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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 OF CANADA

Applicant

and

PUBLIC SERVICE ALLIANCE OF CANADA

Respondent

Indexed as
Treasury Board of Canada v. Public Service Alliance 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: Peter Doherty, counsel

For the Respondent: Janson LaBond, Public Service Alliance of Canada

Decided on the basis of written submissions, filed March 8 and April 2 and 9, 2024.

REASONS FOR DECISION

I. Outline

[1] This is an application by the Treasury Board of Canada ("the employer") to exclude the position of Team Lead in the Corporate Compensation Service Unit at Global Affairs Canada (GAC) from the bargaining unit represented by the Public Service Alliance of Canada (PSAC). The Team Lead (classified at the AS-05 group and level) is the second in command to the Unit Manager (classified at the AS-06 group and level) who heads the compensation unit. The Team Lead is responsible for dealing with complex or difficult compensation questions, occasionally providing advice to labour relations advisors about compensation issues, attending quarterly meetings of a human resources committee, and helping mentor and supervise the rest of the compensation unit.

[2] I have decided to dismiss the application. I have concluded that the duties of this position do not create a conflict of interest with membership in the bargaining unit. I have also concluded that the nature of the duties does not warrant excluding the position for other reasons. My reasons follow.

II. Procedure followed to decide this application in writing

[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 *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "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 a group of 3 (in 2024 FPSLREB 90).

[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 one case (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.

[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. Basis of the application

[9] The employer applied to exclude the Team Lead position under s. 59(1)(g) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*"). That provision reads 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*	***59 (1)*** *Après notification d'une demande d'accréditation faite en conformité avec la présente partie ou la section 1 de la partie 2.1, l'employeur peut présenter une demande à la Commission pour qu'elle déclare, par ordonnance, que l'un ou l'autre des postes visés par la demande d'accréditation est un poste de direction ou de confiance pour le motif qu'il correspond à l'un des postes suivants :*
…	[…]
(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 ….*	***g)*** *poste dont le titulaire, bien que ses attributions ne soient pas mentionnées au présent paragraphe, ne doit pas faire partie d'une unité de négociation pour des raisons de conflits d'intérêts ou en raison de ses fonctions auprès de l'employeur;*

[10] There are three elements to consider under s. 59(1)(g) of the *Act*:

1) the duties and responsibilities must not be otherwise described in s. 59(1); **and**
2) the duties and responsibilities must give rise to a conflict of interest; **or**
3) there are other reasons to exclude the position based on its duties and responsibilities.

[11] These three elements are evident from the wording of s. 59(1)(g). The Board (which in this decision refers to the current Board or any of its predecessors) also set out these three elements in *Treasury Board v. Public Service Alliance of Canada*, 2024 FPSLREB 13 at para. 134 ("*OHS Advisors*"), and both parties agreed that those are the three elements that I should address in this case. Therefore, I will address each of them in turn.

IV. The duties and responsibilities of the position are not otherwise described in s. 59(1)

[12] Paragraph 59(1)(g) of the *Act* states that it applies to duties and responsibilities "not otherwise described in this subsection". It is a residual clause designed to apply to situations not otherwise captured elsewhere in s. 59(1), so that if the reasons for

excluding a position are found under another part of s. 59(1), the position should not be excluded under s. 59(1)(g). I have concluded that the employer has met this threshold under s. 59(1)(g), for the most part.

[13] PSAC does not dispute that at least some of the duties and responsibilities that the employer is relying on are not otherwise described in s. 59(1) of the *Act*. However, PSAC argues that the duties concerning grievances and labour relations or collective bargaining issues should not be addressed under s. 59(1)(g) because they are otherwise described in ss. 59(1)(e) (grievances) and (c) or (f) (labour relations), respectively.

[14] On grievances, the employer's evidence is that the Team Lead provides advice about compensation-related employee grievances. The Team Lead recommends the result in a grievance to a labour relations advisor who usually — but not always — accepts that recommendation. The Team Lead spends less than 10% of their time making recommendations about grievances.

[15] PSAC argues that the employer may not rely upon the Team Lead's work on grievances because that would overlap with s. 59(1)(e) of the *Act*. However, s. 59(1)(e) excludes employees whose duties include "… dealing formally on behalf of the employer with grievances …". This means deciding grievances, not assisting with grievances; see *Canadian Energy Regulator v. Professional Institute of the Public Service of Canada*, 2020 FPSLREB 120 at para. 118. Providing assistance with grievances does not overlap with s. 59(1)(e) of the *Act*.

