



Au service de l'équité

Northwest Territories Ombud
Protecteur du citoyen des Territoires du nord-ouest

Ineligible for the Public Service

FAIRNESS IN REHIRING

Personnes inadmissibles à l'emploi dans la fonction publique

ÉQUITÉ EN MATIÈRE DE RÉEMBAUCHE

Special Report 02-2024
Rapport spécial 02-2024

Le présent document contient la traduction française du message de la protectrice du citoyen.

Contents

- FROM THE OMBUD 3**
- MESSAGE DE LA PROTECTRICE DU CITOYEN..... 5**
- INTRODUCTION 7**
 - Principles of Administrative Fairness 7
- BACKGROUND 8**
 - 3-Year Ineligibility List (“the practice”) 8
 - Human Resource Manual (“the manual”) 9
- INVESTIGATION SCOPE AND PROCESS 10**
 - What we investigated10
 - Investigation Process10
- ANALYSIS..... 11**
 - Is the practice lawful?..... 11**
 - The *Public Service Act*11
 - Authority for the practice11
 - The Manual..... 12
 - Is the practice otherwise unfair?..... 13**
 - Justification for the practice..... 13
 - Impact of the practice on individuals 13
 - Contexts in which the practice is applied 14
 - Summary of Analysis 15
- OPINION OF THE OMBUD 16**
- RECOMMENDATIONS17**
- Appendix A**
 - Response from Finance

From the Ombud

The investigation that led to this report was about a longstanding government-wide practice that places some former employees on a list that prevents them from being rehired for 3 years. This could happen, for example, if an employee was dismissed for cause, abandoned their position, or was rejected on probation.



Territorial government departments and agencies are among the largest employers in the NWT. Not being eligible for re-employment in the public service for a period of time could have potentially life-changing consequences for a person's career and financial situation. Any practice that has such a severe impact on individuals needs to meet a high standard of fairness.

The investigation did uncover some fairness concerns.

First, Finance could not confirm whether or how the list was ever properly authorized under the *Public Service Act*. A Department or agency should be able to say with certainty where the legislative authority for its policies and practices comes from. This includes knowing who has the authority to change them, and how.

Second, the practice is briefly mentioned in the GNWT's *Human Resources Manual*, but is not completely explained anywhere. For rules and practices to be fair and consistently applied, people have to know what they are and how they work.

Third, the practice has never been considered through a systemic equity lens. When decisions are made on a case-by-case basis, as when an individual employee is terminated, systemic fairness issues can go unnoticed. It is possible that the practice is impacting some groups more than others, and could be inconsistent with broader employment equity goals and best practices that have evolved in the many years since the practice was established. An authority can do a good job of treating each individual fairly and still miss the bigger picture of systemic fairness and equity. Authorities do need to take a step back from time to time to make sure that they are seeing the forest as well as the trees.

Finance has committed to addressing these issues.

Across territorial departments and agencies, there are no doubt many other practices that are not clearly explained in writing, and/or that have been in place for so long that no one is sure anymore how or why they began or whether they still fit with more recent standards and policy goals. My hope is that other authorities will take note of this report

and will consider where they may need to refresh and reconsider their own manuals and practices to ensure they provide a basis for fair outcomes, processes, and services.

Colette Langlois
Ombud

June 2024

Message de la protectrice du citoyen

L'enquête qui a mené à la rédaction du présent rapport porte sur une pratique pangouvernementale de longue date, qui consiste à placer d'anciens employés sur une liste les empêchant d'être réembauchés pendant une période de trois ans. Les employés pouvaient par exemple être visés s'ils avaient abandonné leur poste, ou si on les avait congédiés pour un motif déterminé ou en cours de période probatoire.



Les ministères et les organismes du gouvernement territorial comptent parmi les principaux employeurs aux Territoires du Nord-Ouest (TNO). Le fait d'être non admissible à la réembauche à la fonction publique pendant un certain temps peut avoir des conséquences à vie sur la carrière et la situation financière d'une personne. Toute pratique ayant des répercussions d'une telle importance se doit de respecter des normes strictes concernant l'équité.

