



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2008-0579

OTTAWA, APRIL 1, 2009

LAURA HOWARTH

COMPLAINANT

AND

THE DEPUTY MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT

RESPONDENT

AND

OTHER PARTIES

MATTER	Complaint of abuse of authority pursuant to paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
DECISION	The complaint is dismissed
DECISION RENDERED BY	Guy Giguère, Chairperson
LANGUAGE OF DECISION	English
INDEXED	<i>Howarth v. Deputy Minister of Indian Affairs and Northern Development et al.</i>
NEUTRAL CITATION	2009 PSST 0011

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Laura Howarth, seeks to continue a complaint that she had previously withdrawn. The respondent, the Deputy Minister of Indian Affairs and Northern Development, believes that the Public Service Staffing Tribunal (the Tribunal) lacks jurisdiction to proceed to hear this complaint on the merits.

BACKGROUND

[2] A complaint was received by the Tribunal on February 27, 2008 concerning an appointment process for a Senior Policy Analyst (ES-06) in the Department of Indian Affairs and Northern Development, Lands and Trust Services (appointment process no.: 2007-IAN-IA-NCR-LTS-61837). This complaint was assigned file number 2008-0146.

[3] The parties agreed to participate in the Tribunal's mediation process. Pre-mediation was conducted on June 10, 2008. Mediation sessions were held on June 11 and 16, 2008.

[4] The parties executed an Agreement to Mediate on June 11, 2008. The Agreement to Mediate contains the following pertinent clauses:

13. When a settlement is reached, the parties will draft and sign Terms of Settlement. The Terms of Settlement are confidential and cannot be disclosed unless the parties agree to do so.

14. The Terms of Settlement will not be placed on any complaint file. The PSST will only be advised whether a settlement was reached or not.

[5] On June 16, 2008 the Tribunal received a Mediation Status Report confirming that the complaint had been settled.

[6] A Notice of Withdrawal (Form 10) was signed by the complainant on June 16, 2008. In the Notice of Withdrawal, the complainant stated as follows: "I hereby withdraw the above-mentioned complaint."

[7] On August 29, 2008 the Tribunal received a new complaint from Ms. Howarth claiming that the deputy head had abused his authority under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*), specifically in the establishment and application of merit.

[8] In her new complaint, Ms. Howarth seeks to continue with her initial complaint filed February 27, 2008 on the basis that the respondent failed to comply with the terms of settlement entered into on June 16, 2008.

[9] The Tribunal directed the parties to provide written submissions, together with applicable jurisprudence. The parties complied with the Tribunal's direction.

ISSUES

[10] To resolve this matter the Tribunal must determine the following:

- (i) Does the formal withdrawal of a complaint constitute a complete bar to the complaint being heard by the Tribunal?
- (ii) Does an alleged failure to comply with the terms of settlement constitute grounds for a new complaint of abuse of authority?

ARGUMENTS OF THE PARTIES

A) COMPLAINANT'S ARGUMENTS

[11] In her submissions, the complainant acknowledges that the parties agreed to terms of settlement concerning complaint file 2008-0146.

[12] The complainant submits that the respondent has failed to comply with the terms of settlement, and this failure revives her original complaint. Thus, she believes that she is entitled to have her original complaint heard on the merits.

[13] In the alternative, the complainant argues that the failure to comply with the terms of settlement has the effect of providing the grounds for a new complaint of abuse of authority against the respondent pursuant to paragraph 77(1)(a) of the *PSEA*.

[14] The complainant did not provide any jurisprudence to support her position.

B) RESPONDENT'S ARGUMENTS

[15] The respondent submits that the *PSEA* does not confer jurisdiction on the Tribunal to interpret, apply or supervise settlements. According to the respondent, once complaint 2008-0146 was withdrawn, the Tribunal was no longer seized of the matter.

[16] The respondent further submits that there is no basis for a complaint under paragraph 77(1)(a) of the *PSEA* since this new complaint is not in respect of an internal appointment process.

[17] The respondent notes that there is no applicable case law from the Tribunal on this issue. However, it submits that the jurisprudence of the Public Service Labour Relations Board (PSLRB) is germane. The respondent relies on the following decisions: *Treasury Board and Deom*, [1985] C.P.S.S.R.B. No. 150 (QL); *Lindor v. Treasury Board (Solicitor General – Correctional Services Canada)*, [2003] P.S.L.R.B. 10; *Bedok v. Treasury Board (Department of Human Resources Development)*, [2004] P.S.L.R.B. 163; and, *Van de Mosselaer v. Treasury Board (Department of Transport)*, [2006] P.S.L.R.B. 59.

