Federal Court of Appeal | Cour d'appel fédérale

Date: 20210225

Dockets: A-38-18
A-116-18
A-117-18

Citation: 2021 FCA 34

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
RIVOALEN J.A.

Docket: A-38-18

BETWEEN:

MARTIN DUCHARME

Applicant

and

AIR TRANSAT A.T. INC.

Respondent

Docket: A-116-18

AND BETWEEN:

MARTIN DUCHARME

Applicant

and

AIR TRANSAT A.T. INC.

Respondent

and

CANADIAN UNION OF PUBLIC EMPLOYEES

Intervener

Docket: A-117-18

AND BETWEEN:

MARTIN DUCHARME

Applicant

and

CANADIAN UNION OF PUBLIC EMPLOYEES

Respondent

Heard by online videoconference hosted by the registry on January 26, 2021.

Judgment delivered at Ottawa, Ontario, on February 25, 2021.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

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

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CANADIAN UNION OF PUBLIC EMPLOYEES

Intervener

Docket: A-117-18

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MARTIN DUCHARME

Applicant

and

CANADIAN UNION OF PUBLIC EMPLOYEES

Respondent

REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Martin Ducharme (the applicant) is seeking judicial review of three decisions rendered by the Canada Industrial Relations Board (the Board) on the basis of the documentation filed. The first two decisions dismissed two unfair labour practice complaints filed by the applicant pursuant to subsection 97(1) of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the Code) against the respondent Air Transat A.T. Inc. (Air Transat, or the employer): 2017 CIRB LD 3915 and 2018 CIRB LD 3954. The third decision dismissed a complaint by the applicant that the

respondent the Canadian Union of Public Employees (the Union) had breached its duty of fair representation under section 37 of the Code: 2018 CIRB LD 3955.

[2] These applications for judicial review are the culmination of a long saga between the parties that resulted in the applicant losing the job that he had with the employer. I am not insensitive to the consequences of this outcome for Mr. Ducharme, but I cannot allow his applications for judicial review for the following reasons.

I. Factual and procedural background

[3] The facts relevant to the understanding of the three files have been discussed at length by the Board in each of its three decisions, and I will limit myself here to reiterating only the essential elements.

[4] The applicant had been employed as a flight attendant with Air Transat since 1993. During his last six years with the company, the applicant also acted as flight director; in that capacity, he was responsible for supervising flight attendants during flights and liaising between the cockpit and the passenger area. Over all those years, he had a clean disciplinary record and played an active role in the Union.

[5] From May 28 to June 13, 2013, the applicant went on disability leave on the grounds that he was dealing with anxiety issues. He returned to work on June 14, 2013, but then went on leave again from June 26 to December 31, 2013 for medical reasons. Prior to the applicant’s

return to work, his employer had informed him on September 23, 2013 that it suspected a pattern of substance use. Numerous requests for a medical assessment, screening tests and disclosure of his medical records were then made, but the applicant objected to these requests on the grounds that they had nothing to do with his last absence for medical reasons or with his work.

[6] The applicant finally agreed to undergo screening tests on March 21, 2014. However, he refused to answer any questions relating to his medical history during two subsequent medical examinations performed on April 1 and 28, 2014. On May 14, 2014, the employer terminated the applicant's employment. The employer cited his lack of cooperation and its inability to confirm his fitness to perform his duties and to determine whether he had a pattern of substance use.

[7] From January to May 2014, the Union filed four grievances on behalf of the applicant in connection with the actions taken by the employer. The grievances, alleging a violation of his rights and wrongful dismissal, were all dismissed by the arbitrator in April 2017.

[8] On August 8, 2014, the applicant filed an initial complaint with the Board under subsection 97(1) of the Code, in which he alleged that the employer had terminated his employment in violation of subparagraph 94(3)(*a*)(i) (all relevant provisions of the Code cited in these reasons are reproduced in the appendix). This provision essentially prohibits any employer from refusing to employ or to continue to employ a person because of his or her union activities. Consideration of the complaint (A-38-18) was postponed pending the outcome of the arbitration process.

[9] Then, in June 2017, the applicant filed two new complaints, one against his employer (A-116-18) for unfair practice under subparagraph 94(3)(*a*)(i) and paragraph 94(3)(*e*), and the other against the Union (A-117-18) for breach of the duty of fair representation pursuant to section 37 of the Code. The actions of the Union that were at issue related to the arbitration of the grievances before the arbitrator and to the hearing of a request for access before the access to information commission that resulted in a settlement between the parties.

