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*Public Service Labour Relations
and Employment Board Act and
Public Service Employment Act*



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

GUY PINARD

Complainant

and

DEPUTY MINISTER OF NATURAL RESOURCES

Respondent

and

OTHER PARTIES

Indexed as

Pinard v. Deputy Minister of Natural Resources

Complaint of abuse of authority pursuant to section 65(1) of the
Public Service Employment Act

Before: Nathalie Daigle, a panel of the Public Service Labour Relations and Employment Board

For the Complainant: Himself

For the Respondent: Léa Bou Karam

For the Public Service Commission: Mélanie Massé and Luc Savard

Heard at Ottawa, Ontario,
January 5 and 6 and April 7, 2016.

REASONS FOR DECISION

I. Introduction

[1] Guy Pinard, the complainant, alleges that the respondent, the Deputy Minister of Natural Resources, abused its authority by selecting him for layoff. He maintains that he should not have been laid off since his main functions within the organization were not eliminated. Furthermore, he alleges that the respondent based its decision to lay him off on inadequate information and that he should have been assessed against another employee in a similar position to determine which of them would be laid off. The complainant also claims that the respondent was biased against him and that it showed personal favouritism towards the other person who was not laid off.

[2] The respondent denies these allegations and maintains that the Public Service Labour Relations and Employment Board (“the Board”) has no jurisdiction to consider the complaint since the complainant occupied a unique position in the part of the organization where the deputy head determined that layoffs would occur.

[3] The Public Service Commission (PSC) agrees with the respondent that the complainant was not entitled to file a complaint under s. 65(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12 and 13; *PSEA*) and that the Board has no jurisdiction to consider this complaint. The PSC appeared at the hearing and presented written submissions.

[4] The complaint was filed on October 17, 2014, with the former Public Service Staffing Tribunal (“the Tribunal”). On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*), came into effect and created the Board. This new Board replaces the Tribunal and the Public Service Labour Relations Board, and is responsible for handling complaints filed under the *PSEA*. Consequently, this case is being decided by the Board.

[5] For the reasons that follow, I find that the complainant was entitled to make this complaint under s. 65(1) of the *PSEA*; however, the complaint is dismissed on its merits. The complainant did not demonstrate that the respondent abused its authority when it selected him for layoff.

II. Background

[6] The complainant started working at Natural Resources Canada (NRCan) in 1982. He was the fleet technical advisor from 1988 to 2012 in the Fleet Management Section

(also called “Fleet and Parking Operations”, “Fleet Policy and Parking”, or “Fleet Group”), which was part of the Corporate Management and Services Sector (CMSS).

[7] In early 2012, as part of the implementation of the federal government’s Economic Action Plan (EAP) and the Departmental Reduction Action Plan (DRAP), NRCan’s senior management decided to reduce the vehicle fleet and to decentralize fleet management. It eliminated the Booth Street Complex Vehicle Pool (“the BSCVP”, “the Booth Street Fleet”, or “the NRCan Fleet”), which had been created in 1996, and the parking operation located on Booth Street in Ottawa, Ontario, was transferred to the private sector. The Fleet Management Section was also dismantled and stopped managing vehicles loaned to the NRCan’s sectors and providing fleet services and technical advice. The sectors became responsible for their own vehicle maintenance activities, licensing, etc.

[8] The Fleet Management Section was the organizational unit in which layoffs occurred. Five positions were eliminated out of eight:

- the manager (at the AS 06 classification group and level);
- the financial clerk (also referred to as the fleet information analyst, classified AS 03);
- the BSCVP supervisor (also referred to as the junior administrative officer, vehicle pool, classified AS 02);
- the fleet technical advisor (classified GT 05); and
- one of three service agent (classified GT 02).

[9] Three positions were transferred to other sections: two service agents (classified GT 02) and the fleet project officer (classified AS 03). All employees except the fleet project officer received letters informing them that their services might no longer be required because of a workforce adjustment (WFA) situation. Seven positions out of eight were thus termed “affected” or impacted. One “Selection of Employees for Retention or Layoff” (SERLO) process was initiated for the three service agents as only two service agents were to be retained. However, the SERLO process was cancelled when one service agent found employment elsewhere.

[10] NRCan disposed of its general-purpose passenger vehicles kept as part of the Booth Street Fleet (approximately 30 vehicles) and of some special-use vehicles the Fleet Management Section maintained for the sectors (approximately another 30 vehicles). The CMSS retained responsibility for policy advice and reporting, while the sectors became responsible for following fleet management policies and practices for the vehicles they kept. The corporate departmental fleet reporting responsibilities were assigned to the Asset Management Section, which became responsible for ongoing policy and reporting as part of asset management.

[11] On April 3, 2012, the complainant was informed that his position was impacted by the decisions made as a result of government wide fiscal restraint and that he was an affected employee. On June 26, 2012, by letter, he was further informed that due to a lack of work, his GT 05 position had been identified as surplus to requirements effective June 29, 2012. The letter provided him with different options. He chose the education allowance option, which would provide him a cash payment as well as the reimbursement of tuition from a recognized learning institution along with other related costs. He completed his training, was not appointed to another position, and was laid off effective November 13, 2014.

[12] On October 17, 2014, the complainant filed this complaint. Before the hearing, the respondent requested, by motion, that the complaint be dismissed as having been filed out of time. The complainant was given his notice of layoff on April 12, 2012, and therefore, the 15 day period for filing a complaint ended on April 27, 2012. In a letter decision dated February 13, 2015, the Board denied the motion to dismiss the complaint on the grounds that the respondent's failure to provide the complainant with proper notice of his right to make a complaint in any of the letters it issued constituted exceptional circumstances that, in the interest of fairness, justified an extension to file the complaint.

[13] Before the hearing, the respondent also requested that the complaint be dismissed for the reason that the part of the organization where the layoff occurred had been completely eliminated. The Board denied the motion on February 13, 2015, given the conflicting submissions presented at the time by the parties. The Board was unable to conclude at that time that the part of the organization where the complainant's layoff occurred was completely eliminated. The motion was dismissed

without prejudice to the respondent's right to raise at the hearing the matter of whether the entire part of the organization was eliminated.

Preliminary matter

[14] In accordance with s. 20(a) of the *PSLREBA*, the Board has the power to summon witnesses to a hearing. John Robinson was summoned to appear at the first part of the hearing held on January 5 and 6, 2016. He was the complainant's immediate supervisor from 1988 to 2012. He did not present himself at the hearing.

[15] On January 6, 2016, once it became clear that Mr. Robinson would not be present at the hearing, the complainant was asked how he wanted to proceed. He had been represented by a bargaining agent representative until the day before the hearing, when he informed the Board that he would be representing himself. Since Mr. Robinson did not show up at the hearing, I informed the complainant that he could seek an adjournment for the purpose of inquiring about the options available to him. However, he stated that he did not want an adjournment and that he preferred to continue with the hearing. Therefore, the hearing proceeded as scheduled, and Mr. Robinson did not testify.

III. Issues

[16] I must determine the following issues:

- 1) Did the complainant have the right to file a complaint under s. 65(1) of the *PSEA*?
 - 1.1. Does s. 65(1) of the *PSEA* grant an employee in a unique position the right to file a complaint when not all employees in the part of the organization at issue will be laid off?
 - 1.2. Was the part of the organization in which the complainant worked completely eliminated?
- 2) Was the respondent required to consider other similar positions in the organization and conduct a merit based assessment before deciding to layoff the complainant?

3) Did the respondent abuse its authority when it selected the complainant for layoff?

3.1. Did the respondent abuse its authority by relying on inadequate information when it decided to lay the complainant off?

3.2. Was there a prior conflict between the associate executive director and the complainant that raised a reasonable apprehension of bias that would constitute an abuse of authority?

3.3. Did the respondent abuse its authority by demonstrating personal favouritism towards the other person who worked in the eliminated part of the organization but who was neither affected nor laid off?

IV. Analysis

Issue 1: Did the complainant have the right to file a complaint under s. 65(1) of the PSEA?

