



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2008-0122, 2008-0123 AND 2008-0176

OTTAWA, NOVEMBER 16, 2009

MARTINA LAHAIE, SUZANNE LEBLANC AND JACQUES FOURNIER

COMPLAINANTS

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

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|-----------------------------|---|
| MATTER | Complaints of abuse of authority pursuant to paragraph 77(1)(b) of the <i>Public Service Employment Act</i> |
| DECISION | Complaints are dismissed |
| DECISION RENDERED BY | Robert Giroux, Member |
| LANGUAGE OF DECISION | French |
| INDEXED | <i>Lahaie et al. v. Deputy Minister of National Defence et al.</i> |
| NEUTRAL CITATION | 2009 PSST 0030 |

REASONS FOR DECISION

INTRODUCTION

[1] The complainants, Martina Lahaie, Suzanne Leblanc and Jacques Fournier, each filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under paragraph 77(1)(b) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*), alleging that the respondent, the Deputy Minister of National Defence, abused its authority. In their opinion, the respondent abused its authority in choosing a non-advertised process to staff the position of Manager, Client Services, at the CS-04 group and level in the branch known as the Director General Information Management Technology (DGIMT) in the 76 Communications Group (76 Comm Group).

[2] In accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, the three complaints were consolidated on May 14, 2008.

BACKGROUND

[3] At the hearing, the complainants and the respondent agreed on the following facts:

- On or around November 23, 2006, the respondent initiated a generic appointment process to staff positions at the CS-04 group and level (process no.: 06-DND-IA-OTTAWA-054277). A pool was created to staff similar positions in the future.
- In October 2007, the pool contained two candidates who met the essential qualifications. At that time, a third candidate had not yet taken his second-language evaluation tests. The position of Manager of Client Services (CS-04) in 76 Comm Group was therefore offered to the two candidates in the pool on October 15, 2007. Both candidates turned down the offer, and that fact was communicated to Bonnie Oostlander, Acting Commander of 76 Comm Group, in an email on October 16, 2007.

- On October 29, 2007, Ms. Oostlander decided to appoint Sophie d'Auzac de Lamartinie to the position of Manager of Client Services (CS-04) in the ITSS section through a non-advertised appointment process. Ms. d'Auzac de Lamartinie had occupied this position on an acting basis from June 4, 2007 to November 4, 2007.

[4] On January 8, 2008, Ms. Oostlander signed the Non-advertised Appointment Rationale for appointment process no. 08-DND-INA-OTTWA-302926, and on February 5, 2008, the Notification of Consideration was posted on *Publiservice*, indicating that Ms. d'Auzac de Lamartinie was the selected candidate.

[5] On February 7, 2008, Ms. Oostlander held a meeting with the employees at the CS-03 group and level in 76 Comm Group to explain to them why she had chosen a non-advertised process, and to answer their questions. She also told them that Ms. d'Auzac de Lamartinie would be taking up her duties in mid-March, once the negotiations with Public Works and Government Services Canada (PWGSC) regarding Phase III of the XP/DSB (Defence Software Baseline) project had ended.

[6] On February 12, 2008, the Notification of Appointment or Proposal of Appointment that appeared on *Publiservice* announced the indeterminate appointment of Ms. d'Auzac de Lamartinie to the position of Manager of Client Services (CS-04) in the ITSS section. The same day, Ms. Oostlander learned that PWGSC would not be undertaking Phase III of the XP/DSB project. For that reason, Ms. d'Auzac de Lamartinie had to remain in the Project Plan and Requirements (PPR) section on an acting basis until July 2008 in order to undertake Phase III of the XP/DSB project, a major country-wide project aimed at standardizing software applications across Canada.

[7] On July 7, 2008, Ms. d'Auzac de Lamartinie started her duties as Manager of Client Services in the ITSS section.

ISSUE

[8] The Tribunal must determine the following issue:

Did the respondent abuse its authority in choosing a non-advertised process for the appointment?

