



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2010-0219
Issued at: Ottawa, July 21, 2011

KRISTA MCMILLAN

Complainant

AND

THE DEPUTY MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA

Respondent

AND

OTHER PARTIES

Matter Complaint of unreasonable revocation pursuant to section 74 of the *Public Service Employment Act*

Decision Complaint is substantiated

Decision rendered by Joanne B. Archibald, Member

Language of Decision English

Indexed *McMillan v. Deputy Minister of Indian and Northern Affairs Canada*

Neutral Citation 2011 PSST 0020

Reasons for Decision

Introduction

1 Krista McMillan, the complainant, was appointed to the position of Senior Education Programs Officer (the SEPO position) at the PM-05 group and level with Indian and Northern Affairs Canada (INAC). After receiving an anonymous note concerning the appointment process, INAC conducted an investigation into it. Following the investigation, the Deputy Minister of INAC (the respondent) informed the complainant that her appointment was being revoked based on a finding that appointment-related errors and omissions had occurred. The respondent took this action pursuant to s. 15(3) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss.12-13 (PSEA) which provides that:

15. (3) Where the Commission authorizes a deputy head to make appointments pursuant to an internal appointment process, the authorization must include the power to revoke those appointments and to take corrective action whenever the deputy head, after investigation, is satisfied that an error, an omission or improper conduct affected the selection of a person for appointment.

2 When an appointment is revoked pursuant to s. 15(3), the PSEA provides that a complaint may be made to the Tribunal. Section 74 states:

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.

3 After the revocation of her appointment, the complainant brought a complaint to the Public Service Staffing Tribunal (the Tribunal) under s. 74.

Background

4 INAC conducted an internal advertised appointment process for the SEPO position. Twenty-one employees, including the complainant, responded to the *Job Opportunity Advertisement*. Candidates were screened against education and experience qualifications. Fifteen candidates were found to meet the screening criteria and they were invited to an interview and written examination. Only one candidate, the complainant, was found to meet the qualifications assessed to this stage. Her

references were then checked and she was found qualified. A *Notification of Appointment or Proposal of Appointment* was posted October 14, 2009, indicating that the complainant was proposed for appointment. On October 15, 2009, the complainant was offered an appointment to the position. She accepted the appointment on October 22, 2009. No complaints were received by the Tribunal concerning the complainant's appointment.

5 An anonymous note dated September 16, 2009 (the anonymous note), was addressed to Michael Wernick, Deputy Minister, INAC, concerning the complainant's appointment. The anonymous note alleged that the Director of Education, Katherine Knott, was responsible for the appointment of the complainant who was her daughter. It suggested that the appointment was not meritorious, that the complainant was not fully assessed and was, in any event, not qualified.

6 In response to the note, the respondent initiated an investigation which was conducted by two investigators. In January 2010, the investigators issued their investigation report (the Report) in which they raised their concerns. With reference to the appointment of the complainant, they identified specific defects, notably:

- i. The family relationship between Ms. Knott and the complainant, Ms. Knott's failure to declare it in the Signed Statement of Persons Present, and the "real or perceived" conflict of interest caused by the family relationship;
- ii. The investigators' conclusion that the complainant did not demonstrate that she met the essential experience criteria.

7 The investigators' recommendations included the revocation of the complainant's appointment and her reinstatement to her former position of Junior Education Program Officer (JEPO). On February 25, 2010, the respondent accepted the investigators' recommendation. By letters dated March 1, 2010, and March 26, 2010, the respondent advised the complainant of her revocation from the SEPO position and reinstatement to the JEPO position. Specifically in the letter of March 1, 2010, the respondent advised the complainant that:

The investigation concluded that a number of appointment and appointment-related errors and omissions occurred and impacted on the appointment. As well, decisions and practices that are indications of favouritism were present. As such, the appointment did not meet the requirements

of the *Public Service Employment Act* and the Appointment Delegation and Accountability instrument.

[...]

Based on these findings, and in accordance with sub-section 15(3) of the *Public Service Employment Act*, I have decided to revoke your appointment [...].

