



Public Service
Staffing Tribunal

Tribunal de la dotation
de la fonction publique

File: 2012-0982
Issued at: Ottawa, May 30, 2013

ALEX SOLIS

Complainant

AND

THE CHIEF STATISTICIAN OF CANADA

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	Joanne B. Archibald, Member
Language of Decision	English
Indexed	<i>Solis v. the Chief Statistician of Canada</i>
Neutral Citation	2013 PSST 0018

Reasons for Decision

Introduction

1 The complainant, Alex Solis, occupies the position of Marketing Officer, an IS-03 position at Statistics Canada (Stats Can). He believes that the respondent, the Chief Statistician of Canada, abused its authority when it selected him for lay-off. In his view, his selection was linked to his race, colour, national or ethnic origin, and disability.

2 The respondent denies that an abuse of authority occurred and states that it identified a need to eliminate IS-03 Communications Officer positions, and then conducted a selection for retention and lay-off process (SERLO process) to determine which employees would be laid off. The complainant's position fell into this group. At its conclusion, the complainant was one of five IS-03 employees selected for lay-off.

3 The Public Service Commission (PSC) participated in this hearing through a written submission addressing its policies and guidelines concerning the selection of employees for retention and lay-off.

4 For the reasons that follow, the Tribunal has determined that the complaint is not substantiated.

Background

5 Following the federal budget of March 29, 2012, Stats Can acknowledged that it would have to eliminate a number of positions throughout its organization. It undertook an exercise to identify the types of positions, groups, and levels that would be reduced in number. This also entailed the identification of employees who would be laid off when their positions were eliminated.

6 Section 64 of the PSEA governs the process to be followed to identify employees for lay-off. It states that:

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.

7 Section 21 of the *Public Service Employment Regulations*, SOR/2005-334 (PSER) contemplates the conduct of a SERLO process where a lay-off is to be made from among employees employed in similar positions or performing similar duties in the same occupational group and level. Specifically, it provides that:

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.

8 For each of the 29 SERLO processes it conducted, Stats Can first formally notified employees that they were considered affected, meaning that they were among the group of employees from which lay-offs may be made. It also advised them of the requirement to participate in a SERLO process to assess their qualifications relative to the future requirements of Stats Can.

9 Stats Can used a Track Record (TR) to assess affected employees. To complete the TR, the employee provided examples of past performance and work-related achievements to address specified competencies. To assist employees, Stats Can held information sessions in May 2012 where affected employees received guidance for completing the TR and information about the validation and assessment that would follow.

10 Stats Can identified IS-03 Communications Officer positions in the National Capital Region (NCR) as a group of similar positions some of which would be eliminated. The complainant does not dispute that his position fell within the group of IS-03 Communications Officers identified for this SERLO process. Accordingly, he was assessed as one of 50 employees in that group. At the conclusion, it was determined

that the complainant failed to attain the threshold score for retention and he was one of five employees in that group who were selected for lay-off.

11 On July 23, 2012, the complainant filed a complaint with the Public Service Staffing Tribunal (the Tribunal) under s. 65(1) of the *Public Service Employment Act*, S.C. 2003, c. 22, ss. 12,13 (PSEA) that his selection for lay-off constituted an abuse of authority.

12 The complainant provided notice to the Canadian Human Rights Commission (CHRC) in accordance with s. 78 of the PSEA to indicate that he intended to raise an issue concerning the interpretation or application of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (CHRA). At the beginning of the hearing, he clarified that he did not allege that his selection for lay-off was based on any prohibited ground of discrimination and he withdrew his allegation of discrimination in the SERLO process. His reference to discrimination was based on the settlement of a complaint to the CHRC in 2004 (the 2004 settlement). He expressed his discontent with what he viewed as the consequences of the 2004 settlement as they related to the outcome of the SERLO process.

Issues

13 The Tribunal must determine the following issues:

- (i) Did the respondent abuse its authority in the conduct of the SERLO process and the evaluation of the complainant's qualifications?
- (ii) Was the complainant's race, colour, national or ethnic origin, or disability a factor in the decision to select him for lay-off?

Analysis

14 Section 65(1) of the PSEA provides recourse in lay-off situations:

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.

15 The Tribunal confirmed in *Lishman v. Deputy Minister of Environment Canada*, 2013 PSST 0012, that s. 65(1) provides recourse to the Tribunal for employees who have been informed that they will be laid off when only some of the employees in the identified part of the organization will be laid off. In the present case, where the complainant was one of five IS-03 employees in the NCR who were identified for lay-off among a part consisting of 50 IS-03 employees, his complaint falls squarely within the Tribunal's authority.