SUMMARY OF RELEVANT EVIDENCE

[9] The two complainants, Martina Lahaie and Suzanne Leblanc, testified. Ms. Leblanc has worked at the Department of National Defence (DND) since 1987. She is currently the incumbent of a position at the CS-03 group and level in 76 Comm Group, Client Services, ITSS section, DGIMT, in the National Capital Region. Martina Lahaie has worked at DND for 26 years. Since February 4, 2008, she has held the position of Purview Manager, at the CS-03 group and level, in the ITSS section, where she provides desktop services for the West End area of the City of Ottawa.

[10] Ms. Leblanc explained that the role of Client Services is to respond to clients' IT needs. She said that the position of Manager of Client Services in the ITSS section has been held on an acting basis in the past. Between November 2007 and February 2008, two people filled the position. In November 2007, Ms. d'Auzac de Lamartinie held a position on an acting basis in the PPR section.

[11] Ms. Leblanc explained that, during the summer, she had expressed an interest in the Manager of Client Services position to replace the supervisors. She was offered positions at the CS-04 group and level on an acting basis for four month periods, including from November 17, 2007 to March 14, 2008, but she turned down the offer. In the summer of 2008, she expressed an interest in taking up the position on an acting basis, when Ms. Oostlander sent out a request for expressions of interest in order to staff the Manager of Client Services position, pending the return of Ms. d'Auzac de Lamartinie. Ms. Leblanc testified that Ms. d'Auzac de Lamartinie continued to occupy the position in the PPR section on an acting basis until July 2008, even though she had been appointed on February 12, 2008, to the Manager of Client Services position in the ITSS section. On July 3, 2008, Ms. Leblanc was informed that Ms. d'Auzac de Lamartinie would be starting in the position beginning July 7, 2008.

[12] The Notification of Consideration posted on February 5, 2008, announced the imminent appointment of Ms. d'Auzac de Lamartinie. According to Ms. Leblanc, five

people at the CS-03 group and level did not understand the reason for this appointment because they were expecting a generic process to be announced to staff CS-04 positions at DND. Ms. Leblanc said that a generic advertisement to staff similar CS-04 positions was posted on February 15, 2008.

[13] Ms. Lahaie testified that she was interested in obtaining an indeterminate position at the CS-04 group and level in the ITSS. When she saw the notice regarding Ms. d'Auzac de Lamartinie's appointment, she was "shocked and angry" that a non-advertised process had been used to staff that position. She stated that there were a number of people who were qualified and they were upset that a non-advertised appointment process had been used. She would have participated in an advertised process.

[14] In addition, she could not understand the urgency of staffing the CS-04 position on an indeterminate basis given that Ms. d'Auzac de Lamartinie only began working in that position in July 2008. According to Ms. Lahaie, Ms. d'Auzac de Lamartinie was still heavily involved in the XP/DSB project in PPR.

[15] Ms. Leblanc explained that, at a meeting of 15 to 20 employees on February 7, 2008, Ms. Oostlander confirmed that Ms. d'Auzac de Lamartinie was going to be appointed to the Manager of Client Services position in the ITSS section. Ms. Oostlander explained that Ms. d'Auzac de Lamartinie had qualified at the CS-04 level in an appointment process at Indian and Northern Affairs Canada (INAC) and that she had received good performance reviews while acting in the Manager of Client Services position. According to Ms. Leblanc, Ms. Oostlander informed the group at the meeting that Ms. d'Auzac de Lamartinie would continue acting in the position in the PPR section until the negotiations with PWGSC regarding the XP/DSB project had ended.

[16] According to Ms. Leblanc, the complainants pointed out at the meeting that Mr. Macfie should have been considered for the position. In reply, Ms. Oostlander said that there would be a conflict of interest because Mr. Macfie's spouse worked for Client Services in the ITSS section.

[17] Ms. Leblanc testified that they were told, at an information session on April 4, 2008, that Ms. d'Auzac de Lamartinie was still in the PPR section and that she would not be coming back to the ITSS section until the end of July or beginning of August.

