



Public Service  
Staffing Tribunal

Tribunal de la dotation  
de la fonction publique

**File:** 2011-0720  
**Issued at:** Ottawa, February 17, 2012

**TERESA TRAN**

Complainant

AND

**THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE**

Respondent

AND

**OTHER PARTIES**

**Matter** Motion to dismiss the complaint

**Decision** Motion denied

**Decision rendered by** Merri Beattie, Member

**Language of Decision** English

**Indexed** *Tran v. Commissioner of the Royal Canadian Mounted Police*

**Neutral Citation** 2012 PSST 0003

# Reasons for Decision

## Introduction

1 On September 22, 2011, Teresa Tran, the complainant, filed a complaint with the Public Service Staffing Tribunal (the Tribunal) alleging that she would be laid off based on her manager's personal bias and an unfair process.

2 The respondent, the Commissioner of the Royal Canadian Mounted Police, brought a motion to dismiss the complaint. The respondent asserts that the complaint was filed outside the 15-day period, and the complainant has failed to demonstrate that there were exceptional circumstances to justify her late filing.

## Background

3 Included in its motion to dismiss, the respondent submitted a letter it had issued to the complainant on August 11, 2011, informing her that her Custom Tailor, GS - MPS - 07 position had been identified as surplus due to a lack of work. The letter also informed her that the respondent was unable to provide her with a guarantee of a reasonable job offer and, consequently, offered her a choice from among three options. Two of the options provide monetary allowances subject to conditions related to her departure from the public service. The remaining option provides for a twelve-month surplus period followed by lay-off, if she is not successful in finding a position during the surplus period.

4 This complaint was made under s. 65(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (the PSEA), which sets out two preliminary conditions to filing a complaint with the Tribunal. One is that the complainant must have been informed that he or she will be laid off, and the second is that the complainant must have been selected for lay-off.

5 Lay-off from the public service has obvious, serious consequences for an employee. Consequently, the Tribunal convened a teleconference with the parties and subsequently directed them to make written submissions regarding the interpretation of ss. 64 and 65 of the PSEA and s. 21 of the *Public Service*

*Employment Regulations*, SOR/2005-334 (the PSER), as they relate to the facts of this case and to the Tribunal's jurisdiction to consider and dispose of the complaint.

## **Issues**

**6** The Tribunal must determine the following issues:

- (i) Do the circumstances in this case give rise to the right to file a complaint to the Tribunal under s. 65(1) of the PSEA?
- (ii) Is an extension of the time to file the complaint justified?

## **Argument of the Parties – Right to File a Complaint**

**7** The complainant did not make submissions regarding the legal foundation for making this complaint. She states that the Tribunal accepted a similar complaint from another complainant.

**8** The respondent submits that the circumstances of this case give rise to the right of the complainant to file a complaint with the Tribunal under s. 65(1) of the PSEA.

**9** The respondent argues that s. 64 of the PSEA provides deputy heads with the authority to lay off an employee, where the employee's services are no longer required due to a lack of work, the discontinuance of a function or the transfer of work or a function outside the federal public administration. It further argues that, under s. 64(2) of the PSEA, the selection of employees for lay off must be done in accordance with the PSER. Section 21 of the PSER requires deputy heads to assess employees in similar positions or performing similar duties at the same occupational group and level, within a part of the deputy head's organization. The deputy head must identify, according to merit, the employees who will be retained, and the remaining employees will be told that they will be laid off.

**10** The respondent confirms that the complainant was selected for lay-off as required under s. 64(2) of the PSEA and in accordance with s. 21 of the PSER. It states that, of the 14 employees occupying Custom Tailor positions in the Tailor Shop,

the complainant was one of seven who were informed that their position had been identified as surplus to requirements.

**11** The respondent submits that the surplus notice issued by the respondent to the complainant on August 11, 2011 served to inform the complainant that she would be laid off as required under s. 65(1) of the PSEA.

**12** The respondent argues that ss. 64 and 65 of the PSEA refer to circumstances where an employee has been informed that they will be laid off rather than a situation where an employee has already been laid off. It asserts that this distinction is supported in the different priority entitlement sections found in the PSEA, specifically ss. 40 and 41.

**13** Moreover, the respondent submits that an employee's right to recourse to the Tribunal regarding lay-off pertains only to the selection of an employee for lay-off in accordance with s. 64 of the PSEA and s. 21 of the PSER. The respondent argues that s. 65(2) of the PSEA prohibits other lay-off related complaints. Therefore, according to the respondent, the appropriate time to file such a complaint is when the selection for lay-off is finalized.

**14** The respondent further submits that, in the interest of fairness, an employee who has been advised that they have been selected for lay-off should not be required to wait until they are informed of a specified lay-off date to file a complaint under s. 65(1) of the PSEA. Proximity in time of the Tribunal's complaint process to the process for selection for lay-off would cause the least amount of disruption to the complainant and to the workplace as a whole.

**15** The Public Service Commission (PSC) submits that the subject matter of a complaint under s. 65(1) of the PSEA is an employee's selection for lay-off, not the lay-off itself. It argues that when considering a complaint under s. 65(1), the Tribunal will review the process conducted by a deputy head pursuant to s. 21(1) of the PSER to determine whether there was an abuse of authority leading to the selection of a complainant for lay-off.

