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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

**NADINE PARKER**

Complainant

and

**DEPUTY HEAD OF THE PUBLIC SERVICE COMMISSION**

Respondent

and

**OTHER PARTIES**

Indexed as

*Parker v. Deputy Head of the Public Service Commission*

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

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

**For the Complainant:** Hugh Scher, counsel

**For the Respondent:** Noémie Lebel and Karl Chemsî, counsel

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Heard by videoconference,  
March 18 and 19, 2024.

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## REASONS FOR DECISION

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### I. Introduction

[1] The complainant, Nadine Parker, made a complaint to the Federal Public Sector Labour Relations and Employment Board (“the Board”) under ss. 77(1)(a) and (b) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; “PSEA”). She alleged abuse of authority by the respondent, the President of the Public Service Commission (“the respondent” or “the PSC”), in the application of merit and in the choice of an advertised appointment process that was numbered 21-PSC-IA-397803 (“the appointment process”) to staff the position of Manager Investigations Support, classified PE-06 (“the PE-06 position”), at several locations in Canada.

[2] The complainant also alleged discrimination on the protected grounds of race, colour, and age, in contravention of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; “CHRA”). She provided notice of the complaint to the Canadian Human Rights Commission (“the CHRC”) of the allegation of human rights discrimination in the appointment process. The CHRC advised the Board that it did not intend to make submissions in this matter.

[3] The respondent denied abusing its authority in the application of merit or the choice of appointment process, and it denied discriminating against the complainant.

### II. Summary of the evidence

[4] The complainant was a candidate in the appointment process. Her application was considered, and she was found to meet the screening requirements of education and experience. She then received an invitation to complete a take-home written examination (“the examination”).

[5] The invitation for the examination indicated that it would assess three essential criteria: 1) knowledge of the principles of procedural fairness (“K1”), 2) the ability to communicate effectively in writing (“A2”), and 3) the ability to revise documents and provide feedback (“A3”). This information was repeated in the written instructions accompanying the examination.

[6] The examination required a candidate to review a fictional, draft investigation report that an investigator had prepared. The complainant submitted her completed examination on August 31, 2021.

[7] Marie LaTerreur, the director of the Investigations Division (“the director”), marked the complainant’s examination and determined that her response did not demonstrate K1. The minimum required mark was 5 out of 10. The complainant received no marks for her answer, and her candidacy was not further considered.

**A. For the complainant**

[8] The complainant testified that she has been a federal public service employee for 30 years. During that time, she worked for the Correctional Service of Canada (“CSC”), the Department of National Defence (“DND”), and, since 2018, the PSC. During her career, she investigated complaints from employees and members of the public. Additionally, she wrote and presented reports, supervised investigators, managed, and directed general investigations. She stated that throughout her career, she demonstrated her knowledge of K1.

[9] The complainant recalled joining the PSC in 2018 following her success in an advertised appointment process for investigators. She stated that K1 was assessed during that process.

[10] The complainant testified that her annual performance appraisals for 2019-2020 and 2020-2021, completed by the director, showed evaluations of “Succeeded +”.

[11] According to the complainant, the director created the examination. It was the sole tool used to assess K1.

[12] The complainant testified that when she received the examination, she reviewed the fictional investigation report for inconsistencies, errors, and information that did not “flow”. She acknowledged that she did not address K1 in her response to the examination. She missed it. Her examination received a mark of 0 out of 10 for K1, in contrast to marks of 9 out of 10 for A2 and 9 out of 10 for A3.

[13] The consequence of the result that found her not qualified was that she felt devalued, unsettled, and uncomfortable.

[14] The complainant expressed the belief that nonetheless, she qualified for the PE-06 position. In her view, the director knew that she possessed K1. The assessment process overlooked her experience at the PSC coaching an investigator and earlier experience as an AS-07 manager at DND. She did not understand the result that found

her not qualified, particularly in light of a guide entitled “Flexibility in Assessment” that allowed managers discretion and flexibility when assessing candidates.

[15] The complainant acknowledged the director’s authority to create the examination, but she felt that in her case, the assessment of K1 was not accurate. She stated that the examination result contradicted her workplace performance. In addition, it focussed on only one aspect of procedural fairness, namely, the right to be informed. Further, she felt that in PSC investigations, information about procedural rights was disclosed at an initial stage and was not repeated during the investigation stage.