[18] In July 2008, when Ms. d'Auzac de Lamartinie started as Manager of Client Services in the ITSS section, it was announced that she would continue supervising the XP/DSB project. According to Ms. Leblanc, someone else had been acting in the position in the PPR section since November 10, 2008.

[19] In the complainants' view, it is not common practice to staff indeterminate positions at the CS-02, CS-03 and CS-04 groups and levels through non-advertised processes, or to appoint a person who has qualified in another department.

[20] Mr. Macfie testified for the complainants. He has held a position at the CS-04 group and level at Agriculture and Agri-Food Canada since February 4, 2008. Previously he occupied a CS-03 position in the ITSS at DND for three years. Before he left for Agriculture and Agri-Food Canada, he was a desktop manager. He left DND because there were no indeterminate CS-04 positions available in the department. He testified that he would have been interested in an indeterminate position at DND and expressed interest in acting opportunities. He had acted in CS-04 positions in the ITSS a number of times.

[21] Ms. Oostlander testified for the respondent. She has been Acting Commander of 76 Comm Group since October 3, 2007. She decided in October 2007 to staff the ITSS section manager position on an indeterminate basis using a non-advertised appointment process. Her decision was based on three reasons.

[22] Ms. Oostlander explained that they initially wanted to appoint a candidate from the DGIMT pool. The appointment process that led to that pool took place at the end of 2006. Those candidates refused the offer to join the ITSS. Ms. Oostlander also looked at deployments with no success. She explained that another generic appointment process would be conducted, but that it would take more time.

[23] Ms. Oostlander testified that the second reason had to do with operational requirements, i.e. keeping an operation going from 7 a.m. to 5 p.m. and supporting clients on a 24-hour basis. Both the *DGIMT Level 2 Civilian Human Resources Plan* dated October 17, 2007 and the *Assistant Deputy Minister (Information Management (IM)) Level 1 Civilian Human Resources Plan (FY 2008/2009 / FY 2010/2011)* dated November 2007 refer to the challenges of the Canadian Forces Transformation on 76 Comm Group. These include an increase in the number of users and operational centres, the leasing of new government buildings to relocate staff, new positions created as a result of military-civilian conversion, the movement of military medical personnel to the Montfort Hospital, deployments to Afghanistan and Bosnia, and the consequent importance of recruitment and retention in the CS, AS and EN-ENG groups.

[24] Ms. Oostlander explained that she was facing many changes in the senior team at 76 Comm Group. She was faced with key employees retiring, being deployed to Afghanistan, and accepting employment elsewhere. Ms. d'Auzac de Lamartinie had also advised her that she had qualified in a CS-04 pool at INAC. According to Ms. Oostlander these major staff changes, in addition to the operational requirements, all impacted on the services provided by 76 Comm Group.

[25] Ms. Oostlander further explained that all of the above had a great impact on the organization because she was losing all the senior management and this affected the stability of the organization. She noted that the Human Resources Plan indicates that the DGIMT will employ a number of staffing methods, including justified non-advertised appointment processes, in response to specific requirements which are consistent with public service and DND and Canadian Forces values.

[26] With respect to the third reason, Ms. Oostlander explained that, in light of the critical operational requirements, she did not want to lose Ms. d'Auzac de Lamartinie to INAC as this would have been disastrous given that she was working on a number of initiatives.

[27] On October 29, 2007, she wrote to Human Resources indicating that she wanted to offer Ms. d'Auzac de Lamartinie an indeterminate CS-04 position as Manager of the

ITSS. According to her, Human Resources indicated that they would work with her to achieve that. In the request she referred to the outstanding appraisal Ms. d'Auzac de Lamartinie had received in her Civilian Performance Review Report for the period of June 4, 2007 to October 4, 2007. She also referred to Ms. d'Auzac de Lamartinie's success in the CS-04 appointment process at INAC. She also mentioned that Ms. d'Auzac de Lamartinie was working on a number of initiatives and that it would be disastrous to lose her.

