Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Wayne Kerr,

complainant,

and

International Association of Machinists and Aerospace Workers, Transportation District 140,

respondent,

and

Air Canada,

employer.

Board File: 29106-C
Neutral Citation: 2012 CIRB **631**
March 6, 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.

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

Parties' Representatives of Record

Mr. S. Sean Hagler, for Mr. Kerr;
Mr. Boyd Richardson, for the International Association of Machinists and Aerospace Workers, Transportation District 140;
Ms. Rachelle Henderson, for Air Canada.

I–Nature of the Application

[1] 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.

[2] On November 7, 2011, the Board received from Mr. Wayne Kerr a duty of fair representation (DFR) complaint alleging that his former bargaining agent, the International Association of Machinists and Aerospace Workers, Transportation District 140 (IAMAW), 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.

[3] Mr. Kerr had been an employee of Air Canada for approximately 21 years at the time of his "suspension pending discharge" on July 17, 2009. Arbitrator Martin Teplitsky, Q.C., dismissed Mr. Kerr's discharge grievance in a decision dated December 16, 2009.

[4] Mr. Kerr filed his DFR complaint with the Board almost two years after Arbitrator Teplitsky's decision dismissing his grievance.

[5] For the reasons which follow, the Board has not been persuaded to extend the *Code*'s 90-day time limit for the filing of Mr. Kerr's DFR complaint.

II–Chronology of Events

[6] Mr. Kerr's complaint sets out the key event dates. This decision will refer to Mr. Kerr's facts as pleaded, but the Board makes no findings on the accuracy of those facts. Accepting Mr. Kerr's pleading at face value, however, does allow the Board to consider his best possible case.

[7] On or about July 17, 2009, Air Canada suspended Mr. Kerr pending discharge as a result of alleged breaches of security at Air Canada's Toronto cargo location. The discipline concerned Mr. Kerr's alleged involvement in allowing packages to be removed from bond without clearing customs.

[8] In his December 16, 2009 decision, Arbitrator Teplitsky decided that Mr. Kerr "was knowingly complicit in illegal activity" and that such conduct warranted summary dismissal.

[9] On January 4, 2010, the IAMAW called Mr. Kerr to advise him of Arbitrator Teplitsky's decision. Mr. Kerr received a copy of the arbitral decision itself in early January, 2010.

[10] Mr. Kerr pleaded that Arbitrator Teplitsky could only have reached his conclusion because of the IAMAW's failure to properly represent him during the grievance process and at arbitration.

[11] In or about February, 2010, Mr. Kerr retained a private lawyer to assist him. Rather than filing a DFR complaint with the Board, that lawyer wrote to the IAMAW and later commenced a civil action against Air Canada for wrongful dismissal. Mr. Kerr alleged his first lawyer did not act expeditiously and caused the significant delay in bringing this complaint to the Board.

[12] Mr. Kerr retained new counsel in August, 2011.

[13] Mr. Kerr's DFR complaint arrived at the Board on November 7, 2011.

III–Analysis and Decision

[14] Sections 97(1) and (2) of the *Code* deal with the 90-day time limit for the filing of various Board complaints, including DFR complaints:

> 97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that
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> (*a*) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or
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> (*b*) any person has failed to comply with section 96.
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> (2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.
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> (emphasis added)

[15] The Board has the discretion at section 16(*m*.1) to extend the 90-day time limit.

> 16. The Board has, in relation to any proceeding before it, power
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> ...
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> (*m*.1) to extend the time limits set out in this Part for instituting a proceeding;

[16] The issue in this case is whether the Board should extend the time limit for instituting Mr. Kerr's DFR complaint.

[17] For analysis purposes only, the Board will use Mr. Kerr's suggestion that the 90-day delay started only when he read Arbitrator Teplitsky's decision. An argument could be made that Mr. Kerr knew or ought to have known of any alleged inadequate representation by the IAMAW much earlier than in January, 2010 when he received a negative arbitration result.

[18] Under Mr. Kerr's scenario, this case involved a 22-month delay from early January, 2010 to November 7, 2011. The 90-day delay would have expired sometime in early April, 2010, given the *Code*'s 90-day time limit in section 97(2).

[19] The Board is not satisfied that the alleged failure of Mr. Kerr's first legal counsel to file a timely DFR complaint provides a compelling reason for the Board to exercise its discretion under section 16(*m*.1).

[20] First of all, other fora may examine the facts concerning the reasonableness of the legal services Mr. Kerr received. The Board's duty requires it to focus on the parties' labour relations context when deciding whether to apply section 16(*m*.1) of the *Code*.

