



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2007-0024, 2007-0182 AND 2007-0187

OTTAWA, SEPTEMBER 25, 2008

YVES-CYRILLE ROBERT AND HEIDI SABOURIN

COMPLAINANTS

AND

THE DEPUTY MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaints of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
DECISION	Complaints are substantiated
DECISION RENDERED BY	Helen Barkley, Member
LANGUAGE OF DECISION	English
INDEXED	<i>Robert and Sabourin v. Deputy Minister of Citizenship and Immigration et al.</i>
NEUTRAL CITATION	2008 PSST 0024

REASONS FOR DECISION

INTRODUCTION

[1] Yves-Cyrille Robert and Heidi Sabourin filed complaints with the Public Service Staffing Tribunal (the Tribunal) concerning the acting appointment of Melissa Gomes to the position of Ministerial Advisor (PM-05), Citizenship and Immigration Canada (the CIC). They allege that the respondent, the Deputy Minister of CIC, abused his authority by choosing a non-advertised appointment process. They further allege that the respondent acted in bad faith and favoured an employee who did not have all of the essential qualifications for the position. Furthermore the respondent failed to give proper notification of the appointment.

[2] Ms. Gomes was appointed to the position of Ministerial Advisor on an acting basis for the following periods of time: September 11 to November 10, 2006; November 11, 2006 to January 9, 2007; January 10 to February 26, 2007; and, February 27 to March 16, 2007. Notification of the acting appointment was posted on April 13, 2007.

ISSUES

[3] The issues that the Tribunal must address are:

- (i) Did the respondent abuse its authority in choosing a non-advertised appointment process?
- (ii) Did the respondent abuse its authority by acting in bad faith and favouring an employee who did not meet all of the essential qualifications for the position?

SUMMARY OF RELEVANT EVIDENCE

[4] Mr. Robert testified that he wrote to Graham Alldridge, Director, Case Review, Case Management Branch (CMB) on August 28, 2006. In this correspondence, he indicated that he would like to be considered for Alain Tassé's position as Ministerial Advisor, once Mr. Tassé retired in September 2006. In his written response, Mr. Alldridge stated that it was his intention to deploy an officer at the PM-05 level to that position.

[5] However, on September 12, 2006 employees were advised in an email from Louise Downs, Ministerial Advisor, that Melissa Gomes had joined the unit as a Ministerial Advisor “for an indefinite period of time.”

[6] Since there was no official notification of this staffing action, Mr. Robert submitted a grievance in September 2006. In January 2007, when the acting appointment reached four months duration, Mr. Robert filed a complaint with the Tribunal. When official notification of this staffing action was finally published on April 13, 2007, Mr. Robert and Heidi Sabourin filed complaints to the Tribunal. The notification stated that the duration of the acting appointment was from September 11, 2006 to February 26, 2007.

[7] Mr. Robert stated that he has worked in the CMB since 1997 as an Immigration Analyst at the PM-04 level. He is bilingual and fully qualified for the position. He was not approached between September 2006 and February 2007 to act in the position of Ministerial Advisor, even though he had made his interest known in August 2006. According to Mr. Robert, there were many other qualified bilingual employees at the PM-04 level in the CMB who were never given an opportunity to apply for the position of Ministerial Advisor.

[8] Mr. Robert stated further that Ms. Gomes does not meet the linguistic requirements for the position (BBB/BBB). A number of other employees at the PM-04 level do meet the linguistic requirements, but were not considered.

[9] Ms. Sabourin testified that her substantive position is in the CMB. However, she is currently on assignment with the Operational Management and Coordination Unit of CIC. She has worked for CIC since 1991. She performed the duties of Ministerial Advisor for a period of eight months in 2003. She meets the linguistic requirements for the position. She also had several other acting appointments at the PM-05 level. During August and September 2006, she was on leave with income averaging. However, Ms. Sabourin stated that she would have come back from leave to assume the duties of this PM-05 position. She testified that she was never asked whether she was interested in the position.

[10] Following Ms. Gomes' acting appointments, an advertised appointment process was conducted in April 2007 to fill the Ministerial Advisor position on a short-term basis. Ms. Sabourin applied, but was not found qualified, having failed by ½ mark.

[11] Eleven other witnesses who worked at the PM-04 group and level in the CMB testified at the hearing. Each of the witnesses testified that he or she is bilingual and meets the linguistic profile for the Ministerial Advisor position. None of the witnesses was approached to act in that position between September 2006 and February 2007. The following is a summary of the other salient points of their testimony.

[12] Diane Séguin Bacon and Rémi Larivière stated that there was an email notice in early April 2007 asking for expressions of interest for short-term appointments and each had submitted his or her name. They were found qualified. Ms. Séguin Bacon acted as a Ministerial Advisor from May 22 to September 21, 2007. Mr. Lariviere joined CMB in April 2006 and was found qualified for the Ministerial Advisor position in April 2007.

[13] Delmy Rivera had experience acting in the Ministerial Advisor position for two weeks in 2004. She confirmed that she was on annual leave from September 26 to October 5, 2006 and, again, from December 12, 2006 to January 5, 2007. She was on temporary duty in Nairobi from mid-February to the end of March, 2007. She had an acting appointment in the Director General's office from August until November 2007. She did not know if managers were not extending assignments in 2006-07. Colleagues were recalled from acting appointments in 2004-05. The workload in the litigation unit was always intense.

