Federal Court of Appeal | Cour d'appel fédérale

Date: 20221201

Docket: A-97-21

Citation: 2022 FCA 204

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Heard at Ottawa, Ontario, on September 8, 2022.

Judgment delivered at Ottawa, Ontario, on December 1, 2022.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: GAUTHIER J.A.
STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20221201

Docket: A-97-21

Citation: 2022 FCA 204

CORAM: **GAUTHIER J.A.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

REASONS FOR JUDGMENT

LASKIN J.A.

[1] The Attorney General of Canada applies for judicial review of a decision of the Federal Public Sector Labour Relations and Employment Board (2021 FPSLREB 24). In that decision, a single-member panel of the Board dismissed an application by the employer, the Treasury Board, for an order declaring five occupational health and safety (OHS) advisor positions excluded from a bargaining unit represented by the respondent, the Public Service Alliance of Canada.

[2] The application to the Board was brought in reliance on paragraphs 59(1)(g) and (h) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c. 22, s. 2. Paragraph 59(1)(g) authorizes the Board to make an order declaring a position to be a managerial or confidential position—and thus outside the bargaining unit—where "the occupant of the position has duties and responsibilities not otherwise described in […] subsection [59(1)] 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." Paragraph 59(1)(h) authorizes an order to the same effect where "the occupant of the position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of a position described in" certain other paragraphs of subsection 59(1).

[3] By subsection 62(3) of the Act, the burden of proving that a particular position is a position referred to in paragraph 59(1)(g) or (h) is on the employer.

[4] The employer's application to the Board summarized the responsibilities of OHS advisors as follows (Applicant's Record at p.174):

> The incumbent of AS-04 position – *Occupational Health and Safety (OHS) advisor* provides, n a given region, strategic advice and guidance to OHS committees and to any level of Management, on OHS matters, such as: hazard prevention, ergonomics, workplace incidents and injuries, return to work following an injury on duty leave, refusal to work, workplace violence issues and complaints. The OHS advisor also has a role of monitoring to ensure compliance and to support management in their responsibilities and accountabilities as per Canada Labour Code [R.S.C. 1985, c. L-2], Part II (*Code*) [headed "Occupational Health and Safety"] and its regulations.

[5] At the direction of the Board, the application was decided based solely on written submissions. Section 22 of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, authorizes the Board to decide any matter before it without holding an oral hearing.

[6] The Board's decision comprises, apart from its formal order, a brief summary of the application, a summary of the evidence (focused on the duties and activities of the OHS position), and detailed summaries of the parties' arguments (including the authorities on which they each relied), followed by a relatively brief discussion entitled "Reasons". The Board concluded that the employer had not met its burden under either paragraph 59(1)(g) or paragraph 59(1)(h).

[7] In this application, the Attorney General challenges the Board's decision only as it relates to the conflict of interest element of paragraph 59(1)(g). The "Reasons" section of the Board's decision in relation to paragraph 59(1)(g) consists of two paragraphs, which read as follows:

> [97] In my opinion, the applicant's argument that the OHS advisors are in a conflict of interest because of the importance that the PSAC puts on workplace safety is flawed, from two perspectives. First, workplace safety should be of primary concern to all involved, including the applicant. The fact that a bargaining agent has stated that it is a priority does not mean that one of its members cannot faithfully fulfil his or her obligations to advise the applicant on the proper administration of the CLC. Second, the applicant's proposal speaks to employees' loyalty, which is not the purpose of an exclusion. OHS is a bipartisan obligation. One should not presuppose a conflict of interest merely because of membership in one group or the other. Furthermore, the OHS advisors work in a mixed environment and render services related to all categories of employees, including those in different bargaining units, those who are not members of a bargaining unit, excluded employees, and management, in which it is unlikely that a perceived conflict of interest would arise.

> [98] I concur with the finding in the AJC case [*Treasury Board v. Association of Justice Counsel*, 2020 FPSLREB 3, aff'd *Canada (Attorney General) v. Association of Justice Counsel*, 2021 FCA 37] at para. 60, in that I, too, fail to see a labour relations element to this type of advice. My understanding is that the advice pertains to the applicant's exclusive health and safety duties under ss. 124 to 125.3 of the CLC.

[8] As this Court has recognized, "the wording of paragraph 59(1)(g) […] is uncircumscribed, leaving considerable scope for the [Board] to infuse the provision with meaning […]." It accordingly "confers on the [Board] a very broad discretion to exclude an employee on the basis of aspects of his or her duties and responsibilities" (*Association of Justice Counsel v. Canada (Attorney General)*, 2021 FCA 87 at para. 9). Each application under paragraph 59(1)(g) must be "decided on its own circumstances by reference to the jurisprudence that has developed" (*Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 46 at para. 31).

[9] The parties agree that under the judicial review framework set out by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the applicable standard of review is reasonableness. A reasonable decision, *Vavilov* instructs, is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker." A reviewing court must defer to a decision with these qualities (*Vavilov* at para. 85). Under the *Vavilov* framework, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para. 100).

[10] As *Vavilov* further explains (at paras. 127-128, internal citation omitted), the reasons given by administrative decision makers must be responsive: they must "meaningfully grapple"

with the key points the parties put to them. While administrative decision makers need not "respond to every argument or line of possible analysis," "[t]he principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties." Responsive reasons are important in demonstrating that decision makers "have actually *listened* to the parties" (emphasis in original). They are also important in enabling litigants to understand why they have won or lost (*Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at paras. 8, 20). This Court has stated that "[f]ailure to engage with an important argument advanced by a party will generally render an administrative decision unreasonable" (*Barrs v. Canada (National Revenue)*, 2022 FCA 147 at para. 38).

