



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2007-0387/0423/0424
2007-0425/0426/0427
2007-0430
Decision date: August 4, 2009

RICHARD KOSOWAN ET AL.

Complainant

AND

THE DEPUTY MINISTER OF HEALTH CANADA

Respondent

AND

OTHER PARTIES

Matter Complaints of abuse of authority pursuant to paragraphs 77(1)(a) and (b) of the *Public Service Employment Act*

Decision Complaints are dismissed

Decision rendered by Merri Beattie, Member

Language of Decision English

Indexed *Kosowan et al. v. Deputy Minister of Health Canada et al.*

Neutral Citation 2009 PSST 0024

Reasons for Decision

Introduction

1 Rick Kosowan, Jeanine Lynxleg, Doug Mercer, Myra Courchene, Val Sinclair, Moira Nicholson and Murrey Kolody, the complainants, are employees of the First Nations and Inuit Health Branch of Health Canada. The complainants allege that it was an abuse of authority to appoint Edwina Keats to the PM-05 position of Manager, Community Liaison Services using a non-advertised appointment process. They also allege that Ms. Keats does not have significant experience working in First Nations communities; part of one of the essential qualifications for the position.

2 The Deputy Minister of Health Canada, the respondent, states that the choice of a non-advertised appointment process was appropriate; given Ms. Keats' situation as an affected employee, a non-advertised process was used to avoid a priority situation. Furthermore, Ms. Keats was assessed against the merit criteria for the position and found qualified. The respondent denies any abuse of authority in this appointment.

Background

3 In June 2007 the staff of the First Nations and Inuit Health Branch (FNIH), Manitoba Region were informed of decisions concerning the introduction of new Health Funding Arrangements that would impact the work and the organizational structure of FNIH.

4 A *Notification of Appointment or Proposed Appointment* was issued on August 14, 2007, to announce the non-advertised indeterminate appointment of Edwina Keats to the PM-05 position of Manager, Community Liaison Services, FNIH, Winnipeg, Manitoba.

5 Each of the complainants filed a complaint to the Public Service Staffing Tribunal (the Tribunal) under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the *PSEA*). The complaints were consolidated in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

6 Some of the complaints contained allegations of discrimination. Following a pre-hearing teleconference, the complainants withdrew all allegations of discrimination.

Issues

7 The Tribunal must determine the following issues:

- i) Did the respondent abuse its authority in choosing a non-advertised appointment process?
- ii) Did the respondent abuse its authority in establishing the definition of significant experience?
- iii) Did the respondent abuse its authority by appointing a person who failed to meet the essential qualification significant experience in working with First Nations and working in First Nations communities?

Summary of Relevant Evidence

8 Jim Wolfe, Regional Director, First Nations & Inuit Health for Manitoba Region explained the program and organizational factors leading-up to this non-advertised appointment. The FNIH provides community based health services, either directly or through agreements. In October 2005, Treasury Board directed that new Health Funding Arrangements (HFA) were to be implemented by April 1, 2008. As a result, the FNIH was restructured. The Community Liaison program was initiated with three Community Liaison Officers (CLOs) in place, and plans to increase to 10. One Manager of Community Liaison Services was in place.

9 Mr. Wolfe issued a memorandum to all staff of the FHIN, Manitoba Region on June 27, 2007 to provide information about the plan for implementing the HFA, and the roles and responsibilities of those involved.

10 Mr. Wolfe explained that, as a result of the transfer of responsibilities between parts of the FNIH, a PM-04 Audit Officer position would no longer be required. Some of the duties of that position were transferred to Community Liaison Services. The incumbent of the Audit Officer position, Ms. Keats, was affected by this change, and

would become surplus to requirements. Mr. Wolfe testified that he met several times with Brenda Stiff, Director, Health Funding Arrangements, and Jim Mair, Director, Programs, Transfer and Self Government, to discuss the organization's needs, the urgency to implement the new HFA and Ms. Keats' pending surplus situation. Although other staff members' qualifications were discussed, it was decided that, based on a balance of the organization's needs and Ms. Keats' needs, the best decision was to appoint her to the new, additional PM-05 position of Manager, Community Liaison Services.

11 Under cross-examination, Mr. Wolfe stated that the first discussions about adding a second PM-05 Manager, Community Liaison Services took place about one year prior to its creation and this appointment.