[14] The following witnesses confirmed in their testimony that they were not interested in acting in the position of Ministerial Advisor: Christine Wannamaker, Robert Génier, John Warner, Gina Champagne, Judith Lauson-Domingue and Nicole Campbell. Although Ms. Champagne was not interested in the position, she had never informed Mr. Alldridge of this.

[15] Alexandra Hiles testified that she joined the CMB in August 2006. She confirmed that she did not have experience in applying citizenship legislation at that time, one of the experience qualifications for the Ministerial Advisor position. However, she was

found qualified for the position in April 2007. Katherine Dupuis stated she was hired into CMB on October 2, 2006, coming from the Canada Border Services Agency.

[16] Riaz Kara stated that he was the Human Resources Advisor in CMB in 2006-07. He testified that, in response to a request to extend the acting appointment of Melissa Gomes in the position of Ministerial Advisor, he wrote the following email to Mr. Alldridge on Nov. 14, 2006:

Having reviewed this request for acting extension, I would like to make some comments. While the acting extension does not go over 4 months and is well within your discretion, I would suggest taking a closer look at the actor and the situation surrounding your branch. As you know, labor relations is currently working on a grievance which was filed against Case Management and part of this grievance directly related to Melissa Gomes acting at the PM-05 level. Ms. Gomes did not qualify in the PM-05 pool which was run and therefore, may not be the ideal candidate to be acting at that level. Having not qualified in the pool is indicative of her not possessing all the abilities to perform the duties of the job. Though she has had many stints as an actor at the PM-05 level, I would suggest finding another person to act in the position, running a process to fill the position or even drawing from deployment/casuals. Since a grievance has already been made, it would not be best practice to have Ms. Gomes continue acting. If you'd like to meet regarding this issue, I'm happy to sit down with any or all of you.

[17] Mr. Kara stated that he discussed this with the managers involved (Graham Alldridge, Stéphane Larue and Linda Martin) who told him that, while the concerns he raised were valid, they did not apply in this situation. Since the appointment was less than four months at that point, the linguistic requirement did not apply. When Ms. Gomes' acting appointment went over four months in January 2007, Mr. Kara said he met with management and informed them that they would have to post notification of this appointment. Mr. Alldridge was to forward the relevant information to human resources.

[18] The notification was posted on April 13, 2007. Mr. Kara stated that notice is usually posted before the date of extension, or close to the four month mark. It was unusual to post notification this far beyond the four month mark. He explained that the position required an official language proficiency of BBB. However, he had authorized the notation on the notification, which stated that the language proficiency was "Bilingual Excluded – Level: BBB/BBB". According to Mr. Kara, the *Public Service Employment Regulations* (the *PSEER*) permit a manager to appoint a person who is not bilingual to a bilingual position if the position cannot be filled with a qualified bilingual person. Mr. Kara testified that he had been informed by Mr. Alldridge in February 2007 that an

environmental scan had been completed and no one was qualified to do the job except Ms. Gomes.

[19] Graham Alldridge testified on behalf of the respondent. He stated that he had retired from his position on April 20, 2007, although his last day of work was March 18, 2007. He stated that Case Review was made up of four areas – immigration cases, citizenship cases, danger to the public - rehabilitation section, and ministerial advisors.

[20] In the Ministerial Advisor section, there were three or four PM-05 positions. Ministerial Advisors provide the interface between the Department of Citizenship and Immigration and the Offices of the Minister of CIC and the Minister of Public Safety on high profile cases and complex, contentious issues. Ministerial Advisors prepare case summaries and recommend various options to address these issues. As such, they are a critical link between the Ministers' Offices and CIC. Moreover, they must carry out the Ministers' instructions expeditiously. It was Mr. Alldridge's assessment that there had to be at least two Ministerial Advisors on site at all times.

[21] One of the Ministerial Advisors, Rebecca Scott, was on assignment with the Corporate Secretary's office. Jane Turner had agreed to take an assignment at level (PM-05) into this position, but she became ill in September 2006. Because of the critical nature of the position, Mr. Alldridge decided he should fill it immediately. He expected Ms. Turner to come back to work within two months. Having considered the PM-04 officers available, he determined that Ms. Gomes was the right fit for this short-term assignment.

[22] On November 8, 2006 Mr. Alldridge was informed that Ms. Turner would not be returning to work, so he extended the acting appointment of Ms. Gomes. Near the end of the year, he was informed by Ms. Turner that she would not be coming to work as a Ministerial Advisor. At the end of December 2006, a new Minister was appointed. Mr. Alldridge wanted to ensure that there was continuity in advising the Ministers' Offices. Accordingly, Mr. Alldridge extended the acting appointment of Ms. Gomes as Ministerial Advisor from January 9 to February 26, 2007.

[23] Ms. Scott returned to her position as Ministerial Advisor on February 26, 2007 but another Ministerial Advisor, Louise Down, took three weeks' leave. Mr. Alldridge

appointed Ms. Gomes to Ms. Down's position for that three week period to ensure continuity with the Ministers' Offices.

[24] With respect to the email dated September 12, 2006 announcing that Ms. Gomes would be acting for an indefinite period, Mr. Alldridge stated that the message had been sent out by one of the Ministerial Advisors. The statement was simply not true, and it was never his intention to give Ms. Gomes a permanent job as a Ministerial Advisor.

