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

**FILES: 2007- 0048 AND 2007- 0087**

**OTTAWA, MARCH 3, 2009**

**JENNIFER BEYAK**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF NATURAL RESOURCES CANADA**

**RESPONDENT**

**AND**

**OTHER PARTIES**

| | |
|---|---|
| **MATTER** | Complaints of abuse of authority pursuant to paragraph 77(1)*(a)* and *(b)* of the *Public Service Employment Act* |
| **DECISION** | Complaints are substantiated |
| **DECISION RENDERED BY** | Guy Giguère, Chairperson |
| **LANGUAGE OF DECISION** | English |
| **INDEXED** | *Beyak v. Deputy Minister of Natural Resources Canada et al.* |
| **NEUTRAL CITATION** | 2009 PSST 0007 |

# REASONS FOR DECISION

## INTRODUCTION

[1] Jennifer Beyak filed two complaints of abuse of authority concerning the appointments of Monique Delorme as Business Development Officer. Ms. Beyak complains that the job title and description do not match the administrative duties performed by the appointee. Her allegations are broadly framed but she essentially alleges that these appointments were based on personal favouritism and that the managers involved acted in bad faith. She states that the abuse was manifest in the establishment and assessment of the essential qualifications, as well as in tailoring the job description to obtain a desired classification while requiring work of a different nature. She also complains of abuse of authority in the choice of a non-advertised process for both of these appointments. She alleges that these appointments did not comply with the policy requirements for non-advertised appointments.

[2] The respondent, the Deputy Minister of Natural Resources Canada (NRCan), denies that there was any abuse of authority in the choice of process, or in the selection of the person appointed. The respondent states that the decision to appoint Ms. Delorme was based on her past performance, the needs of the organization, and the fact that she met all of the essential qualifications for the position.

[3] The appointee, Monique Delorme, did not participate in the hearing. However, she exercised her right to be heard by filing a written reply to the allegations. She disagrees with the complainant's allegations. She states that other candidates were considered, and she was assessed against the qualifications of the position. She was told that she was selected for the opportunity to work in the Business Affairs Office and would continue to work there at her current group and level as the position had not yet been classified.

## BACKGROUND

[4] NRCan is divided into sectors, which correspond to the various activities of the organization. Mining and Mineral Sciences Laboratories (MMSL) is one of several branches of the Minerals and Metals Sector (MMS). The MMSL consists of federal

government research laboratories which provide research and scientific advice to the industry, as well as to provincial/territorial/federal government departments. The MMSL is comprised of several offices, including: the Business Affairs Office, the Climate Change Office, and the Mineralogy and Metallurgical Processing Office.

[5] Ms. Delorme started working on June 1, 2006 on an assignment in the Business Affairs Office of the MMSL at her substantive AS-02 group and level. She was later appointed retroactively in an acting capacity to the position of Business Development Officer in the Business Affairs Office of the MMSL. This was followed afterward by her indeterminate appointment to this position. Both appointments were made through non-advertised processes. The position is at the C0-01 group and level.

[6] The complaints were filed with the Public Service Staffing Tribunal (the Tribunal) under paragraphs 77(1) (*a)* and *(b)* of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*), on January 25 and February 21, 2007 (process no: 2006-RSN-ACIN-ACXT-0663-46537). These complaints were heard together and the Tribunal consolidated them for decision purposes in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*).

## PRELIMINARY ISSUE

[7] At the beginning of the hearing, the respondent raised the following preliminary matter. It took the position that the complainant did not have a personal interest in the complaints. It requested that the Tribunal make a determination on the issue before proceeding to a full hearing of the complaints.

[8] The Tribunal denied the respondent’s preliminary motion to bifurcate the hearing. The Tribunal ruled that it would make its determination on this issue in conjunction with its reasons for decision on the merits.

ISSUES

[9] To resolve these complaints the Tribunal must determine the following issues:

(i) Did the complainant have a right to complain?

(ii) Did the assignment constitute an appointment?

(iii) If the answer to question (ii) is yes, did the respondent conduct a genuine assessment process for the selection of a person to perform the functions of this position?

(iv) Did the respondent abuse its authority by choosing a non-advertised process for the acting and indeterminate appointments?

(v) Did the respondent abuse its authority by appointing Ms. Delorme?

SUMMARY OF RELEVANT EVIDENCE

EVENTS OF 2005/2006:

[10] Tom Hynes, at the time of these appointments, was the Director of the MMSL and is now Director General. In the summer of 2005, two positions were vacant in the Business Affairs Office. An employee at the AS-02 group and level was on long-term sick leave, and an employee at the AS-04 group and level had retired. There was a sector staffing freeze and, therefore, he considered an assignment to help alleviate the situation.

[11] There was a government announcement that the Climate Change Program (CCP) was ending; it was a stand-alone program that reported directly to Mr. Hynes. Lynda Wilson (PC-04) was in charge of this program. Amelia Atkin, a term employee (PC-01) assisted her. Ms. Wilson left NRCan around Christmas 2005 to work for another department. Elisabeth Giziewicz (PC-03), who replaced Ms. Wilson, left after two weeks as she found the job impossible. Two other positions figured on the organisational chart for the CCP. An Administrative Assistant (AS-01) position was

vacant and an Administrative and Financial Assistant (CR-04) position where the incumbent had moved on.

[12] Mr. Hynes explained that he did not consider it an easy job because the CCP lacked proper record keeping. The program was ending and it would be subject to an audit. Mr. Hynes testified that he could not find another scientist to take over the position and therefore he asked Monique Delorme to help work on closing this program. Ms. Delorme had been Executive Assistant (EA) to Mr. Hynes and two deputy directors for the previous one and a half years. For a time, Ms. Delorme was performing duties for the CCP and as a part-time EA.

[13] Mr. Hynes did not look for anybody else to work in the CCP. He explained that no one wanted to touch it. Mr. Hynes testified that he did not have any personal relationship with Ms. Delorme. He explained that she had a strong financial background and, at this stage, the CCP had to account for all the money that it had been granted.

[14] Mr. Hynes explained that the CCP was scheduled to end by April 1, 2006; the closing was extended, but he could not remember when. Ms. Delorme was appointed on an acting basis to the CCP to a position at the PC-01 group and level for four months less a day but he could not recall the date. No other witness could testify to these dates at the hearing and the respondent was unable to produce documents to establish these.

[15] Mr. Hynes did not believe at this point that a scientific background was required as the program was coming to an end, and all the money had been granted. However, the position required a scientific educational background as it was in the PC group. Ms. Delorme did not have this background and, therefore, she could not be appointed to this position for four months or more.

[16] On cross-examination, Mr. Hynes was asked why he did not appoint her to an administrative position since her work was primarily financial. Mr. Hynes replied that he received advice from Human Resources that it was easier to backfill an existing PC-01 position for four months less a day.

[17] On March 26, 2006 Mr. Hynes sent an email on staff changes at the MMSL. Donna Mingie-Cahill would become Manager, Chemical Analysis and Reference Materials. John MacMillan, who was a Human Resources Advisor, would be Manager, Business Affairs Office. Finally, Monique Delorme was being placed on a developmental assignment with the CCP to assist in the closing down of the office.

[18] John MacMillan testified that Ms. Delorme started to work on the CCP closure around January 2006. She was later appointed in the PC-01 position for a period of four months less a day.

[19] Around February 2006, Mr. MacMillan talked to Ms. Atkin, who with her scientific background, was looking for a job as a PC-01. Mr. MacMillan testified to the following: “We wanted to keep Amelia [Atkin]. We offered her a job in Business Affairs. She would have been extended until Jennifer [Beyak] returned.” At that time, the complainant was on maternity leave until January 2007. He explained that, as the CCP was ending, “The plan was to move Amelia in Jennifer Beyak’s position, if she had stayed.” Ms. Atkin worked at the CCP until about March 2006 when she was offered an indeterminate PC-02 position with another department.

[20] Donna Mingie-Cahill testified on behalf of the complainant. She explained that she was Manager (PC-05), Business Affairs Office, for five years. However, she was asked around January 2006 by Louise Laverdure, a Deputy Director at the MMSL, if she wanted to manage Chemical Analysis and Reference Materials. Ms. Laverdure told her that if she stayed at the Business Affairs Office there would be a lot of travel – accounting for 50% of her time. Ms. Mingie-Cahill explained that Mr. Hynes was planning extensive travel as a requirement of working in the Business Affairs Office. Ms. Mingie-Cahill hesitated to go, but felt pressured to leave her job. In the end, she decided to leave quickly and left in March 2006.

[21] Mr. MacMillan indicated that the MMSL was moving away from having scientists managing the Business Affairs Office; there was a shift taking place to employ Commerce Officers in the CO group instead. He testified that Mr. Hynes wanted him to manage the Business Affairs Office until a job description for the new position was

created and they got the position staffed. In early March 2006, the Management Committee was consulted on a replacement for Ms. Mingie-Cahill. The Management Committee was interested in having him in this position as he had a Master's degree in Business Administration, and because he was available on short notice.

[22] Mr. MacMillan acknowledged on cross-examination that he did not have any work experience in a business development office, nor had he ever worked in a CO position. Prior to this position, he had worked for five years as a Human Resources Advisor with NRCan. He was in the Business Affairs Office on assignment from his substantive position which was at the PE-04 group and level.

[23] Mr. MacMillan was asked on cross-examination whether he was more focussed on human resources work in the Business Affairs Office than management. He responded: "Yes, I carried over some HR files and was still working on some." He was also asked if he was assigned to the position by Mr. Hynes to be an in-house HR consultant in the Business Affairs Office. He answered: "It might have been a factor but not the reason."

[24] Mr. Hynes testified that there were discussions in May 2006 that Ms. Delorme would be "sent to the Business Affairs Office." On cross-examination, Mr. MacMillan acknowledged that he started to work on the paperwork to create the CO-01 position in June 2006. While there was some discussion with Mr. Hynes, it was his idea that Ms. Delorme would now be working in the Business Affairs Office.

[25] On June 1, 2006 Ms. Delorme started to perform the duties related to the CCP from the Business Affairs Office at her substantive AS-02 position. Mr. MacMillan confirmed on cross-examination that it was his plan to create a new position at the CO-01 group and level for Ms. Delorme and that she knew of his intention in June 2006. A similar position had been created in another branch of the MMS at the CO-01 group and level. However, there was no certainty that this new position would be classified at that level, or that it would be indeterminate.

