



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2006-0087, 0088,
0089 & 0090
Issued at: Ottawa, August 13, 2010

**THOMAS A.C. BROWN, GLORIA W. FRY,
TOBY LYNNE MEADE AND JOY H. HUBLEY**

Complainants

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

Respondent

AND

OTHER PARTIES

Matter Complaint of abuse of authority pursuant to section 77(1)(b)
of the *Public Service Employment Act*

Decision Complaints are dismissed

Decision rendered by John Mooney, Vice-Chairperson

Language of Decision English

Indexed *Brown et al. v. Deputy Minister of National Defence*

Neutral Citation 2010 PSST 0012

Reasons for Decision

Introduction

1 The complainants, Thomas A.C. Brown, Gloria W. Fry, Toby Lynne Meade and Joy H. Hubley allege that the respondent, the Deputy Minister of National Defence, abused its authority by choosing an internal non-advertised appointment process to appoint Anne McGuinness on an acting basis to a Senior Contracts Officer position at the PG-04 group and level (the PG-04 position) in Halifax. The complainants submit that that appointment deprived them of the opportunity to act in that position and that it was part of a scheme to increase Ms. McGuinness' chances to be appointed to that position on an indeterminate basis.

2 The respondent denies that it abused its authority in making that choice of process or that it elaborated such a scheme.

3 These complaints were originally brought before the Public Service Staffing Tribunal (the Tribunal) on August 18, 2006, and the Tribunal dismissed them on February 26, 2008. The complainants brought an application for judicial review before the Federal Court. On July 27, 2009, the Court allowed their application, set aside the decision and remitted the matter to a differently constituted panel for determination in accordance with its reasons (see *Thomas Brown, Gloria Fry, Toby Lynne Meade and Joy Hubley and Attorney General of Canada and Public Service Commission*, 2009 FC 758). A new hearing was held on January 14 and 15, 2010.

Background

4 These complaints were made under section 77(1)(b) of the *Public Service Employment Act*, S.C. 2003, c. 22 ss. 12 and 13 (the *PSEA*) which provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of abuse of authority by the Public Service Commission (PSC) in choosing between an advertised and a non-advertised

internal appointment process. In accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, the Tribunal consolidated complaint files 2006-0087 to 2006-0090 for the purposes of the hearing and the decision.

5 The staffing actions involving Ms. McGuinness are, to say the least, complex. This complexity is due to the fact that Ms. McGuinness' acting appointment which is the subject of this complaint was preceded by two other staffing actions: her deployment and an acting opportunity which began the same day.

6 Ms. McGuinness was an internal auditor at the AS-04 group and level in the Department of National Defence's (DND) Logistics Internal Audit branch. On February 13, 2006, she started acting in the PG-04 position in the Formation Logistics branch. The written offer for that acting appointment was approved after the fact on March 22, 2006, retroactive to February 13, 2006. The acting appointment was to last until May 27, 2006 while arrangements were being made to complete the appointment process to fill the PG-04 position on an indeterminate basis.

7 On March 29, 2006, the respondent offered Ms. McGuinness a deployment to the Senior Contracts Officer position at the PG-03 group and level (the PG-03 position) in the Formation Logistics branch, retroactive to February 13, 2006. Ms. McGuinness accepted the deployment offer on April 13, 2006. Ms. McGuinness never worked in the PG-03 position to which she was deployed, since, as indicated above, she was offered an acting appointment to the PG-04 position the same day the deployment was to become effective.

8 Since the process for the indeterminate appointment was not completed within the expected time frames, the respondent offered Ms. McGuinness another acting appointment to the PG-04 position for the period of June 1, 2006 to September 29, 2006. The *Information Regarding Acting Appointment* notice was issued on August 15, 2006. The complainants filed their complaint on August 18, 2006.

Issue

9 The Tribunal must determine the following issue:

Did the respondent abuse its authority when, in June 2006, it chose an internal non-advertised appointment process to staff the PG-04 position on an acting basis and appointed Ms. McGuinness to that position?

Summary of Relevant Evidence

10 The complainants all worked in the Formation Logistics branch of DND in Halifax in positions at the PG-02 group and level when they brought their complaints.

