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

Daniel Ménard,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 30556-C
Neutral Citation: 2015 CIRB **753**
January 8, 2015

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

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

Section 16.1 of the *Canada Labour Code (Part I–Industrial Relations)* (*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.

Parties' Representatives of Record

Mr. Daniel Ménard, for himself;
Mr. Sylvain Lapointe, for the Canadian Union of Postal Workers;
Ms. Stéfanie Germain, for Canada Post Corporation.

I. Nature of the Complaint

[1] On July 25, 2014, the Board received from Mr. Daniel Ménard a duty of fair representation (DFR) complaint alleging that his trade union, the Canadian Union of Postal Workers (CUPW), had violated 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.

[2] Canada Post Corporation (CPC) had terminated Mr. Ménard on March 19, 2014, alleging just cause. CUPW later negotiated with CPC a Memorandum of Agreement (MOA) which allowed Mr. Ménard to resign from his employment.

[3] Mr. Ménard subsequently had second thoughts about the MOA and filed this complaint alleging that CUPW had violated the *Code* when it refused to take his termination grievance to arbitration.

[4] The Board has decided to dismiss Mr. Ménard's complaint for the following reasons.

II. The Duty of Fair Representation

[5] Mr. Ménard's submissions in large part contest whether CPC had just cause to terminate him. It is important to describe the Board's role in a DFR complaint.

[6] When Parliament added the DFR to the *Code*, it did not intend for the Board to sit in appeal and pass judgment on the quality and reasonableness of a trade union's representation. Rather, a *Code* violation only occurs if a trade union's conduct reaches the high threshold in section 37 of being "arbitrary, discriminatory or in bad faith".

[7] As noted in *Singh,* 2012 CIRB 639, the Board examines the steps trade union officials took when representing a bargaining unit member's interests:

> [81] Since the Board focusses on the trade union's process, rather than on the correctness of its decision, a section 37 inquiry is limited to the actual steps the trade union took in reaching its decision not to take a matter to arbitration. The Board commented on the scope of its analysis in *Cheema*, 2008 CIRB 414 (*Cheema 414*):
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> > [12] The Board's role in the context of a duty of fair representation complaint is to examine the union's conduct in handling the employee's grievance (see *Bugay*, 1999 CIRB 45). A section 37 complaint cannot serve to appeal a union's decision not to refer a grievance to arbitration, or to assess the merits of

> the grievance, but it is used to assess how the union handled the grievance (see *Presseault*, 2001 CIRB 138).

[8] In *McRaeJackson,* 2004 CIRB 290, the Board commented on the types of procedural steps it might examine in a DFR case:

> [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.

[9] Recently, in *Heitzmann*, 2014 CIRB 737 (*Heitzmann 737*), the Board examined a trade union's process which had led to its decision to discontinue an arbitration hearing:

> [145] CUPW repeatedly advised Ms. Heitzmann of the legal challenges with her case and the steps she could take to improve her situation. Ms. Heitzmann refused to follow this advice. This refusal, *inter alia,* also prevented CUPW from pursuing the settlement discussions about which CPC had expressed a possible openness.
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> [146] Ms. Heitzmann's failure to cooperate with CUPW's efforts included knowingly failing to show up at the first arbitration date. The written record between Mr. Mooney and Ms. Heitzmann demonstrated that she knew of that arbitration date.
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> [147] Even after the initial fiasco before an experienced labour arbitrator, CUPW continued to attempt to represent Ms. Heitzmann's interests. However, Ms. Heitzmann maintained her attitude of non-cooperation.
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> [148] Ultimately, after reviewing the situation with legal counsel, CUPW decided to withdraw Ms. Heitzmann's grievance. It further emailed Ms. Heitzmann the reasons for its decision.
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> [149] The Board finds nothing arbitrary, discriminatory or in bad faith with CUPW's process throughout this case.

[10] While Mr. Ménard's case is slightly different from the situation in *Heitzmann 737*, *supra*, since his case never proceeded to arbitration, the Board carries out the same analysis of CUPW's process.

III. Facts

[11] CPC terminated Mr. Ménard on March 19, 2014 "for reasons of violence in the workplace" (see MOA). CUPW met with Mr. Ménard on April 28, 2014 in order to discuss his version of events. CUPW already had in its possession a video of the incident.

[12] Mr. Ménard's employee file contained certain disciplinary items. In CUPW's view, these items would support a CPC argument of "culminating incident". Moreover, CUPW considered

that the video of the violent incident involving Mr. Ménard and a female employee, in and of itself, would make its chances of success at arbitration difficult.