[11] The Attorney General submits that the Board's decision is unreasonable in two main respects. He submits first, that the Board's analysis of conflict of interest fails to respond to the primary argument the applicant raised before it. Second, he submits that the Board incorrectly applied Charter values to dismiss relevant precedent.

[12] I agree with the first submission. I am, of course, mindful that reasonableness review generally calls for deference to the Board's decisions, and conscious of the Board's expertise (a factor that remains relevant in determining reasonableness under the *Vavilov* framework (*Vavilov* at para. 31)). I also appreciate that the reasons given by an administrative decision maker must be read holistically and contextually (*Vavilov* at para. 97). However, in my view, the Board's reasons fail to "meaningfully grapple" with central issues raised before it. This renders the Board's decision unreasonable.

[13] As a result of this conclusion, I need not deal with the Attorney General's second submission, relating to Charter values, except to note that in oral argument, he acknowledged it was not clear that the Board's treatment of the Charter values issue had any impact on its decision.

[14] A review of the applicant's written submissions to the Board (Applicant's Record at pp. 62-86), and the Board's summary of those submissions (Board decision at paras. 23-46), bears out the Attorney General's submission before this Court that the Board failed to engage with the applicant's primary argument: that occupational health and safety matters are often adversarial and regularly involve litigation in which the interests of the applicant and the PSAC are opposed.

[15] In its submissions to the Board (Applicant's Record at pp. 68-69), the applicant listed and described multiple examples of cases in which the Board has found the existence of a conflict of interest under paragraph 59(1)(g), in circumstances the applicant submitted were analogous to those here. It also addressed (Applicant's Record at p. 70) the structure of Part II of the *Canada Labour Code*, which it submitted implicitly recognizes "a different set of interests [as between employers and employees/bargaining agents] in the manner of identifying, investigating and resolving health and safety issues." The result is that these parties "are bound in an often adversarial environment," which the Code's checks and balances recognize and address.

[16] The applicant proceeded to describe (Applicant's Record at p. 72) what it submitted was, in the context of occupational health and safety, the "key role" played by the PSAC in advocating the interests of its members. It quoted (Applicant's Record at p. 72) a statement from

a former president of the PSAC that "[l]egal action is another avenue we are using to push health and safety issues." It set out eight examples of litigation arising from OHS decisions in which the employer and the PSAC were adversaries, one challenging and the other supporting the decision (Applicant's Record at pp. 73-76). It footnoted five more. The examples included *Fauceglia v. Canada Border Services Agency*, 2017 OHST 22, an appeal under subsection 129(7) of the *Code* from a decision of an HSO finding that a workplace danger did not exist that would justify a refusal to work. A member of the PSAC represented the appellants; Department of Justice counsel, the respondent.

[17] Yet the reasons given by the Board for refusing an order under paragraph 59(1)(g) are confined to the two paragraphs set out in paragraph 7 above: they are silent on the examples the applicant provided. The reasons do advert to one element in the applicant's submissions, that relating to the statement from a former president of the PSAC, but they do not otherwise engage with the applicant's submissions summarized above.

[18] Like the applicant, the PSAC also included in its submissions to the Board references to case law that it argues supports the Board's conclusion on the paragraph 59(1)(g) issue (Applicant's Record at pp. 100-111). While the Board summarized the case law submitted by the parties in the portion of its decision headed "Summary of the arguments", the portion of the decision headed "Reasons" that relates to paragraph 59(1)(g) refers to one case only—a case that does not address the applicant's central submission.

[19] The PSAC submitted in oral argument before us that the Board must be taken to have simply accepted the PSAC's case law as more persuasive than that provided by the applicant. As a result, it submitted, no further responsive justification was required.

[20] But where, as here, the parties rely on competing case law, the Board's silence on whether and, if so, why it is adopting one line over the other cannot be said to meet its obligations to provide responsive reasons. Rather, for the Board to have properly justified its decision in light of the relevant law before it, it would need to have explained why it concluded that the case law cited by the applicant was insufficiently persuasive (*Vavilov* at para. 102). A mere even-handed summary, as the Board provided, should not be confused with meaningful justification.

[21] Finally, while the Board does refer elsewhere in its reasons (at paras. 94-95) to the absence of sufficient evidence to warrant an exclusion, those references all appear to relate exclusively to aspects of the paragraph 59(1)(h) issue, including the questions whether the giving of OHS advice equates to providing labour relations advice, and whether OHS advisors' access to information calls for an exclusion under that provision.

[22] In my view, given the submissions made to the Board and the nature of the Board's reasons, it is understandable why the Attorney General would submit to this Court that he does not know why the applicant lost the paragraph 59(1)(g) portion of its application.

[23] For these reasons, I would grant the application for judicial review, set aside the portion of the decision of the Board relating to the Treasury Board's application under paragraph 59(1)(g), with costs in the agreed-upon sum of $2,500 all-inclusive, and remit the paragraph 59(1)(g) element of the Treasury Board's application to the Board for redetermination. We are advised that the appointment of the Board member who decided this matter has come to an end. The redetermination must accordingly be by a differently constituted panel of the Board.

"J.B. Laskin"
J.A.

"I agree.
Johanne Gauthier J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-97-21
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v. PUBLIC SERVICE ALLIANCE OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 8, 2022
REASONS FOR JUDGMENT BY:	LASKIN J.A.
CONCURRED IN BY:	GAUTHIER J.A. STRATAS J.A.
DATED:	DECEMBER 1, 2022

APPEARANCES:

Richard Fader Elizabeth Matheson	FOR THE APPLICANT
Morgan Rowe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

A. François Daigle Deputy Attorney General of Canada	FOR THE APPLICANT
Raven, Cameron, Ballantyne & Yasbeck LLP/s.l.r. Ottawa, Ontario	FOR THE RESPONDENT