Date: 20200423

Files: 572-02-3682
572-02-3684

Citation: 2020 FPSLREB 41

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector 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 applications, under subsection 71(1) of the *Federal Public Sector Labour Relations Act*, for a declaration that a position is a managerial or confidential position

Before: Marie-Claire Perrault, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Philippe Giguère, counsel

For the Respondent: Julie Chiasson and Janson LaBond

Heard at Vancouver, British Columbia,
January 9, 2020.

I. Applications before the Board

[1] The Department of Justice (DOJ) has applied for a declaration that two AS-03 positions are managerial or confidential, to be excluded from the bargaining unit. At the time of the application, the positions were filled by Sandy Nguyen and Erica Grant. The Public Service Alliance of Canada ("the respondent"), the bargaining agent that represents the bargaining unit that would include these two positions, opposes the exclusion.

[2] The legal employer in this case is the Treasury Board, which negotiates on behalf of departments such as the DOJ the collective agreements that govern employees' terms and conditions of employment. However, it is understood that the DOJ has requested the exclusion. The employer has delegated to the DOJ the authority for work organization decisions.

II. Summary of the evidence

[3] The DOJ has a regional litigation office in British Columbia, which is divided into four sections: Aboriginal Law; Business and Regulatory Law; Public Safety, Defence and Immigration Law; and Tax Law. Each section is organized along similar lines and is headed by a regional director to whom deputy directors and approximately 15 senior counsel report, as well as an office manager, classified AS-04; an executive assistant, classified AS-01; and the position at issue in this case, the coordinator, legal support, classified AS-03. For ease of reading, throughout this decision, I have used the term "Legal Support Coordinator" or "incumbent" to designate the AS-03 position. The position has different names, such as "Office and Legal Support Manager" (although that is also the title of the AS-04 position in one of the organizational charts) and "Regional Coordinator, Legal Support". Moreover, I am not certain that Ms. Nguyen and Ms. Grant are still the incumbents. This decision applies to the AS-03 positions, numbered 21364 and 22246, that directly supervise the legal assistants in the DOJ's B.C. Regional Offices for Public Safety, Defence and Immigration Law and Tax Law.

[4] The employer called two witnesses: Sandra Weafer, the regional director and general counsel of the Public Safety, Defence and Immigration Law practice; and Andrew Majawa, the regional director and general counsel of the Tax Law practice.

[5] Ms. Grant is the Legal Support Coordinator in Ms. Weafer's office, and Ms. Nguyen is in the same role but in Mr. Majawa's office. Their work descriptions are the same, as are their roles and responsibilities.

[6] A Legal Support Coordinator supervises between 15 and 20 legal assistants, all classified CR-05. The legal assistants carry out administrative tasks for the senior counsel and the approximately 40 counsel in a section. The Legal Support Coordinator's work entails assigning duties, pairing counsel and legal assistants, ensuring a good working relationship between counsel and an assistant, carrying out performance evaluations, and taking care of administrative matters, such as granting leave. Additional duties include ensuring proper accommodation (in the human rights sense) for the legal assistants when needed and facilitating an employee's return to work after a prolonged absence.

[7] The Legal Support Coordinator is also part of the management team, which consists of the regional director, the office manager, and the deputy directors. All other members of the management team fill excluded positions. The management team meets weekly or as needed to discuss office matters, including the following: staffing, resources, finances and budget, training and travel needs, human resources issues and staff well-being, and material resources, such as equipment and furniture.

[8] The legal assistants' workload is frequently discussed, and tasks are redistributed if one assistant is kept too busy by the lawyers with whom he or she is paired. Personal information about employees may be discussed at these meetings if, for example, personal or health issues are negatively impacting an employee's performance (whether counsel or a legal assistant). Another topic may be the office's operational requirements when considering leave approval.

[9] The Legal Support Coordinator reports directly to the regional director and interacts with him or her daily, according to the office's administrative and human resources needs. She is an important conduit who reports on the office's daily problems and irritants, and the regional director must depend on her to ensure a healthy work environment. This requires open and frank two-way discussions. Moreover, Ms. Weafer and Mr. Majawa both testified that they rely on Legal Support Coordinators to instruct them on the terms of the collective agreement covering the

CRs, with which they are much less familiar than with the one covering the LPs (counsel) in the Association of Justice Counsel bargaining unit.

[10] In a recent process to hire more legal assistants, the issue of their classification arose. In the B.C. region, legal assistants were hired at the CR-04 level and then reclassified to CR-05 once fully trained. In other regions, they were hired at the CR-05 group and level from the start. An administration liaison committee, comprising all the AS-03s and AS-04s in the B.C. region, met to discuss the issue and to propose a strategy to overcome the discrepancy (their solution was to adopt the other regions' model). This was given as an example of an AS-03 playing a role in determining the legal assistants' terms and conditions of employment.