[25] Mr. Alldridge stated that he wanted to initiate an advertised appointment process to have Mr. Tassé's position, and any other vacant positions, filled. However, the work description for Ministerial Advisor had been written in 1999 and was completely out-of-date. It needed to be re-written and a statement of merit criteria developed before an appointment process could proceed.

[26] Ms. Gomes started in Case Review as an Immigration Analyst in 2003. Mr. Alldridge was aware of her qualifications through her curriculum vitae and discussions with her. In deciding that Melissa Gomes was the right fit, he looked at two factors: first, the presence of staff who were on-site; and, second, the workflow impact to the section which would lose an employee for the period of the acting appointment. He did an informal assessment of Ms. Gomes' knowledge, experience, personal suitability and skills. The position requires experience in the application of the *Immigration and Refugee Protection Act* and the *Citizenship Act*. As well, experience in an operational milieu and in dealing with the public is required. The ability to communicate orally and in writing is extremely important in order to explain the two pieces of complex legislation to staff in the Ministers' Offices. The appointee must be able to work under pressure and with the tight deadlines imposed by the Ministers' Offices. Personal suitability includes tact, judgement and good interpersonal relationships. On a review of all these elements, Mr. Alldridge concluded that Ms. Gomes was the best fit and the most qualified for the job.

[27] Mr. Alldridge had informally considered other employees. Ms. Séguin Bacon and Ms. Rivera were working in Litigation Management and that section was overwhelmed with work, which just kept increasing. Ms. Séguin Bacon's supervisor decided she would not offer assignments out of her unit. Ms. Rivera was allowed to go to Nairobi

in October, so her supervisor would not allow her another assignment. Christine Wannamaker wanted to go and work in the Danger to the Public - Rehabilitation Unit, and Mr. Alldridge allowed her to do so. Mr. Larivière arrived in the CMB in April 2006 and needed more experience in immigration cases before being assigned additional duties. Ms. Dupuis and Ms. Hiles had recently joined CMB. Mr. Génier had told Mr. Alldridge that he was not interested in the Ministerial Advisor position sometime in 2005. Mr. Warner and Ms. Champagne were busy in their respective areas with high profile cases. Ms. Campbell and Ms. Lauzon had no immigration experience.

[28] Mr. Alldridge testified that it was important to provide service to CIC and the two Ministers' Offices to ensure harmonious working relationships. Taking someone off important work, such as in the case of Gina Champagne, would have had an adverse effect on morale. Mr. Alldridge further stated that he considered who was available and thought about the situation each time he had to extend the acting appointment.

[29] With respect to Ms. Sabourin, Mr. Alldridge testified that she was acting in a Ministerial Advisor position when he arrived in CMB in 2003. She informed him that she did not wish to continue in that position and was given an assignment as Senior Analyst, Immigration Cases. In September 2006, she was on leave with income averaging and was not in the workplace. According to Mr. Alldridge, Ms. Sabourin was not considered for the appointment as acting Ministerial Advisor as she was not interested. She had informed Mr. Alldridge in November 2006 that, if she could not leave CMB, she wanted to leave Immigration Cases. She was able to secure an assignment with the Litigation Management section. Mr. Alldridge stated that she was one of the most experienced officers and could certainly do the job of Ministerial Advisor. He did not speak to her about this position in December 2006 or January 2007, as she was working in the Litigation Management section.

[30] According to Mr. Alldridge, Mr. Robert was the only person who had expressed interest in the Ministerial Advisor position. However, he had no *Citizenship Act* experience. As well, Mr. Alldridge stated that there were some issues surrounding Mr. Robert's interpersonal relationships which he found troubling. Tact and judgement in developing relationships with the staff in Ministers' Offices was a very important aspect

of the Ministerial Advisor position and, in Mr. Alldridge's opinion, Mr. Robert was not an appropriate choice.

[31] In response to a question as to why he did not advertise the acting opportunity, Mr. Alldridge stated that it was never his intention that it would be for a long time. However, he was faced with Jane Turner informing him on several occasions that she would be unable to come to work for two months. At the end of each acting period, he considered who was available and concluded that Ms. Gomes was the right fit for the job. While she was not bilingual, there was an exception to meeting that requirement, provided there was no other suitable bilingual candidate.

[32] In terms of Mr. Kara's concerns, Mr. Alldridge stated that the fact Ms. Gomes had not qualified in a pool for Policy and Program Specialists (PM-05) was irrelevant to the Ministerial Advisor position. The qualifications for Policy and Program Specialist positions were not the same as the qualifications for the position of Ministerial Advisor.

[33] The notification of the acting appointment was published after Mr. Alldridge retired. Mr. Alldridge stated that the notification could not be published in January 2007, when the acting appointment went over four months, as there was no Statement of Merit Criteria (SMC). In October or November 2006, Mr. Alldridge requested that a contractor be hired to write a SMC so that an advertised process could be run, and so that Ms. Gomes could be assessed against the SMC.

[34] Mr. Alldridge did not provide a written rationale for his choice of appointment through a non-advertised process. He testified that he was unaware that this was required. He knew that he could use a non-advertised process for an acting appointment under 12 months.

