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

FILE: 2008-0061

OTTAWA, AUGUST 7, 2009

CHANTAL RAJOTTE

COMPLAINANT

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)*(a)* of the *Public Service Employment Act*
DECISION	Complaint is substantiated
DECISION RENDERED BY	Robert Giroux, Member
LANGUAGE OF DECISION	English
INDEXED	*Rajotte v. President of the Canada Border Services Agency et al.*
NEUTRAL CITATION	2009 PSST 0025

REASONS FOR DECISION

INTRODUCTION

[1] Chantal Rajotte, the complainant, is an Administrative Assistant, AS-01, with the Canada Border Services Agency (CBSA). She filed a complaint with the Public Service Staffing Tribunal (the Tribunal) in which she contends that the President of the Canada Border Services Agency, the respondent, abused its authority by choosing a non-advertised process and not using an established pool of candidates to staff a Team Leader position. After hearing the delegated manager's testimony, she also alleges that she was discriminated against on the basis of her family status.

BACKGROUND

[2] On January 7, 2008, the CBSA posted a Notification of Appointment or Proposal of Appointment concerning the acting appointment of Christine Denault to the position of Team Leader, AS-03, Branch Management Services Unit (BMSU), from December 22, 2007 to December 21, 2008 (December 2007 acting appointment). The acting appointment resulted from a non-advertised process (process no. 07-BSF-ACIN-HQ-SCB-AS-1125).

[3] On January 21, 2008, the complainant filed a complaint against the acting appointment under paragraph 77(1)(*b*) of the *Public Service Employment Act*, S.C. 2003, ss. 12, 13 (the *PSEA*). The complainant alleges that the respondent abused its authority by appointing Ms. Denault who was not in the pool established by the respondent.

[4] On August 11, 2008, the day prior to the hearing, the complainant requested an amendment to her allegations as per subsection 23(2) of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, (the *PSST Regulations*), as a result of new information that could not be obtained before the complainant submitted her original allegations.

[5] The complainant explained that the respondent only recently provided her with a rationale for the non-advertised appointment process. This rationale indicates that the

appointment at issue was in fact an extension of an initial non-advertised appointment made on June 25, 2007 (June 2007 acting appointment). There was no notification of appointment posted on *Publiservice* concerning the initial appointment. The complainant was not aware until she received the rationale that the December 2007 acting appointment was an extension of the initial appointment made on June 25, 2007.

[6] At the beginning of the hearing, the complainant repeated her request for the addition of an allegation of abuse of authority with respect to the initial non-advertised appointment of June 25, 2007. The respondent did not object to this request. The Tribunal granted the request and the new allegation was added to the original complaint. As a result, the complainant also contends that there was an abuse of authority with respect to the initial appointment of June 25, 2007.

[7] The complainant requested the exclusion of witnesses to which the respondent did not object. The Tribunal granted the request for exclusion of witnesses.

PRELIMINARY MATTER: REQUEST TO RECONVENE THE HEARING AFTER THE SUBMISSION OF ARGUMENTS

[8] In her arguments at the hearing, the complainant raised an additional allegation that she was discriminated against on the basis of her family status in the initial appointment process (June 2007). She submitted that access to a promotion should not be limited because of her family obligations. She explained that this allegation could not be foreseen when the complaint was filed as the supporting evidence was revealed during the testimony of the acting hiring manager, Lynn Shannon, the respondent's witness.

[9] The respondent replied in its oral arguments to this allegation of discrimination. The respondent submitted that the fact that the complainant could not perform overtime due to her family obligations was not a factor in the decision to appoint Ms. Denault.

[10] On November 13, 2008, the Tribunal advised the parties that section 78 of the *PSEA* and section 20 of the *PSST Regulations* require that the complainant notify the Canadian Human Rights Commission (CHRC) when a complaint raises an issue

involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 (*CHRA*). The letter stated that, in the interest of fairness, and because of the specific circumstances of this case, the Tribunal granted the complainant an opportunity to notify the CHRC by November 27, 2008, if she intended to pursue the human rights issue.

[11] On November 17, 2008, the complainant's representative notified the CHRC of the human rights issue raised at the hearing. Section 20 of the *PSST Regulations* provides that the CHRC must notify the Tribunal no later than 15 days after receiving the notice, as to whether or not it intends to make submissions regarding the issue raised by the complainant. The Tribunal did not receive submissions from the CHRC within this timeline.

[12] On January 16, 2009, the Tribunal was advised by the CHRC that, because of an administrative error, it did not notify the Tribunal as required. The CHRC indicated that it wished to make submissions on the human rights issue and sought leave to provide submissions. The respondent did not object to the request of the CHRC and the Tribunal granted the CHRC an extension of time to make its submissions. The Tribunal then established a revised schedule for submissions giving the respondent the opportunity to provide rebuttal submissions to the Public Service Commission (PSC) and the CHRC.

[13] On February 10, 2009, the PSC provided its written submissions on the allegation of discrimination. It indicated that it was not present at the hearing to hear the testimony giving rise to the allegation of discrimination. Thus, it based its submissions on those of the complainant and the respondent but was unable to conclude whether or not discrimination occurred. Not having a full record of the facts of this case, the PSC had several questions and suggested that an oral hearing may be warranted.

[14] On February 13, 2009, the CHRC produced its written submissions. It indicated that the evidence of Ms. Shannon as recounted by both parties appears to diverge, which led to many more questions. However, it submitted that either version supported its submissions that the complainant may have experienced discrimination.

[15] On February 20, 2009, the respondent provided its rebuttal submissions to the PSC and CHRC submissions. In these submissions, the respondent requested that the Tribunal reconvene the hearing and allow the respondent to introduce evidence on the issue of discrimination. The respondent submitted that, based on the rules of natural justice, it should be able to adduce evidence on the issue of discrimination to reply to the PSC and the CHRC's submissions.

[16] According to the respondent, the potential of an adverse decision on the respondent outweighs any inconvenience for the other parties. Furthermore, the respondent submits that its case strategy and decision to close its evidence was made before discrimination became an allegation.

[17] On February 27, 2009, the complainant submitted her rebuttal submissions indicating that she had no disagreement with the respondent's account of Ms. Shannon's testimony. However, the complainant indicated that she opposed the respondent's request to reconvene the hearing. She explained that she had no desire to go through another difficult hearing process. She submitted that the respondent was made aware of the new allegation before it closed its evidence and was provided the opportunity to state its arguments on the discrimination issue during its final arguments.

[18] According to the complainant, the respondent was accorded natural justice. The respondent was given the right to be heard and the right to make its case even after it had stated it had concluded its final submissions. Further, the respondent submitted its reply to the Tribunal concerning the allegation of discrimination based on family status on January 30, 2009 and its rebuttal on February 20, 2009. The complainant submitted that the Tribunal has all of the evidence required to make a decision.

ANALYSIS OF THE PRELIMINARY MATTER

[19] The respondent requests that the hearing be reconvened based on procedural fairness, specifically on the right to be heard.

[20] The Supreme Court in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817; [1999] S.C.J. No. 39 (QL), enunciated the common law requirements in meeting the duty of fairness (see paragraphs 23 to 28 QL version):

1. The nature of the decision being made and the process followed in making it;
2. The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. The importance of the decision to the individual or individuals affected;
4. The legitimate expectations of the person challenging the decision;
5. The choice of procedure made by the agency itself.

[21] With these requirements in mind, the Tribunal must determine whether the duty of fairness requires the hearing to be reconvened in the particular context of the *PSEA*, the rights and procedures it provides, and the human rights issue.

[22] The Tribunal's enabling statute, the *PSEA*, is silent on reconvening hearings, but subsection 98(1) indicates that the member making a determination in a complaint shall proceed as informally and expeditiously as possible. Section 27 of the *PSST Regulations* provides the following: "The Tribunal is master of the proceedings and may determine the manner and order of the presentation of evidence and arguments at the hearing." Accordingly, the Tribunal is master of procedural post-hearing matters and should proceed as informally and expeditiously as possible, while respecting the duty of fairness.

[23] The respondent submits that it became fully aware of the case against it following the PSC and the CHRC's submissions, and that it cannot properly defend itself against the human rights issue without adducing additional evidence.

