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

FILE: 2007-0107

OTTAWA, DECEMBER 4, 2008

LUC BOULANGER

COMPLAINANT

AND

THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA

RESPONDENT

AND

OTHER PARTIES

MATTER	Preliminary matter: Determination of jurisdiction
DECISION	The Tribunal has jurisdiction to hear the complaint
DECISION RENDERED BY	Francine Cabana, Member
LANGUAGE OF DECISION	French
INDEXED	*Boulanger v. Commissioner of the Correctional Service of Canada et al.*
NEUTRAL CITATION	2008 PSST 0031

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Luc Boulanger, participated in an advertised appointment process (No.: 07-PEN-IA-QUE-DON-7) to staff the position of Supervisor, Institutional Services (GS-STS-07 C2 group and level) at the Correctional Service of Canada's Donnacona Institution.

[2] The complainant filed a complaint under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*) and alleges that the respondent, the Commissioner of the Correctional Service of Canada, abused its authority in establishing and applying the language requirements for the position. He alleges that, in the past, the respondent did not take into account the fact that this bilingual position had to be staffed imperatively, because the position had been held by a unilingual Francophone for the past two years.

[3] At the Tribunal's pre-hearing conference on December 18, 2007, the respondent raised a preliminary matter. The respondent argued that the matter had already been decided. The respondent therefore submits that issue estoppel applies in this case.

[4] The Tribunal issued a letter decision on January 7, 2008, indicating to the parties that it would decide the preliminary issue before proceeding with the merits of the complaint. The parties were to provide their arguments in writing within the timeframe established by the Tribunal. The Tribunal rendered a decision on the preliminary issue without holding an oral hearing, in accordance with subsection 99(3) of the *PSEA*. The decision was made based on the submissions of the parties and the evidence in the file.

BACKGROUND

[5] The respondent held an advertised appointment process to staff the position of Supervisor, Institutional Services, at Donnacona Institution in Quebec. In the merit criteria, the respondent included the "bilingual imperative BBB/BBB" language requirement under the "Essential Qualifications" heading.

[6] The complainant applied for the position in this appointment process and was screened out.

[7] The respondent assessed the complainant's language proficiency, but the complainant did not meet the language requirements established for the position.

[8] On March 7, 2007, the complainant submitted a request for investigation to the Office of the Commissioner of Official Languages (OCOL) because he challenged the requirement of proficiency in both official languages for the position and submitted that bilingualism for the position was unnecessary, given that the position had been staffed by a unilingual Francophone for two years. He also indicated that the same position at La Macaza Institution was identified as French essential and that, in his opinion, bilingualism was not required for the position at Donnacona. The complainant was also opposed to using imperative staffing to staff the bilingual position. In October 2007, the OCOL published an investigation report and concluded that:

> Under the circumstances, we agree that the use of imperative staffing was required, and that non-imperative staffing could have hindered the immediate delivery of service in both official languages.
>
> In light of the preceding, we find that the language requirement for this selection process was determined in accordance with the requirements of the applicable Directive and Regulations.
>
> Therefore, there was no violation of the letter or spirit of section 91 of the Act in this case.

ISSUES

[9] The Tribunal must render a decision on the following issue:

i) Does the doctrine of issue estoppel apply in this case?

ARGUMENTS OF THE PARTIES

A) RESPONDENT'S ARGUMENTS

[10] The respondent argues that the OCOL's investigation report completely decided the matter of the language requirements established by the respondent for the position and that no other matter remains to be decided by the Tribunal.

[11] The respondent explains that the OCOL has the discretion to investigate and that anyone who has submitted a complaint to the Commissioner, based on section 91 of the *Official Languages Act*, 1985, c. 31 (4th suppl.) (*OLA*), may apply to the Federal Court.

[12] According to the respondent, the OCOL met with five individuals from the Correctional Service of Canada as part of its investigation. They explained to the OCOL the reasons for the language requirements of the position in question. The OCOL concluded that the language requirements of the position were required.

[13] The respondent bases its position on the doctrine of issue estoppel. According to the respondent, the criteria that apply to this doctrine were set out by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460; [2001] 2 S.C.J. No. 46 (QL), and applied in *Sherman v. Canada (Customs and Revenue Agency),* [2006] F.C.A. 912 (QL).