Issues

8 The issues before the Tribunal are:

- (i) Did the respondent's investigation respect procedural fairness?
- (ii) Was the result of the investigation process reasonable?
- (iii) Was the revocation of the complainant's appointment reasonable?

Relevant Evidence

The Assessment Process

Evidence of the complainant

9 The complainant testified that she joined INAC eleven years ago as a CR-03 clerk. In that capacity, she worked with federal schools and performed the duties of an administrative assistant. For one year, she worked as the administrative assistant for the Education Director. Approximately five years ago, she was appointed to the position of JEPO in the Brantford office. In this capacity, she assisted in program delivery, had direct contact with First Nations, assisted with the organization of national meetings, provided information to INAC headquarters, and worked directly with the SEPOs.

10 The complainant stated that she heard in a conversation that an appointment process would be taking place for the SEPO position. She then saw an email advertising the process. She decided to apply to have the experience of participating in an assessment and if she was successful, an opportunity to work more closely with First Nations.

11 The Statement of Merit Criteria (SMC) for the SEPO position contained education and experience criteria that were used to screen candidates. They were:

- A secondary school diploma AND an acceptable combination of education, training and experience allowing for competent performance, at the appropriate level, of duties assigned to the Senior Education Programs Officer.
- Experience in education programming or education administration.
- Experience in the delivery of federal programs with First Nations.

12 In testimony, the complainant stated that she felt she met the screening criteria. She had a secondary school diploma and, at the time of the appointment process, she had four years of experience as a JEPO. In addition, by administering the programs that were run through the Brantford INAC office, she had gained experience completing and reviewing proposals and reports, working closely with First Nations, allocating funds to First Nations and processing documents to ensure timely payment.

13 On February 9, 2009, the complainant submitted her application. On March 23, 2009, she received notification that she had been found to meet the screening criteria. An interview was scheduled for April 15, 2009.

14 The complainant stated that after she received the notification, she prepared for the upcoming interview. She studied using the SMC, the INAC website, and documents available to her in her workplace. She also spoke with SEPOs about their work.

15 The complainant was interviewed by an assessment board composed of Kris Hill, a departmental employee, and Abram Benedict, a First Nations representative. The complainant testified that at her interview, Mr. Benedict and Ms. Hill initially asked her an introductory question to put her at ease. They followed with a series of questions for her to answer and a written exercise which required her to respond to a letter.

16 During the interview, the complainant was asked to provide the names of individuals who could provide a personal reference. She supplied two names.

17 As noted above, the complainant was later advised that she was being considered for appointment and on October 22, 2009, she accepted an appointment to the SEPO position in Brantford, Ontario.

Evidence of Katherine Knott

18 Ms. Knott is the complainant's mother. She testified that she worked for INAC for 32 years, and retired on September 15, 2009. For the last 15 years of her employment, she was the Director of Education. She described the work unit where the JEPO and SEPO are located, and indicated that there is no intermediate position between them. The SEPO position is a next step for a JEPO.

19 Ms. Knott stated that on October 9, 2008, she signed a Human Resources Action Request for Appointments (HRAR) for anticipatory staffing of the SEPO position in the Brantford and Thunder Bay offices. She regularly prepared HRARs for teachers, classroom assistants, curriculum advisors, and superintendents. Ms. Knott explained that the process to initiate an appointment process was first to complete the HRAR, then to obtain approval from the Senior Management Team, and finally to receive approval from the Human Resources Management Committee to make an appointment.

20 Once the HRAR was approved by the Senior Management Team, Ms. Knott prepared the SMC. She testified that she initially worked on the SMC with a Human Resources Advisor at INAC who was later replaced by Elda Ratford, Senior Human Resources Advisor (now retired). When the SMC was finalized, Ms. Knott testified that she developed the interview questions and rating guide. She had no specific memory of when she prepared the questions, except to say that it was during the period of December 2008 to February 2009. Ms. Knott testified that she did not prepare the reference check questions or the rating scale and she received both of them from Human Resources.

