

Date: 20090331

Docket: A-502-07

Citation: 2009 FCA 100

**CORAM: LÉTOURNEAU J.A.
NADON J.A.
PELLETIER J.A.**

BETWEEN:

BENOÎT NADEAU

Applicant

and

**UNITED STEELWORKERS OF AMERICA (F.T.Q.) and
GARDA SECURITY GROUP INC.**

Respondents

Hearing held at Montréal, Quebec, on March 30, 2009.

Judgment delivered at Montréal, Quebec, on March 31, 2009.

REASONS FOR JUDGMENT BY:

LÉTOURNEAU J.A.

CONCURRED IN BY:

**NADON J.A.
PELLETIER J.A.**

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The applicant is objecting to a decision of the Canada Industrial Relations Board (Board). First, he alleges that the Board failed to hold an oral hearing even though one had been requested and even though, in his view, one was warranted.

[2] Second, he submits that the Board made a serious and patently unreasonable error in finding that the union had not breached section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (Code) in its handling of the grievance filed by the applicant. Section 37 addresses a trade union's duty to adequately and fairly represent the employees in the bargaining unit.

[3] Section 16.1 of the Code gives the Board the power to decide any matter before it without holding an oral hearing, even when one has been requested: see *Nav Canada v. International Brotherhood of Electrical Workers, Local 2228*, 2001 FCA 30, at paragraphs 10 and 11.

[4] Counsel for the applicant, who was not his counsel before the Board, recognizes that the Board enjoys discretion in that regard; however, relying on the decision of our colleague Justice Décarý in *Raymond v. Canadian Union of Postal Workers and Canada Post Corporation*, 2003 FCA 418, he submits that, in exceptional circumstances, it is possible to review the Board's decision to proceed solely on the basis of the evidence in the record, without holding an oral hearing. He referred the Court to paragraph 4 of that decision, which reads as follows:

[4] Section 16.1 of the Code provides that the Board may decide any matter before it without holding an oral hearing. This section was introduced by Chapter 26 of the Statutes of Canada, 1998, which repealed the former subsection 98(2) that allowed for circumstances in which the Board could refuse to hold a hearing on a complaint based on section 37. Therefore, the Board now has greater discretion in this respect and the Court must henceforth be more respectful of the Board's decisions about holding hearings, which was not the case prior to the statutory amendment of 1998. This is a matter of internal policy that is beyond the scope of judicial review barring exceptional circumstances.

[Emphasis added]

[5] Counsel for the applicant submits that, in this case, the exceptional circumstances lie in an issue of the credibility of a witness, specifically, the applicant's mother, who denies having received a telephone call from her son's employer informing her that he had dismissed her son, as claimed by the employer.

[6] With respect, I do not agree that, in the context of a section 37 complaint, credibility issues generally constitute exceptional circumstances requiring the Board to hold an oral hearing and that the failure to do so may be used as a basis for a valid application for judicial review. Credibility issues almost inevitably arise in antagonistic employer-employee relations, such that section 16.1 would then be rendered completely meaningless and deprived of Parliament's intended effect.

[7] It is important to bear in mind that the issue under section 37 of the Code is not the merits of the complainant's grievance but rather the union's decision-making process. The Board "examines the union's conduct as to how the union managed the employee's grievance": see *Virginia McRaeJackson et al.*, [2004] CIRB no. 290, at paragraphs 10 to 12.

[8] Like the Board, the union is faced with the employer's and employee's different and even contradictory versions of the events at issue. In exercising its discretion, the union must, among other things, analyze the evidence and weigh the probative value in order to determine whether it should pursue the grievance initiated by the complainant and represent the complainant before the Board. It must exercise its discretion "in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its

consequences for the employee on the one hand and the legitimate interests of the union on the other”: see *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, at page 527.

[9] In the case before this Court, the union sought a legal opinion from experienced counsel regarding the rights of the seventeen (17) probationary employees, including the applicant, and the employer’s right to terminate their contract of employment: see the record of the respondent United Steelworkers of America, at pages 133 to 153.

[10] Each of the seventeen (17) files was also specifically reviewed by that counsel. He focussed on the applicant’s employee status and the employer’s allegations against him in relation to his probationary period: *ibidem*, at pages 154 to 162.

[11] The counsel also referred to the applicant’s mother’s version, which was inconsistent with that of the employer, and stated that she would need to testify before the arbitrator if the grievance were advanced on its merits: *ibidem*, at page 154. The arbitrator, according to the counsel, would then need to assess the witnesses’ credibility: *ibidem*, at pages 155 and 156.

[12] It was brought to the Board’s attention that the applicant’s mother had filed an affidavit contradicting the employer’s version claiming that she had been informed over the telephone of her son’s dismissal. Counsel for the applicant had the opportunity to provide the Board with detailed comments on the applicant’s employment status, the union’s conduct in managing the grievance, the date of the applicant’s dismissal, the difference of opinion expressed by the applicant’s mother, the

acts of misconduct alleged by the employer and the legal opinion of the counsel retained by the union: *ibidem*, at pages 260 to 300, and more specifically at pages 270, 272, 280, 296 and 297 as regards the credibility issue raised by the divergent affidavit of the applicant's mother.

[13] Lastly, counsel for the applicant also provided the Board with comments on the fact-finding report prepared by a Board representative for the Board: *ibidem*, at pages 322 to 326. At page 326, he writes regarding the version of the applicant's mother:

[TRANSLATION]

The complainant also recalls that, throughout the proceedings before the Board, he demonstrated that the union never bothered to speak with the complainant's mother to obtain her version of the circumstances surrounding the complainant's dismissal and assess her credibility for a potential arbitration. That clearly shows that the union failed to conduct a serious investigation into the complainant's dismissal and that it preferred to rely blindly on the employer's position without making verifications. The report should mention those allegations in the complainant's reply.

[14] At page 2 of its reasons for decision, the Board stated that "the documents on file and the submissions of the parties [were] sufficient for it to decide this matter without holding an oral hearing": see the respondent's record, at page 37. Having reviewed the extensive evidence in the record and the parties' detailed submissions, I cannot say that the Board's decision not to hold an oral hearing to determine the merits of the complaint under section 37 of the Code was wrong or unreasonable.

[15] As for the Board's finding that the union was not negligent in handling the complainant's grievance and fulfilled its duties under section 37 of the Code, it is wholly supported by the evidence and the Board's analysis.

[16] For these reasons, I would dismiss the appeal with costs to the respondent Garda Security Group Inc.

“Gilles Létourneau”

J.A.

“I agree
M. Nadon, J.A.”

“I agree
J.D. Denis Pelletier J.A.”

Certified true translation
Tu-Quynh Trinh

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET: A-502-07

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REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

DATED: March 31, 2009

APPEARANCES:

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