16 Abuse of authority is not defined in the PSEA, except to the extent that s. 2(4) states that it includes bad faith and personal favouritism. It is clear from the preamble and the scheme of the PSEA that abuse of authority requires more than mere error. Whether an error constitutes an abuse of authority will depend on the nature and seriousness of the error in question. Abuse of authority can also include improper conduct and omissions. The degree to which the conduct or omission is improper will determine whether or not it constitutes abuse of authority. See *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 0008.

Issue I: Did the respondent abuse its authority in the conduct of the SERLO process and the evaluation of the complainant's qualifications?

17 The complainant took no issue with the evaluation of his qualifications in the SERLO process. He stated that the work examples that he used for the TR were basic but they were the best ones available to him. Although documents filed prior to the hearing indicated that he alleged that the individuals who validated and assessed his TR were biased against him, he did not pursue these allegations at the hearing and presented no evidence in that regard.

18 In accordance with the provisions of s. 21 of the PSER, the respondent conducted a SERLO process to determine which IS-03 Communications Officer employees would be retained or laid off. Although the complainant asserts that he was not performing the full range of duties of an IS-03, he did not allege that he should have been excluded from the SERLO process that was conducted among the IS-03 Communications Officers.

19 Gabrielle Beaudoin, Director General of Communication at Stats Can, testified that she participated in a committee which selected the competencies of client service orientation, reliability, and flexibility for assessment in the IS-03 SERLO process. Each affected IS-03 employee was given a TR to prepare and submit showing their work examples to demonstrate how they met these competencies. The examples were subsequently validated with their supervisors and then evaluated by a review board of four directors, of whom Ms. Beaudoin was one.

20 In the complainant's case, as he did not meet the pre-set threshold score for retention of 29 points out of 50, a second evaluation was conducted by four other directors. The first and second evaluations both concluded that he did not meet the requirements to be retained.

21 The complainant does not dispute the outcome of the SERLO process conducted in 2012 and the evidence raises no questions about the propriety of the process itself. As noted above, the complainant does not challenge whether he was properly included as a member of the IS-03 Communications Officer group for the SERLO process. Further, he has presented no evidence to show that the evaluators in the SERLO process were biased against him, that the evaluation of his qualifications was incorrect or unfair, or that the SERLO process was not merit-based.

Issue II: Was the complainant's race, colour, national or ethnic origin, or disability a factor in the decision to select him for lay-off?

22 Section 65(7) of the PSEA authorizes the Tribunal to interpret and apply the CHRA in determining whether a complaint filed under s. 65(1) of the PSEA is substantiated.

23 Pursuant to s. 7 of the CHRA, it is a discriminatory practice to directly or indirectly refuse to employ or continue to employ any individual, or, in the course of employment, to differentiate adversely in relation to an employee on a prohibited ground of discrimination. Section 3 of the CHRA lists the prohibited grounds of discrimination, which include the grounds named by the complainant: race, colour, national or ethnic origin and disability.

24 In determining whether the respondent engaged in a discriminatory practice, the complainant must first establish a *prima facie* case of discrimination as described by the Supreme Court of Canada in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (*O'Malley*).

25 A *prima facie* case is one that covers the allegations made and which, if the allegations are believed, is complete and sufficient to justify a finding in the complainant's favour, in the absence of an answer from the respondent. Once a *prima facie* case is made, the onus then shifts to the respondent to disprove the allegations or provide some other reasonable explanation. It is not necessary that discriminatory considerations be the sole reason for the actions at issue in order for the complaint to be substantiated. The complainant need only show that discrimination is one of the factors in the respondent's decision. See *Holden v. Canadian National Railway Company* (1991), 14 C.H.R.R. D/12, (F.C.A.) at para. 7.

26 The Tribunal cannot take into consideration the respondent's answer before determining whether a *prima facie* case of discrimination has been established. See *Lincoln v. Bay Ferries Ltd.*, 2004 FCA 204, at para. 22.

Has a *prima facie* case of discrimination been established?

27 The complainant, originally from South America and now suffering from a medical condition, alleges that the 2004 settlement of his complaint to the CHRC and his resultant work assignment were the basis for his selection for lay-off. As he attributed his lay-off to the 2004 settlement, the Tribunal has considered the question of discrimination in that context.

28 The evidence establishes that prior to 2004, the complainant made a human rights complaint against the respondent. In 2004, the parties settled the complaint. Pursuant to the terms of the 2004 settlement, the complainant was appointed indeterminately to a position at the IS-03 group and level which reported to senior management. The complainant testified that he would have preferred to have been given a position in an operational unit within Social and Aboriginal Statistics Division (SASD). He believes that because of his reporting relationship and the work he was

assigned, he was overlooked by SASD and lost opportunities to enhance his skills and abilities. As a result, when he was evaluated in the SERLO process, he could not provide better examples for the evaluation. He therefore claims that his race, colour, national or ethnic origin, and disability were factors in his selection for lay-off.

