Federal Court of Appeal | Cour d'appel fédérale

Date: 20200219

Docket: A-102-19

Citation: 2020 FCA 48

CORAM: **RENNIE J.A.**
DE MONTIGNY J.A.
LOCKE J.A.

BETWEEN:

TREVOR THOMAS LANGEVIN

Applicant

and

AIR CANADA
INTERNATIONAL ASSOCIATION OF MACHINIST & AEROSPACE WORKERS UNION (IAMAW)

Respondents

Heard at Vancouver, British Columbia, on February 6, 2020.

Judgment delivered at Ottawa, Ontario, on February 19, 2020.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This judicial review application arises from a decision of the Canada Industrial Relations Board dated November 22, 2018 (CIRB LD 4061). In its decision, the Board declined to reconsider its dismissal of the applicant's complaint that the respondent, the International Association of Machinist & Aerospace Workers Union (the union), breached its duty of fair representation under section 37 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code).

This complaint was made in the context of a grievance concerning the termination of the applicant's (Mr. Langevin's) employment with Air Canada. For the reasons that follow, I would dismiss the application.

[2] Under subsection 22(1) of the Code, decisions of the Board are final. However, the Board has the discretionary power under section 18 to reconsider a previous decision. The language of section 18 is broad and unrestricted:

Review or amendment of orders	**Réexamen ou modification des ordonnances**
18 The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.	**18** Le Conseil peut réexaminer, annuler ou modifier ses décisions ou ordonnances et réinstruire une demande avant de rendre une ordonnance à son sujet.

[3] The Board's jurisprudence, as confirmed by this Court, has consistently held that the reconsideration is neither an appeal nor a *de novo* consideration of the original decision (*Williams v. Teamsters Local Union 938*, 2005 FCA 302). Reconsideration panels do not re-weigh or substitute their own appreciation of the evidence, nor do they intervene simply because they might have exercised their discretion differently (*Association des réalisateurs v. Société Radio-Canada*, 2015 CIRB 763; *Syndicat des communications de Radio-Canada (FNC-CSN) v. Ms. Z*, 2015 CIRB 752).

[4] These principles support finality and certainty, which are important values in the workplace. Consequently, the Board's jurisprudence limits the power of reconsideration to exceptional circumstances. These include:

1) where there are facts that could not have been brought to the attention of the original panel and which could have persuaded the Board to arrive at a different conclusion;

2) errors of law or policy which call into question the interpretation of the Code; and

3) a failure to respect a principle of natural justice.

[5] The original Board found that the union had not breached its duty to fairly represent Mr. Langevin. Specifically, it found that Mr. Langevin had not met his burden of demonstrating that the union had acted in a manner that was arbitrary, discriminatory or in bad faith.

[6] The Board rejected Mr. Langevin's application for reconsideration on the basis that it failed to meet the criteria for reconsideration under any of the above three grounds.

[7] The Board found that the new evidence Mr. Langevin put before it on reconsideration – consisting of an alleged settlement in an unrelated court case that followed an arbitral decision, and records of a counselling session in which Mr. Langevin participated – did not meet the criteria for fresh evidence. The Board questioned the relevance of the counselling record and noted that, even if relevant, it pre-dated the Board's original decision and could have been put into evidence at that time. The Board also observed that the evidence concerning a settlement in the unrelated matter was introduced in order to show that an arbitration award could be averted or resolved through other mechanisms. Again, the Board found this evidence was not relevant. The Board also found that it touched on settlement privilege and did not constitute a ground for reconsideration.

[8] Regarding the second ground, the Board found that the applicant did not identify any precise errors of law or policy, nor any error which casts doubt on the original panel's understanding of the Code. The Board explained that its role in examining a section 37 complaint was to review the union's conduct and not the underlying arbitration decision. It considered whether the original Board applied the correct evidentiary burden and whether the applicant had discharged the onus on him to establish a breach of the duty of fair representation. The Board reiterated that the applicant had not met his evidentiary burden to show that the union had acted in a manner that was arbitrary, discriminatory, or in bad faith. It also found that the applicant's allegations of coercion and collusion by the union were not supported by the evidence.

[9] Turning to natural justice, the Board observed that the applicant did not specify which principle of natural justice or procedural fairness had been breached or how the original panel failed to respect that principle. The Board nevertheless addressed two issues raised by the applicant that appeared to relate to natural justice: the applicant's lack of access to legal representation and the allegation that the arbitrator's ruling was biased.

[10] On the first issue, the Board determined that a lack of legal representation on the part of the applicant did not constitute a breach of procedural fairness. On the second, the Board reiterated that its role is not to question the arbitrator's findings or rule on his impartiality. The Board's role is to examine the union's conduct, which it did.

[11] The standard of review for determining whether the decision maker complied with the duty of procedural fairness is correctness (*Canadian Pacific Railway Company v. Canada*

(Attorney General), 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 34), and applying the correctness standard, I see no reason to intervene in the Board's consideration of the procedural fairness issue.

[12] I find the reconsideration Board's decision to be reasonable. It is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 85, 101, 102). There is no basis for this Court to intervene with respect to the Board's decision.

[13] That said, an element of the Board's reasons requires comment.

