

Date: 20060815

Docket: T-1006-05

Citation: 2006 FC 983

Ottawa, Ontario, August 15, 2006

Present: The Honourable Madam Justice Johanne Gauthier

BETWEEN:

JOHANNE BELZILE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1007-05

AND BETWEEN:

NATHALIE BOUTHOT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1008-05

AND BETWEEN:

JOSÉE CARON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1009-05

AND BETWEEN:

MARTYNE GUIMOND

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-1010-05

AND BETWEEN:

DIANE PERRON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] The Court jointly heard five applications for judicial review presented by public service employees, each one of whom was the subject of an inquiry under subsections 6(2) and 6(3) of the *Public Service Employment Act*, R.S.C., 1985, c. P-33 (the Act). Following this inquiry, the Public Service Commission (PSC) revoked their appointments because they did not respect the conditions specified by the Health Canada delegation of authority under which they were authorized. In addition, the PSC decided not to reappoint them to another position in the federal Public Service.

[2] The applicants contested the legality of these decisions, especially those by which they were not reappointed to other positions. They submitted that the PSC breached its duty of procedural fairness because, *inter alia*, it did not give sufficient reasons for its decisions and, in the alternative, because these decisions were arbitrary and patently unreasonable in light of the findings of the inquiries.

[3] For the following reasons, the Court has concluded that, except for in docket T-1009-05 (Martyne Guimond), the PSC's decisions not to appoint the applicants to other positions in the public service must be quashed.

FACTS¹

[4] From 1998 to 1999, the applicants had been hired as temporary staff at the Centre of Excellence for Shared Pay and Benefits Services (CESPBS), an organization jointly developed by Health Canada, Public Works and Government Services Canada (PWGSC) and the PSC in the spring of 1998. The goal of CEPBS was to offer pay and fringe benefits services to its client departments. From 1996 to 1998, CEPBS accepted several large-scale projects, including the Veterans' Hospital and projects for Citizenship and Immigration Canada.

[5] All of the applicants were related in some way to the person in charge of staffing for CEPBS (neighbour, sister-in-law, friend of a nephew, etc.). Their initial periods of employment were extended on several occasions, and they received various promotions.²

[6] When Treasury Board's *Long Term Specified Period Employment Policy* came into force on April 1, 2003, the applicant had held term employment for a total of three years without any interruption in service for 60 consecutive calendar days. To comply with this policy, in March 2003, the newly appointed Director of Human Resources at Health Canada certified that the applicants met the applicable quality standards, and the five applicants were offered indeterminate appointments to their respective substantive positions.

¹ The Court did not consider new facts to which the applicants referred in their additional written submissions because, as underlined by the respondent, there is no evidence on this point in the applicants' records.

² At least ten other persons without any connection to the person in charge were hired by the CEPBS according to the same methods (paragraph 195 of Mr. Garceau's report. These persons do not appear to have been the subject of an inquiry.

[7] In April 2003, PWGSC became responsible for CESPBS, thereby replacing Health Canada. Therefore, the five employees reported to this department when the inquiries were conducted and when the impugned decisions were rendered.

[8] At the beginning of 2003, the Regional Office of the PSC received an informal complaint from employees of Health Canada. They claimed that some employees of CESPBS had benefited from nepotism and bureaucratic favouritism when they were hired. Only one employee made a formal complaint to the PSC. In her complaint, she alleged that six employees—the applicants and another person who had since resigned from the federal public service—had an advantage when they were appointed because of their relationship with a manager at CESPBS.

[9] The results of an internal inquiry conducted by Health Canada at the request of the PSC showed that there had not been any nepotism or favouritism. The Recourse Branch of the PSC then assigned Denis Garceau to conduct a second inquiry under section 7.1 of the Act. This inquiry was conducted from March to December 2003. In his report, Mr. Garceau concluded there had been major shortcomings in the casual and term appointments of the employees in question.

[10] In its Record of Decision No. 04-02-RB-244, the PSC ordered Health Canada to improve the quality of its internal investigation procedures and take concrete measures to exercise greater control over casual and term employment. It also ordered PSGSC to remind the manager involved about the rules related to the hiring of family members and friends.

