Public Service Staffing Tribunal | Tribunal de la dotation de la fonction publique

Files: 2010-0243, 0244, 0245, 0246 and 0255

Issued at: Ottawa, July 27, 2012

CRAIG IWATA, MIKA KOMORI, JEANNIE SURIC, DALE GOODMAN AND BEV LEFKO

Complainants

AND

THE DEPUTY MINISTER OF HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA

Respondent

AND

OTHER PARTIES

Matter	Complaints of abuse of authority under sections 77(1)(*a*) and (*b*) of the *Public Service Employment Act*
Decision	Complaints are dismissed
Decision rendered by	John Mooney, Vice Chairperson
Language of Decision	English
Indexed	*Iwata v. Deputy Minister of Human Resources and Skills Development Canada*
Neutral Citation	2012 PSST 0019

Reasons for Decision

Introduction

1 Craig Iwata, Mika Komori, Jeannie Suric, Dale Goodman and Bev Lefko, the complainants, allege that the respondent, the Deputy Minister of Human Resources and Skills Development Canada (HRSDC), abused its authority in choosing a non-advertised appointment process to staff on an acting basis a Program Advisor position at the PM-05 group and level. They also maintain that the respondent abused its authority in the application of merit by relying on insufficient material in appointing Anik Godin to the position and in showing personal favoritism towards the appointee. They also contend that there was an improper delegation of authority in this appointment process.

2 The respondent maintains that the Public Service Staffing Tribunal (the Tribunal) does not have jurisdiction to hear these complaints since the appointment was an acting appointment of less than four months and s. 14(1) of the *Public Service Employment Regulations*, SOR/2005-334 (PSER), exempts such appointments from the application of s. 77 of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA), which grants recourse rights for appointments. The respondent also denies having shown any favouritism towards the appointee or having improperly delegated its authority.

3 The complainants argued that the Tribunal had already settled the question of jurisdiction in a letter decision issued prior to the hearing. The Tribunal ruled that the complainants were not precluded from filing their complaints. According to the complainants, the Tribunal can therefore no longer consider that matter.

4 The Public Service Commission (PSC) did not attend the hearing but submitted written arguments in which it described the relevant policies and guides that apply to this appointment process. Its *Assessment Policy*, for example, provides that assessment methods and tools should be able to accurately assess the candidates' qualifications. In terms of the choice of appointment process, the PSC indicated that the PSC policy, *Choice of Appointment Process*, requires that the choice of process be consistent with the staffing values set out in the *Public Service*

Commission Appointment Policy and that it be consistent with the organization's human resources plan. The PSC did not take a position regarding the merits of the complaints.

5 For the reasons that follow, the Tribunal has decided that it can deal with the question of the acting appointment's duration because it did not previously render a final decision on that issue. The Tribunal has found that the period of the acting appointment was less than four months and that, consequently, it does not have jurisdiction to hear the complaints.

Background

6 Ms. Godin was a Subrogation Officer at the AS-02 group and level in the Atlantic Region when the respondent appointed her on an acting basis to a Program Advisor PM-05 position with the Federal Workers' Compensation Service (FWCS).

7 The complainants are also Subrogation Officers at the AS-02 group and level. The main duty of these officers is to process work injury claims of federal employees. Federal employees are not covered by provincial workers' compensation legislation; they are covered by the *Government Employees Compensation Act*, R.S.C., 1985, c. G-5 (GECA).

8 From April 30 to May 5, 2010, the complainants filed their respective complaints of abuse of authority in relation to Ms. Godin's appointment , pursuant to ss. 77(1)(*a*) and (*b*) of the PSEA.

9 The complaints were consolidated for the purpose of these proceedings pursuant to s. 8 of the *Public Service Staffing Tribunal Regulations,* SOR/2006-6 as amended by SOR/2011-116.

Issues

10 The Tribunal must address the following issues:

(i) The Tribunal's jurisdiction to hear the complaints, and

(ii) The complainants' allegations regarding merit and the choice of process.

Analysis

11 Section 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 because the PSC or the deputy head abused its authority in the appointment process. Abuse of authority is not defined in the PSEA, however, s. 2(4) offers the following guide: "2. (4) For greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism."

