



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2011-0720

Issued at: Ottawa, December 4, 2012

TERESA TRAN

Complainant

AND

THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondent

AND

OTHER PARTIES

Matter	Complaint of abuse of authority pursuant to section 65(1) of the <i>Public Service Employment Act</i>
Decision	Complaint is dismissed
Decision rendered by	Merri Beattie, Member
Language of Decision	English
Indexed	<i>Tran v. the Commissioner of the Royal Canadian Mounted Police</i>
Neutral Citation	2012 PSST 0033

Reasons for Decision

Introduction

1 The complainant, Teresa Tran, alleges that the Commissioner of the Royal Canadian Mounted Police (RCMP), the respondent, abused its authority when it selected her for lay-off from a GS-MPS-07 Custom Tailor position in the Tailor Unit, Cadet Services in Regina, Saskatchewan. Specifically, Ms. Tran alleges that two of the individuals involved in her selection for lay-off were biased against her and that one of them was not qualified to assess her qualifications.

2 The respondent asserts that it conducted a thorough, fair and transparent process to determine who would be laid off and who would be retained in the remaining Custom Tailor positions. It maintains that qualifications that are essential to the new circumstances and ongoing work of Custom Tailors were assessed in an unbiased, open-minded manner.

3 The Public Service Commission (PSC) was actively involved in this process for the selection of employees for retention and lay-off (SERLO process). It asserts that this process was done with considerable care and that it was a fair process.

4 For the reasons that follow, the complaint is dismissed. The Public Service Staffing Tribunal (Tribunal) finds that there is no basis for a finding that the SERLO process was tainted by bias, and no evidence that the assessment board members were not competent to conduct the assessments in this process.

Background

5 The Cadet Services' Tailor Unit has a General Tailor section and a Custom Tailor section, each reporting to the Cadet Services Manager through a Supervisor. In November 2009, the Custom Tailor Supervisor position was vacant and the 14 Custom Tailors, including the complainant, were reporting directly to the Cadet Services Manager, Gail Kuhn. At that time, the number of troops requiring the Tailor Unit's services had fallen from a high of 72 per year to 34. The decision was made to reduce the number of Custom Tailor positions to seven.

6 The SERLO process took place in early 2011, and consisted of an interview and a narrative assessment which was prepared by Ms. Kuhn, with assistance from Karen Runzer, General Tailor Supervisor.

7 On August 11, 2011, the complainant was informed in writing that, subject to her choice from among the options presented to her, she would be laid off. She subsequently filed a complaint of abuse of authority with the Tribunal under s. 65(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12, 13 (PSEA).

Preliminary Matters

8 When Ms. Tran filed written allegations on March 27, 2012, she included allegations that she had been denied the right to be assessed in her language of choice, that she had been denied her right to freedom of expression, and that the respondent had contravened the *Canadian Human Rights Act*.

9 In the course of two pre-hearing teleconferences held in this file on July 24, 2012 and August 27, 2012, the complainant withdrew those three allegations. Accordingly, the Tribunal will not address those matters in these reasons.

Issues

10 The Tribunal must determine the following issues:

- (i) Was the SERLO process tainted by bias against the complainant?
- (ii) Was the complainant improperly assessed?
- (iii) Is Ms. Runzer qualified to assess the complainant?

Analysis

Abuse of authority and burden of proof

11 The Tribunal's mandate is found in s. 88(2) of the PSEA: "The mandate of the Tribunal is to consider and dispose of complaints made under subsection 65(1) and sections 74, 77 and 83."

12 This complaint is made under s. 65(1) of the PSEA, which provides that an employee who is selected for lay-off may make a complaint to the Tribunal that his or her selection constitutes an abuse of authority. The majority of the decisions issued to date by the Tribunal concern complaints made under s. 77 of the PSEA, regarding internal appointment processes where an appointment has been made or proposed. Those complaints are also made on the ground of abuse of authority.