[17] Sections 64 and 65 of the *PSEA* govern layoffs in the public service when an employee's services are no longer required. They read in part as follows:

Laying off of employees

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.*

Selection of employees

(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.*

...

Complaint to Board re lay-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 Board, in the manner and within the time fixed by the Board's regulations, that his or her selection constituted an abuse of authority.

Limitation

(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.

...

Lay-off set aside

(4) Where the Board 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.

...

[18] Section 21 of the *Public Service Employment Regulations* (SOR/2005-334; *PSER*) sets out a process of selecting employees for layoff. Section 21(1) of the *PSER* reads as follows:

Selection of employees for lay-off

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.

1.1. Does s. 65(1) of the PSEA grant an employee in a unique position the right to file a complaint when not all employees in the part of the organization at issue will be laid off?

[19] The respondent submits that in construing the meaning of s. 65 of the PSEA, the Board must look at the PSEA's entire scheme. It submits that in *Molander v. Commissioner of the Royal Canadian Mounted Police*, 2007 PSST 42, the Tribunal examined ss. 64 and 65 of the PSEA, together with s. 21 of the PSEER, and concluded that a complainant must have been selected for layoff, in accordance with s. 21, from among "employees employed in similar positions or performing similar duties in the same occupational group and level" to have the right to make a complaint to the Tribunal under s. 65(1) of the PSEA. As the complainant's position in the *Molander* case was the only one being eliminated at her group and level, the Tribunal found that the situation did not fit within ss. 64(2) and 65(1) of the PSEA and, therefore, it did not have jurisdiction to hear the complaint.

[20] In this case, the respondent submits that the complainant similarly occupied a unique position in the part of the organization where the deputy head determined that layoffs would occur. The respondent argues that since there were no other employees in similar positions or performing similar duties at the same group and level, the complainant did not have a right to make this complaint. In summary, the respondent argues that as there was no requirement to conduct a SERLO process under s. 21 of the PSEER, the complainant was not selected for layoff from among other employees in similar positions or performing similar duties at the same group and level, and, consequently, he had no right to file a complaint under s. 65 of the PSEA.

[21] The PSC agrees with the respondent. According to the PSC, s. 64(2) of the PSEA stipulates that employees to be laid off "shall" be selected in accordance with the PSEER. In turn, s. 21(1) of the PSEER directs that employees to be laid off be assessed through a merit based SERLO process from among employees who occupy similar positions or perform similar duties at the same group and level. Thus, the PSC submits that a selection is required only when two or more employees occupy similar positions or perform similar duties at the same group and level in the part of the organization identified by the deputy head. In other situations, employees are identified for layoff, and no assessment of merit or selection is required. The PSC contends that there is a distinction between an employee who is "selected for layoff" and an employee who is

“identified for layoff”. This distinction is mentioned in its *Guide on the Selection of Employees for Retention or Lay-off* (“the SERLO Guide”), which defines the following terms:

...

Identify for lay-off ... with the exception of when an employee is selected for lay-off as a result of a selection for retention or lay-off process conducted pursuant to subsection 64(2) of the PSEA, means the deputy head has determined that the employee will be laid off pursuant to subsection 64(1) of the PSEA; the employee subsequently is declared surplus, is laid off directly upon the employee’s request, or for those organizations for which the TB is the employer, is offered the options as provided by the NJC WFAD and the other WFAAs.

...

Select for lay-off ... means the deputy head has determined that some but not all of the employees in a part of the organization are to be laid off pursuant to subsection 64(2) of the PSEA, has conducted a selection for retention or lay-off process, and has selected an employee for lay-off; the employee subsequently is declared surplus, is laid off directly upon the employee’s request, or for those organizations for which the TB is the employer, is offered the options as provided by the NJC WFAD and the other WFAAs.

...

[22] The PSC submits that it is only when a deputy head has selected an employee to be laid off pursuant to a SERLO process from among employees who occupy similar positions or perform similar duties at the same group and level that an employee has the right to complain to the Board under s. 65(1) of the PSEA that his or her selection constituted an abuse of authority. According to the PSC, when no selection by a SERLO process is required, employees are not selected for layoff — they are identified, and they do not have the right of recourse to the Board. Similarly, when all employees in the part of the organization at issue are being laid off, they have been identified for layoff rather than selected for layoff and do not have recourse to the Board. The PSC submits that interpreting ss. 64(2) and 65(1) of the PSEA accordingly does not create a complete bar to recourse for employees in unique positions identified for layoff. It submits that while they do not have a right of recourse to the Board, they can request a judicial review of the deputy head’s decision in the Federal Court.

[23] In *Lishman v. Deputy Minister of Environment Canada*, 2013 PSST 12, the Tribunal concluded that the interpretation of s. 65(1) in the *Molander* case was too narrow and that it created a bar to recourse that the legislation did not intend for employees in unique positions. After carefully considering the law and the facts before it, the Tribunal found that a departure from the reasoning in *Molander* was justified.

[24] The Tribunal determined that it had jurisdiction to consider Ms. Lishman's complaint, even though she occupied a unique position in the part of the organization in which the deputy head determined that layoffs would occur. The Tribunal found that s. 65(1) provides recourse to the Tribunal for employees who have been informed that they will be laid off, when only some employees in the identified part of the organization will be laid off. According to the Tribunal in *Lishman*, the word "selected" in s. 65(1) is to be given its plain meaning, namely, "to have carefully chosen." Therefore, an employee in a unique position is not precluded from making a complaint under s. 65(1) of the *PSEA* that his or her selection for layoff constituted an abuse of authority.

[25] The Tribunal also specifically referred to the French version of s. 65(1), which it did not address in *Molander*. It noted that the interpretation of s. 65(1) that the respondent and the PSC proposed was inconsistent with the French version of s. 65(1), which states that the right to make a complaint derives from the deputy head's decision to lay the complainant off. The French version of that section reads as follows:

Plainte à la Commission des relations de travail et de l'emploi — mise en disponibilité

65 (1) Dans les cas où seulement certains des fonctionnaires d'une partie de l'administration sont informés par l'administrateur général qu'ils seront mis en disponibilité, l'un ou l'autre de ces fonctionnaires peut présenter à la Commission des relations de travail et de l'emploi, dans le délai et selon les modalités fixés par règlement de celle-ci, une plainte selon laquelle la décision de le mettre en disponibilité constitue un abus de pouvoir.

[26] The Tribunal therefore concluded that s. 65(1) provides recourse for any employee in the part of the organization identified by the deputy head who is informed that he or she will be laid off, except when the deputy head has completely eliminated the part of the organization that it has identified.

[27] For all those reasons, the Tribunal concluded in *Lishman* that the *PSEER* does not bar an employee who is selected for layoff and whose circumstances fall outside those set out in s. 21 from filing a complaint under s. 65(1) of the *PSEA*.

[28] The respondent and the PSC submit that the Tribunal's conclusion in *Lishman* is wrong. In their view, the Board's jurisdiction is limited to complaints about selecting employees for layoff pursuant to a SERLO process.

[29] It is not disputed that the complainant was in the only GT (General Technician) position at the 5th level within the Fleet Management Section. Thus, he occupied a unique position.

[30] What the respondent and the PSC are ostensibly arguing is that the words "employees employed in similar positions or performing similar duties in the same occupational group and level" from s. 21 of the *PSEER* should be read into s. 65(1) of the *PSEA*. That is, the Board should read s. 65(1) of the *PSEA* as follows:

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 from among employees employed in similar positions or performing similar duties in the same occupational group and level may make a complaint to the Board, in the manner and within the time fixed by the Board's regulations, that his or her selection constituted an abuse of authority.

[Emphasis added]

[31] It is well-settled law that there is only one approach to statutory interpretation, namely, that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (See, for example, *Marche v. Halifax Insurance Co.*, 2005 SCC 6 at para. 54.) I am required to consider the entire context of a provision, in this case s. 65 of the *PSEA*, to determine if it is reasonably capable of multiple interpretations and be labelled ambiguous (see; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 25 at para. 29.)

