



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2010-0574 and 0590
Issued at: Ottawa, December 22, 2011

TRACEY KRESS AND SHELLEY LAVALLEE

Complainants

AND

THE DEPUTY MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaints of abuse of authority pursuant to section 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	S. Lavallee complaint is dismissed T. Kress complaint is substantiated
Decision rendered by	Kenneth J. Gibson, Member
Language of Decision	English
Indexed	<i>Kress v. Deputy Minister of Indian and Northern Affairs Canada</i>
Neutral Citation	2011 PSST 0041

Reasons for Decision

Introduction

1 The complainants, Tracey Kress and Shelley Lavallee, allege that the respondent, the Deputy Minister of Indian and Northern Affairs Canada, abused its authority in an appointment process for a Manager, Financial Planning and Analysis position at the FI-03 group and level in Regina, Saskatchewan. More specifically, it is alleged that the respondent failed to accommodate Ms. Lavallee with regard to the scheduling of a written exam, and failed to accommodate Ms. Kress with regard to the scheduling of an interview. The complainants allege that the appointment process was inappropriately rushed, violating the staffing values of fairness, transparency and access.

2 The respondent denies that there was any abuse of authority. It states that the decision to expedite the appointment process was made in order to provide required stability and leadership to the finance unit in the face of upcoming workloads. A timeline was put in place and the decision to expedite the process was made before posting the Job Opportunity Advertisement (JOA). It further states that the complainants did not make their accommodation needs known to the respondent in a timely manner.

Background

3 The JOA for the Manager, Financial Planning and Analysis position was posted on August 3, 2010, with a closing date of August 11, 2010. The position was open to persons employed in the Federal Public Service occupying a position in the Saskatchewan Region.

4 A total of 19 applications were received. On August 16, 2010, ten candidates who passed the screening stage of the appointment process, including the two complainants, were invited to write an online exam scheduled for August 19, 2010. Nine candidates wrote the exam on August 19, 2010. Ms. Lavallee did not write the exam and was eliminated from the appointment process.

5 On August 20, 2010, the four candidates who passed the written test, including Ms. Kress, were invited to an interview to be held on August 26, 2010. Ms. Kress did not attend the interview and was eliminated from the appointment process.

6 A *Notification of Appointment or Proposal of Appointment* of Rhiannon Shaw to the FI-03 position was posted on September 8, 2010. Ms. Kress filed her complaint on September 13, 2010 and Ms. Lavallee filed her complaint on September 23, 2010.

7 The complainants filed their complaints under s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (the PSEA), under which an unsuccessful candidate may complain that he or she was not appointed by reason of an abuse of authority by the deputy head in the exercise of its authority. Section 2(4) of the PSEA states that, for greater certainty, a reference in the Act to abuse of authority shall be construed as including bad faith and personal favouritism.

8 The Public Service Staffing Tribunal (the Tribunal) consolidated the files for the purpose of the hearing in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

Issues

9 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority when it refused to reschedule the written exam to accommodate Ms. Lavallee?
- (ii) Did the respondent abuse its authority when it refused to reschedule the interview to accommodate Ms. Kress?

10 The complainants had identified other allegations in their complaints but stated at the pre-hearing conference that these allegations would not be pursued at the hearing.

Evidence and Arguments

a) Evidence related to Ms. Lavallee

11 Ms. Lavallee applied for the FI-03 position, was screened in, and on August 16, 2010, she received an email from “HR Staffing” inviting her to write an online written exam to be held on August 19, 2010, from 9-10 a.m. The email stated that she was responsible to be available at a computer at that time. She was required to complete the exam and to email it back by 10 a.m.

12 A little over a half hour after receiving this email, Ms. Lavallee sent a reply email stating that she would be out of the province on annual leave from August 17-23, 2010. She requested that the written exam be rescheduled after August 23, 2010.

13 On August 17, 2010, HR Staffing replied to Ms. Lavallee’s email stating that the responsible manager had decided that all candidates must write the exam on August 19, 2010. HR Staffing requested an email address where Ms. Lavallee could be reached on August 19, 2010, at 9 a.m.

14 Ms. Lavallee testified that she did not see the email of August 17, 2010, because she had already commenced her leave. She provided a copy of an automatic reply email that went to HR Staffing confirming that she would be on leave from August 17 - 23, 2010, and stating that she would be replying to her emails on August 24, 2010.

