



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

Reasons for decision

Ms. Joan Milkson,

complainant,

and

Ottawa-Hull District Federation of Musicians, Local
180 of the American Federation of Musicians of the
United States and Canada,

respondent,

and

National Arts Centre,

employer.

Board File: 27698-C

Neutral Citation: 2010 CIRB 500

March 15, 2010

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

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 complaint without an oral hearing.

Counsel of Record

Mr. Julius H. Grey, counsel for the complainant;

Mr. John Yach, counsel for the respondent; and

Mr. Lynn H. Harnden, counsel for the employer.

These Reasons for Decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I - Nature of the Complaint

[1] On September 1, 2009, the Board received a duty of fair representation (DFR) complaint from Ms. Joan Milkson (Ms. Milkson) alleging a violation of section 37 of the *Code*:

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 employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[2] Ms. Milkson's complaint focussed on the actions of her bargaining agent, Ottawa-Hull District Federation of Musicians, Local 180 of the American Federation of Musicians of the United States and Canada (AFM) and its decision not to file grievances with regard to certain matters related to the non-renewal of her contract by her employer, the National Arts Centre (NAC).

[3] Ms. Milkson had been a member of the AFM and a musician (violin) in the National Arts Centre Orchestra (NACO). Ms. Milkson was a founding member of the NACO.

[4] In 1969, Parliament created the NAC which is located in downtown Ottawa. It is described as the only multidisciplinary, bilingual performing arts centre in North America.

[5] The collective agreement between the NAC and the AFM contains certain specialized provisions dealing with artistic questions that can arise for an orchestra. The collective agreement has a standard just cause provision protecting a musician's employment. It also allows the NAC not to renew a musician's contract. A special artistically-sensitive procedure applies to this type of termination.

[6] After reviewing Ms. Milkson's complaint to determine if it raised a *prima facie* case, the Board requested that the AFM and the NAC, if it desired, respond. The NAC responded on November 12, 2009; the AFM provided a detailed response on November 13, 2009.

[7] On November 27, 2009, as a result of the AFM's lengthy response, the Board received a detailed reply from counsel for Ms. Milkson, including amendments to the original complaint.

[8] The AFM filed further submissions in response to the amended complaint which the Board received on December 14, 2009. Pleadings closed on December 21, 2009 when the Board received Ms. Milkson's final reply.

[9] While Ms. Milkson requested the Board hold an oral hearing, the Board has decided, for reasons expressed herein, that it had sufficient material in the file in order to render its decision.

[10] These reasons will explain why the Board has decided to dismiss Ms. Milkson's complaint.

II - Facts

[11] The parties' pleadings explained the procedural protections that the NAC and the AFM negotiated in their collective agreement to manage artistic issues which may arise when evaluating musicians in a world-renowned orchestra.

[12] Article 4 in the collective agreement is entitled "Dismissal for Cause and Non-renewal of Contract." The NAC may decide not to renew a musician's contract, subject to certain safeguards. For example, a non-renewal (called a termination in article 4.02) first requires a Notice of Warning (article 4.02(c)). The musician has the right to meet with the Music Director and others to review the specific reasons which motivated the Notice of Warning.

[13] The next step is a Notice of Termination under article 4.02(b). The musician has the right to review the termination before a mainly peer-based Committee for Termination (Termination Committee) which ensures "fair play" (article 4.03(a)). Article 4 also deals with changes in

musicians' seating positions within the NACO.

[14] These are the relevant extracts of Article 4:

4.01 Dismissal for Cause

Except as put forth in article 4.02 ("Non-Renewal of Contract"), no regular member shall be dismissed, except for just cause.

