



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2009-0748
Issued at: Ottawa, January 13, 2011

CONNIE UPCOTT

Complainant

AND

**THE DEPUTY MINISTER OF HUMAN RESOURCES AND SKILLS
DEVELOPMENT CANADA**

Respondent

AND

OTHER PARTIES

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

Decision Complaint is dismissed

Decision rendered by Joanne B. Archibald, Member

Language of Decision English

Indexed *Upcott v. Deputy Minister of Human Resources and Skills Development Canada*

Neutral Citation 2011 PSST 0002

Reasons for Decision

Introduction

1 This complaint concerns an internal, non-advertised appointment process to give acting appointments to the position of acting Team Leader (TL) at the PM-03 group and level, with Human Resources and Skills Development Canada (HRSDC) in Windsor, Ontario. The complainant, Connie Upcott, believes that she was promised the next acting TL appointment and that there was no justification for the use of a non-advertised appointment process. She alleges that the time for completing the written exercise that was used in the appointment process was too short. She also alleges that any resulting appointments were limited to the Windsor Regional Processing Unit (RPU) and complains that an individual was appointed to a position outside the RPU.

2 The respondent, the Deputy Minister of HRSDC, denies any abuse of authority in this appointment process. It maintains that it had the right to use a non-advertised appointment process. It used the same tool to assess all of the individuals who expressed an interest and eleven of them were found qualified. The complainant did not succeed because she did not submit the evaluation exercise. The appointment in question is not outside the RPU.

Background

3 The complainant, now retired, had a public service career spanning more than 30 years. All the parties agreed that she was a valued employee who gave exemplary service. At the time of her retirement, she worked in Windsor, at the HRSDC office located at 400 City Hall Square (City Hall). This was one of two offices in Windsor. The second one was located at 467 University Avenue (University).

4 Over a period of time, an informal process for selecting employees for acting appointments to TL positions had developed in HRSDC in Windsor. Employees were selected based on their interest, performance and availability.

5 In June 2009, a decision was made to hire 130 new Service Benefit Officers (SBOs) for the RPU. They were scheduled to report to work on September 8, 2009. To

supervise the new employees, TLs were required. On August 18, 2009, an email was issued to all employees in Windsor, which stated that “in preparation for operationalizing the Windsor Regional Processing Unit,” a formalized process to select employees to act in TL positions would shortly take place.

6 The complainant responded to the email to express her interest in the acting TL positions. On Friday, August 21, 2009, she received a written exercise with instructions to submit it by the close of business on Monday, August 24, 2009.

7 The complainant chose not to return the written exercise, or participate further in the appointment process. She had personal commitments during the weekend and felt that she would not have time for the exercise.

8 On September 10, 2009, an email was sent to all employees in Windsor to announce that, further to the expressions of interest received after the August 18, 2009 email, nine individuals had been selected to act as TLs. Seven of them would be located at University and two of them would be located at City Hall, where the complainant worked. Michelle Mombourquette was one of the appointees listed in the email and her work location was indicated as City Hall.

9 On December 10, 2009, an *Information Regarding Acting Appointment (IRAA)* was posted for the appointment of Ms. Mombourquette for an acting TL position in the Windsor Processing and Payment Services Branch. The *IRAA* stated that Ms. Mombourquette’s acting appointment resulted from the non-advertised appointment process, and was for the period of September 8, 2009 to March 31, 2010.

10 On December 22, 2009, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) pursuant to s. 77(1)(a) and (b) of the *Public Service Employment Act* (the PSEA) alleging abuse of authority.

11 The complainant contended that she had been told that she would receive the next acting TL appointment at City Hall. She maintained that, as a result of the internal non-advertised process, Ms. Mombourquette was appointed to a position at City Hall, and she lost an opportunity she had anticipated. The complainant disputed the

respondent's choice of a non-advertised appointment process as opposed to following through on a promise made to appoint her to a TL position.

Issues

12 The Tribunal must consider:

(i) Whether there was abuse of authority in the choice of a non-advertised appointment process;

(ii) Whether there was abuse of authority in the time for completing the written exercise;

(iii) Whether Ms. Mombourquette was appointed to a location that was not within the terms of the appointment process.

Issue I: Was there an abuse of authority in the choice of a non-advertised appointment process?

13 The complainant's arguments pertaining to the choice of process are grounded in the fact that Windsor HRSDC had a long standing, informal practice of what she described as rotational acting appointments. The complainant testified that she had received several acting TL appointments through that practice.

14 The Tribunal understands that the complainant disputes the internal non-advertised process because it was a departure from the less formal practice that had been used in Windsor.

15 There are therefore two questions to address in examining this issue: first, the respondent's decision to use a formalized non-advertised appointment process, as opposed to proceeding with the informal rotational system of TL appointments, and, secondly, the issue of the alleged promise to appoint the complainant to the next available acting TL position.

The choice of a non-advertised appointment process

16 The Tribunal finds no abuse of authority in the respondent's decision to proceed with a formalized non-advertised appointment process. The choice to use a non-advertised process falls within the authority given to the respondent under s. 33 of the PSEA. There was ample evidence presented to support the use of a non-advertised process to select acting TLs. The email of August 18, 2009 referred to preparations for the RPU and the influx of 130 new SBOs on September 8, 2009. Evidence showed the corresponding urgency for TLs to train the SBOs, monitor their work, and supervise their activity. A current internal advertised appointment process for TLs had yielded only two candidates, leaving a significant unmet need for more.