[11] It also ordered PWGSC to ensure that this manager, who was still with CESPBS, would no longer sit on selection committees or exercise any delegated authority over staffing. She was to receive new training on staffing and professional ethics and was to no longer have any supervisory responsibilities with respect to the persons involved in the inquiry. In addition to other corrective measures, the PSC ordered investigations under subsections 6(2) and (3) of the Act into the appointments that were the subject of Mr. Garceau's inquiry report.

[12] Three boards of inquiry were appointed. They were given a mandate to conduct an inquiry and make recommendations concerning the possibility of revoking the appointments of the applicants on a ground set out in subparagraphs 6(2)(a) and 6(2)(b) of the Act, which read as follows:

(2) Par dérogation aux autres dispositions de la présente loi mais sous réserve du paragraphe (3), la Commission révoque ou empêche la nomination - externe ou interne - d'une personne à un poste de la fonction publique lorsque, selon elle :

- a. cette personne ne possède pas les qualités nécessaires pour s'acquitter des fonctions du poste auquel elle a été - ou est sur le point d'être - nommée en vertu d'une délégation de pouvoirs accordée au titre du présent article;
- b. la nomination contrevient aux conditions fixées à la délégation de pouvoirs par laquelle elle a été autorisée.

(2) Where the Commission is of the opinion

- a. that a person who has been or is about to be appointed to or from within the Public Service pursuant to the authority granted by it under this section does not have the qualifications that are necessary to perform the duties of the position the person occupies or would occupy, or
- b. that the appointment of a person to or from within the Public Service pursuant to the authority granted by it under this section has been or would

be in contravention of the terms and conditions under which the authority was granted,

La Commission peut ensuite nommer cette personne à un niveau qu'elle juge en rapport avec ses qualifications.

the Commission, notwithstanding anything in this Act but subject to subsection (3), shall revoke the appointment or direct that the appointment not be made, as the case may be, and may thereupon appoint that person at a level that in the opinion of the Commission is commensurate with the qualifications of that person.

[13] On this point, it should be noted that subsection 6(3) of the Act provides as follows:

3) Dans le cas d'une nomination - interne ou externe -, l'exercice par la Commission du pouvoir de révocation prévu au paragraphe (2) est subordonné à la recommandation d'un comité chargé par elle de faire une enquête au cours de laquelle le fonctionnaire et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

(3) An appointment to or from within the Public Service may be revoked by the Commission pursuant to subsection (2) only on the recommendation of a board established by the Commission to conduct an inquiry at which the employee and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.

[14] In addition, the PSC gave the boards of inquiry instructions to make a recommendation about the possibility of nominating the applicants to other positions within the Public Service commensurate with their qualifications (subsection 6(2) *in fine*).

[15] On April 16, 2004, the Clerk of the PSC advised each of the applicants by letter that inquiries would be held. These letters mentioned that the applicants would have the chance to be heard and could be assisted. A document entitled "Boards of Inquiry—Terms of Reference and

Procedures” was enclosed (page 200, Book of Excerpts) with these letters, which also mentioned the following:

[TRANSLATION]

I would stress that if the board of inquiry concludes your appointments did not respect the principles of selection according to merit and the provisions of the *Public Service Employment Act*, the investigator may, if required, recommend the revocation of one or several appointments and your appointment to another position in the Public Service considered by the Commission to be commensurate with your qualifications. [Emphasis added.]

[16] In addition, the applicants were told to attend a meeting scheduled for May 10, 2004, during which [TRANSLATION] “the investigators will explain the procedures of the board of inquiry and will answer your questions concerning how the board operates”. The applicants attended this meeting as well as other meetings scheduled by the boards of investigation. A union representative accompanied them at these meetings.

[17] Given that there were facts that were common to all six inquiries (one concerned Ms. Dumais, who is not an applicant), the first hearing was held jointly on May 10, 2004. Other joint hearings were subsequently held, as were separate hearings before each of the boards of inquiry.

