



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0258

OTTAWA, NOVEMBER 26, 2007

EDWARD RINN

COMPLAINANT

AND

THE DEPUTY MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

RESPONDENT

AND

OTHER PARTIES

MATTER Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*

DECISION Complaint is dismissed

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION English

INDEXED *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*

NEUTRAL CITATION 2007 PSST 0044

REASONS FOR DECISION

INTRODUCTION

[1] Edward Rinn is complaining that he was not appointed as Acting Regional Manager, System Safety, Civil Aviation, Prairie and Northern Region, by reason of an abuse of authority. The thrust of his complaint is that the position requires recent experience in piloting an aircraft which he alleges the appointee, Marc Beaulne, does not have.

BACKGROUND

[2] The complainant, Edward Rinn, is an employee of Transport Canada working within the Aircraft Operations (the AO) group as an AO-CAI-02 in Edmonton, Alberta. He is represented by the Canadian Federal Pilots Association (the CFPA), which is the certified bargaining agent for all employees within the AO group. He filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (*PSEA*), on December 8, 2006. He complains concerning an internal non-advertised appointment process (process no.: 06MOTAIWPG008453) for the position of Acting Regional Manager, System Safety, Civil Aviation, Prairie and Northern Region (TI-08). The respondent is the Deputy Minister of Transport, Infrastructure and Communities and is responsible for Transport Canada.

[3] The position of Regional Manager, Aviation System Safety (ACE-02944) is classified at the AO-CA1-05 group and level. The person occupying this position must meet the AO group qualification standards which require, for an AO-CAI position, the possession of a valid Canadian pilot's licence. A "shadow" position which is similar to the substantive position, without the requirements related to pilot certification, was created in May 2005 for acting purposes. Accordingly, the job description was re-written for the shadow position of Acting Regional Manager, System Safety, and was classified at the T1-08 group and level. Mr. Beaulne's initial appointment in July 2006 was for a period of less than four months, and it was extended until the end of March 2007.

[4] The complainant alleges abuse of authority in four areas: in the application of merit; in disregarding the essential qualifications of the position for acting purposes; in the choice of a non-advertised appointment process; and, in the failure to provide timely notification of the appointment.

[5] The respondent replies that the appointee met all of the essential qualifications for the acting position, and the complainant simply disagrees with the classification of the position; the Tribunal does not have jurisdiction to review classifications. In terms of the other allegations, the respondent replies that the choice of a non-advertised process was not done to purposefully exclude the complainant, and the notifications related to the acting appointment were timely.

SUMMARY OF RELEVANT EVIDENCE

[6] The complainant has 30 years of experience as a pilot. He operated his own commercial aviation company for five years prior to joining Transport Canada as an employee in 1985. He worked from 1992 to 2000 in the field of system safety as a Regional Aviation Safety Officer (RASO) at the AO-CAI-02 group and level. He is presently working in the Commercial and Business Aviation Division as a Civil Aviation Inspector at the AO-CAI-02 group and level.

[7] Over the course of the last several years, the complainant has expressed interest in a management position. His interest has been expressed in his Performance Review and Assessment Report (PREA), his Personal Learning Plan, and through conversations with senior managers. For example, he wrote in his 2005 PREA that he had recently resigned his position as Regional Chairman of the employee association and that he believed that he had many transferable skills that would make him an effective member of the management team.

[8] The complainant requested opportunities for acting assignments of three months or more. He has experience in an acting capacity as Superintendent in the Commercial Business and Aviation Division, and also acted for several days to a week as Regional Manager System Safety.

[9] Mr. Rinn reviewed in detail the job description of the shadow position and pointed out areas of aviation safety where having a pilot's licence would still be necessary. He explained that piloting experience is definitely necessary in the field of system safety as 85% of accidents can be attributed to human factors. He testified that the Acting Regional Manager System Safety would have to understand the pilot's perspective and have experience flying an aircraft to do the job.

[10] Philémon Paquette testified, on behalf of the complainant, and was found qualified by the Tribunal as an expert witness in classification. His expertise in classification was not contested by the other parties; however, Mr. Paquette conceded on cross-examination that he is not a specialist in staffing. He explained that, pursuant to the *Financial and Administration Act*, R.S.C. 1985, c. F-11 (*FAA*), Treasury Board is the employer and provides for the classification of positions in the public service under paragraph 11.1(b) of the *FAA*. Pursuant to the Classification System and Delegation of Authority Policy, the Canada Public Service Agency (the CPSA), which is part of Treasury Board, authorizes deputy heads to classify positions in their departments in accordance with the classification standards.

