

Date: 20070330

Docket: T-2274-05

Citation: 2007 FC 304

Ottawa, Ontario, March 30, 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

MICHEL GAUTHIER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

BACKGROUND

[1] Trust in the public service is a pillar on which the perception of the government apparatus is founded. It is the very leitmotif and the driving force behind the public's sense of security. Without this, how can the public trust in the social contract that it has with delegates and sub-delegates to handle the collective affairs of the state?

INTRODUCTION AND JUDICIAL PROCEEDINGS

[2] Michel Gauthier is an investigator with the Department of Social Development Canada and is a municipal counsellor in the same region. The employer is of the opinion that this amounts to an actual or perceived conflict of interest. Mr. Gauthier is now seeking the judicial review of this decision.

FACTS

[3] In the context of his duties as an investigator, Mr. Gauthier carries out investigations in regard to the application of the *Employment Insurance Act*, 1996, c. 23, the *Unemployment Insurance Act* and their respective regulations for the purposes of detecting fraud and abuse. These investigations potentially result in fines, financial penalties or even the calculation of overpayments, as appears from a copy of Mr. Gauthier's job description. (Affidavit of Nicole Barbeau, job description, respondent's record, tab A, page 6.)

[4] Mr. Gauthier must work closely with the public and employers. He must maintain close contact with local police, recommend administrative penalties or legal action, file informations, etc. (Affidavit of Nicole Barbeau, *supra*.)

[5] As a municipal counsellor, Mr. Gauthier is called to meet citizens and businesspeople from his electoral district to *inter alia*, listen to their claims and obtain changes in their favour. Yet, in the context of his duties as an investigator, he is called to meet these same individuals to prevent fraud or to detect it and establish financial penalties or other punitive measures. He can even recommend legal action. (Affidavit of Nicole Barbeau, *supra*.)

Conflict of interest

[6] As a public servant, Mr. Gauthier is subject to the *Values and Ethics Code for the Public Service*. (Affidavit of Nicole Barbeau, *Values and Ethics Code for the Public Service*, respondent's record, tab A, page 21.)

[7] The *Values and Ethics Code* is a powerful tool enabling the public service to preserve and enhance the public's confidence in its integrity. Indeed, each Minister is responsible for maintaining this public confidence and for keeping the public impartial and non-partisan. (Affidavit of Nicole Barbeau, *supra*.)

[8] As stated in the *Values and Ethics Code for the Public Service*, each public servant has the responsibility of taking the measures necessary to ensure that they are not in a conflict of interest situation:

Public servants have the following overall responsibilities:

(a) In carrying out their official duties, public servants should arrange their private affairs in a manner that will prevent real, apparent or potential conflicts of interest from arising.

(b) If a conflict does arise between the private interests and the official duties of a public servant, the conflict should be resolved in favour of the public interest.

Responsabilité de tous les fonctionnaires:

a) Dans l'exercice de leurs fonctions officielles, organiser leurs affaires personnelles de façon à éviter toute forme de conflit d'intérêts réel, apparent ou potentiel.

b) S'il y a d'éventuels conflits entre l'intérêt personnel du fonctionnaire et ses fonctions et responsabilités officielles, l'intérêt public doit primer dans le règlement desdits conflits.

Decision of the Assistant Deputy Minister

[9] It was in this context that Assistant Deputy Minister Nicole Barbeau learned, following the confidential report submitted by Mr. Gauthier on September 15, 2004, that Mr. Gauthier was not only performing the duties of municipal councillor for the region of the merged city of Saint-Jean-sur-Richelieu, but that he intended to run again in the 2005 fall elections. (Mr. Gauthier's affidavit, Nicole Barbeau's letter dated February 23, 2005, applicant's record, tab 4, page 58, exhibit "G".)

[10] Ms. Barbeau studied the situation and determined that there was the appearance of a conflict of interest since Mr. Gauthier was called to carry out investigations in the region of the city where he was a municipal councillor. (Affidavit of Mr. Gauthier, *supra*.)

