



Public Service Alliance of Canada  
Alliance de la Fonction publique du Canada

Submission by the  
Public Service Alliance of Canada  
to  
the Government of Canada  
(Employment and Social Development Canada)  
on  
Accessibility Legislation  
February 27, 2017

## Introduction

The Public Service Alliance of Canada welcomes this opportunity to participate in the consultation on new accessibility legislation in order to remove barriers faced by persons with disabilities so that they may participate fully in society.

PSAC is the largest federal public sector union in Canada, presenting over 180,000 members. Ours is a diverse union that represents not only federal public service workers but also workers in the private and other public sectors across the country.

PSAC strongly believes that all people, including people with disabilities, should be able to fully participate in all aspects of life, including the workplace. The majority of PSAC members are employed in the federal public sector. Our comments will focus on issues affecting these workers and those who may wish to work in the federal public service.

We have identified the following key areas of concern:

- A. Employment Equity
- B. Accommodation
- C. Termination of Employment due to Disability
- D. Staffing

### **A. Employment Equity**

Employment equity is key to removing barriers and improving access to employment for persons with disabilities. Currently, workers in the federal jurisdiction are covered by the *Employment Equity Act* (EEA), which applies to the federal government, agencies, crown corporations, and federally regulated industries. Federal contractors are also partly included.

Despite this employment equity legislation being in place for more than two decades, there are still a number of barriers for persons with disabilities in the federal public service.

For example, Treasury Board's *2014-15 Employment Equity Annual Report* shows a troubling trend. The data show that the number of persons with disabilities leaving the public service is almost three times higher than those coming into the public service. Other information and data that we have, such as the Public Service Employee Survey, give an indication of what might be causing the high number of departures.

The *2014 Public Service Employee Survey* results showed that workers with disabilities have significantly higher rates of negative answers to survey

questions on such as having the materials and equipment to do their job, having the training and equipment needed to ensure their health and safety at work, and receiving meaningful recognition for work well done.

According to the Survey results, workers with disabilities were more likely than workers without disabilities to have a negative experience in being accepted as an equal member of the workplace 'team' or in being selected for a position. They were almost twice as likely to have suffered harassment on the job in the previous two years.

There are also a number of problems with the current legislative framework that need to be addressed to improve employment for persons with disabilities in the federal sector. The current legislation is not broad enough and many workers fall through the cracks. In addition, there is little enforcement or accountability for meeting the requirements of the *Employment Equity Act*.

## **PSAC recommendations on employment equity**

### **1. Review the *Employment Equity Act***

There has been no comprehensive legislative review of the *Act* since 2002. The *Act* states that it be reviewed every five years. When this review does take place, there must be meaningful consultations with all stakeholders, including people with disabilities and bargaining agents.

### **2. Expand the *Employment Equity Act's* coverage**

The *Act* should cover the Senate, the House of Commons and the Library of Parliament. It should also cover the Canadian Armed Forces and the RCMP (civilians and officers). Currently, these workplaces are exempt. This means these employers are not obligated to have a representative workplaces nor to remove barriers to persons with disabilities.

### **3. Amend the *Employment Equity Act* to include measures for accountability and enforcement**

Under the current *Act*, employers remain unaccountable and, as a result, there is no way to ensure they are meeting their obligations under the legislation. The lack of accountability and monitoring has been noted by the Standing Senate Committee on Human Rights in its reports on employment equity.

The delegation of authority by Treasury Board to deputy heads has led to an inconsistent application of the *Act*. If representation rates are examined

closely, the representation rate for persons with disabilities remains constant. However, people with disabilities are leaving the public service at a higher percentage than their representation rate and the hiring rate for that equity group. Yet, there have been few measures to address this issue because there is no or little overall “representation gap”. One reason for not pushing for measures to ensure application is because the Treasury Board Secretariat (TBS) and the Public Service Commission (PSC) have delegated this authority and therefore cannot direct nor require departments to take necessary measures. Consequently, there cannot be any follow up with meaningful consequences for failure to act.

PSAC specifically recommends the following steps.

