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File: 771-02-47127

Citation: 2025 FPSLREB 157

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

DAVID PISCINA

Complainant

and

DEPUTY HEAD (Canada Border Services Agency)

Respondent

and

OTHER PARTIES

Indexed as
Piscina v. Deputy Head (Canada Border Services Agency)

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

Before: Pierre Marc Champagne, 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: Maude Bissonnette Trudeau, senior analyst

Heard by videoconference,
June 18 and 19, 2024,
and on the basis of written submissions,

filed July 12 and August 7, 2024.

REASONS FOR DECISION

I. Overview

[1] In the spring of 2022, the deputy head of the Canada Border Services Agency ("the respondent" or CBSA) was looking to staff vacant positions in its Trade Incentive Unit at the FB-06 group and level. David Piscina ("the complainant") was considered for the position, as were other candidates. However, he was not found to be the right fit for it.

[2] One candidate was appointed after that exercise completed. The complainant did not challenge that appointment. However, in March 2023, another person was appointed through a non-advertised process. I will refer to that person as "the appointee". The complainant made this complaint after that appointment occurred.

[3] The complainant alleges that he was qualified for the position and that while he should have been considered for that second appointment, he was not. He also questions the respondent's assessment of the appointee and its choice of a non-advertised process.

[4] For the reasons that follow, I find that the respondent did not abuse its authority under the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; *PSEA*), and I dismiss the complaint.

II. Context

[5] In February 2022, the complainant and the respondent reached a settlement with respect to other staffing complaints that he had made. Accordingly, a settlement agreement was then signed.

[6] In this complaint, the complainant alleges that the respondent breached one of the clauses of the settlement agreement. The respondent does not dispute the existence and language of that clause, only its interpretation and application.

[7] In his complaint and his allegations provided to the Federal Public Sector Labour Relations and Employment Board ("the Board"), the complainant puts forward a large amount of information about his previous complaints and the negotiations that led to the settlement agreement. He states that this case is a continuation of those complaints. It is not.

[8] This complaint was made after a specific process was run that led to the appointee's indeterminate appointment in March 2023. I made it clear at the start of the hearing that the Board's jurisdiction in this case is limited to the context of that appointment process.

[9] The reference to and analysis of the information related to the settlement agreement will be limited solely to the clause that the complainant invoked in his allegations and that is related to the appointment process at issue.

[10] In the proceedings related to this file, the complainant also refers to some negotiations that took place with respect to this complaint. Those references are strictly not relevant to the analysis that I must make and will not be considered further in this decision.

[11] The respondent also requests a sealing order for the documents and information related to the negotiations and settlement agreement that were used and disclosed in this case. I will deal with that request at the end of my decision.

III. Summary of the relevant evidence

A. For the complainant

[12] In April 2022, the respondent intended to staff FB-06 positions in its Trade Incentive Unit. Therefore, it looked for qualified candidates in existing FB-06 pools and asked managers to submit the names and résumés of persons who could be considered for the positions.

[13] At that time, the complainant was already in a pool of employees who had qualified for positions at the FB-06 group and level. On April 12, 2022, Bradley Jablonski, the manager of the CBSA's Trade Incentive Unit, interviewed the complainant, to determine if he would be a right fit for the position. Mr. Jablonski was accompanied by another FB-06 during the interview. The complainant did not hear back from them until May 2022, when Mr. Jablonski told him that he was no longer considered for the position.

[14] In June 2022, a person from the same FB-06 pool as the complainant was appointed. The complainant decided not to challenge that appointment.

[15] However, on March 16, 2023, the complainant received a notification that another person had been appointed to an FB-06 position, via a non-advertised selection process. He looked at the merit criteria for the position and believed that he met all the required qualifications. He was also in the area of selection.

[16] As the complainant had no knowledge of the appointee, he wondered if management did not recall that he was in a pool. Therefore, he requested an informal discussion with management.

[17] The complainant contacted Charles Melchers, to inquire why was he overlooked for that appointment process. Mr. Melchers was the director of the CBSA's Regulatory Trade Programs. Three managers reported to him at that time, including Mr. Jablonski.

[18] Mr. Melchers told the complainant that it must have been a mistake or that there should be a reason for it. He said that he would contact Mr. Jablonski and get back to him. The complainant states that he never heard back from Mr. Melchers, so he took it as confirmation that he had not been considered.