4.02 Non-Renewal of Contract

a) Regular members wishing to terminate their contracts at the end of the current season must give notice before the 15th of February. Thereafter they may give notice with the permission of the Centre and the Music Director. In either case this notice must be given in writing and a copy sent to the office of the Local.

b) **If the Centre is desirous of termination of a member with tenure, this termination can only be effected by giving notice to the Musician in writing in the last fifteen (15) days of the season, termination to be effective at the end of the following season. A copy of the notice must be sent to the Local.**

c) **The termination notice (Clause 4.02b)) must be preceded by a written notice of warning issued by the Music Director to any player giving the reason why the termination of his or her services is being considered. A copy of the notice or warning must be sent to the office of the Local. This notice must occur and be received by the Musician by December 31 of the current season.**

Written notice will be accompanied by a meeting with the Music Director, the Musician, a representative of the Musician, a representative of the Musician, and a representative of the Centre. At the meeting, specific reasons why termination is being considered, as well as required remedies, will be discussed.

4.03 Committee for Termination

a) **Following receipt of a notice of termination, the Musician may request, by September 15 of the same year, that a Committee be formed whose function it would be to try to ensure fair play (if such were not believed to be the case). This Committee would consist of the following: the Concertmaster, a member appointed by the Musician and three (3) members elected by the Orchestra. The Committee shall be present at interviews between the Music Director and the Musician upon request of the Musician.**

b) The Committee shall make the final decision by secret ballot on whether or not the termination is upheld or the member is reinstated by November 15 of the same year.

...

4.05 Seating Position

a) Annual Seating

The Music Director shall have the right to determine the seating position of every player in the Orchestra. He may consult with the Audition Committee, but the final decision is his. Decisions with respect to seating are not grievable. Orchestra members shall be given written notice of seating positions by June 1st, to be effective at the start of the following season. A copy of the notice will be given to the Local.

b) Promotion and Demotion

A demotion is defined as a fundamental reduction in the duties and responsibilities of a titled player, or a change in the annual seating position such that a titled player is seated behind a non-titled player.

Should a titled player receive written notice that he will be demoted, he may appeal to the Promotion and Demotion Committee. The Committee shall be comprised of the Concertmaster, one String Principal, one Wind Principal, and two other orchestra members, all of whom, except for the Concertmaster, shall be elected periodically by the members of the orchestra.

The Promotion and Demotion Committee shall consider the musician's appeal and the rationale for the change in seating provided by the Music Director. The Committee shall make a final and binding decision by secret ballot on whether the demotion is upheld by the end of the season in which the notice is given.

A change in seating or demotion for a titled player will not result in a reduction in the musician's weekly fee. In addition, the Centre will grant the affected titled player time off without pay should the titled player request a leave of absence to participate in auditions.

(emphasis added)

[15] Ms. Milkson filed her complaint following receipt of a June 4, 2009 letter from the AFM wherein it advised her legal counsel that it would not be filing grievances contesting earlier Notices that Ms. Milkson had received.

[16] Ms. Milkson's legal counsel had previously provided legal arguments why the AFM could contest the Notices the NAC gave her and the ongoing termination process.

[17] While the complaint strictly speaking is limited to the most recent events involving Ms. Milkson and her employment with the NAC, context requires that some earlier, though similar, events be summarized in order to understand the situation in which the various parties found themselves. There is also some inevitable overlap in the chronology of events.

[18] From the fall of 2006 to July 2007, Ms. Milkson was injured and unable to play in the NACO. She was off on medical leave, a medical leave that the NAC never disputed. Certain events took place during her medical leave that had a potential impact on Ms. Milkson's employment.

[19] On December 21, 2006, the NAC issued a Notice of Warning which advised Ms. Milkson that they were considering not renewing her contract. The NAC had issued an earlier Notice of Warning

in November 2005, but it lapsed. The NAC in the 2006 Notice reiterated the Music Director's earlier opinion that Ms. Milkson's playing did not meet the artistic standards the NACO required.

[20] In a letter also dated December 21, 2006, the NAC took the position that it had satisfied its collective agreement obligation to provide Ms. Milkson with an opportunity to meet with the Music Director to discuss the alleged shortcomings.

