



Reasons for decision

Giuliana Fumagalli,

complainant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 31330-C

Neutral Citation: 2016 CIRB **808**

January 19, 2016

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

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

Ms. Giuliana Fumagalli, on her own behalf;

Mr. Sylvain Lapointe, for Canadian Union of Postal Workers;

Ms. Stéphanie Germain, for Canada Post Corporation.

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

I. Nature of the Complaint

[1] On October 26, 2015, Ms. Giuliana Fumagalli filed a Duty of fair representation (DFR) complaint alleging that her bargaining agent, 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] The Board subsequently requested that Ms. Fumagalli complete its DFR form. Ms. Fumagalli filed significant documentation in support of her complaint on November 18, 2015.

[3] Ms. Fumagalli worked for Canada Post Corporation (CPC). This complaint arises from CPC's decision to terminate her employment for being absent without authorization. CUPW later negotiated a Memorandum of Agreement (MOA) which replaced her termination with a 3-month suspension.

[4] Ms. Fumagalli filed an articulate and comprehensive complaint which greatly assisted the Board as it conducted its *prima facie* case analysis, which it applies for all DFR matters, *infra*.

[5] The Board has decided to dismiss Ms. Fumagalli's complaint for the reasons which follow.

II. Facts

[6] The Board will only briefly summarize the relevant facts. The Board's record, which contains the extensive documentation Ms. Fumagalli filed, provides the context in which this decision was made.

[7] On July 9, 2015, Ms. Fumagalli asked CPC for a 4 week leave without pay for the period of July 19 to August 16, 2015.

[8] On July 15, 2015, CPC denied Ms. Fumagalli's leave request for the following reasons:

Hello,

I received your request and took the time to assess it with Josée Pouliotte, but I am unfortunately unable to grant it. We have already refused some employee requests for the same weeks, for the same reason that I must refuse your request. This time of year is by far the busiest period for holidays and we have already reached the maximum.

As a result, I must take into account our replacement capacity and, to be fair and equitable with everyone, I cannot grant your request.

I apologize for the inconvenience.

Christian Tremblay
Manager MVAD, Retail Manager Montréal

(translation)

[9] Following CPC's refusal, Ms. Fumagalli asked CUPW via email dated July 18, 2015, to grant her union leave:

Hello to both – Sandra and Alain
I added Marc – as you are in the region

Here is my invitation – it's in Spanish – sorry

so request for unpaid union leave
and as for the escuelita zapatista – it is from July 30-31 and August 1 and 8-9 for the caracoles zapatistes celebration – this is why I will be there – we won't mention it to the employer –

I will attach the original letter related to my first visit at the zapatistes, which explains and justifies my attendance at that school. Further, I will also be visiting another independent community: Cheran – we need to know about other development patterns, fights and successes.

(translation)

[10] Ms. Fumagalli alleged that CUPW representatives had advised her verbally it would grant her union leave. On that basis, she travelled to Mexico as planned. A few hours before leaving Canada on July 22, 2015, she left a voice mail message late at night for her supervisor advising of her absence.

[11] On July 27, 2015, CPC issued a letter to Ms. Fumagalli regarding her absence without leave from work:

This is further to your unauthorized absence from work as of July 22, 2015. In fact, in spite of our refusals to grant your various leave requests, you persisted and have been absent from work since July 22.

As you are presently absent from work, there is no need to suspend you. Please therefore note that you are considered as being on an unauthorized leave without pay.

We are presently conducting an investigation on the events and will keep you informed of any developments.

Please note that your access to Canada Post facilities was removed until further notice.

A copy of this notice will be added to your personal file.

(translation)

[12] The next day, on July 28, 2015, Ms. Fumagalli wrote to a CUPW representative and explained her situation:

I asked for Union leave without pay to participate at the Escuelita informally and verbally. I was told to wait and that things would be taken care of once local election over. **I lose election an immediately by fluke get a position as wicket clerk. Getting leave without pay is impossible and this is clear from the start but I was told to start by formally asking CPC for the leave. Which i did and am submitting the emails. Sandra Delisle and Alain Laroche knew I was going to Mexico to go to the Escuelita. When my leave without pay from CPC was denied plan b kicked in and this is when local finally asked me to show proof to CPC of participation at the Escuelita and to send documentation so they could plead Education leave - this is where i replied that i was not going to tell CPC about Escuelita and that I should get Union leave with no pay so I could participate without having to justify what and where to CPC.** I was told that if I had an invitation to participate in an event they could justify Union leave without pay. I therefore contacted Martin Barrios who is a member of Comision de Derechos Humanos y Laborales del Valle de Tehuacan (Puebla) to write a letter of invitation. Which they did and they sent it out on the 18th and I resent it to Marc Edouard on Sunday 18th with a text explaining the request. On Saturday I spoke to Sandra who told me i was better off speaking to Marc because it was more regional and national stuff than local. I spoke to Marc on Saturday afternoon. He told me it was unfortunate that I had not spoken to him on Friday since he had spoken to Denis and that Denis had contacts at CPC and that something could have been done then. **He told me he was going to speak to Yannick on Monday and see what could be done and to wait. Having no info on Tuesday afternoon I called him from my work station Youville at around 4:30 to see what was going on. He told me that he had no answers but to call CPC Josee in Ottawa and to say union leave without pay. I asked him at least twice to make sure because I wanted to leave with this issue resolved. At 23:54 i left a message to CPC. On Wednesday morning I left. I arrived in Mexico only to find out I should never have left and that I should return.** A string of text messages and fb messages follow - between Sandra and Marc and I am told to wait or to come back. I followed my plans of going to Tehuacan while I waited for stuff in Montreal to clear up. I arrived in Tehuacan on Thursday night and on Friday was meeting with 3 nurses unions and on Saturday went to visit 2 maquiladoras in Sta Cruz not far from Tehuacan. So this is not a false invitation.

