explained

that she never received any weekly reports from him, just a statement that did not provide her with enough information to understand the trends. She testified that the stakeholders consistently rejected his FMC reports as unsatisfactory, to the point that they informed her that they would no longer accept reports from him.

[89] With respect to Exp. 5, she testified that the complainant's answer was inaccurate in that she had never observed him leading a project and that a budget-plan exercise is not a project. For that exercise, he had simply acted as the secretariat, and even in that capacity, he asked many questions that suggested to her that he had not thoroughly reviewed the call letters.

[90] She testified that performance appraisals were not used in the screening exercise, but she acknowledged that she discussed the details in the responses for Exp. 3 and Exp. 5 with the complainant in formal and informal performance reviews.

[91] On cross-examination, she acknowledged that she agreed with the following statement in the DHR:

...

Ultimately, when Ms. Hanlon reviewed the complainant's application, she could not ignore the fact that clearly, he did not meet two of the above mentioned experience criteria factors. As explained above, she had been managing his performance in the job for a period of two years and determined that he did not perform some of the required functions such as E3 and E5 of the appointment process. Therefore while these experience criteria were in fact functions of his previous position, the sub-delegated manager screened him out based on her knowledge that he did not perform these duties. In light of the timing of the complainant's demotion into a lower-level position, it would have been unreasonable for Ms. Hanlon to screen in the complainant when she knew the complainant did not perform these functions.

...

B. No *prima facie* case of discrimination

[92] Under section 80 of the *PSEA*, the Board may interpret and apply the *CHRA* when considering whether a complaint under s. 77 is substantiated. Two provisions of the *CHRA* that are applicable in this context are ss. 3 and 7. Section 3 of the *CHRA* lists several prohibited grounds of discrimination, including race and national or ethnic origin. It is a discriminatory practice under s. 7 of the *CHRA*, directly or indirectly, in

the course of employment, to differentiate adversely in relation to an employee on a prohibit ground of discrimination. Section 3 of the *CHRA* lists several prohibited grounds of discrimination including race and national or ethnic origin.

[93] The complainant alleged that he was subjected to discrimination based on race and colour. While he did not clearly articulate this aspect of his complaint, I understood this allegation and the evidence he provided through Ms. Jean-Baptiste to be more akin to a systemic allegation of racial discrimination. Specifically, he alleged the following:

...

The information used to exclude me from the process was biased, inaccurate and highly prejudicial. Based on information gathered from the exchange of information and an informal discussion, I found out that I was treated differently from all other candidates. Whereas there was information provided to suggest consideration was taken on how successful the person was in the experience, that should not have been the case. For example if a person has experience driving a motor vehicle and the requirement is that the person has experience driving a motor vehicle one can't go back and say the person should not have had any demerit point, after the fact. The posting would have had to stipulate that the person should not have any demerit point for that to be a reason for eliminating the person. Similarly the requirement would have had to outline the fact that the person should have successfully perform [sic] the duties and outline what is meant by successfully. The requirement asked for experience in the above and I had the experience. Therefore based on the fact that I performed the duties of the position and indicated that I performed the duties of the position and there was no dispute as to my experience, I should not have been eliminated from the process.

[Emphasis added]

...

[94] Ms. Jean-Baptiste testified that she started experiencing negativity in the workplace when she began reporting to Ms. Hanlon and that she was sidelined in her work unit and threatened with demotion. She believed that the negative experience while under Ms. Hanlon's supervision was based on her race.

[95] The respondent denied that allegation and stated that a member of the assessment board was Black and that the appointee is a visible minority. The respondent further argued that the complainant failed to meet a *prima facie* test for discrimination.

[96] I reject the respondent's first two reasons as an answer to a racial-discrimination allegation. However, I agree with it that the complainant failed to establish a *prima facie* case of discrimination.

