

FILE: 2006-0291

OTTAWA, APRIL 23, 2007

BARBARA WARDLAW

COMPLAINANT

AND

**THE PRESIDENT OF THE PUBLIC SERVICE HUMAN RESOURCES MANAGEMENT
AGENCY OF CANADA**

RESPONDENT

AND

OTHER PARTIES

MATTER Application to intervene

DECISION Application is allowed

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION English

INDEXED *Wardlaw v. President of the Public Service Human
Resources Management Agency of Canada et al.*

NEUTRAL CITATION 2007 PSST 0017

REASONS FOR DECISION

INTRODUCTION

[1] The Public Service Alliance of Canada (the PSAC) has brought an application to intervene pursuant to section 19 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*), concerning a complaint to the Public Service Staffing Tribunal (the Tribunal).

BACKGROUND

[2] The Public Service Human Resources Management Agency of Canada (PSHRMAC) undertook an internal advertised appointment process (Selection Process No. 2006-HRH-SAD-33-254) to staff 12 Regional Field Coordinator positions (AS-05) in six regions for the PSAC-PSHRMAC Joint Learning Program (the JLP).

[3] The complainant, Barbara Wardlaw, works for Industry Canada in Sault Ste. Marie, Ontario. She participated in this appointment process and, while meeting the essential qualifications, was not selected for one of two positions for the Ontario Region.

[4] The complainant filed a complaint to the Tribunal on December 21, 2006. In her complaint, Ms. Wardlaw explained that she had self-identified in this appointment process as a member of the Ojibway First Nation. The complainant believes that there were cultural differences in communications between herself and the selection board which were neither acknowledged nor properly considered during the interview stage of the appointment process. As well, the complainant says that, by not having an aboriginal person on the selection board, the selection board was not representative. The complainant has alleged that the selection board discriminated against her in this appointment process.

[5] The complainant provided notice to the Canadian Human Rights Commission (the CHRC) as required under section 78 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) and section 20 of the *PSST Regulations* where a complaint raises an issue involving the interpretation or application of the *Canadian Human Rights Act*.

[6] On January 18, 2007 the CHRC provided notice to the Tribunal in accordance with subsection 20(3) of the *PSST Regulations* of its intention to make submissions regarding the issue involving the interpretation or application of the *Canadian Human Rights Act*.

[7] On March 6, 2007 the PSAC filed its application for intervenor status to the Tribunal in accordance with section 19 of the *PSST Regulations*.

ISSUE

[8] Should the PSAC be granted intervenor status and, if so, what are the directions regarding its role as an intervenor?

ARGUMENTS OF PARTIES

[9] The PSAC states that it is a co-sponsor of the JLP and an integral partner in its design and implementation and, therefore, it would be inappropriate and 'possibly unethical' to represent the complainant in this proceeding.

[10] The PSAC submits that, while the JLP is a unique joint initiative of the PSHRMAC and the bargaining agent, its interests with respect to the JLP are not identical to those of PSHRMAC. Moreover, the PSAC submits that this complaint raises significant issues of discrimination which have the potential to affect all its members in the public service and the PSAC has a markedly different perspective than PSHRMAC on these matters. Finally, the PSAC submits that the interests of the PSAC are directly affected since two members of its staff, who were members of the selection board, are likely to be called as witnesses.

[11] While the PSAC has suggested that it will likely limit its involvement at hearing to providing arguments in relation to the parties' submissions, it seeks to reserve the right to have full rights to participate, including examination and cross-examination of witnesses.

[12] The respondent, the President of PSHRMAC, objects to the application for intervenor status by the PSAC for the following reasons. First, it submits that, as the certified bargaining agent for the complainant and the appointees, the PSAC is entitled to represent these parties before the Tribunal and to fully participate as a party representative. The respondent goes further and asserts that the only role that the PSAC can have before the Tribunal is as a representative of a party. The respondent says that it understands that the PSAC has chosen not to represent the complainant nor the appointees and, by so choosing, has withdrawn itself as a participant in this proceeding.

