



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**FILE: 2008-0732**

**OTTAWA, APRIL 3, 2009**

**MOHAMED AIT LAHCEN**

**COMPLAINANT**

**AND**

**THE COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA**

**RESPONDENT**

**AND**

**OTHER PARTIES**

**MATTER** Motion to dismiss the complaint

**DECISION** The motion is granted

**DECISION RENDERED BY** Guy Giguère, Chairperson

**LANGUAGE OF DECISION** French

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

**NEUTRAL CITATION** 2009 PSST 0013

## REASONS FOR DECISION

### INTRODUCTION

[1] The complainant, Mohamed Ait Lahcen, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) alleging abuse of authority by the respondent, the Commissioner of the Correctional Service of Canada. He alleges that there was abuse of authority in the application of merit concerning the position of Local Coordinator, Quality Improvement and Learning, Health Services, WP-03 group and level at the Donnacona Institution.

[2] The complainant filed his complaint pursuant to section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*). He states that he was eliminated from an internal appointment process. He submits that there was no interview or written examination, and that he was never contacted for information.

[3] The respondent filed a motion to dismiss the complaint on the ground that no appointment had been proposed or made at the time the complaint was filed. According to the respondent, the complaint concerns an assignment, and not an appointment.

### ISSUE

[4] The Tribunal must decide whether the complaint concerns an assignment.

### ARGUMENTS OF THE PARTIES

#### A) RESPONDENT'S ARGUMENTS

[5] According to the respondent, the complaint concerns an assignment rather than an appointment or proposed appointment. The notice of interest and the assignment agreement filed with the motion state that the person selected will be assigned to the position of Local Coordinator, Quality Improvement and Learning, Health Services. In addition, the assignment agreement states that the assignment is for a specific duration, namely from October 13, 2008 to September 30, 2009 and that the status and compensation of the employee on assignment are as follows:

Status of the employee/salary

The employee on assignment will remain the incumbent of his or her substantive position for the entire duration of this agreement and will return to that position unless other arrangements are made and agreed on by the interested parties. During that period, he or she will receive the salary applicable to the substantive position. The person will retain the Penological Factor Allowance applicable to the substantive position for the entire duration of the assignment.

[Underlining in the original]

[Translation]

[6] The respondent asserts that the complainant has no grounds to file a complaint under section 77 of the *PSEA*. It therefore requests that the complaint be dismissed on the ground that the Tribunal does not have jurisdiction to consider or dispose of the complaint.

B) COMPLAINANT'S ARGUMENTS

[7] The complainant did not respond to the respondent's motion.

ANALYSIS

[8] The Tribunal's jurisdiction is circumscribed by its enabling legislation, the *PSEA*. Subsection 77(1) of the *PSEA* provides that a person in the area of recourse may make a complaint to the Tribunal where there has been an appointment or a proposed appointment. Subsections 77(1) and (2) of the *PSEA* read 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);

(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).

(2) For the purposes of subsection (1), a person is in the area of recourse if the person is

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and

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

(Emphasis added)

[9] The term "assignment" is neither defined nor referred to in the *PSEA*, or in the *Public Service Staffing Tribunal Regulations*, SOR/2006-6.

[10] The Tribunal has addressed the issue of assignments in *Beyak v. Deputy Minister of Natural Resources Canada et al.*, [2009] PSST 0007. In *Beyak*, the Tribunal established that, in certain circumstances, an assignment may in fact be an appointment, and that the appointment can be revoked under the *PSEA*. The Tribunal stated as follows:

[90] An assignment can be defined as the temporary move of an employee, within a government department, to perform the duties of an existing position or to carry out a special project. While on assignment, the employee retains his or her substantive position, and performs duties at the same group and level. The employee does not acquire tenure in the position to which he or she is assigned, but rather is expected to return to his or her substantive position. See: *Elmore and Attorney General of Canada*, [2000] F.C.J. No. 119 (QL).

[91] It has been acknowledged in case law that there is a need to provide managers with a degree of reasonable flexibility in assigning temporarily employees to functions without giving rise to the application of merit and the right of recourse. However, there are limitations on this principle and, depending on the particular circumstances of each case, it may be determined that an assignment is in fact an appointment. Where it has been established that the flexibility in assigning duties was not exercised in a fair and reasonable way, the courts have determined that the assignment was in fact an appointment, and revoked the appointment. In *Doré v. Canada*, [1987] 2 S.C.R. 503, where an employee was assigned on a temporary basis to a new position pending the classification of the position, the Supreme Court of Canada found that it was in fact an appointment and revoked the appointment. See also: *Canada (Attorney General) v. Brault*, [1987] 2 S.C.R. 489; *Peet v. Canada (Treasury Board)*, (June 30, 1993) Court File T-1608-92 (F.C.T.D.); and *Canada (Attorney General) v. Davidowski*, [1994], 88 F.T.R. 234.

[11] The Tribunal found in *Beyak* that the assignment was in fact an acting appointment. In that case, the person appointed had first been assigned to the position of Business Development Officer, but the person later was appointed on an acting basis retroactively. The Tribunal thus found that the acting appointment, because it was retroactive, had displaced the assignment that had been made initially. Most importantly, the Tribunal deemed that, in light of the evidence produced, the initial intention was to appoint the person to the position of Business Development Officer.

Moreover, the Tribunal determined that the intention had been to classify the position to a group and level higher than that of the appointed person's substantive position, which was at the AS-02 group and level.

[12] This complaint differs from the complaint analysed in *Beyak* because there is no evidence which demonstrates that this appointment would in fact be to a higher group and level. Furthermore, the assignment agreement states that the assignment is for a specific duration, that the employee remains at the same level because he continues to receive the salary and benefits attached to his substantive position, and that he is to return to his substantive position at the end of the assignment. For these reasons, the Tribunal finds that this is in fact an assignment, and not an appointment or a proposed appointment.

[13] As the Tribunal determined in *Czarnecki v. Deputy Head of Service Canada et al.*, [2007] PSST 0001, a person's right to file a complaint is subject to the preliminary condition that there must be an appointment or proposed appointment. Accordingly, the Tribunal finds that the complainant has no right of recourse under section 77 of the *PSEA*.

[14] The Tribunal's jurisdiction is limited to hearing complaints concerning lay-offs (section 65), revocation of appointments (section 74), appointments or proposed appointments (section 77) and the implementation of corrective action (section 83). Thus, unless an assignment is in fact an appointment, the Tribunal does not have jurisdiction to consider or dispose of a complaint concerning an assignment.

#### DECISION

[15] For all these reasons, the respondent's motion is granted. The complaint is therefore dismissed for lack of jurisdiction.

Guy Giguère  
Chairperson

PARTIES OF RECORD

Tribunal File:	2008-0732
Style of Cause:	<i>Mohamed Ait Lahcen and the Commissioner of the Correctional Service of Canada et al.</i>
Hearing:	Paper hearing
Date of Reasons:	April 3, 2009