



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILES: 2008-0413 AND 2008-0507

OTTAWA, OCTOBER 9, 2008

PIERRE SMITH

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER Motion to dismiss the complaint

DECISION The motion is denied

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION French

INDEXED *Smith v. Deputy Minister of National Defence et al.*

NEUTRAL CITATION 2008 PSST 0025

REASONS FOR DECISION

INTRODUCTION

[1] Pierre Smith has filed a complaint of abuse of authority in regard to a non-advertised appointment process to fill the UT-3 associate professor position at Royal Military College Saint-Jean. Among other things, he alleges that the appointment was tainted by personal favouritism and that the person appointed does not meet all the requirements of the position. According to the complainant, the choice of a non-advertised process by the respondent, the Deputy Minister of National Defence, constituted an abuse of authority because it lacked transparency and did not allow for the consideration of other candidates.

[2] The respondent requests that the complaint be dismissed because it is premature. According to the respondent, no appointments or proposals for appointment had been made when the complaint was filed in June 2008 because the notification of appointment or proposal for appointment was not posted on *Publiservice* until July 2, 2008. The respondent notes that the complainant filed a second complaint (2008-0507) within the prescribed timeframe, and that it relates to the same appointment process that he is challenging in this first complaint.

BACKGROUND

[3] On May 15, 2008 the complainant learned through an e-mail sent by Patricia Lefebvre, on behalf of the Academic Director, Lieutenant-General (Retired) J.O. Michel Maisonneuve, that Sylvie Mainville had been appointed to the position of associate professor on May 7, 2008. The e-mail reads:

The Academic Director, LGen (Ret'd) J.O. Michel Maisonneuve, is proud to announce that Sylvie Mainville has been appointed to the position of associate professor at Royal Military College Saint-Jean. The appointment became effective on May 7, 2008. After a number of years of providing excellent service to the students and professors of the College, we would like to congratulate Ms. Mainville warmly for this well-deserved appointment! [Translation]

[4] Following that e-mail, the complainant filed his complaint with the Public Service Staffing Tribunal (the Tribunal) on June 3, 2008 under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*).

ISSUES

[5] The Tribunal must decide the following:

- i) Was the complaint premature?
- ii) Was the respondent's motion filed out of time?

ARGUMENTS OF THE PARTIES

A) RESPONDENT'S ARGUMENTS

[6] The respondent argues that the complaint is premature because the notification of appointment or proposal for appointment in appointment process 08-DND-INA-KGSTN-307977 was posted on *Publiservice* on July 2, 2008. He contends that the notice indicated a complaint could be made between July 2, 2008 and July 17, 2008. Therefore, according to the respondent, the complaint made on June 3, 2008 was premature.

[7] Furthermore, the respondent submits that notwithstanding section 21 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (*PSST Regulations*), which requires an objection to the complaint to be made within 25 days following the acknowledgment of receipt of the complaint, the complaint cannot be brought under subsection 77(1) of the *PSEA*.

B) COMPLAINANT'S ARGUMENTS

[8] The complainant explains that, after reading the May 15, 2008 e-mail, he filed his complaint on June 3, 2008. He acknowledges that the May 15, 2008 e-mail did not contain a notice of right to complain and that the notice was not posted in the workplace.

[9] The complainant submits that the respondent's argument that he did not have the right to file his complaint is neither valid nor justified. He states that it was reasonable to consider the respondent's notice as a notification of appointment.

[10] In addition, the complainant objects to the respondent's motion, arguing that it was filed out of time under section 21 of the *PSST Regulations*, because the period for exchanging information had ended.

ANALYSIS

Issue I: Was the complaint premature?

[11] The Tribunal's jurisdiction is determined by its enabling statute, the *PSEA*. Subsection 77(1) of the *PSEA* provides that, to file a complaint with the Tribunal, the appointment or proposal for appointment must have been made. Subsection 77(1) of the *PSEA* 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)

[12] Therefore, the right of an employee to file a complaint is conditional upon an appointment or proposal for appointment having been made (See *Czarnecki v. Deputy Head of Service Canada et al.*, [2007] PSST 0001, and *Tennant v. President of the Canadian International Development Agency et al.*, [2007] PSST 0006). Once an appointment or proposal for appointment has been made, the complaint cannot be considered premature.

