



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

Files: 2008-0275 and 2008-0727
Issued at: Ottawa, July 5, 2010

JEAN LAVIGNE

Complainant

AND

THE DEPUTY MINISTER OF JUSTICE

Respondent

AND

OTHER PARTIES

Matter	Motion to dismiss complaints of abuse of authority filed under paragraph 77(1)(a) of the <i>Public Service Employment Act</i>
Decision	The motion is granted in part
Decision rendered by	John Mooney, Vice-Chair
Language of Decision	French
Indexed	<i>Lavigne v. Deputy Minister of Justice et al.</i>
Neutral Citation	2010 PSST 0007

Reasons for Decision

Introduction

1 Jean Lavigne, the complainant, filed two complaints of abuse of authority concerning appointments to senior practitioner positions (LA-2B) within the Department of Justice in Montréal, Québec (files 2008-0275 and 2008-0727).

2 The Deputy Minister of Justice, the respondent, filed a motion to dismiss these complaints because the complainant's allegations are largely the same as those in his six other complaints that the Public Service Staffing Tribunal (the Tribunal) previously dismissed. The respondent submits that the doctrine of issue estoppel applies to these complaints. The respondent further submits that these complaints constitute an abuse of process.

3 The complainant, for his part, submits that these complaints are different from the previous complaints.

Issues

4 The Tribunal must decide the following:

- (i) Does the doctrine of issue estoppel apply to these complaints?
- (ii) Does the doctrine of abuse of process apply to these complaints?

Background

Complaints in files 2007-0241, 2007-0242, 2007-0274, 2007-0314, 2007-0400 and 2008-0384

5 The respondent conducted two appointment processes (No. 2006-JUS-MTL-DAF-1A-89 and No. 2006-JUS-MTL-DAF-1A-130) in the fall of 2006 to fill the positions of team leader and senior practitioner at the LA-2B group and level within the Department of Justice in Montréal, Québec. The complainant applied for both positions, but his applications were screened out because he did not meet one of the essential qualifications established for these positions, namely, "extensive and recent

experience in conducting complex and varied civil litigation before the Tax Court of Canada.”

6 In the spring of 2007, the respondent established a pool of candidates composed of the people who qualified in both appointment processes. In May 2007, the respondent made six appointments from this pool. On May 28, 2007, the complainant filed six complaints of abuse of authority with the Tribunal pursuant to paragraph 77(1)(a) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12 and 13 (the *PSEA*) against those appointments (files 2007-0241, 2007-0242, 2007-0274, 2007-0314, 2007-0400 and 2008-0384). The Tribunal dealt with these six complaints together. The issues, as worded by the Tribunal, were as follows:

1. Did the Tribunal breach the rules of natural justice by conducting a paper hearing?
2. Did the respondent abuse its authority by sub-delegating the establishment of the merit criteria to the assessment board?
3. Did the respondent abuse its authority by dating the document “Rationale of the Merit Criteria for the Appointment Selection” [Translation] September 8, 2006 rather than September 22, 2006?
4. Did the respondent abuse its authority by eliminating the complainant on the basis of definitions not included in the *Publiservice* posting?
5. Did the respondent fail to ensure that the informal discussion was conducted in accordance with the *PSEA*?
6. Is the complainant entitled to moral and punitive damages?

7 The Tribunal answered all these questions in the negative and dismissed all six complaints on May 27, 2008 (*Lavigne v. Deputy Minister of Justice et al.*, 2008 PSST 0013) (*Lavigne* (PSST)). On June 17, 2008, the complainant applied to the Federal Court for judicial review of this decision. On July 2, 2009, the Federal Court dismissed the complainant’s application for judicial review (*Lavigne v. Canada (Justice)*, 2009 FC 684). The complainant did not appeal the Court’s decision.

Complaint in file 2007-0565

8 On October 17, 2007, the respondent appointed Susan Shaughnessy to a senior practitioner position for a period of less than four months, using the pool that had been established in the spring of 2007. On November 5, 2007, the Tribunal received a complaint from the complainant against this acting appointment (file 2007-0565). The complainant alleged that Ms. Shaughnessy did not have the experience required. The Tribunal dismissed that complaint on November 28, 2007 on the ground that it did not have jurisdiction to hear the complaint because it involved an acting appointment of less than four months. Subsection 14(1) of the *Public Service Employment Regulations*, SOR/2005-334, stipulates that such appointments are excluded from the recourse provided for in section 77 of the *PSEA* (*Lavigne v. Deputy Minister of Justice et al.*, 2007 PSST 0045).