[16] On collective bargaining, the employer's evidence is limited. The Team Lead provided advice to senior management during collective bargaining on how language in proposed articles dealing with remote work and overtime should be interpreted. Otherwise, the evidence is of a more indirect involvement with collective bargaining. As the employer submits, the Team Lead's expertise in compensation "intersects" with collective bargaining. Intersecting with collective bargaining is not captured in either ss. 59(1)(c) or (f) of the *Act*. Paragraph 59(1)(c) applies only to positions that provide "advice" on labour relations; intersecting is not the same as providing advice. Paragraph 59(1)(f) applies to positions that are "… directly involved in the process of collective bargaining on behalf of the employer …"; intersecting is not the same as direct involvement. This means that s. 59(1)(g) applies; see *Treasury Board*

(Department of Justice) v. Association of Justice Counsel, 2020 FPSLREB 59 at paras. 39 and 43 ("*CIPL Directorate*").

[17] In its reply submissions, the employer states that the Team Lead "… attends collective bargaining sessions on the employer's behalf …". Respectfully, there is no evidence of that. I have read the work description, the written rationale for exclusion that the employer adopted as part of its evidence, and the portions of the employer's initial submissions that constitute the will-says from managers about the duties of that position, and none of those state that the Team Lead attends collective bargaining. If there was such evidence, I would agree with PSAC that the employer could not rely on it in this application as that falls within the scope of s. 59(1)(f) of the *Act*.

[18] With that small exception, the employer has met this threshold under s. 59(1)(g) that the duties and responsibilities do not fall more accurately under another part of s. 59(1) of the *Act*.

V. Duties and responsibilities must give rise to a conflict of interest

[19] The first ground for excluding a position under s. 59(1)(g) of the *Act* is that its duties and responsibilities give rise to a conflict of interest. The conflict of interest can arise in two ways: because of the duties as a whole, or because of a specific feature of the position. As the Board put it in *Treasury Board (Correctional Service of Canada) v. Public Service Alliance of Canada*, 2012 PSLRB 46 ("*Security Intelligence Officers*") at para. 69:

> ***69*** *… The term "conflict of interest" could mean either that the conflict must be identified by examining the duties and responsibilities performed by the employee as a whole (rather than by referring to any specific exercise of managerial authority, decision-making power or labour relations function) or that the specific feature of the position that gives rise to the conflict of interest is not caught by the other paragraphs because not every instance in which a conflict could occur can be anticipated when a statute is drafted.*

[20] Importantly for this case, the conflict of interest captured in s. 59(1)(g) is not a conflict between an employee's interests and the employer's interests. Conflict of interest in exclusion cases is about the "'… existence of dual loyalties resulting from the duties performed for the employer and membership in a bargaining unit' that relate to the fundamental terms and conditions of the employment relationship" (see

Treasury Board v. National Police Federation, 2023 FPSLREB 110 repeated at paras. 201, 207, 213, 217, and 218). Therefore, the conflict of interest protected against in s. 59(1)(g) is between an employer and a bargaining agent, not between an employer and an employee. The conflict must also relate to a fundamental term and condition of the employment relationship.

A. Compensation duties, taken as a whole, do not justify excluding a position

[21] Turning first to the duties as a whole, those duties are about compensation issues. The position prepares policies and training for how to address ongoing compensation issues, provides advice about compensation issues arising in specific cases, and even provides advice about compensation grievances.

[22] Compensation is obviously a fundamental term and condition of the employment relationship. The Board concluded in *National Police Federation* that staffing and classification are fundamental to the employment relationship because they have a direct impact on pay. At the risk of stating the obvious, compensation is about pay too.

[23] However, compensation duties by themselves do not create a conflict of interest for the purposes of s. 59(1)(g) because any conflict of interest that exists is between the employee and the employer and not between the bargaining agent and the employer.

[24] To explain, the position proposed for exclusion is classified at the AS-05 group and level. This means that even if the position were excluded from the bargaining unit, the Treasury Board's *Directive on Terms and Conditions of Employment* means that occupant of that position would still be paid according to the rates set out in the "relevant collective agreement" — i.e., the collective agreement for the bargaining unit to which the person would be assigned were the person's position not excluded. The employee in that position would be paid the same regardless of whether the position is excluded. To put this another way, an "excluded" AS-05 is paid the same as a unionized AS-05.

[25] This means that any conflict of interest exists regardless of whether the position is excluded. The employer submitted that the risk is that the conflicted employee would be unable to separate the bargaining unit's interests from the

employer's. I disagree. The risk is that the conflicted employee would be unable to separate their own personal interests from the employer's. The employee in the Team Lead position (or any position dealing with compensation) is conflicted regardless of whether the position is excluded because any advice they provide about compensation would rebound to their harm or benefit whether or not they are in the bargaining unit.

