



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

FILES: 2006-0206 AND 2006-0211

OTTAWA, NOVEMBER 21, 2007

**JOËL SÉGUIN AND FRANÇOIS BOUCHER-LEGAULT**

**COMPLAINANTS**

**AND**

**THE DEPUTY MINISTER OF NATIONAL DEFENCE**

**RESPONDENT**

**AND**

**OTHER PARTIES**

<b>MATTER</b>	Complaints of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
<b>DECISION</b>	The complaints are dismissed.
<b>DECISION RENDERED BY</b>	Sonia Gaal, Vice-Chair
<b>LANGUAGE OF DECISION</b>	French
<b>INDEXED</b>	<i>Séguin and Boucher-Legault v. Deputy Minister of National Defence et al.</i>
<b>NEUTRAL CITATION</b>	2007 PSST 0043

## REASONS FOR DECISION

### INTRODUCTION

[1] On November 7, 2006, Joël Séguin filed a complaint with the Public Service Staffing Tribunal (the Tribunal) pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*). The complainant had applied for the position of Parts Preparation Specialist, GL ELE 5, at the Department of National Defence in Montreal (process number 06-DND-MTL-IA-048921).

[2] On November 8, 2006, the complainant, François Boucher-Legault, filed a complaint pursuant to the same paragraph for the same process.

[3] The complainants allege abuse of authority by the respondent, the Deputy Minister of National Defence, since they meet the requirements of the position, but were not appointed. They allege that they were replaced by new employees who do not have the essential qualifications.

[4] For the purposes of hearing and decision, the Tribunal consolidated the two files pursuant to section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

[5] At the pre-hearing conference, Mr. Boucher-Legault's representative informed the parties that this complainant would not attend the hearing because he is now a member of the Canadian Forces and is based in Borden, Ontario.

[6] On the morning of the hearing, the representative informed the Tribunal and the respondent that the second complainant, Mr. Séguin, was not present because he had found employment and did not want to be absent from work. The complainants thus had no witnesses.

[7] Following this development, the respondent did not produce its witness to refute the complainants' allegations. The parties agreed to file certain documents and a joint statement of facts.

[8] The Tribunal therefore heard the parties' arguments in Montreal on October 11, 2007, and is rendering its decision on the basis of these arguments and the documents submitted.

#### BACKGROUND

[9] The complainants held term positions and worked in the 202<sup>nd</sup> Workshop Depot in Montreal, which comprises nine organizations. The complainants were part of "manufacturing processes support" [Translation].

[10] The complainants participated in an advertised internal appointment process in June 2006, designed to fill Parts Preparation Specialist positions. These are term positions. The selection process included a written examination, a practical examination and an interview.

[11] The area of selection for the positions was "employees of the Department of National Defence and members of the Canadian Forces (...) whose employer unit is the 202<sup>nd</sup> Workshop Depot" [Translation].

[12] On October 12, 2006, the complainants were informed by the Civilian Human Resources Officer that they had qualified for the position and that their names had been placed in a pool of candidates for appointment at a later date. There were 18 employees, including the complainants, who met the essential qualifications and who were placed in the pool.

[13] On October 12, the notification of appointment or proposed appointment was published on *Publiservice*, announcing the appointments. There were 13 names on the notification for term positions, but the names of the complainants did not appear on the notification. Five positions were to end on January 31, 2007 and eight on March 31, 2007.

[14] The complainants' contracts were not extended when their term appointments expired.

[15] The complainants are specifically challenging the appointments of four candidates who, in their opinion, do not meet the minimum requirements for the position.

[16] The statement of merit criteria and conditions of employment include the following essential education qualification: “DEP in body work or an acceptable combination of education, training and experience” [Translation].

[17] The acceptable combination for the DEP (*Diplôme d'études professionnelles*, or vocational studies diploma) in body work equivalency was established as two years of secondary school, plus one year of experience, and OJT (on the job training) in a trade.

#### ISSUES

The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in not appointing the complainants to the positions?
- (ii) Does section 124 of *An Act respecting labour standards*, R.S.Q., c. N-1.1, (ALS) apply in this case?

#### ARGUMENTS

##### A) COMPLAINANTS' ARGUMENTS

[18] According to the complainants, the respondent appointed four persons out of 13 who do not possess all the requirements for the position, and this constitutes abuse of authority. Even if those individuals were working in the 202<sup>nd</sup> Workshop Depot in Montreal, they were not working in the respondent's “manufacturing processes support” [Translation] organization where the complainants worked.

[19] The respondent should have appointed the complainants because they were already working for the respondent and were doing good work. Mr. Boucher-Legault had

two years of service, while Mr. Séguin had five. The respondent's decision had the effect of causing them to lose their employment.

