

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170224

Docket: A-316-15

Citation: 2017 FCA 40

**CORAM: PELLETIER J.A.
GAUTHIER J.A.
NEAR J.A.**

BETWEEN:

ELIZABETH BERNARD

Applicant

and

**CANADA REVENUE AGENCY, TREASURY
BOARD AND PROFESSIONAL INSTITUTE
OF THE PUBLIC SERVICE OF CANADA**

Respondents

Heard at Ottawa, Ontario, on February 7, 2017.

Judgment delivered at Ottawa, Ontario, on February 24, 2017.

REASONS FOR JUDGMENT BY:

NEAR J.A.

CONCURRED IN BY:

**PELLETIER J.A.
GAUTHIER J.A.**

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REASONS FOR JUDGMENT

NEAR J.A.

I. Introduction

[1] Elizabeth Bernard, the applicant, seeks judicial review of the June 29, 2015 decision of the Public Service Labour Relations and Employment Board (the Board) (2015 PSLREB 59).

The Board refused to reconsider an ‘interim decision’ of the Public Service Labour Relations

Board (the former Board), dated February 21, 2008 (*Professional Institute of the Public Service of Canada v. Treasury Board and Canada Revenue Agency*, 2008 PSLRB 13 [*PIPSC 1*]).

II. Background

[2] In *PIPSC 1*, the Professional Institute of the Public Service of Canada (the union) brought an unfair labour practice complaint against the Canada Revenue Agency and the Treasury Board (the employer) for failing to provide it with employee contact information so the union could communicate with employees within the bargaining unit concerning bargaining issues. The former Board declared in principle that the employer interfered with the union's representation of employees by failing to provide at least some of the employee contact information that the union requested (*PIPSC 1* at paras. 67, 81). Such an interference is prohibited under paragraph 186(1)(a) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2 (*PSLRA*) and, therefore, constituted an unfair labour practice. The former Board declined to specify the type of contact information that the employer was required to provide to the union and instead directed the parties to reach a voluntary agreement (*PIPSC 1* at paras. 61, 77-79, 82).

[3] Before turning to the decision under review, the Board's refusal to reconsider *PIPSC 1*, it is necessary to describe the multiple proceedings that took place between the issuance of *PIPSC 1* in 2008 and the applicant's request for reconsideration of that decision in 2015.

[4] As directed in *PIPSC 1*, the union and employer reached an agreement concerning the employee contact information and then asked the former Board to incorporate this agreement into an order. The order, issued on July 18, 2008, provided that the employer would disclose the

home mailing addresses and home phone numbers of the employees in the bargaining unit to the union (*Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2008 PSLRB 58 [*PIPSC 2*]).

[5] The union represents the applicant's bargaining unit. The applicant is not a member of the union but she pays union dues to enjoy the benefits of union representation. The union must represent all employees in the bargaining unit fairly, whether they are union members, or Rand formula employees like the applicant.

[6] When the applicant was advised that, as an employee in the bargaining unit, her home contact information would be disclosed to the union, she sought judicial review of *PIPSC 2* (*Bernard v. Canada (Attorney General)*, 2010 FCA 40, 398 N.R. 325 [*Bernard I*]). The applicant argued that the order in *PIPSC 2* violated her privacy rights and her freedom of association under the *Charter*, which includes the right to not associate with a union. This Court held that the former Board erred in failing to consider the privacy issues raised by *PIPSC 1* when endorsing the parties' agreement and issuing the consequential order in *PIPSC 2*. This Court remitted the matter back to the former Board for redetermination and ordered that the Board give the Office of the Privacy Commissioner and the applicant the opportunity to participate in the redetermination proceedings.

[7] On redetermination, the former Board held that the disclosure of employees' home contact information to the union was permitted under the *Privacy Act*, R.S.C. 1985, c. P-21 (*Privacy Act*) (*Professional Institute of the Public Service of Canada v. Canada Revenue Agency*,

2011 PSLRB 34 [*PIPSC 3*]). The former Board added provisions to the order issued in *PIPSC 2* to ensure employees' privacy interests were adequately addressed.

[8] The applicant then sought judicial review of *PIPSC 3* (*Bernard v. Canada (Attorney General)*, 2012 FCA 92, [2012] 4 F.C.R. 370 [*Bernard 2*]). This Court held that the former Board's privacy determination was reasonable and dismissed the application.