[18] On March 18, 2005, the chairpersons of the boards of inquiry, Ginette Trottier (Johanne Belzile, Josée Caron), Nathalie Leblanc (Nathalie Bouthot, Martyne Guimond) and Adrian Rys (Diane Perron), submitted their reports to the PSC. Naturally, because they deal with different appointments and facts, they are not identical, but many paragraphs and especially the conclusions are identical.

[19] The boards concluded that the first term appointments and the subsequent appointments of each of the applicants were made contrary to the terms and conditions under which the delegation of authority from PSC to Health Canada had been made, and that these appointments had not been made according to the principles of selection according to merit.

[20] In all the cases, the reports underlined the fact that the information collected by the boards of inquiry showed that there was no evidence that the applicants were qualified for the positions to which they had been appointed during their employment with Health Canada, and that the Department did not respect the Public Service of Canada's fundamental values regarding staffing, given the way in which the applicants were hired and the approach used in doing so.

[21] However, it was stated in each one of the reports that [TRANSLATION] "the applicants are not responsible for the Department's irregularities as revealed by the boards of inquiry, since they were not in a position to know if the decisions made by the Department were legal and in compliance with staffing procedures".

[22] All the boards recommended that the appointments of the applicants be revoked under subsection 6(2) of the Act.

[23] As far as the second part of their terms of reference are concerned, the reports of the boards did not contain many details. The assessments conducted by PWGSC were not reproduced.

However, even though these assessments were quite distinct for each of the applicants, each of the reports concluded as follows:

[TRANSLATION]

At present, I cannot recommend that she be appointed to another position commensurate with her qualifications. A request for the assessment of the candidate had been made to the department now responsible for CESPBS (PWGSC), but the information on record does not warrant this alternative.

[24] In every one of these cases, the PSC released a record of decision in which it specified the following:

The Commission hereby accepts the findings of the Board of Inquiry report . . . and, pursuant to its authority under subsection 6(3) of the *Public Service Employment Act*, revokes the indeterminate appointment of Ms. . . .

This revocation is based on the finding that her appointments contravened the terms and conditions of the delegation of authority to Health Canada by which these appointments were made. The revocation will thus take effect fourteen (14) calendar days after the signature of this decision.

Furthermore, pursuant to its discretionary authority under subsection 6(2) of the Act, the Commission decides not to appoint Ms. . . . to another position in the federal Public Service.

[25] In each of the cases before me, there is only an affidavit by Denise Fortin, a legal assistant.

This affidavit is essentially used to file the certified record of the decision-maker.

[26] The parties did not file any affidavit about what had been done and said³ about the appointment of the applicants to other positions, in spite of the fact this was the crux of the matter in dispute. Accordingly, the Court directed the parties to supply additional information about what was said at the various meetings held by the boards of investigation concerning the procedure to be followed and the information required by these boards of inquiry in connection with these appointments. The Court also wanted to clarify whether the applicants had permission to make written submissions following the hearings, given that PWGSC's assessments had not been filed at the hearings before the boards and that the letter dated July 12 (see paragraph 28 below) does not mention whether the applicants had received a copy.

[27] The respondent's additional submissions on this point show that, at the initial meeting on May 10, 2004, the board chairpersons held a round table discussion and advised the parties that they would have a chance to cross-examine each of the witnesses.⁴ The only relevant discussions presented to the Court were the following:

[TRANSLATION]

Ms. Brault (representing Public Works): Would it be possible for PWGSC to intervene and make its recommendations at the end of the inquiries and before the final conclusions are made?

Mr. Rys (Chairman of the Board of Inquiry): In case our conclusion is to recommend revocation?

Ms. Brault: Yes.

³ The audio recordings of the hearing were filed and are part of the certified record, but no transcript was given to the Court.

⁴ The daily sheet used by Chairwoman Nathalie Leblanc to explain the procedure is reproduced at page 80 of the applicant's record in T-1009-05 (Martine Guimond). It does not specifically deal with this aspect.

Mr. Rys: . . . You may make a recommendation for reappointment. There's no problem.

. . .

