Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Patrick Provencher,

complainant,

and

Communications, Energy and Paperworkers Union of Canada (now known as Unifor),

respondent,

and

Bell Technical Solutions Inc.,

employer.

Board File: 30808-C
Neutral Citation: 2015 CIRB **787**
August 10, 2015

The Canada Industrial Relations Board (the Board), composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members, considered the above-noted complaint.

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 the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this matter without an oral hearing.

Parties' Representatives of Record

Mr. Patrick Provencher, on his own behalf;

Mr. John Caluori, for the Communications, Energy and Paperworkers Union of Canada (now known as Unifor);

Ms. Annie Gazaille, for Bell Technical Solutions Inc.

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

I. Nature of Complaint

[1] On December 6, 2014, the Board received a duty of fair representation (DFR) complaint from Mr. Patrick Provencher, an employee of Bell Technical Solutions Inc. (BTS), in which he alleges that his union, the Communications, Energy and Paperworkers Union of Canada (now known as Unifor) (Unifor), 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] Mr. Provencher alleges that Unifor breached its DFR under the *Code* by failing to represent him in connection with his harassment complaint filed with Quebec's Commission de la santé et de la sécurité du travail (CSST). Mr. Provencher submits that Unifor ceased to represent him after he obtained information from a rival union.

[3] Unifor, for its part, submitted to the Board a summary of the actions it had taken to help Mr. Provencher.

[4] The Board has decided to dismiss Mr. Provencher's complaint for the reasons set out below.

II. Analysis and Decision

[5] Mr. Provencher provided a "chronological summary" (translation) of the relevant facts on page 6 of his complaint:

> On August 30, 2014, I filed a claim with the CSST for harassment in the workplace. My union told me that it was hard to prove. My issue was that my doctor was telling me to take time off work because of it and I was seeing a psychologist.
>
> I did not feel at all supported and so I did some research on the Internet sites of other unions to get more information on the subject.
>
> I did that because I had been very dissatisfied for six years.
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> When I went back to work on November 17, 2014, the union found out that I had been looking for information on my own.

> Since then, I have been getting replies by email only, and my health and safety representative no longer talks to me.
>
> (translation)

[6] In a letter dated December 9, 2014, the Board asked Mr. Provencher for more information:

> The following additional information is necessary in order to proceed with the processing of your complaint:
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> > a) **the articles of the collective agreement that the employer failed to abide by**;
> >
> > b) an indication of the date on which you first knew of the circumstances giving rise to your complaint;
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> > c) details of your allegations against the union, that is, a description of any arbitrary, discriminatory or bad faith conduct in its representation of employees pursuant to the collective agreement, if applicable;
> >
> > d) information about your request to your union that a grievance be filed, as well as the status of the said grievance, if applicable.
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> (translation; emphasis added)

[7] Mr. Provencher subsequently submitted to the Board a copy of a number of email messages relating to his situation.

[8] In its response of March 5, 2015, Unifor also provided a chronological summary of events. Among other things, Unifor was honest with the Board in admitting that it had made a mistake in regard to the time limit for appealing a CSST decision:

> 9. In reply to the complainant's allegations that Unifor Local 81 acted arbitrarily, we wish to point out to the Board that Local 81
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> …
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> c) Unifor Local 81 understands the complainant's frustration at having missed the deadline for appealing. ***The complainant alleges that he advised the union of the CSST's denial of the claim on October 31, 2014. The union admits its mistake. However, it is important to note that, as indicated in* paragraph 5*, Mr. Provencher never raised the issue of the denial of the claim at the meeting of November 7, 2014.***
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> d) ***It was not until December 4, 2014, that the complainant contacted Local 81 by email to complain about the challenge of the CSST's denial of the claim.***

e) Local 81 sent Mr. Provencher an email reply on December 5, 2014, inviting him to work with the local to pursue the matter and it was Mr. Provencher who shut us out, as may be seen from his email of December 6, 2014.

(translation; bold in original; bold italics added)

[9] Attached to Unifor's response was an email dated December 15, 2014, in which it had summarized its interactions with Mr. Provencher:

Since your workplace injury on August 29 of this year, you have given us your full cooperation for the purpose of following up on your case. By full cooperation I mean telephone conversations and follow-up on emails from you. On November 7, you met with your prevention representative in our offices to update your file.

Emailing us the CSST denial letter on October 31 without taking any steps in the 30-day time limit to ensure appropriate action is a responsibility that you must bear, especially since you know that your presence is required for a challenge on administrative review.

We have discussed your workplace injury several times and the common goal has at a minimum been to approach the SDAT (Service de défense des accidenté(e)s du travail) to get an opinion regarding your case. That goal has never been questioned. **The letter from the CSST denying your claim is dated October 23, 2014. You probably received it a few days later and so the 30-day time limit expired around November 24. Yet you did not approach us about challenging the decision until December 4, after expiry of the time limit. In addressing my reply of December 5, you stated the next day that "if you want something done right, you should do it yourself, and that you would come to an arrangement with the CSST"** (translation). You also indicated that you would file a complaint with the CIRB.

We do not know whether you came to an arrangement with the CSST, but it is clear that you no longer want our services in relation to your workplace injury case. Furthermore, you informed your shop steward last Friday that you had filed your complaint with the Board. **We nevertheless wish to inform you that, if you have not already done so, you are entitled to challenge the CSST's decision on administrative review, though you will be asked to explain why you are late in doing so.** Rest assured that we regret this situation. Nonetheless, the local will provide you, and indeed all members, with the best service possible if you seek its assistance.