L'enquête a permis de mettre en lumière certains points préoccupants à ce sujet.

En premier lieu, le ministère des Finances n'a pas pu confirmer si une telle liste était effectivement autorisée en vertu de la *Loi sur la fonction publique* ni comment elle avait été autorisée. Un ministère ou un organisme du gouvernement doit pourtant être en mesure d'établir avec certitude le cadre légal régissant ses politiques et ses pratiques, ce qui sous-entend que l'on doit connaître qui est autorisé à les modifier et de quelle manière ils sont autorisés à le faire.

En deuxième lieu, même si cette pratique est brièvement mentionnée dans le Manuel des ressources humaines du gouvernement des Territoires du Nord-Ouest (GTNO), elle ne fait nulle part l'objet d'une explication exhaustive. Or, pour que des règles et des pratiques puissent être équitables et appliquées de façon cohérente, chacun doit savoir en quoi elles consistent et comment elles fonctionnent.

En troisième lieu, cette pratique n'a jamais été envisagée sous l'angle de l'équité systémique. En effet, la prise de décisions au cas par cas (pour mettre fin au contrat d'un employé, par exemple) peut entraîner des problèmes d'équité systémique susceptibles de passer inaperçus. Il se peut que cette pratique touche certains groupes plus que d'autres, et que celle-ci ne cadre pas avec les cibles et les pratiques exemplaires plus générales en matière d'emploi, lesquelles ont évolué au fil des années et depuis la création de cette liste. Une administration peut traiter équitablement chaque personne, sans avoir une vision globale de la situation en matière de justice et d'équité systémiques. Les administrations doivent parfois prendre du recul pour voir la forêt derrière les arbres.

Le ministère des Finances s'est engagé à remédier à ces problèmes.

Il ne fait aucun doute que, dans les organismes et les ministères territoriaux, de nombreuses autres pratiques ne sont pas clairement expliquées par écrit ou sont en vigueur depuis si longtemps que plus personne ne sait exactement comment ni pourquoi elles ont été adoptées, ou si elles respectent toujours les objectifs les plus récents en matière de normes et de politiques. J'espère que d'autres administrations prendront bonne note du présent rapport et qu'elles évalueront le besoin ou non de rafraîchir ou de revoir leurs manuels et leurs pratiques, afin qu'elles disposent des bases nécessaires pour obtenir des résultats, mettre en place des processus et fournir des services équitables.

Colette Langlois
Protectrice du citoyen

juin 2024

Introduction

The investigation that led to this report was “own-motion”. This means that it was started on the Ombud’s initiative and was not based on a specific complaint.

The Department of Finance (Finance) is responsible for overall GNWT human resources policy and shared services. This includes advising public service managers on labour relations matters and maintaining and updating the GNWT’s *Human Resource Manual*.¹

This investigation looked into the specific practice of placing some former employees on a list which prevents them from being re-hired in the public service for three years following termination of their employment. Throughout this report, we refer to this as “the practice”.

In this report we provide background on the practice, present our analysis and findings, and provide recommendations to Finance.

Principles of Administrative Fairness

The Ombud has a mandate to investigate “maladministration”, or “administrative unfairness”. Guidance on the principles of administrative fairness comes from the *Ombud Act*², administrative law, and from standards that legislative ombuds have developed together.³

Standards of administrative fairness can be grouped into three categories: fair decisions (what was decided?); fair process (how was it decided?); and fair service (how was the person treated?).⁴ This investigation primarily considered decision fairness, and specifically the standards of lawful and fair rules and equity.

The fairness standard of equity includes taking steps to ensure people are not treated unfavourably or subjected to lesser outcomes because of their personal characteristics. It can include proactive steps to address historical and systemic barriers faced by equity deserving groups. Policies and practices that apply to everyone equally may still be unintentionally inequitable or discriminatory. Authorities can help avoid this outcome by considering policies through an equity lens.⁵

¹ Available for review at <https://my.hr.gov.nt.ca/human-resource-manual>

² S.N.W.T. 2018, c. 19, ss. 33(1).

