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

File: 2008-0740
Issued at: Ottawa, November 23, 2010

JARROD GOLDSMITH

Complainant

AND

THE DEPUTY MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT

Respondent

AND

OTHER PARTIES

Matter	Complaint under section 74 of the *Public Service Employment Act* against a revocation of appointment
Decision	Complaint is dismissed.
Decision rendered by	John Mooney, Vice-Chairperson
Language of Decision	English
Indexed	*Goldsmith v. Deputy Minister of Human Resources and Skills Development*
Neutral Citation	2010 PSST 0020

Reasons for Decision

Introduction

1 Jarrod Goldsmith, the complainant, was appointed to a Training Design Specialist position (the position) at the PM-03 group and level on an indeterminate basis in Service Canada, which is part of Human Resources and Skills Development Canada (HRSDC), through an internal advertised appointment process. After determining that the complainant was not in the area of selection when the appointment was made, the respondent, the Deputy Minister of HRSDC, decided to revoke the complainant's appointment. The complainant brought a complaint before the Public Service Staffing Tribunal (the Tribunal).

Background

2 In August 2007, the respondent posted a *Job Opportunity Advertisement* on *Publiservice* to staff Training Design Specialist PM-03 positions in the Operational Training Group in Service Canada College. The process was open to "[e]mployees of the Public Service occupying a position in the National Capital Region".

3 Seventy-nine persons applied for the position, including the complainant. At that time, the complainant was working on a contract basis as an external consultant in a Senior Archival Researcher position at Indian Residential Schools Resolution Canada (IRSRC). The complainant participated in all steps of the process and was found qualified, along with three other persons. The respondent offered him the position on May 21, 2008 and the complainant accepted the position on May 28, 2008. The complainant commenced working in that capacity on June 16, 2008.

4 In July 2008, the respondent initiated an investigation into the appointment process after finding out that the complainant was not in the area of selection. The investigation report was completed on August 27, 2008 and it confirmed that the complainant was not an employee of the public service and had been screened into the appointment process by error. On November 20, 2008, the respondent decided to revoke the complainant's appointment under section 15(3) of the *Public Service Employment Act* (the PSEA), effective two days later. This provision gives the deputy

head the power to revoke an appointment made in an internal appointment process and to take corrective action if, after investigation, the deputy head is satisfied that an error, an omission or improper conduct affected the selection of the person appointed.

5 On December 1, 2008, the complainant brought a complaint to the Tribunal under s. 74 on the PSEA. That provision provides that a person whose appointment is revoked under s. 15(3) of the PSEA may make a complaint to the Tribunal that the revocation was unreasonable.

Issues

6 The Tribunal must decide the following issues:

i) What is the scope of the Tribunal's role in a complaint regarding the revocation of an appointment?

ii) Was the revocation of the complainant's appointment unreasonable?

iii) Does the Tribunal have jurisdiction over the Deputy Head's decision not to appoint the complainant to another position under s. 15(6) of the PSEA?

Summary of Relevant Evidence

<u>Complainant's background and application for the position</u>

7 The respondent and the complainant submitted into evidence a Joint Statement of Facts and a Joint Book of Documents. The complainant was the only person who gave testimony at the hearing.

8 The facts in this complaint are quite straightforward and uncontested. The complainant had previously worked in the public service on a term basis. At that time, he had been given a Personal Record Identifier (PRI), a number given to employees of the public service for several internal purposes.

9 The complainant was working as an external consultant in a Senior Archival Researcher position at IRSRC at the time that he applied. He had been hired at

IRSRC through a private personnel agency. Although he had been given an office space at IRSRC, he usually worked from home. He had a public service email address and reported directly to a director employed by IRSRC.

10 The complainant applied for the position on September 5, 2007. He sent to the respondent a cover email, a cover letter and a résumé. Under his signature in the cover email, the complainant had included “IRSR Research Consultant”. He also included under his signature his personal telephone and cellphone numbers. In the cover letter of his application, he included his PRI number. In his résumé he wrote that he had “Secret Government Clearance”.