[19] On March 20, 2023, he had an informal discussion with Mr. Jablonski. He felt that Mr. Jablonski tried to explain afterward that he indeed had been considered, as he was interviewed in April 2022. The complainant felt that a year is a long time, and he believed that he should have been interviewed again, as things might have changed since he was last interviewed.

[20] Mr. Jablonski told him that he was sorry if he felt that way but that the appointment decision had been made. Therefore, the complainant made this complaint.

[21] At the end of the complainant's testimony, I reminded him that he had to refer me to some documents if he wanted me to consider them in my analysis. He confirmed that he would rely on or refer only to the respondent's documents that would be presented during its evidence.

B. For the respondent

[22] Mr. Jablonski was the hiring manager for the staffing process at issue. He explained that the respondent required someone to quickly respond to his branch's

priorities at the time. He reviewed the remaining candidates in the existing FB-06 pools but needed someone who had already managed teams with respect to those priorities.

[23] Initially, six or seven candidates were considered for the positions. They were recruited via a poster posted on the GC-Jobs website, which invited at-level employees to show their interest. Candidates were also recruited via existing FB-06 pools and other managers' recommendations.

[24] The complainant was contacted by email for his interest in the position, as he was in a qualified FB-06 pool. He responded that he was interested. He was interviewed on April 12, 2022, to determine if he was the right fit.

[25] Although the complainant was in a qualified pool for FB-06 positions, Mr. Jablonski found that his responses during the interview were not sufficiently detailed. According to him, the answers were more oriented to operations, while the Trade Incentive Unit is more policy-oriented. He informed the complainant by email in May 2022 that he would no longer be considered for the position.

[26] Another manager recommended the appointee. She provided her résumé but was not interviewed to see if she was the right fit, as Mr. Jablonski had worked with her before and was aware of her competencies. A reference check was also made.

[27] Mr. Jablonski found her qualified, as she had acted in FB-06 or FB-07 positions in the previous two years on similar projects. She also demonstrated leadership and managerial skills as an FB-06. Finally, she had worked as a senior officer (FB-04) in Trade Compliance for 10 years, dealing with the same program as did Mr. Jablonski's unit.

[28] The respondent wanted the position to be filled to be bilingual, as the CBSA is a national organization. The only FB-06 positions available in its organization chart at the time were not bilingual, so the respondent had to create one. The appointee's second-language proficiency certification had also expired and had to be renewed.

[29] The respondent also had temporary funding for some of its programs, which could have become permanent if they were successful. Therefore, the appointee was offered an acting appointment from August to December 2022, until funding was secure, a bilingual position was created, and her second-language proficiency

certification was renewed. The acting appointment was further extended until she was appointed indeterminately in March 2023.

[30] In March 2023, Mr. Jablonski wrote a justification for choosing a non-advertised process, a memorandum for Mr. Melchers in which he recommended appointing the appointee indeterminately, and an assessment of the appointee against the statement of merit criteria (SOMC) for the position.

[31] No assessment against the SOMC was completed for the complainant, as he was not found the right fit for the position after his April 2022 interview.

IV. Arguments

A. For the complainant

[32] The complainant feels that management never made reasonable efforts to demonstrate to him that he had been considered for the position. It is clear to him that he was not considered. If in fact he was, it does not mean much to him, as he was never told of it.

[33] For the complainant, being considered would have meant being made aware of it and being interviewed for the appointment process. It did not make sense to tell him that he was considered about a year after he was interviewed and after the appointment process had completed.

[34] The complainant submits that he met all the essential qualifications and that he had already been found qualified in an FB-06 pool. He further submits that he had been offered the same position in the same unit two-and-a-half years before, but he explains that he turned it down, as it was only an acting appointment. For him, all FB-06 positions in Mr. Jablonski's shop are pretty much interchangeable anyway.

[35] The complainant submits that the appointee was not in the FB-06 pool of qualified candidates for their directorate. In the past, management had made it clear that when a position was to be available, it would offer it first to persons in the pool. In this case, instead, it used a non-advertised process to appoint someone who was not in the pool, not in the same region, and teleworking.

[36] According to the complainant, the respondent abused of its authority by doing the following:

- not considering him as a priority as it had committed to in the settlement agreement;
- not respecting s. 30(2)(a) of the *PSEA* by not assessing the appointee properly for the position before being satisfied that she met the SOMC's requirements;
- using a non-advertised process only to move faster and in secrecy and to avoid considering him; and
- not respecting the settlement agreement.

