

Federal Court



Cour fédérale

**Date: 20090610**

**Docket: T-1119-08**

**Citation: 2009 FC 618**

**Ottawa, Ontario, June 10, 2009**

**PRESENT: The Honourable Maurice E. Lagacé**

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**DIANE CAMERON AND ANDRÉ MAHEUX**

**Respondents**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] The applicant is seeking judicial review of a decision dated June 20, 2008, by the Public Service Staffing Tribunal (Tribunal) under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (Act) allowing the respondents' complaints relating to a non-advertised appointment process. Furthermore, as corrective action, the Tribunal ordered the applicant to review all appointments made by the manager since the Act came into force, suspend the staffing authority delegated to the manager during the review, and provide the manager with training to ensure that she correctly understands her obligations and responsibilities under the new provisions of the Act.

## II. Facts

### A. *Background*

[2] While awaiting the results of an internal appointment process advertised by the Department of Human Resources and Social Development (Service Canada) to staff positions for regional specialists in entitlement and appeals to boards of referees, group and level PM-04, a manager in Service Canada needed to fill a Regional Insurance Advisor position, at the PM-04 group and level, in an acting position for a period of less than four months. The subsequent extension of this appointment by a non-advertised internal process is the subject of the complaints from the respondents.

### B. *Complaints*

[3] The complaints filed by the respondents on November 24, 2006, alleged an abuse of authority by the manager in the choice of the non-advertised appointment process as well as in the application of merit according to subsection 30(2) of the Act. According to them, the manager showed favouritism and acted in bad faith in making the impugned appointment.

### C. *Tribunal's decision*

[4] The Tribunal found, in the decision under review, that the Service Canada manager demonstrated bad faith and abused her authority by using a non-advertised process to extend the appointment of the position in question. Since the impugned acting appointment ended with the completion of the indeterminate appointment process, and revocation was no longer an appropriate

corrective action, the Tribunal, in allowing these complaints, felt it had the authority to order the following:

[109] In less serious circumstances, the Tribunal's finding that a manager abused the discretionary authority delegated to him or her may constitute a sanction in itself. However, the Tribunal has determined in these complaints that the testimony of Ms. Domingue was not credible on the question of the experience sought. The allegations of bad faith were also found by the Tribunal to have been proven, and the appointment was not based on merit.

[110] For all these reasons, the Tribunal orders the respondent to review all appointments made by Ms. Domingue since the coming into force of the PSEA, in order to ensure that they were in fact based on merit. The Tribunal further orders the respondent to suspend the staffing authority delegated to Ms. Domingue as a manager during the aforesaid review, and during that period, to provide her with training to ensure that she correctly understands her responsibilities and obligations under the new PSEA.

[5] The applicant is not challenging the Tribunal's assessment of the evidence and findings of fact on the merits of the complaints; however, he is challenging the order on the grounds that the Tribunal allegedly acted without jurisdiction or exceeded its jurisdiction by making the order it did.

### III . Issue

[6] The Court is addressing only one issue:

Did the Tribunal have the jurisdiction to order corrective action with respect to facts that were not before it?

IV. Analysis

A. *Standard of review*

[7] The applicant maintains that the Tribunal's interpretation of its authority to order corrective action relates to its jurisdiction and, as such, is a question of pure law subject to the standard of correctness.

[8] The respondents maintain that the issue involves the Tribunal's interpretation of its own statute; they point out that deference is in order and they find that the standard of review in this case is that of reasonableness.

[9] If it is true that the Tribunal's decision is protected by a privative clause (subsection 102(1) of the Act) which renders it final and immune from judicial review, it is then necessary to verify whether the Tribunal had the jurisdiction required to order the corrective action with respect to facts having nothing to do with the complaints before it. If it had jurisdiction, the standard of reasonableness would apply; if not, the standard of correctness would apply and the decision would not be entitled to deference if the Tribunal exceeded its jurisdiction.

[10] As it seems that the Court has not been called upon until now to rule on the issue, a contextual analysis of the factors making it possible to identify the proper standard of review must be carried out; in this proceeding, this involves the presence of a privative clause, the purpose of the Tribunal as determined by interpretation of enabling legislation, the nature of the question at issue

and the expertise of the Tribunal, without necessarily having to consider all of these factors (*Dunsmuir v. New Brunswick*, 2008 SCC 9, paragraphs 62, 63 and 64).

### B. Tribunal's jurisdiction

[11] The enabling Act determines the purpose of the Tribunal as follows:

**88.** (2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.  
[Emphasis added.]

**88.** (2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu du paragraphe 65(1) ou des articles 74, 77 ou 83 et de statuer sur elles. [Je souligne.]

