



The Federal Public Sector Labour Relations and Employment Board

Presentation on Staffing

Process and Decisions – What You Need to Know

- THIS PRESENTATION IS DESIGNED TO SUPPORT A PRESENTATION OF THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD ON ITS PROCESS AND DECISIONS RELATING TO STAFFING

- THIS IS AN EVERGREEN DOCUMENT AND IS CONSTANTLY BEING UPDATED

- **IT IS NOT A 'STAND-ALONE' DOCUMENT**

- **THIS DOES NOT CONSTITUTE LEGAL ADVICE**

General Overview of the Presentation

- Mandate of the FPSLREB – staffing complaints
- Quick overview of how staffing works in the federal public service
- Various types of complaints
- Procedures that are followed
- Examples of circumstances from previous cases that were either found or not found to constitute an abuse of authority
- Corrective action

Mandate of the FPSLREB – staffing complaints

- Independent and quasi-judicial body
- *Public Service Employment Act (PSEA)*
- Deals with complaints re:
 - Internal appointments
 - Lay-offs
 - Revocations in the federal public service
 - Implementation of corrective measures
- Conducts hearings
- Mediation services in order to resolve complaints

Quick overview of how staffing works in the federal public service

- Appointments in the federal public service (FPS) are the exclusive purview of the Public Service Commission (PSC)
- PSC may delegate its authority to deputy heads of federal departments, who in turn may authorize another person to exercise or perform any of the powers and functions delegated to them by the PSC

Quick overview of how staffing works in the federal public service

- Section 30(1) of the *Public Service Employment Act (PSEA)* – appointments to or from the FPS “shall be made on the basis of merit and must be free from political influence”.

Quick overview of how staffing works in the federal public service

- An appointment is based on merit when (s.30(2)):
 - Person appointed meets essential qualifications for work, as established by deputy head (DH), including official language proficiency
 - Regard is given to any additional asset qualifications as determined by DH
 - Operational requirements and needs of organization as identified by DH

Quick overview of how staffing works in the federal public service

- To determine if a person is qualified, the PSC or delegated authority can use any assessment method that it considers appropriate (s. 36)
- System no longer uses “competitions” or “relative merit” concepts.
- Focus is on finding person who is “right fit” for job (*Visca*)

Grounds for complaint

- Internal appointments (s. 77)
 - A person who was not appointed or proposed for appointment can file complaint that he or she was not appointed by reason of
 - abuse of authority
 - a) in the application of merit
 - a) in the choice of process (advertised vs. non-advertised)
 - b) failure to assess the complainant in the official language of their choice