[20] According to the complainants, they were not chosen because of personal suitability factors discussed in the interview concerning reliability, team work, initiative and interpersonal skills. In their opinion, the interview questions dealing with these topics were inadequate, and they had to "know how to lie effectively to answer them correctly" [Translation].

[21] The complainants submit that the pre-selection was not done properly because the four disputed candidates should have been eliminated at the outset, as they did not have the experience in body work required for the position. According to the complainants, the combination of experience and OJT training must be in body work.

[22] Citing the decision *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, the complainants argue that the manager relied on inadequate material to select these four candidates.

[23] Finally, the complainants submit that the *ALS* applies because they did not receive the advance notice that this legislation requires.

#### B) RESPONDENT'S ARGUMENTS

[24] At the outset, the respondent raised the fact that an allegation of abuse of authority is serious, but that neither of the complainants thought it necessary to appear before the Tribunal to testify and explain how the respondent had committed an abuse of authority. Furthermore, such allegations can affect the career of the individual who carried out the selection process. According to the respondent, there is an impact on the process, the appointed persons and, in particular, the four employees whose qualifications are disputed by the complainants. The respondent stated that it was surprised by the reasons that the complainants gave to justify their absence.

[25] The complainants must produce clear and convincing evidence to prove abuse of authority, and must assume the burden of proof. However, the complainants did not

testify before the Tribunal. This situation is similar to that in *Portree v. Deputy Head of Service Canada et al.*, [2006] PSST 0014, where the complainant did not testify but was present at the hearing.

[26] According to the respondent, the complainants' representative is relying on the complainants' allegations and other documents. However, these documents are not evidence that there was abuse of authority, but are rather proceedings filed with the Tribunal. The complainants allege that the four persons appointed do not possess the essential qualifications, but neither of them testified to prove that these allegations were true. It is not sufficient to rely solely on résumés, as the complainants do, to arrive at such a conclusion.

[27] The respondent asserts that the four persons appointed whose appointments are challenged by the complainants meet the required qualifications for education, experience and knowledge. All the candidates were assessed, and the four whose competencies are disputed received the established pass mark.

[28] The concept of merit contained in the *PSEA* requires that an appointed person possess the essential qualifications for the position. It is no longer necessary to rank candidates commencing with the one with the greatest merit, as was necessary under the old legislation.

[29] In this case, the respondent ranked the candidates even though it was not obliged to do so, and appointed the first 13 individuals on the basis of their rank in the process. The complainants ranked 15<sup>th</sup> and 16<sup>th</sup> on the list. Had there been more than one position to staff in the future, both complainants would have been appointed. The fact that the complainants are qualified candidates in the pool does not mean that they are automatically entitled to be appointed.

[30] The respondent argues that under section 31 of the *PSEA*, it is up to the manager to decide what mix is required to be equivalent to a DEP in body work. The manager chose one year of experience plus OJT in a trade. If he had wanted the year of experience and the OJT to be in body work, he would have clearly indicated this.

Since no trade is specified for the required combination, the experience and the OJT do not necessarily have to be in body work. The complainants are the ones who added this condition, which does not exist, in order to dispute the appointment of the four candidates.

[31] The selection board established the essential qualifications and assessed the candidates in a consistent manner. The board emphasized personal suitability in the interview, in order to choose the individuals to create the selection pool. These decisions are the selection board's to make and do not constitute an abuse of authority.

[32] Regarding the argument that the board should have asked different questions to assess personal suitability, this is the personal opinion of the complainants' representative.

[33] As to the complainants' argument that they should be subject to the ALS regarding the expiry of their contract, the respondent argues that this matter does not come within the Tribunal's jurisdiction and has nothing to do with their complaint. If there is a remedy under that legislation, they can exercise it.

[34] As it argued in *Pugh v. Deputy Minister of National Defence et al.*, [2007] PSST 0025, the respondent submits that abuse of authority requires a negative intent. The respondent has produced case law and excerpts from other legal sources in support of its position.

[35] The respondent concludes that the complainants have not proven any of their allegations and that there is no evidence of abuse of authority. The respondent is asking the Tribunal to dismiss their complaints since the complainants have not discharged their burden of proof.

#### C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[36] The Public Service Commission (the PSC) indicated that it would not make submissions concerning the facts of the case. The PSC argued that there must be an element of intent, recklessness or carelessness for a complaint of abuse of authority to

succeed. The PSC also produced case law and excerpts from other legal sources to support its position.

#### ANALYSIS

**Issue I:** Did the respondent abuse its authority in not appointing the complainants to the positions?

[37] The complaints were made pursuant to paragraph 77(1)(a) of the *PSEA*, which 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

(a) an abuse of authority by the Commission or the deputy head in the exercise of its or his or her authority under subsection 30(2);

(...)