I am heading back to Mexico DF and hoping to leave tomorrow morning for Cheran (Michoacan). I hope this can be resolved and am really sorry for this really shit situation. I was expecting to be told that I could get union leave without pay without having to go through CPC. But i was told to proceed differently.

[sic] (emphasis added)

[13] On August 13, 2015, CPC convened a meeting with Ms. Fumagalli. Ms. Fumagalli's helpful chronology in her complaint set out her concerns about what should be said during the

investigation meeting. This included whether she should say that a particular CUPW representative had advised her that CUPW would grant her the union leave. Ultimately, she did not mention this.

[14] By letter dated August 21, 2015, CPC terminated Ms. Fumagalli's employment:

...

Indeed, despite the fact that I refused your original request for a leave without pay to take care of your son for the period of July 22nd to August 14th 2015, you decided not to respect our refusal and chose to grant yourself this leave from July 22nd to August 8th. Even though I had explained to you that this was our busiest season for annual leaves and we had no means to cover your absence. You irresponsibly chose to leave a message on the answering machine of Josée Pouliotte (resource planning officer) around 1:00am, roughly 5 hours before your departure for Mexico, explaining that you would be absent from July 22nd to August 14th on "Union leave without pay", regardless of the fact that you had not obtained an approval from your employer nor from the union. In fact to this day, no request of that nature has been made by the union as per article 26.05 of the collective agreement.

When asked to provide more information regarding your union leave request and to disclose the name of the person at CUPW that assured you that the situation would be resolved shortly, you replied that you didn't want to involve anybody in your story and you refused to provide us any further details.

Madam Fumagalli, considering the above mentioned and all of the information that we possess, it is clear that you granted yourself a leave, you went against the directives provided to you and that you lied about the reason for your leave request. You must understand that such a behavior is unacceptable and cannot be tolerated.

Given the gravity of the above mentioned facts, the bond of trust has been irreparably broken between you and the employer. **We have no other choice but to terminate your employment with Canada Post Corporation.** Consequently, your access to CPC workplaces is revoked, with the exception of areas destined for customer service. Moreover, please return to us all goods belonging to CPC.

[sic] (emphasis added)

[15] On or about August 28, 2015, CUPW advised Ms. Fumagalli that CPC had offered the MOA which would modify her termination by substituting for it a 3-month suspension. Ms. Fumagalli took issue with what she felt was CUPW's haste in trying to get her to sign the MOA.

[16] However, the facts indicate that the MOA took a period of time to negotiate. Ms. Fumagalli was able to request and obtain changes to the MOA. For example, while the initial draft was written in French, Ms. Fumagalli asked for it to be in English. This change was made.

[17] On September 21, 2015, Ms. Fumagalli asked for several changes to the MOA (see Attachment 14 to her complaint). Ms. Fumagalli attached to her complaint several draft versions of the MOA (Attachments 13, 15, 16, and 17).

[18] Ms. Fumagalli filed with the Board a copy of the tripartite MOA signed by CUPW, CPC and herself (Attachment 18). The introductory paragraphs of the MOA indicate the arrangement constituted what is commonly known as a “last chance agreement”:

Whereas the employee has shown insubordination and has neglected her duties as an employee by taking an unauthorized leave of absence between July 22 and August 7 2015;

Whereas the employee has admitted to the facts listed above;

Whereas the employee was discharged by letter on August 21 2015 following these events;

Whereas the employee recognizes the serious nature of her neglect of duty;

Whereas the Corporation wishes to give the employee one last chance to retain her position with the Canada Post Corporation;

Whereas the parties wish to resolve the aforementioned dispute without prejudice to the position either of them may take in regards to similar or identical future situations;

[19] The initial three paragraphs of the MOA described the background to the dispute:

1. The preamble is an integral part of this memorandum of agreement (MOA);
2. The employee is considered to have taken an unauthorized and unpaid leave of absence between July 22 and August 7 2015;
3. The employee will be suspended without pay for a period of three months, from August 10 to November 6 2015;

...

