

FILE: 2006-0071

OTTAWA, DECEMBER 7, 2006

JOHN CHARLTON

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER Determination of jurisdiction

DECISION The complaint is dismissed

DECISION RENDERED BY Merri Beattie, Member

LANGUAGE OF DECISION English

INDEXED *Charlton v. Deputy Minister of National Defence et al.*

NEUTRAL CITATION 2006 PSST 0018

REASONS FOR DECISION

INTRODUCTION

[1] The Public Service Staffing Tribunal (the Tribunal) has been asked to decide whether it has jurisdiction to consider a complaint filed pursuant to subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22. s. 12, 13 (the *PSEA*) concerning an appointment within the Department of National Defence (the DND).

BACKGROUND

[2] On July 6, 2006, the DND issued a notice which announced the appointment or proposed appointment of Gordon Williams to the position of Steamfitter/Lagger at the GL-PIP 09 group and level, as a result of a non-advertised appointment process (number 06-DND-INA-GRNWD-050124).

[3] The notice informed those in the area of selection that they could file a complaint to the Tribunal by July 21, 2006.

[4] On July 20, 2006, John Charlton, the complainant, filed a complaint with the Tribunal.

[5] After receiving an extension of the time limit, the complainant filed allegations on October 2, 2006.

[6] On October 17, 2006, the reply to the allegations was provided on behalf of the Deputy Minister of National Defence, the respondent.

[7] Mr. Williams' work description was rewritten in July 2005 and submitted for classification in August 2005. A classification decision was provided in March 2006.

[8] Following receipt of the classification decision, Mr. Williams was assessed against the statement of merit criteria and his appointment was announced in July 2006.

ISSUES

[9] In its reply to the complainant's allegations, the respondent raised two separate challenges to the Tribunal's jurisdiction.

(i) Was the appointment process conducted under the *PSEA* or the previous legislative framework, namely, the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as amended (the former PSEA)?

(ii) If the appointment process was conducted under the *PSEA*, is the complaint based on a ground of complaint provided in subsection 77(1) of the *PSEA*?

SUBMISSIONS OF PARTIES

[10] First, the respondent submits that this complaint is outside the jurisdiction of the Tribunal because the appointment process was conducted under the former PSEA. The respondent submits that the appointment process was initiated in March 2005, when management assigned the additional duties of steam fitting to Mr. Williams.

[11] The respondent further submits that the formal assessment of Mr. Williams against the statement of merit criteria, which was done in March 2006, was the final step in the appointment process that began in March 2005.

[12] The respondent refers to the Tribunal's decision in the case of *Schellenberg and Nyst v. Deputy Minister of National Defence et al.*, 2006 PSST 0005, where the Tribunal found that management had effectively made a selection for appointment when it had assigned additional duties to an

employee, which was followed by formal classification and appointment-related steps.

[13] Secondly, the respondent submits that this complaint is not based on one of the grounds for complaint provided in subsection 77(1) of the *PSEA* and is therefore not within the jurisdiction of the Tribunal. The respondent submits that this complaint concerns the complainant's dissatisfaction with his work description and/or the classification of his position.

[14] The complainant submits that he filed his complaint to the Tribunal in accordance with instructions from the DND.

[15] The complainant does not dispute the respondent's statement that Mr. Williams was assigned additional steam fitting duties in March 2005. Nor does the complainant dispute the timing of the rewriting of Mr. Williams' work description. In his complaint, he states that in July 2005 he had knowledge that Mr. Williams' work description had been revised.

[16] The complainant submits that if the wrong recourse was sought, namely, filing a complaint to the Tribunal, it was because of the DND's error. The DND made use of the new system and so he also used the new system, filing a complaint to the Tribunal instead of an appeal to the Public Service Commission (the PSC).

[17] In its reply to the complainant's allegations, the PSC agrees with the respondent's submission with respect to the timing of the appointment process and the effect of that timing on the Tribunal's jurisdiction.

ANALYSIS

Issue I: Was the appointment process conducted under the *PSEA* or the previous legislative framework, namely, the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as amended (the former PSEA)?

[18] Section 70 of Part 5 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (the *PSMA*) provides for a transition from the former PSEA to the *PSEA*, without disruption to appointment processes already underway at the time of the coming into force of the new legislation. Section 70 of the *PSMA* reads as follows:

70. The coming into force of subsection 29(1) of the new Act does not affect any competition or other selection process being conducted under the amended Act.

[19] The question of whether an appointment is made in accordance with the former PSEA or the *PSEA* turns on whether a selection process was being conducted at the time of the coming into force of the new legislation, namely, December 31, 2005.

[20] The Tribunal finds that the DND assigned additional steam fitter duties to Mr. Williams, rewrote his work description and submitted it for classification prior to December 31, 2005.

[21] While the position classification was formalized and Mr. Williams was formally assessed in March 2006, these were merely the final steps in an appointment process that began in 2005 and was being conducted on December 31, 2005. Therefore, in accordance with section 70 of the *PSMA*, the former PSEA is the governing legislation.

[22] The Tribunal notes with concern however the DND's issuance of a notice advising employees of the right to file a complaint to the Tribunal and its subsequent challenge to the Tribunal's jurisdiction to consider such a complaint. As the complainant explained in his submissions, he was simply following what he was told to do by the DND in terms of recourse.

[23] Clearly, an appointment has been made and, whether under the former PSEA or the *PSEA*, employees are intended to have recourse. That right should not be jeopardized because of any procedural uncertainty that may exist during this period of transition.

Issue II: If the appointment process was conducted under the *PSEA*, is the complaint based on a ground of complaint provided in subsection 77(1) of the *PSEA*?

[24] Having concluded that the appointment process was conducted under the former *PSEA*, it is not necessary that the Tribunal address this second jurisdictional issue raised by the respondent.

DECISION

[25] The Tribunal does not have jurisdiction to hear this complaint and the complaint is therefore dismissed.

Merri Beattie
Member

PARTIES OF RECORD

Tribunal File:	2006-0071
Style of Cause:	<i>John Charlton and the Deputy Minister of National Defence et al.</i>
Hearing:	Written request decided without the appearance of the parties
Date of Reasons:	December 7, 2006