21 Ms. Knott indicated that the closing date for the receipt of applications was originally February 2, 2009. It was extended to February 9, 2009. She did not recall the reason for amending the date, but stated that it would have been done in consultation

with Human Resources and possibly because insufficient applications had been received. By extending the date, there was a possibility to receive more applications.

22 Ms. Knott testified that she conducted the screening of the 21 applications that were received. The purpose of screening was to determine whether the applicants met the education and experience qualifications found in the SMC. Ms. Knott pointed out that the complainant's application indicated that she was a high school graduate and that she had been a JEPO since October 2007. It indicated that she had experience assisting SEPOs in the delivery of three programs. Ms. Knott also applied her personal knowledge of the duties performed by the JEPOs, of which she was aware as Director of Education since the JEPOs assisted her directly. The duties included answering programming questions, analysing data, providing information on payment to First Nations, and briefings to SEPOs concerning specific incidents. She knew that the complainant had training as a JEPO and was experienced with providing support to the SEPOs in the delivery of a number of specific federal programs administered through her directorate. Based on the complainant's application together with Ms. Knott's personal knowledge of the JEPO function and the complainant's work as a JEPO, Ms. Knott found the complainant to meet the education and experience requirements.

23 In total, 15 candidates were found to meet the screening criteria and they were invited to interviews.

24 Ms. Knott stated that she did not participate in the complainant's interview because of their family relationship. She was replaced by Ms. Hill who was then a SEPO, but had qualified and was slated to be appointed to the position of Regional Manager, Education, in the Brantford office. Ms. Knott stated that she understood that withdrawing from the interview, but not the overall assessment, was the correct action for her to take. She based her action on her memory of an assessment process in which she was a candidate and her brother was a member of the assessment board. He chose not to participate in her interview.

25 Ms. Knott testified that she assessed the interviews and written exercises of only those candidates she had interviewed. She did not participate in the assessment of the

complainant's interview and written exercise, which were assessed by Mr. Benedict and Ms. Hill. When the assessment of the interviews and written exercises of all candidates was complete, only the complainant was found to meet the essential qualifications up to that point.

26 Ms. Knott stated that the final step in the complainant's assessment was to check references. References were used to assess the essential qualifications of effective interpersonal relations, judgment, tact and adaptability. Ms. Knott conducted the reference check by contacting one referee. The complainant was found to meet these essential qualifications. Ms. Knott added that during October 2009, after she had retired, she returned to the workplace to participate in informal discussion with at least four unsuccessful candidates.

27 Ms. Knott acknowledged that Ms. Ratford, when reviewing the record of the assessment process, counselled her to obtain two references and examples of the qualities referred to during the reference check. Ms. Knott stated that she was of the view that two were not required. A significant body of email messages passing between Ms. Knott and Ms. Ratford was placed in evidence. Ms. Knott reviewed the series of emails and stated that it was an incomplete record of their discussions and not reflective of all of the actions taken to address Ms. Ratford's concerns.

28 Ms. Knott acknowledged her signature on the *Signed Statement of Persons Present* document that was used to indicate those responsible for the screening process. It included the following declaration:

Having been made aware of the list of candidates, I declare that to the best of my knowledge I am not related to any of these candidates, and that the nature of my association, if any, with these candidates is such that I can render decisions in an impartial manner.

29 Ms. Knott stated that when she signed this document on March 14, 2009, she understood that she was certifying that she would uphold her responsibility to screen candidates. She acknowledged that when she now reread the content of the document, she understood that she had erred in signing it as she was indeed related to the complainant. She conceded that she repeated the error when she subsequently signed

the second *Signed Statement of Persons Present* for the assessment board. She indicated, however, that her relationship to her daughter was well known throughout INAC and over years, she personally had made introductions between her daughter and a number of individuals including some who were later involved in assessment and investigative process that are the subject of this complaint. She stated that Tom Pettie, Director of Human Resources for the INAC Ontario Region, Ms. Ratford, Stephen White, A/Associate Regional Director General (South) and Leigh Jessen, Associate Regional Director General for Ontario, were all aware of their family relationship.

