



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**FILE: 2007-0055**

**OTTAWA, MARCH 12, 2007**

**GERARDO SUÀREZ**

**COMPLAINANT**

**AND**

**THE DEPUTY MINISTER OF HUMAN RESOURCES AND SOCIAL DEVELOPMENT CANADA**

**RESPONDENT**

**AND**

**OTHER PARTIES**

**MATTER** Request for extension of time

**DECISION** The complaint is dismissed

**DECISION RENDERED BY** Sonia Gaal, Vice-Chair

**LANGUAGE OF DECISION** English

**INDEXED** *Suárez v. Deputy Minister of Human Resources and Social Development Canada et al.*

**NEUTRAL CITATION** 2007 PSST 0008

## REASONS FOR DECISION

### INTRODUCTION

[1] The complainant, Mr. Gerardo Suárez, filed a complaint on January 19, 2007 under subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss.12, 13 (the *PSEA*) to the Public Service Staffing Tribunal (the Tribunal) regarding a non-advertised acting appointment (2006-SCD-ACIN-NHQ-22068).

### PRELIMINARY MATTERS

[2] On February 22, 2007, the respondent, the Deputy Minister of Human Resources and Social Development Canada, filed an objection that the complaint is untimely in accordance with subsection 10 (b) of the *Public Service Staffing Tribunal Regulations* SOR/2006-6 (the *PSST Regulations*).

[3] On March 1, 2007, the Tribunal informed the parties that the complaint is dismissed, with reasons to follow. These are the reasons.

### BACKGROUND

[4] On November 20, 2006, the complainant wrote to the Public Service Commission (the PSC) asking for an investigation about a non-advertised acting appointment taking place in his department. He asked to be directed to the proper authorities if this was not the proper area to take his concerns.

[5] On November 27, the respondent posted on *Publiservice* a notice of Information Regarding Acting Appointment concerning this appointment, with the information on how to file a complaint. The closing date to file a complaint was December 12.

[6] The complainant followed up with the PSC on November 30 noting that he had not received any form of acknowledgment and asking that the PSC let him know if he had sent it to the proper authorities.

[7] On December 5, he received a response from the PSC, “investigations-enquêtes,” informing him that his email had been forwarded to an Officer.

[8] The complainant wrote again to the PSC on December 18 expressing his concern that he had still not been contacted. He stated: “I was not entirely sure if I had contacted the proper area to handle this, and asked to be referred to the proper Department if it was not an area of expertise that dealt with this or to be provided with a contact.”

[9] On December 20, the PSC finally responded to his numerous emails and informed him that the proper recourse was through the Tribunal and referred him to the Tribunal’s website.

[10] The complainant wrote to the Tribunal on January 19, 2007 basically explaining the same facts that he had provided previously to the PSC on November 20. A Tribunal registry staff member left a voicemail message with the complainant on January 29, followed by an email on February 8 setting out the information needed in order for the Tribunal to acknowledge the complaint and forward it to the deputy head.

[11] The complainant provided the information on February 9, and requested an extension to file his complaint, explaining that it was not until December 20 that he received a response from the PSC. The complainant also said that he was on scheduled vacation from December 20, 2006 to January 9, 2007.

#### ISSUES

[12] The Tribunal must determine the following issues:

- (i) Does filing a complaint before the wrong forum suspend the timelines under section 10 of the *PSST Regulations*?
- (ii) Should the Tribunal exercise its discretion under section 5 of the *PSST Regulations* and grant the request for extension of time to file the complaint?

ARGUMENTS OF PARTIES

A) RESPONDENT'S POSITION

[13] The respondent objects to the extension of time to file the complaint. The respondent argues that once the *PSEA* came into force on December 31, 2005 all employees in the department were advised that every Notification of Appointment or Proposal of Appointment and Information Regarding Acting Appointment would be available through *Publiservice*. The respondent notes this was also the practice prior to December 31, 2005, under the previous system, where all competitions and appeals were also posted on *Publiservice*. Since the complainant was employed in the department at that time, he should have been aware of this procedure. The respondent submits that it is not responsible for the delay while the complainant was waiting for an answer from the PSC.

[14] Furthermore, the closing date to file a complaint was December 12, 2006; the complainant had thus sufficient time to file within that time period prior to his scheduled holidays that began on December 20.

B) COMPLAINANT'S POSITION

[15] The complainant submitted a response on February 28, 2007 to the respondent's objection that the complaint was filed outside the time limits.

[16] The complainant notes that when he filed his initial complaint on November 20, 2006, 14 weeks had passed since the appointment had been made and that the incumbent had started in the position in mid-April, 2006.

[17] He also states that no orientation program had been provided by the respondent "in regards to being made aware of certain procedures or of any recourse mechanism under the *PSEA*."

ANALYSIS

**Issue I:** Does filing a complaint before the wrong forum suspend the timelines under section 10 of the *PSST Regulations*?

[18] It is not disputed that the proper forum for the complaint is before the Tribunal under subsection 88(2) of the *PSEA*. The Tribunal's main jurisdiction to hear and determine complaints is found in the *PSEA* and the *PSST Regulations*.

[19] Section 10 of the *PSST Regulations* reads as follows:

**10.** A complaint by a person may be made to the *Tribunal*  
(a) except where paragraph (b) applies, no later than 15 days after the day on which the person receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; and  
(b) if the notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates is a public notice, no later than 15 days after the date of the notice.