11 Ms. Meade testified that in 2002 Lila Zwicker told her that she would offer acting opportunities to employees in her unit before offering them to employees outside the unit.

12 Ms. Zwicker, who was called as a witness by the respondent, has been a Contract Coordination Manager at the PG-05 group and level since 1997. In 2004, the respondent added duties to her functions and these amounted to another full-time job. That year, she was also asked to help another branch with a new financial system. She worked over 100 hours overtime a month. She created the PG-04 position that year by converting one of three vacant PG-03 positions into a PG-04 position. This would allow her to delegate some of her work, thereby easing her workload.

13 Ms. Zwicker explained that three simultaneous advertised appointment processes were carried out in the summer of 2005 to fill PG-02, PG-03 and PG-04 positions. She was a member of the assessment boards for those processes and the manager of the positions being staffed. There were successful candidates for the PG-02 positions, but none for the PG-03 and PG-04 positions.

14 Ms. Meade and Ms. Fry testified that they applied in the appointment processes for the PG-03 and PG-04 positions in the summer of 2005. They were not successful in either process.

15 Christine Lynds, who was called as a witness by the complainants, is a Senior Contracts Officer at the PG-03 group and level in the Formation Logistics branch. She reports to Ms. Zwicker. She also applied in the appointment process for the indeterminate PG-04 appointment in the summer of 2005, but withdrew from the process for personal reasons.

16 The complainants also called Ms. McGuinness as a witness. She also applied in the advertised appointment process for the indeterminate appointment to the PG-04 position in the summer of 2005, but she failed the knowledge qualification.

17 Ms. Zwicker stated that since the advertised process for the PG-04 position was unsuccessful, she examined other options with Anton Topilnyckyj, Human Resources Officer in DND. Mr. Topilnyckyj tried to deploy employees from other departments but was unsuccessful. Ms. Zwicker therefore decided to conduct another advertised appointment process to fill the PG-04 position on an indeterminate basis, but she needed someone to act in the position until that process was completed. Ms. Zwicker decided to use the results of the 2005 advertised appointment processes for the indeterminate appointments to the PG-04 position to staff that position on an acting basis. She offered the acting appointment to Ms. McGuinness because she had achieved the highest score in the 2005 PG-04 appointment process.

18 Ms. Zwicker stated that she and Ms. McGuinness had worked together in the past, but they had no social relationship at the time.

19 Ms. Zwicker approached John Delaney, Ms. McGuinness' supervisor at that time. He agreed in principle to let Ms. McGuinness leave his unit to act in the PG-04 position, but they could not agree on a date.

20 The complainants called Mr. Topilnyckyj as a witness. He stated that Ms. Zwicker made Ms. McGuinness a verbal offer for an acting appointment to the PG-04 position in November 2005. Since Ms. McGuinness' supervisor would not agree on a date to let Ms. McGuinness join Ms. Zwicker's unit, Ms. Zwicker later decided instead to deploy her to PG-03 position and offer her an acting appointment to the PG-04 position. Mr. Topilnyckyj stated that the PG-03 position had been vacant for at least a year and

that the intent was that Ms. McGuinness would work in the PG-03 position after she completed her acting appointment in the PG-04 position.

21 Ms. McGuinness testified that she and Ms. Zwicker had worked together in the past and Ms. Zwicker liked her work. She stated that in 2005 Ms. Zwicker had offered her an acting appointment to the PG-04 position. Ms. Zwicker became frustrated because Ms. McGuinness' supervisor could not agree on a date to let Ms. McGuinness join Ms. Zwicker's unit. According to Ms. McGuinness, Ms. Zwicker, made a decision in January 2006 to offer Ms. McGuinness a deployment to the PG-03 position. Ms. McGuinness was aware that she would act in the PG-04 position after being deployed to the PG-03 position. Ms. McGuinness was also aware that she would be sharing the acting opportunity with Ms. Lynds after four months. Ms. McGuinness expected to occupy the PG-03 position after her acting appointment to the PG-04 position was completed. To obtain the PG-04 position on an indeterminate basis, she expected to participate in an advertised process.

