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**File:** 771-02-43184

**Citation:** 2024 FPSLREB 133

*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

**JIN GUR CHUNG**

Complainant

and

**DEPUTY HEAD  
(Department of National Defence)**

Respondent

and

**OTHER PARTIES**

Indexed as

*Chung v. Deputy Head (Department of National Defence)*

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

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

**For the Complainant:** Louis Bisson, representative

**For the Respondent:** Geneviève Brunet-Baldwin, counsel

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

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Heard via videoconference,  
February 20 and 21, 2024.

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**REASONS FOR DECISION**

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**I. Complaint before the Board**

[1] On July 4, 2021, Jin Gur Chung (“the complainant”) made a complaint to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*).

[2] He alleged that the respondent, the deputy head of the Department of National Defence (DND), abused its authority when it appointed Johanne Gervais (“the appointee”) to the position of Staffing Officer, classified at the AS-03 group and level. The complainant alleged that an abuse of authority occurred in both the application of merit (under s. 77(1)(a) of the *PSEA*) and in the choice of a non-advertised process to make the appointment (under s. 77(1)(b)). The appointment process number was 21-DND-INA-CORPSEC-475798. A notice of consideration (NOC) was issued on June 15, 2021. The notice of appointment or proposal of appointment (NAPA) was issued on June 23, 2021.

[3] The complainant made these allegations in his complaint:

- that a non-advertised process was chosen, in breach of staffing values such as access, transparency, and representativeness;
- that the essential qualifications were tailored to favour the appointee and exclude others and were not linked to the work to be performed;
- that the appointee did not meet the essential qualifications for the position;
- that the respondent discriminated on the basis of race, national or ethnic origin, or colour by purposely excluding racialized employees from the process; and
- that there was a perception of bias in the decision making leading to the choice of process and application of merit because the complainant had previously filed a grievance.

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

[5] The Public Service Commission did not attend the hearing and provided written submissions to address applicable policies and guidelines. It did not take a position on the merits of the complaint.

[6] For the following reasons, while I find that there were some errors and omissions in the respondent's documentation of its choice to use a non-advertised process, I do not find that the complainant established that the respondent abused its authority. As a result, the complaint is dismissed.

## **II. Summary of the evidence**

[7] The complainant testified for himself and relied on 17 documents that were entered on consent. At the time the complaint was made, he worked as an administrative officer within the Business Management Services (BMS) unit, classified at the AS-02 group and level.

[8] The respondent called Vidalia Botelho as witness and relied on 15 documents that were entered on consent. At the time the complaint was made, Ms. Botelho was the acting director of strategic corporate services (DSCS). As the DSCS, she oversaw a few units, including the BMS. She was the delegated staffing authority for the appointment in question. She began in the acting DSCS role in early 2021 and left it in late 2021. She returned to the role on an indeterminate basis in August 2023 and was in it as of the hearing.

[9] The BMS unit is within the DSCS directorate, which in turn is a part of the office of the Corporate Secretary of DND, all based in Ottawa, Ontario.

[10] At the time the complaint was made, the DSCS directorate consisted of approximately 40 employees. The BMS unit provided financial and administrative services to it. Among other things, this consisted of entering data into and generating reports from DND's information management system, which goes by the acronym DRMIS. The data and reports worked on by the BMS unit were predominantly related to human resources. The BMS unit also handled associated administrative functions; for example, any paperwork for new hires or assignments. The complainant testified that he was also the directorate's security supervisor.

[11] Before the appointment in question was made, the BMS unit was being managed by Thuy-Vi Nguyen, classified at the AS-04 group and level. She began that role in October 2020 but announced her departure from it in February 2021. During her time as the BMS unit manager ("the BMS manager"), she was the supervisor of the

complainant and a colleague of his, who was also classified at the AS-02 group and level.

[12] The complainant testified that within the DRMIS, he prepared financial reports and performed reconciliations. The role of the BMS manager was to go into the system and ensure that the reports were accurate and to make system adjustments as required.

[13] In the two years preceding the appointment being made, at least four different employees served as the BMS manager, none for more than 15 months. In 2019, the complainant and his colleague were given rotating acting appointments as the BMS manager at the AS-04 group and level of two weeks on and two weeks off for a few months.

[14] The complainant testified that during the two-year period preceding the appointment, he took on extra roles because of the level of turnover. He testified that sometimes, the work was overwhelming. He felt like he was doing three jobs. He testified that in September or October of 2020, he filed a grievance concerning acting pay, workload, and discipline. He said that he faced a hostile situation after filing the grievance and that he felt alienated. He testified that he was accused of insubordination and threatened with termination.

[15] The complainant testified that in the fall of 2020, the office of the Corporate Secretary posted an assignment opportunity for participation in a business manager training program. The program was limited to employees already classified AS-03 to AS-05. He still applied but was turned down because he was only an AS-02, even though he had partially qualified for an AS-03 pool at Global Affairs Canada.

[16] The complainant testified that after Ms. Nguyen announced her departure, he expressed to her his interest in acting as the BMS manager. He said that she told him that she would have to speak to Human Resources.

[17] Ms. Botelho, the DSCS, also testified about the state of the BMS unit team when she began to supervise it early in 2021. She said that she learned that there had been significant instability and staff movement. She said that she knew that the employees had concerns about training, guidance, and management.