[26] This conclusion is consistent with the Board's previous decisions about excluding compensation positions. PSAC cited four cases in which the Board decided not to exclude compensation advisors: *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1975] C.P.S.S.R.B. No. 6 (QL) ("*Fraser*"); *Public Service Alliance of Canada v. Canada (Treasury Board)*, PSSRB File No. 175-02-159 (19760407) ("*Provencher*"); *Public Service Alliance of Canada v. Canada (Treasury Board)*, [1983] C.P.S.S.R.B. No. 98 (QL) ("*Wilson*"); and *Public Service Alliance of Canada v. Treasury Board (Public Works Canada)*, [1984] C.P.S.S.R.B. No. 12 (QL) ("*Montgomery*"). In *Montgomery* in particular, the Board concluded that "… there is no inherent conflict [of interest] …" (at paragraph 28) between compensation duties and membership in the bargaining unit. Those four cases are factually different from this one in terms of the level of responsibility of the position, an issue that I will return to later when considering the second element of s. 59(1)(g). However, those decisions all still stand for the proposition that there is no automatic or inherent conflict of interest between compensation duties and membership in a bargaining unit.

[27] Those decisions contrast with *Public Service Alliance of Canada v. Treasury Board*, [1986] C.P.S.S.R.B. No. 341 (QL) where the Board excluded a compensation advisor because they worked directly with Treasury Board analyzing and preparing collective bargaining proposals. That case excluded the position because of its link to collective bargaining, not because it dealt with compensation.

[28] Therefore, I have concluded that compensation duties as a whole do not create a conflict of interest governed by s. 59(1)(g) of the *Act* because the conflict of interest is between the employer and the employee, which exists regardless of whether the position is excluded.

B. The specific features of this position do not justify its exclusion

[29] Turning to the specific features of the position, the closest that any specific duty comes to demonstrating a conflict of interest is the involvement with collective

bargaining that I briefly discussed earlier. An intersection between the duties of a position and collective bargaining falls within the core purpose behind excluding positions for conflict-of-interest reasons in s. 59(1)(g) of the *Act*. Therefore, I will set out the employer's characterization of this duty in its entirety, as follows:

> …
>
> *67. …* [The former Team Lead who is the current Unit Manager] *would testify that when she was in the Team Lead position, she provided advice to senior management during negotiations of the PA collective agreement on how the language in proposed articles dealing with remote work and overtime should be interpreted from the employer's perspective. Senior management relied on this advice in determining its bargaining strategy.*
>
> …

[30] PSAC makes a good technical response to this point: PSAC collectively bargains with the Treasury Board, not GAC. Senior management at GAC does not have a bargaining strategy because it does not collectively bargain — the Treasury Board does. In reply, the employer states that the Treasury Board consults affected departments (not just GAC), particularly on compensation issues.

[31] Therefore, at best, the employer's evidence is of a single instance at some unknown period in the past when the Team Lead advised management at GAC about a collective bargaining issue. There is no indication about whether the Team Lead's information or advice actually made its way to the Treasury Board's bargaining team. Even if it did, it was passed on by GAC managers (perhaps accurately, perhaps not — I have no evidence one way or the other) to the Treasury Board negotiator, along with (perhaps contradictory — again, I have no evidence one way or the other) information from managers in up to 77 other departments listed in Schedules I and I.1 to the *Financial Administration Act* (R.S.C., 1985, c. F-11), which got their own information from compensation advisors. The Team Lead's intersection with collective bargaining is too tenuous to constitute a conflict of interest.

[32] The employer states that during a workforce adjustment, the position would be aware of all the affected employees and would provide advice to management to ensure that the compensation policies and guidelines are applied properly. However, 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 *Treasury Board*

v. Association of Justice Counsel, 2020 FPSLREB 3 at para. 69 (upheld in 2021 FCA 37); and also, *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11 at para. 50 ("*Senior HR Advisor*")). Similarly, the mere fact of access to confidential information does not create a conflict of interest, and the fact that the occupant of this position may know in advance which employees will be workforce-adjusted does not place them in a conflict of interest with the bargaining unit. The Team Lead is not consulted about which employees to layoff or which positions to eliminate. The Team Lead is (at some hypothetical point) being told only who is being laid off and asked to process their compensation.

[33] The employer also states that the position provides advice about compensation grievances. If the alleged conflict is about the content of the advice provided, I addressed that earlier: the conflict exists regardless of whether the position is in the bargaining unit because the employee in that position would benefit from the advice in either case. If the conflict exists because of knowledge of information (i.e., the occupant of the position will know the result of a grievance in advance), what I just said also applies — information alone does not create a conflict of interest. I will say more about grievances when dealing with the second element of s. 59(1)(g) of the *Act*.