[35] Stéphane Larue, Director General, CMB, testified. He has been in his position since mid-August 2006. Mr. Larue stated that an email was sent out on October 18, 2006 to clarify the email that indicated that Ms. Gomes would be working as a Ministerial Advisor "for an indefinite period of time." The October 18 email clarified that she was acting until mid-November 2006.

[36] In response to the question as to why there was no notification of appointment in January 2007, Mr. Larue stated that notification could only be published once the SMC was developed and Ms. Gomes was assessed. The contractor hired had not produced an accurate SMC so it had to be completed within the CMB. Mr. Larue assessed Ms. Gomes using her personnel file, her curriculum vitae, and some input directly from her. He signed off the assessment of Ms. Gomes on April 17, 2007. The assessment confirmed that Ms. Gomes met all criteria except the language requirement.

A) COMPLAINANTS' ARGUMENTS

[37] The complainants allege that Mr. Alldridge abused his authority in the choosing a non-advertised appointment process to appoint Ms. Gomes to the position of Ministerial Advisor. At least three employees within CMB (Ms. Sabourin, Ms. Wannamaker and Ms. Rivera) had already performed the duties on an acting basis in the past and, yet, they were not given an opportunity to express their interest.

[38] There were at least 12 employees at the PM-04 level who were bilingual, but were not considered for the bilingual Ministerial Advisor position. At least four of those were interested in the position (Ms. Rivera, Ms. Bacon-Séguin, Ms. Sabourin and Mr. Robert).

[39] It was evident from Mr. Alldridge's testimony that he did not understand the new staffing regime or its requirements. He did not know the HR Plan. He was unaware of the PSC policy which requires a written rationale for the use of a non-advertised appointment process. He was also unfamiliar with departmental policies. Despite all of this, he insisted that Ms. Gomes was the right fit for the Ministerial Advisor position without conducting any assessment of her qualifications.

[40] There is no dispute that Ms. Gomes did not meet the bilingual language requirement for the position. Moreover, no assessment of Ms. Gomes' other qualifications was carried out until two months after her acting appointment ended. At that time, the Director General prepared a lengthy written assessment. Mr. Alldridge, the hiring manager, stated that Ms. Gomes was evaluated against the Ministerial Advisor job description each time the appointment was extended. However, he admitted that

this job description was very out-of-date; it was so out-of-date that he could not conduct an advertised appointment process.

[41] Mr. Kara, the Human Resources Advisor, expressed concerns about Ms. Gomes' qualifications in November 2006. She had participated, but had not qualified, in a recent pool for PM-05 positions.

[42] The respondent was not transparent during the process. Mr. Robert sought information as early as September 2006 about the length of the appointment and, yet, was not given any information. In January 2007, Mr. Larue admitted that the acting appointment was longer than four months, but still no information was provided. Although the respondent now admits that they made an error, this is not sufficient. The respondent contravened the *PSEA* by not posting notification of the appointment until three months after it became subject to merit and recourse, and by failing to complete a timely assessment of Ms. Gomes' qualifications. The respondent acted in bad faith by extending Ms. Gomes' appointment, even though she did not meet one of the essential qualifications. It could not be said that Ms. Gomes was the only suitable candidate.

B) RESPONDENT'S ARGUMENTS

[43] The respondent submits that, although the complainants have referred to a number of acting appointments by Ms. Gomes, the Tribunal only has jurisdiction to consider the appointments from September 11, 2006 to February 26, 2007, namely three short appointments. Notice was required as of January 11, 2007 when there had been a continuous acting appointment for four months or more. The acting appointment from February 27 to March 16, 2007 was to a different Ministerial Advisor position to replace an employee on holidays, and should not be seen as a continuation of the previous acting appointment.

[44] The manager intended that Ms. Gomes' acting appointment would be of short duration to replace an employee on sick leave. However, it became necessary to extend the acting appointment twice and, on the second extension in January 2007, the appointment became subject to complaint.

[45] Subsection 15(1) of the *PSEER* permits a manager to appoint a unilingual employee to a bilingual position for a period of not more than 12 months, provided the manager cannot fill the position with a person who meets the language proficiency qualification.

[46] With respect to the choice of non-advertised process, section 33 of the *PSEA* provides management with flexibility; there is no preference of one type of appointment process over another. Mr. Alldridge had good knowledge of his unit, and it was his conclusion that he could not fill the position with someone bilingual. Subsection 30(4) of the *PSEA* provides that a manager does not have to compare the appointee with others in the unit. The respondent has established criteria for non-advertised appointment processes; one criterion is that a non-advertised process may be used for an acting appointment for up to 12 months.

[47] The respondent further submits that there was compelling evidence that the position could not be filled by anyone else. The other employees were either unavailable, not interested, or not qualified. Mr. Robert was not qualified, and Ms. Sabourin was on leave when the initial appointment was made.

[48] Once management realized that employees in the area of recourse had to be notified, they contracted to have the Statement of Merit Criteria written. They were delayed and ended up creating this document themselves, but the delay had no impact on the right to recourse for employees; they were still able to file complaints.

[49] There was a rationale for conducting a non-advertised appointment process, although it was not done in writing. This was an omission, but was not a contravention of the legislation; it was a contravention of policy. Mr. Alldridge testified that he was simply not aware that he had to complete a written rationale. He knew that he could use a non-advertised process for a short-term acting appointment; he had no idea that the appointment would have to be extended twice due to Ms. Turner's illness.