[24] One of the circumstances in which a tribunal may receive a request to reconvene a hearing is a situation where a party may be denied the opportunity to place its entire case before the tribunal (See: David Phillip Jones and Anne S. De Villars, *Principles of Administrative Law* (Toronto: Thomson Carswell, 2004), at 344). In *Mansigh v. Canada (Minister of Employment & Immigration) (No. 2),* (1978) 24 N.R. 576 (Fed. C.A.); [1978] F.C.J. No. 1109 (QL), the applicant requested a new hearing as he had failed to

introduce evidence. The Federal Court of Appeal denied the request as it determined there was nothing in the submissions which disclosed the additional evidence which the applicant sought to introduce at the reconvened hearing.

[25] In *Garba v. Lajeunesse*, [1979] 1 F.C. 723; [1978] F.C.J. No. 179 (QL), the Federal Court of Appeal held that, when determining whether to reconvene a hearing, an administrative tribunal must give reasons with regard to the relevancy and evidentiary weight of the new evidence to be filed. In that case, an adjudicator had refused to reconvene the hearing to consider further evidence because the evidence the applicant sought to introduce was available before the hearing. The applicant had considered the evidence submitted to be sufficient. The Federal Court of Appeal stated the following, at paragraphs 8 and 9 (QL version):

> To the extent that it is possible to generalize in such a matter, it seems to me that the chief considerations that should ordinarily influence the exercise of this power [to reopen an inquiry] are the weight and the relevance of the new evidence. Thus, an inquiry should not be reopened to hear evidence that is incredible or which relates to a fact the existence of which cannot affect the outcome of the case. The fact that the new evidence was not recently uncovered, and could have been presented at the inquiry, does not appear to me, of itself and without regard to the circumstances, to justify a refusal in every case to reopen an inquiry.[…]
>
> In the circumstances disclosed by the record, I do not believe the Adjudicator acted unlawfully in refusing to reopen the inquiry. […] Furthermore, **the evidence offered, the exact nature of which was not explained, related to facts which had been raised directly at the inquiry, and which could not have been forgotten either by applicant or his counsel**. There is no reason to think that this evidence could not have been presented at that time. In these circumstances, it could be concluded that the failure to present this evidence at the inquiry was the result of a deliberate decision or gross negligence, and in my opinion this is a sufficient legal basis for the decision a quo.
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> (Emphasis added)

[26] The exact nature of the evidence to be introduced by the respondent is unclear. Nowhere in its submissions does the respondent provide details as to what evidence it would introduce. The weight or relevance that could be given by the Tribunal to this evidence is unknown.

[27] The respondent's request is so vague and broad that it could include recalling its own witnesses. The respondent re-examined its two witnesses and, specifically, Ms. Shannon, after she testified on cross-examination, which led to the allegation of discrimination. Moreover, an order for the exclusion of witnesses was made at the

hearing. Once the respondent closed its evidence and the parties made their arguments, the hearing ended. Given the passage of time since the hearing, witnesses may have discussed their testimony with others, or potential new witnesses may have heard about the evidence given at the hearing. This brings into question the appropriateness of having these witnesses testify.

[28] The respondent argues it became aware of the case that must be met following rebuttal submissions. The respondent did not advise of any need to introduce further evidence prior to these rebuttal submissions.

[29] Fairness and, specifically, knowing the case that must be met means that "[…] all information relied upon by the tribunal when making its decision be disclosed to the individual" (See: Jones and de Villars, at 259). In this case, this means access to witness statements and documents filed as evidence. The respondent knew the case that it had to meet as it attended the hearing, heard all the witnesses' testimonies, and was provided with all the exhibits filed. The respondent was also given the opportunity to fully reply to the written arguments of the PSC and the CHRC.

[30] Moreover, it is the respondent's witness, Ms. Shannon, who, during cross-examination, provided the evidence on which the allegation of discrimination is based. The respondent then re-examined its witness and was given the opportunity to clarify her testimony. After she testified, the respondent did not make a request to call additional witnesses and chose to close its evidence. The respondent has known the case to be met since the hearing was held on August 12 and 13, 2008.

[31] At the hearing, the complainant raised the human rights issue and made submissions. The respondent also presented argument on the human rights issue at the end of its submissions. If it had concerns about not having met the case against it, the respondent could have asked for an adjournment at any time during the proceedings.

[32] There were instances, prior to filing written arguments on the allegation of discrimination, where the respondent could have notified the Tribunal that it had additional evidence it wished to produce. The Tribunal informed the parties on November 13, 2008 that the complainant was required to notify the CHRC if she wished

to pursue her allegation of discrimination. The respondent could have raised its concerns then if it felt that the evidence was insufficient to make its case. Similarly, when the Tribunal provided the schedule for the parties' submissions on December 10, 2008, as well as the revised schedule on February 2, 2009, the respondent could have made its request to file additional evidence. It is only at the respondent's rebuttal to the PSC and CHRC submissions on February 20, 2009 that the respondent raised, for the first time, its need to file new evidence. It is neither reasonable nor fair to make this request so long after the completion of the hearing and receipt of written arguments.

[33] The respondent claims that because the PSC and the CHRC have taken a position against the respondent on the facts, the risk that the Tribunal finds a *prima facie* case of discrimination has increased substantially. This is a fallacious argument. Findings of fact are made on the basis of evidence adduced at the hearing, not on submissions. The PSC and CHRC's positions have no bearing on findings of fact. The PSC and the CHRC both pointed out that, by not having attended the hearing, their submissions were based on the complainant and the respondent's submissions. Their respective submissions pertain to the legal principles governing human rights issues.

[34] For all these reasons, the Tribunal finds that the respondent has not met its onus of satisfying the Tribunal that there is sufficient merit to reconvene the hearing. There were no reasons to prevent the respondent from introducing additional evidence at the hearing, if it wished to do so. The respondent knew at the hearing the case it had to meet; it was given the opportunity to be heard and to present its case. The Tribunal is also satisfied that it has all the necessary evidence to make a finding on the issue of discrimination. Further delays would be unfair to the parties. Accordingly, the Tribunal determines that the rules of natural justice were complied with and it will not reconvene the hearing.

[35] The PSC has suggested that an oral hearing may be warranted as it did not witness the testimony giving rise to the allegation of discrimination. The Tribunal is satisfied that the PSC has been provided with its full right to be heard under subsection 79(1) of the *PSEA.* On May 9, 2008, the PSC was duly informed of the hearing to be

held on August 12 and 13, 2008. It chose not to attend. It was also given the opportunity to provide written submissions on the issue of discrimination. The Tribunal notes that the PSC cannot take a position on whether there has been discrimination as it was not present at the hearing. However, this is not a valid reason to reconvene a hearing as it would not be expeditious or fair to the parties who did attend the hearing.

ISSUES

[36] To resolve this complaint, the Tribunal must address the following issues:

(i) Did the respondent abuse its authority by choosing non-advertised appointment processes?

(ii) Did the respondent abuse its authority by discriminating against the complainant on the basis of her family status?

(iii) Did the respondent appoint Ms. Denault on the basis of personal favouritism?

SUMMARY OF RELEVANT EVIDENCE

[37] The CBSA contains nine separate branches. This complaint deals with events in two of these branches: Strategy and Coordination, and Human Resources. Strategy and Coordination is headed by Vice-President Mary Zamparo, who is assisted by Marianne Thouin. The Branch has a BMSU, headed by Ms. Shannon. The acting appointments, the subject of the complaint, are located in the BMSU.

[38] Lisa Carpenteiro, Manager, Corporate Staffing in the Human Resources Branch, explained that CBSA was created in December 2003. She has been at CBSA since that time. She indicated that the BMSUs are located in each branch of CBSA, but are not shown on the organizational chart. Currently, CBSA is going through a restructuring process, as well as a classification review, to come to a more uniform structure for the BMSUs. Consequently, the BMSUs must staff by borrowing positions from other units and cannot staff on an indeterminate basis. Ms. Carpenteiro does not know when the review will be completed.

[39] The complainant works in Strategy and Coordination, in the Communications Division. The complainant has been an employee in the federal public service for 11 years. In 2003-2004, she was transferred to CBSA when it was first created. She holds the position of Administrative Assistant (AS-01).

[40] The complainant has worked with Ms. Denault since 2004 and her duties were similar to Ms. Denault's. She also stated that she had performed Ms. Shannon's duties for a week in the summer of 2006.

[41] In the fall of 2006, the complainant applied for the position of Team Leader, Program Support, AS-03, in the advertised appointment process no. 06-BSF-INA-HQ-HRB-AS-2929. The purpose of the appointment process was to establish a pool to be used to staff positions on an indeterminate, term and/or acting basis. Following this appointment process, a pool was created to staff the Team Leader positions as well as for similar positions within CBSA.

