Federal Court of Appeal Cour d'appel fédérale

Date: 20160517

Docket: A-299-15

Citation: 2016 FCA 151

CORAM: DAWSON J.A.
RYER J.A.
DE MONTIGNY J.A.

BETWEEN:

CLINTON MADRIGGA

Applicant

and

TEAMSTERS CANADA RAIL CONFERENCE AND CANADIAN NATIONAL RAILWAY COMPANY

Respondents

Heard at Winnipeg, Manitoba, on March 1, 2016.

Judgment delivered at Ottawa, Ontario, on May 17, 2016.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: DAWSON J.A.
RYER J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This application arises out of two complaints filed by Mr. Clinton Madrigga (the applicant) alleging that the Teamsters Canada Rail Conference (the respondent or the TCRC) had violated section 37 (duty of fair representation) and subsection 95(*g*) (prohibition against taking disciplinary action in a discriminatory manner) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code), in the course of establishing his seniority as a locomotive engineer.

[2] In a decision dated June 12, 2014, the Canada Industrial Relations Board (the Board) dismissed the applicant's complaints. The applicant did not seek judicial review of that decision. Rather, the applicant requested that the Board reconsider its decision. On February 11, 2015, the Board dismissed that request. It is that decision that the applicant now seeks to set aside by way of judicial review.

[3] For the reasons set out below, it is my view that there is no ground for this Court to intervene and the application should be dismissed.

I. Facts

[4] The respondent represents a number of bargaining units at the Canadian National Railway Company (the employer or CN), including the conductors, trainmen and yardmen (CTY) and the locomotive engineers (LE) units. Since it is common in the railway industry for CTY employees to aspire to become LEs, article 137 of the CTY collective bargaining agreement outlines the process to be followed for the employees it covers to receive the LE training. Once an employee qualifies and makes his or her first trip as a LE, he or she begins to acquire seniority as such. Article 56 of the LE collective bargaining agreement further provides that an employee's seniority can be carried over from the CTY bargaining unit to the LE bargaining unit if the employee in question takes the LE training at the first possible opportunity.

[5] The applicant was hired as a car checker and chauffeur in 1988, subsequently became a brakeman/yardman, and qualified as a traffic coordinator in 2001. After being on sick leave from July 22 to December 10, 2007, the employer offered him the opportunity to enrol in the LE

training in March 2008. However, this offer was subsequently withdrawn and there is a dispute between the parties as to why that happened. According to the applicant, he was held back because the employer required him to work as a traffic coordinator, whereas the union and the employer affirm that the applicant was denied the LE training because of issues related to his attendance record. Although the applicant then expressed concerns to the employer and to the union representing the CTY unit at that time (the United Transportation Union), no grievance was filed in relation to this event.

[6] In June 2008, the applicant was released from his duties as a traffic coordinator, but was still not offered the LE training. In June 2008 and in March 2009, he was assessed demerit points for attendance issues and a missed call. Those demerits were ultimately expunged from the applicant's disciplinary record and substituted with a letter of reprimand in August 2011, due to successful grievances by the TCRC. The applicant did not apply for the LE training in 2009 and 2010 since he believed he was not eligible to do so as a result of his disciplinary record.

[7] In October 2011, the applicant applied for and was admitted into the LE training, which he completed on September 4, 2012. At that time, his seniority number was 925. However, it dropped to 1368 shortly thereafter at the request of the respondent. On December 12, 2012, the applicant filed a seniority appeal with the TCRC. He argued that he should not be deprived of the long established practice of the parties to assign LE seniority as if an employee had entered LE training in seniority order, when that employee had been withheld from LE training to work in other service at the direction of the employer. His appeal was denied on October 15, 2013 on the grounds that the appeal was untimely and that there was no evidence to support it.

[8] On January 13, 2014, the applicant filed two applications with the Board alleging that the respondent had breached section 37 and subsection 95(*g*) of the Code. These two applications were later consolidated pursuant to section 20 of the Code, as they arose from the same circumstances.

II. The Board's Original Decision (2014 CIRB LD 3230)

[9] Noting from the outset that it was satisfied with the written materials on file, the Board exercised its discretion under section 16.1 of the Code not to hold an oral hearing despite the applicant's request.

