



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2010- 0783  
**Issued at:** Ottawa, April 27, 2011

**MONICA MERCIER**

Complainant

AND

**THE DEPUTY MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Motion to dismiss
<b>Decision</b>	Motion denied
<b>Decision rendered by</b>	Guy Giguère
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Mercier v. Deputy Minister of Public Works and Government Services</i>
<b>Neutral Citation</b>	2011 PSST 0013

# Reasons for Decision

## Introduction

1 The respondent, the Deputy Minister of Public Works and Government Services (PWGSC) has filed a motion to dismiss the complaint of Monica Mercier on the grounds that the complainant is outside the area of recourse and does not enjoy a right to complain. The respondent contends that the complainant was not a candidate in the advertised appointment process and is therefore not entitled to file a complaint.

2 The complainant is employed at PWGSC as a Supervisor, Planning Control Officer, at the AS-02 group and level, in the Real Property Branch, Business Operations Services, in Ottawa. She filed a complaint with the Tribunal in which she alleges that the respondent has abused its authority by not adhering to the appointment values of fairness, access and transparency. She complains that the appointee was initially offered an acting appointment, which was later converted to an indeterminate appointment that was not offered to other employees.

## Issues

3 The Tribunal must determine the following issues:

- (i) Was the indeterminate appointment advertised?
- (ii) Is the complaint against this indeterminate appointment properly before the Tribunal?

## Evidence and arguments of the parties

4 The complaint relates to the appointment of Lorie Brisebois, to the position of Manager, Real Property Disposition Revolving Fund, at PWGSC, at the AS-05 group and level. The Notice of Appointment or Proposal of Appointment (NAPA) regarding Ms. Brisebois's appointment was published on December 15, 2010, indicating that this is an indeterminate appointment made pursuant to an internal advertised selection process (2009-SVC-IA-HQ-45342). The NAPA also advises that persons within the Area of Selection who participated in the advertised process may file a complaint. The

Area of Selection includes employees of PWGSC in the Real Property Branch, occupying a position in the National Capital Region.

**5** The complainant filed her complaint with the Tribunal on December 30, 2010, under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA).

**6** On January 12, 2011, the respondent requested that the Tribunal dismiss the complaint. The respondent argues that the complainant does not have the right to file a complaint under the PSEA as she was not a candidate in this advertised process. Ms. Brisebois was one of the successful candidates in the advertised process and was identified as a right fit for the position.

**7** The complainant acknowledges that she was not an applicant in this process. However, she points out that the Job Opportunity Advertisement (Advertisement) that was published on the Publiservice website in this selection process indicates that this process was for an “Acting, Secondment, Specified Period, Assignment” under the heading “Type of Advertisement”. The Advertisement also states under the same heading that the “Period of Time” is one year. The closing date for filing an application was December 4, 2009.

**8** The complainant argues that she and many interested employees do not apply on job opportunities that would only be available on a short term basis, such as the one described in the Advertisement, due to the interruptions that these types of appointments cause to their work life. She therefore contends that it was unfair for the respondent to advertise the position as being for a short term, and then unexpectedly convert it to an indeterminate appointment, without ever offering people who had not originally considered applying on the short term job opportunity, the chance to apply.

**9** The respondent states that its original intent was to fill the position on a temporary basis because the incumbent was on long term sick leave and the date of her return to work was unknown. In addition, there is some uncertainty about the future of the fund. However, the respondent decided to appoint Ms. Brisebois to the position on an indeterminate basis when it was confirmed that the incumbent would not be returning

to her post. The respondent explains that its ability to retain a qualified manager in the position was particularly a concern because of the uncertain future of the fund.

**10** The respondent claims that it had indicated in the Advertisement that this option was a possibility, under the heading “Other Information (Notes)”, which is found at the end of the Advertisement: “Based on operational needs, this opportunity may become permanent”. Given the inclusion of this note, the respondent contends that it was appropriate for it to indicate in the NAPA that the indeterminate appointment of Ms. Brisebois had resulted from this advertised appointment process.

## **Analysis**

**Issue I:** Was the indeterminate internal appointment advertised?

**11** As expressed in the preamble to the PSEA, the exercise of discretion in staffing within the public service must be characterized by fair and transparent employment practices (see *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008 at para. 64).

**12** The respondent’s motion turns on the issue of whether the indeterminate appointment was made pursuant to the internal advertised process referenced in the NAPA. According to the respondent, the statement, in the “Other Information (Notes)” section of the Advertisement, that the opportunity “may become permanent” was sufficient to inform potential candidates like the complainant that the opportunity was not limited to a term of one year and could also be indeterminate.

**13** The printout of the advertisement provided to the Tribunal by the respondent is three full pages in length. The “Other Information (Notes)” section is only found at the very end of the advertisement, at the bottom of the third page, along with other general information unrelated to employment tenure such as the mention that reference checks may be sought and that a written examination may be administered.

**14** In contrast, the section entitled “Type of Advertisement” is found near the top of the advertisement, indicating in completely unambiguous terms (“Acting, Secondment, Specified Period, Assignment”) that the nature of the opportunity is temporary. There is

no suggestion whatsoever of the respondent's alleged intent to consider converting the tenure to indeterminate. On the contrary, the temporary nature is reinforced by the mention under the same heading on the first page, just nine lines lower, that the "Period of Time" is "1 year".