**interpret and apply the Canadian Human Rights Act (i.e. allegation of discrimination) s.80*

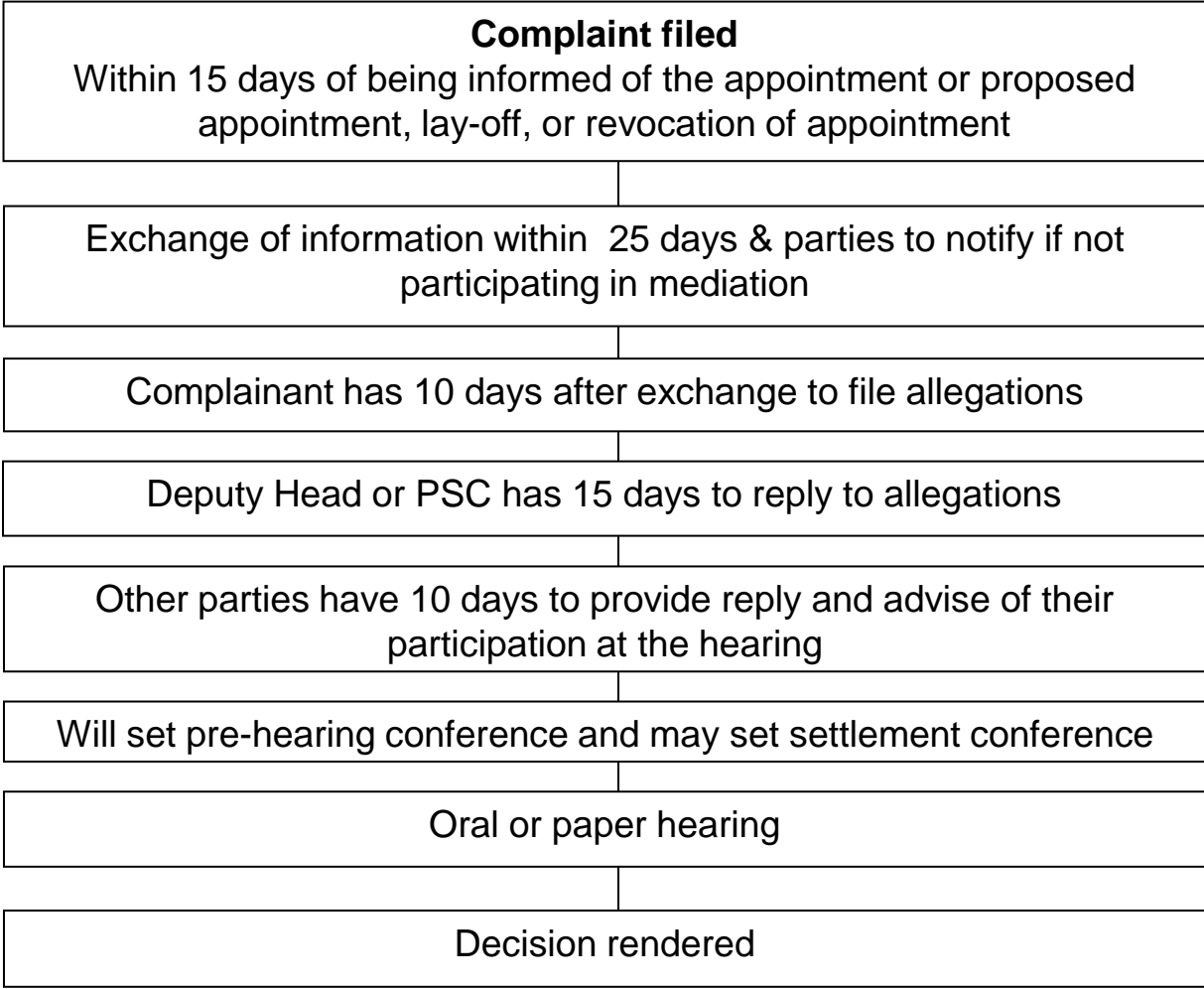
Grounds for complaint

- Lay-offs (s. 65)
 - Abuse of authority in the selection of the complainant for lay-off
 - Board may interpret and apply the *Canadian Human Rights Act* (s.65(7))

- Revocation of an appointment (s. 74)
 - Unreasonable

- Application of corrective action (s.83)
 - Abuse of authority

M
E
D
I
A
T
I
O
N



**Notice
to
Canadian
Human
Rights
Commission
,
if applicable**

Time limits

- The time limits for filing a complaint are strict, but can be extended – if in interest of fairness to do so (s.5(3)) of the *Public Service Staffing Complaints Regulations (MacDonald)*
- Only in exceptional circumstances, reasons beyond one's control.

Exchange of information

- Facilitates complaint resolution
- Parties meet to discuss complaint
- Face-to-face meeting preferred
- All relevant information (written and verbal) should be exchanged – not only specifically requested documents

Orders for the provision of information

- At a party's request, FPSLREB may order that relevant information be provided unless doing so will (s.17(4) Regulations):
 - Threaten national security
 - Threaten any person's safety
 - Affect the validity or continued use of standardized test... by giving an unfair advantage to any individual
- FSPLREB may set conditions to prevent these risks (e.g. anonymization, viewing only-no copies, etc.) (s.17(5) Regulations)

Orders for the provision of information

- All information arguably relevant to issues of complaint must be disclosed (*Akhtar*)

Requirement to file allegations

- *Section 22 Regulations*
- Complainant must file allegations
- Failure to provide allegations may result in the Board dismissing the complaint (s.22(3) *Regulations*)

Requirement to file reply to allegations

- S.24 Regulations
- Procedural fairness requires that respondents fully reply to allegations (*Laroche*)
- A delay to file a reply is not an administrative matter, but a potential denial of procedural fairness to other parties

Requirement to file reply to allegations

Naipaul

- Respondent had history of asking for extensions and failed to meet the deadlines.
- Did not have good reasons to support its requests.
- When it asked for an extension of time to file response to allegations, the Board denied the request.
- It was not entitled to raise any issue or lead any evidence at the hearing in response to allegations without first obtaining leave of the Board
- Unless leave is granted – respondent cannot participate at the hearing

Requirement to file reply to allegations

Taticek

- Respondent failed to file response despite extensions – had to request leave of the Board to participate in hearing.
- Respondent stated « workload issues » as reason for not responding on time.
- Respondent's pattern of behaviour including repeatedly missing deadlines, failing to seek extensions in a timely manner and providing little or no explanation for its actions = abuse of process
- Respondent barred from participating at the hearing
- Board allowed complainant's request to decide matter based on the written information on the record.

Failure to appear at the hearing

- Complainant has the burden of proof.
- If complainant does not appear – Board will continue with the hearing (s.29 Regulations).
- Board has dismissed complaints for lack of evidence (*Daoust, Patwell*)
- Board can also dismiss complaint based on abandonment (*Patwell*)

WHAT IS “ABUSE OF AUTHORITY”?

