

Federal Court of Appeal



Cour d'appel fédérale

Date: 20221107

Docket: A-167-21

Citation: 2022 FCA 192

**CORAM: GLEASON J.A.
LASKIN J.A.
MACTAVISH J.A.**

BETWEEN:

CATHY TURNER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on November 7, 2022.
Judgment delivered from the Bench at Ottawa, Ontario, on November 7, 2022.

REASONS FOR JUDGMENT OF THE COURT BY:

GLEASON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 7, 2022).

GLEASON J.A.

[1] The applicant seeks to set aside the decision of an adjudicator of the Federal Public Sector Labour Relations and Employment Board (the FPSLREB) in *Turner v. Deputy Head (Royal Canadian Mounted Police)*, 2021 FPSLREB 52, 2021 CarswellNat 2051 (WL). In that decision, the adjudicator concluded that an abuse of authority occurred in the staffing process for two positions staffed via a non-advertised process because the essential qualifications for the

positions were improperly set by the employer. However, the adjudicator limited the remedy to declaring that the abuse had occurred. The adjudicator provided no reasons for so limiting the remedy beyond stating that the FPSLREB should exercise its discretion to issue an order revoking appointments “... only ... under rare circumstances” (Decision at para. 79).

[2] Contrary to what the respondent asserts, we do not believe that one can fairly read the decision of the adjudicator any other way or to turn on the alleged concession as to the incumbents’ qualifications for the positions. Were we to do so, we would be rewriting the decision, which is something this Court cannot do as the Supreme Court of Canada held in (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 96–98, 441 D.L.R. (4th) 1 (*Vavilov*)).

[3] As the applicant rightly notes, the adjudicator’s statement as to revocation being only rarely awarded is in conflict with the case law from the FPSLREB and the predecessor Public Service Staffing Tribunal (PSST) because adjudicators have often ordered revocations of the appointment made where an abuse of authority in the staffing process is found to have occurred. Indeed, revocation appears to have been ordered in close to half of the reported cases.

[4] In the authorities presented by the parties, which appear to be all the reported authorities on point, revocation was ordered in *Burke v. Canada (Deputy Minister of National Defence)*, 2009 PSST 3, 2009 CarswellNat 6892 (WL); *Denny v. Canada (Deputy Minister of National Defence)*, 2009 PSST 29, 2009 CarswellNat 6911 (WL); *Beyak v. Canada (Deputy Minister of Natural Resources)*, 2009 PSST 35, 2009 CarswellNat 6268 (WL); *Ayotte v. Canada (Deputy Minister of National Defence)*, 2010 PSST 16, 2010 CarswellNat 7736 (WL); *Martin v. Canada (Deputy Minister of National Defence)*, 2010 PSST 19, 2010 CarswellNat 6365 (WL); *Rochon v.*

Canada (Deputy Minister of Fisheries and Oceans), 2011 PSST 7, 2011 CarswellNat 1760 (WL); *Bain v. Canada (Deputy Minister of Natural Resources)*, 2011 PSST 28, 2011 CarswellNat 5762 (WL); *Marcil v. Canada (Deputy Minister of Transport, Infrastructure and Communities)*, 2011 PSST 31, 2011 CarswellNat 5767 (WL); *Kress v. Canada (Deputy Minister Indian and Northern Affairs)*, 2011 PSST 41, 2011 CarswellNat 6128 (WL); *Whalen v. Canada (Deputy Minister of Natural Resources)*, 2012 PSST 7, 2012 CarswellNat 1735 (WL); *Pardy v. Canada (Deputy Minister of Aboriginal Affairs and Northern Development)*, 2012 PSST 14, 2012 CarswellNat 2922 (WL); *Spirak v. Canada (Deputy Minister of Public Works and Government Services)*, 2012 PSST 20, 2012 CarswellNat 4106 (WL); *Renaud v. Canada (Deputy Minister of National Defence)*, 2013 PSST 26, 2013 CarswellNat 3421 (WL); *Ryan v. Canada (Deputy Minister of National Defence)*, 2014 PSST 9, 2014 CarswellNat 1999 (WL); *Healey v. Canada (Chairperson of the Parole Board)*, 2014 PSST 14, 2014 CarswellNat 3574 (WL); *De Santis v. Canada (Commissioner of the Correctional Service)*, 2016 PSLREB 34, 2016 CarswellNat 2892 (WL); *Goncalves v. Commissioner of the Royal Canadian Mounted Police*, 2017 FPSLREB 2, CarswellNat 6954 (WL); *Sachs v. President of the Public Health Agency of Canada*, 2017 FPSLREB 3, 2017 CarswellNat 6965 (WL); *Burt v. Deputy Minister of Veterans Affairs*, 2019 FPSLREB 31, 2019 CarswellNat 1667 (WL); and *Regier v. Deputy Head of the Correctional Service of Canada*, 2021 FPSLREB 123, 2021 CarswellNat 6437 (WL). In addition, in *Patton v. Canada (Deputy Minister of National Defence)*, 2011 PSST 8, 2011 CarswellNat 8248 (WL), revocation was ordered conditionally; in *Amirault v. Canada (Deputy Minister of National Defence)*, 2012 PSST 6, 2012 CarswellNat 3309 (WL), revocation was ordered in respect of one of the staffing actions in issue; and in *Myskiw v. Commissioner of the Correctional Service of Canada*, 2019 FPSLREB 107, 2019 CarswellNat 7758 (WL), an