[14] The respondent acknowledges the difference between a complaint to the Tribunal and a request for an OCOL investigation. It also acknowledges that these two bodies address the issue from different angles: one from the perspective of an abuse of authority, and the other from the perspective of whether the requirements are objectively required, but based on the same facts.

[15] The respondent submits that the same issue must be decided in each proceeding. The respondent adds that the most appropriate forum, when one considers the true nature of the issue, was the OCOL.

[16] The respondent argues that the decision that creates issue estoppel is final, and the parties to the two proceedings in question are the same. The respondent acknowledges that additional parties can be heard by the Tribunal, but it submits that this fact does not prevent the Tribunal from finding that the issue before the Tribunal involves the same parties.

[17] The respondent alleges that the investigation report issued by the OCOL is final and binding because, in its view, the complainant did not exercise his right to recourse before the Federal Court within the prescribed timeframes.

[18] The respondent also submits that the Tribunal should not exercise its discretion to hear the complaint on its merits. The respondent adds that there is no potential injustice to the complainant. According to the respondent, the complainant cannot obtain the right to be appointed; moreover, there is nothing else relevant to review that has not already been reviewed by the OCOL that would help to decide the real issue put forward by the complainant.

[19] Finally, the respondent argues that the only issue raised by the complainant involves the establishment of the language requirements of the position. The OCOL has already determined that the language requirements of the position were objectively justified. Therefore, the respondent maintains that the issue has already been addressed in light of the criteria set out in *Danyluk*. As a result, the respondent submits that the Tribunal should not make a determination on the issue.

B) COMPLAINANT'S ARGUMENTS

[20] The complainant submits that the issue is unresolved and that only the Tribunal has the authority to deal with the matter under the provisions of the *PSEA*.

[21] The complainant also argues that the complaints are not the same, nor of the same nature. He maintains that the OCOL is governed by the *OLA*, and the Tribunal by the *PSEA*. The complainant argues that the basis for the complaints is different from one act to the other. Also, in his view, there is nothing in the *PSEA* that indicates that another body can act as a substitute for the Tribunal in the determination of a decision involving a complaint submitted to the Tribunal.

[22] According to the complainant, the OCOL's investigation report is not final and, therefore, is not binding.

[23] The complainant submits that he can prove his allegations only if the Tribunal hears them.

[24] Lastly, the complainant asks the Tribunal to consider and dispose of his complaint.

C) PUBLIC SERVICE COMMISSION'S ARGUMENTS

[25] The Public Service Commission (PSC) is of the opinion that, without confirmation that the complainant pursued his complaint in Federal Court, the final nature of the "decision" cannot be confirmed. In addition, the PSC submits that even if the OCOL's decision proved to be final, it would not be binding.

[26] According to the PSC, there are two issues. Even if the Tribunal determined that the issue of the language requirement had already been decided, a decision would still be needed regarding the second issue, namely, the issue of the abuse of authority based on what was done in previous staffing processes. Therefore, the PSC cannot support the respondent's conclusion that there is no issue to be addressed.

ANALYSIS

Issue 1: Does the doctrine of issue estoppel apply in this case?

[27] In *Danyluk*, the Supreme Court established that the doctrine of issue estoppel aims to prevent parties from re-litigating issues that have already been decided in other proceedings. In particular, the rights, issues or facts put in question and directly settled by a competent court cannot be decided again in a subsequent case between the same parties, even if the cause of action is different. This principle was also applied by the Federal Court in *Sherman.*

[28] As expressed by the Supreme Court in paragraph 25 of the *Danyluk* decision, three preconditions are required for the doctrine of issue estoppel to apply:

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and

(3) that the parties to the judicial decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised, or their privies.

[29] The analysis of the applicability of issue estoppel is two-fold. First, the Tribunal must determine whether the preconditions for applying issue estoppel have been met. Then, the Tribunal must decide whether it will exercise its discretion to refuse to apply the doctrine of issue estoppel.

A) PRECONDITION REQUIRING THAT THE SAME QUESTION HAS ALREADY BEEN DECIDED

[30] For this first precondition, the question to be decided must have been fundamental to the OCOL's findings. The issue of estoppel is aimed at the material facts, conclusions of law or conclusions of mixed fact and law established by the OCOL.