The complaints at hand (files 2008-0275 and 2008-0727)

9 In April 2008, the respondent appointed Ms. Shaughnessy to an indeterminate LA-2B senior practitioner position, using the pool that had been established in the spring of 2007. On April 24, 2008, the complainant filed a complaint of abuse of authority pursuant to paragraph 77(1)(a) of the *PSEA* against this appointment (file 2008-0275). The complainant indicated in his complaint that he repeats and reiterates in his complaint the facts and arguments set out in files 2007-0241, 2007-0242, 2007-0274, 2007-0314, 2007-0400 and 2007-0565. The complainant invited the Tribunal to refer to the documents and exhibits filed in those cases. The complainant added a ground to complaint 2008-0275, namely, personal favouritism in the appointment of Ms. Shaughnessy.

10 In October 2008, the respondent made another appointment from the pool that had been established in the spring of 2007. On November 7, 2008, the complainant filed a complaint of abuse of authority pursuant to paragraph 77(1)(a) of the *PSEA* against this appointment (file 2008-0727). In the cover letter for his complaint, the complainant stated that the grounds alleged in his complaint in file 2008-0727 were the

same as those alleged in files 2007-0241, 2007-0242, 2007-0274, 2007-0314, 2007-0400, 2008-0384 and 2008-0275.

Request for consolidation of the complaints in files 2008-0275 and 2008-0727

11 On December 3, 2009, the respondent requested that the complaints in files 2008-0275 and 2008-0727 be consolidated. The Tribunal notes that both complaints refer to the same assessment process and that the allegations are the same. The Tribunal therefore grants the respondent's request and consolidates the two complaints in accordance with section 8 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6, to ensure the expeditious resolution of the complaints.

Motion to dismiss complaints 2008-0275 and 2008-0727

12 On December 10, 2009, the respondent requested that complaints 2008-0275 and 2008-0727 be dismissed because the issues raised in these complaints had already been determined by the Tribunal. The respondent submitted that the doctrine of issue estoppel and the doctrine of abuse of process applied to these complaints. The Tribunal asked the other parties to submit their arguments regarding this motion.

Arguments of the parties

A) Respondent's arguments

13 The respondent asks the Tribunal to exercise its discretion in applying the doctrine of issue estoppel to these complaints regarding the issues in dispute in *Lavigne* (PSST). This doctrine enables a tribunal to refuse to rehear an issue that has previously been determined by a tribunal. The respondent submits that its request satisfies the preconditions for the application of this doctrine, as set out by the Supreme Court in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44. The Supreme Court ruled that issue estoppel could apply when an issue has previously been determined by a tribunal, when a decision is final, and when the issue involves the same parties. According to the respondent, the complainant is providing the Tribunal with the same allegations and the same facts as those he submitted to the

Tribunal in *Lavigne* (PSST), with the exception of the allegation of personal favouritism regarding Ms. Shaughnessy's appointment.

14 The respondent further submits that these complaints involve the same parties as in *Lavigne* (PSST): the complainant, the respondent and the Public Service Commission (PSC). Although the appointed persons are not the same as those in the two series of complaints, the essential character of the dispute in both cases involves the complainant and the respondent.

15 The respondent also submits that rehearing the complaints would constitute an abuse of process. The respondent would suffer an injustice, as it would be obliged to defend itself a second time against previously resolved issues. This would also create the risk of the Tribunal rendering contradictory decisions. It would further result in a waste of the Tribunal's resources.

16 With respect to the allegation of personal favouritism, the respondent submits that these complaints have become moot, given that the complainant cannot be appointed to the positions relating to the appointment processes because the Tribunal already determined in *Lavigne* (PSST) that the complainant did not meet one of the essential qualifications of those positions.

B) Complainant's arguments

17 The complainant opposes the respondent's motion. In these complaints, the complainant invites the Tribunal to render a decision "other" than the decision that the Tribunal rendered in *Lavigne* (PSST), on the basis of "other" evidence. The complainant notes that, in *Lavigne* (PSST), the Tribunal did not deal with the issue of personal favouritism. The complainant also notes that the appointed persons in these complaints are not the same as those appointed in the complaints dealt with in the Tribunal's decision in *Lavigne* (PSST).

18 The complainant points out that the PSC did not take a position on the merits of the case in *Lavigne* (PSST). The PSC would not suffer any prejudice if the Tribunal were to hear these complaints.