22 Ms. Zwicker stated that Ms. Meade and Ms. Fry had asked her for acting opportunities at the PG-04 level, but they occupied positions at the PG-02 level and her policy was to offer acting appointments only to employees who were one level below the level of the position being staffed. Employees at the PG-03 level would have the knowledge and experience needed to perform the duties of the PG-04 position. Ms. Zwicker applied that policy whenever possible. She deviated from it when she asked Ms. Lynds to act in her own position for a month, even though Ms. Lynds occupied a position two levels below her own. In cross-examination, Ms. Zwicker added that in other units, employees have acted in positions more than one level above their position, sometimes even three levels above their position.

23 Mr. Topilnyckyj stated that the respondent does not have a policy on acting appointments. The manager decides who will be appointed to a position on an acting basis.

24 Ms. Meade learned that Ms. McGuinness would join their unit on January 25, 2006 during a staff meeting. Ms. Zwicker told those who attended the

meeting that Ms. McGuinness would be deployed to the PG-03 position, then offered an acting appointment to the PG-04 position. Ms. Meade was shocked to hear that. She was also disappointed because she wanted to act in the PG-03 position. Several employees grieved the deployment and the grievance is still pending.

25 Ms. Fry learned of Ms. McGuinness' deployment at a staff meeting on February 8, 2006. Referring to notes that she had taken at that meeting, she said that Ms. Zwicker stated that she had been trying to get Ms. McGuinness back into the unit after "three years of arm twisting."

26 In cross-examination, Ms. Zwicker acknowledged that she told staff that Ms. McGuinness would return to the unit "after three years of arm-twisting". She also said that when she met Ms. McGuinness the previous year, she asked her whether she was ready to return to the Formation Logistics unit. But she denied that she created the PG-04 position with the intent of offering it to Ms. McGuinness.

27 Ms. Zwicker stated that she offered Ms. Lynds the acting opportunity when Ms. McGuinness' acting appointment was approaching four months. Ms. Lynds refused the offer in late May 2006. Ms. Lynds told Ms. Zwicker that she had several projects to complete.

28 Ms. Lynds testified that she was only offered the acting appointment to the PG-04 position after she grieved Ms. McGuinness' deployment. She refused the offer because she believed Ms. Zwicker was forced to do so by her superiors. She did not believe management would support her if she accepted it. She would have been set up to fail.

29 Ms. Lynds stated that Ms. McGuinness was not qualified to act in a PG-04 position since she did not possess the required experience. Ms. Lynds admitted that she did not know what the qualifications for the position were.

30 Ms. McGuinness testified that she received training when she was acting in the PG-04 position. For her, it was more an update on contracts than training as such since

she had attended courses on that subject before and had even taught contract management in the past.

31 Ms. Zwicker testified that she extended Ms. McGuinness' acting appointment to the end of September 2006 because the advertised process for the indeterminate PG-04 appointment was not completed. This extension meant that the acting appointment exceeded four months in duration and became subject to merit. She made a written assessment of Ms. McGuinness' qualifications. To do so, she used Ms. McGuinness' résumé and her personal knowledge of Ms. McGuinness' work performance. The criteria used to assess Ms. McGuinness' qualifications were nearly identical to those used for the advertised process to fill the position on an indeterminate basis. Ms. Zwicker also completed a written rationale that explained why a non-advertised appointment process was used to fill the position. That rationale was signed on August 3, 2006 by Mr. Dyke to whom that authority had been delegated. She also stated that it is not uncommon that the rationale for the choice of process be signed two months after the staffing action.

Arguments of the parties

A) Complainant's arguments

32 The complainants submit that the respondent abused its authority by appointing Ms. McGuinness on an acting basis to a PG-04 position through a non-advertised appointment process. They argue that the evidence, taken globally, shows that the respondent put in place a scheme to bring Ms. McGuinness to that position. Ms. Zwicker had been enticing Ms. McGuinness to come back to Ms. Zwicker's unit for three years. The PG-04 position was thus created and Ms. McGuinness applied for that position in an advertised appointment process. Unfortunately, she did not meet one of the essential qualifications. The respondent then deployed Ms. McGuinness to a PG-03 position in her unit and appointed her to a PG-04 position on an acting basis the same day. During that acting appointment, the respondent provided her with training to increase her chances in any future process for the indeterminate appointment to the PG-04 position.