[31] In his complaint to the OCOL, the complainant challenged the requirement of both official languages for the position in question under section 91 of the *OLA*, which states:

> **91.** Nothing in Part IV or V authorizes the application of official language requirements to a particular staffing action unless those requirements are objectively required to perform the functions for which the staffing action is undertaken.

[32] The complainant is also opposed to using imperative staffing to staff the bilingual position.

[33] The issue before the OCOL was to determine whether the "Bilingual imperative BBB" language requirement established by the Commissioner of the Correctional Service of Canada was objectively required to perform the functions for which the staffing action was undertaken. However, the OCOL did not examine the complainant's allegation that the position was held in the past by a unilingual Francophone employee and that the position had not been staffed imperatively.

[34] The Federal Court of Appeal explained in *Canada (Attorney General) v*. *Viola*, [1990] 24 A.C.W.S. (3d) 189; [1990] F.C.A. No. 1052 (QL), what is meant by "objectively" in section 91 of the *OLA*:

> By stating that language requirements must be imposed "objectively", s. 91 expressly confirms what has always been implicit, namely that language requirements cannot be imposed frivolously or arbitrarily.

[35] Therefore, to determine whether the requirements were imposed objectively, the OCOL examines the facts related to the language requirements of the position in relation to the demand for service in both official languages, as well as the obligations imposed on federal institutions concerning the promotion of an official language in a minority community (see *Professional Institute of the Public Service v. Canada*, [1993] 2 F.C. 90, and *Rogers v*. *Canada (Department of National Defence)*, [2001] 103 A.C.W.S. (3d) 715 ; [2001] F.C.A. No. 222 (QL)).

[36] The OCOL ensures that language requirements are not established frivolously or arbitrarily in terms of complying with the *OLA*, the *Directive on the Linguistic Identification of Positions or Functions,* the *Directive on the Staffing of Bilingual Positions* (the *Directives*) and the *Official Languages (Communications with and Services to the Public) Regulations,* SOR/92-48 (the *Official Languages Regulations*). The OCOL's investigation is therefore limited and does not extend beyond this framework.

[37] Furthermore, in *Rogers*, the Federal Court stated that, when it reviews a matter concerning section 91 of the *OLA*, it can simply examine the objectivity of the language requirement:

> [28] It is also clear, in my view, that this Court can only make a determination with regard to the objectivity of the requirements and the manner in which the decision to impose those requirements was taken. This Court should not consider whether the applicant was unjustly treated by his employer, […], whether he was denied the position for reasons other than the language requirements, whether his level of French is good, […], how other positions are designated, how the interview process for the position is conducted or any technical administrative matters or errors relating to the staffing of the position. The only relevant issue, in my view, is whether or not the position objectively requires the linguistic requirements which were designated.
>
> [29] […] If the applicant believes that he was unjustly treated by his employer or that he is being denied the position for reasons other than the linguistic requirements, he should raise these issues before a different forum. This Court, under section 91, is restricted to determining the objectivity of the language requirements. I will therefore discuss the language requirements only and leave aside the applicant's arguments which concern his personal situation.

[38] However, before the Tribunal, the issue involves the abuse of authority by the respondent in establishing the essential qualification related to the language requirement.

[39] On March 7, 2007, the complainant filed his complaint with the Tribunal under paragraph 77(1)(*a*) of the *PSEA*:

> **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);
>
> […]

[40] Under paragraph 77(1)(*a*) and subsection 30(2) of the *PSEA*, the Tribunal can examine the allegations relating to the establishment of essential qualifications. Subsection 30(2) states:

> **30.** (2) An appointment is made on the basis of merit when:
>
> *a*) the Commission is satisfied that the person to be appointed meets the essential qualifications for the work to be performed, as established by the deputy head, including official language proficiency;
>
> […]

[41] The issues before the OCOL and the Tribunal are different. In this case, the "Bilingual imperative BBB/BBB" official language proficiency is an essential qualification. The Tribunal will therefore examine whether the respondent abused its authority when it established this essential qualification. The Tribunal's analysis will address a different aspect, namely, abuse of authority under the provisions of the *PSEA*. The complainant alleges that the respondent abused its authority with regard to the imperative staffing requirement of the position in question. He also alleges that, in the past, the respondent did not take into account the fact that the bilingual position had to be staffed imperatively. The criteria that will be used to determine whether the abuse of authority is founded are different from the criteria used by the OCOL to determine whether the decision was consistent with the *Directives* and the *Official Languages Regulations*.