[18] Ms. Botelho testified that when she took over, the BMS unit was nearing the end of the fiscal year, which was a busy time for it. The unit managed a budget of about \$3 million a year, including salaries and operations and maintenance. The job of the BMS unit was to ensure that all paperwork for new hires, assignments, and other staffing changes were in place, reconciled, and input into the different systems.

[19] Ms. Botelho testified that after Ms. Nguyen announced her departure, she let the staff of the BMS unit know, including the complainant. She said that she reached out to Human Resources to ask for résumés and recommendations for candidates at the AS-04 level. She said that she hoped to fill the AS-04 position quickly, given the needs of the unit and the demands of the work.

[20] She testified that she learned that the office of the Corporate Secretary was reviewing its structure and was considering centralizing some of the BMS unit functions within the office of the comptroller, due to issues of recruitment and retention. She said that she was advised not to fill the AS-04 role on an indeterminate basis because of that. Therefore, she shifted from a search for an indeterminate AS-04 candidate to someone ready to act for a period of six months or less. However, the candidates she interviewed at the AS-04 level were not interested in short-term possibilities.

[21] On or about March 19, 2021, Ms. Botelho was in communication with the director of DND's Anti-Racism Secretariat, which was also a part of the office of the Corporate Secretary. Ms. Botelho testified that that director was also looking for a business manager and knew that Ms. Botelho was also looking for someone to fill that role. That director identified the appointee as a potential candidate that the two units could share. That director said that the secretariat did not have any "permanent boxes" to hire someone but understood that the BMS unit had one because of the AS-04 vacancy. That director suggested that the two units could cost-share the appointee, and the hiring would provide some of the relief and stability being sought by the comptroller group.

[22] Ms. Botelho testified that she learned that the appointee had already been pre-qualified for positions at the AS-03 group and level through a pool process at Health Canada. On March 31, 2021, the appointee confirmed that information, and her interest in working under Ms. Botelho.

[23] On April 16, 2021, Ms. Botelho completed the “Articulation of Selection Decision” (ASD) required under the relevant DND staffing policy when a person is being considered for a non-advertised appointment. The ASD referred to the position as “Staff Officer” and later as “Staffing Officer”, classified at the AS-03 group and level. In the document, she stated that the appointment was required to provide support with human resources and financial actions to “... ensure continued high-quality services and avoid potential backlogs of hiring candidates due in part to recent staff departures.” Ms. Botelho wrote that many other candidates were also interviewed but that none was deemed as having the right experience or being the best fit. The document referenced the AS-03 pool with Health Canada. The appointee was identified as “... being the best fit candidate due to her experience.”

[24] Several times, the ASD described the proposed appointment as an “external non-advertised” process. In her testimony, Ms. Botelho described that as a typo and said that it should have read “internal non-advertised”. At the time, the appointee being considered worked elsewhere in DND.

[25] Ms. Botelho also testified that she completed a statement of merit criteria (SOMC) for the position and an assessment of the appointee against the essential qualifications in it. The SOMC, the appointee’s assessment, the appointee’s résumé, and two reference checks were all entered into evidence. An email dated April 12, 2021, about the appointee’s language profile, was also entered into evidence. The appointee had exempt status on two elements of that profile and a “C” on the remaining writing requirement. The C rating had expired on September 23, 2020. However, Ms. Botelho sought and received approval to proceed with the hiring despite the expired rating.

[26] Among the several essential qualifications listed in the SOMC was one that required significant experience coordinating and administering different types of salary budgets. Significant was “... defined as the breadth, depth, and complexity of experience normally associated with full time performance of duties for a period of 18 months.” The complainant testified that he did not meet that requirement as he had only 12 months of continuous experience in that area. Ms. Botelho testified that she decided to set the experience requirement at 18 months because it ensured that the person appointed would have experienced the full scope of financial duties associated with closing out a full fiscal year.

[27] The complainant testified that sometime in May 2021, he learned that Ms. Botelho intended to hire someone at the AS-03 group and level instead of replacing Ms. Nguyen as the BMS manager at the AS-04 group and level. He sought a meeting with Ms. Botelho to express his concerns and to ask if his résumé had been pulled for consideration for an AS-03 appointment. When he emailed her to ask for a meeting, he gave her a “warning” about the topics that he wished to speak about. He testified that he used that word because he had been labelled a troublemaker.

[28] Ms. Botelho also testified about communications she had with the complainant in May 2021 about the staffing situation. She said she had confirmed to him that the director of the Anti-Racism Secretariat had asked Human Resources to pull the résumés of possible candidates. Ms. Botelho testified that she tried to keep the complainant as informed as possible but that she could not divulge details about the potential appointment of another employee. She reminded him that as the security officer for the directorate, he might become aware of information about the potential appointment, and she reminded him not to use it for personal benefit.

[29] As noted, the respondent published the NOC on June 15, 2021, and the NAPA on June 23, 2021. The NOC and the NAPA listed the appointee and described the position being filled as a “Staffing Officer” classified at the AS-03 group and level.

[30] The complainant testified that the appointee began in her position on July 7, 2021.

