



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

FILE: 2006-0230

OTTAWA, NOVEMBER 20, 2007

SHELLEY MOLANDER

COMPLAINANT

AND

THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

RESPONDENT

AND

OTHER PARTIES

MATTER Complaint of abuse of authority pursuant to subsection 65(2)
of the *Public Service Employment Act*

DECISION The complaint is dismissed

DECISION RENDERED BY Helen Barkley, Member

LANGUAGE OF DECISION English

INDEXED *Molander v. Commissioner of the Royal Canadian Mounted
Police et al.*

NEUTRAL CITATION 2007 PSST 0042

REASONS FOR DECISION

INTRODUCTION

[1] On November 6, 2006 the complainant, Shelley Molander, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under subsection 65(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the *PSEA*) alleging that her selection for lay off constitutes an abuse of authority.

BACKGROUND

[2] The complainant was notified in writing on October 23, 2006 that her position of Office Manager (AS-02), Royal Canadian Mounted Police (the RCMP), Regina, Saskatchewan, was surplus due to the discontinuation of a function, and that she would be accorded surplus status effective October 30, 2006. She was also informed that she might be subject to lay-off.

[3] The complainant was offered and accepted the position of HRMIS Coordinator (AS-02) with the RCMP in Regina, Saskatchewan on November 3, 2006, thus ending her period of surplus status. She filed a complaint with the Tribunal alleging that the decision of the delegated manager of the respondent, the Commissioner of the RCMP, to lay her off was an abuse of authority.

[4] Prior to the hearing, the respondent sought dismissal on the basis that the Tribunal lacked jurisdiction to consider the complaint. Several days prior to the scheduled hearing, the respondent requested that the Tribunal proceed by way of bifurcated hearing. The respondent requested that its preliminary objection to the Tribunal's jurisdiction be separated and heard before the hearing of the complaint on its merits.

[5] The Tribunal denied the request to divide the hearing for two reasons. First, pursuant to subsection 98(1) of the *PSEA*, the Tribunal is required to consider and dispose of complaints as expeditiously as possible. Dividing the hearing into two parts may well have required additional time, travel and expense for the parties, their representatives and the Tribunal. Secondly, this was the first hearing of a complaint

under subsection 65(1) of the *PSEA*, and the Tribunal determined that it was important to consider the jurisdictional issue in the context of the entire complaint.

[6] The hearing was held in Regina, Saskatchewan on August 23 and 24, 2007. Two witnesses who had given evidence by affidavit were cross-examined by means of teleconference on September 6, 2007. Following the completion of the oral hearing, the parties provided written submissions on the merits of the complaint. The final submission was received by the Tribunal on October 3, 2007.

SUMMARY OF RELEVANT EVIDENCE

[7] The complainant testified at length as to the events leading up to receiving notice that her position was surplus and that she might be laid off. The complainant had joined the Career Development and Resourcing Office of the RCMP, Regina (Regina CDRO) in 2000, as a recruiting clerk. In February 2003, she was the successful candidate in a competition for a position at the CR-05 group and level. She took on duties supervising the public servants within the office. The complainant's position evolved into one of coordinating the activities in the office and providing assistance to the Officer in Charge. In addition, recruitment became a national priority, especially in the North West Region. The complainant took an active role in the recruitment of new aboriginal RCMP members. In November 2005, her position was reclassified to the AS-02 group and level, and this reclassification was back-dated to April 1, 2004.

[8] On December 1, 2005 Inspector Paul Dowden arrived as the Officer in Charge of the Regina CDRO. The complainant stated that the atmosphere in the office started to change from Inspector Dowden's first day on the job. Within two or three weeks, the complainant lost her signing authority under section 34 of the *Financial Administration Act*. During a unit meeting in March 2006, Inspector Dowden informed the public service staff that the complainant would no longer be supervising them, and that they would report to S/Sgt. Fotteringham. When the complainant asked to discuss roles and responsibilities, Inspector Dowden merely stated that that he would tell her what to do. During a meeting held with Health Services, Inspector Dowden referred to public servants as "dull knives." On another occasion, he stated that studies had shown that

public servants only work 50 percent of the time. She found these comments very upsetting. As well, Inspector Dowden spoke to her in a demeaning fashion on several occasions.

