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Citation: 2024 FPSLREB 90

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

CANADA REVENUE AGENCY

Applicant

and

PROFESSIONAL INSTITUTE OF THE PUBLIC SERVICE OF CANADA

Respondent

Indexed as
Canada Revenue Agency v. Professional Institute of the Public Service of Canada

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

Before: Christopher Rootham, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Applicant: Natalie Atherton, representative

For the Respondent: Vance Coulas, Professional Institute of the Public Service of Canada

Decided on the basis of written submissions, filed February 28 and March 20 and 27, 2024.

REASONS FOR DECISION

I. Overview

[1] The Canada Revenue Agency (CRA) applied to exclude 3 positions from the Audit, Financial, and Scientific Group bargaining unit represented by the Professional Institute of the Public Service of Canada (PIPSC). The 3 positions are in the CRA's Demographics and Workforce Analysis Section. That section provides statistical and demographic analysis about the CRA's workforce to its senior managers. The CRA applied to exclude 3 of the 14 positions in that section: one manager, one senior analyst, and one analyst position. The CRA based its application on s. 59(1)(h) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[2] Paragraph 59(1)(h) of the *Act* requires three things of the occupant of the position: (1) that they have duties and responsibilities to the occupant of a position that is excluded under ss. 59(1)(b), (c), (d), or (f); (2) that their duties and responsibilities are confidential to that position; and (3) that their duties are in relation to labour relations matters. I have concluded that the CRA has not demonstrated the second element of that test. Therefore, I dismiss the applications.

II. Procedural background

[3] This decision is being released alongside five other decisions involving applications by an employer to exclude a position or group of positions identified in s. 59(1) of the *Act*. The six decisions bear the citations 2024 FPSLREB 90 through 95.

[4] For context, the Federal Public Sector Labour Relations and Employment Board ("the Board") is authorized to decide any matter without an oral hearing; see the *Federal Public Sector Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365), at s. 22, and *Walcott v. Public Service Alliance of Canada*, 2024 FCA 68. When the Board schedules an oral hearing for an exclusion case, it typically lasts one or two days at most. However, a large number of exclusion applications were filed before 2023. Therefore, the Board identified 53 older files that may be suitable to be determined in writing.

[5] Both employers and bargaining agents have a shared interest in expeditious decisions in exclusion cases. Scheduling 53 days of hearing would delay the dispositions of many of these exclusion cases, as well as the hearings of other cases

that the Board has not yet scheduled. Exclusion cases are also well-suited for hearing in writing because, most of the time, the evidence about the duties performed by the position at issue is not in dispute and can be provided by the employer through a combination of documents (including a job description) and will-say evidence.

[6] Therefore, the Board wrote to 3 employers and 2 bargaining agents involved in these 53 files. One pair of employer and bargaining agent identified a more recent application that was similar to other existing applications, so the Board issued directions about 54 files, some of which involved multiple employees. The directions provided the employer and bargaining agent in each case with a timetable to file written submissions. The parties in each case were also given the opportunity to request an oral hearing; none did so. In many cases, the Board extended the period for the employer's initial submissions to permit the parties an opportunity to discuss these exclusion applications. After those discussions, the Board had to decide only 21 files involving 2 employers and 2 bargaining agents. Two groups made out of these 21 files were consolidated because they all raised the same issue: a group of 14 (in 2024 FPSLREB 91) and this group of 3.

[7] I was assigned to decide each of these files. After reviewing them, I concluded that they were capable of being decided in writing. In 2024 FPSLREB 95 I had a follow-up question about the effective dates of certain documents, but otherwise, I was able to decide the case on the basis of the documents filed, the employer's will-says, and the written submissions of both parties. I also identified that the basis of the three applications in this case were the same, and therefore I directed that the parties address these three cases together and I also am only issuing a single decision for all three positions.

[8] Finally, I want to thank all the parties (the two employers and two bargaining agents) for the quality of their submissions. It was clear that the employers and bargaining agents worked hard to resolve the majority of these cases on their own and that the cases remaining either raised important points of principle or were borderline cases based on their facts (like this one). These were not easy cases; the parties' submissions made them easier. I thank them for it.

III. The positions at issue

[9] These three positions are in the Demographics and Workforce Analysis Section of the CRA. The CRA describes that the section "… provides demographic services and advice, and conducts statistical analysis on the CRA workforce that respond [*sic*] to the needs of human resources stakeholders within the CRA." Therefore, the employees in that section "… provide information, support and workforce analytics to senior and middle managers and various human resources specialists across the CRA …".

