Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Christian Bomongo; Patrick Kenabantu,

applicants,

and

Communications, Energy and Paperworkers Union of Canada (now known as Unifor),

respondent,

and

Bell Canada,

employer.

Board File: 30788-C
Neutral Citation: 2015 CIRB **768**
March 20, 2015

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and André Lecavalier, Members.

Parties' Representatives of Record

Messrs. Christian Bomongo and Patrick Kenabantu, on their own behalf;
Mr. Claude Tardif, for the Communications, Energy and Paperworkers Union of Canada (now known as Unifor);
Ms. Mireille Bergeron, for Bell Canada.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all

of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this reconsideration application without an oral hearing.

I. Nature of the Application

[1] On November 28, 2014, Messrs. Christian Bomongo and Patrick Kenabantu (the applicants) filed an application for reconsideration of the Board's decision in *Bomongo*, 2014 CIRB LD 3304 (*Bomongo 3304*). In that decision, the Board had found that the applicants' complaint in which they had alleged that their union, the Communications, Energy and Paperworkers Union of Canada (Unifor), had breached its duty of fair representation (DFR) was untimely.

[2] As indicated in its administrative letter of December 1, 2014, the Board did not seek responses from Unifor or the employer, Bell Canada. Instead, the Board must determine whether the applicants put forward a sufficient basis to warrant reconsideration of a past decision. This practice is consistent with the concept of the *prima facie* process for DFR complaints:

> In accordance with the provisions of the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*), a copy of the application is herewith provided to the respondent and the employer. **Submissions from the respondent or the employer are not requested at this time.**
>
> The application will be submitted to a panel of the Board to determine if it contains sufficient information and grounds to support a reconsideration application filed pursuant to section 18 of the *Canada Labour Code (Part I–Industrial Relations)*.
>
> ***If the Board determines through the information it has received that the application does not establish sufficient grounds to sustain it, a summary decision will be issued and the file will be closed*.**
>
> If the Board is of the view that further consideration of the matter is warranted, the respondent and the employer will be offered an opportunity to file a response to the application. The applicant will then have an opportunity to reply.
>
> (translation; bold in original; bold italics added)

[3] Appended to the applicants' reconsideration application were two letters that had not been included in the complaint file, though they had been referred to in the complaint. The letters were from Unifor and were dated June 4 and July 22, 2013, respectively. According to the applicants, those letters would have prompted the Board to reach a different decision:

> … this is to provide you with some very important information that will make a difference, since it was not put before the original panel.
>
> (translation)

II. Application for Reconsideration–New Facts

[4] In *Buckmire*, 2013 CIRB 700, the Board described the reconsideration ground involving an allegation of new facts:

> **1. New Facts**
>
> [37] This ground involves new facts which the applicant did not put before the Board when originally pleading its case. It is not an opportunity for the applicant to add facts it had omitted to plead.
>
> [38] As summarized in *Kies 413, supra*, an application for reconsideration will include, at a minimum, the following information about the alleged new facts:
>
> 1. What the new facts are;
> 2. Why the applicant could not have put them before the Board panel originally; and
> 3. How those new facts would have changed the Board's decision under review.
>
> [39] Generally, the original panel will consider applications raising this ground, given its advantageous position to decide whether "new facts" exist and their impact, if any, on its previous decision.

[5] Since the Board must establish whether new facts exist and decide on the impact of any such facts on the original decision, such a reconsideration application is generally assigned to the original panel.

[6] In *Adams*, 2001 CIRB 121, the Board indicated that a party must explain why it was unable to raise the alleged new facts in the original case:

> [55] As stated above, new facts or evidence advanced on a reconsideration application must have been unavailable at the time of the original hearing and be likely to have caused the Board to reach a different conclusion. An explanation must be given as to why these facts were not brought to the attention of the Board during the original hearing. A party cannot use this ground of reconsideration to remedy its own negligence.

[7] In the matter now before the Board, the applicants submitted documents that they had had in their possession when they had filed their complaint. The documents in question are two letters that Unifor had sent the applicants on June 4 and July 22, 2013, prior to the filing of the original

complaint, in response to two demand letters that the applicants had sent the union on May 23 and July 11, 2013.