- No definition in PSEA
- Section 2(4) – Includes, for greater certainty, bad faith and personal favouritism
- In determining if abuse of authority, may interpret and apply the *Canadian Human Rights Act* (s. 80 PSEA)
- Intention is not required (*Tibbs*)

Examples of circumstances giving rise to claims of abuse of authority

- A. Statement of Merit Criteria and Job Opportunity Advertisement**
- B. Assessment
- C. Choice of process (advertised, non-advertised)
- D. Where delegated managers/assessment boards have restricted or “fettered” themselves in the exercise of their discretion
- E. Personal favouritism
- F. Bias
- G. Discrimination

A. Statement of Merit Criteria and Job Opportunity Advertisement

- PSEA – managers given flexibility when staffing positions
- The FPSLREB’s role - determine if deputy head abused its authority (i.e., exercised its discretion inappropriately) in the staffing process, including in the application of merit (s. 77(1)(a) complaints)
- Section 30(2): Appointment is based on merit when:
 - ✓ (a) Appointee **meets essential qualifications** as established by deputy head, including language proficiency
 - ✓ (b) Having regard to **additional asset qualifications, current/future operational requirements and needs** that the deputy head considers and identifies.

A. Statement of Merit Criteria and Job Opportunity Advertisement

- Choice of merit criteria
 - Failure to provide candidates with specific definition related to a merit criterion does not alone amount to abuse of authority. (*Neil*)
 - No duty on assessment board to tell candidates which combination of merit criteria (essential and asset) would be used to select appointees (*Wall*)
 - Official language proficiency - no abuse of authority where bilingual imperative proficiency requirement – is consistent with respondent’s official languages policy (*Vani*).

A. Statement of Merit Criteria and Job Opportunity Advertisement

- Area of selection
 - not FPSLREB's role to assess if it is reasonable or meets PSC guideline criteria and considerations (*Umar-Khitab*)

A. Statement of Merit Criteria and Job Opportunity Advertisement

- Examples where abuse of authority found
 - ***Poirier***
 - candidates instructed to provide info re qualifications in up to two paragraphs
 - wording found unclear = abuse of authority
 - ***Burke***
 - After interviews, respondent converted asset qualification into essential experience qualification, without reassessing candidates - wording of the qualification also changed.
 - Assessment tool flawed - could not assess the amended qualification - no other reliable evidence available to show that appointee met essential qualification – abuse of authority

Examples of circumstances giving rise to claims of abuse of authority

- A. Statement of Merit Criteria and Job Opportunity Advertisement
- B. Assessment**
- C. Choice of process (advertised, non-advertised)
- D. Where delegated managers/assessment boards have restricted or “fettered” themselves in the exercise of their discretion
- E. Personal favouritism
- F. Bias
- G. Discrimination

B. Assessment

- Managers have discretion to choose from amongst applicants meeting essential qualifications, the person who in their judgment is the **right fit** for the job (*Visca*)
- Deputy heads may use any assessment method they consider appropriate (s.36)(*Jolin, Ouellet*) but discretion not absolute
- Abuse of authority may be found in the selection of the assessment methods if they are unreasonable or do not allow the essential merit criteria to be assessed (*Jacobsen*)

B. Assessment

- Some examples of assessment methods that fall within the deputy head's broad discretion:
 - Weighting merit criteria, using cut-off scores and setting an aggregate passing score for each category of qualifications (*Jogarajah*)
 - Making a “top-down” assessment (*King, Anwar*)
 - Can take into consideration private sector experience (*Kavanagh*)

B. Assessment

- Serious error, however, to use single global rating to assess two essential experience qualifications (each qualification not proven – merit not established - s.30(2)(a)) (*Rochon*)
- Other serious errors:
 - Failing to ask interview questions to assess one of the essential qualifications
 - Relying on answers to one qualification question to assess another qualification

B. Assessment

- No abuse of authority, however, where the candidate is responsible for the error:
 - Candidates must ensure that applications complete and conform with all Job Opportunity Advertisement / Statement of Merit Criteria requirements -- no obligation that board follow-up and ensure that all required elements listed (*Henry*)
 - No obligation on board to infer qualifications where applicants told in Job Opportunity Advertisement to clearly demonstrate qualifications in their applications (*Richard, Lirette*)

B. Assessment

- Assessment boards:
 - Acceptable to use multiple assessment board panels (*Visca, Bizimana*)
 - Manager on assessment board can share with other board members his personal knowledge of various candidates (*Visca*)
 - Where candidate fails to clearly demonstrate in application possession of required experience, cannot assume that because board members knew him, they would conclude that he had the experience (*Agboton*)

B. Assessment

- Errors boards have made in the course of assessing:
 - Changing instructions for off-site exam (by computer) without ensuring candidate received them = serious negligence tantamount to bad faith – obligation to follow up (*Chiasson*)
 - Screening out candidate even though the missing information (relevant experience) was provided in an attachment to the application = board made its decision based on inadequate information (*Brookfield*)

