



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2007-0359 AND -0422

OTTAWA, NOVEMBER 19, 2007

RODNEY MAIDES

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATURAL RESOURCES CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*

DECISION Complaints are dismissed

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION English

INDEXED *Maides v. Deputy Minister of Natural Resources Canada et al.*

NEUTRAL CITATION 2007 PSST 0041

REASONS FOR DECISION

INTRODUCTION

[1] The respondent, the Deputy Minister of Natural Resources, has filed motions to dismiss the complaints filed on July 19, 2007 by the complainant. The respondent submits that one of the complaints was filed out of time and that the other complaint is related to the appointment of a priority employee.

[2] The complainant has requested an extension of time to file his complaint related to the first appointment process. In addition, the complainant seeks to consolidate his two complaints.

[3] In accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*), the complaints are consolidated.

[4] Under subsection 99(3) of the *Public Service Employment Act*, S.C. 2003, c. 22, sections 12 and 13 (the *PSEA*), the Tribunal ruled on the respondent's motions without holding an oral hearing.

BACKGROUND

[5] In March 2006, an internal advertised appointment process was posted on *Publiservice*, 2006-RSN-IA-0006-46069 (the first appointment process) to staff, on an indeterminate basis, four positions of Regional Communications Manager, at the IS-05 group and level, in the Department of Natural Resources, Communications Branch. These positions are located in Fredericton, Sault Ste. Marie, Quebec, and Victoria.

[6] After screening, the complainant was the only candidate left that had expressed an interest in the Victoria position. On April 18, 2007, the complainant was advised that he was eliminated from the first appointment process as he did not meet all of the essential qualifications for the position.

[7] On June 27, 2007 the candidates in this first appointment process were notified that Shirley Pegler was being appointed or proposed for appointment for this position in Fredericton, New Brunswick.

[8] The second complaint concerns selection process 2007-RSN-IA-0869-119295 (the second appointment process). A job opportunity was advertised on *Publiservice* in May 2007 for the position of Regional Communications Manager, at the IS-05 group and level, Department of Natural Resources, Communications Branch, located in Victoria, British Columbia to be filled on an acting, assignment, or secondment basis.

[9] On July 4, 2007 the candidates in the second appointment process were notified that a priority candidate had been appointed and that, therefore, the selection process had been cancelled.

[10] The complainant filed a complaint against these two selection processes on July 19, 2007.

ISSUES

[11] The Tribunal must determine the following issues:

- (i) Is the complaint related to the first appointment process out of time and, if so, should the Tribunal grant an extension of time to file the complaint?
- (ii) Was a person with a priority entitlement appointed in the second appointment process and, if so, is there a right of recourse to the Tribunal under section 77 of the *PSEA*?

ARGUMENTS OF THE PARTIES

A) RESPONDENT'S ARGUMENTS

[12] The respondent's first motion to dismiss relates to the complaint about the first appointment process. The respondent submits that the complaint related to this process was filed out of time. The respondent states that the complainant, along with the other candidates in the appointment process, received notification by email from the Department on June 27, 2007 that a particular candidate was being appointed or proposed for appointment. The respondent provided a copy of this notification, along with the email tracking confirmation that the email had been read by the complainant on June 27, 2007.

[13] The respondent's second motion relates to the second appointment process. The respondent submits that the second appointment process resulted in the appointment of a priority employee under section 41 of the *PSEA* and, as such, in accordance with section 87 of the *PSEA*, the complainant does not have a right of complaint to the Tribunal for this appointment. The candidates, including the complainant, were notified of the priority appointment and that the process was cancelled.

B) COMPLAINANT'S ARGUMENTS

[14] The complainant alleges that he was not appointed in the first appointment process because the members of the selection board were biased against him as a result of their participation in a mediation in which he was a party.

[15] Furthermore, the complainant says that this appointment was initially published in error as being to the Victoria position, and the Department withdrew that notice, and corrected it by issuing a further notice advising that Ms. Pegler was appointed to Fredericton, N.B.

[16] In the alternative, the complainant submits that, if the notice is actually valid, the Tribunal should exercise its discretion pursuant to section 5 of the Tribunal's *Regulations*, and extend the time for filing his complaint. The complainant submits that, since the complaint was filed on July 19, 2007, which is only five days after the end of the notification period, if valid, there is no prejudice to anyone resulting from such a short time period.