33 The complainants submit that the deployment and subsequent acting appointment of Ms. McGuinness were not transparent and fair. The respondent did not inform employees of its intention to deploy Ms. McGuinness and give her an acting appointment. They refer to the preamble of the *PSEA* which provides that the Government of Canada is “. . . committed to a public service . . . that is characterised by fair, transparent employment practices . . .”

34 The complainants also refer to the Departmental Policy Template and Guidelines (the Guidelines) issued by what was then the Public Service Human Resources Management Agency of Canada which provides that managers must make deployments in a manner that is characterized by fair, transparent employment practices and respect for employees. By failing to inform employees about the deployment, the respondent did not respect these Guidelines. The complainants state that the respondent also violated its own directive and order on deployments by not informing employees of its intent to deploy Ms. McGuinness to the PG-03 position. That policy provides that managers should ensure that employees are informed of upcoming deployments.

35 The complainants submit that the respondent waited until the current *PSEA* came into force (*i.e.*, December 31, 2005) before deploying Ms. McGuinness to the PG-03 position to avoid recourse procedures under the *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the former *PSEA*). Under the *PSEA* now in force, employees in the unit to which a person is deployed have no third party recourse to contest a deployment. The respondent also wanted to avoid applying Treasury Board's previous deployment policy and the jurisprudence that applied to deployments made under the former *PSEA*. The complainant referred the Tribunal to *Laidlaw v. Canada (Attorney General)*, [1999] F.C.J. No. 566 for the proposition that a department should not deploy a person to a position which that person will not occupy.

36 Referring to the testimony of Mr. Topilnycky, the complainants argue that the respondent had no policy that required that acting opportunities be offered only to employees one level below the classification level of the acting position. They also note

that Ms. Zwicker acknowledged that other managers made acting appointments to positions three levels higher than the appointee's positions.

37 The complainants submit that Ms. McGuinness was offered training during her acting appointment in the PG-04 position to enable her to acquire the knowledge needed to be successful in a future process for an indeterminate appointment to that position.

38 The complainants note that the respondent was also remiss in failing to post Ms. McGuinness' acting appointment when it lasted beyond four months and became subject to recourse.

B) Respondent's arguments

39 The respondent submits that in these complaints, the complainants have focused on the deployment instead of the appointment. The Tribunal does not have jurisdiction over deployments.

40 The respondent argues that it had the right to choose a non-advertised process to make the acting appointment. Section 33 of the *PSEA* allows a delegated manager to choose between an advertised and a non-advertised appointment process to make an appointment.

41 The respondent submits that Ms. McGuinness was not appointed because of personal favouritism. Ms. Zwicker testified that she had no social relationship with Ms. McGuinness at the time of the appointment process.

42 The respondent states that there was no scheme to appoint Ms. McGuinness to the PG-04 position. Mr. Topilnycky testified that he even tried without success to recruit employees from other departments to fill the PG-04 position.

43 The respondent also notes that the complainant did not submit any evidence that would indicate that Ms. McGuinness was not qualified for the position.

44 The respondent acknowledges that the notice of Ms. McGuinness' acting appointment was posted late. But the delay was not because of bad faith and the

complainants suffered no prejudice because of it. If the Tribunal concludes that that delay constitutes an error, that error would not constitute an abuse of authority.

C) Public Service Commission's arguments

45 The PSC submitted that most of the complainants' evidence pertains to Ms. McGuinness' deployment to the PG-03 position and whether it respected the department's directive and order on deployments. It takes the position that the Tribunal does not have jurisdiction on whether the deployment was valid, but that the Tribunal can examine the deployment in the context of the complaints. The PSC submits that there is no evidence that Ms. McGuinness' deployment was made to circumvent the PSEA or the PSC's policies.

46 With respect to Ms. McGuinness' acting appointment to the PG-04 position, the PSC states that there was no breach of any PSC policy that would be sufficient to constitute an abuse of authority.

47 The PSC submits that there is also no evidence that personal favouritism played any role in Ms. McGuinness' acting appointment.