[34] Finally, the employer also states that the position provides advice to the Unit Manager about how the unit should operate, including how it coordinates its work with the Pay Centre, the process it uses to respond to compensation requests, the way other unit employees communicate with management, and planning new operational initiatives. These are routine operational questions that do not conflict with an interest of a bargaining agent.

[35] For these reasons, I have concluded that the position does not have a conflict of interest that is captured within the meaning of s. 59(1)(g) of the *Act*.

VI. Other reasons based on the duties of the position

[36] The second ground for excluding a position under s. 59(1)(g) of the *Act* is more generally about its duties and responsibilities to the employer. The *Act* confers on me "a very broad discretion" to exclude a position, and the case law "… has failed to articulate a set of clear criteria …" for applying this provision (see *Security Intelligence Officers*, at para. 70).

[37] One way that the Board has sometimes approached this ground is to consider whether the position is part of the "management team". The employer submits I should do that here.

[38] In response, PSAC argues that the concept of "management team" should be used only in cases involving s. 59(1)(e) of the *Act*, which excludes positions that have "substantial management duties". However, the Board has already decided that the "management team" approach applies to s. 59(1)(g), in *Treasury Board v. Public Service Alliance of Canada*, [1997] C.P.S.S.R.B. No. 143 (QL) at para. 27, and *Treasury Board v. Association of Public Service Financial Administrators*, [1998] C.P.S.S.R.B. No. 106 (QL) at para. 73, dealing with similar provisions in the predecessor *Public Service Staff Relations Act* (R.S.C., 1985, c. P-35), and again in *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84 at para. 65, dealing with this version of the *Act*. I agree with those cases that participation in the management team is a reason to exclude a position under s. 59(1)(g) of the *Act*.

A. Caution and narrowness in applying the management team doctrine

[39] PSAC argues that the management team concept should be applied cautiously and narrowly, relying on Canada Industrial Relations Board decisions to that effect, including *I.L.W.U. Local 517 v. Prince Rupert Port Authority*, 2002 CIRB 203; and *United Food and Commercial Workers, Local 247 v. G4S Secure Solutions (Canada) Ltd.*, 2017 CIRB 850. In response, the employer argues that the Board is not bound by the findings of other labour boards and that the "management team" concept is broad and open-ended.

[40] I disagree with both propositions.

[41] I agree that the Board is not bound by findings by other labour boards in the narrow sense that a labour board in one jurisdiction is not bound to follow the decisions of a labour board in another jurisdiction. However, the employer is in practice arguing something broader: that the Board should strike out on its own, uninfluenced by what other labour boards have had to say about the same or similar issues.

[42] This cry for exceptionalism is inconsistent with the broader legal principle that the legal principles and norms governing private-sector employment apply to public-

sector employment; see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 103 ("If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way"); and *Wells v. Newfoundland*, [1999] 3 SCR 199 at para. 29 ("Employment in the civil service is not feudal servitude… It was a contract"). It is also inconsistent with the employer's use of a decision by another labour board (being *Cowichan Home Support Society v. United Food and Commercial Workers International Union, Local 1518*, [1997] B.C.L.R.B.D. No. 28 (QL) ("*Cowichan*")) to support its other arguments. The Board can and should act consistently with other labour boards unless the wording of a statute or a unique feature of employment in the federal public administration requires otherwise. Neither is the case here.

[43] Second, the Board has stated repeatedly that it will use s. 59(1)(g) "sparingly" (see *Security Intelligence Officers*, at para. 76; *CIPL Directorate*, at para. 36; and *OHS Advisors*, at para. 156) and "in rare circumstances" (see *National Police Federation*, at para. 217). The concept of a management team in s. 59(1)(g) cannot be broad or open-ended as the employer argues because that would be inconsistent with this Board's previous decisions that it should use the paragraph sparingly and in rare circumstances.

B. What is a management team?

[44] The parties dispute whether this position is part of the management team. Their dispute raises a threshold question: what is a "management team"? The concept is difficult to define carefully. In *Public Service Alliance of Canada v. Canada (Treasury Board) (Purchasing and Supply Group Bargaining Unit)*, [1977] C.P.S.S.R.B. No. 3 (QL) ("*Lemieux*"), the Board acknowledged that the concept has not been "accurately defined" (see paragraph 15), although it attempted to summarize the management team as follows at paragraph 17:

> *17 … persons* [who] *participate in, or are privy to, the processes of formulating policies, or decision-making [sic], or administrative management at the higher levels of the particular sector of the public service in which they are employed.…*