12 As the Tribunal's jurisprudence has established, the use of such inclusive language indicates that abuse of authority includes, but is not limited to, bad faith and personal favouritism. In *Kane v. Attorney General of Canada and Public Service Commission,* 2011 FCA 19, at para. 64, the Federal Court of Appeal found that abuse of authority can also include errors. It is clear from the preamble and the scheme of the PSEA that abuse of authority requires much more than mere errors. Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question. Abuse of authority can also include improper conduct and omissions. The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority. See, for example, *Tibbs v. Deputy Minister of National Defence,* 2006 PSST 0008.

Issue I: The Tribunal's jurisdiction to hear the complaints

13 Section 14(1) of the PSER exempts acting appointments of less than four months from the application of s. 77 of the PSEA, which provides a right of recourse to those who were not appointed. Consequently, if the acting appointment under consideration was for a period of less than four months, the Tribunal does not have jurisdiction to hear the complaints. The respondent contends that Ms. Godin's acting appointment was indeed for a period of less than four months. The complainants reply that the Tribunal decided the issue of jurisdiction in a previous letter decision and should therefore proceed directly to hear the complaints.

i) Does the doctrine of issue estoppel prevent the Tribunal from dealing with the issue of whether the acting appointment was for less than four months?

14 On May 10, 2010, the respondent presented a motion to dismiss the complaints because they related to an acting appointment for a period of less than four months.

15 On May 19, 2010, the Tribunal issued a letter decision stating that the respondent had not satisfied the Tribunal that when the appointment was announced, the acting appointment was to be for a period of less than four months. The Tribunal indicated that the evidence submitted by the complainants in response to that motion supported their submissions that it was for a period of four months. The evidence in question consisted of an email the respondent sent to its managers on April 28, 2010, which stated that the contested acting appointment was for a period of "four months". The Tribunal went on to state that "accordingly, the complainants are not precluded from filing complaints under section 77 of the PSEA."

16 In its reply to the complainants' allegations, which the respondent filed with the Tribunal on June 21, 2010, the respondent reiterated its claim that the length of the acting appointment was less than four months. It argued that due to an administrative error, the email referred to above described the length of the acting appointment incorrectly, but other evidence would establish that the appointment was in fact for less than four months.

17 On November 2, 2010, Mr. Goodman filed a motion to strike all references to the period of the acting appointment from the respondent's reply to the complainants' allegations. He claimed these portions of the reply would enable the respondent to re-litigate the issue of the period of the acting appointment, an issue that had already been decided by the Tribunal in the letter decision mentioned above. Mr. Goodman invoked the doctrine of issue estoppel which, according to him, precludes the Tribunal from revisiting that matter. He argued that the criteria for the doctrine's application articulated by the Supreme Court in *Danyluk v. Ainsworth Technologies Inc*, 2001 SCC 44, have been met, inasmuch as the Tribunal's decision dealt with the same question, involved the same parties, and was final. He also submits

that no special circumstances exist to justify the Tribunal exercising its discretion to refuse to apply issue estoppel in this case.

18 In the respondent's reply to the complainants' motion to strike elements of its response, which it submitted on November 10, 2010, the respondent alluded to a number of documents that were not produced prior to the Tribunal's issuing its letter decision, which indicate that the acting appointment was in fact for a period of less than four months. Mr. Goodman and Mr. Iwata, however, disputed the accuracy of these documents in their response to the respondent's reply.

19 On December 3, 2010, the Tribunal informed the parties that it would address the matter of whether it could examine the period of the acting appointment and determine its jurisdiction to hear them, at the hearing into the complaints. This was also explained to the parties in a prehearing teleconference held on March 11, 2011.

