

Date: 20170126

File: 572-02-1891

Citation: 2017 PSLREB 11

*Public Service Labour Relations
and Employment Board Act and
Public Service Labour Relations Act*



Before a panel of the
Public Service Labour Relations
and Employment Board

BETWEEN

TREASURY BOARD

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as

Treasury Board v. Public Service Alliance of Canada

In the matter of an application, under subsection 71(1) of the *Public Service Labour Relations Act*, for a declaration that a position is managerial or confidential

Before: Michael F. McNamara, a panel of the Public Service Labour Relations and Employment Board

For the Applicant: Joshua Alcock, counsel

For the Respondent: Linda Cassidy, Public Service Alliance of Canada

Heard at Ottawa, Ontario,
November 14, 2013.

REASONS FOR DECISION

I. Application before the Board

[1] This decision deals with an application by the Treasury Board (“the applicant”) for an order declaring that position 20000809, titled “Senior Human Resources Assistant”, at the Department of Indian Affairs and Northern Development (“the department”) in Gatineau, Quebec, is a managerial or confidential position.

[2] Position 20000809 is classified at the CR-05 group and level and is part of a bargaining unit (“the bargaining unit”), for which the Public Service Alliance of Canada (“the respondent”) is the bargaining agent.

[3] On March 19, 2010, the applicant filed its application with the Public Service Labour Relations Board (“the former Board”), alleging that position 20000809 is managerial or confidential pursuant to s. 59(1)(g) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*). On November 12, 2013, the applicant again wrote to the former Board to indicate that it was also proposing that the position is managerial or confidential pursuant to s. 59(1)(h) of the *PSLRA*. Section 59(1) reads as follows:

59 (1) After being notified of an application for certification made in accordance with this Part, 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

(a) the position is confidential to the Governor General, a Minister of the Crown, a judge of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court or the Tax Court of Canada, or a deputy head;

(b) the position is classified by the employer as being in the executive group, by whatever name called;

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

(d) the occupant of the position has substantial duties and responsibilities in the formulation and determination of any policy or program of the Government of Canada;

(e) the occupant of the position has substantial management duties, responsibilities and authority over employees or has duties and responsibilities dealing formally on behalf of the employer with grievances presented in accordance with the grievance process provided for under Part 2;

(f) the occupant of the position is directly involved in the process of collective bargaining on behalf of the employer;

(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

(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).

[4] On or about March 19, 2010, the applicant provided the respondent with a copy of the application pursuant to s. 72 of the *PSLRA*.

[5] On April 7, 2010, the respondent filed an objection to the application in accordance with s. 73 of the *PSLRA*.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *PSLRA* before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*. Further, pursuant to section 395 of the *Economic Action Plan 2013 Act, No. 2*, a member of the former Board seized of this matter before November 1, 2014, exercises the same powers, and performs the same duties and functions, as a panel of the new Board.

II. Summary of the evidence

[7] Allison Shatford occupies the Manager Client Services, PE-05 group and level position at the National Capital Regional Office (NCRO) Directorate, which specializes in labour relations ("the unit"). She supervises three employees, including two labour relations advisors (whose positions are classified at the PE-04 group and level) and one senior human resources assistant (whose position is classified at the CR-05 group and level) who holds the position at issue. According to the organizational chart, all three

employees report to her.

[8] The unit provides advice and guidance to managers about the grievance process and manages the exclusion and designations processes. This organizational structure has been in place for 13 months.

[9] The unit operates to help managers with labour relations issues, including those involving performance, behaviour (conduct), grievances, and security issues. It also functions to discuss settlement issues with bargaining agents, to attend and report on union-management consultation (UMC) meetings, including local meetings about workforce adjustment (WFA) issues.

[10] The unit is located in an enclosed room, with all employees in cubicles attached to each other. The unit deals with local managers on a daily basis and handles first- and second-level grievances. The unit is also responsible for exclusions in the National Capital region.

[11] The unit's work area has small cubicles, paper-thin walls, and employees in close proximity, so conversations are usually overheard. The senior human resources assistant would be able to overhear discussions because of where this position is located.

[12] The senior human resources assistant helps the entire unit and opens and manages files and documents as well as data entry into PeopleSoft, an electronic human resources management system. The unit produces a labour relations report, which the senior human resources assistant maintains. The applicant established that the senior human resources assistant does not provide advice or guidance to managers but instead assists labour relations advisors.

[13] When entering information about a grievance, the data indicates its type and classification. When information is entered about a disciplinary decision, copies are distributed as necessary.

[14] The senior human resources assistant ensures that files are kept up to date. He or she drafts agendas for Local Union Management Consultation (LUMC) meetings, helps prepare documents, sometimes briefs managers, and attends regular team meetings, at which files' contents are discussed. For labour management committee (LMC) and LUMC meetings, those classified in the PE group prepare and brief the

managers, while the senior human resources assistant is just present.