[37] With respect to the settlement agreement, the complainant further submits that the respondent breaching it was in and of itself an abuse of authority. According to him, the Board has jurisdiction over the settlement agreement under ss. 77(1)(a) and 30(2) of the *PSEA*. More precisely, the complainant submits that since the respondent breached the settlement agreement while exercising its delegated authority under the *PSEA*, his complaint falls under s. 77(1)(a).

[38] Furthermore, the complainant states that in the settlement agreement, the respondent agreed to consider him for its future needs. Therefore, as s. 30(2)(b)(ii) of the *PSEA* states that an appointment is considered to have been made on the basis of merit when the organization's current or future needs are considered, the failure to consider him breached the settlement agreement and s. 30(2)(b)(ii). Such a breach should be considered an abuse of authority under s. 77(1)(a).

[39] Finally, the complainant submits that the Board also has jurisdiction over the settlement agreement, as its mediation team participated in the negotiations. Therefore, it would make no sense that the Board would not be able to intervene when one party did not respect the settlement agreement.

B. For the respondent

[40] The respondent submits that it did not abuse its authority under the *PSEA* or breach the settlement agreement. The complainant was considered for the position when he was interviewed in April 2022, but the hiring manager, Mr. Jablonski, did not consider him the right fit. Mr. Jablonski found that the appointee had the necessary experience and competencies and was the right fit for the position. That person met all the SOMC's requirements.

[41] The evidence clearly demonstrates that the respondent's operational requirements necessitated using a non-advertised process. The respondent had two major priorities at the time and had to staff the position quickly, to be able to fulfil its

obligations. It needed someone able to respond immediately to those priorities, with management experience with the team in those priorities.

[42] The evidence also demonstrates that the appointee was qualified, had at-level experience, and already had good contacts and relationships with most of the teams in the different regions across the country. That person was the most qualified.

[43] The respondent submits that it had discretion with respect to the SOMC's content, the assessment tools used in the process, and the determination of the right fit. In this case, there was simply no abuse of authority.

[44] The respondent referred me to *Portree v. Deputy Head of Service Canada*, 2006 PSST 14, reminding me that the Board is not to substitute its assessment of the appointee or the complainant. *Portree* also stresses the fact that a complaint like this is a serious matter. The complainant must prove serious flaws or wrongdoings by the respondent, not just a perceived injustice.

[45] Finally, the respondent submits that there is no evidence of personal favouritism or bad faith on its part.

C. For the Public Service Commission

[46] The Public Service Commission (PSC) did not attend the hearing but submitted written submissions to the Board that were intended to provide its analysis on some aspects of its *Appointment Policy*. However, it did not take a position on the merits of this case. While I considered those submissions in my analysis, I will not refer to them further.

V. Analysis

[47] This complaint was made under ss. 77(1)(a) and (b) of the *PSEA*. The burden rests with the complainant, who must prove that on a balance of probabilities, the respondent abused its authority, either in the application of merit under s. 30(2) or in the choice of a non-advertised process when it appointed the appointee (see *Haller v. Deputy Head (Department of National Defence)*, 2022 FPSLREB 100 at para. 58).

[48] The term "abuse of authority" is not defined in the *PSEA*. However, over the years, the jurisprudence of the Board and of its predecessor, the Public Service Staffing

Tribunal (PSST), considerably circumscribed what could be considered an abuse of authority.

[49] While the concept of abuse of authority is always a matter of degree, to meet his burden under s. 77 of the *PSEA*, the complainant must put forward more than a simple error or omission (see *Portree*, at para. 47). Establishing abuse of authority requires evidence of serious wrongdoing, such as bad faith or personal favouritism (see *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7 at para. 40).

[50] As the Federal Court of Appeal summarized, "The impugned conduct, error or omission, must be unreasonable, unacceptable or outrageous in some way, such that Parliament could not have intended the person with the authority to exercise its discretion in this manner …" (see *Davidson v. Canada (Attorney General)*, 2021 FCA 226 at para. 25).

[51] It is not necessary to prove the respondent's intention (see *Ross v. Commissioner of the Correctional Service of Canada*, 2017 PSLREB 48 at para. 16), but the complainant must demonstrate more than a perceived injustice (see *Portree*, at para. 50).

[52] I will first address the complainant's allegations that can be related to s. 77(1)(a), and after that I will address the allegations falling under s. 77(1)(b) of the *PSEA*. Finally, I will turn my mind to the other allegations that he made and suggested were abuses of authority under the *PSEA*.

