Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Vicki Lacasse,

complainant,

and

Public Service Alliance of Canada,

respondent,

and

Royal Canadian Mint,

employer.

Board File: 30521-C
Neutral Citation: 2014 CIRB **739**
August 15, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. Robert Monette and Norman Rivard, Members.

Parties' Representatives of Record

Ms. Vicki Lacasse, on her own behalf;
Mr. Jacek Janczur, for the Public Service Alliance of Canada;
Mr. George Vuicic, for the Royal Canadian Mint.

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

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.

I. Nature of the Complaint

[1] On June 25, 2014, the Board received a duty of fair representation (DFR) complaint from Ms. Vicki Lacasse alleging that her bargaining agent, the Public Service Alliance of Canada (PSAC), 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] Ms. Lacasse had been a short-term employee at the Royal Canadian Mint (Mint) until her termination on August 17, 2012. Ms. Lacasse's DFR complaint asked the Board to reinstate her in her position at the Mint.

[3] PSAC filed a grievance contesting the Mint's decision to terminate Ms. Lacasse. In a June 2, 2014 decision, arbitrator John Manwaring dismissed Ms. Lacasse's grievance.

[4] The Board has examined Ms. Lacasse's complaint and determined that she did not establish a *prima facie* case that PSAC violated the *Code*.

[5] These are the Board's reasons.

II. Duty of Fair Representation

[6] Given the content of Ms. Lacasse's complaint, which referred to the merits of the arbitrator's decision, as well as her subjective impression of how PSAC legal counsel pleaded her arbitration case, the Board will first review certain key DFR principles.

A. Time limits for DFR complaints

[7] The *Code* at sections 97(1) and (2) contains a 90-day limit for the filing of complaints:

> 97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

> (*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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> ...
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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)

[8] The Board has a discretion at section 16(*m.1*) to extend this 90-day time limit, but will only do so if a complainant has satisfied it that exceptional circumstances exist: See *Perron-Martin*, 2014 CIRB 719.

B. *Prima facie* case review

[9] Due to the large number of DFR complaints, many of which misconstrue the Board's role, the Board has adopted a *prima facie* case process. The Board will not require the respondent trade union, or the employer, to respond to a complaint, unless it has first determined that the complainant has established a *prima facie* case.

[10] In other words, if the material facts as pleaded in the complaint, even if assumed to be true, do not support the finding of a *Code* violation, then the Board will dismiss the complaint without requiring any submissions from the trade union or the employer.

[11] The Board described its *prima facie* case process in *Browne*, 2012 CIRB 648 (*Browne 648*):

> **D–*Prima facie* case analysis**
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> [20] In section 37 cases, the Board conducts a *prima facie* case analysis when it considers a new complaint. Unless the complainant makes out a *prima facie* case of a *Code* violation, the Board will not call on the trade union and, to a lesser extent, the employer, to file a response. This process was recently explained in *Crispo*, 2010 CIRB 527:
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> > [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.
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> > [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 [*Blanchet*], 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.*
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> [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.**
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> (emphasis added)

[21] The quote from the FCA in *Blanchet*, in the extract above, emphasizes that it is not enough to claim arbitrariness or discrimination in order to bypass the *prima facie* analysis. The Board does not assume as true a complainant's legal conclusions, but instead analyzes the material facts in order to determine whether a *prima facie* case exists.

[22] The Board will accordingly ask itself in this case whether the material facts Ms. Browne pleaded demonstrate a *prima facie* violation of section 37 of the *Code*.

C. Other DFR principles

[12] Many DFR complaints contest a trade union's decision not to take a grievance to arbitration. This case is the exception in that Ms. Lacasse filed her complaint with the Board after she received an unfavourable decision from a labour arbitrator who had upheld the Mint's decision to terminate her employment.

[13] A complainant in a DFR complaint bears the burden of proof: *Scott*, 2014 CIRB 710 at paragraphs 97–102. In other words, Ms. Lacasse had the burden to demonstrate to the Board that PSAC violated the *Code*, at least on a *prima facie* case basis.

[14] In *Heitzmann*, 2014 CIRB 737, the Board noted that it is not a general appeal body which reviews any and all trade union decisions. Rather, section 37 establishes a very clear threshold

involving a trade union's representation that a complainant must pass in order to demonstrate a *prima facie Code* violation:

> [80] Similarly, Parliament did not intend for the Board to sit in appeal and pass judgment on the quality or reasonableness of a trade union's representation. Instead, section 37 is quite clear that a *Code* violation only occurs if a trade union's conduct meets the high threshold of being "arbitrary, discriminatory or in bad faith".

[15] Similarly, a DFR complaint cannot serve as a collateral attack on the merits of a labour arbitrator's decision. Labour arbitrators' decisions benefit from a privative clause at section 58 of the *Code*:

> 58. (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.
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> (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of their proceedings under this Part.

[16] The proper route to contest an arbitrator's decision would be by way of judicial review. The trade union decides whether to seek a judicial review.

