

Federal Court



Cour fédérale

Date: 20120604

Docket: T-789-10

Citation: 2012 FC 681

Ottawa, Ontario, June 4, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

SAMEH BOSHRA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Sameh Boshra, seeks judicial review of a decision of the Public Service Staffing Tribunal (PSST) dated March 4, 2010. The PSST dismissed his complaint regarding abuse of authority in an appointment process for a lack of jurisdiction based on the *Public Service Employment Act*, SC 2003, c 22 (PSEA).

I. Preliminary Matters

[2] At the outset of the hearing, the Applicant, as a self-represented litigant, requested that I recuse myself from these proceedings on the basis of my previous employment with the Department of Justice. He declined to participate further if I continued to preside over the hearing.

[3] I saw no justification for recusing myself and declined the Applicant's invitation to do so, noting that there was no formal motion brought and no supporting evidence beyond some general allegations made in the context of a Motion to Reconsider my previous order striking his Notice of Constitutional Question. I stated that I would proceed with the hearing of the main application at that time. The Applicant indicated that he would not participate further and I confirmed that the matter would be dealt with on the written material already before me.

[4] I also rely on the principles governing such recusals as outlined by my colleague Justice Richard Mosley in *Canada (Attorney General) v Khawaja*, 2007 FC 533, [2007] FCJ no 724. The Ethical Principles for Judges recognize that those principles governing judges and the involvement of their former law firms cannot be strictly applied to those who practiced in government. It is recommended that I "avoid sitting on any case commenced in the particular local office of the government institution" prior to my appointment. That is not an issue in this instance.

[5] In my previous employment at the Department of Justice, specifically with Environment Canada, I had no prior knowledge of or involvement with the Applicant and the issues raised by his current application. As a consequence, I see no conflict of interest or that an informed person

viewing the matter realistically and practically and having thought the matter through would conclude that a reasonable apprehension of bias would be present in this case. I therefore considered it necessary to reach a determination based on the written record, given the Applicant's refusal to participate at the oral hearing.

II. Background

[6] The Applicant expressed interest in working with the Office of Disability Issues (ODI) at Human Resources and Social Development Canada (HRSDC) after completing graduate studies in 2007. However, he subsequently received and accepted an offer of employment from Statistics Canada (StatCan).

[7] In August 2008, the Applicant filed a grievance with StatCan related to a workplace incident.

[8] On July 17, 2009, while working at StatCan, the Applicant received an email from Guy Morissette, Manager, ODI, HRSDC inquiring whether he would consider employment opportunities with ODI. On July 29, 2009, the Applicant met with Mr. Morissette, who indicated his willingness to hire him. They began corresponding regarding the arrangements, including a possible start date of August 17, 2009. There also appear to have been some efforts on the part of Mr. Morissette to prepare an office space and telephone line. A Request for Human Resources Services document indicated that this would be an "Indeterminate appointment" based on the "Deployment of Sameh Boshra."

[9] On July 31, 2009, the Applicant received a termination notice from StatCan citing “personal suitability” concerns. He subsequently filed a complaint with the Public Service Labour Relations Board (PSLRB) for wrongful dismissal.

[10] On August 4, 2009, however, the Applicant sent an email to Mr. Morissette notifying him of the change in his employment status with StatCan.

[11] In an email on August 5, 2009 (the initial draft having been prepared for internal vetting on August 3, 2009), Mr. Morissette informed the Applicant that he was unable to make a formal offer of employment. Given budgetary constraints, approval from the Director General (DG) had not been forthcoming.

[12] On December 29, 2009, the Applicant received a reply to an Access to Information and Privacy (ATIP) Request. After reviewing the records of HRSDC, he filed a complaint with the PSST regarding the EC-04 non advertised appointment process, claiming an abuse of authority and revocation of his offer.

[13] On February 1, 2010, the Applicant filed a request for an extension of time to file his complaint, since relevant documents had only recently come into his possession.

[14] On February 12, 2010, the Respondent before the PSST (HRSDC) brought a motion to dismiss the complaint because no appointment or proposed appointment had been made at the time it was filed.

[15] In its letter dated March 4, 2010, the PSST issued the decision that is now before this Court.

III. Decision Under Review

[16] The PSST noted that an employee's right to make a complaint under section 77 of the PSEA is conditional on an appointment or proposed appointment having been made. Since no appointment had been made of the Applicant, the PSST found it did not have jurisdiction to consider his complaint.

[17] Moreover, if the staffing transaction was indeed contemplated as a deployment, the PSST would not have jurisdiction to consider and dispose of the complaint. Subsection 53(1) of the PSEA specifically excludes a "deployment" from the meaning of "appointment." As a consequence, neither a deployment nor its revocation fall within the jurisdiction assigned to the PSST under section 77 of the PSEA.

[18] The PSST dismissed the complaint because it had no jurisdiction over it and suggested there was no need to render a decision on the complainant's request for an extension of time to file his complaint.

IV. Relevant Provisions

[19] Subsection 88(2) establishes the mandate of the PSST to consider complaints under the PSEA, including those related to appointments or proposed appointments, as follows:

Mandate

(2) The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83.

Mission

(2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu du paragraphe 65(1) ou des articles 74, 77 ou 83 et de statuer sur elles.

[20] To make a complaint alleging abuse of authority under subsection 77(1), an appointment or proposed appointment must have taken place. The provision reads:

Grounds of complaint

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

Motifs des plaintes

77. (1) Lorsque la Commission a fait une proposition de nomination ou une nomination dans le cadre d'un processus de nomination interne, la personne qui est dans la zone de recours visée au paragraphe (2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle elle n'a pas été nommée ou fait l'objet d'une proposition de nomination pour l'une ou l'autre des raisons suivantes :

a) abus de pouvoir de la part de la Commission ou de l'administrateur général

of its or his or her authority under subsection 30(2);

dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

(b) an abuse of authority by the Commission in choosing between an advertised and a non-advertised internal appointment process; or

b) abus de pouvoir de la part de la Commission du fait qu'elle a choisi un processus de nomination interne annoncé ou non annoncé, selon le cas;

(c) the failure of the Commission to assess the complainant in the official language of his or her choice as required by subsection 37(1).

c) omission de la part de la Commission d'évaluer le plaignant dans la langue officielle de son choix, en contravention du paragraphe 37(1).

Area of recourse

Zone de recours

(2) For the purposes of subsection (1), a person is in the area of recourse if the person is

(2) Pour l'application du paragraphe (1), une personne est dans la zone de recours si :

(a) an unsuccessful candidate in the area of selection determined under section 34, in the case of an advertised internal appointment process; and

a) dans le cas d'un processus de nomination interne annoncé, elle est un candidat non reçu et est dans la zone de sélection définie en vertu de l'article 34;

(b) any person in the area of selection determined under section 34, in the case of a non-advertised internal appointment process.

b) dans le cas d'un processus de nomination interne non annoncé, elle est dans la zone de sélection définie en vertu de l'article 34.

[21] Complaints related to the revocation of an appointment are brought under section 74:

Complaint

74. A person whose appointment is revoked by the Commission under subsection 67(1) or by the deputy head under subsection 15(3) or 67(2) may, in the manner and within the period provided by the Tribunal's regulations, make a complaint to the Tribunal that the revocation was unreasonable.

Plaintes au Tribunal

74. La personne dont la nomination est révoquée par la Commission en vertu du paragraphe 67(1) ou par l'administrateur général en vertu des paragraphes 15(3) ou 67(2) peut, selon les modalités et dans le délai fixés par règlement du Tribunal, présenter à celui-ci une plainte selon laquelle la révocation n'était pas raisonnable

[22] However, a deployment is excluded from the definition of an appointment, and consequently the jurisdiction of the PSST to decide a related complaint, by virtue of subsection 53(1):

Deployment not an appointment

53. (1) A deployment is not an appointment within the meaning of this Act.

Précision

53. (1) Les mutations ne constituent pas des nominations pour l'application de la présente loi.

[23] For the purposes of the PSEA, a deployment is defined in subsection 2(1):

“deployment” means the transfer of a person from one position to another in accordance with Part 3.

« mutation » Transfert d'une personne d'un poste à un autre sous le régime de la partie 3.

[24] Some of the additional provisions governing deployments under Part 3 are as follows:

Authority of deputy heads to deploy

51. (1) Except as provided in this or any other Act, a deputy head may deploy employees to or within the deputy head's organization.

Droit d'effectuer des mutations

51. (1) Sauf disposition contraire de la présente loi ou de toute autre loi, l'administrateur général peut muter des fonctionnaires à l'administration relevant de sa compétence ou au sein de cette administration.

Deployment from separate agencies

(2) Except as provided in this or any other Act, a deputy head may deploy to the deputy head's organization persons who are employed in a separate agency to which the Commission does not have the exclusive authority to make appointments if the Commission has, after reviewing the staffing program of the separate agency at the agency's request, approved deployments from it.

Mutations en provenance d'organismes distincts

(2) Sauf disposition contraire de la présente loi ou de toute autre loi, l'administrateur général peut muter à l'administration relevant de sa compétence des employés d'un organisme distinct dans lequel les nominations ne relèvent pas exclusivement de la Commission, si celle-ci, après avoir étudié, sur demande de l'organisme distinct, le régime de dotation de celui-ci, a approuvé les mutations en provenance de l'organisme.

Deployment within or between groups

(3) A deployment may be made within an occupational group or, unless excluded by regulations under paragraph 26(1)(a), between occupational groups.

Mouvements de personnel

(3) La mutation peut s'effectuer à l'intérieur d'un groupe professionnel ou, sauf exclusion par les règlements pris en vertu de l'alinéa 26(1)a), entre groupes professionnels.

Treasury Board directives and regulations

(4) A deployment to or within an organization named in Schedule I or IV to the *Financial Administration Act* shall be made in the manner directed by the Treasury Board and in accordance with any regulations of the Treasury Board.

Employment status preserved

(5) The deployment of a person may not

(a) constitute a promotion, within the meaning of regulations of the Treasury Board, in the case of an organization named in Schedule I or IV to the *Financial Administration Act*, or as determined by the separate agency, in the case of a separate agency to which the Commission has the exclusive authority to make appointments; or

(b) change a person's period of employment from a specified term to indeterminate.

Consent to deployment

(6) No person may be deployed without his or her consent unless

Modalités

(4) Dans le cas d'une administration figurant aux annexes I ou IV de la *Loi sur la gestion des finances publiques*, la mutation se fait selon les modalités fixées par le Conseil du Trésor et conformément à ses règlements.

Maintien de la situation du fonctionnaire

(5) Aucune mutation ne peut :

a) constituer une promotion — au sens des règlements du Conseil du Trésor dans le cas d'une administration figurant aux annexes I ou IV de la *Loi sur la gestion des finances publiques* ou au sens donné au terme par l'organisme distinct en cause dans le cas d'un organisme distinct dans lequel les nominations relèvent exclusivement de la Commission;

b) changer la durée des fonctions d'une personne de déterminée à indéterminée.

Consentement du fonctionnaire

(6) La mutation ne peut s'effectuer sans le consentement de la personne en cause, sauf dans les cas suivants:

(a) agreement to being deployed is a condition of employment of the person's current position; or

a) le consentement à la mutation fait partie des conditions d'emploi de son poste actuel;

(b) the deputy head of the organization in which the person is employed finds, after investigation, that the person has harassed another person in the course of his or her employment and the deployment is made within the same organization.

b) l'administrateur général dont elle relève conclut après enquête qu'elle a harcelé une autre personne dans l'exercice de ses fonctions et la mutation se fait au sein de la même administration.

V. Issues

[25] This application raises the following issues:

- (a) Did the PSST fail to exercise jurisdiction by dismissing the complaint?
- (b) Did the PSST breach natural justice or procedural fairness by not investigating the allegations raised in the complaint?
- (c) Did the PSST err in finding that there was no appointment or proposed appointment to bring a complaint under the PSEA?

VI. Standard of Review

[26] The standard of review applicable to questions of jurisdiction and procedural fairness is correctness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at paras 42-43).

[27] However, reasonableness was found applicable to the PSST's decisions concerning the procedures and approach to hearing the complaint as well as its assessments of a case as questions of mixed fact and law (see *Lavigne v Canada (Deputy Minister of Justice)*, 2009 FC 684, [2009] FCJ no 827 at paras 31-32).

[28] As articulated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, reasonableness is “concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process” as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VII. Analysis

A. *Did the PSST Fail to Exercise Jurisdiction by Dismissing the Complaint?*

[29] The Applicant submits that the dismissal of his complaint by the PSST amounts to a failure to exercise jurisdiction. He disputes the PSST's conclusion that it did not have jurisdiction to consider the complaint because there was no appointment or proposed appointment and any staffing

action would have been contemplated as a deployment. He points to evidence of the efforts made to hire him and prepare for his arrival. This includes suggestions in internal emails that a workstation was being prepared and that Laura Oleson, the Director General had previously approved the hiring despite his later notification to the contrary.