[13] Secondly, the respondent submits that intervenor status is normally granted to protect the rights of those who are not parties, but who may be personally adversely affected by the outcome of the proceeding, and the PSAC has no such personal interest. Finally, the respondent submits that the PSAC's argument that the matters raised by this complaint have the potential to affect all its members is immaterial since all hearings and proceedings before the Tribunal raise issues that have a direct or potential bearing on every member of the PSAC, as well as all other employees who occupy positions in organizations subject to the *PSEA*.

[14] The Public Service Commission has no objection to the PSAC being granted intervenor status.

[15] While the complainant did not make representations to the Tribunal in respect of the application, she has stated that this issue is not addressing the concerns raised by her complaint. She also informed the Tribunal that she may have an Ojibway lawyer look into her complaint.

ANALYSIS

[16] Section 19 of the *PSST Regulations* specifies the form and content for an application for intervenor status and the criteria which the Tribunal will consider.

[17] The criteria can be found in subsections 19(1) and 19(4) of the *PSST Regulations*. Subsection 19(1) stipulates that “anyone with a substantial interest in a proceeding before the Tribunal may apply for permission to intervene. (...)”. Therefore, persons or entities who are not parties to a proceeding, but who still have a substantial interest, may apply for intervenor status.

[18] Subsection 19(4) of the *PSST Regulations* lists the factors that the Tribunal may consider when reviewing an application for intervention and reads as follows:

19.(4) The Tribunal may allow the applicant to intervene after considering the following factors:

(a) whether the applicant is directly affected by the proceeding;

(b) whether the applicant’s position is already represented in the proceeding;

(c) whether the public interest or the interests of justice would be served by allowing the applicant to intervene; and

(d) whether the input of the applicant would assist the Tribunal in deciding the matter.

[19] The underlying objective in considering the factors listed under subsection 19(4) is to ensure that an intervenor is not there to simply restate the parties’ positions, but will provide some added value for the consideration and ultimate disposition of the case. For example, it would be helpful to hear from an applicant who, while not a party, is directly affected by the proceeding. It would also be helpful to hear an applicant who could assist the Tribunal because of some knowledge or expertise that the parties may be unable to provide. However, if the applicant’s position is already represented, its participation could unnecessarily delay and complicate the proceeding which would be contrary to

the requirement in subsection 98(1) of the *PSEA* that the complaint be determined as expeditiously as possible.

[20] Therefore, in deciding whether intervenor status should be granted under section 19 of the *PSST Regulations*, the Tribunal will apply a two pronged test. The first prong of the test, found under subsection 19(1), is that an applicant, while not a party, has a substantial interest in the proceeding. The second prong of the test, whether the applicant's participation would be helpful for the consideration and disposition of the complaint, is applied when considering the factors listed under subsection 19(4).

[21] These factors are akin to those used by the courts in determining whether to grant intervenor status. An applicant does not need to meet all of the criteria to be granted intervenor status, but each criterion may be considered in making this determination. See, for example: *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, [2000] F.C.J. No. 220 (F.C.A.) (QL); and, *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84 (T.D.), affirmed, [1990] 1 F.C. 90 (F.C.A.).

[22] The Tribunal is satisfied that the PSAC, while not a party, has a substantial interest in this proceeding. It is clear from the advertisement for this appointment process that the JLP is a joint initiative between the employer, represented by PSHRMAC, and the PSAC. As the Operational Requirements in the Advertisement stipulated:

Each regional field coordinator works in partnership with another; one represents the PSAC and the other represents the employer. Persons selected for those positions which will represent the PSAC must be members in good standing of the Alliance and must demonstrate that they have been actively involved in union activities (such as serving on the local executive or on regional committees or actively working for a component), building contacts and networks that can be applied in the context of this position.

[23] The PSAC has explained that it participates in the selection boards for candidates applying for these positions. The PSAC stated that this participation puts it in a position similar to that of an employer who selects the person to be

appointed and, as such, it cannot represent the complainant. However, the PSAC is not a party in this proceeding. Under section 79 of the *PSEA*, which stipulates who has the right to be heard in a complaint brought under section 77 of the *PSEA*, the President of PSHRMAC is the respondent in this case and the PSAC does not have a right to be heard.