48 The PSC also stated that there is no evidence that Ms. McGuinness did not meet the essential qualifications established for the position, other than Ms. Lynds' personal opinion on that matter. If Ms. McGuinness had not met those qualifications, it would have been a grave concern to the PSC.

Analysis

49 The issue before the Tribunal is whether the respondent abused its authority when, in June 2006, it chose an internal non-advertised appointment process to staff the PG-04 position on an acting basis and appointed Ms. McGuinness to that position.

50 In *Clout v. Deputy Minister of Public Safety and Emergency Preparedness, 2008 PSST 0022*, the Tribunal held that a complainant must establish, on a balance of probabilities, that the decision to chose a non-advertised appointment process was an abuse of authority.

51 The expression “abuse of authority” is not defined in the *PSEA*, however, section 2(4) provides that it includes “bad faith” and “personal favouritism”. In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, the Tribunal held that the scheme of the *PSEA* indicates that abuse of authority is more than simple errors and omissions. In order to determine whether the choice of process constitutes an abuse of authority, the Tribunal must examine how and why that choice was made.

52 In remitting these complaints to the Tribunal, the Federal Court did not make a finding of abuse of authority but returned the complaints to the Tribunal because it did not consider all the relevant evidence before it. The Court stated the following:

[53] It is neither necessary nor appropriate for me to make a finding as to the occurrence of any abuse of authority, in the manner in which the Tribunal dealt with the Applicants’ complaint. It is noteworthy, however, that a failure to consider all relevant evidence may constitute an abuse of authority, according to the factors discussed by Jones and de Villars referred to above. The question before me is whether the Tribunal’s decision meets the standard of reasonableness. In my opinion, it does not.

53 Finding that the evidence must be assessed from a global perspective, the Federal Court stated that it was incumbent on the Tribunal to look at the overall perspective of what happened from the time the appointee was placed in the PG-03 position. The Court explicitly highlighted the fact that the PG-03 position led to Ms. McGuinness’ eligibility to be placed in the PG-04 position:

[54] In my view, the Tribunal failed to consider the evidence before it, from a global perspective. It improperly focused on isolated events, rather than looking at the overall picture as to what transpired from the time that Ms. McGuinness (*sic*) was placed in an acting position as a PG-04, immediately after her deployment in the PG-03 position. Without status as a PG-03, it appears that Ms. McGuinness would not have been eligible for the PG-04 position. The core of the Applicants’ complaint does not relate to the deployment of Ms. McGuinness, but rather to what happened subsequently.

54 In coming to its determination, the Tribunal has found it useful and important to examine the two staffing actions that preceded Ms. McGuinness’ acting appointment to the PG-04 position in June 2006: Ms. McGuinness’ deployment to the PG-03 position and her initial acting appointment to the PG-04 position. As will be explained below, the Tribunal does not have jurisdiction over those staffing actions. Nevertheless, they are part of the sequence of events that led to Ms. McGuinness’ acting appointment in June 2006 and are part of the Tribunal’s consideration of the complainants’ allegations.

55 In accordance with the Federal Court decision, the Tribunal has therefore carefully reviewed all of the relevant evidence pertaining to the appointment process. The events that came before the appointment process at issue here must be viewed as interconnected and with a global perspective, regardless of whether the Tribunal has jurisdiction over all or some of them. Having reviewed all of these events, the Tribunal finds that, although there were some irregularities and that the staffing actions were complex, there was no abuse of authority in Ms. McGuinness' acting appointment of June 2006. The Tribunal's reasons for coming to this determination follow.

Ms. McGuinness' deployment to the PG-03 position

56 In *Smith v. President of the Canada Border Services Agency*, 2007 PSST 0029, at para. 9, the Tribunal stated that a complaint cannot be filed against a deployment under section 77 of the *PSEA* as a deployment is not an appointment. Nevertheless, given the sequence of events that led to the appointment that is the subject of this complaint, it is important to address the decision to deploy Ms. McGuinness and the parallel decision to put her into an acting position at the PG-04 level.