[31] On July 19, 2021, the complainant left the BMS unit to take on a three-month acting position outside the DSCS directorate but still within the office of the Corporate Secretary. He returned to the BMS unit in mid-October 2021.

[32] The complainant testified that once in the position, the appointee was unable to complete functions with the DRMIS because she did not have access to it. He testified that because of that, he was asked to complete some transactions within the DRMIS while acting outside the BMS unit. The complainant testified that the appointee told him that she did not have experience as a financial resource manager and that she wanted to be trained by him and his colleague.

[33] Under cross-examination, referring to himself and his colleague, the complainant testified that “we knew” that the appointee could not access the system but could not recall the appointee ever verbalizing that fact.

[34] In the assessment of the appointee’s qualifications against the SOMC, the document lists 10 roles that the appointee had within the DRMIS. The assessment also stated that the appointee had “section 32, 33 and 34 delegation” — i.e., delegations of financial authority under the *Financial Administration Act* (R.S.C., 1985, c. F-11; “the *FAA*”).

[35] The complainant testified that he did not believe that the appointee could perform those 10 roles in the DRMIS. He said that he was able to perform all the roles. He testified that he did not believe that the appointee would have had delegations of financial authorities under the *FAA* because those are not normally given to employees at the AS-02 group and level. The complainant also testified that he had those authorities because he had received training.

[36] With respect to the appointee’s access to the DRMIS, Ms. Botelho testified that each directorate has its own cost centres and that access to make specific changes in the DRMIS must be provided for each cost centre. Ms. Botelho said that the appointee arrived from an entirely different part of DND — material acquisition — and that she would not have been able to bring the same access privileges. A renewal of the appointee’s training would have been required, along with orientation to standard operating procedures in the new directorate. Ms. Botelho testified that she was aware that the complainant was asked to assist during the transition period but that he also tried to learn a new position elsewhere.

[37] The complainant returned to the BMS unit from his acting position in mid-October 2021.

[38] On October 25, 2021, the appointee began a period of leave from her position. As of the date of the hearing, she was still on that leave.

[39] The complainant left DND in April 2022. As of the hearing, he worked as a project officer at another department, classified at the AS-03 group and level.

[40] Also entered into evidence was a work description for an “Administrative Staff Officer” classified at the AS-03 group and level. Ms. Botelho testified that this was a *Federal Public Sector Labour Relations and Employment Board Act* and *Public Service Employment Act*

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standardized work description and that it was used in her words as a “positional box” for the appointment. The complainant testified that there was no connection between the work description and the SOMC for the position. Ms. Botelho testified that she had to establish the SOMC based on the needs of the unit and the work to be performed, not on the standardized job description. She said that the appointee was made aware that the work description was not reflective of her tasks and that it would have to be changed once she was in the role. Ms. Botelho testified that she was not aware if the work description was ever changed, as she ceased acting as the DSCS in August 2021.

[41] In relation to his allegation that the position was tailored for the appointee, the complainant testified that the appointee was “promised” an appointment at the AS-04 level. Ms. Botelho testified that the appointee was told that once she was familiar with the AS-03 position, there could be opportunities at the AS-04 level. Ms. Botelho said that the same message was provided to the AS-02s when they acted as the BMS manager.

[42] With respect to the discrimination allegation, the complainant testified that he is a Korean man. He testified that he believed that there was discrimination because he was a better-qualified candidate than the appointee and because he had full access to the DRMIS and the required certifications, while the appointee did not. He testified that he did not have any direct evidence that race was a factor in the appointment process but that the result of being passed over for someone less qualified led him to conclude as much. He testified that he experienced microaggressions while working in the BMS unit, and that racism is systemic in nature. There is not always a “smoking gun”, he testified.

[43] Ms. Botelho testified that race is not an element of the staffing process or in this process. She said that she had led teams for many years, based on trust and respect, and that she does not understand why the complainant thinks that race was a factor in the appointment decision.

[44] With respect to the allegation of bias, the complainant testified that he filed a grievance in September or October of 2020 with the director who had preceded Ms. Botelho. The complainant said that he was accused of being insubordinate. He said that the work environment was toxic, that he was not getting paid properly, and every task was being thrown at him. He testified that the environment after he filed the

grievance was hostile. He said that one official in Human Resources was biased against him and that he believed that she had racist views. The complainant also testified that he did not believe that Human Resources would have pulled his résumé and suggested him as a potential candidate.

[45] Ms. Botelho testified that when she began acting as the DSCS in early 2021, she became aware that the complainant was concerned about moving forward and believed that his grievance was a roadblock to moving up in the organization. She said that she learned that a letter of expectations had been placed on his file by a previous manager. Ms. Botelho told the complainant that she could remove the letter of expectations if he was on a good path. She testified that the letter was removed, in June or July of 2021.

[46] With respect to sharing the position between the BMS unit and the Anti-Racism Secretariat, Ms. Botelho testified that the anticipated division of labour was 60-40, although she could not recall which was 60% and which was 40%. She also testified that the cost-sharing of the position was anticipated to last 1 to 2 years at most.