[15] The person in this role also attends meetings and is an integral part of case management and creating the unit's labour relations report. Those activities are key to the unit working efficiently.

[16] Each file contains tombstone information including a name, work description, and organizational chart. Notes are added to files about the nature of the relevant issues. Additional information is added to files as it is generated. All responsibility for doing so belongs to the senior human resources assistant position throughout a complete grievance or performance evaluation process. The person in that position is the responsible employee.

[17] The senior human resources assistant must understand the labour relations process; the grievance process; the discipline process; the roles of the UMC, the LUMC, and the bargaining agent; and the roles of management and of the department's Legal Services branch. The assistant handles sensitive information, and a high level of discretion is required.

[18] The senior human resources assistant is aware of accommodation cases, of advice received, of risk assessments for the department, and of all grievance advice.

[19] Labour relations advisors add information to files, which includes management and bargaining agent positions and labour relations advice to managers. The senior human resources assistant sees all that information, is present when discussions occur at meetings, and is involved with cross-referencing other files and with general file management.

[20] On issues of discipline, managers make the decisions, and the assistant is not present or part of those deliberations.

[21] Entering data and tracking information in files does not constitute a management responsibility. Collective agreements and policies are not confidential, they are public documents.

[22] For WFA meetings, usually the bargaining agent already has copies of the information being discussed; thus, no confidentiality issue would exist.

[23] For employee performance issues, the senior human resources assistant opens a file, but the employee whose performance is being monitored might not yet be aware of it. The assistant might be aware of any labour relations report and of any notes on file.

[24] For essential services agreements, the senior human resources assistant would be actively involved in the work if not in the decisions to designate employees.

[25] For the designations process management, there have been two strikes since 2001, one in 2004, and the other in 2007. The position at issue was created in 2009. The senior human resources assistant would initially analyze a position before reporting to someone classified PE-03 or PE-05. The assistant carries out an analysis but does not make recommendations.

[26] The unit has weekly team meetings at which file progress is discussed. The senior human resources assistant attends and is required to act on decisions. The assistant is aware of issues with employees, managers, and bargaining agents. Specifically, potential next steps are discussed at these meetings. Strategy is sometimes discussed, including whether the unit is in a good position or at fault and whether it should proceed formally or informally. Decisions are made to uphold or deny grievances. Discussions are held and explanations are made as to how collective agreements apply. A general follow-up discussion takes place as well.

[27] If the senior human resources assistant does not attend a meeting, then they are less efficient and effective. The assistant is the “glue” in the process since he or she knows all the cases and maintains all the files.

[28] The work would have to be managed very differently without the senior human resources assistant’s close involvement. He or she would have to be relocated from being close enough to overhear confidential discussions, and the unit would probably become less efficient. This would also hinder his or her work and would probably affect his or her ability to fully understand the work and its context. The assistant would not have all the information necessary for LUMC meetings and would not have the context. Currently, the senior human resources assistant is aware of management’s actions and the reasons behind its decisions, which awareness would be lost if the application were granted.

[29] Ms. Shatford also spoke about the issue of the senior human resources assistant potentially exercising the right to run for and gain office with the bargaining agent, which could require removing the senior human resources assistant from any discussions and denying the assistant access to information that might give him or her an unfair advantage in union-management discussions.

[30] All employees are bound by their oath of office, and anything they learn in confidence must be kept confidential.

III. Summary of the arguments

A. For the applicant

[31] The applicant points out that the existing jurisprudence is dated but is still of some assistance. The unit uses a management team approach when determining whether to exclude an employee. Given that, the evidence before the Board is clear, that the team includes the senior human resources assistant in all or as many aspects of its work as is necessary to ensure it is a well-oiled operation. As such, leaving the senior human resources assistant in the bargaining unit could lead to him or her having to move to a new location, which could lead to some inefficiency in the workplace and would detrimentally affect the work being done.

B. For the respondent

[32] The respondent states that it is not convinced that the occupant of the position at issue has substantial management duties, responsibilities, or authority or has duties and responsibilities dealing formally with grievances on behalf of the applicant, and it states that there is no conflict of interest.

[33] The respondent's concern is with the clerical nature of the senior human resources assistant's duties and with the fact that no advice is given by the assistant or sought from him or her by the department. The fact that every employee, by their oath of office, must adhere to a certain level of confidentiality enables the Board to determine that the assistant's duties are not of a management or confidential nature but of an administrative nature.

[34] The respondent submits that an employee's union rights should not be minimized to the extent that mere exposure to information would cause him or her to

forfeit those rights. Every day, union activists balance their responsibilities as employees and as union activists across the federal public service. The respondent contends that it would be wrong to deny an employee that right because of his or her proximity to information.

