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

Ida Monica Browne,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 29364-C
Neutral Citation: 2012 CIRB **648**
July 6, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code* (*Part I– Industrial Relations*) (*Code*).

Parties' Representatives

Ms. Ida Monica Brown, self-represented complainant;

Ms. Cathy Kavadas and Mr. Doug Hacking, for the Canadian Union of Postal Workers;

Mr. Chris Meaney, for Canada Post Corporation.

I. Introduction

[1] Section 16.1 of 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 issue a decision without an oral hearing.

[2] On April 11, 2012, Ms. Ida Monica Browne filed a duty of fair representation (DFR) complaint against her bargaining agent, the Canadian Union of Postal Workers (CUPW), 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 of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[3] Ms. Browne had been an employee of Canada Post Corporation (CPC) from 1989 to 2006. Her complaint covered a long period of time starting roughly in 2000/2001 and concluding in January 2012 when, over her objections, CUPW settled her termination grievance with CPC.

[4] The Board has decided to dismiss Ms. Browne's complaint for several reasons, including, in part, timeliness, and the failure to establish a *prima facie* case.

II. The Duty of Fair Representation

[5] Before examining the facts, it is useful to review certain principles applicable to DFR complaints.

A. Delay

[6] Section 97(2) of the *Code* establishes a 90-day time limit for filing various complaints, including one regarding a trade union's duty under section 37:

> 97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that
>
> (a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section **37**, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or

(b) any person has failed to comply with section 96.

...

97(2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board **not later than ninety 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**.

(emphasis added)

[7] Section 16(*m*.1) allows the Board to extend the 90-day time limit for filing a complaint:

16. The Board has, in relation to any proceeding before it, power

...

(*m*.1) to extend the time limits set out in this Part for instituting a proceeding;

[8] However, the Board does not extend timelines routinely, as was recently explained in *Kerr*, 2012 CIRB 631 at paragraphs 21–26:

[21] The Legislator has clearly instructed the Board that labour relations complaints, including those from laypersons, but also from trade unions and employers, must be filed within relatively strict time limits. Indeed, prior to the 1999 amendments made to the *Code*, which included the addition of section 16(*m*.1), the Board had no discretion whatsoever to extend the time limits for instituting proceedings: *Upper Lakes Shipping Ltd.* v. *Sheehan et al.*, [1979] 1 S.C.R. 902.

[22] The need for a time limit in labour relations matters is not surprising. The Legislator frequently imposes time limits for various legal procedures. Given the adage that "labour relations delayed is labour relations denied", the Legislator, while granting the Board a new discretion in 1999, still maintained the *Code*'s 90-day time limit for filing various labour relations complaints.

[23] The Board takes seriously the need to deal with labour relations complaints in a timely manner. The Board recently commented, in *Torres*, 2010 CIRB 526 (*Torres* 526), how it will examine cases which request an extension of time limits. In *Torres* 526, the complainants filed their complaint six months after the deadline:

> [19] The Board will not automatically relieve a party from compliance with the 90-day time limit for the filing of an unfair labour practice complaint. The Legislator has always emphasized that labour relations matters must be brought to the Board forthwith. Potential respondents are entitled to know whether they need to preserve evidence and otherwise prepare for a complaint under the *Code*.
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> [20] While it may appear unfair that laypeople need to act quickly in bringing labour relations complaints forward, section 97(2) applies equally to trade unions and employers.
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> [21] The Board will not exercise its discretion under section 16(*m*.1) so as to render illusory the Legislator's intent to oblige parties to file their labour relations complaints expeditiously.

> [22] Nonetheless, the Board will consider extending the time limits in compelling situations, such as if a complainant's health prevented the filing of a timely complaint: *Galarneau*, 2003 CIRB 239. Generally, the Board will consider the length of the delay and the justification for it.

