Federal Court  Cour fédérale

Date: 20210820

Docket: T-1068-19

Citation: 2021 FC 847

[ENGLISH TRANSLATION]

Ottawa, Ontario, August 20, 2021

PRESENT: The Honourable Associate Chief Justice Gagné

BETWEEN:

MARTIN DUCHARME

Applicant

and

CANADIAN UNION OF PUBLIC EMPLOYEES

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Martin Ducharme is seeking judicial review of a decision of the Canadian Human Rights Commission [the Commission] refusing to rule on a complaint he made against the Canadian Union of Public Employees [Union], to which he belonged for numerous years. The Commission found that Mr. Ducharme's complaint was vexatious within the meaning of paragraph 41(1)(d)

of the *Canadian Human Rights Act*, RSC 1985, c H-6 [the Act], because all the issues it raised had been previously dealt with and dismissed by the Canada Industrial Relations Board [the Board].

[2] Mr. Ducharme disputes this decision and submits that, on the contrary, the Board did not address his allegations of discrimination based on his [TRANSLATION] "disability" although it was the Board's responsibility to do so.

II. Facts

[3] The facts at the heart of this application for judicial review stem from a long-standing labour dispute, initially between the applicant and his employer at the time, Air Transat A.T. Inc. [Air Transat or the employer], and then between the applicant and the Union.

[4] For more than 20 years, the applicant worked as a flight attendant and then flight director for Air Transat. Before the events of 2013–14, he had a clean disciplinary record and was active in the Union.

[5] The applicant took sick leave beginning May 28, 2013, and was on short-term disability for anxiety until December 31, 2013.

[6] On September 23, 2013, the employer informed him that he was suspected of substance abuse. He was required to undergo a medical assessment to determine the real cause of his leave

from work and to detect any substance abuse problems. The applicant refused to undergo a screening test or to provide access to his medical records.

[7] On November 13, 2013, the applicant met with his union advisor and asked the Union to intervene to counter the employer's demands, which he considered to be improper.

[8] There followed a number of requests by the employer and refusals by the applicant, which led to his dismissal on May 14, 2014, for lack of co-operation.

[9] In the wake of this dispute, the Union filed four separate grievances against the employer:

> January 23, 2014: first grievance, disputing the employer's refusal to allow the applicant to return to work even though his attending physician had been recommending it since January 1;
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> March 11, 2014: second grievance, disputing the employer's requests for access to the applicant's medical records;
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> May 1, 2014: third grievance, disputing the medical assessment, testing and taking of samples required of the applicant; and
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> May 14, 2014: fourth grievance, disputing the applicant's dismissal.

[10] All the grievances were denied by the employer; they were then consolidated and submitted to arbitration.

[11] While the arbitration was in progress, on August 8, 2014, the applicant made an initial complaint to the Board against the Union under subsection 97(1) of the *Canada Labour Code*,

RSC 1985, c L-2. He alleged that the Union had failed to fulfill its obligations under section 37 of the Act, which reads as follows:

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.	37 Il est interdit au syndicat, ainsi qu'à ses représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi à l'égard des employés de l'unité de négociation dans l'exercice des droits reconnus à ceux-ci par la convention collective.

[12] On September 26, 2014, Mr. Ducharme made a complaint to the Commission alleging that, between September 2013 and September 2014, the Union engaged in union harassment against him and discriminated against him on the basis of his medical condition.

[13] On June 10, 2015, the Commission temporarily suspended the processing of the complaint on the grounds that it could be more appropriately heard initially under procedures set out in another federal statute. The Commission noted that the complaint before it contained the same allegations as those made before the Board, and that the Board's decision would therefore likely resolve the dispute between the applicant and the Union. However, the Commission invited the applicant to return within 30 days of the completion of the other proceeding if he felt that the human rights issues had not been adequately considered and if he still wanted the Commission to deal with his complaint.