(Cassette No. 1, May 10, Side A)

Mr. Rys (Chairman): According to our terms of reference, we are to conduct an inquiry into the appointments, and the second part of our terms of reference is, if necessary, to make a recommendation about deployment, reappointment to other positions of the persons revoked, if this is necessary, depending on our findings in the first part of our terms of reference. According to our terms of reference, we must have something to be able to make a recommendation about the reappointment of the employees. I know that you are not in a position to give us something right now, but you have two choices: one choice would be to identify the positions for which the employees are qualified and to which they could be deployed in case we recommend revoking the appointments and to give us assessments of the qualifications for these positions and to give them to us in writing following the hearings. If it is impossible to identify such positions, you may give us a general assessment of these employees, which we could use as a basis to make a recommendation in our report if the Commission considers appointing these employees to positions as they become available at such a group and a level. I think that it is better to identify a specific position because it is easier, but I understand that it is impossible to do so right away. If you are unable to give us something on which we can base our recommendation, we cannot make such a recommendation. [Translated as reproduced in the original]

Ms. Brault (representing Public Works): I understand completely. [Emphasis added]

(Cassette No. 2, May 10, Side A)

[28] Following this discussion, PWGSC supplied the assessments of the applicants in a letter from Normand Couture, dated July 12, 2004. It is to this evidence that the reports of the inquiry cited at paragraph 23, *supra*, refer.

[29] Even though all the files which the PSC (and the boards of inquiry) had on hand were filed in the records of the applicants, nothing shows that this letter dated July 12 or the enclosed assessments were disclosed to each one of the applicants and that they had a chance to answer them. As well, nothing showed that the boards of investigation or the PSC had advised the applicants or PWGSC that the information received was insufficient to allow them to make a recommendation about reappointment.

ISSUES

[30] In their memoranda, the applicants stated that the PSC did not provide sufficiently detailed reasons for its decision and that it had not taken into consideration the evidence on record, which showed that they were certainly qualified to hold a position within the Public Service. By doing so, the PSC allegedly made an error of mixed fact and law or an error of law in refusing to exercise its discretion.

[31] At the hearing and in their additional written submissions, the applicants corrected their line of argument and specified that the PSC failure to sufficiently support its decision was a breach of its duty of procedural fairness. The same was alleged with regard to its failure to advise them that the PWGSC assessments were deficient.

[32] Therefore, the issues to be decided are the following:

- i) Did the PSC breach its duty of fairness?

- ii) Are the decisions of the PSC not to appoint the applicants to positions for which they were qualified patently unreasonable?

[33] The Court is not required to conduct a functional and pragmatic analysis when the issue raised is one of procedural fairness. As a general rule, if the PSC breached its duty of procedural fairness, the Court must quash the decision.

[34] However, if the decisions are sufficiently supported by reasons and do not otherwise show that the PSC did not act fairly, the Court will have to determine if they are warranted. This would normally require a functional and pragmatic analysis to determine the standard of review applicable to such an issue. However, since the Court is satisfied that the decision does not meet the standard requiring the greatest possible degree of deference, namely that of patent unreasonableness, it is not necessary to conduct such an analysis.

[35] As I have mentioned, the applicants submitted that the PSC's decision is not sufficiently supported by reasons, as the boards simply concluded that they were not at that time ("at present") in a position to make a recommendation. The conclusion is based solely on the PWGSC assessments and does not take any other evidence into consideration. The PSC did not explain in what way the assessments were deficient.

[36] Contrary to the decision to revoke the appointments under subsection 6(2) of the Act, which is subject to the condition precedent of a recommendation of revocation made by the board of

inquiry, the PSC had the chance to complete the record and obtain missing information from PWGSC or other third parties.

[37] In these circumstances, the PSC even had the duty to advise PWGSC and the applicants of the problem and allow them to remedy the deficiencies identified, if possible.

[38] In its memorandum, the respondent confirms this interpretation, stating the following:

[TRANSLATION]

Having considered the assessment submitted by PWGSC to allow it to recommend an appointment to another position within the Public Service, the board of inquiry can only note that no information was submitted to it that would allow it to assess Johanne Belzile's qualifications to hold employment in the federal public service⁵

[Emphasis added]

[39] In addition, the respondent submitted that the burden of proof was on the applicants. Considering subsection 6(2) of the Act, the letter dated April 16 and the explanations given to them, they knew or should have known that the PSC could not appoint them to another position unless it determined that they were qualified for a specific position. On this point, the respondent noted in its additional written submissions that, under subsection 3(2) of the Staffing Manual, the PSC delegated its authority to the general administrator, who must determine the required qualifications and the conditions of employment for a position. This provision also refers to a competition and to a selection committee.