[13] At the April 28, 2014 meeting, Mr. Ménard did not provide CUPW with any evidence which impacted its analysis of its chances of success at arbitration.

[14] CUPW had also taken certain steps in order to explore with CPC whether it might accept a resignation rather than a termination for cause. While CPC was initially unreceptive, it later agreed to negotiate an MOA.

[15] CUPW had a conference call on May 5, 2014 with Mr. Ménard and others to discuss the terms of a draft MOA. On May 21, 2014, CUPW explained again to Mr. Ménard that it would not be proceeding to arbitration. Mr. Ménard agreed on that date to sign the MOA.

[16] Paragraph 9 of the MOA evidenced Mr. Ménard's acknowledgement that he voluntarily signed the agreement on May 21, 2014:

> 9. The Grievor acknowledges that his resignation is given freely and voluntarily, in full knowledge of the facts, and after careful consideration and discussion with all persons concerned by this resignation, including the Union and its representatives, and hereby releases and discharges them from any current and future recourse he might have exercised or wish to exercise against them in relation to his job or the termination of his employment at the Corporation.

[17] It was only subsequent to his signing of the MOA that Mr. Ménard had second thoughts, which included a belief he had been forced to sign the MOA.

IV. Analysis and Decision

[18] In a DFR complaint, the complainant bears the burden of proof: *Scott,* 2014 CIRB 710, at paragraphs 97–102. Did Mr. Ménard convince the Board that CUPW's actions in obtaining the MOA amounted to conduct that can be described as "arbitrary, discriminatory or in bad faith"?

[19] The evidence demonstrated that CUPW, after viewing the video of the violent incident involving Mr. Ménard and a female employee, concluded that it could not contest his termination successfully before an arbitrator. CUPW took the necessary steps to obtain and view the video evidence. CUPW met with Mr. Ménard in order to ask him for his version of the events.

[20] In CUPW's estimation, Mr. Ménard downplayed the violent incident.

[21] Rather than simply deciding not to file a grievance, CUPW pursued a settlement with CPC in order to remove the "just cause" firing from Mr. Ménard's record. While CPC was not initially open to the idea, eventually the parties, including Mr. Ménard, signed the MOA which set out their respective rights and obligations. Mr. Ménard's complaint indicated that he had spoken to two lawyers in or about early May, 2014.

[22] It was only in hindsight that Mr. Ménard seemingly had regrets about signing the MOA. The content of his DFR complaint gave the impression he thought this Board would look into the merits of the grievance, just as a labour arbitrator could.

[23] The Board's role is not to do what an arbitrator might have done when examining whether CPC had just cause to fire Mr. Ménard. Neither does the Board decide whether the information Mr. Ménard gave CUPW ought to have convinced it to proceed to arbitration. Instead, the Board must examine CUPW's process.

[24] It is clear in this case that CUPW fully understood the facts which had led to Mr. Ménard's termination for cause. It met with Mr. Ménard to give him an opportunity to explain. It further approached CPC to enquire whether there might be another solution.

[25] Ultimately, CUPW obtained for Mr. Ménard the MOA which contained a clause in which he acknowledged he signed it voluntarily.

[26] Mr. Ménard criticized CUPW for essentially giving him no other option, but to sign the MOA. He alleged that CUPW advised him he could either sign the MOA to resign or have his permanent record indicate he had been fired for cause. He also indicated he had told CUPW that other instances of violence in the workplace had not been treated as harshly. Indeed, in his view, the incident was one of horseplay rather than violence.

[27] Mr. Ménard failed to persuade the Board that CUPW acted in a manner which could be described as "arbitrary, discriminatory or in bad faith".

[28] CUPW explained to Mr. Ménard he had two options: the status quo or the MOA. The Board fails to see how this frankness somehow forced Mr. Ménard to sign the MOA against his will. CUPW was not obliged to take Mr. Ménard's grievance to arbitration. As long as it examined the facts and came to a justifiable conclusion, it was entitled simply to refuse to take the grievance any further.

[29] That is the essence of the role of a bargaining agent when deciding how to use its limited resources to serve the bargaining unit.

[30] Rather than simply refusing to go to arbitration, CUPW explored another solution for Mr. Ménard which would change his "just cause" termination into a resignation.

[31] The Board can find nothing even remotely close to a *Code* violation in CUPW's representation of Mr. Ménard.

[32] The Board dismisses the complaint.

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

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Norman Rivard
Member