

Federal Court



Cour fédérale

Date: 20111020

Docket: T-1851-09

Citation: 2011 FC 1205

Ottawa, Ontario, October 20, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

JEFFREY DOUGLAS BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Public Service Labour Relations Board (the Board), dated October 14, 2009, to dismiss the applicant's grievance on the grounds that it did not have jurisdiction to hear the grievance, pursuant to section 208(2) of the *Public Service Labour Relations Act*, SC 2003, C 23, s 2 (the Act).

FACTS

Background

[2] The applicant is an employee of Correctional Service of Canada (the employer). In 2003, he was a correctional officer, and applied for a competition for a Parole Officer position. He was informed by letter on October 3, 2003, that he had been found to be an eligible candidate for the WP-4 Parole Officer position, and that he ranked 11th on the eligibility list.

[3] The eligibility list was certified in November, 2003, and expired in October, 2005. The applicant was not appointed to a position as Parole Officer before the certified list expired.

[4] The applicant states that the competition was a Special Measures Employment Equity Process, intended to address gaps in the hiring of visible minorities and Aboriginal persons. The applicant states that this process was supposed to take priority over other competition processes.

[5] While the certified list was still active, the applicant made inquiries to the employer about the process and why he had not been offered a position. The applicant received an email dated August 18, 2005, from the Acting Assistant Commissioner of the employer, Arden Thurber, which stated in part:

It is my understanding that you qualified on a Parole Officer competitive process open to members of a Visible Minority group and are 11th on the Eligibility List. The list remains valid until October 12, 2005. To date, two indeterminate appointments have been made from the list and a number of acting appointments, in various locations, have been offered to you as a result of the process.

[6] The applicant presented a grievance on October 26, 2005. The grievance stated in part:

I am writing this grievance in response to Pittsburgh Institution and the Ontario Regions failure to place me into a [*sic*] Indeterminate (WP-4) Parole Officer position before my certified list expired. (October 9th/05).

As a successful candidate on the competition process 2002-CSC-ONT-OC-88 (finishing 11th in the region). I did not receive any indeterminate offers from the time this competition process was certified (November of 2003 through the expiry date mentioned above). This is despite the fact that there were a number of identified positions available both at Pittsburgh Intuition [*sic*] and other locations in the Ontario Region.

[7] The applicant's grievance alleged that the employer violated section 5 of the *Public Service Employment Act*, RSC 1985, c P-33 (PSEA); Article 37 of the applicant's collective agreement (a non-discrimination clause); and the *Employment Equity Act*, SC 1995, c 44.

[8] The applicant's grievance proceeded through all four levels of evaluation. The employer's response to the grievance at the final level, dated August 12, 2009, stated in part:

I must inform you that since your grievance relates to a staffing matter, in accordance with subsection 208(2) of the *Public Service Labour Relations Act (PSLRA)* you had another administrative procedure for redress available to you under the former *PSEA*. Moreover, subsection 208(1) of the *PSLRA* defines the grounds under which employees are entitled to present an individual grievance. The subject matter of your grievance does not fall within these grounds.

[9] Pursuant to section 209(1) of the Act, the applicant states that he referred the grievance to adjudication after the Level 3 decision regarding the grievance.

[10] By the time the grievance was adjudicated, the applicant had been appointed to a Parole Officer position (as a result of a separate competition process in 2008); therefore, by the hearing, he indicated he was only seeking a declaration that the employer violated the collective agreement and the *Canadian Human Rights Act*, RSC 1985, c H-6 (CHRA), as well as damages for that violation.

[11] On September 15, 2009, the employer objected to the jurisdiction of the Board to hear the grievance. The Board informed the parties that the objection would be dealt with at the beginning of the hearing on September 23, 2009. The respondent states that the record before the Board in considering the jurisdiction issue consisted only of the applicant's grievance, dated October 26, 2005, and the grievance decision covering all levels of the grievance process, dated October 31, 2005. Both parties made arguments regarding the jurisdiction issue, but no evidence was presented by the parties.

[12] The Court notes that the applicant filed complaints regarding another appointment process, this time for a Correctional Manager position, and those complaints went before the Public Service Staffing Tribunal: *Brown v The Commissioner of Correctional Service of Canada*, 2011 PSST 0015. In that case, the applicant alleged discrimination and he raised the facts in relation to the appointment process at issue in this case. While the Tribunal found that it could not determine whether there was any abuse of authority in previous appointments, it found that it could examine the previous appointment processes as part of the context of the applicant's complaint in order to shed light on the appointment at issue.

Decision under review

[13] In its decision dated October 14, 2009, the Board found that it had no jurisdiction to hear the grievance. It therefore allowed the employer's objection, and dismissed the grievance. The Board summarized the facts giving rise to the grievance, and noted that the applicant was now limiting the grievance to the alleged violation of the non-discrimination clause of his collective agreement, and violation of the CHRA.

