



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2013-0069

**Issued at:** Ottawa, December 16, 2013

**TRINA SNELGROVE**

Complainant

AND

**THE DEPUTY MINISTER OF FISHERIES AND OCEANS**

Respondent

AND

**OTHER PARTIES**

<b>Matter</b>	Complaint of abuse of authority under section 77(1)(a) of the <i>Public Service Employment Act</i>
<b>Decision</b>	The complaint is substantiated
<b>Decision rendered by</b>	John Mooney, Vice-Chairperson
<b>Language of Decision</b>	English
<b>Indexed</b>	<i>Snelgrove v. Deputy Minister of Fisheries and Oceans</i>
<b>Neutral Citation</b>	2013 PSST 35

## **Reasons for Decision**

### **Introduction**

1 Trina Snelgrove, the complainant, participated in an internal advertised appointment process to staff, on an acting basis, the position of MariTime Coordinator at the AS-02 group and level with the Canadian Coast Guard (CCG), which is an agency of Fisheries and Oceans. She was found qualified and her name was placed in a pool of candidates who met the essential qualifications established for the position, but another person was appointed to the position from the pool.

2 The complainant alleges that she was not appointed because the Deputy Minister of Fisheries and Oceans, the respondent, abused its authority in the application of merit. More specifically, she submits that a member of the assessment board did not assess her qualifications independently and that another member of the assessment board inappropriately asked her whether she would be willing to return to work before the end of her maternity leave if she was chosen for the position. She also alleges that the notice regarding the acting appointment was not posted in a timely manner, and that the assessment board provided inconsistent information at different stages of the appointment and complaint processes.

3 The respondent denies that there was any abuse of authority in the appointment process. It asserts that the complainant was properly assessed by both members of the assessment board, and that the complainant was asked when she could return to work for planning purposes. As well, the respondent submits that it complied with requirements regarding the posting of recourse rights, and that the information provided during the appointment and complaint processes was consistent.

4 The Public Service Commission (PSC) did not attend the hearing, but submitted written arguments in which it described the relevant policies and guides that apply to this appointment process and commented on whether the respondent complied with requirements regarding the posting of recourse rights.

5 For the reasons set out below, the Public Service Staffing Tribunal (the Tribunal) finds that the complainant has established that the respondent abused its authority in this appointment process. The failure of one of the assessment board members to

independently assess the complainant's qualifications constitutes a serious error that amounts to an abuse of authority.

## **Background**

6 In July 2011, the respondent initiated an internal advertised appointment process to create a pool of qualified candidates to fill on an acting basis the MariTime Administrator AS-02 position.

7 There were two people on the assessment board: Wade Stagg, Marine Superintendent, CCG, who was the Board Chair, and Denise McKinlay, a Maritime Coordinator, also with the CCG.

8 On February 4, 2013, the respondent posted an *Information Regarding Acting Appointment* notice regarding the appointment of Jodi Johnson (the appointee) to the MariTime Administrator AS-02 position for the period of December 31, 2012, to February 28, 2013.

9 On February 19, 2013, the complainant brought a complaint of abuse of authority to the Tribunal pursuant to s. 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA).

## **Preliminary matters**

10 At the outset of the hearing, the complainant raised three preliminary matters: a request for postponement of the hearing, a request that the hearing not proceed further and that the complaint be substantiated without hearing additional evidence, and a request for a ruling with respect to contact with a witness by opposing counsel prior to the hearing.

### **(i) Request for postponement of the hearing**

11 The complainant presented a request to postpone the hearing. Pursuant to the Tribunal's *Policy for Requests for Postponements*, a request may be made to postpone the hearing at such a late date when exceptional circumstances prevent a party from proceeding with the hearing as scheduled.

12 The basis of the request is that in the two or three weeks preceding the hearing, Mr. Stagg offered Ms. McKinlay, who was retiring from the public service at the end of October 2013, a two week casual employment after her retirement for the purpose of training the person who now occupies the MariTime Administrator AS-02 position on an indeterminate basis. The complainant doubted that this person needed training since she had occupied that position for eight months. According to the complainant, this offer was made to reward Ms. McKinlay if she gave testimony favorable to the respondent in this complaint. In the complainant's view, this offer compromised the complainant's right to a fair hearing.

13 Even if what the complainant asserts were true, these are not exceptional circumstances that justify a postponement of the hearing. Both Mr. Stagg and Ms. McKinlay were to be called as witnesses, and could be questioned under oath by the complainant during the hearing. As such, the complainant could test her assertion and, therefore, her right to a fair hearing was not compromised. The Tribunal denied the complainant's request to postpone the hearing.