[45] The Board first used the concept in *Professional Institute Public Service of Canada v. Canada (Treasury Board) (Economics, Sociology and Statistics Group - Scientific and Professional Category)*, [1971] C.P.S.S.R.B. No. 8 (QL) ("*Gestrin and*

Sunga") and concluded that the Cabinet was included within the scope of that concept and that the two employees who participated actively in discussions at Cabinet committees were part of the "management team". In subsequent cases, the Board has concluded that a regional director was part of the management team (see *Professional Institute of the Public Service of Canada v. Treasury Board*, [1976] C.P.S.S.R.B. No. 12 (QL); and *Treasury Board v. Public Service Alliance of Canada*, 2020 FPSLREB 41 ("*Nguyen and Grant*")), that (while the Board did not use the phrase "management team") the warden and deputy warden of a correctional facility were the highest levels of the institution (*Security Intelligence Officers*), and that the Canada Border Services Agency's national border operations centre was part of the management team, particularly since it managed strike activity (in *Treasury Board v. Public Service Alliance of Canada*, 2016 PSLREB 84).

[46] By contrast, a senior human resources assistant position was not part of the management team because it was not "involved in formulating policies or decision-making [*sic*]" (from *Treasury Board v. Public Service Alliance of Canada*, 2017 PSLREB 11 at para. 53 ("*Senior HR Assistant*")), and two financial managers were not part of the management team simply because they attended meetings with more senior management (see *Association of Public Service Financial Administrators*).

[47] It is likely impossible for the Board to provide a comprehensive definition of what it means by a "management team". There will always be some element of "you know it when you see it" when it comes to what constitutes the management team.

C. Whether the Team Lead is part of the management team

[48] In this case, the employer has four main reasons as to why the position is part of the management team.

1. "Second in command"

[49] First, the employer states that the position is the "second in command" of the unit. I disagree that this makes the position part of the management team, for two reasons.

[50] First, the employer says that this makes the position responsible for overseeing the work of the unit and for reporting to the Unit Manager on day-to-day operations. The employer describes this as monitoring the unit's performance — not assessing the

performance of individuals. The employer also describes this as working on "… how the Unit responds to compensation requests." This is classic supervisory work, as defined in *Canada (Treasury Board) v. Public Service Alliance of Canada (Correctional Group)*, [1979] C.P.S.S.R.B. No. 9 (QL) ("*Sisson*") at para. 71 (namely, ensuring that the objectives of an organization are carried out in accordance with policies handed down from management) — not management.

[51] Second, the position is the second-in-command of an AS-06 manager who is excluded under s. 59(1)(g) of the *Act* — not one of the more specific exclusions such as ss. 59(1)(d) (policy formation) or 59(1)(e) (management duties). The employer is saying that the second-in-command of a position excluded using a residual clause is also caught by the same residual clause. This is inconsistent with the "sparing" use of s. 59(1)(g). Stacking s. 59(1)(g) exclusions in the way proposed by the employer would be the labour relations version of wearing a hat on a hat.

2. Effective recommendations

[52] Second, the employer states that the position makes effective recommendations about compensation grievances and other compensation issues. While the employer does not say as much, this is how it distinguishes this case from *Fraser*, *Provencher*, *Wilson*, and *Montgomery*. In each of those cases, the incumbent of the position did less-complicated compensation analysis, and they referred any hard cases or those requiring judgment to their supervisors (who would be someone like the Team Lead or Unit Manager in this case). This argument raises two issues.

[53] First, the argument raises the issue of whether or when making effective recommendations justifies excluding a position.

[54] The Board has been at best equivocal about whether effective recommendations are the same as decisions in exclusion cases. In *Treasury Board v. Public Service Alliance of Canada*, 2000 PSSRB 46 at para. 37, the Board denied an application to exclude a position because it did not have "… any decision-making or effective recommendation role that would warrant an exclusion" — implying at least that effective recommendations would be sufficient. On the other hand, in *Association of Public Service Financial Administrators*, the Board quoted with approval a passage from a textbook that stated, "The power to 'effectively recommend' does not amount to a power to decide" — but the Board then immediately stated that it was denying the

application because the positions' "… advisory role would not be such that their recommendations would have to be accepted without question, thus making them de facto the author of the decisions taken by the management team" (at paragraph 91).

[55] The Canada Industrial Relations Board has concluded that making effective recommendations does not justify excluding a position, and that to be excluded a position must have the power to make a decision and not just make the effective recommendation; see *International Association of Machinists and Aerospace Workers v. Voyageur Aviation Corp.*, 2021 CIRB 998 at para. 25, and the cases it cites.