13 Abuse of authority is not defined in the PSEA; however, s. 2(4) provides that “[f]or greater certainty, a reference in this Act to abuse of authority shall be construed as including bad faith and personal favouritism.” There is nothing in the PSEA to suggest that abuse of authority under s. 65(1) should be interpreted any differently than in relation to complaints made under s. 77 of the PSEA. The Tribunal has considered what constitutes abuse of authority within the meaning of the PSEA in numerous decisions, beginning with *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008, at paras. 56 to 74. As well, the Tribunal has established that the standard of proof is the civil standard. See *Tibbs*, at paras. 49 to 55.

14 Therefore, the complainant must prove on a balance of probabilities that the respondent abused its authority in selecting her for lay-off.

Lay-off provisions in the PSEA and the *Public Service Employment Regulations*, SOR/2005-334 (PSER)

15 Sections 64 and 65 of the PSEA are relevant to this complaint. The pertinent provisions of those sections 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.

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.

16 Section 64(2) of the PSEA applies to the circumstances of this case. The respondent determined that some, but not all employees in Cadet Services would be laid off. Consequently, the respondent was required to select the employees who would be laid off in accordance with the PSER.

17 Section 21(1) of the PSER stipulates that when employees in the part of the organization where lay-offs will occur are employed in similar positions or are performing similar duties at the same occupational group and level, those employees must be assessed and the determination of who will be retained and who will be laid off must be made in accordance with merit. 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.

18 In this case the respondent determined that employees in Custom Tailor positions would be assessed on the basis of merit to determine who would be retained and who would be laid off. Ms. Kuhn briefly described the differences between Custom Tailors, which are GS-MPS-07 positions, and General Tailors, which are GS-MPS-06 positions.

19 During her testimony, the complainant stated that she wondered why seven good Custom Tailors would be laid off while less-experienced General Tailors were retained. The complainant, however, at no time made an allegation regarding the scope of the SERLO process, which was limited to employees in the Custom Tailor positions. She alleges that the respondent abused its authority in conducting its assessment of her qualifications.

Issue I: Was the SERLO process tainted by bias against the complainant?

20 In *Gignac v. Deputy Minister of Public Works and Government Services*, 2010 PSST 0010, at paras. 60-74, the Tribunal determined that bias, including reasonable apprehension of bias, can constitute abuse of authority in relation to assessment and appointment decisions made under the PSEA. The Tribunal adopted the objective test for reasonable apprehension of bias that was set out in the Supreme Court's decision in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at 394.

21 The test, paraphrased for the purpose of this complaint, is whether a reasonably informed bystander could reasonably perceive bias on the part of one or more members of the assessment board responsible for conducting the SERLO process.

22 The complainant submits that there is a history of conflict between her and both Ms. Kuhn and Ms. Runzer and, therefore, they were unable to assess her impartially. No evidence of actual bias was presented. The Tribunal must, therefore, examine the evidence to determine whether it supports a finding of reasonable apprehension of bias in this case.

23 During her testimony, the complainant stated that there were personal issues between her and Ms. Kuhn and Ms. Runzer. However, she also stated that she had no work-related problems or conflicts with either Ms. Kuhn or Ms. Runzer.

24 The complainant called two other Custom Tailors as witnesses to testify on this matter. One witness testified that she ignores conflict in the workplace. She noticed that the complainant and management were "not getting along" and that there was a "little bit of tension", but stated that she had no direct knowledge of any problem. The second witness testified that she had seen the complainant upset after speaking privately in "the office" but did not know of any conflicts. She stated that she was not aware of any altercations between the complainant and management and that everything in the team was good.

25 The complainant stated that Ms. Kuhn and Ms. Runzer did not treat her “equally”; however, she did not explain or expand on her statement. As well, one of the witnesses said she observed Ms. Runzer’s body language following an interaction with the complainant, but failed to describe what she had seen or how she interpreted it. The witness testified that she did not hear what was said between the complainant and Ms. Runzer.

26 The Tribunal finds that the complainant’s evidence on this matter lacks the necessary detail and specificity to support her allegation of bias. None of the evidence describes specific events or incidents that clearly demonstrate conflict and, in most cases, the evidence does not clearly identify the individuals involved. Moreover, the complainant’s own testimony that she had no work-related problems or conflicts with Ms. Kuhn or Ms. Runzer contradicts her allegation. In addition, there is no evidence that either woman negatively influenced the complainant’s assessment in this SERLO process.

