

Hearing 80-202000008

**Decision**

Department of Labour and Pensions  
Ministry of Employment and Border Control

Sandy Hermiston  
Ombudsman

12 August 2020

**Summary**

An applicant requested access to decisions of the Labour Tribunal (LT) and the Labour Appeals Tribunal (LAT) (the Tribunals) from the Department of Labour and Pensions (the Department) and the Ministry of Employment and Border Control (the Ministry) under the Freedom of Information Law (2018 Revision, as amended) (FOI Law). The Department handled the response to these requests.

Two years of LT and LAT decisions were readily available and were disclosed, but it was claimed that fully complying with the requests would require an unreasonable diversion of resources.

The applicant appealed to the Ombudsman, who investigated and found that fully complying with the requests would not require an unreasonable diversion of the resources of the Department or the Ministry. Both entities are required to disclose the requested records within 30 calendar days with appropriate redactions, if required.

**Statutes<sup>1</sup> considered**

Freedom of Information Law (2018 Revision) (FOI Law)  
Freedom of Information (General) Regulations 2008 (FOI Regulations)

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<sup>1</sup> In this decision, all references to sections are to sections of the Freedom of Information Law (2018 Revision) as amended, and all references to regulations are to the Freedom of Information (General) Regulations 2008, unless otherwise specified.

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### A. INTRODUCTION

[1] On 1 October 2019, the applicant requested that the Department provide access to the following under the FOI Law:

*... all decisions of the Labour Tribunals relating to unfair dismissal, which have been handed down by the Labour Tribunals in the last 5 years.*

[2] The next day, the applicant, using similar wording, requested LAT records from the Ministry, which is responsible for the LAT.

[3] The applicant clarified the specific legal issues he was interested in, namely:

- 1. decisions in which a Labour Tribunal has considered the fairness, or otherwise, of a dismissal of an employee simply on notice;*
- 2. decisions in which a Labour Tribunal has interpreted section 10 of the Labour Law and, specifically, how section 10 relates to Part VII of the Labour Law;*
- 3. decisions in which a Labour Tribunal has considered whether section 51 of the Labour Law contains the only reasons whereby a dismissal can be considered fair;*
- 4. decisions in which a Labour Tribunal has considered section 51(1)(f) of the Labour Law (“some other substantial reason of a kind which would entitle a reasonable employer to dismiss an employee holding the position which the employee held”);*
- 5. decisions in which a Labour Tribunal has considered section 51(3) of the Labour Law (“whether an employer has acted reasonably ...”);*
- 6. decisions in which a Labour Tribunal has considered the fairness, or otherwise, of a dismissal of an employee in circumstances where this employee received severance pay under Part V of the Labour Law; and*
- 7. decisions in which a Labour Tribunal has awarded compensation for unfair dismissal at a rate less than one week’s wages for each completed year of service.*

[4] On 2 October 2019, the Department’s Information Manager (IM) responded in relation to the requests for records from both Tribunals, providing access to 37 records of the LT and five records of the LAT, relating to all LT and LAT decisions from 2017 and 2018. These records had previously been reviewed and were readily available. The Department confirmed that it would continue to review records dated 2015, 2016 and 2019 for publication on its website, and asked the applicant to resubmit his request for the

remainder of the records at a later time, claiming there were staff shortages in the Department.

- [5] On 11 October 2019, the applicant submitted a new request for the remainder of the LT and LAT decisions, covering the years 2015, 2016 and 2019, and confirmed that he was interested in decisions relating to the same legal issues as before.
- [6] On 11 November 2019, the new request was denied on the basis of:
- section 9(a) – vexatiousness of the request;
  - section 9(b) – recent compliance with a substantially similar request from the same person; and
  - section 9(c) – unreasonable diversion of the Department’s resources.
- [7] Following a request from the applicant, the Director of the Department conducted an internal review on behalf of the Chief Officer, confirming the initial decision.
- [8] When the applicant appealed to the Office of the Ombudsman regarding the matter, the Department dropped its reliance on section 9(a) and (b). The matter could not be resolved informally and, on 28 March 2020, the applicant asked the Ombudsman for a formal decision.

