Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Pascal Valenti,

applicant,

and

Canadian Union of Postal Workers,

respondent,

and

Canada Post Corporation,

employer.

Board File: 31531-C
Neutral Citation: 2018 CIRB **866**
January 23, 2018

The Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

Parties' Representatives of Record

Mr. Pascal Valenti, on his own behalf;
Mr. Sylvain Lapointe, for the Canadian Union of Postal Workers;
Ms. Stéfanie Germain, for Canada Post Corporation.

I. Nature and Background of the Matter

[1] On May 6, 2015, Mr. Pascal Valenti filed a complaint against the Canadian Union of Postal Workers (the union) in which he alleged that the union had breached its duty of fair representation (DFR) set out in section 37 of the *Code* in its handling of his grievances. In a decision issued on January 5, 2016 (*Valenti*, 2016 CIRB LD 3543) (LD 3543), the Board

dismissed the complaint as it lacked sufficient evidence of the union's arbitrary or bad faith conduct.

[2] On February 4, 2016, Mr. Valenti filed an application for reconsideration of that decision, asking the Board to review its decision and to take into account the recordings he had submitted with his original application. The complainant also challenged Ms. Céline Allaire's legal opinion of August 17, 2015, which is dated after the filing of his complaint before the Board.

[3] In a decision issued on April 14, 2016 (*Valenti*, 2016 CIRB LD 3602) (LD 3602), the Board dismissed the application for reconsideration because it was not satisfied that there were grounds to warrant its intervention in the original decision.

[4] Mr. Valenti subsequently filed an application for judicial review with the Federal Court of Appeal. In its decision rendered from the bench on April 4, 2017 (*Valenti* c. *Union des travailleurs et travailleuses des postes*, 2017 CAF 70), the Court considered whether "the Board breached its duty of procedural fairness in refusing to accept the applicant's audio evidence, more specifically, the audio recordings of his March 4 and 17, 2015 meetings with the respondent's representatives, as opposed to the recordings that would establish harassment by the employer" (translation). The Court allowed the application for judicial review and ordered the Board to appoint a newly constituted reconsideration panel that would examine the file in its entirety.

[5] It should be noted that when it forwarded the file to the Court, in accordance with section 317 of the *Federal Courts Rules*, the Board sent only the material that had been placed on the reconsideration file, as it was that application that was being judicially reviewed. Thus, the Court did not have the documents contained in the original complaint file.

[6] That said, in accordance with the Court of Appeal's order, a new panel of the Board, composed of Ms. Ginette Brazeau, Chairperson, sitting alone pursuant to section 14(3) of *Code*, examined the application for reconsideration filed by Mr. Valenti on February 4, 2016, in addition to reviewing the original complaint file in order to examine the recordings submitted by the complainant. The Board finds that the documents and evidence contained in both files are sufficient for it to issue its decision. It is therefore exercising its discretion to decide the matter without holding an oral hearing, pursuant to section 16.1 of the *Code*.

II. Analysis and Decision

[7] The audio evidence contained in the complaint file consists of recordings of two meetings between Mr. Valenti and union representatives, which were clearly captured by Mr. Valenti without the other participants' knowledge. The Board notes that the union did not object to this evidence being filed in the context of the DFR complaint.

A. Principles Applicable to Audio Evidence

[8] The Board wishes to point out that it usually does not accept this type of audio evidence in its proceedings. The Board's policy on recordings that were captured without the knowledge of a party was set out in *D.H.L. International Express Ltd.* (1995), 99 di 126; and 28 CLRBR (2d) 297 (CLRB no. 1147). In that decision, the Board explained why it was reluctant to accept this type of evidence:

> It must be remembered that parties who appear before the Board typically continue in an ongoing labour relations relationship with one another. The successful functioning of that relationship is dependent, as far as possible, on mutual trust and respect. It is difficult to imagine how open and frank discussions, in an atmosphere of mutual trust and respect, could be carried on if either party was concerned that the other might be recording the conversation to be played back to the Board or in another forum at some subsequent period of time.
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> Were the Board to adopt a broadly permissive policy with respect to the admission of surreptitiously recorded evidence, it is not difficult to envisage how proceedings before it could become inexorably protracted by applications to have the recordings in question properly proved in an evidentiary fashion similar to that in the courts. Nor is it difficult to anticipate adjournments requested in order to permit the tapes to be analyzed by experts, not to mention the introduction of expert testimony relating to the recordings in question. Without attempting to overstate the case, to allow this type of evidence without restriction, would open an evidentiary Pandora's box from a labour relations perspective. This is particularly so when one keeps in mind the objects and purpose of the *Code* and the Board's role in the implementation of the same.
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> (pages 137–138; and 310)

[9] The Board is of the view that such considerations are all the more important in today's era of mobile devices and various social media, where anything can be recorded anywhere, with great ease and without the knowledge of those present. Allowing such evidence to be submitted freely and without restriction would create an atmosphere of mistrust, which would not be conducive to having open discussion or resolving labour disputes. Such negative impacts would be inconsistent with the objectives sought by the Board in its application of the *Code* and are

contrary to the effective management of its proceedings. The Board must therefore be careful and examine the circumstances of each case.

[10] Recordings made without the knowledge of the other persons present or transcripts of such recordings may be accepted in compelling circumstances that would warrant such evidence being considered by the Board. In order to determine whether to accept such evidence, the Board will review the following criteria, among other things:

- The burden of proof that must be met;
- The adverse effects of the recordings on the parties' labour relations;
- The reliability of the audio evidence;
- The parties' ability to present testimonies and thus allow for cross-examinations;
- The need to ensure a fair process; and
- The need to ensure full disclosure of the evidence, which will in turn promote the timely resolution of the matter.

[11] The Board will weigh these factors on a case-by-case basis before accepting surreptitiously taped evidence. Above all, it will require that the existence of such evidence be disclosed to the parties and to the Board at the earliest opportunity. It will also require that the party seeking to have such evidence admitted demonstrate that the same evidence cannot be obtained through other means and that it is of such probative value as to outweigh any negative or prejudicial effect it will have on the process or on the relationship between the parties (*D.H.L. International Express Ltd.*, *supra*, page 139). The Board will be more inclined to allow such evidence if the parties themselves do not object to its admissibility.

[12] In the present matter, the original panel did not accept the recordings, even if the union had not objected to such evidence being adduced. The panel indicated in its decision that the evidence had no probative value, because it related to allegations of harassment and bullying against the employer and not to the union's conduct. In his application for reconsideration, Mr. Valenti raised that his recordings captured meetings with union representatives and corroborate his allegations of arbitrary conduct on the union's part. The Court found that the Board had breached its duty of procedural fairness by failing to consider excerpts of the recordings submitted by Mr. Valenti in his application for reconsideration, and it directed the Board to consider all of the evidence on file. Accordingly, the Board will examine the audio

evidence submitted by Mr. Valenti with his complaint in order to determine whether this evidence would have altered the original decision.

B. First Ground for Reconsideration: the Recordings

[13] What follows is a brief summary of what these audio tapes reveal.

[14] The first recording, which is approximately one hour in length, captures a meeting held on March 4, 2015, with two union representatives, Messrs. Marc-Édouard Joubert and Yves Chaloux, in attendance. During the meeting, both union representatives review all of the grievances with Mr. Valenti and explain the chronology of events.

[15] In addition, the union representatives explain that, in spite of its decision not to refer the grievances to arbitration, the union had signed a memorandum of understanding with the employer settling all of Mr. Valenti's grievances. The memorandum provided that the dismissal would be changed to a resignation and that the employer would remove all disciplinary letters from Mr. Valenti's personal file. During the discussion, the union representatives take the time to read the memorandum of understanding and go over it in detail with Mr. Valenti.

