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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

KATHY BOLTON

Complainant

and

**DEPUTY HEAD
(Department of Justice)**

Respondent

and

OTHER PARTIES

Indexed as

Bolton v. Deputy Head (Department of Justice)

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

Before: Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Herself and St. Clair Currie

For the Respondent: Mathieu Cloutier, counsel

For the Public Service Commission: Alain Jutras

Heard via videoconference,
July 26 and 27, 2022.

REASONS FOR DECISION

I. Complaint before the Board

[1] Kathy Bolton (“the complainant”) was an unsuccessful candidate in an internal advertised appointment process (numbered 2018-JUS-IA-111504; “the appointment process”) to fill two IS-06 positions (titled “Manager, Communications”) at the Department of Justice (“DOJ”) and to create a pool of qualified candidates to potentially staff similar positions in the DOJ and elsewhere. On September 24, 2018, she made a complaint to 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; “PSEA”), alleging that the respondent abused its authority in the application of merit in the appointment process.

[2] The complainant said that she had a successful career in the DOJ’s communications branch (“the branch”) but felt that it was derailed by a new director general who was very vocal about whom she did and did not like, who publicly belittled the complainant and other employees in meetings, and who talked openly about replacing the “old guard” with “new blood”. With a group of her colleagues, she complained (“the group complaint”) to the deputy minister, who called a meeting of the whole branch, but nothing changed. The complainant applied for the IS-06 position hoping to qualify for the pool and find a managerial position elsewhere.

[3] Concerned for her colleagues, she wanted to leave some record of what she considered undocumented abuses, but the DOJ’s Workplace Branch told her that making a formal, personal harassment complaint against the director general was the only way to document them. Accordingly, she did so, but asked that the complaint be held in abeyance until after the appointment process. With no notice to her, it was sent to the director general a week before her interview.

[4] The complainant submitted that it was an abuse of authority to appoint the director general’s “closest advisors”, as she described them, to the selection board for the appointment process in a workplace environment, in which the director general’s views and preferences were well known and the selection board would have been aware of her role in the group complaint and her personal harassment complaint. As such, the appointment process was tainted by a reasonable apprehension of bias.

[5] Charles Stanfield, director, digital and corporate communications; Michel Champagne, manager, electronic communications, and Kirstan Gagnon, deputy director general, made up the selection board. Messrs. Stanfield and Champagne testified that the selection board ran a fair and neutral process, that the director general was not involved and applied no influence whatsoever, and that the complainant simply failed to provide adequate answers to two interview questions.

[6] The preponderance of the evidence established that each selection board member knew at least something about the director general's disdainful conduct toward the complainant or the alleged harassment issues between them. The appointment process was tainted by a reasonable apprehension of bias, and for the following reasons, the complaint is allowed.

II. Summary of witness testimony

A. Chantal Macdonald

[7] Ms. Macdonald was a senior communications advisor and team lead in the DOJ communications branch. She testified under a summons.

[8] Ms. Macdonald testified about daily morning "stand-up" meetings at which managers and some employees would gather in the hallway for a quick check-in about the status of current files and priorities for the day. These "stand-ups", as they were called, took place outside the offices of the director general and Mr. Stanfield. The director general would ask questions about the status of different files.

[9] Ms. Macdonald said that during the stand-ups, the director general's conduct was often extremely belittling to certain employees, including the complainant. She said that if the director general asked the complainant about the status of a file, her questions would be very pointed, along the lines of, "Why isn't that done, Kathy? Do you understand, Kathy?" She frequently punctuated each question with the complainant's name and used a belittling tone.

[10] Conversely, other employees were addressed in a respectful, collegial manner. For example, if the complainant could not provide an immediate answer to a question on a file, the director general would say, in a belittling manner, "Why don't you know that, Kathy?" If one of the favoured employees did not have an answer for her, the director general's tone and body language were completely different. She would smile

and say: “Ok, well can you find that out for me? ... Thanks.” Ms. Macdonald observed that in general, younger males were favoured and spoken to that way. She found the stand-ups very uncomfortable and difficult to attend due to witnessing that conduct. She said that Mr. Stanfield regularly attended them.

[11] Ms. Macdonald said that the director general frequently referred to Mr. Stanfield as her “fixer”. Ms. Macdonald understood that to mean that he dealt with anything that the director general needed fixed; for example, problematic files or employees whom she did not like. As Ms. Macdonald viewed it, Mr. Stanfield had the skills to deal with people in a respectful way, and the director general had the self-awareness to know that she lacked those skills, so she would have him fix problems.

[12] Ms. Macdonald did not go with the group that complained to the deputy minister about the director general’s conduct as she was on vacation at the time, but she knew that it was planned before she left. She understood that the group complaint was about harassment, unfair appointment processes, employees receiving special treatment, a toxic work environment, and a general sense that the director general ruled by fear.

[13] Ms. Macdonald described the profound effect that the workplace atmosphere created by the director general had on her. She was no longer happy at work but simply tried to get through each day. She recited affirmations to talk herself into going to work each morning. At first it took 5 minutes, then 10, then half an hour, until finally, she had a panic attack as she tried to make herself enter the building.

[14] At that point, she went to see her director, Mr. Stanfield, and asked for an assignment to Human Resources (“HR”). He replied that she was needed in the branch, as she was a team leader. She told him that she could not stay any longer under those conditions; if she could not be assigned elsewhere, she would have to quit or take extended sick leave. He asked for time to think about it and told her later that he had worked it out with the director general. She could go to HR but had to continue to attend all the communications branch meetings and functions.

[15] While on assignment at HR, Ms. Macdonald missed a communications branch event. The HR director received a call and was reminded that Ms. Macdonald had to attend all branch meetings and functions. Ms. Macdonald told her that seeing the director general induced too much anxiety and that she could not go. The HR director

said that she could stop attending. Had the HR director not relieved her of that obligation, Ms. Macdonald said that she would have called in sick for the meetings, as she simply could not go to them.

[16] However, being aware that she could always be called back from assignment, she started looking elsewhere, to ensure that she would never have to go back. In June 2019, she officially left the communications branch after 10 years there.

[17] In cross-examination, Ms. Macdonald said that she was not aware that the complainant had made a formal harassment complaint; nor was she aware of any harassment investigation. She confirmed that she was not a friend of the complainant, just a former colleague. She confirmed that she knew nothing about the appointment process at issue and that she could speak only to the workplace environment.

B. Cindy Reiter

[18] Ms. Reiter was a senior speech writer who had worked in the branch for 27 years. She testified under a summons.

[19] Ms. Reiter testified that she sometimes attended the morning stand-ups, usually when covering for her supervisor, but that she stopped going as she found them too difficult to attend. She stated that at the meetings, the director general quite often singled certain people out for abuse, cutting them off if they spoke or simply ignoring them and not responding to their questions or comments. She made it very clear that she did not like certain people. According to Ms. Reiter, the three employees who “got the worst of it” were Marlene Spatuk, Mr. Champagne, and the complainant, all of whom the director general often singled out.

[20] Ms. Reiter testified that in her view, staffing was manipulated; the rules were not respected. The general theme of what she observed was that the “old guard” (so characterized by the director general), mostly women and some older men, were moved out of their positions by different means or had work removed from them. They were then gradually replaced by “new blood” — younger, less-experienced employees.

[21] An example was Ms. Spatuk, who spoke to Mr. Stanfield about applying for a position. He advised her to first acquire experience in other areas, so she agreed to take a four-month-less-a-day assignment, and an employee was brought over from

another department to temporarily fill her position. Some time later, Ms. Spatuk told Ms. Reiter that it was not clear that she could return to her position. Ms. Reiter later learned from her manager that the new employee had been permanently deployed into Ms. Spatuk's position. Ultimately, Ms. Spatuk retired.

[22] Another example was Mr. Champagne, who had been replaced in his manager role by someone 20 years younger and much less experienced. He had been moved into an HR-focussed "special advisor" role, which had upset everyone. In her view, Mr. Champagne now did menial work while his younger replacement did the work of his manager position.

[23] Ms. Reiter explained that the gradual replacement of older employees was sometimes accomplished by the creation of "mirror positions". A second position that mirrored the first would be created, such that there would be two people at the same level, until the original person left. At that point, the first position would be eliminated, and the younger person would simply stay on. Ms. Reiter testified that in her 27 years in the branch, she had never before seen or heard of that being done.

[24] She also said that some employees simply stopped applying for positions, as they felt certain that they would be screened out because they knew that upper management did not like them. She met with a union representative about the workplace atmosphere and about what she saw as numerous staffing irregularities. She provided the union with information about seven appointment processes in which she believed that the rules had not been followed. She asked the union to look into them and followed up on that request with an email.

[25] Ms. Reiter said that she was mostly able to avoid the director general's abuse but that she was constantly stressed out by witnessing others being subjected to it, or hearing about it from other employees while they cried in her office. The branch experienced a great deal of absenteeism and very high stress levels. She said that she could no longer stand the workplace atmosphere.