³ See, e.g., Canadian Council of Parliamentary Ombudsman (2019). *Fairness by Design: An Administrative Fairness Self-Assessment Guide*. Available at www.nwtombud.ca

⁴ For more about administrative fairness, see www.nwtombud.ca

⁵ For more on equity, see *Fairness by Design*, note 3 above, at 5.1.

Background

3-Year Ineligibility List (“the practice”)

According to information provided by Finance, individuals are automatically placed on a list of people who are ineligible to be rehired in the public service for a 3-year period following their termination if they:

- Have been dismissed for cause;
- Have abandoned their position;
- Have resigned with prejudice / on the heels of discipline; or
- Have been rejected on probation for misconduct.

Finance further advised that the ineligibility period is not automatically applied to non-disciplinary issues, for example, if an employee is rejected on probation due to unsuitability, and/or for innocent absenteeism. While the default period is 3 years, Finance clarified that it can be reduced or increased, and/or can be limited to certain types of positions or certain authorities as part of a settlement agreement with the terminated employee or at the discretion of the employer. For example, a person might be ineligible for rehiring by one GNWT Department only but not across the public service, or for rehiring as a finance officer but not for other positions.

Finance advised that as of October 1, 2023, 39 individuals were ineligible for public service employment. The reasons for being placed on the list were abandonment of position (11); dismissal with cause (20); resignation with prejudice (4); and rejection on probation for misconduct (4).

Although Finance was unable to provide an exact date of when this practice came into effect, they were able to confirm that it has been in effect since some time before 2006.

The practice is not mentioned in the *Public Service Act*⁶ or regulations, or in any collective agreements or employee handbooks for non-unionized employees. Finance confirmed that the practice is only documented in the *Human Resource Manual*.

⁶ R.S.N.W.T. 1988, c. P-16.

Human Resource Manual (“the manual”)

Section 701 of the manual is titled “Employee Discipline”. The only reference to the practice as of January 2024 is 701(50), which deals with letters of dismissal. The provision reads:

(50) The letter of dismissal should clearly state the reasons for the dismissal, why further employment cannot continue and that dismissal of the said position is effective immediately. This letter also informs the dismissed employee of his/her three year ineligibility of employment with the Territorial Public Service in order to re-establish a positive work record.
[emphasis added]

A previous section of the Manual, 1601, addressed termination on probation, and included the following provision:

An employee who has been dismissed or rejected on probation, or deemed to have abandoned their position in the Territorial Public Service is considered ineligible for reemployment for a period of at least three years from the date of their dismissal, rejection on probation or abandonment.

Section 1601 was taken out of the Manual at some point in 2023.

These provisions suggest the 3-year period is non-discretionary and always makes the person ineligible for rehiring across the entire public service. However, as noted in the previous section, this is in practice a default position that can be changed with the employer’s agreement. The ineligibility period can be shorter or longer, and it does not necessarily have to apply across the entire public service.

Investigation Scope and Process

What we investigated

We investigated the fairness of the practice of placing some former employees on a list which prevents them from being re-employed in the public service for 3 years following termination of their employment. In particular we investigated:

- Whether the practice is lawful; and
- Whether the practice is otherwise unfair.

Investigation Process

We reviewed the *Public Service Act* and regulations, the *Human Resource Manual*, other relevant human resource policies, and publicly available reports and statistics. We initially sent questions to Finance in writing and requested written responses, which they provided. This was to allow Finance to gather corporate knowledge and information before providing a Departmental response. We followed up with discussions with Finance officials to clarify information and obtain further details.

Analysis

Is the practice lawful?

The Public Service Act

The Minister Responsible for the Public Service has under s. 3(1) of the *Public Service Act* “the management and direction of the public service” and under s. 16 “the exclusive right and authority to appoint persons to positions in the public service”.

Taken together, these provisions provide the Minister with lawful authority to establish human resource policies and practices. This authority may be limited by other laws, such as human rights legislation, as well as obligations such as those arising from collective agreements.