[56] However, other labour boards have accepted that the power to make effective recommendations can justify excluding a position; see *Hydro Electric Commission of the Borough of Etobicoke v. Ontario Utility Foremen's Assn.*, [1981] OLRB Rep. Jan. 38 at para. 26; *Association of Allied Health Professionals v. Eastern Regional Integrated Health Authority*, 2020 NLLRB 5 at para. 71; and *Faculty Union of the Nova Scotia College of Art and Design v. Board of Governors of the Nova Scotia College of Art and Design*, 2017 NSLB 153 at para. 44. The British Columbia Labour Relations Board uses the term "effective determination" (see *Cowichan*, at para. 111) because "… it is not [its] intention to adopt this notion of 'effective recommendation' holus-bolus …" (from *British Columbia Ferry Corp. v. British Columbia Ferry and Marine Workers Union*, [1978] B.C.L.R.B. No. 65 (QL) at para. 49). It is not clear what exactly is the difference between an effective determination and an effective recommendation.

[57] Having reviewed the relevant authorities, I prefer the more nuanced approach adopted in several decisions of the Ontario Labour Relations Board; see *Canadian Office and Professional Employees Union (COPE Local 225) v. Association of Justice Counsel/Association Des Juristes De Justice*, 2020 CanLII 70973 (ON LRB) at para. 65; and *International Union of Operating Engineers, Local 793 v. Limerick (Township)*, 1993 CanLII 7881 (ON LRB) at para. 4. That approach distinguishes between decisions that have a direct versus indirect impact on the day-to-day working lives of employees. If the decision has a direct impact, then making an effective recommendation is sufficient. If the decision has an indirect impact, then making an effective recommendation is insufficient — to be a manager, the employee must have the final authority to make the decision.

[58] Another way to think of this is the difference between upper and lower management. Upper management usually makes decisions that indirectly affect employees (because it passes its orders through subordinates and tends to deal with less day-to-day issues), but part of being "upper" management means that it makes the final decision. Lower management takes steps that directly impact employees, but it often makes only an effective recommendation that upper management must bless.

[59] Therefore, making effective recommendations can justify excluding a position when the recommendation has a direct impact on employees but not when the impact is indirect.

[60] The second issue is whether this position makes effective recommendations on issues that would warrant its exclusion from the bargaining unit. When contrasting direct and indirect decisions, the Ontario Labour Relations Board has considered the following to be examples of direct decisions (see *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) v. Toronto Transit Commission*, 1994 CanLII 9964 at para. 10, which was recently relied upon in *Labourers' International Union of North America, Ontario Provincial District Council v. Surrey Construction Inc.*, 2023 CanLII 112754 (ON LRB)) at para. 14:

> …
>
> *(a) the power to hire or fire, or to make effective recommendations in that regard;*
>
> *(b) the power to discipline, or make effective recommendations in that regard;*
>
> *(c) the power to grant or effectively recommend wage increases, promotions and other similar matters;*
>
> *(d) the power to enforce the rules and regulations of the organization;*
>
> *(e) whether the individuals participate on behalf of management in the grievance procedure;*
>
> *(f) the power to grant or effectively recommend time off or assign overtime;*
>
> *(g) whether the individuals have effective control over the performance of their subordinates' work and over the efficiency of the service provided by their subordinates;*
>
> *(h) the authority to make effective recommendations with respect to the manner in which their subordinates' work is performed;*
>
> *(i) whether the company has training initiatives directed at the individuals to involve them as part of the management team.*

> *For example, training in such areas as labour relations, employment equity, affirmative action and safety rule enforcement;*
>
> *(j) the role of the individuals in performance evaluations;*
>
> *(k) whether the individuals enjoy any of the "trappings of management" which distinguish supervisors from other employees; and,*
>
> *(l) whether the individuals have the right of access to employee information with which they are able to track employee behaviour.*
>
> …

[61] Deciding compensation issues is notably absent from that list.

[62] In this case, most of the areas in which the position makes effective recommendations are about the process by which compensation issues are addressed. According to the employer, these recommendations "… actively shape the development of new management initiatives", "… providing [*sic*] policy guidance to the entire advisory team", involve "… strategies to maximize the efficiency and effectiveness of departmental interactions with the Pay Centre", provide solutions for "major issues affecting service delivery", "improve coordination" with the Pay Centre, and explain "… to management on [*sic*] how the compensation program could be improved." These all have indirect impacts on employees, and any recommendations — no matter how effective — do not justify excluding this position.