[11] Mr. Paquette testified that the shadow position is not validly classified at the TI-08 group and level as it does not respect the classification standard for the AO group. He explained that the allocation of the position to the AO group was not affected by removing from the work description the requirement for holding a valid pilot's licence, or having recent experience in piloting an aircraft. He stated that the allocation to the AO group could only be changed by removing the responsibility for aviation safety. Mr. Paquette further stated that the classification officer was mistaken in classifying the shadow position at the TI-08 group and level. He asserted that a person could only be appointed at that level for a period of less than four months as it was not subject to recourse.

[12] Mr. Paquette recalled that, in the fall of 2003, Transport Canada attempted to obtain a modification of the AO-CAI classification standard to permit the appointment of individuals who, while not holding a pilot's licence, had the equivalent knowledge. This attempt was refused by the Public Service Human Resources Management Agency of

Canada, the predecessor of CPSA, and Transport Canada was told to apply the classification standards without change.

[13] Kate Fletcher testified on behalf of the respondent as she has been the Regional Director, Civil Aviation, Prairie and Northern Region, since May 2006. Previously, she was the Regional Manager, Commercial and Business Aviation, Prairie and Northern Region. She explained that civil aviation is undergoing a huge transformation with a new regulatory regime. Transport Canada is changing the way it is working with industry, as well as undergoing internal organizational change. Every position will be examined and reviewed under the National Organization Transition Implementation Program. Work descriptions will be examined, rewritten and duly reclassified. A moratorium is in place on the staffing of indeterminate managerial positions in civil aviation across the country. All of these positions are subject to change and management wants to avoid making an indeterminate appointment of a person to a position that could be later classified at a lower level.

[14] When Ms. Fletcher took over as Regional Director, she was facing a challenging situation as there were five acting managers and a number of vacancies in the region. This situation continues to date as several positions will be vacant by the end of the year. She explained that Civil Aviation, Prairie and Northern Region, will change significantly under the proposed organizational chart; only four areas would report to her. Employees have been kept informed and engaged in the reorganization through town hall meetings, communiqués, an updated website and face-to-face meetings.

[15] Acting appointments are widely available and everyone who is qualified, and has a desire to act, will have the opportunity. Management's approach has been to first consider employees within the work unit.

[16] The position of Regional Manager, System Safety has been vacant for some years. Ms. Fletcher met with the previous manager who informed her that three employees within System Safety had indicated their interest in acting in this position: Jack Koosel, an AO-CAI-02; Tom Umscheid, an AO-CAI-02; and, Marc Beaulne, a TI-06.

[17] Ms. Fletcher was satisfied that three out of the eight employees of this division was an adequate pool. It was Mr. Beaulne's turn in rotation for a developmental acting assignment. Ms. Fletcher needed an individual who could assume managerial responsibility for System Safety very quickly and, therefore, did not consider employees from other divisions.

[18] Ms. Fletcher testified that the shadow position had been created for acting purposes where the requirement for recent experience in piloting an aircraft had been removed. This was a standard practice used across Transport Canada for acting purposes only. A job description was prepared in 2005, classified at the TI-08 group and level, and approved for temporary acting situations by Carol McGetnick, a Classification Officer. Marc Beaulne did not testify at the hearing, but Ms. Fletcher explained that he had acted in this position from May 5, 2005 to September 2, 2005 under the previous manager.

[19] Ms. Fletcher reviewed the TI-08 job description for Acting Regional Manager, System Safety to see if she could accept the duties listed. The job description met her requirements as she wanted someone to concentrate on the managerial duties of the position, finance and planning of human resources, management of the program and working with the industry. Given her review of the job description, she was satisfied that the assignment of Mr. Beaulne would be reasonable.

ISSUES

[20] The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority by disregarding the classification standard and appointing a person who did not meet the essential qualifications for the position?
- (ii) Did the respondent abuse its authority in choosing a non-advertised appointment process?
- (iii) What remedy is available if there is a finding of abuse of authority?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[21] The complainant submits that complaints of abuse of authority are very much a matter of evidence and, as the Tribunal has stated in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, each complaint should be assessed on a case by case basis. *Tibbs, supra*, provides a good guide post for the parties to prepare their respective cases to address allegations of abuse of authority. In this complaint, the respondent has abused its authority by acting on inadequate material and without considering relevant matters, namely, that the day-to-day duties performed in this position require recent experience as a pilot. In the same vein, the appointment of Mr. Beaulne has led to an improper result, as an individual with no piloting experience is expected to perform duties in which experience in piloting an aircraft is vital.