[11] Ms. Barbeau therefore asked him to [TRANSLATION] "cease performing the duties of councillor for the city of St-Jean-sur-Richelieu unless measures are taken so that you perform your duties in a region that does not include this city." (Affidavit of Michel Gauthier, *supra*.)

[12] Ms. Barbeau acknowledged that she was aware of the decision made by her predecessor, Danielle Vincent, in 1999, authorizing Mr. Gauthier to pursue his activities as a municipal councillor in the Iberville region at the time.

[13] Ms. Barbeau was however of the opinion that the situation was different. It was therefore in order to protect the integrity of the investigator's role, and that of the public service, that she asked Mr. Gauthier to change the situation in order to avoid the potential for conflict or appearance of

conflict of interest on a daily basis. (Affidavit of Nicole Barbeau, respondent's record, tab A, page 3, paragraph 12; Affidavit of Michel Gauthier, grievance of April 21, 2005, applicant's record, tab 4, page 64, exhibit "T".)

[14] Following discussions with local management, Yvan Desroches, Director of integrity services, informed Mr. Gauthier that he had three options available to him:

1. Cease your political activities in the region;
2. Resign from your employment on a temporary or permanent basis;
3. Submit a written request for transfer.

(Affidavit of Michel Gauthier, Yvan Desroches' e-mail dated April 21, 2005, applicant's record, tab 4, page 68, exhibit "J".)

[15] Following these discussions, Mr. Gauthier continued to perform the same duties and remained a municipal councillor in Saint-Jean-sur-Richelieu. He agreed to perform his work only in the city of Brossard.

[16] Mr. Gauthier however filed a grievance on April 21, 2005, contesting Ms. Barbeau's decision. The grievance read as follows:

[TRANSLATION]

I CONTEST NICOLE BARBEAU'S DECISION DATED 24/03/05: YOU MUST THEREFORE CEASE TO PERFORM THE DUTIES OF COUNCILLOR IN THE CITY OF SAINT-JEAN-SUR RICHELIEU UNLESS MEASURES ARE TAKEN SO THAT YOU PERFORM YOUR DUTIES AS INSPECTOR EXCLUDING THIS CITY. I CONSIDER THAT BY MAKING THIS DECISION, MY EMPLOYER BREACHED THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS.

[17] The following corrective measures were requested through this grievance:

THAT THE EMPLOYER SET ASIDE THIS DECISION.
THAT IT IMMEDIATELY CEASE THE MEASURES AFFECTING ME IN A
REGION OTHER THAN SAINT-JEAN-SUR-RICHELIEU.
THAT THE EMPLOYER RESPECT THE CANADIAN CHARTER OF RIGHTS
AND FREEDOMS AND NOT DEPRIVE ME OF MY RIGHT TO SERVE THE
COMMUNITY.

[18] Following his discussions with local management, Mr. Gauthier signed a transfer request dated July 11, 2005. He then continued to perform the same duties, but from the Brossard office. (Affidavit of Michel Gauthier, transfer request, applicant's record, tab 4, page 74, exhibit "L".)

[19] Phil Jensen upheld Ms. Barbeau's decision at the final level of the grievance. The applicant is seeking the judicial review of this last decision. (Affidavit of Nicole Barbeau, respondent's record, tab A, page 87.)

ISSUE

[20] Was the decision of Assistant Deputy Minister Phil Jensen, dated November 22, 2005, patently unreasonable?

ANALYSIS

Standard of review

[21] The Assistant Deputy Minister has in-depth knowledge of the politics, procedures and rules in effect within the Department, including the *Values and Ethics Code for the Public Service*, as well as the duties performed by Mr. Gauthier. Accordingly, determining whether or not there is a

conflict of interest is clearly within his expertise. His decision is also protected by a privative clause. The standard of patent unreasonableness therefore applies.

[22] The interaction between the four elements of the pragmatic and functional analysis determines the degree of deference that must be given to an administrative decision. (*Dubé v. Canada (Attorney General)*, 2006 FC 796, [2006] F.C.J. No. 1014 (QL), paragraph 21.)