29 There is no evidence that in entering the 2004 settlement, the respondent admitted that it had contravened the CHRA. Equally, there is no suggestion that the settlement was made without the consent of both the complainant and the respondent. Further, because the complaint was settled, there was no hearing of the complaint or finding concerning the alleged contravention of the CHRA. There is no evidence of any subsequent human rights complaint regarding the IS-03 position to which he was appointed.

30 The complainant testified, however, that on a number of occasions after the implementation of the 2004 settlement, he had spoken with his superiors of his concern about the duties and responsibilities that were assigned to him.

31 The complainant called a number of witnesses, Janet Hagey, Rosemary Bender, Jane Badets, and Peter Morrison, to testify concerning his work situation after the 2004 settlement.

32 Janet Hagey, who retired from the public service in 2004, was formerly the Director of SASD. She recalled that the complainant had initiated a human rights complaint and that it had been settled. She testified that the complainant had concerns about his work, but she did not feel that his relationship with the department was “acrimonious.”

33 Rosemary Bender, now Assistant Chief Statistician, was the complainant’s direct supervisor in 2003. She was aware of the 2004 settlement. She characterized her relationship with the complainant as open and frank. She noted that up to the present, the complainant continued to contact her when he had concerns. Ms. Bender stated that she provided a forum for the complainant to bring forth his ideas. On a number of occasions, the complainant spoke with her about his duties and responsibilities. Specifically, she recalled that he stated concerns about permission for a telework

arrangement, and whether he was being assigned work suited to his level. In every instance, according to Ms. Bender, she followed up on the issues he raised. She further stated that from her perspective, the matters he raised were invariably addressed, although not always to the complainant's complete satisfaction.

34 Jane Badets supervised the complainant from 2009 to 2011. She testified that she tried to meet with the complainant biweekly about his work. She felt that she was always open to his ideas. She did not recall receiving concerns from the complainant about whether he had sufficient work at an appropriate level.

35 Peter Morrison, Assistant Chief Statistician, testified that he first met with the complainant in the spring of 2011. He recalled that there was a question of providing training to the complainant. Although Ms. Bender advised Mr. Morrison that the training commitment stemming from the 2004 settlement had been met, Mr. Morrison invited the complainant to provide him with a further training plan for consideration. However, the complainant never presented one to him.

36 The Tribunal is not satisfied that the complainant has established a *prima facie* case of discrimination based on race, colour, or national or ethnic origin, or disability. The complainant attributes his lay-off to the consequences of the 2004 settlement. However, in spite of his continual expression of dissatisfaction concerning his work assignments, the evidence is insufficient to directly or indirectly link the complainant's work assignments to a prohibited ground of discrimination, and it does not demonstrate that his work assignments were designed to ensure that he would be laid off.

37 The complainant has not raised any evidence, direct or circumstantial, to show that a prohibited ground of discrimination was a factor in his work assignments or the eventual decision to lay him off. Therefore, the Tribunal finds that the complainant has not established a *prima facie* case of discrimination based on race, colour, national or ethnic origin, or disability.

Conclusion

38 Viewed as a whole, the Tribunal finds insufficient evidence to support a finding of abuse of authority. The complainant's case rests on his view of the consequences of the 2004 settlement to which he was a party. It has not been shown that his selection for lay-off was linked to race, colour, national or ethnic origin, or a disability, as the complainant alleged or that his evaluation in the SERLO process constituted an abuse of authority.

39 Finally, as both the respondent and the PSC noted, every employee who participated in the SERLO process was a qualified IS-03. Their participation in the SERLO process and the selection of some of them for lay-off reflect solely Stats Can's need to reduce its complement of IS-03 positions. It was not an indication that the laid-off employees were unqualified or unsuited to continued employment if more positions had been available.

40 The Tribunal concludes that the complainant has not established that the respondent abused its authority in selecting him for lay-off.

Decision

41 For these reasons, the complaint is dismissed.

Joanne B. Archibald
Member

Parties of Record

Tribunal File	2012-0982
Style of Cause	<i>Alex Solis and the Chief Statistician of Canada</i>
Hearing	March 19-20, 2013 Ottawa, ON
Date of Reasons	May 30, 2013
APPEARANCES:	
For the complainant	Alex Solis
For the respondent	Joshua Alcock
For the Public Service Commission	John Unrau (Written submission)