[38] According to the Tribunal's case law, the complainants must prove, on the balance of probabilities, that they were not appointed to the positions because there was abuse of authority. It is not sufficient to assert this; the complainants must explain how these actions demonstrate abuse of authority, as the Tribunal held in *Portree*, *supra*:

[43] When filing a complaint under paragraph 77(1)(a), a complainant must now explain that because of some action or inaction he or she was not appointed to a position. Furthermore, this action or inaction must arguably demonstrate that there might or could be an abuse of authority.

[39] The fact that the complainants do not agree with the selection board's decision does not automatically mean that there has been abuse of authority in the selection process. See *Portree*, *supra*:

[56] (...) Simply disagreeing with the final result does not constitute evidence of wrongdoing on the part of the assessment board. The fact that she does not agree with the marks allocated by the assessment board does not constitute abuse of authority.

[40] The complainants failed to produce any witnesses to prove that the selection board's decision not to appoint them constituted an abuse of authority. They chose not



to appear before the Tribunal, and to rely solely on their allegations and certain documents to prove abuse of authority. The Tribunal wishes to stress once again that it is important for a complainant to testify and to produce adequate evidence, as indicated in *Portree, supra*:

[49] Employees who allege that there has been an abuse of authority and, thus, a contravention of the *PSEA* and who wish to obtain a remedy for that contravention must present convincing evidence and arguments to be successful. It would seem prudent in most cases for the complainant to start his or her case by testifying as to the circumstances that they believe constitute an abuse of authority, as well as submitting documentary evidence to support their case. At an oral hearing, a complainant must present evidence, usually through a combination of his or her testimony, the testimony of witnesses, and supporting documents, to prove, on a balance of probabilities, the facts necessary to support a conclusion by the Tribunal that an abuse of authority has occurred. However, the complainant did not testify at the hearing and almost no evidence was provided to substantiate her complaint.

[50] An employee must understand that a complaint is more than merely stating a perceived injustice. The complaint must set out the facts upon which the complainant relies in proving his or her case to the Tribunal. A complaint goes beyond merely alleging that the respondent abused his or her authority. The allegations must allege serious facts and a chronology of the events, times, and dates and any witnesses if applicable.

[41] In *Portree, supra*, the respondent produced a witness after the complainant had given her evidence. However, the situation is different here because there were no witnesses for the complainants. The respondent therefore did not have to produce a witness to refute non-existing evidence; it does not have to assume the burden of proof.

[42] It is true that in accordance with subsection 99(3) of the *PSEA*, the Tribunal may decide a complaint without holding an oral hearing. However, this is usually done in cases where the facts are not disputed and there are one or two specific points to resolve; in these circumstances, witnesses may not be necessary. The decision in *Pugh, supra*, is an example of a case that was disposed of on the basis of written submissions only, without a witness.

[43] On the other hand, this case is not one that can be dealt with on the basis of documents alone since there are several issues, including the qualifications of the four disputed candidates, the interview questions for assessing personal suitability, and the equivalency for the DEP in body work. Documents alone cannot answer these questions.

[44] The Tribunal cannot conclude that the contested candidates do not meet the requirements of the position solely on the basis of their résumés. This kind of argument must be supported by testimonial evidence.

[45] The Tribunal finds itself in a situation where the complainants have not produced any testimonial evidence to support their allegations of abuse of authority. Furthermore, the documents produced by the parties do not support a finding of abuse of authority on the part of the respondent. As for the interpretation of some documents by the complainants' representative, this interpretation has no probative value in the absence of oral evidence, because this is his personal opinion and not evidence produced under oath. The Tribunal cannot find that there has been an abuse of authority solely on the basis of the representative's opinion.

[46] The Tribunal finds that there was no abuse of authority when the respondent did not appoint the complainants.

**Issue II:** Does section 124 of *An Act respecting labour standards*, R.S.Q., c. N-1.1, (*ALS*) apply in this case?

[47] The complainants argue that section 124 of the *ALS* (Recourse against dismissals not made for good and sufficient cause) applies because their term employment ended.

[48] The Tribunal was created pursuant to the *PSEA*, and its mandate is stated in subsection 88(2): "The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83."

[49] The Tribunal's mandate is clear. It may deal with complaints that are specifically referred to in its enabling statute. It may not deal with complaints or issues that fall within the purview of the *ALS*.

DECISION

[50] For all these reasons, the complaints are dismissed.

Sonia Gaal  
Vice-Chair

PARTIES OF RECORD

Tribunal Files:	2006-0206 and 2006-0211
Style of Cause:	<i>Joël Séguin and François Boucher-Legault and the Deputy Minister of National Defence et al.</i>
Date and Place of Hearing:	October 11, 2007 Montreal, Quebec
Date of Reasons:	November 21, 2007
APPEARANCES:	
Stéphane Fiset	For the complainants
Me Karl Chemsî	For the respondent
Me Angie Paquin	For the Public Service Commission