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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

ASIF MOHAMMED

Complainant

and

DEPUTY HEAD
(Department of the Environment)

Respondent

Indexed as
Mohammed v. Deputy Head (Department of the Environment)

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Feriel Latrous, counsel

For the Public Service Commission: Marc-Olivier Payant, senior analyst

Heard by videoconference,
July 24 and 25, 2025,
and written submissions,
filed July 18, September 19, and October 10, 2025.

REASONS FOR DECISION

I. Overview

[1] This is a complaint about a non-advertised acting appointment for the position of Senior Engineer, classified at the ENG-04 group and level. The successful candidate was appointed from May 3, 2023, to August 30, 2024. The complainant alleges that the respondent abused its authority by choosing a non-advertised process, abused its authority in selecting the successful candidate for that position, and discriminated against him on the basis of race, national origin, or colour.

[2] I have decided to dismiss the complaint.

[3] I have concluded that the respondent has justified its decision to choose a non-advertised selection process because of the difficulty attracting and retaining employees for a 15-month appointment to this position. The position was to fill in for someone who was on a secondment elsewhere and who could have returned at any time. I have also concluded that the successful candidate met the essential qualifications for the position, meaning that the appointment was made in accordance with merit. In addition, the appointment was free from bias, contrary to the complainant's argument.

[4] Finally, I have concluded that the complainant has not demonstrated that the respondent discriminated against him. The complainant's only evidence of discrimination was that he was not appointed to this position or other, shorter acting appointments to the same position. The complainant has not provided evidence of a *prima facie* case that he was discriminated against and has not discharged his burden to prove that discrimination was a factor in this appointment.

[5] My detailed reasons follow.

II. Background to the acting appointment

[6] The acting appointment at issue has staffing action number 23-DOE-NCR-ACIN-581694. It was an acting appointment that was scheduled to run from May 3, 2023, to August 30, 2024. Ultimately, the appointment was extended for another three months.

[7] The position at issue is that of the senior engineer in the Technical Services branch of the Real Property division at Environment and Climate Change Canada

(ECCC), position number 71854. It is classified at the ENG-04 group and level and located in Burlington, Ontario.

[8] The Technical Services branch is responsible for maintaining buildings owned by ECCC. At its head is the section head, classified at the ENG-05 group and level. The section head reports to an executive director in an executive (EX) position.

[9] There are four senior engineers (ENG-04) reporting to the section head: one in Burlington, and three in the National Capital Region. The senior engineers each have a group of employees reporting to them.

[10] The section head in Burlington has four employees reporting to them who work in Burlington: three engineers at the ENG-03 group and level (including Asif Mohammed, "the complainant"), and an expert tech-sciences superintendent at the EG-06 group and level. The other senior engineers have groups of employees reporting to them from different locations across Canada, a combination of engineers in the ENG classification, and maintenance technicians or superintendents in the EG classification. In a broad sense, the EG positions in each unit are responsible for the day-to-day maintenance of the buildings, and the ENG positions are responsible for designing, reviewing, and delivering projects such as roof replacements or new heating, ventilation, and air conditioning ("HVAC") systems.

[11] Importantly, the section head did not have delegated staffing authority. As I will describe in greater detail later, he was making effective recommendations, but the actual authority to make appointments rested with the executive director.

[12] The section head at the relevant times was Rock Radovan. At the time of the appointment that is the subject of this complaint, he was acting in that position; he was appointed to that position on an indeterminate basis after the events at issue in this complaint. He explained that he cannot recall receiving staffing training, and therefore, he relied on the guidance of human resources experts when making recommendations about staffing. He also explained that there was turnover in the directorate as a whole. There were two to four directors general in 2022 to 2023; when a director general would leave an executive would act in that role, with a trickle-down effect to fill increasingly junior managerial roles on an acting basis.

[13] The occupant of the senior engineer position that is the basis of this complaint left ECCC on a 2-year secondment with another department sometime in 2022. In 2024, the incumbent left permanently to stay at their new department, so ECCC ran an open advertised staffing process for the position. The person who had been appointed to the position on an acting basis for roughly 18 months was successful in that process and holds the position on an indeterminate basis as of the date of this decision. In the time between the start of the secondment and the permanent appointment, the position was filled using acting appointments. Before this 15-month acting appointment, the position was filled using acting appointments of less than 4 months' duration by 2 employees, the successful candidate and another employee who otherwise reported to the senior engineer position.

