Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Communications, Energy and Paperworkers Union of Canada,

complainant,

and

Bell Mobility Inc.,

respondent.

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February 17, 2012

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and David P. Olsen, 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 issue this interim decision without an oral hearing.

Parties' Representatives of Record

Mr. Jesse M. Nyman, for the Communications, Energy and Paperworkers Union of Canada;
Mr. Israel Chafetz, Q.C., for Bell Mobility Inc.

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

A–Background

[1] This decision considers the impact of an unjust dismissal claim under Part III (Labour Standards) of the *Code* on a Part I unfair labour practice (ULP) complaint to the Board.

[2] On October 3, 2011, the Communications, Energy and Paperworkers Union of Canada (CEP) filed a ULP complaint contesting the suspension and termination of one of its organizers, Mr. Hugh Doherty. Mr. Doherty had worked at Bell Mobility Inc. (BMI).

[3] BMI raised a preliminary objection that the Board should not hear the CEP's ULP complaint, given that Mr. Doherty had filed an unjust dismissal complaint under Part III of the *Code*. BMI's position is summarized succinctly at paragraphs 4 and 5 of its December 20, 2011 letter:

> (4) We do not agree that by statute the case at the CIRB must be decided. The Canada Labour Code ("CLC") does not take a priority over judicial fairness and efficiency. Adjudication that results in unnecessary duplication is not required for all ULP cases before the CIRB. The duplication of the litigation is a source of unnecessary judicial confusion, lacks finality and is inefficient. It would be unprecedented if the CLC was interpreted to protect such a scenario.
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> (5) At its most basic level we have the same parties, alleging the same violation, based on the same fact pattern, seeking the same remedy, using the same counsel with almost identical complaints. The ULP complaint should be deferred to the section 240 arbitration. Otherwise it will amount to the case with no foreseeable finality.

[4] After BMI first raised its objection, the Board in its November 22, 2011 letter requested the parties' comments on section 16(*l*.1) of the *Code*:

> Before taking its next procedural step, the Board would appreciate Mr. Chavetz confirming if he is proceeding with his objection and the grounds in support of it.
>
> The parties are aware of the Board's power to defer hearing a matter under section 16(*l*.1) of the *Code*. However, initially at least, the issue of anti-union animus for Part I complaints appears distinct from a Part III adjudicator's examination of just cause. But this does not resolve the possible issue of duplication and increased expense.

[5] The Board also asked whether the Supreme Court of Canada's (SCC) recent decision in *British Columbia (Workers' Compensation Board)* v. *Figliola*, 2011 SCC 52 (*Figliola*), had any application to the current situation.

B–Issues

[6] BMI's objection raised three issues:

> i) Does the SCC's recent decision in *Figliola* apply to the current situation?
> ii) Does section 98(3) of the *Code* apply? and
> iii) Should the Board defer hearing the CEP's ULP complaint given the existence of a concurrent Part III unjust dismissal complaint?

C–Relevant Statutory Provisions

i) Section 240 of the *Code*

[7] Section 240 in Part III of the *Code* contains an "unjust dismissal" provision. Employees of federal employers, subject to certain conditions, including not being subject to a collective agreement, may contest a decision to terminate their employment. The process is analogous to contesting a for-cause termination under most collective agreements:

> 240. (1) Subject to subsections (2) and 242(3.1), any person
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> (*a*) who has completed twelve consecutive months of continuous employment by an employer, and
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> (*b*) who is not a member of a group of employees subject to a collective agreement,
>
> may make a complaint in writing to an inspector if the employee has been dismissed and considers the dismissal to be unjust.
>
> (2) Subject to subsection (3), a complaint under subsection (1) shall be made within ninety days from the date on which the person making the complaint was dismissed.

(3) The Minister may extend the period of time referred to in subsection (2) where the Minister is satisfied that a complaint was made in that period to a government official who had no authority to deal with the complaint but that the person making the complaint believed the official had that authority.

241. (1) Where an employer dismisses a person described in subsection 240(1), the person who was dismissed or any inspector may make a request in writing to the employer to provide a written statement giving the reasons for the dismissal, and any employer who receives such a request shall provide the person who made the request with such a statement within fifteen days after the request is made.

(2) On receipt of a complaint made under subsection 240(1), an inspector shall endeavour to assist the parties to the complaint to settle the complaint or cause another inspector to do so.

(3) Where a complaint is not settled under subsection (2) within such period as the inspector endeavouring to assist the parties pursuant to that subsection considers to be reasonable in the circumstances, the inspector shall, on the written request of the person who made the complaint that the complaint be referred to an adjudicator under subsection 242(1),

(*a*) report to the Minister that the endeavour to assist the parties to settle the complaint has not succeeded; and

(*b*) deliver to the Minister the complaint made under subsection 240(1), any written statement giving the reasons for the dismissal provided pursuant to subsection (1) and any other statements or documents the inspector has that relate to the complaint.