15 When she returned from leave on August 24, 2010, Ms. Lavallee saw the email from HR Staffing dated August 17, 2010. She sent a reply to HR Staffing stating that she was shocked to discover that her request for an alternate time to write the exam had been declined and that the exam had been sent to her email address on the originally scheduled date. She stated that her leave had been planned for eight months and that she had been away attending the Canadian Association of Police Boards’ Annual Conference in Saint John, New Brunswick in her role as Vice Chair and Aboriginal Representative on the Regina Board of Police Commissioners.

16 Ms. Lavallee noted in the email of August 24, 2010, that even if she had been able to access the exam, she had no suitable place to complete it. She testified that a quiet place is necessary to write an exam and that it would not be suitable to write it on a public computer in a hotel or at an airport. She noted that she had been involved in other processes where arrangements had been made to put a computer in a boardroom or to provide private space to study manuals or research documents.

17 Ms. Lavallee testified that she had 28 years of government experience and had participated in many staffing processes. She explained that it was normal to accommodate candidates who were on leave or became ill during a process. Based on her previous experiences, she had no doubt that she would be given a different date to write the exam. She also stated that she had never seen a staffing process proceed this quickly. Ms. Lavallee believed that the respondent should have put the key dates for the staffing process on the JOA so candidates would have been aware of them.

18 On cross-examination, Ms. Lavallee acknowledged that she did not advise the respondent of her potential need to reschedule the exam prior to August 16, 2010. She noted that there was nothing on the JOA indicating that this was a requirement. She also stated that she did not follow up with HR Staffing while on leave to determine the status of her request to postpone the exam. She had not left contact information with the respondent, and it could only reach her during her leave through email, but she did not have access to email. According to Ms. Lavallee, after sending her email on August 16, 2010, she was on her own "private time".

19 Nicky King is a human resources advisor in Indian and Northern Affairs Canada. She testified that the delegated manager, Loree MacPherson, wanted to expedite the staffing of the FI-03 position. According to Ms. King, there was instability in the work unit and difficulties with personnel due to acting appointments. Ms. King stated that the entire staffing process was planned and the tools were in place before the JOA was posted on August 3, 2010. The staffing process took five weeks from posting the JOA to the *Notification of Appointment or Proposal of Appointment* of the appointee on September 8, 2010.

20 Ms. King prepared and sent the email of August 16, 2010, inviting candidates to write the exam. Ms. King discussed Ms. Lavallee's request to reschedule the exam with Ms. MacPherson. The latter decided that due to operational requirements all candidates had to write the exam on August 19, 2010. Ms. King noted that since the exam was being sent by email, it could be completed anywhere.

21 Ms. King communicated Ms. MacPherson's decision to Ms. Lavallee in the above-noted email from HR Staffing dated August 17, 2010. When Ms. Lavallee did not respond to this email, Ms. King sent another email on August 18, 2010, to Ms. Lavallee's work and home emails, informing her that failure to be available for the exam at the scheduled time would result in her elimination from the staffing process. Ms. King testified that she also attempted to telephone Ms. Lavallee on August 17, 2010, and prior to the exam on August 19, 2010, but that her home and work voicemail accounts were full and not accepting new messages.

22 Ms. King testified that she did not have any conversations about contingency plans in the event that a candidate was not available. When asked what would have happened if a candidate were unavailable due to illness, she stated that she did not know what management would decide. She said each case would be examined on an individual basis.

23 Ms. King stated that she had two and one-half years staffing experience and during that time she had not been involved in a process that had proceeded this quickly. She also stated that she had seen JOA's in which the timelines were set out, but that it was very rare to do so, as it limited management flexibility.

24 Ms. MacPherson was Director, Corporate Services and the hiring manager at the time of the staffing process. She testified that the FI-03 position was filled on an acting basis and she wanted to staff it on an indeterminate basis to provide stability and leadership to the unit. She said there was a need to manage workloads and there was a history of relationship challenges in the work unit. A person was acting in the position, but Ms. MacPherson decided to proceed with an advertised, rather than a

non - advertised, process because she had only recently become responsible for this unit and she wanted to see who was available.

