Date: 20041215

File: 160-2-93

Citation: 2004 PSSRB 173

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

FERNAND DION

Complainant

and

TREASURY BOARD
(Department of Fisheries and Oceans)

Employer

RE: Complaint under section 133 of the *Canada Labour Code*

Before: Sylvie Matteau, Deputy Chairperson

For the complainant: Fernand Dion

For the employer: Mark Sullivan, Counsel

(Decided without an oral hearing)

[1] On March 17, 2003, a complaint was filed with the Public Service Staff Relations Board (PSSRB) by Fernand Dion under section 133 of the *Canada Labour Code* (*Code*), alleging that, on December 20, 2002, his employer had contravened section 147 of the *Code*, causing him to lose his employment benefits and the opportunity to obtain an indeterminate position as a result of an occupational injury that occurred on November 14, 2002, on board CCGS Pierre Radisson.

[2] This decision deals with the preliminary objection raised by the employer concerning the PSSRB's jurisdiction. On July 13, 2003, the parties were invited to submit a brief presentation of their arguments so that a decision could be made on this case based on written submissions. Mr. Dion's presentation was received on August 16, 2004, the employer's on September 8, 2004, and the complainant's response on October 1, 2004.

[3] The correspondence on file and the parties' presentations contain the following facts and allegations: Mr. Dion was employed by the Department of Fisheries and Oceans, having accepted a determinate job offer scheduled to end on February 16, 2003. On November 14, 2002, he had an accident on CCGS Pierre Radisson, the ship to which he was assigned. On December 12, 2002, he was notified by a letter dated December 6, 2002, that the employer was terminating his work contract effective December 20, 2002. Mr. Dion took several steps to have the situation redressed and safeguard his employment benefits and allowances. He approached the Commission de la santé et de la sécurité au travail du Québec (CSST) in December 2002 and the Canada Industrial Relations Board (CIRB). Both organizations indicated that the matter was outside their jurisdiction since Mr. Dion was an employee of the Treasury Board of Canada. The complaint was then submitted to the PSSRB.

[4] When the file was received by the PSSRB, there was an attempt at mediation and, when that failed, extensions were granted to enable the parties to file written submissions.

[5] On March 27, 2003, the employer withdrew its decision to terminate Mr. Dion's contract, at the same time extending his employment contract until April 16, 2003, at which time all such contracts with the ship's employees terminated. Mr. Dion was still off work as a result of the November 2002 accident.

[6] On June 6, 2003, in response to the letter sent to him by the employer on March 27, 2003, and because he had not been called back to work like his colleagues, Mr. Dion wrote to the PSSRB, asking it to intervene and have him reinstated in his position to ensure that he would retain the benefits accumulated before the occupational injury. At this point, he saw the situation as a financial penalty.

[7] On June 11, 2004, the employer responded with a preliminary objection. It indicated that Mr. Dion was now arguing that the employer's decision not to renew his determinate employment contract was an arbitrary financial penalty against him. According to the employer, this matter does not fall under Part II of the *Code*. Indeed, Mr. Dion's complaint did not make any reference to measures taken contrary to section 147 of the *Code*, nor to the employee's rights under sections 128 or 129 of the *Code*, which cover refusal to work, and investigations by health and safety officers covered under subsection 133(3) of the *Code*. Alternatively, the employer asked that the complainant provide details on his allegations under section 133 of the *Code* so it could prepare its defence.

ARGUMENTS

[8] In his submission, Mr. Dion alleged that he had been subjected to a disciplinary measure under section 147 of the *Code*. He explained that he had been subjected to a dismissal or unlawful action because of his occupational injury, specifically because he had followed the workplace health and safety requirements in reporting his occupational injury under subsection 126(1) of the *Code*.