[97] Whether this is an allegation of personal or systemic discrimination, the test is the same: the complainant had to first establish through his evidence a *prima facie* case of discrimination. Once that was established, the burden of proof would then have shifted to the respondent to demonstrate a reasonable and non-discriminatory reason for its decision (see *Spruin*, at para. 21; and *Fang*, at para. 132).

[98] A *prima facie* case in the discrimination context is one that covers the allegations made and that if they are believed, justifies a finding in favour of the complainant absent a reasonable answer from the respondent (see *Simpsons-Sears*, at para. 28).

[99] To demonstrate a *prima facie* case of discrimination, a complainant must establish three things: a) that he or she has a characteristic protected from discrimination; b) that he or she experienced an adverse impact; and c) that the protected characteristic was a factor in the adverse impact (see *Fang*, at para. 131).

[100] Although the threshold for establishing a *prima facie* case is low, nevertheless, the complainant must lead tangible evidence related to the alleged activity — it cannot be simply based on the complainant's belief (see *Abi-Mansour*, at paras. 97 to 101; and *Bah*, at para. 246).

[101] In this case, I find that the first two elements of establishing a *prima facie* case exist; however, there is no evidence to support the third requirement. Other than the complainant's belief, there is no evidence to demonstrate a link between his race or colour and his elimination from the selection process that resulted from the respondent's decision that he failed to meet Exp. 3 and Exp. 5.

[102] While I accept that the relationship between the hiring manager and the complainant was (and possibly remains) fractious, there was no evidence to establish that his race or colour was a factor in his application's assessment.

[103] The complainant argued that he was the only incumbent of the position who was not allowed to perform its supervisory aspects and that that was because of his race and colour. I understand that this argument logically leads to a conclusion that he

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did not have the supervisory experience required under Exp. 5, which would be inconsistent with his position that he did meet that essential experience criterion.

[104] I find that the cases that the complainant relied upon can be distinguished on the facts. In both *Fang* and *Premakumar*, there was tangible evidence that supported the discrimination allegation.

[105] I conclude that the complainant failed to establish a *prima facie* case of discrimination based on race in the context of his application's assessment in the selection process. I do not find that the respondent abused its authority under this allegation.

C. Abuse of authority in the complainant's assessment

[106] My role is not to reassess the complainant's qualifications; rather, the task before me is to examine whether there was an abuse of authority in how the assessment board evaluated his application (see *Portree*, at paras. 48 and 56).

[107] Based on the evidence, I find that the respondent abused its authority in assessing the complainant's application in three ways. First, there was a reasonable apprehension of bias in Ms. Hanlon's participation in assessing the complainant's application. Second, the respondent abused its authority by inconsistently applying the assessment tools at the screening stage of the selection process. Third, it abused its authority by exercising its staffing discretion with an improper intention in mind, to achieve an intended outcome.

[108] The standard test for bias is the reasonable-apprehension-of-bias test. Simply stated, would a reasonably informed bystander, apprised of all the relevant facts and circumstances, and having thought the matter through, reasonably perceive bias on the part of the decision maker? (See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1. S.C.R. 369 at p. 394; and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623.)

[109] In *Denny*, the Tribunal reiterated that assessment board members have a duty to act fairly and to conduct a bias-free assessment. The assessment board fails in this duty to act fairly "[i]f a reasonably informed bystander looking at the process could reasonably perceive bias on the part of one or more of the assessment board members ..." (see *Denny*, at para. 126). Failing the duty to act fairly in a staffing

process constitutes an abuse of authority (see *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10 at para. 71).

[110] In *Drozdowski*, the Board noted the differences in the terminology of the reasonable-apprehension-of-bias test in both French and English staffing cases and reworded the test as follows: “If a reasonably informed bystander could reasonably perceive bias on the part of one or more of the persons responsible for assessment, the Board can conclude that abuse of authority exists” (see *Drozdowski*, at para. 26).

[111] In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 (one of the seminal cases decided under the newly enacted staffing regime in the *PSEA*), the Tribunal noted that Parliament did not intend “abuse of authority” to have a static definition. When considering the parameters of what constitutes an abuse of authority in public service managers’ exercise of staffing discretion, the Tribunal turned to basic principles of administrative law and jurisprudence and recognized five categories of abuse of authority, as follows:

[70] ...