[24] The Federal Court of Appeal, in *Eduardo Buenaventura Jr. et al.* v. *Telecommunications Workers Union (TWU)*, 2012 FCA 69, affirmed the Board's decision not to extend the time limit in *Torres* 526:

> [44] The Board also considered specifically the length of the delay (9 months), and its cause. The Board concluded that the main cause was the honest but mistaken belief of the complainants that the Board would prefer a single, multi-party complaint filed late to a multitude of individual complainants [*sic*] filed earlier. However, the Board noted that it has ample procedural means for dealing with large numbers of complaints.
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> [45] The complainants do not suggest that the Board misunderstood the reason for the delay. However, they argue that it was unreasonable for the Board not to give special consideration to the fact that the complainants were not represented for most of those 9 months. They point out that their relative inexperience represented difficult hurdles, both in assembling the information they believed would be necessary to support their complaint, and in appreciating the Board's procedures and the ways in which a multiplicity of complaints could best be managed.
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> [46] A decision is reasonable if it is sufficiently explained and it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47. In my view, the record discloses nothing unreasonable about the Board's decision not to extend the time limit in this case.
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> [47] It is true that the Board took an unsympathetic stance toward the difficulties faced by the complainants as they attempted to navigate unfamiliar territory and to ensure that their complaint, once made, could be handled efficiently. However, these difficult circumstances gave the complainants no legal right to have the Board exercise its discretion in their favour. In my view, the Board's decision to refuse the extension was a decision that fell within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law, and thus was reasonable. In my view, the application for judicial review should be dismissed.

[25] As mentioned in *Torres* 526, besides the fact the *Code* contains a time limit for filing a complaint, opposing parties should be able to know whether they have to preserve their evidence and prepare for a possible labour relations proceeding. Once the 90-day time limit has passed, they should be able to assume that the matter has ended.

[26] It would be prejudicial to healthy labour relations, where resources are limited, if trade unions and employers had to keep preparing for cases, such as Mr. Kerr's DFR complaint, if they could routinely be filed 19 months after the expiration of the *Code*'s time limit.

[9] Evidently, Ms. Browne's complaint, which referred to events which had occurred over a 10-year period, required the Board to consider timeliness issues.

B. Evaluation of how a trade union and/or its legal counsel represented a grievor at arbitration

[10] CUPW retained an experienced labour law firm to plead Ms. Browne's termination grievance. Ms. Browne raised concerns about delays in the holding of her hearing. She also suggested numerous ways in which she felt legal counsel ought to have acted differently when pleading her case.

[11] The Board in a DFR case does not micromanage the conduct of a trade union's legal counsel.

[12] In *Bomongo* v. *Communications, Energy and Paperworkers Union of Canada*, 2010 FCA 126 (*Bomongo*), the Federal Court of Appeal (FCA) described this type of situation:

> [15] **In this Court, the applicants are alleging that the Board did not take into account conduct which is, in fact, beyond the scope of its mandate when analyzing a section 37 complaint. For example, as previously mentioned, the applicants are once again challenging the conduct of counsel for the Union by criticizing her for having failed to object to the admissibility of a piece of evidence before the arbitrator, whereas section 60 of the *Code* gives the arbitrator the power to receive and accept such evidence as the arbitrator in his or her discretion sees fit, whether admissible in a court of law or not.** In any case, the hearing had only just begun, and the evidence was filed subject to its admissibility and to any other objection. The applicants misunderstood and misinterpreted the initial stages of the conduct of proceedings before the arbitrator. **It may easily be understood that the Board must not rashly involve itself with the quality of representation before the arbitrator or the matter of the competency or strategy of counsel for the Union.**
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> (emphasis added)

[13] In a plenary decision of the Canada Labour Relations Board in *Rousseau* (1996), 102 di 17; and 97 CLLC 220-007 (CLRB no. 1173), this Board's predecessor described its role in this area as being one of "circumspection":

> The Board's policy with respect to the nature and extent of its intervention, based on its assessment of the quality of a union's representation of an employee during arbitration proceedings, is one of circumspection. The Board has a very limited role to play with respect to the quality of representation at arbitration (and that is the question now before us), and will only examine the conduct of the union or of counsel in very unusual circumstances. ...
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> (pages 20; and 143,107)

[14] This circumspection is not surprising since the *Code* does not mandate the Board to review every aspect of a trade union's representation of a bargaining unit member. Rather, the Board

only considers if conduct exists which rises to the level of being arbitrary, discriminatory or carried out in bad faith.

