

Federal Court



Cour fédérale

**Date: 20140415**

**Docket: T-546-13**

**Citation: 2014 FC 361**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, April 15, 2014**

**PRESENT: The Honourable Mr. Justice Montigny**

**BETWEEN:**

**MARIE MACHE RAMEAU**

**Applicant**

**and**

**THE CANADIAN INTERNATIONAL  
DEVELOPMENT AGENCY**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant filed an application for judicial review of a decision by the Public Service Staffing Tribunal (Tribunal) dated February 27, 2013. In its decision, the Tribunal granted the respondent's motion for dismissal of the applicant's complaint on the grounds that it was filed after the time limit set out in section 10 of the *Public Service Staffing Tribunal Regulations*, SOR/2006-6 (Regulations).

[2] For the following reasons, I am of the opinion that the applicant's application for judicial review must be dismissed.

## **I. Facts**

[3] The applicant is an employee of the respondent, the Canadian International Development Agency (CIDA), and holds a position at the PE-03 level. Even though an administrative reorganization has not impacted this application for judicial review, it should be noted that CIDA is now part of the Department of Foreign Affairs, Trade and Development: see the *Department of Foreign Affairs, Trade and Development Act*, SC 2013, c 33, s 174.

[4] In 2003, the applicant brought proceedings against her employer under the *Canadian Human Rights Act*, RSC (1985), c H-6. Those proceedings ended in an agreement according to which the applicant was appointed on an acting basis to a position at the PE-4 group and level and assigned to a position in the Public Service Commission under an assignment agreement between the Commission and CIDA. That assignment, initially twelve months long, was renewed for a second year. At the end of that second assignment period, that is, on February 16, 2009, the applicant was reinstated in her position at CIDA at the PE-3 level. The applicant alleges that she should have been reinstated in a PE-4 position, in accordance with paragraph 6 of the agreement, which states the following:

[TRANSLATION]

If the complainant is unsuccessful in the training during the first six months of her assignment in the Public Service Commission, she will return to a PE-3 position at the respondent. The respondent undertakes to offer her 18 months of training. If the complainant receives a positive quarterly appraisal based on clear and precise objectives and on the assessment criteria, the complainant will be

appointed at the PE-4 level through a non-advertised process at the end of the 18-month training period.

[5] Although she feels that she completed the required training, the applicant was not appointed to that level. In June 2012, Justice Pinard rendered a decision equating the agreement to an order from this Court. The applicant then informed the respondent that she would file a motion for contempt with the Federal Court on the grounds that the respondent did not respect the agreement by not proceeding with her appointment to a position at the PE-4 level.

[6] On October 1, 2012, the applicant received a letter informing her that her position had been declared surplus and that her services would no longer be required because of a workforce adjustment situation. She was also informed of her right to make a complaint to the Tribunal, within 15 days from the date of the letter, that the decision to lay her off constitutes an abuse of authority under section 65 of the *Public Service Employment Act*, SC 2003, c 22 (PSEA).

[7] On October 15, 2012, the applicant wrote to the president of the respondent to obtain an explanation with respect to her appointment to a PE-4 position.

[8] On November 2, 2012, Justice Boivin issued an order dismissing the applicant's motion for contempt on the grounds that there was a difference in interpretation with respect to the agreement and, more specifically, regarding paragraph 6. Under those circumstances, the conduct of the parties was therefore not clearly dictated by the agreement and the respondent could not be found in contempt.

[9] Because the letter dated October 1 gave the applicant until January 29, 2013, to make her option known further to her lay-off and because she was not successful in obtaining clarification with respect to her rights, on January 24, 2013, she requested that the Tribunal suspend the lay-off of her position at the PE-3 level until the Canadian Human Rights Tribunal had ruled on the interpretation to be given to the agreement. On January 25, 2013, the Tribunal replied that it did not have jurisdiction to render a decision with respect to her motion to the extent that no complaint had been filed before it.

[10] Thus, on January 28, 2013, the applicant filed a complaint under section 65 of the PSEA concerning her lay-off from her position at the PE-03 group and level in CIDA.

[11] On February 12, 2013, the respondent filed a motion to dismiss the applicant's complaint on the grounds that it was filed after the 15-day time limit set out in section 10 of the Regulations. The applicant replied on February 22, 2013, and requested the dismissal of the respondent's motion on the grounds that exceptional circumstances had caused her complaint to be filed after the allotted time limit, that is, uncertainty about her position level and the respondent's refusal to clarify the situation.

[12] On February 27, 2013, the Tribunal allowed the respondent's motion and dismissed the applicant's complaint on the grounds that her complaint had been filed after the time limit.

## II. The impugned decision

[13] After stating the facts underlying this application for judicial review and proceeding with the procedural history, the Tribunal briefly summarized the applicant's principal argument, that is, that she was unable to file a complaint against the lay-off notice because she was not aware of her rights with respect to her status as an employee at the PE-4 level. The Tribunal then reiterated that the 15-day time limit is a strict limit that can only be extended in the interests of fairness. It is up to the party requesting the extension, added the Tribunal, to demonstrate the exceptional circumstances justifying such an extension.

[14] In this case, the Tribunal stated that it was of the opinion that the applicant did not demonstrate that exceptional circumstances prevented her from filing her complaint within the time limit. The essence of the Tribunal's reasoning can be found in the following paragraph:

[TRANSLATION]

She maintains that, under the agreement, the respondent should have already appointed her to a position at the PE-04 level. However, as the complainant herself stated in her reply to the motion, the interpretation of the level of her position remains challenged and unresolved, which the Federal Court confirmed in a decision dated November 2, 2012 (*Mache Rameau v Attorney General of Canada*, 2012 FC 1286). To the extent that the complainant's status as an employee at the PE-04 level was still unconfirmed, she had no reason to disregard the letter informing her of her lay-off and, most importantly, the fact that she had only 15 days to file a complaint with the Tribunal. The complainant had to know, especially considering the fact that she was already receiving legal advice and had brought proceedings with respect to her position, that if she had indeed wanted to "preserve her right to complain", she had to file her complaint before October 16, 2012.

### III. Issues

[15] The parties are in agreement that this application for judicial review raises the following three questions:

- (a) What is the applicable standard of review?
- (b) Did the Tribunal err by dismissing the applicant's complaint?
- (c) Did the Tribunal breach the principles of procedural fairness?

### IV. Analysis

[16] The PSEA provides a framework for all of the issues regarding employment in the federal public service. The Tribunal's mandate is well defined in subsection 88(2) of the PSEA, 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.

[17] Within the scope of its authority, the Tribunal is competent to examine complaints concerning lay-offs. Subsection 65(1) of the PSEA sets out that an employee may make a complaint to the Tribunal, in the manner and within the time fixed by the regulations, that his or her selection constituted an abuse of authority. That provision reads as follows:

**Complaint to Tribunal re lay-off**

65. (1) Where some but not all of the employees in a part of an organization are informed by the deputy head that they will be laid off, any employee selected for lay-off may make a complaint to the Tribunal, in the manner and within the time fixed by the Tribunal's regulations, that his or her selection constituted an abuse of authority.

**Plainte au Tribunal — mise en disponibilité**

65. (1) Dans les cas où seulement certains des fonctionnaires d'une partie de l'administration sont informés par l'administrateur général qu'ils seront mis en disponibilité, l'un ou l'autre de ces fonctionnaires peut présenter au Tribunal, dans le délai et selon les modalités fixés par règlement de celui-ci, une plainte selon laquelle la décision de le mettre en disponibilité constitue un abus de pouvoir.

[18] Subsection 10(1) of the Regulations stipulates the time for making a complaint, and section 5 of the Regulations establishes the circumstances in which an extension of the time may be obtained:

**Time for making complaint**

10. (1) A complaint must be received by the Tribunal no later than 15 days after

- (a) the day on which the complainant receives notice of the lay-off, revocation, appointment or proposed appointment to which the complaint relates; or
- (b) the date specified in the notice, if it is a public notice.

**Délai**

10. (1) La plainte est reçue par le Tribunal dans les quinze jours suivant la date, selon le cas :

- a) où l'avis de mise en disponibilité, de révocation, de nomination ou de proposition de nomination en faisant l'objet a été reçu par le plaignant;
- b) figurant sur l'avis, s'il s'agit d'un avis public.

**Amendment of time**

5. (1) A party may request the Tribunal to extend or reduce the time within which a complaint may be made or within which notices and other

**Modification des délais**

5. (1) Une partie peut demander au Tribunal de prolonger ou de réduire le délai de présentation d'une plainte ou le délai d'envoi des avis et

documents must be given in  
relation to a complaint.

autres documents relatifs à la  
plainte.

A. What is the applicable standard of review?

[19] It has been well established that the first step in determining the appropriate standard of review is to ascertain whether past jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question:

*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at paragraph 62 (*Dunsmuir*). In this case, this Court has ruled a number of times on the standard of review applicable to the judicial review of the decisions by the Tribunal. Relying on the strong privative clause in section 101 of the PSEA, on the expertise of Tribunal members, and on the nature of the questions before the Tribunal (that is, questions of mixed fact and law), the Court unanimously found that the applicable standard of review is reasonableness: *Lavigne v Canada (Deputy Minister of Justice)*, 2009 FC 684 at paragraphs 33-51; *Kilbray v Canada (Attorney General)*, 2009 FC 390 at paragraphs 32-33; *Canada (Attorney General) v Lahlali*, 2012 FC 601 at paragraphs 22-23.

[20] It is also interesting to note that the Federal Court of Appeal also made a finding in favour of the reasonableness standard in a matter specifically concerning the dismissal of a complaint by the Tribunal on the grounds that it had been filed after the 15-day time limit: see *Exeter v Canada (Attorney General)*, 2011 FCA 253 at paragraph 14.

[21] As a result, the Court should not seek to make its own findings or to substitute its opinion for that of the Tribunal, but must instead merely determine whether the findings made by the



Tribunal fall within a range of possible outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at paragraph 47.