25 According to Ms. MacPherson, she obtained approval to staff the position in June 2010 and met with human resources staff in July 2010 to plan the process. Ms. MacPherson went into some detail on the work-related expectations for the person to be appointed to the FI-03 position. Essentially, the FI-03 would be responsible for dealing with new fiscal restraint and financial reporting requirements. The requirement for financial status reports had been moved forward from December 2010 to October 2010. She wanted the FI-03 in place by September 2010 so the appointee could gain experience in the position before it was necessary to produce the reports.

26 Ms. MacPherson testified that she considered Ms. Lavallee's request for a different exam date but decided against it because she had timelines to meet if she was to have the appointee in place by September 2010. She believed the timelines she set for the process were reasonable.

27 When asked if Ms. Lavallee could have written the exam on August 24, 2010, Ms. MacPherson stated that she was not aware of any discussions with staff concerning what options were available. She reviewed the last sentence of Ms. Lavallee's email of August 24, 2010 and stated that it did not set out any options. She also stated that she would have been concerned if Ms. Lavallee had received the exam on August 24, 2010, because it had already been emailed to other staff.

28 With regard to posting timelines in the JOA, Ms. MacPherson said it was her role to develop the *Statement of Merit Criteria* (SMC) for the position, not to prepare the JOA. She was not aware of any discussions about putting dates in the JOA.

b) Evidence related to Ms. Kress

29 Ms. Kress was screened into the FI-03 appointment process, and invited to the written exam on August 19, 2010. She was on annual leave from work at that time, but she was at home on the date of the exam and she made herself available to write the exam on the scheduled date. She passed the exam and received an email

on August 20, 2010, inviting her to an interview to be held on August 26, 2010. Ms. Kress responded to the invitation by email on the same date, stating that she was interested in attending the interview but she would be on annual leave and out of the country until August 30, 2010. She asked if it was possible to reschedule her interview after her return. Ms. Kress also spoke to Ms. King on the telephone on August 20, 2010.

30 Ms. King tried unsuccessfully to reach Ms. MacPherson on Friday, August 20, 2010. She spoke to Ms. MacPherson on Monday, August 23, 2010, and followed up with an email to Ms. Kress on the same date, informing her that the manager had decided that the only date available for the interview was August 26, 2010, and asking her to confirm her attendance.

31 Ms. Kress replied on August 23, 2010, stating that she was in the United States on leave with her family and staying at a hotel that had been pre-paid until Friday, August 27, 2010. She said that she would be available for the interview on the morning of Monday, August 30, 2010. She also requested contact information for the manager so she could discuss her situation.

32 Ms. King replied to this email on August 24, 2010, stating that the decision to proceed on August 26, 2010, had been made and that failure to attend the scheduled interview would result in her elimination from the appointment process.

33 Ms. Kress replied to Ms. King the following morning, August 25, 2010, stating that she understood that the public service staffing process provided that reasonable efforts should be made to accommodate candidates and again asked for the name and contact information for the manager.

34 That afternoon, Ms. MacPherson sent an email to Ms. Kress which stated that due to operational requirements, she was not able to accommodate her request to reschedule her interview to the following week. This was the only response Ms. Kress received from Ms. MacPherson in response to her two requests to discuss her situation with the responsible manager.

35 Ms. Kress testified that she felt the respondent was unreasonable as she was only requesting a delay of two working days. She also testified that if she had been informed earlier of the interview schedule she might have been able to change her vacation plans. However, she had booked the holiday, her payments were non - refundable and her husband had also scheduled his leave for this time.

36 Ms. Kress was asked what steps she took to ensure that management was aware of her scheduling needs. Ms. Kress, who has 20 years of public service experience, replied that she had not taken any steps because it was unusual to see a staffing process move this quickly. Ms. Kress stated that when she worked in Public Works and Government Services Canada, she had seen posters with wording indicating that interviews will be held on a certain week and that candidates should make themselves available at that time.

37 Ms. King testified that when she spoke with Ms. Kress on August 20, 2010, the only option Ms. Kress offered was to have the interview on August 30, 2010. Ms. King stated that it would not have been possible to reschedule the interview to the week of August 30, 2010, because one board member, who was the subject-matter expert, would be away on leave. When asked if the board considered conducting the interview with Ms. Kress by telephone, Ms. King replied that the suggestion never came up.