1. When a delegate exercises his/her/its discretion with an improper intention in mind (including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations).
2. When a delegate acts on inadequate material (including where there is no evidence, or without considering relevant matters).
3. When there is an improper result (including unreasonable, discriminatory, or retroactive administrative actions).
4. When the delegate exercises discretion on an erroneous view of the law.
5. When a delegate refuses to exercise his/her/its discretion by adopting a policy which fetters the ability to consider individual cases with an open mind.

D. Reasonable apprehension of bias in the complainant’s assessment

[112] The complainant argued that Ms. Hanlon ought to have recused herself from assessing or evaluating his application because of their rancorous relationship as well as the ongoing complaints against her.

[113] On the other hand, the respondent argued that Ms. Hanlon did not have to recuse herself from assessing the complainant's application. Indeed, she testified that she had an ethical obligation to use her personal knowledge of his performance to assess his application.

[114] These arguments raise the question of whether a reasonably informed bystander could reasonably perceive that Ms. Hanlon's participation in the complainant's assessment would raise a reasonable apprehension of bias.

[115] Based on the evidence before me, I find that there was a reasonable apprehension of bias.

[116] The respondent referred me *Drozdowski* to support its position. Unlike in *Drozdowski*, in which the manager removed herself from the assessment of the complainant in that case, in this case, Ms. Hanlon consciously participated in the assessment. Mr. August testified that although he found the complainant's responses to Exp. 3 and Exp. 5 wanting in detail, he was not ultimately responsible for the decision to screen him out.

[117] Both parties relied on *Denny*. In *Denny*, the Tribunal found that the history of poor relations between the complainant and the person who administered the practical test raised an appearance of bias that resulted in a failure of the duty to conduct a fair appointment process (see *Denny*, at para. 133).

[118] The respondent argued that *De Souza* is directly on point with this case. I disagree.

[119] The facts in *De Souza* appear similar to the facts in this case in that the complainant in that case had occupied the position being staffed on an acting basis for a lengthy period; however, the similarity ends there. In that case, the Board found that although the tone of the email exchanges between the complainant and the hiring manager was less than cordial, it was not a sign of animosity. The Board stated at paragraph 45 as follows:

[45] While the tone of the delegated manager's email leaves something to be desired, I do not see it as a sign of animosity as the complainant alleged. I find that the absence of meaningful dialogue between the complainant and the delegated manager — not bias against the complainant — is the source of the

frustration and impatience implicitly communicated in the delegated manager's email.

[Emphasis added]

[120] In this case, it was evident that the relationship between the complainant and the hiring manager was much more than frustration and impatience. There was an implicit mutual recognition of conflict between them.

[121] I find that the facts and evidence in this case support a conclusion that a reasonably informed bystander, aware of all the circumstances, could reasonably perceive bias in the hiring manager's role in assessing the complainant's application. She could not have objectively assessed his responses.

[122] I conclude that the respondent abused its authority.

E. Using personal knowledge as an assessment tool in the screening was an abuse of authority

[123] The complainant alleged that the respondent abused its authority by treating him differently from other applicants.

[124] I agree. The evidence set out that the respondent used formal and informal performance appraisal information, derived from the hiring manager's personal knowledge, when assessing the complainant's application but that it did not do the same thing for the other applicants.

[125] The respondent denied that it treated the complainant differently; however, there was no evidence to support its position. It argued that it was entitled to use personal knowledge of his job performance to assess his application. There was no evidence to suggest that job performance evaluation was used to assess any other applicant.

[126] The respondent relied on *Visca* to argue that assessment board members could use their personal knowledge to assess an applicant and that the hiring manager properly exercised her discretion by using her personal knowledge to assess the complainant's application.

