

Federal Court



Cour fédérale

Date: 20210824

Docket: T-1028-21

Citation: 2021 FC 867

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 24, 2021

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

MARC-ANDRÉ ROUET

Applicant

and

DEPUTY HEAD (DEPARTMENT OF JUSTICE)

Respondent

ORDER AND REASONS

I. Overview

[1] The respondent is seeking an order to transfer this application for judicial review to the Federal Court of Appeal. The application relates to a decision dated June 1, 2021, by Steven B. Katkin, Member of the Federal Public Sector Labour Relations and Employment Board (FPSLREB), bearing neutral citation 2021 FPSLREB 59 [the Decision]. Because the FPSLREB is identified at paragraph 28(1)(i) of the *Federal Courts Act*, RSC, 1985, c F-7 [the *FCA*], as a

tribunal subject to the superintending power of the Court of Appeal, the respondent submits that that Court has exclusive jurisdiction to deal with the application.

[2] The applicant, on the other hand, submits that the Decision is a decision not of the FPSLREB, but rather of a member of that body not acting on the FPSLREB's behalf. He cites several decisions of this Court and the Court of Appeal that distinguish between decisions by the FPSLREB and decisions by members of the FPSLREB acting as adjudicators.

[3] For the reasons that follow, the respondent's motion is granted and this application is transferred to the Court of Appeal. The amendments made to the *FCA* in 2013 added to section 28, and therefore to the Court of Appeal's exclusive jurisdiction, oversight over adjudicators within the meaning of subsection 2(1) of the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2 [the *FPSLRA*]: *FCA*, s 28(1)(i.1). Accordingly, characterizing the Decision as being the FPSLREB's or Mr. Katkin's in his capacity as an adjudicator no longer has any effect on this Court's jurisdiction. Either way, the Court of Appeal has exclusive jurisdiction to hear and determine this application for judicial review.

[4] Because the Federal Court has no jurisdiction over this application, I do not grant the respondent's second request, namely, for an order amending the style of cause to list the Attorney General of Canada as respondent, pursuant to section 303 of the *Federal Courts Rules*, SOR/98-106. This issue must be determined by the Court of Appeal.

II. Analysis

A. *Federal Courts Act*

[5] Section 18 of the *FCA* grants this Court exclusive original jurisdiction to hear and determine any application for relief in the nature of an injunction, writ of *certiorari*, writ of *mandamus*, writ of prohibition or writ of *quo warranto*, or to grant declaratory relief against any federal board, commission or other tribunal—in other words, to hear and determine any application for judicial review involving a federal board, commission or other tribunal. This jurisdiction, however, is expressly “[s]ubject to section 28”. That provision grants the Federal Court of Appeal jurisdiction over applications for judicial review made in respect of any of the 16 federal boards, commissions or other tribunals identified in subsection 28(1). For the purposes of this application, the following paragraphs are relevant:

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

...

(i) the Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*;

Contrôle judiciaire

28 (1) La Cour d’appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

[...]

i) la Commission des relations de travail et de l’emploi dans le secteur public fédéral visée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l’emploi dans le secteur public fédéral*;

(i.1) adjudicators as defined in subsection 2(1) of the *Federal Public Sector Labour Relations Act*;

i.1) les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans le secteur public fédéral*;

...

[...]

[6] If the Court of Appeal has jurisdiction under section 28, this Court does not: *FCA*, s 28(3).

B. *The Decision that is the subject of this application*

[7] The Decision was rendered by a member of the FPSLREB. The document header states that the matter was “[b]efore a panel of the Federal Public Sector Labour Relations and Employment Board” and identifies the decision maker as “Steven B. Katkin, a panel of the Federal Public Sector Labour Relations and Employment Board” [emphasis added]. The respondent submits that the Decision is a decision by a panel of the FPSLREB and that decisions of the FPSLREB can only be reviewed by the Court of Appeal, citing paragraph 28(1)(i) of the *FCA*.

[8] That said, there are indications that Mr. Katkin’s Decision was rendered in his capacity as an “adjudicator” rather than as a panel of the FPSLREB. According to paragraph 2 of the *FPSLRA*, an adjudicator is “a person or board of adjudication to whom a grievance is referred under paragraph 223(2)(a), (b) or (c)” of the *FPSLRA*.

[9] The Decision states that it is in “the matter of an individual grievance referred to adjudication”. It confirms that the applicant filed a grievance regarding his rejection on probation

and that he referred his grievance to adjudication on September 30, 2011: Decision at paras 2–4. The issue before Mr. Katkin was his jurisdiction to hear the grievance, given the provisions of section 211 of the *FPSLRA*: Decision at paras 7, 13, 283. A similar decision has been described by the Federal Court of Appeal as an adjudicator’s decision, despite the fact that the adjudicator designated herself and signed her decision as a member of the FPSLREB (or its predecessor): *Sincère v Canada (Attorney General)*, 2005 FCA 103 at paras 3–6.