20 Applying the issue estoppel doctrine's criteria to this case, the Tribunal is satisfied that the parties are the same and that the same question was addressed in the letter decision, namely whether the acting appointment was for less than four months. The Tribunal is not, however, persuaded that the previous decision was final, as is required for issue estoppel to apply. The letter decision consisted of an interlocutory ruling regarding the respondent's preliminary motion to dismiss the complaints, the respondent having claimed that the Tribunal clearly lacked the jurisdiction to hear them. The Tribunal found that given the email produced by the complainants in their response to the motion, the evidence did not clearly demonstrate that the acting appointment was for less than four months. Consequently, the Tribunal ruled that the complainants were not precluded from filing their complaints and having their cases proceed to hearing. As such, the Tribunal made a preliminary ruling that it had not been clearly established that it lacked the jurisdiction to hear the complaints. The Tribunal's preliminary ruling was not a final decision that disposed, once and for all, of the question to be decided See Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2nd ed. (Toronto: Butterworths, 2004) at 86.

21 Accordingly, the Tribunal finds that the doctrine of issue estoppel does not apply in the circumstances of this case, and the respondent is not prevented from raising the issue of the acting appointment's duration at the hearing.

22 Furthermore, even if the previous decision was final, the Tribunal is satisfied that special circumstances exist to justify a refusal to apply issue estoppel as a matter of discretion (see *Danyluk* at paras. 62-81). After the Tribunal issued its preliminary ruling, documents regarding the length of the acting appointment were provided although the parties do not agree as to their accuracy. Since the Tribunal cannot assume a jurisdiction that its enabling statute, the PSEA, does not grant, it is essential for the Tribunal to make a finding as to the length of this appointment, based on all the evidence. In these circumstances, a hearing was required to make this determination.

23 Mr. Goodman also argued in his motion that it would be an abuse of process for the respondent to re-litigate an issue that has already been decided even where the strict requirements of issue estoppel have not been met. See *Lavigne v. Deputy Minister of Justice*, 2010 PSST 0007 at para. 28. The Tribunal is not persuaded that exploring in greater depth a question that was only dealt with on a preliminary basis upon the filing of an interlocutory motion would give rise to an injustice constituting an abuse of process. To the contrary, there would be a far greater risk of abuse were the Tribunal to assume a jurisdiction that it does not possess under its enabling statute.

24 The Tribunal therefore concludes that it can examine the length of the period of the acting appointment to determine whether it has the jurisdiction to hear the complaints.

ii) Was the acting appointment for a period of four months or more?

25 The complainants argue that the appointment was for a period of four months or more, while the respondent maintains that it was for a period of four months less a day.

26 In *Parsons and Carey v. Deputy Head of Service Canada*, 2006 PSST 0004, the Tribunal defined the term "month" as meaning a period starting and finishing on the same date:

> **8** Based on the evidence of the respondent on this matter, and no evidence to the contrary by the complainants, I conclude that four acting appointments were made for the period from May 1 to August 31, 2006. The issue I must decide is whether this period is "less than four months".
>
> **9** The term "month" is not defined in either the *PSEA* nor in the *PSER*. However s. 35 of the *Interpretation Act* ,R.S., 1985, c. I-21 (*an Act respecting the interpretation of statutes and regulations*), defines month as follows:
>
> | "month" means a calendar month |
> |---|
>
> The *Dictionary of Canadian Law*, 3rd ed., p. 151 defines calendar month as follows:
>
> | Calendar month may refer to an actual month or to a period from a day in one month to the same day in the next month. |
> |---|
>
> Calendar month is defined by the *Canadian Oxford Dictionary*, 2nd ed., p. 1004 as
>
> | "a period of time between the same dates in successive calendar months" |
> |---|
>
> **10** Applying these definitions to the subject acting appointments, I find that an acting appointment of four months would be one from May 1, 2006 to September 1, 2006. Therefore, the appointments of […] for the period from May 1, 2006 to August 31, 2006 are acting appointments of less than four months.

27 The Tribunal finds, based on the oral and documentary evidence presented in these complaints that the acting appointment was for a period of four months less a day.

28 William Worona is the Director of FWCS. He testified that he signed the *Request for Human Resources Services* form as the delegated appointment authority on March 23, 2010, to initiate the staffing action. He pointed out that the form clearly indicated that Ms. Godin's acting appointment would last from April 26, 2010, to August 25, 2010, which is four months less a day. Mr. Worona added that Ms. Godin actually worked four months less a day and returned to her substantive position after

the acting appointment. Mr. Worona testified that he opted for such a short period because of budget constraints.