242. (1) The Minister may, on receipt of a report pursuant to subsection 241(3), appoint any person that the Minister considers appropriate as an adjudicator to hear and adjudicate on the complaint in respect of which the report was made, and refer the complaint to the adjudicator along with any statement provided pursuant to subsection 241(1).

(2) An adjudicator to whom a complaint has been referred under subsection (1)

(*a*) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;

(*b*) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and

(*c*) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(*a*), (*b*) and (*c*).

(3) Subject to subsection (3.1), an adjudicator to whom a complaint has been referred under subsection (1) shall

(*a*) consider whether the dismissal of the person who made the complaint was unjust and render a decision thereon; and

(*b*) send a copy of the decision with the reasons therefor to each party to the complaint and to the Minister.

(3.1) No complaint shall be considered by an adjudicator under subsection (3) in respect of a person where

(*a*) that person has been laid off because of lack of work or because of the discontinuance of a function; or

(*b*) a procedure for redress has been provided elsewhere in or under this or any other Act of Parliament.

(4) Where an adjudicator decides pursuant to subsection (3) that a person has been unjustly dismissed, the adjudicator may, by order, require the employer who dismissed the person to

(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(*b*) reinstate the person in his employ; and

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

(emphasis added)

ii) Section 98(3)

[8] Section 98(3) of the *Code* allows the Board to refuse to determine certain ULPs filed under Part I of the *Code*:

98. (3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.

(emphasis added)

iii) Section 16(*l*.1)

[9] Section 16(*l*.1) of the *Code* allows the Board to defer deciding a matter if it could be resolved by arbitration or an alternate method of resolution:

> 16. The Board has, in relation to any proceeding before it, power
>
> ...
>
> (*l*.1) to defer deciding any matter, where the Board considers that the matter could be resolved by arbitration or an alternate method of resolution.

[10] The Board, in *Rees*, 2010 CIRB 499 (*Rees*), examined a situation where it exercised its discretion to defer a matter under section 16(*l*.1):

> [18] Section 16 (*l*.1) does not authorize the Board to dismiss Mr. Rees' complaint. In this respect, it differs significantly from section 98(3) of the *Code*:
>
> > 98.(3) The Board may refuse to determine any complaint made pursuant to section 97 in respect of a matter that, in the opinion of the Board, could be referred by the complainant pursuant to a collective agreement to an arbitrator or arbitration board.
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> [19] Section 16(*l*.1) allows the Board to put its matter on hold while another possibly more appropriate labour relations proceeding takes place.
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> [20] The Legislator added section 16(*l*.1) for just this type of case. Mr. Rees' discharge grievance is proceeding before an arbitrator. The arbitrator has the authority under section 60(1.1) of the *Code* to consider whether to extend the collective agreement's time limits and hear the merits of Mr. Rees'grievance.
>
> [21] The Board prefers not to preempt the arbitrator. More importantly, while the arbitrator will consider the simple question of whether to extend time limits, the case before the Board is more complex. Stated succinctly, this case involves a determination whether a bargaining agent's failure to observe a collective agreement time limit constitutes a violation of the duty of fair representation.
>
> [22] The Board would likely require oral submissions on that issue since its case law does not hold that every error a trade union makes necessarily constitutes a violation of the duty of fair representation. The Board does not hold trade unions to a standard of perfection.
>
> [23] Rather than start a process that could end up academic or moot, and given that the Board's hearing might not conclude before the anticipated arbitration date, the Board prefers to defer deciding the DFR question and allow the arbitrator to decide whether to extend the time limit for Mr. Rees' grievance under section 60(1.1) of the *Code*.

D–Analysis and Decision

i) Applicability of *Figliola*

[11] The Supreme Court of Canada in *Figliola*, *supra*, held that, even if two tribunals had concurrent jurisdiction to decide the same human rights question, that question could be litigated only once.

Fairness required the application of the principles of finality, the avoidance of multiplicity of proceedings and the protection for the integrity of the administration of justice to prevent a second hearing before a different tribunal on the same legal question:

> [34] At their heart, the foregoing doctrines exist to prevent unfairness by preventing "abuse of the decision-making process" (*Danyluk*, at para. 20; see also *Garland*, at para. 72, and *Toronto (City)*, at para. 37). Their common underlying principles can be summarized as follows:
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> • It is in the interests of the public and the parties that the finality of a decision can be relied on (*Danyluk*, at para. 18; *Boucher*, at para. 35).
>
> • Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings (*Toronto (City)*, at paras. 38 and 51).
>
> • The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature (*Boucher*, at para. 35; *Danyluk*, at para. 74).
>
> • Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision (*TeleZone*, at para. 61; *Boucher*, at para. 35; *Garland*, at para. 72).
>
> • Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources (*Toronto (City)*, at paras. 37 and 51).
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> [35] These are the principles which underlie s. 27(1)(f). Singly and together, they are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice.
>
> [36] Read as a whole, s. 27(1)(f) does not codify the actual doctrines or their technical explications, it embraces their underlying principles in pursuit of finality, fairness, and the integrity of the justice system by preventing unnecessary inconsistency, multiplicity and delay. That means the Tribunal should be guided less by precise doctrinal catechisms and more by the goals of the fairness of finality in decision-making and the avoidance of the relitigation of issues already decided by a decision-maker with the authority to resolve them. Justice is enhanced by protecting the expectation that parties will not be subjected to the relitigation in a different forum of matters they thought had been conclusively resolved. Forum shopping for a different and better result can be dressed up in many attractive adjectives, but fairness is not among them.

