



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0203

OTTAWA, JANUARY 11, 2008

MERRILY MACINTOSH

COMPLAINANT

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER Complaint of abuse of authority pursuant to section 83 of the
Public Service Employment Act

DECISION Complaint is dismissed

DECISION RENDERED BY Helen Barkley, Member

LANGUAGE OF DECISION English

INDEXED *MacIntosh v. Commissioner of the Correctional Service of
Canada et al.*

NEUTRAL CITATION 2008 PSST 0001

REASONS FOR DECISION

INTRODUCTION

[1] On November 3, 2006 Merrily MacIntosh filed a complaint with the Public Service Staffing Tribunal (the Tribunal) alleging that she was not appointed by reason of abuse of authority in the implementation of corrective action under section 83 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*).

BACKGROUND

[2] In April 2005, the complainant's name was placed on an eligibility list following a closed competition (a competition open only to persons employed in the Public Service) for the position of Correctional Programs Officer (WP-04), Pacific Region - Mental Health Cluster. The first two candidates on the eligibility list were appointed, and the complainant was informed that, pending funding, she would be appointed to the next position. The eligibility list was valid until June 30, 2006.

[3] During the same time period, an open competition (a competition open to persons who are employed in the Public Service as well as to persons who are not employed in the Public Service) was also conducted for Correctional Programs Officer (WP-04) positions in Abbotsford, BC. An eligibility list containing the names of 30 individuals was issued on March 9, 2005 which was valid until June 30, 2006. Tara Mayne and Henry Kokuryo were appointed from this list.

[4] Dale Bruniski and Henry Kokuryo were deployed to Correctional Programs Officer positions, Mental Health Cluster effective June 28, 2006.

[5] In her complaint, the complainant indicated that she was complaining under section 83 of the *PSEA* – failure of corrective action.

[6] In August 2007, the complainant requested that the Tribunal render its decision in this matter without oral hearing. By letter decision dated October 17, 2007 the Tribunal determined that, pursuant to subsection 99(3) of the *PSEA*, it would be appropriate to decide this complaint by way of a paper hearing. The parties were given

an opportunity to make written submissions, and provide documentation and jurisprudence in support of their respective positions.

[7] The parties were directed by the Tribunal to focus their submissions on the following issues:

1. The complainant's ground for complaint is that there was an abuse of authority under section 83 of the *Public Service Employment Act* (the *PSEA*). Have all the conditions under this section been met in order that the Tribunal has authority to decide this complaint?
2. Does the Tribunal have authority under another section of the *PSEA* to decide this complaint?
3. Does the Tribunal have authority to consider the deployments of Dale Bruniski and H. Kokuryo to the position of Correctional Programs Officer?
4. Does the Tribunal have the authority to consider the appointment of Tara Mayne, which the respondent states took place under the former *Public Service Employment Act*?

ISSUE

[8] The Tribunal must determine whether it has jurisdiction to decide the complaint of Ms. MacIntosh.

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[9] The complainant notes in her submissions dated October 24, 2007 that the deployment of Dale Bruniski and the appointment of Tara Mayne have been resolved/explained to her satisfaction. She states that her outstanding concern relates solely to Henry Kokuryo.

[10] She maintains that the Tribunal does have authority to consider this complaint under section 83 of the *PSEA*. She refers to subsection 2(4) of the *PSEA*, which states that abuse of authority may include bad faith and personal favouritism. She further contends that abuse can involve a delegate exercising its discretion with improper intention or when a delegate acts on inadequate material.

[11] The complainant states that human resources personnel informed her that eligibility lists from closed competitions have to be exhausted before eligibility lists from open competitions can be used. She submits that this is not what occurred in the case of Mr. Kokuryo. The complainant says that Mr. Kokuryo was appointed from the open competition and he was immediately sent for training to Saskatoon for a program that fell under the Mental Health Cluster. The complainant alleges that Mr. Kokuryo was then deployed to the Mental Health Cluster. The reason for this, according to the complainant, was to enable Mr. Kokuryo to teach the same program that the complainant had been told that she would be able to teach.

[12] In addition, the complainant contends that Mr. Kokuryo does not possess the essential qualifications required for the Correctional Programs Officer position in the Mental Health Cluster.

[13] The complainant also refers to section 70 of the *Public Service Modernization Act*, S.C. 2003, c. 22 (the *PSMA*), which states that the coming into force of the new *PSEA* does not affect any competition or other selection process under the *Public Service Employment Act*, R.S.C. 1985, c. P-33, as amended (the former Act). Since the eligibility lists were established in 2005, they were ongoing when the new *PSEA* came into effect.

B) RESPONDENT'S ARGUMENTS

[14] The respondent submits that section 83 of the *PSEA* does not apply in this situation. To trigger the recourse set out in section 83, there must first be an order made by the Tribunal under section 81 of the *PSEA*. No order had been made in this case.