S. 4 of the Act also allows the Minister to delegate their powers, functions, and duties to public service employees.

Authority for the practice

The Minister’s broad authority under the *Public Service Act* would include the power to establish the practice that is the subject of this investigation. This is not in question. It would also allow the Minister to delegate that power to an employee, who would presumably be either the Deputy Minister of Finance or a senior official within the Human Resources branch of Finance.

However, Finance was unable to verify whether or how the authority granted by the *Public Service Act* was properly exercised in order to establish the practice. Specifically, they were unable to produce either a Ministerial directive establishing the practice, or alternatively, a delegation instrument authorizing an employee to establish the practice.

Fairness requires a clear chain of authority from powers conferred on Ministers and officials by Acts of the Legislative Assembly through to the policies and practices Departments and other authorities use in their day-to-day work. The reason for this is not only to be able to confirm that government bodies have the legal authority to do what they are doing. In order to have transparency and accountability, we need to know where direction to public servants is coming from and who is making the decisions. We also need to know who has the authority to change a policy or practice. For example, Finance was unable to definitively answer the question of who would have the authority to increase the default ineligibility period from 3 years to 4.

The Manual

The Manual is the key reference for human resources practitioners and managers throughout the public service. It is also a massive document that has evolved over decades of changes to the *Public Service Act* and regulations, Executive Council and Financial Management Board policies, collective agreements, and other sources of law. It requires continual updating to maintain consistency.

Finance has advised that a full review of the Manual was already underway before this investigation began. This is an enormous task that is likely long overdue and will take a great deal of effort. The current Finance team is to be credited for taking it on. Finance has indicated that it is preparing a review action plan for the Manual and will prioritize sections where the chain of legislative authority is not clearly set out.

However, at present, it is not clear that the practice was established within the Minister's authority under the *Public Service Act* because there is no documentation of how it was approved. Further, the practice is not clearly described and documented anywhere. The Manual does not match the description Finance provided to us, even less so since section 1601 was removed.

Is the practice otherwise unfair?

Even if the practice were properly authorized and documented, its fairness might still be questioned.

The practice results in some individuals being entirely ineligible for re-employment in the public service for a period of 3 years. As noted above, Departments and other agencies with public service employees automatically place individuals on the list following dismissal for cause; resignation with prejudice; rejection on probation for misconduct; and abandonment of position.

Justification for the practice

Finance advised that the practice is in keeping with the employer's "obligation to both hire and dismiss employees responsibly, which includes not permitting employees who engaged in problematic conduct to immediately be re-employed with the same employer." The practice is not the only tool authorities have at their disposal to achieve this objective; for example, reference checks with candidates' past supervisors are required before hiring.

When asked why the default ineligibility period is set at 3 years (as opposed to 1 year or 2 years, for example), Finance responded that "3 years is considered a reasonable timeframe" for an individual to re-establish a positive work record. They did not provide any substantiation in support of this view, such as industry best practices or examples of professional literature.

Impact of the practice on individuals

According to the 2022/2023 *Public Service Annual Report*, there were 6,481 public service employees as of March 2023.⁷ This corresponds to approximately one quarter of the NWT workforce, which averaged just under 24,000 individuals in 2023.⁸ Territorial public service jobs are sought after by many workers, in part because they offer higher wages and more benefits than most other employers, and in part because there are few other options in some NWT communities.

Given this labour market environment, being placed on an ineligibility list could have serious economic and career consequences for many individuals. The impact could be

⁷ Report is available for download at:

https://www.fin.gov.nt.ca/sites/fin/files/resources/public_service_annual_report_2022-2023.pdf

⁸ NWT Bureau of Statistics. *Newstats* (January 5, 2024), "Labour Force Activity: December and Annual Review 2023". <https://www.statsnwt.ca/labour-income/labour-force-activity/2023%20Annual%20LFS.pdf>

compounded in most communities outside of Yellowknife, where there are fewer opportunities and the average employment rate in 2023 was 58.9%, and among Indigenous residents, whose 2023 employment rate was 54% compared with 82% for non-Indigenous residents.⁹

The GNWT has recently introduced or updated policies and programs to mitigate public service employment barriers for these groups, for example, the *Remote Work Policy* and the *Indigenous Recruitment and Retention Framework*. As of October 2023, 17, or just under half, of the 39 individuals on the ineligibility list had Indigenous Aboriginal (P1) status under the *Affirmative Action Policy*. The practice, if applied in situations where it is not justified, could be undermining other proactive policies that the GNWT has put in place to improve employment equity in the public service.