[26] Mr. Hynes was asked on cross-examination whether Ms. Delorme knew that the plan was for the position to be a CO-01 when she started to work at the Business Affairs

Office in June 2006. He replied: “We thought of rolling the two things together and make it a CO-01.” However, there was no certainty as to how it would be classified. He was asked if he was aiming for a CO-01. He answered that: “[he] thought a CO-01 was appropriate.” He confirmed that PC-01 and CO-01 are equivalents in terms of pay level.

[27] On August 28, 2006 Mr. Hynes sent an email to employees of the MMSL and some other branches of the MMS advising them of an opportunity in the Business Affairs Office. Mr. Hynes drafted most of this email, with some input from Mr. MacMillan. Mr. Hynes testified that the purpose of the email was to see if anybody was interested in these duties. The email stated that a person was needed until March 2007 to close off ongoing CCP projects; it had been confirmed that the CCP would be extended for one last year. The opportunity would also involve project management work related to marketing and the administration of a web-based database of ongoing mining research. These duties would eventually be a full-time requirement as the CCP came to an end. Good financial and project management skills to track expenditures against budgets and to monitor progress against deliverables were required for this position. Interested employees were to reply to Mr. MacMillan by September 8, 2006.

[28] Mr. MacMillan testified that at the time the position had been identified as temporary until the end of March 2007. He explained that the CCP had been extended for a year, and it was decided to tell staff and see if any employees were interested.

[29] Ms. Mingie-Cahill sent an email to Mr. MacMillan on August 30, 2006 asking him what the classification of the position in the Business Affairs Office referred to in Mr. Hynes’ email was. He replied:

> The classification hasn’t been decided yet, and it could be months. It’s my hope that people will express an interest in the duties without reference to the salary. If the best person happens to above classification (*sic*), or at the classification, they can come at their present salary on an assignment.

[30] Ms. Mingie-Cahill understood from this answer that the opportunity was at level, which corresponded to a developmental assignment. Ms. Mingie-Cahill explained in cross-examination that she linked the email of March 26, 2006 announcing that Ms. Delorme was in a developmental assignment with the August 28, 2006 email, and this

was clearly the same position. As Ms. Delorme was working on closing the CCP in a developmental assignment, she assumed that Ms. Delorme was at the AS-02 group and level, which reflected her substantive position.

[31] Johanne Bourque worked in the Business Affairs Office for nine years. When she left, her position was at the AS-01 group and level. She testified for the complainant. She explained that the office staff used to have a low rotation rate with a good team spirit under Ms. Mingie-Cahill's management. Things changed when Mr. MacMillan replaced her; he did not share her open management style. Mr. MacMillan was not interested in the work of the office, and he was still involved in human resources. She found it strange that he was preparing paperwork for the staffing of the CO-01 position for Ms. Delorme.

[32] Three employees expressed interest in the job opportunity: Ms. Delorme, Karen Beaudoin and Richard Couture. An assessment board consisting of Mr. Hynes, Mr. MacMillan, and another employee who also reported to Mr. Hynes, was established. Mr. Hynes explained that he sat on the assessment board as the CCP was under his responsibility. Mr. MacMillan acknowledged on cross-examination that it was not typical for a director to sit on an assessment board for an entry-level position. However, Mr. MacMillan denied that this had any impact on his assessment of candidates, or that Mr. Hynes' motive for sitting on the board was to influence the other two board members.

[33] Following the August 28, 2006 email, Mr. Couture, a Project Manager with a scientific background, made inquiries with Ms. Bourque about the nature of this position. He met with Mr. MacMillan. As he was leaving this meeting, he told Ms. Bourque that the position was not for him as it was mostly administrative, not project management.

[34] Mr. MacMillan was asked on cross-examination whether he discussed with Ms. Beaudoin his intention to make it an indeterminate CO-01 position. He stated that he did not discuss this with people as he did not want to create expectations. He did not remember meeting with Mr. Couture.

[35] Mr. MacMillan also testified on cross-examination that he had shared a draft of the work objectives for the CO-01 position with Ms. Delorme as he wanted to have her input since she was in the position. He explained that it did not have any impact on the selection process for the assignment as there were no questions related to the work objectives. Mr. MacMillan prepared a document entitled “Work Objectives” that was a job description for the Business Development Officer position and shared this document with Ms. Delorme before sending it to classification. As well, he told Ms. Delorme that it was written for a position at the CO-01 group and level. He testified that “[he] shared that with her at some time in the fall, when [he] began writing the job description, that it would be a CO-01.”

[36] Ms. Beaudoin testified for the complainant. She explained that she was interested in the job opportunity offered in the email of August 28, 2006. She went to see Ms. Mingie-Cahill, her manager at the time, as she was previously the manager of the Business Affairs Office. Ms. Beaudoin testified that she talked to Mr. MacMillan about the position, and he indicated that it had to do with wrapping-up the CCP, and would be at level. Ms. Beaudoin explained that her substantive position was at the EG-04 group and level, which is equivalent to a CO-01 in terms of salary, and that she was interested in the experience.

[37] On October 2, 2006 the position of Manager, Business Affairs Office, at the CO-03 level, was created. Mr. MacMillan was retroactively appointed, on an acting basis, from the time he had begun the assignment. Mr. MacMillan explained that he was involved in setting up his own position by preparing work objectives, but other people, such as the Classification Officer, were involved. He testified that he did not know, and did not check to see, if a Notification of Consideration or Acting Appointment was prepared or posted for his appointment. Mr. Hynes testified that he assumed that the rationale for not advertising the CO-03 acting appointment would be prepared by Mr. MacMillan.

[38] The two remaining candidates, Ms. Delorme and Ms. Beaudoin, were interviewed in late October 2006. Mr. MacMillan explained that the board did not discuss the classification of the position with candidates as it had not been determined at the time.

He also testified that the work description for the position was not written at that time but that he wrote it later.

[39] Mr. MacMillan prepared the questions based on the duties identified in the August 28, 2006 email. There were ten questions. The first six questions were linked to managing a program with an emphasis on budget. The next two questions dealt in general terms with the marketing of the MMSL, i.e. what does the MMSL sell and what is its competitive advantage. The last questions asked candidates to provide personal examples of leadership and working under pressure. The assessment board reached consensus that Ms. Delorme was the right fit for the job.

[40] On November 29, 2006, Mr. Hynes signed a Personnel Action Request form approving the creation of the indeterminate position of Business Development Officer at the proposed CO-01 group and level. This form states that the position was "created June 1, 2006 reporting to Mr. Hynes. Effective Oct. 2, 2006 reporting relationship changed to report to the new CO-03." The form was later co-signed by Marilyn Bressan from Personnel Operations on December 5, 2006, confirming that the classification had been verified and was effective June 1, 2006.

[41] The classification was done by a specialist on contract, Brenda Miller. Mr. MacMillan prepared a document entitled Work Objectives, which were essentially the duties of the position, which was given to Ms. Miller for classification purposes. The position was officially classified on December 11, 2006 at the CO-01 group and level. On that date, two Personnel Action Request forms were signed by Mr. Hynes to authorize acting pay for Ms. Delorme. One form covered the period from June 1, 2006 to September 28, 2006 and indicated "Pay acting pay for 4 months less a day. This will be followed by a non-advertised acting pay". The other form covered the period from September 29, 2006 to September 28, 2007 and indicated "Acting appointment until indeterminate staffing to the position".

[42] Mr. MacMillan explained that Ms. Delorme was appointed on an acting basis retroactively from the beginning of the assignment in the Business Affairs Office. He stated that employees are entitled under the collective agreement to receive acting pay

if they perform duties at a higher classification and that Ms. Delorme had substantially performed the duties of the position.

[43] Mr. MacMillan testified that there was no notice of appointment posted for the retroactive acting appointment from June 1, 2006. He stated that there is a requirement to notify when an acting appointment exceeds four months. He explained that September 28, 2006 was selected as the end date for the first acting appointment because, after this date, the acting appointment would have been over four months thereby requiring notification. A notice was posted on *Publiservice* on January 10, 2007 for the second acting appointment which was from September 29, 2006 to September 28, 2007.

[44] Mr. Hynes was asked on cross-examination whether he completed an assessment of Ms. Delorme when he signed the Personnel Action Request forms. He could not recall doing so. Mr. Hynes was also asked on cross-examination about the two acting pay periods. He was asked whether he took advice from Mr. MacMillan that this was a way to legitimize a non-advertised acting appointment. He responded that this statement might be correct. He was then asked whether by proceeding in this manner, employees would be precluded from complaining about the first acting appointment. His response was “Presumably.”

EVENTS OF 2007

[45] Mr. MacMillan prepared the rationale for choosing a non-advertised process to appoint Ms. Delorme on an acting basis to the CO-01 Business Development Officer position. On January 2, 2007, he signed the rationale for the acting appointment starting June 1, 2006. Mr. Hynes signed the rationale on January 3, 2007.

[46] On January 5, 2007 Mr. Hynes signed a Personnel Action Request form to authorize the indeterminate appointment of Ms. Delorme. Mr. MacMillan testified that it was determined in January 2007 that the position would be filled indeterminately and through an internal non-advertised process. Mr. Hynes was asked on cross-examination if the plan was to appoint Ms. Delorme as of January 5, 2007 before anyone knew of the nature of the acting appointment and indeterminate appointment. Mr. Hynes’ response

was: “Possibly true. The plan was to put her in place, there was no anticipation of any objection.”

[47] A rationale was also prepared by Mr. MacMillan for the indeterminate non-advertised process, dated and signed January 29, 2007. On January 30, 2007 a Notice of Consideration was posted on *Publiservice* and the Notice of Appointment (indeterminate) of Ms. Delorme was posted on February 7, 2007.

[48] NRCan has established criteria for the use of a non-advertised appointment process. Mr. MacMillan reviewed these and explained that none reflected the situation of the appointment of Ms. Delorme. He therefore had to provide a more detailed justification for the use of a non-advertised process including an explanation on how it supported the staffing values of fairness, transparency and access.

[49] Mr. MacMillan was asked on cross-examination why he referred in both rationales to employment equity considerations as all of the staff of the Business Affairs Office had been women until he replaced the former manager. He responded that there was no gap in the representation of women in CO positions at NRCan, but that there is generally in the public service and, therefore, it was appropriate to staff the position with a woman.

