



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2007-0048 and 2007-0087
Issued at: Ottawa, December 18, 2009

JENNIFER BEYAK

Complainant

AND

THE DEPUTY MINISTER OF NATURAL RESOURCES CANADA

Respondent

AND

OTHER PARTIES

Matter Reconsideration of corrective action

Decision New corrective action

Decision rendered by Guy Giguere, Chairperson

Language of Decision English

Indexed *Beyak v. Deputy Minister of Natural Resources Canada et al.*

Neutral Citation 2009 PSST 0034

Reasons for Decision

Introduction

1 On March 3, 2009, the Public Service Staffing Tribunal (the Tribunal) issued *Beyak v. Deputy Minister of Natural Resources Canada et al.*, [2009] PSST 0007, which substantiated two complaints of abuse of authority. The Tribunal determined that the appointments were made on the basis of personal favouritism and were unfair. The Tribunal also found that the managers involved abused their authority by acting in bad faith and conducting themselves in an irrational and unreasonable way. Pursuant to section 81 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*), the Tribunal ordered that the appointments be revoked as of their effective date and ordered other corrective action.

2 The respondent brought an application for judicial review which was limited to the corrective action ordered in paragraphs 200 to 202 of the decision. The respondent did not challenge either the merits of the decision, or the revocation of the appointments. Paragraphs 200 to 202 read as follows:

[200] The Tribunal orders the respondent to immediately rescind Mr. Hynes' delegation of authority under the *PSEA*. The respondent can determine whether it will work toward reinstating that delegation, but must not do so unless proper training is provided and Mr. Hynes can demonstrate that he meets appropriate, pre-determined requirements to exercise delegated authority.

[201] The Tribunal orders the respondent not to reinstate Mr. Hynes' delegation, until it reviews all appointments made under the new *PSEA* involving Messrs. Hynes and MacMillan, proceeds with desk audits where appropriate, and determines that this was an isolated incident.

[202] The Tribunal orders the respondent to assess, within 90 days, the capability of its human resources organization to provide proper support and advice to management concerning non-advertised appointment processes, and to correct within six months any shortcomings arising from the assessment.

3 On June 10, 2009, in *A.G. (Canada) v. Cameron and Maheux*, 2009 FC 618, the Federal Court issued a decision allowing an application for judicial review of the

corrective measures ordered by the Tribunal in *Cameron and Maheux v. Deputy Head of Service Canada et al.*, [2008] PSST 0016. The Federal Court stated the following in paragraph 33 of that decision:

The authority conferred upon the Tribunal by the Act to consider complaints of abuse of authority in the context of appointment processes, as is the case here, does not grant the Tribunal the right to interfere in the aforementioned authority provided in the FAA. Through its decision, the Tribunal may well make a deputy head aware of an incident, but it cannot, through an order, take the place of the PSC, the deputy head or the employer in determining that corrective measures must be taken outside of the specific context of the complaint with which the Tribunal is seized. [Unofficial translation]

4 On September 17, 2009, the Federal Court issued a consent order in *Attorney General of Canada v. Jennifer Beyak*, Court File No. T-528-09, in which it set aside the corrective action ordered by the Tribunal at paragraphs 200, 201 and 202 of its decision, and ordered the following:

The matter is remitted back to the Public Service Staffing Tribunal to provide it with an opportunity, if necessary, to deal with the matter in a manner not inconsistent with paragraph 33 of the Court's decision in *A.G. (Canada) v. Cameron and Maheux*, 2009 FC 618 at para. 33.

5 At the request of the complainant's representative, the Professional Institute of the Public Service of Canada (PIPSC), the Tribunal granted the parties an opportunity to provide written submissions concerning the September 17, 2009 Consent Order. Written submissions were completed November 13, 2009.

Issue

6 The Tribunal must determine whether it is necessary to modify its decision in *Beyak* in a manner consistent with paragraph 33 of the Federal Court in *Cameron and Maheux*.

Arguments of the parties

A) Complainant's arguments

7 The complainant, through its representative, argues that it is open to the Tribunal to strongly suggest to those who have the legislative authority to do so that the corrective measures outlined in paragraphs 200 and 201 be undertaken. Similarly, with

respect to paragraph 202 of the decision, the complainant submits that the Tribunal should recommend that the respondent carry out these corrective measures.

B) Respondent's arguments

8 The respondent argues that the remedy sought has been granted, and what is sought by the complainant has already been clearly addressed in paragraphs 196, 197 and 198 of the Reasons for Decision. Moreover, the respondent asserts that anything more may lead to a potential breach of the Federal Court's Order and, in turn, additional needless litigation.

C) Public Service Commission's arguments

9 The Public Service Commission (PSC) submits that there is no power to make recommendations provided in the *PSEA* and, therefore, the Tribunal should not do so. However, if the Tribunal does make recommendations, any such recommendations will be of a non-binding nature. The PSC relies on *Thomson v. Canada (Deputy Minister of Agriculture)*, [1992] 1 SCR 385, in support of its position. However, the PSC raises a concern that certain parties might seek to have the Federal Court enforce the Tribunal's recommendations which, in turn, will lead to additional needless litigation.

D) Complainant's Rebuttal Arguments

10 The complainant agrees that recommendations are non-binding. However, the complainant submits that recommendations provide a clear and unequivocal means of sending a message to those empowered to take the actions the Tribunal is not empowered to order in such cases.

