Public Service Staffing Tribunal | Tribunal de la dotation de la fonction publique

FILE: 2007-0565

OTTAWA, NOVEMBER 28, 2007

JEAN LAVIGNE

COMPLAINANT

AND

THE DEPUTY MINISTER OF JUSTICE

RESPONDENT

AND

OTHER PARTIES

MATTER	Motion to dismiss the complaint
DECISION	The motion is granted and the complaint is dismissed
DECISION RENDERED BY	Sonia Gaal, Vice-Chair
LANGUAGE OF DECISION	French
INDEXED	*Lavigne v. Deputy Minister of Justice et al.*
NEUTRAL CITATION	2007 PSST 0045

REASONS FOR DECISION

INTRODUCTION

[1] On November 5, 2007, the complainant, Jean Lavigne, 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*) against the acting appointment of Ms. Shaughnessy for the period of October 9, 2007 to February 1, 2008.

[2] On November 8, the respondent, the Deputy Minister of Justice, requested that the Tribunal dismiss the complaint because it involved an acting appointment of less than four months.

[3] In accordance with subsection 99(3) of the *PSEA*, the Tribunal dealt with the respondent's motion without holding an oral hearing. The decision was rendered based on the parties' written submissions, which were reviewed in detail and which are summarized below.

BACKGROUND

[4] The complainant took part in an internal advertised appointment process to staff a Senior Practitioner position (process number 2006-JUS-MTL-DAF-IA-89). He was screened out because he did not meet one of the essential experience qualifications. He filed a complaint with the Tribunal against this appointment process. No final decision has yet been rendered in that case.

[5] As part of that appointment process, the respondent subsequently established a pool of qualified candidates, which included Ms. Shaughnessy. The respondent staffed several Senior Practitioner positions from the pool of qualified candidates. The complainant filed a complaint against each appointment made from the pool.

ISSUES

[6] The Tribunal must determine the following issues:

(i) Can the Tribunal consider the motion without holding an oral hearing?

(ii) Does the Tribunal have jurisdiction to consider a complaint relating to an acting appointment of less than four months?

ARGUMENTS OF THE PARTIES

A) RESPONDENT'S ARGUMENTS

[7] The respondent submits that Ms. Shaughnessy's acting appointment began on October 9, 2007, and ended February 1, 2008. Therefore, the appointment was for a period of less than four months.

[8] The respondent also submits that, pursuant to subsection 14(1) of the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*), the Tribunal does not have jurisdiction to consider the complaint.

B) COMPLAINANT'S ARGUMENTS

[9] The complainant objects to the respondent's motion to dismiss. He is of the opinion that the Tribunal has jurisdiction to deal with the matter because the acting appointment is part of a series of permanent and acting appointments made as a result of the process that forms the basis of his other complaints.

[10] According to the complainant, “the Tribunal has jurisdiction to consider and decide the validity of a process that resulted in a candidate's appointment, regardless of whether the acting appointment was for a period of more or less than four months” [Translation].

[11] The complainant also alleges that the person selected for the acting appointment does not have the required work experience, the basis on which his own application was screened out of the selection process about which he has filed other complaints. The complainant submits the following:

> It would therefore be surprising and unjust if the complainant could not challenge Ms. Shaughnessy's appointment before the Tribunal for the simple reason that Henri Bédirian chose to proceed, in this case, with an acting appointment of less (and just barely less) than four (4) months, clearly with the deputy head's approval.
>
> [Translation]

[12] The complainant is “formally” requesting an oral hearing on this issue alone so that he can submit all of his arguments to the Tribunal [Translation].

ANALYSIS

Issue I: Can the Tribunal consider the motion without holding an oral hearing?

[13] The complainant submits that this is a question of law that could affect the merits of the case and, “therefore, should not be the focus of a simple procedural or incidental decision, made in haste, without giving the parties the opportunity to be duly heard at a proper hearing” [Translation]. He formally requests a hearing before the Tribunal so that he can be heard on this issue.