B. Assessment

- Interpreting management and leadership experience as interchangeable (*Morgenstern*)
- Rescheduling interview due to candidate's unavailability (annual leave) – candidate provided contact information, repeated requests to discuss options including postponing by two business days – hiring manager's failure to respond to request was breach of fairness - serious carelessness – abuse of authority (*Kress*)

B. Assessment

- Appointing someone who did not prepare his own presentation (relied on copyrighted material) – possible that he did not meet essential qualifications – appointment based on inadequate material – not based on merit – abuse of authority (*Bain*)
- Giving complainant's answer a failing mark while giving same answer by two others a passing mark – error with significant impact on complainant (screened out) – all candidates entitled to assessment on uniform basis – improper result – abuse of authority (*Hughes*)

B. Assessment

- Assessment board making unsolicited contact in secret with a candidate seven months after he had applied for one of two positions in a process, asking if he was interested in the other position – candidate subsequently appointed to the position – constitutes breach of PSEA appointment values of fairness and transparency – serious error – abuse of authority (*Renaud*)
- Qualification related to education was modified after the expression of interest notice had been sent out = abuse of authority (*De Santis*)

B. Assessment

- One of the assessment board members admitted that she simply echoed the other member's assessment because she felt intimidated by him - Where board is comprised of more than one member, all members must be able to exercise independent judgment when assessing candidates - Serious error constituting an abuse of authority (*Snelgrove*)

B. Assessment – Use of references

- Where reference answers sparse, board should take reasonable steps to determine if complete information is obtainable (e.g., by asking referees to elaborate) (*Morgenstern*)
- Assessment board cannot place as much weight on the negative reference from supervisor who only supervised complainant for a short period, as it does for referees who supervised for longer period (*Ostermann*)
- Bias on the part of a referee does not necessarily mean assessment board abused its authority. Complainant must prove it was obvious to assessment board that the information provided by the referee was not reliable (*Pellicore, Jean Pierre*)

B. Assessment – Use of references

- Contacting referees in public service not included on list provided by candidate – not an abuse of authority (*Oddie*)
- Board must first consult referees proposed by candidate before pursuing others (*Ammirante*)
- Candidate’s consent not required before contacting non-listed referees. But referee must be familiar with candidate’s work - able to provide sufficient information to make adequate assessment of qualifications (*Dionne, Jean-Pierre*)
- “Off the record” discussion with referee not to be considered when deciding whom to appoint (*Oddie*)

B. Assessment – Use of references

- Board found that the referee was biased because complainant had filed grievances against him and there was a poor relationship between the two – reference not reliable (*Hill*)
- Assessment board has an obligation to consider any evidence that may call into question the reliability of the information provided by a referee (*Laviolette*)

B. Assessment

- Informal discussions (s. 47 PSEA)
 - Informal discussion (*Rozka*)
 - ✓ Means of communication for candidate to discuss reasons for elimination from process
 - ✓ Opportunity for board to correct errors
 - ✓ No requirement to reassess a candidate
 - Failure to conduct proper informal discussion does not alone establish abuse of authority (*Lirette*)

- A. Statement of Merit Criteria and Job Opportunity Advertisement
- B. Assessment
- C. Choice of process (advertised, non-advertised)**
- D. Where delegated managers/assessment boards have restricted or “fettered” themselves in the exercise of their discretion
- E. Personal favouritism
- F. Bias
- G. Discrimination

C. Choice of process

- Section 33
 - Either advertised or non-advertised process can be used
 - Must still uphold PSEA values including transparency, achieved via notification, informal discussion, rationale (non-advertised), and recourse (*Jarvo*)

C. Choice of process

- PSEA expressly authorizes considering only one person for an appointment (*Lahaie*)
- In a non-advertised process, the qualifications of the individual to be appointed need only be assessed (*Vaudrin*)
- Where choice of non-advertised process supported by operational circumstances, no abuse of authority (*Robert and Sabourin, Cannon*)
- Just because non-advertised process was not common practice is not in itself evidence of abuse of authority (*Lahaie*).

C. Choice of process

- *Jack*
 - Incumbent on assignment advises that return delayed – person selected from pool to replace her unavailable for three weeks – appointee's acting appointment therefore extended for three weeks by non-advertised process – practical approach to fill short term vacancy – no abuse of authority – **no guaranteed right of access to every appointment that may arise**

C. Choice of process

- *Cameron and Maheux* –
 - Non-advertised process chosen - presumably an urgent situation.
 - Yet, former incumbent announced retirement nine months earlier - other potential candidates with more experience than appointee available.
 - No evidence that essential qualifications were assessed (CV, assessment report, written rationale)
 - Manager did not adequately explain decision to use non-advertised process.
 - bad faith established - abuse of authority.