**15** In the circumstances, the complainant and other potential candidates may legitimately have expected that all the tenure possibilities arising from this process were listed in this section. Accordingly, it was reasonable for these persons to have concluded that the process was not intended to result in anything but an appointment or other temporary arrangement for one year.

**16** Even if one were to take into account the note found at the end of the advertisement, the Tribunal is of the view that the use of the term "this opportunity may become permanent" is imprecise. It is not specified under what circumstances and conditions this job opportunity for one year may change. It could likely mean that if operational needs changed in the future, the respondent may decide to proceed with an internal advertised or a non-advertised process for an indeterminate appointment in this position.

**17** Moreover, by the respondent's own admission its intent was to fill the position on a temporary basis because the incumbent was on long term sick leave. Ms Brisebois was selected amongst the qualified candidates as the right fit for the position. It is only when the respondent received confirmation that the incumbent would not be returning to her position that it was decided to appoint Ms. Brisebois on an indeterminate basis.

**18** The Tribunal finds that the indeterminate appointment was not advertised and Ms. Brisebois' indeterminate appointment was not made pursuant to the internal advertised appointment process as referenced in the NAPA. Therefore, the Tribunal concludes that the indeterminate appointment of Ms. Brisebois was made pursuant to a non-advertised process.

**Issue II:** Is the complaint against this indeterminate appointment properly before the Tribunal?

**19** The *Public Service Staffing Tribunal Regulations*, SOR/2006-6, (the *Regulations*) provide that a complaint may be made to the Tribunal no later than 15 days after the day the person is notified of the appointment or proposed appointment to which the complaint relates. Section 10 of the *Regulations* reads as follows:

10. A complaint by a person may be made to the Tribunal

(a) except where paragraph (b) applies, no later than 15 days after the day on which the person receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; and

(b) if the notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates is a public notice, no later than 15 days after the date of the notice

**20** As the indeterminate appointment was made following a non-advertised process, the notice requirement of s. 48 of the PSEA for a non-advertised process applies. Section 48 specifies that in the case of a non-advertised internal appointment process the persons in the area of selection must be notified of the person being considered for an appointment and, subsequently, of the person proposed for appointment or appointed.

**21** No such notices were given as the respondent's notice was only directed to those in the area of selection who participated in the appointment process for the advertised temporary opportunity of one year. Notice is a fundamental requirement of the PSEA to ensure transparency by informing the persons who have a legal right to be notified of the appointment. This also includes a notice of the right to make a complaint to the Tribunal and the grounds, the manner and the time period for making a complaint.

**22** The Federal Court of Appeal addressed the issue of notice in the context of the former PSEA. In *Bova v. Canada (Public Service Commission)*, [1990] F.C.J. No. 1032 (QL), the court found that where the notice fails to comply with the requirements contained in the notice provision, it cannot be considered proper notice at all.

**23** The Tribunal dealt with a similar situation in *Sherif v. Deputy Minister of Agriculture and Agri-Food Canada*, 2006 PSST 0003 where the Tribunal found that where a notice of an appointment is incomplete it cannot be considered that the required notice has been given. The Tribunal found, at paras. 18 and 20, the following:

18 The same principle applies in the present case. Ms. Sherif should have received notice not only of the appointment of Mr. Hunter but also of the right and grounds to make a complaint. If the notification is incomplete, then a complaint should not be considered as having been given after the time to file a complaint has expired.

19 (...)

20 Section 10 of the *Regulations* establishes the latest date when a complaint must be filed, but not the earliest. The complaint is timely and there is no need for the Tribunal to delay the review of this appointment until proper notification has been completed under section 13 of the *Public Service Employment Regulations*, either by posting on the Publiservice Web site or otherwise.

**24** The same can be said here. An indeterminate appointment has been made and notice of Ms. Brisebois's appointment was posted on Publiservice. However, only those who participated in the appointment process were advised of their right to recourse. If the notice is incomplete, then it is deficient and cannot be considered as having been given.

**25** Section 10 of the *Regulations* establishes the latest date when a complaint must be filed, but not the earliest. An indeterminate appointment has been made through a non-advertised process and given the lack of notice, the complaint is timely. There is no need for the Tribunal to delay the review of this complaint until proper notice has been given.

## **Decision**

**26** As a result, the respondent's motion to dismiss is denied.

**27** The Tribunal reinstates the timelines for this complaint with this decision. When the respondent's motion was filed, the respondent and complainant were to complete the exchange of all relevant information by January 31, 2011. The Tribunal extends this period to May 16, 2011.

**28** All parties should consult the PSST Regulations and Procedural Guide at [www.psst-tdfp.gc.ca](http://www.psst-tdfp.gc.ca) to calculate the amended deadlines resulting from the granting of the extension and ensure that they make the necessary adjustments to the timelines applicable to them.

Guy Giguère  
Chairperson

**Parties of Record**

<b>Tribunal File</b>	2010-0783
<b>Style of Cause</b>	<i>Monica Mercier and Deputy Minister of Public Works and Government Services</i>
<b>Hearing</b>	Written request, decided without the appearance of parties
<b>Date of Reasons</b>	April 27, 2011