[42] At the time, the complainant's résumé was considered. She was invited to write the test developed for the positions to be staffed, which she did; and she also wrote another test at home and was told that she passed the tests. She was further invited to an interview where she was successful. The complainant qualified for the pool with approximately 45 other employees. Approximately 21 employees were appointed from the pool before its closing date on January 15, 2008. The complainant was not appointed. Ms. Denault was not in the pool since she did not apply for the Team Leader position.

[43] Ms. Shannon joined the BMSU as acting Manager in April 2007. At that time, the BMSU was still going through its restructuring process. She recalls some conversations with the complainant about her interest in other positions. In April 2007, the complainant told her that she had qualified in a pool and asked Ms. Shannon if she knew of available jobs.

[44] In June 2007, Ms. Shannon organized her unit in two groups: Finance, and Human Resources/Accommodation. She needed a Team Leader in Human Resources and Accommodation which led to Ms. Denault's initial acting appointment. Ms. Shannon

surveyed the Branch to find an employee she could appoint on an acting basis. Ms. Shannon stated that, in her discussions with Human Resources, she was not told of an existing pool of AS-03 candidates.

[45] With the help of her supervisor, Ms. Thouin, they identified employees who might be interested and who possessed the essential qualifications. They considered approximately six or seven employees, including Ms. Denault and the complainant. Ms. Shannon had functional authority over Ms. Denault and the complainant in the Communications Division from 2004 until she joined the BMSU in 2007. She interacted daily with them. Ms. Shannon stated that she has had no problems working with the complainant.

[46] Ms. Shannon only spoke to Ms. Denault about the position and not to the other employees who were assessed. Ms. Shannon did not use a written exam. All employees were AS-01s except for Ms. Denault, who had been deployed to the position of Assistant to the Associate Director General (AS-02) in the Communications Division in 2004.

[47] Ms. Denault was assessed on the basis of her experience in the Communications Division. Since Ms. Shannon had functional authority over her, and interacted with her on a daily basis, she had observed that Ms. Denault could perform in a climate of uncertainty, deal with difficult clients, and had knowledge of human resources and accommodation. On cross-examination, Ms. Shannon testified that Ms. Denault was appointed not so much on the basis of her résumé, but because of her experience.

[48] Furthermore, Ms. Denault had shown interest in the acting appointment and was a frequent back-up for Ms. Shannon in the Communications Division. When Ms. Shannon took holidays, a back-up was needed. Ms. Shannon testified that the opportunity to act as her back-up was offered to all employees but, given the work hours from 7:30 a.m. to 5:30 p.m., only a few had expressed interest. She stated that the complainant was not interested in being a back-up for her because the hours were too long and she had to take care of a younger child.

[49] Both Ms. Shannon and Ms. Thouin agreed that Ms. Denault met their needs. She was appointed on June 25, 2007 to the Team Leader position.

[50] In June 2007, Ms. Denault told the complainant that she was going to work for Ms. Shannon as an AS-03. The complainant asked Joanne Cuyler, Human Resources, about this appointment and was told that Ms. Denault was working at the AS-02 group and level.

[51] The acting appointment was originally for four months less one day. Ms. Shannon and Ms. Thouin soon realized that they needed a longer appointment, i.e. until December 2007, because the classification review would take longer than expected. No notice of the extension of the initial acting appointment, an acting appointment of more than four months, was posted on *Publiservice* at the time. However, they did prepare a Statement of Merit Criteria (SMC) and a rationale to justify the longer duration of the appointment. The rationale was written in June 2007. The essential qualifications were set by Ms. Shannon in the SMC based on the qualifications used in the appointment process for the Team Leader position in Finance.

[52] The rationale was written by Ms. Shannon in the form of a memorandum to Ms. Zamparo which was entitled *Rationale for the Acting Appointment for Christine Denault*. Ms. Shannon signed it on August 28, 2007, and Ms. Zamparo approved it on August 29, 2007. The rationale was written to justify Ms. Denault's initial acting appointment starting June 25, 2007, approximately two months after she had been appointed.

[53] In the August 28, 2007 rationale, Ms. Shannon requested approval for the appointment of Ms. Denault until December 21, 2007, which Ms. Zamparo approved on August 29, 2007. No notice of the acting appointment was posted on *Publiservice.*

[54] In this rationale, Ms. Shannon indicated that Ms. Denault "possesses the necessary skills and experience required to perform all duties related to this position." She explained that over the last two years, Ms. Denault had demonstrated a strong ability to perform tasks related to staffing of employees in the Communications Division. Furthermore, she explained that they were working with Human Resources Branch on

the Branch Management Services review to create an organizational structure for the BSMU. She stated that they were going to review the work descriptions for the Team Leader positions and submit them to classification.

[55] Ms. Shannon prepared and signed a second rationale on December 5, 2007. It was written in the form of a memorandum and it was identical in content to the August 29, 2007 rationale except that it was addressed to Ms. Thouin. It requested approval for the acting appointment until December 21, 2008 and is entitled *Rationale for the **Extension** of the Acting Appointment for Christine Denault* (emphasis added). Ms. Thouin approved the rationale and extended the acting appointment on December 6, 2007.

[56] No notices were posted on *Publiservice* advising that there had been an initial acting appointment that began June 25, 2007, and extended beyond four months until December 21, 2007. Employees were not informed in any other way of this initial acting appointment. Ms. Shannon could not explain in her testimony why no notices were posted. She testified that this was Human Resources' responsibility.

[57] Ms. Shannon explained that, in December 2007, a decision was made to extend the acting appointment for one year because the classification review would take another year. There were no changes in duties since June 2007; however, more staff were now reporting to Ms. Denault. Ms. Shannon stated that she did not consider other candidates in December 2007 because Ms. Denault was doing a good job. Notice of this appointment was posted on *Publiservice* on January 7, 2008.

[58] The complainant testified that when she filed her complaint in January 2008 regarding the December 2007 acting appointment, she was not aware that this acting appointment was an extension to the June 2007 acting appointment.

[59] It was only prior to the hearing that the complainant found out that this acting appointment was in fact an extension of a June 2007 initial appointment. The complainant testified that she was shocked, disappointed and depressed when she found out that Ms. Denault had been acting in the position since June 2007. She further

testified that Ms. Shannon was aware that she was in the pool and that she had expressed interest in working with her.

[60] The complainant explained why she believes that Ms. Shannon showed personal favouritism towards Ms. Denault in appointing her. According to the complainant, Ms. Shannon and Ms. Denault have a personal relationship as they are good friends. They have worked together previously and have lunch and knit together. For her part, the complainant had lunch with her supervisors only during group events at the Branch, and she never received knitting lessons from her supervisors.

[61] Ms. Shannon stated that she does not socialize outside the office unless there is a special occasion (groups having dinner). She socializes occasionally at the office, having lunch in her office, and for a period of time a group of six or seven employees knitted with her at lunchtime. She attended Ms. Denault's wedding with 10 to 12 other staff, but only for the dance at the end of the evening.

[62] Ms. Shannon stated that she has had no problems with her working relationship with the complainant and has had little dealings with her since April 2007. She recalls some conversations with the complainant about her interest in other positions. In April 2007, the complainant told her that she had qualified in a pool, and asked Ms. Shannon if she knew of available jobs. She did not recall any meetings with the complainant from December 2007 to June 2008.

RELEVANT LEGISLATION, REGULATIONS AND POLICIES

[63] The authority of the PSC to establish policies is found in subsection 29(3) of the *PSEA.* Deputy heads are subject to these policies pursuant to section 16. These provisions 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.

[64] Section 33 of the *PSEA* provides that appointments can be made following an advertised or non-advertised process. This complaint was filed initially under paragraph 77(1)(*b*) of the *PSEA*, which relates to abuse of authority in the choice of process. Further arguments were put forward concerning the criteria for making an appointment on the basis of merit under paragraph 77(1)(*a*) which refers to subsection 30(2) of the *PSEA.* As well, the allegation of discrimination is based on section 80. These provisions read as follows:

> **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.
>
> 33. In making an appointment, the Commission may use an advertised or non-advertised appointment process.
>
> **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;
> >
> > […]

> **80.** In considering whether a complaint under section 77 is substantiated, the Tribunal may interpret and apply the *Canadian Human Rights Act*, other than its provisions relating to the right to equal pay for work of equal value.

[65] 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.