[17] The Human Rights Tribunal of Ontario in *Taucar* v. *University of Western Ontario*, 2013 HRTO 597, upheld by the Divisional Court in *Taucar* v. *Human Rights Tribunal of Ontario*, 2014 ONSC 1818, commented on the importance of preventing collateral attacks on administrative decisions:

> [46] The second rationale the Tribunal has relied upon for extending the doctrine of judicial immunity to quasi-judicial decision-makers is to prevent collateral attacks on their decisions. The application of the doctrine of adjudicative immunity ensures that adjudicative decisions are reviewed through the proper channels of judicial review and appeal instead of by undertaking a legal proceeding against the adjudicator himself or herself. If parties are dissatisfied with the decisions of quasi-judicial decision makers, they may appeal these decisions or seek judicial review where available, but they are prevented from pursuing litigation against them before the Tribunal. See for example, *Hazel* at para. 98 and *Bin Slama* at para. 14.

[18] For similar reasons, a DFR complaint is not an appropriate method to contest the merits of an unfavourable arbitral decision.

[19] Various decisions note that the Board's role in a DFR complaint generally does not involve reviewing how legal counsel may have pleaded a case at arbitration.

[20] For example, in *Bomongo* v. *Communications, Energy and Paperworkers Union of Canada*, 2010 FCA 126 (Bomongo), the Federal Court of Appeal (FCA) commented on the Board's limited role in this area:

> [15] In this Court, the applicants are alleging that the Board did not take into account conduct which is, in fact, beyond the scope of its mandate when analyzing a section 37 complaint. For example, as previously mentioned, the applicants are once again challenging the conduct of counsel for the Union by criticizing her for having failed to object to the admissibility of a piece of evidence before the arbitrator, whereas section 60 of the *Code* gives the arbitrator the power to receive and accept such evidence as the arbitrator in his or her discretion sees fit, whether admissible in a court of law or not. In any case, the hearing had only just begun, and the evidence was filed subject to its admissibility and to any other objection. The applicants misunderstood and misinterpreted the initial stages of the conduct of proceedings before the arbitrator. **It may easily be understood that the Board must not rashly involve itself with the quality of representation before the arbitrator or the matter of the competency or strategy of counsel for the Union**.
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> (emphasis added)

[21] In a plenary decision of the Canada Labour Relations Board (CLRB) in *Rousseau* (1996), 102 di 17 (CLRB no. 1173), this Board's predecessor described its role in this area as being one of "circumspection". The Board has at best a very limited role to play with respect to the quality of representation at arbitration and will only examine the conduct of the union or of counsel in very unusual circumstances.

[22] In *Lucio Samperi* (1982), 49 di 40; [1982] 2 Can LRBR 207; and 82 CLLC 16,172 (CLRB no. 376), the CLRB commented on the types of rare situations which might invite Board review:

> Human behaviour is too diverse for the establishment of unequivocal rules. **We cannot say the duty of fair representation has absolutely no role during the arbitration process. There may be the extreme case where a union in bad faith merely puts on a charade with employer collusion or the union representative or counsel appears inebriated.** Those like all cases in this area will turn on their facts. The message is, however, that this Board will not, through the duty of fair representation, microscopically review union conduct during arbitration proceedings.
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> (pages 51; 214–215; and 710)
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> (emphasis added)

III. Analysis and Decision

A. 90-day delay

[23] The *Code* contains a 90-day delay, *supra*, in order to require all parties, whether employers, trade unions or employees, to bring their disputes to the Board without delay. In *Kerr*, 2012 CIRB 631, the Board noted that it will not routinely extend the 90-day delay:

> [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.
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> [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.
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> ...
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> [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.

[24] Ms. Lacasse's complaint makes it clear that she advised PSAC of her arbitration concerns long before she filed her DFR complaint on June 25, 2014. Following her October, 2013 arbitration hearing, Ms. Lacasse wrote a November 18, 2013 letter to PSAC to express her disappointment about the quality of the representation she had received at arbitration (Appendix 2 to the complaint).

[25] On January 8, 2014, PSAC sent a detailed response to Ms. Lacasse (Appendix 3 to the complaint).

[26] Despite her concerns, Ms. Lacasse did not file her DFR complaint with the Board until more than six months later.

[27] The time it takes an arbitrator to draft an award does not interrupt the *Code*'s time limits. The Board is satisfied that Ms. Lacasse knew, or ought to have known, of the circumstances giving rise to her complaint by January 8, 2014 at the latest, when she received PSAC's detailed response to the concerns she raised about the arbitration.

[28] In any event, even if Ms. Lacasse's complaint had been timely, the material facts she pleaded did not raise a *prima facie* case of a *Code* violation.