12 Six of the seven complainants testified at the hearing. Mr. Kosowan testified that shortly after receiving the information about the HFA and changes to the organization from Mr. Wolfe, staff were informed that an additional PM-05 Manager position would be established. Mr. Kosowan testified that the existing Manager, Roy Jangula, told them that there would be an advertised process to fill the new PM-05 position. However, it was subsequently announced at a CLO meeting that Ms. Keats would be acting in the position. Mr. Kosowan stated that employees were upset that they were not considered for the acting opportunity and felt that Ms. Keats would receive an unfair advantage in the advertised process. He said that they were told that the acting appointment would only be for a short time. Mr. Kosowan testified that shortly after that, the *Notification* of Ms. Keats' indeterminate appointment was issued by email.

13 Each of the complainants testified concerning the respondent's choice to use a non-advertised process. Ms. Nicholson, Mr. Mercer, Ms. Courchene and Mr. Kolody all spoke about the lack of respect and the unfairness of excluding other qualified people by choosing a non-advertised process. Ms. Nicholson stated that preventing others from applying for a position is abuse of authority. Ms. Lynxleg, Mr. Mercer, Ms. Courchene and Mr. Kolody all stated that they had had to compete in order to advance in their careers, and Ms. Courchene added that an appointment should be of the "most qualified" person, determined by an advertised process. Mr. Kolody testified that he had

never seen an employee obtain a promotion as a result of being surplus to requirements. He stated that the employees he knew who had been declared surplus had been transferred at-level into other positions.

14 Ms. Nicholson described a conversation she had with Ms. Keats when they travelled together on business in the spring of 2007. Based on that conversation, Ms. Nicholson believes that Ms. Keats was favoured; she was groomed for her appointment and knew about it several months in advance. She further testified that she had once asked to have her acting situation extended and was refused because it would not look good. Ms. Nicholson stated that CLOs and clerks have been denied opportunities based on operational requirements. She also stated that, in the five years she had worked there, only employees who reported directly to Ms. Stiff had been appointed through non-advertised appointment processes. Mr. Mercer stated that Ms. Keats had advanced in her career very quickly. He believes that her appointment, without consideration of others, is favouritism.

15 In cross-examining the complainants, the Public Service Commission (PSC) asked about evidence of personal favouritism. Ms. Lynxleg stated that Ms. Keats gets more opportunities for training and meetings with Headquarters personnel than others. Ms. Nicholson stated that the respondent "went around the rules" in making this appointment. Mr. Mercer testified that other Audit Officers have been told that they had to have a professional designation, but Ms. Keats does not have one. Mr. Kosowan stated that it was definitely favouritism to promote Ms. Keats to a PM-05 position rather than appoint her to a PM-04.

16 The PSC also questioned the complainants about evidence of bad faith. Ms. Lynxleg testified that she has had a poor relationship with Ms. Stiff since 2005. She said that Ms. Stiff became angry when Ms. Lynxleg questioned her about why some people were promoted without competing while others, like her, had to compete. Ms. Lynxleg stated that she and Ms. Stiff do not speak outside of their professional day-to-day interactions. Ms. Nicholson stated that she believes that rules were broken and there was a lack of respect for the values and principles of staffing. Mr. Kolody testified that the respondent claimed that Ms. Keats was not appointed to a PM-04 CLO

position because those positions should be filled by Aboriginal people. He believes that the real reason is that the respondent wanted to promote her to the PM-05 level. Mr. Kosowan stated that he did not believe there had been any bad faith.

17 Ms. Lynxleg, Mr. Mercer and Mr. Kosowan testified concerning Ms. Keats' experience working in First Nations communities. Ms. Lynxleg's view is that significant experience means seven or eight years. She said that it is not clear that Ms. Keats had any experience working in First Nations communities. Mr. Mercer stated that Ms. Keats had no experience in First Nations communities. And Mr. Kosowan stated that Ms. Keats had not travelled to any First Nations communities.

18 Mr. Wolfe testified that he was aware that Mr. Jangula had told staff that there would be an advertised process for the PM-05 position. Mr. Wolfe stated that he would normally have used an advertised process but the situation changed when Ms. Keats was identified as an affected employee whose position would be surplus to requirements. He was involved in, and agreed to the decision to appoint Ms. Keats to the PM-05 position on a non-advertised basis sometime in late June 2007. She was offered the position in July 2007. He testified that a non-advertised process was appropriate in this case because Ms. Keats was an affected employee and she possessed skills urgently needed at the PM-05 level.