II. Impugned decisions

[10] The Board dismissed the applicant's three complaints without holding an oral hearing, finding that the documentation was sufficient to render a decision on the basis of that documentation as authorized by section 16.1 of the Code.

[11] With regard to the first unfair practice complaint against the employer (A-38-18), the Board first noted that there was more than a year between the dismissal and the employer's most recent communications which, according to Mr. Ducharme, reflect anti-union animus, and that there were more than four months between these communications and the initial request for a medical assessment. The Board also took into account the letter sent by the employer on February 27, 2014, which stated that the applicant would not be dismissed if he complied with the requests for a medical assessment, to find that there was no correlation or causal link between the comments made and the steps taken by the employer.

[12] The Board also rejected the applicant's argument that the concomitance of the dates of the medical assessments and of activities on the Union schedule demonstrated anti-union animus. Instead, it accepted the employer's evidence that the scheduling conflicts were simply a coincidence. The Board stated that the employer did not at all seek to undermine the applicant's involvement in the Union, and instead showed flexibility by taking into account the applicant's availability when scheduling the dates for the medical assessments.

[13] Finally, the Board noted that it was not its role to determine whether the applicant deserved to be terminated and that it had to limit itself to verifying that this disciplinary measure was not tainted by anti-union animus. In this regard, the Board wrote: "Arbitrator Dubois found that the employer had just and sufficient cause to require the medical assessments and, ultimately, to proceed with the complainant's termination. The Board finds . . . that the employer's decision was rational and not tainted by anti-union animus" (Board's Reasons (A-38-18), page 20; Applicant's Record (A-38-18), page 239).

[14] The second unfair practice complaint against the employer (A-116-18) was dismissed essentially on the same grounds because it was based in several respects on the same allegations as the first complaint. With respect to the new allegations, the Board was of the view that they did not reveal any new behaviour that could constitute an unfair practice within the meaning of subparagraph 94(3)(*e*)(i) insofar as they, for the most part, related to the way that counsel for the employer had done their job during the arbitration. The Board also dismissed the part of the complaint related to paragraph 94(3)(*e*) on the basis that it was time-barred under subsection 97(2) of the Code.

[15] The admissibility of the applicant's third complaint (A-117-18) was challenged by the Union on the grounds that a previous complaint had already been dismissed by the Board (2015 CIRB LD 3514). This argument was rejected because the Board considered that the aspects of this new complaint relating to the Union's representation during the arbitration and to the Union's refusal to file an application for judicial review of the arbitration award did not constitute an extension of the first complaint concerning the Union's conduct prior to the arbitration. However, the Board dismissed the complaint on the merits because the evidence did not establish that the Union had failed to meet its obligations under section 37 of the Code. Rather, the evidence showed that the Union had made considerable efforts to assist the applicant. The Board also noted that the decision to not file an application for judicial review was discretionary because the collective agreement did not impose any obligation on the Union in this regard.

III. Issues

[16] Rather than dealing with each file separately, I propose to address them by examining the common issues. All three files raise the following issue, which I will deal with first:

1. Did the Board err in refusing to hold a hearing?

[17] As regards the first two files (A-38-18 and A-116-18), the following issue must also be decided:

2. Was the Board's decision to dismiss the applicant's unfair practice complaints reasonable?

[18] There are two additional issues to be decided in A-117-18:

3. Should the Court refuse to consider the application for judicial review given the applicant's failure to exhaust internal remedies?

4. Was the Board's decision to dismiss the applicant's complaint regarding a failure to represent reasonable?

IV. Analysis

A. *Did the Board err in refusing to hold a hearing?*

[19] Section 16.1 of the Code gives the Board discretion to decide a matter before it without holding an oral hearing. This provision clearly sets aside the common law and its criteria for determining whether a hearing is required and makes it possible to conclude that the dictates of procedural fairness do not require the Board to hold an oral hearing in all cases. As mentioned by this Court in *Wsáneć School Board v. British Columbia*, 2017 FCA 210 at paragraph 21, leave to appeal to the SCC denied, 37894 (August 9, 2018) (*Wsáneć*), such a provision leaves it to the Board to decide when it will hold a hearing. Although the standard of review for procedural fairness issues is correctness, the intervention of this Court will only be required in rare circumstances where a party can demonstrate that the decision to proceed on the basis of the written record did not allow the party to fully assert its rights or know the case against it: *Wsáneć* at paragraph 23; *Grain Services Union (ILWU-Canada) v. Freisen*, 2010 FCA 339 at paragraphs 22–24 (*Grain Services Union*); *Canadian Pacific Railway Company v. Canada*