⁵ This paragraph of the respondent's memorandum in T-1006-05 is found in all of the cases.

[40] At the hearing, the respondent also argued that the conclusion reached by the boards of inquiry must be considered to be a negative conclusion based on the fact that the assessments submitted by PWGSC did not warrant a positive recommendation.

[41] The Court notes that this second interpretation seems to completely ignore the first sentence of the conclusion. It is obvious that this new interpretation is contrary to the one all the parties had adopted before the hearing. It does not conform to the understanding the Court has and at most shows that this conclusion is ambiguous.

[42] In any event, it is not at all clear that the respondent's interpretation adds anything when we consider the content of the information supplied by PWGSC in light of the explanations given by the boards of inquiry to the parties, including PWGSC, at the meeting on May 10.

[43] In its preamble, PWGSC explained the following:

[TRANSLATION]

PWGSC is using the competencies in the Employability Passport to assess the majority of the employees.

In the field of pay and benefits, six competencies are especially important:

- 1 Focus on service
- 2 Communication
- 3 Teamwork
- 4 Thinking and acting
- 5 Interpersonal relationships
- 6 Learning and moving forward

[44] The department then reached its conclusions about the skills of each of the applicants⁶ for a given group and level:

[TRANSLATION]

| | |
|---|--|
| Person's name | Josée Caron |
| Current group and level | Acting AS-02 appointment |
| Group and level of substantive position | CR-05 |
| Assessment | CESPBS has just finalized an AS-02 selection process where knowledge of pay and benefits and the six competencies referred to above were assessed. Ms. Caron ranked first in the competition. She was therefore able to demonstrate through an official competition that she is qualified for an AS-02 position. |

[45] Ms. Caron had advised the boards of inquiry that as a result of this competition she was qualified for an AS-02 position.

[TRANSLATION]

| | |
|---|--|
| Person's name | Johanne Belzile |
| Current group and level | AS-02 |
| Group and level of substantive position | CR-04 |
| Assessment | Ms. Belzile has been working as a pay and benefits advisor since she arrived at PWGSC. We cannot assess her at the CR-04 group and level. However, in performing her current duties, she meets our requirements in relation to the competencies referred to above. In this respect, we can consider her to meet the requirements at a lower level. |

⁶ With regard to Josée Dumais, the other employee who was the subject of an inquiry, PWGSC stated that it did not assess her, given that she left her employment on March 31, 2004.

[46] In addition to this information, paragraph 115 shows that the report of the inquiry in Ms. Belzile's case contained a written assessment dated October 8, 2002, in which it was mentioned that, after Ms. Belzile was advised of some concerns regarding her behaviour (absences and personal telephone calls at work), significant changes were noted, and Ms. Belzile quickly met the established objectives. It seems that after two months of observation Ms. Belzile's supervisor was of the opinion that her performance was very satisfactory. However, the record contains some contradictory evidence, because in the report of the inquiry it was mentioned that during the inquiry Ms. Belzile held an AS-01 position and did not qualify in the AS-02 competition. However, as mentioned in its report, the board of inquiry did not refer to this evidence.

[47] With regard to Diane Perron and Nathalie Bouthot, PWGSC stated the following:

[TRANSLATION]

| | |
|---|---|
| Person's name | Diane Perron |
| Current group and level | AS-01 |
| Group and level of substantive position | CR-05 |
| Assessment | Ms. Perron has been working as a pay and benefits trainee since she arrived at PWGSC. We cannot assess her at the CR-05 group and level. However, the CR-05 group and level is comparable to the AS-01 level in terms of salary. In this respect, we believe we can consider her to meet the requirements of the CR-05 group and level, which generally focusses more on transactional functions. |
| Person's name | Nathalie Bouthot |
| Current group and level | |
| Group and level of substantive position | CR-04 |

| | |
|------------|--|
| Assessment | Ms. Bouthot meets all the requirements with respect to the six competencies. She clearly demonstrates professionalism in her day-to-day work, in relations with both clients and colleagues. |
|------------|--|

