

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210506

Docket: A-147-20

Citation: 2021 FCA 87

**CORAM: GLEASON J.A.
LASKIN J.A.
LOCKE J.A.**

BETWEEN:

ASSOCIATION OF JUSTICE COUNSEL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard by online video conference hosted by the Registry on May 4, 2021.

Judgment delivered at Ottawa, Ontario, on May 6, 2021.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

**LASKIN J.A.
LOCKE J.A.**

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant seeks to set aside the decision of an adjudicator of the Federal Public Sector Labour Relations and Employment Board (the FPSLREB) in *Treasury Board (Department of Justice) v. Association of Justice Counsel*, 2020 FPSLREB 59. In that decision, the adjudicator determined that the LP-04 position in the Centre for Information Law and Privacy (CILP) within the Department of Justice should be excluded from the bargaining unit

under paragraph 59(1)(g) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2 (the *FPSLRA*).

[2] More specifically, the adjudicator determined that the incumbent of the position in question was sometimes called upon to provide advice on issues under the *Privacy Act*, R.S.C. 1985, c. P-21 and the *Access to Information Act*, R.S.C. 1985, c. A-1 in the context of labour relations-sensitive matters. The adjudicator concluded at paragraph 39 of his reasons that there was accordingly a “sufficient intersection of labour relations, staffing and classification matters” to justify the exclusion due to the potential for a conflict of interest under paragraph 59(1)(g) of the *FPSLRA*. The adjudicator, however, determined that an exclusion under paragraph 59(1)(c) of the *FPSLRA* was not warranted as the occupant of the position did not provide advice on labour relations, staffing or classification issues, themselves.

[3] The relevant provisions in the *FPSLRA* provide:

Application

59 (1) After being notified of an application for certification made in accordance with this Part or Division 1 of Part 2.1, the employer may apply to the Board for an order declaring that any position of an employee in the proposed bargaining unit is a managerial or confidential position on the grounds that

[...]

Demande

59 (1) Après notification d'une demande d'accréditation faite en conformité avec la présente partie ou la section 1 de la partie 2.1, l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants :

[...]

(c) the occupant of the position provides advice on labour relations, staffing or classification;

c) poste dont le titulaire dispense des avis sur les relations de travail, la dotation en personnel ou la classification;

[...]

[...]

(g) the occupant of the position has duties and responsibilities not otherwise described in this subsection and should not be included in a bargaining unit for reasons of conflict of interest or by reason of the person's duties and responsibilities to the employer; or

g) poste dont le titulaire, bien que ses attributions ne soient pas mentionnées au présent paragraphe, ne doit pas faire partie d'une unité de négociation pour des raisons de conflits d'intérêts ou en raison de ses fonctions auprès de l'employeur;

(h) the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in paragraph (b), (c), (d) or (f).

h) poste de confiance occupé, en matière de relations de travail, auprès des titulaires des postes visés aux alinéas b), c), d) et f).

[4] Before us, the applicant asserts that the decision of the adjudicator was unreasonable, principally for two reasons.

[5] First, the applicant says that the adjudicator unreasonably interpreted the relevant statutory provisions, which should be read narrowly as they limit the constitutionally-protected right to join and be represented by a trade union. The applicant submits that the text, context and purpose of the relevant provisions indicate that Parliament contemplated that all labour relations-related exclusions would fall under either paragraph 59(1)(c) or (h) of the *FPSLRA* and that it was therefore not reasonable to interpret paragraph 59(1)(g) of the Act as including duties in relations to labour relations matters that do not rise to the level of being covered by either

paragraph 59(1)(c) or (h) of the *FPSLR*A. According to the applicant, such interpretation impermissibly broadens the scope of the labour relations exclusions in the *FPSLR*A.

[6] Second, the applicant asserts that the adjudicator unreasonably premised his decision in large part on the fact that the incumbent in the LP-04 position within the CILP was a senior, experienced lawyer. The applicant says that this fact is irrelevant to the inquiry that the adjudicator was tasked with undertaking as case law of the FPSLREB requires examination of the duties required of the position as opposed to the attributes of the incumbent. The applicant says that, were it otherwise, no senior government lawyer could ever be unionized, which was clearly not the intent of Parliament when it extended collective bargaining rights to lawyers working for the federal government in 2005.

[7] With respect, I disagree with both submissions.

[8] On the interpretive point, the applicant has cited no authority in support of his contention that paragraph 59(1)(g) of the *FPSLR*A cannot apply to conflicts or potential conflicts arising from the provision of advice of precisely the sort given by the incumbent in the LP-04 position in this case. Indeed, in many ways, this case is similar to earlier decisions of the FPSLREB (or predecessor version of the Board) where incumbents were excluded because they provided advice on topics that had potential impacts akin to those in the present case (see, for example, *Canada (Auditor General) v. Public Service Alliance of Canada*, [1980] C.P.S.S.R.B. No. 2, 1980 CarswellNat 1381; *Canada (Treasury Board) v. Public Service Alliance of Canada*, [1982] C.P.S.S.R.B. No. 148, 1982 CarswellNat 1261; *Professional Institute of the Public Service of*

Canada v. National Film Board of Canada, [1990] C.P.S.S.R.B. No. 78, 1990 CarswellNat 2371; *Canada (Treasury Board – National Defence) v. Public Service Alliance of Canada*, 2000 C.P.S.S.R.B. No. 85, 2000 CarswellNat 2836; *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80, 2016 CarswellNat 4817; *Treasury Board v. PSAC*, 2016 PSLREB 84, 2016 CarswellNat 4958).

[9] Moreover, the wording of paragraph 59(1)(g) of the *FPSLRA* is uncircumscribed, leaving considerable scope for the FPSLREB to infuse the provision with meaning. As noted in *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46, 2012 CarswellNat 1341 at para. 70, the provision “[...] confers on the PSLRB a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities [...].”

[10] The adjudicator’s interpretation of paragraph 59(1)(g) of the *FPSLRA* was therefore reasonable.

[11] Turning to the second alleged defect in the adjudicator’s decision, I disagree that he premised the decision in large part on the fact that the incumbent in the LP-04 position was a senior, experienced lawyer. The comments made by the adjudicator in paragraphs 42 and 43 of his reasons that the applicant points to must be read in context and are responsive to suggestions that the employer could have ensured all labour relations-sensitive discussions were held with the more junior excluded lawyer in the CILP. In the impugned paragraphs, the adjudicator

merely explained why it was permissible for the employer to also exclude a senior position within the CILP.

[12] At other points in the decision, the adjudicator highlights the duties assigned to the LP-04 position that gave rise to a conflict of interest, such as providing advice in respect of privacy or access to information issues in connection with litigation between the employer and the bargaining agents. As the respondent noted, there was evidence before the adjudicator that indicated that such duties had been performed by the incumbent both before and after the reorganization in the CILP, when the incumbent was no longer charged with managing subordinates (see, for example, the submission of the employer to the adjudicator, summarizing such evidence at pp. 432-434 of the applicant's record).

[13] The adjudicator therefore did not unreasonably base his decision on the fact that the incumbent in the LP-04 position within the CILP possessed significant experience.

[14] I would accordingly dismiss this application, with costs, fixed in the agreed-upon all-inclusive amount of \$2,500.00, which I believe to be reasonable.

“Mary J.L. Gleason”

J.A.

“I agree.

J.B. Laskin J.A.”

“I agree.

George R. Locke J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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COUNSEL v. ATTORNEY
GENERAL OF CANADA

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LOCKE J.A.

DATED: MAY 6, 2021

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