[50] Finally, the respondent submits that the complainants have not met the onus placed on them to show that the respondent has abused its authority. Abuse of authority is a serious allegation and complainants must present clear and convincing evidence of abuse, which was not done in this case.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[51] The Public Service Commission (the PSC) provided general written submissions on the concept of abuse of authority and how the PSC suggests the Tribunal focus its approach to abuse of authority. The PSC submits that, to make a finding of abuse of authority in an appointment process, the Tribunal must make a finding of improper intention on the part of the respondent. Errors or omissions do not constitute an abuse of authority, unless a party has shown "serious carelessness or recklessness" such that bad faith may be presumed.

[52] With respect to this particular case, the PSC states that the *PSEER* allows for the exceptional circumstance where no other person is available for an acting appointment to a bilingual position. When examining this issue, the Tribunal should consider whether the review or scan of employees was conducted with such recklessness or serious carelessness that one could impute bad faith on the part of the manager.

[53] In terms of the choice of appointment process, Mr. Alldridge chose to conduct a non-advertised process. The respondent is subject, under section 16 of the *PSEA*, to any policies established by the PSC under subsection 29(3) of the *PSEA*, including the Choice of Appointment Process policy. This policy requires that deputy heads "ensure that a written rationale demonstrates how a non-advertised process meets the established criteria and the appointment values." The respondent did not comply with this part of the policy. However, the PSC submits, to make a finding that this error amounted to an abuse of authority, the Tribunal would have to find that this breach was made in bad faith or with recklessness. With respect to the linguistic qualification, the PSC states that it takes official language requirements very seriously. It would have been preferable if the manager had made a written record of his scan or review of employees, when he determined that there was no one qualified and available for appointment who met the linguistic requirements of the position.

RELEVANT LEGAL AND POLICY PROVISIONS

[54] These complainants were filed under section 77 of the *Public Service Employment Act*, S.C. 2003, c.22, ss. 12, 13 (the *PSEA*) which makes reference to the

criteria for making an appointment on the basis of merit in subsection 30(2) of the *PSEA*. These provisions read, in part, 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);

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

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 (...)

(emphasis added)

[55] The authority of the PSC to establish policies is contained in section 16 and subsection 29(3) of the *PSEA*, which read as follows:

16. In exercising or performing any of the Commission's powers and functions pursuant to section 15, a deputy head is subject to any policies established by the Commission under subsection 29(3).

29. (3) The Commission may establish policies respecting the manner of making and revoking appointments and taking corrective action.

[56] The following provisions of the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*) pertain to acting appointments:

13. The Commission shall, **at the time that the following acting appointments are made or proposed**, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:

(a) an acting appointment of four months or more;

(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.

(emphasis added)

14. (1) An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.

(2) Despite subsection (1), the provision of paragraph 30(2)(a) of the Act respecting official language proficiency continues to apply in the case of an acting appointment of less than four months to a vacant bilingual position if

(a) the Commission is able to fill the position with an appointment of a person who meets the language proficiency qualification; or

(b) the cumulative period of the acting appointments of all persons in that position is four months or more.

15. (1) Subject to subsection (2), an acting appointment of four months or more but not more than twelve months to an encumbered bilingual position **that the Commission cannot fill with an acting appointment of a person who meets the language proficiency qualification** under paragraph 30(2)(a) of the Act is excluded from the application of that paragraph respecting official language proficiency.

(2) Subsection (1) does not apply to an acting appointment to the same position if the cumulative period of the acting appointments of all persons in that position is more than twelve months.

16. (1) Subject to subsection (2), an acting appointment of four months or more but not more than eighteen months to a bilingual position, while the incumbent is on language training, that the Commission cannot fill with an acting appointment of a person who meets the language proficiency qualification under paragraph 30(2)(a) of the Act is excluded from the application of that paragraph respecting official language proficiency.

(2) Subsection (1) does not apply to an acting appointment to the same position if the cumulative period of the acting appointments of all persons in that position is more than eighteen months.

(emphasis added)

[57] The following provisions of PSC and CIC policies on the Choice of Appointment Process are relevant:

PSC Policy on Choice of Appointment Process

Policy Requirements

In addition to being accountable for respecting the policy statement, deputy heads must:

- respect any requirements and procedures implemented to administer priority entitlements (e.g., mandatory use of an inventory);
- establish a monitoring and review mechanism for the following appointment processes:
 - acting appointments over 12 months;
 - the appointment of casual workers to term or indeterminate status through non-advertised processes; and
 - appointments to the EX group through non-advertised processes;
- establish and communicate criteria for the use of non-advertised processes; and

- ensure that **a written rationale demonstrates** how a non-advertised process meets the **established criteria and the appointment values**.
 - This requirement does not apply to acting appointments of less than four months, except where the same person is appointed to the same position on an acting basis within 30 calendar days.

(emphasis added)

CIC policy on Criteria for Non-advertised Appointment process:

2. Essential Elements

2.1 the choice of non-advertised appointment processes must be consistent with:

- (a) The Branch/Regional Human Resources Operational Plan;
- (b) The departmental criteria;
- (c) The PSC and the departmental policies on Choice of Appointment process; and
- (d) The appointment values of fairness, access and transparency.