[15] In *Bayers*, 2008 CIRB 416, this Board again described its approach for complaints about the quality of representation at an arbitration:

> [30] Undeniably, there are various ways in which a union may decide to put forth its case at arbitration. It is not, however, for the Board to determine how the union is to conduct its case or what remedies it should or should not request, nor decide whether the union has violated the *Code* based upon the outcome of the arbitration proceedings. To do so would take the Board well beyond the stated aims and objectives of section 37 of the *Code*. The Board's predecessor, the Canada Labour Relations Board (CLRB), made the following comment in Lucio Samperi (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376):
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> > Human behaviour is too diverse for the establishment of unequivocal rules. We cannot say the duty of fair representation has absolutely no role during the arbitration process. There may be the extreme case where a union in bad faith merely puts on a charade with employer collusion or the union representative or counsel appears inebriated. Those like all cases in this area will turn on their facts. The message is, however, that this Board will not, through the duty of fair representation, microscopically review union conduct during arbitration proceedings.
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> > (page 51; 214–215; and 710)

[16] Strategic decisions on how a trade union pleads a case would rarely, if ever, become the type of issue the Board examines in the context of a DFR complaint.

C. Who has carriage of a grievance?

[17] Another important factor in a DFR case concerns who has carriage of a grievance. In almost all cases, it is the trade union which has carriage and decides whether to take the matter to arbitration and/or to settle the case at some point.

[18] The trade union remains subject to section 37 of the *Code* in carrying out this gatekeeper role. However, a grievor's disagreement with a trade union's exercise of its discretion does not, by itself, constitute a *Code* violation as the Board described in *Kasim*, 2008 CIRB 432:

> [19] The duty of fair representation in the *Code* ensures that a bargaining agent respects the significant rights that come with certification. A bargaining agent cannot act in a manner that is arbitrary, discriminatory or in bad faith with regard to an employee's rights under the applicable collective agreement.

> [20] However, this duty does not mean that every employee has a right to have his or her grievance taken to arbitration. Rather, the bargaining agent can determine which grievances will go to arbitration and which grievances will be settled.
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> [21] In order to analyze whether a bargaining agent respected the duty imposed by the *Code*, the Board examines the process it followed in its representation of an employee. A bargaining agent is not comparable to a private sector lawyer who is obliged to follow the specific instructions of the client. Rather, in almost all cases, the bargaining agent has carriage of the grievance and, while it needs to communicate with the employee in question, retains the discretion to decide what to do with the grievance.
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> [22] The Board does not sit in appeal of how a trade union exercises this discretion. The Board will only intervene if a complainant is able to demonstrate that a bargaining agent acted in an arbitrary, discriminatory or bad faith manner.

[19] CUPW advised Ms. Browne on several occasions that it retained carriage of the grievance. This occurred, for example, when Ms. Browne asked CUPW to change its choice of legal counsel.

D. *Prima facie* case analysis

[20] In section 37 cases, the Board conducts a *prima facie* case analysis when it considers a new complaint. Unless the complainant makes out a *prima facie* case of a *Code* violation, the Board will not call on the trade union and, to a lesser extent, the employer, to file a response. This process was recently explained in *Crispo*, 2010 CIRB 527:

> [12] The Board conducts a *prima facie* case analysis for the numerous duty of fair representation cases it receives. This *prima facie* case analysis accepts a complainant's pleaded material facts as true and then analyzes whether those material facts could amount to a *Code* violation.
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> [13] The *prima facie* case analysis weighs the material facts as opposed to legal conclusions. A complainant who pleads a legal conclusion by alleging, for example, that certain conduct was arbitrary, discriminatory or in bad faith does not, by so doing, avoid the application of the *prima facie* case test.
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> [14] In *Blanchet* v. *the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103, the Federal Court of Appeal endorsed the Board's use of a *prima facie* case analysis and its focus on the material facts:
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> > [17] As a general rule, when a court presumes the allegations to be true, they are allegations of fact. That rule does not apply in findings of law: see *Lawrence* v. *The Queen*, [1978] 2 F.C. 782 (T.D.). It is for the court, not the parties, to determine questions of law: *ibidem.*
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> > [18] It is true that, in the passage quoted, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations cannot be anything other than a reference to allegations of fact. **Otherwise, a complainant would need only to state as a conclusion that his or her union's**

> **decision was arbitrary or discriminatory for the Board to be forced to find that there had been a violation, or at least a *prima facie* violation, of section 37 of the *Code* and rule on the merits of the complaint. Thus, the complaint screening process would become a thing of the past.**

(emphasis added)

[21] The quote from the FCA in *Blanchet* v. *the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103, in the extract above, emphasizes that it is not enough to claim arbitrariness or discrimination in order to bypass the *prima facie* analysis. The Board does not assume as true a complainant's legal conclusions, but instead analyzes the material facts in order to determine whether a *prima facie* case exists.