Analysis

11 The Federal Court in *A.G. (Canada) v. Cameron and Maheux* did not address the matter of the Tribunal making recommendations as that issue was not before it. While the Federal Court found that the Tribunal did not have the power to order corrective measures outside of the specific context of the complaint, it stated specifically that the Tribunal may make the deputy head aware of an incident.

12 Parliament's intention as expressed in the preamble of the *PSEA* is to have recourse aimed at resolving appointment issues. In examining the evidence in a complainant, the Tribunal may note problems that go beyond the appointment process at issue in the complaint. The Tribunal may want to make the respondent aware of recommended measures that would address these problems. In such cases, the recommendations of the Tribunal are non-binding since they are not made under the provisions of the *PSEA* which grant the Tribunal the power to order corrective action. The Tribunal's recommendations are provided for guidance purposes only.

Decision

13 The Tribunal notes that paragraphs 200 to 202 have been set aside by the Federal Court. In addition, paragraphs 190, 191, 195, 196, 197 and 198, as well as the title before paragraph 190, are replaced with the following:

Concerns outside of the context of the complaint

190 The Tribunal has broad corrective powers under subsection 81(1) and section 82 of the *PSEA* when it finds that a complaint under section 77 is substantiated. The Tribunal may order the respondent to revoke the appointment or not make the proposed appointment. The Tribunal can order the respondent to take any corrective action that it considers appropriate with the exception of an order that an appointment be made or that a new appointment process be conducted. ***As the Federal Court stated in A.G. (Canada) v. Cameron and Maheux, 2009 FC 618, the Tribunal's order for corrective measures must relate only to the appointment process at issue in the complaint. Where the Tribunal has concerns outside of the context of the complaint it can, however, make the respondent aware of its concerns.*** It should be noted that the corrective measures are directed at the respondent in the form of an order and not to the individuals involved in a finding of abuse of authority. Subsection 81(1) and section 82 of the *PSEA* read as follows:

81. (1) If the Tribunal finds a complaint under section 77 to be substantiated, the Tribunal may order the Commission or the deputy head to revoke the appointment or not to make the appointment, as the case may be, and to take any corrective action that the Tribunal considers appropriate.

82. The Tribunal may not order the Commission to make an appointment or to conduct a new appointment process

191 Parliament has directed in the Preamble that the discretion given in staffing matters under the *PSEA* to the PSC and deputy heads be delegated at the lowest level to provide the necessary flexibility in staffing. It is important therefore to ensure that this discretion be exercised in a reasonable way as intended by Parliament. When the Tribunal determines that it is not the case and that there has been an abuse of authority, the Tribunal can order **corrective action specific to the complaint. Where the Tribunal's concerns are more of a systemic nature, such as ensuring** that this discretion is

exercised as Parliament intended in ***other appointment processes, it can make the deputy head and the PSC aware of these concerns.***

195 The evidence put before the Tribunal clearly establishes that Mr. Hynes ***should not*** continue to act as a sub-delegate of the respondent unless appropriate corrective measures are taken by the respondent. The evidence also demonstrates that measures put in place by the respondent have failed to ensure that these appointments were based on merit and that the *PSEA*, the *PSEER* and policy requirements were met and not circumvented. These considerations direct the Tribunal in ***making the following recommendations that should provide guidance in addressing the Tribunal's concerns.***

196 Mr. Hynes has testified that he had limited training in the *PSEA* and relied on the advice of Human Resource Advisors. At a minimum, he should receive training that is appropriate for someone delegated to exercise staffing authority under the *PSEA*. ***The Tribunal recommends that***, unless such training is completed and an assessment of Mr. Hynes's ability to make appropriate decisions and conduct proper appointment-related processes is done, he should not be delegated any staffing authority under the *PSEA*.

197 The Tribunal has found that Mr. Hynes demonstrated disregard for the *PSEA* and other staffing requirements. Mr. Hynes's direction clearly led to the abuses of authority in the appointments at issue in these complaints. In light of these findings, the respondent ***should*** ensure that this is an isolated incident and that Mr. Hynes could exercise the discretion in accordance with the *PSEA* and other staffing requirements. ***The Tribunal recommends that*** the respondent review all ***internal*** appointments involving Messrs. Hynes and MacMillan and proceed with desk audits where appropriate, ***before*** Mr. Hynes is delegated any staffing authority under the *PSEA*.

198 In addition, the respondent provides advisory and some oversight functions through its human resources personnel and has put in place measures such as an established criteria for non-advertised appointments. However these have proven to be ineffective in the circumstances of these complaints. Therefore, ***the Tribunal recommends that*** an assessment should be made ***within 90 days*** of the capability of the human resources organization in NRCan to provide proper advice to management, particularly with respect to non-advertised appointment processes ***and to correct within six months any shortcomings arising from the assessment.***

Order

199 The Tribunal orders the respondent to revoke the appointments of Ms. Delorme back to their effective dates. This must be done within 60 days.

Disposition

14 Another decision is to be reissued to incorporate the modifications set out above.

Guy Giguère
Chairperson

Parties of Record

Tribunal Files	2007-0048 and 2007-0087
Style of Cause	<i>Jennifer Beyak and the Deputy Minister of Natural Resources Canada et al.</i>
Hearing	Paper Hearing
Date of Reasons	December 18, 2009