(translation; emphasis added)

[10] As may be seen from the Board's letter of December 9, 2014, to Mr. Provencher and its letter of April 21, 2015, to Unifor, in which it asked for a copy of the collective agreement, the Board in this case was attempting to establish the existence of a link between Mr. Provencher's complaint filed with the CSST and the collective agreement between Unifor and BTS.

[11] That link is important, as indicated recently in *Torabi*, 2015 CIRB 781, since section 37 makes explicit reference to rights under the collective agreement:

> 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.**
>
> (emphasis added)

[12] In reviewing the collective agreement, the Board did not encounter any reference to the CSST. In *Dumontier*, 2002 CIRB 165, the Board found that a bargaining agent does not generally have an obligation to represent employees before other administrative tribunals such as the CSST:

> [22] The Board's case law shows that ***a union's duty of fair representation does not include the obligation to represent its members before other forums or administrative tribunals like the CSST or the CLP if this obligation is not clearly set out in the collective agreement.***
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> [23] In *Judah (Joe) Zegman* (1996), 100 di 25 (CLRB no. 1151), Mr. Zegman complained about his union because it had not provided him with any assistance in getting him sent to a treatment centre for his drug addiction, according to the employer's policy. The Board dismissed his complaint:
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> > As for the alleged discriminatory behaviour by the Union with respect to the complainant's addiction, the existing employee assistance program does not form part of the collective agreement. In this respect, no finding can be made in virtue of section 37 of the *Code* **given that the duty of fair representation applies only to those rights which come under the collective agreement** (see *Donald Publicover*, February 21, 1994 (LD1268).
> >
> > (page 31; emphasis added)
>
> …
>
> [26] ***An examination of the collective agreement filed with the Board shows that the union has no obligation to represent the complainant before the CSST or any other forum.*** In spite of the fact that there was no obligation to represent him, the union provided representation for Mr. Dumontier before the CSST through the services of counsel, until the complainant notified the union that he had a lawyer of his own as well as the means to pay him.
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> (bold in original; bold italics added)

[13] The Board arrived at a similar finding in *Leduc*, 2010 CIRB 495, regarding the obligation of a union to seek judicial review (writ of evocation) of an arbitral award:

> [17] **In the case under review, there is no evidence before the Board that the collective agreement between the union and the employer, applicable during the relevant period, required the union to seek judicial review of an arbitral award** and nothing on file shows

that the union handled the complainant's case in an arbitrary, discriminatory or bad faith manner by refusing to challenge the arbitral award.

[18] Furthermore, the Board has already ruled on the scope of the union's duty of representation with respect to the obligation to seek judicial review of an arbitral award. In *John Presseault*, 2001 CIRB 138, the Board stated as follows:

> [33] The union's obligation to represent its members does not include the duty to pursue a judicial review of an arbitral award (see *Aditya N. Varma* (1991), 86 di 66; 15 CLRBR (2d) 307; and 92 CLLC 16,020 (CLRB no. 894)). Thus, where a collective agreement does not provide for a right to have an arbitral award judicially reviewed, the union's decision not to seek judicial review cannot be seen as a breach of section 37 (see *Gordon Newell* (1987), 69 di 119 (CLRB no. 623)). **Accordingly, a union member does not have an absolute right to judicial review.**
>
> [34] It is up to the union to decide how it will deal with the outcome of an award. Even if the union is wrong, in the absence of unlawful motives or serious negligence in its assessment, there is no redress available under the *Code*. Unless the collective agreement provides otherwise, which is not the case here, the processing of a grievance is reserved to the union, and the decision to further an award to judicial review is an integral part of that process. …

(emphasis added)

[14] With regard to Mr. Provencher's case before the CSST, the Board considers that the complainant failed to demonstrate the existence of a specific right under the collective agreement. The Board asked Mr. Provencher to provide it with evidence of a right under the collective agreement in its letter of December 9, 2014.

[15] Even if, solely for the sake of argument, the Board accepts that a bargaining agent's regular practice of assisting members in matters before the CSST might give rise to a DFR complaint, it is satisfied that Unifor did not violate the *Code*.

[16] The procedure followed by Unifor shows that it met with Mr. Provencher and answered his emails. Unifor even gave him advice about how to proceed.

[17] Unifor was aware of the relevant facts. It may have erred in regard to the 30-day time limit for challenging a CSST decision, but section 37 does not hold trade unions to a standard of perfection. Unifor also indicated to Mr. Provencher that he could ask for an extension of the time limit, but it seems that he chose to deal with the matter on his own.

[18] Mr. Provencher, with whom the burden of proof rested, also failed to show that Unifor had acted in an arbitrary or discriminatory manner or in bad faith. Mr. Provencher alleged that Unifor

had refused to represent him because he had sought information from a rival union, yet he did not provide any evidence in support of that allegation.

[19] On the contrary, the facts indicate that Unifor assisted Mr. Provencher with his situation on several occasions. The dispute between Mr. Provencher and Unifor seems to stem more from Mr. Provencher's subjective view regarding Unifor's actions.

[20] The Board accordingly dismisses the complaint.

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

Translation

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Graham J. Clarke
Vice-Chairperson

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Daniel Charbonneau
Member

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Robert Monette
Member