[20] CUPW retained the right to grieve any future discharge:

...

6. In the event of any major neglect of her obligations as an employee of the Corporation or her commitments under this MOA, Mrs. Fumagalli will be discharged and will lose her employment with the Corporation;

7. In the event of the employee's discharge, the union reserves the right to file a grievance;

[21] At paragraph 8, Ms. Fumagalli agreed she had signed the MOA voluntarily. But she insisted on the addition of paragraph 13 regarding future admissions:

8. Mrs. Fumagalli acknowledges having understood the scope of this MOA and signing it freely and voluntarily, with full knowledge of the facts;

...

13. This MOA is concluded without admission whatsoever by the parties in regard to the employee's discharge;

[22] Ms. Fumagalli produced a letter (Attachment 22) she had sent to Service Canada concerning employment insurance and explained to them why she had signed the MOA:

I did not have a choice but to sign the memorandum. I could not allow myself to go through the usual steps of the grievance process because the process is very long and with no guarantee as to the decision of the arbitrator. The memorandum was presented to me and, despite the fact that all parties knew I did not agree with the first part of the text, my situation as a single-parent and being the sole family provider does not allow me to be involved in a fight without knowing if I will still have my job at the end of the process and if I will be paid for the time until the issue is over. So that is why paragraph 13 was added to the memorandum.

(translation)

III. Analysis and Decision

[23] Ms. Fumagalli bears the burden of proof for her DFR complaint. The issue the Board must decide is whether Ms. Fumagalli has raised a *prima facie* case that CUPW acted in an arbitrary, discriminatory or bad faith manner with regard to her rights under the collective agreement.

[24] The Board described the *prima facie* case process in *Reid*, 2013 CIRB 693:

IV. The DFR *prima facie* Process

[20] The Board applies a *prima facie* case process for DFR complaints. After a complaint is received, but before asking for submissions from the trade union and the employer, the Board first examines whether the complainant has established a case, at least at an initial glance.

[21] Only if the complainant has demonstrated a *prima facie* case will the Board request the respondents to respond. In *Crispo*, 2010 CIRB 527, the Board described this essential screening process:

[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.

[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.

[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:

[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*.

[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.

[25] The Board's role is distinct from that of a labour arbitrator who will decide cases arising from the collective agreement. In this case, the Board does not examine CPC's refusal to grant Ms. Fumagalli leave without pay in 2015. That particular decision was never grieved.

[26] Similarly, the Board does not examine whether Ms. Fumagalli might have been eligible for union leave in the circumstances of this case. Ms. Fumagalli explained in her letter to Services Canada why she did not pursue her belief that a leave had been, or should have been, granted. That would have also been a matter for a labour arbitrator, if CUPW had agreed to contest it.

[27] The allegations Ms. Fumagalli raised which fall within this Board's jurisdiction concern the negotiation and the signing of the MOA. Ms. Fumagalli alleged that CUPW acted in a way during the negotiation of that MOA which violated the *Code*. The Board disagrees for several reasons.

[28] Firstly, Ms. Fumagalli agreed to pursue the MOA route, rather than asking CUPW to grieve the circumstances surrounding her dismissal. That decision made the earlier matters about which she complained no longer relevant. Ms. Fumagalli decided, despite CPC's refusal to grant her leave and no firm confirmation that CUPW and CPC had granted her union leave, to travel to Mexico as she had originally planned.

[29] Secondly, the facts on record did not convince the Board that Ms. Fumagalli had been forced into signing the MOA. While she initially felt she was being forced to sign the MOA without having a proper chance to review it, she subsequently received that chance.

[30] She further requested changes to that MOA during the course of its negotiation. One of those changes was to change the MOA language from French to English. Another change, which was important for her, was the addition of paragraph 13 which stated “This MOA is concluded without admission whatsoever by the parties in regard to the employee’s discharge”.

[31] Thirdly, the MOA itself stated “Ms. Fumagalli acknowledges having understood the scope of the MOA and signing it freely and voluntarily, with full knowledge of the facts”.

[32] These facts do not give rise to a *prima facie* case that CUPW acted in an arbitrary, discriminatory or bad faith manner. It appears instead to be more a case of “buyer’s regret”.

[33] A similar, though not identical, situation occurred in *Ménard*, 2015 CIRB 753. In that case, CUPW negotiated with CPC the substitution of a resignation for the employee’s original termination of employment. Mr. Ménard later filed a DFR complaint against CUPW suggesting he had been forced to sign the negotiated agreement.

[34] The facts demonstrated in that case, just like in the present one, the steps CUPW had followed in carrying out its representation obligations:

[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.

[35] In the instant case, the material facts as alleged by Ms. Fumagalli, and as contained in the supporting documentation, even if assumed to be true, did not raise a *prima facie* case that CUPW violated the *Code*.

[36] As a result, the Board dismisses this complaint.

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

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Gaétan Ménard
Member