[21] The Legislator has clearly instructed the Board that labour relations complaints, including those from laypersons, but also from trade unions and employers, must be filed within relatively strict time limits. Indeed, prior to the 1999 amendments made to the *Code*, which included the addition of section 16(*m*.1), the Board had no discretion whatsoever to extend the time limits for instituting proceedings: *Upper Lakes Shipping Ltd.* v. *Sheehan et al.*, [1979] 1 S.C.R. 902.

[22] The need for a time limit in labour relations matters is not surprising. The Legislator frequently imposes time limits for various legal procedures. Given the adage that "labour relations delayed is labour relations denied", the Legislator, while granting the Board a new discretion in 1999, still maintained the *Code's* 90-day time limit for filing various labour relations complaints.

[23] The Board takes seriously the need to deal with labour relations complaints in a timely manner. The Board recently commented, in *Torres*, 2010 CIRB 526 (*Torres 526*), how it will examine cases which request an extension of time limits. In *Torres 526*, the complainants filed their complaint six months after the deadline:

> [19] The Board will not automatically relieve a party from compliance with the 90-day time limit for the filing of an unfair labour practice complaint. The Legislator has always emphasized that labour relations matters must be brought to the Board forthwith. Potential respondents are entitled to know whether they need to preserve evidence and otherwise prepare for a complaint under the *Code*.

> [20] While it may appear unfair that laypeople need to act quickly in bringing labour relations complaints forward, section 97(2) applies equally to trade unions and employers.
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> [21] The Board will not exercise its discretion under section 16(*m*.1) so as to render illusory the Legislator's intent to oblige parties to file their labour relations complaints expeditiously.
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> [22] Nonetheless, the Board will consider extending the time limits in compelling situations, such as if a complainant's health prevented the filing of a timely complaint: *Galarneau*, 2003 CIRB 239. Generally, the Board will consider the length of the delay and the justification for it.

[24] The Federal Court of Appeal, in *Eduardo Buenaventura Jr. et al.* v. *Telecommunications Workers Union (TWU) et al*, 2012 FCA 69, affirmed the Board's decision not to extend the time limit in *Torres 526*:

> [44] The Board also considered specifically the length of the delay (9 months), and its cause. The Board concluded that the main cause was the honest but mistaken belief of the complainants that the Board would prefer a single, multi-party complaint filed late to a multitude of individual complaints filed earlier. However, the Board noted that it has ample procedural means for dealing with large numbers of related complaints.
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> [45] The complainants do not suggest that the Board misunderstood the reason for the delay. However, they argue that it was unreasonable for the Board not to give special consideration to the fact that the complainants were not represented for most of those 9 months. They point out that their relative inexperience represented difficult hurdles, both in assembling the information they believed would be necessary to support their complaint, and in appreciating the Board's procedures and the ways in which a multiplicity of complaints could best be managed.
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> [46] A decision is reasonable if it is sufficiently explained and it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47. In my view, the record discloses nothing unreasonable about the Board's decision not to extend the time limit in this case.
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> [47] It is true that the Board took an unsympathetic stance toward the difficulties faced by the complainants as they attempted to navigate unfamiliar territory and to ensure that their complaint, once made, could be handled efficiently. However, these difficult circumstances gave the complainants no legal right to have the Board exercise its discretion in their favour. In my view, the Board's decision to refuse the extension was a decision that fell within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law, and thus was reasonable. In my view, the application for judicial review should be dismissed.

[25] As mentioned in *Torres 526*, besides the fact the *Code* contains a time limit for filing a complaint, opposing parties should be able to know whether they have to preserve their evidence and prepare for a possible labour relations proceeding. Once the 90-day time limit has passed, they should be able to assume that the matter has ended.

[26] It would be prejudicial to healthy labour relations, where resources are limited, if trade unions and employers had to keep preparing for cases, such as Mr. Kerr's DFR complaint, if they could routinely be filed 19 months after the expiration of the *Code*'s time limit.

[27] In the Board's view, such uncertainty is not what the Legislator intended when it imposed a 90-day time limit in the *Code*. The Board will exercise its section 16(*m*.1) discretion in appropriate cases, as referenced in *Torres 526*, but that exercise is not automatic merely upon request.

[28] In this case, the Board is not the forum to remedy Mr. Kerr's issue regarding the advice he received about Arbitrator Teplitsky's decision. Rather, the Board has had to consider whether to accept a labour relations complaint which was filed long after the time limits in the *Code* had expired, about a matter the other parties were entitled to consider concluded.

[29] Given the length of the delay, even accepting Mr. Kerr's best-case scenario, the Board has not been convinced to exercise its discretion under section 16(*m*.1). Accordingly, the Board dismisses Mr. Kerr's complaint.

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

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

David P. Olsen
Member