Public Service Staffing Tribunal | Tribunal de la dotation de la fonction publique

FILE: 2007-0088

OTTAWA, SEPTEMBER 2, 2008

KATHRYN CLOUT

COMPLAINANT

AND

THE DEPUTY MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)*(b)* of the *Public Service Employment Act*
DECISION	Complaint is dismissed
DECISION RENDERED BY	Merri Beattie, Member
LANGUAGE OF DECISION	English
INDEXED	*Clout v. Deputy Minister of Public Safety and Emergency Preparedness et al.*
NEUTRAL CITATION	2008 PSST 0022

REASONS FOR DECISION

INTRODUCTION

[1] Kathryn Clout is a Senior Policy Analyst at the PM-06 group and level with Public Safety Canada. Ms. Clout's complaint concerns the decision to use a non-advertised appointment process to staff an ES-06 Senior Policy / Research Advisor position.

BACKGROUND

[2] On February 13, 2007 a Notification of Appointment or Proposal of Appointment was posted on *Publiservice*, announcing the non-advertised appointment of Ms. S. Jory to the ES-06 position.

[3] Ms. Clout, the complainant, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(*b*) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the *PSEA*). At the time this complaint was filed, Public Safety Canada was the Department of Public Safety and Emergency Preparedness.

[4] The complainant alleges that the respondent, the Deputy Minister of Public Safety and Emergency Preparedness, abused its authority in choosing to use a non-advertised appointment process.

ISSUE

[5] To resolve this complaint, the Tribunal must determine whether the respondent abused its authority in choosing to use a non-advertised appointment process.

ARGUMENTS AND RELEVANT EVIDENCE OF THE PARTIES

COMPLAINANT

[6] The complainant argues that this appointment process does not respect the values of fairness and transparency.

[7] She submits that this opportunity was not made available to others. She also submits that, in light of her qualifications, she should have been considered for this position.

[8] The complainant testified that she qualified in an ES-06 process in late 2006, and that she had acted at the ES-06 level for a period of ten months ending in September 2005, as well as other periods in 2003 and 2004. She provided testimony about her qualifications as they relate to the merit criteria for the ES-06 position at issue.

[9] The complainant argues that the request to obtain the Deputy Minister's (DM) approval of this non-advertised appointment was misleading. According to the complainant, the DM was informed that Ms. Jory had been acting at the ES-06 level, but was not informed that she was acting in the position to be staffed. She states that the DM was also misled concerning opportunities for other employees; other employees were not given an opportunity to obtain this position.

[10] The complainant submits that the decision to use a non-advertised appointment process was made in bad faith for the following reasons: first, Human Resources did not advise management of other completed ES-06 appointment processes and eligibility lists; secondly, other employees were not considered for this appointment; and, thirdly, communications to employees about this process were not effective. The complainant testified that she was unaware of the non-advertised appointment until she saw the Notice of Appointment or Proposal for Appointment.

[11] The complainant argues that Ms. Jory was favoured when she was transferred into the Science & Technology Policy Division (S&TPD) prior to Treasury Board approval of the new organizational structure and was assigned to the Senior Policy / Research Advisor position on an acting basis before the position was classified. The complainant does not dispute Ms. Jory's qualifications, but submits that she is equally qualified and should have been considered.

RESPONDENT

[12] The respondent argues that the *PSEA* provides for both advertised and non-advertised appointments, and does not favour one over the other. Further, the respondent argues that, in accordance with the *PSEA*, there is no requirement to consider more than one person when making an appointment.

[13] The respondent submits that the Tribunal's decisions in *Kane v. Deputy Head of Service Canada et al*., [2007] PSST 0035 and *Robbins v. the Deputy Head of Service Canada et al.*, [2006] PSST 0017 establish that abuse of authority requires more than simply an assertion that a non-advertised process should not have been chosen. The complainant must prove that the decision to make that choice constitutes an abuse of authority.

[14] The respondent submits that the complainant has not provided any evidence of abuse of authority in the decision to choose a non-advertised appointment process. The respondent further submits that this non-advertised appointment process is lawful and was conducted in accordance with the requirements of Public Safety Canada's Policy for Non-Advertised Appointment Processes.

[15] The respondent states that, as a matter of course, employees will not have prior knowledge of a non-advertised appointment process. However, while, by their very nature, non-advertised processes are not publicized, this does not mean that they are non-transparent.

[16] Michael MacDonald, who was Acting Director, S&TPD, Emergency Management Policy Directorate (EMPD) at the time of the appointment, testified on behalf of the respondent. He explained that, as part of a departmental core business review, the Acting Director General, EMPD decided to consolidate certain files and move them into the S&TPD. As a result, the S&TPD became responsible for the Chemical, Biological, Radiological and Nuclear (CBRN) file.