17 The Tribunal is satisfied that the respondent's operational circumstances at the time were unique and pressing. There was an evident requirement to staff TL positions expeditiously. There is no evidence of abuse of authority in the respondent's choice to proceed as it did. On the contrary, choosing a non-advertised appointment process demonstrated the use of the flexibility provided in the PSEA to allow the respondent to address an urgent situation.

The promise to the complainant of a TL appointment

18 There is no dispute that, before the decision to hire 130 new SBOs, there had been an informal practice of appointing acting TLs in Windsor. In addition to the complainant, a number of other witnesses also testified that in Windsor HRSDC, an informal system of choosing employees to act as TLs existed. The local union president Barbara Lum, Pamela Armstrong, Acting Manager RPU, Dennis Carroll, Director Benefits Processing, South Western Ontario, and Wayne McKeen, Service Manager, all agreed that this was the case.

19 The complainant testified that in July 2009, she asked her manager, Ms. Armstrong, when she would next receive an acting TL appointment and was led to believe that she would be next in the rotation at City Hall. Ms. Armstrong, however, testified that she recalled a discussion concerning the complainant's performance review but not one concerning the next acting TL appointment.

20 The complainant argues that the Tribunal ought to enforce the promise that she states was made to her. The Tribunal finds that, whether a promise was made or not, there was a clear message sent to all the employees through the email of August 21, 2009 that a more formal non-advertised appointment process would be used to select employees for appointment to TL positions. The Tribunal finds that the communication pertaining to the appointment process clearly set this out. For the complainant to rely on the previous practice, given the transparent and concerted effort by the respondent to communicate with the employees concerning the selection for acting TL appointments, was imprudent.

Issue II: Was there abuse of authority in the time for completing the written exercise?

21 The complainant testified that she had personal commitments on August 21, 2009, and she felt that over the weekend she would not have sufficient time to access the respondent's intranet for information to complete the examination. Ms. Armstrong testified that two other employees requested and received extensions when they asked for additional time due to personal circumstances and leave from the workplace, respectively. There was no evidence that the complainant made the same request.

22 Tribunal finds no abuse of authority in the length of time that was given for completing the exercise. The complainant elected not to proceed with it and at no time asked for an extension of the allotted time. The Tribunal finds that when the complainant decided not to proceed, she effectively abandoned the opportunity to be considered in the TL process.

Issue III: Was Ms. Mombourquette appointed to a location that was not within the terms of the appointment process?

23 Ms. Mombourquette's work location was City Hall from the onset of her acting TL appointment. The complainant submits that this constitutes abuse of authority because City Hall was not the work location referred to in the email of August 18, 2009. She

argues that it referred solely to positions at the RPU which, in her view, was located at University.

24 Mr. Carroll, who issued the email of August 18, 2009, testified that it had always been known that neither University nor City Hall was large enough to accommodate all of the new SBOs and he had never represented that TLs would all be located at University. From the outset it was known that 101 of the BSOs would work at University and 29 would work at City Hall. TLs would be required in both locations. The email of August 18, 2009 did not indicate a work address.

25 The Tribunal finds that there was no specific work location indicated on the August 2009 email, although it clearly indicated that the staffing action was motivated by the “operationalizing” of the RPU. Moreover, the evidence of Mr. Carroll on which he was not cross-examined, squarely refutes the contention that the work of the RPU is conducted solely at University and shows that it is undertaken at the City Hall location as well. The Tribunal finds no abuse of authority in the appointment of Ms. Mombourquette to the City Hall location.

26 The complainant also argues that the *IRAA*, dated December 10, 2009, ought to have been posted earlier as it was clear from the August 18, 2009 email that the appointments would be for the period of August 31, 2009 to March 31, 2010.

27 Mr. McKeen, who prepared the written rationale for the extension of Ms. Mombourquette’s appointment, testified that she was initially appointed for four months less a day. This information is also reflected in the written rationale for extending her acting appointment. The *IRAA* was posted in December 2009 when the decision to extend her appointment was made.

28 Under the *Public Service Employment Regulations*, SOR/2005-334, (the *PSER*) s. 13 provides for notice in the case of acting appointments:

13. The Commission shall, at the time that the following acting appointments are made or proposed, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:

(a) an acting appointment of four months or more;

(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.

14. (1) An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.

29 Section 14 of the *PSER* specifically excludes acting appointments of less than four months from the application of s. 77 of the *PSEA*, the section which sets out the right to complain to the Tribunal.

30 The Tribunal finds that the rationale and Mr. McKeen's testimony provide evidence that the length of Ms. Mombourquette's initial appointment was, in fact, four months less a day. As such, no *IRAA* would have been required at the time of her initial appointment. The *IRAA* was posted early in the fourth month of Ms. Mombourquette's appointment. As it had only then been decided to extend the appointment for a cumulative period exceeding four months, the posting was timely.

31 The Tribunal finds no abuse of authority in the appointment of Ms. Mombourquette to a position at City Hall, or in the timing of posting the *IRAA*.

Decision

32 For these reasons, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2009-0748
Style of Cause	<i>Connie Upcott and the Deputy Minister of Human Resources and Skills Development Canada</i>
Hearing	October 7-8, 2010 Windsor, Ontario
Date of Reasons	January 13, 2011
APPEARANCES:	
For the complainant	Todd Ferguson
For the respondent	Pierre-Marc Champagne