[22] According to the complainant, the primary duties of the Regional Manager, System Safety relate to safety operations, which require someone with recent experience in piloting an aircraft. It does not matter whether the job is performed on an acting or a permanent basis. Accordingly, the respondent abused its authority by disregarding the classification standard, and by modifying the essential qualifications for the acting position. The requirement of recent experience in piloting an aircraft should never have been removed as an essential qualification for the position. Appointing someone who does not have the essential qualifications of the position is a clear breach of the merit principle under subsection 30(2) of the *PSEA* and, in and of itself, is an abuse of authority under the *PSEA*.

[23] The complainant explains that there is no other recourse. An application for a determination by the Public Service Labour Relations Board (the PSLRB) as to whether an employee or class of employees is included in a bargaining unit or not under section 58 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (*PSLRA*), would not help the complainant as he is not the incumbent of the position.

[24] The complainant also submits that the respondent abused its authority by choosing a non-advertised appointment process. The rewriting of the work description

to remove all references to pilot certification and the length of time it took to notify employees of the extension of the acting appointment are a concerted effort to deny individuals in the AO group the opportunity for advancement in the position of Regional Manager, Aviation System Safety.

[25] The complainant argues that the use of a non-advertised process by the respondent is suspect. The CFPA has filed requests before the PSLRB pursuant to section 58 of the *PSLRA*. These requests are for a declaration that similar managerial and supervisory positions that have been re-classified by the employer at Transport Canada are more properly included in the AO group. Ms. Fletcher testified that she was aware of two of these requests filed in May 2006. Given that this is an issue of contention between the respondent and the bargaining agent, there was some obligation to inform the bargaining agent prior to the appointment of Mr. Beaulne at the TI-08 group and level. When the decision to extend the acting appointment for an additional five months was made on October 31, 2006, there was no notice to the bargaining agent. The respondent knew that the employees and the bargaining agent would take exception to this extension.

B) RESPONDENT'S ARGUMENTS

[26] The respondent submits, as it did in *Pugh v. Deputy Minister of National Defence et al.*, [2007] PSST 0025, that abuse of authority should be limited to bad faith, personal favouritism or similar misfeasance.

[27] The respondent raises a preliminary objection, namely, that the Tribunal lacks jurisdiction to deal with this complaint. According to the respondent, the essential character of this complaint pertains to the classification of positions within Transport Canada, and not to staffing. The respondent submits that the Tribunal has no jurisdiction to deal with the alleged classification violation. The same issue is before the PSLRB as three requests were filed by the CFPA pursuant section 58 of the *PSLRA*.

[28] The respondent agrees with the complainant that there would be an abuse of authority if the Tribunal were to find that the respondent had appointed a person who

does not meet the essential qualifications for the position. However, the employer has exclusive authority to classify positions and the Tribunal lacks the jurisdiction to make a determination on the classification of this position.

[29] In terms of the allegation that the respondent intended to conceal the appointment and, therefore, abused its authority in selecting a non-advertised appointment process, there is no evidence to support this allegation. Ms. Fletcher had a dialogue with employees, keeping them informed of the organizational change in the region. The initial acting appointment was posted despite the fact that there was no requirement to provide notice.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[30] The Public Service Commission (the PSC) presented written submissions, together with its supporting jurisprudence. It contends, as it has in previous cases before this Tribunal, that, generally, abuse of authority requires a finding of improper intent.

[31] The PSC's specific argument on this complaint is that, even if the Tribunal were to find that the person who was appointed does not meet the essential qualifications for the position, this would not on its face constitute an abuse of authority. The PSC submits that it is not merely the outcome that must be examined, but what was done in the circumstances of the particular case. For the PSC, the Tribunal must determine whether intent could be imputed by reason of an egregious error or omission, or the person was appointed as a result of favouritism, or bad faith.

ANALYSIS

Issue I: Did the respondent abuse its authority by disregarding the classification standard and appointing a person who did not meet the essential qualifications for the position?

[32] The parties have all taken a different approach concerning the allegation that the appointee, Mr. Beaulne, does not meet the essential qualifications for the position. For the Tribunal, the starting point for the analysis is the applicable provisions of the *PSEA*.