B. Carriage of a grievance

[29] A review of Ms. Lacasse's complaint suggests that she may not have fully understood the well-known labour relations principle that the certified bargaining agent, PSAC, had carriage of her grievance. For example, on page 5 of her complaint, she implied that legal counsel's explanation of his mandate supported her allegation that PSAC had violated the *Code*:

> At one point in the arbitration process, I said to the PSAC lawyer – "you are representing me in this case. His direct response to me was "I'm not representing you – I'm representing the union – I am not your lawyer." It is to be noted too, he did not feel it necessary to have any witnesses at the trial whereby the other side had many witnesses.

[30] One of the key decisions any bargaining agent must make concerns which cases it will take to arbitration. A bargaining agent is not bound to take whatever steps a member of the bargaining unit might request: *Kasim,* 2008 CIRB 432, at paragraph 21:

> [21] In order to analyze whether a bargaining agent respected the duty imposed by the *Code*, the Board examines the process it followed in its representation of an employee. A bargaining agent is not comparable to a private sector lawyer who is obliged to follow the specific instructions of the client. Rather, in almost all cases, the bargaining agent has carriage of the grievance and, while it needs to communicate with the employee in question, retains the discretion to decide what to do with the grievance.

C. Legal counsel at arbitration

[31] Ms. Lacasse's complaint referred to various ways in which she believed that PSAC's lawyer ought to have pleaded her case differently. She noted, *inter alia*, and the Board emphasizes these are only one party's unproven allegations, that the lawyer could have challenged more thoroughly the Mint's witnesses, contested the extent of the Mint's progressive discipline, called a witness she had proposed and taken more time to prepare the case.

[32] Even if one accepts these material facts as true, they simply amount to a dispute about how a trained legal counsel pleaded a case. Both the Federal Court of Appeal in *Bomongo, supra,* and this Board in *Browne 648, supra*, have emphasized that the Board should not micromanage a lawyer's pleading of a grievance.

[33] What Ms. Lacasse's complaint does demonstrate is that PSAC filed a grievance contesting her termination. PSAC took that grievance all the way to arbitration. PSAC used legal counsel to

prepare and plead Ms. Lacasse's case. That oral hearing before an independent arbitrator took four days: October 17, 18, 24 and 25, 2013.

[34] PSAC's extensive representation efforts demonstrate why Ms. Lacasse was unable to satisfy her burden of showing a *prima facie* case for a *Code* violation.

D. Merits of the arbitral decision

[35] Pages 7–10 of Ms. Lacasse's complaint summarize the events which led to her suspension and later termination. This may have been included in her complaint given her remedial request to this Board to reinstate her in her employment.

[36] Ms. Lacasse's complaint included various appendices, including Appendix 5, entitled "Response to Arbitrator's decision". Appendix 5 detailed her specific disagreements with the arbitrator's factual and legal findings. It appears from the complaint at page 6 that Ms. Lacasse sent this "Response" to the arbitrator.

[37] The Board in a DFR complaint examines the trade union's process: *Singh*, 2012 CIRB 639, paragraphs 81–86. As explained above, PSAC took all the collective agreement steps it could to ensure Ms. Lacasse received a full arbitral hearing about her termination. The content of the arbitral decision is evidently not something PSAC controls.

[38] The Board will not review a labour arbitrator's factual and legal conclusions. Not only does that fall outside the Board's DFR jurisdiction, which focuses on the trade union's actions, but to do so would constitute an impermissible collateral attack on an arbitral decision: *Taucar, supra*.

IV. Summary

[39] The Board has examined Ms. Lacasse's complaint.

[40] In her November 18, 2013 letter (Appendix 2), Ms. Lacasse raised her concerns with PSAC about the representation she received at arbitration. PSAC responded to her in significant detail via its January 8, 2014 3-page letter.

[41] Ms. Lacasse knew, or ought to have known, of PSAC's alleged *Code* violation in January, 2014. She only filed her DFR complaint on June 25, 2014. The *Code*'s 90-day time limit is not suspended merely because Ms. Lacasse waited to learn of the arbitrator's decision. If Ms. Lacasse felt that PSAC had violated the *Code*, then Ms. Lacasse ought to have filed her complaint within 90 days of PSAC's January 8, 2014 letter.

[42] In any event, the Board's *prima facie* case analysis showed that Ms. Lacasse's complaint, even if timely, did not demonstrate that PSAC violated the *Code*.

[43] The Board focuses on a trade union's process when evaluating a DFR complaint. PSAC's process included taking Ms. Lacasse's termination before an arbitrator and representing her at a 4-day oral hearing. The complaints Ms. Lacasse put forward about how her case was pleaded fell far short of showing arbitrary, discriminatory or bad faith conduct on the part of PSAC. Ms. Lacasse did not meet her burden of demonstrating to the Board that PSAC's conduct amounted to arbitrary, discriminatory or bad faith conduct with regard to her rights under the collective agreement.

[44] The Board dismisses the complaint.

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

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Graham J. Clarke
Vice-Chairperson

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Robert Monette
Member

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Norman Rivard
Member