III. What this complaint is not about

[14] In the fall of 2022, Mr. Radovan offered to appoint the complainant to the senior engineer position on an acting basis for less than four months starting on May 3, 2023. However, he rescinded that offer on March 6, 2023. At the risk of oversimplification, the complainant wanted to take some training courses in Toronto, Ontario, while he was acting and wanted ECCC to pay his travel and meal expenses while taking those courses. Mr. Radovan wanted him to focus on the additional duties that came with being an ENG-04, along with the mandatory training to obtain the financial authority needed to perform those duties, instead. Eventually, Mr. Radovan gave the complainant a choice: take fewer courses and the acting appointment, or take more courses. Mr. Radovan also refused to approve his travel and meal expenses. The complainant sent an email containing approval forms for fewer courses but without saying which choice he made or responding in any substantive way. Mr. Radovan got "fed up" (his words) with the complainant's lack of responsiveness and decided that this, along with other disputes that the complainant had with other employees about engineering projects, made him unsuitable for the acting appointment.

[15] The complainant spent a great deal of time in both his evidence and submissions arguing that Mr. Radovan acted unfairly by refusing to pay his travel and meal expenses and by withdrawing the acting appointment. He spent time going through his performance assessments for several years, to show that he was a good employee. However, this complaint is not about travel expenses or whether the complainant was a good employee who deserved an acting appointment. The

complainant filed a grievance about the travel and meal allowance; eventually, ECCC decided to pay the travel costs but not his meal expenses. I am not here to decide whether he should have been reimbursed his travel or meal expenses. I am also not deciding whether Mr. Radovan was right to withdraw his offer of an acting appointment. Acting appointments of less than four months are excluded from ss. 30 and 77 of the *Public Service Employment Act* (S.C. 2003, c 22, ss. 12, 13; *PSEA*), meaning that they do not need to be made in accordance with merit and that the Federal Public Sector Labour Relations and Employment Board ("the Board") cannot hear a complaint about them; see the *Public Service Employment Regulations* (SOR/2005-334), at s. 14(1).

[16] As the Federal Court of Appeal stated in *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 at para. 51:

> *[51] While in this case the promotion is of great importance to the respondent, normally we do not think of people having a "right" to a promotion. Often in promotion decisions, only a few win, many more lose, and the difference between winning and losing can legitimately turn upon fine things, sometimes subjective or subtle things. For example, usually we describe people who have been promoted as "deserving" or "lucky." We do not say that people have been promoted because the employer was legally forced to do it.*

[17] *Boogaard* was not a case decided under the *PSEA*, but the principle remains that there is no inherent right to a promotion. The Board's role is not to decide whether the complainant should have received an acting appointment. Its role is to decide whether the respondent abused its authority in a specific acting appointment.

[18] Despite that, I will state that I did not hear any evidence to indicate that Mr. Radovan acted unreasonably by withdrawing the acting appointment offer. I understand why he was "fed up" with the complainant and why he did not consider him suitable for that role. The complainant made two submissions that I found particularly confirmatory of that decision.

[19] First, in response to the respondent's justification for staffing the position using a non-advertised process, the complainant submitted that the senior engineering position was relatively unimportant and that the duties of that position could have been performed by other employees without filling the position. This submission confirms Mr. Radovan's impression that the complainant was not taking the senior

engineering opportunity seriously. Mr. Radovan testified that the senior engineering position was important (in large part because of its financial authority) and needed to be occupied at all times; part of why he was "fed up" with the complainant was that he refused to take the mandatory training to get that delegated financial authority. I was left with the distinct impression that the complainant did not take the senior engineering position seriously, which explains why Mr. Radovan no longer wanted to promote him.

[20] Second, the complainant submitted that his performance evaluations demonstrate that Mr. Radovan was wrong about whether he was qualified for that promotion. He relied in part on his performance rating for the 2023-2024 fiscal year (i.e. the year after these events), which was succeeded-minus. The complainant testified that this means rating means that he was "on track" for a promotion. It means no such thing. It means that he was barely keeping his head above water in his current position. Barely succeeding in a current position does not make an employee qualified for a promotion, especially to a supervisory position.