[50] Mr. MacMillan testified on the content of the rationales. He explained that for both the acting and the indeterminate appointments, he wrote that if an advertised process had been held, Ms. Delorme would have been found to be the best qualified candidate and in all likelihood the only one qualified. For the acting appointment, he wrote that the merit principle was protected by recourse. As for the indeterminate appointment, he explained that prospective candidates would be given access to the appointment process through recourse because any complainant would then be considered for the position. The rationale for the indeterminate appointment mentioned that notification of the details of this process would ensure transparency. He stated that by its nature the retroactive acting appointment obviously had to be non-advertised.

[51] Mr. Hynes was asked on cross-examination if he had put his mind to preparing the rationales. He replied that Mr. MacMillan had prepared them and stated: “I don’t get

involved, left it to HR. I signed the rationales. I believe I read the document. I am accountable for it." Mr. Hynes was also asked why the rationales indicated that there was no point in considering anyone else. He replied that he did not remember this. He was then asked whether he was a trained delegated manager. He answered that he was trained enough to understand the basic principles but that it was not adequate to understand the day to day processes. He later added: "I would have been advised by HR. Anybody makes mistakes, myself and HR adviser. I believe I did the best I can."

[52] Mr. MacMillan testified that the duties of Ms. Delorme consisted mostly of closing the CCP. She also assisted him in the Business Affairs Office, preparing the latest estimates for revenues and monitoring accounts receivable. He explained on cross-examination that providing the latest estimates was a key component of Ms. Delorme's duties, amounting to half her duties. He testified that these duties had been done in the past by someone in an AS-02 position.

[53] Mr. MacMillan was then asked on cross-examination to go through the document entitled "Work Objectives" that he had prepared for the classification of the position and to indicate what duties Ms. Delorme performed while he was working at the Business Affairs Office. The work objectives are as follows:

> PROFILE / CLIENT – SERVICE RESULTS
>
> Reporting to the Manager – Business Affairs, researches markets for potential clients; prepares marketing material and promotes mining and mineral science research to the industry; promotes the division Climate Change program; researches and produces summary reports and briefing notes.
>
> KEY ACTIVITIES
>
> Research the mining industry to identify mining research consumers and create and maintain client and other files and databases of companies; analyses current and past cost-recovery data; researches and produces business statistics financial reports, and briefing notes on market segment potential for senior management.
>
> Conducts research in support of marketing strategies identified by program and other managers; contacts current and former clients for feedback and to identify their research needs; reports findings verbally and in writing.
>
> Identify external clients, universities, industry organizations, and research companies to promote scientific research and technology transfer in the mining industry.

> Produce promotional and informational materials on division programs, capabilities, and activities by collecting technical information, writing and reviewing text on divisional programs, and negotiating contracts to produce selected products.
>
> Promote the services and capabilities of the division in support of the growth, profitability, and safety of the mining industry and protection of the environment over the internet, through advertising material, and in person to representatives of companies and industry organizations over the telephone, at conferences and at trade shows.
>
> Establishing and maintaining links with the Climate Change Community in the federal, provincial and non-governmental organizations and in the private sector; monitoring agreements and reports in support of scientific research and technology transfer.
>
> Monitoring activity, collecting data, and reporting on the Key Performance Indicators, Latest Estimates, and other measures of the performance of the division in the marketplace.

[54] Mr. MacMillan conceded on cross-examination that many of these duties were not performed by Ms. Delorme. He testified that several were performed to a great extent by others or that he never assigned the duties to her. He indicated that the Work Objectives document had been written for the future. He also testified that more than half of Ms. Delorme's time was spent working on the CCP closure.

[55] Mr. MacMillan confirmed that Ms. Delorme had not created or prepared a database of mining companies. She had not researched the industry as he had done this himself. She had not prepared marketing profiles of clients. She did not analyse current and past cost-recovery data. She had not researched or prepared business statistics. She did not report research needs. She did not prepare briefing notes on market segment potential. She did not negotiate contracts as this was done by the complainant. Mr. MacMillan did not recall that Ms. Delorme attended a trade show while he was the manager. However, she did update posters as something fresh was needed for the trade shows. She prepared financial reports. She was the contact with companies on the CCP closure. She did briefing notes for Mr. Hynes on the CCP closure.

[56] Mr. MacMillan testified that he determined that Ms. Delorme met the essential qualifications for the indeterminate position by assessing her on the merit criteria. The essential and asset qualifications were as follows:

| | |
|---|---|
| Education: | Graduation, from a recognized educational institution with an acceptable certificate, diploma, or degree with an acceptable specialization in accounting, business administration, commerce, economics, law, management, or marketing. |
| Language: | Bilingual Imperative (CBC/CBC) |
| Experience: | In financial management<br>In project management |
| Knowledge: | Knowledge of project management<br>Knowledge of contract requirements for projects. |
| Abilities: | Ability to coordinate business development activities<br>Ability to market research and technology to potential external clients<br>Ability to communicate project goals, objectives, and performance expectations<br>Ability to work independently<br>Ability to work under pressure |
| Personal Suitability: | Initiative<br>Tact<br>Sound judgement<br>Effective interpersonal relationships |

Asset Qualifications

Knowledge of the Canadian mining industry

Experience in reviewing technical proposals and reports prepared by scientific experts for structure, format, clarity and completeness.

Knowledge of the mandate and organization of the Mining and Mineral Sciences Laboratories and the Climate Change program

[57] Mr. MacMillan explained that his assessment of Ms. Delorme was based on his personal knowledge and feedback from managers. He felt that she demonstrated that she met the essential qualifications, and it was in the interests of the organization to retain her because of the turnover of staff in the Business Affairs Office.

[58] Mr. MacMillan indicated in cross-examination that he prepared the Statement of Merit Criteria (SMC) before January 2007 but he could not remember the exact date. He

confirmed that the experience and knowledge required was in financial management, project management and contract requirements. He acknowledged that the requirement was for the ability to coordinate business development activities and the ability to market research and technology. He was asked about the NRCan broadband work description for a CO-01 position. This document states that the functions of such a position are to conduct research and analysis supporting economic development. It also indicates that such a position requires knowledge of research, analysis and consultation techniques, of market trends and principles of marketing and of trade development.

[59] He was asked how he could assess that Ms. Delorme had the ability to market research and technology. He believed that she had the ability to market as she looked professional and dressed well. He indicated that there is a distinction between ability to do something and doing it. He assessed that she had the ability to communicate project goals because he believed she could do it.

[60] Mr. MacMillan was also asked in cross-examination why he found it justified that Ms. Delorme would be appointed retroactively and be remunerated for duties that she was not performing. He replied that there was an entitlement in the collective agreement to receive acting pay if an employee was performing the duties of a higher level position.

[61] The complainant returned from maternity leave in early January 2007. She was a Contract Coordinator (PC-02) with the Business Affairs Office. She stated that Mr. MacMillan did not share any information willingly with employees. As well, he did not seem to understand the workings of the office. She learned from a colleague that a notice was posted on *Publiservice* for the acting appointment of Ms. Delorme as a CO-01 in their office. She explained that it was a chance discovery, as employees were not otherwise notified, and it was unusual to look at notices of CO positions since there were previously none in the office.

[62] The complainant explained that she initially dismissed the email notice of a job opportunity in August 2006 as she was not interested in an administrative position. She understood that the position was temporary as the email referred to the wrap-up of the

CCP. However, she would have expressed interest in the position if the August 28, 2006 email had reflected the job description of the CO-01 position, or had any sort of technical or scientific aspect to it. She also testified that the difference in salary between her position as a PC-02 and a CO-01 was not significant for her.

[63] The complainant explained that there was a complete disconnect between the job description of the CO-01 position and the functions described in the August 28, 2006 email, as well as the functions performed by Ms. Delorme. She testified that Ms. Delorme was performing duties of an administrative nature in the wrap-up of the CCP and never reported on any business development activities in team meetings. She also explained that Ms. Delorme coordinated administrative duties and the annual report. She prepared monthly estimates, which were previously prepared by a person in an AS-01 position. She also testified that Ms. Delorme did not perform any of the duties in business development found in the job description of the CO-01 position, and that no business development was coming out of the Business Affairs Office. The duties of Ms. Delorme on the CCP closure did not include any business development as the program did not generate revenue, but consisted of controlling expenditures.

[64] The complainant explained that the business development duties of a Business Affairs Officer would require liaising with clients at conferences or on-site to market NRCan scientific expertise. The aim of this liaising is to hopefully attract cost recovery projects, or to secure participation in a consortium of different companies. If Ms. Delorme had been doing business development, she would have had to report to the manager or the scientist in the responsible field and to discuss meetings with clients. The complainant would have heard about it in her position as Contract Coordinator as the two jobs were linked.

[65] The complainant testified that Ms. Delorme's receipt of acting pay as a PC-01 until her arrival in June 2006 in the Business Affairs Office was evidence that her appointment as a CO-01 was pre-planned and a sign of preferential treatment. In her opinion, this was another sign of personal favouritism as she did not meet the educational requirements of a PC position. She believes that the August 28, 2006 email was deliberately misleading.

[66] The complainant further testified that Ms. Delorme did not have the ability to market research and technology to potential external clients as she did not have a scientific background, and did not meet this merit criterion for the position of Business Development Officer. She stated that the SMC was tailored for Ms. Delorme. She referred to the requirement in the asset qualifications for knowledge of the CCP, which had been terminated and was not generating revenue, as an example of a qualification that should not have been essential for the position of Business Development Officer.

[67] On April 13, 2007, Ms. Laverdure issued an email advising staff that Mr. MacMillan was leaving the Business Affairs Office as of April 20, 2007. The email stated: “As you know John has been on assignment from Human Resources to the Business Office for a year.” Mr. Hynes, on cross-examination, confirmed that some managers knew that Mr. MacMillan had been appointed retroactively into a CO-03 position. He did not recall specifically asking Ms. Laverdure to send this email.

[68] Ms. Bourque testified that she was treated unfairly by Mr. MacMillan, and that he personally favoured Ms. Delorme. After the departure of an AS-02 employee, Ms. Bourque was performing some of her duties and Ms. Mingie-Cahill asked for a reassessment of the classification of Ms. Bourque’s position. Ms. Bourque testified that Mr. MacMillan unduly stopped her reclassification and, in contrast, personally favoured Ms. Delorme by appointing her to a CO-01 position from an AS-02 in such a short timeframe. She was surprised that the notification of the indeterminate appointment of Ms. Delorme came only a week or so after the notification of her retroactive acting appointment. Ms. Bourque started looking for another position, and left the Business Affairs Office on April 1, 2007.