[21] Ms. Milkson continued to be off work from January to July 25, 2007. In the AFM's estimation, this prevented her from obtaining the benefit of the lengthy remedial playing opportunities that article 4.02 of the collective agreement contemplated. On March 23, 2007, the AFM grieved the NAC's Notice of Warning, on the basis that a failure to have a period of remedial play was fatal to any Notice under the collective agreement.

[22] On May 31, 2007, the NAC advised Ms. Milkson in writing that her seating position in the orchestra would change. The AFM took the position that the change constituted a demotion under article 4.05 of the collective agreement. When a titled player is moved to a seat behind a non-titled player, a demotion occurs. In the AFM's view, a demotion fell outside the Music Director's usual discretion to determine orchestra seating and could be appealed.

[23] On June 21, 2007, Ms. Milkson appealed her seating change (demotion) to the Promotion and Demotion Committee established under article 4.05 of the collective agreement.

[24] On June 26, 2007, the AFM grieved the notice of seating change Ms. Milkson had received on the basis of discrimination, given the fact she had been off work on disability-related leaves.

[25] On July 27, 2007, the NAC issued Ms. Milkson a Notice of Termination of her contract. Under article 4.02(b) of the collective agreement, this notice would take effect at the end of the 2007-2008 playing season, *i.e.* July 2008. The NAC again took the position that Ms. Milkson had declined opportunities to meet with the Music Director to discuss her alleged artistic deficiencies.

[26] On September 6, 2007, the AFM grieved the Notice of Termination, also on the basis of discrimination related to Ms. Milkson's disability.

[27] The AFM took all of Ms. Milkson's grievances to arbitration before arbitrator Anne Barrett. The AFM convinced arbitrator Barrett to grant interim relief under the *Code* while the arbitration was ongoing. This interim relief prevented the NAC from implementing the proposed change to Ms. Milkson's seating position.

[28] The AFM argued before arbitrator Barrett that Ms. Milkson had been discriminated against on the basis of disability. It further argued that the Notices resulted from the Music Director's personal animosity towards her.

[29] The AFM alleged that the NAC had provided few particulars to Ms. Milkson with regard to her artistic issues. On October 17, 2007, while the arbitration was continuing, the NAC sent Ms. Milkson a letter providing written particulars of the deficiencies it claimed she had. The letter mentioned that the NAC had tried to set up a meeting between Ms. Milkson and the Music Director and indicated what specific deficiencies needed to be overcome.

[30] Following the receipt of the October 17, 2007 letter, the AFM met with Ms. Milkson and advised her that the NAC would in all likelihood provide her with a new Notice of Warning in December, 2007. The AFM interpreted the October 17, 2007 letter as the NAC's first step in restarting its termination process now that Ms. Milkson had returned to playing in the NACO on a full-time basis, without medical restrictions.

[31] The AFM advised Ms. Milkson that the disability arguments available to it for the existing grievances before arbitrator Barrett would no longer be available if a new termination process started. The AFM counselled Ms. Milkson to meet with the Music Director in order to get any further particulars she required and to use the collective agreement's remedial period to address the alleged deficiencies.

[32] The AFM was of the view that Ms. Milkson did not believe she had any deficiencies. She blamed the various Notices she had received on the Music Director's personal animosity.

[33] In an October 24, 2007 letter to the AFM, the NAC suggested that Ms. Milkson meet with the Music Director.

[34] The AFM again recommended to Ms. Milkson that she meet with the Music Director as contemplated by article 4.02(c) of the collective agreement.

[35] On December 19, 2007, as the AFM had surmised, the NAC issued a new Notice of Warning to Ms. Milkson. That notice referenced the NAC's earlier October 17, 2007 letter regarding her alleged playing deficiencies.

[36] The NAC sent a second letter dated December 19, 2007 to Ms. Milkson inquiring if she wanted to meet with the Music Director.

[37] On December 24, 2007, the AFM grieved the NAC's December 19, 2007 Notice of Warning. That grievance was added to the earlier grievances which were already being heard by arbitrator Barrett.

[38] The AFM advised Ms. Milkson that the new grievance was unlikely to succeed unless they could prove the Music Director exhibited personal animosity against her.

[39] It was the AFM's view that the evidence being presented at the Barrett arbitration did not disclose any personal animosity on the Music Director's part.

[40] During the 2007-2008 NACO season, Ms. Milkson played regularly. During this time period, Ms. Milkson never asked for further particulars about the deficiencies that the NAC had particularized in its October 17, 2007 letter. Ms. Milkson did not take up the offer to meet with the Music Director.

[41] On May 26, 2008, the NAC advised Ms. Milkson by letter that her seating position would change pursuant to article 4.05(a) of the collective agreement.

[42] Ms. Milkson appealed the change as provided for by article 4.05(b) of the collective agreement. The AFM also grieved the composition of the Promotion and Demotion Committee, but arbitrator Barrett rejected that grievance in her award dated September 22, 2008.

[43] The Promotion and Demotion Committee later rejected Ms. Milkson's appeal of her seating position change.

[44] The arbitration before arbitrator Barrett ended on June 19, 2008. On that date, the AFM had to take a position with regard to remedy. The AFM concluded that the December 19, 2007 Notice of Warning respected the collective agreement. The AFM therefore dropped its December 24, 2007 grievance which had contested the NAC's December, 2007 Notice of Warning.

[45] Arbitrator Barrett issued her decision on the remaining grievances on July 28, 2008. The AFM succeeded in convincing the arbitrator that the July 27, 2007 Notice of Termination was defective because Ms. Milkson had been away from work due to illness. The arbitrator did not find that the Music Director had exhibited any personal animosity toward Ms. Milkson.

[46] On July 30, 2008, the NAC issued Ms. Milkson a Notice of Termination under article 4.02(b) of the collective agreement. The NAC took the position that Ms. Milkson had not worked on her deficiencies and there had been no improvement in her playing during the collective agreement's remedial period.

[47] The AFM consulted with its labour law firm regarding its chances if it grieved the Notice of Termination. Based on advice, the AFM declined to file a grievance. Ms. Milkson, as was her right under the collective agreement, appealed the Notice of Termination to the Termination Committee (article 4.03).

[48] The parties' extensive documentation showed the exchange of viewpoints between the AFM and Ms. Milkson, as well as with the outside legal counsel that she had retained.

[49] Ms. Milkson's legal counsel suggested legal arguments existed to contest the Notices. For example, they alleged that a Notice for her original seating position could not be valid for her new position. The AFM considered the arguments, sought independent legal advice, and set out its position in writing on June 4, 2009 to Ms. Milkson's legal counsel.

[50] The AFM did act on comments from Ms. Milkson about the fairness of the process before the Termination Committee.

[51] The AFM succeeded in convincing the NAC that Ms. Milkson should be entitled to have a representative of her choice at the hearing.

[52] The NAC, at the AFM's urging, also adopted several suggestions Ms. Milkson made with regard to the process.

[53] The peer-review based Termination Committee was made up, in large part, of fellow members of the AFM's bargaining unit (article 4.03(a)).

[54] Ms. Milkson's legal counsel, in representing Ms. Milkson to the best of their ability, raised several issues directly with the Termination Committee, including sending them a copy of the current DFR complaint.

[55] One of Ms. Milkson's personal lawyers attended the Termination Committee meetings with her.

[56] It became clear that some members of the Termination Committee were uncomfortable with some of the legal implications arising from their hearing. At times, they turned either to the NAC and/or the AFM for advice. The AFM assisted its bargaining unit members on the Termination Committee as well as Ms. Milkson, who also had her own personal legal representative.

[57] Ultimately, the Termination Committee declined to intervene in Ms. Milkson's termination.

III - Analysis and Decision

A - When is the Board required to hold an oral hearing?