[30] The Applicant refers to the Human Resources staffing document as additional evidence of the conclusion of an appointment process. While the document refers to a “deployment”, the Applicant insists that this was not initially contemplated as a deployment as the PSST suggested. He maintains that Mr. Morissette did not inquire into his status with StatCan until after he had been offered a position.

[31] However, this does not amount to an error of jurisdiction. There is evidence of fairly advanced plans to hire the Applicant, but that evidence also points to a deployment as opposed to an appointment process. The Human Resources staffing document is clear on this particular point. Although the Applicant suggests that Mr. Morissette did not inquire into his status, there was awareness of his employment with the Public Service at StatCan that would facilitate a deployment. Critical evidence therefore points to this being a deployment as opposed to an appointment process.

[32] Subsection 53(1) is clear that a deployment is not an appointment within the meaning of the PSEA. The PSST is not entitled to consider complaints in relation to a deployment. As a consequence, its dismissal for lack of jurisdiction because there was no appointment or proposed appointment and any action would have been by way of deployment is not in error.

B. *Did the PSST Breach Natural Justice or Procedural Fairness by not Investigating the Allegations Raised in the Complaint?*

[33] The Applicant claims a violation of his right to be heard in bringing this complaint based on the reference to that requirement in subsection 79(1) of the PSEA. Given the evidence submitted and the PSST's uncertainty as to jurisdiction, the Applicant insists an oral hearing would have provided him with the opportunity to address the question of jurisdiction, as well as make submissions with respect to whether the selection process had been completed and an appointment had been proposed or made.

[34] However, the Applicant is not automatically entitled to an oral hearing in response to his complaint. Subsection 99(3) allows the PSST to decide a complaint without holding a hearing. According to Justice Michel Shore in *Lavigne*, above at para 92, this "must be interpreted as confirming that the Tribunal is not obligated to hold hearings in all cases." He also held at para 97 that the PSST did not err in exercising its discretion regarding whether or not to hold an oral hearing where the complainant was given every opportunity to state their factual issues and arguments in writing and the PSST had enough information to make its decision without holding an oral hearing.

[35] I am unwilling to find a breach of natural justice or procedural fairness solely on the grounds of a failure to provide the Applicant with an oral hearing to present his case, particularly when the PSST was of the opinion that it did not have jurisdiction to hear the complaint.

C. *Did the PSST Err in Finding that there was no Appointment or Proposed Appointment to Bring a Complaint Under the PSEA?*

[36] The Applicant further contests the reasonableness of the PSST's decision that there was no appointment or proposed appointment and any action would have been in relation to a deployment based on the evidence. Once again, he emphasizes the extent to which arrangements were made to hire him. He suggests that this evidence warranted further consideration by the PSST. More specifically, the Applicant insists the PSST had to engage in further analysis of whether any appointment or proposed appointment existed and whether it was truly contemplated as a deployment.

[37] In light of clear evidence in the Human Resources staffing document that this was to be contemplated as a deployment, however, the PSST's conclusions were not unreasonable. They accord with the evidence that while there were efforts made to hire the Applicant; it was not yet finalized and would be in relation to a deployment. Moreover, the termination of his status with the Public Service could have made that deployment infeasible.

[38] The PSST was justified in weighing the evidence as it did to find that it should dismiss the complaint because of jurisdictional considerations in relation to an appointment or deployment. The PSST is entitled to deference in its determination regarding the facts.

VIII. Conclusion

[39] The decision of the PSST dismissing the complaint does not amount to a failure to exercise jurisdiction, breach of natural justice or procedural fairness by not providing an oral hearing, or unreasonableness in the determination that there was no appointment or proposed appointment.

Whatever the Applicant's concern regarding his interactions with Mr. Morissette; there is a strong indication that this was in relation to a deployment to which the PSEA does not provide for recourse with the PSST.

[40] Accordingly, this application for judicial review is dismissed

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-789-10
STYLE OF CAUSE: BOSHRA v AGC

PLACE OF HEARING: OTTAWA
DATE OF HEARING: JANUARY 16, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: JUNE 4, 2012

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