[22] The Board will accordingly ask itself in this case whether the material facts Ms. Browne pleaded demonstrate a *prima facie* violation of section 37 of the *Code*.

III. Facts

[23] The Board has considered all the facts Ms. Browne submitted in her lengthy complaint form. It is evident that an extensive delay in the arbitration process frustrated her.

[24] The Board emphasizes it does not have any submissions from CUPW or CPC and is accordingly assuming Ms. Browne's factual allegations to be true, solely for the purpose of conducting its *prima facie* case analysis. No findings of fact are being made.

[25] For analysis purposes only, the Board has broken down Ms. Browne's complaint into two separate parts. Part I deals with various issues Ms. Browne had with CUPW and CPC in the 2001–2006 time frame. Part II deals with CPC's termination of her employment in 2006 and her subsequent arbitration hearing.

A. Part I (2001–2006)

[26] For the Part I matters, Ms. Browne's complaint related difficulties she experienced in the 2001–2006 time period. Ms. Browne pleaded she filed 15 grievances and alleged CUPW ignored or otherwise failed to deal with them.

[27] These are the main matters raised in Part I of her complaint:

i) CPC allegedly fired her in 2000/2001 when notified Ms. Browne was returning to work after being on disability leave;
ii) CPC failed to accommodate her following a return to work after April, 2001, and discriminated against her;
iii) a CUPW grievance officer was hostile when she attempted to pursue her grievances;
iv) despite an August 2002 settlement, Ms. Browne alleged the harassment/discrimination never stopped and CPC never fully respected the terms of the settlement agreement;
v) in 2003, Ms. Browne learned of a letter in her personnel file recommending her dismissal;
vi) in June–October, 2005, Ms. Browne was off work due to illness and filed a grievance when CPC allegedly cancelled her benefits; and
vii) Ms. Browne had filed other grievances regarding harassment and discrimination which she alleged CUPW had failed to deal with properly during this time period.

B. Part II (2006–2012)

[28] In Part II of her complaint, Ms. Browne detailed CPC's decision to terminate her employment on October 17, 2006. Her later arbitration took place over several years and concluded in early 2012 when CUPW entered into a settlement with CPC. Ms. Browne advised CUPW explicitly that she refused to accept the settlement.

[29] In her complaint, Ms. Browne noted that she had filed a human rights complaint against CPC and two of its managers related to some of the matters. The Board understands that human rights complaint was put on hold during the arbitration process, but may now be reactivated.

[30] Ms. Browne filed extensive correspondence in support of her position that her arbitration took too long. She noted that continuation dates were often set down for 10 months after the most recent arbitration hearing dates. Ms. Browne also took issue with the handling of the arbitration by both CUPW representatives and the independent legal counsel they retained.

[31] For example, Ms. Browne indicated that in between arbitration dates, she did not hear from CUPW for periods sometimes as long as five months.

[32] Ms. Browne, who self-identified in the complaint as a visible minority who also suffered from a disability, alleged there had been incidents of discrimination during the arbitration hearing related, *inter alia*, to her disability and race.

[33] For example, Ms. Browne wrote in her complaint that during the course of the arbitration she had been "attacked personally, humiliated, threatened, subjected to unfair, unwelcomed, derogatory remarks, gestures and tactics about my disability". This perception resulted, in part, from CPC's legal counsel suggesting to the arbitrator the case had a "psychiatric flavor [*sic*]".

[34] Ms. Browne further alleged CPC brought up irrelevant, sensitive, private and personal information during the arbitration.

[35] Ms. Browne alleged that CUPW did nothing about these insults and discriminatory behaviour which occurred during the arbitration, despite her requests.

