



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**Files:** 2007-0207, 2007-0208,  
2007-0209, 2007-0295,  
2007-0305, 2007-0307  
**Issued at:** Ottawa, September 29, 2010

**SUSAN AYOTTE ET AL**

Complainants

AND

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority pursuant to s.77(1)(a) and (b) of the <i>Public Service Employment Act</i>
<b>Decision</b>	Corrective Measures
<b>Decision rendered by</b>	Guy Giguère, Chairperson
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Ayotte v. Deputy Minister of National Defence</i>
<b>Neutral Citation</b>	2010 PSST 0016

# Reasons for Decision

## Introduction

1 On July 3, 2009, the Tribunal issued its decision in *Ayotte v. Deputy Minister of National Defence*, 2009 PSST 0021 (*Ayotte*). The Tribunal substantiated the complaint and found that the respondent had abused its authority. It deferred its decision on corrective action as requested by the parties at the hearing and requested submissions on this issue. The Tribunal will address the question of corrective action in this decision.

## Submissions on Corrective Action

2 The complainants make four requests in their submissions. They request that the Tribunal revoke the appointment of Hope Seidman (appointee) to the position of Chief, Curriculum English at the Canadian Forces Language School (CFLS), now part of the Canadian Defence Academy – Language Programme (CDA-LP). The complainants also request that the Tribunal issue three recommendations:

- A) A recommendation to the deputy head at the Department of National Defence (DND) to provide ongoing and extensive training on the PSEA to delegated management and Human Resources at the CFLS.
- B) A recommendation to the Public Service Commission (PSC) to suspend the staffing authority delegated to the (CFLS) until training on the PSEA is given to management and Human Resources at the CFLS.
- C) A recommendation to the PSC to review and conduct an audit on all appointments made by Bruno Jobin since the coming into force of the PSEA, in order to ensure these were in fact based on merit and not subject to abuse of authority.

3 The complainants argue that these corrective measures are warranted because the appointee was not fully assessed and was privileged by personal favouritism. They submit that the respondent wanted the appointee in the position at all costs and that the appointment was not made in accordance with merit. They refer to *Burke v. Deputy Minister of National Defence*, 2009 PSST 0003, in support of the request for revocation

and to *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 0035 (*Beyak*, 2009 PSST 0035) in support of the request for recommendations.

**4** The respondent submits that the appointee has moved to another department. It states that although the Tribunal may not be deprived of its jurisdiction to revoke the appointment, revocation ought not to be ordered. In the respondent's view, in such circumstances, revocation would not be corrective in nature.

**5** The respondent also submits that the Tribunal does not have the power to make recommendations pertaining to the three areas that the complainants have requested. It argues that the requested recommendations encroach on the respondent's authority under section 15(3) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the PSEA) with regard to investigating past appointments, and section 12 of the *Financial Administration Act*, R.S. 1985, c. F-11, with regard to training. It also submits that the request for a recommendation on the suspension of delegation authority of the delegated manager encroaches on the authority of the PSC under section 24(2) of the PSEA.

**6** The respondent also requests that the decision on corrective action be held in abeyance, pending the decision of the Federal Court in relation to the judicial review of the modified reasons of the Tribunal in *Beyak*, 2009 PSST 0035.

**7** The PSC submits that revocation is warranted and not moot. It refers to the unclear circumstances surrounding how the appointee got her next position and the fact that the Tribunal concluded that there was no evidence that all the essential qualifications were assessed or that the appointee met them all.

**8** The PSC also submits that the Tribunal does not have the jurisdiction to make recommendations. However, even if the Tribunal has the jurisdiction to do so, its recommendations will be of a non-binding nature. It refers to *Thomson v. Canada (Deputy Minister of Agriculture)* [1992] 1 S.C.R. 385 (*Thomson v. Canada*).

**9** The complainants further submit in their rebuttal that the respondent has not met its burden to establish that revocation of the appointment is moot, as it provided no

evidence on this. They argue that it is incumbent upon the Tribunal to comment on the situation whether it is in the form of a recommendation or a direction.

## Issues

**10** Based on the arguments of the parties, there are three questions that must be addressed. First, is revocation appropriate in this complaint? Secondly, should any corrective action be ordered in the form of recommendations? Thirdly, if the Tribunal has the power to issue recommendations, should it do so in this complaint?