[12] The Act is careful to limit the jurisdiction of the Tribunal to the following complaints:

**65.** (1) Where some but not all of the employees in a part of an organization are informed by the deputy head that they will be laid off, any employee selected for lay-off may make a complaint to the Tribunal, in the manner and within the time fixed by the Tribunal's regulations, that his or her selection constituted an abuse of authority.

**65.** (1) Dans les cas où seulement certains des fonctionnaires d'une partie de l'administration sont informés par l'administrateur général qu'ils seront mis en disponibilité, l'un ou l'autre de ces fonctionnaires peut présenter au Tribunal, dans le délai et selon les modalités fixés par règlement de celui-ci, une plainte selon laquelle la décision de le mettre en disponibilité constitue un abus de pouvoir.

...

[...]

**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

**74.** La personne dont la nomination est révoquée par la Commission en vertu du paragraphe 67(1) ou par l'administrateur général en vertu des paragraphes 15(3) ou

within the period provided by the Tribunal's regulations, make a complaint to the Tribunal that the revocation was unreasonable.

...

**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

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

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

(c) the failure of the Commission to assess the complainant in the official language of his or her

67(2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle la révocation n'était pas raisonnable.

[...]

**77.** (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en

choice as required by subsection 37(1).

contravention du paragraphe 37(1).

...

[...]

**83.** Where the Commission has made or proposed an appointment as a result of the implementation of corrective action ordered under section 81, a complaint may be made to the Tribunal, in the manner and within the period provided by its regulations, by

**83.** Dans le cas où la Commission fait une nomination ou une proposition de nomination en conséquence de l'application des mesures ordonnées en vertu de l'article 81, les personnes ci-après peuvent, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle le fait qu'elles n'ont pas été nommées ou fait l'objet d'une proposition de nomination constitue un abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'application des mesures correctives :

(a) the person who made the complaint under section 77,

a) la personne qui a présenté la plainte en vertu de l'article 77;

(b) the person who was the subject of the appointment or proposed appointment referred to in subsection 77(1), or

b) la personne qui a fait l'objet de la proposition de nomination ou de la nomination visées au paragraphe 77(1);

(c) any other person directly affected by the implementation of the corrective action,

c) toute autre personne qui est directement touchée par l'application des mesures correctives.

on the grounds that the person was not appointed or proposed for appointment by reason of an abuse of authority

by the Commission or deputy head in the implementation of the corrective action.

[13] Therefore, it was in relation to the complaints filed by the respondents that the Tribunal had to exercise its jurisdiction. The Tribunal hears the complaint before it on the basis of the facts giving rise to the complaint, and not on the basis of the facts not before it or facts that could give rise to complaints that are not before it.

[14] These provisions of the Act thus required the Tribunal to determine in this case, since it was the subject of the complaints filed under section 77 of the Act, whether the manager had abused her authority by evaluating the qualifications of the candidate on the basis of the requirements or needs of the work to be carried out, at the time of filling a Regional Insurance Advisor position (at the PM-04 group and level) on an acting basis, and in subsequently extending this appointment by a non-advertised internal process.

[15] From the moment the Tribunal found the complaints to be substantiated, a finding not challenged by the applicant, the Act authorized it to impose the following remedies:

**81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal**

**81. (1) S'il juge la plainte fondée, le Tribunal peut ordonner à la Commission ou à l'administrateur général de révoquer la nomination ou de ne pas faire la nomination, selon le cas, et de prendre les mesures correctives qu'il estime indiquées.**



considers appropriate.

[Emphasis added.]

[Je souligne.]

[16] The Tribunal could have ordered the Public Service Commission (PSC) or the deputy head to revoke the appointment and order the appropriate corrective action. But even if we were to admit that revocation was not an appropriate corrective action, and even if the Tribunal's decision was a sanction in itself against the manager who was being criticized for abusing her delegated discretionary authority, the power given to the Tribunal under subsection 81(1) of the Act does not authorize it to order just any corrective action; such action has to be within its jurisdiction and pertain to the facts surrounding the appointment process giving rise to the respondents' complaints.

[17] Moreover, even when the Tribunal acts within its jurisdiction, the Act restricts its authority to order corrective action. Thus,

**82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process.**

[Emphasis added.]

**82. Le Tribunal ne peut ordonner à la Commission de faire une nomination ou d'entreprendre un nouveau processus de nomination.**

[Je souligne.]