[36] The complaint also sets out various situations where Ms. Browne did not agree with how legal counsel pleaded her case. These are a few of Ms. Browne's main concerns:

i) Length of the Arbitration

Prior to the 2012 settlement, the arbitration concerning her termination had taken approximately five years;

ii) The Non-Termination Grievances

CUPW's legal counsel refused Ms. Browne's request to deal with other grievances at the arbitration, but instead focussed solely on the termination grievance;

iii) Ability to Negotiate Settlements

Ms. Browne was not interested in settling the case and repeatedly advised CUPW legal counsel of this fact as different settlement offers arrived in amounts varying from $8,000 to $65,000. The settlement amount CUPW later accepted, and which led to this complaint, was significantly higher.

iv) Presenting Evidence First

Ms. Browne objected to CPC presenting its evidence first in her termination grievance;

v) Examination of Witnesses

Ms. Browne objected to the questions put to her psychiatrist during the arbitration on the basis the questions were not relevant to her work;

vi) Opinion of Cross-Examination

Ms. Browne suggested that the cross-examination of CPC's witnesses was "half-hearted";

vii) Relevance of Documentary Evidence

CUPW's lawyers allegedly resisted her efforts to provide them with "pertinent and relevant information";

viii) Relevance of Medical Evidence

Ms. Browne contested legal counsel's decision to ask her psychiatrist for full medical records from 1995 and to subpoena medical records from her family physician from 1990 onwards;

ix) Retention of Legal Counsel

Ms. Browne contested CUPW's refusal to remove the legal counsel it had retained for the arbitration and to pay for her own lawyer;

x) Communication with Decision Maker

Ms. Browne felt obliged to write directly to the arbitrator asking him to recuse himself, in part on the basis she considered him prejudiced, a move which legal counsel later advised was unhelpful;

xi) Law Society Complaint

When CUPW refused to remove its legal counsel from the arbitration, Ms. Browne felt she had no option but to file a complaint with the Law Society of Upper Canada;

xii) Settlement

CUPW settled Ms. Browne's grievance, despite her express refusal to agree to it.

IV. Analysis and Decision

A. Is the complaint covering the Part I matters timely?

[37] The Board commented earlier on section 97(2) which imposes a 90-day time delay to file a DFR complaint:

> 97.(2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board **not later than ninety** 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.
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> (emphasis added)

[38] The Board focuses its timeliness analysis on when Ms. Browne knew, or ought to have known, of the actions or circumstances giving rise to the complaint.

[39] Despite Ms. Browne's stated dissatisfaction with CUPW going all the way back to 2000–2001, she filed no DFR complaint with the Board until 2012. That complaint only materialized after CUPW decided, over her objections, to settle her termination grievance with CPC.

[40] In the Board's opinion, for the matters described earlier as falling within Part I of the complaint, and which occurred in the 2001–2006 time frame, the time limits for complaints have long since expired.

[41] Even a generous evaluation of the complaint as drafted would arrive at the conclusion that Ms. Browne knew or ought to have known of the circumstances giving rise to a complaint for these Part I matters in 2006 or 2007. The Board notes in particular she asked unsuccessfully for some of these matters to be added to her termination arbitration.

[42] The delay of four to five years before filing a complaint, besides falling outside the statutory time limits, clearly prejudices CUPW's ability to deal with such dated matters.

[43] The Board emphasizes that its conclusion on timeliness depends on the facts of each case. A bargaining agent which has simply failed to act over a long period of time does not avoid having to answer to a DFR complaint merely because a complainant has been patient. But, in this case, Ms. Browne clearly knew, especially when other matters would not be included in the arbitration for her termination, of the circumstances giving rise to a complaint.

[44] The Board is further not persuaded to extend the time for filing a DFR complaint for these Part I matters. Ms. Browne provided no explanation why she did not pursue these various matters sooner than in 2012. Ms. Browne's complaint demonstrated she actively pursues matters which are important to her. Her failure to file a DFR complaint for many years for the Part I

matters has prejudiced CUPW's ability to defend itself. Those matters are therefore dismissed as being untimely.

B. Did CUPW violate the *Code* for Part II of the complaint related to Ms. Browne's termination grievance?

[45] The Board is satisfied Ms. Browne's complaint about the Part II matters is timely with regard to her concerns about CUPW settling her termination grievance, despite her express objection.