## Analysis

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

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

**12** Section 82 of the PSEA states that the Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.

**13** In *Canada v. Cameron*, 2009 FC 618 (*Cameron*), the Federal Court found that the corrective action ordered by the Tribunal must relate to the appointment process that is the subject of the complaint. It stated that binding orders of corrective action must focus on the remedy for the flaw identified in the particular appointment process under scrutiny in the complaint. It also stated that where the Tribunal has concerns outside of the context of the complaint it can make the respondent aware of its concerns.

**14** Following the Federal Court decision in *Attorney General of Canada v. Beyak* (September 17, 2009), Ottawa, T-528-09 (Federal Court), the matter was remitted back to the Tribunal to provide it with an opportunity to address corrective action in a manner that would not be inconsistent with *Cameron*. The Tribunal outlined and explained its changes to the original corrective action in *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 0034 (*Beyak*, 2009 PSST 0034), and issued the modified decision in *Beyak*, 2009 PSST 0035. In its explanation of the changes to the

remedial order the Tribunal specified that *Cameron* did not address the jurisdiction of the Tribunal in making recommendations, as that issue was not before it. The Tribunal stated that where its concerns are of a systemic nature, such as ensuring that discretion is exercised as Parliament intended in future appointment processes, it can make the deputy head and the PSC aware of these concerns.

**15** An application for judicial review of the amended reasons in *Beyak*, 2009 PSST 0035, was filed but a decision has not been issued. At this time, the Federal Court hearing in *Beyak* has not yet taken place. In the Tribunal's view, the fact that the decision is pending should not delay the Tribunal's reasons.

### **Is revocation appropriate in this complaint?**

**16** The Tribunal finds that revocation is an appropriate corrective action in this complaint. This complaint was substantiated on many grounds, and raised significant concerns. The Tribunal found that the respondent abused its authority because the appointment was not made in accordance with merit. The respondent relied on insufficient material and did not ensure that the appointee met all the essential qualifications before it appointed her. In addition, it abused its authority and showed personal favouritism in this appointment process. The Tribunal found that the actions taken by the respondent in the process constituted bad faith. This led the Tribunal to conclude that the respondent had not provided any adequate explanation as to why it proceeded in the way that it did in selecting the appointee for the appointment that was the subject of the complaint.

**17** The Tribunal does not agree with the respondent's argument that, because Ms. Seidman is no longer in its department, there is no reason to order revocation of the appointment at issue. It also does not accept the respondent's suggestion that in this case, it is sufficient to simply make a finding that there had been an abuse of authority.

**18** Bad faith and personal favouritism are among the most serious forms of abuse of authority. Parliament specifically referred to bad faith and personal favouritism in s. 2(4) of the PSEA so that there would be no doubt that such improper behaviour constituted

abuse of authority. (See *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007 at paras. 36 to 40).

**19** In *Cameron and Maheux v. Deputy Head of Service Canada*, 2008 PSST 0016, the Tribunal did not order revocation, but that decision concerned an acting appointment. The appointment made in the present complaint was indeterminate. But even in cases where the appointment is for a specified period of time, the Tribunal finds that there are valid grounds upon which to revoke the appointment after it has come to an end.

**20** Although *Lo v. Canada (Public Service Commission Appeal Board)*, 1997 CanLII 5849 (F.C.A.) (*Lo*) is a decision under the previous legislative regime for staffing, the fundamental principle made in that case pertaining to redress remains true. It would be overly easy for a department or an appointee to avoid the recourse process by simply moving to another position.

**21** In *Lo*, the Federal Court of Appeal found that the issue was not moot even though the appointee had later resigned from the public service. As Desjardins, J.A., writing for a unanimous Court held, at para. 12:

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

**22** In this case, the respondent could not establish that the appointee met the essential qualifications for the position in question. Moreover, the respondent has failed to provide evidence that would establish why revocation would no longer be relevant.

**23** In *Beyak*, 2009 PSST 0035 (at para. 192), the Tribunal referred to *Lo* and stated that it would be improper that there be no consequences simply because the appointee had left the department. Otherwise, the intent of the legislation would be undermined.

**24** The Tribunal also finds that there are a number of situations where the appointee may no longer be in the position and where revocation would not be moot and would be an appropriate corrective action.

**25** In addition, in this complaint, there is no evidence as to how the appointee obtained the position that immediately followed the one at issue and, therefore, no evidence that the issue of revocation is moot.