[21] Now, back to what this complaint is actually about.

IV. Grounds of the complaint

[22] The complainant made three broad arguments in this complaint. First, he argued that the respondent abused its authority by choosing a non-advertised appointment process. Second, he argued that the respondent abused its authority by selecting the successful candidate. Third, he argued that the appointment process was discriminatory. He also raised what I characterize as procedural issues as part of his complaint about both the choice of process and the selection of the successful candidate.

[23] I will address the procedural issues first and then turn to the three broad grounds of the complaint.

V. Procedural arguments

A. The problem of timing

[24] As set out earlier, the successful candidate was appointed effective May 3, 2023; however, the manager with the delegated authority to appoint him made that decision on May 11, 2023. Mr. Radovan recommended both the choice of a non-advertised

selection process and the selection of the successful candidate by email dated April 20, 2023, which was sent to a human resources official. While the narrative assessment justifying the selection of the successful candidate is undated, he testified that he prepared it on or "right around the time" of April 20, 2023. The human resources official did not send the information to the executive director until May 11, 2023, and he approved the choice of selection process and the choice of candidate that day.

[25] During the hearing of this complaint, I asked both parties to address whether backdating an appointment is an abuse of authority and contrary to the *PSEA*. After considering the matter, I decided to solicit additional written submissions from the Public Service Commission about whether backdating an appointment is contrary to the *PSEA*. It filed written submissions on that issue.

[26] Both parties were permitted to file replies to the Public Service Commission's submissions. The respondent attempted to file additional evidence to explain why it took until May 11 to make the appointment; I informed the parties that I would not accept new evidence because my directions were that they were only permitted to reply to the Public Service Commission's submissions, and they did not seek leave to file new evidence.

[27] I have concluded that backdating the appointment was not an abuse of authority in this case.

[28] This issue is one of statutory interpretation, which concerns the text, context, and purpose of a statutory provision. Section 56 of the *PSEA* reads as follows:

56 (1) *The appointment of a person from within that part of the public service to which the Commission has exclusive authority to make appointments takes effect on the date agreed to in writing by that person and the deputy head, regardless of the date of their agreement.*	***56 (1)*** *Toute nomination d'une personne appartenant à la partie de la fonction publique dans laquelle les nominations relèvent exclusivement de la Commission prend effet à la date dont sont convenus par écrit l'administrateur général et la personne, indépendamment de la date de l'entente.*

[29] I agree with the Public Service Commission that this provision permits backdating an appointment.

[30] Beginning with the text, s. 56(1) is clear that the effective date of the appointment is the date agreed to "… regardless of the date of their agreement." On its face, this provision means that an appointment can be made in the past, on the date of the agreement, or in the future.

[31] The parties did not make any submissions that the context or purpose of this provision would detract from its plain meaning that appointments can be backdated. In terms of context, s. 23(2) of the *Interpretation Act* (R.S.C., 1985, c I-21) states that the instrument appointing a public officer "… may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued is deemed to be the day on which the appointment takes effect." That provision prohibits backdating an appointment of a "public officer", showing that when Parliament has wanted to restrict the backdating of an appointment, it has done so expressly. The absence of similar language in the *PSEA* means that Parliament has not intended to prohibit backdating appointments under that Act.

[32] I also considered the change in the wording of the *PSEA*. The *PSEA* came into force on December 31, 2005, and replaced a statute of the same name. Section 22 of the old *PSEA* (R.S.C., 1985, c P-33) stated, "An appointment under this Act takes effect on the date specified in the instrument of appointment, which date may be any date before, on or after the date of the instrument." This former provision was clear that an appointment could be backdated.

[33] Since changes in the wording of legislation are presumed to be made for some purpose (Ruth Sullivan, *The Construction of Statutes*, 7th ed., chapter 23.02), I considered whether the change in wording between s. 56 of the new *PSEA* from s. 22 of the old *PSEA* means that appointments can no longer be backdated. I have concluded that the substantive difference between the old and new *PSEA* is that the effective date of an appointment is set out in the change to "agreement" instead of the "instrument of appointment". This change reflects that appointments are now made by agreement between the person with delegated authority to make an appointment and the appointee, instead of an instrument prepared by the Public Service Commission. In any event, s. 45(2) of the *Interpretation Act* is clear that the amendment of the *PSEA* does not imply any change in the law by itself. The fact that the old *PSEA* expressly provided for backdating does not, by itself, mean that the silence in the new *PSEA* means that Parliament intended to bring an end to backdating.