[14] The Board then summarized the employer's preliminary objection to the Board's jurisdiction: the employer submitted that the grievance related to an appointment, and the PSEA provided a procedure to appeal appointment decisions. The employer submitted that the grievance could not be heard by the Board, pursuant to section 208(2) of the Act, because another administrative procedure was available for redress, and because the grievance did not fall within any of the paragraphs under section 209(1) of the Act.

[15] The Board summarized the applicant's submissions regarding jurisdiction: the applicant submitted that the Board had jurisdiction to decide whether a clause of the collective agreement and the CHRA were violated by the employer. The applicant submitted that section 208(2) of the Act provides jurisdiction to hear a grievance on possible violation of the CHRA.

[16] The Board found that section 208(2) clearly precluded the applicant's grievance:

Subsection 208(2) of the *Act* is clear: an employee cannot present a grievance in respect of which an administrative procedure for redress is provided under another Act of Parliament other than the *CHRA*. The grievance is also clear in that it relates to staffing. On that point, the *PSEA* provides employees with an administrative procedure for redress. The grievor could have used that procedure to challenge the

employer's staffing decision. Consequently, I do not have jurisdiction to hear the grievance.

[17] The Board found that the PSEA procedure was the proper recourse even in relation to the applicant's allegations of discrimination:

Even if the grievor were to prove that he was discriminated against by the decisions or actions of the employer when it staffed or did not staff parole officer positions, I would still conclude that I do not have jurisdiction. The grievor could have used the administrative redress procedure provided by the *PSEA* to argue discrimination. One of the intents of subsection 208(2) of the *Act* is to prevent the use of multiple recourses for the same challenged issues or decisions. There was an administrative redress procedure provided by the *PSEA*, and I cannot agree that the grievor is also entitled to refer the same issue to adjudication, even if it deals with human rights.

[18] The Board found that the cases relied on by the applicant were distinguishable, because in those cases there was not another administrative procedure available to the applicant. Therefore, the Board concluded, the Board had no jurisdiction and the grievance was dismissed.

LEGISLATION

[19] Section 208(1) of the *Public Service Labour Relations Act*, SC 2003, C 23, s 2 (the Act) specifies the circumstances in which an employee is entitled to present an individual grievance:

<p>208. (1) Subject to subsections (2) to (7), an employee is entitled to present an individual grievance if he or she feels aggrieved</p>	<p>208. (1) Sous réserve des paragraphes (2) à (7), le fonctionnaire a le droit de présenter un grief individuel lorsqu'il s'estime lésé :</p>
<p>(a) by the interpretation or application, in respect of the employee, of</p>	<p>a) par l'interprétation ou l'application à son égard :</p>
<p>(i) a provision of a statute or regulation, or of a direction or</p>	<p>(i) soit de toute disposition d'une loi ou d'un règlement, ou</p>

other instrument made or issued by the employer, that deals with terms and conditions of employment, or	de toute directive ou de tout autre document de l'employeur concernant les conditions d'emploi,
(ii) a provision of a collective agreement or an arbitral award; or	(ii) soit de toute disposition d'une convention collective ou d'une décision arbitrale;
(b) as a result of any occurrence or matter affecting his or her terms and conditions of employment.	b) par suite de tout fait portant atteinte à ses conditions d'emploi.

[20] Section 208(2) of the Act states that an employee may not present a grievance if another administrative procedure for redress has been provided under any Act of Parliament other than the CHRA:

208. (2) An employee may not present an individual grievance in respect of which an administrative procedure for redress is provided under any Act of Parliament, other than the <i>Canadian Human Rights Act</i> .	208. (2) Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation lui est ouvert sous le régime d'une autre loi fédérale, à l'exception de la <i>Loi canadienne sur les droits de la personne</i> .
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[21] Section 209(1) of the Act permits an employee to refer an individual grievance to adjudication by the Board under certain circumstances:

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to	209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur :
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| (a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award; | a) soit l'interprétation ou l'application, à son égard, de toute disposition d'une convention collective ou d'une décision arbitrale; |
| (b) a disciplinary action resulting in termination, demotion, suspension or financial penalty; | b) soit une mesure disciplinaire entraînant le licenciement, la rétrogradation, la suspension ou une sanction pécuniaire; |
| (c) in the case of an employee in the core public administration, | c) soit, s'il est un fonctionnaire de l'administration publique centrale : |
| (i) demotion or termination under paragraph 12(1)(d) of the Financial Administration Act for unsatisfactory performance or under paragraph 12(1)(e) of that Act for any other reason that does not relate to a breach of discipline or misconduct, or | (i) la rétrogradation ou le licenciement imposé sous le régime soit de l'alinéa 12(1)d) de la Loi sur la gestion des finances publiques pour rendement insuffisant, soit de l'alinéa 12(1)e) de cette loi pour toute raison autre que l'insuffisance du rendement, un manquement à la discipline ou une inconduite, |
| (ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or | (ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire; |
| (d) in the case of an employee of a separate agency designated under subsection (3), demotion or termination for any reason that does not relate to a breach of discipline or misconduct. | d) soit la rétrogradation ou le licenciement imposé pour toute raison autre qu'un manquement à la discipline ou une inconduite, s'il est un fonctionnaire d'un organisme distinct désigné au titre du paragraphe (3). |