[17] Mr. MacDonald explained that Ms. Jory, as well as an employee on secondment from National Defence, and a student were working on portions of the CBRN file in another Division within the EMPD. They were moved to the S&TPD in early November 2006.

[18] Mr. MacDonald testified that when Ms. Jory moved to S&TPD, she was assigned to the new CBRN position. The position consists of some of her former duties as well as some new duties. Following receipt of Treasury Board approval for new positions and funding, the CBRN position was classified in December 2006 at the ES-06 group and level. Mr. MacDonald explained that the position was classified retroactively and Ms. Jory was accorded acting pay retroactive to November 2006.

[19] Mr. MacDonald was informed that Ms. Jory had qualified in an appointment process conducted to staff various ES-06 positions in Public Safety and Emergency Preparedness. Employees of the Public Service occupying a position across Canada were eligible to apply to this process. Ms. Jory's results letter dated December 1, 2006 and the advertisement for this process were entered into evidence.

[20] Mr. MacDonald explained that he referred to Public Safety Canada's Policy for Non-Advertised Appointment Processes, and determined that Ms. Jory could be appointed by non-advertised process based on the following criteria:

> The appointment of a person (all groups and levels except the EX group) that qualified for either a departmental or interdepartmental pool which was open to employees of PS. The group and level of the position to be staffed must be the same as the group and level of the qualifying pool.

[21] Mr. MacDonald testified that he initiated the non-advertised process to appoint Ms. Jory to the new ES position in mid to late-December 2006.

[22] Mr. MacDonald stated that he completed a written assessment of Ms. Jory against the statement of merit criteria (SMC) for the Senior Policy/Research Advisor position. He explained that he was not involved in creating the SMC; it was a generic one that had been previously developed in consultation with several managers in the National Security Branch. It was the same SMC that had been included in the Treasury Board submission. Mr. MacDonald testified that Ms. Jory meets all the essential qualifications for the position.

[23] On January 4, 2007 a written justification was submitted to the DM for approval of the non-advertised appointment. The submission, which was entered into evidence, records the DM's approval.

[24] The respondent argues that, for an allegation of favouritism to succeed, the complainant must prove that an appointment was made because of personal favouritism, based on factors other than merit. The respondent submits that the evidence demonstrates that Ms. Jory meets the essential qualifications for the position. Moreover, according to the respondent, there is no evidence that factors other than merit were considered in her appointment.

[25] Mr. MacDonald testified that he met Ms. Jory very briefly in 2001. Following the creation of the Department of Public Safety and Emergency Preparedness in 2003, he had "extremely limited" contact with her until he began supervising her in November 2006, following the move of the CBRN file to his Division.

PUBLIC SERVICE COMMISSION

[26] The Public Service Commission (PSC) did not appear at the hearing. As it has done in previous complaints, the PSC provided written submissions on the concept of abuse of authority and how the Tribunal should focus its approach in this area.

LEGISLATION

[27] Paragraph 30(2)(*a*), subsection 30(4) and section 33 of the *PSEA* are relevant:

> **30.** (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
>
> **30.** (4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.
>
> **33.** In making an appointment, the Commission may use an advertised or non-advertised appointment process.

[28] This complaint is made under paragraph 77(1)(*b*) of the *PSEA*:

> **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; or

[29] Abuse of authority is not defined in the *PSEA*, however, subsection 2(4) provides the following:

> **2.** (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.

ANALYSIS

[30] Under the former PSEA, appointments without competition were permitted. However, relative merit still applied in that the ground for appeal was that relative merit had not been achieved. Practically speaking, once an appeal was filed, the respondent had to conduct an assessment and determine whether the appellant or the appointed person was more qualified. This complaint has been framed and presented based on the staffing and recourse system that existed under the former PSEA.

[31] There is no dispute that the complainant may well be qualified for the Senior Policy/Research Advisor position. There is also no dispute that Ms. Jory was the only one considered for appointment. These facts, in and of themselves, do not contravene the *PSEA* and do not individually or collectively equate to abuse of authority.

[32] The former system of mandatory relative merit no longer exists. There is considerable discretion when it comes to staffing matters. Clearly, a Deputy Head, as the PSC's delegate, has discretion to choose between an advertised and a non-advertised appointment process. Moreover, considering only one person, as was done in this case, is also discretionary and specifically authorized by subsection 30(4) of the *PSEA.*

[33] However, this does not mean that the *PSEA* provides absolute discretion. Paragraph 77(1)(*b*) of the *PSEA* provides for a direct challenge of the discretionary choice between an advertised and a non-advertised appointment process, on the ground of abuse of authority.

[34] The Tribunal has established that merely choosing to conduct a non-advertised process is not an abuse of authority in itself. A complainant must establish, on a balance of probabilities, that the decision to choose a non-advertised appointment process was an abuse of authority. See, for example: *Rozka et al. v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2007] PSST 0046.