11 The Human Resources Advisor who conducted the screening of candidates wrote by hand on the complainant’s résumé the word “consultant” beside the description of the position the complainant occupied at the time of his application.

12 As stated above, the complainant was found qualified and he started working at Service Canada College on June 16, 2008.

The investigation and the revocation of the complainant’s appointment

13 On June 17, 2008, the complainant informed Josée Charbonneau, a Compensation and Benefits Pay Advisor with Service Canada, that he was a contractor at IRSRC before joining Service Canada. In that same email, he asked her to reactivate his PRI number. In another email sent to Ms. Charbonneau on the same day, he informed her that when he was working at IRSRC, he had been hired by someone else who wrote him a cheque and that the government never paid him directly.

14 In late June 2008, Ms. Charbonneau tried to enter the complainant’s PRI in the employee data system. The system would not accept the PRI as a valid active number. She concluded that the complainant may not have been an employee of the public service when he applied for the position.

15 On July 4, 2008, Colette Tessier, Senior Manager, Operation Training, sent a memorandum to Ginger Fillier, the Director of Service Canada College – National

Headquarters Learning Campus. Ms. Tessier wrote that the Corporate Staffing section had launched an investigation into the complainant's appointment and that the appointment was deemed illegal. (This was a first informal investigation which was followed by a more formal one later.) In the memorandum, she also stated that the most likely outcome would be the revocation of the complainant's appointment and that the complainant's actions would not be considered as fraud because he had included the word "[c]onsultant" under his signature in the cover email of his application.

16 In that memorandum, Ms. Tessier set out three options in the event that the Deputy Head decided to revoke the complainant's appointment: offer the complainant a short term casual appointment, offer him a 90-day casual appointment, or appoint him through an external non-advertised appointment process. The memorandum points out that appointing the complainant through a non-advertised appointment process to a PM-03 Training Design Specialist position would alleviate some of the labour shortage at the PM-03 level but that the unusual circumstances of the case had to be taken into consideration. Ms. Tessier also noted that all the successful candidates were offered indeterminate appointments.

17 On the same day, Carole Maisonneuve, Manager, Operational Training Group, informed the complainant by email that the respondent was considering revoking his appointment, but that it was also considering offering him casual employment or an indeterminate appointment through an external non-advertised appointment process. She added that she had recommended the option of an indeterminate appointment, but that she did not have the authority to decide whether the complainant should be appointed to a position.

18 In an email dated July 7, 2008, the complainant told Ms. Maisonneuve that he was not aware that he was ineligible for the position when he applied. He also pointed out to her that the respondent had nine months to screen him out of the process but did not do so. He had therefore assumed there were no problems with his application.

19 On July 17, 2008, Marilyn Dingwall, Chief Operating Officer and Director General, Corporate Policy and Monitoring, wrote to the complainant and advised him that she had decided to conduct an investigation into his appointment and that the investigator, Line Chandonnet, would be contacting him.

20 On July 29, 2008, Ms. Chandonnet met the complainant to discuss the matter of his appointment. At his request, the complainant was accompanied by his supervisor, Monika Palitza, Project Manager, Operation Training.

21 On August 19, 2008, Ms. Maisonneuve wrote to Ms. Fillier and explained that she had conducted reference checks with the complainant's previous employer. The two persons she contacted stated that the complainant "was a team worker", that he was "creative and open to ideas", that he "would take on more work", that he "brought suggestions which were adopted and helped rejuvenate old outdated processes" and that overall he was a "very good energetic worker" and "[s]omeone they would be willing to take on again".

22 On August 27, 2008, Ms. Chandonnet forwarded her investigation report to the complainant. She concluded that the complainant was not in the area of selection and had been screened into the appointment process by error. In her view, this constituted an error, omission or improper conduct that affected the selection of the person appointed. She also concluded that the intervention of the Deputy Minister was warranted. She informed the complainant that the respondent would be contacting him regarding further action.