[10] The CRA has applied to exclude 3 of 14 positions in that section, titled Manager, Workforce Analytics and Performance Evaluation (classified at the MG-06 group and level); Senior Workforce Analyst (classified at the ES-05 group and level); and Workforce Analyst (classified at the ES-04 group and level). According to the organizational chart that the CRA provided to me, 5 of the other positions in that section are vacant: 1 analyst, 3 junior analysts, and 1 position titled HR Program Support Officer. Of the positions that are filled, 2 are for university undergraduates, 1 is a trainee, 1 is a junior analyst, 1 is an analyst, and there is 1 other Workforce Analyst.

[11] The CRA's submissions for all three positions are virtually identical. I have reproduced the submissions for the Manager position. PIPSC agreed that the CRA's evidence was virtually identical for all three positions as well. Those submissions state:

> …
>
> *20. The workforce analytics developed by the incumbents contribute to CRA's human resources policy development as a separate employer. With the requests they receive, and reports they prepare, they are informed of proposed changes to the Government of Canada's and the CRA's human resources agenda, in order to determine the national impact on the organization. The incumbents contribute to the monitoring plans for human resources programs that evaluate the effectiveness of CRA's policies and compliance. They are able to see trends and patterns in the requests received, and the data generated in response. When preparing data, they see the raw information, while small numbers will be suppressed when the information is released to protect the identity of employees. As such, they could become aware of the circumstances associated with specific cases.*
>
> *21. The Human Resources Branch (HRB) and the CRA recognize the importance of using the Agency's analytic capacity and HR data to maximize their ability to make informed decisions based on*

> *evidence. The HRB Data Strategy, published in November 2018, establishes several objectives that link to the Agency Data and Analytics Vision, such as: data literacy and advanced analytics (conducting research with HR data). Data literacy is needed to ensure appropriate expectations of what the data can and cannot say, how data is processed, and the basic cleaning process. There are many ways to input and interpret data in the systems which can yield inaccurate data, conclusions, and/or recommendations, leading to decisions based on incorrect information. Advanced analytics begins with a question that needs to be answered and methodology chosen to answer it, to ensure that the answer obtained is reliable and valid.*
>
> *22. As the incumbents of these positions are represented, there are times when management or human resources stakeholders need to limit the amount of information shared with their requests. It could become difficult for the incumbents to demonstrate data literacy and develop advanced analytics, if they are not provided with complete information about the problem or questions being considered. This is a significant gap for the CRA as the incumbents have specific knowledge and competencies related to gathering, manipulating, analyzing and interpreting data and information that is not being fully used. It would benefit virtually all human resources stakeholders and program areas to make use of this expertise.*
>
> *23. For example, the incumbents do not currently provide advice and guidance on documents under negotiations confidence as they are not excluded and this could place them in a conflict of interest. Should the incumbents become excluded, they would be called upon to participate in the negotiation process in an open and transparent manner (from planning to execution to monitoring), making them privy to negotiation confidence material (e.g. mandates, proposals, etc.). They could analyze the impact of the proposed amendments on the organization, and provide interpretation of material related to the preparation of the employer's mandate, proposal development and responses to proposals from the bargaining agents. It would be beneficial to the negotiation process to have the incumbents more involved in the development of negotiation strategy.*
>
> *…*

[12] PIPSC points out that the work descriptions for the three positions do not provide this explanation for the duties of these positions. PIPSC points out that of the three work descriptions, only the Manager's refers to collective bargaining in any way — and that work description mentions it only once. I found the reference to collective bargaining in the work description instructive, and therefore, I will set it out in full:

> *…*

> *Manages the analysis of demographic and other information concerning the CRA workforce, compares to public and private sector information, and provides advice and opinions on the interpretation and application of this information, to the Minister, the Commissioner, the Agency Management Committee, and senior management teams of branches and regions, -The [sic] information is used to develop resourcing, retention, learning, organization and classification, staff relations, collective bargaining and other human resource management strategies and plans.*
>
> …

[13] I note that the work description does **not** state that the position is responsible for collective bargaining. Instead, the work description states that the position provides information that is used **by other people** to develop collective bargaining strategies.

IV. Basis of the application

[14] As I mentioned in the overview, the CRA has applied to exclude these three positions under s. 59(1)(h) of the *Act*. That paragraph reads as follows:

59(1)(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).*	***59(1)h)*** *poste de confiance occupé, en matière de relations de travail, auprès des titulaires des postes visés aux alinéas b), c), d) et f).*

[15] As is evident from its text, s. 59(1)(h) has three elements. The occupant of the position must have duties and responsibilities (1) toward the occupant of a position excluded under the four listed paragraphs, (2) confidential to that position, and (3) in relation to labour relations matters.