[14] Two provisions of the *PSEA* are particularly relevant to this issue. Subsection 98(1) reads as follows: "A complaint shall be determined by a single member of the Tribunal, who shall proceed as informally and expeditiously as possible." Furthermore, subsection 99(3) of the *PSEA* states: "The Tribunal may decide a complaint without holding an oral hearing."

[15] Together these two provisions provide the Tribunal with the requisite degree of flexibility to manage complaints and resulting motions in the manner it deems to be the most efficient. Subsection 99(3) of the *PSEA* is clear; the Tribunal is not required to hold an oral hearing. Generally speaking, deciding a motion or complaint on the merits based on the written documentation is more efficient, reduces the waiting time for a decision and makes better use of the Tribunal's limited resources. The Tribunal is responsible for deciding whether to hold an oral hearing, and the Tribunal makes an informed decision on the basis of all the circumstances of a case. The parties are still given an opportunity to be heard, albeit in writing.

[16] This is not a new concept. A number of administrative tribunals are given similar authority in their enabling legislation. For example, section 16.1 of the *Canada Labour Code,* R.S. 1985, c. L-2, states that the Canada Industrial Relations Board (the Board) may decide any matter before it without holding an oral hearing. Furthermore, the Public Service Labour Relations Board may also decide grievances without holding an oral hearing (see section 227 of the *Public Service Labour Relations Act,* S.C. 2003, c. 22, s. 2). The authority to decide a matter without holding an oral hearing is therefore not unique to the Tribunal.

[17] The Supreme Court of Canada expressed its opinion on the issue of whether an oral hearing must always be held. In *Québec (Commission des Relations de Travail) v. Canadian Ingersoll-Rand Co. Ltd.,* [1968] S.C.R. 695, p. 5 (QL), the Court ruled that there was no breach of the *audi alteram partem* rule when the Quebec Labour Relations Board did not hold a hearing on a case:

> The *audi alteram partem* rule does not require that there must always be a hearing, but only that the parties must be given an opportunity of putting forward their arguments. The circumstances of this case do not support a finding that the Board, without a hearing, necessarily came to the conclusion that the respondent could not substantiate the points it raised in support of its opposition to the Steelworkers' Union. In any event, no request for a formal hearing had been made by the respondent until after the expiration of the additional period granted to it by the Board for this purpose.
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> [Translation from: *Quebec Labour Relations Board* v. *Canadian Ingersoll Rand Co. Ltd. et al*.,1 D.L.R. (3d) 417.]

[18] In *Nav Canada v. International Brotherhood of Electrical Workers, Local 2228,* 2001 F.C.A. 30, [2001] F.C.J. No. 257, at paragraphs 10 and 11 (QL), the applicant argued that the Board had exceeded its jurisdiction and had failed to observe the principles of natural justice and procedural fairness in issuing a decision on the merits without having provided the applicant with the opportunity to adduce its evidence. The Federal Court of Appeal dismissed the application for judicial review and stated the following:

> [10] Further, section 16(1) of the *Canada Labour Code* and section 19(2) of the Regulations provide that the Board may decide any matter before it without holding an oral hearing. Thus even if the Applicant had requested a hearing the Board was at liberty to decide the matter without granting an oral hearing.

> [11] The scheme of the legislation and Regulations indicates that the Board will decide on the basis of the material filed unless it decides to hold an oral hearing or specifically requests additional evidence. No authority was provided to the Court for the proposition that the Board cannot do so, or that in order to treat the material filed as evidence, the Board must give notice to the parties of this intention.
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> [Emphasis added]

[19] The acknowledgement of receipt, which the Tribunal sends to all complainants and which in this case was sent to the complainant on November 6, 2007, contains the following paragraph:

> • The Tribunal will set a date for the hearing and will notify all parties at least seven days before the hearing. Please note that the Tribunal is not obligated to hold an oral hearing to reach a decision.