[26] She testified that some employees wanted to complain to the deputy minister, and she agreed to go with a group of eight to the Workplace Branch. Its representatives were sympathetic and said that they would speak to the deputy minister. As a result, the deputy minister called a meeting of the whole branch, which she attended with the director general, who apologized to everyone. However, the apology was not well

received in the branch. Ms. Reiter understood that after the meeting, the director general was to work with the Workplace Branch, to improve her manner of dealing with the staff, but it did not get better. For example, subsequently, the director general brought in a box of donuts, offered one to an employee, and then yelled at her.

[27] Ms. Reiter's communications branch position had been her dream job, and she very much wanted to stay. However, the workplace atmosphere really took a toll on her, as did the significant staff shortages created by many employees leaving the branch. Ultimately, she had to leave as well.

[28] Ms. Reiter was asked only three questions on cross-examination, in response to which she confirmed that she had not been on the selection board for any of the appointment processes that she mentioned, had not been involved in the decision making, and could not speak to the reasoning behind any of those processes.

C. The complainant

[29] The complainant was hired in 2009 as a senior communications advisor. She had been responsible for several important, high-profile files, such as the legalization of cannabis, medical assistance in dying, and several national security matters. She acted as an IS-06 manager for 4 months, during which her substantive position was not backfilled, requiring her to work 60 to 80 hours of overtime per month, as she effectively did both jobs.

[30] Throughout her career, she always had very good relationships with her colleagues and managers. Her performance reviews always indicated that her performance met or exceeded expectations, and she always thought that she did very good work. She received a number of awards, including the deputy minister's award of excellence. Her former manager recommended her for management training and told her that she was on track for a managerial position. At that point, she was the only one in the branch sent for management training.

[31] She said that when the new director general came in, the branch flipped from a managerial complement of six women and two men to six men and two women. Older women and some older men were deliberately displaced by younger employees by several means. At least a handful of the women who left the branch told her that they could not stay because the director general was a bully.

[32] She avoided the director general as much as possible but could not escape being belittled, ignored, and humiliated by her, often in the stand-ups in front of her colleagues and managers. The director general often talked about “getting rid of the old guard”, and based on her actions, she seemed to be doing just that. The whole ordeal was very upsetting for everyone. Many injustices occurred in the branch. Eight people went on long-term sick leave. As a workplace mental-health champion, many people cried in her office about these issues.

[33] In late 2016 and early 2017, she sought advice from the Workplace Branch, which is part of HR, about how to make a complaint about the workplace environment. She was told that if 10% of the employees came forward, the Workplace Branch could do something. In the spring of 2018, she and a group of employees met with the Workplace Branch and asked that these issues be raised with the deputy minister who called a meeting to have the director general apologize to the whole branch.

[34] The director general told the branch that some people were not happy with change. She said that she was sorry she could not be more transparent about staffing changes but that it was because the funding situation was often unknown. It was not a real apology. The deputy minister put her arm around the director general and said that they had had a heart-to-heart and that she supported the director general. The complainant noted that the deputy minister did not have a heart-to-heart with any of the staff — only with the director general.

[35] The ongoing situation was so disruptive to the whole branch that an investigation should have been launched, but the employees were just told that there would be ongoing support for them. A later meeting did take place with the deputy minister’s chief of staff, and there was a branch retreat and communications training. However, nothing was ever done to directly address the situation.

[36] After the “apology” meeting, there was no improvement. The director general was supposed to see a coach through the Workplace Branch and did so for a while but then said that she would just continue with her own counsellor. The employees were told to report anything further to their managers, but when they did, the managers simply said that they were in the same boat.

[37] The complainant did not want to make a harassment complaint just for herself. Nor did she want the manager job in communications, given the situation there — her

goal was to qualify for the pool and seek a job elsewhere. However, as a mental-health champion, she was concerned that so many employees had left, and she felt responsible to help those who remained. As nothing concrete had come out of the employees' efforts so far, she thought that it was important to at least document the information, so that it was recorded. So many things had gone on without any consequence or even any record. The Workplace Branch would not take any information from her for this purpose and told her that the only way to raise these issues was to make a harassment complaint.

[38] Seeing no other option, she met with Workplace Branch representatives and explained that she was engaged in the appointment process. She understood them to say that a harassment complaint could be held in abeyance. Relying on this, she emailed her complaint to them on June 8, 2018, twice asking in writing that it be held in abeyance and asking how long it could be held without processing. She wrote as follows:

Hello Eve and Helena,

Thank you for meeting with me a few weeks ago and talking to me about the available options.

*I have decided that I need to submit this harassment complaint to you today, **but I would like to request that you hold it in abeyance until other processes that are currently underway have ended. I don't expect that to take too long, but am wondering how long we may agree to hold off on processing this.***

Please let me know if there is anything in this that you would like to discuss.

*I know it is late on a Friday, but **if you could please acknowledge receipt of this on Monday, I would greatly appreciate it.***

...

*Thank you very much. **I look forward to hearing from you.***

Kathy

...

[Emphasis added]

[39] On June 13, 2018, the following Wednesday, the Workplace Branch sent the complaint to the director general with no notice to the complainant. It did not respond to her June 8, 2018, email, in which she asked how long the complaint could be held without processing and that she be advised if there was anything to be discussed.

[40] The complainant was shocked to learn that the harassment complaint had been sent to the director general against her express wishes. She was very uncomfortable at the thought of her upcoming interview with a selection board that in her view, was composed of the director general's closest advisors, from whom she would likely have sought advice upon receiving the harassment complaint.

[41] On Monday, June 18, 2018, she wrote to Eve Nadeau, copying Susan Harrison and Helena Santos. As follows, she asked why that had been done and asked for help to determine how she should proceed, since they had acted against her wishes:

Hello Eve,

I am very upset to hear that the complaint I sent you on June 8 was shared with the respondent.

A number of weeks ago, when you, Helena and I discussed submitting the complaint to be held in abeyance, I understood that this would mean that it would not be processed until a time at which we agreed on. I had asked that it not yet be processed in my email, and in the complaint form itself, I indicated and signed that the complaint be put on hold for 6 months. When I read the TBS Guide on Applying the Harassment Resolution Process, and the departmental Harassment Complaint Process Guide, they both indicate that the respondent is only informed that a complaint has been made, and only once it has been received, reviewed, and determined to meet the definition of harassment.

I am working from home today, and I have an interview on Thursday this week, for a position as manager in the Branch. The interview is with a panel of the respondent's senior advisors: the Branch's Deputy Director General, Director and a senior manager. I do not feel comfortable going in to work, let alone doing a presentation and being interviewed under these circumstances.

I'm not sure what to do now. How should I proceed? This comes as quite a shock to me. Please reassure me that this email that I am writing to you now will be held in confidence.

Thank you.

Kathy

...

[Underlining in the original]

[Emphasis added]

[42] On Tuesday, June 19, 2018, Ms. Nadeau responded as follows:

Good day Kathy,

I'm sorry to hear that you are in the middle of a competition during this complaint process, as I can appreciate how stressful this must be for you.

When Helena and I met with you, our intent was to review the available options with regards to 4 possible recourse mechanisms. Helena and I mentioned that if you were to proceed with a formal process, you could request that it be held in abeyance while you pursue an informal approach in an attempt to resolve the issues. In fact, an informal approach is the only way for a formal process to be put in abeyance.

*We also explained that the only process that can run in parallel to a harassment complaint is the violence in the workplace complaint. However, it is not possible to request that one be held in abeyance once initiated, for reasons other than pursuing an informal approach (i.e., mediation). **Once a formal recourse mechanism has been initiated, it must move forward unless mediation services are requested or the complaint is withdrawn.***

Concerning this email, rest assured that it will remain confidential.

I recognize it can be difficult to navigate through these types of processes and I hope I have provided sufficient clarification.

Eve

...

[Emphasis added]

[43] The complainant testified that upon receiving that response, she was distraught and that on that afternoon, she wrote Ms. Nadeau the following, copying Ms. Harrison and Ms. Santos:

*Thank you for your response Eve, but **if for whatever reason you were not able to hold my complaint in abeyance, could you not have told me that, since that had been my request? If you had told me, I would have said that if you could not hold it in abeyance, then I did not want you to initiate it.*** And I still don't understand why you would send the complaint to the respondent before all of this had been worked out? As I indicated below, even the policies around this indicate that the respondent would only be made aware of the complaint - and not given the complaint itself - and only after the complaint had been received, reviewed and determined to meet the definition of harassment. Does that mean that my complaint was determined to meet the threshold definition for harassment, since a copy of it was sent to the respondent?

I understand it cannot be taken back now that it has been read by the respondent. But I would like to understand why you sent it to her when I specifically requested in my email and in the complaint form itself that it be held and not even initiated, let alone the full contents sent to the respondent. I just really still

do not understand. And the fact that she received the complaint and read it, and very likely sought advice from her senior advisors, who will be interviewing me on Thursday is causing me a lot of unnecessary anxiety.