[22] Regarding issues of procedural fairness, they generally result in the application of the correctness standard: *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 46. Evidently, it is up to the Court to determine whether there is actually a procedural fairness issue or whether the question raised concerns, first and foremost, the substance of the decision rendered.

B. Did the Tribunal err by dismissing the applicant's complaint?

[23] As stated above, section 10 of the Regulations sets out a time limit of 15 days following the date of receipt of the notice of the lay-off to file a complaint with the Tribunal. The applicant argued that that time limit applies only when a lay-off notice is properly issued to the concerned person. That condition was apparently not respected in this case because the lay-off notice that she received on October 1, 2012, was imprecise and inappropriate, given that there was still some confusion about her level of employment. Because she had sought recognition of her appointment to the PE-4 level and a decision had not yet been made in that regard, the notice of lay-off should have mentioned that recourse or explained why such recourse was unavailable.

[24] In the alternative, the applicant maintains that the Tribunal unreasonably exercised its discretionary authority by not considering how her recourse to obtain an appointment to the PE-4 level could impact her lay-off. According to the applicant, the Tribunal was required to consider

the substance of her complaint to determine whether exceptional circumstances could justify her delay in filing it.

[25] Unfortunately, I cannot accept those arguments, essentially for the reasons raised by the respondent. First, the notice of the lay-off did meet the fairness and transparency requirements set out in the preamble of and in subsection 65(1) of the PSEA. The notice clearly mentioned the position at the PE-3 level that the applicant held at the time she received the notice, and also included all of the necessary information to allow her to file a complaint against that notice.

[26] Second, it is important to keep in mind that the 15-day time limit set out in section 10 of the Regulations is a strict limit: *Allard v Canada (Public Service Commission)*, [1982] 1 FC 432 at paragraph 6; *MacDonald v Service Canada*, 2006 PSST 2 at paragraph 5; *McConnell v Deputy Minister of National Defence et al.*, 2009 PSST 18 (*McConnell*). Only exceptional circumstances can allow the Tribunal to exercise its discretionary authority to amend that time limit, and the burden of proving those exceptional circumstances rests with the person who raises them: *Casper v Deputy Minister of Citizenship and Immigration Canada et al.*, 2006 PSST 10; *Richard v Canada (Deputy Minister of Public Works and Government Services)*, 2007 PSST 2; *Poulin v Canada (Deputy Minister of Justice)*, 2008 PSST 18; *McConnell, supra*.

[27] Even though the applicant's situation is unique, I am of the opinion that it was reasonable for the Tribunal to find that there were no exceptional circumstances in this case. Nothing prevented the applicant from filing her complaint within the time limit set out in the Regulations and indicating that one of the reasons behind the complaint was the uncertainty about her level of

employment and her requests for clarification in relation thereto. Like the Tribunal pointed out, the applicant was not justified in disregarding the lay-off notice to the extent that she did hold a position at the PE-3 level and her claim to obtain a position at the PE-4 level was still unresolved. It was not up to the Tribunal to consider the legal effects of an agreement entered into as part of a separate proceeding before the Canadian Human Rights Commission, especially since that proceeding was in no way connected to her lay-off and had been commenced several years prior. In that view, the fact that this Court's decision to dismiss the applicant's motion for contempt was rendered on November 2, 2012 (therefore after the 15-day time limit for filing her complaint) can be of no help to justify the failure to respect section 10 of the Regulations.

C. Did the Tribunal breach the principles of procedural fairness?

[28] The applicant argued that the Tribunal breached procedural fairness by not respecting its obligation to assess the merit of her complaint and to consider her arguments. She also maintained that the Tribunal failed to address her concern for fairness.

[29] Even accepting that the procedural fairness requirements may be relatively high given the importance of the decision for the applicant, I believe that the Tribunal completely met the requirements by handling the case in accordance with the Regulations and by allowing the applicant to make her arguments. The Tribunal could only assess the complaint filed by the applicant after finding that there were exceptional circumstances justifying the failure to meet the 15-day time limit set out in section 10 of the Regulations. After considering the reasons raised by the applicant to justify her delay, and given the purpose which underlies section 10 of the Regulations and that consists in promoting predictability and timeliness in proceedings, the

Tribunal found that those reasons were not sufficient to constitute exceptional circumstances. I see nothing in that approach that may constitute a breach of procedural fairness.

**V. Conclusion**

[30] In light of the foregoing, this application for judicial review must be dismissed. Since the parties have agreed as to costs, the costs are fixed at \$500.00.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that** the application for judicial review is dismissed, with costs in favour of the respondent fixed at \$500.00.

“Yves de Montigny”

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Judge

Certified true translation  
Janine Anderson, Translator

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-546-13

**STYLE OF CAUSE:** MARIE MACHE RAMEAU v THE CANADIAN  
INTERNATIONAL DEVELOPMENT AGENCY

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** DECEMBER 10, 2013

**REASONS FOR JUDGMENT  
AND JUDGMENT:** DE MONTIGNY J.

**DATED:** APRIL 15, 2014

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