[66] The following provisions of the *CHRA* are relevant to the discrimination issue:

> **3.** (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.
>
> **7.** It is a discriminatory practice, directly or indirectly,
>
> […]
>
> (*b)* in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.
>
> **10.** It is a discriminatory practice for an employer, employee organization or employer organization
>
> (*a*) to establish or pursue a policy or practice, or
>
> […]
>
> That deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[67] The following provisions of the PSC policy and CBSA guidelines on the choice of appointment process are also relevant to this complaint and read as follows:

Choice of Appointment Process (PSC Policy)

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:

- o acting appointments over 12 months;
- o the appointment of casual workers to term or indeterminate status through non-advertised processes; and
- o 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.

Canada Border Services Agency
Resourcing Policy
Choice of Appointment Process * *in force at the time of the events, has been modified since*

Policy requirements:

Authorized persons, as per the Delegation framework 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:
  - o acting appointments over 12 months;
  - o the appointment of casual workers to term or indeterminate status through non-advertised processes; and
  - o appointments to the EX group through non-advertised processes;
- Ensure that a written rationale demonstrates how a non-advertised process meets the established business and human resource plans and the appointment values.

[…]

ANNEX A:

<u>Acting Appointments</u>

> **ACTING LESS THAN 4 MONTHS**
>
> […] When its is known that an acting appointment will last for more than the excluded period of 4 months less a day, employees in the area of selection must be informed of their right to file a complaint with the PSST.
>
> **ACTING APPOINTMENTS – 4 TO 12 Months ADVERTISED/NON-ADVERTISED**
> Notice is given in the applicable area of selection for recourse for non-advertised appointment - informal discussion and/or complaint to the PSST.

ARGUMENTS OF THE PARTIES AND ANALYSIS

Issue I: Did the respondent abuse its authority by choosing non-advertised appointment processes?

ARGUMENTS OF THE PARTIES

[68] The complainant submits that, in conducting these non-advertised processes, the delegated manager failed to respect the values of merit, fairness and transparency found in the *PSEA* preamble, as well as both the PSC *Choice of Appointment Process Policy* and CBSA *Resourcing Policy – Choice of Appointment Process.* In choosing a non-advertised process, the delegated manager deprived all candidates in the pool of a job opportunity and, therefore, abused her authority.

[69] The August 29, 2007 rationale was written several months after the initial appointment and failed to mention that Ms. Denault's experience was gained in the three months of work acting in the position. It is a carbon copy of a departmental example and fails to show how the *PSEA* values were respected. The December 6, 2007 rationale also failed to show how the *PSEA* values were respected. There was no urgent need to conduct a non-advertised appointment process, and during the initial six-month acting appointment, the delegated manager could have run an appointment process. The pool was to be used for acting appointments. Ms. Shannon admitted that she did not discuss the pool with Ms. Cuyler of Human Resources.

[70] The complainant points out that serious errors occurred and the delegated manager simply ignored the CBSA appointment policy. The initial six-month appointment was never posted. Accordingly, the right of recourse was not available.

The rationale did not disclose that the experience listed was gained in the acting appointment and not before.

[71] Furthermore, the respondent failed to disclose, after the complaint was filed, during the exchange of information period or in response to the allegations, that the December 2007 appointment was an extension of the June 2007 appointment.

[72] The respondent argues that there was no abuse of authority in the choice of a non-advertised appointment process. Section 33 of the *PSEA* provides that the respondent has discretion to use an advertised or non-advertised appointment process. With respect to the *PSEA* preamble, the respondent referred to paragraph 34 in *Visca v. Deputy Minister of Justice et al.*, [2007] PSST 0024. This paragraph states that managers have considerable discretion when it comes to staffing matters, that there is no set of strict rules in the *PSEA* on how qualifications should be established, what method of assessment should be used, or how a candidate who meets the essential and asset qualifications is chosen for appointment. In this appointment process, the assessment method chosen was different than that for the pool.

[73] The respondent submits that when Ms. Shannon decided to staff the position she reviewed the immediate organization which included the complainant and decided that Ms. Denault would be the right fit. The complainant was therefore part of this appointment process.

[74] The respondent submits that the PSC policies are not legally binding under subsection 29(3) of the *PSEA.* The PSC *Choice of Appointment Process* policy requires a rationale for the choice of process and, in this case, two rationales were written containing evidence supporting the choice of Ms. Denault. Ms. Shannon could not staff on an indeterminate basis and had to take the acting route, initially for a four-month acting appointment, and then, extending it to six months. When the complainant spoke to Ms. Cuyler of Human Resources in August 2007 and was told that Ms. Denault was an AS-02, the first rationale may not have been completed and sent to Human Resources. The complainant did not call Ms. Cuyler as a witness.

[75] The respondent agrees that a notice should have been posted for the six-month appointment. It was a mistake not to post it. However, this was corrected by the notice posted for the December 2007 appointment. Failure to post a notice has nothing to do with the merits of the case, and nothing to do with the choice of appointment process. The pool did not have to be used as it is an administrative tool which is not binding for staffing purposes.

[76] The Notice of Appointment for the December 2007 acting appointment did not mention that this was an extension. This was an error, but no prejudice resulted from this mistake. The reply to the allegations dealt only with the content of the complaint, as it was then. Other information could have been provided during an exchange of information meeting which did not take place between the parties.

ANALYSIS

[77] A key legislative purpose found in the preamble of the *PSEA* is that managers have considerable discretion in staffing matters; they must exercise this discretion in accordance with fair, transparent employment practices, and with respect for employees (See: *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).

[78] The *PSEA* does not require that more than one person be considered for an appointment and managers have the discretion to choose between an advertised and a non-advertised process under subsection 30(4) and section 33 of the *PSEA*. However, this discretion is not absolute and must be exercised in accordance with fair, transparent employment practices and respect for employees, as required by the *PSEA*, the *PSST Regulations*, the *PSER* and the PSC policies.

[79] The complainant is alleging that the respondent failed to be transparent and did not comply with its obligations in choosing a non-advertised process. This is essentially an allegation of bad faith.

[80] The Tribunal has recognized in its decisions that bad faith is established where there is direct or circumstantial evidence of improper intent, bias, lack of impartiality or when an irrational procedure leads to a finding that it is incompatible with the exercise of the delegated manager's staffing authority. Bad faith has also been given a broad meaning that does not require improper intent where there is serious carelessness or recklessness (See: *Cameron and Maheux v. Deputy Head of Service Canada et al.*, [2008] PSST 0016; *Chiasson v. Deputy Minister of Canadian Heritage et al.*, [2008] PSST 0027; *Gannon v. Deputy Minister of National Defence et al.*, [2009] PSST 0014 and *Robert and Sabourin*).

[81] Shortly after the acting appointment began in June 2007, the decision was made to extend the appointment to more than four months. A rationale for conducting a non-advertised appointment process was prepared and, in this rationale, Ms. Shannon requested the approval of the acting appointment until December 21, 2007. She signed this document on August 28, 2007 and Ms. Zamparo approved the extension on August 29, 2007. The rationale indicated that Ms. Denault had demonstrated a strong ability to perform staffing tasks over the last two years and described her current experience in the acting position. Included in the rationale were the following reasons for using a non-advertised appointment process:

> […]
>
> At the present time, we are working with Human Resources Branch on the Branch Management Services review to create an organizational structure for the BMSU. Human Resources Branch will be assisting in reviewing the job descriptions for the positions of the team leaders in this section, among them the AS-03 position Christine currently occupies. Once this position has been described, Classification will undergo a classification of the position.
>
> The plan is then to advertise this position and staff it permanently. Until this is accomplished, the position will need to be staffed on an acting basis.

[82] The rationale disclosed that Ms. Denault gained the relevant experience in the acting position. The Tribunal finds that the overall evidence does not establish that the rationale was unfounded, unreasonable or misleading.

[83] Ms. Shannon needed to staff a Team Leader position, Human Resources/ Accommodation. In doing so, she could not staff on an indeterminate basis

because of restrictions imposed by Human Resources. These restrictions were because of the classification review in the BMSUs. A non-advertised appointment process was chosen because of the restrictions. Ms. Shannon prepared a rationale as required by the PSC and CBSA policies when she initiated the non-advertised appointment process. The Tribunal finds that the complainant has not demonstrated that the rationale failed to justify the use of a non-advertised process.

[84] This rationale was sent to Human Resources at the end of August 2007 for the appointment to be processed according to various requirements. However, no notification of this appointment was provided to employees. In fact, when the complainant inquired with Human Resources about this appointment, she was told that Ms. Denault would be working at her substantive group and level.

[85] The *PSER* requires notification of an acting appointment and right to recourse. By virtue of sections 12 to 14 of the *PSER*, an acting appointment is exempted from this notification requirement, provided it does not extend the cumulative period of the acting appointment in a position to four months or more. It is therefore important that employees be notified of any appointment of more than four months as this ensures fair and transparent employment practices and provides employees with assurances that they can exercise their right to recourse.