[11] The following elements of the work description, under the heading "Responsibility", were drawn to my attention:

> …
>
> *Collects, synthesizes and applies background information to provide recommendations to managers for their use in resolving administrative policy, procedural and process issues.*
>
> …
>
> *The work requires the supervision of approximately 20-30 Legal Assistants. This involves the development of pairing arrangements with counsel, individual work plans, assigning work, providing advice and on-the-job training to employees, temporary help and students within own section; monitoring work in progress and performing audit spot checks on work performed; participating as a member of selection boards by interviewing and selecting employees; participating in establishing goals and priorities, establishing and implementing the operating procedures, standards and practices, scheduling hours of work and overtime to ensure operational requirements are met, receiving, reviewing, approving/denying leave requests, evaluating employees' performance and completing performance appraisals with counsel and the Deputy Regional Directors, identifying skill gaps, developing training plans and recommending disciplinary action.*
>
> …
>
> *Resolves subordinate staff performance issues and imposes disciplinary actions; mediates and resolves disputes in consultation with management and HR specialists.*
>
> …
>
> *Provides guidance and assistance to supervising counsel, other supervisors and managers on roles, responsibilities, and work performance of staff.*

> *Approves leave, and training for direct reports and recommends approval of overtime.*
>
> *Participates in recruitment/staffing processes for administrative staff. Drafts a variety of staffing documents, including interview questions, statement of merit criteria work descriptions, and participate in interview panels and perform reference checks.*
>
> *The work involves providing advice and guidance to the Regional Director, Deputy Regional Directors relating to resource requirements.*
>
> *The work involves making recommendations to the Deputy Regional Directors on the spending of funds relating to training, travel and overtime for the Legal Assistants.*
>
> …

[12] In its rationale to justify the exclusions, the DOJ states that as members of the management team, the incumbents are "… involved in discussions regarding management issues such as staffing, labour relations, performance management, training and task assignment".

[13] In addition, the incumbents have the authority to make decisions that may significantly affect the terms and conditions of employment of represented employees, such as decisions involving leave approval, work assignment, work schedules, overtime, accommodation measures, and performance appraisals. They have access to the legal assistants' files and thus to sensitive, confidential information.

[14] The Legal Support Coordinators' decisions could be subject to grievances. The incumbent would be the one to prepare background information to brief the management team and the director on the issues giving rise to the grievance.

[15] In short, an incumbent's responsibilities may place her in a conflict of interest. The incumbent is involved in management decisions and "… has authorities that may conflict with unionized employees".

[16] The other two sections of the B.C. litigation sector, Aboriginal Law and Business and Regulatory Law, also employ Legal Support Coordinators, who have the same duties and responsibilities as the incumbents of the positions at issue. Those positions are excluded from the bargaining unit. No evidence was given at the hearing as to why those exclusions went unopposed.

[17] The bargaining agent did not call any witness.

III. Summary of the arguments

A. For the applicant

[18] The applicant asks for the two positions to be excluded on the basis of s. 59(1)(g) of the *Federal Public Sector Labour Relations Act*, S.C. 2003, c.22, s.2 ("the *Act*"). The Board is seized of this matter because the respondent bargaining agent objected to the exclusions. The governing provisions of the *Act* on this matter read as follows:

> …
>
> ***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*
>
> ***(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 or Division 2 of Part 2.1;*
>
> ***(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).*
>
> …

> ***62 (1)*** *If an objection is filed in respect of a particular position included in the application, the Board must, after giving the employer and the employee organization an opportunity to make representations, determine whether the position is a position referred to in any of paragraphs 59(1)(a) to (h) and, if it determines that it is, make an order declaring the position to be a managerial or confidential position.*
>
> …
>
> ***(3)*** *The burden of proving that a particular position is a position referred to in any of paragraphs 59(1)(d) to (h) is on the employer.*
>
> …

[19] The applicant submits that it has discharged its burden.

[20] The main idea of s. 59(1)(g) is the notion of conflict of interest. Employees' interests do not always coincide with the employer's interests. As one of their main tasks, the positions at issue provide advice to the employer, in accordance with its interests.

[21] The only relevant consideration when deciding whether to exclude a position is the description of its duties and responsibilities. The employer cites several Board decisions that have considered the specific meaning of s. 59(1)(g). I will return to them in my analysis. The gist of the case law is that when it applies s. 59(1)(g), the Board should consider "… the overall relationship between the position and the applicant's interests" (see *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 at para. 70).

