



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2009-0115

OTTAWA, JUNE 25, 2009

CANDICE McCONNELL

COMPLAINANT

AND

THE DEPUTY MINISTER OF NATIONAL DEFENCE

RESPONDENT

AND

OTHER PARTIES

MATTER Motion to dismiss the complaint

DECISION The motion is granted

DECISION RENDERED BY Guy Giguère, Chairperson

LANGUAGE OF DECISION English

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

NEUTRAL CITATION 2009 PSST 0018

REASONS FOR DECISION

INTRODUCTION

[1] The complainant, Candice McConnell, filed a complaint before the Public Service Staffing Tribunal (the Tribunal) under section 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) alleging the respondent, the Deputy Minister of National Defence, abused its authority in the application of merit. She contends there was personal favouritism in appointing the successful candidate to the position of Supervisor Administration and Record, CR-05 group and level.

[2] The respondent filed a motion to dismiss on the ground that the complaint is untimely.

BACKGROUND

[3] On February 4, 2009, a Notice of Information Regarding Acting Appointment was posted on *Publiservice* for the position of Supervisor Administration and Record. The complaint period closing date was February 19, 2009.

[4] The complainant filed her complaint on February 20, 2009, where she states the following:

I am aware that the complaint period states Date of Notification: 2009/02/04 to Complaint Period Closing Date: 2009/02/19; I called the Public Service Staffing Tribunal and spoke with [...] [a Tribunal employee] on February 19, 2009 at approximately 10:00 am and she stated that I could still forward my complaint via fax [...] additionally she stated that if I had any further questions to call her specifically [...]

[5] On February 23, 2009, the respondent filed a motion to dismiss the complaint on the ground that the complaint is untimely. No submissions were filed by the complainant.

[6] On March 31, 2009, the Tribunal directed the complainant to reply to the respondent's motion by indicating the reasons why her complaint was filed after the complaint period closing date, including exceptional circumstances.

[7] On April 6, 2009, the complainant indicated that the Tribunal employee had told her on February 19, 2009, that she could send her complaint the following day: "I did

submit my complaint prior to Feb 19/09 because it stated it was closed Feb20/09. I called and spoke with [...] [a Tribunal employee] and she said it was ok to send my complaint on February 20, 2009.”

ISSUE

[8] To resolve this matter the Tribunal must determine whether it is appropriate for a complainant to rely on statements that she asserts were made by a Tribunal employee regarding the timeliness of a complaint.

ARGUMENTS OF THE PARTIES

A) RESPONDENT’S ARGUMENTS

[9] The respondent submits that the complaint was made outside the time period provided for in paragraph 10**b**) of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (*PSST Regulations*). Pursuant to paragraph 10**b**), a complaint must be filed within 15 days of the public notice of appointment or proposed appointment. The 15-day period is a strict time limit. The notice was posted on *Publiservice* on February 4, 2009 with a complaint period closing date of February 19, 2009. The Tribunal received the complaint on February 20, 2009.

B) COMPLAINANT’S ARGUMENTS

[10] In her submissions, the complainant argues that she relied on statements made by a Tribunal employee and that her complaint should be timely. The complainant does not raise any exceptional circumstances or provide any other reason or circumstance to support her position.

ANALYSIS

[11] Paragraph 10**b**) of the *PSST Regulations* provides that if the notice of appointment or proposed appointment to which the complaint relates is a public notice, a complaint must be made no later than 15 days after the date of the notice. A complaint must be filed in writing under section 11 of the *PSST Regulations*.

[12] The complainant was required to file her complaint within 15 calendar days of the date of notification, namely, by February 19, 2009; the complaint was received by the Tribunal on February 20, 2009. There is no dispute that the complaint was filed out of time.

[13] The Tribunal has held in *MacDonald v. Deputy Head of Service Canada et al.*, [2006] PSST 0002 that the time limit for filing a complaint is a strict limit. As the Tribunal also held in *MacDonald*, the strict time limit can be set aside, pursuant to section 5 of the *PSST Regulations*. However, as the Tribunal has confirmed in numerous decisions, the onus lies with the complainant to provide exceptional circumstances to justify the extension of the strict time limit.