[34] Finally, the respondent noted that the Board addressed this issue briefly (as the Public Service Staffing Tribunal) in *Brown v. Deputy Minister of National Defence*, 2010 PSST 12, stating this:

> …
>
> ***75*** *The Tribunal is concerned that the acting appointment was signed by the approving authority on June 23, 2006 and was made retroactive to June 1, 2006. The respondent did not offer any explanation for this delay. Although section 56(1) of the* PSEA *allows for retroactive appointments, generally a person should not start working in a position until the staffing action is approved by the person having the delegated authority. In the present case, this irregularity, however, does not impact the choice of process or the person appointed, and is not serious enough to constitute an abuse of authority.*
>
> …

[35] The former Board concluded that s. 56(1) of the *PSEA* permits retroactive appointments and that a retroactive appointment is not, automatically, an abuse of authority — even when it is unexplained.

[36] Like in *Brown*, I have concluded that backdating the appointment in this case did not impact the choice of process or the person appointed. Mr. Radovan made his recommendation about both the choice of process and candidate before the date of the appointment. Like in *Brown*, I have no explanation for the delay (except for the respondent's attempt to introduce this explanation in its reply submissions, which I have refused to admit, as explained earlier); however, it was not, by itself, an abuse of authority.

[37] Backdating an appointment can be risky, if the evidence shows that the successful candidate did not have the essential qualifications for the position on the effective date of the appointment, as in *Munden v. Commissioner of the Royal Canadian Mounted Police*, 2024 FPSLREB 141. However, it is not, by itself, contrary to the *PSEA* or an abuse of authority. In this case, it is not an abuse of authority because it did not impact the choice of process or the choice of the successful candidate.

B. Other procedural issues

[38] The executive director with the delegated staffing authority did not sign any document about his decision to choose a non-advertised process or select the

successful candidate. Instead, as I discussed earlier, Mr. Radovan prepared the written articulation of his recommendation to choose a non-advertised process and prepared a narrative assessment of the successful candidate. He sent both documents to human resources officials, who forwarded them to the executive director who was the delegated staffing authority. The executive director approved the relevant documents by email dated May 11, 2023.

[39] The complainant argues that the executive director's decision was invalid because it was not signed. However, the *PSEA* does not require that the documents setting out the reasons to appoint a person, or to choose an appointment process, be signed. I note that this is unlike s. 11(i) of the *Public Service Staffing Complaints Regulations* (SOR/2006-6), which requires that a complainant sign their complaint. Had Parliament required that the articulation of the reasons for choosing a selection process or the reasons for choosing a candidate for that process be signed, it would have said so explicitly.

[40] I am satisfied that the email trail demonstrates that the executive director exercised his delegated staffing authority. I am also satisfied that the lack of a signed document does not constitute an abuse of authority under the *PSEA*. The lack of a signature does not (contrary to the complainant's submissions) undermine the principle of transparency set out in the preamble of the *PSEA*; nor was it reckless on the part of the executive director.

[41] The complainant suggested that the fact that the documents are unsigned creates some doubt about who wrote them, even going so far as to suggest that the successful candidate wrote them. He did not have a scintilla of evidence to support this claim, which was clearly rebutted by Mr. Radovan's testimony that he drafted the documents.

[42] He also argued that the fact that the articulation of selection decision does not have a box to name the person making the recommendation and person approving it makes that document null and void because every document must have those two boxes. He cited no authority for that proposition; nor have I been able to think of any reason that a document must contain those two boxes.