**16** The PSC argues that, for an employee to obtain a surplus priority entitlement pursuant to s. 40 of the PSEA, they must have been informed that they will be laid off, and when only some but not all of the employees in a part of the organization are so informed, they must first have been selected for lay-off.

**17** The PSC notes that, through the operation of s. 40 of the PSEA and s. 5 of the PSER, an employee who has been selected for lay-off may be appointed or deployed into a position before lay-off. It argues that Parliament cannot have intended that an employee who is selected for lay-off due to an abuse of authority, and is subsequently appointed or deployed before being laid-off should have no recourse to the Tribunal with respect to their selection for lay-off. It points out that being selected for lay-off may have serious, negative consequences even if the employee secures an appointment or deployment to another position. An involuntary relocation is one such example.

**18** Accordingly, the PSC argues that, based on a harmonious reading of the PSEA and PSER, the appropriate time for recourse to the Tribunal is when an employee first receives notice of his or her selection for lay-off.

### **Analysis - Right to File a Complaint**

**19** Sections 64 and 65 of the PSEA are relevant to this complaint. They read as follows:

**64.** (1) Where the services of an employee are no longer required by reason of lack of work, the discontinuance of a function or the transfer of work or a function outside those portions of the federal public administration named in Schedule I, IV or V to the *Financial Administration Act*, the deputy head may, in accordance with the regulations of the Commission, lay off the employee, in which case the deputy head shall so advise the employee.

(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.

(3) Subsection (1) does not apply where employment is terminated in the circumstances referred to in paragraph 12(1)(f) of the *Financial Administration Act*.

(4) An employee ceases to be an employee when the employee is laid 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.

(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.

(5) Where a complaint raises an issue involving the interpretation or application of the *Canadian Human Rights Act*, the complainant, in accordance with the regulations of the Tribunal, notify the Canadian Human Rights Commission of the issue.

(6) Where the Canadian Human Rights Commission is notified of an issue pursuant to subsection (5), it may make submissions to the Tribunal with respect to that issue.

(7) In considering whether a complaint is substantiated, the Tribunal may interpret and apply the *Canadian Human Rights Act*, other than its provisions relating to the right to equal pay for work of equal value.

(8) Corrective action may include an order for relief in accordance with paragraph 53(2) (e) or subsection 53(3) of the *Canadian Human Rights Act*.

**20** Section 21 of the PSER sets out how the selection of employees for lay-off is to take place. It 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.

**21** In *Molander v. Commissioner of the Royal Canadian Mounted Police*, 2007 PSST 0042, the Tribunal examined these provisions together and concluded that one preliminary condition for filing a complaint under s. 65(1) of the PSEA is that the complainant must have been selected for lay-off.

**22** Section 21 of the PSER stipulates that when a deputy head has a group of employees in similar positions or performing similar duties at the same occupational group and level in part of his or her organization and only some of those employees will be laid off, the deputy head must determine which employees will be retained based on merit. Those employees who will not be retained have been selected for lay-off and, therefore, meet one of the conditions for filing a complaint to the Tribunal under s. 65(1) of the PSEA.

**23** There is no dispute in this case that the complainant had been selected for lay-off within the meaning of s. 64(2) of the PSEA when her complaint was made. Accordingly, she meets one of the preliminary conditions for making a complaint under s. 65(1) of the PSEA.

**24** The second preliminary condition in s. 65(1) of the PSEA is that an employee has to have been informed by the deputy head that he or she will be laid off. In this case the letter dated August 11, 2011 informed the complainant that her position was surplus.

**25** The term “surplus” does not appear in any provision of the PSEA. It does, however, appear in the marginal note next to s. 40 of the PSEA. The surplus period described in s. 40 of the PSEA starts after the employee is informed by the deputy head that they will be laid off and ends when lay-off becomes effective. Under the PSEA, the term surplus is linked solely to the eventual lay-off of an employee. It follows then

that when a deputy head informs an employee that his or her position is surplus, it equates to informing an employee that they will be laid off, for the purpose of recourse under s. 65(1) of the PSEA.

**26** As noted by the PSC in its submissions, an employee's circumstances may change between the time they are informed that they will be laid off and the lay-off date. In this case, the complainant was given three options, two of which would not result in an actual lay-off. However, as specified in s. 65(2) of the PSEA, no complaint can be made against the decision to lay an employee off. It is the selection for lay-off that the Tribunal will consider in a complaint under s. 65(1) of the PSEA.

**27** Section 65(1) of the PSEA provides an employee with a right to bring a complaint that his or her selection for lay off constituted an abuse of authority. The Tribunal's role in considering a complaint under s. 65(1) of the PSEA is similar to its role in considering a complaint under s. 77(1) of the PSEA, where the Tribunal will determine whether a complainant was not appointed or proposed for appointment by reason of an abuse of authority. Both types of complaint relate to a process conducted by a deputy head that resulted in an unfavourable outcome for the complainant. Moreover, both types of process are governed by merit – appointment processes, in accordance with s. 30 of the PSEA, and selection for lay-off, in accordance with s. 21 of the PSER.

