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Reasons for decision

Anne-Marie Lamolinaire,

complainant,

and

Bell Canada,

employer,

and

Communications, Energy and Paperworkers Union of
Canada,

respondent.

Board File: 25536-C

Neutral Citation: 2009 CIRB 463

July 24, 2009

The Board, composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*), considered the above-noted complaint. A hearing was held in Montréal, Quebec, on December 2 and 3, 2008, and June 11 and 12, 2009.

Appearances

Mr. Gabriel Hébert-Tétrault, for the complainant;

Mr. André Paiement, for Bell Canada;

Mr. Claude Tardif, for the Communications, Energy and Paperworkers Union of Canada.

I - Nature of the Complaint

[1] On December 8, 2005, Ms. Anne-Marie Lamolinaire (Ms. Lamolinaire) filed a duty of fair representation complaint under section 37 of the *Code*, which reads as follows:

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[2] Ms. Lamolinaire claims that her union, the Communications, Energy and Paperworkers Union of Canada (CEP), acted in a manner that was arbitrary and in bad faith in handling her grievance.

[3] Ms. Lamolinaire filed her grievance when her term contract with Bell Canada (Bell) ended and Bell informed her that she was not being rehired.

[4] On January 13, 2006, CEP filed a response to Ms. Lamolinaire's complaint. The response comprised a short cover letter and a large number of appended documents.

[5] After reviewing the documentation filed by the parties, the Board decided to hold a hearing.

II - Facts

[6] The most relevant facts presented at the hearing are set out below.

[7] Ms. Lamolinaire worked as a telephone operator with Bell. Despite differing initial positions, the parties were in agreement that Ms. Lamolinaire's status at Bell was temporary part-time (TPT). She had several term contracts with Bell, but given her TPT status, had very few rights under the collective agreement between Bell and CEP.

[8] According to CEP, during the relevant period, Bell was under no obligation whatsoever to offer a TPT employee a new contract. The practice adopted by the parties gave Bell considerable discretion in regard to the rehiring of TPT employees. Unless CEP could prove abuse of management rights, it had very little recourse in relation to TPT employees.

[9] Ms. Lamolinaire's last contract commenced in January 2004 and ended on April 16, 2004. Prior to the hearing, a question was raised as to whether she had completed her last contract or been dismissed by Bell before its expiry. However, it became clear at the hearing that Ms. Lamolinaire had in fact worked right up to her contract end date, that is, April 16, 2004. At that time, Bell informed Ms. Lamolinaire that she was not being rehired, in part because of Bell's evaluation of her work performance.

[10] Ms. Lamolinaire contacted CEP on April 16, 2004, concerning this situation. According to the evidence, Ms. Lamolinaire had also been in touch with her union during her last contract concerning other matters, including a pay matter and another situation where she had felt wronged by comments made by one of her superiors.

[11] Over the different periods of her employment contracts with Bell, Ms. Lamolinaire had had some negative experiences involving other employees. For example, she had felt harassed because she was originally from France and for other reasons.

[12] After the end of her last contract, Ms. Lamolinaire attempted to explain those negative experiences at Bell to her union.

[13] However, she appears to have had difficulty recalling specific facts in her discussions with her union.

[14] CEP filed a grievance relating to the end of the employment contract. The file contains notes on investigations conducted by union representatives, such as Ms. Lise Therrien.

[15] Ms. Claire Ouellette, Vice-President of the CEP local, prepared the official grievance on the basis of her notes and some discussions.

[16] CEP followed its normal grievance procedure, which under the collective agreement involves three levels.

[17] A first-level meeting was held on June 9, 2004. A second-level meeting was held on December 9, 2004. The local union handles the first two levels itself.

[18] The parties were unable to arrive at an appropriate solution at either of the first two levels of the procedure. The grievance was therefore advanced to CEP National for a third-level review. At this level of the procedure, Mr. Richard Chaumont, a national representative, reviewed the matter. Mr. Chaumont also met with Ms. Lamolinaire to prepare for the third-level meeting. The meeting in question, which Ms. Lamolinaire attended, was held on February 16, 2005.

[19] CEP amended the grievance during the grievance procedure based on Ms. Lamolinaire's comments regarding harassment. Ms. Lamolinaire moreover decided on her own to file a harassment complaint with the Canadian Human Rights Commission (the Commission), but did not provide CEP with a copy of that complaint. Although CEP was aware that she had filed a complaint, it did not ask for a copy thereof.