[127] In *Visca*, the Tribunal concluded that the complainant ought to have expected that the assessment board member would or could have used his personal knowledge

to assess his application. In that case, the job opportunity advertisement specified that the essential qualifications would be assessed by different means and that it included individual reference checks from both current and previous managers. Despite its finding that there was no abuse of authority in using the assessment board member's personal knowledge, at paragraph 56, the Tribunal cautioned as follows:

*[56] The Tribunal finds that the use of the words "various means" on the advertisement was broad enough to encompass the assessment methods chosen in this appointment process. While the circumstances of this case do not lead to a conclusion of abuse of authority, **informing the persons to be assessed, in a timely manner, of the assessment methods that are going to be used, including personal knowledge, could avoid allegations of this nature. In addition, care should be exercised to ensure that the selection board member's knowledge of the candidate is relevant to the merit criteria being assessed and is treated similarly to a reference check.***

[Emphasis added]

[128] I concur with the Tribunal's caution in *Visca*.

[129] In this case, the JOA specifically informed the applicants that several assessment methods would be used and that the applicants would be notified of the assessment methodology throughout the selection process, for instance on the poster for screening. There was no evidence that the respondent informed the applicants at the assessment and screening stage that personal knowledge would be one of the assessment tools or that formal and informal performance evaluation information would be used.

[130] Instead, the respondent informed the applicants that the essential experience qualifications would be assessed through their applications.

[131] Relying on *Drozdowski*, the respondent argued that the assessment board must have some leeway when determining what constitutes satisfactory answers (see *Drozdowski*, at para. 36).

[132] However, I agree with the complainant that *Drozdowski* can be distinguished from this case. In *Drozdowski*, it was evident that there was a marking scheme and a scoring scale. The Board was satisfied that based on the evidence, the marking of the complainant's examinations in that case was not arbitrary. It found that the

complainant's marks were consistent with the marking scale and the notes reflected on the complainant's examinations.

[133] There was no such evidence in this case that would allow me to arrive at the same conclusion as *Drozdowski*. The evidence in this case set out that the two assessment board members who testified gave two different explanations as to why the complainant failed to meet Exp. 3 and Exp. 5. Mr. August testified that he found that the complainant's responses lacked detail; on the other hand, Ms. Hanlon testified that the responses lacked detail and that using her personal knowledge of the complainant's work, she knew that his responses were untruthful.

[134] According to the respondent, the complainant's responses for Exp. 3 and Exp. 5 were incomprehensible, so the hiring manager had to use her personal knowledge to understand his examples. Mr. August testified that the complainant's responses lacked detail. As previously noted, his responses to all the experience questions were similar in length and detail, yet the assessment board found them satisfactory for the other experience criteria.

[135] The assessment board's screening summary showed that six applicants, including the complainant, did not meet Exp. 3; only he failed to meet Exp. 5.

[136] There was no evidence before me to support the respondent's position. For instance, it could have tendered into evidence samples of answers graded as Meet and those graded as Not meet as comparisons to the complainant's answers. Further, it could have easily anonymized the responses of those who failed to meet Exp. 3, to support its position. Similarly, it could have anonymized a response to Exp. 5 to demonstrate the inadequacy of his response.

[137] Based on the evidence presented, I conclude that the respondent abused its authority by treating the complainant differently at the screening stage of the selection process by using the hiring manager's personal knowledge when neither personal knowledge nor performance evaluation information was used for the other applicants. In arriving at my conclusion on this point, I was mindful of the Tribunal's caution in *Visca*, noted earlier, to the effect that the use of personal knowledge in an assessment process must be done in a manner that respects the value of transparency. I find that the respondent did not respect that value.

F. The respondent exercised its staffing discretion for an improper purpose

[138] The first category of abuse of authority set out in *Tibbs* is when a delegate exercises his or her discretion with an improper intention in mind, including acting for an unauthorized purpose, in bad faith, or on irrelevant considerations.

[139] Based on the evidence, I find that the respondent abused its authority by exercising its discretion for an improper purpose.