[69] Ms. Delorme was nominated for an award for her work on the CCP closure. Ms. Mingie-Cahill explained that this was unusual as Ms. Delorme did not contribute as much as Ms. Wilson, who was responsible for the program. A team award would have been more logical. She explained, on cross-examination, that managers can propose employees for awards, but Mr. Hynes was the only one who could approve a nomination.

[70] Ms. Mingie-Cahill testified that there was no need to reward Ms. Delorme with the award as she was well compensated when her position in the Business Affairs Office was classified at the CO-01 group and level. Ms. Mingie-Cahill also explained on cross-examination that the CO-01 classification is equivalent in salary to an AS-04, which is two levels higher than Ms. Delorme's substantive AS-02 position. She testified that this is unusual, and that she had never witnessed a two-level promotion at the MMSL.

[71] Mr. Hynes testified that he was not surprised to hear that Ms. Delorme had not been performing all of the duties of the position "as it takes some time to get up to speed on things." Since Mr. MacMillan left the Business Affairs Office, three or four program managers have replaced him in rotation until a permanent replacement could be found. During the rotation, none of the managers raised any concern about Ms. Delorme. Mr. Hynes explained that she has left NRCan and now works in another department as a Financial Officer. At the time of the hearing, the position had been vacant for several months and the same SMC was in place. He confirmed in cross-examination, that the position had recently been advertised and about 20 employees expressed their interest; six were screened in.

## RELEVANT LEGISLATION AND POLICIES

[72] Abuse of authority is not defined in the *PSEA*; however, subsection 2(4) provides the following: "For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

[73] These complaints were filed under paragraph 77(1)(*a*) of the *PSEA*, which refers to the criteria for making an appointment on the basis of merit at subsection 30(2) of the *PSEA.* These complaints were also filed under paragraph 77(1)(*b*) of the *PSEA* which refers to the choice of process. These provisions 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);
>
> *(b*) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process;
>
> […]
>
> **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
>
> (*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.

[74] The authority of the Public Service Commission (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.

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

> **12.** An acting appointment is excluded from the application of section 40, subsections 41(1) to (4) and section 48 of the Act.
>
> **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.

**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.

[76] The following provisions of PSC policy and NRCAN guidelines 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.

**Choice of Appointment Process Guidelines** (NRCan):

(…) In some circumstances, managers may choose to use a non-advertised appointment process.

The non-advertised process has been identified by the PSC as high risk due to potential for abuse. Therefore, a written rationale must be developed by the manager on the NRCan template (Rationale Form) and kept on the HR staffing file, for future reference, including during the monitoring and reporting phases.

The rationale must highlight the work situation justifying the manager's decision to use a non-advertised appointment process. Managers may refer to the NRCan list of criteria when developing their rationale. In circumstances other than those found on the list, a more detailed justification must be provided.

When making the decision to use a non-advertised process, the manager must keep in mind the following considerations:

- The manager must uphold and is bound by the staffing values of fairness, transparency and access.
- The sub-delegated manager understands and has considered that non-compliance could lead to his/her revocation of sub-delegated staffing authority.
- The manager adheres to the highest standards of audit integrity.

## ARGUMENTS OF THE PARTIES AND ANALYSIS

**Issue I:** Does the complainant have a right to complain?

[77] The respondent submits that the complainant appears to be making a complaint on behalf of other employees, and that she does not have a personal interest in these complaints. The respondent states that a complainant does not have standing to speak on behalf of other potential complainants. It relies on *Visca v. Deputy Minister of Justice et al.*, [2006] PSST 0016. The respondent argues that being appointed in the CO-01 position would have meant a $7,000 pay cut for the complainant and, therefore, she had no interest in the position.

[78] The complainant submits that she has a personal interest in these complaints as demonstrated by her testimony.

[79] A complainant must have a personal interest in the appointment to file a complaint. The wording of subsection 77(1) of the *PSEA*, namely "a complaint to the Tribunal that he or she was not appointed or proposed for appointment," makes this clear. A complaint must be personal to the complainant, as a person can only complain that he or she was not appointed, and cannot complain that other persons were not appointed. See: *Visca*; and *Evans v. Deputy Minister of Indian Affairs and Northern Development*, [2007] PSST 0004.

[80] In an advertised appointment process, an employee in the area of selection can communicate his or her personal interest by applying for the position. This is not possible when a non-advertised appointment process is chosen. However, by filing a complaint that he or she was not appointed, an employee can also express personal interest. The threshold test for having a personal interest in a position should not be higher for a non-advertised process than an advertised process. In both situations, where there is a challenge to a complainant's right to bring a complaint, the Tribunal will make its determination based on the evidence and arguments presented by the parties.

[81] In this case, the Tribunal finds, based on the complainant's evidence, that she has a personal interest in these complaints. The complainant's evidence concerning her interest in the position was not refuted. The respondent's argument that a person would not take a reduction in pay for a position is mere conjecture; no evidence was tendered to support this argument.

[82] Accordingly, the Tribunal finds that the complainant had the right to file complaints to the Tribunal that she was not appointed by reason of an abuse of authority.

**Issue II**: Did the assignment constitute an appointment?

ARGUMENTS OF THE PARTIES

[83] The complainant submits that the assignment was in fact an acting appointment. She argues that the August 28, 2006 email does not qualify as a job opportunity notice

for an acting appointment. The email was misleading and intended to discourage employees from applying.

[84] Initially, the respondent indicated in its reply to the allegations that it conducted an advertised process for the acting appointment, and referred to the August 28, 2006 email. It later clarified in its arguments that it was a non-advertised appointment process, and that the job opportunity advertised was for an assignment.

[85] The respondent submits that there is no right to complain under the *PSEA* against the assignment of Ms. Delorme, and that the right to recourse came about only when an appointment was made.

[86] The PSC did not make any submissions on this issue.

ANALYSIS

[87] A definition of acting appointment is found in section 1 of the *PSER*. Under this definition, an employee is on an acting appointment when he or she performs duties of another position, if the performance of those duties would have constituted a promotion had the employee been appointed indeterminately to the position. Under sections 12 and 13 of the *PSER*, notification of acting appointments of less than four months is not required, provided that it does not extend the person's cumulative period in the acting appointment to four months or more. As well, under subsection 14(1) of the *PSER*, acting appointments of less than four months are not subject to recourse under section 77 of the *PSEA*.

[88] Ms. Delorme was first assigned duties related to the CCP closure in January 2006, while still working part-time in Mr. Hynes' office, according to Mr. MacMillan. Mr. MacMillan also testified that Ms. Delorme was later given an acting appointment of less than four months as a PC-01 in the CCP. This acting appointment, which would have begun around February 2006, could not be for four months or more as she did not meet the merit criteria for this position. The CCP had been extended for one year and it was Mr. MacMillan's idea to have Ms. Delorme work out of the Business Affairs Office until a new position was classified. His plan was to have the position classified at the

CO-01 group and level, which was equivalent in pay to the PC-01 group and level. On June 1, 2006 Ms. Delorme began an assignment in the Business Affairs Office. On December 11, 2006 Ms. Delorme was appointed retroactively to June 1, 2006, on an acting basis to the position of Business Development Officer, at the CO-01 group and level.

[89] There is no mention of assignment in either the *PSEA* or in applicable regulations, nor was there in the preceding legislation. The parameters and limitations on the use of assignments were established in case law under the former PSEA. While this jurisprudence needs to be reviewed in light of the changes found in the *PSEA*, the Tribunal considers it useful to do so in addressing this issue.

[90] An assignment can be defined as the temporary move of an employee, within a government department, to perform the duties of an existing position or to carry out a special project. While on assignment, the employee retains his or her substantive position, and performs duties at the same group and level. The employee does not acquire tenure in the position to which he or she is assigned, but rather is expected to return to his or her substantive position. See: *Elmore and Attorney General of Canada,* [2000] F.C.J. No. 119 (QL).

[91] It has been acknowledged in case law that there is a need to provide managers with a degree of reasonable flexibility in assigning temporarily employees to functions without giving rise to the application of merit and the right of recourse. However, there are limitations on this principle and, depending on the particular circumstances of each case, it may be determined that an assignment is in fact an appointment. Where it has been established that the flexibility in assigning duties was not exercised in a fair and reasonable way, the courts have determined that the assignment was in fact an appointment, and revoked the appointment. In *Doré v. Canada*, [1987] 2 S.C.R. 503, where an employee was assigned on a temporary basis to a new position pending the classification of the position, the Supreme Court of Canada found that it was in fact an appointment and revoked the appointment. See also: *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489; *Peet v. Canada (Treasury Board)*, (June 30, 1993) Court

File T-1608-92 (F.C.T.D.); and, *Canada (Attorney General) v. Davidowski,* [1994] 88 F.T.R. 234.

[92] There is no question that Ms. Delorme was appointed on an acting basis retroactively to June 1, 2006. From June 1, 2006 until the appointment was made, the arrangement may have operated as an assignment; however, by virtue of its retroactivity, the acting appointment displaced any assignment that may have been in place. Moreover, based on the evidence, the Tribunal finds that, from the outset, this was not intended to be an assignment.

[93] On March 6, 2007 Mr. Hynes announced in an email that Ms. Delorme would now be on a developmental assignment with the CCP. However, this was an acting appointment in a PC-01 position. This position was two levels higher in pay scale than her substantive AS-02 position. The acting appointment could not be extended as it would be subject to recourse if it had a cumulative term of four months or more, and she did not meet the merit criteria for the position. Mr. Hynes was satisfied that she would be able to close off the program, and in May 2006 he discussed with Mr. MacMillan assigning Ms. Delorme to the Business Affairs Office until the position was classified.

[94] On June 1, 2006 Ms. Delorme began an assignment in a new position in the Business Affairs Office, but still reported to Mr. Hynes. Her duties were to continue the close off of the CCP as she did when acting in a PC-01 position, but she was now paid at her substantive position. Mr. MacMillan told her in June 2006 that, subject to a classification decision, the position was intended to be classified at the CO-01 group and level. The CO-01 position was also two levels higher than her substantive position, and was equivalent to a PC-01 in terms of pay.

