



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2008-0046

OTTAWA, JULY 16, 2008

YVES-CYRILLE ROBERT

COMPLAINANT

AND

THE DEPUTY MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER Determination of jurisdiction

DECISION The complaint is dismissed

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION English

INDEXED *Robert v. Deputy Minister of Citizenship and Immigration
Canada et al.*

NEUTRAL CITATION 2008 PSST 0020

REASONS FOR DECISION

INTRODUCTION

[1] Yves-Cyrille Robert, the complainant, submitted an application for a position that was being offered on an acting basis. He did not qualify. Successful candidates were given an opportunity to fill the position for a period of four months less a day. One of the successful candidates filled the position on two separate occasions.

[2] The complainant filed a complaint as he believes that the respondent, the Deputy Minister of Citizen and Immigration Canada, abused its authority by not issuing a notification for the reappointment of this successful candidate. The complainant alleges that the second acting opportunity brought the cumulative period of the acting appointment to a period of four months or more which makes it subject to the notification requirements of the *Public Service Employment Act*, S.C. 2003, ss.12,13 (the *PSEA*).

[3] On January 17, 2008 the complainant filed a complaint with the Tribunal pursuant to section 77 of the *PSEA* following the acting appointment of H el ene Beauchamp on January 14, 2008.

[4] The respondent filed a motion to dismiss on the grounds that the complainant does not have a right of recourse as the acting appointment is for less than four months, and is excluded from the application of the *PSEA*.

ISSUE

To resolve this complaint the Tribunal must answer the following question:

[5] Did the second acting opportunity result in an extension of the cumulative period of the acting appointment to a period of four months or more?

SUMMARY OF RELEVANT EVIDENCE

[6] The Case Management Branch (the CMB) of the Department of Citizenship and Immigration Canada (CIC) advertised internally for an acting opportunity in a Ministerial

Advisor position (PM-05) for the Minister's office. An email was sent to CMB staff on April 3, 2007 to notify them of this opportunity.

[7] Based on the assessment results, a total of nine candidates were found to meet the qualifications for the acting opportunity and their names were placed in the pool of qualified candidates for the PM-05 acting opportunity, which was identified as position number 00500456 (the position).

[8] The position was offered to those candidates who were found qualified on a rotational basis for a period of four months less a day each.

[9] The rotation of candidates in the position commenced on May 7, 2007. Ms. Beauchamp was the first of the candidates to fill the position. Her appointment was from May 7, 2007 to September 5, 2007.

[10] Ms. Beauchamp had other acting opportunities of less than four months within CIC as indicated in the *Peoplesoft* report provided by the respondent. She was Senior Analyst, Case Review, from April 1, 2007 to May 6, 2007. Ms. Beauchamp was later seconded to the Canada Border Service Agency, beginning on December 3, 2007.

[11] Meanwhile, two other successful candidates, Diane Séguin-Bacon and Remi Larivière, took turns in the position. Another successful candidate, Alexandra Hiles, was offered a turn, but declined as she went to another job.

[12] On January 11, 2008 Raylene Baker, Senior Director, CIC, sent out an email informing case management users that Ms. Beauchamp would be returning to CIC on January 14, 2008 in the position of Acting Ministerial Advisor until May 13, 2008 as she was the next qualified candidate who accepted an offer for an acting assignment.

[13] Ms. Beauchamp returned to CIC on January 14, 2008 and was in the position until May 13, 2008.

ARGUMENTS OF THE RESPONDENT

[14] The respondent argues that the purpose of the acting opportunity was to temporarily fill vacancies while the CMB management administered an advertised process to fill the vacant position indeterminately.

[15] The respondent says that it was also management's intention to offer acting opportunities of four months less a day on a rotational basis should more than one qualified candidate be found.

[16] The respondent submits that the complainant does not have a right to make a complaint under section 77 of the *PSEA*.

[17] The respondent argues that this complaint involves an acting appointment of less than four months. As such, section 14 of the *Public Service Employment Regulations*, SOR/2005-334, (the *PSER*) applies.

[18] The respondent submits that the facts do not give rise to a continuation of an acting appointment as Ms. Beauchamp was not working at CIC in the month prior to the acting appointment.

[19] The respondent submits that no notification was posted on *Publiservice* as the respondent is not required to post a notification unless, and until, the acting appointment exceeds a period of four months.

[20] The respondent relies on the Tribunal's decision *Schellenberg and Nyst v. Deputy Minister of National Defence et al.*, [2006] PSST 0005, in support of its position that if an acting appointment is for a period of less than four months, then it is excluded from the application of section 77 of the *PSEA*.

ARGUMENTS OF THE COMPLAINANT

[21] The complainant does not accept that the position was being filled on a rotational basis. The complainant argues that the second acting appointment of Ms. Beauchamp

is a continuation of her previous acting appointment. As such, this makes the duration of Ms. Beauchamp's acting appointment for a period of more than four months.

[22] The complainant relies on the Tribunal's decision *Wylie v. President of the Canada Border Services Agency et al.*, [2006] PSST 0007, for the proposition that each extension of Ms. Beauchamp's acting appointment made on or after January 14, 2008 constitutes an appointment.

[23] Moreover, the complainant argues that each of these appointments has the effect of extending the cumulative period of the acting appointment to four months or more.

[24] The complainant argues that the facts do not fit within the exclusion provided by subsection 14(1) of the *PSEER*. There was a continuation, as well as an extension, of a cumulative period of time exceeding four months, which must be considered as an appointment exceeding four months and, therefore, subject to recourse.