[16] Mr. Valenti asks a few questions during the meeting but does not take issue with the union's actions. In their discussion, the union representatives refer to notes they had taken from previous meetings with the complainant, more specifically the February 9, 2015, meeting with Ms. Allaire, the union's legal counsel, during which the union explained to Mr. Valenti the reasons for not referring the grievances to arbitration. In fact, the statements made at that meeting were confirmed in a letter dated February 10, 2015.

[17] The second recording is about 25 minutes long. One can hear Mr. Valenti going over documents and subsequently asking to meet with Mr. Joubert. Over the course of a four-minute conversation, Mr. Valenti asks to get a copy of his harassment grievance. Mr. Joubert tells him that he does not have the grievance form but that he does have a typewritten document containing Mr. Valenti's allegations. Mr. Joubert indicates that he never received the grievance form, as it would be on file if it had been submitted. Nevertheless, he states that he will check. Mr. Valenti reiterates that he filled out the grievance form in the presence of Ms. Yvrose Pierre-Louis at the local's office and that she is a witness to that. During the discussion, Mr. Joubert reminds Mr. Valenti that he is still awaiting his response to the memorandum of understanding.

[18] Having listened to the recordings of both meetings, the Board has no doubt that the union was well aware of the harassment complaint, as this was discussed with Mr. Valenti at that first meeting on March 4, 2015. As the recording reveals, it was clearly explained to him at that meeting that the issues raised were not sufficient to support a separate harassment grievance, given that the union had determined that these rather concerned the supervisor's management approach.

[19] In the Board's view, this evidence provides no new facts that would have altered the original panel's analysis or finding in LD 3543. On the contrary, the recordings support the union's position that it devoted much time and many resources to Mr. Valenti's grievances. Indeed, the union went over the grievances with him and showed him the memorandum of understanding it had managed to negotiate as a comprehensive settlement. The recordings further confirm that the union suggested that Mr. Valenti take a few days to review the agreement and think about it. The recordings contain no new evidence that would establish arbitrary conduct or bad faith on the union's part.

[20] Mr. Valenti argues that the recordings show that the union did not provide him with a cut-off date for his response to the memorandum of understanding, and that the union acted in an arbitrary manner when it closed his grievance files on March 20, 2015, after failing to receive a response from him.

[21] Nevertheless, the recordings confirm that the union had asked Mr. Valenti to provide it with a response soon. The recordings further confirm that the union had clearly explained that it would not be referring the grievances to arbitration in light of its facts analysis and Ms. Allaire's legal opinion. It was therefore quite clear that the memorandum of understanding was the last and only opportunity that would be provided to the complainant to resolve all of his grievances. The recording of the March 17, 2015, meeting only confirms the complainant's visit to review his file, during which Mr. Valenti questioned the union on the absence of the grievance form. During the meeting, Mr. Joubert reminded the complainant that he was awaiting an answer with regard to the memorandum of understanding.

[22] In light of the contents of the recordings and the Board's finding that this evidence does not justify amending the original panel's decision, the Board decided not to take any further steps to validate the recordings. Even if it were to accept the recordings as they are, the Board finds that they contain nothing that would affect the outcome of LD 3543, given that the Board has found

no new evidence that would have brought it to amend its original decision on the union's conduct.

C. Second Ground for Reconsideration: the Legal Opinion

[23] In his application for reconsideration, Mr. Valenti argues that the original decision contains an error, as it refers to the legal opinion written in March 2015. However, that legal opinion was issued on August 17, 2015, as per the documents on file. The Board agrees that the date quoted in LD 3543 is erroneous. Nevertheless, the Board is of the view that the date referred to in the decision in no way affects its analysis, given that it is clear that Ms. Allaire discussed her legal opinion with Mr. Valenti in February 2015, well before the written opinion.