[8] The reconsideration process is not an opportunity for a party to reargue the original complaint. In *Canada Post Corporation* (1988), 75 di 80 (CLRB no. 710), the predecessor to this Board, the Canada Labour Relations Board, confirmed the need for a party to plead its entire case before the original panel:

> … The Board encourages parties to put their whole case before the Board in initial applications by applying strict rules for reconsideration applications. Parties seeking reconsideration of Board decisions are required to show cause why any additional information sought to be added was not placed before the Board in the initial proceedings. Cases where parties are found to be merely seeking a different decision based on the same factual considerations are usually dismissed by the Board without proceeding to a public hearing…
>
> (page 87)

[9] The Board notes that the applicants did not explain why they had not provided the two letters from Unifor at the time of their complaint. Consequently, the Board finds that the applicants have not raised any new facts required for a reconsideration application.

[10] This finding is sufficient to dismiss the application for reconsideration.

III. Letters Would Not Have Affected Original Decision

[11] Even if the documents filed by the applicants had been admissible for purposes of a reconsideration application, which is not the case here, the finding would have remained the same.

[12] As indicated in *Bomongo 3304*, *supra*, and in accordance with section 97(2) of the *Code*, the Board must determine whether a DFR complaint was filed not later than 90 days "after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint."

[13] In the original complaint, the applicants alleged that Unifor had refused to file a disavowal request in regard to the actions of former counsel for the union in the first seven days of arbitration of their dismissal grievances and that it had in effect withdrawn their grievances.

[14] As pointed out in *Bomongo 3304*, *supra*, Unifor told the applicants that it would not be filing a disavowal request on March 17, 2011. It indicated that it was willing to pursue their grievances only if the applicants dropped their disavowal request and cooperated with it.

[15] The applicants challenged Unifor's position regarding the handling of their grievances. Rather than drop their disavowal request, they sent three successive demand letters.

[16] On page 6 of its decision in *Bomongo 3304*, *supra*, the Board considered the facts and concluded that the complainants knew or ought to have known of the circumstances that gave rise to their complaint at the latest on May 23, 2013, when they sent the union the first demand letter concerning its withdrawal of their grievances:

> Based on the complaint as drafted by the complainants themselves along with the appended material, the Board is satisfied that the complainants knew, at the latest on May 23, 2013, of the union's decision not to pursue their grievances any further at arbitration. Yet the complainants did not file their complaint with the Board until July 23, 2014, that is, 14 months later.
>
> It is clear on reading such a complaint that it is untimely.
>
> The additional demand letters sent in July 2013 and April 2014 in no way stop the clock on the 90-day time limit provided for in section 97(2) of the *Code*. The three demand letters plainly indicate that the complainants were considering filing a complaint with the Board, and were considering doing so as early as May 23, 2013. Yet they did not file a complaint until July 23, 2014.
>
> Furthermore, unlike the situation in *Perron-Martin 719*, *supra*, the complainants failed to explain why they were able to send three demand letters in 2013 and 2014, but at the same time were unable to file their complaint within the time limit set by the *Code*.

[17] The Board considers that Unifor's two letters dated June 4 and July 22, 2013, did not restart the clock on the time limit for filing. In fact, Unifor did not change its position regarding the handing of the applicants' grievances and did not take any new steps to pursue the grievances at arbitration. The letters merely repeated Unifor's refusal to pursue the grievances at arbitration without proper cooperation on the part of the applicants.

[18] Unifor refused for years to proceed with the strategy the applicants were seeking in relation to their grievances. Unifor informed them in writing as early as March 17, 2011, that their cooperation was necessary for it to continue to pursue their grievances. After a considerable lapse in time, the applicants challenged Unifor's position in this regard by sending successive demand letters. Their complaint, which was not filed with the Board until 2014, was untimely.

[19] The application for reconsideration is therefore dismissed.

[20] This is a unanimous decision of the Board.

Translation

_____
Graham J. Clarke
Vice-Chairperson

_____
Daniel Charbonneau
Member

_____
André Lecavalier
Member