A. Allegations under s. 77(1)(a)

[53] Pursuant to s. 30(2), appointments under the *PSEA* must be based on merit. An appointment not based on merit would constitute an abuse of authority under s. 77(1)(a).

[54] The respondent has the authority and considerable discretion to determine a SOMC's content, to choose the assessment methods that it will use, and to select the person whom it considers the right fit to staff a position (see *Visca v. Deputy Minister of Justice*, 2007 PSST 24 at paras. 42 to 44; *Gannon v. Deputy Minister of National Defence*, 2009 PSST 14 at para. 70; and *Portree*, at para. 39).

[55] While the complainant's allegations are not clearly articulated, his allegations that can be related to s. 77(1)(a) are based on these two of his assertions:

- Firstly, he suggests that he met all the essential qualifications and that he was already in a pool of qualified FB-06s for the same directorate. Still, he was not considered.
- Secondly, he takes issue with the fact that the appointee was not in a qualified FB-06 pool and that she did not participate in a competitive selection process.

1. The complainant was considered

[56] First and foremost, the complainant does not dispute that in April 2022, Mr. Jablonski and another FB-06 interviewed him. He stated in cross-examination that he thought that it went well. The email inviting him for the interview was also clear that he was being interviewed for an FB-06 position in Mr. Jablonski's unit.

[57] The complainant also confirmed that in May 2022, he was told that he was no longer considered for the position and that someone from the same pool that he was in would be appointed. He did not complain, and that first appointment is not before me. He complained only when the second appointment was made, in March 2023, which is the complaint before me.

[58] The crux of this matter resides in the fact that the complainant makes a distinction between the two appointments as if they were completely distinct and factually not linked in any way. That is not supported by the evidence before me.

[59] Although obviously, two separate appointments were made, the evidence is clear that they were part of the respondent's same continuous factual timeline and staffing action.

[60] In April 2022, the respondent's poster indicated that it was looking for FB-06s. Mr. Jablonski and Mr. Melchers testified that they were looking to make more than one appointment and that they considered six or seven candidates.

[61] Some of the documentation that the respondent entered into evidence sets out that it had to deal with two departures, in June and July 2022. It further mentions that although it anticipated hiring one person in August 2022, it still had to fill one remaining FB-06 position.

[62] Mr. Melchers testified that he had temporary funding for a program related to the branch's priorities at the time but that the funding could have become permanent had it been successful.

[63] The evidence demonstrates that the first person appointed after the complainant's interview ended up not being available until December 2022. Therefore, Messrs. Melchers and Jablonski needed someone else quickly, to respond to priorities and hopefully to help securing permanent funding.

[64] However, the remaining position available in their branch was not bilingual. As they wanted it to be bilingual, they had to ask that a new position be created. Therefore, in August 2022, they gave an acting appointment to the appointee, which was extended once, in December 2022. The acting appointment was necessary until a new bilingual position was created and funding was secured. The acting period also provided time to renew the appointee's second-language proficiency certification, which had expired. In March 2023, the appointee was finally appointed indeterminately in the same position that she had been acting in since August 2022.

[65] The evidence is not clear as to whether the language-proficiency issues had been dealt with and settled when the appointment occurred. In fact, the appointment documentation seems to indicate that it was still an English-essential position. However, no matter if the position was intended to be bilingual or not, the evidence clearly sets out that the appointee met the language requirements when the appointment was made.

[66] Hence, I conclude that the March 2023 appointment process that is before me was part of the same continuous factual timeline that started in April 2022 when the respondent intended to staff FB-06s positions and during which the complainant was interviewed and considered but not found to be the right fit.

2. The complainant's qualifications

[67] The complainant believes that he was qualified and that he met all the essential qualifications for the position. The respondent does not dispute that he was in a pool of qualified FB-06s. However, after interviewing him, it did not consider him the right fit for position.

[68] Mr. Jablonski's testimony was clear that he found the complainant's responses inadequate. He explained that the answers were more oriented to operations and that the Trade Incentive Unit is more policy-oriented. He also testified that the respondent was looking for someone with management experience.

[69] The complainant submits that he should have been interviewed again in March 2023, as things could have changed. Beyond that suggestion, he provided no evidence of any changes in his situation after April 2022 that could have made a difference to the respondent. Nor did he provide any evidence demonstrating his management experience.

