



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2007-0190 AND 0196

OTTAWA, JULY 11, 2007

JOSÉE ST-PIERRE AND PIERRE LÉTOURNEAU

COMPLAINANTS

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER	Determination of jurisdiction
DECISION	The complaints are dismissed
DECISION RENDERED BY	Francine Cabana, Member
LANGUAGE OF DECISION	French
INDEXED	<i>St-Pierre and Létourneau v. Deputy Minister of National Defence et al.</i>
NEUTRAL CITATION	2007 PSST 0032

REASONS FOR DECISION

INTRODUCTION

[1] On May 8, 2007, the respondent, the Deputy Minister of National Defence, requested the Public Service Staffing Tribunal (the Tribunal) dismiss the complaints filed under subsection 77(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*), since the appointments were made using an external appointment process.

[2] Under the provisions of section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (the *PSST Regulations*), the Tribunal consolidated the complaints in files 2007-0190 and 2007-0196.

BACKGROUND

[3] In May 2006, the respondent initiated an advertised internal appointment process to fill Storeperson positions at the GS-ST5-03 group and level at the 202 Workshop Depot in Montreal, Quebec (process number 06-DND-MTL-IA-047906). An external appointment process (process number 06-DND-MNTRL-EA-054204) was held jointly with this internal appointment process.

[4] The complainants' term employment period ended on March 31, 2006. The complainants were re-hired on June 19, 2006. The Department posted the notification of an internal appointment process between March 31 and June 19, 2006. The closing date was May 18, 2006. The complainants therefore only had the option of applying under the external appointment process.

[5] The complainants went through the various selection stages of the external appointment process, but were not appointed or proposed for appointment because they did not possess all the essential qualifications for the Storeperson position.

[6] On April 25, 2007, the complainants filed their complaints under section 77 of the *PSEA*. On their complaint form, they cited process number 06-DND-MTL-IA-047906, namely, the number for the advertised internal appointment process.

[7] The Tribunal's procedure sets out that a party may provide a written reply within five days of receiving a motion. Following the respondent's request to dismiss the complaints on May 8, 2007, the complainants had until May 14, 2007 to send their comments in writing. The complainants' representative provided their arguments to the Tribunal on May 23, 2007, nine days after the prescribed date. On May 23, 2007, the Tribunal Registry reminded the complainants' representative that he had to request an extension of time to file arguments, which he still has not done.

ISSUES

[8] The Tribunal must answer the following questions:

- (i) Can the Tribunal extend the time for filing the complainants' arguments?
- (ii) Do the complainants have a right to recourse under subsection 77(1) of the *PSEA*?

ARGUMENTS OF THE PARTIES

A) ARGUMENTS OF THE RESPONDENT

[9] According to the respondent, the complainants are casual employees. Therefore, they could not apply in the advertised internal appointment process. The complainants applied in the external appointment process.

[10] The respondent submits that the complainants are not entitled to recourse under section 77 of the *PSEA*, since they did not participate in an internal appointment process. They are not part of the area of recourse, as they

participated in an external appointment process, for which there is no right to recourse before the Tribunal.

B) ARGUMENTS OF THE COMPLAINANTS

[11] The complainants admit that they applied in the external process, but as term employees, not casual employees.

[12] The complainants argue that they were misled and that the Department's actions favoured the individuals appointed through the internal appointment process, particularly by carrying out an internal appointment process while the complainants were laid off, namely, from March 31 to June 19, 2006. The employees who were proposed for appointment were not laid off, even though they were also term employees.

ANALYSIS

Issue I: Can the Tribunal extend the time for filing the complainants' arguments?

[13] The complainants' representative was late in providing arguments to the Tribunal and did not request an extension as the Tribunal required. The Tribunal must therefore determine whether it will take into account the complainants' arguments.

[14] The Tribunal is master of the proceedings, as indicated in section 27 of the *PSST Regulations*. The Tribunal receives a considerable number of motions and, to speed up their processing, it has adopted a procedural rule that sets out that a party may provide a written reply within five days of receiving a motion. This procedural rule now appears in the second edition of the *Procedural Guide*, available on the Tribunal's Web site.