- A. Statement of Merit Criteria and Job Opportunity Advertisement
- B. Assessment
- C. Choice of process (advertised, non-advertised)
- D. Where delegated managers/assessment boards have restricted or “fettered” themselves in the exercise of their discretion**
- E. Personal favouritism
- F. Bias
- G. Discrimination

D. Fettering discretion

- Where deputy head refuses to exercise discretion by adopting policy that fetters the ability to consider individual cases with an open mind – may constitute abuse of authority (*Tibbs*)

D. Fettering discretion

- Chiasson
 - Assessment board changed off-site exam instructions (no page limit) 47 minutes in, after complainant had gone off-line. Deputy head fettered discretion by disregarding her subsequent request that error be taken into account. Deputy head could have exercised discretion to deviate from guidelines and practices in particular cases such as this.

D. Fettering discretion

- *Payne*:
 - Assessment board member knew complainant had the required trade certification, which was acquired at work. But respondent did not issue trade certificates, so no proof to submit with application. Assessment board applied guideline rigidly, did not consider relevant facts. Abuse of authority because assessment board decided not to use personal knowledge as assessment tool.

D. Fettering discretion

- *Bowman*
 - Job Opportunity Advertisement required significant HQ experience. Board interpretation = having charge of file through full fiscal or planning cycle, i.e. 11 months in two assignments or 22 months in one
 - Complainant screened out: 18-19 months in one and four months in another
 - Board fettered discretion by adopting rigid guidelines in its assessment of complainant - not assessed in a meaningful way – improper conduct – abuse of authority

D. Fettering discretion

- *Poirier*
 - Job Opportunity Advertisement asked for one or two paragraphs regarding candidates' qualifications. Complainant's interpretation = up to two paragraphs for **all** qualifications
 - Board refused to consider complainant's suggestion that instructions flawed
 - He should have been given more flexibility – board fettered its discretion – eliminated him based on inadequate information regarding his qualifications
 - Abuse of authority

- A. Statement of Merit Criteria and Job Opportunity Advertisement
- B. Assessment
- C. Choice of process (advertised, non-advertised)
- D. Where delegated managers/assessment boards have restricted or “fettered” themselves in the exercise of their discretion
- E. Personal favouritism**
- F. Bias
- G. Discrimination

E. Personal favouritism

- Section 2(4) – abuse of authority includes, for greater certainty, bad faith and personal favouritism
- *Glasgow*
 - It is **personal** favouritism that constitutes abuse – examples: personal relationship between person selecting and appointee, appointing someone as a personal favour or to gain favour with someone else

E. Personal favouritism

- *Martin*
 - Assessment board member contacts appointee before interview with information regarding two of the questions – assessment board member had previously supervised appointee. Inappropriately assisting a candidate – finding of personal favouritism

E. Personal favouritism

- Examples where no personal favouritism found:
 - Fact that appointee and manager were often together at work (i.e. got along well) and that appointee given responsibility to organize off-site retreats was insufficient to establish personal favouritism (*Charest*)
 - Fact that board chair was appointee's supervisor (did not interview appointee) and that they had attended the same wedding of a work colleague does not alone establish personal favouritism (*Sproule*)

E. Personal favouritism

- Examples of founded personal favouritism claim:
 - *Beyak*
 - Appointee was assistant to branch Director. As reward for her work, appointed to position with a description not reflecting actual duties - to ensure her a higher classification and salary
 - Assessed without regard to actual requirements for the position - appointment therefore made based on personal favouritism and in bad faith
 - Abuse of authority

E. Personal Favouritism

- *Ayotte*
 - non-advertised process - appointee lacked a qualification - respondent modified Statement of Merit Criteria to accommodate appointee
 - regarding this qualification, manager stated she'd "learn on the job" - evidence that he was not concerned whether she was qualified
 - respondent aware that other qualified employees interested in appointment
 - personal favouritism shown to appointee - choice to appoint her by non-advertised process was in bad faith - abuse of authority

- A. Statement of Merit Criteria and Job Opportunity Advertisement
- B. Assessment
- C. Choice of process (advertised, non-advertised)
- D. Where delegated managers/assessment boards have restricted or “fettered” themselves in the exercise of their discretion
- E. Personal favouritism
- F. Bias**
- G. Discrimination

F. Bias

- Bad faith encompasses bias (*Gignac*)
- Not necessary to prove actual bias
- Objectively viewing the circumstances, is there a reasonable apprehension that person is acting in biased manner
- Evidence of improper intent not required

F. Bias

- Test (*Gignac*, derived from SCC):

If a reasonably informed person would reasonably apprehend bias on the part of one or several of the persons responsible for the assessment, the Tribunal may conclude that there was an abuse of authority.

- Commonly referred to as the “reasonable apprehension of bias” test

F. Bias

- *Denny*
 - Prior conflicts between assessment board member, who administered practice test, and complainant (who had played role in removing member from a committee, replacing him as co-chair; filed grievances and harassment claim against him; not on speaking terms)
 - Former PSST concluded that informed person would think it more likely than not that the assessment board member would not administer the test fairly (whether consciously or unconsciously)

F. Bias

- *Ryan*
 - Rare example of actual bias
 - Assessment board member said, “The only way I would give you this job is if I am ordered to.”
 - There was therefore an adverse disposition toward the complainant
 - Also evidence that the complainant was denied opportunities to act and she only got acting appointments from this assessment board member only when HR ordered him to do so.