[9] Prior to Inspector Dowden's arrival at Regina CDRO, the complainant had been involved in a project called Recruiting for the Future, which was a project aimed at recruiting aboriginals into the RCMP. As Inspector Dowden did not think it was appropriate for a non-RCMP member to be involved in the project, the complainant's involvement was terminated.

[10] Inspector Dowden informed S/Sgt. Coutts in February 2006 that he did not need the complainant's position.

[11] In June 2006 the complainant was asked to work on a transition team which was moving the recruiting function out of the Regina CDRO to a new Regional Recruitment Processing Centre (RRPC). She had an administrative role working on organizational charts, business cases for funding and job descriptions for the new RRPC. However, she was also expected to continue her regular duties in the Regina CDRO, reporting to Inspector Dowden. At that point, there were no staffing clerks in the Regina CDRO. Another increment level had been added for RCMP members, and the processing of performance assessments had to be completed on a priority basis. The complainant was absolutely "swamped" with work in her position in the Regina CDRO. Shortly thereafter, her position was declared surplus. She could not understand how her position could be declared surplus given that there was a great deal of work to be done.

[12] Given concerns raised about conflict in the Regina CDRO, management requested that a Group Needs Assessment be carried out in July 2006. The complainant participated in the assessment. According to the complainant, after its completion, management decided not to release the report as it was so damaging. Instead they ordered another report, a Management Review.

[13] The complainant testified that her position was declared surplus because Inspector Dowden wanted to get rid of her. Her duties had not changed and there was plenty of work to do.

[14] Chief Superintendent Garry Jay, Human Resources Officer, North West Region, RCMP gave the following evidence on behalf of the respondent. He stated that his branch was responsible for career development and resourcing of regular RCMP members, civilian RCMP members and public servants who work for the RCMP in Nunavut, the Northwest Territories, Alberta, Saskatchewan, Manitoba and the RCMP Depot in Regina. He was responsible for developing a strategy to deal with the increased need for regular and civilian member recruitment, as well as training of new members. The strategy involved establishing a regional processing centre for recruitment as well as pro-active recruitment of potential members.

[15] Once approval was received, a Recruitment Processing Centre was established in Regina (RPC) in June 2006. The Regina CDRO continued to be responsible for public service staffing and training, regular and civilian training, and career management. However, since all recruitment was to be done at the RPC, four positions at the CR-04 group and level were transferred there from the Regina CDRO. This eliminated the supervisory duties of the Office Manager position at Regina CDRO. The residual duties of the position were sent to classification, and were classified at the CR-04 group and level.

[16] With respect to the concerns raised by the complainant, financial signing authority had been removed from the complainant shortly after Inspector Dowden arrived in Regina. Chief Superintendent Jay explained that this was because of an increased emphasis on management accountability within the RCMP. Accountability structures in all offices were re-evaluated and, in this case, the Officer in Charge was the appropriate manager to exercise financial authority.

[17] Chief Superintendent Jay was aware of rumours of conflict in the Regina CDRO, but there had been no formal complaints. He decided to inquire into the situation and requested a Group Needs Assessment in June 2006. He particularly wanted to know if there were matters bordering on harassment and whether he should start a harassment investigation. There were lots of hearsay disclosures and reports of inappropriate or vulgar comments. However, there was nothing concrete and no one had come forward

to make allegations of harassment to him. He decided to order a Management Review to focus on issues of leadership, interpersonal relationships and harassment.

[18] As the delegated manager, Chief Superintendent Jay had been briefed on the changes to the Office Manager position and was satisfied with the process that had been carried out to review it. He then made the decision that the AS-02 position was surplus to requirements. This was the only AS-02 position in the Regina CDRO.

[19] He further testified that he signed the letter addressed to the complainant which stated that her position was surplus to requirements. However, it was never his intention to lay-off the complainant, as he was aware of at least three job opportunities in the RCMP in Regina at the AS-02 level. He felt confident that she would be made a reasonable job offer within the surplus period. His intention was simply to advise the complainant of her surplus status and to provide her with the guarantee of a reasonable job offer.