[70] Furthermore, while the complainant believes that he should have been interviewed again because one year had elapsed since his interview, and that could have meant something, he also submits that respondent should have found him qualified on the sole basis that he was in a pool for which he had qualified two years before. I find those two suggestions difficult to reconcile.

[71] At any rate, the respondent had significant discretion to determine the right-fit candidate for the position. In this case, it found that the complainant was not the right fit and provided a reasonable and valid explanation for that decision.

3. The appointee's qualifications

[72] Once again, for his allegation that the respondent abused its authority under s. 77(1)(a) of the *PSEA* to succeed, the complainant must demonstrate that the appointment at issue was not based on merit. Section 30(2) sets out that an appointment is made based on merit when the PSC, or its delegated authority, is satisfied that the person to be appointed meets the essential qualifications for the work to be performed.

[73] The complainant does not clearly allege that the appointee was not qualified for the position. He does not present any evidence that would demonstrate that that person did not meet all the essential qualifications for the position, and he does not ask that the appointment be revoked.

[74] In fact, instead, the complainant seems to take issue and to not agree with the respondent's method of assessing the appointee. Among other things, he questions the fact that she was found qualified even though she was not in an FB-06 pool, as he was,

was not from the respondent's Central-East region, and was teleworking. However, the respondent presented evidence that clearly demonstrated that the appointee was duly qualified for the position. It entered into evidence the complete assessment that it made of her against the SOMC.

[75] In cross-examination, Mr. Jablonski even explained the complainant's perceived issues with respect to the appointee's qualifications. When the complainant questioned him on a requested experience that he has and that was not apparent from the appointee's résumé, Mr. Jablonski explained that she had acquired that experience by dealing for a long time with a specific program that is mentioned in the résumé.

[76] At any rate, the respondent appreciated that the appointee had experience at the FB-06 and FB-07 levels in the two previous years. Anyway, according to the complainant himself, FB-06 positions in Mr. Jablonski's shop are pretty much interchangeable.

[77] It is not my role to substitute my assessment for the respondent's (see *Parliament v. Deputy Minister of Public Works and Government Services*, 2020 FPSLREB 118 at para. 119). The respondent provided clear evidence that the appointee was assessed and explained why it considered her qualified. Adding the fact that the complainant does not really dispute the appointee's qualifications and does not ask that the appointment be revoked, I must conclude that she was qualified for the position.

B. Allegations under s. 77(1)(b)

[78] The complainant summarily submits that the respondent abused its authority when it chose a non-advertised process to appoint the appointee. He further suggests that the respondent did so to move faster, to avoid transparency, and to avoid considering him. I will address those allegations.

1. The respondent's discretion

[79] For almost two decades now, the jurisprudence of the Board and the PSST has always recognized that the delegated authority under the *PSEA* has complete discretion to choose between an advertised or a non-advertised process to staff a position.

[80] Section 33 of the *PSEA* does not prioritize one process over the other (see *Haller*, at para. 60). The complainant cannot allege that the respondent abused its

authority simply because it chose to use a non-advertised process. He must demonstrate why on the balance of probabilities, the decision was an abuse of authority (see *Robbins v. the Deputy Head of Service Canada*, 2006 PSST 17 at para. 36; *Clout v. Deputy Minister of Public Safety and Emergency Preparedness*, 2008 PSST 22 at para. 34; and *Parliament*, at para. 89).

[81] In this case, the respondent chose to use a non-advertised process for the appointment. While it clearly had the right to, it still had to ensure that it provided a justification supporting its choice, which should have been free of personal favouritism or bias (see *D'Almeida v. Royal Canadian Mounted Police*, 2020 FPSLREB 23 at para. 55).

[82] The complainant might be of the opinion that the respondent did not have to or should not have used a non-advertised process, as it could have easily appointed him with an advertised process because, contrary to the appointee, he was already in a valid pool of employees qualified for FB-06 positions. That is irrelevant to my analysis of this complaint (see *D'Almeida* at paras. 62 to 66).

[83] Moreover, the respondent did not have to use the pool or exhaust it before considering someone else for the position. Being in a pool is not a guarantee of being appointed or a priority over anyone else (see *D'Almeida*, at para. 66).

[84] Finally, the complainant's claim that he should have been made aware of the appointment before it was made is baseless. A non-advertised process is by definition not advertised. It is not unusual that he was not informed of the appointment before it was finalized; nor was the respondent required to give him notice (see *Clout*, at para. 38; and *Haller*, at para. 88).