Again, can you please tell me when you sent my complaint to the respondent? Was it by email or mail? And is she also to keep this entire matter confidential, as I have been asked to do in the letter that was sent to me?

I hope you are able to answer all of my questions.

Thank you.

[Emphasis added]

[44] Ms. Harrison responded the next day, Wednesday, June 20, 2018, copying Ms. Nadeau and Ms. Santos. She did not address the main point of the complainant's correspondence or her obvious distress. She did not answer the complainant's question as to why her complaint had been sent against her express request in both the complaint form and the covering email. No advice or assistance was provided in response to her question as to what she might do about her interview. Ms. Harrison responded to the complainant as follows:

Good afternoon, Kathy.

To answer your question on the exact date that a copy of your complaint was sent to the respondent, I will have to wait until Friday when I am back in the office. But I can tell you that it was near the end of last week. I will confirm on Friday.

Further, I can assure you that the caution about keeping the information confidential was also included in the letter to her. Both letters (the one to you and the one to her) contain similar, if not identical, paragraphs. This too I will confirm on Friday when I can review the file.

...

[45] Realizing that she was on her own, and seeing no other option, the complainant decided to proceed with her interview the following day to the best of her ability, despite the circumstances. She described it as a highly stressful situation but noted that she typically did well under pressure. Upon entering the interview room, she made a small joke to gauge the atmosphere. The selection board was composed of managers, but nevertheless, they were her colleagues — people with whom she worked. However, the joke elicited not even a smile; there was a cold formality that suggested to her that as she feared, they likely knew about the harassment complaint.

[46] Although she could not know for sure, the complainant felt that there was no question that the director general would have told Mr. Stanfield, her confidante and fixer, about the harassment complaint, but even if she had not told him about it, he was already well aware that the complainant was one of the people targeted by the director general. It was common knowledge throughout the branch.

[47] Subsequently, the complainant became ill, due, in her view, to the three months of working significant overtime while acting in the manager position and not being backfilled, the undue stress of having her harassment complaint sent to the director general just before her interview, and her failure to qualify in the appointment process. Ultimately, she went on income-averaging leave, then leave without pay, then long-term disability, and ultimately, medical retirement.

[48] The complainant questioned how the selection board could not have been biased when the director general was so vocal about her favourites and about wanting the old guard out and new blood in. She targeted older employees and destroyed them in front of their colleagues and managers. Work was taken away from senior employees, both men and women, and they were replaced by young men through the creation of mirror positions. The pattern was so prevalent that in the complainant's view, the director general's direct reports really could not do anything other than what they knew she wanted them to do. As she put it, they knew that the director general was a bully. Even if they tried to be objective, how could they be in that environment?

[49] On cross-examination, the complainant was asked to clarify her evidence that she had worked with the selection board members for years, given that Ms. Gagnon had been in the branch for only a year. She clarified that she had worked with Messrs. Stanfield and Champagne for years and with Ms. Gagnon since she joined the branch. She also mentioned that she had spoken to Ms. Gagnon about a harassment complaint. This testimony was not explored further on cross-examination, nor was it refuted by Ms. Gagnon, who was not called to testify.

[50] The complainant confirmed that she signed the interview advisory that stated that a candidate should advise the selection board of any concerns, explaining that she felt she had no choice but to proceed. She had asked the Workplace Branch what to do but had received no response. It was a stressful situation due to her harassment complaint going to the director general against her wishes, and the formality of the

selection board added to her unease. She tried to make the best of a bad situation. She knew it was not in her interest to mention her feelings of stress, as this would have entailed explaining to the selection board members her doubts about their neutrality.

[51] It was put to the complainant that once the Workplace Branch explained that a harassment complaint could be held in abeyance only if it was in formal mediation, she did nothing else to address any alleged bias. She responded to the contrary that she went to the Office of the Public Sector Integrity Commissioner and was told that she could make a complaint but that any other investigation should be terminated first. In the meantime, she could apply for financial assistance for a lawyer, in case of a reprisal. She followed up on that and did speak with a lawyer.

[52] The complainant confirmed on cross-examination that her personal harassment complaint was investigated and deemed unfounded. Asked why she did not appeal it, she said that she did not want to make a personal harassment complaint in the first place, that the complaint that she wanted to make was not just about her because she was just one of many. As a mental-health champion, she was concerned about the whole branch. However, the Workplace Branch said that anything concerning other employees fell outside the scope and narrowed the complaint down to a few incidents involving only her. She did not expect it to succeed. She also noted, however, that although the investigation report concluded that the harassment allegation was unfounded, it also found that the director general had shown "... a marked lack of judgment and self control". The respondent did not dispute this.

[53] More importantly, she noted, that the bigger systemic issue was never investigated.

D. Mr. Champagne

[54] Mr. Champagne was a member of the selection board. He testified under a summons.

[55] Mr. Champagne described himself as a long-standing veteran (38 years) of the public service. He had been an IS-06 since the late 1990s and the manager of electronic communications from 2006 until 2017, when the director general introduced a new structure. Since then, he had worked on different assignments: HR, duty-to-accommodate matters, enterprise-wide initiatives, and a priority file in the law practice

branch. As the manager of electronic communications, he had previously managed a team of nine direct reports but said that his shop had always been decentralized.

[56] As for how he came to be on the selection board, he said that the branch was going through a difficult period; many people had left, and critical positions had to be filled. He had experience with appointment processes, so the director general thought that he would be ideal to work on this one and asked if he would be willing to undertake HR matters. He participated in this appointment process and later in an IS-05 process, but before the IS-05 process was completed, he was assigned to the law practice branch for a two-year stint working on a priority file.

[57] Mr. Champagne attended the stand-ups after the director general arrived in 2015 but, in his words, only for a “short period of about a year, or a year-and-a-half” before being assigned to HR matters in the fall of 2017. He said that he attended when he was still a manager but that when his role changed, his attendance became sporadic, as he was no longer involved in the day-to-day operations of the branch.

[58] Asked if he had ever seen the director general being aggressive toward employees, Mr. Champagne replied: “**Not to my knowledge**; we have deadlines, there’s a business to run, **but for the first few years, no**; it was just getting the job done and believe me I have thought about this” [emphasis added]. Asked if he witnessed the director general single people out for criticism, he said: “**Not during those first years, after that I can’t vouch, my attendance was sporadic**” [emphasis added]. On re-examination, he repeated that he never saw anyone being belittled, again stressing “**not at that time**” [emphasis added] in reference to his year, or year-and-a-half, as a manager under the director general when he still regularly attended the stand-ups.

[59] Mr. Champagne emphatically described the director general’s involvement with the appointment process as: “Hands-off! I was working with Charles Stanfield and Kirstan Gagnon, the director general was completely not involved, hands-off.” He said that he never discussed anything with her, was given no direction, and experienced no pressure or expectations as a selection board member. He participated in the appointment process just as he would have in any other HR matter.

[60] Mr. Champagne said that he had known the complainant since she arrived at the DOJ, that he never had any problems with her whatsoever, that she was a very decent human being, and that he quite liked her. He said that she did very well in the

appointment process until the interview stage, at which she did not succeed on two questions. For question 2, assessing criterion A2, her advice was at too high a level and did not make enough links to the specific impact on the DOJ. As for question 5, assessing criterion C5, on values and ethics, the selection board tried to get to the hard side of a tough scenario question dealing with insubordination and absenteeism as well as the soft side, which she had covered well.

[61] Mr. Champagne confirmed that he reports to Mr. Stanfield, who reports to the director general. As for his experience with her, he said that she was a sound director general, very much a doer who works to a deadline and that personally, he has a professional relationship with her. He denied that she ever belittled or insulted him, singled him out, or treated him unfairly.

[62] He said that 2017 brought a difficult transition. The changes that the director general brought were happening across the federal government, as it shifted to a web-based organization with 24/7 discussion and dialogue. This transformation was taking place everywhere, and the changes were abrupt and steep for senior people, whose response to them was not optimal. He was in a good position to act as a sounding board and had led staff consultations.

[63] Asked about harassment, he said that in April of 2018, a harassment complaint was made, and the deputy minister called a meeting of the whole branch. Therefore, he knew that there were issues pertaining to the director general and some employees in the branch. He had no prior awareness and received very few specifics from the meeting, but he knew that the director general was to take training and receive coaching.

[64] Asked if he was aware that the complainant had made a personal harassment complaint, Mr. Champagne said: “I don’t believe so; it was 2018. I don’t think so; **I knew there were issues**” [emphasis added].

E. Mr. Stanfield

[65] Mr. Stanfield explained that the branch had not run an IS-06 appointment process for some time and that there was a need to staff two current vacancies, while also looking to the future.

[66] A range of assessment tools was used — a cover letter and résumé from each candidate, and a written exam that entailed preparing a briefing note. Before the interview, the candidates were asked to prepare a short PowerPoint presentation, drawing from the information that they had already prepared for the briefing note. The first interview question was to walk the selection board through the PowerPoint presentation. The statement of merit criteria and job poster laid out the knowledge and ability competencies sought and how they would be assessed. The interview guide showed which criteria would be assessed in the interview.