[18] The respondent submits that these cases endorse the “established principle that a valid settlement agreement is a complete bar to an adjudicator’s jurisdiction” (*Van de Mosselaer*, at paragraph 62). The respondent submits that the same principle applies to the interpretation of the *PSEA* as it relates to the Tribunal’s role.

[19] Finally, given the confidentiality agreement between the parties, the respondent is not prepared to make submissions as to whether the terms of settlement have been complied with, save to state that all of its obligations have been met.

ANALYSIS

Issue 1: Does the formal withdrawal of a complaint constitute a complete bar to the complaint being heard by the Tribunal?

[20] By the complainant's own admission, the new complaint constitutes a continuation of her original complaint. The complainant filed a Notice of Withdrawal of her original complaint. The Federal Court of Appeal has addressed the powers of an adjudicator in these circumstances.

[21] The issue of the legal effect of a discontinuance was addressed in *Canada (Attorney General) v. Lebreux*, [1994] F.C.J. No. 1711 (C.A.)(Q.L.), 178 N.R. 1 (F.C.A.). In that case, following a settlement agreement, the grievor filed a discontinuance of his suspension and dismissal grievances. He later asked the then Public Service Staff Relations Board (the Board) to set a new date for hearing on the basis that there had been no satisfactory agreement between the parties. The Board agreed to review the case, and hear the grievance on its merits. The Federal Court of Appeal found, at paragraph 12 (Q.L.), that the adjudicator erred in doing so, and that once a withdrawal is filed the Board loses jurisdiction to hear a grievance. Therefore, the withdrawal of a grievance is a complete bar to adjudication:

[12] From the time the respondent discontinued his grievances the Board and the designated adjudicator became functus officio since the matter was then no longer before them. The Board was not required either to inquire into the merits or feasibility of such a discontinuance or to agree to accept or reject it. The act of discontinuance without more terminated the grievance process in respect of which it was filed.

[22] More recently, *Lebreux* was analysed and applied in *Maiangowi v. Treasury Board (Department of Health)*, [2008] C.P.S.L.R.B. No. 6 (Q.L.). In *Maiangowi*, the grievor's representative had requested that the grievance be reopened, and scheduled for hearing, on the ground that the employer had breached the settlement that the parties had agreed on. She asked the PSLRB to take jurisdiction over the enforcement of the settlement agreement. At paragraph 61 (Q.L.), Adjudicator Mooney, relying on *Lebreux*, held as follows:

61. In my view, *Lebreux* stands for the proposition that the withdrawal of a grievance is a bar to adjudication, not only regarding the merits of the grievance but also the enforcement of the settlement if I had that jurisdiction. Once a grievance is withdrawn, the Board loses jurisdiction over all matters related to it. There is simply no longer any grievance before the adjudicator.

[23] In this case, the original complaint was withdrawn and the Notice of Withdrawal was neither conditional nor was it claimed to have been filed under duress. The Tribunal

finds that it lost any jurisdiction to hear this complaint once the withdrawal was filed by the complainant. The withdrawal of a complaint under the *PSEA* is a complete bar to adjudication.

Issue 2: Does an alleged failure to comply with the terms of settlement constitute grounds for a new complaint of abuse of authority?

[24] The complainant's alternative argument is that the failure of the respondent to comply with the terms of settlement constitutes a new complaint of abuse of authority under paragraph 77(1)(a) of the *PSEA*.

[25] This argument, as well, cannot succeed. Paragraph 77(1)(a) of the *PSEA* reads as follows:

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);

[...]

(Emphasis added)

[26] Paragraph 30(2)(a) of the *PSEA*, in turn, reads as follows:

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;

[27] Thus, a person in the area of recourse has the right to make a complaint to the Tribunal pursuant to paragraph 77(1)(a) of the *PSEA* that there has been an abuse of authority in the establishment and/or application of merit. The fact that a party may or may not have complied with the terms of settlement is not a proper ground of complaint under paragraph 77(1)(a) of the *PSEA*.

DECISION

[28] For all of these reasons, the complaint is dismissed.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2008-0579
Style of Cause:	<i>Laura Howarth and. the Deputy Minister of Indian Affairs and Northern Development et al.</i>
Hearing:	Paper hearing
Date of Reasons:	April 1, 2009