[48] Finally, PWGSC gave a negative assessment of Martyne Guimond as follows:

[TRANSLATION]

| | |
|---|--|
| Person's name | Martyne Guimond |
| Current group and level | CR-05 |
| Group and level of substantive position | CR-05 |
| Assessment | Martine Guimond was an acting AS-02 until January 2004. Following an assessment of unsatisfactory performance, she returned to her position as a CR-05 compensation assistant in January and began extended sick leave on January 28, 2004. For this reason, we are unable to assess Ms. Guimond's performance of her CR-05 duties. However, the identified shortcomings that led to the termination of her acting appointment pertain to competencies that are also required at the CR-05 level, namely, focus on service, thinking and acting, and teamwork. |

[49] It should be remembered that on May 10 the chairpersons of the boards of inquiry mentioned to PWGSC that the Department had two choices: to assess the applicants for specific positions to which they could be deployed or to make a general assessment for a given group and level that would allow PSC to appoint them, if it intended to do so, to positions that could eventually become available at these groups and levels.

[50] With this in mind, it seems illogical and patently unreasonable to conclude that the information supplied, for example, for Ms. Caron, who placed first in the AS-02 competition (presumably qualifying her for a permanent appointment to the specific position that she had been holding on an acting basis), was insufficient for the board to make a recommendation.

[51] The respondent was unable to give a valid explanation on this point. However, the respondent did note that the allegations of nepotism and favouritism to which Mr. Garceau referred in his report could warrant the decision rendered by the PSC.

[52] In these cases, the Court does not have to decide if the PSC could render its decision on such a basis, as this is not what it relied on here. It rendered its decision on the basis of the conclusions reached by the boards of investigation, which did not in any way deal with this issue when they drew their conclusions on this aspect of their terms of reference.

[53] It is obvious that PWGSC was of the view that applicants Belisle, Bouthot and Perron also had the skills required to hold positions at a given group and level. Because the same text had been used in all the reports, including the report concerning Ms. Caron, the reasons do not allow us to determine whether it was the nature or the quality of the assessments of these persons that was insufficient. For example, was PWGSC required to assess the applicants through a competition? The Court cannot answer this question, considering the explanations given on May 10, which simply referred to a general assessment and to the assessment applicable to Ms. Caron.

[54] Martyne Guimond is the only applicant for whom the conclusion reached by the board of inquiry was not illogical or patently unreasonable, considering the information to which it referred. In this case, the conclusion to the effect that the information received from PWGSC did not warrant a positive recommendation or was insufficient to warrant any recommendation at all was perfectly reasonable. In fact, PWGSC specified that the performance of this employee was not satisfactory and that she did not have the qualifications deemed necessary for either of the two groups considered, that is, CR-05 or AS-02.

[55] The Court also notes that if, as the respondent states, only the general administrator with delegated staffing authority in a given department may determine the qualifications and conditions of a position and assess the candidates, it is obvious that PWGSC and the PSC had more information on this point than did the applicants.

[56] It is not up to the Court to determine whether in all cases in which the information supplied by the employer is insufficient the boards of inquiry or the PSC have the obligation to obtain additional information.

[57] The content of the duty of procedural fairness of the PSC varies according to the context. Considering the information that was supplied on May 10 to the applicants, to Health Canada and to PWGSC, the Court is satisfied that if, as was mentioned by the respondent, PWGSC had to conduct a specific assessment (competitions or other procedures) for specific positions to which the applicants could be deployed, the PSC should have given PWGSC and the applicants (except for Martyne Guimond) the chance to update the assessments submitted in July. The concerned parties

had to know precisely what they had to supply to the boards of inquiry and to the PSC so that it could exercise its discretion. In reaching this conclusion, the Court took into consideration the five factors mentioned in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[58] The first factor is the nature of the decision being made and the process followed in making it. The role of the PSC, to which the government gave exclusive jurisdiction in staffing matters, is to ensure that the persons to whom it delegates its authority by agreement do not abuse it and that they respect the principles of merit and impartiality. The process specified in subsections 6(2) and 6(3) of the Act gives the PSC a means of exercising control and dealing severely with cases of abuse.