(emphasis added)

[20] As the notice for this appointment process was posted on *Publiservice*, it is a public notice. The *PSST Regulations* are very clear that a complainant has no later than 15 days after the date of the notice to file a complaint to the Tribunal. Thus, the time limit of 15 days does not begin when the employee is aware or becomes aware of the recourse or the proper forum.

[21] In addition, there is no indication in the *PSEA* or the *PSST Regulations* that filing before the wrong forum, namely the PSC, interrupts the time limits before the Tribunal.

[22] The Tribunal's decision in *MacDonald v. Deputy Head Service Canada et al.*, [2006] PSST 0002, confirmed that the 15 days is a strict limit:

[6] As determined by the Federal Court of Appeal in *Allard v. Canada (Public Service Commission)*, [1982] 1 F.C. 432, and *Lalancette v. Canada (Public Service Commission Appeal Board)*, [1982] 1 F.C. 435, **the time limit to file a complaint is a strict limit**. A complaint is not brought merely by signing a complaint or giving such a complaint to a messenger; it should reach the Tribunal within the 15-day time limit...

(emphasis added)

[23] Section 9 of the *PSST Regulations* provides that no proceeding is invalid by reason only of a defect in form or a technical irregularity. However, filing a complaint outside the time limits or before the wrong forum cannot be viewed as a defect in form or a technical irregularity that can be corrected by the Tribunal. In fact, section 21 of the *PSST Regulations* establishes a process to be followed when there is an objection on timeliness for filing a complaint.

[24] Therefore, since this is a strict time limit and not a defect in form or a technical irregularity that can be corrected under section 9 of the *PSST Regulations*, the Tribunal finds that filing the complaint before the PSC cannot be construed as compliance with the *PSST Regulations* and, thus, does not suspend the timelines found in section 10 of the *PSST Regulations*.

[25] The Canada Industrial Relations Board has taken a similar approach in a number of decisions where individuals filed complaints before the wrong forum. The complaints filed against unions under section 37 of the *Canada Labour Code*, R.S. 1985, c. L-2, were found to be untimely. See, for example: *Winfield Porter*, [2002] CIRB no. 176 (QL); and, *Sylvain Gagné*, [2003] CIRB no. 254 (QL).

**Issue II:** Should the Tribunal exercise its discretion under section 5 of the *PSST Regulations* and grant the request for extension of time to file the complaint?

[26] Section 5 of the *PSST Regulations* reads as follows:

5. The Tribunal may, in the interest of fairness, extend any time specified in these Regulations.

[27] A complainant has a responsibility to file a complaint before the proper forum and within the timelines established in the *PSST Regulations*. If a complainant requests to file a complaint outside the time limits established in section 5 of the *PSST Regulations*, the complainant has the burden to prove that

he was diligent and that exceptional circumstances or reasons beyond his control prevented him from filing his complaint on time.

[28] In *Casper v. Deputy Minister of Citizenship and Immigration et al.*, [2006] PSST 0010, where the complainant relied on the department's previous notice system to justify her delay, the Tribunal wrote:

[22] It is important for the parties to know that the time limits are respected and adhered to in order for the process to function properly. In the interest of fairness, the Tribunal may extend the strict time limits for filing a complaint. The complainant has the onus of providing reasons for the request for extension. Unless there are exceptional circumstances to extend the time limits, the Tribunal will not grant an extension.

[29] The complainant's reasons for his request for an extension are essentially twofold and can be summarized as follows: first, he believed that the PSC may have been the proper forum for bringing his complaint, and the PSC delayed in informing him otherwise; secondly, his department failed to provide training on the new legislation and recourse procedures under the new system for complaints to the Tribunal.

[30] It is obvious the complainant had doubts since his first email on November 20, 2006 to the PSC about being before the proper forum. Yet, despite his concerns, it appears he did not make any further inquiries and basically waited for the PSC's answer. He does not explain why he did not pursue this with anyone else. By the time he received the PSC's email on December 20, one month had already elapsed.

[31] The Tribunal's decision in *Casper, supra*, addresses time limits and procedures and held:

[25] All complainants have a responsibility to ensure that they are fully aware of the time limits and procedures applicable to the Tribunal's complaint process. A failure on the part of a complainant to be so apprised, especially in the face of the information available from the Tribunal, does not qualify as an exceptional circumstance to warrant the granting of an extension of time.

[32] Furthermore, in its submissions, the respondent states that the notification process has not changed since December 31, 2005 as notices are still posted on *Publiservice*. The complainant provided no evidence to refute this. The complainant could have consulted *Publiservice* for the notice; there was no need to receive any additional training to perform such a search.

[33] Finally, even if the Tribunal accepted that the complainant was not aware of the proper forum for filing his complaint until December 20, 2006, he still waited almost one month before filing his complaint to the Tribunal on January 19, 2007. In fact, he filed 10 days after his return from vacation on January 9. The Tribunal would add that being on vacation does not qualify as a valid reason to extend the time limits. Again, he provided no explanation for this additional delay.

[34] The Tribunal is not satisfied that the complainant has met the onus here, especially since all the information is easily available on the government's web sites, in particular the Tribunal's website or through consultation with union representatives or an employee's human resources department.

[35] The Tribunal finds that the reasons provided by the complainant to support his request for an extension do not constitute exceptional circumstances or reasons beyond his control. It is inappropriate for the Tribunal to exercise its discretion in such a case.

#### DECISION

[36] The complaint is dismissed.

Sonia Gaal  
Vice-Chair



PARTIES OF RECORD

Tribunal File:	2007-0055
Style of Cause:	<i>Gerardo Suárez and the Deputy Minister of Human Resources and Social Development et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	March 12, 2007