(Attorney General), 2018 FCA 69, [2019] 1 F.C.R. 121 at paragraphs 34–56 (*Canadian Pacific Railway*).

[20] In this case, the applicant is contesting the Board's decision to dispose of his complaints on the basis of the documentation filed. He is essentially relying on the fact that he had specifically requested that a hearing be held and that the nature of the case, the importance of the facts and the existence of contradictory evidence before the Board justified a hearing. In my opinion, these arguments cannot be accepted.

[21] The mere fact that evidence is contradictory and raises questions of credibility "does not automatically warrant an oral hearing" (*Guan v. Purolator Courier Ltd.*, 2010 FCA 103 at para. 28 (*Guan*)), absent other "compelling reasons." Otherwise, "section 16.1 of the Code would be devoid of all sense and use" (*ibid.*). See also: *Grain Services Union* at para. 24; *Nadeau v. United Steelworkers of America (F.T.Q.)*, 2009 FCA 100, 400 N.R. 246 at paragraph 6; *Dumont v. Canadian Union of Postal Workers, Montréal Local*, 2011 FCA 185, 423 N.R. 143 at paras. 7–8. Also, it is well established that the Board "is not required to hold an oral hearing on every occasion that one is requested": *Madrigga v. Teamsters Canada Rail Conference*, 2016 FCA 151, 486 N.R. 248 at para. 27.

[22] In this case, the applicant failed to demonstrate that he had been unable to put forward his position. As the Board pointed out in each of its three decisions, he filed a very comprehensive complaint based on a very detailed sequence of events and extensive documentation. He also had

the opportunity to reply to the employer's response and to the Union's response in the third file, and the parties also provided additional submissions following the arbitration award.

[23] On this basis, it is impossible to conclude that the Board erred in considering that it had sufficient documentation to rule on the complaint without holding a hearing. Also, during the hearing before this Court, the applicant was unable to specify how he had been denied his right to be heard and was not even able to provide examples to illustrate the arguments that he could have made or the additional evidence that he could have submitted. This first ground of attack must therefore be dismissed with regard to the three Board decisions.

B. *Was the Board's decision to dismiss the applicant's unfair practice complaints reasonable?*

[24] Subparagraph 94(3)(*a*)(i) of the Code provides that an employer cannot refuse to continue to employ or lay off a person because of his or her union activities. Similarly, under paragraph 94(3)(*e*), an employer cannot compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union. Section 97 provides that a complaint may be made to the Board in case of contravention. In such a case, subsection 98(4) reverses the burden of proof: the complaint is itself evidence of the violation, and the burden of proof is on the other party to prove the contrary. In order to reverse this presumption, the employer must persuade the Board on a balance of probabilities that its actions were not the result of anti-union animus: Ronald M. Snyder, *The 2018 Annotated Canada Labour Code*, Scarborough, Ont., Thomson Reuters, 2017 at page 855.

[25] The applicant made several similar criticisms of the Board's decisions in A-38-18 and A-116-18. First, he argued that the Board failed to consider that there was no progressive discipline prior to his dismissal and that the final disciplinary measure was disproportionate. The Board also allegedly [TRANSLATION] "usurped" the grievance arbitrator's role by considering whether the employer had demonstrated just cause for his dismissal and by acting as if it were bound by the arbitrator's findings regarding the first grievances. Finally, he argued that the Board incorrectly applied subparagraph 94(3)(*a*)(i) and subsection 98(4) of the Code and had therefore rendered an unintelligible and unreasonable decision.

[26] In my opinion, none of these criticisms can hold up to even a cursory analysis of the case.