[16] The CRA argues that the three positions meet all three elements. As I will explain, I disagree.

A. Duties and responsibilities toward the occupant of an excluded position

[17] The CRA states that these positions perform duties for “senior management”, and the work descriptions refer to the CRA’s Commissioner or Assistant Commissioners as the recipients of their reports. PIPSC does not dispute that the

duties and responsibilities are performed for positions excluded under ss. 59(1)(b), (c), (d), or (f) of the *Act*. Therefore, the CRA has met its burden to meet this element.

B. The requirement of confidentiality

[18] The leading decision in this jurisdiction about the meaning of confidential duties remains *Canada (Treasury Board) v. Public Service Alliance of Canada (Correctional Group)*, [1979] C.P.S.S.R.B No. 9 (QL) at para. 48 ("*Sisson*"). The Board continues to apply the principles set out in *Sisson*, as seen in *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11 at para. 37, and *Treasury Board v. National Police Federation*, 2023 FPSLREB 110 at para. 205. In *Treasury Board v. Association of Justice Counsel*, 2020 FPSLREB 3 at para. 69 (upheld in 2021 FCA 37), the Board summarized the *Sisson* principles as follows (and the quotations are from *Sisson*, at paras. 48 to 51):

> …
>
> *a. The mere fact that an employee has access to confidential information does not of itself mean that she or he is employed in a confidential capacity.*
>
> *b. 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.*
>
> *c. In many instances, it is of the essence to the confidence that the information not be disclosed to any member of any group or body of the generality of employees.*
>
> *d. The confidential matters to which the person has access must be related to industrial relations.*
>
> *e. Disclosing the information would adversely affect the employer.*
>
> *f. The person must be involved with this information as a substantial and regular part of his or her duties. It is not sufficient that he or she comes in contact with it occasionally.*
>
> *g. The confidential exclusion is to be narrowly interpreted to avoid circumstances in which the employer designates a disproportionate number of persons as confidential and to ensure that the maximum number of persons enjoys the freedoms and rights incidental to collective bargaining.*
>
> *h. 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.*

[19] The CRA has provided no evidence that would meet the second of those eight principles. The employees occupying these positions receive and analyze data. According to the CRA, those employees "provide information, support, and workforce analytics". None of that suggests a quality of confidence between the analysts and the recipients of that analysis.

[20] This is particularly evident from the portions of the work descriptions that the CRA relied upon in its rebuttal written submissions. In response to an argument by PIPSC that the work descriptions did not provide a sufficient link to "labour relations" (an issue that I will return to later), the CRA quoted from a paragraph of each of the work descriptions.

[21] From the work description for the Workforce Analyst, it quoted, "Provides detailed analyses and interpretations on demographic and labour market data **in response to information request** [*sic*] from the Board of Management …" [emphasis added]. There is no element of "thinking aloud" — there is a request for information and an analysis of that information.

[22] From the work description for the Senior Workforce Analyst, it quoted, "Develops PowerPoint presentations to be delivered by senior management …" at different forums. There is no element of "thinking aloud" — they are drafting a PowerPoint presentation, not collaborating in a confidential way with senior management.

[23] Finally, from the work description for the Manager, it quoted, "Manages the development of reports related to the frameworks, processes, standards and methodology by which workforce and program information is gathered, collated, analyzed and **presented to** Agency senior management …" [emphasis added] and "… provides advice and opinions on the interpretation and application of this information …" to senior management. Presenting information to an employee in a senior position is not the same as being confidential to that position.

[24] I have also quoted the last portion about the Manager providing advice because it is noteworthy that the CRA has not applied to exclude this position under s. 59(1)(c)

of the *Act* (i.e., that it provides advice about labour relations). Since s. 59(1)(c) excludes positions that provide labour relations advice, providing advice cannot be what Parliament contemplated by a confidential relationship in s. 59(1)(h) — otherwise, the provision would be redundant.

[25] The CRA also argued that the positions should be excluded because when preparing their analysis of data, the incumbents will see the "raw information", which means that "… they could become aware of the circumstances associated with specific cases." However, as the Board has repeatedly pointed out from *Sisson* to *Association of Justice Counsel*, "The mere fact that an employee has access to confidential information does not of itself mean that she or he is employed in a confidential capacity" (see *Association of Justice Counsel*, at para. 69). Yet, this is exactly what the CRA is arguing in this case: that having access to information makes their position confidential to a senior manager. It does not.