2. Justification

[85] As mentioned earlier, while the respondent has full discretion to choose to proceed by way of a non-advertised process, it still must be fair and transparent (see *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 7).

[86] In this case, Mr. Jablonski, who was the hiring manager, and Mr. Melchers, who was the delegated manager, both testified. They gave clear explanations as to the reasons behind their choice. Their testimonies are also supported by a clear and detailed document that articulates their rationale for the choice of process.

[87] When the appointment was made, the respondent was dealing with two major branch priorities. It had also faced two departures of experienced employees at the FB-06 level in 2022. Despite its staffing efforts, it still had FB-06 positions to be filled in early 2023.

[88] The witnesses testified to the lack of experienced and knowledgeable FB-06 or FB-04 employees who could have helped immediately with the branch's priorities. The respondent was also trying to secure funding that was linked to its success dealing with those branch priorities.

[89] The appointee had the necessary knowledge and skills to hit the ground immediately, do the job, and fill that gap. She also had experience as an acting manager and had displayed signs of good leadership. Finally, the appointee was already in contact with all the respondent's different regions and was well respected by colleagues.

[90] The complainant presents no evidence to challenge the respondent's justification. He simply disagrees with the fact that it used a non-advertised process. He suggests that it was chosen to move faster. However, as can be seen from the factual timeline that I already set out, the respondent took more than nine months after it assessed the appointee before it proceeded with the indeterminate appointment.

[91] The complainant also suggests that it was done to avoid considering him. The respondent had the right to consider only one person (see *Jack v. Commissioner of the Correctional Service of Canada*, 2011 PSST 26 at para. 18). However, as mentioned earlier in this decision, he was indeed considered in April 2022, as were other candidates from the same period.

[92] Finally, the complainant suggests that the respondent used a non-advertised process to avoid transparency. I find that the following paragraph from the Board's decision in *Haller* applies perfectly to this allegation:

> …
>
> *[87] The key staffing value of transparency creates specific obligations. It requires that assessments and decisions be properly documented contemporaneously with the appointment process; see* Morris*, at para. 82. It also requires that persons in the area of*

> *recourse be notified of their right to complain. In a non-advertised process, transparency also requires the deputy head to explain its choice of process; see* Robert v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24 at para. 60. All those requirements were met in the present case.*
>
> …

[93] I was also not presented with any evidence of personal favouritism or bad faith. While the complainant did not challenge the appointee's acting appointments before the indeterminate appointment was made, and they are not before me per se, they are still part of the factual timeline. Usually, personal-favouritism allegations in a similar context are linked to some acting periods that were given to an appointee before a non-advertised indeterminate appointment was made, as in this case.

[94] However, as can be seen from the documentation that the respondent presented in evidence to justify the choice of process and the appointee's qualifications, it emphasized not the experience gained during those actings periods but her acting experience from 2020 to April 2022. Therefore, the experience was gained before her résumé was even referred to Mr. Jablonski for his consideration for the FB-06 position at issue.

[95] That experience was also used to justify the acting periods that were given to the appointee, and the respondent gave a clear explanation as to why it had to give that person two acting periods before proceeding with the indeterminate appointment.

[96] Therefore, I find that the respondent did not abuse its authority when it chose to proceed with a non-advertised process for the indeterminate appointment at issue.

C. The settlement agreement

[97] The complainant made some allegations and presented arguments related to the settlement agreement that he and the respondent signed in February 2022. Therefore, I will turn my mind to those arguments. However, as settlements should normally be kept confidential, and as the respondent requests a sealing order, it would be inappropriate and counterproductive for me to reproduce in this decision the text of that agreement.

[98] For the sake of the following analysis, I will simply refer to the essence of the relevant settlement agreement clause to the extent that I must to reach a conclusion on the complainant's arguments.

[99] The complainant's interpretation of that clause is that appointing the appointee without interviewing the complainant or without giving him priority consideration breached the settlement agreement and therefore was an abuse of authority.

[100] First and foremost, I already concluded earlier in this decision that the respondent interviewed and considered the complainant. I was also not presented with any evidence that he was entitled to any of the priorities set out in ss. 39 to 41 of the *PSEA*.

[101] For the complainant, as the respondent breached the settlement agreement while it exercised its authority under the *PSEA*, a breach of the agreement should be considered a breach of the *PSEA*.