[13] The e-mail that the complainant received on May 15, 2008 is straightforward and announces the appointment of Ms. Mainville to the position of associate professor, effective May 7, 2008. The respondent does not deny this fact, but argues that the

complaint was premature because the notification of appointment or proposal of appointment was not posted on *Publiservice* until July 2, 2008.

[14] The Tribunal addressed a similar situation involving an acting appointment in *Sherif v. Deputy Minister of Agriculture and Agri-Food Canada et al.*, [2006] PSST 0003, in which the Tribunal determined that an appointment did not need to be posted on *Publiservice* for a person to have the right to make a complaint.

[15] In *Sherif*, the Tribunal established that the notification of an acting appointment that does not inform the persons involved of their right to file a complaint, and of the grounds on which they can do so, is not a proper notice. The Tribunal stated:

[17] The Federal Court of Appeal addressed the issue of notice in the context of a notice provision contained in predecessor regulations of the old PSEA. In *Healey v. Canada (Public Service Commission Appeal Board)*, [1982] 1 F.C. 792, the Federal Court of Appeal determined that a notice of appeal should not be regarded as having been given after the time to appeal has expired since the notification of appointment failed to comply with the notice requirements contained in the governing regulations. The Federal Court of Appeal further clarified in *Bova v. Canada (Public Service Commission)*, [1990] F.C.J. No. 1032 (QL), that where the notice fails to comply with the requirements contained in the notice provision, it cannot be considered proper notice at all. The Court found that "this does not entail ... that the ... notice of appeal is premature, because the Regulations establish the latest date for a notice of appeal ... but no earliest date, so that if an unsuccessful candidate does not for some reason receive a notice of appointment at all, he/she can still file a notice of appeal ..."

[16] Although the *Sherif* decision was rendered in the context of an acting appointment, the Tribunal considers that the notification for an indeterminate appointment must also be complete. Section 48 of the *PSEA* contains the provisions regarding the notification of an appointment. It provides that, in a non-advertised appointment process, the notice announcing that a person has been appointed must also inform the persons in the area of selection of that internal appointment process:

48.(1) After the assessment of candidates is completed in an internal appointment process, the Commission shall, in any manner that it determines, inform the following persons of the name of the person being considered for each appointment:

(a) in the case of an advertised internal appointment process, the persons in the area of selection determined under section 34 who participated in that process; and

(b) in the case of a non-advertised internal appointment process, the persons in the area of selection determined under section 34.

(2) For the purposes of internal appointment processes, the Commission shall fix a period, beginning when the persons are informed under subsection (1), during which appointments or proposals for appointment may not be made.

(3) Following the period referred to in subsection (2), the Commission may appoint a person or propose a person for appointment, whether or not that person is the one previously considered, and the Commission shall so inform the persons who were advised under subsection (1).

[17] In addition, subsection 29(3) of the *PSEA* states that the Public Service Commission (PSC) may establish policies respecting the manner of making and revoking appointments and taking corrective action. To that end, the *Appointment Policy* of the PSC establishes the terms and conditions for notifications of appointment in the context of advertised and non-advertised internal appointment processes. It should be noted that the *Appointment Policy* does not apply to acting appointments, which are covered by sections 12 to 17 of the *Public Service Employment Regulations*, SOR/2005-334 (*PSER*).

[18] In accordance with section 16 of the *PSEA*, Deputy heads are required to comply with the *Appointment Policy* when they carry out these appointments as it was established by the PSC under subsection 29(3) of the *PSEA*. Section 16 states: “In exercising or performing any of the Commission’s powers and functions pursuant to section 15, a deputy head is subject to any policies established by the Commission under subsection 29(3).”

[19] The *Appointment Policy* states that the notification of appointment must inform individuals of their right to make a complaint to the Tribunal, as well as the grounds for doing so. The notification of appointment must also include the deadline for filing a complaint. The relevant part of the *Appointment Policy*, with regard to this complaint, can be found under the “Policy Requirements” heading. It sets out what a complete notification of appointment or proposal for appointment should contain:

Policy Requirements

In addition to being accountable for respecting the policy statement, deputy heads must:

- establish a waiting period of at least five calendar days;

- ensure that persons to be notified are informed of the duration of the waiting period; and
- ensure that the notification of appointment or proposal for appointment informs persons of:
 - the right to and the grounds upon which to make a complaint to the Public Service Staffing Tribunal (PSST); and
 - the manner and the time period within which a complaint may be made, as set out by the PSST.