[95] The Tribunal finds that the assignment of Ms. Delorme to the Business Affairs Office was in fact an acting appointment. The intention from the outset was to use the assignment, until the position was classified, to continue the acting appointment in the CCP which started around February 2006. The new position was not intended to be temporary, and the plan was that it would become a permanent position. Moreover, it was not intended to be at level as the plan was to have the position classified as a

CO-01, which is equivalent in pay to the PC-01 group and level. Finally, the fact that Ms. Delorme was retroactively appointed for a period corresponding to the beginning of the assignment in the Business Affairs Office is further evidence that the assignment was an acting appointment.

[96] For all these reasons, the Tribunal finds that the assignment was in fact an acting appointment.

**Issue III**: If the answer to question (ii) is yes, did the respondent conduct a genuine assessment process for the selection of a person to perform the functions of this appointment?

ARGUMENTS OF THE PARTIES

[97] The complainant submits that the email was a sham carefully crafted to mislead as it focussed on climate change and responsibilities related to marketing and the administration of a new web-based database of ongoing mining research. As well, the email was sent about a developmental assignment and opportunity, but Ms. Delorme had already been working in the Business Affairs Office since June 1, 2006 on administrative duties related to closing the CCP.

[98] The complainant argues that Ms. Delorme's assessment for the assignment was inadequate given the composition of the assessment board and the timing of the interview. It is not a coincidence that the questions asked were prepared before the SMC was completed. The information shared with Ms. Delorme was not provided to other candidates.

[99] The complainant argues that the assessment tools used in a staffing process must meet a standard of reasonableness in view of the object of the *PSEA*. One such standard is the use of objectives tools. As the Tribunal found in *Jolin v. Deputy Head of Service Canada et al.,* [2007] PSST 0011 at paragraph 37:

> […] abuse of authority could occur in choosing an assessment method that would unduly favour an individual, or in seeking to harm certain candidates or discriminate against persons on the basis of their sex, age or other prohibited grounds. The resulting assessment, though based on a defective method, might seem completely impartial, but

> an abuse of authority would have occurred in the choice of method for assessing the person to be appointed.

[100] The respondent argues that the right to recourse was triggered when the notifications came out for the acting and the indeterminate appointments. Prior to January 2007, there was no right to complain because management was simply assigning work to Ms. Delorme. The classification decision, which came about in December 2006, brought about the appointment and only at that time a rationale could be prepared for the choice of a non-advertised appointment process.

ANALYSIS

[101] There are two versions with respect to the nature of this selection process. Messrs. Hynes and MacMillan testified that the August 28, 2006 email for the assignment and the interviews that followed were part of a genuine assessment process for selection for an assignment where it was not predetermined that Ms. Delorme would be selected. According to the complainant, the decision had already been made to appoint Ms. Delorme in the Business Affairs Office when she started the assignment on June 1, 2006. Her evidence is that the email of August 2006 and the interviews that followed were part of a subterfuge to hide this, and discourage employees from applying.

[102] The Tribunal must assess credibility and determine which version of the facts it will accept. The test when credibility is at issue is well-established. The Tribunal must determine which version is in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in the circumstances. See: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at page 357, and *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, at paragraphs 45 and 46.

[103] Ms. Delorme could not stay in the PC-01 position and the CCP had been extended for one year until March 2007. Mr. Hynes was satisfied that she could wrap-up the program and wanted her to continue to perform these duties. He therefore assigned her to the Business Affairs Office. The plan was that she would be assigned until the

position was classified at the CO-01 group and level, which is equivalent in pay to the PC-01 group and level. It was also planned that the position would be indeterminate.

[104] Mr. Hynes indicated in an email on August 28, 2006 that his plan was to combine two different functions into one position that would be based in the Business Affairs Office. He stated that he needed to appoint a person to manage the CCP until its end in March 2007. As the position was half-time in scope, it would be combined with functions related to project management in the marketing and the administration of a new web-based database of ongoing mining research in Canada.

[105] When Ms. Beaudoin asked Mr. MacMillan about the position, he indicated that it had to do with wrapping-up the CCP in six months, and that it would involve help with administrative duties for up to one year. He told her that the person chosen would be paid at their substantive position's group and level which she rightly understood to be an assignment. While the email refers to an appointment, Mr. MacMillan also indicated to Ms. Mingie-Cahill that it was at level, from which she also understood that it was an assignment.

[106] Mr. MacMillan did not inform either Ms. Beaudoin or Ms. Mingie-Cahill that the position was intended to be classified at the CO-01 group and level. He did inform Ms. Delorme of that in June 2006. He did not share the C0-01 job description with the other candidates; he did share it with Ms. Delorme.

[107] A practical and informed person would conclude that, on a balance of probabilities, it was already predetermined that Ms. Delorme was going to perform those duties. This person would also conclude, on a balance of probabilities, that the email of August 2006 was sent and the assessment process of October 2006 was done to provide the appearance of a genuine assessment process just before the position was classified. Mr. Hynes was satisfied that Ms. Delorme could wrap up the program, but the acting appointment as a PC-01 could not be extended. There was money left in the program to pay her salary and he wanted to reward her as she had "bailed" them out. When employees inquired about the job opportunity, they were told that it was temporary, at level, and of an administrative nature. The job opportunity was advertised

at the end of August 2006, and the interviews conducted at the end of October 2006. However, Ms. Delorme had been performing the duties since early 2006. She received acting pay at two levels beyond her substantive position, and knew that the plan was to classify the new indeterminate position at the CO-01 group and level. No other candidate was privy to this information.

[108] The Tribunal finds that a practical and informed person would conclude, on a balance of probabilities, that the respondent did not conduct a genuine selection process. The advertisement was misleading and designed to discourage other applicants and it was predetermined that Ms. Delorme was going to perform those duties.

[109] For all these reasons, the Tribunal finds that the August 2006 job opportunity announcement and the selection process held in late October 2006 did not constitute a genuine selection process as it was predetermined that Ms. Delorme would continue the assignment until she was appointed.

**Issue IV:** Did the respondent abuse its authority by choosing a non-advertised process for the acting and indeterminate appointments?

ARGUMENTS OF THE PARTIES

[110] The complainant submits that the Preamble of the *PSEA* should be read as establishing the purpose and guidelines in applying the Act. The Preamble, with its key principles, must be read as a whole, and the ordinary meaning of words should be used in its interpretation. A key paragraph of the Preamble refers to the public service being characterized by fair and transparent employment practices, respect for employees, effective dialogue and recourse aimed at resolving appointment issues.

[111] The complainant submits that the respondent has not adhered to the staffing value of transparency found in the Preamble of the *PSEA* in proceeding with these non-advertised processes. It withheld public announcements or failed to give proper notice of Ms. Delorme's acting appointments. According to the complainant, the respondent has acted in this manner in the past, and used the same approach for Mr. MacMillan's

acting appointment. In both cases, significant retroactivity was applied to their effective dates of appointment.

[112] The complainant states that the rationale for the non-advertised position does not meet either the departmental or the PSC policies, and is not supported by the *PSEA*. It was not written in a timely fashion, as it was prepared after the fact, and should be viewed suspiciously. An advertised process should have been held as this was a new position and there was no pressing urgency.

[113] The complainant alleges that the respondent has abused its authority in choosing non-advertised processes contrary to the *PSEA* staffing value of transparency found in the Preamble, and that the rationale for the non-advertised position does not meet either the departmental or the PSC Policy on Notification.

[114] The complainant further submits that the allegation of bad faith is supported by the evidence. The email of August 2006 was clearly misleading and the selection process for the job opportunity was a sham. Ms. Delorme had access to information not available to other employees. Mr. Hynes' bold statements that no one was interested in this position are not supported by facts. When the position was recently advertised, many employees expressed their interest for it and were screened in.

[115] The respondent argues that there was no cloak of secrecy around Ms. Delorme's acting appointment and her indeterminate appointment. The choice to proceed with an advertised or non-advertised process could not be made until there was a position to staff. The classification of the position was completed in mid-December 2006, after which the acting and indeterminate appointments were made. The respondent simply exercised its discretion not to solicit applications by choosing a non-advertised process.

[116] The respondent submits that transparency is not a legislated requirement of the *PSEA*. The respondent argues, essentially, that PSC policy and NRCan guidelines on the Choice of Appointment Process are reference documents with no legislative authority.

[117] The respondent further submits that the policies and guidelines have no legislative authority, and that the *PSEA* specifically allows managers to choose between advertised and non-advertised processes. There is no requirement for management to inform employees of its intention to staff positions through an advertised or a non-advertised process.

[118] The PSC did not attend the hearing, but provided written submissions. It submits that the respondent would have abused its authority if the hiring manager's decision to proceed by way of a non-advertised appointment was motivated by personal favouritism towards the appointee or by bad faith, or otherwise if bad faith can be presumed.

ANALYSIS

[119] As the Tribunal's jurisprudence has emphasized, the Preamble of the *PSEA* is an integral part of the Act; it highlights at the outset its legislative purpose. The following sections of the Preamble are particularly noteworthy:

> Canada will continue to benefit from a public service that is based on merit […];
>
> delegation of staffing authority […] should afford public service managers the flexibility necessary to staff, to manage and to lead their personnel to achieve results for Canadians.
>
> the Government of Canada is committed to a public service that embodies linguistic duality and that is characterized by fair, transparent employment practices, respect for employees, effective dialogue and recourse aimed at resolving appointment issues.

[120] The following key legislative purposes of the *PSEA* can be found in the Preamble and are reflected throughout the Act. Appointments must be based on merit and respect linguistic duality. Managers have considerable discretion in staffing matters, but their discretion must be exercised in accordance with fair, transparent employment practices, and respect for employees. Concerns about appointments are to be resolved through effective dialogue and recourse. See, for example: *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008; *Rinn v. Deputy Minister of Transport, Infrastructure and Communities et al.*, [2007] PSST 0044; and, *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration et al.,* [2008] PSST 0024, at paragraph 69.

[121] Requirements for fair, transparent employment practices and respect for employees are found in the *PSEA*, the *PSST Regulations*, the *PSER* and the PSC policies. For example, a non-advertised process requires under section 48 of the *PSEA* that notification be given to persons in the area of selection when a person is considered for an appointment, or when an appointment is made or proposed. For an advertised process, this notification must be given to employees who participated in the appointment process. As well, when a person is eliminated from further consideration in an appointment process, informal discussion may be held.