23 On October 14, 2008, Janice Charette, the Deputy Minister of HRSDC, received a memorandum, a draft Record of Decision and Ms. Chandonnet's investigation report. In the memorandum, Hélène Gosselin, the Deputy Head of Service Canada, recommended that the complainant's appointment be revoked because he was incorrectly screened into the appointment process, and that the complainant not be re-hired as a casual employee upon his termination. Ms. Gosselin also recommended that a copy of Ms. Chandonnet's investigation report and a copy of the draft Record of Decision be forwarded to the complainant and that he be given the

opportunity to present his comments and suggestions regarding the proposed revocation of his appointment. The draft Record of Decision restated the above but also indicated that the complainant should not be hired as a term employee upon his revocation.

24 On October 16, 2008, Ms. Fillier hand-delivered a letter to the complainant, while he was on the work premises. In that letter she ordered the complainant to remain at home on paid leave pending the completion of the investigation into his appointment. She added that the complainant should not contact any departmental employee, other than herself and Ms. Maisonneuve. At that moment, the complainant was asked to return his security pass and was escorted out of the building.

25 The complainant testified that he was treated like a criminal on that last day at work. Without notice, he was told to pack his things and was escorted out of the building by Ms. Fillier and by Guy Marcotte, the Chief of Building Emergency Operations, with whom he had previously worked. He stated that this incident occurred in front of colleagues and was very humiliating. The complainant sat in his car for 30 minutes because he was too disturbed to drive. He thought his professional life was over. He felt helpless, neglected and shamed.

26 On October 17, 2008, Ms. Charette adopted the recommendation made by the Deputy Head of Service Canada to revoke the complainant’s appointment and not to rehire him after revocation.

27 In a letter dated October 20, 2008, Lise Longval, Manager, Monitoring & Complaints, Corporate Staffing, informed the complainant that the Deputy Head was considering revoking his appointment. The letter provided the complainant with an opportunity to comment on the proposed revocation and included the draft Record of Decision mentioned above.

28 On October 30, 2008, the complainant provided Ms. Longval his comments on the proposed revocation of his appointment. He wrote that revoking his appointment would be unfair, unjust, wrong and unreasonable. He stated that he thought he was an employee of the public service at the time he applied for the position because he was

working exclusively on government projects at IRSRC. According to the complainant, the respondent should have questioned him to determine his eligibility in the process. He also submitted that he should not be made to pay for the respondent's error in having screened him into the process.

29 On November 19, 2008, Ms. Gosselin sent Ms. Charette a memorandum in which she states that the complainant's comments did not reveal any new facts that would impact on the recommendation to revoke his appointment. She concluded that her recommendation would remain the same. Attached to the memorandum were the complainant's comments and a Record of Decision identical to the draft Record of Decision. Ms. Charette signed the Record of Decision that revoked the complainant's appointment on November 20, 2008. The revocation was made effective November 22, 2008.

30 On November 24, 2008, Ms. Chandonnet wrote to the complainant to inform him that his appointment had been revoked.

31 In their Joint Statement of Facts, the complainant and the respondent stated that there were no issues with the complainant's job performance.

32 The complainant testified that the revocation of his appointment had a significant impact on his personal relationships and his health.

33 The complainant also testified that the revocation had an adverse impact on his financial situation. He left a higher paying position to accept the respondent's offer of employment. He stated that he had tried to mitigate his losses since the time of his revocation and that he had worked for two departments through an agency or through casual employment and term employment.

34 During the hearing, the complainant submitted a document that he had drafted that sets out the amounts of money he had lost due to the revocation of his appointment, including wages and benefits. The respondent and the Public Service Commission (PSC) objected to the admissibility of that document because they had only received it that morning. They also argued that the Tribunal did not have

jurisdiction to award financial compensation. The Tribunal reserved on the objection. It also ruled that the hearing would be reconvened to allow the respondent and the PSC to cross-examine the complainant and make submissions, should the document be entered into evidence. As the Tribunal has not substantiated this complaint, it is not necessary to address this evidence or the objection of the parties.