38 Ms. MacPherson testified that she considered Ms. Kress' request to postpone her interview but determined that she had three candidates to interview and that this was a reasonable number. Therefore, she decided to proceed based on the existing timelines, with the goal of having an appointee in place in early September 2010. Ms. MacPherson stated that she considered the timelines that she had established for the appointment process to be reasonable and that the length of the process was not unique.

39 Ms. Kress did not attend the interview and was eliminated from the appointment process.

c) *Arguments of the parties*

40 The complainants argue that the respondent exercised its discretion in an unreasonable manner. It failed to provide advance notice of the process schedule and it fettered its discretion by administering the timelines in a rigid and inflexible manner. Furthermore, it failed to respond appropriately to reasonable and timely requests from the complainants. The complainants characterized this behaviour as serious recklessness amounting to bad faith.

41 The complainants referred to a document from the Canada School of the Public Service (CSPS) entitled *The Manager's Collective Staffing Handbook*, dated April 2008, which states under the heading "Practical Considerations", that the anticipated dates of interviews and exams be put on JOA's to keep the process on track and to put the onus on candidates to make themselves available. They argue that this would have highlighted the need to be available on the specific exam and interview dates but this information was not included in the JOA.

42 The complainants submit that it is unreasonable to expect candidates to make their vacation schedules and medical appointments available in advance. They note that the JOA states that candidates, if contacted in relation to the process, are to advise the organization of their accommodation needs. They contend that this was done as soon as they became aware of the dates for the exam and interview, respectively.

43 The respondent argues that it did consider Ms. Lavallee's request to postpone the exam but decided to proceed. It submits that at the time of this decision, there was no indication when Ms. Lavallee would be available to write the exam.

44 The respondent contends that candidates also have responsibilities in a staffing process. It notes that Ms. Lavallee planned her leave eight months in advance but she did not inform management at the time she made her application. She made an assumption that her postponement request would be accepted and did not follow up by phone or email to determine if it had been approved. The respondent contends that if anyone was reckless, it was Ms. Lavallee.

45 With regard to Ms. Kress, the respondent submits that she did not provide information about her leave plans when she filed her application or after she completed the written exam. She simply asked for the interview to be rescheduled and offered no options that would allow her to participate.

46 Regarding the document from the CSPA, the respondent states that this is a guide providing general advice. It is not a binding directive or policy. Furthermore, the document is concerned with collective staffing – the establishment of a pool of candidates. The process at issue here concerns the staffing of one position.

47 The respondent submits that the Preamble to the PSEA provides managers with broad discretion in staffing and that, in this case, this discretion was exercised reasonably based on operational requirements.

Analysis

Issue I: Did the respondent abuse its authority when it refused to reschedule the written exam to accommodate Ms. Lavallee?

48 Ms. MacPherson's rationale is that she decided to proceed with an advertised appointment process to staff the FI-03 position on an indeterminate basis because of issues with staff in the work unit. She obtained approval to staff the position in June 2010 and established a schedule that was intended to lead to an appointment by September 2010, in order for the appointee to gain experience prior to preparing financial status reports in October 2010. Neither complainant challenged her rationale.

49 The Preamble to the PSEA provides that public service managers should be provided with the flexibility to staff, to manage and to lead their personnel to achieve results for Canadians. The Tribunal is satisfied that this was Ms. MacPherson's objective in this appointment process. The respondent had a reasonable basis for establishing timelines that would result in an appointment by September 2010. The Tribunal does not find that the appointment process was inappropriately rushed.

50 Ms. MacPherson testified that she was not aware of what options were available for Ms. Lavallee to write the exam. She said that Ms. Lavallee did not inform her when she would be available. This testimony implies that she was prepared to entertain options to reschedule the exam but she was not provided with any. However, it appears clear enough from Ms. Lavallee's email of August 16, 2010, that she was requesting that the exam be scheduled after August 23, 2010, when her leave would be over.

51 It is worth noting that when Ms. King emailed Ms. MacPherson's decision back to Ms. Lavallee on August 17, 2010, she simply stated that Ms. MacPherson had decided that all candidates must write the exam on August 19, 2010.