[15] Under this procedural rule, if the Tribunal does not receive comments within five days or a request for an extension of time for filing a reply, it will

render its decision on the basis of the information it has received, without further notice.

[16] Furthermore, section 5 of the *PSST Regulations* allows the Tribunal, in the interest of fairness, to extend any time specified in the *PSST Regulations*. The Tribunal can also extend the time limits that it has established to guide the complaint process, if satisfied that it is in the interest of fairness to do so.

[17] In this case, the nine-day delay in filing has no impact on the motion because the Tribunal has not rendered a decision on it prior to receiving the reply from the complainants. In addition, the Tribunal is satisfied that the delay did not cause any prejudice to the respondent because the delay was only a few days.

[18] Rendering a decision on this motion without considering the reply sent by the complainants would be contrary to the well-established rule of administrative law that the parties have the right to be heard. This rule of natural justice is also known as *audi alteram partem*. The Tribunal will therefore take into account the complainants' arguments.

[19] Nevertheless, the Tribunal would like to point out that information on the procedure is available on the Web site and that the Tribunal expects complainants and respondents to be familiar with these procedures. Furthermore, the Tribunal notes that the complainants' representative, in not respecting the Tribunal's clear directive to request an extension of the time for filing, demonstrated a lack of respect. The time periods, whether prescribed in regulations or elsewhere, must be observed. The parties must not expect the Tribunal to automatically extend the time limits.

Issue II: Do the complainants have a right to recourse under subsection 77(1) of the *PSEA*?

[20] Subsection 77(1) of the *PSEA* grants a right to recourse to a person who is not appointed or proposed for appointment in an internal appointment process. Subsection 77(1) reads as follows:

77. (1) When the Commission has made or proposed an appointment *in an internal appointment process*, a person in the area of recourse referred to in subsection (2) may — in the manner and within the period provided by the Tribunal's regulations — make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of:

(...)

(Emphasis added)

[21] The Tribunal finds that the complainants do not have a right to recourse under subsection 77(1) of the *PSEA* because they did not apply in an internal appointment process. Subsection 2(1) of the *PSEA* defines an “internal appointment process” as “(...) a process for making one or more appointments in which only persons employed in the public service may be considered.” For the period from March 31 to June 19, 2006, the complainants were not persons employed in the public service. Therefore, they are not part of the area of recourse. Instead, the complainants participated in an external appointment process, for which there is no right to recourse under section 77 of the *PSEA*.

[22] In fact, subsection 77(1) of the *PSEA* clearly states that the Tribunal's jurisdiction is limited to appointments or proposed appointments in *internal* appointment processes. The Tribunal addressed this in *Robillard v. President of the Canada Border Services Agency et al.*, [2007] PSST 0015.

[23] The complainants participated in an external appointment process, and the *PSEA* does not contain a provision for recourse to the Tribunal in such cases. However, section 66 of the *PSEA* states that the PSC may investigate. Section 66 reads as follows:

66. The Commission may investigate any *external appointment process* and, if it is satisfied that the appointment was not made or proposed to be made on the basis of merit, or that there was an error, an omission or improper conduct that affected the selection of the person appointed or proposed for appointment, the Commission may

(a) revoke the appointment or not make the appointment, as the case may be;
and

(b) take any corrective action that it considers appropriate.

(Emphasis added)

[24] The complainants could therefore seek recourse to the PSC under section 66 of the *PSEA* since the PSC is the institution which is granted the authority to investigate external appointment processes.

DECISION

[25] For all these reasons, the request for dismissal is granted. The complaints are dismissed for want of jurisdiction.

Francine Cabana
Member

PARTIES OF RECORD

Tribunal Files:	2007-0190 and 2007-0196
Style of Cause:	<i>Josée St-Pierre and Pierre Létourneau and the Deputy Minister of National Defence et al.</i>
Hearing:	Written request; decision made without the appearance of parties
Date of Reasons:	July 11, 2007