[28] Ms. Oostlander subsequently completed a Non-advertised Appointment Rationale form on October 29, 2007 and signed it on January 8, 2009. She explained that before filling out the form, she consulted DND's directives, policy and guidelines such as *DND Guidelines on Staffing Options*, the Statement of Merit Criteria (SMC) and both Human Resources plans. She also attached a Staffing Request form and a Candidate Assessment Form indicating that Ms. d'Auzac de Lamartinie met the requirements of the SMC for the ITSS CS-04 position.

[29] The Non-advertised Appointment Rationale form indicates that a non-advertised appointment process may be used if it is the best staffing method to meet the needs of the DND/CF in the situation, and the use is consistent with the appointment values of fairness, access and transparency. A further section shows that such a process is to be used, for example, for increasing employment equity representation, for skills shortages, for new and evolving program initiatives that would require new skills in the organization, in the case of a remote region, and for the appointment of a person in an emergency. Ms. Oostlander believed that the situation in the 76 Comm Group met these definitions, particularly with the possibility of losing Ms. d'Auzac de Lamartinie. According to Ms. Oostlander, the provision of a written rationale was made consistent with *DND Guidelines on Staffing Options* and justified the non-advertised appointment process.

[30] She testified that she assessed two candidates for the position, Ms. d'Auzac de Lamartinie and a priority referral. The priority referral was assessed in January 2008 and referred to a colleague of Ms. Oostlander's, a Director in DGIMT who needed someone with skills in architecture. However, the priority referral refused the offer.

Ms. Oostlander then obtained the approval of the Director General to make the non-advertised appointment.

[31] The Notification of Consideration which named Ms. d'Auzac de Lamartinie to the indeterminate position of Manager, Client Services (CS-04) was posted on *Publiservice* on February 5, 2008. Ms. Oostlander testified that she invited CS-03s and CS-04s to a meeting on February 7, 2008, to explain her decision to select a non-advertised process and address employees' concerns. She indicated that she told the employees that Ms. d'Auzac de Lamartinie would start in the ITSS in mid-March, once the negotiations with PWGSC were finished with respect to the XP/DSB Phase III Project.

[32] Ms. Oostlander stated that Ms. d'Auzac de Lamartinie's acting appointment to PPR from November 18, 2007 to mid-March 2008, was to supervise the roll-out of the XP/DSB project, while discussions with PWGSC were taking place. PWGSC had undertaken the XP/DSB project in the last two years. She indicated that on February 12, 2008, at 3:54 p.m., she was advised by email that PWGSC would not undertake the XP/DSB Phase III Project. According to her, a plan was needed in order to proceed with Phase III of the project, which consisted of replacing 20,000 computers. As a result, Ms. d'Auzac de Lamartinie remained in PPR until July 4, 2008, and moved to her substantive position on July 7, 2008, but continued to supervise the XP/DSB project from the ITSS.

[33] In cross-examination, Ms. Oostlander stated that Human Resources had reservations about using a non-advertised process because of staff morale, as a CS-04 appointment process had been cancelled in the fall of 2007 and another one was to be launched in 2008. She also indicated that she knew that when she made the decision to appoint Ms. d'Auzac de Lamartinie that she was not going to work in the ITSS until the negotiations for Phase III of XP/DSB with PWGSC were over. She also confirmed that it was the first time that a CS-04 who had qualified in another department was appointed in 76 Comm Group, but not the first time within the Information Management group. It was also the first time that a CS-04 was staffed with a non-advertised process in 76 Comm Group.

ARGUMENTS OF THE PARTIES

A) COMPLAINANTS' ARGUMENTS

[34] The complainants argue that the respondent abused its authority by citing urgency as the reason for staffing the Manager of Client Services position through a non-advertised appointment process, since Ms. Oostlander knew that Ms. d'Auzac de Lamartinie could not start before March 2008. In addition, the decision to choose a non-advertised process to staff the position was made despite Human Resources' reservations about the use of this type of process. The reservations were partly related to the morale of Client Services employees in the ITSS, who had been informed in May 2007 that a generic appointment process would be launched to staff various positions.