[27] The applicant first argued that the Board should have taken into account the disproportionate nature of the disciplinary measure and the absence of progressive discipline. In my opinion, this is only an issue if the inquiry concerns the worker's misconduct. In such a case, the arbitrator must indeed review the progressive severity of the disciplinary measures after finding that the worker engaged in misconduct. However, this is not the Board's role when making a decision on the employer's conduct within the context of an unfair practice complaint under subsection 94(3) of the Code. Rather, in such a case, the Board's mission is to assess whether the dismissal was the result of anti-union animus, however minimal it may have been, as also noted by the Board (Board's Reasons (A-38-18), pages 16–17; Applicant's Record (A-38-18), pages 234–235).

[28] The applicant's claims that the Board usurped the role of the arbitration tribunal or that the Board felt bound by the tribunal's decision are also without merit. The Board's reasons in A-38-18 indeed show that it was well aware of the distinction to be drawn between an unfair practice complaint and a wrongful dismissal complaint, as evidenced by the following passage of its reasons:

> The question for the Board to determine in this matter is whether the reasons given by the employer for terminating [the applicant's] employment are the only reasons for its decision. . . . In reviewing these issues, the Board is not required to determine whether the employer had valid reasons to request the medical assessments or a just and sufficient cause to terminate [the applicant's] employment, as that instead falls under the jurisdiction of a grievance arbitrator.
>
> [Board's Reasons (A-38-18), page 17; Applicant's Record (A-38-18), page 235. See, similarly, Board's Reasons (A-38-18), pages 18 and 20–21; Applicant's Record (A-38-18), pages 236 and 239.]

[29] Insofar as the Board understood the distinction between these two roles and knew that it was not bound by the arbitrator's decision, it was still open to the Board to consider that decision as a contextual element in its analysis. After all, it is perfectly understandable that an employer would want to provide an explanation for the disciplinary measure that it imposed in order to discharge its burden under the Code, regardless of whether that rationale is viewed as a just or sufficient cause by an arbitrator: see Ronald M. Snyder, *The 2018 Annotated Canada Labour Code* at pages 855–856. In fact, an employer that would simply deny having dismissed an employee because of his or her union activities without providing any other reason for the dismissal would risk having its credibility tainted. In my opinion, the Board understood this nuance very well, as shown by the following excerpt at the very end of its reasons:

> The Board is persuaded that the only reasons behind the employer's decision to terminate the complainant's employment are those it mentioned and that are

> related to the complainant's refusal to cooperate in the medical assessment process. The evidence as a whole establishes that the employment was terminated because of the complainant's refusal to cooperate satisfactorily with the steps the employer was requiring him to take so that his return to work could be considered. Arbitrator Dubois found that the employer had just and sufficient cause to require the medical assessments and, ultimately, to proceed with the [applicant's] termination. The Board finds, in light of the above, that the employer's decision was rational and not tainted by anti-union animus.
>
> [Board's Reasons (A-38-18), page 20; Applicant's Record (A-38-18), page 239.]

[30] The applicant also submits that the Board erred in applying the provisions of the Code. However, the Board's reasons clearly indicate that the Board fully understood its role, and there was ample evidence in the record to rebut the presumption in subsection 98(4). The mere fact that the applicant is not satisfied with the outcome does not demonstrate that the Board erred in disposing of his complaint.

[31] Finally, the applicant attempted to persuade this Court that the Board's decision was unreasonable by asking us to compare its factual findings with the conclusions that it drew from them. It is true that the Board did not fail to mention the applicant's clean disciplinary record, the concomitance of certain medical assessment dates and Union activity dates, as well as the applicant's presence at some medical assessments. However, the Board also properly took into account various factors against the applicant's position. These factors included the time that had elapsed between the alleged inappropriate communications and the dismissal, the employer's flexibility at the time of deciding on the medical appointment dates, the applicant's lack of cooperation during certain appointments, and the letter notifying the applicant that he would not be dismissed if he met the employer's requirements. The Board's finding that the only reasons for the dismissal had to do with the applicant's refusal to comply with the employer's legitimate

requests undeniably fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", and it is not for this Court to reweigh the evidence in reviewing an administrative decision: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 at para. 55, referring to *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 64 (*Khosa)*.

[32] The applicant also raises a few additional arguments in A-116-18. He claims that the Board erred in deciding that certain aspects of his complaint were time-barred. Furthermore, he submits that the Board's decision is unreasonable not only because it did not take into account the lack of progressive discipline (an argument already addressed in the previous file), but also because the employer had engaged in wrongful conduct during arbitration.