[20] The witnesses called by CEP indicated that they had held several discussions with Ms. Lamolinaire regarding her harassment complaints, but had had difficulty obtaining details. In any event, Ms. Ouellette had attempted to conduct an investigation concerning Ms. Lamolinaire's allegations of harassment.

[21] After the third-level meeting between CEP and Bell, CEP had to decide whether Ms. Lamolinaire's grievance would be referred to arbitration.

[22] At that stage, Bell made an offer that would have settled Ms. Lamolinaire's grievance and the complaint before the Commission. After consulting the Commission, Ms. Lamolinaire asked that the offer be made in writing. Bell subsequently decided to withdraw the offer.

[23] Mr. Chaumont reviewed the file and prepared a memorandum to CEP National in which he explained why the grievance should not be referred to arbitration.

[24] Given CEP National's decision, Ms. Lamolinaire's file was returned to the local union. Despite that decision, the local union could have referred the matter to arbitration, at its own costs.

[25] A grievance committee of the local union met on December 12, 2005, but decided not to proceed any further.

[26] After the end of her last contract, Ms. Lamolinaire had retained the services of independent counsel. Ms. Ouellette informed Ms. Lamolinaire of the decision of the local union's grievance committee by leaving a message on her telephone answering machine. Ms. Lamolinaire returned CEP's call, but refused to speak with Ms. Ouellette. She instead left her lawyer's number and asked that Ms. Ouellette contact him.

[27] The evidence shows that Ms. Ouellette left a message on Ms. Lamolinaire's answering machine concerning her right to ask that the general assembly of the local union decide whether her grievance should be referred to arbitration. This was in fact her last recourse.

[28] Ms. Lamolinaire's counsel asked CEP to provide relevant information. According to notes made by Ms. Ouellette, since Ms. Lamolinaire had filed a complaint with the Board, CEP decided not to provide her with any more information relating to her file.

[29] In its oral arguments, CEP submitted that its response to the complaint meant that Ms. Lamolinaire had received all the information relating to the status of her grievance and the decisions made by CEP National and the local union's grievance committee.

III - The Law

[30] The law surrounding the duty of fair representation is straightforward. The Board does not sit in appeal of the numerous decisions made by a union in assessing a matter, as that work is part and parcel of the union's power of exclusive representation of the bargaining unit conferred on it when it is granted certification.

[31] One of the union's duties as exclusive representative is to make discretionary decisions.

[32] Generally speaking, the Board respects the decisions made by the unions.

[33] However, the Board does have an important duty to perform under section 37 of the *Code*. Along with the exclusive power conferred on a union to represent a bargaining unit comes a prohibition against the union acting in a manner that is arbitrary, discriminatory or in bad faith in the representation of the employees in the unit with respect to their rights under the collective agreement.

[34] The Board must therefore closely examine the matter and the procedure followed by a union, to ensure that the union did not act in a manner that was arbitrary, discriminatory or in bad faith.

[35] In *Ronald Schiller*, 2009 CIRB 435, a recent decision in which the Board considered the investigation conducted by the union, the Board stated the following:

[33] A union also cannot act arbitrarily by only superficially considering the facts or merits of a case. It would be arbitrary not to investigate and discover the circumstances surrounding the grievance or to fail to make a reasonable assessment of the case.

[34] Union officials can make honest mistakes in the sense that they may wrongly assess a grievance but still not act arbitrarily. As the Board stated at paragraph 37 in *Virginia McRaeJackson et al.*, *supra*:

“[37] Accordingly, the Board will normally find that the union has fulfilled its duty of fair representation responsibility if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the outcome of the grievance, and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.”

[35] In short, the Board examines the trade union's process in order to determine whether it acted in an arbitrary, discriminatory or bad faith manner.

[36] Given that a member of a bargaining unit generally does not have an absolute right to have a grievance referred to arbitration, the Board must consider, among other things, the following questions in regard to an investigation conducted by a union:

1. Did the union conduct only a perfunctory or cursory inquiry, or a thorough one?
2. Did the union gather sufficient information to arrive at a sound decision?

3. Were there any personality conflicts or other bad relations that might have affected the soundness of the union's decision?

[37] Regarding the duty of fair representation, it is true that a union has certain obligations toward its members, but members also have obligations. Complainants must assist their union in the performance of its duties. If a union is investigating a matter, the complainant has a duty to provide as much information as possible to ensure that the final decision is a sound one.