C. *Jurisdiction over decisions made pursuant to the FPSLRA*

[10] In *Beirnes*, Justice Rothstein, then of this Court, reviewed the similar provisions of the former *Public Service Staff Relations Act*, RSC, 1985, c P-35. Justice Rothstein explained that members of the Public Service Labour Relations Board (PSRLB), the predecessor of the current FPSLREB, may act as adjudicators: *Beirnes v Canada (Treasury Board)*, [1993] FCJ No 970 at paras 4–8. He held that decisions of PSRLB members acting in their capacity as adjudicators were subject to the jurisdiction of this Court rather than that of the Court of Appeal: *Beirnes* at paras 10–11.

[11] In response to the respondent’s motion, the applicant cites *Beirnes* and *Sincère*, as well as other decisions of this Court and the Court of Appeal to the same effect: *Chamberlain v Canada (Attorney General)*, 2012 FC 1027 at para 6; *Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at paras 6–7, 9; *Frève v Canada (Attorney General)*, 2000 CanLII 15060 (FC). He therefore submits that the Decision was not rendered by the FPSLREB and that paragraph 28(1)(i) does not apply.

[12] The principal difficulty with the applicant's submissions is that the cases cited were decided before the *FCA* was amended in 2013 to add paragraph 28(1)(i.1): *Economic Action Plan 2013 Act*, SC 2013, c 40, s 439. This paragraph also grants the Federal Court of Appeal jurisdiction to review decisions of adjudicators within the meaning of paragraph 2 of the *FPSLRA*. As a result, the Court of Appeal has exclusive jurisdiction to review the Decision whether the decision maker is acting as an adjudicator of the FPSLREB or a panel of the FPSLREB, regardless of whether the respondent cites paragraph 28(1)(i.1). It should be noted that in the cases cited by the applicant, the Court held that the impugned decision was rendered by a Board member acting either as an adjudicator (*Beirnes* at para 11; *Sincère* at paras 1, 5; *Chamberlain* at para 6; *Rahman* at para 6) or as the Board (*Frève* at para 3). They did not contemplate a third decision category.

[13] On this point, the applicant submits that the term "adjudicator" in section 2 of the *FPSLRA* does not apply in this case. As noted above, an adjudicator is defined in that section as "a person or board of adjudication to whom a grievance is referred under paragraph 223(2)(a), (b) or (c)". The applicant argues that paragraphs 223(2)(a), (b) and (c) apply only to "policy grievances" within the meaning of sections 220 to 222 of the *FPSLRA* and not to "individual grievances" within the meaning of sections 208 to 214 of the *FPSLRA*. The applicant's grievance is an individual grievance.

[14] I cannot accept this argument. By my reading, sections 223 to 235 of the *FPSLRA*, which relate to the conduct of adjudication, apply to all grievances, whether they are individual grievances, group grievances or policy grievances. When a statute refers specifically to a policy

grievance, it uses the term “policy grievance”: *FPSLRA*, ss 220–222.1. Section 223 uses only the term “grievance”, as do sections 224 to 235. I also note that section 223 requires the party who refers a grievance to adjudication to give notice of the reference to the FPSLREB in accordance with the regulations. Section 89 of the *Federal Public Sector Labour Relations Regulations*, SOR/2005-79, specifies the requirements of such a notice for each of the three types of grievances, including individual grievances.

[15] I therefore find that an adjudicator to whom an individual grievance is referred pursuant to paragraph 223(2)(a), (b) or (c) of the *FPSLRA* is an adjudicator within the meaning of subsection 2(1) of the *FPSLRA*. He is therefore an adjudicator within the meaning of paragraph 28(1)(i.1) of the *FCA*. I note in this regard that in *Arsenault*, the Court of Appeal heard and allowed an application for judicial review of a decision by an adjudicator regarding an individual grievance: *Arsenault v Canada (Attorney General)*, 2016 FCA 179 at paras 1, 6, 16–18, 34.

[16] In any case, if subsection 223(2) does not apply, the PSLREB is seized of the grievance: *FPSLRA*, s 223(2.1). In either case, section 28 of the *FCA* applies and this Court lacks jurisdiction.

[17] The respondent’s motion is therefore granted and this application for judicial review is transferred to the Federal Court of Appeal. The respondent is not seeking its costs, and none are awarded.

[18] The respondent is also seeking an order amending the style of cause by substituting “Attorney General of Canada” as the respondent in lieu of the Deputy Head (Department of Justice). Given that this Court has no jurisdiction over this application, I refer this motion to the Court of Appeal.

ORDER in T-1028-21

THIS COURT ORDERS as follows:

1. This application for judicial review is transferred to the Federal Court of Appeal.
2. No costs are awarded.

“Nicholas McHaffie”

Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1028-21

STYLE OF CAUSE: MARC-ANDRÉ ROUET v DEPUTY HEAD
(DEPARTMENT OF JUSTICE)

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO, PURSUANT TO
RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: MCHAFFIE J.

DATED: AUGUST 24, 2021

WRITTEN REPRESENTATIONS BY:

Marc-André Rouet

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Marc Séguin

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT