Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Tony Aker,

complainant,

and

United Parcel Service Canada Ltd.,

respondent.

Board File: 27248-C
Neutral Citation: 2009 CIRB 474
October 23, 2009

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156 of the *Canada Labour Code* (*Part - II) Occupational Health and Safety*) (the *Code*).

Parties' Representatives of Record

Mr. Tony Aker, on his own behalf;
Ms. Crystal A. Gamble, for United Parcel Service Canada Ltd.

I - Nature of the Complaint

[1] On January 9, 2009, the Board received from Mr. Tony Aker (Mr. Aker) a complaint alleging a violation of Part II of the *Code*. Mr. Aker argued that his employer, United Parcel Service Canada Ltd. (UPS), terminated his employment on December 4, 2008 for reasons related, in whole or in part, to safety concerns he had raised under Part II of the *Code*.

[2] UPS denied the allegations and provided background on its decision to terminate Mr. Aker.

[3] The Board has concluded that Mr. Aker has not met his burden of proof under the *Code* to demonstrate that UPS's termination of his services constituted a reprisal prohibited by section 147 of the *Code*.

II - Oral Hearing

[4] Section 16.1 of the *Code* states as follows:

> 16.1 The Board may decide any matter before it without holding an oral hearing.

[5] The Board initially held a case management conference on April 16, 2009. On April 17, 2009, the Board sent the parties a post case management letter summarizing some of the discussions held during the case management conference. The Board indicated it had not decided whether to hold an oral hearing.

[6] The Board then sent a letter dated May 12, 2009 advising it would hold a hearing on October 14 and 15, 2009.

[7] In the course of preparing for that hearing, the Board concluded that it would in fact be able to determine the complaint based on the parties' extensive written submissions. The Board advised the parties immediately of the hearing cancellation in order to save them any further expense in this matter.

III - Facts

[8] Mr. Aker's complaint described an incident which occurred on November 18, 2008. A fellow employee (Mr. F) allegedly assaulted Mr. Aker in the men's room at the UPS workplace. Mr. Aker reported the incident to UPS officials. UPS called a police officer who interviewed Mr. Aker about the incident.

[9] This was not the first incident between Mr. Aker and Mr. F.

[10] UPS sent Mr. Aker home for several days while it investigated the situation. They then called him in on December 4, 2008 and terminated his employment for cause. UPS also terminated the employment of Mr. F on the same day.

[11] Mr. Aker described in his complaint various incidents from previous years which, in his view, involved workplace harassment. The incidents included other altercations between Mr. Aker and Mr. F.

[12] Mr. Aker argued that UPS should not have terminated his employment, especially when, in his view, he was the innocent victim in the November 18, 2008 event.

[13] UPS filed a detailed submission about Mr. Aker's history with Mr. F. UPS provided copies of policies it had enacted such as those dealing with Harassment and Violence Prevention.

[14] UPS catalogued Mr. Aker's personnel file, including the previous altercations he had with Mr. F. UPS described the steps it had taken to deal with these various incidents, some of which involved discipline.

[15] For the November 18, 2008 incident, UPS described the steps it took after the incident came to its attention, including calling the police.

[16] UPS described how it suspended both Mr. Aker and Mr. F pending its investigation. This investigation included meeting with Mr. Aker, Mr. F and any witnesses to the incident.

[17] UPS ultimately decided to terminate both Mr. Aker and Mr. F after reviewing their individual files and their disciplinary history. UPS denied it terminated Mr. Aker for raising safety concerns, but instead terminated him as being a safety threat.

[18] Mr. Aker and UPS have significantly different views of the facts relating to the incidents which had occurred over the years. As will be reviewed shortly, while an adjudicator may have to decide which version to believe for the purposes of an unjust dismissal complaint under section 240 of Part III of the *Code*, the Board does not have to carry out the same extensive exercise in applying its limited jurisdiction under section 133 of the *Code*.