Evidence of Tom Pettie

30 Mr Pettie, Director of Human Resources for the INAC Ontario Region, testified that he was aware of the action taken by Ms. Knott to remove herself from the complainant's interview as she personally advised him she was doing it because her daughter was a candidate. He stated that this "seemed okay" to him. He did not recall whether she spoke of other actions she was taking to ensure the integrity of the process. Other than a subsequent discussion with Ms. Knott about her concern for delays in finalizing the process, he was not involved or aware of the anonymous note until one month after it was received, by which time the complainant had already been appointed to the SEPO position.

The Investigation Process

31 As noted above, on September 16, 2009, the anonymous note was sent to Mr. Wernick. The text of the anonymous note follows:

I am writing because I am getting really frustrated at the staffing practices in the Brantford office of INAC. The one in particular that broke the camel's back was a recent one where the Director of Education (Katherine Knott) promoted her daughter to a PM/05 position. This daughter is not even qualified as a PM/2 but her mother hired her then, and now she's jumping another 3 levels and I think it is quite the audacity for this to happen. Her daughter was a CR/2 a few years ago. And HR does nothing about it even though they should have put a stop to this nepotism. I was told the Director herself did up all the questions for the interview and that she wasn't even fully assessed. Yet, she get's (sic) an offer of employment at a senior level, and not because it was her own merit which got her there, but because she's related! This is an abuse of authority, and HR is in cahoots because don't they need to review this staffing to make sure it's in line with the staffing values? Why do we have staffing values when nobody cares?

32 The complainant testified that on December 1, 2009, Ms. Hill told her that a letter of complaint had been received concerning her appointment to the SEPO position. The complainant immediately wrote to Mr. White, to say that she had been “verbally advised that there was an anonymous letter of complaint sent to the Deputy Minister regarding my appointment, which is being investigated.”

33 On December 4, 2009, the complainant received a written response from Sylvie Deschamps, Associate Director General, Human Resources and Workplaces Services Branch, to confirm that an investigation of the appointment process was being undertaken. Ms. Deschamps added:

As part of this investigation, we will meet current INAC employees involved in the staffing process to gather more information. Given that your staffing appointment may be affected by the outcome of this investigation, we are offering you an opportunity to be heard. Departmental representative (sic) will be at INAC's Toronto office in (sic) either Monday December 14th or Tuesday December 15th to conduct interviews. Please inform Martin Dinan, Corporate Resourcing Advisor, by Tuesday December 8th, end of business day, whether you wish to meet departmental representatives on one of those aforementioned days. [...] Please note that you may be accompanied or represented by a person of your choice.

34 The complainant stated that she then scheduled a time to meet with the investigators. Prior to attending the interview, she contacted Mr. Dinan by telephone to ask for a copy of the anonymous note but he refused to give her one. She acknowledged that he gave her some context for the investigation by telling her it was about her mother.

35 The complainant testified that she attended the interview accompanied by John C. Peters, Barrister and Solicitor. The interview was conducted by the investigators, Mr. Dinan and Genevieve Trothier. The complainant stated that at the interview, she repeated her request for a copy of the anonymous note. She added that Mr. Dinan indicated to her that he would look into the issue of whether she could have a copy of it and he suggested that she initiate an access to information request (ATIP request) to obtain it.

36 The complainant testified that the interviewers had no specific questions for her, but Mr. Dinan asked her if she wanted to say anything. She responded that she studied, worked very hard, and deserved the job. He also asked her whether Ms. Knott was her

mother, which she confirmed. The complainant stated that the meeting was no more than ten minutes in length and Mr. Dinan told her that the investigation would be concluded in January 2010.

37 The complainant testified that in December 2009, she initiated an ATIP request to obtain the anonymous note. However, in early January 2010, before receiving a response to the ATIP request, INAC provided her with a copy of it. She did not initiate any contact with the investigators at that point and she received no further invitation from INAC or the investigators to discuss the anonymous note after they supplied it.