29 At the time of the appointment process, Denise Crégheur was acting as the Manager of Operations, FWCS, Labour Program. She reported to Mr. Worona and worked at the respondent's headquarters in Gatineau. She also signed the *Request for Human Resources Services* form on March 23, 2010, since the incumbent of the Program Advisor PM-05 position at issue reported to her. She corroborated Mr. Worona's testimony that Ms. Godin worked for four months less a day and returned to her substantive position after that period.

30 On March 25, 2010, Mr. Worona sent an email to fellow managers and his superiors regarding proposed staffing activities in the upcoming year. In that email, he announced that he would be filling a Program Advisor PM-05 position for a period of four months less a day to work on a master list of clients in New Brunswick, and provide subrogation services and officer training.

31 The *Appointment Deployment of an Employee (ST306) ST306 form* also indicates that Ms. Godin was "seconded" [the proper term is "appointed"] to the subject position from April 26, 2010 to August 25 of the same year. This staffing action was authorised on May 10, 2010.

32 The above documents therefore establish clearly that the acting appointment was for a period of four months less a day.

33 The complainants' contention that the acting appointment was for a period of four months or more is based on an email Nathalie Larose, an Administration Officer at FWCS, sent on April 28, 2010, on behalf of Mr. Worona, to several office managers to inform them that Ms. Godin had accepted an "assignment" [the proper term is "appointment"] to the contested position "for a period of four months effective April 26, 2010".

34 Ms. Crégheur testified that she composed the email and gave it to Ms. Larose so she could send it to fellow managers on behalf of Mr. Worona. The purpose of the email

was to prepare the managers for the teleconference Mr. Worona held with them later that day. It was not intended to be a staffing notice for PSEA purposes. According to Ms. Crégheur, the reference to a four-month appointment was simply an oversight.

35 The Tribunal is not persuaded that this single email should be given more weight than the more formal documents listed above, particularly the *Request for Human Resources Services* form, which clearly indicated that the acting appointment was for a period of four months less a day. The Tribunal accepts the argument of the respondent that the reference to a "four months" acting "assignment" was an error. This error was corrected on May 5, 2010, when Ms. Larose sent another email to managers on behalf of Mr. Worona, to "clarify" that Ms. Godin's "assignment" was for a period of "4 months less a day".

36 The complainants' contention that the acting appointment was for a period of four months or more was also based on the fact that on the *Request for Human Resources Services* form, there is a section for acting appointments of less than four months, and a section for acting appointments of four months or more. Ms. Crégheur ticked the box "Initial" (meaning it was an initial appointment as opposed to an extension of an appointment) in the part of the form dedicated to acting appointments of four months or more.

37 The Tribunal does not accept the complainant's interpretation of the document. When one examines the form in its entirety, it is clear that ticking that box was a simple error. In that same form, there is a section dedicated to "Acting Under Four Months (Reason)". Ms. Crégheur indicated in that part of the form the reason for the acting appointment. She also indicated in that part of the form that the acting appointment would start on April 26, 2010, and end on August 25, 2010. The Tribunal finds that by inserting those elements in that section of the form, Ms. Crégheur clearly signalled that the acting appointment was for a period of less than four months.

38 The complainants also point out that on the same *Request for Human Resources Services* form, the respondent erroneously ticked the box entitled "Internal Advertisement", while the appointment process used was a non-advertised

appointment process. The Tribunal notes, however, that this element does not relate to the period of the acting appointment. Besides, Ms. Crégheur explained that ticking the box simply meant that the staffing action would be posted on an internal electronic system. The box does not relate to the type of appointment process used. In the same form there are boxes to indicate whether the process was an advertised or a non-advertised appointment process and neither of those two boxes was ticked.

39 The complainants also contend that the respondent intended to make an acting appointment of more than four months since it knew or should have known that Christine Sakiris, the incumbent of the position to which Ms. Godin was appointed, had been acting in a Policy Analyst position in the Disability Management Initiative and would not return to her substantive position within four months. Also, in May 2010, Ms. Sakiris announced her secondment to Health Canada for one year. The complainants referred the Tribunal to the respondent's *Acting Appointment Procedures,* which specify that if it is expected in advance that an acting appointment will last more than four months, it should be treated as such from the outset.