[10] The Board held that the applicant did not ask the union to file a grievance on his behalf in March 2008 when he was held out of the LE training by the employer and that the union did not have the obligation to proactively take action in this regard. The Board also noted that the TCRC was not the bargaining agent in March 2008, as it did not obtain this status until September 2008. The Board found that the complaint was untimely and that there was no ground for a duty of fair representation complaint against the respondent. The Board accordingly dismissed this portion of the complaint.

[11] Turning to the change in the applicant's seniority number, the Board stated that the section 37 complaint was clearly untimely. It should have been brought within 90 days of October 5, 2012, the date the applicant was made aware that his seniority number had been changed. However, the complaint was filed with the Board on January 13, 2014. Given that the

applicant provided no justification for his failure to file in a timely manner, the Board declined to grant an extension of time.

[12] Nonetheless, the Board found that the portion of the complaint alleging a violation of subsection 95(*g*) of the Code was timely since, according to subsection 97(4), the applicant first had to exhaust the internal union appeal process. On the merits of the subsection 95(*g*) complaint, the Board held that it was essentially a dispute between the applicant and the union over the interpretation and application of a provision of the collective bargaining agreement, and that there was no evidence that the union applied any discipline to the applicant.

[13] With regard to the union's handling of the applicant's seniority appeal, the Board stated that the applicant failed to establish that the union's conduct was arbitrary, discriminatory or in bad faith as he was required to do in order to demonstrate a violation of section 37. The Board emphasized that, even assuming the employer was wrong to rely on the applicant's lengthy absence from work in 2007 to hold him out of the LE training in 2008, this was not a relevant consideration in this complaint against the union. The TCRC dismissed the applicant's seniority appeal because it was untimely and there was no evidence to support it. According to the Board, those were not arbitrary or discriminatory considerations.

[14] The Board also found that the applicant's seniority appeal was not a disciplinary process and as a result, dismissed the complaint under subsection 95(*g*). In response to the applicant's argument that the union should have advised him without delay when the demerits had been expunged from his record making him eligible for training, the Board decided that "the union

cannot be held responsible for the consequences of the [applicant]'s own failure to obtain accurate information" (original decision, p. 9) and that a section 37 complaint regarding those events was untimely.

III. The Board's Reconsideration Decision (2015 CIRB LD 3366)

[15] As previously mentioned, the applicant did not file an application for judicial review of the Board's original decision. Instead, he requested that the Board reconsider its decision pursuant to section 18 of the Code.

[16] The Board noted that, on June 18, 2014, the TCRC issued to its membership Circular #1/14 which essentially informed members that:

> Simply put, the application is that a Conductor must take training at their first opportunity in order to retain their relative standing as a Locomotive Engineer. It is not open to a Conductor to choose to wait for a subsequent class some years later and then claim that their seniority as an Engineer should reflect their original position relative to other Conductors. There are, however, certain circumstances which would justify a Conductor retaining his turn even though they did not attend at their first opportunity. An example of such would be illness, being held back in other service at the direction of the Company, or other such situation. If a Conductor feels that he has not been trained in the proper order or has been by-passed, it is incumbent on that Conductor to contact the Company to enquire as to why he or she was not given the training in the proper order. If the Conductor does not agree with the information provided by the Company, then it may be necessary to file a grievance. Article 110 is very clear that there is a strict 60 day time limit for seniority appeals. Failure to adhere to that time limit will lead to any seniority appeal being dismissed, absent compelling reasons. [emphasis added]

[17] After having listed the principles applicable to reconsideration applications, the Board affirmed that it is not required to hold an oral hearing in every file as long as it grants the parties an opportunity to present their case.

[18] The Board held that the applicant's assertions that he had been treated differently than other employees were mere allegations unsupported by evidence. Furthermore, the Board declared itself satisfied with the respondent's explanation about the treatment of other employees – an explanation that the respondent had no obligation to give since the onus of proof was on the applicant.