[9] In this same submission, Mr. Dion asked the PSSRB to intervene for the following reasons:

> [Translation]
>
> [...]
>
> *(i) I exercised my rights in a timely manner;*
>
> *(ii) I based my application on the following:*
>
> *(a) dismissal because of my occupational injury;*
>
> *(b) loss of my contractual benefits; and*

(c) loss of my accumulated seniority;

(iii) the CSST told me it did not have the jurisdiction;

(iv) my union representative told me this case fell under the CSST, nothing else; and

(v) the employer's representative is requesting the dismissal of this complaint, pure and simple, without any other form of action, because of the issue of jurisdiction.

[...]

And he added:

[Translation]

[...]

With all due respect for the opinion of my union representative and that of the employer's representative, I believe that the Board does have jurisdiction in this matter.

My employer's refusal to call me back to work after April 16, 2003, constitutes a disciplinary measure against me because I met my obligations under paragraph 126(1)(b) of the Code. *I reported the accident in accordance with the regulations on safety in the workplace, and the end result is the one we see today:*

(i) the employer has not called me back to work since this accident;

(ii) the employer is depriving me of my contractual benefits; and

(iii) the employer is preventing me from accumulating the seniority I need to obtain permanent status.

Claiming that I have not been subjected to a disciplinary action because the ship on which I was serving ceased operations on April 16, 2003, is nothing more than a worthless excuse.

The ship resumed operations within 60 days after April 16, 2003. Had it not been for my occupational injury, I would have been called back to work, as had always been the

> *case before. Employees with less seniority than mine were hired.*
>
> *Claiming that the employer did not call me back because my injury was not entirely healed is also a worthless excuse.*
>
> *I was entitled to be called back, even if my injury was not entirely healed. It was up to my doctor to decide whether I was able to return to work. It was not up to my employer to make this decision in an arbitrary manner.*
>
> [...]

[10] Mr. Dion alleged that some accommodation, even temporary, could have been made. In any case, he maintained, he was entitled to the uninterrupted continuation of his rights and benefits, his seniority and his work ties. Alternatively, he asked that the PSSRB consider his complaint under subsection 240(1) of the *Code*, since he had been unjustly dismissed as a result of an occupational injury, which is forbidden under subsection 239(1) of the *Code*. He asked that the timeframe for filing this complaint be extended under subsection 240(3) of the *Code*, since he had duly and diligently pursued his recourses.

[11] On September 8, 2004, the employer replied that it was repeating the position it had initially expressed in support of its objection, and added that:

> [Translation]
>
> [...] *For the first time, Mr. Dion indicated that his complaint was driven by the fact that he was acting under section 126 of the* Code. *Specifically, he alleged that he believed he had been subjected to a dismissal or unlawful action because of his occupational injury and the fact that he had reported the accident.*
>
> *On this point, the employer would like to point out that Mr. Dion held a determinate position in the Department of Fisheries and Oceans. The fact that his initial work contract had been amended to terminate prematurely (December 2002) was corrected. His initial work contract had been adhered to and even extended until April 16, 2003, the termination date set for work by all employees on CCGS Pierre Radisson.*
>
> *Under section 25 of the* Public Service Employment Act, *an individual appointed for a determinate period ceases being an employee as of the date of termination of the work contract. Section 25 reads as follows:*

> *"Term appointments*
>
> *25. An employee who is appointed for a specified period ceases to be an employee at the expiration of that period."*
>
> *The employer maintains that the termination of Mr. Dion's term of employment did not constitute a dismissal or an illegal action, as alleged. His employment ended as provided in his work contract, which coincided with the April 16, 2003 discontinuation of operations on the ship, and not a decision made by the employer independently of this contract.*
>
> *The case law is clear on the fact that it is not within the Board's jurisdiction to hear a complaint or grievance by a grievor based on the fact that his/her work contract has terminated.*
>
> *In light of the above, the employer continues to maintain that this complaint is unfounded and that the recourse based on the* Code *is not applicable. Consequently, the employer respectfully reiterates its request that the Board dismiss this complaint without a hearing.*
>
> *Finally, in his last correspondence, Mr. Dion indicated that if his complaint was dismissed under section 133-147 [sic], he would ask that the Board consider his application under subsection 240(1) of the* Code. *The employer submits that Part III of the* Code, *which section 240 falls under, does not apply to employees of a department under the* Financial Administration Act. *Consequently, the employer submits that the Board has no jurisdiction under section 240.*
>
> [...]