(emphasis added)

[12] The Federal Court of Appeal in *Canadian Human Rights Commission* v. *Air Canada*, 2011 FCA 332 (*Air Canada*) recently applied the *Figliola* principle when it decided that one administrative tribunal should have stayed its proceeding after another administrative tribunal, with concurrent jurisdiction, had already decided the same human rights question:

> [28] Turning to the application of these principles to the Tribunal's decision, as in *Figliola* it may be said that the Tribunal was "complicit" in an attempt to collaterally appeal the merits of the Agency's decision and decision-making process. The Tribunal dismissed Air Canada's motion for a stay on technical grounds, without considering the unfairness inherent in serial forum shopping. The Tribunal failed to consider whether Mr. Morten should be allowed to ignore the review mechanisms provided in the Act and to instead use the Tribunal to relitigate essentially the same legal issue in an effort to obtain a more favourable result. It did not engage in the required analysis. Specifically, the Tribunal failed to consider that, before the Agency, Mr. Morten knew the case to be met and was afforded the opportunity to meet that case. Any concern on the part of Mr. Morten about the Agency's application of human rights principles ought to have been addressed through the redress provided under the Act for decisions of the Agency - particularly when Air Canada had offered to support an application for leave to appeal the Agency's decision.
>
> (emphasis added)

[13] The Federal Court of Appeal emphasized that the proper recourse against an unfavourable tribunal decision was by way of judicial review. The legal determination could not be litigated a second time before another administrative tribunal with concurrent jurisdiction.

[14] The principles flowing from *Figliola* do not apply to the CEP's complaint.

[15] Firstly, BMI cannot point to a pre-existing decision from another tribunal which has already resolved the same legal issue before the Board. The decisions in *Figliola* and *Air Canada* both focussed on relitigating an already-decided human rights legal issue.

[16] Secondly, both *Figliola* and *Air Canada* dealt with a human rights issue over which two different administrative tribunals had jurisdiction. The issue in the current case does not concern human rights.

[17] Thirdly, even if the principles in *Figliola* and *Air Canada* extend beyond identical human rights questions, an adjudicator under Part III (if one is appointed) examines a different issue from the one before the Board.

[18] A Part III adjudicator will analyze whether BMI's decision to terminate Mr. Doherty was "unjust". In essence, the analysis will focus on whether BMI had just cause to dismiss Mr. Doherty.

[19] By contrast, the Board in a Part I ULP complaint limits its analysis to the question whether anti-union animus played any part in BMI's decision to terminate Mr. Doherty's employment. The Board does not consider the merits of the termination, including whether just cause existed: *National Pagette* (1991), 85 di 1 (CLRB no. 862).

[20] Accordingly, the Board will not apply the *Figliola* principle to stay the CEP's complaint.

ii) Section 98(3)

[21] In *Rees*, the Board noted that section 98(3) allows it to refuse to hear a complaint when the matter can be referred to an arbitrator under the parties' collective agreement.

[22] Had the Legislator wanted to expand the Board's power under section 98(3) to include another process, such as that found at section 240 of the *Code*, it could have done so. For current purposes, a condition of the Board exercising its section 98(3) power is that a collective agreement exists. By contrast, the unjust dismissal remedy at Part III of the *Code* exists only where employees are not subject to a collective agreement. Sections 98(3) and 240 of the *Code* apply to completely opposite employment situations.

iii) Section 16(*l*.1)

[23] Section 16(*l*.1) incorporates the concept of "judicial economy" into the *Code*. The concept is a relevant consideration when administrative tribunals must decide how to allocate their finite resources: see, for example, *Air Canada*, 2012 CIRB 624.

[24] From a judicial economy perspective, the Board could consider deferring the hearing of the CEP's ULP complaint under section 16(*l*.1), given that a Part III adjudicator might conceivably reinstate Mr. Doherty back into his employment.

[25] However, since there was no evidence of a concurrent section 240 hearing at this time, the Board will follow its usual practice and schedule a hearing into the CEP's ULP complaint.

[26] Should a concurrent section 240 hearing begin during the Board's hearing process, the Board may revisit the matter. The Board's main goal, however, is to adjudicate the merits of this ULP complaint quickly.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member