[20] Katherine Kesslering, Manager of Public Service Career Development, RCMP gave evidence that she prepared a letter of offer dated November 1, 2006 in which Ms. Molander was offered the position of HRMIS Coordinator at the AS-02 group and level, effective November 6, 2006. The complainant signed this letter confirming her acceptance of the offer on November 3, 2006. Ms. Kesslering testified that the complainant was at all times employed by the RCMP, that she had no break in service and no loss of pay.

PRELIMINARY MATTER - JURISDICTION

[21] The respondent raised a preliminary objection to the jurisdiction of the Tribunal on the following basis: first, no lay-off took place; secondly, the complainant was not selected from among other employees; and, lastly, the subject-matter of this complaint was expressly prohibited by subsection 65(2) of the *PSEA*.

ISSUES

[22] The Tribunal must answer the following questions:

[23] Does the Tribunal have jurisdiction to consider and dispose of this complaint under subsection 65(1) of the *PSEA*?

[24] If yes, did the selection of the complainant for lay-off constitute an abuse of authority?

ARGUMENTS OF THE PARTIES ON PRELIMINARY MATTER OF JURISDICTION

A) RESPONDENT'S ARGUMENTS

[25] The respondent submits that no lay-off took place, nor was the complainant informed that she would be laid off. The respondent submits that neither the *PSEA* nor the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*) provide a definition of lay-off. However, the provisions regarding lay-off in the *PSEA* and the *PSER* must be read in conjunction with section 5 of the *PSER* which deals with surplus priority entitlement.

[26] According to the respondent, the complainant's position was declared surplus, she was afforded a surplus priority and, within one week, she was provided with a reasonable job offer.

[27] The respondent contends that the right to complain to the Tribunal arises only when an employee is notified that he or she will be laid off, usually 30 days in advance of the date of lay-off. This notification could happen six months after the date of surplus declaration, or after a much longer period of time, given the guarantee of a reasonable job offer and the provisions of the Workforce Adjustment policy.

[28] With respect to the second issue, the respondent made the following submissions. For section 65 of the *PSEA* to apply, two criteria are required for a valid complaint. First, some, but not all, employees in a part of the organization have to be notified, and certain employees have to be "selected" for lay-off. Black's Law Dictionary defines select as "to take preference from among others." Assuming that she was informed that she was to be laid off, since her position was unique in Regina, it cannot be said that the complainant was selected from among other employees.

[29] The respondent argues that the intent of section 65 of the *PSEA* was to replace the former “reverse order of merit process” set out in the *Public Service Employment Act*, R.S.C. 1985, c. P-33 (the former Act) for employees to be laid off. Under the *PSEA*, the ground for complaint is that there was an abuse of authority in the selection of a particular employee for lay-off. This interpretation is supported by the remedy portion, subsection 65(4) of the *PSEA*, which allows the Tribunal to set aside the decision of the deputy head to lay off the complainant. In this case, a substantiated complaint would mean that the complainant would not be laid off, but that she would be returned to a position which no longer exists. The legislation does not allow the Tribunal to set aside the decision to lay off. The respondent insisted that the Tribunal is given authority only to set aside the decision to lay off *the complainant*.

[30] Finally, the respondent states that the grounds for this complaint are expressly prohibited by subsection 65(2) of the *PSEA*, which does not allow the complainant to challenge the decision to lay off employees, the determination of the part of the organization from which to lay off, or the number of employees to be laid off.

[31] According to the respondent, the entire thrust of the complainant’s arguments in her complaint, and at the hearing, was that her functions were not discontinued, but rather the decision to lay her off was a decision that constituted an abuse of authority.

[32] The respondent requests that the Tribunal dismiss Ms. Molander’s complaint for lack of jurisdiction. What the complainant is challenging is the managerial decision to lay off, which is prohibited by subsection 65(2) of the *PSEA*. The complainant’s allegations pertaining to the failure to follow the RCMP harassment policy, the Workforce Adjustment policy, and the Public Service Commission Guidelines, as well as her dissatisfaction with the reasonable job offer, are not matters which fall within the Tribunal’s authority under section 65 of the *PSEA*.