[25] Given this, the respondent was required to provide a notification of this acting appointment and the complainant has the right to make a complaint to the Tribunal.

RELEVANT LEGAL PROVISIONS

[26] "Acting appointment" is not defined in the *PSEA*. However, it is defined in section 1 of the *PSEER*. The definition reads as follows:

"acting appointment" means the temporary performance of the duties of another position by an employee, if the performance of those duties would have constituted a promotion had they been appointed to the position.

[27] Section 13 and subsection 14(1) of the *PSEER* reads as follows:

13. The Commission shall, at the time that the following acting appointments are made or proposed, as a result of an internal appointment process, inform the persons in the area of recourse, within the meaning of subsection 77(2) of the Act, in writing of the name of the person who is proposed to be, or has been, appointed and of their right and grounds to make a complaint:

(a) an acting appointment of four months or more;

(b) an acting appointment that extends the person's cumulative period in the acting appointment to four months or more.

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 33 and 77 of the Act.

[28] Section 58 of the *PSEA* reads as follows:

58. (1) Subject to section 59, an employee whose appointment or deployment is for a specified term ceases to be an employee at the expiration of that term, or of any extension made under subsection (2).

(2) A deputy head may extend a specified term referred to in subsection (1), and such an extension does not constitute an appointment or a deployment or entitle any person to make a complaint under section 77.

(3) This section does not apply in respect of appointments made on an acting basis.

ANALYSIS

[29] Subsection 58(2) of the *PSEA* stipulates that the extension of a specified term is not an appointment and is not subject to recourse under section 77. However, subsection 58(3) states that this section does not apply to acting appointments; therefore, their extensions are appointments, and subject to recourse.

[30] As explained in *Wylie*, at paragraph 21:

The courts have recognized the need for flexibility to assign federal public service employees to functions on a temporary basis without this giving rise to the application of merit and the right of recourse. The case of *Doré v. Canada*, [1987] 2 S.C.R. 503, is illustrative of both this principle and its limitations.

[31] Subsection 14(1) of the *PSEER* provides this flexibility to managers as acting appointments are excluded from the right of recourse provided that they are for less than four months and that they do not extend the cumulative period of the acting appointment to four months or more.

[32] Therefore, each extension of an appointment constitutes an appointment and is subject to the requirements of the *PSEA*, including recourse if it brings the cumulative

period of the acting appointment of a person in a position to four months or more. Under paragraph 13(b) of the *PSER*, notice of such extension must also be given.

[33] In *Wylie*, Mr. Rose's initial acting appointment was for nine months, from June 30, 2003 to March 31, 2004 to which notification of right to recourse was given. The initial acting appointment was extended on April 1, 2004, but no notice of recourse was issued as the deputy head viewed this as an extension to the initial acting appointment and not a new appointment. The acting appointment was extended contiguously in this way for a total of six times. The Tribunal reviewed section 58 of the *PSEA*. The Tribunal found that each appointment made on an acting basis and each extension of such an appointment constitutes an appointment subject to the requirements of the *PSEA* and its regulations, including recourse.

[34] In this complaint, the position was initially offered on a rotational basis for a period of four months less a day to different successful candidates. The acting appointment of Ms. Beauchamp was not extended contiguously as in *Wylie*. When Ms. Beauchamp accepted the second acting appointment, she was the next qualified candidate who accepted an offer for an acting assignment.

[35] The circumstances here are clearly different than what transpired in *Wylie*. *Wylie* was not a situation where an acting appointment was being filled on a rotational basis. There was no one else who filled the position; Mr. Rose held the position, through a series of extensions, from June 30, 2003 to June 16, 2006.

[36] In the present case, the acting opportunity for a period of less than four months was offered to qualified candidates on a rotational basis, while an advertised process to fill the vacant position indeterminately was being completed. There was a gap of more than four months between the time that Ms. Beauchamp initially filled the position, and her second placement in the position. In the interim, the position was filled by another successful candidate.

[37] The Supreme Court of Canada considered the terms “extend” and “extension” when analyzing the distinction between an “extension” and a “renewal”. In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, at paragraph 29, the Court held as follows:

Black’s Law Dictionary ... defines “extension” ... as “[a]n increase in length of time... The word ‘extension’ ordinarily implies the existence of something to be extended.” This clearly indicates that an ‘extension’ refers to extending an agreement which already exists... This distinction is confirmed by The Concise Oxford Dictionary of Current English ... which defines “extend” as “lengthen or make larger in space or time” (...)

[38] The Tribunal finds that, with a gap of several months between the times that Ms. Beauchamp filled the position, the second acting appointment was clearly not an extension of the first appointment. On the evidence, the Tribunal finds as a fact that the second acting appointment is a separate appointment and not an extension of the first appointment.

[39] The Tribunal finds that, as the second acting appointment is not an extension of the first, both acting appointments were for periods of less than four months. Therefore, by virtue of subsection 14(1) of the *PSER*, both appointments are excluded from the application of section 77 of the *PSEA*.

[40] Accordingly, there was no obligation for the respondent to issue a notification.

DECISION

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

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2008-0046
Style of Cause:	<i>Yves-Cyrille Robert and the Deputy Minister of Citizenship and Immigration Canada et al.</i>
Hearing:	Written request, decided without the appearance of parties
Date of Reasons:	July 16, 2008