[23] Mr. Jensen's decision is subject to a privative clause. Pursuant to section 214 of the *Public Service Labour Relations Act*, 2003, c. 22 (PSLRA), any decision made at the final level of the grievance process that cannot be referred to adjudication is final and binding.

214. If an individual grievance has been presented up to and including the final level in the grievance process and it is not one that under section 209 may be referred to adjudication, the decision on the grievance taken at the final level in the grievance process is final and binding for all purposes of this Act and No. further action under this Act may be taken on it.

214. Sauf dans le cas du grief individuel qui peut être renvoyé à l'arbitrage au titre de l'article 209, la décision rendue au dernier palier de la procédure applicable en la matière est définitive et obligatoire et aucune autre mesure ne peut être prise sous le régime de la présente loi à l'égard du grief en cause.

[24] It is clear, in this case, that Mr. Gauthier's grievance could not have been referred to adjudication. Accordingly, Mr. Jensen's decision is final and binding, which warrants a high degree of judicial deference.

[25] The Assistant Deputy Minister has in-depth knowledge of the type of work done by Mr. Gauthier and the policies that apply within the Department in conflict of interest matters. This knowledge also warrants a high degree of judicial deference. (*Dubé, supra.*)

[26] Mr. Jensen's decision bears essentially on a factual issue. In fact, it is based on Mr. Gauthier's duties as well as on the activities performed by Mr. Gauthier as municipal councillor in the city of Saint-Jean-sur-Richelieu. His finding to the effect that there is an appearance of conflict of interest therefore is worthy of a high degree of deference.

[27] Since this Court does not have in-depth knowledge of the applicant's duties and since it cannot substitute its opinion for that of the Assistant Deputy Minister on this point, the decision made at the final level of the grievance must be submitted to the standard of patent unreasonableness.

Available recourse and recourse sought by Mr. Gauthier

[28] Pursuant to the new provisions of the PSSRA, a grievance bearing on a deployment carried out without the public servant's consent may be referred to adjudication.

209. (1) An employee may refer to adjudication an individual grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to

...

(c) in the case of an employee in the core public administration,

...

(ii) deployment under the Public Service Employment Act without the employee's consent where consent is required; or

209. (1) Après l'avoir porté jusqu'au dernier palier de la procédure applicable sans avoir obtenu satisfaction, le fonctionnaire peut renvoyer à l'arbitrage tout grief individuel portant sur:

[...]

c) soit, s'il est un fonctionnaire de l'administration publique centrale:

[...]

(ii) la mutation sous le régime de la Loi sur l'emploi dans la fonction publique sans son consentement alors que celui-ci était nécessaire;

[29] This statutory regime implemented by Parliament is preferred over any other recourse. The applicant decided to avail himself of his right to resort to a grievance and to directly address this Court. (*Vaughan v. Canada*, [2005] 1 S.C.R. 146, [2005] S.C.J. No. 12 (QL); *Estwick v. Canada (Treasury Board)*, 2004 FC 970, [2004] F.C.J. No. 1259 (QL).)

Conflict of interest

[30] Mr. Jensen's decision was not patently unreasonable considering the appearance of conflict of interest, which should be treated the same way as a real conflict of interest. (*Threader v. Canada (Treasury Board)*, [1987] 1 F.C. 41, [1986] F.C.J. No. 411 (QL).)

[31] As the Federal Court of Appeal stated in *Threader, supra*, the employer must determine the applicable rules in matters of conflict of interest:

[16] . . . The Crown is quite entitled to demand different standards of its employees than those prevailing in the private sector. It is not only entitled in law to enjoin its servants from putting themselves in a position of an apparent conflict of interest; the rationale for its doing so is patently obvious.

[32] The appropriate test for determining whether or not there is an appearance of conflict of interest was formulated as follows by the Federal Court of Appeal in *Threader, supra*:

Would an informed person, viewing the matter realistically and practically and having thought the matter through, think it more likely than not that the public servant, whether consciously or unconsciously, will be influenced in the performance of his official duties by considerations having to do with his private interests?