38 The evidence before the Tribunal shows some of the activity that was being undertaken within INAC to prepare a response from Mr. White to the complainant's letter of December 1, 2009. On January 4, 2010, Mr. Pettie asked Mr. Dinan to comment on a draft response. The draft to which he referred was not presented during the hearing. However, Mr. Dinan's response to Mr. Pettie of that date indicates editing changes were being discussed. Mr. Dinan wrote:

*My only suggestion is to take out a section of the last sentence ("and that you will be provided with the opportunity to present your concerns"). By meeting her (the complainant) on December 15th, we have addressed the requirement of the **Corrective Action and Revocation Policy** ("Before deciding to take corrective action or revoke an appointment, persons) whose appointments or proposed appointments are affected by the decision will be given an opportunity to be heard").*

It is most likely that we will offer Krista a chance to voice her concerns when a final decision is taken. However, I would not mention it in the letter.

39 On January 6, 2010, following her interview with the investigators, the complainant received a response from Mr. White in reply to her initial letter of December 1, 2009. The penultimate paragraph of Mr. White's letter acknowledged the difficulty of being subject to an investigation and assured the complainant that the investigation would be impartial. It contains no mention of an opportunity to be heard, to respond to the investigation report or provide any further submissions.

40 The complainant testified that on March 8, 2010, she received a letter from Mr. Wernick enclosing a copy of the Report. His letter advised her that "the investigation concluded that a number of appointment and appointment-related errors and omissions occurred and impacted on the appointment." He also indicated that "decisions and

practices that are indications of favouritism were present.” Further, he advised the complainant that he was revoking her appointment to the SEPO position effective March 1, 2010, and reappointing her to her former JEPO position. Due to errors in the revocation letter, it was corrected and resent on March 26, 2010.

41 The Report described the investigators’ review of the manner in which the complainant’s experience was assessed. After reciting the experience factors and the complainant’s description of her experience in her application documents, the investigators concluded that:

The experience described by Ms. McMillan is for the most part administrative. There is no information in this paragraph that clearly demonstrates that the candidate meets the essential experience criteria.

42 The investigators noted that Ms. Knott was the assessment board member who conducted the screening and they stated that the screening board report did not justify the decision to screen the complainant into the appointment process. The investigators concluded that the experience criteria were not assessed, that the complainant ought to have been screened from the appointment process, and that her appointment was not based on merit.

43 The investigators noted the family relationship between the complainant and Ms. Knott and recognized that it was known by the other assessment board members and a Human Resources Advisor. The Report records that Ms. Knott did not participate in the complainant’s interview and that the Signed Statements of Persons Present were not correctly completed to reflect their family relationship. The investigators remarked that the closing date for advertising the appointment process was extended for unknown reasons to February 9, 2009, the date on which the complainant submitted her application. They concluded that there was an appearance of favouritism or nepotism in the appointment process and raised a number of unrelated issues concerning the documentation or organization of the human resources staffing file.

44 The Report referred to annexes containing the evidence gathered during the investigation. However, the annexes were not included. Mr. Wernick’s letter directed the complainant to contact Mr. Dinan with any questions or for clarification.

45 An email exchange between the complainant and Mr. Dinan during the period of March 9-10, 2010, indicates that when she contacted him, he referred her to the Tribunal's complaint process.

46 On March 10, 2010, the complainant emailed Mr. Dinan to ask him for the missing annexes to the Report. In response, he wrote her on March 11, 2010, to state that "given the seriousness of the file," she should make an ATIP request to obtain the annexes. There is no indication that anyone provided the complainant with an opportunity either to see the information on which the respondent relied or to respond to the content of the report and its findings before they were made final and her appointment was revoked.

47 The complainant initiated an ATIP request on March 11, 2010. On February 28, 2011, she received the missing annexes on a CD sent by regular mail to her residence. She understood that provision of this information, more than eleven months after the request was initiated, was not a response to her ATIP request but was part of the mandated disclosure process for a hearing before the Tribunal.

The complainant's response to details in the anonymous note

48 Before the Tribunal, the complainant addressed several issues raised in the anonymous note. The complainant testified that when the anonymous note was provided to her after her interview with the investigators, she was not offered any further opportunity to discuss it with them.