## **B. CONSIDERATION OF ISSUES**

### **a. The narrowing and resubmission of the application for access**

- [9] As indicated above, immediately following the requests, the Department provided some of the requested records, namely 2 years (2017 and 2018) of records from both Tribunals, as these were readily available. The Department asked the applicant to resubmit the request for records from the remaining years at a later time. This was done in light of the Department’s goal of eventually reviewing, redacting and publishing these Tribunal decisions on its website. This goal is commendable, since these important records ought to be available to members of the public without them having to go through the FOI process.
- [10] The applicant accepted the records for 2017 and 2018, later stating that “this was never intended to be an end to the records gathering exercise”. He submitted a new request for the remaining years a few days later. The Department expected more time to prepare all of the Tribunal decisions for publication on its website. It called the applicant’s position unreasonable and vexatious, saying that he had “ignored his previous request and asked for more than what was agreed”. The Department claimed that it did not need to comply with the request under section 9.

[11] The Department's approach is problematic. The FOI Law requires a public authority to respond to an application within 30 calendar days. This period cannot be extended except for good reason, under section 7(4), or potentially to defer disclosure under section 11. However, neither of these provisions was invoked. In any event, there is no basis for requiring an applicant to resubmit a request for records that were not provided in response to an initial request.

[12] Therefore, in the circumstances of this case, the Department's requirement for a new request to be submitted had no legal grounds and placed an unnecessary burden on the applicant. The applicant was correct in saying that he was simply exercising his rights under the FOI Law and should not have had to submit a new request for records that he had already requested.

**b. Whether compliance with the requests would require an unreasonable diversion of the Department's resources**

[13] Section 9(c) states that:

*9. A public authority is not required to comply with a request where –*

*...*

*(c) compliance with the request would unreasonably divert its resources;*

[14] Regulation 10(3) requires a determination on section 9(c) to be made on a case-by-case basis and lists the factors to be taken into consideration, including:

- the nature and size of the public authority;
- the number, type and volume of the requested records; and
- the work time involved in processing the request.

[15] The Department and the LAT Secretary addressed these points in their submissions to us, as follows:

Nature and size of the public authority

- The Department stated that "the Ministry and/or Department, did not then and does not now, have the financial wherewithal to recruit additional personnel to fulfill the duties of either Tribunal." The Department had 23 staff members, some of whom were on secondment or long-term medical or maternity leave when the requests were made. The Department stated that only "50%" of staff were available, although details were provided for seven absent staff members only. Some remaining staff, including the IM, were obliged to take on additional duties, which had added to the Department becoming overburdened. Since then, some

staff have returned to work and additional staff have been hired, but the Department continued to claim that it had significant staff shortages.

- The LAT had a single staff member who fulfilled the role of LAT Secretary on a part-time basis without administrative support and who also fulfilled other roles that were said to be affected by understaffing.

#### Number, type and volume of requested records

- The requests were for 5 years of LT and LAT decisions dealing with unfair dismissals.
- The Department immediately disclosed 2 full years of LT decisions (37 decisions), as these were readily available. The Department stated that this left 141 LT decisions to be reviewed, scanned and redacted.
- The LAT disclosed five decisions for 2 full years and stated that it held an additional 47 appeal decisions for the other years. Most of these remained unredacted and about half were not in a digital format.

#### Work time involved in processing the requests

- The Department claimed that the work time required to scan, review and redact the remaining 141 LT decisions, which vary in length from 6 to 25 pages, would require an estimated 30 minutes per decision or approximately 70 hours/10 working days in total.
- According to the LAT Secretary, the LAT records were “archived in a location highly likely to be off site which [the Secretary] presume[s] is accessible by personnel of the former Ministry of Education, Employment & Gender Affairs”. Locating and retrieving them would require assistance from that Ministry’s successor entity. The records would then have to be scanned, redacted and prepared for release. The Secretary estimated that each record “could take about 3 hours ... after being found”. The Secretary stated that “it can be estimated that the entire process per document could easily be a full work day”, which would add up to a total of “potentially ... 47 days to fulfil [this] request” and would force her to ignore her “other ... primary work tasks”.

[16] Despite these arguments, the Department said that it “remains committed to ensure that these records for both tribunals are published on our website. These efforts are particularly being hampered by the current pandemic, especially the Department’s ability to scan and print the decisions while staff work from home.”

[17] The applicant correctly observed that the Covid-19 crisis does not “explain and cannot be used to justify the actions of the [Department] at the time that the requests were made and processed”.