[59] Revocation under paragraph 6(2)(b) may have dramatic consequences for the employee in question. Therefore, Parliament provided that the authority to revoke cannot be exercised without an inquiry and a positive recommendation to this effect.

[60] It may be presumed that part of the reason why Parliament gave the PSC the power to reappoint employees to positions commensurate with their aptitudes was to protect innocent victims of the abusive practices of the authority to whom the PSC delegated its staffing powers. In this regard, the Act ensures that the PSC has elbow room. Nothing shows that it must use the process provided for in subsection 6(3) of the Act. Although the only criterion mentioned in the Act is competency, it is quite clear that transparency and impartiality are part of the principles that are to guide the PSC in the exercise of its authority.

[61] The second factor is the statutory scheme. The Act does not provide for a right of appeal, and this argues in favour of greater procedural protection.

[62] Thirdly, the rigour of procedural protections is often proportional to the impact of the decision on the person concerned. The applicants do not have the right to be reappointed to another position. This is a privilege. However, there is no doubt that the decision of the PSC not to reappoint them has significant and serious consequences for the applicants.

[63] The fourth factor, legitimate expectations, warrants increased procedural protection. In this case, although it was not required to do so, the PSC chose to use the same process as for revocation by instructing the boards of inquiry to make recommendations concerning compensation.

[64] The PSC mentioned at paragraph 7 of the document dated January 1990 describing the terms of reference and procedure of the boards of inquiry that the report of the inquiry was to be sent directly to it,⁷ as the PSC was to analyze it on the basis of the observations and comments made by the parties, if applicable, and make a decision as soon as possible. Even if no specific promise was made on this point, considering the explanations given on May 10 and the content of the PWGSC assessments, the parties could legitimately expect that the PSC or the boards of inquiry would contact them if, for example, contrary to what was said to them, the assessments received necessarily had to concern specific positions and the applicants had to be assessed by a selection committee as part of a competition process.

⁷ The parties apparently do not receive a copy before a final decision is rendered by the PSC.

[65] As regards the fifth factor, the nature of the deference due to the decision-maker, it is obvious that the PSC has more expertise in staffing matters than the Court. However, the procedure it chose shows that it acknowledges the right of the parties to fully participate in the decision-making process on this point. In some cases, it accepts that additional comments and observations will be required to allow it to make an informed decision, even after receiving the report of the board of inquiry.

[66] On the basis of these same factors, the Court is also of the view that the reasons for decision of the PSC (which include the conclusions of the reports of the boards of inquiry) are insufficient to allow the applicants (except for Martyne Guimond) and the Court to determine what was missing in the assessments supplied by PWGSC or to assess the legality of the decision.

[67] The Court notes that it would be appropriate for the PSC to specify to the union representatives and the employees concerned what information is to be supplied so that it can exercise its discretion and how the assessment of the employees' aptitudes is to be conducted.

ORDER

THE COURT ORDERS that:

1. Except in T-1009-05, the applications for judicial review are allowed with costs.
2. The decisions of the PSC not to appoint Johanne Belzile, Josée Caron, Nathalie Bouthot and Diane Perron to another position are quashed.
3. The PSC shall reconsider this matter in respect of the applicants after having given them and PWGSC the opportunity to provide assessments and additional submissions on this point.

“Johanne Gauthier”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

Docket: **T-1006-05**

CITATION: JOHANNE BELZILE v. ATTORNEY GENERAL
OF CANADA

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OF CANADA

Docket: **T-1010-05**

CITATION: DIANE PERRON v. ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: Ottawa

DATE OF HEARING: March 27, 2006

REASONS FOR ORDER BY: The Honourable Madam Justice GAUTHIER

DATED: August 15, 2006

APPEARANCES:

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FOR THE APPLICANTS

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FOR THE RESPONDENT

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