[140] Given that the respondent demoted the complainant from the position, the expectation was that he would not be one of the applicants. Ms. Hanlon candidly testified that when she saw his name on the list of applicants after the initial machine screening, she immediately contacted her human resources advisor to discuss his candidacy in the selection process. The details of her discussion with that advisor were captured in the email dated October 14, 2020, as follows:

...

As discussed, it's recommended that you screen the candidate out at the application stage.

To consider for elimination:

-as the candidate's previous manager, you have working knowledge of the candidate's performance and abilities

-one of the reasons why there is an LR case file on the candidate for this particular AS-04 position is because of their performance, that resulted in the demotion

-the candidate may say "yes" to experience qualifications, but does not necessarily meet the depth and breadth you are looking for in this AS-04 position

-the LR case and demotion just recently wrapped up, so not enough time has passed for the candidate to gain experience, complete training, etc. to meet the AS-04 threshold

Recommendation:

-screen out at application stage

-keep decisions consistent — if you know the candidate does not meet the experience factors, why allow to proceed on to assessment (difficult to justify as staffing process progresses)

-have informal discussion before HR sends the screening results to the candidate; can be communicated by email, so have record of communication for file

Let me know if you'd like to discuss further.

...

[Emphasis added]

[141] The respondent's objective was to eliminate the complainant from the selection process because he had been demoted from that position. The recommendation to "screen out at [the] application stage" meant that the respondent had to find a reason in the context of the screening exercise to achieve that purpose.

[142] Section 36 of the *PSEA* permits the respondent to "... use any assessment method, such as a review of past performance and accomplishments ..." that it considers appropriate. The respondent argued that a selection board member's personal knowledge is an accepted assessment method (see *Visca*, at paras. 53 and 54); therefore, it was appropriate for Ms. Hanlon to use her personal knowledge of the complainant's performance to assess his application.

[143] I accept that the respondent had broad discretion to choose any assessment method; however, its discretion was not untrammelled. The *PSEA*'s preamble espouses the value of transparency in employment practices, which is reflected in the expected results in the PSC's *Appointment Policy* requiring that appointment processes be conducted fairly and transparently and in good faith.

[144] I find that the use of personal knowledge in this context was pretextual and that it lacked transparency. What occurred in this case was a quintessential example of the first of the five categories of abuse of authority that the Tribunal outlined in *Tibbs*.

[145] I find that the respondent abused its authority by exercising its staffing discretion for an improper purpose.

V. Conclusion

[146] In this case, I find that the respondent breached its duty to conduct a fair assessment process and that it abused its authority, for three reasons.

[147] First, the mutually acknowledged poor relations between the complainant and Ms. Hanlon raised a reasonable apprehension that she would not be unbiased when assessing his responses, particularly since she had been instrumental in demoting him from the same position just before the selection process.

[148] Second, Ms. Hanlon considered and rejected the idea of recusing herself from the assessment because she believed that she had an ethical obligation to bring her

personal knowledge of the complainant's work situation to bear on his candidacy. On this basis, the respondent treated him differently from the other applicants during the screening phase of the selection process by using personal knowledge of his informal and formal performance assessment information.

[149] Third, the respondent abused its authority by exercising its staffing discretion for an improper purpose. It wanted to eliminate the complainant from the selection process because he had just recently been demoted from the position to be staffed. The way to achieve it was to eliminate his candidacy at the screening phase.

[150] I conclude that the respondent abused its authority by failing its duty to act fairly in the selection process.

VI. Corrective measures

[151] Before addressing the remedial aspects of this complaint, I wish to make two remarks. First, common sense would seem to dictate that by exercising good judgment, an individual would not submit his or her candidacy to a process for a position from which he or she had been recently demoted. However, whether or not it was common sense, as the complainant pointed out, no law prohibited him from applying to the selection process. Once he did so, his application had to be assessed as objectively as the respondent assessed all the other ones.