19 The complainant submits that the decision in *Lavigne* (PSST) was rendered on the basis of arguments that the respondent failed to prove. The complainant was unable to have witnesses testify because the Tribunal rendered its decision without holding an oral hearing. In the complainant's view, this amounts to a major irregularity that precludes the application of the doctrine of issue estoppel.

C) Public Service Commission's arguments

20 The PSC does not oppose the motion.

D) Arguments of the appointed persons

21 The appointed persons did not respond to the motion.

Analysis

22 Paragraph 77(1)(a) of the *PSEA* provides that a person in the area of recourse may make a complaint to the Tribunal that he or she was not appointed or proposed for appointment by reason of an abuse of authority by the PSC or the deputy head in the exercise of its or his or her authority. The provision 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);

(...)

Subsection 30(2) deals with the application of merit in appointments made under the Act.

23 It follows that a person in the area of recourse may make a complaint to the Tribunal each time the deputy head makes or proposes an appointment. The deputy head may, in some instances, make appointments at different times from the same assessment process. That is what happened in this case. The respondent made six appointments in May 2007, one in October 2007, one in April 2008, and one in

October 2008, all from the same pool of candidates established in the spring of 2007. The complainant exercised his right to make a complaint at the time of the six appointments made in May 2007, and the Tribunal dismissed those complaints in *Lavigne* (PSST). The complainant also filed a complaint against the acting appointment of Ms. Shaughnessy in October 2007, and the Tribunal dismissed that complaint in *Lavigne v. Deputy Minister of Justice et al.*, 2007 PSST 0045. The complainant now intends to exercise this right with respect to the appointments made in April and October 2008; however, the respondent asks that the Tribunal apply the doctrines of issue estoppel and of abuse of process to these complaints.

Issue I: Does the doctrine of issue estoppel apply to these complaints?

24 In *Danyluk*, paragraph 33, the Supreme Court held that the application of issue estoppel is a two-step process. The Tribunal must first determine whether the three preconditions to the operation of issue estoppel have been satisfied. The Tribunal must then decide whether it ought to exercise its discretion in applying this doctrine. In paragraph 25 of *Danyluk*, the Supreme Court set out three preconditions to the operation of issue estoppel:

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 were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

25 In the Tribunal's opinion, aside from the issue of personal favouritism towards Ms. Shaughnessy, these complaints raise the same issues as those that were raised in *Lavigne* (PSST). The complainant himself states that his allegations are the same in both cases, with the exception of the allegation of personal favouritism.

26 The Tribunal notes that the decision in *Lavigne* (PSST) was final. In fact, the Federal Court dismissed the complainant's application for judicial review, and he did not appeal the Federal Court's decision.

27 However, in the Tribunal's opinion, these complaints do not satisfy the third precondition set out in *Danyluk*, given that the parties are not the same as those involved in *Lavigne* (PSST). Subsection 79(1) of the *PSEA* provides that the complainant, the deputy head, the PSC and the persons appointed are entitled to be heard by the Tribunal. It is true that the complainant, the deputy head and the PSC were the parties involved in the complaints dealt with in *Lavigne* (PSST) and are also the parties involved in these complaints; however, the appointed persons are not the same in both series of complaints. Therefore, the appointed persons in these complaints were not involved in the case that was dealt with by the Tribunal in *Lavigne* (PSST). The Tribunal therefore finds that the doctrine of issue estoppel does not apply to these complaints because the parties are not the same in both cases.

Issue II: Does the doctrine of abuse of process apply to these complaints?

28 In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77; [2003] S.C.J. No. 64 Q.L., the Supreme Court explains that Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. In this ruling, the Supreme Court sets out the principles underlying this doctrine, namely, ensuring the finality of decisions, ensuring that people are not required to defend themselves a second time against the same issue, avoiding a situation in which the tribunal might render contradictory decisions, and preventing the allocation of resources to a previously determined case:

[37] (...) the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. (...)

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

(...)

(Emphasis in the original.)

[38] (...) The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (...):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

29 In the Tribunal's opinion, where a complaint concerns an issue that was previously determined by the Tribunal and where that decision was final, it must assess whether the doctrine of abuse of process should be applied. The Tribunal finds that it is important that the principle of the finality of its decisions be respected, that the parties not be required to relitigate an issue, and that the parties and the Tribunal not be obliged to unnecessarily allocate resources to a previously determined issue.