[16] The complainant noted that she participated in an informal discussion with the director. The “common theme” included her acknowledgement that she missed K1 in the examination.

[17] The complainant indicated her disappointment in herself, as she felt that she should have recognized the procedural fairness issue. Nonetheless, she considered that she has mastery of the principles and procedures of administrative law. She gained it through years working for the CSC, DND, and the PSC. She testified that she had managed, directed, coached, and mentored employees at the CSC and DND. She agreed that the director had no knowledge of that work, but she knew of the complainant’s work at the PSC. She felt that there were allowances in a policy framework for a manager to use to ensure the soundness and reliability of staffing decisions.

[18] In cross-examination, the complainant acknowledged that to be qualified, a candidate must meet all the essential qualifications for a position and that she did not pass K1, as she did not demonstrate her knowledge in her examination response. However, she maintained that she possessed K1. It disappointed her that the director was not willing to confirm it by another means, including her assessment in an appointment process conducted in 2018, or by contacting references.

[19] The complainant also recalled a conversation with Kim Jessome, the director general, during the summer of 2021, before the appointment process. The director general stated that she might recuse herself from participating in assessing the candidates because she knew one of them. A colleague advised the complainant that the appointee and the director general were friends. The colleague did not appear as a

witness, and the complainant presented no evidence to substantiate the assertion. She agreed in cross-examination that the director general did not participate in assessing the candidates.

[20] The complainant further noted that the PSC initially failed to invite her to a January 2022 training session on investigating discrimination in the workplace. She testified that the initial invitation included the appointee from the outset and predated her appointment to the PE-06 position.

[21] She learned of it during a team meeting. When she reviewed the list of invitees, she noted that she was not included. The complainant alerted the director general, and her name was added to the list of invitees on December 30, 2021.

[22] The complainant expressed her concern for representativeness in the workplace and a lack of diversity. She presented no evidence beyond her stated concern.

[23] Concerning the PSC's choice to conduct an advertised appointment process, the complainant asserted that the director could have selected her using a non-advertised process. There was no requirement to consider more than one person for the position. The PSC disregarded the fact that her knowledge, skills, and abilities fully met the requirements of the PE-06 position.

[24] Concerning human rights discrimination, the complainant's notice to the CHRC described the priority placed on equity, diversion, and inclusion in federal government recruitment. It also referred to the "Clerk's Call to Action" and the PSC's 2020-2021 "Audit on Employment Representation in Recruitment" document.

[25] The complainant relied on her experience and knowledge in the public service as a demonstration that she met the merit criteria in spite of the examination results. She viewed the failure to appoint her to the PE-06 position as inadvertent discrimination.

## **B. For the respondent**

[26] The director testified that she occupied her current position from 2018 onward, first in an acting capacity and then indeterminately.

[27] As of the appointment process, 11 or 12 investigators reported directly to her. She provided references for several of the candidates because she was their director. Other board members assessed those references.

[28] The director indicated that within her division, she always used advertised appointment processes. Non-advertised appointment processes were rare. The PE-06 position was new and had to be staffed due to a new authority for the PSC to investigate an error, omission, and improper conduct, including bias or a barrier, negatively impacting members of equity-seeking groups.

[29] The director testified that the PE-06 position differed from that of an investigator. An investigator determined investigation strategy, conducted fact collecting, and drafted reports. The PE-06 position supervised, coached, and mentored throughout the process by providing support, answering questions, and reviewing work.

[30] The director bore the responsibility for developing the merit criteria and the assessment strategy and for preparing the assessment tools and rating guides. She marked all the examinations and participated in the candidate interviews. The director updated the requirements for the appointment process from the requirements in the 2019 process. She described knowledge of procedural fairness as the basis of all investigations. She included it in earlier appointment processes as well, so in both 2019 and 2021. She modified the ability to revise and provide feedback to reflect the main duty of the manager relative to the investigators. To reflect a new mandate for the PSC, she added an asset criterion of experience working on employment equity, diversity and inclusion, accessibility, or human rights issues.

[31] In the job posting, under the heading “Organizational Needs”, appeared a statement indicating that selection might be limited to Aboriginal peoples, persons with a disability, and visible minorities. The director testified that when the appointment was made, she did not invoke the organizational need, as there was no underrepresentation at the PSC at that time.

[32] When making her decision to conduct an advertised appointment process, the director looked at her needs at the time. By the beginning of June 2021, she had approval to staff five new positions, one manager and four investigators. Her reasons to proceed with an advertised appointment process were the following:

- The PSC's president had asked that half the positions be allocated to regional offices.
- The director sought a pool of qualified candidates to allow her to staff quickly.
- She also wanted to give the opportunity to apply for the positions to as many people as possible.
- She wanted candidates with experience working in employment equity, diversity, and inclusion.

[33] According to the posting for the PE-06 position, the area of selection extended to persons employed in the federal public service occupying a position in Vancouver, British Columbia; Toronto, Ontario; the National Capital Region; Montreal, Quebec; and Halifax, Nova Scotia. This corresponded with the president's direction to staff regional offices.

[34] The PSC received approximately 40 applications. Screening relied on the résumés that the candidates provided. Those candidates who were screened in then wrote the examination to assess K1, A2, and A3. Candidates who received a passing score were interviewed, and reference checks were completed.

[35] Concerning the examination, each candidate received it at the time they chose and had 24 hours to complete and return it. The instructions set out the three criteria to be assessed: K1, A2, and A3.

[36] The examination reproduced the PE-06 position's work, allowing a candidate to review an investigator's report and to revise and provide feedback in an email from the candidate to the investigator as well.

[37] The director testified that it was fundamental to the manager's work to identify what was missing from the report. The investigator's report did not show that the individual subject of the investigation was informed, and the complainant's response failed to identify this omission. After marking the complainant's examination, the director asked another board member to review it, for a response to K1. As a result, the complainant failed to demonstrate K1 and did not proceed further in the appointment process.

[38] The director stated that the examination provided no advantage to a PSC employee over a candidate from elsewhere. While the complainant might have made an assumption that the person had been informed, nothing in the report or the response confirmed this assumption.

[39] The director did not use performance evaluations to assess candidates. Personal knowledge of the candidates was not an assessment tool, and the director stated that in any event, she did not have exposure to the complainant's work or an opportunity to observe it. She had no personal knowledge of the work that the complainant performed before she joined the PSC. Further, while the complainant demonstrated knowledge of the principles of procedural fairness during an appointment process in 2018, it was for an investigator position. The PE-06 position's orientation differed, as it focussed on supervising or coaching investigators.

[40] Responding to a question in cross-examination, the director agreed that the complainant could have done everything else correctly, but if she did not raise the issue of procedural fairness, she could not succeed in the assessment. She used her discretion to assess answers that addressed procedural fairness, including unexpected responses to the issue of K1. However, she did not extend her discretion to using her personal knowledge to substitute for an answer when a candidate failed to respond. A candidate had to demonstrate their knowledge of procedural fairness by identifying its absence from the fictitious report used for the examination.

[41] In cross-examination, the director agreed that she did not contact DND or the CSC with respect to the complainant's experience working with those departments. The candidate had to demonstrate the K1 in the examination and not through a reference from a third party.

[42] As for personal favouritism, the director stated that the director general did not participate in the assessment or the selection. She knew six or seven candidates, but she did not influence the choice of the appointee or pressure the director to select her.

[43] Concerning the training held in January 2022, the director stated that she had no involvement in it or in the invitation to the participants. She recalled that the complainant was assigned elsewhere when the invitation was sent. When she returned earlier than anticipated, she received an invitation to attend the training. The director added that the software used to generate the invitation continued to generate the invitation date of September 8, 2021, although emails showed that the appointee was not included in the invitation until December 30, 2021.



### III. Summary of the arguments

#### A. For the complainant

[44] In argument, the complainant asserted that the director fettered her discretion in the application of the merit criteria. The issue was whether the selected assessment method fairly enabled a proper assessment of the complainant for K1.

[45] The complainant met the asset and merit criteria through her application and her past employment experience, including significant investigation, management, and supervisory experience. The director relied on a single tool to assess K1, and the complainant questioned the examination's validity and reliability; it failed to take into account her real-world experience.

[46] As such, the director acted on inadequate material, which had an adverse consequence for the complainant. The examination did not account for her knowledge and long-term experience as an investigator at the PSC.

[47] The complainant was aware that the PSC addressed procedural fairness at an early stage in the investigation. Therefore, she was entitled to deference if she failed to address it in her response. There was little doubt that she met the requirements of the PE06 position. Ignoring her knowledge of K1 was either unintentional or wilful blindness to the reality of her experience.

[48] The director fettered her discretion by failing to take into account her personal knowledge of the complainant and her experience working at the CSC and particularly at DND, where she had been a manager.

[49] The complainant acknowledged that the *PSEA* provides broad discretion to a manager, but the misuse of discretionary power could give rise to an error and an abuse of authority.

[50] Concerning human rights discrimination, the complainant asserted that the pattern and practice of using a single assessment tool served to screen out visible minority candidates without considering their full backgrounds. As she was removed from consideration on the basis of K1, she considered her treatment differential, which led her to feel demeaned and diminished.

[51] The complainant questioned the director general's role, particularly given the failure to invite her to the training on September 8, 2021. This tainted the process and added to the perception of unfairness.

**B. For the respondent**

[52] The complainant bears the burden of proof on the balance of probabilities and must present convincing evidence and arguments to be successful.

[53] For abuse of authority in the application of merit, the test requires more than a simple error or omission. A serious error must be demonstrated. This is more than perceived injustice.

[54] The respondent noted the complainant's admission that she did not recognize the missing K1 element in the examination and that she failed to address it. Therefore, the director had no information to assess or evaluate. Consequently, the complainant was eliminated from consideration, as she did not meet K1 and could not be placed in the pool of qualified candidates.

[55] To be qualified, a candidate must meet the essential qualifications established for a position. Broad discretion is given to set out those qualifications and the methods used to assess candidates.

[56] One objective of the examination was to assess K1. The assessment tools did not include personal knowledge of the assessor, references, or performance evaluations. The examination presented a scenario that was similar to the work done in the PE-06 position. The complainant did not demonstrate this knowledge, and she was eliminated from the appointment process.

[57] Using personal knowledge to assess the complainant would have been unfair to other candidates and would have lacked transparency. The director had no awareness of the work that the complainant had performed at the CSC or DND.

[58] Addressing personal favouritism, the respondent noted that the director general did not participate in the assessment process. She did not recuse herself, as she was never involved. There was no evidence to infer that the appointment was done to gain favour.

[59] The director chose to conduct an advertised appointment process for clear reasons. There was no evidence to demonstrate that the choice was improper.

[60] On the issue of human rights discrimination, the respondent did not dispute that the complainant has characteristics that are protected or that she was unsuccessful in the appointment process. However, the evidence does not support a conclusion that a protected characteristic was a factor in the decision to find that she was not qualified. Similarly, she did not demonstrate that the examination was a barrier from a human rights perspective.

[61] The fact of being a member of a protected group who was not successful does not render the outcome discriminatory; nor does the evidence demonstrate any differential treatment of the complainant in the appointment process.

[62] The complainant was eliminated because she failed to demonstrate K1, which was an essential merit criterion. This is a reasonable, non-discriminatory explanation for the treatment of her candidacy. It would have been contrary to the objectives of transparency, equity, and fairness to all candidates had the director overlooked the complainant's failure to address K1.

[63] Further, the director testified that there was no underrepresentation of visible-minority employees on the management team. The evidence demonstrated no pattern of discrimination at the PSC. Eliminating a candidate on the basis that they do not meet the qualifications for a position does not constitute discrimination.

### **C. For the appointee**

[64] The appointee attended the hearing and provided a closing submission. She stated that she has 20 years of work in employment equity, diversity, and inclusion. This includes work in regulation and investigation. She climbed the ladder from the PE-01 to the PE-06 level. In 2021, she received an acting appointment to a PE-06 position as the manager of regulation. The appointee stated that she has completed a master's degree in public administration.

[65] She expressed concern that she had been tainted by an allegation that she had a personal relationship with the director general.

[66] Concerning the training given in January 2022, she acknowledged that she received an invitation on December 30, 2021, after her appointment to the PE-06 position.

[67] She concluded by stating that she simply applied for the PE-06 position and that she was appointed.

#### IV. Reasons

[68] Sections 77(1)(a) and (b) of the *PSEA* provide as follows:

**77 (1)** *When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Board's regulations — make a complaint to the Board that he or she was not appointed or proposed for appointment by reason of*

**(a)** *an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);*

**(b)** *an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process ....*

**77 (1)** *Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement de la Commission des relations de travail et de l'emploi, présenter à celle-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :*

**a)** *abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);*

**b)** *abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas [...]*

[69] A complainant who comes before the Board bears the onus of proving their allegations on the standard of the balance of probabilities. (See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8.)