19 Mr. Wolfe stated that working *with* First Nations was more important than working *in* First Nations communities. In his view, the number of visits to communities was not a critical factor. He placed importance on having worked extensively with First Nations in a variety of situations, which provides detailed knowledge of how the communities function.

20 Mr. Wolfe stated that it is more important to have First Nations employees in the CLO positions than in the Manager positions because the CLOs have more direct contact with the First Nations communities.

21 The HR Action Plan Summary Worksheet for FNIH for 2007-2008 (HR Plan) was introduced into evidence. Ms. Stiff testified that she was involved in developing the HR Plan, which was done prior to finalizing the HFA. Ms. Stiff agreed that the new PM-05

position was not included in the HR Plan, however, plans to increase to 10 CLOs was included. She testified that the workload in Communities Liaison Services increased because of additional agreements, the integration of the new HFA and the need to operate both the old and new systems for a period of time. Additional CLOs were needed and Mr. Jangula told her that 10 CLOs was too many to manage. She also stated that a lot of capacity building and training was needed to implement the new HFA, including audit coordination. Ms. Stiff discussed the need for a second PM-05 position with Mr. Wolfe.

22 Ms. Stiff acknowledged that the HR Plan does not specify the elimination of the Audit Officer position but it does refer to reduction and elimination of duplication, and clarification of roles and responsibilities, which encompasses the plan for Community Liaison Services to assume audit coordination.

23 Ms. Stiff stated that she had been working on the Audit Officer position with the Classification personnel in Human Resources and knew that the position was affected. Ms. Stiff testified that a decrease in audits was expected because of the implementation of quality assurance measures. As well, the CLOs and the Community Liaison Services Managers would be responsible for coordinating audits and ensuring compliance with audit recommendations. The Audit Officer's duties related to coordination of First Nations communities' audits would remain in FNIH, while all other duties were to be moved to another part of the organization.

24 Ms. Stiff explained that Ms. Keats was affected rather than surplus because her position had not yet been eliminated. She testified that Ms. Keats' Audit Officer position would have been declared surplus to requirements once the 10 CLOs were staffed and the audit role had been assumed by Community Liaison Services. She added that the other duties of the Audit Officer position had already been transferred elsewhere in Health Canada.

25 Ms. Stiff testified that other employees as well as Ms. Keats were considered for the PM-05 position, when it was initially planned to appoint someone on an acting basis. She had recommended individuals from her Directorate, as did another Director. She

stated that she did not recall who was considered, but that ultimately no others were assessed because Ms. Keats was identified as an affected employee and was subsequently found qualified for the position.

26 Ms. Stiff consulted with Human Resources about advertised and non-advertised appointments, and reviewed Health Canada's *Criteria for use of Non-Advertised Processes*, which was introduced into evidence. She identified the appointment of an employee in order to avoid a priority situation as one of the listed criteria for using a non-advertised process. The decision to appoint Ms. Keats to the PM-05 position on an indeterminate basis, by a non-advertised process was made jointly with Mr. Wolfe sometime in June 2007.

27 Ms. Stiff stated that the PM-04 CLOs are key contacts with the First Nations communities. Those positions are filled with Aboriginal persons as much as possible.

28 Ms. Stiff explained that Mr. Jangula spoke with the CLOs about Ms. Keats' acting appointment before it was decided that an indeterminate appointment would be made. He attempted to speak with them again when it was decided that the appointment would be indeterminate, but was unable to due to absences. He instead sent an email to the CLOs on July 31, 2007.

29 Ms. Stiff testified that the Managers, Community Liaison Services are responsible for establishing and managing the HFA with First Nations. They handle key interventions regarding the HFA, implementing the intervention policy when required. They determine the required level of intervention based on the level of risk.

30 Ms. Stiff explained that the Statement of Merit Criteria (SMC) was established initially as a Statement of Qualifications when Mr. Jangula was appointed under the former PSEA. Her definition of "significant" was someone with experience handling complex issues and developing viable solutions with the First Nations communities. Under cross-examination, Ms. Stiff said that experience in First Nations communities, handling complex issues is required for the PM-05 position.