[33] As to the admissibility of the part of the second complaint that is based on paragraph 94(3)(*e*) of the Code, the applicant has not persuaded me that the Board erred in declaring it out of time. As the Board explained, the actions carried out by the employer that could form the basis of this complaint were taken in 2013 and 2014, which was more than three years before the applicant filed the second complaint. This time frame greatly exceeds the 90-day period set out in subsection 97(2) of the Code. The new facts arising from the arbitration process could not serve as a basis for a new complaint and also could not reset the clock because they merely constituted additional evidence, so to speak, of the actions already alleged against the employer in the first complaint. Also, unlike the part of the complaint relating to subparagraph 94(3)(*a*)(i), which the Board agreed to consider as a follow-up to the first complaint, paragraph 94(3)(*e*) had not been invoked when the first complaint was filed.

[34] Regarding the conduct for which the employer's counsel were criticized in the arbitration process, the applicant has not shown how it was unreasonable for the Board to consider that the way in which the employer's counsel submitted evidence or conducted the cross-examination could not form the basis of an unfair labour practice complaint.

[35] In short, I am of the view that none of the arguments raised by the applicant in support of his two applications for judicial review in A-38-18 and A-116-18 can be accepted. The Board conducted an exhaustive review of the facts in issue, correctly summarized the parties' arguments, did not err in stating the applicable legal principles, and provided detailed reasons to justify its dismissal of the two complaints. In doing so, the Board was not required to refer to all of the evidence or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16 (*Newfoundland Nurses*)). I therefore have no hesitation in dismissing these two applications for judicial review.

C. *In A-117-18, should the Court refuse to consider the application for judicial review given the applicant's failure to exhaust internal remedies?*

[36] The Union argues that the Court should not consider this application for judicial review because the applicant did not avail himself of the opportunity to ask the Board to review its decision, a remedy explicitly set out in section 18 of the Code. Given that the exercise of superintending jurisdiction is discretionary, the Court can in fact dismiss a premature application if, for example, it considers that an alternative remedy was available. See, among others, *Canada*

(Attorney General) v. Haydon, 2018 FCA 88; *Canadian Pacific Railway* at paras. 78–80; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713 at paras. 40–45. This is exactly what this Court did under the same circumstances in *Murphy v. Canadian Telecommunications Employees' Association*, 2010 FCA 113, finding that "the applicant should have availed himself of the administrative remedy of reconsideration that was available under section 18 of the Code" (at para. 7).

[37] However, the more recent case law of this Court is no longer so clear-cut. While failure to seek review may be a factor to consider when determining whether an application for judicial review can be heard, it cannot be the only applicable criterion: *Rogers Communications Canada Inc. v. Metro Cable T.V. Maintenance*, 2017 FCA 127 at paras. 16–18. See also: *Canadian Union of Postal Workers v. Lang*, 2017 FCA 233 at para. 2; *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221 at paras. 57 and 94. Given the fact that Board decisions are final (section 22 of the Code), it goes without saying that its power of review is limited and that the purpose of this power cannot be to allow reconsideration of the facts and arguments already submitted, as would be the case in an appeal (*Harelkin v. University of Regina*, [1979] 2 S.C.R. 561). Indeed, it appears from the Board's case law that the Board interprets its power of review in a narrow manner and that the main reasons underlying the exercise of this power are as follows: new facts, errors of law or of policy relating to the interpretation of the Code, and a breach of a principle of natural justice or procedural fairness. See for example: *Buckmire v. Teamsters Local Union 938*, 2013 CIRB 700 at paras. 36–45; *Mataya Reid v. Canadian Union of Postal Workers*, 2016 CIRB 818 at para. 8.

[38] Therefore, I find that the review was not an adequate or appropriate alternative remedy in the circumstances of this matter. The applicant is not relying on new facts or an error allegedly made by the Board in interpreting the Code or principles of natural justice. Rather, he is essentially repeating arguments that he already made before the Board and submits that the Board erred in weighing the evidence and not accepting his claims. Under these circumstances, the application for review was not a necessary step, and it would therefore not be appropriate for the Court, in the exercise of its discretion, to refuse to hear Mr. Ducharme's application for judicial review.

