

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210512

Docket: A-84-20

Citation: 2021 FCA 91

[ENGLISH TRANSLATION]

**CORAM: DE MONTIGNY J.A.
GLEASON J.A.
LOCKE J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DENIS CHÉNARD

Respondent

Heard by online videoconference hosted by the registry on May 5, 2021.

Judgment delivered at Ottawa, Ontario, on May 12, 2021.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

**DE MONTIGNY J.A.
LOCKE J.A.**

Federal Court of Appeal



Cour d'appel fédérale

Date: 20210512

Docket: A-84-20

Citation: 2021 FCA 91

**CORAM: DE MONTIGNY J.A.
GLEASON J.A.
LOCKE J.A.**

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

DENIS CHÉNARD

Respondent

REASONS FOR JUDGMENT

GLEASON J.A.

[1] The applicant is seeking to set aside the decision rendered on February 17, 2020, by an adjudicator of the Federal Public Sector Labour Relations and Employment Board in *Chénard v. Treasury Board (Employment and Social Development Canada and Statistics Canada)*, 2020 FPSLREB 15, 2020 CarswellNat 806. In that decision, the adjudicator allowed the respondent's grievance, having found that the employer had violated the Work Force Adjustment

Directive (the Directive), which was an integral part of the collective agreement that applied to the respondent.

[2] More specifically, the adjudicator concluded that the respondent's home department and appointing department (namely, Human Resources and Skills Development Canada, which is now Employment and Social Development Canada (ESDC), and Statistics Canada) had failed to meet their obligations under the Directive with regard to retraining the respondent after his position at ESDC was eliminated.

[3] It is well established, and indeed the parties agree, that the reasonableness standard applies to the judicial review of the adjudicator's decision (see, for example, *Canada (Attorney General) v. Yates*, 2021 FCA 74, 2021 CarswellNat 1031 at para. 25).

[4] The applicant raises four grounds on which he asserts the decision is unreasonable.

[5] First, the applicant argues that the adjudicator failed to consider some of the evidence before her. According to the applicant, that evidence demonstrates that it would have been impossible to train the respondent for the vacant EC-06 positions at Statistics Canada within the two-year retraining period set out in the Directive.

[6] Second, the applicant submits that the adjudicator broadened the scope of the grievance and exceeded her jurisdiction with respect to the subject of the grievance by focusing on the failure of ESDC and Statistics Canada to consider the retraining options related to the EC-05 positions at Statistics Canada, since the scope of the grievance was limited to the failure to

retrain the respondent for an appointment to one of the vacant EC-06 positions at Statistics Canada.

[7] Third, the applicant submits that the adjudicator unreasonably substituted her own assessment for that of the employer as to whether the respondent met the essential qualifications of the EC-06 positions.

[8] Lastly, the applicant submits that the Board made an unreasonable finding by criticizing the home department, ESDC, for not having explored every reasonable opportunity to retrain the respondent because, according to the applicant, the evidence shows that there were never any opportunities for an appointment to a vacant position at ESDC and because the respondent himself indicated in his testimony that his grievance did not concern ESDC.

[9] Despite the able argument of counsel for the applicant, I disagree with these submissions.

[10] Contrary to what the applicant asserts, the adjudicator did not disregard the testimony of the managers concerning the time that they considered to be necessary to train the respondent for the vacant positions at Statistics Canada. The adjudicator was well aware of their testimony and, in fact, referred to it in her decision. However, she did not accept their assessment of the situation given the evidence to the contrary submitted by the respondent, as well as the lack of concrete details concerning the type of training required and the reason why the respondent supposedly could not have qualified for at least one of the vacant EC-06 positions within two years, given his previous experience and training. It was therefore open to the adjudicator to find, on the basis of the evidence before her, that ESDC and Statistics Canada had acted

arbitrarily with respect to their obligation to offer the respondent a retraining plan. In short, the adjudicator was not required to accept the managers' evaluation, especially in the absence of details supporting that assessment and with evidence to the contrary submitted by the respondent.

[11] With regard to the scope of the grievance, the wording was sufficiently broad so as to make it reasonable for the adjudicator to take into account the fact that Statistics Canada and ESDC did not even consider the possibility of retraining the respondent so that he could apply to one of the anticipated EC-05 vacancies identified by management. Regardless, the adjudicator noted the failure to consider the possibility of retraining for those positions as an additional ground only and not as the main reason for allowing the grievance.

[12] As for the third ground raised by the applicant, contrary to what the applicant argues, the adjudicator did not unreasonably substitute her own opinion for that of the employer as to whether the respondent met the essential qualifications of the EC-06 positions at Statistics Canada. Instead, the adjudicator accepted that the respondent did not meet those qualifications; in fact, the respondent did not argue the contrary. Nevertheless, that did not negate his right to retraining because the Directive requires that retraining be considered when an employee affected by a work force adjustment meets, among other things, the minimum requirements set out in the relevant qualification standard for appointment to the group concerned (in this case, the EC group). The respondent met those minimum requirements. Therefore, the adjudicator did not commit the third error raised by the applicant.

[13] In addition, the fact that the adjudicator seems to have erred at paragraph 81 of the decision by stating that the respondent had failed to meet only one of the evaluation criteria is

inconsequential because the number of criteria not met was irrelevant to the adjudicator's findings.

[14] Lastly, the adjudicator also did not commit the fourth error raised by the applicant because her decision is based on the failure by ESDC and Statistics Canada to make every reasonable effort to retrain the respondent for an appointment to one of the EC-06 or EC-05 positions at Statistics Canada. Therefore, her analysis was based on the relevant wording of the Directive.

[15] In sum, the adjudicator gave a reasonable interpretation of the relevant provisions of the Directive and drew a reasonable conclusion based on the evidence before her.

[16] Most of the arguments presented by the applicant invite us to reassess the facts and substitute our own assessment for that of the adjudicator. However, that is not the role of this Court. On the contrary, we must show deference to decisions that, like this one, are based primarily on the facts, unless it is demonstrated that they are unreasonable. In this matter, the applicant has failed to establish that this is the case.

[17] Consequently, I would dismiss the application for judicial review, with costs fixed in the agreed-upon all-inclusive amount of \$3,000.00.

“Mary J.L. Gleason”

J.A.

“I agree.

Yves de Montigny J.A.”

“I agree.

George R. Locke J.A.”

Certified true translation

Melissa Paquette, Jurilinguist

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-84-20

STYLE OF CAUSE: ATTORNEY GENERAL OF
CANADA v. DENIS CHÉNARD

PLACE OF HEARING: BY ONLINE
VIDEOCONFERENCE

DATE OF HEARING: MAY 5, 2021

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

DATED: MAY 12, 2021

APPEARANCES:

Karl Chemsî FOR THE APPLICANT

Jean-Michel Corbeil FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin FOR THE APPLICANT
Deputy Attorney General of Canada

Goldblatt Partners LLP FOR THE RESPONDENT
Barristers & Solicitors
Ottawa, Ontario