[22] The following points support the applicant's position:

- The AS-03s are part of the management team and thus are actively engaged in confidential information sharing and decision-making discussions.
- They are asked to advise on operational issues, human resources, labour relations, and staffing.
- The regional directors rely on the incumbents for advice on applying the terms of the collective agreement applicable to the legal assistants (which would also be applicable to them).
- It is important for management to know that any such advice has the employer's interests at heart. That role creates a clear conflict of interest for the AS-03s.

[23] The applicant also highlights the incumbents' role in conducting the CR-05s' performance appraisals, which it says is incompatible with being part of the same bargaining unit.

[24] Finally, the applicant submits that it would be contradictory to deny this application given that identical positions are already excluded within the DOJ's B.C. Regional Office.

B. For the respondent

[25] The applicant has the burden of demonstrating that there truly is a conflict of interest. In *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 80, in which the Board concluded that senior investigators should be excluded under s. 59(1)(g), according to the respondent, there truly was a conflict of interest as the employer called the senior investigators to testify in proceedings involving employees who had been investigated.

[26] The fact that some AS-03s are already excluded is irrelevant. The positions at issue are newly created. Moreover, in *Treasury Board (Canadian International Development Agency) v. Public Service Alliance of Canada*, PSSRB File No. 174-02-378 (19820831), [1982] C.P.S.S.R.B. No. 148 (QL), the Board stated that precedents do not apply.

[27] The incumbents in this case have no role in discipline or grievances. They may provide information to management, but they are not decision makers.

[28] The Board has applied narrowly the terms of s. 59 to avoid depriving employees of their right to collective bargaining. A real demonstration must be made of a fundamental incompatibility between a position and its inclusion in a bargaining unit.

[29] The respondent mentioned a number of decisions in its arguments. In my analysis, I will return to those I found most relevant to this decision.

[30] The main point was that the Legal Support Coordinators have no decision-making authority. They can make recommendations, but they are not the ultimate deciders. The regional directors who testified strongly emphasized the importance of the coordinators' advice. However, it amounts to recommendations, not to decisions as such. The confidentiality that the weekly meetings entail is normal for employees at their level. They are bound by their oath of office to respect that confidentiality, but no conflict per se is created by belonging to the bargaining unit.

[31] The Legal Support Coordinators' duties do not warrant excluding them. They are not at a high level within their department, they do not form an integral part of management, and the confidentiality they ensure is routine. They have no part in the grievance process, save gathering information and informing the regional director as to the content of the collective agreement, which is not a confidential endeavour per se. Finally, they have no delegated authority. Their only authority is supervisory, which is a quality that the Board has already judged insufficient to lead to a finding that a position is managerial or confidential.

[32] Consequently, there is no cogent evidence to deprive them of the right to collective bargaining.

IV. Analysis

[33] In the following analysis, the term "Board" includes the present Board's predecessors.

[34] The import of the decision to conclude that a person occupies a managerial or confidential position is that the person is not considered an "employee" under s. 2(1) of *Act* and therefore is excluded from the bargaining unit.

[35] The wording of s. 59(1)(g), under which the applicant requests the two exclusions at issue, does not specifically entail the managerial and labour relations duties that were dealt with in a number of the decisions presented by the parties. Rather, the exclusion under s. 59(1)(g) is made by reason of a "conflict of interest" or "… the person's duties and responsibilities to the employer …".

[36] When interpreting those words, the Board has been very cautious and cognizant that it should not lightly deprive an employee of his or her right to collective bargaining.

[37] I have read all the jurisprudence submitted by the parties, but in coming to my decision, I have found the following cases particularly relevant. The wording of s. 59(1)(g) is peculiar, being a sort of catch-all phrase. Therefore, I have heeded the Board's guidance for this particular phrase.

[38] In *Treasury Board (Correctional Service of Canada)*, the Treasury Board applied for the exclusion of the security intelligence officer within a correctional facility. The

officer's role was to gather information on any security risk to the institution and to advise management on the best course of action to take to mitigate that risk.

[39] After reviewing the rather scant jurisprudence on exclusions made under s. 59(1)(g) and its preceding legislative embodiments, the Board concluded that the position should be excluded. According to the Board, s. 59(1)(g) provides an additional ground to the employer to exclude a position that is not clearly managerial or involved in labour relations yet that creates an untenable conflict of interest or is untenable as part of the bargaining unit by its very nature. As the Board states, "… in some circumstances, including an employee in a bargaining unit could impair the effectiveness of that employee's performance of duties essential to the applicant."