(ii) *Request to substantiate the complaint without further hearing*

14 Mr. Stagg denied the complainant's assertion that he attempted to influence Ms. McKinlay's testimony. According to Mr. Stagg, he offered the casual employment to Ms. McKinlay because, in his view, the person who replaced the appointee in the position needed more training. Ms. McKinlay had previously occupied the position, but had accepted another position in the summer of 2012. Mr. Stagg had previously asked her several times whether she could dedicate some of her time to train the new incumbent, but her heavy workload precluded her from providing this training. Mr. Stagg thought that she might have time to train the new incumbent after her retirement.

15 The Tribunal found that the complainant had not established that Mr. Stagg offered Ms. McKinlay casual employment to influence her testimony. Mr. Stagg gave a reasonable explanation for making the offer of casual employment.

16 Accordingly, there was no basis for granting the complainant's request to substantiate the complaint based on her conjecture that Ms. McKinlay's testimony would be improperly influenced at the hearing.

(iii) *Contacting a witness prior to hearing*

17 The complainant also took issue with the fact that the respondent's counsel contacted Ms. McKinlay on two occasions prior to the hearing. The complainant argues that the respondent's counsel should not have contacted Ms. McKinlay because she was called as a witness by the complainant. According to the complainant, Ms. McKinlay had felt intimidated by counsel's questions.

18 Respondent's counsel explained that she approached Ms. McKinlay on the Friday preceding the hearing to ask her a few questions regarding the complaint. She also spoke to her for five minutes on the morning of the hearing to clarify certain facts. Ms. McKinlay did not at any time indicate to the respondent's counsel that she was uncomfortable with her questions.

19 The general rule with respect to contacting witnesses is that there is no ownership of a witness. Either party may approach a witness prior to the hearing to obtain facts from the witness. When contacting a witness, an important proviso is that the representative or counsel should not deter the witness from giving evidence. Accordingly, opposing counsel is not required to obtain an order from the Tribunal in order to speak with a witness prior to a hearing.

20 The Tribunal found that the conduct of the respondent's counsel was not improper. A witness can be asked questions prior to hearing regardless of which party seeks to call the witness.

**Issue**

21 The Tribunal must decide whether the respondent abused its authority in this appointment process.

## **Analysis**

22 Section 77(1) of the PSEA provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment because the PSC or the deputy head abused its authority in the appointment process. Abuse of authority is not defined in the PSEA, however, s. 2(4) offers the following guidance: “For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism”.

23 As the Tribunal’s jurisprudence has established, the use of such inclusive language indicates that abuse of authority comprises, but is not limited to, bad faith and personal favouritism. In *Kane v. Canada (Attorney General)*, 2011 FCA 19 at para. 6, the Federal Court of Appeal upheld the Tribunal’s interpretation by ruling that an error can also constitute an abuse of authority. (The Court of Appeal’s decision was set aside on a different ground by the Supreme Court of Canada in *Canada (Attorney General) v. Kane*, 2012 SCC 64). Whether an error constitutes an abuse of authority will depend on its nature and seriousness.

24 Abuse of authority can also include improper conduct and omissions. The nature and seriousness of the improper conduct or omission will determine whether or not it constitutes abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

25 The complainant has the burden to prove, on a balance of probabilities, that there was abuse of authority in the appointment process. See, for example, *Tibbs* at para. 49.

### ***Independent assessment of the complainant’s qualifications***

26 The complainant alleges that the assessment board members did not independently assess her qualifications. During the exchange of information, she noticed that they wrote identical reasons to justify the marks given for her answers to two questions that assessed the ability to work under pressure and to adapt to

constantly changing priorities. According to the complainant, this calls into question whether each of them independently assessed her qualifications.

27 The testimony of Mr. Stagg and Ms. McKinlay highlights that their views on how the assessment board carried out its assessment of candidates differed significantly.

28 Ms. McKinlay testified that, after each interview, Mr. Stagg described orally his assessment of the candidate's answers to the interview questions. Ms. McKinlay stated that she felt compelled to write down his comments word for word because she did not want to contradict him. She did not therefore provide her own assessment of the candidates' answers. She had learned while working with Mr. Stagg that sometimes it was easier to go along with him than to oppose him. She had to choose her battles with Mr. Stagg. Many times in the past, Mr. Stagg had told her he did not want to know her opinion. Once, in another context, she had expressed her opinion on a matter and Mr. Stagg told her she would be disciplined for doing so. She was shocked at his reaction. She did not raise her concerns during or after the interviews because she believed that, if she did, she would be "under threat of discipline".

29 Mr. Stagg testified that the scores awarded to candidates were the result of a consensus between him and Ms. McKinlay. They worked as a team. He stated that he avoided influencing other board members when conducting appointment processes.

30 The Tribunal finds that the board members did not independently assess the complainant's qualifications. When an assessment board comprised of more than one member is established, all members must be able to exercise independent judgment when assessing candidates. Ms. McKinlay admitted that she did not do this. She simply echoed Mr. Stagg's assessment because she felt intimidated by him. Notwithstanding Mr. Stagg's perspective, Ms. McKinlay admitted that she did not fulfill her role as an assessment board member.

31 Whether Ms. McKinlay's concerns were founded in fact is not determinative of this complaint. What is determinative is that Ms. McKinlay felt intimidated by Mr. Stagg and that feeling prevented her from exercising independent judgment when assessing candidates' qualifications, including the complainant's.

32 The Tribunal concludes that the failure of one of the board members to independently assess candidates amounts to a serious error and constitutes an abuse of authority.

***Asking the complainant during the interview whether she would end her maternity leave if she were chosen for the position***

33 The complainant alleges that her maternity leave might have had an impact on the results of the appointment process.

34 The Tribunal notes that the complainant did not raise an allegation of discrimination prior to the hearing, nor did she notify the Canadian Human Rights Commission that there was an issue involving the interpretation or application of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. Moreover, at the hearing, the complainant's representative specifically confirmed that there is no allegation of discrimination based on sex with respect to the circumstances surrounding her maternity leave. The complainant's representative had taken the same position during the pre-hearing conference.

35 The assessment of candidates was conducted in the summer of 2011. This assessment was used for the acting appointment at issue, and two other acting appointments that preceded this appointment process.

36 The complainant was on maternity leave when she was interviewed for the position. During her interview, Mr. Stagg asked her whether she would end her maternity leave if she were chosen for the position. She answered that she was not ready to make a commitment at that point and that she wanted to discuss the matter with her family.

37 Ms. McKinlay testified that she was surprised by that question because Mr. Stagg already knew the answer. When the complainant dropped by her office after submitting her application for the position, Ms. McKinlay asked her whether she would come back to work earlier than scheduled if the position were offered to her. The complainant told Ms. McKinlay that she could. Ms. McKinlay relayed that conversation to Mr. Stagg.



38 The complainant confirmed in her testimony that she had told Ms. McKinlay that she would end her maternity leave early if she were chosen for the position, but this was an “off the cuff” remark. She viewed the conversation with Ms. McKinlay as an informal discussion rather than a commitment to return to work early.

39 The complainant testified that she felt that it was inappropriate for Mr. Stagg to ask that question during the interview and she wondered whether her candidacy had been adversely affected by her answer. The complainant also thought the question was unfair because she had learned during the exchange of information that other candidates were not asked questions about their availability.

40 Ms. McKinlay also felt that the question was inappropriate. The issue of availability is not part of the assessment process; it only becomes relevant when the assessment process is completed and the person is offered the position. She did not think, however, that the complainant’s answer had an impact on the outcome of the appointment process.

41 During his testimony, Mr. Stagg explained why he had asked the question. He knew that the complainant had a good chance of succeeding in the appointment process and he wanted to know, for planning purposes, when she could come back to work. If she was not planning to return prior to the completion of her maternity leave, he would have to appoint someone else until she was able to return to the workplace. Mr. Stagg agreed that he did not ask others about their availability because he knew that they were all currently present in the workplace.

42 In the Tribunal’s view, it was highly inappropriate for Mr. Stagg to ask the complainant, during her interview, whether she would end her maternity leave if she were offered the acting opportunity. Questions concerning a candidate’s maternity leave should not be asked at any stage of an assessment of candidates. However, since the Tribunal has already determined that the respondent abused its authority in the application of merit, it is unnecessary to make a finding as to whether asking this question would, by itself, be a serious error amounting to an abuse of authority.

43 The complainant also brought forth other allegations set out at the beginning of these reasons. The evidence on these matters was not always clear and cogent. Since the Tribunal has already decided that there was an abuse of authority in the appointment process, and any further finding of errors in this process regarding those matters would have no impact on the corrective action imposed, it is unnecessary to address them.

### **Decision**

44 For these reasons, the complaint is substantiated.

### **Corrective Action**

45 The appropriate corrective action in the circumstances of this complaint is a declaration that the respondent abused its authority in this appointment process. The respondent must not use the results of this appointment process to make any further appointments.

John Mooney  
Vice-Chairperson

### **Parties of Record**

<b>Tribunal File</b>	2013-0069
<b>Style of Cause</b>	<i>Trina Snelgrove and the Deputy Minister of Fisheries and Oceans</i>
<b>Hearing</b>	October 22 and 23, 2013 St. John's, Newfoundland
<b>Date of Reasons</b>	December 16, 2013
<b>APPEARANCES:</b>	
<b>For the complainant</b>	Larry Teslyk
<b>For the respondent</b>	Caroline Engmann
<b>For the Public Service Commission</b>	Claude Zaor (written submissions)