[46] The Board could consider two different limitation periods when analyzing Ms Browne's arbitration. It could find that only the events within 90 days of the settlement were timely. Alternatively, the Board could extend its focus to consider all events since 2006 related to the arbitration.

[47] Regardless of which time frame the Board considers, Ms. Browne has failed to make out a *prima facie* case.

[48] The Board is satisfied that the approach it adopted in *Vilven*, 2011 CIRB 587 is appropriate here:

> [43] ACPA argues that many portions of the complaint are untimely, given the 90-day time limit provided in section 97(2) of the *Code* for the filing of complaints. The complainants suggest that, in order for the Board to understand the context within which the complaint has been made, it was necessary to recount the history of their dealings with the union since the initial grievances regarding mandatory retirement were filed.
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> [44] The Board agrees that portions of the complaint that relate to a number of the specific events identified by the complainants are untimely, as they occurred more than 90 days prior to the filing of the complaint. However, in coming to a conclusion as to whether a union has violated its duty of fair representation, the Board is entitled to look at a course of conduct towards a particular member or group of members over a period of time. While a complainant is not entitled to sit on his rights indefinitely, the Board will not necessarily rule a complaint to be untimely simply because some of the alleged events occurred prior to the specific event that prompted the complaint.

[49] On the narrow issue of whether CUPW was entitled to settle Ms. Browne's termination grievance, the Board's jurisprudence is clear that CUPW, as it advised Ms. Browne, had carriage of the grievance and could decide to settle it. Ms. Browne clearly expressed her concerns to CUPW and its legal counsel about settlement. This no doubt played a part in CUPW rejecting earlier CPC offers and continuing with the arbitration.

[50] However, CUPW's decision to reject CPC's earlier settlement offers did not limit its fundamental discretion to decide whether to plead Ms. Browne's case to its natural conclusion, or to settle it at some point.

[51] On the broader issue of CUPW's conduct during the five-year arbitration period, the Board can understand Ms. Browne's frustration with the length of the arbitration process. An arbitration taking over five years prior to a settlement occurring would fall at the longer end of the spectrum.

[52] But the mere existence of such cases, including long breaks between arbitration hearing dates, is not evidence of a trade union breaching its duty at section 37 of the *Code*. Indeed, arbitration delays result from many factors beyond a trade union's sole control, despite a general desire in the labour relations community to resolve cases quickly.

[53] The complaint as pleaded demonstrated CUPW made continuous efforts over the years to progress Ms. Browne's termination case. For example, hearing dates took place. Examination in chief and cross-examination of witnesses occurred. Ms. Browne provided information, both orally and in document form, to CUPW's lawyers. Those lawyers made decisions about which witnesses had to be to called to assist Ms. Browne's case. They also decided what medical documentation was needed to protect Ms. Browne's interests.

[54] CUPW and CPC also held settlement discussions at various points in the process.

[55] This is not a case of a bargaining agent simply ignoring a member's grievance or failing to start an arbitration for many years. The complaint itself makes it clear the matter was proceeding, albeit slowly.

[56] The Board will not micromanage how a trade union's legal counsel pleads an arbitration case. Ms. Browne expressed her views to legal counsel about the conduct of the case. While CUPW and/or its legal counsel may not have followed Ms. Browne's requests and suggestions, differences over strategic issues do not amount to arbitrary, discriminatory or bad faith conduct.

[57] The voluminous material Ms. Browne filed as an annexe to her complaint demonstrated the amount of communication taking place between CUPW and her.

[58] The various strategic acts about which Ms. Browne complained suggest, with respect, that she may not have understood fully the implications of CUPW having carriage of her grievance. For example, independent legal counsel answered to CUPW rather than to Ms. Browne. A trade union's legal counsel is not the grievor's personal lawyer who must follow any and all of the grievor's instructions or get off the record: *Kasim, supra*.

[59] While Ms. Browne concluded she experienced discrimination during the arbitration process, the facts as pleaded do not support this conclusion. The evidence an opposing party may lead will be relevant, unless the arbitrator rules otherwise. While Ms. Browne may not have liked some of the evidence being led, or the explanations given for its relevance, that issue was ultimately for the arbitrator to decide.