49 The complainant testified that she had never worked as a CR-02 as claimed by the writer of the anonymous note. She stated that she was a qualified PM-02 and that Ms. Knott did not hire her for the PM-02 position. She denied that she had been promoted to a PM-02 position by her mother, Ms. Knott. Further, she asserted that she received the appointment to the SEPO position on the basis of merit and not because she was related to Ms. Knott.

50 The complainant questioned INAC's delay after receiving the anonymous note, remarking that a period of nearly one month elapsed between INAC's receipt of the

anonymous note and her acceptance of the appointment to the SEPO position without any action being taken. She noted further that her pay increment for working in the SEPO position was withheld from the time of her appointment in October 2009 until March 2010.

51 The complainant testified that she believed everyone in the Brantford INAC office knew that she was Ms. Knott's daughter, as did employees from elsewhere in INAC. This included Mr. White, who sent her the letter of offer for the SEPO position, Mr. Pettie and Ms. Ratford. Further, while the investigation report relied on departmental records showing the complainant and Ms. Knott to have the same telephone number and inferred that they lived together, the complainant stated that the records were considerably out of date. She lives with her spouse and her children. She has not lived with her mother for some years.

52 The complainant's evidence was not contested.

Submission of the Public Service Commission

53 The Public Service Commission (PSC) did not attend the hearing, but provided a written submission. Of significance to the present case is the *Public Service Commission on Corrective Action and Revocation Policy (Revocation Policy)*. Section 16 of the PSEA expressly binds deputy heads to act in accordance with PSC policies. The PSC noted the requirements of the *Revocation Policy* to provide any person affected with a meaningful opportunity to present relevant facts and to have their position fully and fairly considered. It emphasized that "(f)or deputy heads, the most important steps will be to consider the input from those affected by the action, to exercise their discretion in a reasonable way, and to communicate the decision and reasons for it to all those involved."

Analysis

54 For the reasons that follow, the Tribunal finds that the revocation of the complainant's appointment to the position of Senior Education Programs Officer (PM 05) was unreasonable.

Issue 1: Did the respondent's investigation respect procedural fairness?

55 As the PSC noted in its submissions, the *Revocation Policy* requires deputy heads to consider the input from those persons who are affected by a decision to revoke an appointment. This requirement is consistent with the duty of procedural fairness that is recognized in the jurisprudence. Thus, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para. 22, the Supreme Court explained that among the procedural rights mandated by the duty of fairness is the "opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."

56 The evidence before the Tribunal is uncontradicted: the complainant was not informed of the content of the anonymous note and was not provided a copy until a time subsequent to her meeting with the investigators. She was never asked to respond directly to its content and after the Report was issued, she was provided neither with the evidence on which the respondent relied nor an opportunity to respond to it. The Tribunal notes that the complainant was, according to the evidence, told to use a formal access to information process to ask for both the anonymous note and the annexes to the Report.

57 The respondent had a number of clear chances to discharge its obligation to provide the complainant with a meaningful opportunity to respond to the anonymous note. It might have responded promptly to her letter of December 1, 2009, by giving her the note and asking for a response. It could have provided her with the anonymous note for her interview of December 15, 2009. It could have extended an invitation to respond to the evidence before it made a final decision. The email exchange of January 4, 2010, disclosed, at best, a lukewarm recognition of the duty of the respondent to the complainant. Any suggestion that a meaningful opportunity was provided to the complainant on December 15, 2009, is simply incorrect. Without being advised of the content of the anonymous note and the accusations made concerning her appointment, the complainant had no opportunity to address the case that was being made. Moreover, withholding information from the complainant, in spite of the seriousness of

the case and requiring her to make ATIP requests to obtain critical information is incomprehensible.

58 The *Revocation Policy* specifically provides that “(a) Deputy Head must respect [...] procedural fairness in the process followed for corrective action and revocation, in particular the right to be heard and the right to have a fair investigation.” As the Supreme Court of Canada stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 90:

... procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interest of individuals. In other words, “[t]he observance of fair procedures is central to the notion of the “just” exercise of power” (Brown and Evans, at p. 7-3).