[19] The Board also found that an "employee's mistaken belief as to a union's obligations to proactively protect his interests does not constitute grounds for a finding of a breach" of its duty of fair representation (reconsideration decision, p. 10). Furthermore, the applicant's mistaken belief that he had to bring an internal appeal regarding his seniority before filing a duty of fair representation complaint, did not justify the grant of an extension of time. Finally, the Board also held that Circular #1/14 did not assist the applicant's case, since it was consistent with the submissions provided by the union to the Board in the proceedings regarding the applicant's original complaint.

[20] The Board concluded by stating that the applicant failed to establish that the respondent treated him differently from other members and that he had "not demonstrated how any of the union's actions constituted the application of its standards of discipline, let alone that those standards were applied to him in a discriminatory manner" (reconsideration decision, p. 10).

[21] In the result, the Board dismissed the application for reconsideration.

IV. Issues

[22] In my view, the present application for judicial review raises the following questions:

A. Did the Board err in refusing to hold an oral hearing?

B. Was the applicant's section 37 complaint untimely? Did the Board err in refusing to grant an extension of time?

C. Did the Board err in deciding that the applicant had to prove his case using affidavit evidence?

V. Analysis

[23] Before dealing with the substance of the issues raised by the applicant, the Court must deal briefly with the respondent's submission that this application is moot because a review of the reconsideration decision cannot lead to an alteration of the June 12, 2014 decision. It is no doubt true that the jurisprudence of this Court is to the effect that a final decision of the Board cannot be challenged collaterally through an appeal of the reconsideration decision: see *Lamoureux v. C.A.L.P.A.*, [1993] F.C.J. No. 1128, 1993 CarswellNat 2215; *Sarty v. Canada (Labour Relations Board)*, [1987] F.C.J. No. 310, 1987 CarswellNat 1279; *Ager v. U.T.U., Local 701*, [1991] F.C.J. No. 216, 1991 CarswellNat 1252.

[24] In the case at bar, however, the applicant is not trying to attack indirectly the original decision of the Board. First of all, the applicant is not challenging any of the findings relating to his section 95 complaint. More importantly, the issues raised by the applicant in this application for judicial review were brought before the Board and addressed in its reconsideration decision;

to that extent, therefore, the present application is not a collateral attack on the initial decision of the Board. Of course, if this Court were to grant this application, a new reconsideration decision could vary the initial decision, as was acknowledged by counsel for the respondent at the hearing. This is different, however, from a collateral attack. For these reasons, therefore, this application is not moot and the issues raised by the applicant must be analyzed.

A. *Did the Board err in refusing to hold an oral hearing?*

[25] The applicant submits that there was significant contradictory evidence before the Board, as a result of which an oral hearing should have been ordered. He points, in particular, to the contradictory versions as to whether there was a practice of maintaining the seniority of an employee who is held out of LE training to work in the position of traffic coordinator and as to why he was held out of LE training in 2008.

[26] As a matter of general principle, the Board has full control over its own procedure. In addition, section 16.1 of the Code explicitly provides that the Board has the discretion not to hold an oral hearing:

Determination without oral hearing	**Décision sans audience**
16.1 The Board may decide any matter before it without holding an oral hearing.	**16.1** Le Conseil peut trancher toute affaire ou question dont il est saisi sans tenir d'audience.

[27] The Board is not required to hold an oral hearing on every occasion that one is requested. Nor does the fact that there is contradictory evidence automatically warrant an oral hearing. As

this Court stated in *Grain Services Union (ILWU-Canada) v. Frisen*, 2010 FCA 339, at para. 24, 414 N.R. 171:

> Our Court has also found, in the context of a complaint of unfair representation under section 37 of the *Code*, that the mere fact that evidence is contradictory does not automatically warrant an oral hearing before the Board absent other compelling reasons. Indeed, since many credibility issues will almost unavoidably arise in a labour relations context, section 16.1 of the *Code* would potentially be deprived of effect if it were otherwise interpreted and applied: *Nadeau v. United Steelworkers of America*, 2009 FCA 100, 400 N.R. 246 at para. 6; *Guan v. Purolator Courier Ltd.*, 2010 FCA 103 at para. 28; see also in a different legislative context *Vancouver Wharves Ltd. v. International Longshoremen's and Warehousemen's Union, Ship and Dock Foremen, Local 514 (F.C.A.)* (1985), 60 N.R. 118.