### III. Summary of the arguments

#### A. For the complainant

[47] The complainant argued that the Board should find that the respondent abused its authority in making this appointment. While s. 2(4) of the *PSEA* states that abuse of authority includes “bad faith and personal favouritism”, the Board is not limited by those terms. In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8 at para. 70, the Board’s predecessor, the Public Service Staffing Tribunal (PSST), listed five categories of abuse, as follows:

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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.*

[48] The complainant argued that he did not believe that the delegated staffing authority, Ms. Botelho, woke up one morning with bad intent. However, as outlined in *Tibbs*, bad intent is not required. An abuse of authority can be found when several aspects of the appointment process simply do not make sense; see *Hunter v. Deputy Minister of Industry*, 2019 FPSLRB 83 at paras. 80, 90, and 93. The Board should not simply accept the respondent's explanation for its actions; it must look at the facts from the perspective of the complainant. The Board must undertake an "objective assessment ... of what actually occurred", the complainant argued; see *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at para. 78.

[49] To find that the respondent abused its authority, the Board need not uphold every allegation made, the complainant argued. He had only to demonstrate that one or two of his allegations were founded to establish that an abuse of authority took place.

[50] On the choice of a non-advertised process, the complainant argued that the respondent breached its staffing values. The content of the ASD document does not adequately explain why a non-advertised process was selected. As in *Hunter*, the content does not make sense. The form refers to the appointment as an external non-advertised process, but it was an **internal** non-advertised process. There is no explanation of why the respondent chose to fill an AS-04 vacancy with an appointment at the AS-03 group and level. All the respondent did was fill out the spaces in the ASD form. It did not provide a proper and accurate justification for its decision to use a non-advertised process, the complainant argued.

[51] The respondent also did not explain why the appointee's successful participation in an AS-03 pool process at Health Canada was relevant to its decision, the complainant argued. The reference in the ASD to the Health Canada pool should assist the Board in concluding that the appointment was made in bad faith. The essential qualifications used in the Health Canada process were not the same as those established by the respondent for this appointment, he argued.

[52] The complainant argued that the planned sharing of the appointee between two directorates was hidden in secrecy. There is no mention in the ASD that the appointment was being made to fill the needs of two different directorates. The identification of the appointee as a potential candidate was done behind closed doors by the two directors, which opens the door to favouritism, the complainant argued. To simply move a candidate being considered for one position (under the Anti-Racism Secretariat) to another is problematic, he said.

[53] The respondent has the right under the legislation to consider only one person, the complainant noted, but its decision must make sense. In this case, too much justification was drawn from other selection processes, he argued. The ASD makes only a vague reference to looking at candidates from another inventory. If other candidates would have been considered, or the appointment was made from a pool that was relevant to the work of the unit, it would be different. He submitted that the circumstances of this appointment add up to an abuse of authority.

[54] On the establishment of the essential qualifications for the appointment, the complainant argued that there was a mismatch between the SOMC and the work description for the AS-03 position. The respondent admitted that the work description was not up to date. It made the appointment anyway and said that it would fix the paperwork afterward. While the respondent has wide discretion to establish the essential qualifications for a position, the exercise of that discretion must make sense. When it does not, an abuse of authority occurs, he argued.

[55] With respect to the allegation that the appointment was made without merit, the complainant argued that the appointee was unable to perform several of the functions required for the job within DND's DRMIS. The complainant said that the appointee told him that she did not have the necessary access to perform these functions. The complainant argued that he was knowledgeable about the software, while the respondent's witness was not a subject-matter expert.

[56] While not disputing the language abilities of the appointee, the complainant also noted that her rating was expired at the time the appointment was made. This suggests that an improper assessment was done, he argued.

[57] On the discrimination allegation, the complainant argued that he would leave it for the Board to make a finding based on the evidence provided.

[58] On the allegation of bias, the complainant highlighted the fact that he had filed a grievance and that he felt like he was being watched. The PSST found that an abuse of authority has taken place when bias is involved; see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at paras. 121 to 141.

#### **B. For the respondent**

[59] The respondent highlighted several provisions of the *PSEA* that should be applied by the Board to conclude that there was no abuse of authority in the respondent making this appointment.

[60] The preamble to the *PSEA* states that staffing authority should be delegated to the lowest possible level within the public service, it argued, and s. 30(2)(b)(ii) states that an appointment is made on the basis of merit when the deputy head considers "... any current or future operational requirements of the organization ...". This is what the respondent did when it appointed the appointee to a position to be shared by two different organizations at the same time and when it made an indeterminate appointment responsible for financial management. The respondent also argued that the ability of the employer to take into consideration future needs is also found at s. 31(1).

[61] While it is unusual for a position to be shared between two directorates, the work that the appointee performed for the BMS unit was the same work she performed for the Anti-Racism Secretariat, the respondent argued. It was finance work and was appropriately classified at the AS-03 group and level.

[62] Under the circumstances facing DND, it was reasonable for the respondent to cease looking for someone to fill the AS-04 vacancy and instead make an appointment at the AS-03 group and level, it argued. There had been much turnover at the AS-04 level, which had led to instability in the team. Ms. Botelho made the appointment with the expectation that it would address the needs of the unit and the longer-term requirements of the directorate and the office of the Corporate Secretary.