[24] The question remains whether, in examining the factors set out in subsection 19(4) of the *PSST Regulations*, the PSAC's participation is determined to be helpful in this proceeding. Undoubtedly, the PSAC not only has a substantial interest in this proceeding, but also a direct interest since staff of the PSAC served as members of selection boards.

[25] The PSAC is submitting that the outcome of the complaint could have the potential to affect other cases involving its members. However, the respondent is quite correct that intervention should not be permitted simply because of jurisprudential interest. As the Federal Court stated in *Anderson v. Canada (Customs and Revenue Agency)*, [2003] F.C.J. No. 1388 (F.C.A.) (QL), at paragraph 6: "It has also been established that intervention should not be permitted where the sole interest of the proposed intervenor is jurisprudential in nature, in the sense that the outcome of the case may have repercussions in another case."

[26] However, the Tribunal is satisfied that the PSAC's position is not already represented in this proceeding and that it will be of assistance in considering and disposing of this complaint. The respondent filed its reply to the complaint on February 27, 2007. There is no reference in its reply to the PSAC's position on the complaint and, more particularly, whether, and to what extent, the PSAC's position on the complaint differed from that of the respondent. Conversely, the PSAC has submitted that it has a markedly different perspective from the respondent on certain aspects of this complaint, most notably on the issue of discrimination.

[27] As the Court held in *Canadian Union of Public Employees (Airline Division) v. Canadian Airlines International Ltd.*, *supra*, at paragraph 12: “[I]t was incumbent upon PSAC to show in its application for leave (to intervene) what it would bring to the debate over and beyond what was already available to the Court through the parties.” The PSAC has submitted that the role of the PSAC in the JLP is essentially that of an employer; however, it has different interests than the respondent concerning the JLP. As well, the PSAC as a bargaining agent has been involved in many discrimination complaints and could bring an additional or different perspective from the respondent and the complainant, who is at this point unrepresented.

[28] The Tribunal is also satisfied that the interests of justice would be served by allowing the PSAC to intervene. The PSAC has submitted that it is likely to limit its participation to comments made in respect of the arguments presented by the parties to the complaint. The PSAC has also indicated that it will make every attempt to present its comments in the least obtrusive manner possible. It would appear that the intervention of the PSAC, if limited to presenting comments on the arguments raised by the parties, would not unduly complicate or prolong this proceeding.

[29] However, the PSAC has also requested that it be granted full rights to participate in the hearing if it determines that its further participation is necessary. No reasons are given by the PSAC to justify this request. The PSAC has not satisfied the Tribunal that full participation rights would be helpful in this proceeding. The addition of an intervenor with full rights should be reserved for exceptional situations. In most cases, the granting of full participation rights to an intervenor will unnecessarily delay and complicate the hearing. This, in turn, would result in a less expeditious hearing, contrary to the requirement of subsection 98(1) of the *PSEA*.

[30] Subsection 19(5) of the *PSST Regulations* specifies that the Tribunal may issue directions regarding the role of the intervenor, including any matter relating

to the procedure to be followed by the intervenor. The Tribunal therefore directs that the PSAC's intervention be limited to presenting comments on the arguments raised by the parties.

[31] In conclusion, the Tribunal finds that it is appropriate to allow the PSAC to intervene in this proceeding as it has a substantial interest in participating and, considering the factors set out in subsection 19(4) of the *PSST Regulations*, its participation would be helpful.

DECISION

[32] The application of the PSAC to intervene in this proceeding is allowed.

ORDER

[33] The PSAC is granted intervenor status. The role of the PSAC as intervenor will be limited to presenting comments on the arguments of the parties.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2006-0291
Style of Cause:	<i>Barbara Wardlaw and the President of the Public Service Human Resources Management Agency of Canada et al.</i>
Hearing:	Written request, decided without the appearance of parties
Date of Reasons:	April 23, 2007