40 There is no evidence that the respondent knew when it appointed Ms. Godin to act in the Program Advisor position that Ms. Sakiris would not return to her substantive position after acting in the Policy Analyst position. Ms. Sakiris' acting appointment to another position was to finish on March 31, 2010, as indicated in the *Information Regarding Acting Appointment* notice, but it had been extended and Ms. Crégheur testified that she did not know how long the extension would last. Ms. Crégheur also testified that she did not know that Ms. Sakiris was planning a secondment to Health Canada. Moreover, the main reason to appoint Ms. Godin was not to replace Ms. Sakiris as a subrogation officer, but to work on a special project–the development of a master client list. The respondent used Ms. Sakiris' position for this project. Ms. Sakiris' position was still vacant at the time of the hearing.

41 The Tribunal therefore finds that Ms. Godin's acting appointment was intended and was in fact for a period of four months less a day. Consequently, it does not have jurisdiction to hear these complaints since s. 14(1) of the PSER specifically excludes

acting appointments of less than four months from the application of s. 77 of the PSEA, which sets out the right to complain to the Tribunal.

Issue II: The complainant's allegations regarding the application of merit and the choice of process

42 Since the Tribunal does not have jurisdiction over Ms. Godin's acting appointment, the above finding is sufficient to dispose of the complaint.

43 Given this finding, all of the complainants' allegations pertaining to the application of merit are unfounded since they are premised on the mistaken assumption that merit applies to Ms. Godin's acting appointment. Section 14(1) of the PSER provides specifically, however, that acting appointments of less than four months are excluded from the application of merit.

44 For instance, the complainants contended that the respondent abused its authority in the application of merit by relying on insufficient material in making the appointment. They argue that the respondent did not set proper merit criteria by not making the distinction between essential qualifications and asset qualifications. Ms. Crégheur stated in her testimony that the respondent did not establish merit criteria because the acting appointment was for a period of less than four months.

45 The complainants also argue that the respondent did not use proper assessment methods. They base this on Ms. Crégheur's testimony that she did not examine résumés, nor did she conduct interviews or reference checks.

46 However, as mentioned above, s. 14(1) of the PSER provides that merit does not apply to acting appointments of less than four months. Consequently, the respondent was not required to establish a Statement of Merit Criteria, nor to assess Ms. Godin's qualifications in accordance with PSC policies regarding merit.

47 The complainants also alleged that the respondent defined the duties of the position in order to personally favour Ms. Godin, specifically with respect to the creation of a master client list to indicate which organizations, persons or classes of persons in New Brunswick were covered by the GECA. The respondent viewed a legal background

as an asset for the performance of this task. The complainants contend that this duty was ascribed to the position in order to favour the appointment of Ms. Godin, who had a legal background. To underscore their point, the complainants assert that the task was not even necessary because such a list already existed.

48 Section 2(4) of the PSEA provides that any reference to abuse of authority in the Act includes personal favouritism. In this instance, the complainants have alleged abuse of authority in the application of merit. However, as indicated above, merit does not apply to acting appointments of less than four months. Consequently, even if there were evidence of personal favouritism in this case, the complaints would still be unsubstantiated since the Tribunal lacks the jurisdiction to deal with acting appointments of less than four months.

49 Besides, the complainants have not established that there was any personal favouritism shown towards Ms. Godin. Ms. Crégheur stated that the chief part of the duties assigned to Ms. Godin was the development of the master client list. The list was prepared as part of the memorandum of understanding between the respondent and the New Brunswick Workers' Compensation Board (NBWCB) to assist the NBWCB in determining which employees were covered by the GECA.

50 Deborah Silvester is a Regional Manager for Labour Programs for the North West Pacific Region. She stated that such a list was not needed since it already existed. The lists are compiled in each region by clerks at the CR-04 group and level.

51 Nikolina Milkovic is a Claims Administrator at the CR-04 group and level who reports to Ms. Silvester. She testified that she updates the client list for her region by drawing information from the National Injury Compensation System (NICS) data base. Ms. Milkovic added that she does not have a legal background and was not required to do legal research to compile the list.