[33] This complaint was filed under paragraph 77(1)(a) of the *PSEA* which refers to the criteria for making an appointment on the basis of merit under subsection 30(2) of the *PSEA*. These provisions should be read together, and are as follows:

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

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

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

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

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

(b) the Commission has regard to

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

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

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

[34] The Tribunal explained in *Visca v. Deputy Minister of Justice et al*, [2007] PSST 0024, at paragraph 44, how merit in the *PSEA* has changed from the former *PSEA*:

Under the former *PSEA*, the ground for an appeal was that relative merit was not achieved. The process was prescriptive, ranking was mandatory, and any discrepancy in the process could lead to an appeal being allowed. Now, under subsection 30(2) of the *PSEA*, considerable discretion is given to choose amongst the applicants who meet the essential qualifications, the person who in the manager's judgment is the **right fit** for the job.

[35] Merit now relates to individual merit where the person to be appointed must meet the essential qualifications for the work to be performed. There is considerable flexibility in selecting the person to be appointed; however, the fundamental requirement in appointing a person on the basis of merit is that the person must be qualified for the position.

[36] The PSC submits that, where a person who is not qualified is appointed, there would be an abuse of authority only where improper intent is established, or can be imputed. The Tribunal has rejected this approach in *Tibbs, supra*, and subsequent decisions. Such an approach would go against the legislative intent and purpose of the *PSEA* which is, *inter alia*, to have a public service that is based on merit.

[37] The preamble of the *PSEA* highlights Parliament's recognition of the benefit of a public service based on merit, and that this value should be independently safeguarded. As the Tribunal found in *Tibbs, supra*, at paragraph 61:

In construing the meaning of abuse of authority in the context of *PSEA* complaints, the Tribunal must look at the whole scheme of the *PSEA*, including the preamble. Preambles are optional components of legislation; Parliament has chosen to include a preamble in the *PSEA*. A preamble is "considered an integral part of the Act" and can assist with the determination of legislative purpose: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 296.

[38] Subsection 30(1) of the *PSEA* clearly states that appointments shall be made on the basis of merit. Subsection 30(2), in turn, sets out the criteria for making an appointment on the basis of merit. Paragraph 77(1)(a) of the *PSEA* provides for recourse against an abuse of authority by the PSC or the deputy head in making an appointment under subsection 30(2). Parliament expressed its unequivocal intention that merit would be independently safeguarded and this is provided through recourse to the Tribunal. Recourse under paragraph 77(1)(a) of the *PSEA* addresses this appointment issue, namely, whether an appointment or proposed appointment is made on the basis of merit. It is not a matter of an improper intention. If the appointee does not meet the essential qualifications then, regardless of intent, it is not an appointment based on merit. As explained in *Tibbs, supra*:

[74] (...) It could not have been envisioned by Parliament that, for example, when a manager unintentionally makes an appointment that leads to an unreasonable or discriminatory result, there would be no recourse available under the *PSEA*. When a manager exercises his or her discretion, but unintentionally makes an appointment that is clearly against logic and the available information, it may not constitute bad faith, intentional wrongdoing, or misconduct, but the manager may have abused his or her authority.

[39] The complainant submits that the classification of the acting position at the TI-08 group and level is invalid and, therefore, it was an abuse of authority to appoint Mr. Beaulne. Quite simply, he does not meet the essential qualification of experience as a

pilot. While the respondent agrees that it would be an abuse of authority to appoint a person who does not meet the essential qualifications, it submits that the determination of the classification for the position is not within the jurisdiction of the Tribunal.

[40] Subsection 31(2) of the *PSEA* stipulates that the essential qualifications established by the deputy head for a position, and used in making an appointment based on merit, **must meet or exceed** the qualification standards established by the employer. Section 31 reads as follows:

31. (1) The employer may establish qualification standards, in relation to education, knowledge, experience, occupational certification, language or other qualifications, that the employer considers necessary or desirable having regard to the nature of the work to be performed and the present and future needs of the public service.

(2) The qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i) must meet or exceed any applicable qualification standards established by the employer under subsection (1).

[41] Subsection 31(2) refers back to paragraph 30(2)(a) and subparagraph 30(2)(b)(i) and, therefore, must also be included in the criteria for making an appointment on the basis of merit. Thus, the Tribunal has jurisdiction to hear a complaint that the deputy head abused its authority by establishing essential or additional asset qualifications that do not meet or exceed the applicable qualification standards established by the CPSCA for the employer.