[86] As soon as the decision was made to extend the initial acting appointment to more than four months, notification of the appointment should have been issued. However, the respondent did not provide this notification at any point, nor did it correct this omission later on. When Ms. Shannon was asked on cross-examination why the employees were not notified of this appointment, she explained that it was Human Resources' responsibility and not hers.

[87] The CBSA policy on *Choice of Appointment Process* at the time did not indicate, as it does now, that, as sub-delegated manager, this was her responsibility. Ms. Shannon's explanation negates her responsibilities as a sub-delegated manager. No evidence was provided to explain the involvement of Human Resources on this

issue. In the end, it is the respondent that is accountable in a complaint before the Tribunal for this serious carelessness.

[88] Failing to comply with the mandatory notification requirements and the repeated failure to disclose this represents a pattern of serious carelessness and recklessness up until a few weeks before the hearing. There were many opportunities to correct this omission or to disclose the failure to comply, but the respondent did not take any of them.

[89] Between August 2007 and December 2007, four months went by without any notification being issued. During this period, it was decided to extend the acting appointment for one year, and Ms. Thouin approved Ms. Denault's acting appointment on December 6, 2007, for the period of December 22, 2007 to December 21, 2008. The failure to provide notification of the initial acting appointment was not rectified. The Tribunal finds that the respondent's failure to meet its notification obligations constitutes serious carelessness.

[90] When Ms. Denault's acting appointment was extended from December 22, 2007 to December 21, 2008, this was a new appointment within the meaning of the *PSEA*. By virtue of subsections 58(2) and (3) of the *PSEA*, the extension of an acting appointment constitutes an appointment that can give rise to a complaint (See: *Chaves v. Commissioner of the Correctional Service of Canada et al.*, [2007] PSST 0009; and *Wylie v*. *President of the Canada Border Services Agency et al.*, [2006] PSST 0007).

[91] A new rationale was not prepared even though the second extension of the acting appointment constituted a new appointment. In fact, the second rationale is identical to the first one. The Tribunal finds that a new rationale for the period from December 22, 2007 to December 21, 2008 should have been prepared in accordance with the PSC and CBSA policies (See *Cannon v. Deputy Minister of Fisheries and Oceans et al.,* [2008] PSST 0021). A new rationale would have been more transparent. It would have allowed the respondent to explain the lengthy delay in the classification of the position.

[92] The cumulative period of the acting appointment would be 18 months and, according to the PSC and CBSA policies, a monitoring and review mechanism must be established for acting appointments over 12 months. Approval is needed and a valid rationale must be written as acting appointments over 12 months are audited by the PSC. It would not have been possible for the complainant and others to ask if the respondent had complied with the requirements since there was no notification of the initial appointment of six months, and the acting appointment of December 2007 to December 2008 is for 12 months less a day.

[93] On January 7, 2008, a notification was posted regarding the December 2007 acting appointment. There was nothing in the notification that indicated Ms. Denault had been acting in this position since June 2007 at the AS-03 group and level. The notice specified only that Ms. Denault was being appointed from an AS-02 position in the CBSA to an AS-03 position in the BSMU from December 22, 2007 to December 21, 2008. There was an opportunity to be transparent and correct the previous failure to notify, but this was not done.

[94] While there were some errors and omissions in preparing the rationales, it is the lack of notification of the initial acting appointment that is most problematic. At all key times, the respondent disregarded the notification requirements in the *PSER.* The Tribunal concludes that, taken as a whole, these actions and omissions demonstrate serious carelessness or recklessness amounting to an abuse of authority.

[95] The actions of the respondent subsequent to the filing of the complaint confirm that a finding of bad faith by the Tribunal is warranted. Subsection 16(1) *of the PSST Regulations* requires that the parties disclose information relevant to a complaint. The complainant could not have known that Ms. Denault had been acting in this position since June 2007 as there was no notification, and she had been advised by Human Resources that Ms. Denault was working at the AS-02 group and level. The respondent knew that the complainant had an issue with this appointment and that this was certainly relevant information. The respondent had an obligation to disclose this important and relevant information and should have disclosed it.

[96] It is even more troubling that the respondent's reply to the allegations failed to disclose that Ms. Denault had been initially appointed in June 2007. It only indicated that, in April 2007, the need for a Team Leader was identified and that Ms. Denault was appointed for a period beginning December 22, 2007. The respondent stated:

> In April 2007, Ms. Lynn Shannon, Manager, BMSU, Strategy and Coordination Branch, determined that she needed a Team Leader, Program Support, to help her with managing employees and alleviate her workload. Because all management services positions were under a classification review, Ms. Shannon decided to staff the position on a temporary basis until the position's classification was established. She appointed Ms. Christine Denault to the position on acting basis through a non-advertised appointment process, from December 22, 2007 until December 21, 2008.
>
> [Translation]

[97] There is a clear gap between the determination in April 2007 of a need for a Team Leader and the appointment in December 2007. The respondent clearly chose not to inform the complainant that Ms. Denault had been acting since June 2007. The Tribunal finds that this statement was misleading and is further evidence of bad faith.

[98] A prehearing conference was held on June 18, 2008, and, again, it was not disclosed that the acting appointment had begun in June 2007. At the prehearing conference, parties were asked to disclose to each other, in the two weeks preceding the hearing, the information that they would produce in evidence at the hearing. It was only after receiving this information that the complainant found out that the acting appointment had begun in June 2007.

[99] For all these reasons, the Tribunal finds that the respondent acted in bad faith by demonstrating serious carelessness and recklessness in repeatedly failing to provide notification of, and disclosure of, the acting appointment of June to December 2007. Notification is an essential and final step when a deputy head chooses a non-advertised appointment process. Indeed, notification triggers a right to recourse. It is part of a continuum where a deputy head chooses a non-advertised appointment process, assesses employees and then provides notification that an employee has been appointed. By repeatedly failing to notify and disclose, the respondent abused its authority in this non-advertised appointment process.

ANALYSIS

Issue II: Did the respondent abuse its authority by discriminating against the complainant on the basis of her family status?

COMPLAINANT'S ARGUMENTS

[100] At the hearing, the complainant argued she was not selected because of her family obligations as she had to leave work before 5:30 p.m. to take care of her young child. She submits that parenthood should not be a reason to limit access. This amounts to abuse of authority. This argument could not be foreseen when the complaint was filed. The evidence supporting this argument was revealed only during Ms. Shannon's testimony.

[101] In further written submissions, the complainant argued that she was not being considered for higher level positions because of her family status, and that was why she had been treated differently from other employees in her work place.

[102] According to the complainant, she has established a *prima facie* case of discrimination. She has demonstrated that her family status includes the status of being a parent. It also includes the duties and obligations as a member of society and further that she was a parent incurring those duties and obligations. As a consequence of those duties and obligations combined with an employer barrier, the complainant was unable to fully and equally participate in employment.

[103] The complainant argues that Ms. Shannon assumed that the complainant would not be available because of her family obligations. At no time did Ms. Shannon approach the complainant to discuss her family obligations in relation to career opportunities.

[104] The complainant refers to *Brown v. Canada (Department of National Revenue, Customs and Excise)*, [1993] C.H.R.D. No. 7 (QL); *Brown v. Canada (Department of National Revenue)*, [1993] CanLII 683 (C.H.R.T.) and *Hoyt v. Canadian National Railway*, [2006] C.H.R.D. No. 33 (QL) in which the Canadian Human Rights Tribunal (CHRT) ruled that differential treatment to employees with family obligations constitutes

a *prima facie* ground for discrimination. She also refers to *Johnstone v. Canada (Attorney general)*, [2007] F.C.J. No. 43 (QL).

[105] The complainant submits that accommodation was not discussed with her. Based on relevant jurisprudence, the onus of undue hardship falls on the respondent. The respondent has not demonstrated that accommodation would have been impossible short of undue hardship.

[106] The complainant requests the following corrective action:

- To be provided with an opportunity for an acting assignment in the AS-03 position for a period of no less than one year;
- To be reimbursed for all losses in pay and benefits;
- An amount for pain and suffering;
- Interest on all amounts owed to the complainant;
- All other remedies deemed appropriate in the circumstances.

RESPONDENT'S ARGUMENTS

[107] At the hearing, the respondent stated in its arguments that the complainant could not perform overtime and that this was not a factor in the decision to appoint someone else. The respondent further submitted that the complainant was not penalized.