[32] For the reasons outlined below, I find that the wording of s. 65(1) of the *PSEA* is unambiguous and, as such, there is no justification for the respondent and the PSC's argument that the words proposed above must be "read in" to this provision of the *PSEA*.

[33] To start, in ss. 64(2) and 65(1) of the *PSEA*, Parliament provides for only two possible scenarios in which layoffs will occur, the first one being when all the employees in the part of the organization identified by the deputy head will be laid off, and the second one being when not all of those employees will be laid off. Parliament clearly states that no recourse is available for the employees in the first scenario, i.e., when all the employees will be laid off, but that recourse is available for the employees in the second scenario, i.e., when not all the employees in the part will be laid off.

[34] It makes sense that no recourse is available for the employees in the first scenario as Parliament's intent, as seen in s. 65(2), is to exclude the right to complain about (1) the decision to lay off employees, (2) the determination of the part of the organization from which employees will be laid off, or (3) the number of employees to be laid off there. Consequently, employees cannot complain to the Board about a lack of work, the discontinuance of a function, or the transfer of work or a function outside certain portions of the federal public administration, as stated in s. 64(1) of the *PSEA*.

[35] Similarly, for those employees who have a right of recourse because not all employees in the part of the organization identified by the deputy head will be laid off, Parliament has limited their right of recourse. As mentioned in the last paragraph, pursuant to s. 65(2), they do not have the right to complain about (1) the decision to lay off employees, (2) the determination of the part of the organization from which employees will be laid off, or (3) the number of employees to be laid off there. Consequently, they too cannot complain to the Board about a lack of work, the discontinuance of a function, or the transfer of work or a function outside certain portions of the federal public administration, as stated in s. 64(1) of the *PSEA*.

[36] At the hearing, the PSC emphasized that s. 64(2) states that if fewer than all the employees are laid off in any part of the organization where the layoffs occur, then the selection "shall" be made in accordance with the PSC's regulations.

[37] The PSC has issued regulations, pursuant to s. 22(2)(i) of the *PSEA*, to guide a deputy head in selecting or deciding which employees will be laid off and which will be retained. Specifically, s. 21(1) of the *PSEER* sets out a process of selecting employees for layoff. It specifies that a merit based SERLO process will be conducted from among employees who occupy similar positions or perform similar duties at the same group and level.

[38] Section 21 of the *PSEER* stipulates that to select employees for layoff, the employees of the same group and level are to be assessed. When the employees belong to the same occupational group and level, their merit can be evaluated against the same selection criteria. Thus, s. 21(1) of the *PSEER* limits the scope of a SERLO process to employees who are at the same occupational group and level in the part of the organization identified by the deputy head. This is why the PSC takes the position that the right of recourse should be limited to situations in which the selection has been made from among employees in similar positions or performing similar duties at the same group and level. It is also for this reason that the respondent and the PSC maintain that the words “employees employed in similar positions or performing similar duties in the same occupational group and level” that are found in s. 21 of the *PSEER* should be read into s. 65(1) of the *PSEA*.

[39] Despite the very able representations on this question that the PSC and the respondent made, I do not agree with their position.

[40] First of all, Parliament did not include the words “employees employed in similar positions or performing similar duties in the same occupational group and level” in s. 65(1) of the *PSEA*. Parliament did state in s. 65(1) that if not all employees in the part of the organization where the layoff will occur will be laid off, then “any” employee selected for layoff may make a complaint that his or her selection constitutes an abuse of authority. Given the clear wording of s. 65(1), I am not persuaded that a different interpretation from that set out in *Lishman* is warranted.

[41] Secondly, I would be ignoring the plain meaning of the word “selected” in s. 65(1) if I limited its meaning to employees selected exclusively from among “employees employed in similar positions or performing similar duties in the same occupational group and level”, as found in s. 21 of the *PSEER*. In *Lishman*, the plain meaning of “selected” was said to be “to have carefully chosen”.

[42] Thirdly, as explained in *Lishman*, were s. 65(1) interpreted in the manner proposed by the respondent and the PSC, it would be inconsistent with the French version of s. 65(1) of the *PSEA*. While the English version provides that any employee may make a complaint that his or her selection for layoff constitutes an abuse of authority when not all employees in the identified organizational part are being laid off, the French version provides that any employee who has been informed of his or

her layoff can make a complaint that the decision to lay him or her off constitutes an abuse of authority. The term “informed” used in the French version may be seen as broader than “selected”. However, reading the two versions of the provision, they both say that any employee who is being laid off — when not all employees in the part of the organization will be laid off — has the right to make a complaint that his or her layoff constitutes an abuse of authority.

[43] Provisions of a statute are meant to work together, and, presumptively, legislation enacted by Parliament does not contain contradictions or inconsistencies. (See *Sullivan on the Construction of Statutes*, Fifth edition, at 223.) In my view, there is no contradiction between the English and French versions of s. 65(1); they say the same thing, which is that the employee is selected for layoff, or informed of his or her layoff, and, the employee being laid off is given a right of recourse as “not all” employees in the identified part are being laid off.

[44] Fourthly, Parliament gave the Board jurisdiction to examine discrimination allegations from employees selected for layoff when not all employees in the part of the organization are laid off. Parliament makes it clear in s. 65(7) that employees who have a right of recourse may raise discrimination issues. Section 65(7) specifically states that when considering whether a complaint is substantiated, the Board may interpret and apply the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; *CHRA*). Applying the plain meaning of s. 65(1), if the Board declined to consider a complaint from an employee in a unique position who raised an issue of discrimination, it would be doing so notwithstanding s. 65(7), which states that when considering whether a complaint is substantiated, the Board may interpret and apply the *CHRA*.

[45] Fifthly, I note that the PSC offers definitions for the terms “Identify for lay-off” and “Select for lay-off” in its SERLO Guide. However, those definitions do not state whether an employee can file a complaint with the Board. They simply distinguish when the deputy head must or must not conduct a SERLO process. They do not specify when a right of recourse to the Board exists. The right of recourse is set out in the governing statute, the *PSEA*, not the regulations of the PSC.

[46] In addition, the distinction made in the SERLO Guide between an employee “selected for lay-off” and an employee “identified for lay-off” is not made in the *PSEA*. The *PSEA* does not use the term “identified for lay-off” and does not define the term

“selected for lay-off”. In the circumstances, in my view, the definitions in the SERLO Guide should not be used to limit the meaning of the words Parliament used in s. 65(1) of the *PSEA*.

[47] Finally, the PSC submits that to determine the meaning of s. 65(1), it is necessary to look at the entire context of the *PSEA* and to prefer an interpretation that creates a coherent, workable scheme and avoids internal inconsistency or conflict. I find that interpreting s. 65(1) as stating that the right of recourse is limited only to those employees who work in the identified part when more than one employee occupies a similar position or performs similar duties at the same group and level does not necessarily create a coherent, workable scheme of the *PSEA*. This narrow interpretation would put employees in unique positions at a disadvantage compared to employees in non-unique positions. In particular, if discrimination allegations were made, the employees in the non-unique positions would have a right of recourse to the Board, but the employees in the unique positions would not. Instead, as the PSC mentioned, those employees would have to seek judicial review from the Federal Court of the deputy head’s decision to lay them off instead of other employees. In my view that would run contrary to the legislative scheme of the *PSEA* as s. 65(1) specifically provides for recourse to the Board when not all employees in the identified part are being laid off.

[48] I conclude that the wording of s. 65(1) of the *PSEA* is unambiguous. As such, I decline to “read in” the words “employees employed in similar positions or performing similar duties in the same occupational group and level”, found in s. 21 of the *PSEER*, into s. 65(1) of the *PSEA*. While Parliament expressly prohibits complaints about the decision to lay off employees, it does not prohibit a complaint to the Board from an employee in a unique position in the identified part, when fewer than all employees are laid off, that his or her selection for layoff constitutes an abuse of authority.

1.2. Was the part of the organization in which the complainant worked completely eliminated?

[49] The respondent submits that even if persons occupying unique positions can file complaints, the part of the organization where the layoff occurred, in this case, was completely eliminated. As mentioned earlier, under s. 65(1), there is no recourse to

the Board available when all the employees in the part of the organization identified by the deputy head will be laid off.