adjudicator indicated that revocation would have been ordered if the complainants had asked for it.

[5] Conversely, revocation was not ordered in *Cameron v. Canada (Department of Human Resources and Social Development)*, 2008 PSST 16, 2008 CarswellNat 8070 (WL); *Chiasson v. Canada (Deputy Minister of Canadian Heritage)*, 2008 PSST 27, 2008 CarswellNat 5221 (WL); *Hughes v. Canada (Deputy Minister of Human Resources and Skills Development)*, 2011 PSST 16, 2011 CarswellNat 3367 (WL); *Hammouch v. Canada (Deputy Minister of National Defence)*, 2012 PSST 12, 2012 CarswellNat 2488 (WL); *Ostermann v. Canada (Deputy Minister of Human Resources and Skills Development)*, 2012 PSST 28, 2012, CarswellNat 4564 (WL); *Gabon v. Canada (Deputy Minister of Environment Canada)*, 2012 PSST 29, 2012 CarswellNat 4652 (WL); *Payne v. Canada (Deputy Minister of National Defence)*, 2013 PSST 15, 2013 CarswellNat 3488 (WL); *Lavolette v. Canada (Commissioner of the Correctional Service)*, 2015 PSLREB 6, 2015 CarswellNat 281 (WL); *Hill v. Deputy Minister of Public Works and Government Services*, 2017 FPSLREB 21, 2017 CarswellNat 4986 (WL); *Hunter v. Deputy Minister of Industry*, 2019 FPSLREB 83, 2019 CarswellNat 5350 (WL); *Gomy v. Deputy Minister of Health*, 2019 FPSLREB 84, 2019 CarswellNat 5390 (WL); *Desalliers v. Deputy Head (Department of Citizenship and Immigration)*, 2022 FPSLREB 70, 2022 CarswellNat 3887 (WL); and *Massabki v. Deputy Head (Department of Foreign Affairs, Trade and Development)*, 2022 FPSLREB 79, 2022 CarswellNat 4213 (WL). However, in several of these cases, circumstances were distinguishable from the instant case.

[6] In the case at bar, the applicant submitted before the adjudicator that revocation should be ordered because the essential qualifications for the positions staffed without competition had

been improperly set and, therefore, the incumbents in them had not been evaluated in respect of the appropriate essential qualifications.

[7] The adjudicator did not consider any of the relevant authorities of the FPSLREB or of the PSST on the remedial issue and did not offer any explanation as to why he had concluded that revocation was not warranted, apart from the erroneous assertion that it is rarely appropriate.

[8] The adjudicator's decision is thus unreasonable because the case law requires that, to be reasonable, an administrative decision must, among other things, provide reasons for departing from decided authority and must also must engage with the central arguments raised by the parties: *Vavilov* at paras. 127–132; *Walker v. Canada (Attorney General)*, 2020 FCA 44 at para. 9, 314 A.C.W.S. (3d) 843; and *Bell Canada v. Copyright Collective of Canada*, 2021 FCA 148 at para. 43, 336 A.C.W.S. (3d) 538.

[9] Accordingly, this application for judicial review will be granted, with costs fixed in the all-inclusive amount of \$2500.00. The portion of the adjudicator's award dealing with remedy will be set aside. In the circumstances, we believe it is appropriate that the remedial issues be remitted to a different adjudicator for redetermination. We leave it to that adjudicator to decide what additional evidence, if any, might be required for the redetermination of the remedial issues in light of the fact that, as is usual in a labour case, there is no transcript of the evidence before the first adjudicator.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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BY:** GLEASON J.A.
LASKIN J.A.
MACTAVISH J.A.

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