[12] As previously indicated, Mr. Dion provided a reply in which he maintained that he was seeking reparation for the financial harm inflicted on him and objected that there did not appear to be a single organization empowered to hear his case.

REASONS FOR DECISION

[13] Mr. Dion's complaint was presented under section 133 of the *Code*, alleging that the Department of Fisheries and Oceans had violated subsection 147*(c)* on December 20, 2002, by taking action that had caused him to lose his employment benefits and the opportunity to obtain an indeterminate position.

[14] On March 27, 2003, the employer had sent Mr. Dion a letter extending the duration of his determinate contract until April 16, 2003, as, it seems, it had done with

all the other employees of CCGS Pierre Radisson. In his letter of June 6, 2003, to the PSSRB, Mr. Dion confirmed that he had received the letter of March 27, 2003, and that his work contract had been extended until April 16, 2003. This corrected Mr. Dion's situation and rendered the complaint groundless.

[15] However, in that same letter dated June 6, 2003, Mr. Dion informed the PSSRB that he wanted to pursue his complaint under section 133 of the *Code* because, in his opinion, effective April 23, 2003, he had lost all of his benefits because his work contract had been broken for more than 5 days. Since he was still on sick leave at the time, he maintained that this breach of contract was a financial penalty against him. He maintained that it was now impossible for him to get an indeterminate position after three consecutive years of work. He pointed out that he had already accumulated more than two consecutive years of work by the time of his injury.

[16] He then asked that he be allowed to resume his work on the date approved by his doctor and to retain the benefits he had accumulated before the injury instead of starting all over, which he continues to perceive as a financial penalty.

[17] Thus, what Mr. Dion is reproaching the employer is that it did not maintain his employment until his doctor approved his return to work and that it did not call him back to work. In his presentation, he clearly states:

> [Translation]
>
> [...]
>
> *My employer's refusal to call me back to work after April 16, 2003, constitutes a disciplinary measure against me because I met my obligations under paragraph 126(1)(b) of the* Code. *I reported the accident in accordance with the regulations on safety in the workplace, and the end result is the one we see today:*
>
> *(i) the employer has not called me back to work since this accident;*
>
> *(ii) the employer is depriving me of my contractual benefits; and*
>
> *(iii) the employer is preventing me from accumulating the seniority I need to obtain permanent status.*
>
> [...]

[18] Mr. Dion alleged that he was subjected to a disguised disciplinary measure because, he claimed, the excuse that the ship on which he was working ceased operations on April 16, 2003, was nothing more than a worthless pretext. He also asked that his complaint be deemed to have been made under section 240 of the *Code*. The PSSRB has no jurisdiction under this provision of the *Code,* since it is limited to Part II of the *Code*.

[19] The events contested after June 2003 are different from those contained in the initial complaint. As of March 2003, the latter no longer had any grounds. Mr. Dion should have started a new process, since the fact that he was not called back to work was a separate event that occurred after the original complaint.

[20] Thus, I maintain the employer's preliminary objection to the complaint filed under section 133 of the *Code* since the employer had corrected the situation.

[21] Since section 240 of the *Code* does not apply to Mr. Dion's situation because he was a federal employee at the time of the accident, I cannot review his complaint from that angle, either, contrary to what he requested in his submission.

[22] Since the objection is maintained, the complaint is dismissed.

Sylvie Matteau,
Deputy Chairperson

OTTAWA, December 15, 2004

P.S.S.R.B. Translation