[50] The issue then is whether the deputy head completely eliminated the part of the organization where the layoff occurred.

[51] Tandrae E. Knapp, who from July 2011 to April 2014 was the associate executive director, Shared Services Office (SSO), NRCan, was responsible for the oversight and monitoring of the cost saving initiative that led to the layoffs. She explained that the Booth Street Fleet, which was eliminated, owned approximately 60 vehicles. Approximately 30 were used for daily rentals. Approximately another 30 were long-term leases. The 30 cars kept for the car rental service were disposed of with the exception of a few vehicles, which were kept for the minister and for mail service. With respect to the 30 long-term leased vehicles, the responsibility for them was transferred to the sectors, or they were disposed of. The sectors now look after servicing and repairing their own vehicles.

[52] Ms. Knapp explained that the garage located on Booth Street was emptied and that the above-ground fuel tanks there were drained and either disposed of or relocated to another location. The vehicle pool trailer was also removed.

[53] The complainant explained that when he was laid off, he was told that the reason for his layoff was that the Booth Street Fleet was being eliminated. However, he explained that while four employees of the Fleet Management Section worked at the garage and trailer on Booth Street where the fleet was kept, namely, the three service agents (classified GT 02) and the BSCVP supervisor (classified AS 02), he did not work there. He specified that he, as the fleet technical advisor, and the other three employees who provided fleet management services to NRCan, namely, the manager, the fleet project officer, and the financial clerk, worked in an office located at 580 Booth Street. They provided fleet management services across NRCan in addition to playing a role in overseeing the Booth Street Fleet's operation.

[54] The part of the organization where the layoff occurred was described, in some of the documentation filed at the hearing, as the "NRCan Booth Street Fleet". For example, in an "Interview Questionnaire for CMSS (Interview Date: March 12, 2013)", the following response was provided to the question, "Please provide details about the cost saving initiative":

Item 1 - Eliminate NRCan Booth Street Fleet

- *NRCan was managing a pool of vehicles (Booth Street Fleet) that were being used by employees for:*
 - *Daily use rentals*
 - *Long term leases*
- *They were responsible for managing the pool, associated maintenance, policy requirements and collecting the reporting information required by the policy related to fleet.*
- *As this function did not fit within the core business of the Department, the NRCan Booth Street Fleet was to be eliminated with the exception of:*
 - *1 vehicle for the DM (transferred to CMSS)*
 - *1 vehicle for mail service (transferred to CMSS)*
 - *Maintaining the Policy/reporting function*
- *Special Use Vehicles were transferred to Sectors, marked for disposal or disposed of via the Crown asset disposal process.*
- *A plan was prepared for stopping fleet related activities.*

[55] However, the positions that were eliminated as part of the dismantling of the Booth Street Fleet belonged to the Fleet Management Section. It is clear that some of the employees doing fleet-related work in that section were laid off while others were not. In the Interview Questionnaire for CMSS, for example, the following response was provided to the question, "Is WFA (Workforce Adjustment) a component of this plan?":

Item 1 - Eliminate NRCan Booth Street Fleet

- *4 positions were eliminated through DRAP ... 2012 (One GT 05, one AS 3, one AS 2, and one GT 2).*

[56] The CMSS actually declared five out of eight positions surplus in the Fleet Management Section (the AS 06 position was eliminated as part of the federal government's EAP, while the GT 05, AS 03, AS 02, and GT 02 positions were eliminated as part of the DRAP).

[57] At the hearing, the respondent did not describe the part eliminated as the Booth Street Fleet. It submitted that the part eliminated consisted of the following three functions: (i) the operation of the Booth Street Fleet, (ii) the operation of the car parking, and (iii), the provision of technical support to the sectors. Another way that the part was described was as the two components “Fleet” and “Parking” of the section “Fleet Policy and Parking” (another name given to the Fleet Management Section), in addition to providing technical support.

[58] The respondent submits that the deputy head completely eliminated those three functions and that the complainant, in the circumstances, was not entitled to make this complaint under s. 65 of the *PSEA*, since all the employees in this “part” of the organization were informed that they would be laid off.

[59] However, before the layoff occurred, the Fleet Management Section (also called Fleet Policy and Parking) was responsible for overseeing the operation of the Booth Street Fleet and the car parking. That section also provided technical support to the sectors. Among other things, it managed the Booth Street Fleet and the parking, contracted out fleet maintenance, collected the reporting information required by the fleet policy, did the reporting, etc.

[60] Therefore, I find that the Fleet Management Section (or Fleet Policy and Parking) was the part of the organization where the layoffs occurred. I understand that the DRAP proposal did not state that the Fleet Management Section or Fleet Policy and Parking was being eliminated. It stated that the NRCan Booth Street Fleet was being eliminated. But the employees that were laid off belonged to what was referred to, at the hearing, as the Fleet Management Section or Fleet Policy and Parking. This section was dismantled in 2012 and no longer exists. The question that must be answered then is whether all the employees in that section were laid off.

[61] When the Fleet Management Section was dismantled, the CMSS assigned new roles to the remaining three employees (two GT 02s and one AS 03) of the section. This was clarified in the Interview Questionnaire for CMSS as follows:

SSO is responsible for implementation of NRCan Booth Street Fleet elimination plan, maintaining policy and reporting aspects of fleet at NRCan. The required responsibilities are and will be carried over by the existing resources, using their time partially. Mainly by one AS 3 that worked in the Fleet

group before. Sectors will need to assume the responsibility for any vehicles retained and will be accountable for ensuring compliance with departmental /GoC policies.

[Sic throughout]

[62] In addition, as described in a document entitled “NRCan Vehicle Fleet Reduction and Restructuring of Fleet Management” prepared in 2012, the employees in the three positions that remained (two GT 02s and one AS 03) were to be moved to new offices after November 30, 2012. The new role for the fleet staff was also described in the document as follows:

The SSO will continue to provide fleet management services. These will include (but may not be limited to) centralized NRCan fleet data base [sic] management (Treasury Board requirement), credit card management, procurement, disposal, licensing, decals, log books, reporting requirements and accident settlement advice.

... The future provision of maintenance management services will have to be clarified.

Employees may also be tasked with a variety of other tasks outside the fleet realm depending on the volume of work.

[63] Therefore, the evidence is clear that not all employees of the Fleet Management Section — or Fleet Policy and Parking — were laid off. In addition, as Cheri Crosby, director general and chief human resources officer, NRCan, confirmed at the hearing, the “Policy” part of “Fleet Policy and Parking” was not eliminated.

[64] Even if I were to consider that the organizational part that was eliminated consisted of the three functions identified by the respondent, namely, (i) the operation of the Booth Street Fleet, (ii) the operation of the car parking, and (iii), the provision of technical support to the sectors, I would still conclude that not all employees accomplishing those functions were laid off. The evidence shows that two service agents (classified GT 02) working at the Booth Street Fleet were not laid off. They still belong to the CMSS, although they have been reassigned different duties. The fleet project officer was also not laid off and he helped in managing the Booth Street Fleet.

[65] Accordingly, the evidence does not support a finding that the part of the organization where the layoffs occurred was completely eliminated, no matter how it is defined. Therefore, the complainant had the right to make this complaint under s. 65(1) of the PSEA.

[66] In closing this section of my reasons, I note that in the complainant's affected letter, the respondent omitted identifying the part of the organization where the layoffs would occur. And the complainant's surplus letter makes no reference to any specific part of the organization.

[67] The Tribunal in *Lishman* stated that the first step, when selecting employees for layoff, is to identify the affected part of the organization where the layoffs will occur. In this case, the respondent, in its letters to the complainant, should have clearly named the part of the organization that was affected. As noted in *Lishman*, it is of utmost importance that the reasons for a layoff decision be fully explained to an employee. Fairness and transparency dictates that they be fully informed of who made the decision and the reasons for it.

[68] In this case, I find that the failure to identify in the complainant's affected and surplus letters the part of the organization where the layoffs were occurring was an error. That in itself does not constitute an abuse of authority. As *Tibbs v. Deputy Minister of National Defence*, 2006 PSST 8, noted, abuse of authority is more than simply errors and omissions.