[26] Finally, as I pointed out earlier, an employer has an obligation to arrange its affairs so that its employees are not placed in a conflict of interest if it can be avoided. The CRA has done exactly that. The CRA acknowledges that "… the incumbents do not currently provide advice and guidance on documents under negotiations confidence as they are not excluded and this could place them in a conflict of interest." The CRA goes on to submit that it "would be beneficial" to it if the Board excluded these positions so that these positions could participate in collective bargaining more intensely.

[27] An employer's application to exclude positions must be based on the duties that the position is performing — not the duties that the employer would like the position to perform in the future; see *CUPE v. Resort Village of Candle Lake*, 2022 CarswellSask 340 at para. 80, and *Peel Children's Aid Society v. CUPE*, 2015 CarswellOnt 13808 at para. 22. Equally, the CRA may not justify the exclusion of a position because it wants to assign new duties to it in the future. This would be contrary to the CRA's obligation to organize its affairs to minimize exclusions under s. 59(1)(h) of the *Act*. It has done so already; it did not explain why it could not continue to do so.

[28] Finally, I have considered cases when labour boards have excluded employees who provide financial analysis for an employer, such as *O.P.E.I.U., Local 166 v. Spruce Falls Power & Paper Co*, 1980 CarswellOnt 885, and *York University Staff Assn. v. York*

University, 1975 CarswellOnt 795. In those cases, labour boards excluded employees who provided financial analysis for an employer about the costs of collective bargaining proposals made by a union. The relationship between collective bargaining and the analysis provided was immediate and direct. In this case, there is no immediate and direct relationship between collective bargaining and the analysis being conducted. As I explain later, I accept that the analysis performed by these positions is about labour relations; however, the positions still lack the immediate and direct relationship with another excluded employee that characterizes the other decisions.

[29] In conclusion, the CRA has not demonstrated that these three positions are confidential to senior management. The employees in these three positions analyze data and present that analysis to senior management. The CRA has provided no evidence or even asserted that the employees in these positions are part of deliberations by senior management about labour relations issues or are present when senior management is "thinking aloud" about those issues. As far as the evidence that the CRA has provided sets out, the employees in these positions are given data (some of which is confidential) and are asked to generate reports or presentations based on that data. The act of analyzing and reporting on data does not create the sort of confidential relationship captured in s. 59(1)(h) of the *Act*.

C. The requirement of labour relations

[30] PIPSC argues that neither grievances nor labour relations form a substantial or regular part of the work done by these positions. As stated in the *Association of Justice Counsel* decision, the criteria of confidentiality and labour relations in s. 59(1)(h) are connected such that contact with confidential labour relations issues must form a substantial and regular part of these positions' duties.

[31] PIPSC's main argument is that demographic and statistical information cannot be "labour relations" information. I respectfully disagree. The Board in *Association of Justice Counsel* defined "labour relations" for the purposes of ss. 59(1)(c) and (h) of the *Act* to mean the types of issues that fall within the scope of Part I of the *Act*. PIPSC urges me to adopt that meaning, and I have done so.

[32] However, the work being done relates to collective bargaining, among other things. The work description for the Manager states that the information is used for "collective bargaining". The relationship with labour relations is clear in that case. The

other work descriptions state that employees in these positions provide information that is used to "develop HR Resourcing strategies and plans" and "recruitment and development strategies." Recruitment and retention are key drivers in collective bargaining strategy, as evidenced by their inclusion in the list of factors considered by arbitration boards under s. 148(a) of the *Act*.

[33] As for the requirement that this be a "substantial and regular" part of the duties of the position, I also conclude that the CRA has demonstrated this. The work of this section responds to the needs of all human resources stakeholders at the CRA. While the term "labour relations", as defined in *Association of Justice Counsel*, is narrower than all aspects of "human resources", the types of information being analyzed and relayed in this case can all have a labour relations application as well as an application to other aspects of human resources. The intersection with labour relations is substantial and regular.

[34] Therefore, I have concluded that the CRA met its requirement under this element of s. 59(1)(h) of the *Act*.

[35] However, the CRA must meet all three elements under s. 59(1)(h) of the *Act*. It has not demonstrated that it meets the second element — namely, demonstrating that the positions are truly "confidential" to the other excluded positions.

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

(The Order appears on the next page)

V. Order

[37] The application is dismissed.

July 17, 2024.

Christopher Rootham,
a panel of the Federal Public Sector
Labour Relations and Employment Board