- Treasury Board and Public Service Commission must make departments accountable, monitor their employment equity progress and put the necessary resources in place to address the barriers for persons with disabilities.
- Require the Treasury Board policy on employment equity to contain specific direction and accountability measures for departments.
- Put in place strong human rights related policies on issues such as accommodation, telework, and harassment that are effective, timely and have meaningful consequences for non-compliance. There has been a move to get rid of stand-alone policies and merge them with more general workplace policies that are much less effective.
- Make joint union-employer employment equity committees mandatory and allow unions to raise issues to address barriers for persons with disabilities and have them resolved. Currently, few employment equity committees exist. Where they do, some do not function well or have meaningful consultations.
- There must be a meaningful mechanism that allows unions to file human rights complaints which can trigger an audit where there are problems in a workplace. These complaints can be based on data from employment equity plans or other relevant data. Currently, there are barriers in the *Canadian Human Rights Act* (CHRA) that prohibit this from occurring. While there is a process for employment equity complaints, it is through the employment equity audit process. We believe this mechanism has not been effective.
- The Canadian Human Rights Commission must conduct regular in-depth audits on all employers covered under the *Act*, preferably every one to three years. The process for employment equity audits have changed over the years, including fewer audits and the use of the practice of “streamlining” audits, so there are fewer reporting requirements.

#### **4. The Federal Contractors Program must be strengthened**

The previous government made changes that weakened the Federal Contractors Program. In 2013, the government changed the threshold for which employers are covered, reducing the number of employers covered under the Program from 1000 to just over 600.

The employment equity requirements were also significantly reduced. Companies no longer have to meet requirements such as adopting accountability mechanisms for employment equity, consulting and collaborating with bargaining agents or employee representatives, adopting measures to remove barriers, adopting reasonable accommodation measures, adopting monitoring procedures or reviewing and revising their employment equity plans.

Also, instead of submitting their compliance measures when selected for a government contract, contractors will now only have to submit a workforce analysis and their representation goals a year after obtaining an initial contract.

As well, employment equity auditors at EDSC (formerly HRSDC) were laid off so there are no or few auditors to actually do audits.

These changes were a step backward for employment equity and inclusion for persons with disabilities. The Federal Contractors Program should be restored and strengthened.

PSAC specifically recommends these actions.

- The government needs to restore the thresholds for contractors coming under the program, i.e. employers with contracts of more than \$200,000.
- The requirements for these employers must be the same as those for other employers under the *Employment Equity Act*. These changes will ensure that more opportunities are created for persons with disabilities, and that barriers in these workplaces are addressed.
- Audits must be conducted to ensure employers are complying with the legislation.

#### **5. The Canadian Human Rights Commission must be staffed appropriately to conduct regular audits under the *Employment Equity Act***

For the past several years, the budget and staff of the Canadian Human Rights Commission have been under resourced. There are not enough staff or funds to ensure that regular audits are conducted under the *Employment Equity Act*. The Commission has changed its model to one where employers self-regulate rather than one in which employers are accountable for meeting the requirements of the Act.

PSAC specifically recommends this action.

- The federal government must fund the Canadian Human Rights Commission sufficiently to ensure that regular audits (every one to three years) of all employers covered under the *Employment Equity Act* take place.

**6. The federal government must implement all of the recommendations of the Standing Senate on Human Rights Committee, contained in their reports dealing with employment equity**

The Senate Standing Committee on Human Rights has been investigating employment equity and barriers for the four designated groups for a number of years. The Committee has interviewed numerous witnesses. The reports of the Committee contain a number of very important recommendations. Rather than repeat them here, we encourage those who are preparing this legislation to review the reports and recommendations contained in the Senate reports. The recommendations are still relevant today.

[Employment Equity in the Federal Public Service: Staying Vigilant for Equality](#)

(December 2013)

[Reflecting the Changing Face of Canada: Employment Equity in the Federal Public Service](#)

(June 2010)

[Employment Equity in the Federal Public Service – Not There Yet](#)

(February 2007)

## **B. Accommodation**

Even with the protection of human rights legislation and the Supreme Court of Canada's seminal decisions on how to address accommodation issues in the

workplace, this issue continues to be a major area of concern for workers with disabilities.