[69] However, as a result of this lack of clarity, and because some of the complainant's questions remained unanswered, he never clearly understood why he was laid off. As will be seen, a certain amount of confusion surrounded the restructuring and the layoffs, which was very unfortunate. As Ms. Knapp testified, the complainant was well respected and appreciated in the organization. The decision to lay him off had a big impact on him. He could see that not all his duties were being eliminated and that one of his colleagues was not being laid off. The lack of communication, in this case, which gave rise to much confusion, should have been avoided at all costs.

Issue 2: Was the respondent required to consider other similar positions in the organization and conduct a merit based assessment before deciding to lay off the complainant?

[70] The complainant recognizes that the four employees from the Fleet Management Section who worked in the office — the manager (classified AS 06), the fleet technical advisor (classified GT 05), the fleet analyst (classified AS 03), and the fleet project officer (classified AS 03) — all held unique positions. However, he asserts

that they all played a national fleet management role. He focused his remarks in particular on the fact that both he and Yan Martin, the fleet project officer (classified AS 03), advised sectors on fleet policy issues. He stressed that the two of them did the mandatory reporting required by the central agencies. In his view, his position was similar to Mr. Martin's position, and the respondent failed to assess him and the incumbent of that position to determine who should be laid off.

[71] Ms. Knapp explained at the hearing that the complainant's fleet technical advisor position (GT 05) was unique and that no SERLO process was required. In the respondent's view, as his position was the only one at the GT 05 group and level within the Fleet Management Section, no SERLO process was required.

[72] John Birk, senior corporate staffing advisor, NRCan, explained that an employee in the GT group holds a technical expertise and occupies a technical position; while an employee in the AS (Administrative Service) group occupies an administrative type position. He added that the complainant in this case is a certified mechanic but that Mr. Martin (in a position classified AS 03) is not.

[73] As the Tribunal found in *Lishman*, at para. 52, under s. 21 of the PSER, when one or more but not all employees will be laid off in the identified part of the organization, a deputy head is required to conduct a merit based assessment of employees who (a) occupy similar positions classified at the same occupational group and level, or (b), perform similar duties at the same occupational group and level. Accordingly, only employees in the same occupational group and level can be assessed. I agree with the reasoning in *Lishman*.

[74] In this case, as the complainant's position was unique in the part of the organization identified by the deputy head, he could not be assessed vis-a-vis any other incumbent of a GT 05 position. By the same token, he could not be assessed by way of a SERLO process with an employee in an AS 03 position.

[75] To conclude, although the complainant provided details about the similarities between his GT 05 position and the AS 03 position held by Mr. Martin, they were not employees in the same occupational group and level. Therefore, the respondent was not required to undertake a SERLO process involving the complainant and Mr. Martin. Moreover, since the complainant occupied the only GT 05 position in the Fleet Management Section, the respondent was not required to consider whether any other

position was similar for the purpose of conducting a SERLO process under s. 21 of the PSEER. (See *Lishman* at para. 53.)

Issue 3: Did the respondent abuse its authority when it selected the complainant for layoff?

[76] Abuse of authority is not defined in the PSEA, but s. 2(4) states 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 indicate that a complaint of abuse of authority under s. 65(1) should be interpreted differently from a complaint filed under s. 77. (See, for example, *Tran v. Commissioner of the Royal Canadian Mounted Police*, 2012 PSST 33, and *Raymond v. Chief Statistician of Canada*, 2013 PSST 25 at para. 13.)

[77] In many decisions regarding complaints filed under s. 77, including *Tibbs* at paras. 56 to 74, the Tribunal examined what constitutes abuse of authority under the PSEA and gave it a broad meaning that includes serious errors even if there is no bad faith or intent. Therefore, a finding of abuse of authority can be made when a delegate acts on inadequate material (particularly without considering relevant matters), when the result is unfair or when unreasonable action is taken. In my view, this is the proper approach for the Board to take when considering complaints brought under s. 65(1) of the PSEA.

3.1. Did the respondent abuse its authority by relying on inadequate information when it decided to lay the complainant off?

[78] I have grouped the allegations and arguments put forward by the complainant in this section under three headings, which are that the respondent abused its authority by relying on inadequate information when it decided to lay the complainant off because (1) it misunderstood his role, (2) it erred in assuming that his main functions were eliminated, and (3), the DRAP proposal was insufficiently documented.

3.1.1. Allegation that the respondent misunderstood the complainant’s role

[79] The complainant submits that senior management did not come to a fair decision to lay him off because it did not understand what his role was and where he worked. To support his claim, he provided evidence to establish that senior management did not understand, in addition, the fleet project officer’s role.

[80] In my view, the evidence that was presented does not support a finding that senior management misunderstood the complainant's duties. This conclusion is based on the following evidence that was presented and my findings based on this evidence.

The complainant's role

[81] The complainant maintains that his role was not confined to overseeing the Booth Street Fleet operations or to providing technical advice to the sectors. He explained that it was to provide fleet management services to NRCan in its entirety and that he had been doing so for years before the Booth Street Fleet had even been created. He specified that 75 percent of his work consisted of providing fleet management services across NRCan (which included providing expert technical advice) and that 25 percent of his work consisted of overseeing the Booth Street Fleet operations.

[82] The complainant also alleges that senior management did not realize that he fulfilled administrative and procurement roles in addition to a technical role. He testified that his administrative tasks included the following: accounting, finance, statistics, client service, general procurement and planning, program management, project management, and supervising the three employees in GT 02 positions. He explained that while at the time of the WFA the three GT 02s reported to him, he was not involved in their day to day work. His role was to provide them with technical backup if and when they needed it. The BSCVP supervisor (AS 02) coordinated their daily activities, in addition to performing administrative tasks. The BSCVP supervisor, in turn, reported to the manager of the Fleet Management Section. The complainant explained that the three GT 02s, among other things, parked the cars, washed them, checked their fluid levels, and took them for repairs.

[83] The complainant brought to my attention several instances in which he claims misunderstanding or lack of information arose about his role. For example, he alleges that the respondent mistakenly considered that his position reported to the Booth Street Fleet, while it had reported to the Fleet Management Section since 1988. He also claims that senior management relied on a wrong version of his work objectives before deciding to eliminate his position. He clarified that many of his tasks, such as maintaining databases, were not included in his work objectives.

[84] The complainant maintains, in addition, that senior management relied upon an organizational chart that contained many errors when it chose the positions to eliminate. He explained that the employees' titles on the chart were not correct. For example, while he was the fleet technical advisor, his title on the chart was "Fleet Manager". And one of the employees in an AS 03 position was a fleet analyst, but her title on the chart was "Financial Clerk". For the three GT 02s, their title was service agent, but they were simply referred to as "Fleet" on the chart. Again, with respect to the AS 02, her real title was BSCVP supervisor, but her title on the chart was "Fleet Pool Office Assistant".

[85] The complainant emphasized that the decision to lay him off but to keep the fleet project officer (classified AS 03) position was made without senior management being aware that he, as the fleet technical advisor, had been responsible for the ongoing policy and reporting tasks well before Mr. Martin joined the Fleet Management Section as the fleet project officer in 2008.

The Fleet Project Officer's role

[86] According to the complainant, senior management, in addition to not understanding his role, did not have a clear understanding of the fleet project officer's role. He pointed out, for example, that the "Statement of Merit Criteria" used for the fleet project officer position refers to the fleet project officer having been the "Vehicle Pool Supervisor".

[87] The complainant testified that he and Mr. Martin shared administrative tasks. They provided services that included complying with Treasury Board reporting requirements; coordinating data requirements with license bureaus; coordinating, monitoring, and scheduling maintenance for National Capital Region (NCR) vehicles; and managing accident settlements. He and Mr. Martin both attended meetings with and consulted the Treasury Board and Public Works and Government Services Canada (PWGSC).