30 The Tribunal finds that, in the complaints at hand, the doctrine of abuse of process should be applied. The complainant seeks to have the case reopened with respect to the issues that the Tribunal determined in *Lavigne* (PSST). As explained above, the complainant himself states that the allegations he is submitting in these complaints are the same as those that were determined in *Lavigne* (PSST), with the exception of the issue of personal favouritism (we will deal with the issue of personal favouritism below). Rehearing these same issues would not respect the finality of the Tribunal's decisions. It would require the parties to relitigate previously determined issues and would risk resulting in contradictory decisions. As a result, the parties and the Tribunal would also waste resources unnecessarily.

31 In *Toronto (City)*, the Supreme Court noted that a tribunal should avoid relitigating an issue that has already been determined, unless the circumstances dictate that relitigation is necessary, for instance, where the first proceeding is tainted

by fraud or dishonesty, or where new and previously unavailable evidence is discovered:

[52] (...) It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. (...)

32 Such circumstances are not present in these complaints. The Tribunal's decision in *Lavigne* (PSST) was not tainted by fraud or dishonesty. The Federal Court upheld the Tribunal's decision.

33 The complainant also has not submitted any new evidence in support of the issues that were determined in *Lavigne* (PSST). The complainant wishes to have people testify to highlight new evidence because, in his view, he was unable to do so previously, as the Tribunal had decided not to hold an oral hearing. In the Tribunal's opinion, the complainant already had the opportunity to submit all his evidence in *Lavigne* (PSST). The Federal Court determined that the Tribunal had not erred in exercising its discretion to hold a paper hearing. The Federal Court stated in paragraph 97 of its decision that "this is not a case requiring oral evidence or arguments."

34 The Tribunal therefore finds that it is appropriate to apply the doctrine of abuse of process to these complaints with respect to the issues determined in *Lavigne* (PSST). The parties will thus be unable to address those issues in these complaints.

35 The complainant added a ground of complaint to file 2008-0275. The complainant alleges that the respondent showed favouritism by appointing Ms. Shaughnessy to an indeterminate LA-2B senior practitioner position in March 2008. Since the issue of personal favouritism was not dealt with in *Lavigne* (PSST), the Tribunal finds that the doctrine of abuse of process does not apply to this issue. The Tribunal will therefore hear the parties' arguments on the allegation of personal favouritism towards Ms. Shaughnessy in file 2008-0275.

36 In file 2008-0727, the complainant refers to the grounds alleged in file 2008-0275. As explained above, file 2008-0275 included the allegation of personal favouritism towards Ms. Shaughnessy. File 2008-0727 therefore also includes this allegation by reference. The parties will thus be able to raise the issue of personal favouritism towards Ms. Shaughnessy in 2008-0727, even though it is not clear how this issue may be relevant in file 2008-0727, as Ms. Shaughnessy was not the person appointed in that file.

Decision

37 The Tribunal grants the respondent's request to consolidate complaints 2008-0275 and 2008-0727, as both complaints refer to the same assessment process and the same allegations.

38 The Tribunal applies the doctrine of abuse of process in files 2008-0275 and 2008-0727 to the following issues that have been previously determined by the Tribunal in *Lavigne* (PSST):

- 1 Did the Tribunal breach the rules of natural justice by conducting a paper hearing in *Lavigne* (PSST)?
- 2 Did the respondent abuse its authority by sub-delegating the establishment of the merit criteria to the assessment board?
- 3 Did the respondent abuse its authority by dating the document "Rationale of the Merit Criteria for the Appointment Selection" [Translation] September 8, 2006 rather than September 22, 2006?
- 4 Did the respondent abuse its authority by eliminating the complainant on the basis of definitions not included in the *Publiservice* posting?
- 5 Did the respondent fail to ensure that the informal discussion was conducted in accordance with the *PSEA*?
- 6 Is the complainant entitled to moral and punitive damages?

The parties therefore cannot raise these issues in files 2008-0275 and 2008-0727.

39 Since the issue of personal favouritism towards Ms. Shaughnessy, raised by the complainant in files 2008-0275 and 2008-0727, was not addressed in *Lavigne* (PSST),

the Tribunal finds that the doctrine of abuse of process does not apply to this issue. The complainant may therefore raise the allegation of personal favouritism towards Ms. Shaughnessy in files 2008-0275 and 2008-0727.

John Mooney
Vice-Chair

Parties of Record

Tribunal Files	2008-0275 and 2008-0727
Style of Cause	<i>Jean Lavigne and the Deputy Minister of Justice et al.</i>
Hearing	Paper hearing
Date of Reasons	July 5, 2010
REPRESENTATIVES:	
For the complainant	Jean Lavigne
For the respondent	Erin Smith
For the Public Service Commission	Lili Ste-Marie