[14] The Board issued its decision on October 23, 2015. In it, it summarized the applicant's allegations as follows:

> [TRANSLATION]
>
> He alleges that the Union acted in a manner that was arbitrary, discriminatory and in bad faith in its handling of a number of grievances;
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> He alleges that he is a victim of union harassment; and
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> He alleges that the Union contributed to his dismissal by failing to act.

[15] The Board began by pointing out that, when it receives a complaint under section 37 of the *Canada Labour Code*, it is not called upon to examine the merits of the Union's strategic decisions but rather to ensure that the Union has not acted in bad faith or in a manner that is arbitrary or discriminatory in defending the employee's rights.

[16] Regarding the allegations of union harassment, the applicant submitted that certain members of the Union's executive committee had placed themselves in a position of conflict of interest and had acted inappropriately towards him because of his dissent and differing opinions. The Board noted that, under section 37 of the *Canada Labour Code*, it could not interfere in internal union disputes, but it could examine the allegations to determine whether the alleged conflict of interest affected the Union's process in defending the employee's rights.

[17] The Board concluded that the Union had not acted in a manner that was arbitrary because: (1) the Union had obtained the applicant's version of the facts; (2) it had dealt with the substance of the issues raised by the applicant; (3) it had informed the applicant of the various steps it had taken; and (4) in its written communications with the applicant, it had demonstrated a thorough knowledge of his case.

[18] The Board also concluded that the Union had not acted in bad faith because: (1) the methods and strategy employed by the Union evolved with the situation; and (2) the handling of the applicant's case by his union advisors did not show that they were involved in the applicant's union disputes.

[19] Finally, regarding the allegations of discrimination, the applicant submitted that the Union had represented him perfunctorily and had treated him unfairly. However, the Board concluded that there was nothing in the record to indicate that the applicant had been treated in a discriminatory manner. On the contrary, the Union had followed all the steps to advance the various grievances, and it had referred the grievances to arbitration with the intention of advocating for the applicant.

[20] The applicant did not seek judicial review of the Board's decision dismissing his complaint.

[21] On April 5, 2017, the arbitrator denied the four grievances filed by the Union.

[22] In early February 2018 (nearly 2½ years after the Board's decision and 10 months after the arbitrator's decision), the Union was informed that the applicant had reactivated his complaint with the Commission.

[23] On May 30, 2019, the Commission issued the decision under review and refused to deal with Mr. Ducharme's complaint on the grounds that it was vexatious under paragraph 41(1)(f) of

the Act. The Commission was of the opinion that all the issues raised in Mr. Ducharme's complaint had been considered by the Board and that it was bound to respect the finality of the Board's decision. The Officer's Report ultimately points out the following:

> [TRANSLATION]
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> Lastly, the complainant was invited to approach the Commission "within 30 days of the completion of the other proceeding if he believes that the human rights issues have not been adequately addressed and if he still wants the Commission to deal with his complaint". Instead, however, the complainant allowed 26 months to elapse between the date of the [Board's] decision when [*sic*] asked the Commission to reactivate his complaint on December 29, 2017. Therefore, it seems that this complaint is an abuse of the Commission's resources, since the complainant did not return to the Commission within 30 days of receiving the [Board]'s decision and since this complaint is vexatious.

III. Issues and standard of review

[24] This application for judicial review raises only one issue, namely, whether the Commission erred in refusing to rule on the applicant's complaint.

[25] The standard for the screening process under the Act and for the Commission's decision to refuse to deal with a complaint is reasonableness. The Court will thus intervene only if the decision is not inherently logical and does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law. This Court owes deference to the Commission and must give respectful attention to the decision and underlying reasons (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85).

IV. Analysis

[26] Contrary to the respondent's position, I do not believe that the applicant's complaint is limited to events between September 2013 and September 2014. In his complaint form, the applicant did write that the discrimination occurred between September 2013 and September 2014. However, he also checked the box "ongoing" to indicate the ongoing nature of the discrimination. Moreover, in his written submissions to the Commission, the applicant refers to events after September 2014 and to interactions he had with his Union in connection with the grievance arbitration.

