



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2007-0028

OTTAWA, APRIL 20, 2007

DONATO TROCCHIA

COMPLAINANT

AND

THE DEPUTY MINISTER OF FOREIGN AFFAIRS

RESPONDENT

AND

OTHER PARTIES

MATTER Determination of jurisdiction

DECISION The complaint is dismissed

DECISION RENDERED BY Sonia Gaal, Vice-Chair

LANGUAGE OF DECISION English

INDEXED *Trocchia v. Deputy Minister of Foreign Affairs et al.*

NEUTRAL CITATION 2007 PSST 0014

REASONS FOR DECISION

INTRODUCTION

[1] The respondent, the Deputy Minister of Foreign Affairs, filed a motion to dismiss on March 20, 2007. The respondent submits that the Tribunal does not have jurisdiction to hear and determine the complaint as this is a process for locally-engaged staff outside Canada and is excluded from the operation of the *Public Service Employment Act*, S.C. 2003, c. C-22, ss. 12, 13 (the *PSEA*).

BACKGROUND

[2] On January 9, 2007, the complainant, Donato Trocchia, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under section 77 of the *PSEA*, c. C-22, ss. 12, 13.

[3] The complainant had been working as a Consular Assistant (LE-06) with the Canadian Consulate in Miami, Florida (United States). He applied for an internal advertised position as a Public Affairs Officer - Academic and Cultural Relations (LE-09) with the Miami Consulate General in Miami, in February 2006. The advertised position was open to all locally-engaged staff at the Miami Consulate General. The complainant was unsuccessful; another locally-engaged staff working at the Miami Consulate General was appointed to the position.

[4] The complainant alleges that he was denied a promotion because of his gender, colour and national origin. He also filed a complaint with the Canadian Human Rights Commission (the CHRC) in January 2007.

ISSUE

[5] Is the appointment of staff hired locally outside Canada subject to the *PSEA*?

ARGUMENTS OF PARTIES

A) RESPONDENT'S ARGUMENTS

[6] The respondent submits that the appointment process for this position was conducted entirely in Miami and is excluded from the operation and recourse available under the *PSEA*.

[7] The respondent provided a historical review of the legislation and regulations going back to 1967 to demonstrate that this category of employees is not subject to the *PSEA*. The respondent also provided a copy of Order in Council, P.C. 1967-444, which excluded from the application of the *Public Service Employment Act*, S.C. 1966-67, c. 71 (the former *PSEA*), effective March 13, 1967, "the positions of persons engaged locally outside Canada." The respondent submits that this Order in Council was never repealed or replaced.

[8] The main argument is that the exclusion of locally-engaged staff from the application of the former *PSEA* which was enacted in 1967 is still valid under the *PSEA*. This is reviewed in detail in the Analysis section of the decision.

B) COMPLAINANT'S ARGUMENTS

[9] The complainant's representative informed the Tribunal on April 4 that he would not respond to the motion as it appears that the Tribunal lacks jurisdiction and he will pursue the complaint before the CHRC.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[10] The Public Service Commission did not provide submissions on this motion.

ANALYSIS

[11] The former PSEA provided in section 39 that “(...) the Commission may, with the approval of the Governor in Council, exclude such position or person or class of positions or persons in whole or in part from the operation of this Act. (...)”

[12] The Order in Council, P.C. 1967-444, excluded from the operation of the *Public Service Employment Act* “positions of persons engaged locally outside Canada”. This Order in Council has not been repealed or replaced.

[13] Subsection 20(1) of the current *PSEA*, which came into force on December 30, 2005, also has a provision to allow the exclusion of positions or persons from the application of the *PSEA*. Its wording is similar to the wording of section 39 referenced in paragraph 11 above.

[14] The *Locally-Engaged Staff Employment Regulations*, SOR/95-152 (the *Regulations* SOR/95-152) provides for the hiring of staff outside Canada and includes topics such as delegation of powers, appointments, selection criteria, probation, lay-off and revocation of appointment. However, there is no mention of a recourse mechanism for such employees. *Regulations* SOR/95-152 has not been repealed or replaced.

[15] The Tribunal finds that *Regulations* SOR/95-152 and Order in Council P.C.1967-444 are still applicable by virtue of paragraph 44 (g) of the *Interpretation Act*, R.S. 1985, c. I-21, which reads as follows:

44. Where an enactment, in this section called the “former enactment”, is repealed and another enactment, in this section called the “new enactment”, is substituted therefor,

(...)

(g) all regulations made under the repealed enactment **remain in force and are deemed to have been made under the new enactment**, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead;

(emphasis added)

[16] The term “regulation” is defined in section 2 of the *Interpretation Act* and includes orders in council:

“Regulation” includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(a) in the execution of a power conferred by or under the authority of an Act, or

(b) by or under the authority of the Governor in Council;

[17] Since “the positions of persons engaged locally outside Canada” are still excluded from the application of the *PSEA*, the right to complain to the Tribunal found in section 77 of the *PSEA* when dealing with internal appointments under the *PSEA* is not available to those persons.

[18] The complainant, who applied for a local position in Miami, has, therefore, no legal right to file a complaint to the Tribunal and, accordingly, the Tribunal has no jurisdiction to hear and dispose of it.

[19] Although the respondent did not raise the timeliness of the complaint, the Tribunal believes it is also an issue that needs to be examined.

[20] The complainant filed his complaint approximately 11 months after the closing date of the competition. He explains he filed a complaint on May 11, 2006 before the Miami Dade County Equal Opportunity Board as he “attempted to have his legal claim heard in the United States, but the Canadian government has claimed sovereign immunity in those proceedings.” The complainant further submits that he filed his complaint to the Tribunal at the request of the CHRC where he had filed a complaint earlier in January 2007.

[21] The Tribunal found in *Suarez v. Deputy Minister of Human Resources and Social Development Canada et al.*, [2007] PSST 0008 that filing a complaint before the wrong forum does not interrupt the time limits found in the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*).

[22] Therefore, even if the complainant had the right to file a complaint before the Tribunal, the complaint would be dismissed as it is filed outside the time limits. The Tribunal finds that the reasons submitted to explain the delay do not constitute exceptional circumstances or a reason beyond his control which would justify the granting of an extension of time for filing his complaint under section 5 of the *PSST Regulations* in any event.

DECISION

[23] For all these reasons, the motion to dismiss the complaint is granted. Consequently, the complaint is dismissed.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal File:	2007-0028
Style of Cause:	<i>Donato Trocchia and the Deputy Minister of Foreign Affairs et al.</i>
Hearing:	Written request, decided without the appearance of parties
Date of Reasons:	April 20, 2007