27 In conclusion, based on the evidence tendered in this case, a reasonably informed bystander could not reasonably perceive bias on the part of either Ms. Kuhn or Ms. Runzer.

Issue II: Was the complainant improperly assessed?

28 Section 21(1) of the PSER stipulates that, when the circumstances require, employees must be assessed and that merit is the basis for determining which employees will be retained and which ones will be laid off. This closely resembles the requirement to appoint persons based on merit, according to s. 30 of the PSEA.

29 The Tribunal has held in several decisions that broad discretion is provided under s. 36 of the PSEA for those with staffing authority to choose and use assessment methods to determine whether candidates meet the established qualifications. See, for example, *Jolin v. Deputy Head of Service Canada*, 2007 PSST 0011. Given the clear similarities, and in the absence of any provisions in the PSEA or the PSER to the contrary, the Tribunal finds that those authorized to conduct a SERLO process have the same broad discretion to choose and use assessment methods and tools.

30 The Tribunal heard testimony about the assessment approach for this SERLO process from Ms. Kuhn, Lindsay Pearce, Human Resources (HR) Advisor, RCMP, and Jennifer Cuffley, who was an HR Advisor with the PSC when the SERLO process was conducted.

31 Ms. Pearce testified that she first met with Ms. Kuhn to discuss the SERLO process in 2010. Initially, the respondent believed that they could guarantee an offer of reasonable alternate employment to the seven Custom Tailors who would not be retained. At that time, it had been decided that the SERLO process would consist solely of Ms. Kuhn's written assessment of each of the 14 Custom Tailors against the established qualifications (narrative assessments). With input from Ms. Runzer, Ms. Kuhn began preparing written narrative assessments. Subsequently, the respondent determined that guaranteed reasonable job offers would not be possible, and it decided to consult the PSC on how best to proceed.

32 The PSC called Ms. Cuffley to testify about the SERLO process and her role in it. Ms. Cuffley provided options and advice to the respondent based on her experience and training. She explained that the respondent had initial concerns about conducting interviews because many of the Custom Tailors do not speak English or French as their first language. After much consideration and discussion, it was decided that the employees should be given the opportunity to contribute to their assessments through interview questions that asked them to give examples of how they met the qualifications being assessed. Ms. Kuhn was not available at the time, so Ms. Pearce, Ms. Cuffley and Ms. Runzer conducted the interviews (interview board members).

33 Ms. Cuffley testified that, in an effort to reduce the stress for participants, they were given 30 minutes before the interview to review the questions and prepare themselves, and there was no time limit set for the interviews. Also, the interviews were conducted in a small room with chairs around a small table to reduce feelings of intimidation as much as possible. The board agreed to prompt participants to obtain a full explanation of their examples. In addition, Ms. Cuffley greeted each participant and identified herself to put participants at ease.

34 The Rating Guide and Scale, which was tendered as evidence, establishes that the ability to communicate effectively orally and being a team player were initially assessed based on the interview. Participants were rated as needing improvement, satisfactory, very good or excellent, based on criteria that were established for each qualification. After reaching agreement on a participant's interview ratings, the interview board members reviewed the narrative assessment and came to an agreement on the participant's final rating for each qualification. It had been predetermined that the narrative assessment could change an interview rating by no more than one level in the scale. All four assessment board members signed the report of the final results of the SERLO process in January 2011.

35 There is no evidence before the Tribunal to suggest that the chosen assessment methods could not properly assess the essential qualifications that were established for the remaining Custom Tailor positions.

36 Documents related to the complainant's assessment were also put into evidence, namely, Ms. Pearce's and Ms. Cuffley's interview notes, the narrative assessment and the board's final assessment and rating.

37 The complainant submits that the narrative assessment contains comments that have no relation to the abilities and skills required for a Custom Tailor. She asserts that the assessment board was wrong to conclude that she does not have good communication skills and that she is not a team player.