[35] Finally, the respondent points out that the senior human resources assistant has no power of effective recommendation over any of the department's decisions made in the unit.

IV. Reasons

[36] The exclusion of the senior human resources assistant's position is sought under s. 59(1)(g) and (h) of the *PSLRA*. The applicant has the burden of proving that the position should be excluded given that exclusions are narrowly interpreted. I will first deal with the proposed exclusion under s. 59(1)(h) on whether the occupant of the senior human resources assistant position has, in relation to labour relations matters, duties and responsibilities confidential to the occupant of the Manager, Client Services position.

[37] In *Canada (Treasury Board) and Public Service Alliance of Canada (Correctional Group)*, 1979 C.P.S.S.R.B. No. 9 (QL)(Sisson case), the Public Service Staff Relations Board ("the PSSRB") reviewed decisions on exclusions from various labour relations boards and expressed the essence of its thinking as follows:

48. *The following principles emerge from the Canada Safeway Ltd. (supra decision):*

- (1) *The mere fact that an employee has access to confidential information does not, of itself, mean that he is employed in a confidential capacity.*
- (2) *To be considered a confidential exclusion, there must exist between the particular employee and the employer "a relation of a character that stands out from the generality of relations and bears a special quality of confidence". There is an element of personal trust which permits some degree of "thinking aloud" on special matters.*
- (3) *In many instances, it is of the essence of the confidence that the information not be disclosed to any member of any group or body of the generality of employees.*

49. Following the *Canada Safeway Ltd.* decision, the various Canadian labour relations boards have developed a threefold test which is to be applied in determining whether a person qualifies as a confidential exclusion. This test is as follows:

- (1) The confidential matters to which the person has access must be in relation to industrial relations.
- (2) The disclosure of the information would adversely affect the employer.
- (3) The person must be involved with this information as a substantial and regular part of his duties. It is not sufficient that he occasionally comes in contact with it.

50. As a further refinement on the test, the B.C. Labour Relations Board has established the following:

- (1) The confidential exclusion is to be narrowly interpreted to avoid circumstances where the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoy the freedoms and rights incidental to collective bargaining.
- (2) The denial of collective bargaining rights to persons employed in a confidential capacity is based on a conflict of interest rationale. The employer has a duty to organize its affairs so that its employees are not occasionally placed in a position of a potential conflict of interest if that result can readily be avoided.

[38] Even though the senior human resources assistant handles sensitive information, it does not mean that the occupant of this position is employed in a confidential capacity.

[39] Most of the duties of the position concerning grievances are related to data entry as well as updating systems and files. I note that the Ontario Labour Relations Board ruled on a similar issue as the one before me in *Greater Essex County District School Board v. Canadian Union of Public Employees, Local 1348*, 2010 CanLII 47900 (ON LRB) concerning secretaries in the Human Resources Department. In this decision, discipline matters were not characterized as confidential as it is the norm that unions are advised and often become involved in discipline matters early in the process. I agree with this line of reasoning; not all the information related to grievances, including discipline, is confidential.

[40] The job description of the senior human resources assistant is focussed on

administrative services such as methodologies, practices. There is also some research involved to prepare reports and statistics with respect to human resources program activities. According to the Manager, Client Services' job description, he or she delivers the human resources management perspective and strategic planning advice and recommendations to senior client management as well as presentations to client management committees and corporate colleagues on strategic human resources management. There is no evidence showing that the senior human resources assistant participates in senior client management meetings or presentations and the he or she could be privy to confidential information in relation to labour relations matters.

[41] I do not find that there is an element of personal trust permitting the Manager, Clients Services some degree of "thinking aloud" on grievances since the senior human resources assistant does not provide advice on grievances. Therefore, he or she does not influence decisions taken by the Manager, Client Services or by managers in the department. The senior human resources assistant may be privy to some confidential information on grievances. However, I adopt the line of reasoning in *Sisson* concerning a supervisory position (CX-08 group and level) where the following is stated:

If the Board were to designate Mr. Sisson under paragraph (f) of the definition, because on occasion he engaged in the exchange of confidential information relating to grievances with his superior it would establish a precedent that would lead to proposals that other supervisors, similarly involved on occasion with the exchange of confidential information relating to grievances, should be designated as persons "employed in a managerial or confidential capacity". In doing so we would fail to ensure that the maximum number of persons enjoy the freedom and rights to collective bargaining.

[42] Similarly, the applicant was quite insistent that because of the configuration of the office and the close proximity of the Corporate Labour Relations group, the senior human resources assistant could overhear confidential discussions in the office. As stated above by the B.C. Labour relations Board, the employer has a duty to organize its affairs so that its employees are not occasionally placed in a position of a potential conflict of interest if that result can readily be avoided. I find that to exclude a position based on the configuration of an office could lead to abuse and forfeit collective bargaining rights. The employer could then exclude a disproportionate number of positions based on their location in the office.