[33] In the context of his duties, Mr. Gauthier is called to carry out investigations in the municipal region regarding citizens who reside in the city of Saint-Jean-sur-Richelieu, including his own electoral district. This is an apparent risk of conflict of interest. For example, a citizen can be

under investigation by the applicant and in the days that follow have to address him for the issuance of a permit or a change of zoning. Similarly, an individual who is refused any given permit by the city following an investigation carried out by the applicant could legitimately believe that the applicant's duties with the Department influenced the city's decision or that the information gathered for an investigation had been used by the city.

[34] In another scenario, a citizen addressing the applicant in his capacity as a municipal councillor, could the following day be the subject of an investigation by the applicant, or even of an administrative penalty.

[35] Also, in the context of his activities as municipal councillor, the applicant does fundraising for charities and solicits these same citizens who were or who could be the subject of an investigation.

[36] In such circumstances, it is indisputable that a well-informed individual would perceive the applicant as wearing two hats simultaneously and would have difficulty believing that the applicant's personal activities would never influence his professional activities and vice-versa.

[37] As the Federal Court of Appeal stated in *Threader, supra*, the employer cannot tolerate such a situation:

[16] . . . Manifestly, the public service will not be perceived as impartial and effective in fulfilling its duties if apparent conflicts between the private interests and the public duties of public servants are tolerated.

[38] As stated in the *Values and Ethics Code for the Public Service*, the public servant must take adequate measures to prevent real, apparent or potential conflicts of interest from arising. Public servants' responsibilities are defined as follows:

Public servants have the following overall responsibilities:

(a) In carrying out their official duties, public servants should arrange their private affairs in a manner that will prevent real, apparent or potential conflicts of interest from arising.

(b) If a conflict does arise between the private interests and the official duties of a public servant, the conflict should be resolved in favour of the public interest.

Public servants also have the following specific duties:

(a) They should not have private interests, other than those permitted pursuant to these measures, that would be affected particularly or significantly by government actions in which they participate.

Responsabilité de tous les fonctionnaires:

a) Dans l'exercice de leurs fonctions officielles, organiser leurs affaires personnelles de façon à éviter toute forme de conflit d'intérêts réel, apparent ou potentiel.

b) S'il y a d'éventuels conflits entre l'intérêt personnel du fonctionnaire et ses fonctions et responsabilités officielles, l'intérêt public doit primer dans le règlement desdits conflits.

Le fonctionnaire a aussi les responsabilités individuelles suivantes:

a) Il doit se départir de ses intérêts personnels, excluant ceux autorisés par les présentes mesures, lorsque sa participation à des activités gouvernementales peut avoir une influence quelconque.

[39] These rules were enacted in order to ensure impartiality, integrity and objectivity in the public service. They are an integral part of the public servants' duty of loyalty, intrinsic to the employer-employee relationship. (*Fraser v. Canada (Public Service Labour Relations Board)*, [1985] 2 S.C.R. 455, [1985] S.C.J. No. 71 (QL); *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45 (QL).)

[40] This duty of loyalty presupposes that all public servants must comply with these standards in order to maintain the public's trust in the public service:

[43] . . . The tradition emphasizes the characteristics of impartiality, neutrality, fairness and integrity. A person entering the public service or one already employed there must know, or at least be deemed to know, that employment in the public service involves acceptance of certain restraints. . . .

(Fraser, supra)

[41] These restrictions must, in this case, be considered in light of the duties of public servants under the *Values and Ethics Code for the Public Service*. The employer must therefore intervene to require that the applicant comply with the Code put an end to a real or apparent conflict of interest situation. Accordingly, by abolishing any possibility that the applicant would carry out investigations in the region of Saint-Jean-sur-Richelieu, the employer addressed the concerns regarding the existence of a real or apparent conflict.

[42] The employer was satisfied that the appearance of conflict was eliminated since the applicant would no longer be in contact with the same population pool for the purposes of his investigator duties and his activities as municipal councillor. The fact that the employer proposed the option of accepting a transfer to the city of Brossard office is not paradoxical. Such a compromise indeed had the effect of eliminating the employer's concerns.