[9] The applicant appealed *Bernard 2* to the Supreme Court of Canada (SCC) (*Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227 [*Bernard SCC*]). The SCC found that the former Board reasonably determined that the employer's disclosure of home contact information to the union was required under the *PSLRA*. The SCC found that the Board clearly justified its conclusion that the failure to provide home contact information was a prohibited interference with the union's representation of employees and, therefore, an unfair labour practice under section 185 and paragraph 186(1)(a) of the *PSLRA* (*Bernard SCC* at paras. 23-29). The SCC also found that the Board reasonably determined that the disclosure of home contact information was authorized under the *Privacy Act* (*Bernard SCC* at paras. 30-33).

[10] Following *Bernard SCC*, on April 24, 2014, the applicant requested that the Board reconsider *PIPSC 1*. In the decision under review, the Board dismissed the applicant's reconsideration request on the basis that: the applicant did not have standing; the applicant's request was untimely; the evidence or argument on which the applicant sought to rely would not have a material and determining effect on the outcome of *PIPSC 1*; and the request was an attempt to reopen *Bernard SCC*.

III. Analysis

A. *Standard of Review*

[11] The parties accept that the Board's decision to refuse to reconsider *PIPSC 1* is reviewable on the standard of reasonableness. I agree as the decision was both discretionary and involved interpreting and applying the Board's home statute, the *PSLRA* (see also *Chaudhry v. Canada (Attorney General)*, 2009 FCA 376 at para. 5, 399 N.R. 6 [*Chaudhry FCA*]). The applicant asks this Court to review her procedural fairness arguments on the correctness standard.

B. *The Board's Reconsideration Power*

[12] Under subsection 43(1) of the *PSLRA*, the Board may review, rescind or amend any of its orders or decisions. In *Chaudhry v. Treasury Board (Correctional Service of Canada)*, 2009 PSLRB 39 [*Chaudhry PSLRB*], the former Board determined that, although there are no deadlines for filing a request for reconsideration under subsection 43(1), "in the interests of finality in labour relations disputes, reconsiderations should be raised at the earliest possible opportunity" (*Chaudhry PSLRB* at para. 25). The former Board defined the earliest opportunity as a reasonable time after the applicant receives the evidence on which it intends to rely in supporting its reconsideration request.

[13] The former Board also set out the following "guidelines or criteria" for reconsidering a decision under subsection 43(1). The reconsideration must:

- not be a relitigation of the merits of the case;
- be based on a material change in circumstances;
- consider only new evidence or arguments that could not reasonably have been presented at the original hearing;

- ensure that the new evidence or argument have a material and determining effect on the outcome of the complaint;
- ensure that there is a compelling reason for reconsideration; and
- be used "...judiciously, infrequently and carefully..."

(*Chaudhry PSLRB* at para. 29)

[14] On judicial review of *Chaudhry PSLRB*, this Court found that the former Board reasonably rejected a reconsideration request because of delay (*Chaudhry FCA* at para. 5). As a result, this Court declined to review the former Board's findings on the merits of the request for reconsideration (*Chaudhry FCA* at para. 6). This Court noted, however, that:

A request for reconsideration under section 43 of the PSLRA is neither an appeal nor a request for a redetermination. Rather, it is a limited exception to the finality of the Board's decisions which enables the decision-maker to revisit the decision in the light of fresh evidence or a new argument.

(*Chaudhry FCA* at para. 8)

C. *The Reasonableness of the Board's Decision*

[15] In my view, the Board reasonably determined that the applicant's 'new' evidence and argument, on which she based her reconsideration request, would not have a material and determining effect on the outcome of *PIPSC 1*. The applicant's proposed evidence consisted of "federal legislative history surrounding the issues of strike votes, final-offer votes, and the disclosure of home contact information" (Request for Reconsideration, Applicant's Record, Tab 4a, p. 62). The evidence was related to provisions of the *Canada Labour Code*, R.S.C. 1985, c. L-2 and the *Public Service Modernization Act*, S.C. 2003, c. 22, whereas *PIPSC 1* dealt with the interpretation of *PSLRA* provisions. Further, the former Board in *PIPSC 1* deliberately declined to decide what type of contact information would be provided to the union. The need to provide home contact information was at issue in *PIPSC 2* and was confirmed in *Bernard SCC*.