[43] Finally, the notice of acting appointment in this case was published on June 20, 2023, over a month after the appointment was made. The complainant argues that this

leads to an inference of an abuse of authority. I disagree. The Board has stated that a delay publishing a notice of appointment is an abuse of process only when the length of the delay prejudices those who have a right to make a complaint (see *Tanguay v. Commissioner of the Correctional Service of Canada*, 2018 FPSLREB 94 at paras. 155 and 156; and *Merkley v. Deputy Minister of National Defence*, 2017 PSLREB 47 at para. 33). The complainant did not identify how his right to make a complaint was prejudiced by the delay publishing the notice of appointment. I also note that the delay in this case was less than the delays that the Board was prepared to overlook in *Tanguay* (2.5 months) and *Merkley* (4 months).

[44] I have concluded that the procedural defects alleged by the complainant are either not defects at all or, if they are, are of such a picayune nature as to fall well short of the threshold of an abuse of authority.

VI. No abuse of authority in the choice of non-advertised process

[45] The complainant submits that the respondent abused its authority by choosing a non-advertised selection process.

[46] There is nothing inherently wrong with a non-advertised appointment process. Section 33 of the *PSEA* states specifically that delegated managers may use either an advertised or a non-advertised process and that "… the simple fact of using a non-advertised process does not constitute, in and of itself, abuse of authority …" (see *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19 at para. 51; see also *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6; *Karoulis Newman v. Canada Border Services Agency*, 2020 FPSLREB 22 at para. 29; and *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22 at para. 32). The burden rests with the complainant to show that the respondent abused its authority by choosing a non-advertised process.

[47] Mr. Radovan prepared a written articulation of his recommendation to use a non-advertised appointment process. That articulation was brief and reads as follows:

…

> *The incumbent is currently on secondment with PSPC. Historically our division has had difficulties in attracting and retaining candidates for short term assignments because of: 1. The lack of a permanent position, and 2. Many of our projects are multi-year and as such the contribution of the temporary senior engineer*

> *position is small in the overall scheme of things. This also has an impact on the delivery of these projects; it can take a long time to get up to speed and short term actings are not conducive to success.*
>
> …

[48] In addition, when explaining the reason he recommended selecting the successful candidate, he wrote that the successful candidate "… is the only candidate who would be considered to meet merit for this appointment over 4 months." He elaborated on that in his testimony. As I mentioned earlier, there were two employees who rotated in shorter-term acting appointments to this position. One of them was the successful candidate. The other was not an engineer and therefore did not meet the essential qualifications for the position and could not be appointed for longer than four months. Of the remaining two engineers in the unit, only the successful candidate had the necessary training to receive the financial delegation for this position. The complainant was offered that training but delayed taking it, meaning that he was not qualified for the position at that time.

[49] During his testimony, Mr. Radovan gave other reasons for his recommendation to use a non-advertised appointment. He testified that he wanted a longer-term appointment, to create some stability in the organization. He also testified on cross-examination that advertised appointment processes are lengthy.

[50] He asked his human resources advisors what he could do to create stability, and one of their suggestions was a lengthy non-advertised appointment.

[51] The problem with this testimony is that Mr. Radovan was not the decision maker. I have no evidence that the decision maker based his decision on a desire for stability in the organization. Mr. Radovan did not testify about any verbal briefing of the decision maker, aside from a discussion much earlier about why there were so many short-term acting assignments. Therefore, the only evidence before me is that the decision maker approved the non-advertised appointment for the reasons set out in writing, not because of any of the reasons that Mr. Radovan testified about but were absent from the written articulation.

[52] This means I am left with three reasons for choosing a non-advertised appointment process: difficulty attracting candidates, the impact of shorter-term

acting assignments on project delivery, and the successful candidate was the only qualified possible candidate.

[53] The complainant correctly pointed out that the respondent initially decided to appoint him on an acting basis for a shorter period; therefore, there cannot have been an operational need for this longer acting appointment. I asked the respondent about this in closing argument, and it relied on the operational pressures created by rotating acting assignments.

[54] However, I have concluded that the question of whether this should have been a shorter or longer acting appointment is not relevant. Subsection 77(1) of the *PSEA* does not list the length of an acting appointment as a possible ground of a complaint. Any negative effect of shorter-term assignments is not relevant to this complaint. That negative impact explains why the respondent chose to appoint the successful candidate for 15 months instead of just under 4 months. It does not and cannot logically explain why it decided not to advertise the position.