[22] Section 8 of the *Public Service Employment Act*, RSC, 1985, c P-33, as repealed by the *Public Service Modernization Act*, SC 2003, c 22, s 284, effective December 30, 2005 (SI/2005-

121) (PSEA), stated that the Public Service Commission had exclusive authority over appointments within the public service:

8. Except as provided in this Act, the Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons for whose appointment there is no authority in or under any other Act of Parliament.

8. Sauf disposition contraire de la présente loi, la Commission a compétence exclusive pour nommer à des postes de la fonction publique des personnes, en faisant partie ou non, dont la nomination n'est régie par aucune autre loi fédérale.

[23] Section 21 of the PSEA permitted an unsuccessful candidate to appeal an appointment to the Commission:

21. (1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.

21. (1) Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.

ISSUE

[24] The Court finds that the only issue to be decided is whether the Board was correct to find that it did not have jurisdiction to hear the applicant's grievance.

STANDARD OF REVIEW

[25] In *New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9, at paragraph 59, the Supreme Court held that the standard of review is correctness for true questions of jurisdiction:

Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. “Jurisdiction” is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter.

[26] In the decision under review, the Board decided that it did not have jurisdiction to hear the grievance. Therefore, this decision is in relation to a true question of jurisdiction or *vires*, and the standard of review is correctness.

ANALYSIS

[27] The applicant submits that the grievance was in relation to the interpretation or application of a provision of a collective agreement, and therefore it fell within section 209(1)(a), and was properly referred to adjudication by the Board. The respondent submits that the grievance relates to a staffing decision, which falls within the regime under the PSEA, and therefore was beyond the jurisdiction of the Board.

[28] The Court finds that section 208(2) of the Act clearly precludes the presentation of a grievance where another administrative procedure for redress is provided under another Act of Parliament other than the CHRA. The Court finds that the facts giving rise to the applicant’s

grievance relate to a staffing appointment. Section 8 of the PSEA, which was in force at the time of the applicant's grievance, granted exclusive authority over appointments to the Public Service Commission. Section 21 of the PSEA granted unsuccessful candidates a right to appeal any appointment decision to the Commission.

[29] The Court finds that it was this process – an appeal under section 21 of the PSEA – that the applicant should have pursued for redress in relation to the employer's appointment decision. Since this procedure was available to the applicant, the applicant was in fact not entitled to present his grievance at any level of the grievance process under the Act, nor was he entitled to refer the grievance to adjudication: *Canada (Attorney General) v Boutilier*, [1999] 1 FC 459 (TD).

[30] The applicant submitted to the Court that he could not have appealed the appointment under this procedure because the employer would not inform him whether any appointments had been made. However, there is evidence before the Court that a credible, senior individual within Correctional Service of Canada—the Acting Assistant Commissioner, Arden Thurber—informed the applicant by email that two appointments were made from the applicant's eligibility list. It was up to the applicant to act on this information in the proper forum.

[31] The Court further notes that the appeal process under the PSEA would have permitted the applicant to present his allegations of discrimination. The Public Service Commission Appeal Board had jurisdiction to consider allegations of discrimination: *Chopra v Canada (Attorney General)*, 2005 FCA 374. The applicant has presented these kinds of allegations to the Public Service Staffing Tribunal, which is the tribunal that succeeded the Public Service Commission Appeal Board: *Brown*

v The Commissioner of Correctional Service of Canada, 2011 PSST 0015. Thus, this forum would have been able to consider all of the applicant's allegations, including that he was discriminated against in the competition process.

[32] The Court finds that the Board was correct to conclude that it did not have jurisdiction to hear the grievance. The Court therefore has no basis upon which to intervene, and the application for judicial review is dismissed.

[33] There will be no order as to costs.

JUDGMENT

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

“Michael A. Kelen”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1851-09

STYLE OF CAUSE: JEFFREY DOUGLAS BROWN v.
ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: October 5, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** Kelen J.

DATED: October 20, 2011

APPEARANCES:

Jeffrey Douglas Brown SELF-REPRESENTED APPLICANT

Martin Desmeules FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nil FOR THE APPLICANT

Myles J. Kirvan FOR THE RESPONDENT
Deputy Attorney General of Canada