52 It is clear that Ms. MacPherson was not open to any options that involved rescheduling the exam. If she were, she could have suggested them herself or, at the very least, offered to discuss options with Ms. Lavallee. Instead, she decided against Ms. Lavallee's request because she had timelines to meet if she was to have an appointee in place by September 2010.

53 Nevertheless, candidates also have responsibilities in an appointment process. Ms. Lavallee testified that her leave had been planned eight months in advance. When she applied for the FI-03 position she knew, or should have known, from the JOA that she would have to be available for assessment. Since she knew that she would be unavailable during a portion of the assessment process she could have informed the respondent at the time of her application. If she had done so, it is possible that options could have been considered, as described below, for her to complete the exam without impacting the timelines.

54 Instead, Ms. Lavallee did not inform the respondent that she would be on leave until after she was invited to participate in the exam. She then requested that the exam be postponed and went on leave assuming that her request would be approved. She did not provide the respondent with any means to contact her while on leave. Her assumption proved incorrect, and despite a number of efforts on the part of Ms. King, the respondent was unable to contact her during her leave.

55 Ms. Lavallee testified that while she was on leave, she was on her own “private time”. However, Ms. Lavallee was on leave from her own position. Her leave did not exempt her from the need to meet the reasonable requirements of an appointment process for another position. This would include ensuring that the respondent is able to contact her during the appointment process.

56 Ms. Lavallee was aware of the date of the exam and she left on leave without knowing whether her request to postpone the exam would be approved. The respondent exercised its discretion to proceed with the exam as scheduled and it was unable to communicate this information to Ms. Lavallee. Ms. King testified that since it was an email exam it could have been completed anywhere.

57 Ms. Lavallee testified that even if she had been able to receive the exam, she had no suitable place to complete it. However, if the respondent had been able to communicate with Ms. Lavallee, it might have been possible for the respondent to assist her in finding a suitable place to complete the exam. For example, she might have been able to use a government office in St. John, New Brunswick. Ms. Lavallee testified that she had participated in appointment processes in the past where these types of arrangements had been made. Such an arrangement might have allowed Ms. Lavallee to complete the exam within the timeframes set out for the appointment process. If such an arrangement proved impossible, then the parties could have discussed other options to complete the exam.

58 As will be seen below, the circumstances of Ms. Lavallee’s complaint are very different from those of Ms. Kress. Unlike Ms. Kress, Ms. Lavallee did not provide the respondent with any means to contact her while she was on leave. In so doing, Ms. Lavallee closed the door to discussions that might have led to her continuation in the appointment process.

59 For these reasons, the Tribunal finds that the respondent did not abuse its authority by refusing to reschedule Ms. Lavallee’s exam. Ms. Lavallee’s complaint is dismissed.

Issue II: Did the respondent abuse its authority when it refused to reschedule the interview to accommodate Ms. Kress?

60 Although the case of Ms. Kress has many similarities to that of Ms. Lavallee, there is a significant difference. Ms. Kress maintained contact with the respondent during her leave and sought to discuss her situation with Ms. MacPherson when she was informed of the interview date.

61 Both complainants argued that if the assessment dates had been included in the JOA, then these scheduling issues might have been avoided. The appointment process took place during the height of the summer vacation season, and proceeded at an unusual pace. Ms. Lavallee, Ms. Kress and Ms. King all testified that in their years in the public service, they had not experienced an appointment process that had proceeded as quickly as this one.

62 The Public Service Commission (PSC) submitted that its *Guidance Series - Assessment, Selection and Appointment* provides that managers should develop an assessment plan that includes, among other things, timelines for assessment. This document also provides that managers should communicate as much relevant information as possible regarding the appointment process. The PSC stated that this information might include any scheduling requirements. It notes that communicating this information in an open and timely manner supports the guiding value of transparency.

63 Pursuant to s. 16 of the PSEA, the respondent is subject to PSC policies such as the *Appointment Policy* (see, for example, *Robert and Sabourin v. Deputy Minister of Citizenship and Immigration*, 2008 PSST 0024, at para. 69). However, the *Guidance Series* documents as well as the CSPS document, relied on by the complainants, are not PSC policies and the respondent, therefore, does not have the same obligation to comply with these documents.

