

Federal Court of Appeal



Cour d'appel fédérale

Date: 20211123

Docket: A-107-20

Citation: 2021 FCA 227

**CORAM: STRATAS J.A.
LOCKE J.A.
MONAGHAN J.A.**

BETWEEN:

GHANI OSMAN

Applicant

and

**PUBLIC SERVICE ALLIANCE OF
CANADA**

Respondent

Heard at Toronto, Ontario, on November 23, 2021.
Judgment delivered from the Bench at Toronto, Ontario, on November 23, 2021.

REASONS FOR JUDGMENT OF THE COURT BY:

MONAGHAN J.A.

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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on November 23, 2021).

MONAGHAN J.A.

[1] Mr. Osman has applied for judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (the Board): 2020 FPSLREB 40 (*Osman* 2020). That decision dismissed Mr. Osman's complaint made under the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, against the Canada Employment and Immigration Union (CIEU),

a component of the Respondent. Mr. Osman alleges that the CIEU acted in an arbitrary or discriminatory manner by declining to represent him in a judicial review of the Board's decision in *Osman v. Deputy Head (Department of Employment and Social Development)*, 2018 FPSLRB 15 (*Osman* 2018).

[2] *Osman* 2018 concerned a grievance Mr. Osman filed alleging that his employer had breached a settlement agreement with Mr. Osman and had made misrepresentations to him in connection with the settlement agreement. The Board dismissed the grievance. Because Mr. Osman did not agree with that decision, he asked the CIEU to help him apply for judicial review. The CIEU advised against pursuing judicial review. Undaunted, Mr. Osman sought judicial review with the assistance of private counsel. That application was dismissed by this Court: *Osman v. Canada (Attorney General)*, 2019 FCA 72.

[3] Mr. Osman asserts that the Board's decision in *Osman* 2020 was unreasonable or incorrect because it ignored evidence of collusion between CIEU and his employer. He also asserts that the Board violated procedural fairness because it made its decision on the basis of written submissions, rather than holding a hearing at which the Board would hear oral testimony.

[4] There is one preliminary matter to be addressed. Mr. Osman filed an affidavit in support of his application which includes material not before the Board when it made its decision. A judicial review application examines the reasonableness of the decision made based on material before the decision-maker: *Ochapowace First Nation v. Canada (Attorney General)*, 2007 FC 920, [2008] 3 F.C.R. 571, at paras. 9 and 10, *aff'd Ochapowace First Nation v. Canada*

(*Attorney General*), 2009 FCA 124, 389 N.R. 87. Fresh evidence such as this is not normally admissible: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)* 2012 FCA 22, 428 N.R. 297. Accordingly, this information is inadmissible and we have disregarded it.

[5] We turn now to the merits of Mr. Osman's application.

[6] The parties agree on the relevant standard of review. The Board's decision to dismiss Mr. Osman's complaint against the CIEU is reviewed on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65 [Vavilov], at paragraph 85. Mr. Osman bears the burden of showing that the decision is unreasonable.

[7] Questions of procedural fairness are legal questions; the Court must be satisfied the duty of procedural fairness is met: *Lipskaia v. Canada (Attorney General)* 2019 FCA 267, at para. 14. The focus is on whether a fair and just process was followed having regard to all the circumstances: *Canadian Pacific Railway v. Canada (Attorney General)*, 2018 FCA 69, [2019] 1 F.C.R. 121, at para. 54.

[8] Both before the Board and this Court, Mr. Osman sought to re-argue his grievance concerning the settlement agreement between him and his employer. As the Board said in its decision in *Osman 2020*, that matter is closed. The only issue before the Board in *Osman 2020* was whether the CIEU acted in an arbitrary and discriminatory manner in declining to represent

Mr. Osman in the judicial review application. The Board concluded the CIEU did not and dismissed Mr. Osman's complaint.

[9] In our view, the Board's decision is not unreasonable. The Board correctly identified the question before it: whether Mr. Osman's allegations, if believed, constituted an arguable case that the CIEU's decision was arbitrary or discriminatory. It answered that question with regard to Mr. Osman's allegations, the record, and the relevant law; it explained the reasons for its decision. The Board found that Mr. Osman's case rested "essentially on his disagreement with Mr. Sivalapan's decision" as representative of the CIEU and that Mr. Osman's allegations "suggest he was not prepared to live with any option other than to proceeding to judicial review" and "that other avenues to pursue his concerns ...were not acceptable to him." The decision is "justified in light of the facts" [*Vavilov*, at para 126]; the Board's reasoning is "both rational and logical" [*Vavilov*, at para 102]. Neither the rationale nor the outcome was unreasonable in the circumstances [*Vavilov*, at para 83].

[10] Mr. Osman's complaint about the breach of procedural fairness concerns the Board's decision to deal with the complaint on the basis of written submissions, rather than by holding an oral hearing. We observe that Mr. Osman was given notice that the Board intended to proceed on the basis of written submissions, which it is expressly permitted by statute to do: see section 22 of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, Mr. Osman not only did not object, but advised the Board in writing that "he did not object to the respondent's request to deal with the matter in writing." Mr. Osman had the opportunity to make written submissions and to make rebuttal submissions following receipt of

the respondent's submissions. The Board proceeded on the basis that Mr. Osman would be able to prove his allegations. We see no procedural unfairness.

[11] Accordingly, the application will be dismissed with costs.

"K.A. Siobhan Monaghan"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A DECISION DATED APRIL 22, 2020, BY THE FEDERAL PUBLIC SECTOR LABOUR RELATIONS AND EMPLOYMENT BOARD.

DOCKET: A-107-20

STYLE OF CAUSE: GHANI OSMAN v. PUBLIC SERVICE ALLIANCE OF CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: NOVEMBER 23, 2021

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.
LOCKE J.A.
MONAGHAN J.A.

DELIVERED FROM THE BENCH BY: MONAGHAN J.A.

APPEARANCES:

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ON HIS OWN BEHALF

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