31 Ms. Stiff testified that she assessed Ms. Keats and prepared the *Candidate Assessment & Rationale for Non-Advertised Process*, which was introduced as evidence. Ms. Stiff used Ms. Keats' résumé and her personal knowledge of Ms. Keats based on having supervised her for three years. She also based her assessment of Ms. Keats, in part, on Ms. Keats' performance in the appointment process she conducted when Ms. Keats was appointed to the Audit Officer position, and on feedback from the Regional Director and Mr. Jangula.

32 Ms. Stiff acknowledged that the appointment process for the Audit Officer had been conducted three years prior to this process. She stated that, although there were differences between the two positions, there are also similarities. She looked for qualifications such as respect and being a good team player in both officers and managers. Ms. Stiff emphasized that this was only one of the tools she used to assess Ms. Keats for this appointment.

33 With respect to significant experience working with and in First Nations communities, Ms. Stiff testified that Ms. Keats had handled a lot of complex and sensitive audits of First Nations communities. She had met with Tribal Councils to discuss audit recommendations and develop solutions to resolve audits. Ms. Stiff explained that the amount of time spent in First Nations communities would depend on the nature of the audit, but that the amount of time was not key to the experience being significant. Ms. Keats had been to the communities while working as an Audit Officer. Ms. Keats had also briefed the Regional Director on very complex audits and had worked closely with Mr. Jangula. Both provided positive references which were incorporated into the assessment, although not separately documented.

34 Ms. Stiff found that Ms. Keats was qualified for the PM-05 Manager, Community Liaison Services. A *Notification of Consideration* was issued on July 31, 2007, followed by a *Notification of Appointment or Proposed Appointment* on August 14, 2007.

35 In response to questions from the PSC, Ms. Stiff stated that she did not have negative working relationships with any of the complainants that caused her to choose a

non-advertised appointment process. She also stated that she had no relationship with Ms. Keats outside of the office.

Arguments of the parties

A) Complainants' arguments

36 The complainants argue that the decision to use a non-advertised appointment process without considering others was unfair and demonstrates favouritism. They submit that an injustice occurred when the respondent failed to conduct an advertised process as initially planned, thereby denying an opportunity to others. The complainants also argue that the respondent was required to appoint the "most suitable" person.

37 The complainants argue that the respondent's definition of "significant" experience working in First Nations communities is flawed. They submit that a lot of experience physically working in the communities is required to meet the meaning of significant, and the respondent's definition is not sufficient. They further submit that there is no evidence that Ms. Keats had extensive experience working in First Nations communities; specifically, that the required experience is not in her résumé. Also, the complainants submit that the written assessment of Ms. Keats was inadequate. Ms. Keats does not meet all of the essential qualifications and, therefore, appointing her was an abuse of authority.

B) Respondent's arguments

38 The respondent argues that, under the *PSEA*, there is no requirement to base appointments on relative merit and appoint the most suitable or most qualified person. The respondent argues that section 33 and subsection 30(4) of the *PSEA* permit the use of non-advertised appointment processes and the consideration of only one person for appointment. The respondent submits that its use of the flexibility afforded under the *PSEA* was both reasonable and appropriate in the circumstances. There were pressing operational requirements to be addressed and there was an employee who was affected by the restructuring of the FNIH. In choosing a non-advertised process, the

respondent argues that it was able to avoid declaring Ms. Keats surplus to requirements and meet its urgent operational needs.

39 The respondent submits that it was transparent about the restructuring and the decision to make a non-advertised appointment. The HR Plan was circulated in February, 2007 and indicated expected change for the FNIH. More information was provided in a memorandum from Mr. Wolfe in June, 2007. Mr. Jangula corrected the misinformation about the appointment process for the PM-05 position in an email on July 31, 2007. The respondent submits that this is evidence of good faith.

40 The respondent argues that deputy heads and their delegates have the authority to establish qualifications under subsection 30(2) of the *PSEA*. This has been found by the Tribunal to be a broad discretion in *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024. The respondent submits that Mr. Wolfe and Ms. Stiff explained the definition of significant experience working in first Nations communities in the context of the work of the position to be staffed.