38 The complainant did not specify which of the comments about her oral communication skills were unrelated to that qualification. The evidence before the Tribunal demonstrates that Ms. Pearce and Ms. Cuffley each assessed the complainant's oral communication skills as satisfactory, based on her interview. After reviewing the narrative assessment, the board raised the complainant's rating to satisfactory-high for this qualification.

39 The narrative assessment does contain negative comments about the complainant with respect to the team player qualification. Again, the complainant did not provide any evidence to support her claim that the comments were unrelated to that

qualification. She did testify that she had received “perfect” performance evaluations from Ms. Kuhn, with no mention of this weakness prior to the SERLO process. In the course of the hearing, however, evidence was tendered that showed that Ms. Kuhn had, in fact, commented both verbally and in writing, on the complainant’s unwillingness to mentor new Custom Tailors. Ms. Kuhn brought this concern to the complainant’s attention in a meeting with the complainant, as well as in her written performance evaluation for the 2009/2010 fiscal year.

40 The evidence shows that Ms. Pearce and Ms. Cuffley both rated the complainant as satisfactory for the team player qualification, based on her interview. Despite the negative comments, the complainant’s rating for this qualification did not change after the board reviewed the narrative assessment.

41 The complainant has not demonstrated that Ms. Kuhn or Ms. Runzer provided untrue or irrelevant information in their written narrative assessment of the complainant.

42 In conclusion, the complainant has failed to demonstrate, on a balance of probabilities, that the assessment methods chosen were improper or that the respondent acted improperly with respect to her assessment.

Issue III: Is Ms. Runzer qualified to assess the complainant?

43 The complainant argues that Ms. Runzer is not qualified to assess her qualifications. However, there is no evidence to support this allegation.

44 Testimony provided by Ms. Kuhn and Ms. Runzer demonstrates that Ms. Runzer has worked in the tailor shop since 2003 and has experience as a Custom Tailor. At the time of the SERLO process, the Custom Tailor Supervisor position was vacant and Ms. Runzer was the General Tailor Supervisor, and was working in close proximity with the Custom Tailors, including the complainant. Based on the uncontested testimony of both Ms. Kuhn and Ms. Runzer, the Tribunal finds that Ms. Runzer understands the tailor shop and how it works, and knows the work of Custom Tailors.

45 With respect to the narrative assessments, the Tribunal is of the view that similar considerations apply to those providing these assessments as to referees who are

participating in reference checks. As the Tribunal held in *Dionne v. Deputy Minister of National Defence*, 2008 PSST 0011, at para. 55, a referee must be familiar with an employee's work and be able to provide sufficient information to the assessment board so it can conduct an adequate assessment of the employee's qualifications. A similar level of familiarity is required by those providing a narrative assessment in a SERLO process.

46 The Tribunal finds that there is no evidence that Ms. Runzer lacks sufficient knowledge of the complainant's work to provide input to a narrative assessment of her skills and abilities. In any case, the complainant's narrative assessment, prepared by Ms. Kuhn with input from Ms. Runzer, did not have any negative impact on the complainant's result in the SERLO process.

47 As to Ms. Runzer's role as an assessment board member, the Tribunal has addressed the requirements to be met for those who conduct assessments for appointment. See, for example, *Sampert v. Deputy Minister of National Defence*, 2008 PSST 0009. In applying the same principles to those conducting assessments in SERLO processes, those individuals should be familiar with the work required in the positions that will remain.

48 There is insufficient evidence to support a finding that Ms. Runzer is not competent to assess the complainant's qualifications with respect to the continuing work of a Custom Tailor.

Decision

49 For these reasons, the complaint is dismissed.

Merri Beattie
Member

Parties of Record

Tribunal File	2011-0720
Style of Cause	<i>Teresa Tran and the Commissioner of the Royal Canadian Mounted Police</i>
Hearing	September 11 and 12, 2012 Regina, Saskatchewan
Date of Reasons	December 4, 2012
APPEARANCES:	
For the complainant	Satinder Bains and Ryan Forsburg
For the respondent	Lesa Brown
For the Public Service Commission	John Unrau