[63] On the choice-of-process allegation, at s. 33, the *PSEA* clearly allows the respondent to use either an advertised or a non-advertised process, the respondent argued. No preference is given to the use of an advertised process; see *De Souza v. Deputy Head (Royal Canadian Mounted Police)*, 2023 FPSLRB 114 at paras. 62 to 65.

Like *De Souza*, in this case, Ms. Botelho faced a key vacancy in a small team, which required her to move quickly. The team required someone capable of performing the job.

[64] The respondent argued that the choice of process was not made in bad faith. It was made for operational reasons and within the discretion allowed under the legislation; see *D’Almeida v. Commissioner of the Royal Canadian Mounted Police*, 2020 FPSLREB 23 at paras. 55 to 58, *Tremblay v. Deputy Head (Department of Employment and Social Development)*, 2023 FPSLREB 92 at paras. 35 to 39, and *Haller v. Deputy Head (Department of National Defence)*, 2022 FPSLREB 100 at paras. 60, 63, 64, 66 to 70, 73 to 76, 79 and 81.

[65] While acknowledging that the ASD erroneously identified the appointment as an external non-advertised one, the respondent took the position that otherwise, the document met the requirements of its policy, which requires that the hiring manager provide an explanation of the factors, the name of the candidate, and how they meet the essential requirements. This was done, it said.

[66] The respondent was under no obligation to address the AS-04 vacancy with an appointment at the AS-04 group and level, it argued. Initially, doing so was the plan, but no pre-qualified candidates were found. The decision to appoint at the lower level was made in the context of a reorganization that was underway. Ms. Botelho knew that there was a short-term requirement in the BMS unit and a longer-term requirement within the office of the Corporate Secretary for someone with the appointee’s skill set.

[67] It was not an abuse of authority to make the appointment to a position with an outdated work description, the respondent argued. The *PSEA* does not require an up-to-date work description. It said that at s. 31, the *PSEA* allows the respondent to establish qualification standards, having regard to the nature of the work and the present and future needs of the organization, and that is what it did.

[68] The respondent did not abuse its authority by failing to mention in the ASD that the appointment would be shared between the BMS unit and the Anti-Racism Secretariat, it argued. It said that when it makes an appointment, it must do so to a specific position number. That is the position listed in the NOC and the NAPA. It may be unusual to share a position with another directorate, but it is not an abuse of

authority under the *PSEA*, the respondent said. Furthermore, the cost-share was planned for 1 to 2 years; it was not a permanent arrangement.

[69] Contrary to what the complainant argued, it was not an abuse of authority for the director of the Anti-Racism Secretariat to share the name of a potential candidate with Ms. Botelho, the respondent argued. When any employer runs an unadvertised process, it is because it has someone in mind who meets the criteria. That is the reason for choosing a non-advertised process. The respondent must ensure only that the appointment is not made in bad faith and that the appointee meets the essential requirements.

[70] The Board should not consider the fact that the appointee remained in the position for only a few months and was not replaced after going on leave in October 2021. The Board should focus on the facts in place when the appointment was made. The decision to proceed with an indeterminate appointment was made because Ms. Botelho knew that it is hard to bring in people on short-term contracts. When the appointment was made, Ms. Botelho believed that it would bring relief to an already stretched group.

[71] Whatever errors might have occurred in the process of deciding to use a non-advertised process do not add up to a significant lack of transparency, the respondent argued. The Board and its predecessors have dismissed complaints on this basis, it said; see *Morris v. Commissioner of Correctional Service of Canada*, 2009 PSST 9 at para. 100, and *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6 at paras. 47 and 48.

[72] On the allegation that the SOMC did not reflect the requirements of the position, the respondent argued that the essential qualifications were determined by Ms. Botelho after consulting the outgoing BMS unit manager, Ms. Nguyen. The SOMC reflected the requirements of the position, which were clearly linked to the financial experience required by the BMS unit and the Anti-Racism Secretariat.

[73] As for the allegation that the appointee did not meet the essential qualifications required for the position, the respondent denied it. A thorough and complete assessment of the appointee's experience was made. That assessment was supported by the appointee's résumé and by two different reference checks. The complainant made assumptions that the appointee was not qualified because he was asked to carry

out certain tasks within the DRMIS while he was away from the unit. Ms. Botelho testified that there are delays approving access to certain functions; this does not mean that the appointee lacked the experience listed in the essential qualifications.

[74] The respondent argued that the complainant was not in a position to assess the appointee before her appointment; after the appointment was made, he worked with her for only a short period in July 2021, before he started his acting position away from the unit, and for a few weeks in October 2021, after he returned. The complainant has not met his burden of proof of demonstrating that the appointee did not meet the essential qualifications, the respondent argued.

[75] The respondent had a valid reason for setting the financial experience level at 18 months, it argued. That duration was chosen because it reflected the full scope of managing an entire fiscal year from the time it is opened until it is completely closed off. The same experience level was required by Health Canada in the pool for which the appointee had qualified.

[76] The complainant failed to establish a *prima facie* case of discrimination, the respondent argued; see *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 paras. 59 to 65 (“*Bombardier*”), *Davidson v. Deputy Minister of Health*, 2020 FPSLREB 56 at paras. 32 to 36 (“*Davidson 1*”), and *Abi-Mansour v. President of the Public Service Commission*, 2016 PSLREB 53 at paras. 74 to 78 and 82 to 84.