[15] The respondent argues that the Tribunal does not have jurisdiction under any other section of the *PSEA* to decide this complaint. The complainant has acknowledged that her concerns about the deployment of Dale Bruniski and the appointment of Tara Mayne have been resolved. The only outstanding matter concerns the decision to deploy Mr. Kokuryo. Subsection 53(1) of the *PSEA* provides that a deployment is not an appointment. The mandate of the Tribunal is set out in subsection 88(2) of the *PSEA* and does not include jurisdiction to hear complaints about deployments.

[16] According to the respondent, it is an undisputed fact that Mr. Kokuryo's appointment as Correctional Programs Officer is the result of a selection process started in 2004. Therefore, the respondent argues that, based on section 70 of the *Public Service Modernization Act*, the Tribunal does not have jurisdiction since the appointment was made from a process which commenced before the coming into force of the current *PSEA*. The fact that Mr. Kokuryo was subsequently deployed does not create a right to complain to the Tribunal.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[17] In its submission, the Public Service Commission (the PSC) states that it is in agreement with the submissions made by the respondent with respect to the applicability of section 83 of the *PSEA* to this complaint.

[18] As it has done in previous complaints, the PSC also provided general written submissions on the concept of abuse of authority and how the Tribunal should focus its approach in this area.

ANALYSIS

[19] The complainant filed her complaint pursuant to section 83 of the *PSEA*, which reads as follows:

83. Where the Commission has made or proposed an appointment **as a result of the implementation of corrective action ordered under section 81**, a complaint may be made to the Tribunal, in the manner and within the period provided by its regulations, by

(a) the person who made the complaint under section 77,

(b) the person who was the subject of the appointment or proposed appointment referred to in subsection 77(1), or

(c) any other person directly affected by the implementation of the corrective action,

on the grounds that the person was not appointed or proposed for appointment by reason of an abuse of authority by the Commission or deputy head in the implementation of the corrective action.

(emphasis added)

[20] A complaint may only be filed where an appointment has been made as a result of the implementation of corrective action ordered under section 81. Section 81 of the *PSEA* reads as follows:

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.

[21] For a complaint to be made under section 83 of the *PSEA* several events must have taken place. First, an appointment must have been made or proposed in an internal appointment process conducted under the current *PSEA*. Second, a complaint must have been filed with the Tribunal under subsection 77(1) of the *PSEA*. Third, the Tribunal must have found the complaint to be substantiated and have ordered corrective action under section 81 of the *PSEA*. Finally, a new appointment must have been made.

[22] In this case, none of the events has taken place. No appointment was made under the current *PSEA*, nor has a complaint been filed under subsection 77(1) of the *PSEA*. A complaint has not been substantiated by the Tribunal and, therefore, there is no order of the Tribunal as to corrective action. As such, this complaint was improperly brought under section 83 of the *PSEA*.

[23] The mandate of the Tribunal is set out in subsection 88(2) of the *PSEA*, which reads as follows: "The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83."

[24] Subsection 65(1) deals with situations of lay-off, and section 74 addresses revocation, neither of which are applicable in this situation. Section 77 provides a complaint mechanism to persons who are not appointed in an internal appointment process. It reads:

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);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

(emphasis added)

[25] In the present case, the parties agree that both Mr. Kokuryo and Mr. Bruniski were deployed into Correctional Programs Officer positions in the Mental Health Cluster. Subsection 53(1) of the *PSEA* states: "A deployment is not an appointment within the meaning of this Act."

[26] As the Tribunal held in *Smith v. President of the Canada Border Services Agency et al.*, [2007] PSST 0029, at paragraph 9, a complaint cannot be filed against a deployment under section 77 of the *PSEA* as a deployment is not an appointment. Thus, no right to complain exists under the *PSEA* against a deployment.

[27] Finally, although the complainant is no longer complaining about the appointment of Tara Mayne, it is clear that that appointment was made from an eligibility list created following a competition under the former Act. In *Schellenberg and Nyst v. Deputy Minister of National Defence et al.*, [2006] PSST 0005, at paragraph 13, the Tribunal found that selection processes that started prior to December 31, 2005 were subject to the former *PSEA*. The Tribunal has no jurisdiction to consider and dispose of complaints concerning selection processes that were conducted under the former *PSEA*.

DECISION

[28] For all of these reasons, the Tribunal does not have jurisdiction to consider and dispose of this complaint. The complaint is dismissed.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File:	2006-0203
Style of Cause:	<i>Merrily MacIntosh and the Commissioner of the Correctional Service of Canada et al.</i>
Hearing:	Paper Hearing
Date of Reasons:	January 11, 2008
APPEARANCES	
Merrily MacIntosh	For the Complainant
Martin Desmeules	For the Respondent
Lili Ste-Marie	For the Public Service Commission