[122] The *PSST Regulations* require that an exchange of all relevant information take place as soon as possible after a complaint is filed to facilitate its resolution. Mediation can resolve a complaint through effective dialogue and respect for employees. Tribunal hearings also ensure fair, transparent employment practices and respect for employees.

[123] The respondent argues that the PSC's Policy – *Choice of Appointment Process* is merely a matter of policy without legislative authority. However, as the Tribunal explained in *Robert and Sabourin*, there is an obligation under the *PSEA* for deputy heads, and their delegates, to comply with PSC policies respecting the manner of making appointments. Pursuant to subsection 29(3) of the *PSEA,* the PSC can establish policies on the manner of making appointments and deputy heads are subject to these policies under section 16 of the *PSEA*. The French text of section 16 indicates clearly that deputy heads must comply with these policies, as it states: "l'administrateur général est tenu […] de se conformer aux lignes directrices […]." The PSC policy on the choice of appointment process falls under these provisions, and deputy heads must comply with the policy.

[124] The PSC has assessed that non-advertised processes are a risk area in terms of fair and transparent employment practices. The PSC policy requires that, in the interest of fairness and transparency, deputy heads establish and communicate criteria for the use of non-advertised processes. It also requires a written rationale demonstrating how the choice of a non-advertised process meets the appointment values of access, fairness and transparency.

[125] Managers are not required to consider more than one person and they have the discretion to choose between an advertised and non-advertised process under subsection 30(4) and section 33 of the *PSEA*. This discretion is not absolute and it must be exercised in accordance with the legislative purpose of the *PSEA*. As Rand J. wrote in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at page 140; [1959] S.C.J. No. 1 (QL):

> […] there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute.

[126] The recourse available for those concerned that the exercise of discretion in choosing between an advertised and a non-advertised process did not respect fair and transparent employment practices is a complaint of abuse of authority under paragraph 77(1)(*b*) of the *PSEA*.

[127] Essentially, the complainant is arguing in this case that the discretion to choose a non-advertised process was exercised in bad faith, and not for the purposes for which it was delegated under the *PSEA*.

[128] Bad faith in exercising a discretionary power traditionally implies that there is an improper intent, a bias*,* a lack of impartiality. As well, bad faith is established where an irrational procedure leads to a conclusion that it is incompatible with the exercise of the authority's public duties*.* See René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1990) vol. 1, at page 425 and vol. 4, at page 343.

[129] The courts have acknowledged that direct evidence of bad faith may be difficult to establish and have found that it can be established by circumstantial evidence. Bad faith has also been given a broader meaning that does not require the improper intent where there is serious carelessness or recklessness. See *Finney v. Barreau du Québec,* [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31 (QL); and, *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304, [2004] S.C.J. No. 57 (QL).

[130] As the Supreme Court explained in *Finney* at paragraph 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). […]

[131] As the Supreme Court also explained in *Entreprises Sibeca Inc*., at paragraph 26:

> Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it.

[132] Two Personnel Action Request forms were signed on December 11, 2006 by Mr. Hynes to authorize acting pay for Ms. Delorme at the CO-01 group and level. The first form covered the period beginning June 1, 2006, when Ms. Delorme started her assignment in the Business Affairs Office, to September 28, 2006 – a period of less than four months. The second form was for the period from September 29, 2006 to September 28, 2007, and a comment on the form indicated that the acting appointment would be until the indeterminate staffing of the position.

[133] A written rationale for the use of a non-advertised appointment process was prepared for the acting period starting June 1, 2006. No written rationale was prepared for the second acting period starting on September 29, 2006. The PSC policy requirement that a written rationale be prepared for each non-advertised process was therefore not followed. It could be that one rationale was intended to cover the whole retroactive period, as well as the acting appointment until September 28, 2007. However, there is no mention of two separate acting appointments, with the first being of less than four months.

[134] The decision was made to make two separate retroactive acting appointments so that the first acting appointment would be less than four months, and would therefore not be subject to the *PSER* requirement of notification of acting appointments or the right to recourse. When Mr. Hynes authorized the first acting appointment on December 11, 2006, this meant that, at that date, Ms. Delorme had been in the position for more than seven months. This was a deliberate decision not to notify employees that this acting appointment was really retroactive to June 1, 2006. It would have been logical and transparent to make one retroactive appointment to that date.

[135] The Tribunal concludes that, in fact, only one acting appointment was made. In December 2006 the acting appointment had already continued beyond the end date of the initial appointment without any break. The Tribunal finds that the requirements for notification of acting appointments and right to recourse under section 13 of the *PSER* were intentionally circumvented to hide the fact that the retroactive appointment was for over seven months. The Tribunal considers this to be evidence of an improper intent.

[136] It is certainly non-transparent and, moreover, deceitful to break a continuous retroactive acting appointment into two periods. The Tribunal cannot conclude that it was done here for any reason but to evade the *PSER* requirements to notify employees and inform them of their right to recourse for an acting appointment of four months or more. These actions are so inconsistent with the legislative purpose of the *PSEA* to exercise discretion in accordance with transparent employment practices that the Tribunal cannot conclude that they were performed in good faith.

[137] The authority to make an acting appointment of less than four months is not subject to the checks and safeguards which apply to other appointments. Circumventing the notification and recourse requirements demonstrates serious recklessness and is evidence of bad faith. The Tribunal finds that Messrs. Hynes and MacMillan acted in bad faith by intentionally appointing Ms. Delorme for a period of less than four months to circumvent the requirements of the *PSER*.

[138] The notification of the second acting appointment for the period starting on September 29, 2006 was posted on *Publiservice* on January 10, 2007. The complainant

argues that the justification for the non-advertised process was untimely as it came after the fact and was not transparent. The PSC policy does not specify when a rationale must be prepared. It was prepared within a few weeks prior to the notification of Ms. Delorme's second acting appointment. The Tribunal finds that these actions do not constitute evidence of bad faith.

[139] The PSC policy on Choice of Appointment Process requires that a manager complete a written rationale explaining how the established criteria for the choice of a non-advertised process were met. A rigorous demonstration of how the non-advertised process respects the four appointment values of fairness, transparency, access and representativeness is required.

[140] The respondent has established criteria for the use of a non-advertised appointment process. However, Messrs. Hynes and MacMillan could not justify the use of a non-advertised process on the basis of the established criteria. Failing this, they explained in the rationale that it was more efficient to appoint Ms. Delorme in a non-advertised process as it was believed that she would have been the best qualified or likely the only one found qualified, if an advertised process had been conducted.

[141] Furthermore, the rationale does not address the retroactivity of the acting appointment for the period of the assignment. The rationale is silent on the important fact that Ms. Delorme had been on assignment in this position since June 1, 2006, the date when the retroactive appointment begins. Also, it did not disclose that Ms. Delorme was previously in an acting appointment of less than four months performing similar duties in the CCP.

[142] The rationale states that the merit principle is protected by the recourse available to other prospective candidates. However, this was not the reality as there had been no notification of the acting appointment of June 1, 2006 or of the right to recourse.

[143] A third Personnel Action Request form was signed on January 5, 2007 by Mr. Hynes for Ms. Delorme's indeterminate appointment. Again a rationale was required and prepared for the use of a non-advertised process.

[144] The rationale explained that there had been a high turnover of staff in this unit, and that it was important to immediately appoint Ms. Delorme to retain corporate knowledge. However, the evidence given on cross-examination by Mr. MacMillan was that there was not a high turnover, as most employees had been there between five to nine years.

[145] The rationale stated that prospective candidates, who may have been interested in the position, would have access to this position through recourse available to those in the area of selection. It indicated that any candidate who contacted the manager would be considered, and that this was reasonable given the realities of a non-advertised process.

[146] Employees who are interested in a position apply to a position when it is advertised, not by filing a complaint of abuse of authority. A complaint is not a selection process and it does not lead to the appointment of a complainant.

[147] The Tribunal, therefore, finds that the explanations contained in the rationales were deceptive, untrue, inexplicable and incomprehensible having regard to the *PSEA*, and are further evidence of bad faith.

[148] A pattern of overall lack of transparency prevailed from the assignment of Ms. Delorme to the CCP to her indeterminate appointment in the Business Affairs Office. A genuine assessment process was not utilized; it was predetermined that Ms. Delorme was going to perform those duties and, as the Tribunal found, the assignment of Ms. Delorme was in fact an acting appointment. The requirements of the *PSER* on acting appointments were circumvented and the rationales were deceptive.

[149] The Tribunal finds that non-advertised appointment processes were chosen because Mr. Hynes wanted to reward Ms. Delorme. This was likely the reason for her acting appointment as a PC-01, a position for which she is clearly not qualified. To ensure her continued reward of a much higher salary, she had to be appointed to a position that was equivalent in salary. This is an improper intention for making an appointment. The Tribunal also finds that the actions taken in order to conceal the circumstances of these appointments amount to bad faith. The Tribunal finds that there

was no interest in identifying other qualified candidates because of a bias to ensure that Ms. Delorme was appointed.

[150] It is troubling that a human resources professional, and a sub-delegate who is now at the Director General level, would orchestrate and participate in such deceitful practices. Mr. Hynes did not deny that he was accountable, but explained that he was relying on the advice of human resources advisors as he did not receive sufficient training to understand the basic principles of staffing. Clearly Mr. MacMillan mostly came up with these plans but the fact remains that it was Mr. Hynes who wanted to reward Ms. Delorme without regard to the *PSEA* or simple ethical considerations. He approved these staffing processes and signed the documentation supporting them. The Tribunal also notes that Mr. Hynes was not forthcoming in his answers while Mr. MacMillan was generally responsive in his testimony.

[151] The Tribunal is concerned that the requirement for producing a rationale for a non-advertised appointment appears to be only the filing of a document without consideration of its content. In these complaints, there was no effective review of the reasons invoked in the rationale.

[152] While not the subject of these complaints, it also appears that there was no notification of the acting appointment of Mr. MacMillan as a CO-03 in the Business Affairs Office. As well, no rationale was prepared for this retroactive non-advertised appointment.

[153] For all these reasons, the Tribunal finds that the respondent abused its authority by choosing a non-advertised process for both the acting and indeterminate appointments of Ms. Delorme.