[102] More precisely, as he alleged that the respondent breached the settlement agreement in the application of merit in the disputed appointment, and as the agreement uses words similar to those in s. 30(2) of the *PSEA*, a breach of the agreement should be considered an abuse of authority under s. 77(1)(a).

[103] Therefore, for the complainant, as the Board has jurisdiction under s. 77(1)(a) of the *PSEA*, I should find that I have jurisdiction over the settlement agreement.

[104] I do not agree.

[105] When it comes to staffing in the federal public service, the Board takes its jurisdiction from s. 88 of the *PSEA*. In accordance with that section, the Board may consider and dispose of complaints made under ss. 65(1), 74, 77, and 83 of the *PSEA*. This complaint was made under s. 77.

[106] Section 77 of the *PSEA* sets out that when the PSC, or its delegated authority, has made or proposed an appointment in an internal appointment process, a person in the area of recourse can make a complaint for three reasons. This complaint was made based on two of them, namely, an abuse of authority by the respondent in the exercise of its authority under s. 30(2) and in its choice between an advertised and a non-advertised appointment process.

[107] The complainant and the evidence do not suggest that in the settlement agreement, the respondent agreed to proceed by way of an advertised instead of a non-advertised process. Therefore, his only possible argument about the agreement could be that the respondent breached s. 77(1)(a) of the *PSEA* because it did not meet its obligations in the agreement. That is what he alleges.

[108] The respondent's authority to make appointments is granted in ss. 15(1) and 29(1) of the *PSEA*. An appointment must be made on merit, as set out by s. 30. Sections 31 to 38 further specify the respondent's discretion and the modalities that it must observe when it makes appointments.

[109] I cannot find anywhere in the *PSEA* any obligation for the respondent to respect the terms and conditions of settlement agreements that it might have agreed to before I can conclude that an appointment that it made was done within its authority or in accordance with the *PSEA*.

[110] My jurisdiction under s. 77(1)(a) of the *PSEA* is to determine if the appointment at issue was based on merit under s. 30(2). I concluded earlier that it was.

[111] A settlement agreement is an agreement between the parties; it does not supersede the *PSEA*. The parties' agreement even contains a statement to that effect, which the complainant recognized with his signature. If a settlement agreement is breached, it is a breach of the agreement and not the *PSEA*.

[112] At any rate, certainly, it was not an abuse of authority as set out in the *PSEA*. The complainant might have recourses available if such a breach of the settlement agreement occurred, but not before this Board, and not under s. 77.

D. Other allegations

[113] In the proceedings that the complainant filed before the Board, he alleged that the respondent abused its authority by falsely accusing him of committing fraud in an appointment process that it conducted in 2020, which then damaged his reputation.

[114] Once again, my jurisdiction in this matter is limited to the respondent's appointment of the appointee in March 2023. Clearly, the facts in that allegation are not related to that appointment process. Therefore, I need not assess its merit.

E. Request for a sealing order

1. The request

[115] The respondent requested a sealing order with respect to any reproduction of or reference to the terms of the parties' *Memorandum of Settlement* (MOS) dated February 10, 2022, and any related settlement communications.

[116] It submits that the MOS and all the parties' settlement discussions were entered into to resolve complaints that the complainant had made. The respondent's understanding is that the materials and discussions that arose from any settlement negotiations and the MOS and its terms would be kept confidential between the parties, as agreed.

[117] For the respondent, a breach of the confidential nature of settlement discussions poses a serious risk to the integrity of the settlement process and to its ability to engage in future meaningful settlement discussions. It further suggests that the interference with court openness would be minimal and that there is no alternative to a sealing order in this case that would be practicable.

[118] Finally, for the respondent, the benefits of protecting settlement privilege, especially in the context of a settlement agreement and settlement discussions with an employee, outweigh the open court principle. It submits that such an approach would not affect the transparency of the quasi-judicial process and would not be prejudicial to the complainant, given the limited scope of the request.

[119] The complainant indicated to the Board that he did not wish to contest the respondent's request for a sealing order and that therefore, he would not make submissions on it.

2. The test

[120] As the Board recognized in *Catahan Niles v. Professional Institute of the Public Service of Canada*, 2024 FPSLREB 169 at para. 66, and *Abi-Mansour v. Public Service Alliance of Canada*, 2022 FPSLREB 48 at para. 20, the applicable test for an order seeking to seal documents that were properly filed before it is the one set out in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38. In accordance with that test, the respondent must demonstrate these three things:

- that court openness poses a serious risk to an important public interest;
- that the order sought is necessary to prevent the serious risk to the identified interest because reasonably alternative measures will not prevent the risk; and
- as a matter of proportionality, the benefits of the order outweigh its negative effects.

