

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170913

Docket: A-475-16

Citation: 2017 FCA 178

**CORAM: PELLETIER J.A.
BOIVIN J.A.
GLEASON J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

TIMOTHY PHILPS

Respondent

Heard at Vancouver, British Columbia, on September 13, 2017.

Judgment delivered at Vancouver, British Columbia, on September 13, 2017.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

**PELLETIER J.A.
BOIVIN J.A.**

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The respondent, a manager at the Canada Revenue Agency (the CRA), received a 30-day suspension for inappropriate acts involving a number of subordinate employees. He grieved the suspension, and his grievance was referred to adjudication before the Public Service Labour Relations and Employment Board (the PSLREB or the Board). The CRA called several non-managerial employees to testify as part of the employer's case at adjudication, and they appear to

have been told by counsel for the employer that their full names would not be used in the decision.

[2] There is a dispute as to what transpired before the Board regarding the request to redact names from the decision. The CRA's Assistant Director of Human Resources deposed that counsel for the employer requested that all non-management employee witnesses be referred to simply by their initials in the decision and that this request was not opposed by the applicant. The respondent disagrees and in his affidavit says that the request for use of initials was made only with respect to a former non-management employee, and that he agreed only to this request.

[3] On November 24, 2016, the Board released its decision to the parties, in which the adjudicator dismissed the grievance and found that the respondent had engaged in the acts with which he was reproached. In her decision, the adjudicator used the full names of all the witnesses and also referred to a former employee who did not testify by her full name.

[4] Following receipt of the decision, counsel for the employer wrote to the Board and requested that it redact the names of the non-management employees and former employee and to refer to them by their initials. The Board refused to do so, taking the position that the employer had only requested that the name of the former employee be redacted and that it could not redact the other individuals' names as it was *functus officio* and thus without jurisdiction to address the issue after the release of the award. At the employer's request, the Board did not publish the decision on its website, and the decision has not yet been posted pending the determination of this application for judicial review.

[5] In this application, the applicant seeks to set aside the decision of the Board refusing the requested redaction. That decision is contained in emails that were sent to the parties on November 24 and 25, 2016 and confirmed in a subsequent email sent December 16, 2016. The applicant also seeks an order requiring that the material filed with this Court in support of this application for judicial review be treated confidentially, even though the materials have already been filed as part of the Court's public file.

[6] Turning to the former of these requests, I believe that the Board's decision cannot stand as it undoubtedly possessed the jurisdiction to make the requested redactions following the release of its award.

[7] It is unlikely that counsel for the employer would have requested that only the name of the former employee be redacted as such a request would make little sense because the existing employees have a far greater privacy interest in having their identities protected. Thus, in all likelihood, there was a misunderstanding as to the nature of the redaction request. If this were the case, the adjudicator could amend the decision as in such event it would have been based on something akin to a clerical error and the common law doctrine of *functus officio* permits the correction of such errors, particularly in the context of an administrative tribunal: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 at pp. 861-862, [1989] S.C.J. No. 102; *Herzig v. Canada (Treasury Board)*, 2002 FCA 36 at para. 16, 287 N.R. 105, leave to appeal refused [2002] S.C.C.A. No. 88, 301 N.R. 394; *Rogers Communications Partnership v. Society of Composers, Authors and Music Publishers of Canada (SOCAN)*, 2016 FCA 28 at paras. 70-

71, 480 N.R. 325; *Association of Justice Counsel v. Canada (Attorney General)*, 2016 FCA 56 at paras. 17-18, 481 N.R. 113.

[8] However, even if there had been no misunderstanding and the employer actually broadened the nature of its redaction request following the release of the decision, I nonetheless believe that the adjudicator possessed jurisdiction to deal with the request by virtue of section 43 of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2. This section gives the PSLREB jurisdiction to amend issued decisions. In light of the clear wording of section 43, the Board's determination that it lacked the authority to make the requested redactions by reason of the doctrine of *functus officio* is unreasonable.

[9] I would therefore allow this application for judicial review and remit the redaction request to the PSLREB adjudicator who made the decision so that she may consider the request on the merits. In such exercise she should weigh afresh the privacy interests of the individuals in question against any possible need to publish their names. As the respondent claims he did not have an opportunity to express his position on the request, the adjudicator should give the parties an opportunity to make submissions on the issue before ruling upon it.

[10] Finally, as concerns the request for a confidentiality order in respect of the materials filed with this Court, I am of the view that the request is overly broad and that the legitimate privacy interests of the individuals in question in protecting their identities can be adequately protected by simply filing a redacted public version of the materials in which they are referred to by initial. So doing provides little, if any, derogation to the open courts principle as their identities are not

germane to the decisions. On the other hand, they do have a legitimate concern about further publicizing their names. A request for an order of this nature ought to have been made before the materials were filed, but the applicant's failure to make a timely request ought not prejudice the individuals' ongoing interest in having their privacy maintained.

[11] I would therefore order that the current version of the materials be treated as confidential under Rule 151 of the *Federal Courts Rules*, SOR/98-106 and that the applicant file a redacted photocopied public version of the records within fifteen (15) days of the date of this Court's judgment, in which the names of the non-managerial employees and former employee are replaced with initials.

[12] I do not believe it appropriate to award costs to the applicant in the circumstances of this case.

"Mary J.L. Gleason"

J.A.

"I agree
"J.D. Denis Pelletier J.A."

"I agree
Richard Boivin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-475-16

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. TIMOTHY PHILPS

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: SEPTEMBER 13, 2017

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: PELLETIER J.A.
BOIVIN J.A

DATED: SEPTEMBER 13, 2017

APPEARANCES:

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