41 The respondent argues that section 36 of the *PSEA* gives the PSC and its delegates the authority to choose assessment methods. Ms. Keats' assessment was based on her performance on a previous appointment process, her résumé, references, and the personal knowledge of Ms. Stiff who had supervised her for three years. The respondent submits that Ms. Keats was assessed and found qualified for the position. The respondent argues that there is no evidence that the assessment tools were inappropriate, and no evidence that Ms. Keats is not qualified for the PM-05 position.

42 Finally, the respondent argues that there must be convincing evidence to support a finding of personal favouritism. It submits that the complainants have failed to provide any evidence of personal favouritism and have relied solely on their perceptions.

C) Public Service Commission's arguments

43 The PSC submits that the respondent did not fully comply with two of its relevant policies. Although the respondent's witnesses provided evidence about the pressing needs facing the organization, the written justification lacks an explanation of how the

choice of a non-advertised process addresses those needs. The rationale also fails to explain how the staffing values were met. In these ways, the respondent failed to fully comply with the policy on *Choice of Appointment Process*.

44 The PSC submits that the respondent could have done more to communicate its plans and strategies more fully and in a timely manner. More transparency would have been better aligned with the *Appointment Policy* and may have increased the confidence of employees in the appointment decision.

45 The PSC argues that errors in the application of its policies do not necessarily lead to abuse of authority.

Relevant Legal Provisions

46 These complaints are made under subsection 77(1) of the *PSEA*:

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

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

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

[...]

47 Subsection 30(4) and sections 33 and 36 of the *PSEA* are relevant:

30. (4) The Commission is not required to consider more than one person in order for an appointment to be made on the basis of merit.

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

36. In making an appointment, the Commission may use any assessment method such as a review of past performance and accomplishments, interviews and examinations, that it considers appropriate to determine whether a person meets the qualifications referred to in paragraph 30(2)(a) and subparagraph 30(2)(b)(i).

48 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.”

Analysis

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

49 Under the former *PSEA*, appointments without competition were permitted. However, relative merit still applied as the ground for appeal was that relative merit – appointment of the most qualified person – had not been achieved.

50 The former system of mandatory relative merit no longer exists. There is considerable discretion when it comes to staffing matters. This complaint concerns a non-advertised indeterminate appointment. Clearly, a deputy head, as the PSC’s delegate, has discretion to choose between an advertised and a non-advertised appointment process pursuant to section 33 of the *PSEA*. Moreover, considering only one person, as was done in this case, is also discretionary and specifically authorized by subsection 30(4) of the *PSEA*.

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

52 The Tribunal has determined that, for a complaint under paragraph 77(1)(b) of the *PSEA* to be successful, a complainant must establish, on a balance of probabilities, that the choice to use a non-advertised appointment process was an abuse of authority. See, for example: *Rozka et al. V. Deputy Minister of Citizenship and Immigration Canada et al.*, [2007] PSST 0046.

53 Based on the evidence, the Tribunal finds the following facts to be uncontested. The FNIH was undergoing significant change to its program and restructuring of its organization. As a result, there were two relevant impacts: one, a second PM-05

Manager, Community Liaison Services was needed; and secondly, a PM-04 Audit Officer was to be eliminated and the incumbent, Ms. Keats, would be in a priority situation.

54 Priority situations are governed by the *PSEA* and the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*). Section 64 of the *PSEA* deals with the lay-off of employees whose services are no longer required. Subsection 64(1) requires that an employee in this situation must be advised by the deputy head. A surplus priority situation is established under subsection 5(1) of the *PSER*, when an employee is advised of their impending lay-off. A surplus priority is entitled to appointment “to any position in the public service for which the Commission is satisfied that the employee meets the essential qualifications [...]”

55 The complainants argue that Ms. Keats should have been moved to a PM-04 CLO position. Subsection 2(1) of the *PSEA* defines deployment as “the transfer of a person from one position to another in accordance with Part 3.” Subsection 51(5) stipulates that the deployment of a person may not constitute a promotion. And, subsection 53(1) stipulates that “[A] deployment is not an appointment within the meaning of this Act.”

56 Use of the word “appointment” in the *PSER*, in relation to an employee with surplus priority status, clearly permits a promotion for that employee. Furthermore, the Tribunal finds that, by including “the appointment of an employee to avoid a priority situation” among its criteria for using a non-advertised appointment process, the respondent clearly contemplated the possibility of promoting an employee who faces, but does not yet have priority status.