[18] The combined reading of sections 77, 81 and 82 of the Act indicates that any corrective action ordered by the Tribunal must address only the appointment process that is the subject of the complaints before it. The corrective action must aim at remedying the default identified by the Tribunal in hearing the complaint before it, and cannot address other past or future appointment processes not before the Tribunal further to a complaint made according to the Act.

[19] The fact that the only impugned acting appointment ended does not have the effect of withdrawing the complaint from the Tribunal; however, the Tribunal is limited in such a case to declaring that an abuse of authority occurred without being able to revoke this appointment or order corrective action in respect of an appointment process that no longer exists. Moreover, the Tribunal correctly recognized that revocation in this case is not an appropriate action for these complaints; it also recognized that the fact of deciding that the manager abused her discretionary authority may constitute a sanction in itself.

[20] We must not lose sight of the fact that it is the appointment process on which the complaint is based that is in question, not other appointment processes that are not the subject of any complaint before the Tribunal. The manager could have very well abused her discretionary authority during the appointment process in dispute, but also fully understood her responsibilities and obligations during the process followed for other appointments.

[21] The respondents' complaints did not seek to bring before the Tribunal all of the appointments made by the manager, and to give it free rein to order corrective action that had nothing to do with the complaints.

[22] Nevertheless, the Tribunal ordered the following three corrective actions:

- a. Review all appointments made by the manager since the Act came into force;
- b. Suspend the staffing authority delegated to the manager during this review; and

- c. Provide training to the manager to ensure that she correctly understands her responsibilities and obligations under the new provisions of the Act.

[23] None of these corrective actions is designed to exempt the appointment process before the Tribunal from abuse of authority. These actions target past or future appointment processes that are not the subject of any complaint before the Tribunal.

*Action I - Review all appointments made by the manager since the Act came into force*

[24] Furthermore, these actions also infringe on the PSC's authority to delegate appointment authority and to supervise this delegation, and displace the deputy head's authority to sub-delegate this authority, to exercise his or her discretion to hold a review and to require that his or her employees take training. Parliament did not speak in vain in expressing the following in the Act:

**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.

**15. (3)** Dans les cas où la Commission autorise un administrateur général à exercer le pouvoir de faire des nominations dans le cadre d'un processus de nomination interne, l'autorisation doit comprendre le pouvoir de révoquer ces nominations — et de prendre des mesures correctives à leur égard — dans les cas où, après avoir mené une enquête, il est convaincu qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée.

[25] The Act already authorizes the deputy head to revoke internal appointments and to take action in their regard, subject to a review being conducted. The Tribunal's corrective action ordering the deputy head to review all appointment processes conducted by the manager involved in this proceeding infringes on the discretionary authority of the deputy head to review internal appointment processes within his or her jurisdiction.

[26] Furthermore, the PSC also has, under the Act, the exclusive discretionary authority to investigate any external appointment process:

**66.** The Commission may investigate any external appointment process and, if it is satisfied that the appointment was not made or proposed to be made on the basis of merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment, the Commission may

*(a)* revoke the appointment or not make the appointment, as the case may be; and

*(b)* take any corrective action that it considers appropriate.

**66.** La Commission peut mener une enquête sur tout processus de nomination externe; si elle est convaincue que la nomination ou la proposition de nomination n'a pas été fondée sur le mérite ou qu'une erreur, une omission ou une conduite irrégulière a influé sur le choix de la personne nommée ou dont la nomination est proposée, la Commission peut :

*a)* révoquer la nomination ou ne pas faire la nomination, selon le cas;

*b)* prendre les mesures correctives qu'elle estime indiquées.

[27] This authority to investigate conferred under the Act on the PSC cannot be delegated to a deputy head:

**15. (1)** The Commission may authorize a deputy head to exercise or perform, in relation to his or her organization, in the manner and subject to any terms and conditions that the Commission directs, any of the powers and functions of the Commission under this Act, other than its powers under sections 17, 20 and 22, its power to investigate appointments under sections 66 to 69 and its powers under Part 7.

**15. (1)** La Commission peut, selon les modalités et aux conditions qu'elle fixe, autoriser l'administrateur général à exercer à l'égard de l'administration dont il est responsable toutes attributions que lui confère la présente loi, sauf en ce qui concerne les attributions prévues aux articles 17, 20 et 22, les pouvoirs d'enquête prévus aux articles 66 à 69 et les attributions prévues à la partie 7.

[28] The Tribunal therefore does not have any jurisdiction with regard to external appointments. Consequently, no external appointment can be the subject of a complaint to the Tribunal or an investigation by a deputy head. Consequently, by ordering the deputy head to carry out reviews on all appointments made by the manager, the Tribunal is including external appointments, and therefore in effect is ordering the deputy head to take actions that the Act does not permit him or her to take. The Tribunal cannot, on the basis of subsection 81(1), act on an external appointment by ordering a review to take place or by taking any other corrective action in relation thereto. This is perhaps not what the Tribunal intended, but this is what is contained in the words it used.