59 While the respondent eventually provided the missing information to the complainant, this act did not diminish the initial breach and its impact on the complainant’s right to be heard. When it finally provided a copy of the anonymous note, it neglected to provide her an opportunity to respond to it. As discussed below, this left the investigation incomplete and superficial. If it had been properly executed, with due regard for procedural fairness and the opportunity for the complainant to properly address the anonymous note and present her case, the investigation may well have led to a different result. The procedural flaws rendered the investigation report an unreliable foundation for a decision of the magnitude of revocation.

Issue 2: Was the result of the investigation process reasonable?

60 The Tribunal finds that because the complainant was denied a meaningful opportunity to be heard, the investigation process cannot be considered reasonable. Due to two significant errors in the design and conduct of the investigation, the decision to revoke the complainant’s appointment was based on inadequate information.

61 The first of these is the limitation on the investigation as expressed in Ms. Deschamps’ letter of December 4, 2009, in which she stated that the investigators would meet only with current employees. Before the Tribunal, the respondent offered no explanation for the imposition of this limitation on the investigation. The Tribunal finds

that the arbitrariness of the limitation placed relevant information beyond the mandate of the investigators. It arbitrarily precluded Ms. Knott, who had retired, but who had significant personal knowledge of the appointment process and the selection of the complainant. The Tribunal finds that the investigation process was, therefore, incomplete. There may indeed have been other individuals, such as Mr. Benedict, who fell outside the limitation who might usefully have contributed to the investigation and therefore the ultimate soundness of the revocation decision.

62 The second significant error arose in the respondent's reliance on the investigators' opinion of the complainant's experience, which led to the conclusion that she did not meet the essential experience criteria. It is not disputed that the investigators had no communication with Ms. Knott, who performed the screening function and there is no evidence that contacting her was ever considered. Her evidence, as presented to the Tribunal, was indisputably relevant. Ms. Knott's knowledge and opinion of the complainant's experience were not challenged. As the Tribunal noted in *Visca v. Deputy Minister of Justice*, 2007 PSST 0024, at para. 53, personal knowledge falls within the range of assessment methods referred to in s. 36 of the PSEA. Interviewing Ms. Knott ought to have led to the discovery of the personal knowledge she had of the duties being performed by the JEPO and the complainant in particular. In failing to pursue her evidence during the investigation, the investigators overlooked important information and rendered an opinion based on an incomplete view of the information that was used in screening. As such, the conclusion they reached was untenable. When the respondent then relied on their flawed conclusion, its ensuing decision to revoke the complainant's appointment was unsustainable.

63 In considering the adequacy of the investigation, the Tribunal notes the analogous situation that was raised in *Tinney v. Attorney General of Canada*, 2010 FC 605, where the Court considered the issue of selecting witnesses to be interviewed during an investigation, and held at para. 28:

The jurisprudence is clear: There is no requirement that a human rights investigator interview every witness proposed or identified by the parties: *Miller v. Canada (Canadian Human Rights Commission)*, (1996), 112 F.T.R. 195. However, it is equally clear that an interview is required where a reasonable person would expect evidence useful to the investigator in his determination would be gained as a result of the interview (*Egan v. Canada (Attorney General)*, 2008 FC 649) or

where there is a witness that may have information that could address a significant fact and where no one else has been interviewed that could resolve that important and controversial fact (*Busch v. Canada (Attorney General)*, 2008 FC 1211).

64 There can be no doubt that a reasonable person would have expected Ms. Knott to be interviewed, given her contribution to establishing the SMC and conducting the screening. Without it, the investigators' determination concerning screening was based on a superficial view of that aspect of the appointment process, derived solely from their view of her application document.

Issue 3: Was revocation of the complainant's appointment unreasonable?

65 In its decision in *Goldsmith v. Deputy Minister of Human Resources and Skills Development*, 2010 PSST 0020, at para. 47, the Tribunal examined its role and the significance of an investigation report when hearing a complaint made under s. 74 of the PSEA, and held:

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.*

(emphasis added)

66 As the Tribunal noted above, the investigation on which the respondent relied suggested a number of errors in the appointment process. Two in particular bore on the appointment of the complainant. The first was the close family relationship that was held to suggest a real or perceived conflict of interest. The second was the investigators' finding that the complainant did not meet the experience qualifications.