[42] It is true that the OCOL determined that the language requirement had been objectively required in accordance with section 91 of the *OLA*; however, the Tribunal's mandate is broader than the OCOL's. The Tribunal must go beyond the fact that the *OLA* was complied with and go further in its analysis to determine whether there was an abuse of authority, such as bad faith, personal favouritism or discrimination, for example, when the respondent decided to establish the linguistic qualification. In addition, if the complaint is founded, the Tribunal may revoke the appointment; take any corrective action that it considers appropriate or both. The *OLA* does not grant this authority to the OCOL with regard to staffing.

[43] In addition, the fact that Parliament expressly referred to official languages in subsection 30(2) of the *PSEA* shows that it intended to grant the Tribunal the power to decide all abuse of authority matters concerning official languages.

[44] Although there may be an overlap in the facts in the two proceedings, this does not mean that the doctrine of issue estoppel is applied automatically (*The Doctrine of Res Judicata in Canada*, Second Edition, Butterworths, Donald J. Lange, 2004).

[45] In light of the facts and the case law, the Tribunal finds that this first precondition has not been met because the Tribunal will be reviewing a different matter, one concerning the abuse of authority, which was not examined by the OCOL in its investigation report.

B) PRECONDITION REQUIRING THAT THE PARTIES BE THE SAME PARTIES IN BOTH PROCEEDINGS

[46] The OCOL investigation focused on the Correctional Service of Canada and the complainant. The parties are different before the Tribunal because, in addition to the complainant and the Commissioner of the Correctional Service of Canada, the PSC and the person appointed are also parties identified in subsection 79(1) of the *PSEA* as being entitled to be heard. In fact, the *PSEA* stipulates in section 81 that if the Tribunal determines that there has been an abuse of authority, it may order the revocation of the appointment, which has a direct impact on the person appointed. Furthermore, the PSC

plays a lead role in the application of the *PSEA*. That is why the PSC and the person appointed are identified as being parties to the case before the Tribunal.

[47] Therefore, the Tribunal cannot accept the respondent's argument that the parties are the same because, according to the rules of natural justice, the PSC and the person appointed are parties who are entitled to be heard by the Tribunal.

[48] Obviously, the same parties are not involved in this case because the PSC and the person appointed were not part of the investigation or the OCOL report. The condition regarding the same parties to the proceedings has therefore not been met.

C) PRECONDITION REQUIRING THAT THE JUDICIAL DECISION BE FINAL

[49] In *Danyluk*, the Supreme Court undertook an analysis of the "judicial decision" concept and stated, in paragraph 42, that "the adjudication of the claim, once the relevant information had been gathered, is of a judicial nature." The Court also noted that the finality of a decision concerning the issue of estoppel is linked to the appeal process. Therefore, the decision is final when the tribunal or the court does not have the ability or jurisdiction to review the issue.

[50] The respondent argues that the complainant did not exercise his right to recourse before the Federal Court within the prescribed timeframes. The complainant did not refute that argument. Therefore, the OCOL's decision is final. However, it is not necessary for the Tribunal to examine this third precondition further, given that two of the three preconditions have not been met.

D) JUDICIAL DISCRETION REGARDING ISSUE ESTOPPEL

[51] Since the three preconditions for applying issue estoppel have not been met, in the circumstances of this case, it is not necessary for the Tribunal to consider whether or not to exercise its judicial discretion.

CONCLUSION

[52] Given the facts and the case law, the Tribunal finds that the doctrine of issue estoppel does not apply in this case. The Tribunal will therefore proceed with a hearing on the merits of the complaint.

Francine Cabana
Member

PARTIES OF RECORD

Tribunal File:	2007-0107
Style of Cause:	*Luc Boulanger and the Commissioner of the Correctional Service of Canada et al.*
Hearing:	Written request, decision rendered without the appearance of the parties
Date of Reasons:	December 4, 2008