[77] The complainant also did not establish that the respondent demonstrated bias, it argued. Unlike the situation in *Denny*, there was no evidence of an ongoing conflict in this situation. Ms. Botelho testified that she wanted to make a fresh start with the staff of the unit when she became the director and that she took the steps required to remove the letter of expectations on the complainant’s file. Of course, the complainant might have been unhappy that he was not appointed to the AS-03 position, but that does not prove that bias existed when the decision was made.

#### **IV. Reasons**

[78] The complainant has the onus of establishing that on the balance of probabilities, the respondent abused its authority; see *Tibbs*, at paras. 48 to 55, and *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 27 (“*Davidson 2*”).



[79] The complainant made five allegations with respect to his complaint that the respondent abused its authority in making this appointment, which I shall address in the order that follows.

**A. Was the complainant discriminated against because of his race?**

[80] I find that the complainant has not substantiated his discrimination allegation. The jurisprudence cited by the respondent all supports the requirement that the complainant must first establish a *prima facie* case of discrimination, as follows: 1) he has a characteristic protected from discrimination, 2) he experienced an adverse impact due to the actions of the respondent, and 3) the protected characteristic was a factor in the adverse impact; see *Bombardier*, at para. 63, *Davidson 1*, at para. 34 (upheld in *Davidson 2*, at paras. 54 and 55), and *Abi-Mansour*, at para. 78.

[81] I am satisfied that the complainant met the first of these steps, in terms of his race, by identifying as a Korean man. I am less convinced that he experienced an adverse impact, as he was not a candidate in the appointment process in question, so this is not a situation in which the appointee was selected over him. However, since he did testify that he had expressed an interest in the position to Ms. Nguyen and that he had previously acted at the AS-04 level within the BMS unit, I accept that he experienced an adverse impact by not being actively considered for the position. However, there was no evidence presented to demonstrate that there was a link between his race and the adverse impact. The complainant testified that he believed that a human resources officer was biased against him and was known as having racist views but provided no concrete evidence of this. There was no testimony about specific events or conversations, and no documents were introduced that hinted that race could have been a factor. All I heard was the complainant's assertion that he had experienced microaggressions and that he believed that he experienced systemic racism.

[82] In his argument, the complainant left it to the Board to consider his discrimination allegation on the basis of the facts presented. He did not argue the allegation in any detail or cite any case law to support it. I find that he failed to establish a *prima facie* case of discrimination; therefore, this allegation has not been substantiated.

**B. Was there a reasonable apprehension of respondent biased against the complainant?**

[83] I find that the complainant has not substantiated his allegation that the hiring manager was biased against him. The applicable test in this case is the reasonable apprehension of bias. In *Denny*, the PSST stated that “[s]uspensions, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious” (see *Denny*, at para. 124). It further referred to the Supreme Court’s decisions in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394, and *Newfoundland Telephone Company v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623; [1992] S.C.J. No. 21 (QL) at para. 22, to formulate the following test: “If a reasonably informed bystander looking at the process could reasonably perceive bias on the part of one or more of the assessment board members, then the duty to act fairly has not been met”; (see *Denny*, at para. 126).

[84] It is clear that the complainant had filed a grievance and that he believed that management had seen him as a troublemaker. However, there was a lack of details provided in evidence of this. Furthermore, the decision maker in this appointment was Ms. Botelho, who became the director responsible for the complainant’s unit only a few months before this appointment was made. She testified convincingly that she sought to create a clean slate and that she had taken the steps needed to remove a letter of expectations from the complainant’s file.

[85] The complainant cited *Denny* in support of his allegation of bias. The complainant in *Denny* was an unsuccessful candidate in an advertised process and was required to complete a practical test before a manager against whom he had filed grievances and made a harassment complaint. I do not find *Denny* at all on parallel with the situation in this case. The complainant was not even actively considered for this appointment. He was not tested or assessed. When Ms. Botelho spoke to the complainant about the appointment process in May 2021, she had already completed the ASD and evaluated the appointee against the SOMC for the position. Quite simply, there was no evidence that Ms. Botelho’s decision to appoint the appointee was motivated by bias against the complainant. Consequently, the complainant has not established the existence of a reasonable apprehension of bias.

**C. Did the appointee meet the essential qualifications for the position?**

[86] I find that the complainant failed to establish that the appointee did not meet the essential qualifications for the position. The appointee's experience in relation to the SOMC for the position was thoroughly documented by the respondent. She came to the position with more than 19 years of experience within the public service. She had extensive and recent experience under each of the essential experience requirements for the position in another part of DND. That experience was reflected in the appointee's résumé and in the written references that were tendered into evidence. Her language-assessment profile might have been out of date, but according to her résumé, it was because testing was not easily available during the COVID-19 pandemic. The respondent was satisfied that the appointee was fully bilingual, and an exception was granted.

[87] The complainant appears to have assumed that the appointee was not qualified for the position because there were certain tasks or functions that she could not perform in the DRMIS. His evidence was that he was asked to complete some of these tasks or functions while he was on an acting appointment elsewhere in the office of the Corporate Secretary. He claimed to have known that the appointee was not qualified for the position, but he could not provide any specific testimony about conversations with the appointee. Indeed, he worked with the appointee for only about a week in early June 2021 and for less than three weeks in October 2021, as he was away on his acting appointment for three months.