[14] The complainant indicated in her complaint that she was aware that the closing date was February 19, 2009 as it was specified in the Notice of Information Regarding Acting Appointment. She states that on February 19, 2009, she spoke to a Tribunal employee who told her that she could forward her complaint by fax. She does not explain what prevented her from submitting her complaint on that day when it was still within the time limit.

[15] To justify the late filing, the complainant asserted on April 6, 2009 that she spoke to the Tribunal employee who told her that she could send her complaint the following day on February 20, 2009. This was clearly outside the complaint period as acknowledged by the complainant in her complaint. It is difficult to understand why the complainant, who was still within the time limit to file her complaint on February 19, 2009, would not have filed it then or would have been advised to file it one day late.

[16] The complainant's argument that she relied on statements that she asserts were made by an employee of the Tribunal, has never been put before the Tribunal but has been addressed in case law by other administrative tribunals, such as the Canada Industrial Relations Board (CIRB) and the Ontario Labour Relations Board (OLRB).

[17] In *United Brotherhood of Carpenters and Joiners of America, Local 18*, [1998] OLRB Rep. May/June 360; [1998] O.L.R.D. No. 1829 (QL), the OLRB stated that it placed "no weight on any information the applicant asserts he received from someone

of the Board. The Board is an independent tribunal and cannot and does not provide legal advice to parties who may appear before it.”

[18] Similarly, in *Bayer Inc.*, [1999] O.L.R.D. No. 3099 (QL), the OLRB dealt with a conversation that had occurred with a Registrar and the statement relied upon by a party. The OLRB made the following statement:

There has never been a situation where the Board has treated oral communication with the Registrar's office as a notice under the Act and none was cited by counsel. To adopt that approach would create an untenable situation for the Board, its staff and more importantly, the parties who appear before the Board. Uncertainty or disputes over who said what to whom and when it was said would give rise to litigation that would have to be resolved by the parties having to testify about what they said to the Registrar or Deputy Registrar and what they heard the Registrar or Deputy Registrar say to them and by requiring the Registrar or Deputy Registrar to give evidence about conversations they may or may not have had with a party.

Apart from the difficulties in trying to have the Registrar and Deputy Registrar accurately recall a specific telephone conversation or message that might become an issue several weeks or months later when those officials are engaged in numerous telephone conversations in connection with a variety of Board proceedings every day, and the prejudice to the Board's ability to discharge its day to day functions if the Registrar were occupied with testifying before the Board, such a process would unduly narrow the privilege afforded by section 117 of the Act.

[19] In *Woodley (Re)*, [2000] CIRB No. 85; [2000] C.I.R.B.D. No. 39 (QL), the CIRB relied on the above case law as well as the privilege afforded by section 119 of the *Canada Labour Code*, R.S.C., 1985, c. L-2. A similar provision is found in section 104 of the *PSEA*:

104. Members of the Tribunal, persons employed by the Tribunal and persons retained under subsection 95(2) are not competent or compellable to appear as a witness in any civil proceedings respecting information obtained in the discharge of their functions.

[20] While this section is related to Tribunal hearings, the Tribunal finds that statements made or asserted to have been made by Tribunal employees are also governed by this provision for the same reasons provided in the above case law. Ambiguity or disagreement over when and what a party might have said to Tribunal employees, or when and what these employees might have said to a party, would have to be resolved at a hearing. This would mean that the Tribunal employees involved would have to testify about conversations they may or may not have had with a party.

[21] As such, a Tribunal employee is not compellable under section 104 of the *PSEA* to provide evidence to support the complainant's position. The Tribunal places no weight on any statements the complainant asserts were made by a Tribunal employee. The Tribunal does not provide legal advice to parties who may appear before it. When a Tribunal employee provides information by way of clarification or guidance, it is not in the context of legal advice. It is understood that parties know this as reasonable informed individuals. Accordingly, a complainant cannot rely on statements that she asserts were made by a Tribunal employee regarding the timeliness of a complaint.

DECISION

[22] For all of these reasons, the motion is granted. The complaint is dismissed.

Guy Giguère
Chairperson

PARTIES OF RECORD

Tribunal File:	2009-0115
Style of Cause:	<i>Candice McConnell and the Deputy Minister of National Defence et al.</i>
Hearing:	Paper hearing
Date of Reasons:	June 25, 2009