**26** Subsection 81(1) of the PSEA stipulates that the Tribunal may order the deputy head to revoke an appointment. There is no requirement in the PSEA that the person still be in the position. It is up to the Tribunal to review the facts and determine if, in the circumstances of the case, revocation is required. In this case, an order for revocation is warranted. An appointment was not made in accordance with merit because all the essential qualifications were not assessed or the appointee did not meet all the essential qualifications. In addition, the appointment was made on the basis of personal favouritism, which is unacceptable and constitutes serious misconduct.

**27** For all these reasons, the Tribunal finds that the appointment should not have been made in the first place and should be revoked. Consequently, the Tribunal orders that the respondent revoke the appointment within 90 days.

**Should any corrective action be ordered in the form of recommendations in the present complaint?**

**28** For the reasons provided below, the Tribunal finds that, in appropriate situations, it can and should offer recommendations.

**29** Section 81(1) of the PSEA gives the Tribunal the power to revoke an appointment. That provision also provides the Tribunal with the power to “take any corrective action that the Tribunal considers appropriate.”

**30** Corrective action in the form of a binding order must address the particular flaw that has been identified in the complaint. *Cameron* states that a binding order must address only the appointment process at issue in the complaint. However, *Cameron* did

not address the Tribunal's powers to issue recommendations. A recommendation by the Tribunal should be given its ordinary meaning and is not binding (*Thomson v. Canada*).

**31** It is widely recognized that tribunals have implied powers, particularly when the provisions that they are mandated to enforce cannot otherwise be given force or effect. As noted in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunication Comm.)* [1989] 1 S.C.R. 1722 (*Bell Canada*), while the powers of any administrative tribunal must be stated in its enabling statute, they may also exist by necessary implication from the structure, wording and purpose of the legislative scheme in place. In *Bell Canada*, the Supreme Court of Canada cautioned against unduly interpreting provisions of a tribunal's statute and rendering its powers meaningless. It stated (at para. 50):

[... ] The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial lawmaking, they must also avoid sterilizing these powers through overly technical interpretations.

**32** The Tribunal's capacity to issue recommendations under s. 81(1) of the PSEA is a matter of practical necessity in order to give meaning to the section. Without this capacity, the latter portion of s. 81(1)—which allows the Tribunal to take any corrective action that it considers appropriate—is rendered meaningless. To paraphrase the Supreme Court of Canada in *Bell Canada*, without such an interpretation, the additional discretion given to the Tribunal to address staffing complaints becomes sterile.

**33** As the Tribunal stated in *Beyak*, 2009 PSST 0034, *Cameron* did not address whether the Tribunal could make recommendations. Here, the Tribunal also noted that *Cameron* recognized its power to raise concerns that are more of a systemic nature. This could include for example, ensuring that discretion is exercised as Parliament intended in other appointment processes.

**34** The power to issue recommendations is especially important because, under the PSEA, only the Tribunal can consider complaints of abuse of authority. Where the Tribunal determines that recommendations need to be made following a finding of



abuse of authority, it is doing so having had the benefit of hearing from the parties, and the evidence and argument in a hearing that is subject to rules of procedure and fairness. It is also doing so in the interests of upholding the values of the PSEA.

**35** By providing recommendations, the Tribunal does not encroach upon the jurisdiction of the deputy head or of the PSC. Clearly, an order or a recommendation must be one that is within the specific powers of the deputy head or of the PSC. Otherwise they could not implement it. However, these powers always remain within their respective areas of responsibility. Should a recommendation be made as part of the Tribunal's remedial mandate, the deputy head or the PSC has to determine if and how best to address it. There is no inconsistency in the wording of the PSEA in this regard.

**36** In addition, the Supreme Court of Canada has recognized several factors that determine the scope of remedial powers: (a) the wording of the enactment conferring jurisdiction; (b) the purpose of the statute; (c) the reason for the tribunal's existence; (d) the expertise of the tribunal's members; and (e) the nature of the problem before the tribunal. See *Royal Oak Mines Inc. v. Canada (Labour Relations Board)* [1996] 1 S.C.R. 369.

**37** An analysis of these factors points to the Tribunal's capacity to issue recommendations by necessary implication, to ensure its corrective action powers are not rendered meaningless and can address the problems identified in its decision.