[108] In its written submissions, the respondent acknowledges that Ms. Shannon, during her direct testimony and on cross-examination, candidly stated that the complainant refused to act as her back-up because of her family obligations. According to the respondent, this is not evidence that Ms. Shannon discriminated against the complainant because of her family obligations.

[109] The respondent argues that the complainant has not established a *prima facie* case of discrimination. The respondent submits that the complainant was not prevented from acting as a back-up in the AS-03 position or from gaining experience because of

her family obligations. The complainant acted at least once, for a period of one week, as a back-up in the AS-03 position Ms. Shannon formerly occupied. The respondent simply respected the complainant's choice.

[110] The respondent submits that it considers every request to accommodate any employee with family obligations. It argues that the complainant did not seek, and was not refused, accommodation in the context of back-up opportunities. According to the respondent, even if the complainant was interested in the position at issue, it did not prevent the respondent from choosing a non-advertised process. No evidence was tendered suggesting that the choice to use a non-advertised process was made to prevent the complainant from being a candidate based on her family obligations. It was simply not a factor in the decision.

PUBLIC SERVICE COMMISSION'S SUBMISSIONS

[111] The PSC submits that, in human rights jurisprudence, intent is not a requirement for a finding of discrimination. However, according to the PSC, whether a finding of discrimination will amount to a finding of abuse of authority under the *PSEA* is a separate issue. The PSC's position is that a finding of abuse of authority requires either improper intention or such serious carelessness or recklessness that bad faith may be presumed. Thus, even if discrimination were to be proven in this case, it does not automatically translate into a finding of abuse of authority.

[112] The PSC argues that one prerequisite for making a finding of abuse of authority under the *PSEA* is intent. If the Tribunal finds that Ms. Shannon discriminated against the complainant, there is no evidence showing she did so intentionally, or in a seriously reckless or careless manner, or to what extent that discrimination had an impact on the choice of process for the AS-03 acting appointment.

[113] The PSC made submissions on the burden of proof in human rights cases. It notes that, in human rights case law, if one aspect of a matter is found to have been discriminatory, it taints the whole process and is sufficient to show that a discriminatory consideration was a basis for the impugned decision.

[114] The PSC does not take a firm position as to whether discrimination occurred in this case as it was not present at the hearing. However, it considers that the complainant may have shown a *prima facie* case of discrimination in that Ms. Shannon made assumptions about the complainant's availability based on her family status.

[115] According to the PSC, The Tribunal cannot grant remedies under paragraphs 53(2)(*b*) and (*c*) and subsection 53(4) of the *CHRA* since they are not mentioned in subsection 81(2) of the *PSEA*. With regard to the acting assignment requested, pursuant to section 82 of the *PSEA*, the Tribunal has no jurisdiction to order this corrective action.

CANADIAN HUMAN RIGHTS COMMISSION'S SUBMISSIONS

[116] In its written submissions, the CHRC reviews the applicable provisions of the *CHRA* as well as relevant jurisprudence concerning family status and accommodation. The CHRC concludes that, if the complainant was not considered for appointment to an acting position because of her parental responsibilities, she would appear to have met her burden to establish a *prima facie* case of discrimination on the basis of family status.

[117] The CHRC submits that it appears that the manager just assumed that the complainant was unable or unwilling to take on the responsibilities of the acting AS-03 position because of her child care responsibilities. If the Tribunal concludes that the respondent made these assumptions, then it should find that the respondent has not adhered to the requirements of the *CHRA*.

[118] According to the CHRC, if the Tribunal finds that the complainant had been discriminated against, it is important that she benefit from an individualized assessment of her accommodation needs. The respondent must not base its assessment of whether an employee needs accommodation, or of whether it can implement accommodation measures, based on "impressionistic assumptions."

RESPONDENT'S REBUTTAL

[119] The respondent reviewed the relevant jurisprudence concerning human rights such as burden of proof, the test for a *prima facie* case of discrimination, and accommodation.

COMPLAINANT'S REBUTTAL

[120] The complainant reviewed the evidence adduced at the hearing, and reiterated her position concerning the *prima facie* case of discrimination and accommodation.

[121] The complainant strongly disagrees with the PSC's position that a discriminatory practice must be intentional, or require serious recklessness or carelessness to be considered an abuse of authority.

ANALYSIS

[122] In *Morris v. Canada (Canadian Armed Forces),* 334 N.R. 316; [2005] F.C.J. No. 731 (QL), the Federal Court of Appeal reaffirmed that, in matters of employment, the legal test for a *prima facie* case of discrimination under the *CHRA* is the test established in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd,* [1985] 2 S.C.R. 536; [1985] S.C.J. No. 74 (QL) (*O'Malley*). In *O'Malley*, the Supreme Court of Canada stated the following (QL version):

> **28** […] The complainant in proceedings before human rights tribunals must show a *prima facie* case of discrimination. A prima facie case in this context is one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a verdict in the complainant's favour in the absence of an answer from the respondent-employer. […]

[123] Case law has defined "family status" as "[…] practices or attitudes which have the effect of limiting the conditions of employment of, or the employment opportunities available to, employees on the basis of a characteristic relating to their [...] family." (See: *B v. Ontario (Human Rights Commission)*, [2000] O.J. No. 4275 (C.A.)(QL), aff'd [2002] 3 S.C.R. 403; [2002] S.C.J. No. 67 (QL) where Abella J.A. based this definition on *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252; [1989] S.C.J. No. 4).

[124] In *Brown*, the CHRT set forth the evidentiary requirements to establish a *prima facie* case of discrimination based on family status:

> [...] [T]he evidence must demonstrate that family status includes the status of being a parent and includes the duties and obligations as a member of society and further that the Complainant was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined with an employer rule, the Complainant was unable to participate equally and fully in employment with her employer.

(See also *Woiden et al v. Dan Lynn*, [2002] C.H.R.D. No. 18, T.D. 09/02).

[125] The reasoning in *Brown* was followed in *Hoyt*. The *Hoyt* approach was recently cited in *Johnstone* where the Federal Court agreed with the CHRT's approach. The Federal Court rejected the approach to *prima facie* discrimination in *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, 240 D.L.R. (4th) 479; [2004] B.C.J. No. 922 (B.C.C.A.) (QL) stating, at paragraph 29, that "[t]he suggestion […] prima facie discrimination will only arise where the employer changes the conditions of employment seems to me to be unworkable and, with respect, wrong in law." *Johnstone* was upheld on appeal by the Federal Court of Appeal based on the finding that the failure of the CHRC to identify the legal test it applied was "a valid basis for finding the decision of the Commission to be unreasonable […]" (See *Johnstone v. Canada (Attorney General)*, [2008] CLLC para. 230-031; [2008] F.C.J. No. 427(QL) at paragraph 2).

[126] The CHRC submits that, as the Federal Court did in *Johnstone*, the Tribunal should follow the approach in *Hoyt* which is consistent with human rights principles in treating all prohibited grounds of discrimination as equal. The CHRC submits that the approach in *Campbell River* imposes a hierarchy of grounds which is not supported by the letter of the law under the *CHRA*.

[127] The Tribunal agrees that the proper approach to be followed is the one set out in *Hoyt* which is also recognized by the Federal Court in *Johnstone.* Accordingly, the evidence must demonstrate that the complainant is a parent, that she has duties and obligations as a member of society, and further that she was a parent incurring those duties and obligations. As a consequence of those duties and obligations, combined

with the respondent's conduct, the complainant must prove she was unable to participate equally and fully in employment.

[128] There is no question that the complainant is a parent who has duties and obligations in attending to a young child. The issue is whether this fact, combined with Ms. Shannon's conduct, has made the complainant unable to participate equally and fully in being considered initially for the acting appointment. To determine this, the Tribunal must review Ms. Shannon's conduct in the appointment process.

[129] Ms. Shannon became Acting Manager in April 2007. In June 2007, she organized her unit into two groups, with one being Human Resources and Accommodation where she needed a Team Leader. To determine who would be appointed, she surveyed the Branch to find an employee. With Ms. Thouin they considered a number of employees, including Ms. Denault and the complainant.

[130] When considering the employees for the acting appointment, one important factor was that Ms. Denault had acted as Ms. Shannon's back-up. Ms. Shannon based her decision essentially on Ms. Denault's experience, the fact that she was interested in the acting appointment and that she had been a frequent back-up previously in the Communications Division. She only spoke to Ms. Denault about the acting opportunity.

[131] Ms. Shannon did not consider the complainant further as she had refused to be her back-up in the past because of her family obligations. This was based on her knowledge of the complainant's past limitations and she assumed they had not changed. She did not inquire whether the complainant required any accommodation. No effort was made to accommodate what was assumed to be the complainant's inability to work flexible hours and overtime because of her family obligations. She assumed that, because of the complainant's family obligations, the complainant would not be the right fit.

[132] Ms. Shannon relied on her experience with the complainant prior to April 2007 when the complainant was not interested in being a back-up "because the hours were too long and she had a younger child." Ms. Shannon testified that the complainant refused to act as her back-up because of her family obligations. The fact that this is one

of several reasons why Ms. Shannon selected Ms. Denault for appointment, and not the complainant, is sufficient to find a *prima facie* case of discrimination under the *CHRA*. Since it was a factor in Ms. Shannon's decision not to appoint the complainant, then a *prima facie* case of discrimination has been established (See *Holden v. Canadian National Railway (CNR),* 112 N.R. 395 (F.C.A.); [1990] F.C.J. No. 419).

[133] The Tribunal finds, based on the evidence, that the complainant was interested in a position where overtime could be required, thus requiring longer hours which could have had an impact on her family obligations. The complainant testified that, in the fall of 2006, she applied for the position of Team Leader, Program Support, AS-03 (process no. 06-BSF-INA-HQ-HRB-AS-2929). She qualified and was placed in a pool. The SMC for that position included the following:

- **Operational Requirements:** Flexible hours of work
- **Conditions of Employment:** Overtime may be required

The same operational requirements and conditions of employment are required for the Team Leader position at issue in this complaint.

[134] The fact that the complainant applied for a position which required flexible hours and overtime should have sent a strong signal to Ms. Shannon that the complainant was interested in a position requiring overtime and flexible hours, and should have led her to check any assumption she may have had with regard to the complainant's family obligations.

[135] The complainant testified that she had mentioned to Ms. Shannon that she was in a pool and had expressed interest in working with her. Ms. Shannon admitted recalling some conversations with the complainant about her interest in other positions and the complainant being qualified for a pool. However, she also said that she was not aware that the pool existed. Ms. Shannon also stated that the complainant had asked her whether she knew of available jobs. Ms. Shannon should have followed up on these conversations and not relied on the fact that the complainant had refused to be Ms. Shannon's back-up in the past because of her family obligations. If Ms. Shannon had any concerns about the complainant meeting the overtime requirements for the

position, it was incumbent on her to raise these concerns. Possible accommodation measures could then have been discussed.

[136] The Tribunal finds that the complainant has established a *prima facie* case of discrimination. She has demonstrated that her family status includes the status of being a parent and taking care of a young child. As a consequence of her duties and obligations as a parent combined with Ms. Shannon's conduct, the complainant was unable to fully and equally participate in employment opportunities presented by her employer.

[137] Once a *prima facie* case has been established, the onus shifts to the respondent to provide a reasonable explanation or to establish a *bona fide* occupational requirement (BFOR) defence. (See *O'Malley* and *British Columbia (Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)) (Meiorin)*, [1999] 3 S.C.R. 3; [1999] S.C.J. No. 46 (Q.L.)).

[138] The respondent did not submit a BFOR defence but explained that it considers every request to accommodate any employee with family obligations. The respondent argued that it is well established in case law that accommodation must first be sought before it can be provided and that, in this case, the complainant did not seek accommodation.

[139] The Tribunal finds that the respondent's explanation for its *prima facie* discriminatory conduct is not reasonable given the facts of this case. The complainant did not know that she would not be considered further because of her refusal in the past to act as a back-up due to her family obligations which did not permit her to work longer hours. She therefore had no way of knowing that her family status was a factor in the decision not to appoint her to the position; in the circumstances, she had no reason to ask for accommodation. Ms. Shannon was aware of the complainant's family obligations in the past, and did not make inquiries about availability to work overtime or whether she required any accommodation.

[140] The Tribunal further finds that the respondent has not established a BFOR defence. The respondent did not assess whether it could accommodate the complainant's family responsibilities. The Tribunal therefore finds that the respondent failed to establish that it could not accommodate the complainant to the point of undue hardship.

[141] In its submissions, the PSC argued that a finding of discrimination does not automatically result in a finding of abuse of authority. The PSC submits that, in human rights jurisprudence, intent is not a requirement for a finding of discrimination; however, a finding of abuse of authority would require either improper intent, or such carelessness or recklessness that bad faith may be presumed.

[142] In previous decisions, the Tribunal has consistently ruled that a finding of abuse of authority does not require intent (See *Tibbs*, at paragraph 72; *Rinn*, at paragraph 36; *Cameron and Maheux*, at paragraph 76; *Chiasson*, at paragraph 46).

[143] The Tribunal finds that the PSC's 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 or 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. The Tribunal stated the following in *Tibbs* with regard to discrimination:

> [73] While abuse of authority is more than simply errors and omissions, acting on inadequate material and actions which are, for example, unreasonable or discriminatory may constitute such serious errors and/or important omissions to amount to abuse of authority even if unintentional.
>
> [74] To require that a finding of abuse of authority be linked to intent would lead to situations that clearly run contrary to the legislative purpose of the *PSEA*. It could not have been envisioned by Parliament that, for example, **when a manager unintentionally makes an appointment that leads to an unreasonable or discriminatory result, there would be no recourse available under the *PSEA*.** When a manager exercises his or her discretion, but unintentionally makes an appointment that is clearly against logic and the available information, **it may not constitute bad faith,**

> **intentional wrongdoing, or misconduct, but the manager may have abused his or her authority.**
>
> (Emphasis added)

[144] As the Tribunal explained in *Glasgow v. Deputy Minister of Public Works and Government Services Canada et al.*, [2008] PSST 0007, Parliament specifically provided in subsection 2(4) of the *PSEA* that abuse of authority includes bad faith and personal favouritism so that there is no debate that this unacceptable conduct constitutes an abuse of authority. Similarly, Parliament specifically provided that the Tribunal could interpret and apply the C*HRA* in considering complaints of abuse of authority. Thus, there is no debate that discrimination constitutes abuse of authority. This is further reinforced by the Tribunal's power to order corrective action in accordance with paragraph 53(2)(*e*) of the *CHRA*.

[145] For all these reasons, the Tribunal finds that the respondent discriminated against the complainant on the basis of her family status and that the respondent failed to accommodate the complainant. The Tribunal further finds that, by discriminating against the complainant, the respondent abused its authority in the application of merit.

Issue III: Did the respondent appoint Ms. Denault on the basis of personal favouritism?

ARGUMENTS OF THE PARTIES

[146] The complainant submits that Ms. Denault would not have been appointed if she had not known Ms. Shannon so well. This personal relationship gave her an unfair advantage. The complainant argues that the circumstantial evidence establishes that Ms. Denault was appointed on the basis of personal favouritism. The delegated manager chose a non-advertised process, ignored the existing pool of qualified candidates for Team Leader positions, and did not assess properly whether Ms. Denault met the essential qualifications for the position. The respondent did not justify the use of a non-advertised process or why it did not use the pool. At one point in Ms. Shannon's testimony, she stated that she had been told the complainant was in the pool, but at another point, stated that she was not aware that the pool existed.

[147] The complainant alleges that there is no evidence that Ms. Denault was qualified or more qualified than the employees in the pool, or employees working in the same Communications Division. The complainant contends that it is the delegated manager's duty to assess Ms. Denault. In the case of Ms. Denault's initial acting appointment, an SMC was completed. The complainant asserts that Ms. Denault completed the part containing the assessment of candidate against the essential qualifications. Further, the complainant alleges that the delegated manager, Ms. Shannon, did not provide evidence of the assessment of the qualifications and abilities of Ms. Denault against the merit criteria. She referred to paragraphs 80, 81, 84 and 85 in *Cameron and Maheux* which emphasize the responsibilities of the delegated manager and respondent to provide evidence of the candidate's assessment against the merit criteria.

[148] The complainant argues that there must be a proper assessment of Ms. Denault's qualifications. The appointment cannot be made simply on the basis of the delegated manager's knowledge of the appointee. Unlike Ms. Denault who was not part of the pool, the complainant wrote exams, was interviewed, and studied to qualify for AS-03 acting appointments.

[149] Ms. Shannon attended Ms. Denault's wedding, ate regularly with her, worked side by side with her, knitted with her, and often selected Ms. Denault to perform her duties when she was in the Communications Division. According to the complainant, these facts, which constitute circumstantial evidence, prove that personal favouritism existed.