The practice creates a positive barrier to employment in a large sector of the NWT economy for individuals who are put on the ineligibility list, some of whom come from equity deserving groups that are already at a disadvantage in the NWT labour market. It applies across the board to a range of circumstances that vary in seriousness and severity. It has been in existence since at least 2005, and possibly much longer, and there is no evidence that it was ever considered through a systemic equity lens. An equity lens might, for example, identify factors that should be considered in the use of discretion to make the ineligibility period shorter or longer, or to a more limited range of public service jobs. It could also help identify patterns or systemic issues that are not apparent when considering individual cases in isolation.

The reasons for the practice might or might not outweigh any equity concerns. The fairness issue is that Finance has not asked itself the question.

Contexts in which the practice is applied

The practice casts a wide net. The circumstances in which someone might be placed on the list can vary greatly. At one extreme an employee might be dismissed for activity that could lead to criminal charges, such as assault, theft, or purposeful destruction of property; for intentionally breaking laws intended to protect privacy and confidentiality; or for deliberately endangering workplace safety.

Another employee might make a serious error of judgment or a mistake at a new job that could justify their rejection on probation for misconduct. However, they might still be capable of succeeding at another public service job with different or less demanding responsibilities.

The default 3-year ineligibility for re-employment with the public service would apply to these individuals the same as to someone who was dismissed for embezzling or for a serious and intentional safety breach that could have endangered the lives of their

⁹ Employment statistics from *ibid*.

coworkers or the public. Finance advised that in practice these and other factors do come into consideration on a case-by-case basis and can result in a longer or shorter ineligibility period, or in the ineligibility being limited to certain authorities or types of positions. However, this is not formalized anywhere and seems to be in contradiction of the *Human Resource Manual* provisions listed earlier in this report.

Summary of Analysis

The *Public Service Act* provides the Minister with the authority, which they may delegate, to establish practices such as the one that is the subject of this investigation.

The practice was established some time before 2006. Finance is unable to demonstrate that the practice was properly established in accordance with the authority provided in the *Public Service Act*. At present, the practice is not fully or clearly documented anywhere, including in the *Human Resources Manual*, which is currently under review.

Finance advises that the practice supports its obligation as an employer to hire and dismiss employees responsibly. The choice of a default of 3-years for the ineligibility period is based on what it considers a reasonable time frame for an individual to re-establish a positive work history. Finance did not provide any authority such as industry best practices or professional literature in support of the 3 year length of the ineligibility period or the practice in general.

Individuals are automatically placed on the list following dismissal for cause; resignation with prejudice; rejection on probation for misconduct; and abandonment of position. The employer has some discretion to reduce or lengthen the ineligibility period, or to limit it to certain authorities and/or certain types of positions rather than applying it across the public service.

The practice results in some individuals being ineligible for re-employment in the public service for a period of time. This may have serious economic and career consequences for some individuals given labour market conditions in the NWT. The impact may be more severe for members of some groups, such as individuals who live in most communities outside of Yellowknife, and Indigenous NWT residents. There is no evidence that Finance has ever considered the practice through a systemic equity lens. While Finance advised that the employer does consider on a case-by-case basis whether the circumstances leading to the termination and other factors justify the default 3 year ineligibility for rehiring for any public service position, this is not formalized and seems to be in contradiction of the *Human Resource Manual* provisions listed earlier in this report.

