

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20180907**

**Docket: A-232-17**

**Citation: 2018 FCA 159**

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

**BETWEEN:**

**ATTORNEY GENERAL OF CANADA**

**Applicant**

**and**

**CHRISTINE FEHR**

**Respondent**

Heard at Ottawa, Ontario, on September 5, 2018.

Judgment delivered at Ottawa, Ontario, on September 7, 2018.

**REASONS FOR JUDGMENT BY:**

**GLEASON J.A.**

**CONCURRED IN BY:**

**GAUTHIER J.A.  
DE MONTIGNY J.A.**

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**CHRISTINE FEHR**

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**REASONS FOR JUDGMENT**

**GLEASON J.A.**

[1] In this application for judicial review, the applicant seeks to set aside the July 28, 2017 decision of an adjudicator of the Federal Public Sector Labour Relations and Employment Board (FPSLREB) in *Fehr v. Canada Revenue Agency*, 2017 FPSLREB 17.

[2] In that decision, the adjudicator granted the respondent's grievance and found her entitled to family leave under the collective agreement between the Canada Revenue Agency (the CRA) and the Professional Institute of the Public Service of Canada (PIPSC) even though she had already taken leave in the same fiscal year under another of the CRA's collective agreements when she worked in a position in another bargaining unit and the total leave claimed exceeded the 45-hour per year cap in the collective agreement. In reaching this decision, the adjudicator decided to follow earlier interpretations of similar articles made in *Delios v. Canada Revenue Agency*, 2013 PSLRB 133, aff'd *Delios v. Canada (Attorney General)*, 2015 FCA 117 and *Professional Institute of the Public Service of Canada v. Canada Revenue Agency*, 2016 PSLREB 77.

[3] The applicant asserts that the adjudicator's decision should be set aside as his interpretation of the relevant provisions of the collective agreement was unreasonable in the face of the past practice evidence submitted by the employer and what the applicant asserts is the perplexing treatment of this evidence by the adjudicator.

[4] I disagree and see no reason to interfere with the adjudicator's decision, especially in light of the deference owed to FPSLRB adjudicators in matters involving the interpretation of collective agreements, which is the heartland of their expertise: see, for example, *Canada (Attorney General) v. Canadian Federal Pilots Association*, 2017 FCA 100 at para. 9.

[5] More specifically, as the respondent rightly asserts, the adjudicator's decision turns on his determination that the relevant clause in the collective agreement was not ambiguous and that, in

light of this, no weight should be afforded to the employer's past practice evidence. The adjudicator's comments about the import of that evidence are therefore non-binding *obiter*. This is evident in particular from the statements made in paragraph 62 of the reasons where the adjudicator states that his consideration of the past practice evidence was being undertaken in the alternative as his decision rests on the meaning he ascribed to the relevant clause in the collective agreement.

[6] Thus, the question for this Court in this application for judicial review is whether the adjudicator's finding of non-ambiguity and his determination that this finding meant that the past practice evidence should be given no weight were reasonable. I believe they were.

[7] Insofar as concerns ambiguity, given the wording of the relevant clauses and the earlier precedents, which involved similar contractual provisions, it was open to the adjudicator to determine that the clause was unambiguous and supported the respondent's interpretation. Contrary to what the applicant asserts, the adjudicator did not consider himself bound to follow the earlier precedents, but rather decided he agreed with them and found they should be applied to ensure consistency. There is nothing unreasonable in this conclusion.

[8] Insofar as concerns the arbitrator's determination to afford the past practice evidence no weight, I similarly believe this determination to be reasonable, particularly in light of the discretion afforded to the FPSLREB adjudicators in evidentiary matters under subsection 20(e) of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365 and the fact that such evidence cannot be used to vary a clear contractual term. As the

Supreme Court of Canada noted in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at para. 57, evidence of “surrounding circumstances [...] must never be allowed to overwhelm the words of the agreement”.

[9] While the foregoing is sufficient to dispose of this application, I think it is useful to say a word about the adjudicator’s comments about the employer’s past practice evidence as I agree with the applicant that they are perplexing, but for a different reason than that invoked by the applicant. The past practice evidence tendered by the employer would seem to me to have been insufficient to result in the rejection of the grievance as the evidence appears to have fallen short of demonstrating a shared intention to support the employer’s interpretation. Evidence that an employer has applied a clause in a certain way through successive re-negotiations of the collective agreement is typically not sufficient to establish a binding past practice before a labour arbitrator if the union is not shown to have been aware of and acquiesced in the employer’s practice at the time it negotiated the collective agreement under which the grievance arises. It would seem that the employer’s evidence fell short of making this sort of demonstration in the instant case.

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

“Mary J.L. Gleason”

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J.A.

“I agree.  
Johanne Gauthier J.A.”

“I agree.  
Yves de Montigny J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-232-17

**STYLE OF CAUSE:** ATTORNEY GENERAL OF  
CANADA v. CHRISTINE FEHR

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** SEPTEMBER 5, 2018

**REASONS FOR JUDGMENT BY:** GLEASON J.A.

**CONCURRED IN BY:** GAUTHIER J.A.  
DE MONTIGNY J.A.

**DATED:** SEPTEMBER 7, 2018

**APPEARANCES:**

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