[150] The respondent referred to paragraph 39 of *Glasgow* and argues that no personal favouritism existed. No evidence was presented to suggest that anything other than merit motivated the process and the acting appointment. Ms. Denault met the essential qualifications of the position. Ms. Shannon worked with Ms. Denault in a professional context, and noticed her work as well as that of other staff. The fact that Ms. Denault was not a candidate in the process to establish a pool does not mean that she could not have been qualified. She was appointed on the basis of her knowledge, abilities, experience and personal suitability and on operational needs.

[151] The respondent submits that Ms. Denault's qualifications are not the issue since the allegations of abuse of authority relate to the choice of process. According to the respondent, Ms. Denault told Ms. Shannon how she met the essential qualifications of the position and this is no different than a candidate answering interview questions or writing an exam. The respondent argues that the *PSEA* does not specify how to assess a candidate and referred to section 36 of the *PSEA*. The assessment method can be different for each process.

[152] The respondent states that this case is very different than *Cameron and Maheux*. In this case, the Tribunal was provided with a rationale, the assessment against the SMC and Ms. Denault's résumé.

[153] The respondent argues that Ms. Denault met the essential qualifications in the SMC, in accordance with paragraph 30(2)(*a*) of the *PSEA*. Furthermore, subsection 30(4) of the *PSEA* states that the respondent is not required to consider more than one person for an appointment to be made on the basis of merit. The respondent referred to section 36 of the *PSEA* which states that past performance and accomplishments are proper methods to use in assessing qualifications.

ANALYSIS

[154] The respondent argues that Ms. Denault's qualifications are not the issue since the allegations of abuse of authority relate to the choice of process. In her complaint, the complainant checked off the "Abuse of Authority in the choice of process" box, but not the "Abuse of Authority in the application of merit" box. In her complaint, the complainant stated that she wanted to know why the person mentioned in the acting appointment was chosen as opposed to selecting someone from the already established pool. She did not provide further details in her allegations. However, at the beginning of the hearing, a broad allegation of abuse of authority was added concerning the initial acting appointment.

[155] In *Jogarajah v. Chief Public Health Officer of the Public Health Agency of Canada et al*., [2007] PSST 0013, the Tribunal found that a defect in form could be corrected under section 9 of the *PSST Regulations*. Although the complainant did not

check off the “Abuse of Authority in the application of merit” box for “Type of Complaint” on her complaint form, the complaint form did not mislead the Tribunal or the respondent as to the nature of the complaint. The respondent replied to the complaint by addressing the allegations of personal favouritism and another merit issue. Furthermore, the respondent presented arguments on the issue of merit at the hearing. Thus, the Tribunal finds that the parties were fully aware that the complaint related to the issue of merit.

[156] The complainant contends that circumstantial evidence establishes that the respondent made this appointment on the basis of personal favouritism. In *Glasgow*, the Tribunal found that personal favouritism could be established by direct evidence or, more often, by circumstantial evidence:

> [44] Evidence of personal favouritism can be direct, such as facts establishing clearly the close personal relationship between the personal selecting and the appointee. However, it will often be a question of circumstantial evidence where some action, comments or events prior to, and during, the appointment process will have to be reviewed.

[157] The complainant strongly relies on the fact that the pool was not used to fill the Team Leader position, thus depriving candidates in the pool of a job opportunity. However, the evidence shows otherwise.

[158] It is important to distinguish between the internal advertised appointment process for the position of Team Leader, Program Support (06-BSF-INA-HQ-HRB-AS-2929) and the non-advertised process for the position of Team Leader, BMSU (07-BSF-ACIN-HQ-SCB-AS-1125-1). The advertised appointment process was used to staff positions from the pool and, thus, required most of the essential qualifications of the non-advertised appointment process, as well as experience and abilities in research. In contrast, the non-advertised appointment process for the acting appointment to the Team Leader position sought a candidate who met the essential qualifications of the advertised appointment process (research qualifications apart) as well as the following qualifications:

- Experience in processing requests for staffing actions;
- Experience in supervision;

- Knowledge of the Agency's organizational structure and role and responsibilities of various corporate organizations, in particular those related to the human resources functions;
- Knowledge of MS Office products;
- Ability to interpret and explain policies, procedures, regulations and/or legislation;
- Ability to effectively manage multiple, concurrent demands;
- Initiative;
- Discretion.

[159] Ms. Shannon indicated she had been told that the complainant was in the pool; although she also said she was not aware the pool existed. The Tribunal finds that this apparent contradiction does not affect Ms. Shannon's credibility as the fact remains that the qualifications listed above differed and were not assessed when the pool was established.

[160] Ms. Shannon's testimony, as well as Ms. Denault's assessment against the SMC, establishes that Ms. Denault was assessed on the basis of her experience, knowledge and abilities. Ms. Denault had experience processing a full range of staffing actions and significant experience supervising subordinate staff. She also had the required knowledge and abilities. The Tribunal finds that the respondent has provided sufficient evidence of the assessment of the qualifications and abilities of Ms. Denault against the merit criteria.

[161] Ms. Shannon and Ms. Denault have established a workplace relationship that is friendly – they have worked side by side, they have had lunch together, and knitted together at lunch time. Ms. Shannon, as a functional supervisor, was able to assess Ms. Denault's abilities because the latter replaced her frequently in her duties, and Ms. Denault had shown a desire to undertake these functions. There is no evidence that Ms. Shannon and Ms. Denault saw each other socially or outside work hours, apart from Ms. Shannon's attendance at Ms. Denault's wedding with some 10 to 12 other work colleagues. The Tribunal finds that the complainant has not established that Ms. Denault was appointed on the basis of a personal relationship.

[162] The Tribunal is troubled by Ms. Shannon's evidence that both herself and Ms. Denault completed the assessment. A candidate should not participate in his or her assessment. This lack of rigour appears to be an isolated incident in the assessment of the SMC. The Tribunal finds, however, that there is insufficient evidence to establish that Ms. Denault did not meet the essential qualifications.

[163] For all these reasons, the Tribunal finds that the complainant has not established that Ms. Denault was appointed to the position on the basis of personal favouritism.

DECISION

[164] For all these reasons, the complaint of abuse of authority is substantiated.

CORRECTIVE ACTION

[165] The Tribunal has broad corrective powers under subsection 81(1) of the *PSEA* when it finds that a complaint under section 77 is substantiated. Moreover, corrective action may include a monetary award to compensate a victim of discrimination for pain and suffering in accordance with paragraph 53(2)(*e*) of the *CHRA*. Where the Tribunal determines that a complainant has been discriminated against wilfully or recklessly in accordance with paragraph 53(3) of the *CHRA*, the Tribunal may order additional monetary compensation. However, the Tribunal may not order the respondent to make an appointment or to conduct a new appointment process under section 82 of the *PSEA*. The Tribunal has no jurisdiction to order the respondent to provide the complainant with an opportunity for an acting assignment.

[166] The Tribunal finds that the complainant was discriminated against on the basis of family status, and has determined appropriate corrective measures. The complainant should have the benefit of an individualized assessment of her need for accommodation, so that she is not deprived in the future of opportunities for advancement based on the assumption that she is unavailable due to her parental responsibilities. The Tribunal does not consider it appropriate in the circumstances of this case to award monetary compensation.

[167] The Tribunal recommends that the respondent consult with the CHRC to assess whether its delegated managers need training on discrimination and, specifically, on discrimination and family status.

[168] With respect to the finding of bad faith, it is essential that the respondent take measures to ensure that in the future, notifications of acting appointments of four months or more are made as required. The importance of transparency cannot be neglected in a system where such broad discretion is given to managers in making appointments. The evidence in this complaint is even more troubling as there were no measures taken to correct the failure to notify or to disclose it until two weeks prior to the hearing. The Tribunal is of the opinion that, given the PSC's concerns that acting appointments are a high risk as well as its overall responsibilities in regards to the *PSEA* and *PSER*, the PSC should look into the circumstances of this complaint to determine if any further steps are warranted.

ORDER

[169] The Tribunal orders the respondent to assess the complainant with regard to her needs for accommodation in relation to her family obligations.

Robert Giroux
Member

PARTIES OF RECORD

Tribunal File:	2008-0061
Style of Cause:	*Chantal Rajotte and the President of the Canada Border Services Agency et al.*
Hearing:	August 12 and 13, 2008 Ottawa, Ontario
Date of Reasons:	August 7, 2009
APPEARANCES:	
Bruno Loranger	For the complainant
Martin Desmeules	For the respondent
Kimberley Lewis	For the Public Service Commission