(Emphasis added)

[20] The Tribunal finds that the notification of this indeterminate appointment does not comply with section 48 of the *PSEA* or the *Appointment Policy* and, therefore, cannot be considered proper notice. However, this does not imply that the complaint is not premature since section 10 of the *PSST Regulations* sets the latest date for filing a complaint, but does not establish any date on which it would be too early to do so. This means that, in this non-advertised process, a person in the area of selection who has not received proper notice may still file a complaint. Section 10 reads as follows:

10. A complaint by a person may be made to the Tribunal:

(a) except where paragraph (b) applies, no later than 15 days after the day on which the person receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; and

(b) if the notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates is a public notice, no later than 15 days after the date of the notice.

(Emphasis added)

[21] Therefore, once an appointment has been made, a right to recourse exists, and the complaint cannot be considered premature. A complaint is only considered premature when no appointment or proposal for appointment has been made.

[22] In light of the above, the Tribunal finds that the notification of appointment sent by e-mail on May 15, 2008 does not constitute proper notice. The e-mail announced the appointment of Ms. Mainville, but it did not mention the right to file a complaint to the

Tribunal or the grounds for doing so. In addition, it did not include the timeframe for filing a complaint. As well, the e-mail was not preceded by a notification of the name of the person being considered for appointment, as required by subsections 48(1) and (2) of the *PSEA*. Consequently, the Tribunal finds that the complaint is not premature. The Tribunal therefore has jurisdiction to consider and dispose of the complaint.

Issue II: Was the respondent's motion filed out of time?

[23] The respondent's motion pertains to the Tribunal's jurisdiction to consider the complaint under the provisions of subsection 77(1) of the *PSEA*. The respondent argues that subsection 21(1) of the *PSST Regulations* does not apply in these circumstances. The complainant maintains that the respondent's motion was not made within the time period set out in section 21 of the *PSST Regulations* since the period for exchanging information had ended.

[24] Subsection 21(1) of the *PSST Regulations* provides that, if the deputy head objects to the complaint on the ground that it was not made within the time period set out in section 10 of the *PSST Regulations*, it must be made before the end of the period for exchanging information. However, as the Tribunal explained in addressing the previous issue, section 10 of the *PSST Regulations* establishes the time limit for making a complaint after receiving a complete notification of appointment. It does not establish any date before which it would be too early to do so. In other words, section 10 applies only when a proper notice has been issued. The Tribunal has established that the May 15, 2008 e-mail did not constitute proper notice. Subsection 21(1) reads as follows:

21.(1) If the deputy head or the Commission or a person appointed or proposed for appointment wishes to object that the complaint was not made within the period required by section 10, they must do so before the end of the period for exchanging information.

[25] Therefore, subsection 21(1) would apply when the respondent alleges that the complaint was made after the time period set out in section 10 of the *PSST Regulations*. This is not the issue raised by the respondent in this case. The respondent argues that the Tribunal does not have jurisdiction to consider this complaint under subsection 77(1) of the *PSEA*. According to the respondent, there had been no appointment or proposal

for appointment because the notification on *Publiservice* was posted after the complaint had been made.

[26] For all these reasons, the Tribunal finds that the respondent's motion was not made out of time since it pertains to the Tribunal's jurisdiction to consider a complaint made before the notification of appointment or proposal for appointment was issued. Therefore, section 10 and subsection 21(1) of the *PSST Regulations* do not apply in these circumstances.

CONSOLIDATION OF COMPLAINTS

[27] As mentioned, the complainant filed within the prescribed timeframe a second complaint (2008-0507) concerning the same appointment process. The Tribunal has reviewed the two complaints and notes that they both involve the same appointment process. The nature of the complaints is also similar. In addition, the complainant's representative is the same for both complaints. Therefore, in accordance with section 8 of the *PSST Regulations*, and to ensure the expeditious resolution of the complaints, the Tribunal directs that the proceedings be consolidated for complaints 2008-0413 and 2008-0507. The Tribunal will thus consider the complaints at the same time. The main file will be 2008-0413.

DECISION

[28] For all these reasons, the respondent's motion is denied.

Guy Giguère
Chairperson

PARTIES OF RECORDS

Tribunal Files:	2008-0413 and 2008-0507
Style of Cause:	<i>Pierre Smith and Deputy Minister of National Defence et al.</i>
Hearing:	Written request, decided without the appearance of the parties
Date of Reasons:	October 9, 2008