**Issue V**: Did the respondent abuse its authority by appointing Ms. Delorme?

Arguments of the parties

A) COMPLAINANT'S ARGUMENTS

[154] The complainant disagrees with the PSC's narrow interpretation of abuse of authority. Given the role of the PSC in the delegation of staffing authority, the complainant would have expected the PSC to endorse the Tribunal's broader interpretation. The complainant is disappointed by the PSC's submission as it would render recourse to the Tribunal meaningless, and ensure that deputy heads and the PSC are not accountable for abusing their authority.

[155] The complainant submits that any discretion must be exercised after consideration of appropriate and relevant factors, with an understanding of the law and policies, with regard to the fairness of the outcome, and without considering improper factors. The complainant argues that the position of the PSC is inconsistent with all recognized jurisprudence and all concepts of due process and fairness.

[156] The complainant alleges that the appointments were made on the basis of personal favouritism. Moreover, the abuse of authority of Messrs. Hynes and MacMillan in these appointments falls under all five types of general categories of abuse of authority identified in *Tibbs*. Bad faith was prevalent in giving Ms. Delorme an unfair advantage and circumventing policy requirements and the *PSEA*. They relied on inadequate material as the rationales for the non-advertised processes disregarded policy. There was no objective evidence that Ms. Delorme met the qualifications or performed the duties of the position. This led to an improper result as Ms. Delorme should not have been appointed to a position where she did not perform the duties. They relied on an erroneous view of the law as they recklessly disregarded the requirements of the *PSEA* and the policies. Finally, they refused to exercise their discretion as they failed to assess other candidates for this position.

[157] The complainant argues that Ms. Delorme's assessment was inadequate. Mr. Hynes' testimony on the tasks performed by Ms. Delorme is in contradiction with the

version of the other witnesses. There was no evidence that Ms. Delorme did any marketing or business development.

[158] The complainant submits that some of the remedies that she might have sought are moot, or of little useful effect since she, Ms. Delorme and Mr. MacMillan have left NRCan. However, the complainant is seeking corrective measures sufficient to ensure that there are real consequences to deceit, subterfuge and the flagrant disregard for the *PSEA* and the respondent's own policy. The complainant is asking the Tribunal to order a series of corrective measures including some similar to those ordered by the Tribunal in *Cameron and Maheux v. Deputy Head of Service Canada et al.*, [2008] PSST 0016.

B) RESPONDENT'S ARGUMENTS

[159] The respondent submits the complainant's case is based on assumptions and perceptions and is not in harmony with the preponderance of probabilities as required in *Glasgow*. Circumstantial evidence may be considered in some cases, however personal favouritism calls for some evidence of intentional behaviour or, at the very least, evidence of serious carelessness where actions are inexplicable and incomprehensible. There is a distinction to be made between favouritism and personal favouritism. It is not unreasonable to favour employees who perform well, who get the job done or who are the right fit for an assignment.

[160] The respondent argues that the complainant's evidence is that Ms. Delorme was performing administrative duties and not the duties of a Business Development Officer. It has been suggested in this evidence that an appointee should be performing 80% of the duties in the job description. However, no document or policy requiring that an appointee be performing a specific percentage of the duties has been produced in evidence. Management has the delegated authority to assign work as it sees fit.

[161] The respondent also submits that the complainant has failed to establish that the appointee did not meet the essential qualifications of the position. The deputy head has the authority to establish qualifications for a position and has broad discretion to choose assessment methods. The respondent argues that Mr. MacMillan is the only person who could speak to this issue. His testimony is that he found her to meet the

qualifications after he assessed Ms. Delorme on the basis of her résumé, past performance and his knowledge of her experience and abilities.

[162] In the event that the Tribunal found that the respondent abused its authority, the respondent argues that revocation is not an appropriate remedy as there is simply nothing to revoke. It also distinguishes the facts in *Cameron and Maheux* and those of these complaints. The respondent finally submits that corrective measures should correct and not punish.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[163] The PSC filed written submissions on abuse of authority. It argues, as in previous cases before this Tribunal, that abuse of authority requires a finding of improper intent unless bad faith can be imputed. The PSC submits that an interpretation of abuse of authority that includes the five categories of abuse of discretion identified in *Tibbs* is too broad and risks frustrating the system of accountability envisioned by Parliament and reflected in the Preamble of the *PSEA*.

ANALYSIS

[164] The PSC and deputy heads have been given considerable discretion in the exercise of their appointment authority under the *PSEA*. Deputy heads must exercise this appointment authority within a framework of policy requirements and regulations to ensure their accountability to the PSC, which is accountable to Parliament. Parliament also made the PSC accountable under the *PSEA* for its use of appointment authority in its own organization and in departments and agencies when the authority is not delegated. The PSC and deputy heads, when delegated, are accountable to the Tribunal to answer to complaints of abuse of authority.

[165] The Tribunal understands that the complainant is perplexed by the PSC's submission as it would limit accountability in appointments to only those complaints of abuse of authority where an improper intention or bad faith has been established.

[166] While bad faith can be established by circumstantial evidence, the PSC's submission would mean that other types of abuse of authority require a higher level of

evidence; the establishment of improper intention, such as the intention to commit a crime "*mens rea*", in criminal law. This is similar to the PSC's submission in *Tibbs* where it argued that a complainant has to prove "beyond a doubt" that abuse of authority has occurred.

[167] Abuse of authority in the *PSEA* is neither a crime nor a tort. A finding of abuse of authority does not lead to having a criminal record, being incarcerated or being personally liable for damages. The Tribunal can order corrective measures and sometimes will order the revocation of the appointment. There is no reason to require a higher standard of proof to such findings. Therefore as the Tribunal has established, the complainant must prove the matter on the civil standard of the balance of probabilities. See also *F.H. v. McDougall*, [2008] 3 S.C.R. 41; [2008] A.C.S. No. 54 (QL).

[168] The Tribunal wholly disagrees with the approach that has been espoused in the PSC's submission. To agree with this interpretation would mean that the PSC, or its delegate, has been vested with the authority to appoint or lay off an employee without considering relevant matters and directing itself properly under the *PSEA,* as long as the action was unintended or done without any improper intention. As well, it would imply that the PSC and deputy heads could appoint or lay off an employee in an unreasonable or discriminatory way if it was done unintentionally or without any improper intention. Clearly Parliament did not vest the PSC, and by extension deputy heads, with the authority to act in this manner.

[169] The discretion that has been given by Parliament is to be exercised in a reasonable manner. An abuse of authority is a jurisdictional error in the exercise of this discretion and the doctrine of *ultra vires* applies. Parliament did not give the PSC or deputy heads the authority to exercise their discretion in an outrageous, unreasonable or capricious ways whether unintended or done without any improper intention. See David Philip Jones & Anne S. De Villars, *Principles of Administrative Law* (Toronto: Carswell, 2004) at pages 168 to 170.

[170] The Tribunal did not adopt a static definition or test of abuse of authority but referred to the five categories identified by Jones and DeVillars as a useful framework in

the analysis of a complaint of abuse of authority. (See *Tibbs*, at paragraphs 68 to 74.) These categories could evolve with jurisprudence but are more helpful in analysing a complaint than referring to the general doctrine of *ultra vires*. These five categories of abuse of authority are not exclusive of each other, nor are they intended to be. They often overlap in complaints before the Tribunal, as the actions leading to a finding of an abuse of authority will fit into more than one category.

[171] For instance, in these complaints, it is alleged that Ms. Delorme was appointed for reasons of personal favouritism because she worked as Mr. Hynes' assistant, and a position was created to reward her even though she did not perform the functions of the position. If so, by appointing her on the basis of personal favouritism, Messrs. Hynes and MacMillan would have abused their authority under the first three categories of abuse described in *Tibbs*. They would have acted in bad faith as this would be inconsistent with the legislative purpose of the *PSEA* of making appointments based on merit. They would not have considered relevant matters, and therefore would have acted on inadequate material. The outcome would be unfair and be based on an irrational and unreasonable conduct.

[172] There is conflicting evidence about whether Ms. Delorme was performing the duties of the position, was appointed on the basis of merit and the reasons for appointing her. The Tribunal must therefore establish which version is more credible. As the respondent pointed out in its submissions, the Tribunal must apply the test described in *Glasgow* and referenced earlier in this decision. As explained in *Faryna*, at page 357, the test is set out as follows:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[173] Ms. Delorme was not assigned to work at the CCP, but was given an acting appointment at the PC-01 group and level of less than four months. The intention was clearly to remunerate her at a higher level, even if she did not meet the essential

qualifications for this position as she did not have a degree in science. Mr. Hynes testified that he could not get an employee with a scientific background to work on closing the CCP and, therefore, Ms. Delorme was appointed for a period of less than four months, which ended on May 31, 2006. Nevertheless in February 2006, Ms. Atkins, who had a scientific background and was an employee in a term PC-01position, was offered a move to the Business Affairs Office to replace Ms. Beyak during her maternity leave.

[174] To support his proposition that no employees with a scientific background were interested in closing the program, Mr. Hynes explained that an employee at the PC-03 group and level quit the job after two weeks. However, no evidence was tendered to show that Mr. Hynes had made any effort to seek out interested employees following this departure. Moreover, when an email was sent out in August 2006 for the job opportunity, Mr. Couture, a project manager with a scientific background, showed interest in the position. After meeting with Mr. MacMillan, he indicated that he would not pursue the opportunity as it was an administrative position.

[175] Mr. Hynes also explained that record keeping was in disarray, and that the functions related to closing the program were administrative and not scientific. He testified on cross-examination that he did not appoint her in an administrative function, as he had received advice from Human Resources that it was easier to backfill an existing PC-01 position for four months less a day. However, there were two administrative positions in the CCP organization – an Administrative Assistant at the AS-01 group and level and an Administrative/Financial Assistant at the CR-04 group and level. If these positions had been filled and properly supervised, the record keeping of the program would likely have been in order. In any event, although administrative work was required, no administrative position was created or offered to Ms. Delorme.

[176] Ms. Delorme was then assigned to the Business Affairs Office, but this assignment was in fact an appointment, as the Tribunal has found. Furthermore, the assessment process for the assignment was not a genuine process.

[177] It was planned from the outset that this new position would be at the CO-01 group and level, which is equivalent to the pay level of a PC-01 position. This would represent a pay increase of $11,000 from Ms. Delorme's substantive AS-02 position. Mr. Hynes believed that Ms. Delorme's help in closing the CCP should be rewarded. Mr. MacMillan prepared the work objectives that described mostly the duties of the position for the future and which was used to classify the position. He testified that, except for the CCP, it did not represent the duties that Ms. Delorme was performing. He explained that her work consisted of administrative duties and closing the CCP. Mr. Hynes testified that, at this stage, Ms. Delorme's duties in the CCP were to account for all the money that had been granted. He did not know what Ms. Delorme was doing other than her climate change duties.

