



FINDINGS AND RECOMMENDATIONS: October 2018

REF: 905

RECRUITMENT PRINCIPLES COMPLAINT TO THE CIVIL SERVICE COMMISSION

FINDINGS OF THE INVESTIGATION

AUTHORITY

1. The Constitutional Reform & Governance Act 2010 (“the Act”) outlines the statutory requirement that all selections for appointments to the Civil Service must be on the basis of fair and open competition and also the functions of the Civil Service Commission.

2. Section 10(2) of the Act says:

10 (2) A person’s selection must be on merit on the basis of fair and open competition.

Alternatively, there may be appointment under one of the exceptions set out in the Recruitment Principles, pursuant to section 10 (3). This mandatory requirement for appointment on merit on the basis of fair and open competition applies to all appointments to the Civil Service. Any appointments made without compliance with the provisions of the Act are outside of employing department’s powers and void for illegality, meaning the employment contract entered into is of no effect, irrespective of any fault of either party. [This legal requirement was considered and confirmed by the Employment Appeal Tribunal in the case of *Betts & Others v Secretary of State for Justice (2017)*]

3. One of the functions set out in the Act concerns the investigation of complaints made by any person that a selection for appointment has been made in contravention of this legal requirement.

The Act says:

13 (3) The Commission –

- a) *May determine steps that must be taken by a person before making a complaint (and those steps must be taken accordingly);*
- b) *Must determine procedures for the making of complaints and for the investigation and consideration of complaints by the Commission;*
- c) *After considering a complaint, may make recommendations about how the matter should be resolved.*

OUTLINE OF THE COMPLAINT

4. This complaint alleges an abuse of process in relation to a Stage 4 external recruitment campaign for a Grade 6 role at HSE. The complainant, who also applied for the role in question, alleged that the rules of fair and open competition have not been observed, as well as making a Civil Service Code complaint (dealt with separately under the Civil Service Code complaints regime).

5. The report of the investigation appears to show the involvement of the post holder (**Person A**), a senior manager at HSE, in the campaign to recruit to the post, in which her husband (**Person B**) was successful. There are questions over the constitution of the panel that oversaw the recruitment process and failure to declare by those who may have had a conflict of interest. There are also indications that the successful applicant was treated more favourably than other applicants at sift

METHODOLOGY OF THE INVESTIGATION

6. The Commission investigated the complaint through consideration of written evidence supplied by HSE. The Commission considered the following evidence:

- The report of the HSE investigation.
- HSE email responses to CSC questions.
- Notes from CSC visit to HSE.
- Sift report, containing names of candidates.

7. Ian Watmore, First Civil Service Commissioner, Margaret Edwards and Jan Cameron were the decision making Commissioners.

SUMMARY OF THE EVIDENCE

8. Approval to recruit for the role was given on 9 February 2018 and the advertisement for the Stage 4 external recruitment campaign went live on 26 March 2018. According to **Person A**, her partner **Person B**, first indicated his intention to apply for the role on 10 April 2018.

9. On 11 April 2018, **Person A** sought advice from HR Director **Person E** about whether there were any Civil Service rules about working with partners. On 13 April 2018, **Person E** responded stating that **Person A** '*should not participate in the interview*' and if her husband was successful in his application, she '*could not line manage him*'. She also advised her to step back from the sift of candidates.

Constitution of Panel

10. Had **Person B** not applied for the position, the intention was for **Person A** and HSE Senior Manager **Person F** to lead on this recruitment. **Person F** reports to **Person A**, within the same Division as the post being advertised.

11. After **Person A** withdrew from the process, the sift was undertaken by **Person F** alone, and the interviews were conducted by **Person F** and HSE Senior Manager **Person G**. **Person F** led on the recruitment campaign. The sift was thus being overseen by one person only and not the minimum of two, as is required.

