**Date:** 20170830

**File:** EMP-2017-10961

**Citation: 2017 FPSLREB 25**

*Federal Public Sector Labour Relations and Employment Board Act* and *Public Service Employment Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

**MICHELLE HENDERSON**

Complainant

and

**DEPUTY MINISTER OF CITIZENSHIP AND IMMIGRATION**

Respondent

and

**OTHER PARTIES**

Indexed as
*Henderson v. Deputy Minister of Citizenship and Immigration*

In the matter of a complaint of abuse of authority - paragraph 77(1)(a) of the *Public Service Employment Act*

**Before:** Catherine Ebbs, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Complainant:** Todd Ferguson

**For the Respondent:** Aaron Feniak

**For the Public Service Commission:** Claude Zaor for Louise Bard

Decided on the basis of written submissions received July 17, 19, and 20, 2017.

## I. Introduction

[1] The complainant, Michelle Henderson, filed a complaint on February 8, 2017, under s. 77 of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*). The complaint related to the appointments by the respondent, the Deputy Minister of Citizenship and Immigration, of two individuals to the position of Team Leader (PM-04), on an indeterminate basis.

[2] All the written proceedings in this matter (the complaint, allegations, and replies) were filed by June 8, 2017, and the case is now ready to be scheduled for hearing. On July 14, 2017, the respondent filed a motion to dismiss the complaint on the grounds that the complainant no longer enjoys a right of recourse because after filing her complaint, she was proposed for appointment to a Team Leader position and received a letter of offer for the post. The respondent contends that as a result, her complaint is now moot.

[3] The parties filed written submissions on the motion. For the reasons set out later in this decision, I find that the matter is not moot and that therefore, the complaint should not be dismissed.

## II. Background and submissions

[4] The respondent explains in its motion that it initiated an internal advertised appointment process (14-IMC-IA-21402) in September 2014 with the intention of creating a pool of qualified candidates for Team leader positions. The complainant successfully completed all stages of the assessment and was placed in the pool. On January 25, 2017, the respondent issued a "Notice of Appointment or Proposal of Appointment" (NAPA) for two appointees.

[5] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the names of the Public Service Labour Relations and Employment Board and the *Public Service Labour Relations and Employment Board Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board") and the *Federal Public Sector Labour Relations and Employment Board Act*.

[6] On June 22, 2017, the respondent posted a notice indicating that the complainant was being considered for a Team Leader position (via a "Notice of Consideration"). On June 28, 2017, she was given a letter of offer for an indeterminate appointment to a Team Leader position, which she refused on July 5, 2017.

[7] The respondent points out that although in her complaint, the complainant questions the application and use of the pool to make the two indeterminate appointments, the offer to appoint her was made in a similar manner. Consequently, the respondent submits that there no longer exists a dispute between the parties. The dispute arose because she had not been appointed on an indeterminate basis when she filed her complaint. Five months later, she was offered an appointment to the same position. The respondent maintains that therefore, the matter has been rendered moot and should not proceed.

[8] The Public Service Commission filed a reply to the motion to dismiss but did not take a position on it.

[9] The complainant objects to the motion to dismiss. She points out that at the time the complaint was filed, she was an unsuccessful candidate with legitimate allegations concerning abuse of authority in the application of merit. Merely making her a successful candidate 22 weeks after she filed the complaint did nothing to resolve the "legitimate questions and concerns" surrounding how the respondent used its authority to assess the candidates' merit. In addition, the effort of appointing her so many weeks after the complaint was filed did not address the issue of why she was not appointed in January 2017, which had a "tangible" impact on her in terms of lost pay and benefits. Finally, the complainant argues that it would be absurd to accept the contention that allegations of a lack of fairness and transparency in January 2017 were rendered moot by offering her a position 22 weeks later. If anything, the late offer only compounds questions on the fairness and transparency of the process.

[10] The complainant maintains that a dispute remains between the parties about the fairness and transparency of the staffing process and the abuse of authority the respondent engaged in with respect to the application of merit. To dismiss the complaint would be a tremendous injustice in that it would ignore the serious questions and concerns raised about the respondent's actions, which would remain unanswered.

**III. Analysis**

[11] The former Public Service Staffing Tribunal ("the Tribunal") dealt with the issue of mootness in *Dubord v. the Commissioner of the Correctional Service of Canada*, 2013 PSST 10. In that case, the complainant alleged that an abuse of authority had occurred because he had been screened out of an appointment process. He was subsequently reassessed and eventually appointed to the positon. The Tribunal dismissed the complaint, having determined that there was no longer any dispute between the parties. It applied the test set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, which involves the following two questions:

(a) Is there still an issue, that is, a tangible and concrete dispute, between the parties?

(b) If there is no longer a dispute between the parties, should the tribunal still exercise its discretion to rule on the merits of the complaint?

[12] The respondent submits similarly that since the complainant in the present case was also offered an appointment to the position at issue, there has ceased to be a tangible and concrete dispute between the parties, and therefore, the matter is moot.

[13] However, the respondent fails to take into account some significant points from the *Dubord* decision. For instance, the Tribunal highlighted at paragraph 44 the fact that "… a complaint does not necessarily become moot merely because a complainant is later appointed to the position at issue." In some cases, even when the person has been appointed to the position, there may still be a dispute, if reasons still exist to take corrective action. *Dubord* was issued after a full hearing of all the evidence, and the Tribunal was able to conclude that no other corrective action was available to the complainant in that case. In the present case, the matter has not even been set down for a hearing. The question of whether any corrective action could still be taken remains to be determined.

[14] Furthermore, the details in *Dubord* are significantly different from those in the present case. In *Dubord*, during the exchange of information that occurred between the parties immediately after the complaint was filed, the complainant presented to the respondent a different perspective on the answers upon which he had been

screened out. The respondent was receptive to these submissions and reassessed them, resulting in the complainant being screened back into the process. The complaint related to him being screened out, and the respondent specifically addressed that claim when it reintegrated him into the process shortly after the complaint was filed. He was eventually appointed to a position.

[15] In the present case, there was no similar resolution of the dispute. The facts as presented merely indicate that as the case approached the hearing stage, the respondent proposed, by what at this point appears to be a unilateral action, to appoint the complainant to the position, even though she evidently no longer had any interest in it, based on her refusal. As the Tribunal stated in *Morgenstern v. Commissioner of the Correctional Service of Canada*, 2010 PSST 18 at para. 40, the jurisdiction to deal with a complaint is established once a NAPA for the appointment at issue is posted, and it cannot be ousted by subsequent actions taken by a respondent. It would be too easy for a respondent to avoid the complaint process by such an action, which in *Morgenstern* consisted of revoking the appointment and cancelling the appointment process.

[16] For whatever reasons, the complainant in the present case did not accept the appointment offer that was made to her 22 weeks after she filed her complaint. This fact should not affect her right to complain of a lack of transparency and fairness in the decision not to appoint her when the original appointments were made. If her complaint were declared moot, these issues would remain unresolved.

[17] Therefore, I do not find that a hearing into the complaint is moot.

[18] For all of the above reasons, I make the following order:

(*The Order appears on the next page*)

## IV. Order

[19] The respondent's motion to dismiss the complaint is denied.

August 30, 2017.

**Catherine Ebbs,**
**a panel of the Federal Public Sector**
**Labour Relations and Employment Board**