**28** Accordingly, the Tribunal concludes that the appropriate time for making a complaint to the Tribunal under s. 65(1) of the PSEA is when the selection for lay-off process is complete and an employee is notified that they have been selected for lay-off and that their position is surplus to requirements.

**29** For the reasons set out above, the Tribunal finds that the circumstances in this case give rise to the right to bring a complaint to the Tribunal under s. 65(1) of the PSEA.

### **Timeliness of the Complaint**

**30** The respondent submits that this complaint is untimely and should be dismissed. It argues that, according to s. 10 of the *Public Service Staffing Tribunal Regulations*,



SOR/2006-6 as amended by SOR/2011-116 (the *Regulations*), the complainant had 15 days after the August 11, 2011 letter to file a complaint. The complainant did not file this complaint until September 22, 2011.

**31** Section 10 of the Tribunal's *Regulations* establishes the time limit for filing a complaint to the Tribunal:

**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.

(emphasis added)

**32** It is well established in the Tribunal's jurisprudence that the time limit for filing a complaint is a strict limit. See, for example, *MacDonald v. Deputy Head of Service Canada*, 2006 PSST 0002. The Tribunal has dismissed a number of complaints on the basis that they have been filed outside of the strict time limit, in the absence of exceptional circumstances that prevented a complainant from filing a complaint within the prescribed time.

**33** However, s. 5 of the Tribunal's *Regulations* provides that the Tribunal may extend the time within which a complaint may be made, in the interest of fairness.

**34** In its letter dated August 11, 2011, the respondent did not inform the complainant that she had a right of recourse to the Tribunal, or the grounds on which her complaint could be filed, or the deadline for making a complaint.

**35** The PSEA does not address the matter of informing employees of the right of recourse to the Tribunal. Section 22(2)(i) of the PSEA authorizes the PSC to make regulations regarding the manner of laying off employees and of selecting employees to be laid off, for the purposes of s. 64. The PSC has the authority under s. 29(3) of the PSEA to establish policy concerning the manner of making and revoking appointments and taking corrective action. There is no corresponding legislative authority under the PSEA with respect to lay-offs.

**36** With respect to appointments, the PSC has addressed notice of recourse in regulation and in policy, as it is authorized to do under the PSEA. Section 13 of the PSER requires that, in the case of acting appointments of four or more months, the PSC or its delegate must inform persons in the area of recourse of their right and grounds to make a complaint. The PSC *Policy on Notification* sets the same requirement for all other appointments. The PSER and PSC policies are binding on deputy heads.

**37** The Tribunal has consistently held that for an appointment-related complaint to be considered late, the respondent must have first given proper notice, including notice of the right and grounds for recourse to the Tribunal. In cases where the Tribunal has determined that the respondent has not provided proper notification, the Tribunal has found that the complaint was not untimely. See, for example, *Sherif v. Deputy Minister of Agriculture and Agri-Food Canada*, 2006 PSST 0003.

**38** Notice of recourse is not included in s. 21 of the PSER regarding selection for lay-off. However, the PSC has established a *Guidance Series* that includes *Selecting employees for retention or lay-off* (Guide), which it provided with its submissions. The Guide clearly directs deputy heads to notify an employee of the right and grounds for recourse when he or she has been selected for lay-off.

**39** Although the Guide, unlike regulations and policy, is not binding on deputy heads, the Tribunal finds that fairness dictates that employees must be informed of the recourse available to them when they have been selected and face lay-off.

**40** The preamble to the PSEA identifies fairness and transparency as key values in public service employment practices. Moreover, the Supreme Court of Canada held, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, that procedural fairness applies to administrative decisions that affect the rights, privileges or interests of an individual. What constitutes fair procedure depends on the context of the particular statute and the rights that are affected.

**41** The overall scheme of the PSEA requires that people are informed of their right to recourse when appointments are made – even temporary ones – and a person has

lost an opportunity to obtain a different position. The Tribunal finds that, in the matter of lay-off, which has the potential consequence of loss of employment, it is essential that the deputy head inform an employee that they have recourse to the Tribunal, as well as the grounds and deadline for making a complaint.

**42** The Tribunal concludes that the respondent's failure to inform Ms. Tran of her right to bring a complaint to the Tribunal, the grounds for making a complaint, and the time for making a complaint constitute exceptional circumstances that, in the interest of fairness, justify an extension of the time to file her complaint.

**43** For all of these reasons, the Tribunal denies the respondent's motion to dismiss this complaint. The time within which Ms. Tran's complaint can be filed is extended until September 22, 2011. The Tribunal therefore accepts her complaint regarding her selection for lay-off and will consider and dispose of the complaint accordingly.

Merri Beattie  
Member

#### **Parties of Record**

<b>Tribunal File</b>	2011-0720
<b>Style of Cause</b>	<i>Teresa Tran and the Commissioner of the Royal Canadian Mounted Police</i>
<b>Hearing</b>	Paper hearing
<b>Date of Reasons</b>	February 17, 2012