[27] That said, in *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 [*Figliola*], the Supreme Court provides a framework for a human rights tribunal's discretion "to refuse to hear a complaint if the substance of that complaint has already been appropriately dealt with in another proceeding" (at para 2). The Court stated:

> [37] Relying on these underlying principles leads to the Tribunal asking itself whether there was concurrent jurisdiction to decide human rights issues; whether the previously decided legal issue was essentially the same as what is being complained of to the Tribunal; and whether there was an opportunity for the complainants or their privies to know the case to be met and have the chance to meet it, regardless of how closely the previous process procedurally mirrored the one the Tribunal prefers or uses itself. All of these questions go to determining whether the substance of a complaint has been "appropriately dealt with". At the end of the day, it is really a question of whether it makes sense to expend public and private resources on the relitigation of what is essentially the same dispute.

[28] In his submissions to the Commission, the applicant was asked to identify the human rights issues that the Board had allegedly failed to consider. He listed the issues that he felt had

not been dealt with in the Board's decision, including the alleged inadequacies of the Union's submissions to the Quebec Commission d'accès à l'information and to the arbitrator.

[29] It is clear that some of the facts alleged by the applicant could not have been considered by the Board and addressed in its decision of October 23, 2015, because they arose after that decision.

[30] However, in June 2017, between the time the arbitrator denied the applicant's grievances and the time the applicant reactivated the complaint under review before the Commission, the applicant made a second complaint to the Board against the Union. The Union's actions at issue here related to grievance arbitration before the arbitrator and a hearing before the Commission d'accès à l'information that resulted in a settlement between the parties. The Union disputed the admissibility of this new complaint on the grounds that a previous complaint had already been dismissed (the decision of October 23, 2015, referred to at paragraph 14 above), an argument that the Board did not accept. The Board concluded, however, that the evidence did not establish that the Union had failed to meet its obligations under section 37 of the *Canada Labour Code*, but rather illustrated its significant efforts to assist the applicant.

[31] This time, the applicant filed an application for judicial review of the Board's decision with the Federal Court of Appeal (the application concerned two complaints against the employer and one against the Union). In its decision, issued shortly before the hearing of this application (*Ducharme v Air Transat AT Inc*, 2021 FCA 34), the Federal Court of Appeal dismissed the applicant's application. The Court was of the opinion that the Board had conducted

a careful review of the evidence and submissions of the parties before concluding that the Union had made significant efforts to assist the applicant in disputing the employer's actions and his dismissal. The decision was well reasoned and bore all the hallmarks of justification, intelligibility and transparency that litigants are entitled to expect.

[32] That said, it is clear that the Board has jurisdiction to rule on any human rights issue that comes before it. Moreover, section 37 of the *Canada Labour Code* prohibits the Union from acting in a manner that is discriminatory in defending the rights of employees.

[33] Regarding the applicant's allegations of discrimination, the arguments he raised before the Board and those raised before the Commission are essentially the same; they vary between discrimination on the basis of medical condition and discrimination on the basis of difference in political and union ideology. There is also some confusion between the alleged discrimination and what the applicant has described as union harassment.

[34] The Board was therefore called upon to rule on the same facts and arguments and had the opportunity to do so twice. In its first decision, the Board summarized the applicant's arguments regarding discrimination as follows:

> [TRANSLATION]
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> The complainant alleges that his union acted in a discriminatory manner by preventing him from returning to his job as a flight director, as well as to his positions within the union. In addition, the complainant submits that it is because of a series of events that have gone on for a number of years between him and some members of Local 4041 and the component's executive committee that the union is acting in a discriminatory manner by failing to take the necessary steps to counter the employer's demands. The complainant submits that the union's discriminatory conduct

> consists of discrimination based on a "principle of union dissent" and perfunctory representation. The complainant alleges that Ms. Rainville acted in a discriminatory manner in asking him, in the email of April 22, 2014, to co-operate with the employer with respect to the required tests, and in the contents of her communications with the employer, which he describes as subjective, such as when she referred to "the possibility that the complainant tests negative." The complainant submits that discriminatory conduct is also demonstrated by the text message and subsequent email from Ms. Gauthier. The complainant reiterates that the negative comments made about him cast doubt on the fact that union officials, whether the component's executive committee members, Local members or advisors, are discriminating against him.