57 It is clear from the evidence that Ms. Zwicker wanted Ms. McGuinness to return to the Formation Logistics unit. Ms. Zwicker and Ms. McGuinness had worked together in the past and Ms. Zwicker appreciated Ms. McGuinness' work. In 2005, Ms. Zwicker asked Ms. McGuinness whether she was ready to return to the Formations Logistics unit. She also told employees of her unit during a staff meeting in February 2006 that Ms. McGuinness was coming back to the unit "after three years of arm-twisting". However, actively recruiting employees is not in and of itself improper. It is the rationale for appointing a person to a specific position that will determine whether there was an abuse of authority.

58 Both Ms. Zwicker and Ms. McGuinness testified that Ms. McGuinness was deployed to the PG-03 position on February 13, 2006. The evidence shows however that the deployment was actually finalized two months after it came into effect (the offer was made on March 29, 2006 and accepted on April 13, 2006). The issue of retroactivity of the deployment, however, was not raised at the hearing by either party.

59 In the Tribunal's view, however, the respondent provided ample evidence of the operational reasons that led to the decision to use a deployment. This evidence is not in dispute. It is clear from the evidence that Ms. Zwicker had a real need to staff her unit and had made several different efforts to do so, without success. A deployment had not been Ms. Zwicker's first approach to address the operational demands of the unit. She originally wanted to offer Ms. McGuinness an acting appointment to the PG-04 position when Ms. McGuinness was in the AS-04 position in another DND unit. This would have been possible, but because Ms. McGuinness's supervisor could not agree upon a date to let her leave his unit, Ms. Zwicker decided instead to deploy Ms. McGuinness to the PG-03 position as of February 13, 2006, and have her act in the PG-04 position the same day.

60 The complainant raised *Laidlaw*, in which the Federal Court held that the department had abused its authority by deploying an employee to a position which the employee never occupied. *Laidlaw* was decided under previous legislation and is not directly relevant since the new *PSEA* does not give the Tribunal jurisdiction over deployments. In addition, *Laidlaw* is factually distinct from the current complaint. With regard to the reasons for the deployment, the evidence shows that there was a need to fill the PG-03 position to which Ms. McGuinness was deployed. As stated earlier, the respondent had previously held an advertised appointment process to fill that vacancy but the process did not yield a successful candidate. The Tribunal also finds that although Ms. McGuinness never occupied the PG-03 position, the respondent intended to return her to the PG-03 position when her acting appointment reached its term if she was not successful in the advertised appointment process for the indeterminate PG-04 position.

61 The complainant also argued that the respondent waited until the *PSEA* came into force to deploy Ms. McGuinness to the PG-03 position in order to avoid recourse rights provided for in the former *PSEA*. No evidence was provided to support the complainants' allegation.

Ms. McGuinness' initial acting appointment to the PG-04 position

62 This initial acting appointment was under four months in duration. Section 14(1) of the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*) provides that acting appointments of less than four months are not subject to section 77 of the *PSEA*. In such a case, the Tribunal does not have jurisdiction. The Tribunal can, however, examine this staffing action as it sheds light on how Ms. McGuinness received an acting opportunity in June 2006. (See for example *Robert v. Deputy Minister of Citizenship and Immigration Canada*, 2008 PSST 0020).

63 Ms. McGuinness started acting in the PG-04 position on February 13, 2006, the same day that she was retroactively deployed to the PG-03 position. That acting appointment was also made after the fact. The written offer was made on March 29, 2006 and signed by the approving authority on March 22 of that same year. It was made retroactive to February, 13, 2006.

64 Prior to February 13, 2006, Ms. McGuinness was not part of Ms. Zwicker's unit. She was in an AS-04 position in another section of DND. The deployment that brought Ms. McGuinness to Ms. Zwicker's unit was only made two months later, albeit retroactively. Ms. Zwicker did not, therefore, offer the acting opportunity to a person in her unit as she had promised Ms. Meade in 2002.

65 However, the Tribunal finds that there was nothing improper in Ms. Zwicker's decision to give Ms. McGuinness the acting opportunity. Ms. Zwicker chose Ms. McGuinness because her practice was to choose, when possible, a person occupying a position one level below the position that was being staffed on an acting basis. In her view, such persons would have the necessary knowledge and experience to perform the duties of the higher position. The complainants were not offered that acting opportunity because they occupied positions two levels below the position being staffed.