IV - Analysis and Decision

[38] According to Ms. Lamolinaire, CEP acted in a manner that was arbitrary and in bad faith.

[39] She alleges that CEP failed to contact all potential witnesses, which would have enabled it to properly appreciate the facts surrounding this complaint.

[40] She further alleges that CEP was negligent in not asking for a copy of the complaint she had filed with the Commission. In her view, if the union is claiming that she did not provide sufficient information, it should have asked for a copy of the complaint.

[41] Ms. Lamolinaire is also critical of CEP for failing to provide her with proper advice concerning Bell's offer, which could have settled the matter. According to Ms. Lamolinaire, CEP, which is made up of experts, should have known that asking for an offer in writing would cause the offer to disappear.

[42] Ms. Lamolinaire alleges that CEP acted in bad faith in that, once she had filed her complaint with the Board, the union refused to provide her with key information, including information concerning her right to present her case to the general assembly of the local union.

[43] Despite the detailed and professional written and oral submissions made by counsel for Ms. Lamolinaire, the Board is not convinced that CEP breached the *Code*.

[44] The evidence shows that CEP put a great deal of energy into reviewing Ms. Lamolinaire's file.

[45] For example, an investigation was launched on the last day of Ms. Lamolinaire's employment contract with Bell. The evidence shows that several people, including Ms. Therrien, made notes regarding relevant facts. In addition, several CEP representatives, including Ms. Ouellette and Mr. Chaumont, met with Ms. Lamolinaire in preparation for the meetings at the different levels of the grievance procedure, to gain a better understanding of the facts.

[46] The Board is satisfied that, when Ms. Lamolinaire brought certain incidents, such as unkind words by a member of management, to the union's attention, CEP investigated.

[47] The Board does not accept the argument that CEP should have asked for a copy of the complaint filed with the Commission by Ms. Lamolinaire. It was up to Ms. Lamolinaire to provide all relevant information to her union. Ms. Lamolinaire could easily have sent a copy of her complaint to her union if the complaint contained additional, relevant information.

[48] CEP's investigation was properly conducted. The union cannot be criticized for not having spoken to every potential witness mentioned by Ms. Lamolinaire at the hearing. It was up to Ms. Lamolinaire to provide CEP with the names of potential witnesses if she wanted it to speak with them. It is too late at the hearing to call witnesses to show that other people had relevant information.

[49] Furthermore, the Board does not accept the argument that CEP erred in asking that Bell make an offer in writing. Ms. Lamolinaire is the one who asked CEP to make the request. In a grievance procedure, it is always possible for a party to withdraw an offer after a more careful review of legal considerations. It is not CEP's fault if Bell decided to change its position after consulting with counsel.

[50] Ms. Lamolinaire also submits that CEP could have come up with some ingenious legal arguments to contest the non-renewal of her contract. For example, the legal impact of successive term contracts has been raised in several courts of late. The Board agrees that CEP could have decided to raise this issue before an arbitrator. However, it is up to CEP to decide what will prompt it to challenge existing law and when it will do so.

[51] The duty of fair representation is an ongoing obligation. The fact of an employee filing a complaint with the Board would never excuse a certified union from meeting its obligation to represent members or former members of the bargaining unit.

[52] In the instant case, the Board does not accept CEP's withholding of relevant information from the complainant's counsel because Ms. Lamolinaire filed a complaint.

[53] However, in this case, the Board is of the view that this action is not a violation of the *Code* given that CEP provided Ms. Lamolinaire with satisfactory all-around representation for several years. Moreover, the relevant information concerning the right to speak to the general assembly was left on Ms. Lamolinaire's telephone answering machine.

[54] Nevertheless, in different circumstances, categorically refusing to provide relevant information to a member of the unit because that person filed a complaint under the *Code* would raise serious concerns for the Board.

V - Conclusion

[55] Ms. Lamolinaire has not convinced the Board that CEP breached section 37 of the *Code*.

[56] CEP strove to defend Ms. Lamolinaire's interests under circumstances that were at times difficult.

[57] The Board is not satisfied that the inquiry conducted by CEP was perfunctory or cursory. Ms. Lamolinaire was a TPT employee and the Board recognizes that CEP had little in the way of recourse to challenge Bell's decision not to rehire the complainant at the end of her term contract.

[58] For all of the above reasons, the Board dismisses the complaint.

***Certified Translation
Communications***

Graham J. Clarke
Vice-Chairperson