[35] The situation, as explained by Mr. MacDonald, is that he was given responsibility for the consolidated CBRN file, and approval to create a new position. Ms. Jory had been working on some aspects of the CBRN file, and she was moved into the S&TPD. Ms. Jory was assigned to the new, unclassified position which consisted of some of her former duties and some new duties. The position was classified with a retroactive effective date, and Ms. Jory was accorded acting pay for that period. Ms. Jory was also found to be qualified as a result of an advertised process for various ES-06 positions in another Branch within the former Department of Public Safety and Emergency Preparedness. All these events took place within approximately a one month time period.

[36] Based on the evidence, the Tribunal finds that Mr. MacDonald had a new mandate to deliver. He had an employee with the experience he was looking for, who had qualified at the ES-06 level. He determined that the circumstances fit one of Public Safety Canada's criteria for making a non-advertised appointment. He conducted an independent assessment of the employee, using the generic ES-06 SMC, and determined that she met the essential qualifications for the position to be staffed. He decided to appoint the employee on a non-advertised basis, subject to approval of the DM.

[37] The Tribunal has not been presented with any evidence to support a finding that Mr. MacDonald's decision to choose a non-advertised appointment process to appoint Ms. Jory to the position of Senior Policy/Research Advisor constitutes an abuse of authority.

[38] The fact that some employees, including the complainant, did not know in advance about Ms. Jory's non-advertised appointment is not evidence of abuse of authority. As the respondent points out, there will likely not, nor does there need to, be prior notice that a non-advertised appointment process is being conducted.

[39] The Tribunal finds that the measures that were taken to ensure transparency in this appointment process were adequate. Mr. MacDonald stated that employees in the Branch where the S&TPD is situated were told of the plan to staff the position in this manner. As required by the *PSEA*, a Notice of Appointment or Proposal of Appointment was posted and recourse was made available.

[40] The complainant alleges that Ms. Jory was favoured by being assigned the position on an acting basis before it was classified and, again, when she was appointed on a non-advertised basis. Subsection 2(4) of the *PSEA* specifies that **personal favouritism** constitutes abuse of authority.

[41] In *Carlson-Needham and Borden v. Deputy Minister of National Defence et al.*, [2007] PSST 0038, the Tribunal determined that a complainant must present convincing evidence of personal favouritism. In *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, the Tribunal further developed the concept of personal favouritism. The Tribunal explained, at paragraph 41, as follows:

> […] Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

The Tribunal also held in *Glasgow* that evidence of personal favouritism can be direct or circumstantial.

[42] In this case, the complainant has not provided any evidence, either direct or circumstantial, to support a claim of personal favouritism. Conversely, Mr. MacDonald described his very limited, professional interaction with Ms. Jory prior to her appointment, and the circumstances under which he decided to appoint her using a non-advertised appointment process. Mr. MacDonald testified in a clear and

straightforward manner. Moreover, his testimony regarding the extent of his relationship with the appointee was not challenged in any material way.

[43] Finally, the complainant contends that Mr. MacDonald obtained the DM's approval for the non-advertised appointment of Ms. Jory based on misleading information. The request for the DM's approval was entered into evidence, and Mr. MacDonald was cross-examined on its content.

[44] The information raised by the complainant, which is summarized at paragraph 9 of these reasons, is not, in fact, included in the request for the DM's approval of Ms. Jory's non-advertised appointment. It is additional information, and somewhat more detailed. However, it does not contradict the information that was submitted to the DM.

[45] The complainant has not explained to the Tribunal's satisfaction how the more detailed information would, or even might, have altered the DM's decision. The complainant's argument is mere speculation; she has not presented any evidence to support her allegation. Accordingly, the complainant has not established that the DM's approval of Ms. Jory's non-advertised appointment was obtained based on misleading information.

[46] Finally, as summarized in paragraph 10 above, the complainant argued that some of the respondent's actions had been done in bad faith. The complainant did not allege bad faith in her pleadings. Moreover, the complainant did not produce any evidence of bad faith at the hearing. Accordingly, the Tribunal finds that any claim based on bad faith is not substantiated.

DECISION

[47] For the reasons set out above, the complaint is dismissed.

Merri Beattie
Member

PARTIES OF RECORD

Tribunal File:	2007-0088
Style of Cause:	*Kathryn Clout and the Deputy Minister of Public Safety and Emergency Preparedness et al.*
Hearing:	January 9-10, 2008 Ottawa, Ontario
Date of Reasons:	September 2, 2008
APPEARANCES:	
Helen Friel	For the complainant
Jennifer Champagne	For the respondent
John Unrau	For the Public Service Commission
None	For the other party