[24] Mr. Valenti further contends that the written legal opinion differs from the oral opinion that was discussed at that meeting in February 2015. He is challenging the validity of the opinion that served as the basis for the union's decision not to refer the grievances to arbitration, given that changes to his file had occurred. He criticizes the union for having relied solely on that legal opinion in deciding not to refer his grievances to arbitration. Yet the Board notes that Mr. Valenti had raised his concerns about Ms. Allaire's legal opinion when replying in the original complaint file:

> In fact, Ms. Céline Allaire's legal opinion issued verbally in February 2015 should have been provided in writing at the time. I am therefore challenging Appendix 1 (Ms. Allaire's letter dated August 17, 2015), which was filed by the union at Mr. Lapointe's request. I ask that Appendix 1 be dismissed or withdrawn from Sylvain Lapointe of CUPW's document in response to my complaint before the CIRB, because that document was written after my complaint had been sent to the CIRB.
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> I am challenging Appendix 1, that is to say, the letter produced by Ms. Céline Allaire on August 17, 2015, at Mr. Lapointe's request, in response to my complaint before the CIRB. Ms. Allaire's oral legal opinion should have been delivered in writing at the very same time her oral statements were made before the union, i.e. in February 2015.
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> Therefore, I wish to add that the union relied solely on Ms. Céline Allaire's oral legal opinion in deciding not to pursue my grievances. Ms. Céline Allaire's oral legal opinion led to the union's failure to assert my rights as a worker. It contained the opinion of an external party who was not a member of CUPW and the union relied on it in withdrawing my grievances. That is completely arbitrary.
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> (translation; Mr. Valenti's reply in file 31063-C)

[25] The Board considered these arguments in LD 3543 and noted that the fact that the legal opinion had been written later in no way changed its contents, and that the substance of the opinion was not disputed. The reconsideration process is not an opportunity to present the

same arguments or to bolster one's arguments in order to obtain a favourable decision. Similarly, a reconsideration panel will not substitute its opinion and assessment of the evidence for those of the original panel and will not second-guess the original panel's exercise of discretion (*Société Radio-Canada*, 2015 CIRB 763).

[26] Furthermore, it is well established in the Board's jurisprudence that it is for the union to determine whether to refer a grievance to arbitration. The Board examines only the process followed by the union in order to determine whether it acted in an arbitrary, discriminatory or bad faith manner (*Bugay*, 1999 CIRB 45). In its original decision (LD 3543), the Board found that:

> The evidence also shows that the union was especially careful to consider the circumstances surrounding the complainant's termination. It followed the steps in the grievance procedure until, in February 2015, it met with the complainant, along with Ms. Allaire. Following that meeting, on March 10, 2015, it advised the complainant that it had decided not to pursue the grievance any further. ...
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> (page 8)

[27] Mr. Valenti disputes the original panel's findings. However, the Board is not persuaded that there are any grounds for reconsideration of the original decision issued in LD 3543. In *Kies*, 2008 CIRB 413; and *Buckmire*, 2013 CIRB 700, the Board set out the circumstances in which it may exercise its reconsideration powers:

a) new facts that the applicant could not have brought to the attention of the original panel and which would likely have caused the Board to arrive at a different conclusion;
b) errors of law in the original panel's decision or non-compliance by the original panel with the Board's policies regarding the interpretation of the *Code*; and
c) a failure of the original panel to respect a principle of natural justice or procedural fairness.

III. Conclusion

[28] Having considered the arguments raised by Mr. Valenti in his application for reconsideration as well as the details from the recordings from March 4 and 17, 2015, the Board cannot conclude that there are new facts that would have caused the original panel to have made a different finding. Furthermore, the Board found no error of law in the original panel's reasons and also finds the decision to be consistent with the Board's policies regarding the interpretation of section 37 of the *Code*.

[29] For all of the reasons set out above, the Board must therefore dismiss the application for reconsideration.

Translation

Ginette Brazeau
Chairperson