64 Ms. MacPherson testified that it was her role to develop the SMC for the position, not to prepare the JOA. While the actual preparation of the JOA can be undertaken by human resources staff, it is clear from the *Guidance* document noted above, and

relevant PSC policy documents, that the manager retains responsibility for its content. As the Tribunal determined in *Poirier v. Deputy Minister of Veteran's Affairs*, 2011 PSST 0003, significant flaws in the JOA can lead to a finding of abuse of authority.

65 Although the respondent was not required to do so, it would have been useful in the circumstances if it had identified the assessment schedule in the JOA. Ms. King testified that the assessment plan had been developed in July 2010. It would not have been difficult to incorporate that information into the JOA.

66 While advance knowledge of the assessment dates would have been helpful to the complainants, failure to include the dates in the JOA does not by itself constitute abuse of authority. However, having failed to provide this information to candidates in the circumstances of this expedited appointment process, it places more responsibility on the shoulders of the manager to ensure that the appointment values of access, fairness and transparency, as articulated in the PSC's *Appointment Policy*, are respected.

67 When Ms. King informed Ms. Kress that the manager had decided to proceed with the interview as scheduled, Ms. Kress asked for the manager's name and contact information so she could discuss her situation directly with the manager. Ms. Kress again asked for this information after receiving another email from Ms. King, which confirmed that the manager was not prepared to change the date of her interview. This resulted in a brief email from Ms. MacPherson, on the eve of the interview, which reiterated her decision that she could not accommodate Ms. Kress due to operational requirements. Having had her request turned down three times, there is no evidence that Ms. Kress made any further attempts to discuss the matter prior to the interview.

68 The Tribunal is not persuaded by the respondent's argument that Ms. Kress did not provide it with any options that would have allowed her to participate in the appointment process. In her email of August 23, 2010, Ms. Kress states that she can be available for an interview "as early as first thing on Monday morning August 30th". This may not have been an option that was acceptable to the respondent but it is nonetheless an option.

69 The Tribunal also notes that Ms. Kress twice requested Ms. MacPherson's name and contact information so she could "discuss" her situation with the manager. These requests were met with the second and third emails, which informed her that her request to reschedule the interview had been denied. At that point, less than 24 hours prior to the scheduled time for the interview, it was reasonable for Ms. Kress to believe that there would be no point in continuing to pursue an opportunity for a discussion with the manager.

70 No evidence was presented as to why Ms. MacPherson did not engage in a discussion with Ms. Kress concerning her situation. At the interview stage in the appointment process, there were only four candidates left in contention. There is no evidence that it would have been a significant burden for Ms. MacPherson to engage in a dialogue with one of them, especially since her decision was likely to eliminate that candidate from the appointment process. At the hearing, the complainant's representative raised the possibility of conducting the interview by telephone, something that Ms. King said never came up. There was no evidence presented regarding whether a telephone interview would have been suitable in this case, but it, along with other options, could have been explored if Ms. MacPherson had responded to Ms. Kress' two requests for discussion.

71 The Tribunal finds the respondent's claim that Ms. Kress offered no options to be factually incorrect. She offered to be available for an interview on August 30, 2010, two working days after the scheduled date for the interview. The respondent did not offer any counter-options of its own, nor did it give any indication to Ms. Kress that it was open to discuss any further options. It simply insisted that Ms. Kress appear for an interview on August 26, 2010, or she would be eliminated from the appointment process. Furthermore, even if there were possible options that would have permitted Ms. Kress to continue in the appointment process, Ms. MacPherson's failure to respond to Ms. Kress' request for a discussion made it impossible to identify them. Just as Ms. Lavallee closed the door to the discussion of possible options in her case, it was Ms. MacPherson who closed the door to such discussions in this case.

72 Ms. MacPherson testified that she considered Ms. Lavallee's request to reschedule her written exam but decided against it because of the timelines she had established. She testified that she similarly considered Ms. Kress' request but again decided not to reschedule the interview because of the timelines and because she already had three other candidates available for interview, a number she considered sufficient.

73 In *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at para. 70, the Tribunal referred to five categories that may lead to a finding of abuse of authority. One of these categories is when a delegate refuses to exercise his/her/its discretion by adopting a policy that fetters the ability to consider individual cases with an open mind. Based on the evidence in this case, the Tribunal concludes that in her determination to rigidly follow her assessment schedule, Ms. MacPherson's mind was closed and she fettered her discretion by refusing to consider other options that might have permitted Ms. Kress to remain in the appointment process.