**38** The wording of the PSEA ensures the Tribunal's complete adjudicative independence. The Preamble of the PSEA highlights its legislative purpose. Fair and transparent employment practices, respect for employees, effective dialogue and recourse aimed at resolving appointment issues are guiding principles on employment matters in the public service. Appointments must be based on merit where the person to be appointed meets the essential qualifications of the position. The PSC and deputy heads, where delegated, have considerable discretion in staffing matters, but must exercise this discretion without abusing their authority. The prohibition against abuse of authority is fundamental to the PSEA and this is a value that it strives to protect. (See

*Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at paras. 61 and 62, and *Rinn v. Deputy Minister of Transport, Infrastructure and Communities*, 2007 PSST 0044 at para. 35.)

**39** Looking at the reasons for the Tribunal's existence, the mandate of the Tribunal is exclusive, as it has the sole responsibility under s. 88(2) of the PSEA to hear complaints in the area of abuse of authority in internal appointments as well as complaints related to the implementation of corrective action, and to selection for lay-off. The Tribunal's mandate also includes complaints that a revocation of an internal appointment was not reasonable. The remedial provisions in s. 81 of the PSEA are broadly worded and limited only by s. 82, which states that it cannot make an appointment or conduct a new appointment process.

**40** Members of the Tribunal must have expertise in employment matters under the PSEA. The decisions of the Tribunal are final and the object of a strongly worded privative clause. As the Federal Court established in *Lavigne v. Canada (Justice)* (2009 FC 684), at para. 41, the Tribunal's expertise lies in employment practices in the public sector, in recognizing wrongdoing and consequently imposing remedies. The Court found that in these areas of expertise, the Tribunal's decisions are entitled to a degree of deference.

**41** With regard to the nature of the problem, the present case illustrates that there are situations where the findings of the Tribunal address not only problems as to the specific appointment process before it, but also address larger contextual issues where egregious behaviour led to the problems with the delegated manager's exercise of discretion. The nature of the problem therefore cannot be corrected merely through remedies that would be retroactive in nature. In these circumstances, it would be appropriate as well to address the systemic issues that are at the cause of the problem.

**42** In reviewing these factors, it is clear that the remedial powers of the Tribunal should be given a broad interpretation. The scope of remedial powers should include identifying the problem leading to an abuse of authority, and being instructive as to what should be done to rectify the situation in a complaint and how to avoid repetition of the

same abuse in the future. Considering the values of the PSEA, it is also clear that where egregious behavior has been identified, the Tribunal would be remiss if it adopted an overly compartmentalized view of its role and did not provide proactive observations to stem the source of the abuse that occurred.

**43** A finding of abuse of authority in one appointment process does not always infer systemic problems and the issuance of a recommendation is not always necessary. However, there are situations where the power to make recommendations pertaining to a substantiated complaint becomes a logical necessity to prevent a reoccurrence of the underlying problem. Particularly in serious cases of abuse of authority, the Tribunal may also have heard evidence that demonstrates systemic problems. This is the case in the present complaint.

**44** This approach is also consistent with the nature of staffing issues in the federal public service. In *Canada (Attorney General) v. Bates* (1997) 3 F.C. 132 (T.D.) (*Bates*), a decision that pertains to the previous legislative scheme for staffing, the Federal Court stated that the capacity to take a broad approach to correcting errors protects merit. It also stated that, to be effective, a corrective approach goes hand in hand with an approach that considers ways to avoid making the same mistakes in the future:

[...] [T]o adopt the idea that the appeal process is not corrective is to narrow its function to the point of making it useless.

[...]

Elements of the corrective function of the Appeal board necessarily involve critical analysis and an instructive response. For the appeal Board to be effective it has to say where the selection process went wrong, and while it is true that such critical analysis might be viewed as criticism or vindication depending upon your perspective, it is a necessary element of the appeal process. I think it is entirely within the proper role and function of an Appeal Board to identify an error, and be instructive in saying what should be done to rectify the situation in hand, and what to do, or not to do, to avoid making the same error in the future.

**45** In *Bates*, the Federal Court recognized the necessity of adopting a proactive approach in the corrective function of decision-making. *Bates* addressed an appeal under a previous and distinct legislative regime. However, nothing in the new legislative scheme with regard to the Tribunal's powers suggests that the approach in *Bates* would not also apply to serious errors constituting an abuse of authority. For example, given the broad wording of the remedial provision in s. 81(1) and the values enshrined in the

PSEA, it is entirely appropriate for the Tribunal to identify an abuse of authority, order corrective action to be taken in the appointment process at issue to rectify the situation in hand, and to be instructive in saying what to do, or not to do, in order to avoid a reoccurrence in the future. To ensure that the remedial powers are effective therefore, the Tribunal interprets s. 81(1) as including the power to instruct proactively through a recommendation, to avoid the repetition of the situation that led to abuse of authority.