[70] The complainant advanced a case alleging abuse of authority in the application of merit and in the choice to conduct an advertised internal appointment process. She also alleged human rights discrimination.

## A. Abuse of authority in the application of merit

[71] Merit is the cornerstone of staffing in the federal public service. Section 30 of the *PSEA* provides as follows:

**30 (1)** *Appointments by the Commission to or from within the public service shall be made on the basis of merit and must be free from political influence.*

**(2)** *An appointment is made on the basis of merit when*

**(a)** *the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency; and*

**(b)** *the Commission has regard to*

**(i)** *any additional qualifications that the deputy head may consider to be an asset for the work to be performed, or for the organization, currently or in the future,*

**(ii)** *any current or future operational requirements of the organization that may be identified by the deputy head, and*

**(iii)** *any current or future needs of the organization that may be identified by the deputy head.*

...

**30 (1)** *Les nominations — internes ou externes — à la fonction publique faites par la Commission sont fondées sur le mérite et sont indépendantes de toute influence politique.*

**(2)** *Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*

**a)** *selon la Commission, la personne à nommer possède les qualifications essentielles — notamment la compétence dans les langues officielles — établies par l'administrateur général pour le travail à accomplir;*

**b)** *la Commission prend en compte :*

**(i)** *toute qualification supplémentaire que l'administrateur général considère comme un atout pour le travail à accomplir ou pour l'administration, pour le présent ou l'avenir,*

**(ii)** *toute exigence opérationnelle actuelle ou future de l'administration précisée par l'administrateur général,*

**(iii)** *tout besoin actuel ou futur de l'administration précisé par l'administrateur général.*

[...]

[72] Accordingly, an appointment to or within the public service must, as a general rule, be made on the basis of merit. The appointee must demonstrate that they meet the essential qualifications for the position and may be required to meet additional qualifications or requirements.

[73] It is beyond dispute that the complainant failed to demonstrate that she met K1, which was an essential qualification for the PE-06 position. She did not address it in the examination.

[74] Section 36(1) of the *PSEA* addresses as follows the assessment methods to be used when making an appointment:

**36 (1)** *In making an appointment, the Commission may, subject to subsection (2), use any assessment method, such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).*

**36 (1)** *Sous réserve du paragraphe (2), la Commission peut avoir recours à toute méthode d'évaluation — notamment la prise en compte des réalisations et du rendement antérieur, examens ou entrevues — qu'elle estime indiquée pour décider si une personne possède les qualifications visées à l'alinéa 30(2)a) et au sous-alinéa 30(2)b)(i).*

[75] This provides broad discretion in the choice of assessment methods but not absolute discretion. Any choice is subject to scrutiny for an abuse of authority.

[76] I find that the evidence suggesting a flaw in the examination is without substance. This is not a case in which it has been shown that the question was inadequate for its purpose. Candidates were told in written initial instructions and again upon receiving the examination that K1 would be assessed. The complainant testified that procedural fairness is not, in practice, a concern for a PSC investigator. That may be, although the evidence of the PSC's investigation methodology is scant. However, I do note that the area of selection for the appointment process extended beyond the PSC to candidates who did not share her experience with PSC methods.

[77] The complainant argued that the director fettered her discretion by relying on the examination. In that respect, she cited the Board's decision in *Schwarz v. Deputy Minister of Employment and Social Development*, 2021 FPSLREB 92, for its reference to the Public Service Staffing Tribunal's ("the Tribunal") decision in *Bowman v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 12. In *Bowman*, the Tribunal found that an assessment board improperly fettered its discretion by applying rigid temporal criteria to an essential qualification measuring a candidate's experience. As such, it improperly and arbitrarily fettered its discretion. I do not find it relevant to the issue of using an examination to assess K1.

[78] Moreover, the complainant offered no explanation for her failure to include any reference to K1 in her response. Her position is that the director necessarily had to employ another assessment method — personal knowledge, performance evaluations, or prior work experience — when she recognized that the complainant failed to provide an answer to satisfy the requirements of K1.