Workers continue to be denied accommodation in the workplace both for an established disability or when returning to work with a disability. This is in part due to attitudinal barriers, as well as, lack of understanding and experience. In a society that demands increased “productivity”, workers with disabilities’ requests for accommodation can be seen as interfering with those demands. For example, where managers’ bonuses or performance evaluations are linked to specific productivity targets or requirements, workers who may need to use other tools or “work differently” may be seen adversely by managers and their co-workers if there is an impact on these targets or requirements.

People with disabilities still experience stigma when seeking accommodation for mental health reasons. They are often the subject of comments that either mock or downplay their mental health issues. This gives the impressions that their accommodation requests are not being taken seriously. People with physical disability issues also face similar situations.

It should be noted that accommodation-related grievances and human rights complaints can often take years before they are resolved. This further compounds the issues faced by people who are seeking timely accommodation and can worsen the person’s condition.

## **PSAC recommendations on accommodation**

- Develop a disability lens similar to the gender-based analysis lens for all policies, proposed legislation and regulations, programs, services, practices and standards and use it to determine the impact on persons with disabilities. For example, the changes to Treasury Board Parking Policy did not take into consideration the impact on people with disabilities and, as a result, each individual had to address it at the discretion of their manager. Another example is the implementation of Workplace 2.0. This initiative did not take into consideration the impact on people with learning, hearing, ADHD or other disabilities.
- Treasury Board must play an active role in monitoring and making sure the departments are accountable and able to address accommodation issues when they arise in departments.
- Establish a centralized accommodation fund so that managers do not feel that accommodation adversely impacts their budget even though most accommodation requests cost less than \$500. Obtaining accommodation tools, whether they be software or hardware, can often take several months. This can potentially injure or worsen the risk to employees.

- Provide mandatory on-going training for managers on accommodation. This does not mean on-line training or a minimal three-hour session because such training does not effectively change attitudinal bias. The intent of the training must be that managers internalize and accept that accommodation is part of “managing” their workforce.
- Provide clear direction on sufficiency of medical information during the search for accommodation. Members seeking accommodation must frequently provide additional medical information to employers despite the medical information on record already clearly identifying their limitations and impairments. This constant request for medical information prolongs the accommodation process and can be exhausting for the members who incur the costs associated with obtaining this information and are at a loss when explaining to their physician what additional information their employer is seeking. One consequence of the repeated requests for additional medical information is the eventual request by employers to members that they participate in an independent medical evaluation to clarify their accommodation needs. When the situation reaches this stage, the accommodation process is further prolonged because the employees and/or their union have to argue that the request for independent medical examination is an exceptional request and that the medical information provided prior to the request is sufficient.
- Track accommodation requests and compile information on how many initial request are made, how many are resolved and not resolved, the length of time for resolution, how many workers leave the workplace as a result of not being accommodated that includes how they leave (e.g. on leave without pay, take a medical retirement, etc.), and from which workplaces (direct location, department, and general public service), as result of not being accommodated. This will reveal trends and help provide an understanding of where the barriers are for people with disabilities.
- Conduct Exit interviews of employees, especially those with disabilities, to determine if they are leaving due to lack of accommodation or other reasons related to their disability.

## **C. Termination of Employment by Treasury Board due to Disability**

Since 1997, Treasury Board has authorized departments to send letters to employees directing that they must either return to work or end their employment with the federal government. In almost all instances, these letters are being sent to employees who are on leave without pay due to a disability, for one year or longer. Many of these employees are sick and battling chronic illnesses.

It is the 2009 Treasury Board *Directive on Leave and Special Working Arrangements* that provides TBS with the ability to assess members who are on leave. The 2009 Directive continues the practice of allowing departments and agencies to terminate employees on disability insurance (DI) after two years. In some instances, the termination has occurred even before the two-year time period.