[43] Public servants are not absolutely forbidden to carry out political activities in the municipal arena. They must nevertheless comply with the *Values and Ethics Code for the Public Service*. There is an additional requirement under the new *Public Service Employment Act* in that public servants must also obtain permission from the Public Service Commission before becoming a candidate. This new law does not however apply to the applicant, as he filed his application for judicial review before it came into force.

Canadian Charter of Rights and Freedoms, Part I, Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 (Charter)

[44] In response to the arguments raised by the applicant, the rights guaranteed to the applicant under the Charter were not violated in this case since Mr. Gauthier was never forbidden to run in municipal elections.

[45] In this case, the employer required the applicant to take the measures necessary to avoid a situation of real or apparent conflict of interest. In order to do so, he was given three options:

1. Cease your political activities in the region;
2. Resign from your employment on a temporary or permanent basis;
3. Submit a written request for transfer.

[46] In fact, the employer simply required Mr. Gauthier to comply with the *Values and Ethics Code for the Public Service* and proposed solutions to him for doing so. The applicant chose the option to transfer to Brossard's regional office. There was no prejudice to Mr. Gauthier. He continued to perform the same duties and still acts as a municipal councillor in Saint-Jean-sur-Richelieu. His travelling time has certainly increased, but a grievance has already been filed on that point.

[47] This situation was a viable compromise for the employer because the conflict of interest resulted from the perception that the public could have regarding the applicant's roles as investigator and municipal councillor in the city of Saint-Jean-sur-Richelieu region and the influence that one could have over the other. This manner of proceeding does not breach the rights conferred to Mr. Gauthier under the Charter. (*Haydon v. Canada*, [2000] F.C.J. No. 1368 and

affirmed by 2005 FCA 249, [2005] F.C.J. No. 1146 (QL), *Fraser, supra*; *Jones v. Ontario (Attorney General)*, [1992] O.J. No. 163 (QL).)

[48] Mr. Gauthier indeed was not deprived of the opportunity to continue his activities as a municipal councillor, as an acceptable alternative had been proposed. The fact that Mr. Gauthier had to choose between different solutions in order to comply with the *Values and Ethics Code for the Public Service* and had to increase his travelling time is certainly not, in the case at bar, a breach of rights conferred under the Charter.

[88] . . . in cases that fall within the *Fraser* qualifications, the public interest outweighs the objective of an impartial and effective public service.

[89] In conclusion, I am of the view that the common law duty of loyalty as articulated in *Fraser* sufficiently accommodates the freedom of expression as guaranteed by the Charter, and therefore constitutes a reasonable limit within the meaning of section 1 of the Charter.

(*Haydon, supra*)

[49] Therefore, if this Court were to determine that there is a limit on the rights conferred to Mr. Gauthier by the Charter, such a limit is justified under section 1 of the Charter, since it is a question of public servants' duty of loyalty.

CONCLUSION

[50] To summarize, the fact that Mr. Gauthier was performing his investigation duties in the same region as the city for which he was a municipal councillor amounts to an appearance of conflict of interest situation. Mr. Gauthier had to take adequate measures to rectify this situation. The employer was correct in deciding to require the applicant to comply with the *Values and Ethics Code for the Public Service*, as well as in proposing a few options for doing so. This was not a

breach of the Charter. Mr. Gauthier did not suffer any prejudice and continues to carry out the same professional and personal activities. Under the circumstances, the employer's decision was not patently unreasonable and the application for judicial review is therefore dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed with costs.

“Michel M.J. Shore”

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2274-05

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v. ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

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**REASONS FOR JUDGMENT
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DATE OF REASONS: March 30, 2007

APPEARANCES:

James Cameron FOR THE APPLICANT

Jennifer Champagne FOR THE RESPONDENT

SOLICITORS OF RECORD:

RAVEN, CAMERON,
BALLANTYNE & YAZBECK LLP
Ottawa, Ontario FOR THE APPLICANT

JOHN H. SIMS, Q.C.
Deputy Attorney General of Canada FOR THE RESPONDENT