[79] I do not accept this proposition. The authority to decide on assessment methods rested with the PSC, particularly with the director as a subdelegated manager. The examination instructions transparently set out the qualifications to be assessed. The complainant failed to address one of them.

[80] After choosing to administer an examination and then determining that the complainant failed to meet the required score for K1, the director was not obliged to substitute a different method to assess the complainant. Had she done so, she might have risked the appointment process's integrity by creating special conditions for a candidate on the basis that they shared a workplace.

[81] In this respect, I refer to the Board's decision in *Lesage v. Deputy Minister of Transport, Infrastructure and Communities*, 2021 FPSLRB 97. The complainant, who was screened out of the appointment process on the basis of an inadequate application, alleged abuse of authority in the application of merit. In dismissing the complaint, the Board held as follows:

...

*[95] As the Tribunal found in Henry, candidates should not assume that assessment boards will follow up with them to ensure that they identified everything required to meet the essential qualification criteria.*

*[96] In this case, the respondent ensured that all candidates were assessed on an equal footing. Thus, although the assessment board members who rejected the complainant's application knew of her experience, only the information in her application letter and CV was considered at the preselection stage. That method was not an abuse of authority.*

*[97] In short, I find that the complainant's application letter was incomplete. The assessment board's decision not to rely on its personal knowledge of the candidate to accept her application at the preselection stage resulted in the fair treatment of all candidates. Its decision not to rely on its personal knowledge of the candidate to accept her application at the reconsideration stage of its decision in September 2015 also resulted in the fair treatment*

*of all candidates. Had the complainant benefitted from the personal and subjective knowledge of the assessment board's members about her work experience, it would have been unfair to the other candidates. In this case, the complainant's application was considered on the same basis as those of all other candidates.*

...

[82] This echoes the Tribunal's finding in *Trites v. Deputy Minister of Public Works and Government Services Canada*, 2009 PSST 16, in which it held that failing to reassess a complainant using a different assessment tool does not improperly fetter the assessor's decision or constitute an abuse of authority.

[83] The complainant also alleged that the appointed candidate improperly benefited from friendship with the director general. Personal favouritism constitutes an abuse of authority, according to s. 2(4) of the *PSEA*.

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

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

[85] No evidence was presented to suggest, for example, personal gain or a favour. Similarly, the complainant's testimony concerning an unidentified person speaking to her is not evidence substantiating the existence of a friendship between the director general and the appointee. Moreover, there is no evidence of the director general's involvement in any stage of the appointment process and nothing from which to infer that she interfered with the appointment process or the selection of the appointee.

[86] Concerning the invitation to training, the evidence demonstrates that the task of inviting participants to the training in January 2022 fell to the director general's assistant. Neither the complainant nor the appointee was present in the workplace when the initial invitation was sent on September 8, 2021. According to the documents



before me and the testimonies of the witnesses, both of them were invited on December 30, 2021. I find no abuse of authority, whether bias against the complainant or favour extended to the appointee, in delaying the invitation until that time.

[87] As such, I conclude that the complainant did not discharge the burden of proving an abuse of authority in the application of merit. The allegation is dismissed.

## **B. Abuse of authority in the choice of process**

[88] Concerning the allegation of an abuse of process in the choice to conduct an advertised appointment process, I turn first to the *PSEA*. It provides in s. 33 as follows:

*33 In making an appointment, the Commission may use an advertised or non-advertised appointment process.*

*33 La Commission peut, en vue d'une nomination, avoir recours à un processus de nomination annoncé ou à un processus de nomination non annoncé.*

[89] The complainant alleged that using an advertised appointment process constituted an abuse of authority, as in her view, she was qualified and available for appointment. By contrast, the director cited the reasons for choosing an advertised appointment process, which were to 1) create a pool of qualified candidates, 2) make appointments to regional offices, 3) draw as many applicants as possible, and 4) attract candidates with employment equity, diversity, and inclusion experience.

[90] Even if, as the complainant urged, a qualified person is available, the discretion given by s. 33 may be exercised, subject to an assessment for an abuse of authority. In this case, I find that the director's testimony about the considerations that influenced her choice reasonable and relevant to the decision to use an advertised appointment process.

[91] Viewed in the context of the evidence, and the undisputed considerations that led to the choice of an advertised process, the complainant's burden of proving an abuse of authority in the choice of process was not discharged. The allegation is dismissed.