57 The complainants believe that the respondent’s choice to promote Ms. Keats to a PM-05 position rather than deploy her to a PM-04 CLO position constitutes favouritism.

58 In *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, the Tribunal examined the concept of personal favouritism. The Tribunal held at paragraph 39 of *Glasgow* that the word **personal** precedes the word **favouritism** in subsection 2(4) of the *PSEA* to emphasize

Parliament's intention that **personal favouritism**, not other types of favouritism, constitutes abuse of authority. The Tribunal went on to explain personal favouritism:

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

59 The complainants testified that Ms. Keats received more training and more opportunities to meet with Headquarters personnel than others, that Ms. Keats had moved upward in the organization quickly, and that she had occupied an Audit Officer position without a professional designation whereas others were required to possess one. While the complainants made these statements, they are not first-hand witnesses to these events and they did not provide any documents to support these statements.

60 The respondent could have deployed Ms. Keats to a PM-04 position; however, Mr. Wolfe and Ms. Stiff both testified that it is preferable to appoint Aboriginal persons to CLO positions, whose role is to be a close, key contact with the First Nations.

61 It was also open to the respondent to choose to appoint Ms. Keats to a position for which she was qualified. Mr. Wolfe and Ms. Stiff also testified that Ms. Keats skills were needed at the Manager level. Ms. Stiff stated that she had no personal relationship with Ms. Keats.

62 Moreover, avoidance of a priority situation is one of Health Canada's criteria for using a non-advertised process. Ms. Stiff consulted with Human Resources and reviewed Health Canada's *Criteria for use of Non-Advertised Processes*. Together with Mr. Wolfe, she decided to use a non-advertised process in order to avoid putting Ms. Keats in a priority situation.

63 The Tribunal finds that the complainants have not established on a balance of probabilities that personal favouritism influenced the decision to use a non-advertised process for this appointment.

64 In previous cases the Tribunal has examined the issue of non-compliance with PSC policy. In *Robert and Sabourin v Deputy Minister of Citizenship and Immigration et*

al., [2008] PSST 0024, the Tribunal found that the respondent's multiple errors and omissions demonstrated such serious carelessness as to constitute bad faith. In that case the Tribunal determined that the respondent had not established a *Statement of Merit Criteria*, had not assessed the appointee, had failed to write a justification for using a non-advertised appointment process on any of the three occasions when it was required and did not notify employees of the appointment until more than three months after it was required to do so, and after the acting appointment had ended.

65 In *Morris v. Commissioner of Correctional Service of Canada et al.*, [2009] PSST 0009, the respondent's written justification for using a non-advertised appointment process did not meet PSC policy requirements. The respondent in *Morris* made other errors and omissions as well; however, the Tribunal found that the errors and omissions did not demonstrate serious carelessness or recklessness and therefore did not amount to abuse of authority.

66 The written justification in this case lacks an explanation of how the choice of a non-advertised process addressed the urgent operational needs and fails to explain how the staffing values were met. However, Ms. Stiff and Mr. Wolfe testified that the non-advertised appointment of Ms. Keats would assist the organization in meeting its deadline to integrate the new HFA. They explained that it would also provide additional management capacity in Community Liaison Services, which had increased its size and its workload.

67 The Tribunal is satisfied that the respondent's evidence is credible and responds to the requirement to demonstrate how the non-advertised appointment would address the urgent operational needs of the organization. The respondent's failure to include the explanation in the written rationale was an omission, as was its failure to address the staffing values. While the written justification does not comply fully with the PSC's policy on *Choice of Appointment Process*, these omissions do not demonstrate serious carelessness or recklessness and do not constitute bad faith.

68 The Tribunal finds that the evidence does not support a finding that the decision to choose a non-advertised appointment process to appoint Ms. Keats to the position of Manager, Community Liaison Services constitutes an abuse of authority.

Issue II: Did the respondent abuse its authority in establishing the definition of significant experience?

69 Subsection 30(2) of the *PSEA* sets out the authority of the deputy head and his or her delegates to establish essential qualifications. The Tribunal held in paragraph 42 of *Visca*, that this discretion is broad.

70 The essential qualification at issue here is “significant experience in working with First Nations and working in First Nations communities”. The complainants do not challenge the validity of the qualification as essential to the work of the position. They argue that the respondent’s definition of significant is flawed, as it relates to working *in* First Nations communities.