2.2 managers must provide a written rationale demonstrating how the non-advertised appointment process is consistent with the above requirements. A written rationale must be prepared by the manager and kept on the staffing file. (...)

(emphasis added)

4. Internal Non-advertised Appointment Process

An internal non-advertised appointment process may be used in the following situations:

(...)

- (h) Acting appointment for up to 12 months. (...)

ANALYSIS

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

[58] The complainant argues that the respondent was not transparent in this appointment process and should have considered other employees. However, managers have the discretion to choose between an advertised and non-advertised process under section 33 of the *PSEA* and considering only one person is expressly authorized under subsection 30(4). In *Clout v. Deputy Minister of Public Safety and Emergency Preparedness et al.* [2008] PSST 0022, the Tribunal stated:

[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.

[59] The Preamble to the *PSEA* sets out the legislative purpose of the Act and refers to a public service that embodies "transparent employment practices". The *Canadian Oxford Dictionary* defines transparent, with reference to transactions and activities in business and government, as "open to examination by the public". Thus, for non-advertised appointment processes, persons in the area of recourse may complain to the Tribunal on the ground of abuse of authority. The *PSEA* requires that persons in the area of recourse be notified of appointments made or proposed.

[60] Policies of the PSC also ensure that there are transparent employment practices. The policy on notification requires that persons in the area of recourse are notified of their right to complain. With respect to non-advertised appointment processes, PSC policy requires that deputy heads establish and communicate criteria for the use of non-advertised processes, and requires a written rationale. These requirements ensure there is a written record of decisions made.

[61] The *Public Service Staffing Tribunal Regulations* provide for exchange of all information relevant to the complaint. It is in these ways that the *PSEA* and policies made under it ensure transparent employment practices. And this is the reason why it is so important that managers follow the requirements of the legislation.

[62] Mr. Alldridge testified that he was unaware of the requirement for a written rationale, but was aware that one of the criteria for the use of a non-advertised process was for an acting appointment of less than 12 months. It was for that reason that he had used a non-advertised process. He indicated that he had considered other persons in

the CMB, but they were either unavailable, uninterested or were not qualified for the Ministerial Advisor position.

[63] On the evidence, the Tribunal finds that Mr. Alldridge was initially faced with an unforeseen circumstance; Ms. Turner could not assume the Ministerial Advisor position due to illness in September 2006. Therefore, he authorized the acting appointment of Ms. Gomes for two months. Due to the anticipated short duration of the acting appointment, he chose to appoint her through a non-advertised appointment process.

[64] In November 2006, he was once again advised that Ms. Turner would not be available for work for another two months due to illness and, thus, he extended the acting appointment of Ms. Gomes for another two month period, again by means of a non-advertised process.

[65] The second acting appointment expired on January 9, 2007 at which point the appointment was reaching the four month mark, and would become subject to complaint under section 77 of the *PSEA*. According to Mr. Alldridge, he needed the consistency of continuing the acting appointment of Ms. Gomes until Ms. Scott returned to her substantive position on February 27, 2007.

[66] A fourth acting appointment of Ms. Gomes to the position of Ministerial Advisor was made on February 28, 2007 for a period of three weeks. This appointment was to replace a different Ministerial Advisor who was on annual leave. The Tribunal finds that this acting appointment is subject to the provisions of the *PSEA*, through the operation of section 13 of the *PSEER*. Ms. Gomes was appointed to the position of Ministerial Advisor in a situation which extended her cumulative period in the acting appointment to four months or more. Thus this appointment was also subject to sections 30(2) and 77 of the *PSEA*.

[67] While the Tribunal has serious concerns about the process, which will be addressed below, the evidence does not support a finding that the respondent abused its authority in the *choice* of a non-advertised process. Mr. Alldridge was faced with temporary and short-term requirements for Ministerial Advisors. The criteria established by CIC allow non-advertised appointment processes for short-term acting situations of less than 12 months.

Issue II: Did the respondent abuse its authority by acting in bad faith and favouring an employee who did not meet all of the essential qualifications for the position?

[68] A number of serious errors and omissions occurred in this appointment process. The Tribunal has concluded that taken as a whole, the actions of the respondent amount to abuse of authority.

(a) Lack of written rationales

[69] After deciding on a non-advertised appointment process, Mr. Alldridge did not complete a written rationale for his choice of process on three separate occasions, which he was required to do. Under subsection 29(3) of the *PSEA*, the PSC may establish policies respecting the manner of making appointments. Pursuant to section 16 of the *PSEA*, deputy heads are subject to these policies. Contrary to the respondent's submission, this is not merely a question of policy; there is a clear obligation under the *PSEA* for deputy heads, and their delegates, to comply with PSC policies established under subsection 29(3).

[70] According to the PSC policy on Choice of Appointment Process, Mr. Alldridge was required to complete a written rationale on November 11, 2006 to demonstrate how the non-advertised process met the established criteria and the appointment values. This was not done. Neither was a written rationale completed on January 10, 2007 when the acting appointment was extended for a second time. Nor was a rationale completed on February 27, 2007 for Ms. Gomes' final acting appointment as Ministerial Advisor.