[16] In addition to its limited relevance, the Board was also justified in finding that the applicant's proposed evidence was not actually 'new' and, therefore, the applicant did not make her reconsideration request at the earliest opportunity. The evidence had been publicly available since 1998 and 2003, when the House of Commons Debates and the Senate committee proceedings took place. The applicant argued that the legislative history could not have been reasonably presented at the written hearing for *PIPSC 1* in 2007 because she had not been advised of the proceedings. Yet, the applicant waited until 2014 to request reconsideration of *PIPSC 1*, over five years after she became aware that her home contact information would be disclosed to the union.

[17] Further, in my view, the Board reasonably concluded that the applicant is seeking to reopen *Bernard SCC*. While *PIPSC 1* was not explicitly under review in *Bernard SCC*, the SCC clearly determined that disclosing home contact information was required under paragraph 186(1)(a) of the *PSLRA* and authorized under the *Privacy Act*. After a total of four proceedings, before the Board, the Federal Court of Appeal, and the SCC, all of which the applicant participated in, the SCC definitively addressed the applicant's long-standing concern with the disclosure of her home contact information to the union (see *Bernard 2* at paras. 1-2; *Bernard SCC* at para. 82). Yet, this concern remains at the core of the application's reconsideration request. Indeed, the applicant explained her delay in bringing her request on the basis that, had she been successful in *PIPSC 2* and *PIPSC 3*, it would have been unnecessary to pursue a reconsideration of *PIPSC 1*. In addition to waiting until after *Bernard SCC* was issued to bring her request, the applicant's proposed 'new' evidence relates to the disclosure of home contact information.

[18] In my view, the Board considered relevant factors in refusing the applicant's request for reconsideration: the importance of finality of Board decisions; the length of the applicant's delay in bringing the request; the applicant's explanation for the delay; and the absence of new and relevant evidence (see *Chaudhry FCA* at para. 5). The applicant's request simply does not fit within the parameters of a reconsideration under subsection 43(1) of the *PSLRA* and the Board reasonably refused it.

[19] The applicant also urges this Court to recognize that she was denied her opportunity to be heard when she was not originally notified of the proceedings in *PIPSC I* and when the Board found that she had no standing to request reconsideration. A breach of procedural fairness will render a decision invalid unless the same decision is inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 115 Nfld. & P.E.I.R. 334). Even if this Court were to assume, without deciding, that the applicant's right to procedural fairness was breached, the applicant's request for reconsideration was, nevertheless, doomed to fail. It would serve no purpose to remit this matter back to the Board in light of the deficiencies of the applicant's proposed evidence and the precedent in *Bernard SCC*.

D. *Reasonable apprehension of bias and elevated costs*

[20] The applicant also submitted that the Board's decision raised a reasonable apprehension of bias as the presiding Board Member had a prior affiliation with a federal public service union (not the respondent union) and appeared before a House of Commons Standing Committee to speak to the proposed *PSLRA* in 2003. The Board is composed of individuals with experience in public service labour relations, usually as a result of having worked within the federal public

service or having dealt with one of the unions which represent federal public servants. The fact that in the course of those duties an individual expressed his or her organization's viewpoint does not mean that that individual is not capable of having an open mind on the same subject when sitting as a member of the Board. The applicant's evidence is insufficient to establish a reasonable apprehension of bias.

[21] The union submitted that the applicant's conduct, including continuing to raise bias without evidentiary support and attempting to re-litigate *Bernard SCC*, justifies an award of solicitor-client costs or costs at the high end of Column V of Tariff B. While I understand the union's frustration, I would not, at this point, award elevated costs.

IV. Conclusion

[22] I would dismiss the application for judicial review with costs.

"David G. Near"
J.A.

"I agree.

J.D. Denis Pelletier J.A."

"I agree.

Johanne Gauthier J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

THIS IS AN APPLICATION FOR JUDICIAL REVIEW IN RESPECT OF THE DECISION OF A PANEL OF THE PUBLIC SERVICE RELATIONS AND EMPLOYMENT BOARD, (2008 PSLRB 13) WHICH WAS RENDERED ON JUNE 29, 2015.

DOCKET: A-316-15

STYLE OF CAUSE: ELIZABETH BERNARD v.
CANADA REVENUE AGENCY,
TREASURY BOARD AND
PROFESSIONAL INSTITUTE OF
THE PUBLIC SERVICE OF
CANADA

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 7, 2017

REASONS FOR JUDGMENT BY: NEAR J.A.

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

DATED: FEBRUARY 24, 2017

APPEARANCES:

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