[152] Second, I accept that the complainant had the burden of proving the allegations; however, in a system in which all the relevant information resides with the respondent, the statutory regime has provided mechanisms by which complainants may assemble the relevant evidence to support their allegations. For instance, s. 47 of the *PSEA* provides for an informal discussion that allows a prospective complainant to gather information as to why he or she was eliminated from a process. This is a valuable tool not only for the complaint process, but it also serves to inform him or her as to what he or she might do differently in a future selection process.

[153] Once a complaint is made, ss. 16 and 17 of the *Public Service Staffing Complaints Regulations* (SOR/2006-6) provide additional tools for a complainant to gather information. Section 16 requires the parties to exchange all relevant information regarding the complaint, and s. 17 allows the Board to make an order for the production of information upon a party's request. Much like the procedure for the

pre-hearing disclosure of information in labour relations matters, the standard is the arguable relevance of the requested information to the allegations. The complainant did take advantage of those tools, with some success.

[154] At the hearing, the complainant argued that pertinent information was withheld from him. Following a request for the provision of information in November 2023, the respondent provided the complainant with the October 14, 2020, email that summarized the discussion between Human Resources and Ms. Hanlon on screening the complainant out at the application stage. This relevant document was not provided to the complainant during the exchange of information period. The respondent asserted that its earlier search for relevant documents had been restricted to the staffing file. In my opinion, this situation shows that the scope and search for arguably relevant information must be broader than just the staffing file.

[155] Section 81 of the *PSEA* specifies the remedial authority of the Board when a complaint is upheld. The Board may order the PSC or the Deputy Head to revoke or not make an appointment and to take any corrective action that the Board considers appropriate. Corrective action taken by the Board may include an order for relief under ss. 53(2)(e) and 53(3) of the *CHRA*. The respondent cited *Cameron* in its arguments. In that case, the Federal Court addressed the scope of the Board's (then it was the Tribunal) remedial authority and explained that the combined reading of ss. 77, 81 and 82 indicates that any corrective action must address only the appointment process that is the subject of the complaint before the Board (see *Cameron*, at paras. 15 to 18).

[156] Most of the Board's jurisprudence to date appear to signal that a financial remedy is not available for staffing complaints. However, in a recent decision, *Harnois v. Deputy Head (Deputy Minister of Transport, Infrastructure and Communities)*, 2024 FPSLREB 106, the Board noted that awarding damages as a corrective measure under the *PSEA* framework has rarely been requested or considered and held that where abuses of authority are so flagrant, it may be worthwhile to seriously consider this issue.

[157] I agree.

[158] The complainant asked that the Board revoke the appointment, award him damages under s. 53(3) of the *CHRA*, and grant him relief like that awarded in *Premakumar*. *Premakumar* dealt with discrimination. Given my finding on the

discrimination allegation, I need not consider any discrimination-related corrective action.

[159] With respect to revocation, the complainant did not challenge the respondent's assessment of the appointee, nor did he allege that the appointee was not qualified for the position. There was no evidence before me that the appointee did not meet the merit criteria. Revocation is therefore not an appropriate corrective action.

[160] Given the nature of the abuses of authority established in this case, as well as the evidence of the complainant regarding the impacts of his being screened out of the process, I believe it is appropriate to consider other corrective action for harms stemming from the abuses of authority that occurred in this process.

[161] I adopt the Board's approach in *Harnois*, since I did not hear the parties' submissions on my authority to take corrective action in the form of remedying harms caused to the complainant because of substantiated abuses of authority in this staffing process. Specifically, I will reconvene the parties to a hearing in the coming months to provide submissions on the possibility of awarding damages as a corrective action in this case.

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

(The Order appears on the next page)

VII. Order

[163] The complaint is allowed.

[164] I declare that the respondent abused its authority in the assessment of the complainant's application.

[165] The Board will reconvene the parties to a hearing in the near future to provide submissions on the possibility of awarding damages as a corrective action in this complaint.

October 17, 2024.

**Caroline Engmann,
a panel of the Federal Public Sector
Labour Relations and Employment Board**