67 The proper role for the Tribunal in deciding a complaint brought under s. 74 of the PSEA is to consider the evidence presented before it and determine whether, in the

circumstances, the revocation was unreasonable. As the Tribunal noted above, significant flaws in the investigation process were demonstrated in evidence. Key witnesses were not interviewed and the complainant was not provided with a fair opportunity to know the case being made against her appointment or to respond to it.

68 The Tribunal recognizes the existence of a close family relationship between a candidate and a hiring manager or assessment board member is decidedly less than ideal. It may indeed raise issues and concerns. The Tribunal does not, however, accept that the close family relationship necessarily signals that the candidate's appointment is not meritorious. The mere fact of the existence of a family relationship presents neither an automatic assumption of favouritism nor a routine foundation for revocation. In its *Guidance Series – Selection, Assessment and Appointment*, the PSC explains that managers can help ensure that appointment decisions are free from bias by ensuring that the relationships between applicants and assessment board members do not bias the assessment process or appear to do so. By no means is the PSC's statement prescriptive: the participation of family members in the assessment of candidates is not prohibited. In those rare instances when it arises, it should be managed with care to ensure that merit is upheld, mindful always that adverse differential treatment of an employee on the basis of family status could constitute a discriminatory practice under the *Canadian Human Rights Act*, R.S.C 1985, c. H-6.

69 The Tribunal finds no evidence to contradict the position taken by the complainant and Ms. Knott that their family relationship was well known by many, including persons in authority. It is remarkable that no one intervened earlier to assist in avoiding any appearance of a conflict of interest, but it is noted that Ms. Knott herself took the step of removing herself from the interview. Nothing in the evidence has suggested that the family relationship influenced the appointment process or any of the decisions made within it. The failure to properly complete the *Signed Statement of Persons Present* was solely Ms. Knott's error. The mistake was not attributable to the complainant and has not been shown to have had a bearing on her merit. Moreover, on the question of whether the complainant satisfied the essential experience criteria, her application document together with Ms. Knott's unchallenged evidence of the work

performed by her as a JEPO demonstrate that there was indeed a foundation for the screening decision.

70 The Tribunal finds no basis for replacing Ms. Knott's assessment of the complainant's experience with that of the investigators. The investigators restricted their *post facto* consideration of the complainant's experience to the application document and were likely unaware of the personal knowledge used by Ms. Knott as they did not speak with her.

71 Having weighed all of the evidence presented, the Tribunal finds that the complainant has demonstrated that the decision to revoke her appointment was unreasonable. The respondent did not discharge the duty of procedural fairness it owed to the complainant. This duty is reiterated in the *Revocation Policy*. In *Nagulesan v. Canada*, 2004 FC 1382 at para 17, the Court held that, "A breach of procedural fairness can only be overlooked if there is no doubt that it had no material effect on the decision." The Tribunal finds that the nature of the breach had a genuinely deleterious impact on the opportunity afforded to the complainant to address the case against her. In turn, the effect of the breach influenced the ability of the respondent to make a properly informed and reasonable decision concerning the complainant's appointment and ultimately her revocation.

Decision

72 For all of these reasons, the complaint is upheld. The revocation of the complainant's appointment to the position of Senior Education Programs Officer (PM 05) was unreasonable.

Order

73 Pursuant to s. 76 of the PSEA, the Tribunal orders that the revocation of the complainant's appointment be set aside and, within thirty (30) days of the issuance of

this decision, that the complainant be fully reinstated to the position of Senior Education Programs Officer (PM-05) with effect from the date of the revocation from the position, as if the revocation had not occurred.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2010-0219
Style of Cause	<i>Krista McMillan and the Deputy Minister of Indian and Northern Affairs Canada</i>
Hearing	April 5-6, 2011 Hamilton, Ontario
Date of Reasons	July 21, 2011
APPEARANCES:	
For the complainant	John C. Peters
For the respondent	Martin Desmeules
For the Public Service Commission	John Unrau