[35] The complainants also argue that Ms. Oostlander made the appointment without waiting for the results of the negotiations with PWGSC. The employees knew that the position had been staffed on an acting basis since November 2006, and that it had continued to be staffed in that way until the appointment of Ms. d'Auzac de Lamartinie in February 2008, and then even after that until July 2008. The complainants submit that, at the February 7, 2008 staff meeting, Ms. Oostlander saw the employees' reaction to the announcement of Ms. d'Auzac de Lamartinie's appointment. Nevertheless, Ms. Oostlander chose to proceed with the appointment on February 12, 2008. The employees were expecting an advertised appointment process to be announced for 15 positions at the CS-04 group and level. This process was announced on February 15, 2008, three days after Ms. d'Auzac de Lamartinie's appointment.

[36] In addition, the complainants submit that this was the first time the respondent had used a non-advertised appointment process to staff an indeterminate CS-04 position in 76 Comm Group. It was also the first time that a CS-04 who had qualified in another department was appointed in the 76 Comm Group.

[37] The complainants refer to *Cameron and Maheux v. Deputy Head of Service Canada et al.*, [2008] PSST 0016, pointing out that urgency was also cited as justification in that case. As well, they refer to *Chiasson v. Deputy Minister of Canadian Heritage et al.*, [2008] PSST 0027, to show how discretion should not be exercised, and

to address the issue of bad faith. They submit that an element of intent is not required to prove bad faith, and that bad faith can be established by both direct evidence and circumstantial evidence.

[38] The complainants therefore argue that the fact that Ms. d'Auzac de Lamartinie started her duties five months after being appointed raises doubts as to the operational requirements, the importance of client services and the urgency to staff the position. According to the complainants, Ms. Oostlander acted illogically and to the detriment of employee morale.

[39] They also argue that Ms. Oostlander did not respect the values of the *PSEA*, namely, transparency, fairness, respect for employees and a real commitment to dialogue. Ms. Oostlander's conduct is more than an error or omission—it suggests serious recklessness. They submit that the evidence points to an abuse of authority and ask that Ms. d'Auzac de Lamartinie's appointment be revoked, in accordance with subsection 81(1) of the *PSEA*.

B) RESPONDENT'S ARGUMENTS

[40] The respondent argues that the onus is on the complainants to prove abuse of authority in the choice of appointment process. It submits that the key test for finding abuse of authority is very stringent, and that abuse of authority must include elements of intent, or at least wrongdoing constituting a very serious breach. The respondent contends that the three reasons cited by Ms. Oostlander are valid and justify the non-advertised process: (1) the previous unsuccessful attempts to staff the position; (2) the urgent operational requirements; and (3) the risk of losing Ms. d'Auzac de Lamartinie, who had qualified at the CS-04 group and level in another department.

[41] The respondent argues that the fact that the previous advertised process did not work is in itself justification for the non-advertised process.

[42] With regard to the urgent operational requirements, the respondent insists that the decision was made on October 29, 2007, on the basis of the facts available to the manager at that time. Ms. Oostlander did not know that Ms. d'Auzac de Lamartinie

would be joining PPR in November 2007, nor did she know that PWGSC would refuse to move forward with the XP/DSB project. In the respondent's view, what transpired after October 29, 2007, is circumstantial.

[43] The respondent cites *Cannon v. Deputy Minister of Fisheries and Oceans et al.*, [2008] PSST 0021. It argues that the operational requirements in that case were similar to those in the instant case, and that this to some extent justifies the use of a non-advertised appointment process.

[44] In addition, the respondent argues that the fact that Ms. d'Auzac de Lamartinie qualified in an appointment process at INAC justifies the choice of a non-advertised process, given the staff retention objective in the Human Resources Plan.