Arguments

A) Complainant's arguments

35 The complainant's position is that he has the onus of proving that his revocation was unreasonable.

36 Regarding the merits of the complaint, his view is that the revocation of his appointment was unreasonable, that the respondent failed to inform him of his recourse rights and that the respondent should have appointed him to another position under s. 15(6) of the PSEA. That provision provides that when a deputy head revokes an appointment under s. 15(3), it can appoint that person to another position if that person meets the essential qualifications of the position.

B) Respondent's arguments

37 The respondent argues that the complainant has the onus of proving that the revocation of his appointment was unreasonable.

38 Regarding the merits of the complaint, the respondent's position is that the revocation of the complainant's appointment was not unreasonable, that its failure to inform the complainant of his recourse rights does not affect the reasonableness of its decision to revoke his appointment, and that the Tribunal does not have jurisdiction over the issue of whether the complainant should have been appointed to another position upon his revocation.

C) Public Service Commission's arguments

39 On the matter of onus of proof, the PSC submits that the onus lies with the complainant.

40 The PSC is of the view that the Tribunal does not have jurisdiction over the investigation carried out by the deputy head, and that it cannot question the accuracy or truthfulness of the information relied upon by the deputy head in deciding to revoke the complainant's appointment.

41 Regarding the merits of the complaint, the PSC's position is that in this case, the Deputy Head had no choice but to revoke the complainant's appointment. The PSC states that the respondent's failure to inform the complainant of his right of complaint is a distinct matter since it occurred after the revocation and it is not related to the reasonableness of the Deputy Head's decision. The PSC shares the respondent's view that the Tribunal does not have jurisdiction over the Deputy Head's decision not to re-appoint the complainant to another position upon revocation.

Analysis

Issue 1: What is the scope of the Tribunal's role in a complaint regarding the revocation of an appointment?

42 Before addressing the substance of this complaint, the Tribunal will address arguments submitted by the PSC regarding the scope of the Tribunal's role in a revocation complaint under s.74 of the PSEA. According to the PSC, the role of the Tribunal is similar to the role of the Federal Court acting on judicial review. The PSC argues that, consequently, the Tribunal cannot admit new evidence, nor can it question the accuracy or truthfulness of the facts relied on by the deputy head in revoking the complainant's appointment. The PSC also argues that the Tribunal cannot examine the manner in which the deputy head carried-out the investigation.

43 The Tribunal does not agree with the PSC's submissions. The PSC referred to *Canada (Attorney General) v. Select Brand Distributors Inc.,* (2010 FCA 3) in support of its argument in this regard. However, the remarks made by the Federal Court of Appeal in that case were focused on the specific functions of a court on judicial review and are misplaced in the present context.

44 The Tribunal must examine a complaint for revocation in light of the entire context of the PSEA, in the grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the legislation and the intention of Parliament (see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) 1, 259. The role of the Tribunal in a complaint under s. 74 of the PSEA is distinct and different from the role of the Federal Court acting on judicial review of a decision of an administrative tribunal. The Tribunal's functions go beyond those involved in judicial review. This is clear from the wording of the PSEA. Section 74 directs the Tribunal to examine whether the decision to revoke an appointment was unreasonable. There is nothing in the wording of s. 74 which would preclude the Tribunal from hearing new evidence or evaluating the evidence before it. The wording of s. 74 does not expressly state or imply that a complaint for revocation is restricted to simply reviewing the manner in which the deputy head came to its decision. Had Parliament intended to limit the Tribunal's hearing powers in a complaint under s. 74 to performing a function of judicial review, it would have expressly included these limitations in the provisions of the PSEA.

