Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Sukhwant Rai,

complainant,

and

National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (now known as Unifor),

respondent,

and

Loomis Express (Canada) Ltd.,

employer.

Board File: 30527-C
Neutral Citation: 2014 CIRB **743**
October 20, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*).

Parties' Representatives

Mr. Sukhwant Rai, on his own behalf;
President, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (now known as Unifor);
Mr. Steve King, for Loomis Express (Canada) Ltd.

Section 16.1 of the *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 procedural decision without an oral hearing.

I. Nature of the Complaint

[1] On June 27, 2014, Mr. Sukhwant Rai filed a duty of fair representation (DFR) complaint against his trade union, the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Unifor), alleging a violation of 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 complaint arises from Mr. Rai's former employment with Loomis Express (Canada) Ltd. (Loomis) and Unifor's representation of his interests.

[3] Mr. Rai's complaint raises a procedural issue due to his decision to append just under 2000 pages of unreferenced documents.

[4] The Board has decided, for the reasons explained below, to order Mr. Rai to recast his pleading.

[5] The Board will provide Mr. Rai with an opportunity to identify the specific allegations he is making against Unifor and to provide proper references to any pages in his documentation he believes relevant. The Board will then proceed with its mandatory *prima facie* case analysis.

II. The DFR Process

A. Scope of a DFR Complaint

[6] A DFR complaint is tied to the wording of section 37 of the *Code*. It is a complainant's obligation to plead in what way his/her trade union allegedly acted in a manner that was arbitrary, discriminatory or in bad faith with regard to rights under the collective agreement.

[7] The Board is not a general appeal body examining any and all decisions trade unions make as they represent members of a bargaining unit. Similarly, the Board does not examine disputes a complainant may have with his/her employer. The collective agreement governs those issues.

B. *Prima Facie* Case Analysis

[8] Because of the number of DFR complaints it receives, the Board has adopted a *prima facie* case analysis. Before requiring the respondent trade union to respond to a complaint, the Board has to be satisfied that the complainant has made out a *prima facie* case that a *Code* violation occurred.

[9] The Board described this *prima facie* case process in *Lacasse*, 2014 CIRB 739 (*Lacasse 739*):

> **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.
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> [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**
> >
> > [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:
> >
> > > [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 [*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*.
>
> [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.**
>
> (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.
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> [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*.

(emphasis in original)

C. 90-day Time Limit for DFR Complaints

[10] The *Code* also contains an explicit 90-day time limit for DFR complaints. *Lacasse 739, supra*, also commented on this delay:

> **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

...

> (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.
>
> (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.

(emphasis in original)

[11] The Board applies this 90-day time limit by deciding when a complainant knew, or ought to have known, of the circumstances giving rise to the complaint.

III. Drafting a DFR Complaint

[12] The Board is sensitive to the fact that most DFR complainants are self-represented. The Board must strike a balance between ensuring access to justice while respecting other parties' rights to a fair and efficient administrative law process.

[13] In *Reid*, 2013 CIRB 693 (*Reid 693*), the Board explored the challenges labour relations boards have faced when confronted with a DFR complainant's unwieldy pleading:

> [26] What should the Board do in the face of 356 pages of generally unfocussed material filed as a DFR complaint?
>
> [27] Other labour boards in Canada have had to deal with this same issue.
>
> [28] For example, the British Columbia Labour Relations Board (BCLRB) follows a similar *prima facie* case analysis for its DFR complaints. In *John Murphy*, [2005] B.C.L.R.B.D. No. 33 (*Murphy*), the BCLRB commented on the challenges for a tribunal which has to wade through a large swath of unorganized material:
>
> ...
>
> [9] I endorse the views expressed by the original panel regarding the lack of details of the alleged violations of the *Code*. Murphy failed to explain how he says the Union and others actually violated the *Code*. **I agree with the original panel that a party bringing a complaint before the Board is obliged to provide coherent submissions setting out relevant facts and cannot simply file volumes of documents and expect the Board to search through them to find some evidence that might be relevant.**

> **[10] I would add that it is not enough for a complainant to raise a bald allegation of impropriety and attach a body of documents and expect that the Board will divine how those documents demonstrate a breach of the *Code* or support the bald assertions of impropriety.**
>
> **[11] The basic requirement to provide an explanation of how a breach is alleged to have occurred is reinforced in the Board's Rules. Section 2(2) requires that an application contain an outline of the facts and circumstances upon which the applicant intends to rely, including when and where relevant facts occurred and who engaged in the alleged breaches of the *Code*.**
>
> …
>
> (emphasis added)

[29] In *Murphy*, *supra*, the BCLRB dismissed the complaint.