[60] Some of the actions that Ms. Browne contested in her complaint relating to the arbitration process, while no doubt arising from honestly held beliefs, also do not establish arbitrary, discriminatory or bad faith conduct on the part of CUPW.

[61] The Board will comment on the main allegations Ms. Browne made in this regard using the same numbering employed earlier:

i) Length of the Arbitration

The Board has commented on the length of the arbitration which, while unfortunately at the long end of the spectrum, seemingly involved potentially complex medical issues. There is no evidence CUPW was not continuously pursuing the matter, via legal counsel, on Ms. Browne's behalf.

ii) The Non-Termination Grievances

CUPW could not add the Part I grievances to an arbitration designed to deal solely with Ms. Browne's termination. An arbitrator's jurisdiction is confined to the specific grievance before him or her.

iii) Ability to Negotiate Settlements

While Ms. Browne could refuse to accept a settlement, a bargaining agent is nonetheless entitled to settle an arbitration case despite this refusal.

iv) Presenting Evidence First

The fact CPC presented its evidence first in Ms. Browne's termination case resulted from it having the burden of proof. This reversal of the burden of proof is generally considered an advantage for any terminated employee.

v) Examination of Witnesses

The questions legal counsel puts to a witness, such as Ms. Browne's psychiatrist, are designed to assist Ms. Browne's efforts to return to work. The Board does not micromanage how experienced legal counsel pleads an arbitration case: Bomongo, supra.

vi) Opinion of Cross-Examination

While Ms. Browne is entitled to her opinion about the quality of cross-examination, the Board, as indicated earlier, does not involve itself in a debate about these types of issues.

vii) Relevance of Documentary Evidence

A lawyer is not obliged to put into evidence any and all documents a grievor may provide. It is clear in this case that CUPW retained outside legal counsel to make the strategic decisions about which information was relevant to the issues.

viii) Relevance of Medical Evidence

Similarly, while Ms. Browne may disagree about the extent of her medical evidence required for the case, that is ultimately a strategic decision for legal counsel.

ix) Retention of Legal Counsel

As mentioned, CUPW retained outside legal counsel. CUPW had carriage of the grievance. It was up to CUPW to decide which lawyer would act on Ms. Browne's case.

x) Communication with Decision Maker

Ms. Browne's decision to write to the arbitrator asking him to recuse himself was her decision alone. It does not demonstrate in any way that CUPW did not respect its duty under section 37 of the *Code*.

xi) Law Society Complaint

Ms. Browne's decision to file a complaint to the Law Society of Upper Canada (LSUC) when CUPW refused to remove its legal counsel has no relevance to this DFR complaint. The Board notes that LSUC advised Ms. Browne that the solicitator-client relationship was between CUPW and its chosen lawyer. Ms. Browne's remedy was a DFR complaint.

xii) Settlement

CUPW had the authority to settle the grievance. Some of Ms. Browne's own actions are relevant factors, among many, that CUPW may take into account when making this decision.

[62] In sum, when the Board considers the material facts pleaded in her complaint, it concludes that Ms. Browne has failed to establish a breach of the *Code*. She may not have fully appreciated the implications of CUPW having carriage of the grievance, perhaps because the case was obviously very personal to her.

[63] The facts as pleaded in the complaint show the significant efforts to which CUPW went to contest Ms. Browne's termination. CUPW sent the matter to arbitration despite no absolute obligation to do so. It retained independent legal counsel to plead the case. CUPW also explored settlement at times, but refused various offers during the proceedings. The arbitration continued, despite unfortunate delays.

[64] Regrettably, the relationship between Ms. Browne and CUPW became adversarial during the arbitration, due in part, the Board suspects, to Ms. Browne misunderstanding that CUPW's legal counsel was obliged to plead the case, but had no obligation to follow her every instruction. CUPW gave those instructions, though the facts demonstrate Ms. Browne had input. Some of Ms. Browne's independent actions may not have assisted her case and could have influenced the decision to settle.

[65] The complaint does not demonstrate in any way that CUPW acted in an arbitrary, discriminatory or bad faith manner.

[66] For these reasons, the Board has decided that, for the Part II portion of the complaint which is timely, Ms. Browne has not established a *prima facie* case of a violation of the *Code*.

[67] As a result, the complaint is dismissed.

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Graham J. Clarke
Vice-Chairperson