*Action II - Suspend the staffing authority delegated to the manager during this review*

[29] The Act already provides the following with respect to the authority delegated to the manager:

**24. (2)** Where the

**24. (2)** L'administrateur

|   |  |
|---|--|
| <p>Commission has authorized a deputy head under subsection 15(1) to exercise or perform any of the Commission's powers and functions, the deputy head may — subject to the Commission's approval and any terms and conditions specified under that subsection — authorize another person to exercise or perform any of those powers or functions, other than the power to revoke appointments.</p> | <p>général que la Commission a autorisé, en vertu du paragraphe 15(1), à exercer des attributions peut à son tour autoriser toute autre personne à les exercer — à l'exception du pouvoir de révocation — avec l'agrément de la Commission et conformément à l'autorisation accordée par celle-ci.</p> |
|---|--|

[30] It is apparent in subsection 24(2) that the PSC has the exclusive authority to make appointments and authorize as well as impose conditions on the sub-delegation of authority to make appointments. The PSC can also remove the delegation just as it can remove the authority to sub-delegate this power. Consequently, it is clearly apparent in the Act that the exercise of the appointment authority, its delegation and their supervision are the responsibility of the PSC and not the Tribunal and that therefore this second action of the order infringes on the exclusive jurisdiction of the PSC to authorize the sub-delegation of the power of appointment and to ensure its supervision.

[31] The reason underlying this corrective action is a negative assumption that the manager will act in a manner contrary to her obligations during future appointment processes. However, it must be assumed that the manager will act in good faith with full awareness of her responsibilities and obligations, and that, even though she allegedly abused her discretionary authority on one occasion, she will not abuse it in the future. If this were not the case, every new internal appointment

subsequently made by the manager could be the subject of a complaint to the Tribunal, while every external appointment would be subject to an investigation and the supervision authority of the PSC.

*Action III – Provide training to the manager*

[32] The *Financial Administration Act* (FAA) already provides as follows:

**12.** (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,

(a) determine the learning, training and development requirements of persons employed in the public service and fix the terms on which the learning, training and development may be carried out;

**12.** (1) Sous réserve des alinéas 11.1(1)f) et g), chaque administrateur général peut, à l'égard du secteur de l'administration publique centrale dont il est responsable :

a) déterminer les besoins en matière d'apprentissage, de formation et de perfectionnement des personnes employées dans la fonction publique et fixer les conditions de mise en œuvre de cet apprentissage, de cette formation et de ce perfectionnement;

[33] The authority given to the Tribunal by the Act to hear complaints of abuse of authority related to appointment processes as is the case here does not give it the right to interfere in the authority conferred by the FAA as stated above. By means of its decision, the Tribunal can very well make the deputy head aware of an incident, but it cannot with an order take the place of the PSC, the deputy head or the employer in determining whether corrective action must be taken outside of the specific context of the complaint before it.

V. Conclusion

[34] Since the applicant is not challenging the Tribunal's finding on the fact that the manager abused her discretionary authority, the Court does not have to rule on this finding.

[35] However, even in admitting that there was an abuse of authority in the appointment process that was the subject of the two complaints, for the reasons already given, the Court must find that the three corrective actions ordered are not entitled to deference by this Court; not only are they ill-founded in fact and in law, and therefore unreasonable, but they also considerably exceed the jurisdiction of the Tribunal.

[36] The corrective actions will therefore be set aside; since the Tribunal recognizes that its first finding can be a sanction in itself, and there is no appropriate corrective action other than those already ordered, the Court does not see the usefulness of returning the complaints to the Tribunal to order what it did not find appropriate in this case to order by way of other corrective action.



**JUDGMENT**

**FOR THESE REASONS, THE COURT:**

**ALLOWS** in part the application for judicial review with costs;

**SETS ASIDE** the corrective action ordered by the Public Service Staffing Tribunal in its decision dated June 20, 2008.

“Maurice E. Lagacé”

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Deputy Judge

Certified true translation  
Janine Anderson, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1119-08

**STYLE OF CAUSE:** ATTORNEY GENERAL OF CANADA v. DIANE CAMERON ET AL

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** May 6, 2009

**REASONS FOR JUDGMENT AND JUDGMENT:** LAGACÉ D.J.

**DATED:** June 10, 2009

**APPEARANCES:**

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