[67] He said that the IS-06 is a senior position for communications personnel; therefore, the essential qualifications include experience with complex files. The position is broad in scope. It entails providing advice, carrying out development, knowing how to work with colleagues, and having sufficient knowledge of the policies and practices that guide the work. He said that one looks for depth for a senior position; for a manager, you need someone who can lead and manage, someone who can analyze and synthesize information.

[68] He said that the selection board read out the interview instructions to the candidates, to be clear on what the interview assessed and how it would proceed, and to ask if there were any issues. The onus was on each candidate to raise any concerns, and the complainant raised none.

[69] Mr. Stanfield said that it was a tough appointment process; the selection board sought well-rounded senior communicators who could step into a manager role. The complainant did well with the cover letter, résumé, and written exam. The briefing note preparation was solid and led to her doing well on the first interview question, which involved talking about the PowerPoint presentation that was based on the briefing note information. She also gave a solid, well-rounded response to question 3 but did not provide enough for a pass mark for question 2 (which assessed criterion A2 — the ability to analyze, synthesize, and provide advice on complex issues) and question 5 (which assessed criterion C5 — upholding integrity and respect).

[70] Question 2 was designed for the candidates to identify and give recommendations on priorities. The complainant identified a few important considerations, such as monitoring media reaction and looking at the public environment but did not link anything specific in those priorities to the DOJ's work. No

particular steps to take were set out, and no specifics were provided. The advice was too general, such as renewing the relationship with Indigenous communities. The selection board was looking for what that priority would mean specifically for the DOJ.

[71] Question 5 was about dealing with a good employee with whom some troubling behaviour had emerged, including insubordination and absenteeism. The complainant's answer was good but for only half the equation — supporting the employee. The question was to assess the candidate's competency to uphold integrity and respect and involved understanding a manager's obligations to the rest of the staff as well as supporting the employee; that aspect was missing from her answer.

[72] The complainant's mark was calculated using the interview guide and the rating scale, which provided the selection board with general reminders, keywords, and considerations with which to assess and mark the answers. It showed the kind of answers expected and some of the key elements required. Each member took notes and discussed the strengths or weaknesses that each had noted about the candidates, all against the expected answers in the rating guide. All the candidates had been asked for references, but for time management, only the references of those who passed the interview were reviewed. Pass marks had to be achieved for each question, even if that ability or competency was assessed and passed elsewhere in the appointment process.

[73] Mr. Stanfield noted that for all internal candidates, a failed interview was tough and disappointing, so instead of just receiving a letter from HR, as a courtesy, the selection board members reached out to their colleagues first, to let them know. They called the complainant to give her an indication of what they had been looking for in the two questions that she failed and strongly encouraged her to seek an informal discussion to delve into that information more deeply. They did this with all three unsuccessful internal candidates, who were their colleagues.

[74] Mr. Stanfield said that he was not aware of any allegation of bias and that it was important to him to run a sound process, to meet his staffing needs. He worked with his selection board members to develop materials and to put the appointment process in place with the right tools to identify quality candidates. He had been a staffing manager for some time and was motivated solely by his staffing needs. He knew what was required, and he had the discretion, along with the selection board and with help from HR, to find the right candidate.

[75] Mr. Stanfield denied that he was under any pressure from the director general to include or exclude candidates. Asked if he knew about the complainant's harassment complaint, he said no but added: "I will say there were issues raised and this came to my attention when our deputy minister called us to a meeting in the boardroom to say that issues were being explored, but I had no specific information."

[76] After Mr. Stanfield's examination-in-chief, the complainant asked the Board to dismiss her representative, so that she could represent herself for the remainder of the hearing. She was advised that the Board could not do so but that she could dismiss her representative if she wished. She confirmed that she wished to continue the hearing and to represent herself. The hearing was adjourned for an extended period, during which the complainant dismissed her representative and prepared to continue the hearing. Upon reconvening, she cross-examined Mr. Stanfield.

[77] On cross-examination, Mr. Stanfield confirmed that the complainant had successfully met the criteria assessed in interview questions 2 and 5 at the other points in the appointment process, where they were also assessed. The complainant asked whether, given that, it would not have made sense to reconsider her marks for those criteria and perhaps look at her references. He responded that candidates had to receive a pass mark on each question whether or not the competency was assessed and passed elsewhere in the process. As well, the interview was assessed solely on the questions; references were looked at only if a candidate passed the interview.

[78] Mr. Stanfield confirmed that he had had no specific information about any harassment complaints or any discussions with the director general about them. Like many in the branch, by virtue of the deputy minister's meeting, he knew that there were issues, but the information shared at that meeting had been general "without any attribution or any individuals," in his words. Asked what he took from the meeting, he said that he worked closely with the director general and that they had a productive, professional relationship. He took from the meeting what he had seen from her, and he never saw anything that he would have had to react to as a manager.

[79] It was put to Mr. Stanfield that Ms. Macdonald testified that she had complained to him about problems with the director general. He replied that he "would say that there are files and work and that people have different ideas as to how the work should be approached". He tried to help Ms. Macdonald with her work issues and with

adjusting to a new director general. He had been there 10 years, put significant stock in his work relationships, and was compelled to help. He elaborated as follows: “I would have heard. If I saw something off, I am committed to the workplace. We worked through the professional requirements; some of that was challenging, to understand the director general’s ideas and how to deal with part of being on a team.”

[80] Mr. Stanfield said that he only remembered talks with Ms. Macdonald about different visions of the work. It was put to him that she told him that it had become increasingly difficult to come to work and that she had a panic attack when trying to force herself to enter the building. Mr. Stanfield said that he had no recollection of anything that charged, but he knew that she was having a difficult time with some of the files for which she was responsible.

[81] Asked to specify the kind of difficulty that she experienced, he said that more clarity was needed around departmental champions and the new focus on reconciliation issues, which was a new emphasis and an area with which she was unfamiliar. The branch had a new head of communications who rightfully told the staff how to carry out the work. There was a new relationship with Indigenous communities, to which the staff had to adjust.

[82] Asked if Ms. Macdonald had not told him why she had to leave the branch, Mr. Stanfield did not answer directly. He said that she had been strong on pay-related issues and that she had superior relationships with HR. Issues involving the Phoenix pay system were in the news daily and, for her at the time it was an area of excitement and energy. An opening occurred and based on the good relationships she had built with HR she had an opportunity to work on those files.

[83] It was put to him that Ms. Macdonald told him that she did not want to quit but that she would have to, or go on sick leave, if she could not be assigned elsewhere. Mr. Stanfield again responded that she had trouble with the role, that she had an interest in pay-related communications, and that he was there to support the employees and workplace operations.

[84] Mr. Stanfield confirmed that he regularly attended the stand-ups. Asked if he had observed the director general demeaning some employees, using a belittling tone, or rolling her eyes when they spoke, he replied with this: “No, nothing. I was there as a regular contributing member”. He said that they were short, quick meetings; they had

to be, as they dealt with the priorities of the day. The stand-ups had a pace and rhythm to them, to ensure that the best use would be made of the time each day.

[85] He did recall the deputy minister's meeting, which he said "raised everyone's general awareness" about these issues. Asked to specify those issues, he stressed again that it was "without attribution" but that the branch was told that some issues had been raised about the director general's style and that the deputy minister was looking into it and taking it seriously.

[86] He said that it was conveyed in a very general way and that "for a lot of us, you don't get called to a meeting everyday by the deputy minister. Most people knew nothing and left the meeting knowing not much more ... it was just to let us know it was being looked at." He did recall that the director general was to take some follow-up steps, but he was outside of that; the deputy minister had handled it.

[87] Asked if Mr. Champagne reported to him, Mr. Stanfield said that Mr. Champagne was the manager of electronic communications, that he did report to him, but that it was a functional reporting relationship only. He said that the branch did not have strong business management and that it had many staffing needs, so Mr. Champagne spent considerable time on HR matters, including this appointment process. Asked if Mr. Champagne had been a manager before moving into the HR role, Mr. Stanfield confirmed that he had been an IS-06 communications manager reporting to the head of creative services and again stressed that although Mr. Champagne now reported to him, that it was a functional reporting only.

[88] Asked if he had heard the director general talk about replacing the old guard with new blood, Mr. Stanfield said that he had not and that he would have remembered that. He said that a restructuring was taking place, there was significant change, and people were coming and going — it was an evolving organization, as it is the case in every communications branch. It was put to him that in the year-and-a-half after the director general arrived, five to seven female managers left the branch. He agreed but said that some left for promotional opportunities, some retired, and some made personal work-life balance choices because in communications, one works all the time. He said that there might have been all sorts of personal motivations.

[89] Mr. Stanfield agreed that a number of staff members went on sick leave but said that he did not know why they were pushed to that point; he had no specific

information tied to the director general. Asked if he had ever seen so many people take long periods of sick leave, he said that at any point in a team of 60 people, some will be off work, and that it was nothing unique. Asked if it was expected that the staff complement would go from 73 to 50, he said that he would have to look at the numbers, that some left and some arrived, and that the available budget for wages always played a big role.