[55] As for the successful candidate being the only qualified possibility, I have no evidence of that. As the respondent correctly points out, it is not legally required to consider anyone other than the successful candidate (see *Bérubé-Savoie v. the Deputy Minister of Human Resources and Skills Development Canada*, 2013 PSST 2 at para. 38). However, if its justification for using a non-advertised appointment is that there are no other qualified candidates, it has to show that it looked for or considered other candidates. There was no such evidence in this case, aside from rejecting the complainant for the reasons I set out earlier. The respondent looked at only three employees: the successful candidate, the complainant, and the non-engineer who was ineligible. Before saying that the successful candidate was the only possible qualified candidate, the respondent should have cast its net a little wider than three people.

[56] However, I am satisfied that there was evidence of the difficulty attracting and retaining employees for appointments of this length. Having decided to use a 15-month acting appointment instead of one of 4 months less a day (which is not a decision that the Board has the power to review), I am satisfied that the respondent had an explanation for selecting a non-advertised appointment. There was a risk that the incumbent in the position could return, so the respondent needed to find someone willing to take on an acting appointment that was relatively lengthy (15 months) but

that could also have been ended on little notice. Effectively, this meant choosing someone from the team in Burlington because they would not have to relocate if they were returned to their old position on short notice. Understanding that, the previous justification of selecting the only qualified candidate makes more sense. I do not believe that the successful candidate was the only employee in the federal public administration qualified to do the job; however, I am convinced that he was the only qualified candidate who could have been reasonably expected to take on a longer-term acting appointment with a risk that it would be cut short on very little notice.

[57] For these reasons, I have concluded that the respondent did not abuse its authority by selecting a non-advertised process. There was an operational reason for doing so: the difficulty attracting qualified candidates to this acting appointment that was 15 months long but could have been ended on very short notice.

VII. Selection of candidate

[58] The complainant argues that the respondent abused its authority in assessing the merit of the successful candidate.

[59] Subsection 30(2) of the *PSEA* provides as follows:

30(2) *An appointment is made on the basis of merit when*	***30(2)*** *Une nomination est fondée sur le mérite lorsque les conditions suivantes sont réunies :*
(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*	***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) *the Commission has regard to*	***b)*** *la Commission prend en compte :*
(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,*	***(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) *any current or future operational requirements of the*	***(ii)*** *toute exigence opérationnelle actuelle ou future de*

organization that may be identified by the deputy head, and	*l'administration précisée par l'administrateur général,*
***(iii)** any current or future needs of the organization that may be identified by the deputy head.*	***(iii)** tout besoin actuel ou futur de l'administration précisé par l'administrateur général.*

[60] In essence, the successful candidate has to meet the essential qualifications for the position, after which the delegated hiring manager may consider the other factors set out in s. 30(2)(b).

[61] The complainant initially argued that the successful candidate did not meet the essential qualifications for the position because he did not have an engineering degree. However, the respondent filed a copy of his diploma from a university in Brazil, along with a document from the Government of Quebec certifying that his degree meets the requirements to be an engineer in that province. The complainant conceded during his closing argument that this meant that the successful candidate met the education qualifications for the position.

[62] The complainant also alleged personal favouritism and bias on the part of Mr. Radovan.

[63] Personal favouritism and bias are similar but distinct grounds of a complaint. Personal favouritism requires that the complainant demonstrate that "… undue personal interests, such as a personal relationship between the person selecting and the appointee, were the reason for appointing the person …". It includes situations in which an appointment is made "… as a personal favour or reward or to gain personal favour with someone …" (see *Desalliers v. Deputy Head (Department of Citizenship and Immigration)*, 2022 FPSLREB 70 at para. 142).

[64] The legal test for bias in the context of a staffing complaint is the same, long-standing test for bias in other contexts: whether a reasonably well-informed bystander would perceive bias in the selection of that candidate (see *Myskiw v. Commissioner of the Correctional Service of Canada*, 2019 FPSLREB 107 at para. 38).

[65] These are different tests and can lead to different results. This is evident from the result in *Desalliers*, which was that there was no personal favouritism but that there was a reasonable apprehension of bias.

[66] In this case, there was no evidence of any personal or friendly relationship between Mr. Radovan and the successful candidate. They live and work in separate cities, and I heard no evidence that they had a personal relationship. The complainant argued that Mr. Radovan had an "interest" in promoting the successful candidate, but when I asked him to explain how, he could not.

