



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2012-0864
Issued at: Ottawa, December 10, 2012

LISA KITSOS

Complainant

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority of authority under sections 77(1)(a) and (b) of the <i>Public Service Employment Act</i>
Decision	Complaint is dismissed
Decision rendered by	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Kitsos v. the President of the Canada Border Services Agency</i>
Neutral Citation	2012 PSST 0035

Reasons for Decision

Introduction

1 Lisa Kitsos, the complainant, filed a complaint of abuse of authority with the Public Service Staffing Tribunal (the Tribunal), under s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA), concerning the acting appointment of Debbie Dundas to the position of Project Officer, an AS-04 position in Fixed Infrastructure (FI) with the Canada Border Services Agency (CBSA) in Windsor, Ontario. It is the complainant's view that the President of CBSA, the respondent, abused its authority in the choice of a non-advertised appointment process. She also asserts that personal favouritism was a factor in the respondent's decision to appoint Ms. Dundas for this acting appointment.

2 The respondent denies that any abuse of authority occurred. It states that a non-advertised appointment process was a proper choice within the discretion of the hiring manager, Mary Boone. Ms. Dundas was assessed and found to meet the qualifications for the position as well as the operational needs of CBSA as they existed at the time of her appointment.

3 The Public Service Commission (PSC) took no position on the merits of this case. While the PSC did not attend the hearing of this complaint, it did present a written submission in which it reviewed pertinent PSC policies and guidelines.

4 For the reasons that follow, the complaint is dismissed. It has not been shown that the choice of a non-advertised appointment process was an abuse of authority or that the appointment of Ms. Dundas was based on personal favouritism.

Background

5 Ms. Dundas was initially appointed to act in the AS-04 position on December 1, 2010. The complainant became aware of that appointment and on May 25, 2011, she sent her résumé to Ms. Boone to indicate that she would be

interested in an assignment to FI. When she saw the Information Regarding Acting Appointment dated April 24, 2012, which showed that Ms. Dundas was being appointed to act in the AS-04 position for a further period of April 1, 2012 through September 7, 2012 (the April 2012 appointment), she filed a complaint.

Issues

- 6** The Tribunal must determine the following issues:
- (i) Did the respondent abuse its authority by choosing a non-advertised appointment process for the April 2012 appointment?
 - (ii) Was personal favouritism a factor in the appointment of Ms. Dundas for the April 2012 appointment?

Analysis

Issue I: Did the respondent abuse its authority by choosing a non-advertised appointment process for the April 2012 appointment?

7 Section 33 of the PSEA provides that: “In making an appointment, the Commission may use an advertised or non-advertised appointment process.”

8 Section 77(1)(b) provides a right of recourse when the choice of appointment process is at issue:

77. (1) When the Commission has made or proposed an appointment in an internal appointment process, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal’s regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of

...

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; ...

9 Ms. Boone described the circumstances leading to the April 2012 appointment. Cheryl Baker was the indeterminate incumbent of the AS-04 Project Officer position in FI in Windsor until her retirement in April 2012. Leave reports for April 1, 2010 through

March 31, 2012 show that Ms. Baker was often absent from the workplace, using leave totalling more than 1500 hours during that period. Ms. Boone stated that given Ms. Baker's absences and CBSA's need for someone who could consistently be relied on to continue the project work assigned to the AS-04 position, CBSA Headquarters decided in 2010 to temporarily fund an additional AS-04 position for Windsor (the temporary AS-04 position). The purpose of the position was to ensure sufficient resources for several major on-going projects including the redevelopment of the Detroit-Windsor tunnel and the Ambassador Bridge, and work on construction deficiencies arising from the Blue Water Bridge project. Ms. Dundas was chosen to act in the temporary AS-04 position in December 2010 on the basis that she had worked in FI for more than five years, she had knowledge of FI and its role, and she had accumulated experience working on FI projects and issues within the scope of her substantive AS-02 position.

10 Ms. Boone stated that in November 2011, she assigned Ms. Baker to work on issues related to the Ambassador Bridge redevelopment. In an email dated February 3, 2012, Ms. Baker advised Ms. Boone that she would be absent for an extended period of leave and would then retire effective April 28, 2012.

11 Ms. Boone testified that to keep the Ambassador Bridge redevelopment project on schedule, she had to replace Ms. Baker. As Ms. Dundas's appointment to the temporary AS-04 position was scheduled to end shortly, Ms. Boone elected to extend it until September 7, 2012, using a non-advertised appointment process. The magnitude of the Ambassador Bridge project, the timelines, and the fact that it was a major border crossing that could not be obstructed because of delay, were influences on the choice to use a non-advertised appointment process for the April 2012 appointment.

12 Ms. Boone stated that she did not consider the complainant for the April 2012 appointment. The complainant's résumé showed that her work experience was generally clerical whereas the AS-04 position required someone knowledgeable of infrastructure needs and requirements.

13 The complainant's position is that the decision to use a non-advertised appointment process for the April 2012 appointment was an abuse of authority. In her view, the existence of large, long term projects should not have been a factor in the choice of a non-advertised process. Although she presented no evidence on the point, she expressed the opinion that it is common for projects to change hands.

14 The Tribunal finds that the complainant has not established that there was an abuse of authority in the choice to use a non-advertised appointment process in the circumstances presented in this case. Section 33 of the PSEA provides that "the Commission may use an advertised or non-advertised appointment process." The PSEA uses permissive language that does not establish a preference in the choice of process. In *Jarvo v. Deputy Minister of National Defence*, 2011 PSST 0006, at para. 7, the Tribunal held that:

Section 33 of the PSEA explicitly permits the use of non-advertised appointment processes. Nevertheless, s. 77(1)(b) of the PSEA provides for a direct challenge of the discretionary choice between an advertised and non-advertised process, on the ground of abuse of authority. The Tribunal has established that merely choosing to conduct a non-advertised process is not an abuse of authority in itself. For a complaint under s. 77(1)(b) of the PSEA to be successful, the complainant must establish, on a balance of probabilities, that the **choice** to use a non-advertised process was an abuse of authority.

15 The Tribunal is satisfied that Ms. Boone's evidence provides support for the decision to use a non-advertised appointment process. Her testimony reflected a reasoned decision that recognized the importance of continuing the on-going Ambassador Bridge redevelopment project at the time of Ms. Baker's departure from the workplace. The written rationale that Ms. Boone prepared at the time of the appointment noted that Ms. Dundas's experience and knowledge were significant considerations in using a non-advertised appointment process.

16 The complainant feels that others should have had access to the opportunity to act in the AS-04 position and she expressed a concern that her résumé was not considered before appointing Ms. Dundas. The evidence demonstrates that Ms. Boone

did not consider the complainant or anyone other than Ms. Dundas for the April 2012 appointment. In accordance with the provisions of s. 30(4) of the PSEA, she was not required to consider more than one person in order for the appointment to be made on the basis of merit.

17 The *Appointment Policy* of the PSC identifies fairness, transparency, access and representativeness as guiding values for managers who are delegated to make appointment decisions. As the Tribunal held in *Jarvo*, at para. 32, “(n)either the PSEA nor PSC’s *Appointment Policy* guarantees an employee a right of access to every appointment opportunity.” By their nature, non-advertised appointment processes are not advertised to employees prior to the decision to appoint. Therefore, they do not present an opportunity for individuals to apply for them.

18 Based on the evidence, the Tribunal concludes that the complainant has not established that the respondent abused its authority when it chose to proceed with a non-advertised appointment process after considering only one person.

Issue II: Was personal favouritism a factor in the appointment of Ms. Dundas for the April 2012 appointment?

19 In s. 2(4), the PSEA provides that: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.”

20 The complainant takes the position that personal favouritism was a factor in Ms. Boone’s decision regarding the April 2012 appointment of Ms. Dundas. The complainant is not employed in FI. She stated that when she asked Ms. Boone about the April 2012 appointment of Ms. Dundas, Ms. Boone told her that Ms. Dundas was an employee of FI and she was only interested in providing opportunities for her own FI employees.

21 Ms. Baker was called to testify by the complainant. She stated that she was the only AS-04 in Windsor until Ms. Dundas’s acting appointment began in 2010. She stated that Ms. Dundas did the AS-04 job well. However, Ms. Baker commented that

she felt that she lost responsibility for certain projects to Ms. Dundas. She sensed that there was “camaraderie” between Ms. Dundas and Ms. Boone who worked in Windsor and Niagara Falls respectively. Ms. Baker felt excluded from their camaraderie, but had no awareness of any personal relationship between them apart from their workplace responsibilities.

22 Ms. Boone acknowledged that when she spoke with the complainant after this complaint was filed, she told her that she would prefer to develop her own employees when making acting appointments because of their acquired knowledge and experience within FI. The assessment of Ms. Dundas was placed in evidence, showing that she met the requirements for the AS-04 position. Her qualifications were not challenged.

23 Ms. Boone noted that during the period following the April 2012 appointment, she received permission to conduct an internal advertised appointment process to staff an indeterminate AS-04 position. Both the complainant and Ms. Dundas were candidates and neither of them was found qualified. Ms. Dundas’s appointment to the temporary AS-04 position was not further extended and she returned to her substantive AS-02 position at the conclusion of the April 2012 appointment.

24 In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 0007, the Tribunal found that it was significant that the PSEA refers to **personal** favouritism, giving emphasis to Parliament’s intention that the words should be read together. As the Tribunal indicated at para. 41 in *Glasgow*, personal favouritism may include the selection of a person solely based on a personal relationship, as a personal favour, or to gain personal favour with someone else.

25 The evidence before the Tribunal fails to establish that Ms. Dundas was appointed for reasons of personal favouritism. Her qualifications have not been challenged and her work as an AS-04 has been described positively by Ms. Baker. The Tribunal finds no evidence of improper considerations such as personal favouritism influencing her appointment. Neither Ms. Baker’s characterization of Ms. Dundas’s relationship to Ms. Boone as camaraderie, nor Ms. Boone’s confirmation that she preferred to develop people within FI, are sufficient for a finding of personal favouritism.

26 Considering the totality of the evidence presented during this hearing, the short term of the April 2012 appointment, the importance of the on-going project work, and the requirement for relevant knowledge and experience, the Tribunal finds that the complainant has not established that there was abuse of authority in the appointment of Ms. Dundas.

Decision

27 For these reasons, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2012-0864
Style of Cause	<i>Lisa Kitsos and the President of the Canada Border Services Agency</i>
Hearing	October 30, 2012 Windsor, Ontario
Date of Reasons	December 10, 2012
APPEARANCES:	
For the complainant	Mike Fummerton
For the respondent	Christine Langill
For the Public Service Commission	Laurence St-Gelais (written submission)