[90] Finally, Mr. Stanfield said that he was not aware of a formal harassment complaint and that the selection board did not discuss one.

III. Summary of the submissions

A. For the complainant

[91] The complainant submitted that it was an abuse of authority to have the director general's three closest advisors on the selection board, given the group complaint that became very high profile when the deputy minister addressed the whole branch, given her personal harassment complaint, and given that the director general was very vocal about whom she did and did not like and demeaned the complainant publicly.

[92] Whether the director general overtly applied influence, or not, in that environment, the selection board members could do only what they knew she would want.

[93] The complainant's specific request to hold her harassment complaint in abeyance was ignored, and it was sent to the director general a week before her interview. In those circumstances, she could not have expected an unbiased selection board.

[94] Being given an opportunity at the interview to say that she was under psychological stress was meaningless. Had she brought it up, she would have had to give an explanation, which was that she questioned the selection board's ability to be objective. How could she say that to them going into an interview? And what could she really have expected them to do? Given the situation, she would not have been able to offer an alternative time when she would have been fine for the interview. As well, the Workplace Branch had told her that she was not allowed to discuss her harassment complaint with anyone — it was a catch-22 situation.

[95] She had been told that she was in a strong position to become a manager, and she was the only one sent for manager training. She had won numerous awards, including the deputy minister's award of excellence, which goes to only a handful of people each year.

[96] Mr. Stanfield's testimony directly conflicted with the testimony of Ms. Macdonald that she had told him about the director general's abuse. Ms. Macdonald was a good employee, yet Mr. Stanfield denied knowing that she had any difficulties with the director general other than adjusting to a new vision of the work.

B. For the respondent

[97] The allegations of bias were not substantiated by any of the evidence. The complainant's subjective opinion was that the selection board members ought to have known about the harassment complaint, but Mr. Stanfield said unequivocally that he did not know about it. The complainant did not call into question the selection board members' integrity. She was very upset about the treatment that she felt she received from the director general, but the hearing was not about a harassment grievance or investigation but the appointment process. She lacked evidence with respect to any nexus between the harassment issue and the appointment process.

[98] She was advised, and it was her responsibility, to tell the selection board that she was indisposed to a degree and that she had to be reassured. She did not put that forward, and the selection board was not responsible for what it did not know. By not coming forward, she allowed her perception of bias to go on, and then pointed a finger at the selection board members.

[99] The complainant disagrees that she should have failed the two criteria that she passed in other areas of the appointment process, but the selection board had a good deal of discretion to decide the requirements, which were the same for everyone. She adduced no evidence that she provided good answers and did not challenge Mr. Stanfield's testimony on that point or provide any contradictory evidence. Therefore, there is only the respondent's evidence that she fell short on criteria C5 and A2 and the selection board's reasoning as to why she did not pass.

[100] The respondent did not dispute that the complainant took management training and won multiple awards, but none of that means that one will be successful in a

specific appointment process. Mr. Stanfield said that it was a tough appointment process; a top IS-level manager was being sought. Candidates had to meet all the requirements and pass every question. The selection board had much discretion on what assessment tools to use and on how to determine who was the right fit.

[101] Ms. Macdonald alleged harassment by the director general, said she was unhappy, and decided to leave the branch. Her testimony provided no nexus to the appointment process. This hearing was not to establish whether harassment took place. Ms. Macdonald was not part of the appointment process, and her testimony should be given no weight.

[102] The same applies to Ms. Reiter. She described unpleasant situations and employees being subjected to unfair treatment by the director general. She alleged that there were problems in the branch because of the director general. The complainant did make a harassment complaint, and it was determined unfounded. Ms. Reiter's testimony should be given little weight or discarded.

[103] Ms. Reiter said that the complainant was a victim of the director general and that she was belittled and humiliated, but she said the same of Mr. Champagne, which he refuted; he said that he was never singled out, insulted, or belittled. What transpired in the stand-ups is subjective and establishes no nexus with the appointment process. Mr. Champagne had nothing to gain or lose in this proceeding, which raises the question of how much credibility these allegations should be given.

[104] Ms. Reiter's allegations about seven staffing scenarios were hearsay and of no probative value. There was little to no evidence about the age- and gender-discrimination allegations. The Board had the opportunity to assess Messrs. Champagne and Stanfield. The complainant and her witnesses made very strong allegations about the director general but nothing about the appointment process or anything that questioned the selection board's integrity. Strong allegations were made, but none were substantiated — the complainant did not meet the burden of proof.

[105] The complainant said that she made a formal complaint on June 8 because she just wanted to have something on the record. The Workplace Branch has nothing to do with the respondent. She adduced no evidence of bad faith. Any time a formal complaint is made, the respondent to the complaint has to know about it. That the

complaint was not put in abeyance had nothing to do with the complainant's marks on the two questions at issue.

[106] The complainant's evidence did not show that she was unsuccessful for any other reason besides those cited by Messrs. Champagne and Stanfield. They thought that she did really well; she was screened in, passed the written test, and did very well on the PowerPoint presentation and on some interview questions. That does not point to bias. But she fell short on two questions, the reasons for which were conveyed to the Board and were not refuted.

[107] The complainant's impression was that the selection board members knew of the harassment complaint, but she said that it was just a feeling, that she could be wrong, and that she had no evidence of it. She said that Mr. Stanfield must have known but that she did not know if he knew and that it was possible that the director general did not tell him about it. He said that he was not aware of it. That, in her view, he should have known is not enough to establish bias. The selection board acted with courtesy. It called her before the generic letter was sent to advise her that unfortunately, she had not passed, and it strongly suggested an informal discussion to help her do better next time.

[108] Mr. Champagne is a long-standing manager. He had no bias; to the contrary, he really liked the complainant and had worked with her for years. He gave the same reasons for her failing those two questions as did Mr. Stanfield. Although Ms. Reiter named him as one of the director general's victims, he clearly negated it, stating that he has had no bad experience with her and that she is an effective leader. Like Mr. Stanfield, he did not witness the director general belittling anyone. Mr. Champagne's testimony should be given significant weight because he was called by the complainant and his testimony contradicted that of Ms. Reiter who was also called by the complainant.

[109] The complainant did not raise her concerns with the selection board members, before or after the interview. Mr. Stanfield said that these concerns were never brought to his attention, that he spends considerable time building workplace relationships, and that had he known about it, he would have had to respond to it.

[110] Messrs. Stanfield and Champagne both testified that the director general was not involved with the appointment process at all, and the complainant's evidence

failed to show any such involvement. There was only a large amount of hearsay evidence that the alleged harassment took place, which was dealt with during the formal investigation and was clearly unfounded.

C. The complainant's reply

[111] As to the respondent's claim that Mr. Champagne had nothing to gain or lose by testifying, the complainant noted that this was a public hearing and that a public decision would be issued. She noted that as of the hearing, both Messrs. Champagne and Stanfield still reported to the director general, that they both know very well how she treats people, and that therefore, they both had much to lose. But she had nothing to lose or gain by the appointment process except to help ensure that what she, and so many colleagues had been through would not continue in the branch.

[112] It was hard to believe that Mr. Stanfield had no discussion at all with anyone about any issues with the director general. Further, Ms. Macdonald clearly testified that she did talk to him about it.

[113] Although she always had good relationships with both Mr. Stanfield and Mr. Champagne, the complainant submitted that there was at least an unconscious bias in their testimonies, given that they have to work with the director general, who engages in bullying. It was a systemic situation — a toxic atmosphere was created in the branch, people were being destroyed, going home sick, and suffering panic attacks and post-traumatic-stress-disorder-type symptoms. The nexus with the appointment process is that the selection board members were deep into it; they lived it day in and day out. Their testimonies showed that they continue to do what they have to do.

[114] The complainant acknowledged that her harassment complaint was deemed unfounded but noted that the investigation report specifically found that the director general had shown "... a marked lack of judgment and self control". Given that, it was highly unlikely that Mr. Stanfield knew nothing about the harassment or her complaint.

D. For the Public Service Commission

[115] The Public Service Commission ("PSC") took no position on the merits of the complaint but made general and policy-specific written submissions.

IV. Reasons

A. Analyzing the evidence

[116] Credibility issues arose at several points during the hearing. To determine the credibility of witness testimony, one must evaluate how consistent it is with the reasonable probabilities of a particular fact situation. The former Public Service Staffing Tribunal (“the PSST”) explained it as follows in *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10:

...

78 The Tribunal must examine the witnesses’ credibility in the face of this contradictory evidence in order to determine which of these two versions is most credible. The test for making this determination is well established in case law, as indicated in the decision in Glasgow v. Deputy Minister of Public Works and Government Services Canada, 2008 PSST 0007, at para. 45. This test is explained on page 357 of the decision in Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.):

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

...