[88] Before the complainant was laid off in June 2012, he also dealt with Automotive Resources International (ARI). ARI is a private sector company that helps clients manage the landscape of rules, regulations and laws that govern fleets. Both the complainant and Mr. Martin were the contact persons for ARI in 2012. When the complainant left, Mr. Martin remained that contact person, and another employee

became the second contact person. Mr. Martin also became the contact person for issues such as purchasing new vehicles.

[89] In the complainant's view, the respondent did not understand that he and the fleet project officer accomplished the above mentioned tasks simultaneously. However, he was the one who had accomplished these tasks for a longer period.

Conclusions based on the evidence

[90] To decide the question of whether the respondent misunderstood the complainant's role, it is appropriate to consider the complainant's main functions, as outlined in his work objectives. The main parts of that document read as follows:

Fleet Technical Advisor, Fleet and Parking Operations ...

Objectives

Serving as a technical advisor for design and development Project, carrying out design fabrication and testing for standard and prototype vehicles for use in enhancing energy efficiency of vehicles....

Developing terms of reference including the design, technical specifications, and administrative parameters for contractual or collaborative/service delivery agreements....

Ensuring mechanical integrity of the in service equipment by instituting a [sic] preventive maintenance or risk mediation actions, equipment and system performance monitoring and disseminating information to staff....

Planning, organizing, implementing and carrying out operational and administrative processes....

- *Manages the operation of the Booth Street Vehicle Pool on a cost neutral basis whereby revenues offset all overhead costs including salaries.*

Administering and controlling allocated financial and material resources; assigning work and providing technical leadership and guidance to personnel assigned....

Incorporating health and safety guidelines, processes and procedures in work processes and the design of infrastructure and services....

[91] While the complainant's work objectives might not contain all the tasks he performed, I am satisfied that they contain a list of his main functions.

[92] Ms. Crosby testified that when she started in her position in May 2011, she quickly saw that the complainant was the fleet expert. His expertise was acknowledged in the technical field. She knew that he reported to the fleet manager, even though his title on the organizational chart that was produced at the hearing might not have been correct; it was “Fleet Manager”, while on his work objectives it was “Fleet Technical Advisor”. However, as she explained, while the organizational chart might not have contained the titles the employees used daily, it offered an overall profile of the fleet sector. In any event, Ms. Crosby explained that the selection of the employees who were laid off was not based on the chart.

[93] In essence, Ms. Crosby understood that the fleet technical expertise largely came from the complainant and that the policy work and reporting was primarily done by Mr. Martin.

[94] At the hearing, the complainant stressed that both he and Mr. Martin offered the list of services that was mentioned before. The evidence also shows that both the complainant and Mr. Martin attended meetings with and consulted the Treasury Board and PWGSC.

[95] That, in my view, does not change the fact that both the complainant and Mr. Martin had particular fields of expertise based on their different training. As Ms. Crosby explained, the respondent found that the complainant’s expertise was of a technical nature, while Mr. Martin’s was of an administrative nature. The complainant did not deny that he has a technical expertise. Based on all the evidence and documentation provided at the hearing, the respondent’s finding was not unreasonable.

[96] Furthermore, as the CMSS retained responsibility for policy advice and reporting, it was not unreasonable for the respondent to conclude that Mr. Martin’s services of reviewing and advising on policy and reporting on results would still be needed. He held an administrative position, and NRCan needed him to carry out those administrative tasks.

[97] There is also an explanation as to why there is a reference to Mr. Martin having been the “Vehicle Pool Supervisor”. Mr. Martin testified at the hearing and explained that his prior position in the Fleet Management Section was as the BSCVP supervisor

(classified AS 02). In that role, he supervised the service agents, which is why there is a reference to Mr. Martin having been the “Vehicle Pool Supervisor”.

[98] For all of these reasons, I find that the evidence that was presented does not support a finding that senior management misunderstood the complainant’s role or the role of Mr. Martin.

3.1.2. Allegation that the respondent erred when it decided that the complainant’s main functions were to be eliminated

[99] The complainant asserts that while some of his functions were eliminated in the wake of the cutbacks, his main functions were not eliminated, and therefore, he should not have been laid off. He explained that Mr. Martin, as a result of the elimination of his position, was assigned his tasks. He maintains that 90 percent of Mr. Martin’s tasks in 2012, 2013, and 2014, as described in his job description, were the complainant’s previous tasks.

[100] The complainant has established that NRCan still offered some fleet related services after he was laid off. The evidence may be described as follows.

[101] Mr. Martin explained that he started in the fleet project officer position in 2008. Before that, from 2004 to 2008, he occupied the BSCVP supervisor (AS 02) position at the Booth Street Fleet, where he worked in the trailer. He confirmed that from 2008 onwards, he worked closely with the complainant at the 580 Booth Street office. He confirmed that the complainant was responsible for, among other things, purchasing and disposing of vehicles, managing the inventory, finding maintenance solutions, obtaining vehicle licenses, keeping logbooks, overseeing the Booth Street vehicle pool, and liaising with PWGSC.

[102] After the complainant and the fleet manager were laid off, Mr. Martin started reporting to Mark Budd, regional manager, SSO, Atlantic, who was assigned the functional lead role for fleet policy, reporting, and operations. Mr. Martin was also assigned some of the complainant’s tasks for a certain time. The complainant showed the Board an email that Mr. Martin wrote on September 14, 2012, which read as follows: “All the purchasing, disposal of vehicles, licensing and ARI will be done centrally by me.”

[103] The complainant also pointed out that in 2011, his name was stated as the contact person on a form entitled “Report of Vehicle/Equipment Surplus”. However, in 2013, Mr. Martin’s name was listed as the contact person.

[104] Mr. Budd also testified at the hearing and he confirmed that he did not work in the fleet management area before 2012. He confirmed that as a result of the changes, he and Mr. Martin became responsible for handling fleet policy, reporting, and operations. Vehicle purchases and disposals became the sectors’ responsibility, along with all maintenance. However, the Asset Management Section required information to keep the fleet management database up to date.

[105] There was also evidence filed that shows that the two GT 02s who were not laid off also carried out fleet duties after the complainant left. In an email dated September 27, 2012, one of the GT 02s provided a list of the maintenance services he provided at that time, which included, among other things, performing minor upgrades and servicing, road testing, fuelling, washing, and inspecting vehicles. The evidence shows that the two GT 02s carried out fleet-related tasks until at least October of 2013. In the complainant’s view, this demonstrates that the respondent was wrong when it stated that all fleet-related duties were being eliminated.

[106] The complainant also stressed that, at the time of the reorganization, some confusion existed in the SSO with respect to fleet-related duties that needed to be completed. He referenced an email in which the incumbent of the material management position noted that the fleet manager and the fleet technical advisor (the complainant) did more than just look after the NRCan pool. With respect to the complainant, the incumbent of the material management position wrote that he looked after vehicle purchases and sales, maintenance solutions, and damage or abuse issues. According to the complainant, all of those duties were still required to be carried out after he was laid off.

[107] The complainant also drew the Board’s attention to emails Ms. Knapp sent that show that the reorganization led to some confusion. In one email, dated January 8, 2013, in which the author requested a meeting to discuss acquisitions, disposals, and asset-management issues, for example, Ms. Knapp wrote: “Here is an example of where we are at with fleet confusion.” Two days later, on January 10, 2013, Ms. Knapp, in response to a question from Mr. Budd about an upcoming meeting,

responded with “[what you need to know] just that the whole file is in total disarray and no one knows what is going on, including me.”

[108] In support of his position that fleet related services were still being offered after he was laid off, the complainant underlined that Mr. Martin’s title appears to have changed, from “Fleet Project Officer” to “Fleet Operations Officer”, in 2014. When questioned about it, Mr. Martin explained that his position was to be reviewed but that it was not done before his departure in September 2015. Another person replaced him when he left NRCan.

[109] The complainant also presented to the Board a version of the “Fleet Management Policy”, which is dated November 21, 2014, that he argues supports his position that NRCan still offers fleet management services. For example, he pointed out that the policy still refers to a departmental fleet manager. In addition, section 7.4.2.2 refers exactly to what he was doing before he was laid off, that is: “Providing RCMs or Regional Fleet Managers with technical expertise when developing specifications for non-standard vehicles and equipment.” Section 7.4.2.6 also refers to one of his prior functions: “Ensuring that departmental motor vehicles bear external markings in accordance with the Federal Identity Program.” He also made similar observations with respect to other sections of the policy.