3. Application to this matter

[121] I must first specify that while the applicable test would be the same, the respondent's request is more for a confidentiality order than a sealing order. It does not seek that full documents be sealed, just that specific portions of them be inaccessible to public view.

[122] A confidentiality order would allow for the partial redaction of those documents, while the documents themselves would still be available to the public. This would also help minimize the impact of the order that the respondent seeks on the open court principle. That is the approach that I will take in this case.

[123] The documents or parts of them that the respondent wants redacted are all related to the negotiations that took place on two different occasions between it and the complainant. In fact, on his initial complaint form presented to the Board on April 12, 2023, as well as in his final allegations submitted on May 23, 2024, the respondent provided details of discussions, email exchanges, offers, and counteroffers that involved the parties to this case during those negotiations.

[124] The respondent referred me to three decisions to support its request: *Alderville First Nation v. Canada*, 2017 FC 631; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para. 34; and *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37.

[125] In *Alderville First Nation* (see paragraphs 11 to 13), the Federal Court stressed that the privilege of settlement negotiations is a well-established principle that aligns with the important public policy interest of encouraging settlements. It meets the criteria established "… by the Supreme Court of Canada for recognition of a class privilege because protection of settlement negotiations is essential to operation of the legal system; without settlements, the administration of justice would be overburdened …".

[126] In *Sable Offshore Energy Inc.*, the Supreme Court recognized that there is an overriding public interest in favour of protecting settlement privilege. In that decision, the Court noted that protecting settlement negotiations encourages open and fruitful negotiations and allows parties to reach mutually acceptable resolutions to disputes, amicably, without prolonging the personal and public expense and time involved in litigation.

[127] Finally, in *Union Carbide Canada Inc.*, the Supreme Court further held that this protection applies to all settlement discussions or negotiations and that it continues even after a settlement is reached.

[128] In both *Sable Offshore Energy Inc.* and *Union Carbide Canada Inc.*, the Supreme Court of Canada held that the settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed.

[129] I see no reason to deviate from those principles in this case.

[130] I find that a confidentiality order is necessary for the proper administration of justice, as some of the information that the complainant submitted is protected by settlement privilege. It is not just that publishing the settlement discussions, negotiations, and their outcome would pose a serious risk to the public interest — I am also convinced that no other alternative measure could prevent that risk.

[131] Making information about current negotiations available to the public would seriously jeopardize negotiations between the Treasury Board and employees in the federal public service, as all other employees would expect to receive the same offer or would seek more (for similar conclusions, see *Catahan Niles*, at para. 77). The benefits of a confidentiality order in this case clearly outweigh its negative effects.

[132] However, to minimize the restriction to the fundamental open court principle, the confidentiality order will extend exclusively to the portions of the documents listed in Appendix A to this decision.

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

(The Order appears on the next page)

VI. Order

[134] The complaint is dismissed.

[135] The portions of the documents listed in Appendix A are to be redacted.

[136] The record is ordered sealed until the redaction and replacement exercise is completed.

November 26, 2025.

Pierre Marc Champagne,
a panel of the Federal Public Sector
Labour Relations and Employment Board

APPENDIX A

In the initial complaint form submitted by the complainant and dated April 12, 2023, the factual description of events at page 6, from the third sentence to sixth sentence included.

In the allegations submitted by the complainant and dated May 23, 2024:

- the last three paragraphs of page 5;
- the first two paragraphs of page 6;
- the last four paragraphs of page 7;
- pages 8 to 10, except for the last paragraph of page 10 under the subtitle "ALLEGATIONS"; and
- Appendix C at pages 21 and 22 of those allegations.

In the Deputy Head reply submitted by the respondent and dated May 30, 2024:

- the last paragraph of page 4 under subtitle "Breach of Confidentiality"; and
- the first paragraph of page 5.

In the registry communications to the parties on April 17, 2023, the initiating documents attached to it will be replaced by the redacted copy of the initial complaint form.

In the registry's notice to the other parties dated April 19, 2023, the initiating documents attached to it will be replaced by the redacted copy of the initial complaint form.

In the registry notice to the parties on May 24, 2024, acknowledging receipt of the complainant's allegations, the allegations attached to it will be replaced by the redacted copy of the allegations.