[45] The respondent argues that the process chosen respects the values of the PSEA, that no allegation of personal favouritism has been made, and that Ms. d'Auzac de Lamartinie's qualifications have not been called into question. It submits that Ms. Leblanc and Ms. Lahaie refused an acting position in Client Services, but that Ms. d'Auzac de Lamartinie demonstrated an interest. The respondent argues that it tried without success to appoint a candidate from a CS-04 pool. It points out that it staffed only one Manager of Client Services position through a non-advertised process, and that the other positions would be staffed through an advertised process.

[46] With regard to transparency, the respondent refers to paragraphs 38 and 39 of *Clout v. Deputy Minister of Public Safety and Emergency Preparedness et al.*, [2008] PSST 0022. The fact that some employees, including the complainants, did not know in advance about Ms. d'Auzac de Lamartinie's non-advertised appointment is not evidence of an abuse of authority. The respondent argues that it is not necessary to provide prior notice in the case of a non-advertised appointment process. Furthermore, the employees were told of the plan to staff the position in this manner when they met with Ms. Oostlander on February 7, 2008, and they were also told that there were one or two vacant CS-04 positions that would be staffed in the future. A notification of appointment or proposal of appointment was posted, thus ensuring that recourse was made available. Moreover, the respondent argues that Ms. Oostlander believed that

Ms. d'Auzac de Lamartinie would be joining Client Services in March 2008, once the negotiations with PWGSC had ended. She did not know that PWGSC would not be undertaking the project and that Ms. d'Auzac de Lamartinie would be staying in PPR to take care of the project herself.

[47] The respondent submits that the facts in *Cameron and Maheux* are different from those in this case. It explains that the urgency described by Ms. Oostlander was immediate and that the situation had not been known for several months.

[48] The respondent argues that 76 Comm Group's past practice of using advertised appointment processes does not preclude the use of a non-advertised appointment process. Consequently, it submits that the complainants did not present direct or circumstantial evidence of an abuse of authority.

C) ARGUMENTS OF THE PUBLIC SERVICE COMMISSION

[49] The Public Service Commission (PSC) is of the view that the Tribunal should reserve the expression "abuse of authority" for the most serious cases of negligence or improper practice.

[50] The PSC explains that section 33 of the *PSEA* grants broad discretion regarding the choice of an advertised or non-advertised process. Under subsection 29(3) of the *PSEA*, the PSC has established policies with regard to the use of non-advertised processes. It submits that the reasons cited by Ms. Oostlander comply with DND's guidelines and the PSC's policies. However, the PSC explains that the risk of losing Ms. d'Auzac de Lamartinie does not in itself justify a non-advertised process, but that the other reasons described by Ms. Oostlander are sufficient.

ANALYSIS

[51] Section 33 of the *PSEA* provides that the PSC (or the delegated deputy head) may use an advertised or non-advertised appointment process. Further, under subsection 30(4) of the *PSEA*, the deputy head is not required to consider more than one person in order for an appointment to be made on the basis of merit (see also *Clout*).

[52] The *PSEA* gives authority to make appointments to those with staffing authority, and thus they are the ones who will use their discretion to make an appointment. However, this discretion is not absolute (see *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008; *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024).

[53] Essentially, the complainants argue that the respondent acted in bad faith in choosing a non-advertised process because, in their view, there was no urgency. Under paragraph 77(1)(b) of the *PSEA*, a complaint may be filed in an internal appointment process for abuse of authority in the choice of appointment process. Abuse of authority is not defined in the *PSEA*, but subsection 2(4) of the *PSEA* stipulates that abuse of authority includes bad faith.

[54] The Tribunal clearly established in *Chiasson*, paragraph 38, that “an element of intent is not required to prove bad faith.” (See also *Cameron and Maheux; Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, [2004] S.C.J. No. 31 (QL).)

[55] The complainants have to demonstrate that the decision itself to choose a non-advertised process constitutes an abuse of authority (see *Clout*). The mere fact that choosing a non-advertised process is not common practice is not in itself evidence of abuse of authority. Moreover, the *PSEA* is clear: considering only one person is expressly authorized under subsection 30(4) of the *PSEA*. To determine whether the respondent abused its authority in choosing a non-advertised process, it is necessary to consider the circumstances under which the appointment was made.

