

Federal Court



Cour fédérale

Date: 20111202

Docket: T-53-11

Citation: 2011 FC 1401

Ottawa, Ontario, December 2, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

NEIL SMITH

Applicant

and

**ATTORNEY GENERAL OF CANADA and
THE PUBLIC SERVICE COMMISSION OF
CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Neil Smith has performed duties as a dog handler with the Canada Border Services Agency (CBSA) and with a predecessor, Canada Food Inspection Agency (CFIA), more or less continuously from December 2003 to March 2009, following which he was assigned to other duties. In 2009, the CBSA advertised for applications for persons interested in dog handler duties. The Applicant did not apply, as he understood that he would be unlikely to get the job. Another person, Ms. Simoneau, was selected by CBSA for dog handler duties. The Applicant made a complaint under the provisions of sections 74 and 77 of the *Public Service Employment Act*, SC

2003, c 22 (PSEA) as to the appointment of Ms. Simoneau and alleging that his own appointment had been revoked. The Public Service Staffing Tribunal, in a written decision dated December 13, 2010, cited as 2010 PSST OO22, dismissed the complaint for want of jurisdiction. This is a judicial review of that decision. For the reasons that follow, I find that the application is allowed and the matter is returned to the Tribunal for a decision on the merits.

THE FACTS

[2] The relevant facts were the subject of a set of agreed facts put on the record before the Tribunal.

[3] On May 1, 2003, the Applicant was appointed to a position with the CFIA as a Canine Officer at the PM-02 group and level with general responsibility for the daily care, feeding and exercise of a detection dog assigned to him, in this case the dog was named Bella. Specific duties included patrolling passenger arrivals and cargo areas in Canadian international airports.

[4] On December 12, 2003, parts of the CFIA, together with Canada Customs and Revenue Agency and Citizenship and Immigration Canada, amalgamated to form the Canada Border Services Agency (CBSA). As a result the Applicant was transferred to the position of Canine Officer at the PM-02 group and level at the newly formed CBSA.

[5] On February 8, 2005, CBSA announced a new work description being the position of national Border Services Officer (BSO). That announcement included an addendum describing detector dog handler duties and reclassification of such handlers to a PM-03 group and level.

[6] After this reclassification, the Applicant was offered an indeterminate position as a BSO (PM-03) effective April 1, 2005. The Applicant was concerned that if he accepted this offer, he would be relinquishing his dog handler duties. On April 20, 2006, the Applicant received an email from the Regional Acting Chief of CBSA stating that CBSA did not intend to remove his dog handler duties if he accepted the reclassified position. The e-mail acknowledged that the Applicant's position required specialized training and that he had been hired specifically for that function, it said:

Neil this is to confirm that we do not intend to move you from your Agriculture Detector Dog functions after you accept the Border Services Officer reclassification (PM03). While the BSO classification does/will encompass all three legacy positions of Customs officer, Immigration officer and CFIA POE Inspector; we acknowledge that your role as agriculture DDS requires specialized training as well [sic] the fact that you were hired by the CFIA specifically for that function.

[7] On January 30, 2007, CBSA completed a new work description respecting the BSO (PM-03) position. That description was extensive and contained a large number of duties including the following specific references to dog handling duties:

[...] It may also require knowledge of the principles, methods and techniques associated with detector dog training and handling to detect contraband and regulated commodities.

[...] may also be required to interpret the behavioural reaction of a detector dog in order to determine a course of action during examinations [...]

[8] Except for a brief leave of absence, the Applicant worked as a detector dog handler from 2007 until his dog, Bella, retired in May 2009.

[9] On May 15, 2009, the Chief of Operations at CBSA wrote a letter to the Applicant stating:

I am writing to you in reference to the position of FPA Dog Handler at the Ottawa Airport.

In February 2007 the FB conversion was completed, which in effect converted all existing PM category Officer positions to FB-03 Border Services Officer positions. As part of this conversion process all previous positions at this level, including Dog Handlers, became substantive Border Services Officers. In the case of Dog Handlers, the positions were converted to Border Services Officer, with Dog Handler role considered an assignment.