Opinion of the Ombud

A practice of designating some individuals as ineligible for re-employment in the public service is permissible under the *Public Service Act* and is not in itself contrary to law. However, Finance was unable to confirm that the current practice was established by either the Minister or their delegate through lawful exercise of the authorities conferred by the Act. While, in the absence of information about how the practice was established, I am unable to determine whether it is contrary to law within the meaning of 33(1)(a)(i) of the *Ombud Act*, Finance's uncertainty of whether and how the practice was properly authorized is unreasonable within the meaning of 33(1)(a)(ii) of the *Ombud Act*.

The lack of a clear statement of the practice in the *Human Resources Manual* or in any other document, is unreasonable within the meaning of 33(1)(a)(ii) of the *Ombud Act*.

Authorities have an obligation to hire and dismiss employees responsibly. The practice helps in fulfilling this obligation. It also has serious consequences for individuals on the ineligibility list, some of whom belong to equity deserving groups that are already disadvantaged in the NWT labour market. Finance has not considered the practice through a systemic equity lens. This omission is wrong within the meaning of 33(1)(a)(vi) of the *Ombud Act*.

Recommendations

1. It is recommended that Finance immediately cease its use of the re-employment ineligibility list until the practice is lawfully authorized by either the Minister or their delegate pursuant to the powers conferred by the *Public Service Act*.
2. It is recommended that as soon as possible on completion of recommendation 1, Finance include a clear and consistent statement of the practice in the *Human Resources Manual* and communicate it to users.
3. It is recommended that by March 31, 2025 Finance reconsider the practice through a systemic equity lens.
4. It is recommended that within 30 days of any changes to the practice as a result of recommendation 3, Finance reconsider the cases of any individuals who remain on the list to ensure their inclusion there meets the criteria of the revised practice.



June 7, 2024

Ms. Colette Langlois
Northwest Territories Ombud
#5-6 COURTOREILLE STREET
PO BOX 4297
HAY RIVER NWT X0E 1G5

Via E-mail: admin@nwtombud.ca

Dear Ms. Langlois:

Report – File OM-04-23 Rehiring Ineligibility List

Thank you for your report and the agency's own-motion investigation into the Government of the Northwest Territories' (GNWT) rehiring ineligibility list (list).

I appreciate the time you have taken in your report to outline your concerns with the list. Your report highlights that while the practice is permissible under the *Public Service Act*, information is missing to determine whether the Minister or their delegate was involved in its establishment. Further, your report states the practices need to be reviewed through a systemic equity lens.

A response to the recommendations contained in the Ombud's report is as follows:

1. Immediately cease its use of the list until the practice is lawfully authorized by either the Minister or their delegate pursuant to the powers conferred by the *Public Service Act*.

The Department of Finance will ensure that the chain of authority for implementation and operation of the practice is properly set out and requisite information about the practice, including these details, are made easily accessible to members of the public and employees of the public service.

2. Establish a clear and consistent statement of the practice in the Human Resources Manual and communicate it to users.

The Department of Finance will amend the Human Resource Manual and other affected resources as necessary to reflect the current practice, the authorities under which it operates, and to update the resources available to individuals involved in this process. The updated Human Resource Manual entry will set out more accurately the possible range of outcomes that can result from the practice and the conditions precedent necessary for the practice to be engaged. This update will provide clarity and will serve to alleviate concerns of the public that the practice is frivolous, that it is unfair, or that it is misapplied.

.../2

3. Reconsider the practice through a systemic equity lens and identify any appropriate changes.

The Department of Finance will explore and review the rehire ineligibility list practice under a systemic equity lens to determine and make any amendments to the practice necessary to ensure equity of experience for all employees.

4. Reconsider the cases of any individuals who remain on the list under the revised criteria as per recommendation 3.

The Department of Finance commits to reviewing the relevant circumstances of all individuals present on the rehire ineligibility list to ensure that all individuals on the list are there appropriately. The Department of Finance also commits to making reasonable efforts to inform those individuals whose circumstances no longer warrant inclusion on the list of this status change.

Sincerely,



William MacKay
Deputy Minister of Finance

c. Tara Hunter, Deputy Secretary Human Resources, Finance