IV - Applicable Statutory Provisions

[19] Part II of the *Code* contains important provisions which protect employees from reprisals when they seek to exercise their occupational health and safety rights.

[20] Section 147 prohibits employer reprisals:

> 147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
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> (a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
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> (b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
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> (c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[21] Section 133 establishes a dual role for the Board when policing reprisals:

> Complaint to Board
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> 133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.
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> Time for making complaint
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> (2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.

Restriction

(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

Exclusion of arbitration

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

Duty and power of Board

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

Burden of proof

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

i) Right to Refuse Unsafe Work

[22] Most of the Board's cases under Part II arise when an employee exercises his or her right to refuse to work if the employee has reasonable cause to believe a situation is dangerous. Sections 128 and 129 of the *Code* establish a comprehensive regime for employees and employers to follow when the right to refuse is in issue.

[23] Section 133(6) of the *Code* creates a reverse onus provision when a complainant alleges a reprisal took place related to the right to refuse dangerous work. In such cases, it is up to the employer to prove that it did not discipline an employee for exercising his or her refusal rights under the *Code*.

[24] The Board formerly had a role in assessing whether danger existed, but the last elements of that jurisdiction were removed with the passing of Bill C-12 (2000, c. 20), *An Act to amend the Canada Labour Code (Part II).*

[25] Mr. Aker's complaint does not involve the exercise of the right to refuse unsafe work under section 128 of the *Code*.

ii) General protection against reprisals

[26] If a reprisal occurs because an employee sought the enforcement of other provisions of Part II, then the Board can examine that situation and intervene, if necessary. Essentially, Part II of the *Code* now restricts the Board's role to focussing on reprisals.

iii) Concurrent Fora

[27] The Board described its limited Occupational Health and Safety jurisdiction in *Air Canada*, 2007 CIRB 394:

> [59] Part II of the Code does not give the Board any jurisdiction over either the administration or enforcement of any of the provisions relating to the operation of health and safety committees. The present wording of Part II does not give this Board jurisdiction to address the myriad of matters relating to the administration and operation of these committees, that are found in both unionized and non-unionized workplaces. Part II does not give the Board jurisdiction, for example, to determine the amount of training, the level of resources, or the amount of time away from their regular duties that should be provided to committee members at the hundreds, if not thousands, of workplaces falling under federal jurisdiction. Similarly, it does not give this Board jurisdiction to set the regular rate of pay of employees who perform health and safety work.
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> [60] The only jurisdiction the Board has under Part II of the Code is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the Code.
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> ...
>
> (page 17, emphasis added)

[28] Concurrent proceedings can arise under the *Code* from the same incident(s). For example, section 127.1 establishes the procedure to follow if an employee believes there has been a contravention of Part II of the *Code*. Section 127.1(8) describes when in the process an employee may refer the complaint to a Health and Safety Officer (Officer):

127.1(8) The employee or employer may refer a complaint that there has been a contravention of this Part to a health and safety officer in the following circumstances:

(a) where the employer does not agree with the results of the investigation;

(b) where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or

(c) where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified.

[29] The Officer can issue Directives to remedy a violation of a provision under Part II:

Special Safety Measures

Direction to terminate contravention

145. (1) A health and safety officer who is of the opinion that a provision of this Part is being contravened or has recently been contravened may direct the employer or employee concerned, or both, to

(a) terminate the contravention within the time that the officer may specify; and

(b) take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

Confirmation in writing

(1.1) A health and safety officer who has issued a direction orally shall provide a written version of it

(a) before the officer leaves the work place, if the officer was in the work place when the direction was issued; or

(b) as soon as possible by mail, or by facsimile or other electronic means, in any other case.

...

[30] It appears Mr. Aker filed a Part II complaint which later resulted in a Direction from an Officer: See Mr. Daniel Roy's January 16, 2009 Direction issued pursuant to section 145(1)(a) of the *Code*.