[28] Given the importance of the principle of finality, as stressed by the Board, it is important that complainants present all relevant facts and arguments in support of their complaint in writing. In the case at bar, the parties did have the opportunity to file with the Board the written submissions they found appropriate, and those submissions do not raise important credibility issues that would require an oral hearing. A mere credibility issue, without more, does not amount to a "compelling reason" that warrants granting judicial review against the Board for its refusal to hold an oral hearing.

[29] Moreover, the fact that there may have been confusion amongst the membership as to the practice followed when an employee is held back from LE training in order to work in another position does not assist the applicant, as noted by the Board. Even if there was a practice to maintain the seniority of an employee in such circumstances, the evidence supporting the applicant's claim that his circumstances qualified him for such differential treatment was at best tenuous. In any event, this was a battle that he lost in 2008 when he failed to file a timely

grievance alleging that he was wrongfully denied LE training in seniority order, and oral evidence submitted at the reconsideration stage could not have turned the clock back.

[30] For those reasons, the Board committed no reviewable error in concluding that an oral hearing was not required.

B. *Was the applicant's section 37 complaint untimely? Did the Board err in refusing to grant an extension of time?*

[31] The applicant argues that his section 37 complaint was timely because the time limits set out in subsection 97(2) of the Code run only once a final decision has been made by the union. That only happened on October 15, 2013, when the union made its final decision in respect of the seniority appeal filed on behalf of the applicant. Accordingly, the applicant states that his section 37 complaint was timely as it was filed on or about January 13, 2014.

[32] Subsection 97(2) of the Code sets out a strict requirement that "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". In its original decision, the Board found as a fact that the date the applicant knew or ought to have known about the actions giving rise to his complaint – i.e. that his seniority had been amended at the TCRC's request - was October 5, 2012. Not only is that decision consistent with the Board's jurisprudence that internal union processes do not interrupt the mandatory 90-day time limit for the filing of section 37 complaints (see *Auto Haulaway Ltd. (Re)* (1987), 72 di 127, 19 C.L.R.B.R. (N.S.) 196; *Coull* (1992), 89 di

64, 17 C.L.R.B. (2d) 301; *Pinel (Re)*, 1999 CIRB 19, [1999] C.I.R.B.D. No. 19), but it was not challenged by the applicant in his application for reconsideration. As a result, he is precluded from raising that argument before this Court.

[33] As for the Board's refusal to grant an extension of time to file a complaint pursuant to section 37 of the Code, it is well established that such a decision is a discretionary one. As a result, it will be found reasonable unless it is not sufficiently explained or does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47, [2008] 1 S.C.R. 190. In its decision, the Board held that the applicant's mistaken belief that he had to bring an internal appeal regarding his seniority before filing a duty to fair representation complaint does not justify the grant of an extension of time. In my view, there is nothing unreasonable in that finding; considering the high deference to which the Board is entitled when making discretionary decisions, it ought not to be disturbed on judicial review.

C. *Did the Board err in deciding that the applicant had to prove his case using affidavit evidence?*

[34] The applicant affirms that it was unreasonable for the Board to rely on the fact that he did not submit affidavit evidence to support his allegation that he had been treated differently from other employees since there is no statutory obligation to submit affidavits.

[35] At page 9 of its reconsideration decision, the Board stated:

> The applicant asserts that he has been treated differently from other employees, but on both occasions he failed to submit affidavits from any of these employees

> to support his allegations. Consequently, his assertions remain nothing more than allegations.

[36] These comments must be put into context. The applicant asserted that he had been treated differently from other employees, but failed to particularize his allegations with any cogent evidence. As noted by the Board, the onus was on the applicant to make out his case and to substantiate his allegations of unequal treatment. It is in that perspective that the comments of the Board must be read. Affidavit evidence would clearly have been helpful to support the applicant's claim; nothing more should be read into the Board's passing remark, and it certainly does not amount to a requirement to submit affidavits.

VI. Conclusion

[37] For all of the above reasons, I would dismiss the application for judicial review with costs.

"Yves de Montigny"
J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
C. Michael Ryer J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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