74 A second category referred to in *Tibbs* concerns a delegate acting on inadequate material (including where there is no evidence, or without considering relevant matters). In this case, since an expedited assessment process was planned without having provided the candidates with any information about the tight schedule, it was incumbent on Ms. MacPherson to have responded to Ms. Kress' request for an opportunity to discuss her situation. Discussion of a possible solution that would have permitted Ms. Kress to continue her candidacy was a relevant matter, and Ms. MacPherson acted on inadequate information when she made her decision without responding to Ms. Kress' requests to discuss the matter.

75 Ms. Kress claims that her behaviour was based on expectations built up over many years of experience in appointment processes. When she was informed about the interview date, she acted quickly and in good faith to communicate with the respondent to find a solution. Her failure to ask in advance when the interview would be held did not warrant summary elimination from the appointment process without an opportunity to discuss options that might have allowed her to remain in the process. It is clear from the evidence that Ms. King was only passing information back and forth

between Ms. Kress and Ms. MacPherson. Ms. King had no authority to grant a particular accommodation without Ms. MacPherson's approval. Any discussion of options leading to a change in the interview arrangements for Ms. Kress would have required the personal involvement of Ms. MacPherson.

76 As mentioned earlier in this decision, s. 2(4) of the PSEA states that abuse of authority includes bad faith. The Tribunal has recognized in its decisions that bad faith has been given a broad meaning that does not require improper intent where there is serious carelessness or recklessness (see, for example, *Cameron and Maheux v. Deputy Head of Service Canada*, 2008 PSST 0016, at para. 55).

77 In the present case, the Tribunal finds that Ms. MacPherson's failure to respond to Ms. Kress' request to discuss her situation amounted to serious carelessness as it prevented the parties from exploring options that might have allowed Ms. Kress to remain in the appointment process.

78 The Preamble to the PSEA provides that the Government of Canada is committed to fair and transparent employment practices. As the delegated manager, Ms. MacPherson had a duty to conduct an appointment process that met these values of fairness and transparency. Inclusion of the assessment dates in the JOA would have led to a more transparent process. According to the PSC's *Appointment Policy - General*, fairness requires practices that reflect the just treatment of persons. Failure to discuss Ms. Kress' situation was, in the circumstances, careless and unfair.

79 The Tribunal finds that the respondent abused its authority in the scheduling of Ms. Kress' interview.

Decision

80 For all these reasons, the complaint of Ms. Lavallee is dismissed. The complaint of Ms. Kress is substantiated.

Order

81 At the hearing, the complainants' representative requested that the appointment of Ms. Shaw be revoked if the Tribunal substantiated a complaint.

82 The Tribunal notes that this appointment process was not undertaken to identify a pool of qualified candidates for appointment. It was undertaken to fill one position, Manager, Financial Planning and Analysis.

83 Section 77(1) of the PSEA provides that a person in the area of recourse may make a complaint that he or she was not appointed or proposed for appointment by reason of abuse of authority. In this case, the Tribunal has found that due to the respondent's abuse of its authority, Ms. Kress did not have a fair opportunity to be considered for appointment. While there is no evidence that Ms. Shaw was not qualified for appointment to this position, the only way the Tribunal can make Ms. Kress whole in this appointment process is to revoke the appointment of Ms. Shaw.

84 Therefore, pursuant to its authority under s. 81(1) of the PSEA, the Tribunal orders the respondent to revoke the appointment of Ms. Shaw to the position of Manager, Financial Planning and Analysis, within 60 days of the date of this decision.

Kenneth J. Gibson
Member

Parties of Record

Tribunal Files	2010-0574 and 0590
Style of Cause	<i>Tracey Kress and Shelley Lavallee and the Deputy Minister of Indian and Northern Affairs Canada</i>
Hearing	September 13 and 14, 2011 Regina, Saskatchewan
Date of Reasons	December 22, 2011
APPEARANCES:	
For the complainants	Grant Boland
For the respondent	Lesa Brown
For the Public Service Commission	John Unrau (written submissions)