Conflict of Interest

12. **Person A** told **Person F** that her partner, **Person B** had applied for the role. While he did not personally know her partner, he was aware of his background, and therefore was able to recognise his application, along with those of internal candidates. **Person F** indicated that this did not influence his decision to put **Person B** through to the interview stage. Given that **Person F** had knowledge of **Person B** and his application, it seems reasonable to conclude that this was a perceived conflict of interest and should have been formally declared, but it was not.

13. On 11 April 2018, **Person A** sought advice from **Person E** about whether there were any Civil Service rules about working with partners. On 13 April 2018, **Person E** responded stating that **Person A** should not participate in the interview and if her husband was successful in his application, she could not line manage him. She also advised her to step back from the sift of candidates. Whilst the vacancy outcome report indicates that the successful applicant was known to **Person A**, and this is recorded at the end of the recruitment process, there is no written record of how **Person A's** conflict of interest was to be dealt with at any point during the recruitment. There was also no record on the sift sheet, or elsewhere, of how the conflict with **Person F** was managed. He was in **Person A's** line management chain which could clearly represent a difficult situation for him.

Unfair advantage at sift

14. At interview for the HSE investigation, **Person F** confirmed that he set the sift standard at 5 for each competence. This is supported by the email he sent to **Person A** indicating the outcome of the sift, and the sift spreadsheet he sent to **Person A's** Executive Assistant, **Person D** for inputting into the recruitment system. It is also supported by the Vacancy Outcome Report.

15. A review of the sift spreadsheet indicates that one of the candidates put through for interview achieved a 4 in the competency Leading and Communicating. This candidate was **Person B**.

16. When asked why he felt the need to put this candidate through to interview as there were already 4 strong candidates who met the sift criteria, **Person F** stated that the candidate must have scored highly on the other competences. He stated initially that this would have been a potentially strong candidate and if they had high scores elsewhere and just fell short by 1 on a competence, he would wish to interview the candidate. **Person F** also indicated that he used the sift standard as a guideline.

17. **Person F** stated in a later email that *'when considering the sift results I looked at both individual competency scores **and** total score. Looking back at my sift results, the total score for the application in question was 32 (above the 30 that a 5 in all competencies would have scored). If any candidate had scored a 4 on one category but met/exceeded everywhere else and the total score was above 30 in this case, I would have wanted to see them at interview.* Based on his rationale when initially asked about this there was another candidate who scored 5 in all competences except one (where they scored a 4) and who could have been invited to interview but was not. This second candidate scored 29 however, and the score of 29 falls outside his second, later, explanation of his rationale. This second explanation of his rationale seems a very specific rationale that almost precisely matches the situation that **Person B** was in.

18. Sift standards are set to provide a clear benchmark and to support an objective assessment. **Person F's** actions are not in accordance with this nor were they sift standards he had previously set and documented in his subsequent paperwork. When asked about this, **Person F** was categorical that he did not feel any pressure to put this candidate through to interview.

Consideration

THE LEGAL REQUIREMENT

19. As detailed at paragraph 2, the legal requirement is for selection for appointment to the Civil Service to be made on **merit** on the basis of **fair** and **open** competition. All three elements have to be met for the appointment to be lawful.

20. **Merit** means the appointment of the best available person judged against the essential criteria for the role. No one should be appointed to a job unless they are competent to do it and the job must be offered to the person who would do it best.

21. **Fair** means there must be no bias in the assessment of candidates. Selection processes must be objective, impartial and applied consistently.

22. **Open** means that job opportunities must be advertised publicly. Potential candidates must be given reasonable access to information about the job and its requirements, and about the selection process. In open competitions anyone who wishes must be allowed to apply.

Have the Recruitment Principles been breached due to the constitution of the selection panel?

23. After **Person A** withdrew from the process, the sift was undertaken by **Person F** alone, and the interviews were conducted by **Person F** and **Person G**. **Person F** led on the recruitment campaign.

24. Paragraph 9 of the recruitment Principles states *A selection panel of two or more people must be set up to oversee the appointments process.*

25. **As there was only one person overseeing the sift, this is a breach of Paragraph 9 of the Recruitment Principles.**

Have the Recruitment Principles been breached due to a failure to declare a conflict of interest?