B) COMPLAINANT’S ARGUMENTS

[33] The complainant contends that her complaint falls squarely within sections 64 and 65 of the *PSEA*. The letter of surplus dated October 23, 2006 stated that her position in the organization was surplus due to a discontinuance of a function pursuant

to subsection 64(1) of the *PSEA*. As such, the complainant was placed squarely within the parameters of the sections of the *PSEA* which entitle her to bring her complaint. Once a person is given notice that he or she may be laid off, they fall under the jurisdiction of subsection 64(1) of the *PSEA*, and hence section 65 of the *PSEA*.

[34] According to the complainant, once an employee is selected for lay off, the respondent must show that the decision falls within the parameters set out in subsection 64(1) of the *PSEA*, namely: there must be a lack of work, discontinuance of a function, or transfer of work or function outside the public service. The PSC's Guidance Series on Selecting Employees for Retention and Lay-off states:

The guiding values of fairness and transparency must be respected by organizations in conducting the process of selecting employees for retention and lay-off. Fairness means that decisions are made objectively and free from political influence or personal favouritism; policies and practices reflect the just treatment of persons. Transparency means that information about decisions, policies and practices is communicated in an open and timely manner.

Once an employee has been selected for lay-off, the employee has a right to know that his or her selection meets the requirements of the *PSEA*.

[35] The complainant further contends that, contrary to the respondent's submissions, the "part of the organization" referred to in subsection 65(1) was not, in the circumstances of this case, a unit of one. While the Office Manager position by its very nature was singular, it was part of the Regina CDRO that included regular RCMP members as well as public servants at the CR-03 and CR-04 group and level. The Office Manager position provided support to the Officer in Charge as well as regular members, and supervision of the clerical positions.

[36] The complainant argues that subsection 65(1) of the *PSEA* does not say that you must be selected from others who have been identified for lay-off, nor that the selection must be from the same group and level. An employee within a unit performing a unique job should have the same rights as others in a unit who may be selected for lay-off. Otherwise, all employees who are in unique jobs would be at a disadvantage in terms of the *PSEA* and its guiding values. It cannot be up to a department to determine what constitutes a unit or "part of the organization" simply to suit its needs at the time. The

“part of the organization” must be such as to include the right of recourse where an employee is facing lay-off.

[37] With respect to the use of the phrase “where some but not all of the employees” in subsection 65(1), the complainant submits that “some” could mean only one person. The complainant relies on the *Interpretation Act*, R.S.C. 1985, c. I-21, subsection 33(2) which states that “words in the singular include the plural and words in the plural include the singular.”

[38] With respect to the respondent’s argument that the remedy provision of the *PSEA*, subsection 65(4), supports the position that there must be more than one employee involved, the complainant submits that the Tribunal’s authority to set aside the decision to lay off the complainant is permissive, and leaves it to the Tribunal to determine the appropriate course of action. The complainant further contends that the corrective action might not relate specifically to the complainant, but could relate to limitations being placed on the delegated authority, or ensuring procedures are in place to prevent a reoccurrence of an improper situation.

C) PUBLIC SERVICE COMMISSION’S ARGUMENTS

[39] The Public Service Commission (the PSC) states that it is in agreement with the respondent’s submissions and that the Tribunal lacks jurisdiction to hear the complaint.

ANALYSIS

Issue I: Does the tribunal have jurisdiction to consider and dispose of this complaint under subsection 65(1) of the *PSEA*?

[40] The complainant filed her complaint under section 65 of the *PSEA*, which reads in part as follows:

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.

(2) No complaint may be made under subsection (1) against the decision to lay off employees, the determination of the part of the organization from which employees will be laid off or the number of employees to be laid off from that part.

(3) A complainant, every other employee in the part of the organization referred to in subsection (1), the deputy head and the Commission — or their representatives — are entitled to be heard by the Tribunal.

(4) Where the Tribunal finds a complaint under subsection (1) to be substantiated, it may set aside the decision of the deputy head to lay off the complainant and order the deputy head to take any corrective action that it considers appropriate, other than the lay-off of any employee.