[71] The requirement to provide a written rationale for each non-advertised appointment process is also clearly set out in the CIC policy. Not only does the manager have to demonstrate how the decision meets the departmental criteria, but the rationale must demonstrate how the decision is consistent with the Human Resources Plan and the appointment values. As noted above, the written rationale is one of the important ways in achieving transparent employment practices. The Tribunal finds that failure to complete a written rationale on three separate occasions demonstrates extreme

carelessness on the part of the manager. The Tribunal considers the lack of written rationales to be serious omissions in these appointment processes.

(b) Lack of Statement of Merit Criteria

[72] The cornerstone of an appointment process in the public service is the Statement of Merit Criteria (the SMC). This is the document against which a candidate or candidates must be assessed in order to determine if an appointment is made on the basis of merit. The evidence presented in this case was that a request was made in October or November 2006, for a contractor to be hired to write a current SMC for the Ministerial Advisor position; however it was not completed until April 2007.

[73] The reason given for not posting notification of appointment or completing a timely assessment of Ms. Gomes was that no current SMC existed. Management knew in January 2007 that they would have to post notification of this acting appointment and assess Ms. Gomes. These requirements are not new – similar obligations existed under the former *PSEA*. Even though the contractor did not provide a current SMC by January, Mr. Alldridge, as an experienced Director in the CMB, was in the position to determine the qualifications needed for Ministerial Advisors. The Tribunal considers that under these circumstances, failing to have a current SMC available in January 2007 was a serious omission.

(c) Assessment against merit criteria

[74] There is no clear evidence that Ms. Gomes was assessed against the merit criteria for the Ministerial Advisor position in January 2007. In fact, Mr. Larue gave evidence that she could not be assessed until the SMC was completed in April 2007. Therefore, the respondent has failed to provide sufficient evidence that, at the time the acting appointment became subject to subsection 30(2) and section 77 of the *PSEA* in January 2007, Ms. Gomes met the essential qualifications for the position.

[75] Concerns about the continuation of Ms. Gomes' acting appointment were raised by Mr. Kara, the Human Resources Advisor, in November 2006, prior to the first extension of the acting appointment. At that time Mr. Kara raised questions about Ms. Gomes' qualifications, as well as the concerns of Mr. Robert, and suggested

several alternatives to extending the acting appointment of Ms. Gomes. Mr. Kara's concerns were dismissed by management.

[76] In *Cameron and Maheux v. Deputy Head of Service Canada et al.*, [2008] PSST 0016, the Tribunal found that a lack of assessment of the merit criteria was an abuse of authority since the delegated manager relied on insufficient material:

[85] In this case, the respondent did not tender into evidence documents that could have set out the grounds for the decision, namely the assessment report and Ms. Bouchard's *curriculum vitae*. As established in *Rinn*, for an appointment to be based on merit, the person appointed must have the essential qualifications. The weight of the evidence leads the Tribunal to conclude that the respondent did not adequately assess the merit criteria and, thus, did not meet the respondent's obligations under the *PSEA*.

[86] The Tribunal finds that the respondent did abuse its authority in relying on insufficient material to extend Ms. Bouchard's appointment, and in making that appointment even though it was not based on merit.

[77] A written assessment of Ms. Gomes was completed by Mr. Larue, Director General, on April 17, 2007 approximately four months after the appointment became subject to merit and recourse, and one month after the acting appointment ended. The Tribunal finds that the respondent erred in failing to complete a timely assessment of Ms. Gomes' qualifications on January 10, 2007. This was another serious omission, which demonstrates carelessness on the part of the respondent.

(d) Language Proficiency qualification and lack of written scan

[78] Ms. Gomes did not meet the official language proficiency qualification for the Ministerial Advisor position. This is an undisputed fact. However, the respondent relies on the exemption from meeting the official language proficiency qualification found in sections 14 to 16 of the *PSER*.

[79] Under the scheme of the *PSER*, merit and recourse do not apply to acting appointments under four months, except that the official language proficiency qualification applies to a vacant bilingual position under certain circumstances. Subsection 15(1) prescribes an exception in the case of an encumbered bilingual position; that is, a unilingual person may be appointed for a period that does not exceed twelve months, when the position *cannot* be filled with a bilingual employee.

[80] Therefore, the respondent must be able to satisfy the Tribunal that his delegate, Mr. Alldridge, was unable on January 10, 2007 to fill the position with a person who met the language proficiency qualification for the Ministerial Advisor position.

[81] The Tribunal finds that the respondent has not met its onus of showing that it could not fill the position with a bilingual employee. The Tribunal finds that there were at least 13 individuals in CMB at the PM-04 level who were bilingual, many of whom had performed duties at the PM-05 level on an acting basis in the past.

[82] At a minimum, four employees in CMB were bilingual, qualified and interested in the position. According to Mr. Alldridge, Ms. Séguin Bacon's and Ms. Rivera's supervisors would not release them to another section. He stated that the Litigation Management section was overwhelmed with work, which kept increasing. He testified that Ms. Rivera's supervisor would not let her go on assignment, as she had been allowed to go to Nairobi in October, 2006.

[83] Mr. Alldridge's testimony on this point is not substantiated. Ms. Séguin Bacon testified that while it was generally true to say that managers were not extending assignments at that time, a couple of her colleagues were allowed to go on assignments. The documentary evidence presented at the hearing shows that Ms. Rivera was allowed to go to Nairobi in February 2007. Ms. Rivera testified that she returned from annual leave on January 5, 2007. While Mr. Alldridge may well have believed that Ms. Séguin Bacon and Ms. Rivera were unavailable for this acting appointment, belief is not proof. Weighing the evidence presented at hearing, the Tribunal finds that the respondent has failed to prove that the supervisors refused to release them for an acting appointment as Ministerial Advisor on January 10, 2007.