The following is an excerpt from an Appendix “Leave Without Pay” to the Directive:

## *2.2 Illness or injury in the workplace*

*When a person appointed to the core public administration is unable to work due to illness or injury in the workplace and has exhausted his or her sick leave credits or injury-on-duty leave, the person with the delegated authority is to consider granting leave without pay.*

*For administrative and benefits purposes only, this type of leave without pay is referred to as sick leave without pay and is recorded as such.*

*If it is clear that a person will not be able to return to duty within the foreseeable future, the person with the delegated authority is to consider granting such leave without pay for a period sufficient to enable the person to make the necessary personal adjustments and preparations for separation from the core public administration on medical grounds.*

*When a person with the delegated authority is satisfied that there is a good chance a person will be able to return to duty within a reasonable period of time (the length of which will vary according to the circumstances of the case), leave without pay provides an option to bridge the employment gap. The period of leave without pay is to be flexible enough to allow person with the delegated authority to accommodate the needs of a person with special recovery problems, including retraining.*

*Persons with the delegated authority are to regularly re-examine all cases of leave without pay due to illness or injury in the workplace to ensure that continuation of leave without pay is warranted by current medical evidence. Such leave without pay situations are to be resolved within two years of the leave commencement date, although each case must be evaluated on the basis of its particular circumstances.*

*All leave without pay due to illness or injury in the workplace will be terminated by the person's:*

- *return to duty;*
- *resignation;*
- *retirement or medical retirement; or*
- *termination for incapacity or for reasons other than breaches of discipline pursuant to the Financial Administration Act.*

Employees on leave without pay may be offered the “option” of resigning, being fired, returning to work or choosing to go on medical retirement. Agencies, such as the Canada Revenue Agency and the Canadian Food Inspection Agency, have mirrored this practice.

While on its face the policy seems to allow employees to voluntarily choose to end their employment, employees are often being forced to leave. There is on-going concern that this forced termination targets vulnerable workers with disabilities. Keep in mind that leaving the federal public service has a direct impact on employees pensions and benefits.

As a result of a settlement on this issue, Treasury Board did issue a bulletin to ensure that there is no confusion regarding the approach and the standard for addressing leave without pay due to illness or injury. Among other things, the clarification bulletin states:

***“As indicated in the Directive, the period of leave without pay for illness or injury is to be flexible enough to allow the designated authority for administration of leave to accommodate the needs of an employee who has special recovery problems. Periods of leave without pay should be granted and extended on a case-by-case basis according to individual circumstances. When there is evidence that the employee may be able to return to work in the foreseeable future, the concepts of flexibility and duty to accommodate must be considered.*”**

*The two years mentioned in the Directive is a marker or reference point to ensure that a review is done into order to determine that the period of leave without pay corresponds to and is appropriate to the individual circumstances. **The two-year mark is not a cap or a limit, but rather, a trigger to ensure that an in-depth review and assessment of the employee's file is performed. The period of leave without pay may continue beyond the two-year mark; however, management must be satisfied that there is a reason to extend the leave without pay, i.e. the employee continues to be unable to return to work but there are***

*reasonable prospects of returning to work in the foreseeable future.”*  
(Emphasis added)

It is important to note that according to the current case law, if there is no reasonably foreseeable return to work, then an employer is not obligated to employ a worker indefinitely.

Even with this bulletin, PSAC continues to contest the practice of terminating employees automatically when they have been on leave without pay due to disability. In some cases, employees may need two or more years before they can return to work with proper workplace accommodation, depending on their disability. Each case needs to be assessed on its specific facts.

## **PSAC recommendation on termination of employment due to disability**

- Review the Directive on Leave and Special Working Arrangements to remove all barriers for people with disabilities, including the time limitations to continue being an employee when on a leave without pay due to disability.

## **D. Staffing**

If there is to be a meaningful intervention on the representation of persons with disabilities in the federal public service, the legislation and processes related to staffing must be examined. The *Public Service Employment Act* (PSEA) was amended in 2003 and implemented in part in 2005. While it may appear that more avenues of recourse are provided under the new legislative scheme than previously existed, in reality this is far from the case.

The current regime of staffing lacks effective accountability and recourse processes. While the old system of appeal boards was far from perfect, it did provide for an independent third party to consider the effect of errors, irregularities and omissions in the selection process, and it was informal and easily accessible. These characteristics are absent from the current regime.