[63] The subject matter of effective recommendation that comes closest to a direct impact on employees involves compensation grievances. According to the employer, the position makes a recommendation as to whether to accept or deny a compensation-related grievance to a labour relations advisor, who generally accepts those recommendations. The employer also states that these grievances "… raise new interpretive questions that bear upon the outcome of the grievance in question." In response, PSAC points out that advice about grievances is missing from the work description and that there are no documents to support this alleged involvement in grievances. The employer fairly admits that this forms a minor portion of the position's duties (less than 10%), but I agree that the fact that it is not listed in the work description does not mean the duties do not exist — although the work description is important, for reasons that I will set out shortly.

[64] I have decided not to exclude the position on this basis for two reasons.

[65] First, the employer's evidence is that the position makes effective recommendations to labour relations advisors about grievances. However, the labour relations advisor is not the decision maker: the manager formally responsible for the grievance is the decision maker. I have no evidence that the manager deciding the grievance follows the advice provided by their labour relations advisor. I have no evidence about whether the extent to which managers accept labour relations advice changes the higher the grievance goes — i.e., whether the deputy head or assistant deputy minister is more or less likely to accept labour relations advice at the final level of the grievance process. I have no evidence about whether the advice provided by the Team Lead is always second-hand advice (from the Team Lead to the labour relations advisor to the grievance decider) or whether the advice becomes third- or fourth-hand (from the Team Lead to the labour relations advisor to a more-senior labour relations advisor to the director general to the assistant deputy minister, and so on). I have no evidence showing how much leakage there is in the chain of advice (i.e., if the labour relations advisor generally accepts only the Team Lead's recommendation, does that mean that a manager only generally accepts the labour relations advisor's recommendation and that a more-senior manager only generally accepts the manager's advice, and so on).

[66] In short, the employer does not connect all the dots to show that the Team Lead's recommendation is ultimately effective.

[67] This failure to connect the dots in the employer's will-say statement is particularly important in this case because the Team Lead's work description does not say anything about providing advice about grievances. Neither does the rationale prepared by the employer explaining why it wants to exclude this position. The work description says that the Team Lead drafts letters for management to respond to inquiries and complaints from the public, members of Parliament, and other stakeholders — but never mentions drafting letters or otherwise helping with grievances. To continue the metaphor, the work description has no dots at all about grievances. This makes the will-say's failure to connect the dots fatal because I cannot infer the connection of those dots from the work description.

[68] My second reason is about the nature of compensation advice. The employer has conflated discretion and judgment. Discretion is the power to choose between legally available alternatives; judgment is the power to decide questions of fact and law (see Eric Tucker, Alan Hall, Leah Vosko, and Rebecca Hall, *Making or Administering Law and Policy: Discretion and Judgment in Employment Standards Enforcement in Ontario*, 31 CAN. J.L. & SOC. 65 (2016) at p. 67, which is a paper about front-line employment-standards officers who deal with issues including pay).

[69] Managerial exclusions in the second part of s. 59(1)(g) of the *Act* are about the power to exercise discretion, not judgment. A manager has the discretion to decide whom to hire, whether to impose discipline for an infraction, or which worker to offer overtime to. Unless the discretion is fettered by a collective agreement (such as an obligation to offer overtime to the most senior employee), the essence of being a manager is the ability to exercise discretion over matters that affect employees' working lives.

[70] Compensation is not discretionary. No one has the discretion to decide whether or what an employee should be paid after they start working (although there can be some discretion about their initial rate of pay); the rules of compensation are set out in collective agreements and in the directives used to implement them. The employer correctly describes the Team Lead's role as acting in an "interpretive capacity". I have concluded that providing advice about compensation — even in the grievance process — is not a duty or responsibility warranting exclusion from the bargaining unit because the advice involves the exercise of judgment, not discretion.

3. Policy work

[71] Third, the employer argues that the Team Lead's duties in designing the unit's programs and policies warrant its exclusion.

[72] I appreciate that the Board has referred to preparing policies as justifying the exclusion of a position in *Senior HR Assistant* (in which it decided not to exclude a position because it was not involved in formulating policies), *Gestrin and Sunga* (in which it did exclude the positions), and *Lemieux* (in which it referred to the formulation of policies as a possible reason to exclude a position). However, there are policies and then there are policies. To give one example, there are committees that have come up with naming policies for documents to help with filing them. By no

stretch does being on that policy committee make someone part of the management team.

[73] To use an example from this application, the managerial policy is to improve service delivery by coordinating with the Pay Centre. The non-managerial policy is about how to communicate with the Pay Centre (by email, by a document portal, by using a help form, etc.) and how to improve service delivery — in other words, how to execute the managerial policy. The Team Lead's work description and the will-say state that the position is responsible for the second type of policy, not the first. That is not the type of policy work that justifies excluding a position from the bargaining unit.