[20] This paragraph is also included in the notice of complaint sent to deputy heads. The parties are thus advised when a complaint is filed that the Tribunal can decide a case or motion without holding an oral hearing. It is therefore the parties' responsibility to ensure that all relevant information and their positions are included in the file.

[21] Clearly, there are instances when the Tribunal cannot decide an issue without holding an oral hearing, for example, if witnesses need to be heard because credibility is at issue and oral evidence is necessary (see *Séguin and Boucher-Legault v. Deputy Minister of National Defence et al*., [2007] PSST 0043). In other instances, the evidence must be heard because the facts are too complicated or are being challenged, or the evidence seems contradictory. In such situations, the parties receive notification in accordance with section 28 of the *Public Service Staffing Tribunal Regulations,* SOR/2006-6, and an oral hearing is held.

[22] In the case at hand, the facts are simple: Ms. Shaughnessy was appointed to a Senior Practitioner position on an acting basis from October 9, 2007 to February 1, 2008. The complainant is not challenging the length of the acting appointment, but believes that the Tribunal must hear him in order to decide the motion, regardless of the length of the acting appointment. He submitted two e-mails in support of his position, on November 8 and 9, 2007.

[23] The complainant also objects to Ms. Shaughnessy's inclusion in the pool because, in his opinion, she is not qualified. The Tribunal is of the opinion that, in the context of this motion to dismiss, it is not required to deal with this issue or review the respondent's choice of candidate for the acting appointment.

[24] Although the complainant submitted his position to the Tribunal on two occasions, the Tribunal considers that holding an oral hearing on this specific issue would serve no useful purpose since the underlying facts of the motion are not being challenged. This case does not require any oral evidence or arguments. The Tribunal deems that it has sufficient information to render its decision and that it can do so based on the information on record. As mentioned above, subsection 99(3) of the *PSEA* clearly states that the Tribunal can decide the matter without holding an oral hearing.

Issue II: Does the Tribunal have jurisdiction to consider a complaint relating to an acting appointment of less than four months?

[25] The complainant filed his complaint under paragraph 77(1)(*a*) of the *PSEA* against the acting appointment of Ms. Shaughnessy for the period of October 9, 2007 to February 1, 2008, a period of less than four months.

[26] Subsection 14(1) of the *PSER* states the following:

> 14. (1) An acting appointment of less than four months, provided it does not extend the cumulative period of the acting appointment of a person in a position to four months or more, is excluded from the application of sections 30 and 77 of the Act.
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> [Emphasis added]

[27] The *PSER* clearly states that the right of complaint under sections 30 and 77 of the *PSEA* does not apply to acting appointments of less than four months. The Tribunal has already dealt with this issue several times and has found that it does not have jurisdiction to hear a complaint relating to an acting appointment of less than four months.

[28] In *Parsons and Carey v. Deputy Head of Service Canada et al.*, [2006] PSST 0004, the acting appointments were for a period of less than four months:

> [11] Section 14 of the *PSER* specifically excludes acting appointments of less than four months from the application of section 77 of the *PSEA*, the section which sets out the right to complain to the Tribunal. Therefore, I find that the Tribunal has no jurisdiction to consider these complaints.

[29] In *Schellenberg and Nyst v. Deputy Minister of National Defence et al.,* [2006] PSST 0005, at issue was an acting appointment that began in 2005, before the coming into force of the *PSEA*, and that ended in 2006:

> [36] Nevertheless, even if the Tribunal were to only take into account the part of the period from January 3, 2006 to March 31, 2006, this period is less than four months. It is clearly excluded from the application of the current *PSEA*.

[30] In conclusion, the Tribunal does not have jurisdiction to consider the complaint regarding Ms. Shaughnessy's acting appointment for the period of October 9, 2007 to February 1, 2008.

DECISION

[31] For all these reasons, the respondent's motion is granted and the complaint is dismissed.

Sonia Gaal
Vice-Chair

PARTIES OF RECORD

Tribunal File:	2007-0565
Style of Cause:	*Jean Lavigne and the Deputy Minister of Justice et al.*
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	November 28, 2007