**46** Even if such a power could not be implied, the Tribunal can offer non-binding recommendations in its observations made by *obiter dicta*. Although not central to the decision, and not binding, statements made by *obiter dicta* allow the decision-maker to offer a recommendation that is pertinent to the evidence and arguments that have been heard. These recommendations do not form a part of a Tribunal order.

#### **Should a recommendation be made?**

**47** Having determined that its remedial powers include implied powers to make non-binding recommendations, the Tribunal must now address the complainant's request for corrective action. Of the three requests for recommendations made by the complainant, the Tribunal finds that there is one recommendation that needs to be made and that is directly linked to the evidence before the hearing.

**48** As the Tribunal stated in *Ayotte*, the actions throughout the appointment process constituted an egregious departure from the staffing values of fairness and transparency found in the Preamble of the PSEA, the requirements of the PSEA and the PSC's *Choice of Appointment Policy*. In its reasons, the Tribunal also found that the responsible managers at the CLFS and Human Resources Advisors conducted themselves in a way that showed personal favouritism. The Tribunal referred to significant gaps in the respondent's evidence. These included difficulties with the evidence as to how in fact qualifications were assessed; questions as to how the respondent ensured that all the essential qualifications were assessed; and problems with the manner in which key documents were handled, such as the Statement of Merit Criteria. While there were several opportunities to ensure that the process could be transparent, the respondent proceeded in a predetermined manner, to the desired

result. This had a negative consequence on the appointment process, on a number of employees in the CFLS, and on the credibility of an appointment system where broad discretion in choosing the appointee is given to delegated managers.

**49** The departure from the values in the PSEA is significant and raises concerns about the accountability of the infrastructure of the CFLS and its capacity to meet the requirements of the legislation. The Tribunal is concerned that in this complaint, Human Resources advice to the managers with delegated authority was inadequate, and failed to assist delegated managers in understanding the consequences of an appointment that is made without consideration of the requirements of the PSEA and its values.

**50** A finding of abuse of authority in one appointment process does not always infer that there are systemic problems. However, the flaws identified in this process are so pronounced that a reasonable person would have concern for the potential impact above and beyond this complaint at the CFLS in Saint-Jean. The Tribunal's findings in this complaint should raise concerns as well about the capacity of delegated managers to heed appropriate human resources advice and the human resources capacity generally.

**51** Having turned its mind to these considerations, the Tribunal finds that this complaint raises many concerns pertaining to the advisory capacity at the CFLS in Saint-Jean, now part of the CDA-LP. Consequently, it recommends that the respondent provide training in Saint-Jean, for delegated managers, within or associated with the CFLS and for all those in human resources who advise the CFLS. The training should cover the requirements of the PSEA, the significance of the responsibilities upon delegated managers under the PSEA, as well as the manner in which human resources carry out their advisory function to meet the requirements of the PSEA. The Tribunal recommends that this training be carried out with the key objective of ensuring that delegated managers within CFLS in Saint-Jean and human resources staff understand the importance of upholding the requirements of the PSEA and the consequences of failing to uphold these requirements.

**Corrective Action**

**52** The Tribunal orders the respondent to revoke the appointment of Ms. Seidman back to its effective date and to do so within 90 days.

**53** The Tribunal also recommends that the human resources staff and the managerial staff in Saint-Jean within or associated with the CFLS now part of the CDA-LP be given training on the requirements of the PSEA. The training should convey the importance of the requirements of the PSEA, as well as the significant responsibilities upon delegated managers and the manner in which human resources carry out their advisory function to ensure that the department meets the requirements of the PSEA. The Tribunal recommends that this training be carried out with the objective of properly conveying to the delegated managers and to human resources, the importance of upholding the requirements of the PSEA and the consequences of not adhering to the requirements of the PSEA.

Guy Giguère  
Chairperson

**Parties of Record**

<b>Tribunal Files</b>	2007-0207, 2007-0208, 2007-0209, 2007-0295, 2007-0305, 2007-0307
<b>Style of Cause</b>	<i>Susan Ayotte and the Deputy Minister of National Defence</i>
<b>Hearing</b>	Paper Hearing
<b>Date of Reasons</b>	Ottawa, September 29, 2010