1. The fixer

[117] Ms. Macdonald testified that the director general frequently referred to Mr. Stanfield as her “fixer”, which she understood to mean that he fixed anything that the director general needed fixed, such as problematic files or employees that she did not like. The complainant characterized the working relationship between Mr. Stanfield and the director general the same way. She said that it was hard to believe that the director general would not tell her “confidante and fixer” about the harassment complaint.

[118] Neither witness was challenged on this nor did Mr. Stanfield refute it. Accordingly, I accept the unchallenged testimonies of the complainant and Ms. Macdonald that the director general openly referred to Mr. Stanfield as her fixer and that he played that role in the branch.

2. The stand-ups

[119] Ms. Macdonald, Ms. Reiter, and the complainant were long-term employees who had very much enjoyed their work in DOJ communications, Ms. Reiter for 27 years, the complainant for 19 years, and Ms. Macdonald for close to 10 years. They had come to strongly dislike what they all described as a toxic work environment that began to develop when the director general joined the branch.

[120] One example of the toxic environment was the daily stand-up, about which they all gave specific, graphic examples of the director general's frequent disdainful and belittling behaviour directed at the complainant and others. They said that during the stand-ups, the director general's conduct made clear the employees she favoured and those she disdained. She smiled and spoke to favoured employees in a collegial manner, even when they could not give her the information that she wanted. She treated others with extreme disrespect in the way she spoke to them and engaged in humiliating behaviour, such as rolling her eyes when they spoke or ignoring them and not responding to their questions or comments.

[121] Ms. Reiter identified Ms. Spatuk, Mr. Champagne, and the complainant as the employees who "got the worst of it". Ms. Reiter has retired, and she offered straightforward testimony about the stand-ups that was not challenged on cross-examination. Both Ms. Macdonald and Ms. Reiter found the stand-ups extremely uncomfortable and difficult to attend, due to witnessing that conduct. Ms. Reiter testified that while she mostly avoided being subjected to it, she stopped attending the stand-ups, as it became too difficult to watch. None of the three were challenged on this evidence in cross-examination.

[122] Ms. Reiter said that Mr. Champagne was one of those who "got the worst of it". The respondent argued that Mr. Champagne denied being treated badly by the director general and that therefore, Ms. Reiter's testimony about the director general's conduct toward both him and the complainant should be rejected.

[123] The testimonies of Ms. Reiter and Mr. Champagne differed on whether he had been subjected to any negative conduct by the director general during the stand-ups. However, this issue has little to do with the allegations in this case, which are about whether there was a reasonable apprehension of bias toward the complainant. In this respect, the testimonies of the complainant, Ms. Macdonald, and Ms. Reiter were consistent that the director general belittled and humiliated the complainant at the stand-ups. Mr. Champagne's testimony did not contradict the evidence pertaining to the complainant on that point. He simply answered, "not to my knowledge", and limited his answer to the year, or year-and-a-half, when he regularly attended the stand-ups.

[124] For even the most inattentive manager, the egregious behaviour described by three witnesses as taking place in small, hallway meetings, would be hard to miss. Mr. Stanfield, according to his testimony, is the opposite of an inattentive manager. He stressed the degree to which he cares about people; about building, maintaining and putting significant stock in strong workplace relationships; and about being there for employees. He said that had he seen anything, he would have been obligated as a manager to do something.

[125] These meetings took place right outside his office, and the director general's office, every morning. He confirmed that he attended daily as a regular contributing member. Three credible witnesses said that the director general's conduct occurred frequently and that it was extremely unsettling. Ms. Macdonald said that it was difficult to attend the stand-ups because of it. Ms. Reiter, although rarely subjected to it personally, stopped attending the stand-ups because it was too hard to witness.

[126] It is inconsistent with the preponderance of probabilities that in all the daily meetings, over a number of years, an attentive and dedicated director like Mr. Stanfield never once noticed the complainant, or anyone else, being belittled or humiliated by the director general's words, tone of voice, or body language. I find it more likely than not that he did witness this disdainful conduct.

3. Old guard-new blood

[127] Both the complainant and Ms. Reiter testified that the director general often spoke of getting rid of the "old guard" and bringing in "new blood". Mr. Stanfield testified that he had never heard the director general use those expressions and that

he would have remembered that. Neither Ms. Reiter nor the complainant were challenged on it in cross-examination. I accept their unchallenged testimonies that the director general often used those expressions in public settings within the branch.

[128] The complainant was a long-term employee, hired long before the director general's arrival in the branch. In these circumstances and based on the evidence presented, I infer that she was part of what the director general referred to as the "old guard".

[129] Ms. Reiter and the complainant also said that a number of senior employees lost their positions or job duties by different means, such as through mirror positions, resulting in them leaving the branch, going on sick leave, or retiring prematurely. They said that this was a prevalent pattern in the branch; one that Ms. Reiter had never seen before in her 27 years of experience.

[130] Ms. Reiter testified that some employees did not apply for positions, as they felt certain that they would be screened out because upper management did not like them. She met with a union representative to try to have something done about the workplace atmosphere and provided the union with information about seven staffing scenarios that she believed should be looked into. In her view, they broke the rules and appeared to be aimed at pre-emptively replacing the old guard with new blood.

[131] The respondent argued that Ms. Reiter's testimony was inadmissible as hearsay and that it was of no probative value and asked Ms. Reiter only three questions on cross-examination, all of which were aimed at simply showing that she was not privy to any staffing decisions, which she readily confirmed. Of course, there were limitations to what Ms. Reiter knew; but that does not mean that she could not testify as to her observations — what she saw occurring in the workplace.

[132] She did not suggest that she was privy to Mr. Champagne's situation. However, she testified that she saw him transitioned from managing a department with nine direct reports to working on menial projects, while someone 20 years younger did his job. She observed, and was told by her manager, that Ms. Spatuk was permanently replaced when she took a short-term assignment to broaden her experience, to seek a promotion and ultimately retired. The respondent did not directly challenge any of Ms. Reiter's observations or seek to explain them.

[133] Ms. Reiter, Ms. Macdonald, and the complainant also testified that some of the “old guard” simply left because of the toxic work environment. At least a handful of managers told the complainant that they had to go because the director general was a bully. Ms. Reiter said that many people left, creating a staff shortage that along with increased absenteeism, worsened the high stress and tension in the branch. Both Ms. Reiter and the complainant said that other employees came to their respective offices to talk, and often cry, about these issues. What had been Ms. Reiter’s dream job for many years turned into a work environment that she could no longer endure. As much as she wanted to stay, eventually she had to leave too.

[134] Mr. Champagne had been the manager of electronic communications since 2006. He said that the new director general arrived in 2015 and in 2017 introduced a new structure that resulted in his role being changed. At another point, he explained his work transition by relating that the director general thought he would be ideal to work on this appointment process and asked if he would mind working on HR matters. He tried to put the best possible face on it and downplayed any suggestion of negativity about the director general throughout his testimony. That is entirely understandable.

[135] Neither he nor Mr. Stanfield explained how it is that he has worked on “special projects” since 2017 while another employee does the work of the managerial position that he still holds. Nor did either explain what position is held by the employee who does that work. They both mentioned a variety of special projects on which Mr. Champagne had worked and consistently referred to his “role” rather than his position; it was clear that they were two different things. Mr. Champagne acknowledged that he no longer has nine direct reports but mentioned that his team “had always been decentralized”. He said that he attended stand-ups regularly when he was a manager but that his attendance became sporadic when he was “no longer involved in day-to-day operations”.

[136] Ms. Reiter testified rather more bluntly that Mr. Champagne had been replaced as a manager by an employee who was 20 years younger and much less experienced, and that this had upset everyone. Her testimony was not challenged on cross-examination.

[137] The vaguer versions offered by Mr. Champagne and Mr. Stanfield of how Mr. Champagne came to be in a different “role” while still holding the same position did

not contradict but rather were consistent with Ms. Reiter's version. Mr. Stanfield testified that Mr. Champagne was a manager but that he did a lot of HR work. He acknowledged that when Mr. Champagne was in the manager "role", he reported to the head of creative services and now reported to him but stressed that it was a functional reporting relationship only.

4. Ms. Macdonald's situation

[138] Ms. Macdonald testified that she told Mr. Stanfield that she had to leave due to the director general's conduct. She told him that the work environment had increasingly affected her emotionally, to the point that she had a panic attack at the thought of entering the building and that she could not continue to work under those conditions. When he initially balked at the idea of an assignment, she persisted and told him it was either that or she would need to quit or go on extended sick leave.

[139] On cross-examination, Mr. Stanfield did not directly answer several direct questions about what Ms. Macdonald told him about why she had to leave the workplace. He answered instead with generalities describing his assessment of her problem and her work performance - he knew only that she was having a hard time with some of her files or with understanding and transitioning to the vision of a new director general.

[140] Asked if she did not tell him that she had to either quit, go on assignment, or go on sick leave, he responded that she was strong on pay issues, felt that there was an energy and excitement around Phoenix issues at the time, and that she had built good relationships with HR that provided her with an opportunity to work on pay files.