[84] Mr. Larivière met the language proficiency qualification for the Ministerial Advisor position. Mr. Alldridge testified that the reason Mr. Larivière was not considered for the acting opportunity was that he had recently joined CMB. Mr. Larivière joined CMB in April 2006. On January 10, 2007 Mr. Larivière had nine months experience in CMB, and could no longer be considered an employee who had recently joined CMB.

[85] It is noteworthy that both Ms. Séguin Bacon and Mr. Larivière qualified in April 2007 for acting opportunities for Ministerial Advisor.

[86] The fourth person, Ms. Sabourin, testified that she was interested in the position in the fall of 2006 and would have come back from leave to take this acting position. Mr. Alldridge admitted that she was fully qualified for appointment. However, according to Mr. Alldridge, she was not interested. Mr. Alldridge admitted that he did not speak to Ms. Sabourin about this acting appointment prior to appointing Ms. Gomes on January 10, 2007. The Tribunal finds as a fact that Mr. Alldridge did not ask Ms. Sabourin whether she was interested in the position.

[87] Mr. Alldridge explained that he conducted a “scan” of PM-04 employees in CMB each time the acting appointment was extended. There is no written evidence that any scans were completed as claimed. Even if the Tribunal accepts that Mr. Alldridge did conduct a scan each time, the facts demonstrate that, at least for the January 10, 2007 extension decision, Mr. Alldridge failed to make a proper inquiry for Ms. Sabourin, Ms. Rivera, Ms. Séguin Bacon and Mr. Larivière. This lack of due diligence was serious and fatal to this staffing action. Had Mr. Alldridge conducted a proper scan, he would have realized that, at a minimum, four bilingual employees may have been available and interested. Given the obligations imposed on the respondent by subsection 15(1) of the *PSEER*, the Tribunal finds that the respondent has not met its onus of demonstrating that it could not fill the position with a person who met the language proficiency qualification.

[88] In *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044, the Tribunal articulated the following key principle:

[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.

[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. (...) 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. (...)

[89] Ms. Gomes did not meet the language qualification for the position on January 10, 2007. Therefore, her appointment was not based on merit, and the Tribunal finds that the respondent abused its authority in appointing her.

(e) Improper Notification

[90] Finally, at the time Ms. Gomes' acting appointment became subject to recourse under section 77 of the PSEA on January 10, 2007, no notification of the appointment was made as required by section 13 of the *PSEER*. Section 13 of the *PSEER* requires that persons in the area of recourse be informed of the name of the person who is appointed and their right and grounds to make a complaint. Both managers were well aware that Mr. Gomes' acting appointment was being questioned by Mr. Robert, and had been since September 2006. Despite concerns raised, the respondent exacerbated the situation by failing to notify employees on January 10, 2007. The explanation for this omission was that there was no current SMC. Notification was finally posted on April 13, 2007. The Tribunal finds that the failure to notify persons in the area of recourse in a timely manner was another omission in this case.

[91] In *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31 (QL), the Supreme Court found that it is not necessary to show intentional fault in order to establish bad faith, and that the latter should be interpreted more broadly to include serious carelessness or recklessness. The Supreme Court held as follows, at paragraph 39 (QL version):

39. These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised (Dussault and Borgeat, *supra*, vol. 4, at p. 343). [...]

[92] Having reviewed this series of acting appointments of Ms. Gomes and the multiple errors and omissions by the respondent, the Tribunal concludes that the delegated manager acted with such serious carelessness as to constitute bad faith. Therefore the Tribunal finds that the respondent abused its authority by acting in bad faith and by appointing a person who did not meet all of the essential qualifications for the position.

[93] Although favouritism was raised by the complainants during the hearing, the Tribunal finds there is no evidence of personal favouritism in this case that could constitute abuse of authority as outlined in *Glasgow v. Deputy Minister of Public Works and Government Services Canada* [2008] PSST 0007.

DECISION

[94] For the reasons stated above, these complaints are substantiated.

CORRECTIVE ACTION

[95] The Tribunal's authority with respect to corrective action is found at subsection 81(1) of the *PSEA*, which reads as follows:

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.

[96] As remedy, the complainants have requested a declaration by the Tribunal that the respondent abused its authority. They have not requested revocation or any other corrective action. In this case, the appointee had an acting appointment of six months duration, which ended in March 2007. The manager, Mr. Alldridge, has retired from the public service. In early April 2007, CIC held an advertised appointment process for short-term acting appointments to the position of Ministerial Advisor. Given all these circumstances, no revocation or further corrective action need be ordered.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal Files:	2007-0024, 2007-0182 and 2007-0187
Style of Cause:	<i>Yves-Cyrille Robert and Heidi Sabourin and the Deputy Minister of Citizenship and Immigration et al.</i>
Hearing:	October 17 and 18, 2007 and January 30 and 31, 2008 Ottawa, Ontario
Date of Reasons:	September 25, 2008
APPEARANCES:	
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Karl Chemsí	For the respondent
John Unrau	For the Public Service Commission