[58] As mentioned at the beginning of these reasons, the Board decided it did not need to hold an oral hearing in this complaint, despite an explicit request from Ms. Milkson's legal counsel to do so.

[59] Section 16.1 sets out the Board's discretion whether to hold an oral hearing:

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

[60] The Federal Court of Appeal has recently confirmed that the Board is not required to hold an oral hearing in a DFR complaint, even if there may be some credibility issues:

[6] With respect, I do not agree that, in the context of a section 37 complaint, credibility issues generally constitute exceptional circumstances requiring the Board to hold an oral hearing and that the failure to do so may be used as a basis for a valid application of judicial review. Credibility issues almost inevitably arise in antagonistic employer-employee relations, such that section 16.1 would then be rendered completely meaningless and deprived of Parliament's intended effect.

Nadeau v. Métallurgistes Unis D'Amérique (F.T.Q.), A-502-07 (March 31, 2009)
(unofficial translation)

[61] In this particular case, the Board does not need to hold an oral hearing given its role in DFR matters.

[62] In DFR cases, the Board examines a bargaining agent's process with regard to the representation it provided to a bargaining unit member. The Board does not decide the merits of a particular grievance or whether a bargaining agent interpreted the collective agreement correctly: see generally, *Ronald Schiller*, 2009 CIRB 435, at paragraphs 33-35. An arbitrator performs that role in the *Code's* labour relations regime.

[63] The Board is satisfied that the parties' extensive materials and submissions allow it to comprehend fully the process the AFM followed in representing Ms. Milkson, without the necessity of holding an oral hearing.

B - Did Ms. Milkson demonstrate that the AFM violated its duty of fair representation?

[64] Section 37 of the Code states 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.

[65] Following certification, a bargaining agent becomes the exclusive representative for members of the bargaining unit. The bargaining agent enjoys a wide discretion when deciding how best to represent the diverse interests of those employees in the unit.

[66] However, the *Code* gives the Board the role of ensuring that a bargaining agent does not exercise its exclusive right of representation in a way that is arbitrary, discriminatory or in bad faith with regard to an employee's rights under the collective agreement.

[67] The Legislator did not want the Board to micro-manage a trade union's discretionary decisions such as when it decides whether to file a grievance or to take that grievance to arbitration.

[68] The Board will closely analyze a DFR complaint that involves the termination of a long-service employee. Ms. Milkson had been with the NAC since 1969. Her situation is entitled to high scrutiny.

[69] For several reasons, Ms. Milkson, who had the burden of proof, did not convince the Board that the AFM violated its duty of fair representation.

[70] Firstly, the Board is satisfied that the AFM carefully analyzed Ms. Milkson's situation. The AFM's successful representation of Ms. Milkson's interests before arbitrator Barrett are not directly

relevant to the instant complaint. That representation referred to a previous termination process the NAC had followed for Ms. Milkson.

[71] However, given the similarity of the distinct episodes involving Notices under article 4 of the collective agreement, the previous process does provide helpful context with regard to Ms. Milkson's understanding of the procedure, as well as her options after receiving Notices from the NAC.

[72] The Board is satisfied that the AFM advised Ms. Milkson that its ability to defend her successfully a second time for the 2007 and 2008 Notices would be more difficult given that Ms. Milkson was playing in the NACO. The AFM could no longer argue that she was being denied a proper remedial period due to disability.

[73] The Board is also satisfied that the AFM took into account suggestions from Ms. Milkson and her legal counsel and obtained certain changes to the Termination Committee's process. For example, Ms. Milkson obtained the right to have her personal legal representative attend with her before the Termination Committee.

[74] The AFM demonstrated to the Board's satisfaction that it did its best to balance the duties it owed to Ms. Milkson and to bargaining unit members sitting on the Termination Committee. Trade unions are often faced with competing demands from bargaining unit members. The Board does not agree that the AFM's attempts to assist the Termination Committee's process, while also helping Ms. Milkson and her counsel, amounted to anything resembling a failure of the duty of fair representation. The AFM balanced the needs of its members.

[75] The second reason the Board has decided to dismiss the complaint comes from the principle that a grievor needs to assist the trade union in his or her own defence.

[76] In this case, the AFM suggested to Ms. Milkson that she take steps to address the October 17, 2007 letter giving particulars of alleged deficiencies. The AFM suggested that she meet with the Music Director to get more information if she required it. The AFM also suggested that she seek the assistance of her peers with regard to her playing.

[77] Ms. Milkson never took these suggested steps, but instead argued in her complaint that the October 17, 2007 Notice from the NAC lacked sufficient particularity.

[78] The collective agreement provides an opportunity for an individual to discuss any alleged deficiencies with the Music Director. It also gives an individual time to attempt to deal with those alleged deficiencies during a remedial period.

[79] There was no obligation for Ms. Milkson to take any steps, despite her bargaining agent's urging. She did not have to accept the Music Director's views. She was fully entitled to her belief that there were no deficiencies in her playing. The Board is not criticizing Ms. Milkson for her decision not to pursue a meeting with the Music Director.

[80] However, that stance can make it more difficult for a bargaining agent to craft a successful defence. For example, if Ms. Milkson's remedial efforts had led to others being prepared to testify about her successful improvement in her playing, or a confirmation that her playing was never in need of improvement, then the AFM might have had other reasons to contest the termination process.

[81] Ms. Milkson was not obliged to take the AFM's suggestion regarding steps she could take. But given the absence of any disability argument, which had prevailed the first time, the AFM needed evidence to defend Ms. Milkson in the peer-reviewed process negotiated by the parties. Ms. Milkson could not provide this evidence.

[82] A third reason for dismissing the complaint is that much of the dispute between the AFM and Ms. Milkson's legal counsel concerned the proper interpretation of the collective agreement. Ms. Milkson's legal counsel, in representing their client, raised interpretation issues such as the fact that the Notices had not been given for Ms. Milkson's new seating position in the orchestra. Similarly, legal counsel suggested that the Notice of Termination had not been signed by the appropriate individual.

[83] The AFM's letter of June 4, 2009 demonstrated that it turned its mind to these arguments. Indeed, they raised those arguments with their own legal counsel and obtained a legal opinion.

[84] The Board does not determine whether the AFM or Ms. Milkson's legal counsel were correct in terms of these legal arguments. The Board is satisfied that the AFM looked into the arguments and that the process which led to its conclusion was far from being arbitrary, discriminatory or carried out in bad faith.

[85] The fourth and final reason for dismissing Ms. Milkson's complaint is that a trade union representing a grievor fulfills a role different from that of a private lawyer representing a client.

[86] Unless the collective agreement states otherwise, the trade union has carriage of a grievance, rather than the individual grievor.

[87] While a lawyer is obliged, as long as there is no ethical issue, to follow a client's instructions, even to the point of putting forward weak positions, a trade union does not have a similar obligation.

[88] Rather, the trade union must examine the collective agreement it negotiated and determine whether it agrees with the grievor's suggested interpretation. In this case, the AFM had an interpretation different from that of Ms. Milkson and her legal counsel.

[89] As long as the AFM turned its mind to these interpretation arguments, which it did, Ms. Milkson did not have an absolute entitlement to have her legal arguments taken to arbitration.

IV - Conclusion

[90] The Board has decided to dismiss Ms. Milkson's duty of fair representation complaint.

[91] The AFM requested that the Board award costs given the expenses it had incurred in defending this complaint.

[92] The Board's practice is to award costs only in rare situations. Generally, in the labour law field, unlike in civil actions, parties bear the costs of their own case.

[93] The Board sees no reason to deviate from this well-known labour law principle in this particular matter.

[94] For all of the above reasons, the complaint is dismissed.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

André Lecavalier
Member