45 The Tribunal is an independent administrative tribunal and its functions are quasi-judicial in nature. Its full adjudicative role in conducting a hearing is also informed by the preamble of the Act, which specifically highlights fairness, transparency and the need for ". . . recourse aimed at resolving appointment issues . . ." In order to ensure effective recourse, the Tribunal has all the powers outlined in s. 99 of the PSEA. These include summoning the attendance of witnesses, compelling them to give oral or written evidence on oath, accepting any evidence and compelling the production of documents and objects that may be relevant. The wording in the PSEA points to a broad review at the stage that a complaint is brought before the Tribunal hearing.

46 The PSC's interpretation presumes that the functions of the deputy head under s. 15(3) constitute a hearing of first instance and an avenue of recourse. As the Tribunal has explained in *Liang v. President of the Canada Border Services Agency*, 2007 PSST 0033 at paras. 37 and 38, while s. 15(3) may be used to examine and correct an appointment process, it is not a form of recourse. In exercising its authority

under this provision, the deputy head is simply carrying out one of its powers regarding appointments.

47 The Tribunal is therefore the first avenue of recourse for a complainant with regard to a revocation decision made by the deputy head. In deciding to revoke the complainant's appointment, the deputy head relies on the information uncovered in the investigation. That report does not stand for the truth of its content. In deciding whether a decision to revoke is unreasonable, the Tribunal must be able to review those facts and, in some situations, it must allow the parties to challenge the accuracy or truthfulness of those facts. That challenge may involve the presentation of evidence that was not before the deputy head. In addition, in some instances, the Tribunal may examine how the deputy head carried out its investigation. The manner of conducting the investigation may be a factor in determining the accuracy of the facts relied upon by the deputy head. For example, a finding by the Tribunal that an investigation was incomplete may shed doubt on the accuracy of the facts laid out in the investigation report.

Issue 2: Was the revocation of the complainant's appointment unreasonable?

48 Section 74 of the PSEA provides that when the deputy head revokes an appointment under s. 15(3), the complainant may make a complaint to the Tribunal that the revocation was unreasonable.

Which party has the onus when an employee's appointment is revoked pursuant to s. 74 of the PSEA and what is the standard of proof?

49 It is clear from the wording of s. 74 of the PSEA that Parliament intended that the overall burden of proof lie with the complainant to prove that the revocation is unreasonable. That section provides that a ". . . person whose appointment is revoked ... may ... make a complaint to the Tribunal that the revocation was unreasonable..."

50 This approach is in keeping with long established principles in civil courts and arbitration hearings that suggest that the complainant bears the overall burden of proof in those contexts. These principles were also referred to in *Tibbs v. Deputy*

Minister of National Defence, 2006 PSST 0008 (*Tibbs*), when the Tribunal stated (at para. 49):

> The general rule in civil courts and in arbitration hearings is that the party making an assertion bears the burden of proving this assertion rather than the other side having to disprove it. For example, in labour law, a grievor complaining that the employer has breached the collective agreement bears the burden of proving the assertion.

51 The *Tibbs* decision dealt with a complaint pertaining to abuse of authority under s. 77 of the PSEA. Although complaints for revocation and complaints for abuse of authority have clear distinctions, there are important similarities. Both examine decisions made by the respondent regarding the appointment process. Both recourse mechanisms also require an examination of the respondent's decision. The Tribunal has determined that it should adopt a similar approach in revocation complaints under s. 74 of the PSEA.

52 In *Tibbs*, the Tribunal reminded the parties of its right to draw inferences when the respondent chooses to simply deny an assertion, without more, in situations where some evidence is provided as to abuse of authority. The Tribunal stated (at para 54):

> While it is open to the respondent, for its part, to simply deny the assertion, once the complainant has presented some evidence in support of his or her assertion that abuse of authority has occurred, then the respondent will likely wish to raise a positive defense to the assertion. Moreover, it is open to the Tribunal to draw reasonable inferences from uncontested facts and, thus, if the respondent does not present evidence to explain its reasons for a particular course of action or conduct, it risks being faced with an adverse finding by the Tribunal, namely, a substantiated complaint: Gorsky, Uspich & Brandt, supra, at 9-15, 9-16.