[56] Under the DND guidelines, a non-advertised process may be used if it is the best staffing method to meet the needs of the department and the choice is consistent with the values of fairness and transparency. The DND *Guidelines on Staffing Options*, under the heading “Non-Advertised Appointment Process”, describe the circumstances under which a non-advertised process is permissible and appropriate:

A non-advertised appointment process may be used when:

- it is considered the best staffing method to meet the needs of DND and the CF in the particular situation; and

- its use is consistent with the appointment values and principles of fairness and transparency. [...]

[57] The following information can be found in the rationale prepared in support of Ms. d'Auzac de Lamartinie's non-advertised appointment:

[...]

Internal non-advertised appointment process is being utilized due to the fact the ITSS Manager Position is an operational position and has been without a permanent Manager since 06 Nov 2006 when the incumbent went on full time French language training and then deployed to another position upon her return to work.

ITSS is one of the largest Sections within 76 Comm Gp and requires the stability of a permanent manager in order to ensure that operations and support are maintained on a 24/7 basis. [...]

Internal non-advertised appointment process is being utilized due to the fact 76 Comm Gp offered the ITSS Manager position to the candidates in the existing DGIMT CS-04 pool and none were interested in the position.

The non-advertised process is used in this particular case to ensure the operational efficiency and effectiveness of the ITSS Section. The ITSS Manager position is responsible for approx 108 employees, plus 30-50 contractors, 5-6 co-op students and casual and term employees. The ITSS Manager is responsible for providing desktop support to approximately 1500+ clients. The role of the Manager is crucial in order to ensure the operational and staff functioning of the purview, either by supporting the clients or the daily administration of the workforce. [...]

The value of transparency: The information about the appointment process will be communicated in an open and timely manner. [...]

[58] The rationale also indicates that Ms. d'Auzac de Lamartinie was qualified for the position because she qualified in an appointment process at INAC at the same group and level. Ms. d'Auzac de Lamartinie's assessment and her résumé were filed as evidence.

[59] The *DGIMT Level 2 Civilian Human Resources Plan* provides a detailed description of the challenges facing DGIMT, in particular 76 Comm Group, (e.g. increase in the number of users, new positions created as a result of military-civilian conversion, movement of military personnel to Montfort Hospital, the importance of recruitment and retention in the CS, AS and EN-ENG groups). The document also indicates that “[...] DGIMT will use other staffing methods, including justified non-advertised appointments in response to specific requirements and when doing so is consistent with public service and DND/CF values.”

[60] Moreover, the *Assistant Deputy Minister (Information Management (IM)) Level 1 Civilian Human Resources Plan (FY 2008/2009 – FY 2010/2011)* points out that one of the major challenges facing the organization is employee recruitment and retention:

The IM Group's greatest challenge remains its capacity to recruit and retain a highly specialized workforce within a competitive technologies labour market within the National Capital Region (NCR). The forecasted attrition rate due to impending retirements and other separations is estimated to be approximately 272 vacancies for FY 2008/2009 with a majority of the departures to be from the CS group.

[61] In *Cameron and Maheux*, the manager felt justified in using a non-advertised process because the person who held the position had unexpectedly retired. She extended an acting appointment of under four months, citing the urgency and immediate need to support the processing teams. However, the evidence showed that she had known for some time that she had to staff the position because the incumbent would be retiring. She was therefore unable to cite urgency to justify choosing a non-advertised process.

[62] The facts are very different in this complaint, in which Ms. Oostlander justified the choice of a non-advertised process by citing the need to staff this position permanently to ensure operational efficiency and good employee management, after attempts had been made to staff the position from an existing pool. She testified that it was necessary to have someone in the position permanently to ensure some stability in the group, given that the position had been occupied by various people on an acting basis since November 2006. She explained that a number of people in senior positions were leaving, that there was an urgent operational requirement, and that she did not want to lose Ms. d'Auzac de Lamartinie, who had qualified at the CS-04 group and level in another department.