26. **Person F** oversaw the recruitment process when **Person A** withdrew and had knowledge of **Person B** and his application. It seems reasonable to conclude that this was a perceived conflict of interest and should have been formally declared in advance, but it was not.

27. Whilst the vacancy outcome report indicates that the successful applicant was known to **Person A**, and this is recorded at the end of the recruitment process, there is no written record of how **Person A's** conflict of interest was to be dealt with at any point during the recruitment. Also there was no formal record being made in advance that one of the applicants was known to her. Although she formally withdrew from the recruitment process, she continued to be involved on the sidelines. Furthermore, **Person F** also had a conflict of interest in this case because of his position in **Person A's** line management chain, which was not declared or recorded.

28. Paragraph 12 of the Recruitment Principles states that *Panel members must declare any conflict of interest including prior knowledge of any applicant. A record must be kept of how any such conflicts were dealt with.*

29. **As the above was not complied with, this represents a breach of Paragraph 12 of the Recruitment Principles, as detail of how the conflict would be managed was particularly important in this unusual case, to ensure transparency and fairness.**

Have the Recruitment Principles been breached due to the successful applicant having received an unfair advantage at sift?

30. As detailed above, the successful candidate scored a 4 in one of the competencies when the sift standard had previously been set at 5 in order to progress to interview. This candidate was subsequently progressed to interview.

Person F, who was solely responsible for the sift assessment stated in an email that *'when considering the sift results I looked at both individual competency scores and*

total score. Looking back at my sift results; the total score for the application in question was 32 (above the 30 that a 5 in all competencies would have scored). If any candidate had scored a 4 on one category but met/exceeded everywhere else and the total score was above 30 in this case, I would have wanted to see them at interview. However, there was another candidate who scored 5 in all competences except one of them where they scored a 4 (albeit with a combined overall score of 29), but they were not invited to interview.

31. Sift standards are set to provide a clear benchmark and to support an objective assessment. **Person F's** actions are not in accordance with this nor were they sift standards he had previously set and documented in his subsequent paperwork.

32. Paragraph 27 of the Recruitment Principles states that *Candidates must be assessed on merit, and they should not be treated more or less advantageously because of their previous or current activities, affiliations, or the employment of their friends, partner or family members.*

33. **This is a breach of Paragraph 27 of the Recruitment Principles as the successful applicant was treated more favourably than other candidates.**

FINDINGS AND RECOMMENDATIONS

34. In investigating this complaint, the Commission has determined that there have been three breaches of its Recruitment Principles – an incorrectly constituted panel, a failure to declare and record conflicts of interest, and most seriously, a breach of fairness, by affording one candidate an unfair advantage. **For this reason, the Commission has determined that this appointment was not made on merit on the basis of fair and open competition. HSE has no power or discretion to appoint civil servants without compliance with the Recruitment Principles and the Commission's view is that Person B's appointment is in breach of the Act and void.**

35. **HSE will now have to decide what steps are taken to address this, but the Commission would strongly advise that it urgently seek legal advice on the matter.**

36. This case has raised some serious concerns with the Commission about levels of awareness within HSE about the requirement to appoint to the Civil Service on merit after fair and open competition. The Commission will be making recommendations about how this can be addressed. This will include the commission providing training to HSE on compliance with the Recruitment Principles.

37. This Decision Notice will be published on the Civil Service Commission's website and summary details of this case will be published in the Commissions 2018/19 Annual Report and Accounts.

REQUEST FOR REVIEW

38. There is no mechanism for appealing against the decision of the Civil Service Commission in a Civil Service recruitment complaint case.

39. The Commission will, however, consider representations from complainants, or those complained against, for review of the Commission's decision and recommendations that suggest that it has made factual errors in its decision-making.

40. The Commission will not normally accept a request to review its decision or recommendations if the request is received more than 20 working days after the date of its findings.

**Civil Service Commission
October 2018**