53 Likewise, in a complaint regarding revocation, the Tribunal may draw inferences when the complainant has presented some evidence in support of his assertion that the revocation was unreasonable and the respondent chooses to simply deny an assertion.

54 As to the standard of proof, it should be the civil standard, as in other complaints brought before the Tribunal (see *Tibbs* at para. 53). The complainant must therefore prove on a balance of probabilities that the revocation of his appointment was unreasonable.

Was the decision unreasonable?

55 The PSEA does not define the term “unreasonable”. The *Canadian Oxford Dictionary* (Katherine Barber ed., 2nd eds., (Don Mills, Ontario: Oxford University Press, 2004), defines that concept as “[g]oing beyond the limits of what is reasonable or equitable”. *Black’s Law Dictionary* (Bryan A. Garner, Editor in Chief, 8th eds. (USA: West Publishing Co. USA 2004)) defines “unreasonable” as “[n]ot guided by reason; irrational or capricious”.

56 The Supreme Court of Canada (SCC) recently revisited definitions of reasonableness and unreasonableness in *Dunsmuir v. New Brunswick*, 2008 SCC 9. These serve as useful guideposts and are consistent with the definitions above. The SCC stated that the concept of reasonableness relates to “. . . whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (para. 47). The SCC also referred to *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, where it had stated that an “unreasonable” decision is one that “. . . is not supported by any reasons that can stand up to a somewhat probing examination. . .” (para. 37). In *Southam* (para. 56), the SCC adds that a reasonable decision must be supported by the evidence and the conclusion must be drawn from a logical process.

57 The Tribunal must therefore determine whether the decision to revoke the appointment is one that does not fall within a range of possible acceptable outcomes which are defensible or that is one that cannot be supported by a somewhat probing examination.

58 The concept of unreasonableness set out in s. 74 must be understood in light of the scheme of the PSEA. An important factor in deciding whether the decision was unreasonable is whether the deputy head acted within the bounds of s. 15(3) of the PSEA. This provision specifies when a deputy head can revoke an appointment. It gives the deputy head the authority to revoke an appointment made in an internal appointment process if he or she is satisfied that an error affected the selection of a person for appointment.

59 In this case, it is uncontested that an error occurred in the appointment process. Section 34(1) of the PSEA provides that the deputy head may set organisational and geographical criteria in establishing the area of selection for an appointment. Persons who are not in the area of selection cannot submit their candidacy for the position. In this internal advertised appointment process, the area of selection was "[e]mployees of the Public Service occupying a position in the National Capital Region." The term "employee" is defined in the PSEA as ". . . a person employed in that part of the public service to which the Commission has exclusive authority to make appointments". It is uncontested that when the complainant applied for the position, he was not an "employee" within the meaning of the PSEA. He was working at the IRSRC through a personnel agency on a contract basis. Therefore, the complainant was not in the area of selection. It is also uncontested that the error affected the person selected for appointment since the complainant was not eligible in this appointment process.

60 The fact that the Deputy Head acted within the bounds of s. 15(3) however, does not end the discussion. By choosing "unreasonableness" as a ground of complaint in s. 74, Parliament has indicated that it is not sufficient that the deputy head act within its authority in revoking an appointment, the decision must also not be unreasonable.

61 The complainant argues that the revocation of his appointment was unreasonable since it was the respondent that committed the error, not him. In the Tribunal's view, who committed the error and the manner that the error was committed can be factors in determining whether the revocation was unreasonable. In this case, however, this is not a determinative factor.

62 Although the respondent was in error when it screened the complainant into the appointment process, the complainant contributed to this error in several ways. The Tribunal notes that there is no allegation that the complainant intentionally misled the respondent, nor was there any argument made to that effect. However, the complainant, who had previously worked in the public service as a term employee, should have inquired more into his eligibility in the process. Had he done so, he would

have realised that, as an external consultant, he had no right to have his candidacy considered.