F. Bias

- *Bain*
 - Board member did not interrupt social contacts with appointee during the appointment process, and
 - Board member did not deny having discussion with appointee about his candidacy once process engaged
 - Gives rise to reasonable apprehension of bias

- A. Statement of Merit Criteria and Job Opportunity Advertisement
- B. Assessment
- C. Choice of process (advertised, non-advertised)
- D. Where delegated managers/assessment boards have restricted or “fettered” themselves in the exercise of their discretion
- E. Personal favouritism
- F. Bias
- G. Discrimination**

G. Discrimination

- PSLREB interprets and applies *Canadian Human Rights Act* (ss. 65(7) and 80 PSEA)
- Section 7 of CHRA:

It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely in relation to an employee,

on a prohibited ground of discrimination.

G. Discrimination

- The complainant need only show that a prohibited ground of discrimination was **a** factor in the respondent's decision
- Grounds of discrimination (s. 3(1), CHRA): race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, genetic characteristics, gender identity or expression and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

G. Discrimination

- Complainant must first establish *prima facie* case of discrimination
- Onus then shifts to respondent to disprove the allegations or prove that there is a reasonable explanation to justify what may appear to be a discriminatory practice
- If respondent provides an explanation, complainant may still try to establish that it is merely a pretext for respondent's otherwise discriminatory practice

G. Discrimination

- *Rajotte*
 - Non-advertised acting appointment – manager did not consider appointing complainant (a mother of a young child) because 8 months earlier she declined opportunity to fill in for manager due to longer hours/child care commitments.
 - Manager assumed complainant unable to work flexible hours even though she previously applied for similar position in a separate process
 - *Prima facie* case that complainant's family status was factor in decision not to appoint her - no reasonable explanation provided - respondent had made no inquiries about complainant's availability to work flexible hours
 - **No debate that discrimination constitutes an abuse of authority** (see also *Murray*)

G. Discrimination

- *Besner*

- Selection for retention or lay-off (SERLO) process – The complainant had several disabilities and had been working from home full time in accordance with an accommodation agreement
- Former PSST found that the low scores assessed to her references were due in part to the fact that she had to work from home because of her disabilities, which in turn affected her performance. Her disabilities were thus factors in the decision to select her for lay-off
- Former PSST ordered that decision to lay her off be set aside and that the respondent pay her \$2000 in compensation for her pain and suffering (under the remedial provisions of the CHRA, s. 53(2)(e))

G. Discrimination

- *Song*
 - Complainant became visibly ill during the assessment
 - Assessment board was concerned enough that it considered calling the ambulance – but complainant continued with the assessment
 - Board concluded that it was an error to have complainant continue with the assessment
 - Disability - Abuse of authority

G. Discrimination

- *Boivin*
 - Interview question referring to Christmas, which complainant did not celebrate
 - Reference to Christmas found only to be incidental and he was given opportunity to answer question without reference to Christmas
 - No *prima facie* case
 - 2nd issue – complainant had visual disability, but interview question had a written component – *prima facie* case established that he would have been disadvantaged by the written requirement – however, although he had turned his mind to making a request for accommodation, but did not do so during or after the interview – he was responsible for the breakdown in the accommodation process – no breach of the *Canadian Human Rights Act*

Lay-offs – section 65 PSEA

- Section 65 - any employee in the part of the organization identified by the Deputy Head who is informed that he or she will be laid off, may file complaint alleging abuse of authority in his or her selection, unless the Deputy Head has completely eliminated the part of the organization that it has identified.

Lay-offs – section 65 PSEA

- S.21 of the PSER: Deputy Head must conduct a Selection of Employees for Retention or Lay-off (SERLO) process when employees in the identified part of the organization (1) occupy positions that are classified at the same group and level and are similar or (2) perform similar duties at the same group and level.
- An employee in a “unique position” within the identified part of the organization can still file a complaint under s.65. (*Lishman*)

Lay-offs – section 65 PSEA

- *Hailu*
 - SERLO – Employees required to give examples of how they meet the criteria being assessed
 - Assessment board found complainant's too general but board did not seek any clarification, pursuant to respondent's instructions
 - Assessment board fettered its discretion – rigid application of rule – serious error – abuse of authority
- See also *Raymond*

Revocation

- Section 74 *PSEA* -> person whose appointment is revoked can complain that the revocation was unreasonable
- Onus on complainant to prove revocation unreasonable on a balance of probabilities

Revocation

- *Goldsmith*
 - Complainant had worked as term employee and external contractor - applied for and hired in internal appointment process
 - After investigation, appointment revoked - not employee of public service when he applied - not eligible for internal appointment processes.
 - Error occurred - no finding that complainant intentionally misled respondent - both contributed to the error.
 - Decision not unreasonable – does not fall outside the range of possible acceptable outcomes that are defensible
 - Complaint dismissed