[178] The evidence of Ms. Mingie-Cahill, Ms. Beyak, Ms. Labrecque and Mr. MacMillan was that Ms. Delorme was performing administrative duties and the CCP functions. Their evidence is clear that she performed almost no business development duties found in the description of the CO-01 position.

[179] Both Messrs. Hynes and MacMillan were unconcerned that these administrative functions did not correspond to a CO-01 position. They showed disregard for the classification system by having a work description with duties that did not correspond to what Ms. Delorme was actually doing.

[180] Mr. MacMillan prepared the SMC and assessed Ms. Delorme against the essential qualifications for the position. He established in the SMC that the experience and knowledge required for the position was in financial management, project management and contract requirements which were those that Ms. Delorme had demonstrated in her administrative duties and in closing the CCP. However these were not found in the NRCan broadband work description for a CO-01 position which required instead knowledge of research, analysis and consultation techniques, of market trends and principles of marketing and trade development.

[181] The knowledge requirements in the NRCan broadband work description were addressed by Mr. MacMillan in the SMC, as the ability to coordinate business

development activities and marketing of research and technology. His assessment of her ability to market was at a superficial level. He believed she could do these duties in the future because she looked professional and would present herself well to clients. This ability to market would imply more, such as some understanding of the research and technology in order to communicate with clients. His assessment of this ability could not be based on past performance as Ms. Delorme had never performed these duties in the past and had no scientific background. His assessment was done without regard to the requirements of the position, and was unsupported by facts.

[182] Mr. MacMillan made a broad statement that Ms. Delorme was entitled under the collective agreement to receive acting pay as an employee performing the duties of a higher classification. However, he testified that she was not performing most of the duties in the Work Objectives as they were performed by others. He explained that her work consisted of administrative duties and closing the CCP.

[183] A practical and informed person would therefore conclude, on a balance of probabilities that:

- The Work Objectives document was prepared in order that the position be classified as a CO-01 and that Ms. Delorme receive compensation at a level equivalent to a PC-01 position even if she did not perform most of the duties of the position;
- The SMC was established on the basis of personal favouritism to tailor it to the experience and knowledge that Ms. Delorme could demonstrate, without regard to the requirements of a CO-01 position and the duties of this position;
- The assessment of Ms. Delorme was done on the basis of personal favouritism as she was assessed against a SMC tailored to her and without regard to the requirements of the position.

[184] Thus, this practical and informed person would also conclude that Ms. Delorme was appointed on the basis of personal favouritism as Mr. Hynes wanted to reward her.

[185] As the Tribunal stated in *Glasgow*, undue personal interests should never be the reason for appointing a person as this constitutes personal favouritism. The appointment of a person as a personal favour, or to gain personal favour with a manager, is an example of personal favouritism. Preparing a work description that does not reflect the actual duties of the position to ensure a higher classification and therefore

a higher salary in order to reward an employee is personal favouritism. Establishing the essential qualifications of the position and assessing an employee to ensure his or her appointment without regard to the actual requirements of the position is also personal favouritism. Appointing an employee who does not meet the essential qualifications of a position because the manager wants to reward that employee also constitutes personal favouritism.

[186] Based on the overwhelming evidence presented at the hearing, the Tribunal finds that Messrs. Hynes and MacMillan abused their authority by appointing Ms. Delorme on the basis of personal favouritism both on an acting basis and an indeterminate basis to the position of Business Development Officer.

[187] The Tribunal also concludes after reviewing the actions leading to those appointments that Messrs. Hynes and MacMillan abused their authority by acting in bad faith and by conducting themselves in an irrational and unreasonable way which led to the unfair appointments of Ms. Delorme. These actions were:

- The establishment of the Work Objectives which did not correspond to Ms. Delorme's duties in order that the position be classified at the CO-01 group and level;
- The establishment of a SMC tailored to the experience and knowledge that Ms. Delorme could demonstrate without regard to the requirements of a CO-01 position and the duties of this position;
- The assessment of Ms. Delorme on the basis of personal favouritism with a SMC tailored to her and without regard to the requirements of the position;
- The appointments of Ms. Delorme to reward her and ensure that she received compensation at a level equivalent to a PC-01 position even if she did not perform most of the duties of the position.

[188] Therefore, the respondent abused its authority in making both the acting and indeterminate appointments of Ms. Delorme.

## DECISION

[189] For all these reasons, the complaints of abuse of authority are substantiated.

CORRECTIVE ACTION

[190] The Tribunal has broad corrective powers under subsection 81(1) and section 82 of the *PSEA* when it finds that a complaint under section 77 is substantiated. The Tribunal may order the respondent to revoke the appointment or not make the proposed appointment. The Tribunal can order the respondent to take any corrective action that it considers appropriate with the exception of an order that an appointment be made or that a new appointment process be conducted. It should be noted that the corrective measures are directed at the respondent in the form of an order and not to the individuals involved in a finding of abuse of authority. Subsection 81(1) and section 82 of the *PSEA* read 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.
>
> **82.** The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.

[191] Parliament has directed in the Preamble that the discretion given in staffing matters under the *PSEA* to the PSC and deputy heads be delegated at the lowest level to provide the necessary flexibility in staffing. It is important therefore to ensure that this discretion be exercised in a reasonable way as intended by Parliament. When the Tribunal determines that it is not the case and that there has been an abuse of authority, the Tribunal can order broad remedial actions to correct the situation and ensure that this discretion is exercised as Parliament intended.

REVOCATION

[192] The fact that Ms. Delorme has left NRCan does not make the revocation of the appointments moot. These appointments and the processes used were based on personal favouritism and the appointments should be revoked. It would be improper that there would be no consequences because the appointee has left the department. In *Lo v. Canada (Public Service Commission Appeal Board)*, [1997] F.C.J. No. 1784 (QL), 222 N.R. 393 (F.C.A.), the Federal Court of Appeal dealt with a similar issue where the

appointee had left the department and later resigned from the public service. As Desjardins, J.A. writing for a unanimous Court, held, at paragraph 12 (QL):

> In the case at bar, an appointment was made and, although the incumbent has left that position and the public service itself, the contested appointment has not been revoked by the Commission and ought to be dealt with. It would be too easy for a department or an appointee to avoid the appeal process and prevent an inquiry as to whether the merit principle has been respected in the selection process by simply moving to another position.

[193] Subsection 81(1) of the *PSEA* stipulates that the Tribunal may order the deputy head to revoke an appointment. It does not require that the person still be in the position. The Tribunal finds that revocation of the acting and indeterminate appointments of Ms. Delorme is appropriate in view of the unethical and improper manner in which they were made. Consequently, the Tribunal orders that the respondent revoke these appointments within 60 days.

CORRECTIVE MEASURES

[194] There has been considerable evidence that the requirements for notification of acting appointments and for rationales for non-advertised processes have been circumvented or simply ignored. Likewise, discretion provided in the *PSEA* for a manager to establish the essential qualifications of a position and to assess a candidate was exploited and abused to hide the fact that this appointment was based on personal favouritism.

[195] The evidence put before the Tribunal clearly establishes that Mr. Hynes cannot continue to act as a sub-delegate of the respondent unless the appropriate corrective measures are taken by the respondent. The evidence also demonstrates that measures put in place by the respondent have failed to ensure that these appointments were based on merit and that the *PSEA*, the *PSER* and policy requirements were met and not circumvented. These considerations direct the Tribunal in ordering the following corrective measures.

[196] Mr. Hynes has testified that he had limited training in the *PSEA* and relied on the advice of Human Resource Advisors. At a minimum, he should receive training that is appropriate for someone delegated to exercise staffing authority under the *PSEA*.

Unless such training is completed and an assessment of Mr. Hynes's ability to make appropriate decisions and conduct proper appointment-related processes is done, he should not be delegated any staffing authority under the *PSEA*.

[197] The Tribunal has found that Mr. Hynes demonstrated disregard for the *PSEA* and other staffing requirements. Mr. Hynes's direction clearly led to the abuses of authority in the appointments at issue in these complaints. In light of these findings, the respondent must ensure that this is an isolated incident and that Mr. Hynes could exercise the discretion in accordance with the *PSEA* and other staffing requirements. Unless the respondent review all appointments involving Messrs. Hynes and MacMillan and proceed with desk audits where appropriate, Mr. Hynes should not be delegated any staffing authority under the *PSEA.*

[198] In addition, the respondent provides advisory and some oversight functions through its human resources personnel and has put in place measures such as an established criteria for non-advertised appointments. However these have proven to be ineffective in the circumstances of these complaints. Therefore, an assessment should be made of the capability of the human resources organization in NRCan to provide proper advice to management, particularly with respect to non-advertised appointment processes.

ORDER

[199] The Tribunal orders the respondent to revoke the appointments of Ms. Delorme back to their effective dates. This must be done within 60 days.

[200] The Tribunal orders the respondent to immediately rescind Mr. Hynes' delegation of authority under the *PSEA*. The respondent can determine whether it will work toward reinstating that delegation, but must not do so unless proper training is provided and Mr. Hynes can demonstrate that he meets appropriate, pre-determined requirements to exercise delegated authority.

[201] The Tribunal orders the respondent not to reinstate Mr. Hynes' delegation, until it reviews all appointments made under the new *PSEA* involving Messrs. Hynes and

MacMillan, proceeds with desk audits where appropriate, and determines that this was an isolated incident.

[202] The Tribunal orders the respondent to assess, within 90 days, the capability of its human resources organization to provide proper support and advice to management concerning non-advertised appointment processes, and to correct within six months any shortcomings arising from the assessment.

Guy Giguère
Chairperson

PARTIES OF RECORD

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| Tribunal Files: | 2007-0048 and 2007-0087 |
| Style of Cause: | *Jennifer Beyak and The Deputy Minister of Natural Resources Canada et al.* |
| Hearing: | January 17-18, April 22 to 24, June 17 to 19, June 25, 2008<br>Ottawa, Ontario |
| Date of Reasons: | March 3, 2009 |
| APPEARANCES: | |
| Denise Giroux | For the complainant |
| Stéphane Bertrand | For the respondent |
| John Unrau | For the Public Service Commission |