52 There is no evidence to support the proposition that the respondent added the task of creating the GECA master client list to favour Ms. Godin. Ms. Crégheur explained that preparing the GECA master client list is different from using the NICS data base. Ms. Godin took information from the NICS to create the GECA master

client list, but the latter had more information. The NICS did not indicate whether an employee is covered by the GECA while the GECA master client list did. Preparing the GECA master client list involved more complex work than compiling information taken from the NICS. Whether individuals were covered by the GECA depended on how they were hired. The incumbent of the position therefore had to examine and interpret the legislation or order-in-council that created the organization to determine whether an individual or class of individuals was covered by the GECA. It also entailed examining legislation governing labour relations and staffing. Possessing a legal background was helpful in developing that list since a person with a legal background would have more ease in analysing the relevant legislation.

53 The Tribunal notes that it made sense giving that task to Ms. Godin since she worked in the Atlantic Region. The list was made for the use of the NBWCB and Ms. Godin communicated with that board on a regular basis in her substantive position. The evidence does not therefore establish that the respondent personally favoured Ms. Godin.

54 The complainants also argued that the respondent did not comply with the respondent's *Policy on Acting Appointments.* Even if the Tribunal had the jurisdiction to hear the complaints, the evidence shows that the policy was not breached. The policy lists three situations where acting appointments are effective staffing options: to meet short-term operational needs, to operate pending the outcome of an appointment process to fill a vacant position, or to ensure continuity of service when the incumbent of a position is temporarily absent. The complainants pointed out that the evidence for making the appointment is contradictory. Mr. Worona testified that the acting appointment was intended to fill a short term operational need. On the other hand, the *Request for Human Resources Services* form specified that the acting appointment was made to replace the incumbent who would be temporarily absent because of an assignment to another position.

55 The Tribunal notes, however, that both explanations are consistent with the *Policy on Acting Appointments.* Ultimately, the purpose of Ms. Godin's acting appointment was to fulfil temporary operational needs and to replace a person

temporarily away on an acting appointment to another position. In his email of March 25, 2010, Mr. Worona stated that he would be staffing the Program Advisor position in order to have a person work on a special project–the creation of a master client list. In that same email, he indicated that the appointee would also perform duties carried out by the previous incumbent, namely to provide subrogation services. These describe a short term operational need to be fulfilled during the absence of the incumbent through the use of an acting appointment. The *Policy on Acting Appointments* was not breached.

56 Finally, the complainants claim that Mr. Worona, who had the delegated staffing authority, improperly delegated that authority to Pierre Meunier, Director, FWCS. The complainants invoke the common law principle that a person who has received a delegation of authority cannot in turn sub-delegate that authority to another person.

57 The evidence demonstrates, however, that Mr. Worona did not sub-delegate his appointment authority to Mr. Meunier. Mr. Worona made the appointment conditional on securing the proper funds. He had signed the appropriate *Request for Human Resources Services* form prior to leaving on vacation and had instructed Mr. Meunier to proceed with the staffing of the Program Advisor position if and when the funds were approved. If the funds had not been secured, the staffing action would not have proceeded. Mr. Meunier took no part in the appointment decision he only acted according to instructions given to him by Mr. Worona.

The choice of appointment process

58 The complainants also contend that the respondent abused its authority in appointing Ms. Godin through a non-advertised appointment process. As indicated above, the Tribunal does not have jurisdiction over these complaints. Besides, the complainants did not specify why the respondent could not chose a non-advertised appointment process to staff the position nor did they lead evidence on this issue.

Decision

59 For these reasons, the complaints are dismissed.

John Mooney
Vice Chairperson

Parties of Record

Tribunal Files	2010- 0243, 0244, 0245, 0246 and 0255
Style of Cause	*Craig Iwata, Mika Komori, Jeannie Suric, Dale Goodman and Bev Lefko and the Deputy Minister of Human Resources and Skills Development Canada*
Hearing	April 6, 7 and 8, 2011 Vancouver, BC
Date of Reasons	July 27, 2012
APPEARANCES:	
For the complainants	Craig Iwata, Dale Goodman**,** Bev Lefko and Jeannie Suric
For the respondent	Christine Diguer
For the Public Service Commission	John Unrau (written submissions)