[42] Mr. Paquette testified that, in accordance with the *Classification System and Delegation Authority Policy*, the authority to classify positions is delegated by the CPSCA to deputy heads. In effect, when a delegated deputy head classifies a position, he does it on behalf of the employer. The decision to delegate the classification authority to deputy heads and how the delegation is exercised is not within the jurisdiction of the Tribunal. Thus, the Tribunal does not have jurisdiction to determine if a position is validly classified under the applicable classification standards.

[43] Therefore, whether the respondent respected the classification standard is not an issue that can be determined by the Tribunal.

[44] The issue for the Tribunal to decide is whether Mr. Beaulne meets the essential qualifications of the shadow position. The classification officer who classified the

position on June 24, 2005 specified that the classification is approved for temporary acting situations only. While the initial assignment period was for less than four months, the classification of the acting position is not limited in length to a period of less than four months.

[45] Mr. Beaulne's initial appointment of less than four months was extended until March 31, 2007. Ms. Fletcher testified that Mr. Beaulne meets the essential qualifications for the shadow position, and that the situation is temporary while the reorganization is being completed.

[46] Based on the evidence at hearing, the Tribunal finds that the appointment was for a temporary acting position as specified, and that Mr. Beaulne meets the merit criteria for the shadow position. Accordingly, the complaint of abuse of authority on this ground is not substantiated.

Issue II: Did the respondent abuse its authority in choosing a non-advertised appointment process?

[47] Section 33 of the *PSEA* gives discretion to the PSC, or its delegate, to choose between an advertised and non-advertised process in making an appointment. However, this discretion is not absolute. Under paragraph 77(1)(b) of the *PSEA*, a complaint can be made to the Tribunal that the PSC, or its delegate, has abused its authority in choosing an advertised or non-advertised process. These provisions of the *PSEA* read as follows:

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

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

(...)

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

[48] As the Tribunal's jurisprudence has established, the burden is on the complainant to prove abuse of authority on a balance of probabilities. In other words, if

the evidence is such that the Tribunal can say that it is more probable than not, then the burden is discharged.

[49] The complainant alleges that the respondent deliberately chose a non-advertised process in order to conceal the appointment of Mr. Beaulne at the TI-08 group and level. The complainant argues that there was some obligation to inform the bargaining agent prior to the appointment given that this has been an area of contention between the respondent and the bargaining agent.

[50] The *PSEA* does contain provisions for consultation with the bargaining agent under section 14 with respect to a number of PSC policies, and under section 27 concerning certain Treasury Board regulations. However, the *PSEA* does not require consultation or any other notification to the bargaining agent prior to or after making a non-advertised appointment. Paragraph 48(1)(b) of the *PSEA* requires only that the persons in the area of selection be informed of the appointment.

[51] The Tribunal finds that the complainant has not provided any evidence of concealment. On the contrary, the position of Regional Manager, System Safety has been vacant for several years and three employees, including Mr. Beaulne, occupied the position on an acting basis over this time period. Mr. Beaulne occupied this position for the first time from May 5, 2005 to September 2, 2005; the second time, he occupied the position from July 1, 2006 to October 31, 2006. Notification was posted that he was occupying the position at the TI-08 group and level. When this acting appointment was extended, another notification of appointment was posted on November 27, 2006. While the notification was late, this is clearly not, in and of itself, sufficient evidence to warrant a finding by the Tribunal of concealment. Moreover, in the circumstances of this complaint, this error is clearly not of a serious nature and not indicative of wrongdoing that could constitute an abuse of authority.

[52] Accordingly, the Tribunal finds that this allegation is not substantiated.

Issue III: What remedy is available if there is a finding of abuse of authority?

[53] Since the Tribunal has not substantiated the complaint, there is no need to address this issue.

DECISION

[54] For all these reasons, the complaint is dismissed.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2006-0258
Style of Cause:	<i>Edward Rinn and the Deputy Minister of Transport, Infrastructure and Communities et al.</i>
Hearing:	August 27-28, 2007 Edmonton, Alberta
Date of Reasons:	November 26, 2007
APPEARANCES	
Phil Hunt	For the complainant
Caroline Engmann	For the respondent
Lili Ste-Marie	For the Public Service Commission
N/A	For the other party