As a consequence of the changes to the *PSEA*, remedies and recourse processes are limited. For example, an employee cannot be put into a position if their complaint is upheld. As well, very few complaints dealing with disabilities or lack of accommodation during a staffing process are pursued.

PSAC has identified concerns in the following areas.

- **Recruitment**

The Public Service Commission (PSC) 2015-2016 Annual Report states:

*“The PSC undertook a quantitative study entitled Application by and Appointment of Persons with Disabilities in the Public Service. Results showed that over the past 10 years, the representation of persons with disabilities within the public service has remained steady, exceeding the level of workforce availability every year.*

*However, the percentage of persons with disabilities applying and being appointed to the public service remained below the overall level of workforce availability. This inconsistency may be in part due to a disproportionate number of new recruits who self-identify as having a disability within the first few years after appointment, thereby increasing representation of persons with disabilities in the public service population. It also suggests that some individuals may be apprehensive about self-identification at the time of hiring.”*

- **Merit**

The current concept of merit is less fair and is systemically more arbitrary than it was before the amendments to the PSEA. An appointment is made on the basis of merit when the person meets the essential qualifications for the job which are established by the deputy head of the department currently and in the future. This creates enormous flexibility for staffing. The department does not have to hire the most qualified candidate, only the candidate who they deem to be the best.

For example, if a cash-strapped department is in the position where they desperately need to hire, perhaps to meet unrealistic job performance targets, they are more unlikely to hire someone with a disability who might cost them more because of accommodation obligations or who might not be able to meet these job performance targets, regardless of the Public Service Commission’s “guidance” around barrier-free workplaces.

During the previous government’s strategic and operating review (otherwise known as the Deficit Reduction Action Plan), relative merit was actually used arbitrarily without the same restrictions or recourse rights as before the *Public Service Modernization Act*. Although we can assume that most public service workers, including managers, do not intentionally misapply the staffing process, we can also assume that there are some who do. Unfortunately, there is very little that can be done in the latter instance.

- **Precarious Staffing**

Precarious work is another barrier for workers with disabilities. The most up-to-date statistics demonstrate a large increase in precarious staffing in the federal

public service. Both the Parliamentary Budget Office and the Public Service Commission confirm this increase.

Overall, government compensation costs have declined by 1.3% or \$120M compared to last year. The Parliamentary Budget Officer (PBO) has said that this is partly because the government is employing a growing precarious workforce.

The number of full time employees is decreasing compared to precarious workers. According to the PBO, term employment has increased 9.3%, casual employment by 8.3% and student employment by 6.0%.<sup>1</sup>

Looking at staffing actions, the Public Service Commission reports that in 2015-16 there were 4533 indeterminate workers hired overall, not counting departures and retirements. Over the same time there were 32,370 workers hired to fill jobs on a term, casual or student basis.<sup>2</sup>

These statistics do not capture the growing use of contract employees who are hired through temporary staffing agencies. The Professional Services budget line in the estimates for the 2016-17 fiscal year, which outlines these kinds of employment costs was estimated to be \$10.9 billion. When departments were asked to report about their use of contract employees, most departments advised Parliament that they “didn’t capture that information.”<sup>3</sup>

Lastly, over the last year, a new PSC staffing policy has been implemented that further delegates staffing processes. This new policy is causing further concern about the use of “discretion” by managers during the hiring process.

## **PSAC recommendations on staffing**

- Review the staffing processes and legislation to determine what are the barriers for persons with disabilities during the staffing and recourse processes.
- Give the Public Service Commission a greater oversight and accountability role.

## **Conclusion**

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<sup>1</sup> Parliamentary Budget Officer Expenditure Monitor 2016-17 Q1 2.1 Operating pp 7-8

<sup>2</sup> Public Service Commission of Canada 2015-16 Annual report p.10

<sup>3</sup> ORDER/ADDRESS OF THE HOUSE OF COMMONS Q-89 by “Ms. Finley (Haldimand-Norfolk) April 7, 2016)

The federal government has an opportunity to remove accessibility and inclusion barriers faced by persons with disabilities in the public service by improving legislation, processes and policies that can serve as a model for all employers in the federal sector.

PSAC is ready to work with the government to make the necessary changes.