71 In *Bowman et al. v. Deputy Minister of Citizenship and Immigration Canada et al.*, [2008] PSST 0012, the Tribunal found that definitions that are required to give precision to a qualification fall under the deputy head’s broad authority to establish qualifications.

72 Ms. Lynxleg believes that seven or eight years of experience is an appropriate definition of significant. It is clear that the complainants think that significant must be applied separately to experience working *with* First Nations and to experience working *in* First Nations communities. The complainants did not produce any documents indicating that this is a requirement or any other evidence to support their views.

73 Mr. Wolfe and Ms. Stiff considered the experience qualification as a whole and placed more importance on the breadth and nature of the experience rather than on the length of time or the number of visits to First Nations communities. Ms. Stiff explained that working on complex issues and developing viable solutions with First Nations together with some time spent in the communities, is relevant to the work of the PM-05 position, whose role in the changed organization is to establish and manage the HFA and intervene to resolve issues as required.

74 There is no evidence to support a finding of abuse of authority in the establishment of the definition of “significant” for the essential experience qualification.

Issue III: Did the respondent abuse its authority by appointing a person who failed to meet the essential qualification significant experience in working with First Nations and working in First Nations communities?

75 The complainants allege that Ms. Keats does not meet the experience qualification. Statements by Mr. Mercer and Mr. Kosowan that Ms. Keats does not have any experience working in, and has not travelled to First Nations communities are not supported by the evidence. As Ms. Keats’ supervisor, Ms. Stiff testified that Ms. Keats had been to First Nations communities in her role as Audit Officer. Moreover, Ms. Keats’ résumé, which was submitted into evidence, specifically mentions visits to First Nations communities.

76 In *Jolin v. Deputy Head of Service Canada et al.*, [2007] PSST 0011, at paragraphs 26 to 28, the Tribunal explains the broad discretion a delegate has to choose from a wide range of assessment tools and methods under section 36 of the *PSEA*. In this case, a résumé, past performance in an appointment process, references and personal knowledge were used to assess Ms. Keats.

77 Résumés, references and an assessor’s personal knowledge are accepted assessment methods. Ms. Stiff testified that she used Ms. Keats’ past performance in an appointment process for another position only with respect to those qualifications that were required of both positions. This evidence was not contradicted.

78 There is no evidence to support a finding that the combination of tools used was insufficient to permit a thorough assessment of Ms. Keats’ qualifications for this PM-05 position.

79 The Tribunal held in paragraph 35 of *Zhao v. Deputy Minister of Citizenship and Immigration et al.*, [2008] PSST 0030, that “[A]n assessment method must provide a means to determine whether a candidate meets or does not meet an essential

qualification in order to comply with the requirement to appoint qualified persons in accordance with subsection 30(2) of the *PSEA*.”

80 The Tribunal finds that the assessment tools used in this case did provide a means to determine whether Ms. Keats met the essential qualifications.

81 The complainants argue that the *Candidate Assessment & Rationale for Non-Advertised Process* is lacking in sufficient detail.

82 Based on the document itself, which was submitted into evidence, the Tribunal is satisfied that the assessment contains sufficient detail; namely, a statement of each of the merit criteria, a clear indication whether Ms. Keats meets or does not meet each criteria, and a narrative statement supporting the assessment of each criteria.

83 The instructions in section A of the document state the following: “[...] assess the candidate against each Essential and any applicable Asset qualification on a Meets (Yes/No) basis or use the five point scale”. (emphasis added) No point scale rating was required and the fact that none was used does not render this assessment document incomplete or invalid.

84 The Tribunal finds that the complainants have not provided evidence to support a finding of abuse of authority in the assessment of Ms. Keats. There is no evidence that Ms. Keats did not meet the qualifications for appointment to the position of PM-05 Manager, Community Liaison Services.

Decision

85 For the above reasons, the complaints are dismissed.

Merri Beattie
Member

Parties of Record

Tribunal File	2007-0387/0423/0424/0425/0426/0427/0430
Style of Cause	<i>Richard Kosowan et al. and the Deputy Minister of Health Canada et al.</i>
Hearing	May 6 - 7, 2008 Winnipeg, MB
Date of Reasons	August 4, 2009
APPEARANCES:	
For the complainant	Frank Janz
For the respondent	Lesa Brown
For the Public Service Commission	John Unrau