Cour d'appel fédérale

Federal Court of Appeal

**Date: 20111216**

**Docket: A-70-09**

**Citation: 2011 FCA 356**

**CORAM:** **NOËL J.A.**
**PELLETIER J.A.**
**TRUDEL J.A.**

**BETWEEN:**

**RAKEL ELBILIA**

**Applicant**

**and**

**AIR CANADA**
**and**
**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 2002**

**Respondents**

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on December 16, 2011.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

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

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## REASONS FOR JUDGMENT

**TRUDEL J.A.**

Introduction

[1] This is an application for judicial review of a decision of the Canada Industrial Relations Board [Board] dated January 16, 2009, dismissing Ms. Elbilia's complaint pursuant to section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 [the Code], wherein she alleged that the National

Automobile, Aerospace, Transportation and General Workers Union of Canada [Union] was arbitrary and unfair in its representation of her.

[2] In January 2006, Ms. Elbilia went on sick leave. Her physician declared her fit to return to work as of April 24, 2006, but her employer imposed conditions upon her return so that she only came back to work on February 7, 2007. Ms. Elbilia contends that her absence between April 24, 2006 and February 7, 2007, a period of about nine and a half months, was a form of constructive dismissal. She asked her Union to file a grievance with respect to her delayed return to work. She failed to persuade the Board that the Union was unfair and arbitrary in the handling of her grievance.

[3] For the reasons below, I would dismiss this application for judicial review. Before turning to the merit of the application, a few preliminary remarks are in order.

Preliminary remarks

[4] As permitted by section 16.1 of the Code, the Board determined the matter without holding a hearing as it was satisfied that the parties' submissions and the record were sufficient (Board's reasons, at page 9).

[5] For very different reasons and pursuant to an order made in the presence of the parties on November 30, 2011, this Court also decided to dispose of the within application on the basis of the existing record, including the parties' written submissions, but without an oral hearing.

[6] Having regard to its obligations of fairness and equity to all parties appearing before it, our Court imposed this unusual way of proceeding in view of the circumstances described below (see Order of November 30, 2011 delivered by the Court).

[7] Following a joint request for a hearing date, this case was first set down for hearing on September 7, 2011. The applicant was then a self-represented litigant.

[8] On August 26, 2011, Chief Justice Blais refused the applicant's request for an adjournment of the hearing. In the following days, the applicant appointed Mr. Jean-Carol Boucher as her solicitor. On behalf of his client, he, in turn, presented a second motion for adjournment of the hearing citing his professional and ethical duties as his main justification. Both respondents objected to the motion, which was heard on September 7, 2011, before the hearing on the merits was to take place.

[9] That motion gave rise to an Order delivered in the presence of the parties whereby:

- the motion was allowed;
- the defendants were awarded costs of the day in the amount of $2 800;
- the hearing was set down for November 30, 2011, a date that was accepted by all parties;

- the application was to "proceed on the existing record. Should the applicant wish to amend her memorandum of fact and law, a motion to that effect should be made as soon as possible".

[10] On November 23, 2011, Mr. Boucher served and attempted to file yet another motion for adjournment of the hearing set to take place on November 30th. I say "attempted" because the Registry of the Federal Court of Appeal refused the motion for filing as it did not conform with the *Federal Courts Rules*, SOR/98-106. Counsel for the applicant was seeking a delay to amend his memorandum of fact and law and book of authorities in order, he argued, to present a "full defence" for his client.

[11] By direction issued on November 28, the parties were invited to debate the motion at the beginning of the hearing. Counsel for the applicant was also advised that if his motion was refused, he had to be ready to proceed with the hearing of the application. So the November 30th hearing proceeded as planned, at least for the first few minutes.

[12] Indeed, the applicant's motion for an order granting her adjournment was accepted for filing and the parties argued on its merits. After a brief recess, the Court dismissed the motion and invited counsel to proceed with the application.

[13] At that moment, counsel asked for permission to file a document which was, in fact, an amended memorandum of fact and law. The respondents strongly objected. Permission was denied.

[14] After a further recess, Mr. Boucher sought permission to cease representing the applicant. She did not object. Mr. Boucher's verbal request was granted. As a result, the applicant was left on her own to present her case. It was then her turn to ask for an adjournment in order, she said, to mandate a new representative. She was not willing to proceed on her own. That request was also denied.

[15] Faced with this situation and concerned with the fairness of the whole process, the Court indicated that it would dispose of the application on the basis of the existing record without an oral hearing.

The substantive issues

[16] This being said, I move on to the within application mindful that the standard of review applicable to the Board's decision about a union's duty of fair representation is reasonableness (*Grain Services Union (ILWU-Canada) v. Friesen*, 2010 FCA 339 at paragraph 31; *McAuley v. Chalk River Technicians and Technologists Union*, 2011 FCA 156 at paragraph 13).

Analysis

[17] Before the Board, the applicant essentially claimed that her Union did not thoroughly examine her situation, did not file a grievance when asked to, and kept her uninformed about the progress of her case (Board's reasons at pages 10-11). She also alleged the "illegal manoeuvres by the employer and the Union" in order to build a case against her (*ibidem* at page 12).