Revocation

- *McMillan*
 - Manager (complainant's mother) conducted initial screening; did not participate in complainant's interview; conducted reference checks; complainant appointed
 - Anonymous note that complainant not qualified for position - only appointed because manager's daughter
 - Deputy head conducts s. 15(3) investigation
 - investigators found complainant did not meet essential experience qualifications
 - Appointment revoked

Revocation

McMillan cont'd

- Complainant not provided with meaningful opportunity to respond to accusations made against her appointment
- Significant breaches of procedural fairness with investigation and ensuing report:
 - ✓ Complainant not given copy of anonymous note (told to use access to information)
 - ✓ Investigators did not ask complainant any specific questions other than whether she was manager's daughter, and did not interview two members of the assessment board (including the manager)
 - ✓ Investigators failed to consider other available information in concluding that complainant did not meet the essential experience qualification
- Revocation found unreasonable and set aside

Corrective action

- In appointment related complaints
 - the FPSLREB **cannot order** that the respondent make an **appointment** or conduct a new appointment process (s. 82 PSEA)
 - the FPSLREB may order respondent to revoke or not make the appointment and to take any corrective action it thinks appropriate (s. 81(1))
 - where there is a discrimination finding, damages for pain and suffering (up to \$20K) and special compensation if the discriminatory practice was wilful or reckless (up to \$20K)(s. 81(2))
- Lay-offs
 - Order that lay-off be set aside, other corrective action and damages if finding of discrimination (s. 65(4) and (8))

Corrective action

- Assessment of complainant (qualifications – *Patton, Elazzouzi, Hughes, Poirier*) (needs for accommodation -*Rajotte*)
- Review of procedure for administration of exams (*Chiasson*)
- Revocation (*Martin, Ayotte, Burke, Rochon*)
- Declaration of abuse of authority (*Robert and Sabourin*)
- New assessment board (*Parker*)
- No further action required (*Morgenstern*)
- Revocation set aside, reinstate to position (*McMillan*)
- Set aside lay off (*Hailu, Raymond*)
- Damages for pain and suffering (discrimination) - \$2000 (*Besner*)

Recommendations

- The Board can make recommendations where matters of concern are identified [*Canada v. Beyak*, 2011 FC 629]
- Examples of recommendations made in the past:
 - Training
 - Rescinding delegation of authority
 - Reviewing all appointments made since coming into force of *PSEA*
 - Assessing capability of HR to provide support and advice
 - Public Service Commission and Canadian Human Rights Commission to be consulted

List of decisions referred to in this presentation

- *Agboton v. President of the Public Service Commission*, 2010 PSST 13
- *Akhtar v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 26
- *Ammirante v. Deputy Minister of Citizenship and Immigration*, 2010 PSST 3
- *Anwar v. Chief Public Health Officer of the Public Health Agency of Canada*, 2011 PSST 24
- *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 21 (re: personal favouritism issue)
- *Ayotte v. Deputy Minister of National Defence*, 2010 PSST 16 (re: corrective action)

List of decisions referred to in this presentation

- *Bain v. Deputy Minister of Natural Resources*, 2011 PSST 28
- *Berglund v. Deputy Minister of National Defence*, 2007 PSST 34
- *Besner v. Deputy Minister of Human Resources and Skills Development*, 2014 PSST 2
- *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 35
- *Bizimana v. Deputy Minister of Public Works and Government Services*, 2014 PSST 3
- *Boivin v. President of the Canada Border Services Agency*, 2010 PSST 6
- *Bowman et al. v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 12
- *Brookfield v. Deputy Minister of Foreign Affairs and International Trade*, 2011 PSST 25
- *Burke v. Deputy Minister of Department of National Defence*, 2009 PSST 3

List of decisions referred to in this presentation

- *Cameron and Maheux v. Deputy Head of Service Canada*, 2008 PSST 16
- *Canada (Attorney General) v. Beyak*, 2011 FC 629
- *Cannon v. Deputy Minister of Fisheries and Oceans*, 2008 PSST 21
- *Charest v. Deputy Minister of Human Resources and Social Development*, 2008 PSST 19
- *Chiasson v. Deputy Minister of Canadian Heritage*, 2008 PSST 27
- *Daoust v. Deputy Minister of Public Safety and Emergency Preparedness*, 2018 FPSLREB 10
- *Denny v. Deputy Minister of National Defence*, 2009 PSST 29
- *De Santis v. Commissioner of Correctional Service Canada*, 2016 PSLREB 34
- *Dionne v. Deputy Minister of National Defence*, 2008 PSST 11