[63] The Tribunal found in *Cannon* that there can be circumstances in which a non-advertised process is chosen for its speed, given the pressing operational requirement to staff a position. In this case, there was in fact an urgent operational requirement at the time Ms. d'Auzac de Lamartinie was appointed. Someone permanent was needed in the position to maintain stability in 76 Comm Group and deal with all the challenges the department was facing.

[64] The fact that Ms. Oostlander appointed Ms. d'Auzac de Lamartinie to a position that she would not occupy immediately upon being appointed does not, in itself, constitute abuse of authority. The evidence shows that Ms. Oostlander could not have known that PWGSC would not undertake the XP/DSB project and that Ms. d'Auzac de Lamartinie would remain in the acting position in the PPR section to complete the project herself. Instead, a series of circumstances beyond Ms. Oostlander's control led to the appointment of Ms. d'Auzac de Lamartinie on the same day that PWGSC decided not to undertake the project.

[65] It is not necessary for an appointed person to start the new position immediately after being appointed. There may be reasonable, and even exceptional, circumstances that justify postponing the starting date. In this case, Ms. d'Auzac de Lamartinie was unable, in the circumstances, to start the job as planned, because she had to finish the XP/DSB project that PWGSC had decided not to undertake. The Tribunal notes that the position of Manager of Client Services did not remain vacant between February 2008 and July 2008 while Ms. d'Auzac de Lamartinie was still in her acting position in the PPR section. Ms. Oostlander staffed the position on an acting basis until Ms. d'Auzac de Lamartinie's return. These facts demonstrate that there was a real operational requirement and that it was necessary to staff the position.

[66] The uncontested evidence shows that Ms. Oostlander tried other staffing methods (pool of qualified candidates, deployments). Having been unable to staff the position using those methods, she decided to use a non-advertised process. She met with employees on February 7, 2008, to explain why she was using a non-advertised process to staff the position. At the meeting, she told them that there were two other vacant positions and that an advertised process would be used to staff them. Ms. Leblanc testified that a generic advertisement to staff similar CS-04 positions was posted on February 15, 2008. The notifications of consideration and of appointment or proposal of appointment were posted in accordance with section 48 of the *PSEA*, properly creating a right of recourse. This evidence shows that the values set out in the *PSEA* were respected.

[67] The complainants have not demonstrated that the respondent abused its authority in using a non-advertised process because the other staffing methods had been explored but had not proven fruitful, and the operational requirements of 76 Comm Group in the ITSS section were in fact urgent. The simple fear of losing an employee does not justify the use of a non-advertised process. However, in this case, losing Ms. d'Auzac de Lamartinie would have contributed to the shortage of specialized employees at the senior level in the CS group and to the instability of the organization at a time when a number of operational changes were taking place. Therefore, staff retention, as expressed in the *Assistant Deputy Minister (Information Management (IM)) Level Civilian Human Resources Plan (FY 2008-2009 – FY 2010/2011)*, was very important, especially for the CS group.

[68] The Tribunal finds that the respondent was in compliance with the PSC policy, as well as the DND guidelines and Human Resources plans, when it opted for a non-advertised process. The Tribunal finds that the complainants have not demonstrated, on a balance of probabilities, that the respondent abused its authority in choosing a non-advertised appointment process.

DECISION

[69] For all these reasons, the complaints are dismissed.

Robert Giroux
Member

PARTIES OF RECORD

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| Tribunal File: | Files: 2008-0122, 2008-0123, 2008-0176 |
| Style of Cause: | <i>Martina Lahaie, Suzanne Leblanc and Jacques Fournier and the Deputy Minister of National Defence et al.</i> |
| Hearing: | December 4 and 5, 2008, and February 10 and 11, 2009, Ottawa ON |
| Date of Reasons: | November 16, 2009 |
| APPEARANCES: | |
| For the Complainants: | Marie-Claude Chartier |
| For the Respondent: | Sean Kelly |
| For the Public Service Commission: | Marie-Josée Montreuil |