[141] Ms. Macdonald's testimony about what she told Mr. Stanfield was neither challenged in cross-examination nor directly refuted by him in his examination-in-chief. When cross-examined on it, the closest he came to responding directly to her testimony was to say that he remembered nothing as charged as a panic attack. Beyond that, he simply told a different narrative about an employee who was struggling with her responsibilities and could not adapt to changing times.

[142] I accept Ms. Macdonald's testimony. Contrary to Mr. Stanfield's statement that he knew of nothing untoward about the director general's conduct toward some

employees, I find that with respect to Ms. Macdonald's situation, he did know because she had told him.

5. Selection board knew something of complainant's alleged harassment issues

[143] Mr. Champagne was equivocal as to whether he knew that the complainant had made a harassment complaint. He said this: "I don't believe so; it was 2018. I don't think so; I knew there were issues." I take from this response that he knew of alleged harassment issues relating to the complainant. He might or might not have specifically known that she made a complaint.

[144] On cross-examination, the complainant mentioned that she had spoken to Ms. Gagnon about a harassment complaint. Counsel for the respondent did not explore this further with the complainant. He did not seek to challenge this evidence or call Ms. Gagnon to refute it. It was not clear if the complainant had spoken to Ms. Gagnon about her complaint or the group complaint; however, at a minimum, this unchallenged evidence indicates that Ms. Gagnon knew something about a harassment complaint related to the complainant, as the complainant was involved in both.

[145] Mr. Stanfield testified in chief that he knew nothing about the complainant's harassment complaint. Asked again on cross-examination he said that he knew nothing specific but that: "I will say there were issues raised and this came to my attention when **our** deputy minister called **us** to a meeting in the boardroom to say issues were being explored, but I had no specific information" [emphasis added].

[146] In response to questions about the group complaint he said: "I had no specific information, **like many in the branch**, by virtue of the meeting with the deputy minister without any attribution or any individuals" [emphasis added], and "I do recall the April meeting with the deputy minister raising **everybody's general awareness**" [emphasis added]. When he was asked what everyone's general awareness was being raised about, Mr. Stanfield said this:

*Without any attribution, that some issues had been raised about [the director general's] style and that she [the deputy minister] was looking into it and taking it seriously, **very general nature, for a lot of us you don't get called to a meeting everyday by the deputy minister, most people knew nothing and left knowing not much more** — it was just to let **us** know it was being looked at.*

[Emphasis added]

[147] I gather that this self-inclusive language was meant to convey that Mr. Stanfield was just like everyone else — a member of the uninformed masses called to a highly unusual all-branch meeting with the deputy minister and given no real information. This characterization was strikingly inconsistent both with his director position and with the unchallenged evidence that he was known in the workplace as the director general's "fixer".

[148] As well, Mr. Stanfield testified emphatically about the importance of his managerial obligations and the value he placed on building and maintaining good workplace relationships and being there for the employees. He said that if he had ever seen any untoward behaviour from the director general, he would have been obliged, as a manager, to deal with it.

[149] Yet, when the deputy minister thought that what she had been told was serious enough to have the director general apologize to the entire branch, to put her arm around her and tell the whole branch that they had had a heart-to-heart, that the director general would receive coaching, and that there would be ongoing support for the employees, Mr. Stanfield felt no obligation to even find out what was going on or who was involved. He was content to remain in the dark, to have, in his words, "no specific information", and to simply accept that the information provided to the whole branch was provided "without attribution". This is entirely inconsistent with the value that he said he placed on meeting his managerial obligations and being there for the employees.

[150] I also note and accept the complainant's testimony that her involvement in the group complaint was common knowledge in the branch. I find it more likely than not that Mr. Stanfield at least knew that the complainant had something to do with the group complaint.

[151] Accordingly, I find it more likely than not that all three selection board members knew something about the complainant and her alleged harassment issues with the director general. The evidence was not clear as to how much they knew, or what specifics they had, but on a balance of probabilities I find that they each knew something.

B. A reasonable apprehension of bias

[152] Section 77 of the *PSEA* states that an unsuccessful candidate in the area of selection in an internal appointment process may complain to the Board that they were not appointed because of an abuse of authority in the application of merit by the deputy head in the exercise of its authority. The Board's predecessor defined "abuse of authority" in *Drozowski v. Deputy Head (Department of Public Works and Government Services)*, 2016 PSLREB 33, as follows:

...

[13] The complainant alleges an abuse of authority in the assessment of his qualifications. As stated in Tibbs v. Deputy Minister of National Defence, 2006 PSST 8 at para. 71, abuse of authority is essentially an action that Parliament cannot have envisaged as part of the discretion given to a delegated authority. In other words, acting in an "outrageous, unreasonable or unacceptable way". As the Tribunal has often stated, abuse of authority is a matter of degree. It cannot be any omission or error that amounts to abuse of authority; rather, the behaviour must be of such an egregious nature that it cannot be part of the delegated manager's discretion.

[14] It is important also to state that the complainant has the burden of proof; he has to establish that the respondent has committed an error of such serious nature that it amounts to an abuse of authority.

...

[153] In this case, the complainant alleges that an abuse of authority took place, based on a reasonable apprehension of bias.

[154] The test for a reasonable apprehension of bias is well established (see *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; and *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623). It has been applied many times in staffing cases (see *Denny v. Deputy Minister of National Defence*, 2009 PSST 29; and, more recently, in *Massabki v. Deputy Head (Department of Foreign Affairs, Trade and Development)*, 2022 FPSLREB 79; *Monfourny v. Deputy Head (Department of National Defence)*, 2023 FPSLREB 37; and *Menzies v. Deputy Head (Correctional Service of Canada)*, 2023 FPSLREB 68).

[155] The Board must determine if a reasonably informed bystander could reasonably perceive bias on the part of the respondent. Suspicions, speculations, or possibilities of bias are not enough, and bias must be real, probable, or reasonably obvious (see *Denny*, at para. 124).

[156] The respondent referred me to *Wepruk v. Deputy Minister of Health*, 2018 FPSLRB 14, a decision in which the Board found that the workplace environment was toxic but held that the complainant had not met her onus of establishing an apprehension of bias on the part of the respondent. The complainant in *Wepruk* alleged that among other things, the selection board's composition could not have led to a fair and impartial assessment, given the harassment that she experienced and the grievances that she had filed.

[157] The facts in *Wepruk* are quite different from this case. In *Wepruk*, the Board noted that two of the three selection board members had no prior knowledge of the complainant. And when a disparity arose between the board members' assessments, the regional director, who had some limited knowledge of the complainant, deferred to the subject-matter expert, who had no preconceived impression of her. He did the same with all the candidates' assessments. The subject-matter expert also testified and explained that he came to be on the selection board when his director general volunteered him to be an assessor in that appointment process. He had never met the regional director and had no prior awareness of the complainant.

[158] In *Denny*, the PSC submitted that the appearance of bias was a concern because the evidence demonstrated a "tough' history" between an assessor and the candidate, such that more effort should have been made to address the perception of bias, which could have been avoided by having someone else conduct the test. The PSST found that other qualified personnel could have conducted the test and concluded that the respondent abused its authority by having the assessor do it despite a reasonable apprehension that he might be biased against the complainant.

[159] The complainant's tough history in this case was not directly with anyone on the selection board but rather with the director general. However, she testified that it was well known in the branch. The director general expressed her negative assessments of certain employees, including the complainant, strongly, disdainfully, and publicly. Ms. Reiter and Ms. Macdonald witnessed it frequently.

[160] For the reasons explained earlier in this decision, I found it more likely than not that Mr. Stanfield witnessed the director general's disdainful conduct toward the complainant, that he knew that there were issues in the branch about the director general's conduct, and that he knew that the complainant was involved in the group complaint. I also found that both Mr. Champagne and Ms. Gagnon knew something of the alleged harassment issues between the complainant and the director general. Each selection board member knew at least some of this tough history between the complainant and the director general. And, they all worked directly with the director general who, by virtue of her office, held a position of power over them. Accordingly, as in *Denny*, more could, and should, have been done to address the perception of bias, for instance, by appointing selection board members who were unaware of the history.

[161] A reasonably informed bystander could reasonably perceive bias on the part of the selection board in this case.

[162] As in *Denny*, the respondent took the position that the onus was on the complainant to raise any concerns of bias before the interview. Mr. Stanfield said as much in his testimony. The complainant did raise the issue with the Workplace Branch before her interview, which made sense, as that branch's action had exacerbated a situation of potential bias. She not only raised it but also specifically asked for help in determining how to proceed. The Workplace Branch responded briefly on other matters but completely ignored the bias issue that she raised and her plea for help and guidance. Given that, she had every reason to believe that she was on her own and that she just had to try to tough it out. In these circumstances, it is entirely understandable that she was reluctant to raise bias issues with the very people about whom she would raise those doubts.