4. Committee involvement

[74] Finally, the employer relies upon the Team Lead's participation in two committees. I can deal with the first one quickly: an interdepartmental committee with the Pay Centre to discuss procedures or issues with the Phoenix pay system once a month is nowhere close to a management team.

[75] The second committee is the more serious issue. The Team Lead attends the Human Resources Labour Management Committee at GAC ("the HR Committee"). The HR Committee is composed of the directors of the human resources disciplines at GAC (compensation, staffing, corporate finance, operational finance, and labour relations). It meets quarterly to discuss high-priority management issues. The employer's will-say states that the HR Committee votes on proposed action plans, although it does not state whether the Team Lead is a voting member of the HR Committee. The Team Lead's main duties for the HR Committee are to draft the agenda and take notes, although the Team Lead is occasionally asked for their opinion on compensation matters. Strangely, both the rationale for exclusion prepared by the employer and the work description do not mention the HR Committee; they mention only the interdepartmental committee that I just dismissed as a reason to exclude the position from the bargaining unit. Also, the HR Committee meets only quarterly. Finally, PSAC does not make any submission about the HR Committee aside from declaring that there is no conflict of interest that arises from the Team Lead's work on that committee because the Treasury Board, not GAC, collectively bargains.

[76] I agree with the employer that the HR Committee is part of the management team at GAC because the members of that committee are all senior managers who deal

with significant discretionary issues. The HR Committee also has a significant intersection with labour relations, which is another factor that indicates that it is part of the management team.

[77] However, I am still not excluding the position.

[78] An 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" see *Sisson*, at para. 50; and *Senior HR Advisor*, at para. 42. A mere sprinkling of managerial duties will not justify excluding a position; see *Cowichan*, at para. 120; and *National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) v. Reynolds-Lemmerz Industries*, [1995] OLRB Rep. Jan. 59 at para. 5. The HR Committee meets only quarterly. The tasks that the Team Lead performs at the HR Committee (namely, drafting an agenda and note-taking) are not in the work description and could be done by anyone in a position that is already excluded. During those times when the Team Lead actually presents something to the HR Committee (which the employer described as "occasionally"), I have no evidence to explain why the presentation cannot be done by the AS-06 Unit Manager, who is already excluded and is also an expert on compensation.

[79] The cases relied upon by the employer for why participating in the HR Committee makes the Team Lead part of the management team (namely, *Gestrin and Sunga*, *Nguyen and Grant*, and *Lemieux*) are all distinguishable. In *Gestrin and Sunga*, the employees attended every cabinet meeting and briefed the Prime Minister about those meetings, and in *Nguyen and Grant*, the employees attended weekly management team meetings. Their attendance at management team meetings was a frequent and substantial part of their duties. In this case, the meetings occur quarterly, and the work for the HR Committee is neither frequent nor a substantial part of the duties of this position. In *Lemieux*, the employer specifically stated that the employee was not a member of the management team (see paragraph 18), so the case has no relevance to this issue.

[80] In conclusion, the employer has not shown why the Team Lead is a part of the HR Committee. There is nothing in the will-say, rationale, or work description to show why the Team Lead was chosen to draft an agenda and take notes once each quarter, instead of one of the hundreds of other excluded positions at GAC. As for the

presentations to the HR Committee, the employer has not satisfied me that the excluded Unit Manager cannot make the occasional presentation instead.

[81] Therefore, I have concluded that the position is not part of the management team. As its work description states, it "[a]lerts the management team of major issues …"; this is different from participating in the management team.

D. Conclusion about other duties in s. 59(1)(g)

[82] My reasons about the other-duties branch of s. 59(1)(g) of the *Act* have, so far, focussed on the concept of the management team because that was the focus of the parties' submissions on this point. However, this branch of s. 59(1)(g) is not limited to the concept of the management team. In addition to considering whether the Team Lead is part of the management team, I also considered the duties of that position more completely and holistically, to determine whether it should be excluded from the bargaining unit.

[83] As the Supreme Court of Canada recently stated, an organization is structured at two levels of operation: that of management on the one hand, and that of execution on the other (see *Société des casinos du Québec inc. v. Association des cadres de la Société des casinos du Québec*, 2024 SCC 13 at para. 168; a concept concurred with by the majority judgment at paragraph 51). Looking at its duties as a whole, this position is responsible for execution, not management. The position lacks the discretion that is the hallmark of management. Its main tasks are to design practices to ensure that compensation issues are resolved efficiently and to provide interpretations for the hard cases. The work description describes the position's main task as to be the point of contact with the Pay Centre and to deal with "procedural issues as they arise". These are tasks of execution, not management.

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

(The Order appears on the next page)

VII. Order

[85] The application is dismissed.

July 17, 2024.

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