D. *Was the Board's decision to dismiss the applicant's complaint regarding a failure to represent reasonable?*

[39] The applicant claims that the Board's decision to dismiss his complaint regarding a breach of the duty of fair representation was unreasonable and cites a number of elements in support of this argument: the Union held a pre-arbitration meeting in a public place, lacked zeal in the steps that it took with the access to information commission, dealt with his applications in a cursory fashion, did not respond to a witness's testimony during arbitration, and did not apply for judicial review of the arbitrator's decision. On this basis, the Board should have found that the Union had acted in a manner that was arbitrary and in bad faith, according to the applicant.

[40] These arguments do not stand up to scrutiny. In fact, the applicant is asking this Court to reassess the evidence that was before the Board, which is clearly not the purpose of judicial review: *Khosa* at para. 61; *Hughes v. Canadian Airport workers Union (STCA Canada)*, 2012 FCA 236 at para. 8; *Dumont v. Canadian Union of Postal Workers, Montréal Local*, 2011 FCA

185 at para. 55 (*Dumont*). Furthermore, the Board's decision is well-reasoned and has all the characteristics of justification, intelligibility and transparency that a litigant is entitled to expect it to have. After having carefully reviewed the evidence and the submissions of the parties, the Board stated that, in its view, the Union had made considerable efforts to help the applicant challenge the actions taken by the employer as well as his dismissal, and found that the applicant had only provided it with cursory submissions.

[41] It is true that the exclusive authority afforded to a union to represent its members in any recourse relating to their rights under the collective agreement comes with a duty to represent them in a fair and equitable manner. This obligation is set out in section 37 of the Code, and it is for the Board to assess the union's conduct in order to ensure that it has not acted in a manner that is arbitrary or discriminatory. That said, the Board does not have the power to "rashly involve itself with the quality of representation before the arbitrator or the matter of the competency or strategy of counsel for the Union": *Bomongo v. Communications, Energy and Paperworkers Union of Canada*, 2010 FCA 126 at para. 15 (*Bomongo*).

[42] The Board was therefore correct in pointing out the limits of its role in a dispute arising from a complaint under section 37 of the Code. Indeed, it was not for the Board to scrutinize every single tactical choice that the Union made during arbitration: *Bomongo* at para. 15; *Dumont* at paras. 51–53; *Champagne v. International Association of Machinists and Aerospace Workers (IAMAW/AIMTA - District 140)*, 2015 FCA 264 at para. 6; *Orzeck v. Bell Canada*, 2009 CIRB 471 at paras. 10–12.

[43] The applicant has not demonstrated how it was unreasonable for the Board to find that the Union's decision not to apply for judicial review of the arbitration decision resulted from a valid exercise of the Union's discretion in this regard. As the Board noted, the evidence shows that the Union was diligent in seeking a legal opinion from an attorney in order to decide whether it should apply for judicial review of the award rendered by the arbitrator, particularly given that the collective agreement in no way obliges the Union to apply for this remedy.

[44] Finally, the applicant's argument that the decision was unreasonable because the Board failed to consider certain evidence and also failed to explain which of the submitted exhibits were taken into account cannot be accepted either. As mentioned above, an administrative decision-maker is not required to refer to all of the evidence or to make an explicit finding on each element of the reasoning: *Newfoundland Nurses* at para. 16. It is sufficient that, as in this case, the Court be able to understand the basis of the decision.

V. Conclusion

[45] For all of these reasons, I am of the opinion that the application for judicial review must be dismissed, with costs in A-38-18 and A-116-18 and without costs in A-117-18. A copy of these reasons will be placed in each of these three files.

"Yves de Montigny"
J.A.

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

"I agree.
Marianne Rivoalen, J.A."