[31] Part III of the *Code* at section 240 allows a employee like Mr. Aker to contest whether a federal employer like UPS had just cause to dismiss him:

240. (1) Subject to subsections (2) and 242(3.1), any person

(a) who has completed twelve consecutive months of continuous employment by an employer, and

(b) who is not a member of a group of employees subject to a collective agreement,

may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.

[32] Section 242(1) allows a complaint to be referred to adjudication:

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

[33] Mr. Aker exercised his rights under section 240 of the *Code* and is contesting his termination before an adjudicator.

[34] It is essential to highlight the Board's limited Part II jurisdiction given the possibility of concurrent proceedings. The Board does not deal with issues which are properly within the jurisdiction of either an Officer or an adjudicator.

V - Analysis and Decision

[35] Since this case does not involve the right to refuse dangerous work, the burden of proof remains with Mr. Aker. It is up to him to convince the Board that UPS engaged in a reprisal when it terminated his services on December 4, 2008. If the Board is satisfied that Mr. Aker's termination was for reasons other than his safety concerns under Part II of the *Code*, then the complaint will be dismissed.

[36] In his April 3, 2009 letter to the Board, Mr. Aker suggested that the Board should determine, among other things, these issues:

What we need to discuss and find out is what has happened on Nov 18, 2008;

What we need to find is whether UPS did enough previous to Nov. 18, 2008 in reaction to the safety complaints made by Mr. Tony Aker;

> Did UPS create a safe work environment for Mr. Tony Aker over the last 6 years when (Mr. F) was attacking/harassing/assaulting, Mr. Tony Aker;
> ...
>
> What we need to investigate is whether UPS had sufficient reason, just cause and evidence to take the employment and health coverage away from Mr. Tony Aker.
> ...
>
> (emphasis in original)

[37] These are not the types of questions the Board examines under its Part II jurisdiction. Rather, as the extract from *Air Canada*, *supra*, states, the Board's jurisdiction is limited to determining whether UPS punished Mr. Aker for exercising any of the various rights to which section 147 of the *Code* makes reference.

[38] Mr. Aker has not convinced the Board that UPS' action in terminating him on December 4, 2008 was a reprisal for any attempt he made to seek the protection of Part II of the *Code*. The mere contemporaneousness of safety issues with alleged inappropriate conduct does not prevent an employer from evaluating an employee's continued employment.

[39] For example, if harassment or fighting has been an issue in the workplace, an employer is not prevented from imposing discipline merely because Part II of the *Code* may be in issue. For federally regulated employers like UPS, however, section 240 of the *Code* allows employees who are not subject to a collective agreement to demand that the employer demonstrate just cause for any termination before an independent adjudicator.

[40] Why has Mr. Aker not convinced the Board that UPS acted in violation of section 147 of the *Code*?

[41] It is clear that for a significant period of time, there have been workplace issues between Mr. Aker and Mr. F. Mr. Aker's personnel file contains a significant amount of information about these incidents. There has been discipline in the past for some of these incidents.

[42] UPS has demonstrated to the Board's satisfaction that for a number of years, it has been attempting to deal with workplace difficulties between Mr. Aker and Mr. F. Mr. Aker did not deny

a significant amount of documentation exists. However, it is clear he is not in agreement with UPS' version of the facts about all of the past incidents.

[43] UPS might have had more difficulty had the November 18, 2008 event constituted a single episode which immediately led to Mr. Aker's dismissal. However, the Board cannot ignore the significant background to the situation between Mr. Aker and Mr. F upon which UPS relies.

[44] The Board does not decide whether or not UPS had just cause to terminate Mr. Aker. The adjudicator will evaluate that issue. However, the Board accepts that UPS dismissed Mr. Aker due to his history of altercations with Mr. F in the workplace. It took the identical action with Mr. F. The dismissal accordingly did not result from Mr. Aker's invoking his rights under Part II of the *Code* and thus did not violate section 147.

[45] The Board dismisses the complaint.

Graham J. Clarke
Vice-Chairperson