66 The Tribunal also finds that the purpose of that acting appointment was to staff the position temporarily while the appointment process for the indeterminate appointment to that position was being carried out. Ms. Zwicker chose Ms. McGuinness

because she had worked with her in the past and was satisfied with her work. Ms. McGuinness had also achieved the highest score in the unfruitful advertised appointment process carried out to fill the PG-04 position on an indeterminate basis in the summer of 2005.

The June 2006 decision to proceed with a non-advertised process to staff the PG-04 position on an acting basis and to appoint Ms. McGuinness to that position

67 Ms. McGuinness continued acting in the PG-04 position through a non-advertised appointment process from June 1, 2006 to September 29, 2006. It is that acting appointment that is the subject of these complaints.

68 The *PSEA* specifically allows a delegated manager the flexibility to staff a position through a non-advertised process. Section 33 provides that the PSC may choose between an advertised and a non-advertised process to make an appointment, and section 30(4) specifies that the PSC need not consider more than one person in order for an appointment to be made on the basis of merit. The *PSEA* in fact expresses no preference for one process or the other.

69 In the Tribunal's view, there was no abuse of authority in choosing a non-advertised process to staff the PG-04 position. Ms. Zwicker chose a non-advertised process because the advertised process to fill the position on an indeterminate basis had not been completed within the expected time-frames. In the Tribunal's view, it makes sense to choose a non-advertised appointment process for such a short period.

70 In the Tribunal's view, there was no abuse of authority in choosing Ms. McGuinness to fill the position on an acting basis. There were only two persons occupying positions at the PG-03 level: Ms. Lynds and Ms. McGuinness. Ms. Lynds was offered the acting opportunity in late May 2006 but she refused it. Ms. Lynds did not file a complaint. Ms. Zwicker assessed Ms. McGuinness against the *Statement of Merit Criteria* and found her qualified. The complainants did not dispute that Ms. McGuinness was qualified for the appointment, and they did not present evidence regarding that matter, other than Ms. Lynds' unsubstantiated comment that Ms. McGuinness was not qualified.

71 There is no evidence the respondent purposely deprived the complainants of the acting opportunity through bad faith. The complainants were not offered that acting opportunity because they occupied positions two levels below the position being staffed and Ms. Zwicker's practice was to offer acting opportunities to persons occupying positions one level below the acting position. The respondent did not have an acting policy in place, and the practice personally adopted by Ms. Zwicker was not unreasonable. The evidence shows that she followed this practice consistently and whenever possible. The complainants did not submit any evidence that would indicate that the respondent's practice in that matter breached any of the PSC's policies on acting appointments, or its own policies or directives on that matter. The Tribunal finds that, in the circumstances of this case, there is no evidence that this practice constitutes an abuse of authority.

72 The complainants allege that Ms. Zwicker extended the period of Ms. McGuinness' acting appointment in the PG-04 position to increase her chances in any future appointment process to that position on an indeterminate basis. There is no evidence to support that allegation. Ms. Zwicker needed to staff that position on an acting basis until the process to staff the position on an indeterminate basis was completed. That being said, there is nothing wrong with providing an employee with an acting opportunity to increase his or her skills in view of future appointment processes. It could be an abuse of authority, of course, to grant an acting opportunity for an improper reason, such as to favour a personal friend or gain a personal favour (see *Beyak v. Deputy Head of Natural Resources Canada*, 2009 PSST 0007), but there is no evidence that personal favouritism played any part in Ms. McGuinness' acting appointment.

73 Ms. Zwicker testified that she had no social relationship with Ms. McGuinness at the time of the acting appointment. The complainants did not submit any evidence to contradict this. There is no evidence before the Tribunal that Ms. Zwicker had anything other than a professional relationship with Ms. McGuinness at the time of the acting appointment. There is also no evidence that the choice of a non-advertised process for extending the acting was associated with rewarding the appointee or ensuring in any other way that she would have a personal advantage in the indeterminate appointment process.

