

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20171124**

**Docket: A-115-17**

**Citation: 2017 FCA 233**

**CORAM: DAWSON J.A.  
NEAR J.A.  
DE MONTIGNY J.A.**

**BETWEEN:**

**CANADIAN UNION OF POSTAL WORKERS**

**Applicant**

**and**

**CORRIE LANG**

**Respondent**

Heard at Ottawa, Ontario, on November 21, 2017.

Judgment delivered at Ottawa, Ontario, on November 24, 2017.

**REASONS FOR JUDGMENT BY:**

**DAWSON J.A.**

**CONCURRED IN BY:**

**NEAR J.A.  
DE MONTIGNY J.A.**

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**REASONS FOR JUDGMENT**

**DAWSON J.A.**

[1] The applicant Union seeks judicial review of the decision of the Canada Industrial Relations Board that found the Union to have violated its duty of fair representation, contrary to section 37 of the *Canada Labour Code*, R.S.C., 1985, c. L-2 (2017 CIRB 848).

[2] As a preliminary matter, I begin by confirming that during the hearing the respondent withdrew its submission that the Union was precluded from seeking judicial review because it did not seek what was said to be an adequate, alternative remedy – reconsideration. In light of the recent decision of this Court in *Rogers Communications Canada Inc. v. Maintenance and Service Employees' Association*, 2017 FCA 127, [2017] F.C.J. No. 635, and the authorities discussed therein, this was a very reasonable concession for the respondent to make on the facts of this case.

[3] On this application, the Union concedes that the Board identified the correct standard to be applied when considering the duty of fair representation. This is the standard articulated by the Supreme Court of Canada in *Canadian Merchant Service Guild v. Gagnon et al.*, [1984] 1 S.C.R. 509, at page 527. The Union argues, however, that the Board failed to apply the test. Rather, the Union asserts that the Board sat in appeal of the Union's actions and imposed a standard of virtual perfection; a standard the Union says was divorced from the factual reality of the respondent's grievance.

[4] I agree that the respondent's explanation for her use of a stolen gift card could at least initially be viewed to be implausible. However, the Board found that the Union fell short of its duty of fair representation because of the process the Union followed in reaching its final conclusion that the respondent's explanation was implausible. The Board's conclusion was supported by a number of factual findings:

- The Union departed from its usual process to determine whether a grievance should be submitted to arbitration. More particularly, the following routine steps are generally

taken: a local grievance hearing is held between the local representative and the employer during which the Local obtains the employer's documents; the Local then assesses the grievance and submits its file together with its opinion to the region; the regional representative receives and considers the file and opinion, gathers further information about the grievance, and decides whether to recommend it to arbitration. The final decision as to whether the grievance goes to arbitration is made by either the regional grievance officer or the national office (reasons of the Board, paragraph 98).

- In the present case, there was no evidence that the Union conducted a local grievance hearing, there was no evidence that either the regional grievance representative or the regional grievance officer received any notes or opinion from the Local shop steward. Rather, the evidence disclosed that the Local's only role was to assist the complainant with filing her grievance and delivering a copy to the employer (reasons of the Board, paragraph 101).
- The employer never responded to the grievance, which was said by the Board to be unusual (reasons of the Board, paragraph 102).
- There was no evidence whether any local steward continued to investigate following the filing of the grievance (reasons of the Board, paragraph 102).
- There was no evidence that the respondent was asked to complete a statement of fact for the purpose of the grievance. The regional grievance officer's evidence was imprecise as to what information he had and what steps he took to investigate before or after the decision was initially made in October 2014, not to refer the grievance to arbitration. At that time the Union had not received the police reports, nor had Union representatives

spoken to a witness the respondent advised would corroborate her explanation that she was given the stolen gift card (reasons of the Board, paragraph 106).

- There was no evidence that the Union made a request for the employer's disclosure at any time, and no evidence that the Union contacted the employer to obtain, or attempt to obtain, what information the employer had in its investigation file to support the complainant's dismissal (reasons of the Board, paragraph 107).
- There was no evidence that the regional grievance officer contacted the employer to discuss the grievance. Particularly after the criminal charges against the respondent resulted in a not guilty verdict, there was no evidence that the Union ensured that the employer was aware of this, or that the Union discussed the impact, if any, the acquittal had on the employer's position regarding the grievance. This was viewed by the Board to be significant, given that the employer had indicated that it was relying on the criminal charges as the basis for the respondent's suspension (reasons of the Board, paragraph 111).

[5] Based on these conclusions the Board found that not only did the Union not follow its usual process in handling the grievance but that "[t]his denied the union the benefit of having the employer's full disclosure, and the complainant's full response to it, prior to making its recommendation not to refer the grievance to arbitration" (reasons of the Board, paragraph 107). Ultimately, the Board went on to conclude that this level of investigation and effort to represent the complainant in these circumstances fell below the acceptable standard required of it and

amounted to arbitrary conduct. Accordingly, the Board found the Union breached its duty of fair representation (reasons of the Board, paragraph 136).

[6] The substance of the Union's position on this application is that all of the relevant facts were known to the Union from the outset, including the respondent's explanation for how she came to possess the stolen gift card. It submits that it was therefore unreasonable to expect the Union to investigate further; it is unclear as to what additional information could have possibly been obtained through further investigation.

[7] In my view, this submission is answered by the Board's conclusions at paragraphs 124 and 131 of its reasons. There, the Board observed that while the Union was entitled to assess the respondent's credibility in the course of its investigation and decision making process, the Union did so without conducting a full investigation into the circumstances. Instead, the Union made an initial assessment that the complainant was not credible and failed to further investigate the facts or to follow-up with witnesses. In the Board's view, assessing credibility without a further and full investigation of the circumstances in order to substantiate or confirm the initial assessment was not sufficient. Deference is owed to the Board's expertise and to its fact-based conclusions.

[8] Given the substantial deference owed to the Board's fact-based conclusions, despite Mr. Raven's able submissions, I have not been persuaded that the Board's decision was unreasonable.

[9] It follows that I would dismiss the application for judicial review. In my view, this is a case where the parties should bear their own costs so I would make no award of costs.

“Eleanor R. Dawson”

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J.A.

“I agree.

D.G. Near J.A.”

“I agree.

Yves de Montigny J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-115-17

**STYLE OF CAUSE:** CANADIAN UNION OF POSTAL  
WORKERS v. CORRIE LANG

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** NOVEMBER 21, 2017

**REASONS FOR JUDGMENT BY:** DAWSON J.A.

**CONCURRED IN BY:** NEAR J.A.  
DE MONTIGNY J.A.

**DATED:** NOVEMBER 24, 2017

**APPEARANCES:**

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