[88] The respondent's explanation for the delays providing the appointee with full access to the DRMIS was logical and was not contradicted by the testimony or arguments of the complainant.

[89] The complainant might well have been in a better position than the appointee to "hit the ground running", as the saying goes, with respect to the performance of certain DRMIS functions. However, he did not demonstrate that the appointee did not meet the essential qualifications for the position.

**D. Did the respondent abuse its authority by demonstrating personal favouritism towards the appointee?**

[90] The complainant alleged that the respondent tailored the essential qualifications to favour the appointee. I find it somewhat illogical to allege that on one

hand, the appointee did not meet the essential qualifications, while alleging on the other hand that the qualifications were modified to favour the appointee.

[91] The PSST described personal favouritism in its decision in *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at para. 41, as follows:

*41 Where there is a choice among qualified candidates, paragraph 30(2)(b) of the PSEA indicates that the selection may be made on the basis of additional asset qualifications, operational requirements and organisational needs. The selection should never be for reasons of personal favouritism. Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.*

[92] The only specific example identified by the complainant under this allegation was related to the part of the SOMC that required significant experience coordinating and administering different types of salary budgets, and “significant” was “... defined as the breadth, depth, and complexity of experience normally associated with full time performance of duties for a period of 18 months.” The complainant testified that he had 12 months of continuous experience and therefore was excluded by the 18-month requirement. Therefore, this was not truly an allegation that the SOMC was modified to favour the appointee but that the SOMC was modified to exclude others, including him.

[93] There is no evidence that the respondent set the experience requirement at 18 months to favour the appointee. Ms. Botelho had a perfectly reasonable explanation for seeking 18 months of experience: that is the time frame required to both open and close out one entire fiscal year of budgeting and financial reporting, which she deemed an essential task to be performed in the position. The same criteria had been used in the Health Canada pool that the appointee had qualified in. The complainant provided no evidence that that the 18-month requirement was artificially inflated, unnecessary, or inconsistent with the SOMC developed for similar positions.

[94] The respondent erroneously cited s. 31(1) of the *PSEA* as the source of its authority to establish the essential qualifications for the work to be performed. In fact, s. 31(1) relates to the establishment of qualification standards by the **employer** for

positions. It is at ss. 30(2)(a) and (b) that the *PSEA* gives the deputy head (or a delegate) the authority to set the essential qualifications for a particular appointment.

[95] Nevertheless, the Board has concluded that the *PSEA* gives deputy heads broad discretion to set the essential qualifications for an appointment; see *Thompson v. President of the Canada Border Services Agency*, 2017 PSLREB 22 at para. 71, and *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at para. 42. I find no basis in this case to conclude that the respondent abused its authority by setting the budget experience expectations at 18 months.

**E. Did the respondent abuse its authority by choosing a non-advertised appointment process?**

[96] This leaves me with one final allegation to assess, which is that the respondent abused its authority by choosing to use a non-advertised process to make the appointment.

[97] At s. 33, the *PSEA* allows the deputy head to choose between advertised and non-advertised processes. At s. 30(4), the legislation states that a deputy head is not required to consider more than one person for an appointment to be based on merit.

[98] The Board and its predecessors have regularly dismissed complaints that essentially come down to a complainant's desire that he or she wanted to be considered for a non-advertised appointment or that he or she believed that they were more qualified than the appointee; see *Robbins v. Deputy Head of Service Canada*, 2006 PSST 17 at paras. 36 and 42 to 45, *Aucoin v. President of the Canada Border Services Agency*, 2006 PSST 12 at paras. 42 and 43, *Haller*, at para. 89, and *Thompson*, at para. 54, to mention but a few.

[99] It is also true that as the respondent argued, the preamble of the *PSEA* provides as follows that staffing authority should be delegated to as low a level as possible, to provide for flexibility:

|   |   |
|---|---|
| ...   | [...]   |
| <i>delegation of staffing authority should be to as low a level as possible within the public service, and should afford public service managers the flexibility necessary to</i> | <i>que le pouvoir de dotation devrait être délégué à l'échelon le plus bas possible dans la fonction publique pour que les gestionnaires disposent de la marge de manœuvre dont ils</i> |

*staff, to manage and to lead their personnel to achieve results for Canadians ....*

*ont besoin pour effectuer la dotation, et pour gérer et diriger leur personnel de manière à obtenir des résultats pour les Canadiens [...]*

...

[...]

[100] In this case, the staffing authority was delegated to Ms. Botelho, who was very attuned to the needs of her directorate and made choices as allowed for under the PSEA to staff her vacancy quickly.

[101] At the same time, the preamble provides that the delegation of that authority take place within a framework of accountability:

...

[...]

*those to whom this appointment authority is delegated must exercise it within a framework that ensures that they are accountable for its proper use to the Commission, which in turn is accountable to Parliament ....*

*que ceux qui sont investis du pouvoir délégué de dotation doivent l'exercer dans un cadre exigeant qu'ils en rendent compte à la Commission, laquelle, à son tour, en rend compte au Parlement [...]*

...