74 The fact that the respondent offered Ms. McGuinness contract training does not indicate that the offer was part of a scheme to prepare Ms. McGuinness for an indeterminate PG-04 appointment. The position entailed working on contracts and Ms. McGuinness felt that she needed to update her knowledge of that matter. Ms. Lynds was also offered contract training to prepare for an acting appointment to the same position, but she refused the offer.

75 The Tribunal is concerned that the acting appointment was signed by the approving authority on June 23, 2006 and was made retroactive to June 1, 2006. The respondent did not offer any explanation for this delay. Although section 56(1) of the *PSEA* allows for retroactive appointments, generally a person should not start working in a position until the staffing action is approved by the person having the delegated authority. In the present case, this irregularity, however, does not impact the choice of process or the person appointed, and is not serious enough to constitute an abuse of authority.

76 The complainants argue that the respondent was remiss in failing to post notice of Ms. McGuinness' acting appointment in a timely manner. Section 13 of the *PSEER* provides that the PSC must inform the persons in the area of recourse of an acting appointment that extends a persons' cumulative period of the acting appointment to four months or more. The respondent did not clearly explain why the notification was posted late, although Ms. Zwicker stated that this was not an uncommon occurrence, and that the written rationale that explained why a non-advertised appointment was used was only signed on August 3, 2006 by Mr. Dyke to whom that authority had been delegated. There is no evidence that the late notice was related to efforts to conceal the appointment or actively avoid the posting of recourse rights. The delay from the time that the second acting appointment process began was two and a half months, but the notification was posted within two weeks of it having been approved by Mr. Dyke.

77 The Tribunal wishes to stress that it is important that delegated managers adhere strictly to the requirements of the *PSEER* regarding notification. Employees have the right to be informed at the time of the acting appointment, not after the fact. In this case, however, that omission is not serious enough to constitute an abuse of authority.

According to Ms. Zwicker, such delays appeared to be common and while the Tribunal does not excuse this, in this case the complainants did not suffer any prejudice because of the delay and they were able to exercise their right of complaint. As noted in *Tibbs*, at para. 65, it is clear from the preamble and the whole scheme of the *PSEA* that Parliament intended that much more is required than mere errors and omissions to constitute abuse of authority.

78 In summary, the evidence shows that the process leading to the June 2006 acting appointment was complicated. Nevertheless, the evidence, viewed globally, shows that Ms. McGuinness' acting appointment to the PG-04 position in June 2006 did not offend the *PSEA* or the *PSER*. Originally, Ms. Zwicker wanted to offer Ms. McGuinness an acting appointment directly to the PG-04 position when Ms. McGuinness occupied an AS-04 position in another unit of DND. It is because Ms. McGuinness' supervisor could not agree on a date to let her leave his unit that Ms. Zwicker decided instead to deploy Ms. McGuinness to the PG-03 position and have her act in the PG-04 position the same day. Ms. McGuinness' deployment to the PG-03 position was therefore a means to allow her to be appointed on an acting basis to the PG-04 position. Although the decision to place Ms. McGuinness in the acting PG-04 position resulted from a number of involved steps, these steps were transparent and the decision was not improper. The period of the initial acting appointment was extended in June 2006 because the process to staff the PG-04 position on an indeterminate basis was not completed. There was nothing in that acting appointment that constitutes an abuse of authority.

79 In conclusion, while the Tribunal has raised a concern pertaining to the June 2006 acting appointment having been made retroactively, and having been posted late, it finds that there is no evidence that the respondent abused its authority in choosing a non-advertised process to make that appointment and appointing Ms. McGuinness to that position.

Decision

80 For all of these reasons, the complaints are dismissed.

John Mooney
Vice-Chairperson

Parties of Record

Tribunal File	2006-0087, 0088, 0089 & 0090
Style of Cause	<i>Thomas A.C. Brown, Gloria W. Fry, Toby Lynne Meade and Joy H. Hubley and the Deputy Minister of National Defence</i>
Hearing	January 14 and 15, 2010 Halifax, Nova Scotia
Date of Reasons	August 13, 2010
APPEARANCES:	
For the complainant	Alan Phillips
For the respondent	Pierre Marc Champagne
For the Public Service Commission	Lili Ste-Marie