[30] The Ontario Labour Relations Board in *Manuel-Bolduc*, [2007] O.L.R.D. No. 5171, similarly considered a complainant's pleading and ordered the preparation of a particularized, concise pleading:

> **[3] The applicant has filed submissions and documents totalling approximately 1.25 inches in volume. As submitted by the union, the sheer volume makes it very difficult to decipher and respond to the application.**
>
> **[4] The applicant is directed to particularize her complaint in numbered paragraphs, totalling no more than five pages.**
>
> [5] The applicant is to file her submissions and serve them on the other two parties by no later than Monday, January 14, 2008, failing which, her application will be dismissed.
>
> [6] The other parties are not required to file submissions in response to the applicant's submissions unless the board indicates otherwise.
>
> [7] I remain seized of this application for the purposes of dealing with the applicant's submissions only.
>
> (emphasis added)

[31] The Board shares these views emanating from other labour tribunals. In some cases, such as in *Murphy*, *supra*, an unwieldy pleading may simply lead to the case being dismissed. In other cases, such as in *Manuel-Bolduc*, *supra*, if the Board's review reveals a semblance of a complaint, then it may give a complainant an opportunity to particularize and focus his/her pleading.

(emphasis in original)

[14] As noted in the references in *Reid 693*, *supra*, it is not up to the Board to search through reams of documents in order to discover whether any cause of action exists. A complainant, even if unrepresented, must still provide a coherent pleading. If significant documentation is required to support that pleading, then it is up to the complainant to refer to, and explain, the relevance of the various documents.

[15] The Board in *Reid 693*, *supra*, while it could have dismissed the complaint, decided to provide her with an opportunity to recast her pleading in order to respect the intent of the *Canada Industrial Relations Board Regulations*, *2012* (*Regulations*) when it comes to pleading:

> [32] As mentioned above, the Board is fully aware that Ms. Reid, like many unrepresented litigants, may not be familiar with the *Code*. But a complainant still has the ultimate obligation of going through his/her own material, including allegedly relevant documents, and drafting a complaint in accordance with the *Regulations*. That obligation is not satisfied by filing hundreds of pages of documents and implicitly asking the Board to go through it and decide what, if anything, should form part of a complaint.
>
> [33] It would be unfair in a DFR case for the Board to forego the essential *prima facie* case screening analysis of an unwieldy pleading and instead ask the respondents to provide their submissions. One of the goals of the *prima facie* process is to avoid the waste of resources which occurred in the past when respondents had to respond to every DFR complaint, no matter how deficient.
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> [34] The quid pro quo is that respondents must now take the time necessary to respond properly in those cases where the Board requests submissions after finding that a *prima facie* case exists.
>
> [35] In this case, the Board is not prepared to dismiss Ms. Reid's complaint outright, though that is an available option in the right circumstances. While the complaint is unfocussed, Ms. Reid initially attempted to set out her concerns with regard to CUPW's alleged actions.
>
> [36] However, it will be up to Ms. Reid to provide a proper and focussed pleading.

IV. Decision

[16] Mr. Rai's complaint covers a significant time period. For example, he provided a chronology of various events starting as far back as 2008. He also complained about some of Loomis' alleged actions.

[17] At page 23 of Mr. Rai's pleading, he starts repeating the exact same 25 paragraphs he already included starting at page 6.

[18] The Board has conducted a general review of the almost 2000 pages Mr. Rai submitted with his complaint. The complaint itself does not refer to any specific pages in these documents. Instead, Mr. Rai simply asks the Board to review them: "…I attached all the complaints and

grievance and e-mails (page 1 to 1950) evidence with this and please read as part of my evidences." (page 5 complaint) [*sic*].

[19] It is not up to the Board to review disparate documentation appended to a complaint. Rather, if Mr. Rai believes that some, or all, of this extensive documentation is relevant to a proper DFR complaint, then it is up to him to explain that relevance with precision. This is especially the case given that the Board is not obliged to hold an oral hearing for its cases: section 16.1 of the *Code*.

[20] In a DFR matter, the Board must initially conduct its *prima facie* case analysis. The Board must therefore sometimes intervene when faced with this type of shotgun approach to pleading. If the Board did not have a *prima facie* process, then the respondent trade union would no doubt have immediately brought a motion contesting Mr. Rai's pleading.

[21] Since the *prima facie* case analysis is designed to prevent party resources being expended on complaints which fail to raise a *prima facie* case, the Board will have to take such proactive measures as part of its screening process.

[22] The Board accordingly orders Mr. Rai to do the following:

i. Given the scope of a DFR complaint as explained in this decision, identify clearly in what ways, and when, Unifor allegedly acted "in a manner that is arbitrary, discriminatory or in bad faith" with respect to his rights under the collective agreement (see section 37 of the *Code*); and
ii. Identify which specific pages in his already-filed documents relate to these incidents, together with an explanation of their relevance.

[23] Mr. Rai will have until November 17, 2014, four weeks from the date of this decision, to comply with the Board's direction.

Graham J. Clarke
Vice-Chairperson