[110] Based on all of this, the complainant’s position is that NRCan still offers fleet management services and that he should not have been laid off.

Conclusions based on the evidence

[111] There is a reasonable explanation; however, why several fleet related services were still offered after the complainant was laid off. The respondent was going through a period of change and some services were offered as an intermediary measure during the reorganization. After a transitional period, nevertheless, the CMSS role was limited to providing advice to the sectors on policy issues related to fleets and to mandatory reporting required by central agencies.

[112] For instance, in response, to an access-to-information request the complainant made to help support his belief that Fleet Management duties that were cut during WFA activities were transferred to other departmental employees, Ms. Crosby responded, on September 20, 2013, as follows: “Since the centrally managed NRCan

fleet has been eliminated, no related duties are required or have been transferred to other employees in the department. As a result, there are no such documents.”

[113] The complainant subsequently requested further clarification on the question, to which Ms. Crosby responded on October 7, 2013 as follows: “I spoke with ATIP and confirmed that no duties related to the centrally managed fleet that has been eliminated were transferred to any NRCan employees, thus we have no such evidence.”

[114] On March 3, 2014, the complainant’s representative also sought clarification from Ms. Knapp with respect to the two service agents’ tasks. The request read as follows:

During the meeting, you stated that there is no more Booth Street Fleet as you had proceeded with a formal transfer of assets and that there were no services provided from CMSS anymore to Sectors as they were now responsible for their vehicles.

This leads me to ask why there would be a need for 2 Fleet Technical Services Agents in CMSS ...? Can you please let me know what their respective duties are in relation to Fleet or pool at this time.

[115] In response, Ms. Knapp answered as follows: “Thank you for bringing this to our attention. These two employee [sic] are no longer performing these functions, so we will insure [sic] that their titles are corrected as soon as possible.”

[116] It is a deputy head’s prerogative to layoff an employee when that employee’s services are no longer required by reason of, as stated in s. 64(1) of the *PSEA*, the lack of work, the discontinuance of a function, or the transfer of work or a function outside certain portions of the federal public administration. Therefore, a deputy head has the authority to layoff an employee if his or her services are no longer required.

[117] In this case, in the EAP of 2012, NRCan stated its commitment to reduce the size of its vehicle fleet across its operations. It then proceeded to close the Booth Street Fleet and to reduce its vehicle pool inventory. Ms. Knapp and Ms. Crosby confirmed that the Booth Street general-purpose passenger vehicles were disposed of and that the number of special vehicles, especially in the Canadian Forestry Sector, was reduced. Fleet management was also decentralized, and the sectors became responsible for following fleet management policies and practices for the vehicles they kept. However, the CMSS retained responsibility for policy advice and reporting. The corporate

departmental fleet reporting responsibilities were assigned to the Asset Management Section.

[118] Given those organizational changes, it was not unreasonable for the respondent to conclude that some employees' services would no longer be required.

[119] As the deputy head decided to eliminate the centralized management of the 60 NCR vehicles, decisions had to be made as to which services and positions were no longer required. Ms. Crosby and Ms. Knapp explained that the Fleet Manager and his line manager, an acting director (these two positions have been eliminated), were mandated to come up with recommendations for senior management as they knew best the functions of those implicated in fleet management. In turn, they used the following logic as the basis for their recommendation: if 80 percent of an employee's work consisted of handling the Booth Street Fleet or parking or consisted of providing technical advice, then the employee's position was no longer required. Thus, those who were declared surplus were those for whom management found that 80 percent of their work consisted of accomplishing these tasks, which no longer needed to be accomplished. On the other hand, those who were not declared surplus performed tasks that still needed to be performed.

[120] Ms. Crosby and Ms. Knapp explained that Mr. Martin's position, for example, was not impacted by the proposals because his tasks, which consisted mainly of accomplishing administrative advisory and policy work, still needed to be performed. While NRCan reduced its fleet by 74 vehicles during the transition period, its fleet still consisted of 215 vehicles as of December 2014. Therefore, the CMSS was responsible for some residual work. Management understood that the fleet project officer's primary activities were to advise on policy issues and provide the mandatory reporting required by central agencies. This position's functions included providing administrative support to allow NRCan to carry out its tasks. Therefore, the decision was made to retain this administrative position. For similar reasons, two GT 2 positions were also retained. While the Booth Street Fleet was closed, two vehicles were retained, i.e. one vehicle for the Deputy Minister and one vehicle for mail service. Therefore, the decision was made to retain two GT 2 employees to drive these two vehicles.

[121] However, with the fleet management decentralization, the complainant's services would no longer be required. The sectors were informed that, as a result of the decentralization, they would be responsible for vehicle acquisition, maintenance, and disposal; for ensuring that they operated the vehicles within required policies and procedures; and for accurately reporting all required data on usage and fuel purchases to the SSO as required. These were tasks that the complainant accomplished regularly from 1988 to 2012, in addition to providing technical, mechanical, and maintenance advice for the fleet and overseeing the Booth Street Fleet's operations. Thus, there was no longer a need for him to accomplish these tasks. In sum, there was no longer a need to have a licenced mechanic on staff to provide expert advice and guidance to the sectors. Therefore, it was agreed that the complainant would be laid off.

[122] Considering all that, it was not unreasonable to conclude that the complainant's services would no longer be required.

[123] It is true that these changes were not accomplished overnight and that there was a transition period. At the hearing, Mr. Martin confirmed that he developed policy and produced statistical reports as an AS 03 from 2008 until he left in 2015. He was also engaged in a range of other work, for example, reporting on fleet gas emissions and preparing reports on life-cycle management. He did some of this work in conjunction with the complainant before his layoff. However, his tasks evolved over the years.

[124] Ms. Knapp testified that the implementation period for the reorganization lasted approximately two years. She and Ms. Crosby confirmed that during the transition period, the fleet project officer and the two service agents performed some of the complainant's tasks.

[125] However, the fact that during the transition period, these individuals accomplished some of the complainant's previous functions is not necessarily evidence that the respondent still offers the fleet management services it offered before the layoffs. These services were offered only temporarily, while NRCan was adjusting to the situation. The evidence shows that some of the services initially offered became the sectors' responsibility. An example is renewing vehicle licence plates.

[126] In addition, the document entitled "NRCan Vehicle Fleet Reduction and Restructuring of Fleet Management", prepared in 2012, stated that the future provision

of maintenance management services would have to be clarified. The document also stated that the three remaining employees could be tasked with a variety of other tasks outside the fleet realm depending on the volume of work. The plan for the three remaining employees was also described as follows in the “Implementation, Monitoring and Reporting Plan” (updated on May 31, 2012): “The employees remaining in the Fleet Management Section will have their position rewritten by October, 2012 to ensure all essential corporate functions are still provided including overseeing the fleet policy framework.”

[127] As of 2014, the SSO’s Fleet Operations were however limited to carrying out the following policy and operational responsibilities:

- *Develop and publish NRCan policies and procedures regarding departmental motor vehicles, their life cycle management and utilization, including those related to the reporting of accidents*
- *Manage and maintain the departmental fleet databases, including inventory tombstone information, operating data on kilometres driven, fuel consumption, and maintenance costs*
- *Monitor the operation, use, maintenance and repairs of departmental vehicles used by NRCan employees, to ensure compliance with departmental and Treasury Board motor vehicle policy instruments:*
 - *NRCan Fleet Management Policy*
 - *Treasury Board Directive on Fleet Management: Light Duty Vehicles*
 - *Treasury Board Directive on Fleet Management: Executive Vehicles*
- *Respond to enquiries from NRCan employees on any fleet related issues (e.g., who can drive a Crown vehicle, who can be a passenger, what is covered by insurance, what are the roles and responsibilities of an NRCan vehicle fleet use)*

[128] Thus, after the transition period, although not all fleet-related duties were eliminated, the CMSS’ role was limited to providing advice to the sectors on policy issues related to fleets and to mandatory reporting required by central agencies. Ms. Crosby and Ms. Knapp confirmed that the fleet project officer and the two service agents had modified duties by then. Mr. Martin, the fleet project officer, is the only one

who kept doing fleet-related work, as the CMSS continued offering administrative support to the sectors, but no technical advice was provided. The two service agents no longer carry out fleet-related duties. Their positions report to the SSO and, as seen, are in the area of delivering mail and driving the minister's car.