[163] Further, the Workplace Branch cautioned her in writing that she was not to discuss the harassment complaint with anyone. She understood that she was bound by that direction. Before her interview, upon finding out that her complaint had been sent to the director general, against her wishes, she inquired as follows: "And is she [the director general] also to keep this entire matter confidential, as I have been asked to do in the letter that was sent to me?" The Workplace Branch responded: "... I can assure you that the caution about keeping the information confidential was also included in

the letter to her”, thus confirming to the complainant the afternoon before her interview that her harassment complaint had to be kept confidential.

[164] Counsel for the respondent impugned the complainant for not coming forward, stating that she allowed her perception of bias to go on and that “she now points a finger at the board members”. As the complainant expressed it, as follows:

If you can really imagine my situation, how could I say to them that I questioned their bias, what could I really expect them to do when they report to someone who is well known as a bully — and I was not allowed to tell anyone about it — it was a catch 22 situation.

[165] In *Denny*, the PSST made it clear that selection board members have a duty to act fairly, which includes ensuring that the assessment is unbiased and that it does not generate a reasonable apprehension of bias. Failing that duty constitutes an abuse of authority (see *Gignac*, at para. 71). In these circumstances, it would have been an entirely unrealistic and unfair expectation to hold the complainant responsible for raising bias issues at an interview, especially when she had been instructed to keep information about her harassment complaint confidential. It is not up to the complainant to ensure a fair process, that is the selection board’s duty.

[166] The respondent also argued that the complainant did not demonstrate that she was unsuccessful in the appointment process for any reason other than those that Messrs. Champagne and Stanfield cited. The Board’s role is not to reassess the complainant but rather to determine whether there was an abuse of authority in the appointment process (see *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19 at para. 65; and *Broughton v. Deputy Minister of Public Works and Government Services*, 2007 PSST 20 at para. 54). As mentioned earlier in this decision, the respondent has a duty to carry out an assessment that does not generate a reasonable apprehension of bias. Failing to fulfill that duty constitutes an abuse of authority.

[167] In *Parker v. Deputy Minister of Indian and Northern Affairs Canada*, 2010 PSST 21, as in *Denny*, the PSST noted that the courts had acknowledged that direct evidence of actual bias is difficult to establish and that therefore, fairness requires that there be no reasonable apprehension of bias. The PSST asked itself whether a reasonably informed bystander looking at the appointment process would reasonably perceive

bias on the part of one or more of the persons involved in the complainant's assessment.

[168] Before the appointment process at issue in *Parker*, the complainant had raised a concern with her manager that the manager was in an unrelated conflict of interest. Her manager did not act on her concerns, and the employer's headquarters had intervened to remove the file from the manager. The complainant felt that her relationship with her manager changed after that, and she became concerned that she had put herself at risk by raising the matter.

[169] Her manager was the hiring manager for the appointment process at issue. One of the selection board members also knew about the conflict-of-interest issue that the complainant had raised. As well, another selection board member had sent the manager a note criticizing the complainant for her conduct at a meeting where, it was alleged, she had been critical of her manager and two others who were assessing aspects of her candidacy. This member was removed from the selection board, but the manager showed the complainant the note and discussed it with her shortly before her interview.

[170] Similar to this case, the selection board members in *Parker* denied any influence or interference from the manager, and their testimony as to the weakness in the complainant's interview performance was not challenged. However, the PSST found that while it was appropriate for the manager to discuss the note with the complainant, it was not so urgent as to require a discussion right before her interview, and that the manager failed to consider the impact on the complainant of both the note's content and the meeting to discuss it.

[171] The PSST found that a reasonably informed bystander would consider the uncontradicted evidence about the note, the conflict-of-interest issue that the complainant had raised, and her feeling that she was at risk after raising it, and said this:

...

67 Individuals who are given the task of assessment will often have knowledge of candidates. It may come to them because of their position in the organization. Relevant personal knowledge may, in some circumstances, be an important tool in the assessment of candidates.

68 However, in the present case, **the reasonably informed bystander would consider not only the level of knowledge or awareness of the assessment board, but would view as a whole the accumulation of actions taken involving the complainant and her candidacy.** The bystander would then find it was more likely than not that the assessment board would be biased against the complainant.

69 ... In the present case, the web of relationships, knowledge and dealings among the members of the assessment board and the complainant, as well as events prior to the interview gave rise to a reasonable apprehension of bias.

...

[Emphasis added]

[172] In this case, although the director general was not on the selection board, her confidante and fixer, Mr. Stanfield, was in charge of the appointment process. Mr. Champagne had been a manager, but since 2017 had been assigned to roles at the director general's discretion and now reports to Mr. Stanfield. Ms. Gagnon did not testify, and little is known about her role in this matter, but two things are clear: she was a new (one year) deputy director general reporting to the director general, and the complainant had discussed a harassment complaint involving the director general with her. In this context, it was not unreasonable for the complainant to ask, "How could they not do what they would know she [the director general] wanted?"

[173] How, indeed? The unchallenged evidence described a branch ruled by fear. None of the selection board members could be seen as truly objective, even if they tried hard to be. The director general's conduct had compromised them by creating such an environment. In this case, the respondent should have ensured that the selection board members were well beyond the director general's sphere of influence and that they knew nothing of her predilection toward or against any candidate, including the complainant.

[174] Further, as the PSST said in *Parker*, a reasonably informed bystander would consider not only the selection board's level of awareness but would also "... view as a whole the accumulation of actions taken involving the complainant and her candidacy."

[175] To view as a whole the accumulation of actions involving the complainant and her candidacy, a reasonably informed bystander would have to consider the director

general's public expressions of disdain toward the complainant, the director general's public references to getting rid of the "old guard" and bringing in "new blood", the complainant's active involvement in the group complaint, and the sharing of her harassment complaint with the director general a week before her interview, with an admonition to her to keep that complaint confidential.

[176] Considering the evidence as a whole, I find that a reasonably informed bystander could reasonably perceive that the selection board was biased, consciously or not, against the complainant. Accordingly, I find that the respondent abused its authority, contrary to s. 77(1)(a) of the *PSEA*.

C. Corrective action

[177] Section 81(1) of the *PSEA* outlines as follows the corrective action that can be ordered when the Board finds a complaint substantiated:

***81 (1)** If the Board finds a complaint under section 77 to be substantiated, the Board may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Board considers appropriate.*

[178] The complainant has been out of the workplace since 2018; she never returned after these events and ultimately took medical retirement from the public service. She withdrew her original remedial request to be reassessed "... fairly and without bias... by a panel ... who are not direct reports to the Director General ..." and seeks only the revocation of the appointment.

[179] Under s. 30 of the *PSEA*, a person may be appointed to a position if the deputy head is satisfied that they meet the essential qualifications for the work to be performed. There was no evidence that the appointee did not meet the merit criteria; nor were his qualifications disputed; the complainant candidly described him as very competent. Accordingly, it would not be appropriate to revoke the appointment.

[180] In a similar context, the Board said this in *Gomy v. Deputy Minister of Health*, 2019 FPSLRB 84:

...

[140] In this case, the evidence supports concluding that there is a reasonable apprehension of bias in the complainant's evaluation....

[141] However, there is no evidence that the person appointed did not satisfy the merit criteria... I do not find that the appointed person's answers were incorrectly assessed due to an abuse of authority. Instead, I find that there is a reasonable apprehension of bias in the complainant's assessment.

[142] For these reasons, I find that it would not be appropriate to revoke the appointment in this case... As I have no reason to believe that that person's appointment was the result of an abuse of authority and as I have no evidence to indicate that that person is not qualified, I find that it would not be appropriate to revoke the appointment.

[143] Instead, I find that in the circumstances of this complaint, a declaration is sufficient that Ms. Messier abused the discretion delegated to her because there is a reasonable apprehension of bias in the complainant's assessment....

...

[181] The corrective action in these circumstances is a declaration of abuse of authority.

D. Recommendations

[182] As stated in *Canada (Attorney General) v. Beyak*, 2011 FC 629, the Board may also make recommendations to avoid the repetition of the situation that led to an abuse of authority. Accordingly, I make the following recommendations.

[183] Based on the testimony that I heard in this matter, I recommend that the respondent review its staffing practices to ensure compliance with the *PSEA*.

[184] Based on the testimony that I heard in this matter, I conclude that the Workplace Branch caused considerable harm to the complainant and that it failed to take responsibility for its actions. I also note the respondent's attempt to distance itself from the Workplace Branch; its counsel going so far as to say that the Workplace Branch "had nothing to do with the respondent".

[185] I recommend that the respondent review or put in place policies and procedures with respect to harassment complaints and appointment processes, to ensure that meaningful assistance can be provided and that employees are not placed in difficult situations as was the complainant in this case.

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

(The Order appears on the next page)

V. Order

[187] The complaint is allowed.

[188] I declare that the respondent abused its authority based on a reasonable apprehension of bias in its assessment of the complainant.

November 28, 2024

**Nancy Rosenberg,
a panel of the Federal Public Sector
Labour Relations and Employment Board**