[41] As the Tribunal held in *Tibbs v. Deputy Minister of National Defence et al.*, [2006] PSST 0008, at paragraph 61, in construing meaning, the Tribunal must look at the whole scheme of the *PSEA*. Thus, to construe the legislative intent of section 65 and to determine if the complainant has the right to complain in these circumstances, it is necessary to examine other sections of the *PSEA*, particularly subsection 64(2), as well as the applicable regulation made pursuant to section 64 of the *PSEA*.

[42] Subsection 64(2) of the *PSEA* reads as follows:

64. (2) Where the deputy head determines under subsection (1) that some but not all of the employees in any part of the deputy head's organization will be laid off, the employees to be laid off shall be selected in accordance with the regulations of the Commission.

[43] The applicable regulation is section 21 of the *Public Service Employment Regulations*, SOR/2005-334 (the *PSER*), which reads as follows;

21. (1) If the services of one or more employees of a part of an organization are no longer required in accordance with section 64 of the Act, the deputy head shall assess the merit of the employees employed in similar positions or performing similar duties in the same occupational group and level within that part of the organization, and identify, in accordance with merit, the employees who are to be retained having regard to the continuing functions of that part of the organization and the remaining employees who are to be advised that their services are no longer required and are to be laid off.

(2) Deputy heads shall record the reasons for the selection of those employees to be retained.

(3) Despite subsection (1), the determination of employees to be laid off in the Ship Repair group in the Department of National Defence shall be based on a combination of merit and seniority factors and shall be made in consultation with the bargaining agents concerned.

(4) Despite subsection (1), if an employee volunteers to be laid off, the deputy head may advise the employee that their services are no longer required and may lay off the employee.

(5) The deputy head shall, in writing, inform

(a) the Commission of the names of the employees who are to be laid off in accordance with this section and the proposed date of the lay-off; and

(b) any employee who is advised that their services are no longer required, of the proposed layoff date.

(6) Subsections (1) to (5) do not apply to an employee who is appointed for a specified period.

[44] It is clear that section 21 of the *PSER* contemplates a situation where there is more than one employee in a similar position or performing similar duties at the same occupational group and level. This provision requires the deputy head to identify those employees to be retained in accordance with merit. Thus, the crux of this section of the *PSER* centres around *selecting* some employees from a larger group. Those employees selected for lay-off are then given the right to bring a complaint to the Tribunal concerning their *selection* for lay-off.

[45] In this case, the evidence given by the managers involved, and by the complainant, was that the complainant's position, namely, Office Manager in the Regina CDRO, was the only position of this group and level and was unique. The Tribunal finds as a fact that the complainant's position was the only position of this group and level and was unique within the Regina CDRO.

[46] Accordingly, when her position was found to be surplus to requirements, there was no requirement to select her from among other employees, as she was the only person occupying such a position. The circumstances of this complaint do not give rise to the right of the complainant to bring a complaint to the Tribunal under subsection 65(1) of the *PSEA*. The complainant was not *selected* from among other employees in similar positions or performing similar duties. On the facts of this complaint, the complainant's situation does not fit within subsections 64(2) and 65(1) of the *PSEA*.

Issue II: Did the selection of the complainant for lay-off constitute an abuse of authority?

[47] The Tribunal has determined that the complainant does not meet one of the conditions set out in subsection 65(1) and, therefore, does not have a right to make a complaint to the Tribunal. The Tribunal does not have jurisdiction to consider a complaint brought by an employee who was not selected for lay-off from among other employees. Since the Tribunal does not have jurisdiction to consider and dispose of

this complaint under section 65 of the *PSEA*, it will not address the merits of the complaint.

DECISION

[48] For the reasons stated above, the complaint is dismissed.

Helen Barkley
Member

PARTIES OF RECORD

Tribunal File:	2006-0230
Style of Cause:	<i>Shelley Molander and the Commissioner of the Royal Canadian Mounted Police et al.</i>
Hearing:	August 23 and 24, 2007 Regina, SK Last document received October 3, 2007
Date of Reasons:	November 20, 2007
APPEARANCES	
Satinder Bains	For the complainant
Lesa Brown	For the respondent
Angie Paquin	For the Public Service Commission