[14] Air Canada presented new information to the arbitrator after the hearing. The union was copied on this communication. Upon receipt of the information, the arbitrator, in turn, advised Air Canada and the union that he would re-open the hearing if the parties requested. The union made no representations in respect of the content of the letter and did not request that the hearing be re-opened. The union did however, correct the assertion in Air Canada's communication with the arbitrator that the applicant was in breach of a direction from the arbitrator that he not communicate with the company, noting that no such direction had been issued.

[15] The evidence contained in that letter was relied on by the arbitrator in his decision. The arbitrator wrote:

> There was also evidence submitted that the Employer instructed Mr. Langevin to not have any contact with the Grievor but he did so on two occasions, including

> following the hearing when on December 18, he sent a letter, which contained all the allegations contained in his statements, addressed to both AB and her husband.

[16] The reconsideration Board adopted, as its own, the reasons of the original Board in its consideration of the effect of the new evidence. It quoted at length from the Board decision:

> First, the complainant alleges that the communication of additional evidence by the employer to the arbitrator following the end of the arbitration hearing was a "procedural error", and that as a result, the award should be set aside. Through this aspect of the complaint, Mr. Langevin appears to suggest that his union failed to intervene on December 18, 2015.
>
> Contrary to Mr. Langevin's allegations, the record shows that the union received a copy of the letter sent to the arbitrator on December 18, 2015, and was also given the opportunity by the arbitrator, in his December 29, 2015, email, to provide further submissions, a right that the union chose not to exercise. Further, the arbitrator also advised the parties that he could make arrangements should they wish "to reopen the hearing" and it appears that the parties did not elect to do so.
>
> …
>
> As the evidence reveals no exceptional circumstances, the Board will not, as part of this DFR complaint, examine and question how the union handled the case or how it should have dealt with the subsequent event evidence. As the Board previously indicated, it is up to the union and its counsel or representative, not the complainant, to make the final decisions such as what witnesses to call and what arguments to make before the arbitrator. The Board finds that the evidence presented does not support the complainant's contention that the union acted in an arbitrary, discriminatory or bad faith manner. The union reviewed the evidence and decided not to comment on it. It is not the Board's role to intervene or questions the union's decision and strategy in this regard.
>
> Further, the fact that the union did not advise the complainant of this evidence does not change anything; it was still the union's judgment call to make, and the complainant suffered no prejudice as a result of the union's failure to advise him of the letter filed by the employer.

[17] The Board then concluded:

> The above analysis does not reveal any error of law or policy by the Board. The original panel's analysis is consistent with the applicable case law in DFR matters

> involving the union's conduct at arbitration. As correctly indicated in the original decision, the Board has a very limited role when it examines the union's conduct at arbitration and will not "microscopically" examine the union's conduct (see *Bayers*, 2008 CIRB 416)

[18] The Board's reasons in this regard test the limits of coherence and justification. They do not explain how it concluded that the failure to make representations and to advise the applicant of the new evidence caused no prejudice to Mr. Langevin, where the arbitrator thought it sufficiently important to include in his reasons. It reverts to the conclusory, boiler-plate statement that a duty of fair representation complaint is not a microscopic examination of counsel's conduct. On the Board's reasoning, if all questions of strategy and judgment are outside of the scope of the duty of fair representation, it is unclear what content the duty of fair representation consists of, or whether it has any content at all and can ever be breached.

[19] That said, administrative justice is not judicial justice (*Vavilov* at paras. 91 to 98). While it would have been highly desirable for the Board to elaborate on this point in its reasons, looking at the record as whole and reading the arbitral decision, it appears that a response by the union would have been of little assistance. The key fact drawn by the arbitrator (that Mr. Langevin continued to have communications with people involved in his case even after Air Canada had asked him not to) was and remains undenied. Mr. Langevin has not suggested what kind of response the union might have made that would have been helpful to him. For these reasons I do not find the reasons, lacking as they are, to constitute a reviewable error.

[20] Before this Court, the applicant raises two new arguments. First, he argues that his inability to access legal representation violates section 15 of the *Canadian Charter of Rights and*

Freedoms, s. 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c. 11. He reaffirms his allegation that the arbitration was biased and that the arbitrator lacked independence from Air Canada.

[21] These arguments do not support intervention by this Court. It is well-known that where the respondent has not had the opportunity to file the evidence necessary to respond to a constitutional question on appeal, this Court will not entertain constitutional arguments (*Hérold v. Canada*, 2013 FCA 19 at para. 7; *Little Red River Cree Nation #447 v. Laboucan*, 2011 FCA 87 at para. 1). As for the applicant's allegations of bias and lack of independence, they are not substantiated on the record.

[22] Accordingly, I would dismiss the application for judicial review with costs.

"Donald J. Rennie"
J.A.

"I agree
Yves de Montigny J.A."

"I agree
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

(APPLICATION UNDER SECTION 18.1(1) OF THE FEDERAL COURTS ACT, R.S.C. 1985, c. F-7)

DOCKET:	A-102-19
STYLE OF CAUSE:	TREVOR THOMAS LANGEVIN v. AIR CANADA INTERNATIONAL ASSOCIATION OF MACHINIST & AEROSPACE WORKERS UNION (IAMAW)
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REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. LOCKE J.A.
DATED:	FEBRUARY 19, 2020

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