Within the Ottawa District the decision was made to rotate handlers when appropriate. This rotation allows for fair distribution of career opportunities and to ensure efficiency of the program.

When making the decision to rotate an Officer from the handler assignment several factors are considered, such as: performance assessments, career objectives of the handler, service time as a handler, service time of the dog, and overall experience base of the district teams.

As you know, headquarters in conjunction with the training staff at the college, have decided to retire Bella after many years of productive service. You are currently the longest serving district handler. As Bella is retiring and will be replaced by a new service dog, in reviewing the situation we have decided that now would be an appropriate time to allow another BSO the opportunity to work as a Dog Handler.

I know that you will be leaving an assignment that you are passionate about and I would like to commend you for your dedication to this worthwhile program.

In the near future we will be discussing Individual Learning Plans. I encourage you to evaluate your career plans in order to work towards your next career objective.

[10] Shortly thereafter, CBSA posted a bulletin entitled “*Assignment Opportunity*” directed at indeterminate BSO’s at the FB-03 level in the Ottawa District. Those “*interested in an assignment to fill the position of Food, Plant and Animal Detector Dog Handler*” were solicited. The bulletin provided details as to a two-day detector dog pre-selection course that “*may be used as an assessment tool*”. The successful candidate would be required to complete a ten-week training course.

[11] The Applicant did not respond to this invitation. The Applicant says that from the letter of May 15, supra, it was clear to him that CBSA would not entertain an application from him. Seven persons did apply. Ultimately, Ms. Simoneau was selected; she attended the ten-week training course and assumed the dog handler duties previously performed by the Applicant.

[12] On June 30, 2009 the Applicant presented a complaint to the Tribunal pursuant to sections 74 and 77(1)(a) of the PSEA. He alleged with respect to section 74 that his appointment had been revoked. With respect to section 77 he alleged that Ms. Simoneau’s assignment to dog handling duties constituted an appointment and that there was an abuse of authority in the appointment process.

[13] In reply, the CBSA moved to dismiss the complaint, arguing that the Tribunal was without jurisdiction to accept the complaint on the basis that dog handler duties were part of the reclassified BSO work description; thus no appointment or revocation had occurred.

[14] A hearing was held before the Tribunal from September 8th to 10th, 2010. Each of the Applicant and CBSA called witnesses. Written arguments were submitted by each of them and submissions made to the Tribunal on their behalf.

[15] The Tribunal gave a written decision dated December 13, 2010. It is the decision under review. In that decision, two issues were considered:

Issue 1: Does Ms. Simoneau's assignment constitute an appointment within the meaning of s. 77(1) of the PSEA?

Issue 2: Has the complainant's (Applicant's) appointment been revoked within the meaning of s. 74 of the PSEA?

[16] On the first issue, the Tribunal concluded, at paragraph 46 of its Reasons, that “...it has no jurisdiction over this matter as it has not been shown that an appointment has occurred.”

[17] On the second issue, the Tribunal concluded, at paragraph 52 of its Reasons, that “...there has been no revocation of an appointment within the meaning of s. 74 (of the PSEA). The complainant's concerns do not fall within the Tribunal's mandate.”

[18] Accordingly, at paragraphs 53 and 54 of its Reasons, the Tribunal determined that it had no jurisdiction to hear the complaint and dismissed it for want of jurisdiction.

ISSUES

[19] This judicial review raises two issues in respect of the Tribunal's decision dated December 13, 2010:

1. What is the appropriate standard of review?
2. Did the Tribunal commit a reviewable error in concluding that it was without jurisdiction to determine the Applicant's complaint?

[20] A letter from Ms Simoneau was filed at the hearing in which she stated that she had no interest in participating in the matter

ISSUE 1: What is the appropriate standard of review?

[21] The parties are agreed that reasonableness is the appropriate standard of review in this case. The Federal Court of Appeal recently accepted the reasonableness standard in a similar case: *Kane v Canada (Attorney General)*, 2011 FCA 19 at paragraph 36 (leave to appeal to the Supreme Court granted Dec. 1, 2011).

ISSUE 2: Did the Tribunal commit a reviewable error in concluding that it was without jurisdiction to determine the Applicant's complaint?

[22] It is important to remain focused on the issue, which can be re-stated as:

Was the decision of the Tribunal not to accept jurisdiction in the circumstances of this case reasonable?

[23] Section 74 of the PSEA gives jurisdiction to the Tribunal in circumstances where a person's appointment has been revoked:

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.

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.

[24] Section 77(1)(a) of the PSEA gives jurisdiction to the Tribunal where a person complains that they were not appointed by reason of an abuse of authority by the Commission or deputy head in making the appointment:

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

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 :

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

a) abus de pouvoir de la part de la Commission ou de l'administrateur général dans l'exercice de leurs attributions respectives au titre du paragraphe 30(2);

[25] The word “appointment” is not a term defined in the PSEA. This word has caused the Supreme Court of Canada, in dealing with a predecessor statute, and other Courts, to provide considerable guidance as to what activity may or may not constitute an “appointment”.

[26] In the present case, the Tribunal considered a number of these authorities in its Decision. As to the complaint based on section 74 of the PSEA, its conclusions are summarized at paragraphs 51 and 52 of the Decision:

51 However, in the case before the Tribunal there is no evidence that either the deputy head or the PSC revoked the complainant's appointment. On the contrary, the evidence establishes that the complainant accepted an appointment to an indeterminate BSO position in April 2006 and in May 2009 he was moved to new opportunities within the BSO work description. This move was based on a number of considerations including the distribution of career opportunities, employees' career objectives, service time as a handler, and the overall experience base within the district. In these circumstances, giving the complainant other duties within the existing BSO work description does not constitute revocation under the PSEA.

52 Accordingly, the Tribunal finds that there has been no revocation of an appointment within the meaning of s. 74. The complainant's concerns do not fall within the Tribunal's mandate.

[27] As to the complainant based on section 77 of the PSEA, the conclusions of the Tribunal are summarized at paragraphs 40 and 41 of the Decision:

40 The Tribunal finds the facts of the present case distinguishable from those in Brault.

41 Firstly, the dog handler duties do not constitute the creation of additional functions or duties. The current work description for the BSO defines the duties of the position to include dog handling. The evolution of those duties from a stand-alone dog handler position to their incorporation into the BSO work description is well documented in the evidence. It is a mischaracterization to say that this complaint concerns an appointment to a new position. The work description defines the duties and responsibilities of the position. It provides flexibility in work assignments within the BSO position. The dog handler duties are explicitly set out in the BSO work description.

[28] It is relevant to look at the individual circumstances of the Applicant/Complainant, Mr. Smith. He began as a dog handler with the Canadian Food Inspection Agency. His duties were focused on the training and handling of a dog for specific purposes relating to materials entering Canada. The Agency merged with another agency and became the Canada Border Services Agency. Mr. Smith's duties, nonetheless, remained the same. A reclassification occurred. Mr. Smith sought and received assurances that his role "*requires specialized training*" and that the Border Services Agency "*[did] not intend to move you from your Agriculture Detection Dog functions*". The Border Services Agency then did a major reclassification of the duties to be assigned to Border Services Officers, of which Mr. Smith is now one, to create a large omnibus description of a wide variety of duties, included within which dog handling is among them. It is not pretended that every Officer will or should be capable of performing each and every duty. Dog handling is still a specialized skill requiring special training. Mr. Smith's dog Bella is then "retired". Mr. Smith received a letter stating

in no uncertain terms that, while his past efforts are commended, he will be reassigned. Others are invited to apply. One of the others is selected and must undergo an intensive ten-week course in order to perform dog handler duties sufficiently well so as to replace Mr. Smith.

[29] Throughout, Mr. Smith's work has been praised. He has been assured that his assignment as a dog handler will remain. The Border Services Agency created a new omnibus duty description which includes many duties, including that of dog handler. At an opportune time for the Agency, Mr. Smith is told his services as a dog handler are no longer required. Somebody else is trained for and gets the job.

[30] The Tribunal did not look at the matter from the viewpoint of Mr. Smith; only from the Border Services' viewpoint. Border Services wishes to be free to reassign, merge, reclassify and what have you, the duties of an Officer. That is not the issue. The issue is whether, in so doing, the person – in this case, Mr. Smith – is, as section 74 of the PSEA says, “*a person whose appointment is revoked*” and whether, as section 77(1)(a) says, the appointment of another person effectively to carry on the same duties is “*an abuse of authority*”.

[31] The decisions of the Supreme Court of Canada in *Doré v Canada*, [1987] 2 SCR 503 and *Canada (Attorney General) v Brault*, [1987] 2 SCR 489 (a dog handler case) are most relevant. They each deal with predecessor legislation to the PSEA, but the issue is the same: What is an “appointment”? Both are unanimous decisions of that Court written by Justice Le Dain.

[32] In *Doré*, supra, at paragraph 7, the Court wrote:

It is what the Department has objectively done as a matter of fact and not what it may have intended or understood it was doing as a matter of law that must determine the application of the merit principle and the right of appeal.

[33] At paragraph 9 of *Doré*, supra, the Court recognized that a Department should be allowed reasonable flexibility, but where there is as a result a significant change in a person's circumstances, then a right of redress exists.

[34] In *Brault*, supra, the Court expressed the same principles. At paragraph 8, Le Dain J. wrote :

8 The second appeal board further held, as had the first appeal board, that the appointment to the position of dog handler had not been based on selection according to merit in accordance with the applicable selection standards, as required by ss. 10 and 12 of the Act and s. 5 of the Regulations, which have been quoted above, because, as admitted by the Department, the candidates had not been evaluated with respect to the rated requirements of knowledge, capacity and personal qualities for the position of customs inspector, as well as suitability for the function of dog handler, in the light of the special qualifications for that function. According to the first appeal board, the Department's reason for not evaluating the merit of the candidates with respect to their qualifications for the position of customs inspector, as well as those for the function of dog handler, was a concern that such evaluation might establish that some candidates were not qualified for the position of customs inspector, with the result that they would have to be dismissed. In any event, it is admitted by the Department that if the assignment of the mis en cause as dog handlers was an appointment within the meaning of s. 21 of the Public Service Employment Act it was not one based on selection according to merit.

[35] The PSEA affords a right of redress in sections 74 and 76 by way of a complaint to the Tribunal. The Tribunal should, as expressed by Justice Lemieux in *Baur v Canada (Attorney General)*, 2004 FC 725 at paragraph 47, “...look at the totality of the circumstances...”. In the present case, the Tribunal did not do so. It looked only at one side, the Border Services side; not at Mr. Smith’s side. In so doing, its decision was unreasonable. A Tribunal should be balanced and open in accepting jurisdiction. Jurisdiction is there for a purpose; the Tribunal should accept its mandate and deal with matters such as the present one.

[36] I digress to deal with an issue not dealt with by the Tribunal and not apparently raised before it if one looks at the Tribunal record. Counsel for the Respondents assures the Court that, in oral argument, it raised an issue to the effect that Mr. Smith’s circumstances should be viewed as a “deployment” and, as such, his remedy was to file a grievance under sections 208 ff of the *Public Service Labour Relations Act*, SC 2003, c 22, s 2. In my view, even if that issue had properly been raised before the Tribunal, it was irrelevant. First of all, section 51(6) of the PSEA forbids deployment without the consent of the employee unless it is a condition of the employment or there are harassment issues. The record before the Tribunal does not support any of these exceptions, or consent. Secondly, section 208 ff of the *Public Service Labour Relations Act* provides that a person “may” file a grievance. There is no provision in that *Act* or the PSEA to the effect that a grievance “must” be filed or that a right to a grievance takes away any right to have the Tribunal hear a complaint under the PSEA. I therefore disregard the “deployment” argument, even if it was properly raised.

[37] As a result, the application is allowed. The Tribunal has jurisdiction to hear the complaints. The matter is returned to the Tribunal for determination on the merits. The parties are agreed that costs are to be awarded to the successful party here, Mr. Smith, in the amount of \$3,500.00.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. The application is allowed;
2. The matter is returned to the Tribunal for determination on the merits; and
3. The Applicant is entitled to costs in the sum of \$3,500.00.

"Roger T. Hughes"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-53-11

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CANADA and THE PUBLIC SERVICE
COMMISSION OF CANADA

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DATED: December 2, 2011

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