63 In addition, the complainant contributed to the screening error by including a PRI number in the covering letter of his résumé. A PRI number is given only to government employees and the complainant had been given one when he had previously been an employee of the public service for term periods. Furthermore, in his résumé, the complainant referred to his current position as a position at the IRSRC. This could also give the impression that the complainant was an employee of the public service. The fact that the complainant also indicated that he had a government security clearance may have compounded that impression.

64 The complainant also argues that the respondent should have realised that he worked on a contract basis since the cover email to his application described him as “IRSR Research Consultant” and the person who screened his application wrote the word “consultant” on his résumé beside the description of the position he occupied at the time of his application. The complainant also argues that the inclusion of only personal phone numbers in his cover email is significant.

65 The Tribunal finds that, while the title “consultant” might generally indicate that a person is hired on a contract basis, it is conceivable that employees in the public service might use that term in their job title. In addition, the respondent’s inclusion of the word “consultant” on the complainant’s résumé does not necessarily mean that the respondent was aware of the complainant’s status. The Tribunal also finds that the complainant’s reference to his personal telephone numbers only, would not necessarily lead the person screening the applications to conclude that the complainant was not an employee of the public service. An employee might be reluctant to give a work phone number and prefer to give his personal number.

66 The complainant also submits that the decision to revoke his appointment was unreasonable because he is highly qualified for the position. The fact that he was found qualified, however, does not change the fact that he was not eligible to apply in the process. Given the circumstances of the present case, it was not unreasonable for

the Deputy Head to conclude that the proper way to correct this defect in the appointment process was to revoke his appointment.

67 The complainant submits that the revocation of his appointment was unreasonable because the respondent failed to conduct a proper investigation, as required by s. 15(3) of the PSEA. The Tribunal finds that the respondent carried out a proper investigation and gave the complainant the opportunity to provide his views on the proposed revocation of his appointment. The facts were straightforward and uncontested. The investigator, Ms. Chandonnet, interviewed the complainant on July 29, 2008, and sent him the investigation report on August 27, 2008. On October 20, 2008, Ms. Longval informed the complainant that the respondent was considering revoking his appointment and asked him for his comments on that matter. She included the draft Record of Decision which sets out the reasons for considering that option. The complainant therefore knew the case against him and had a full opportunity to put forward his views on the proposed revocation of his appointment.

68 The Tribunal does not support the complainant's argument that the respondent waited too long to revoke his appointment. The complainant accepted the employment offer on May 28, 2008 and started working on June 16. 2008. The respondent realised that it had made an error in late June 2008, and after having conducted an investigation, revoked the complainant's appointment on November 20, 2008, that is a little less than six months after his appointment. In the Tribunal's view, the respondent acted diligently. It did not take an inordinate length of time to conduct a proper investigation, to ensure that the complainant had an opportunity to provide his comments and to secure the proper approvals.

69 The complainant argues that the respondent was at fault for having given him false hope. The Tribunal does not agree. It is true that Ms. Maisonneuve informed him in an email on July 4, 2008 that the respondent was considering offering him casual employment or an indeterminate appointment through an external non-advertised appointment process; but there was no commitment to do so. She made it clear that she did not have the authority to make that decision.

70 The complainant also states that since he was formally hired as an employee of the public service, the only way to terminate his employment was to dismiss him for cause. The Tribunal does not agree. Section 15(3) of the PSEA explicitly allows the deputy head to determine whether he or she should revoke an appointment, if an error in the appointment process affected the selection for appointment.

71 The complainant also raises the respondent's failure to properly inform him of his recourse rights, as required by the PSC's *Corrective Action and Revocation* policy. This policy is mandatory and it is unfortunate that the respondent failed to comply with it. However, failure to do so in this case did not affect the reasonableness of the Deputy Head's decision to revoke the complainant's appointment. The Tribunal notes that the complainant did not suffer any prejudice from this omission since he was able to file his complaint.

72 In conclusion, the Tribunal finds that the Deputy Head's decision to revoke the complainant's appointment is not one that falls outside the range of possible acceptable outcomes which are defensible. It can also be supported by a probing examination of the reasons for the decision.