[129] Mr. Martin confirmed that, once the transition period ended, his work consisted of providing policy support and of being the contact person for fleet-related questions. In essence, he produced internal and external reports and provided policy advice to the sectors for their acquisitions and disposals of special-service vehicles. By then, he no longer reported to the regional manager, SSO, Atlantic, but to the Asset Management Section head.

[130] Mr. Martin's 2014-15 work objectives also confirm the CMSS's new limited fleet management role. Mr. Birk also confirmed that those work objectives only included tasks that are in the fleet policy and operational guidance areas.

[131] In sum, it is true that Mr. Martin was assigned some of the complainant's tasks after he left. However, after the transition period elapsed, he had a new limited role in fleet management with the Asset Management Section.

[132] Henceforth, when the sectors consider fleet purchases now, they need to request a fleet number from the Asset Management Section. Then, once a vehicle is received, the Asset Management Section requires information to keep the assets up to date in the fleet management database. Forms are also filled in and sent to the Asset Management Section when sectors dispose of their vehicles.

[133] It is a fact that some confusion arose with respect to fleet-related duties during the adjustment period. With respect to certain of the comments Ms. Knapp made in the emails the complainant referred to, she explained that they were not related to fleet and that she had made a very poor choice of words. She further explained that the meeting in question covered a wide range of issues and that she was trying to manage the transition and to avoid chaos.

[134] Ms. Crosby and Ms. Knapp also agreed that the Fleet Management Policy is not accurate, that it needs to be updated, and that many clarifications will need to be made. Ms. Crosby clarified that NRCan does not have technical staff anymore and that the policy's content is not a description of the situation as it stands but of the

situation before the WFA. Ms. Knapp also confirmed that there is no departmental fleet manager anymore.

[135] For all of these reasons, I find that the complainant has not established that the respondent wrongly concluded that his main functions were to be eliminated and that he therefore should not have been laid off.

3.1.3. Allegation that the DRAP proposal was insufficiently documented

[136] The complainant maintains that the DRAP proposal was insufficiently documented. The SERLO Guide requires departments to document their decisions.

[137] The evidence includes, however, documentation comprising some comprehensive descriptions of the proposal. A rationale was also produced with respect to the elimination of the complainant's position. It read as follows:

Workforce Adjustment (WFA) Rationale TAB7 and U16

Guy Pinard - Context:

- *This GT 05 Fleet Technical Advisor position provides technical expertise for the sourcing and disposal of vehicles, including general purpose vehicles in the NCR. No other GT 05 positions are associated with this activity.*

Rationale:

- *Discontinuance of work, due to elimination of the Booth Street general purpose vehicle pool, and NRCan's commitment to the use of technology to minimize travel.*

[138] Ms. Crosby did acknowledge that she had a number of discussions with the acting director and Mr. Robinson, who were in charge of making recommendations, and that not everything that was discussed was written down. However, all conclusions were documented.

[139] Taking into account all evidence that was produced, I find that the complainant has not established that the DRAP proposal was insufficiently documented.

Conclusion

[140] For all of the above reasons, I find that the evidence does not support the allegations that: (1) the respondent misunderstood the complainant's role; or (2) the respondent wrongly concluded that his services would no longer be required; or (3) the respondent insufficiently documented its decision to lay him off. Therefore, I conclude that the complainant has not established that the respondent abused its authority by relying on inadequate information to lay him off.

3.2. Was there a prior conflict between the associate executive director and the complainant that raised a reasonable apprehension of bias that would constitute an abuse of authority?

[141] To establish bias, it is not necessary that actual bias is found. A reasonable apprehension of bias may constitute an abuse of authority. (See *Denny v. Deputy Minister of National Defence*, 2009 PSST 29 at para. 125, referring to *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394.) In *Denny*, the Tribunal stated at paragraph 124 that "(s)uspicious, speculations or possibilities of bias are not enough and bias must be real, probable or reasonably obvious."

[142] The complainant testified that he had a strained working relationship with Ms. Knapp because he had contested a decision she made in the past. He explained that she had decided that he would not be paid the difference for an eight week period during which he occupied a position in an acting capacity. And he stated that he had difficulties with her when the time came for her to approve his WFA form. The difficulties he experienced concerned cashing out his annual leave for previous years.

[143] Ms. Knapp testified that she barely knew the complainant. However, in the difficult context under which employees were being laid off, she had to inform him of the layoffs. From her perspective, no significant conflict arose between them.

[144] There is no evidence of actual bias in this case. Moreover, insufficient evidence was presented to support a finding of reasonable apprehension of bias. While the complainant may have perceived that there existed a conflict with Ms. Knapp, I do not find that a reasonably informed bystander would reasonably apprehend bias in these circumstances. The alleged difficulties with Ms. Knapp with respect to his WFA form

arose after the decision was made to lay him off, and had no bearing on his selection for layoff. Moreover, with respect to the other reason cited by the complainant in support of his bias allegation, there is no evidence before me as to when this acting pay issue arose, and the complainant has not alluded to any recent events that could be linked to the decision to select him for layoff.

[145] I therefore find that the complainant has not proven a reasonable apprehension of bias on the part of Ms. Knapp with respect to the decision to lay him off.

3.3. Did the respondent abuse its authority by demonstrating personal favouritism towards the other person who worked in the eliminated part of the organization but who was neither affected nor laid off?

[146] Under section 2(4) of the *PSEA*, abuse of authority includes personal favouritism.

[147] The complainant alleges that the fact that Mr. Martin was not impacted by the decisions made as a result of the government wide fiscal restraint is due to personal favouritism. Mr. Martin, who was classified at the AS 03 group and level, worked in the eliminated part of the organization but was neither affected nor laid off.

[148] There is no direct evidence, however, of a relationship between senior management and Mr. Martin. Ms. Knapp testified that she had never met the employees in the Fleet Management Section before her arrival, when the DRAP proposal was discussed.

[149] The evidence established that the fleet manager and the acting director made recommendations for implementing the DRAP proposal, which identified the positions that would be affected by the cuts and those that would be retained. Ms. Knapp explained that she was advised that the complainant's position could be eliminated because NRCan was disposing of the Booth Street Fleet and some of the long-term leased vehicles that the Fleet Management Section looked after for the sectors. In addition, NRCan was decentralizing fleet management services. Ms. Knapp was told that the complainant was overseeing the Booth Street Fleet and that, as a licensed mechanic, he provided the technical expertise required in NRCan. She further explained that given the three areas of work that were being eliminated (fleet, parking, and technical expertise), it made sense to eliminate the complainant's position. The

fleet manager's position and the acting director's position were also eliminated at the same time.

[150] With respect to Mr. Martin, Ms. Knapp clarified that he was retained because senior management deemed that his services would still be required given the CMSS's responsibility in the fleet policy area.

[151] In *Glasgow v. Deputy Minister of Public Works and Government Services Canada*, 2008 PSST 7, the Tribunal stated the following at paragraph 41:

... Undue personal interests, such as a personal relationship between the person selecting and the appointee should never be the reason for appointing a person. Similarly, the selection of a person as a personal favour, or to gain personal favour with someone else, would be another example of personal favouritism.

[152] In the present case, no evidence was presented of a personal relationship between the fleet project officer, Mr. Martin, and any member of senior management involved in the decision to layoff the complainant.

[153] In the circumstances, I conclude that the complainant has not proven that the respondent abused its authority by showing personal favouritism toward Mr. Martin.

[154] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[155] The complaint is dismissed.

July 22, 2016.

**Nathalie Daigle,
a panel of the Public Service Labour Relations
and Employment Board**