[40] The following paragraphs detail the Board's reasoning behind the exclusion:

> …
>
> ***76*** *Paragraph 59(1)(g) of the* PSLRA *provides me considerable discretion when deciding whether this position should be excluded. Of course, I cannot simply remove the position from the bargaining unit without a rationale. I agree with counsel for the applicant that the jurisprudence invoking that paragraph or its predecessors has not provided any clear definition of the range of circumstances under which it might be applied. That paragraph's clear intention is to permit the PSLRB to consider situations that cannot be aligned with any of the usual rationales for excluding a position from the bargaining unit. Therefore, it is not surprising that no specific outline of the circumstances covered by that paragraph has been produced. One would expect that paragraph to be used sparingly and that any situation in which it is held to apply would be unusual.*
>
> ***77*** *I have concluded that the situation presented by this case calls for the application of paragraph 59(1)(*g*) of the* PSLRA*. Although the typical hallmarks for exclusion — the exercise of managerial functions, expansive decision-making authority and involvement in labour relations issues — are not associated with the SIO position, it is evident even in Mr. Cossette's description that the SIO's duties are thoroughly enmeshed with the decision-making process about security issues at the highest levels of the institution. Despite the efforts of the bargaining agent representative to show that the SIO's responsibility to convey information and to be alert to security threats does not differ markedly from that of all other employees, it is clear that the SIO's role is unique. The SIO is not simply a conduit for random information about risks but is responsible for weighing and shaping that information in a way that senior institution managers can rely on with confidence. An SIO has the heavy burden of ensuring that the intelligence provided is based on an accurate weighting and prioritizing of*

> *information, that any recommendations represent a reliable assessment of the nature and extent of any threat, and that senior managers can make the necessary decisions with confidence. Those decisions must often be made under demanding and time-sensitive conditions, and it is vital that the managers and the SIO have a relationship of mutual trust.*
>
> ***78*** *I am mindful of the caution expressed in a number of earlier decisions to which I was referred that an employee's rights to collective representation 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. However, in this case, it is critical that the senior managers of a correctional institution have access at all times to the assistance that can be offered only by the SIO. They must be able to discuss sensitive information and to canvass operational options in an atmosphere of absolute confidence. In my view, that creates a fundamental incompatibility between the SIO's role and membership in a bargaining unit.*
>
> ***79*** *The use of the word "or" in paragraph 59(1)*(g) *of the* PSLRA *suggests that there is a distinction between the circumstances that would fall under a conflict of interest and those that would justify the exclusion "… by reason of the person's duties and responsibilities to the employer …" It is somewhat difficult to consider the kind of incompatibility I see between the SIO's duties and membership in the bargaining unit without characterizing it as a conflict of interest, but I think that the SIO position could be excluded in accordance with either description. Were the SIO position included, the unique relationship of confidence between the SIO and the institution's senior managers would give rise to a conflict between that relationship and the SIO's obligations to fellow members of the bargaining unit. To put the rationale for exclusion on the more general footing of "… duties and responsibilities to the employer" might be another way of saying the same thing in this case, although I do not wish to foreclose considering circumstances in which the "duties and responsibilities" ground is not associated with a conflict of interest.*
>
> …

[41] In *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11 ("*Senior Human Resources Assistant*"), the Board had to decide whether a senior human resources assistant position should be excluded under 59(1)(g). It did not find that the position was considered part of the "management team or management's approach"

and denied the request. An important feature is that the Board saw the assistant's role as mainly clerical, not advisory.

[42] In *Treasury Board (Canadian International Development Agency)*, the Board stated that to be declared managerial or confidential, each position had to be reviewed on its merits. Consequently, the fact that in two other offices of the DOJ's litigation sector in B.C., there are similar positions with similar duties and responsibilities that have been declared managerial or confidential, is not in itself a deciding factor.

[43] Supervisory duties alone are not sufficient to justify excluding a position from a bargaining unit (see *Treasury Board v. Public Service Alliance of Canada*, PSSRB File No. 176-02-287 (19791009), [1979] C.P.S.S.R.B. No. 9 (QL) ("*Sisson*")). If it were only a matter of the incumbents supervising the legal assistants and conducting their performance appraisals, I would not find it sufficient ground for exclusion.