73 Before leaving this issue, the Tribunal wishes to comment on the manner the respondent treated the complainant during the period preceding his revocation. The respondent escorted the complainant out of his workplace in front of his colleagues. The complainant remarked that he felt that he was being treated as a criminal. There was no reason for this humiliating treatment. There was also no reason for the respondent to instruct the complainant, as it did through Ms. Fillier's letter of October 16, 2008, not to communicate with any departmental employee. This treatment was harsh and unwarranted.

Issue 3: Does the Tribunal have jurisdiction over the Deputy Head's decision not to appoint the complainant to another position under section 15(6) of the PSEA?

74 The complainant submits that he should have been appointed to another position after his revocation. Section 15(6) of the PSEA provides that when an

employee's appointment is revoked under s. 15(3) of the *Act,* the PSC or its delegate can appoint that person to another position if that person meets the essential qualifications established for the position.

75 The Tribunal finds that it cannot review the decision not to appoint the complainant to another position because it does not have jurisdiction over that matter. Section 74 of the PSEA makes it clear that the Tribunal's jurisdiction is limited to reviewing the decision to revoke the appointment, not the subsequent decision whether to appoint the person to another position:

> 74. A person whose appointment is revoked by the Commission under subsection 67(1) or by the deputy head under subsection 15(3) or 67(2) may, in the manner and within the period provided by the Tribunal's regulations, make a complaint to the Tribunal that the revocation was unreasonable.
>
> Emphasis added

76 The powers granted to the Tribunal in revocation complaints also make it clear that the issue before the Tribunal is the decision to revoke the appointment, and only that. Section 76 of the PSEA provides that if the complaint is substantiated, the Tribunal can set aside the revocation. That provision does not provide the Tribunal with any other powers. It does not provide for corrective action regarding the failure to appoint an employee to another position under s. 15(6) of the PSEA, such as ordering the respondent or the PSC to make such an appointment.

77 Section 87 of the PSEA provides that the appointment of a person to another position under s. 15(6) is not subject to a right of complaint. The decision not to reappoint the complainant to another position under s. 15(6) is therefore a distinct and separate decision over which the Tribunal does not have jurisdiction.

78 While the Tribunal does not have jurisdiction over this issue, it believes that under the circumstances, it would have been reasonable for the respondent to avail itself of s. 15(6) to appoint the complainant to another position, at least on a term basis. The inclusion in the PSEA of such a provision indicates that Parliament gave the deputy head a tool to alleviate the negative impact of a revocation on the person whose appointment was revoked. As the PSC points out in its document *Appointment*

Policy Considerations – Revocation and Corrective Action, there are circumstances where the appointment to another position is not only fair but may also mitigate the negative impact on the employee and reduce potential liabilities on the part of the department.

79 In this case, appointing the complainant to another position would have made good business sense since there were vacancies to fill and the complainant was qualified for the position. As noted in the evidence, Ms. Tessier, the Senior Manager, Operational Training, stated in her memorandum that appointing the complainant to another position would alleviate some of the labour shortage at the PM-03 level. In addition, Ms. Maisonneuve, the Manager, Operational Training, was impressed by the complainant's qualifications since she informed him in July 2008 that she would be recommending that he be appointed to another position through an external non-advertised process. References from previous employment were very positive. Again, the respondent's approach to this issue was harsh. It went further than not appointing the complainant to another position; it directed that the complainant not be rehired as a casual employee.

Decision

80 For all of these reasons, the complaint is dismissed.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2008-0740
Style of Cause	*Jarrod Goldsmith and the Deputy Minister of Human Resources and Skills Development*
Hearing	April 6, 2010 Ottawa, Ontario
Date of Reasons	November 23, 2010
APPEARANCES:	
For the complainant	Joanne Daniel
For the respondent	Martin Desmeules
For the Public Service Commission	Marie-Josée Montreuil