List of decisions referred to in this presentation

- *Elazzouzi v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 11
- *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 10
- *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7
- *Goldsmith v. Deputy Minister of Human Resources and Skills Development*, 2010 PSST 20
- *Hailu v. Deputy Minister of Health Canada*, 2013 PSST 27
- *Henry v. Deputy Head of Service Canada*, 2008 PSST 10
- *Hill v. Deputy Minister of Public Works and Government Services*, 2017 FPSLRB 21

List of decisions referred to in this presentation

- *Hughes v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 16
- *Jack v. Commissioner of the Correctional Service of Canada*, 2011 PSST 26
- *Jacobsen v. Deputy Minister of Environment Canada*, 2009 PSST 8
- *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 6
- *Jean-Pierre v. President of the Canada Border Services Agency*, 2013 PSST 28
- *Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada*, 2008 PSST 15
- *Jolin v. Deputy Head of Service Canada*, 2007 PSST 11
- *Kavanagh v. President of Shared Services Canada*, 2017 FPSLRB 38
- *King v. Deputy Head of Service Canada*, 2008 PSST 6
- *Kress v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 41

List of decisions referred to in this presentation

- *Lahaie v. Deputy Minister of National Defence*, 2009 PSST 30
- *Laroche v. Deputy Minister of Foreign Affairs*, 2009 PSST 17
- *Lavigne v. Canada (Deputy Minister of Justice)*, 2009 FC 684
- *Lavolette v. Commissioner of the Correctional Service of Canada*, 2015 PSLREB 6
- *Lirette v. Deputy Minister of National Defence*, 2011 PSST 42
- *Lishman v. the Deputy Minister of Environment Canada*, 2013 PSST 12
- *MacDonald v. Deputy Head of Service Canada*, 2006 PSST 2
- *Martin v. Deputy Minister of National Defence*, 2010 PSST 19
- *McMillan v. Deputy Minister of Indian and Northern Affairs Canada*, 2011 PSST 20
- *Morgenstern v. Commissioner of the Correctional Service of Canada*, 2010 PSST 18

List of decisions referred to in this presentation

- *Neil v. Deputy Minister of Environment Canada*, 2008 PSST 4
- *Naipaul v. President of the Canada Border Services Agency*, 2017 FPSLRB 39
- *Oddie v. Deputy Minister of National Defence*, 2007 PSST 30
- *Ostermann v. the Deputy Minister of Human Resources and Skills Development Canada*, 2012 PSST 28
- *Ouellet v. President of the Canadian International Development Agency*, 2009 PSST 26
- *Parker v. Deputy Minister of Indian and Northern Affairs Canada*, 2010 PSST 21
- *Patton v. Deputy Minister of National Defence*, 2011 PSST 8
- *Patwell v. Deputy Minister of Employment and Social Development*, 2018 FPSLRB 37
- *Payne v. Deputy Minister of National Defence*, 2013 PSST 15
- *Pellicore v. President of the Canada Border Services Agency*, 2010 PSST 23
- *Poirier v. Deputy Minister of Veterans Affairs*, 2011 PSST 3
- *Rajotte v. President of the Canada Border Services Agency*, 2009 PSST 25
- *Raymond v. Chief Statistician of Canada*, 2013 PSST 25
- *Renaud v. Deputy Minister of National Defence*, 2013 PSST 26

List of decisions referred to in this presentation

- *Richard v. Deputy Minister of Canadian Heritage*, 2009 PSST 0012 (re: assessment issue)
- *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 24
- *Robertson v. Deputy Minister of National Defence*, 2010 PSST 11
- *Rochon v. Deputy Minister of Fisheries and Oceans*, 2011 PSST 7
- *Rozka v. Deputy Minister of Citizenship and Immigration Canada*, 2007 PSST 46
- *Ryan v. Deputy Minister of National Defence*, 2014 PSST 9
- *Snelgrove . Deputy Minister of Fisheries and Oceans*, 2013 PSST 35
- *Song v. Deputy Minister National Defence*, 2016 PSLREB 73

List of decisions referred to in this presentation

- *Spirak v. Deputy Minister of Public Works and Government Services Canada*, 2012 PSST 20
- *Sproule v. Deputy Minister of Transport, Infrastructure and Communities*, 2011 PSST 34
- *Taticek v. President of the Canada Border Services Agency*, 2018 FPSLRB 44
- *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8
- *Umar-Khitab v. Deputy Head of Service Canada*, 2007 PSST 5
- *Vani v. Chief Statistician of Canada*, 2008 PSST 29

List of decisions referred to in this presentation

- *Vaudrin v. Deputy Minister of Human Resources and Skills Development Canada*, 2011 PSST 19
- *Visca v. Deputy Minister of Justice*, 2006 PSST 16 (re: exchange of information issue)
- *Visca v. Deputy Minister of Justice*, 2007 PSST 24 (re: assessment issue)
- *Wall v. Deputy Minister of Fisheries and Oceans*, 2009 PSST 2
- *Zankl v. Chief Statistician of Canada of Statistics Canada*, 2010 PSST 1
- *Zhao v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 30