[18] The applicant explained that he made the requests for both specific and principled reasons. Initially, he acted as legal counsel representing a client who was responding to two complaints before the LAT. Opposing counsel at the LAT, as a result of being a former chairman of the Tribunal, was aware of previous decisions which were relevant to the issue before the Tribunal. The applicant felt it would be helpful to have access to those decisions in order to make a full argument. However, since the decisions of the LAT are not publicly available (and opposing counsel had returned all records in his possession upon completion of his tenure as chairman), he was unable to consult or provide copies of the relevant decisions. The applicant stated that the two matters before the Tribunals proceeded without adjournment, and the decisions went against his client without being fully argued in light of the requested decisions. The applicant stated that his inability to access the requested records:

*... is particularly troubling in the context of labour justice, where there [is] little by way of bespoke Caymanian case law ... the proper ventilation of the matter would have facilitated a clear and more reasoned decision, which would have been of general benefit; or, if the previous decisions were themselves clear, the provision of the earlier decisions could have avoided the need for unnecessary time and expense for all parties in pursuing these matters before the Tribunals.*

[19] Now that “the window for filing appeals in those matters has long passed”, the applicant is pursuing the FOI requests as a matter of principle, stating that the decisions of the Tribunals ought to be available to the general public as a matter of law and procedural fairness, preferably in a publicly accessible form with a useful search capacity. The applicant argued that this would result in savings in terms of the operations of the Tribunals and a net saving overall, and, given the records’ importance for justice under the Labour Law, their disclosure should be a priority when allocating resources.

[20] It is troubling to read the statements from the Department and the LAT Secretary about the general lack of resources available for the important work of the Tribunals, including their compliance with the FOI Law. The LAT Secretary also indicated a lack of control over the LAT’s records, including with regard to their location, which appears to be uncertain. This is a serious issue, since the management of all records, especially important records such as tribunal decisions, is a key prerequisite for an efficient and effective public service.

[21] In the context of this appeal, regulation 10(4) does not allow a lack of control over requested records to be included in time spent “searching for, locating or collating a record”. Therefore, this is not a valid argument for claiming that complying with the requests would constitute an unreasonable diversion of a public authority’s resources.

- [22] The Department and LAT Secretary stated that respectively 141 LT and 47 LAT decisions would need to be reviewed, scanned and redacted. The LT decisions were said to number between 6 and 25 pages each. On that basis, the time required to process the records for disclosure was calculated as 70 hours (LT decisions) and 47 days (LAT decisions).
- [23] In my opinion, these times are overestimated, as they are based on the assumption that all decisions would be relevant to the applicant's requests. However, the Tribunals deal with many issues under the Labour Law and therefore not all decisions will be about unfair dismissal, as requested by the applicant.
- [24] Therefore, in the first instance, relevant decisions would need to be identified. As far as the LAT is concerned, this initial step would be relatively simple, since the general topic is indicated in the first few paragraphs of each decision. Scanning through 47 decisions to identify the relevant ones should therefore not take very long.
- [25] LT decisions are not marked in the same way and therefore the identification of relevant decisions would take more time. However, while only some LAT decisions are available in digital form, the vast majority of LT decisions exist as PDF files, which can easily be searched for keywords, not only within one document but also within all documents in a single folder; such a search function is a standard feature of Adobe Reader software. This would therefore also require much less effort than estimated.
- [26] There is no clear indication of how many of the Tribunal decisions for the relevant years relate to the topic of unfair dismissal. Given the complexity of the Labour Law and the fact that, according to the applicant, the 2 years for which records were released did not yield relevant decisions, it seems reasonable to conclude that only a portion of the total number of decisions will be relevant to the applicant's requests.
- [27] The statement that LT decisions are between 6 and 25 pages appears to be a generous estimate. The LT decisions in the sample that was provided to us range from 3 to 13 pages per decision and most are between 5 and 7 pages. Only a few, more complex decisions are as long as 25 pages. Again, this indicates that the effort required to review and redact the relevant decisions (once identified) would be less than estimated.
- [28] **In view of these findings, I find that both the identification of and the process of reviewing and redacting these important records would be less onerous than stated by the Department and the LAT Secretary. Consequently, I conclude that compliance with the requests would not require an unreasonable diversion of the resources of the Department of Labour and Pensions or the Ministry of Employment and Border Control.**

### C. FINDINGS AND DECISION

Under section 43(1) of the Freedom of Information Law, I make the following findings and decision:

- a) Compliance with the requests for decisions of the Labour Tribunal and the Labour Appeals Tribunal on the subject of unfair dismissal dated 2015, 2016 and 2019 would not require an unreasonable diversion of the resources of the Department of Labour and Pensions or the Ministry of Employment and Border Control.
- b) The Department of Labour and Pensions is required to disclose the requested Labour Tribunal decisions within 30 calendar days.
- c) The Ministry of Employment and Border Control is required to disclose the requested Labour Appeals Tribunal decisions within 30 calendar days.



Sandy Hermiston  
Ombudsman