[...]

[102] As cited by the complainant, *Tibbs* (at paragraph 70) stands for the proposition that an abuse of authority can be found if a delegated staffing authority acts on inadequate material, uses irrelevant considerations, or when there is a result that is improper or unreasonable. Although the complaint in *Tibbs* was dismissed, the PSST found that that "... serious errors and/or important omissions [could] amount to abuse of authority even if unintentional"; see paragraph 73.

[103] The Board's decision in *Hunter* is one example of when a series of errors and omissions amounted to a complaint about the choice of process being substantiated. In that case, the Board found that the respondent failed to provide a logical justification for its choice. The Board found that it amounted to a finding of bad faith and an abuse of authority; see *Hunter*, at paras. 92 to 95.

[104] In this case, I find several elements of the respondent's decision making and documentation to be of concern. These include the following:

- The fact that the ASD documented the appointment process as an “external non-advertised process” and did so not just once, but several times, when in fact, the appointment was an **internal** non-advertised process.
- The fact that neither the ASD, the NOC, nor the NAPA made any mention of the fact that the appointee would work for both the BMS unit and the Anti-Racism Secretariat, even though the agreement to share the appointee was a central aspect of Ms. Botelho’s decision to appoint her.
- The fact that the respondent used an empty “position box” to make this appointment for an AS-03 “Staffing Officer”, with a work description that was not linked to the actual position being staffed. The work description describes a position of which the purpose is to provide administrative assistance and advice on administrative processes to an executive manager. There is a significant disconnect between the job title, the work description, and the actual functions to be performed by the appointee, which were clearly related to financial management.

[105] I understand why these errors and omissions were a particular concern for the complainant. After all, his work unit, and his position, carried out the function of carefully “crossing the ‘T’s and dotting the ‘T’s”, as the saying goes, when it came to human resources budgeting and record keeping.

[106] At the same time, I must consider the following facts:

- The respondent did correct the “external non-advertised” error in the ASD when it posted the NOC and the NAPA. This meant that the appointment was subject to the resource mechanism under the *PSEA* (i.e., this complaint).
- Otherwise, I found the ASD thorough and consistent with DND’s relevant appointment policy. Ms. Botelho completed it as soon as she decided to use a non-advertised process (in April 2021). She then proceeded to assess the candidate, document that assessment thoroughly, seek out her references, and document those. She met with members of her team, including the complainant. Eventually, she asked Human Resources to post the NOC, following by a posting of the NAPA, before the appointee began in the position.
- While there was a disconnect between the work description associated with the AS-03 “position box” and the actual work to be performed by the appointee,

there was consistency between the role of the position described in the ASD, the SOMC in the assessment of the candidate, the NOC, and the NAPA.

[107] When analyzing the appointment process as a whole, I do not find that the errors give rise to a finding that the respondent abused its authority. The errors and omissions I have noted do not, in my assessment, add up to evidence of carelessness and recklessness amounting to bad faith such that I should find that there was an abuse of authority in this case.

[108] I make no adverse finding with respect to the collaboration between the director of the Anti-Racism Secretariate and Ms. Botelho in sharing information about a potential candidate. This is precisely the kind of flexibility that the *PSEA* provides hiring managers when it allows them to consider only one person for an appointment. Ms. Botelho was entirely transparent about the process in her testimony before the Board.

[109] I also did consider odd the respondent's reliance on the appointee having been found qualified in a Health Canada AS-03 pool. Given that Health Canada is an entirely different department, and there were some important differences between the SOMC it used and the SOMC used for this appointment, I understand why the complainant argued that the respondent relied on improper information. However, in the final analysis, the respondent did not rely heavily on this as the reason for making the appointment. The assessment of the appointee against the SOMC identified for this appointment was thorough and based on her résumé and DND work experience, not on having passed through a screening and assessment process at Health Canada.

[110] The most serious omission by the respondent in its choice to use a non-advertised process was that none of its documentation — the ASD, the NOC, or the NAPA — made mention of the 60-40 sharing of the appointee between the BMS unit and the Anti-Racism Secretariat. However, Ms. Botelho testified that she responded to the future needs of the office of the Corporate Secretary by both meeting the needs of the Anti-Racism Secretariat and appointing the appointee. I simply do not find that this error gives rise to a finding that the respondent abused its authority.



## V. Conclusion

[111] In this case, there were some significant errors and omissions with respect to the respondent's documentation of its decision to use a non-advertised process. However, I do not find that those errors and omissions rise to the level that is required to justify a finding that the respondent abused its authority in its choice of process, under s. 77(1)(b) of the *PSEA*.

[112] In my assessment, the errors and omissions fall short of the errors and omissions that led to the complaint in *Hunter* being substantiated. They are more akin to the errors and omissions identified in *Morris*, in which the PSST also did not substantiate the complaint but made its comments about the respondent's shortcomings clear for all to read; see paragraphs 100 and 101.

[113] As already noted, I find that the complainant did not substantiate his allegation that the appointment was made without merit, under s. 77(1(a) of the *PSEA*.

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

*(The Order appears on the next page)*

**VI. Order**

[115] The complaint is dismissed.

September 27, 2024.

**David Orfald,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**