[17] The complainant alleges that the second appointment process was only instituted out of bad faith to frustrate the complainant's appointment to the position of Regional Communications Manager in Victoria, BC. The complainant submits that if the Tribunal finds that there was abuse of authority in the first appointment process, then the appointment of Ms. Nicol on a priority basis should be set aside by the Tribunal under section 43 of the *PSEA* in favour of the complainant.

ANALYSIS

Issue I: Is the complaint related to the first appointment process out of time and, if so, should the Tribunal grant an extension of time to file the complaint?

[18] The Tribunal has reviewed the email notification dated June 27, 2007 and has determined that it constitutes proper notice as required by paragraph 10(a) of the *PSST Regulations*.

[19] As the Tribunal held in *Larivière et al. v. Deputy Minister of Health Canada et al.*, [2007] PSST 0019, at paragraph 20: "The information required for filing a complaint was also provided to the complainants. There is thus no confusion in the notification sent by the respondent." The complainant was required to file his complaint within 15 calendar days of the date of notification, namely, by July 12, 2007. The complaint was filed on July 19, 2007, which was seven days outside the required time limit.

[20] The Tribunal has held in a number of decisions that the time limit to file a complaint is a strict limit. See, for example: *MacDonald v. Deputy Head of Service Canada et al.*, [2006] PSST 0002, at paragraph 6

[21] Pursuant to section 5 of the *PSST Regulations*, the Tribunal may, in the interest of fairness, extend any time limit specified in the *Regulations*. An extension of time to file a complaint may be granted if the complainant satisfies the Tribunal that there were exceptional circumstances for the late filing.

[22] As the Tribunal found in *Suárez v. Deputy Head of Service Canada et al.*, [2006] PSST 0002, at paragraph 27: "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."

[23] The complainant has not provided any reasons that satisfy the Tribunal that exceptional circumstances or reasons beyond his control prevented the complainant from filing his complaint on time. Therefore, the request for an extension to file the complaint related to the first appointment process is denied.

Issue II: Was a person with a priority entitlement appointed in the second appointment process and, if so, is there a right of recourse to the Tribunal under section 77 of the *PSEA*?

[24] In its second motion related to Mr. Maides' complaint concerning the second appointment process, the respondent submits that this appointment process resulted in the appointment of a priority employee under section 41 of the *PSEA* and, as such, in accordance with section 87 of the *PSEA*, there is no right to complain to the Tribunal.

[25] By email dated July 4, 2007 the complainant was informed that this appointment process was being cancelled as a priority candidate had been appointed. In its submissions, the respondent stated that a "Leave of Absence Priority" had applied and been found qualified for the position. In support of its submission, the respondent provided the Tribunal with a copy of the Priority Clearance – Priority Appointment form for this employee that confirms her priority entitlement.

[26] Subsection 41(1) and section 87 of the *PSEA* read as follows:

41. (1) When an employee on leave of absence is replaced, pursuant to the appointment or deployment of another person for an indeterminate period to the employee's position, priority for appointment shall be given over all other persons to

(a) the employee on leave of absence, for the duration of the leave of absence and a further period of one year; or

(b) if the employee on leave of absence returns to his or her position, the person who replaced that employee, for a period of one year after that employee returns to the position.

87. No complaint may be made under section 77 in respect of an appointment under subsection 15(6) (re-appointment on revocation by deputy head), section 40 (priorities — surplus employees), any of subsections 41(1) to (4) (other priorities) or section 73 (re-appointment on revocation by Commission) or 86 (re-appointment following Tribunal order), or under any regulations made pursuant to paragraph 22(2)(a).

[27] Clearly, there is no right to complain to the Tribunal under section 77 of the *PSEA* in respect of the appointment of an employee with a leave of absence priority entitlement. In *Campbell v. Deputy Minister of National Defence et al.*, [2006] PSST 0011, at paragraphs 21 to 23, the Tribunal found that it had no jurisdiction in respect of appointments of surplus employees with priority entitlement for

appointment. The same reasoning applies in respect of the appointment of a person with a leave of absence priority.

[28] Since the person appointed in the second appointment process had priority entitlement by virtue of section 41 of the *PSEA*, the Tribunal finds, pursuant to section 87 of the *PSEA*, that there is no right to complain under section 77 of the *PSEA* in respect of her appointment.

DECISION

[29] For the reasons stated above, these complaints are dismissed.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal Files:	2007-0359 and 2007-0422
Style of Cause:	<i>Rodney Maides and the Deputy Minister of Natural Resources Canada et al.</i>
Hearing:	Written request, decided without the appearance of parties
Date of Reasons:	November 19, 2007