[44] A distinction must be made between supervisory and managerial duties. I find useful the following definitions, which are quoted in *Sisson*:

> [Supervision:]
>
> *The function and activity of making sure that the objectives of the organization are carried out according to plans and policies which are designated and handed down from management.*
>
> [Management:]
>
> *A collective term that refers to the system, function, process or office of planning, providing, coordinating, directing, evaluating and controlling all available efforts and resources of an organization for the accomplishment of the objectives and policies which are designated by and handed down from the top executives of the organization.*

[45] In *Treasury Board v. Public Service Alliance of Canada*, PSSRB File Nos. 172-02-884 A and 172-02-886 A (19971219), [1997] C.P.S.S.R.B. No. 143 (QL), the Board explained the essence of what is now s. 59(1)(g) (then 5.1(1)(d)) in the following manner:

> …
>
> *27 Under paragraph 5.1(1)(d), the Board has some discretion in determining whether the duties and responsibilities of a position so closely associate the incumbent of that position with the employer*

> *as to warrant exclusion or whether there is likelihood of serious conflict of interest between the duties of the position and membership in the bargaining unit. It is under this heading that the "management team" concept developed by the Board over the years has some application.*
>
> …

[46] That said, I am also mindful of the caution expressed as follows in the next paragraph of that decision:

> …
>
> ***28*** *It is particularly important, when interpreting paragraph 5.1(1)(d) to remember that the right to membership in a bargaining unit (unionization) should not be removed lightly. Wherever possible an employer must arrange its affairs so as to minimize the need for exclusion. This is necessary to preserve the statutory framework for the regulation of labour relations in the Public Service. Exclusions under paragraph 5.1(1)(d) must be supported by cogent evidence of potential conflict or association with management by reason of the duties of the position.*
>
> …

[47] In this case, I find that there is a proper basis for exclusion, precisely because the duties and responsibilities of the position "… so closely associate the incumbent of that position with the employer as to warrant exclusion …". Although the Legal Support Coordinators are not at an especially high classification level, the organization of their work environment deserves to be taken into account.

[48] The litigation sector of the DOJ's B.C. region is divided into four separate offices, and each has considerable autonomy in how the work is carried out. The Legal Support Coordinators' role in managing the offices places them in a potential conflict of interest.

[49] According to the evidence, the incumbents play an important part in the management team and are very much involved in decision making that affects the CR-05s who are part of the PA group, which the incumbents would also be included in. It seems to me that this is a case in which the management advisor role, within the management team and in close relationship with the regional director, is in direct conflict with being part of the bargaining unit.

[50] Both witnesses stated that they rely on advice from the Legal Support Coordinators to interpret the collective agreement that applies to the legal assistants

and that would apply to them were they included in the bargaining unit. That in itself would not be sufficient to tip the balance. Providing advice on the collective agreement is not part of the Legal Support Coordinators' duties according to their job descriptions. Management could ask the Human Resources section for advice on labour relations and the collective agreement.

[51] However, in addition, from the evidence heard, a Legal Support Coordinator is a full-fledged member of the management team. Although they do not make management decisions, they certainly play a role in providing their points of view and participating in the discussions leading to those decisions. They are privy to management's reasoning, and there would appear to be a conflict of interest if they were also as part of the bargaining unit. Both witnesses testified to their reliance on the incumbents' advice to ensure the smooth functioning of their office.

[52] In *Professional Institute Public Service of Canada v. Canada (Treasury Board) (Economics, Sociology and Statistics Group - Scientific and Professional Category)*, PSSRB File No. 172-02-31 (19710714), [1971] C.P.S.S.R.B. No. 8 (QL), the employer sought an exclusion for a Mr. Gestrin and a Mr. Sunga. Mr. Gestrin's position was the assistant secretary to the Cabinet Committee on Priorities and Planning, while Mr. Sunga's position was the privy council officer in the Cabinet Secretariat (Operations) in the Social Development Division. Both were part of the economics, sociology, and statistics occupational group in the scientific and professional category, a bargaining unit represented by the Professional Institute of the Public Service of Canada. According to the Board, their proximity to Cabinet made their participation in the bargaining unit untenable, given the possibility they might sit at the bargaining table on the bargaining agent side. Therefore, the exclusion request was granted.

[53] The incumbents are certainly not at that level in the hierarchy. Nevertheless, I find that as in that case, being both part of the management team and part of the bargaining unit would create an untenable situation. The incumbents are too closely linked to management to be part of the bargaining unit.

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

(The Order appears on the next page)

V. Order

[55] Position #21364, Coordinator, Legal Support, is declared a managerial or confidential position under s. 59(1)(g) of the *Federal Public Sector Labour Relations Act*.

[56] Position #22246, Coordinator, Legal Support, is declared a managerial or confidential position under s. 59(1)(g) of the *Federal Public Sector Labour Relations Act*.

April 23, 2020.

Marie-Claire Perrault,
a panel of the Federal Public Sector
Labour Relations and Employment Board