[43] The unit has weekly team meetings where file progress, potential next steps, and explanations on collective agreements are discussed. Strategy is sometimes discussed. No evidence was put before me on the frequency of discussions on strategy. It cannot be said that attending meetings where strategy is discussed is part of the substantial and regular duties of the senior human resources assistant's duties. In any event, the senior human resources assistant position is involved in administrative matters; he or she is not an advisor.

[44] I find it unlikely that decisions are made to deny or uphold grievances during weekly team meetings. The authority to make decisions on grievances relies on managers. The unit provides human resources services to them to support them in their decisions. I do not find this statement to be credible.

[45] The senior human resources assistant maintains the unit's labour relations report. The applicant has failed to convince me that the duties related to the report require the exclusion of the position. There is no evidence before me demonstrating that the senior human resources assistant is involved with this information as a substantial and regular part of his or her duties. Furthermore, it is not clear who is the audience for the unit's labour relations report. There is some indication in the assistant's job description that reports are related to salary scales and pay equity rates to support various management and central agencies. This is hardly a reason to exclude the senior human resources assistant's position from the bargaining unit.

[46] Part of the senior human resources assistant's duties is to draft agendas for LUMC meetings and attend LMC and LUMC meetings. As stated in *Canada Labour Relations Board v. Transair Ltd.*, [1977] 1 SCR 722, "... [t]here could be nothing confidential in that duty as, of course, both management and unions were present at the conferences and the minutes simply stated what had been said and done in the presence of them both." Therefore, the senior human resources assistant does not deal with confidential information since the information is shared with the bargaining agents.

[47] Given my findings, I deny the application under s. 59(1)(h) of the *PSLRA*.

[48] I now turn to the other ground submitted by the applicant under s. 59(1)(g) of the *PSLRA*. The applicant argues that a potential conflict of interest exists, that the senior human resources assistant has access to confidential information, and is part of

the unit's management team approach.

[49] The applicant has submitted decisions to support the proposition that the senior human resources assistant has duties and responsibilities not otherwise described in s. 59(1). In *Treasury Board (Correctional Service of Canada) and Public Service Alliance of Canada*, 2012, PSLRB 46, the former Board recognized that s. 59(1) of the *PSLRA* is "an umbrella provision that seems meant to catch situations" in which excluding a position can be justified on grounds not captured by the more specific descriptions in the other paragraphs. At paragraph 78 of that decision, the former Board referred to the employee's rights to collective representation and that they should not be removed lightly:

I do not think it necessary, in making this decision, to accept the speculation in counsel for the applicant's argument about the difficulties that the SIO might encounter in the context of a labour dispute, on the picket line or as the incumbent of an elected position with the bargaining agent. There are many circumstances in which the status of an employee who is privy to important information must be balanced in favour of continued membership in the bargaining unit. An employer would be asked to suffer a certain amount of inconvenience. (...)

[50] Access to information on its own does not create a conflict of interest and therefore does not necessarily result in a position being declared confidential. It has not been established that a conflict of interest exists for the senior human resources assistant. I agree that, while the senior human resources assistant may be privy to sensitive information, the balance tips in favour of continued membership in the bargaining unit and potentially exercising the right to participate in the bargaining unit's activities. The respondent may suffer a certain amount of inconvenience, however, the senior human resources assistant may still participate in meetings and have access to sensitive information. He or she is bound by the oath of office.

[51] The unit contains a number of positions. This is the only one being proposed for exclusion from the bargaining unit. The other two positions are classified in the PE group and are occupied by unrepresented employees.

[52] The applicant has the right to assign duties and responsibilities to the senior human resources assistant and to locate him or her where it deems appropriate and necessary. In this case, the senior human resources assistant is located with the rest of the unit. Were the assistant to exercise the option of taking on an active role in the

bargaining unit, the department would be able to relocate him or her if it believed it necessary, without restricting the assistant's ability to do the job efficiently.

[53] I do not find that the senior human resources assistant position is considered to be part of the management team or management's approach. The PSSRB developed the concept of the "management team" in the *Gestrin and Sunga* case (*The Professional Institute of the Public Service of Canada v. Treasury Board*, PSSRB File No. 172-2-31 (19710714), [1971] C.P.S.S.R.B. No. 8 (QL)). The PSSRB enunciated a number of guidelines to determine the likelihood of conflict of interest because the occupant of the position is involved in formulating policies or decision-making. There is no such evidence before me.

[54] Given my findings, I deny the application as well under s. 59(1)(g) of the *PSLRA*.

[55] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[56] The application is dismissed.

January 26, 2017.

**Michael F. McNamara,
a panel of the Public Service Labour
Relations and Employment Board**