### C. Human rights discrimination

[92] The complainant's position was that human rights discrimination tainted the appointment process and resulted in the respondent's failure to appoint her to the position. She specifically cites the protected grounds of race, colour, and age.

[93] In a human rights context, the complainant bears the onus of demonstrating a *prima facie*, or at first glance, a case of discrimination. The onus then shifts to the respondent to provide a reasonable non-discriminatory explanation for not appointing her to the PE-06 position in the appointment process.

[94] In *Ontario (Human Rights Commission) v. Simpson Sears*, [1985] 2 S.C.R. 536 (known as the *O'Malley* decision), the Supreme Court of Canada set out the following test for establishing a *prima facie* case of discrimination:

...  
28. ... *The complainant in proceedings before human rights tribunals must show a prima facie case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer....*  
...

[95] Following the test in *Moore v. British Columbia (Education)*, 2012 SCC 61, the complainant is required to demonstrate that 1) she possesses a characteristic protected against discrimination under the *CHRA*, 2) she suffered an adverse employment-related impact, and 3) the protected characteristic was a factor in the adverse impact. The complainant has only to show that the alleged discrimination was one factor, not the sole or even the main factor, in the respondent's decision to eliminate her from the appointment process for the *prima facie* case to be met.

[96] Turning to the first part of the test, the parties agree that the complainant is a member of a protected class of persons. Therefore, she possesses a characteristic that is protected from discrimination. Secondly, she suffered an adverse employment-related impact when she was not selected for the PE-06 position. Accordingly, the first two branches of the *prima facie* test for discrimination are met.

[97] The complainant also had to demonstrate a link or nexus between the prohibited grounds of discrimination (race, age, colour) and the conduct complained of

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*Federal Public Sector Labour Relations and Employment Board Act and Public Service Employment Act*

(her elimination from the appointment process). In *Filgueira v. Garfield Container Transport Inc.*, 2005 CHRT 32, the Canadian Human Rights Tribunal (“CHRT”) found as follows:

...

*[41] The question that I am left with is this: if an employee believes that someone in a different ethnic group is doing the same job, and receiving a higher wage, is that enough to establish a prima facie case of discrimination? I think there must be something more. There must be something in the evidence, independent of the Complainant’s beliefs, which confirms his suspicions. I am not saying that a complainant’s beliefs do not have any evidentiary weight. It depends on the circumstances. But an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough.*

...

[98] In particular, in a case involving an appointment process, the *prima facie* case can be shown by establishing that 1) the complainant was qualified for the particular employment, 2) she was not hired, and 3) someone no better qualified but lacking the distinguishing feature, which is the gravamen of the human rights complaint, subsequently obtained the position. (See *Shakes v. Rex Pak Ltd.*, 1981 CanLII 4315 (ON HRT), and *Israeli v. Canada (Human Rights Commission)*, 1983 CanLII 4687 (CHRT).)

[99] I accept that the complainant is firmly of the view that discrimination influenced her assessment in the appointment process. However, it was not sufficient for her to assert that the PSC treated her unfairly. She had to demonstrate a connection tying the alleged act of discrimination to the proscribed grounds. I refer again to *Filgueira*, at para. 41, in which the Canadian Human Rights Tribunal stated that “... an abstract belief that a person is discriminated against, without some fact to confirm that belief, is not enough.”

[100] On the facts presented, the evidence does not support a finding that the complainant was qualified for the PE-06 position. She admitted that she did not address K1 in her examination response. As a result, she failed to attain the required score for an essential qualification. However, the evidence fails to establish that prohibited grounds of discrimination were a factor in this decision.

[101] Section 36 of the *PSEA* permitted the respondent to choose the examination to assess K1. No evidence was presented to suggest that it did not assess the

requirements for K1 or that it was actually, circumstantially, or inferentially discriminatory in its use or application.

[102] The evidence does not demonstrate that any protected characteristic was a factor in the respondent's decision to find the complainant not qualified.

[103] As the elements of the *prima facie* case are not met, no further answer to the discrimination allegation is required from the respondent. The allegation of human rights discrimination is dismissed.

## **V. Conclusion**

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

*(The Order appears on the next page)*

**VI. Order**

[105] The complaint is dismissed.

December 11, 2024.

**Joanne Archibald,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**