[35] In analyzing this argument, the Board relied on one of its earlier decisions (*McRaeJackson*, 2004 CIRB 290) in which it described discriminatory conduct by a Union:

> [28] **A union must not discriminate on the basis of age, race, religion, sex or medical condition. Each member must receive individual treatment and only relevant and lawful matters must influence whether or not a grievance is referred to arbitration. It should be noted that not every instance of differential treatment is considered discrimination.** For example, to refer one employee's grievance to arbitration and not another where there are relevant considerations to support the distinction is not discriminatory. Nor is an agreement with the employer to give different or better working conditions to a group of employees because of workplace considerations (see *Mario Soulière et al.*, [2002] CIRB no. 205; and 94 CLRBR (2d) 307).
>
> [Emphasis added by the Board]

[36] Having analyzed all the evidence and considered all the arguments of the applicant, the Board exercised its jurisdiction within the parameters described above and found as follows:

> [TRANSLATION]
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> A mere allegation that the union acted in a discriminatory manner is not sufficient. In this case, the Board is of the opinion that there

> is nothing on the record to indicate that M.D. was treated differently. Throughout the detailed chronology and multiple allegations in his complaint, the complainant has not demonstrated that his union acted in a discriminatory manner. As noted above, the union has followed all steps in the grievance process and has since even referred the grievances to arbitration with the intention of advocating for the complainant.

[37] In its analysis of the Board's decision, the Commission was required not to determine whether it would have reached the same conclusions as the Board but whether the process followed was fair and the complainant's position had been fully considered. I agree with the recent comments of Justice Barnes in *Gunn v Halifax Longshoremen's Association, ILA Local 269*, 2020 FC 341:

> [11] It is also of some significance in this case that Mr. Gunn did not challenge the [Board's] decision but, instead, sought to obtain a different outcome in the context of a human rights complaint. As Justice Thomas Cromwell observed in *Figliola*, above, at para 94:
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> > "… Failure to pursue appropriate means of review will generally count against permitting the substance of the complaint to be relitigated in another forum."
>
> [12] I accept that the Commission has the discretion to refer a complaint to the Tribunal even where it has been dealt with in another adjudicative forum. That discretion, however, must be exercised in a principled way with a focus on a comparison of the two processes: see *Bergeron*, above, at para 46. Laying at the heart of that comparison is a concern for procedural fairness, and not whether the earlier decision-maker got it right or had the requisite expertise: see *Figliola*, above, at paras 49-53.

[38] Insofar as the same evidence, facts and submissions were presented to and fully considered by the Board, I am unable to conclude that the Commission erred in exercising its discretion to refuse to dispose of the applicant's discrimination complaint on the merits.

[39] Lastly, I am also of the opinion that it was open to the Commission to consider the adverse impact of the applicant's failure to reactivate his complaint with the Commission within 30 days of the Board's decision. The applicant chose instead to wait 26 months, and his lack of timeliness also supports the Commission's conclusion.

V. Conclusion

[40] As I see no error in the exercise of the broad discretion granted to the Commission to refuse deal with a discrimination complaint that has already been dealt with by another adjudicative body, the applicant's application for judicial review will be dismissed. I would, however, exercise my discretion not to award costs.

JUDGMENT in T-1068-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No costs are awarded.

"Jocelyne Gagné"
Associate Chief Justice

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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