[18] Although "touched by the [applicant's] case", the Board was "unable to conclude that the Union breached its duty of fair representation" (*ibidem* at page 19). In its view, the applicant had failed to "present sufficient facts to establish that it is more likely than not that the Union contravened its obligations under the Code" (*ibidem*).

[19] In her amended notice of application, the applicant challenges the Board's decision letter on the grounds that the Board was biased, arbitrary, and lacked impartiality. She also claims that the Board, through its "staff … has demonstrated a partisanship with her Union and has on several occasions… [exceeded and surpassed] its mandate and authority in the applications of procedures and its decision-making abilities" (amended notice of application, June 25, 2009).

[20] These grounds of complaint, if successful, would require that the matter be sent back for redetermination by a differently constituted Board.

[21] However, having carefully examined the record, I agree with counsel for the Union that nothing in it, directly or indirectly, supports the proposition that an informed person, viewing the matter realistically and practically, would find that the Board ruled on the applicant's complaint unfairly or without due impartiality (Union's memorandum of fact and law at paragraph 53; see also *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 S.C.R. 623 at page 636.

[22] This should end the matter as procedural fairness was the sole element raised in the amended notice of application.

[23] But through her affidavit material and memorandum of fact and law, the applicant added several grounds of complaint against the Board's decision. Although it appears that, at times, she re-argues the merits of her grievance against her employer and Union, she also takes issue with some of the Board's findings and its failure to rule favourably on her complaint.

[24] More specifically, the applicant takes issue with (a) the timeliness of the grievance which lead her to seek her own counsel (applicant's memorandum of fact and law at paragraph 38); (b) the Union's lack of communication with her (*ibidem* at paragraphs 38 and 51); and (c) the Board's failure to consider her right to fair representation at arbitration (*ibidem* at paragraphs 60-62).

[25] It appears clearly from a careful reading of the decision that the Board had these issues in mind when considering the complaint. The Board wrote:

> According to the documents on file, the union informed the complainant on a number of occasions that, in order for it to continue with her case, she had to provide the medical information required by the employer. The complainant did not respond to the employer's requests. The union also asked the complainant whether she wanted to be represented by the union or by her own counsel, and she opted to be represented by counsel of her choice. The evidence effectively shows that the complainant was represented by counsel of her choice concerning her return to work.

> The evidence also demonstrates that, in a letter dated January 31, 2007, counsel for the complainant asked the union to arrange a meeting to deal with the complainant's various files – a meeting that did take place.
>
> The union subsequently filed a grievance contesting the employer's refusal to allow the complainant to return to work on April 24, 2006, although the union knew that the time limit for filing such a grievance had expired. According to the evidence on file, the union had obtained from the employer that it would disregard the time limit provided in the collective agreement, and allowed the union to refer the grievance to Arbitrator Martin Teplitsky for determination. The union informed the complainant that the arbitration hearing was scheduled for September, and it was in fact held that month. The arbitral award was rendered on September 25, 2007, dismissing the complainant's grievance.
>
> It is useful to note that, since this complaint was filed before the arbitral award was rendered, it does not concern the union's representation at arbitration (Board's decision at page 20).

[26] Having said this, the Board found that the complainant had not provided enough material facts for it to find that the Union was hostile towards her. The Board rather noted that the Union took the necessary steps to enforce the complainant's rights, although it had advised her that it would be difficult for it to intervene since she had chosen to be represented by her own counsel rather than by the Union and refused to provide the requested medical information.

[27] Having considered the record as a whole, I am of the view that the Board's decision is reasonable, one that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[28] Indeed, in spite of the Union's delay in pursuing the grievance, it successfully negotiated the issue of time limits with the employer and brought the grievance to arbitration. Poor communication with the grievor is not, in itself, a breach of section 37. It constitutes lack of fair representation only if it prejudices the position of the grievor. There is no evidence to that effect. To the contrary, the grievance was successfully filed and adjudicated upon.

[29] Finally, on the issue of fair representation at arbitration, I note that the grievance was heard on September 24, 2007, that is after the section 37 complaint was filed on September 7, 2007. Therefore this issue was not in front of the Board.

[30] Therefore, I would dismiss this application with costs.

"Johanne Trudel"

J.A.

"I agree
Marc Noël J.A."

"I agree
J.D. Denis Pelletier J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | A-70-09 |
| **STYLE OF CAUSE:** | Rakel Elbilia v. Air Canada and National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA), LOCAL 2002 |

**DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES**

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|---|---|
| **REASONS FOR JUDGMENT BY:** | TRUDEL J.A. |
| **CONCURRED IN BY:** | NOËL J.A.<br>PELLETIER J.A. |
| **DATED:** | December 16, 2011 |

**WRITTEN REPRESENTATIONS BY:**

| | |
|---|---|
| Rakel Elbilia | SELF-REPRESENTED APPLICANT |
| Michael McCrory | FOR THE RESPONDENT AIR CANADA |
| Lewis Gottheil | FOR THE RESPONDENT CAW-Canada Local 2002 |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| AIR CANADA<br>Montréal, Quebec | FOR THE RESPONDENT AIR CANADA |
| CAW-Canada Legal Department<br>Toronto, Ontario | FOR THE RESPONDENT CAW-Canada Local 2002 |