[67] While the complainant was upset about the fact that the successful candidate had been appointed on an acting basis before this (while he had not), "… the mere fact that an appointee has previously acted in the same or a similar position does not, in the absence of other supporting evidence, demonstrate personal favouritism, bias or generally abuse of authority … (see *Thompson v. President of the Canada Border Services Agency*, 2017 PSLREB 22 at para. 88). In conclusion, there was no evidence on which I could conclude that a reasonable bystander, fully informed, could perceive bias on the part of Mr. Radovan. Further, the complainant has not demonstrated any personal relationship between the successful candidate and Mr. Radovan, so he has also not shown that the appointment was tainted by personal favouritism.

[68] Finally, the complainant argues that there was no "scale" used to assess the successful candidate. The complainant submits that there should be a numerical scale used to assess each criteria. Since the narrative assessment used a description of how the successful candidate met each qualification instead of a grade for each qualification, the complainant says that this means that the respondent cannot prove that the assessment was fair.

[69] The complainant cited no authority for the proposition that a rating scale is necessary in all cases. In fact, there are legions of Board decisions with appointments having been made on the basis of a narrative assessment that set out why or how the successful candidate met the qualifications for the position. In *Desalliers*, at para. 110, the Board explained that a "… narrative assessment must reflect why the manager believed that the appointee met the merit criteria when the appointment was made." In that case, the narrative assessment was insufficient because it failed to describe how the successful candidate met one of the experience qualifications for the position (namely, experience drafting decisions), and there was no other evidence that the successful candidate had such experience.

[70] In this case, by contrast, the narrative assessment responds directly to each qualification of the position. It provides a concrete example for each experience and knowledge qualification, and it provides a narrative describing the successful candidate's abilities and leadership skills. Most importantly, the complainant did not argue that the successful candidate was actually unqualified, just that the narrative assessment could be based only on an opinion and is inferior to a rating scale. By contrast, Mr. Radovan explained that he based his assessment on his direct knowledge as the successful candidate's immediate supervisor and the person who completed his mid-year assessments. I am satisfied that the successful candidate met the requirements of the position at the time of his appointment.

VIII. No discrimination in the appointment process

[71] Both parties submitted that the Board should apply the three-part test for discrimination articulated in *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 33, namely, 1) the complainant has a characteristic protected from discrimination under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6), 2) the complainant experienced an adverse impact, and 3) the protected characteristic was a factor in the adverse impact. The complainant identifies as a visible minority of South Asian descent, so he meets the first element of the *Moore* test. He experienced an adverse impact by not being appointed to the position, so he meets the second element as well. The respondent does not contest that the complainant meets those two elements of the *Moore* test. The case turns on the third element.

[72] The respondent emphasized that there needs to be evidence of a link or nexus between the prohibited ground and the adverse treatment and that a complainant needs to provide objective facts instead of bald assertions or subjective feelings that they have been the victim of discrimination. The complainant does not submit otherwise. The Board has also followed that approach in *Nash v. Commissioner of the Correctional Service of Canada*, 2014 PSST 10 at para. 54; and *Chung v. Deputy Head (Department of National Defence)*, 2024 FPSLREB 133 at para. 81. Finally, the respondent acknowledged that discrimination is rarely overt and that the Board must be alert for what earlier cases have called the "subtle scent" of discrimination. I agree.

[73] In cases involving the decision not to promote an employee, some tribunals have applied the approach set out in *Shakes v. Rex Pak Ltd.,* 1981 CanLII 4315 (ON HRT), which is that a complainant's case is met when 1) the complainant was qualified

for the particular employment, 2) the complainant was not hired, and 3) someone no better qualified but lacking the distinguishing feature, which is the basis of the complaint of discrimination, subsequently obtained the position. This case long predates *Moore*, and it is no longer appropriate to treat it as a legal test that a complainant must meet. However, it can still be a useful framework in the right case. As the Canadian Human Rights Tribunal stated in *Emmett v. Canada Revenue Agency*, 2018 CHRT 23 at paras. 56 to 58:

> *[56] The Tribunal notes the Complainant's reliance on* Shakes v. Rex Pak Ltd.*, (1982), 3 CHRR D/1001 [*Shakes*] and would like to make the following comments. Under* Shakes*, a complainant's case is met where (1) the complainant was qualified for the particular employment; (2) the complainant was not hired; and, (3) someone no better qualified but lacking the distinguishing feature, which is the basis of the complaint of discrimination, subsequently obtained the position.*
>
> *[57] It is well established that this framework serves only as a guide and should not be applied in a rigid or arbitrary fashion in every hiring case (*Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204 at para. 77 [*Bay Ferries*]; see also* O'Bomsawin v. Abenakis of Odanak Council*, 2017 CHRT 4 at paras. 46-48).*
>
> *[58] Ultimately, the issue for the Tribunal to decide is whether the Complainant has met her burden of establishing that her sex and/or age was a factor in the CRA's decision not to award her with the staffing opportunities at issue. The* Shakes *framework is helpful to decide this, but is not binding. In deciding this issue, I have considered all the evidence adduced by the parties, including elements related to the* Shakes *test.*

[74] The Federal Court also summarized the current approach as being that *Shakes* is an illustration of the test for discrimination and is not to be automatically applied in every hiring case. However, it can still be a useful framework in the right case; see *Hughes v. Canada (Attorney General)*, 2021 FC 147 at paras. 54 to 59.

[75] As I mentioned earlier, the complainant spent considerable effort on the first element of the *Shakes* framework, to demonstrate that he was qualified for the position. While I said earlier that I am not seized with the question of whether he should have been appointed, his evidence and submissions are relevant within this context.

[76] However, I found the *Shakes* framework most helpful because of the third element — that someone no better qualified **but lacking the distinguishing feature**

was promoted. In this case, the only evidence presented at the hearing was that both the successful candidate and the other employee who was given earlier acting opportunities are visible minorities too.

[77] The complainant's case rests entirely on the fact that he has had a very limited number of acting opportunities. He points out that he had a single acting opportunity of one week's duration in 2014. He attributes this to discrimination.

[78] As I stated earlier, this position became temporarily vacant when the incumbent left on a secondment. I have evidence about acting appointments in this position dating back to January 1, 2021. There were two other employees who were given acting appointments to this position for periods of less than four months, both before and after the secondment. One of them was the employee eventually appointed for a longer period in this complaint. The other acted for shorter periods.

[79] Mr. Radovan testified that both of them are visible minorities. The complainant called both of them "white" in his closing arguments; however, he never testified about their race, ethnicity, or colour. He also did not cross-examine Mr. Radovan about the ethnicity of the other two employees. In his written reply to the Public Service Commission's submissions, he also added to this submission by stating that the successful candidate "… although potentially a visible minority, is white …".

[80] I acknowledge some discomfort in commenting on the ethnicity and skin colour of employees who did not testify about whether they self-identify as visible minorities. However, the only evidence I have is that the two other employees who acted in this position were not "white", as the complainant stated in closing argument. I have to make this decision on the basis of that evidence.

[81] When I pushed the complainant in closing submissions on this point, he shifted his argument to one of discrimination based on being of South Asian descent instead of being a visible minority. He pointed out that there was another engineer in his group who was of South Asian descent and who was not given acting appointments. However, I have no evidence about that employee aside from his name; I have no evidence about whether he was interested in acting appointments or whether he was turned down for one, and, if so, why.

[82] The fact that a successful candidate shares a protected characteristic with a complainant does not, of course, mean that the decision cannot be discriminatory. However, in this case, the complainant's case rests solely on the fact that he was not given acting opportunities between 2015 and 2023. The complainant did not provide evidence of even a "subtle scent" of discrimination. In *Chung*, the Board dismissed the argument about discrimination because "[t]here was no testimony about specific events or conversations, and no documents were introduced that hinted that race could have been a factor." In this case, the complainant did not testify about any events, discussions, or documents that were tainted by racial discrimination either.

[83] In essence, the complainant's only evidence of discrimination in the promotion process was that he was not promoted but that (at least since 2021) two other employees were promoted. In the absence of any other evidence, I must conclude that the complainant has not shown that his race, colour, or ethnicity was a factor in the appointment process.

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

(The Order appears on the next page)

IX. Order

[85] The complaint is dismissed.

November 24, 2025.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board