APPENDIX

***Canada Labour Code*, R.S.C. 1985, c. L-2**	***Code canadien du travail*, L.R.C. (1985), ch. L-2**
Determination without oral hearing	**Décision sans audience**
16.1 The Board may decide any matter before it without holding an oral hearing.	**16.1** Le Conseil peut trancher toute affaire ou question dont il est saisi sans tenir d'audience.
…	[…]
Order and decision final	**Impossibilité de révision par un tribunal**
22 (1) Subject to this Part, every order or decision made by the Board under this Part is final and shall not be questioned or reviewed in any court, except in accordance with the *Federal Courts Act* on the grounds referred to in paragraph 18.1(4)(a), (b) or (e) of that Act.	**22 (1)** Sous réserve des autres dispositions de la présente partie, les ordonnances ou les décisions du Conseil rendues en vertu de la présente partie sont définitives et ne sont susceptibles de contestation ou de révision par voie judiciaire que pour les motifs visés aux alinéas 18.1(4)a), b) ou e) de la *Loi sur les Cours fédérales* et dans le cadre de cette loi.
…	[…]
Duty of fair representation	**Représentation**
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.
…	[…]

Prohibitions relating to employers

94 (3) No employer or person acting on behalf of an employer shall

(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,

…

(e) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part,

…

Complaints to the Board

Autres interdictions relatives aux employeurs

94 (3) Il est interdit à tout employeur et à quiconque agit pour son compte :

a) de refuser d’employer ou de continuer à employer une personne, ou encore de la suspendre, muter ou mettre à pied, ou de faire à son égard des distinctions injustes en matière d’emploi, de salaire ou d’autres conditions d’emploi, de l’intimider, de la menacer ou de prendre d’autres mesures disciplinaires à son encontre pour l’un ou l’autre des motifs suivants :

(i) elle adhère à un syndicat ou en est un dirigeant ou représentant — ou se propose de le faire ou de le devenir, ou incite une autre personne à le faire ou à le devenir —, ou contribue à la formation, la promotion ou l’administration d’un syndicat,

[…]

e) de chercher, notamment par intimidation, par menace de congédiement ou par l’imposition de sanctions pécuniaires ou autres, à obliger une personne soit à s’abstenir ou à cesser d’adhérer à un syndicat ou d’occuper un poste de dirigeant ou de représentant syndical, soit à s’abstenir :

(i) de participer à une procédure prévue par la présente partie, à titre de témoin ou autrement,

[…]

Plaintes au Conseil

97 (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section 37, 47.3, 50, 69, 87.5 or 87.6, subsection 87.7(2) or section 94 or 95; or

(b) any person has failed to comply with section 96.

Time for making complaint

97 (2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

…

Burden of proof

98 (4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

97 (1) Sous réserve des paragraphes (2) à (5), toute personne ou organisation peut adresser au Conseil, par écrit, une plainte reprochant :

a) soit à un employeur, à quiconque agit pour le compte de celui-ci, à un syndicat, à quiconque agit pour le compte de celui-ci ou à un employé d'avoir manqué ou contrevenu aux paragraphes 24(4) ou 34(6), aux articles 37, 47.3, 50, 69, 87.5 ou 87.6, au paragraphe 87.7(2) ou aux articles 94 ou 95;

b) soit à une personne d'avoir contrevenu à l'article 96.

Délai de présentation

97 (2) Sous réserve des paragraphes (4) et (5), les plaintes prévues au paragraphe (1) doivent être présentées dans les quatre-vingt-dix jours qui suivent la date à laquelle le plaignant a eu — ou, selon le Conseil, aurait dû avoir — connaissance des mesures ou des circonstances ayant donné lieu à la plainte.

[…]

Charge de la preuve

98 (4) Dans toute plainte faisant état d'une violation, par l'employeur ou une personne agissant pour son compte, du paragraphe 94(3), la présentation même d'une plainte écrite constitue une preuve de la violation; il incombe dès lors à la partie qui nie celle-ci de prouver le contraire.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-38-18, A-116-18 AND A-117-18
DOCKET:	A-38-18
STYLE OF CAUSE:	MARTIN DUCHARME v. AIR TRANSAT A.T. INC.
AND DOCKET:	A-116-18
STYLE OF CAUSE:	MARTIN DUCHARME v. AIR TRANSAT A.T. INC. AND CANADIAN UNION OF PUBLIC EMPLOYEES
AND DOCKET:	A-117-18
STYLE OF CAUSE:	MARTIN DUCHARME v. CANADIAN UNION OF PUBLIC EMPLOYEES
PLACE OF HEARING:	HEARD BY ONLINE VIDEOCONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	JANUARY 26, 2021
REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	PELLETIER J.A. RIVOALEN J.A.
DATED:	FEBRUARY 25, 2021

APPEARANCES:

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Sylvain Beauchamp	FOR THE CANADIAN UNION OF PUBLIC EMPLOYEES

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