

Date: 20050511

File: 160-24-102

Citation: 2005 PSLRB 43

Canada Labour Code



Before the Public Service
Labour Relations Board

BETWEEN

LISE P. TANGUAY

Complainant

and

STATISTICAL SURVEY OPERATIONS

Employer

Indexed as

Tanguay v. Statistical Survey Operations

Re: Complaint made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: Sylvie Matteau, Vice-Chairperson

For the Complainant: Michel Houle, Public Service Alliance of Canada

For the Employer: David Bolger, Counsel

Decided without an oral hearing.

(P.S.L.R.B. Translation)

Complaint before the Board

[1] On April 19, 2004, the Canada Industrial Relations Board received a complaint from Lise P. Tanguay, a shop steward and co-chair of the safety and health committee of the FIELD-SSO at Statistics Canada. Her letter was forwarded to the Public Service Staff Relations Board (PSSRB), and, on June 23, 2004, the PSSRB acknowledged receipt of the complaint dated April 13, 2004.

[2] This complaint is made under section 133 of the *Canada Labour Code*:

133 (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

[3] In the complaint, Ms. Tanguay alleges that the employer refused to pay travel expenses, i.e., kilometrage, meals and parking, incurred in connection with a safety and health committee meeting called by the Director General at the Montreal Office on June 25, 2003. According to her, this contravenes section 147 of the *Canada Labour Code*. The negative response at the final level had been received on April 7, 2004.

[4] Section 147 of the *Canada Labour Code* (Part II) provides:

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any action against or threaten to take any such action against an employee because the employee

(a) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or

(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[5] After reviewing the case, the PSSRB asked the parties on December 24, 2004, to send it written submissions on the following question [translation]: "*Based on the facts*

set out in the complaint and on the assumption that they have been established, is there a contravention of section 147 of the Canada Labour Code (Part II)?”

[6] On April 1, 2005, the *Public Service Labour Relations Act* (the new *PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Under section 39 of the *Public Service Modernization Act*, the Board remains seized of the complaint.

Summary of the facts

[7] The facts assumed to have been established are as follows: the complainant is a member of the SSO-CAPI group, field and telephone interviewers, working from home. In 2002, this group joined their colleagues' local safety and health committee (SSO-CATI) working in the Montreal and Sherbrooke offices. During this period, the SSO-CAPI representatives were asked to attend meetings in Montréal and were paid for their preparation and travel time as well as kilometrage, parking and meals. In 2004, since the two groups' needs differed, two separate committees were established.

[8] The first meeting of the new group, of which the complainant is a representative, was called by the Director General, Eastern Canada Region, in Montréal, on June 25, 2004. The complainant attended this meeting. The complainant and two other stewards were paid for two hours of preparation and one hour of meeting time. The employer refused to pay travel expenses (kilometrage, parking and meal(s)).

Summary of the arguments

[9] The complainant's submissions were received on February 11, 2005. Her representative made the following arguments:

[TRANSLATION]

...

I want to bring to the Board's attention the fact that the employer had initially agreed to pay for 2 hours of preparation time and an hour for the meeting. It had refused to pay for travel time, kilometrage, parking and any meals that the meeting might necessitate.

After a number of attempts (Annexes 1, 2 and 3) and even a threat (Annex 4) to file a complaint with the PSSRB, on April 7, almost one year later, the employer decided to pay for

preparation time, travel time and meeting time; but still refused to pay related expenses (Annex 5).

In its response [to the complaint] of October 6, [2004], the employer refers you to section 135.1 (11) of the CLC, Part II, which reads as follows:

A committee member shall be compensated by the employer for the functions described in paragraphs (10)(a) and (b), whether performed during or outside the member's regular working hours, at the member's regular rate of pay or premium rate of pay, as specified in the collective agreement or, if there is no collective agreement, in accordance with the employer's policy.

However, the employer did not cite the preceding paragraph, paragraph 10, which provides that

The members of a committee are entitled to take the time required, during their regular working hours,

- (a) to attend meetings or to perform any of their other functions; and*
- (b) for the purposes of preparation and travel, as authorized by both chairpersons of the committee.*

We find it difficult to understand how travel time can be reimbursed but not related expenses, namely, kilometrage, parking and meals. When an employee travels during working hours remunerated by the employer, the employer defrays all the expenses that the employee has to incur in the course of his or her duties; since the time spent on the activities of the safety and health committee is considered working time (I refer you to the Manager's Guide CLC, Part II, published by the Treasury Board Secretariat, pages 55 and 56, Annex (6), the same logic must apply.

The employer's refusal to defray expenses such as kilometrage, parking and meals amounts to a violation of section 147 in that it imposes a financial penalty because the employee acted in accordance with the provisions of the CLC, Part II, or sought their enforcement (147(c)). Moreover, section 125.(1)(z.08) provides that the employer shall cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under this Part.

A refusal to defray such expenses must be interpreted as an obstacle preventing the member from participating on the committee and its activities. Part II of the CLC, in force since September 30, 2000, has changed the situation in that the establishment of the committee is now mandatory under section 135.(1). If the employee is required to defray the expenses incurred in the course of his or her duties under this Act, there will no longer be anyone willing to represent the workers on such committees. Incidentally, do managers who participate on the safety and health committees defray their own expenses? I do not think so!

We urge the Board to order the employer under section 134(d) to pay for Ms. Tanguay for the expenses that she incurred in participating in a duly called meeting of the safety and health committee.

...

[10] The employer provided its answer on March 4, 2005, which reads as follows:

[TRANSLATION]

...

I wish to reaffirm the employer's submissions communicated by Wayne Smith in his letter of October 6, 2004. The complaint is based on section 147 of the Canada Labour Code - Revised Statutes of Canada, 1985, Chapter L-2. (the "Code"). It is claimed that a financial penalty was inflicted because the employer refused to reimburse her for her kilometrage, meals and parking expenses when she attended meetings of the local safety and health committee at the regional office of Statistics Canada.

The refusal to pay these expenses does not amount to a penalty because the employer is not in a position to pay them. A penalty would require a positive action by the employer, which is not the case.

Paragraph 135.1(11) of the Code requires that the employee be paid for the hours devoted to the activities. Therefore, the complainant is adequately compensated for this work.

It is an incontrovertible principle that any expenditure of public funds by a department is subject to the Financial Administration Act - Revised Statutes of Canada, 1985, Chapter F-11., section 26, which reads: "Subject to the Constitution Acts, 1867 to 1982, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament."

Neither the Financial Administration Act nor the Code authorizes the payment of kilometrage, meals and parking to attend committee meetings. Consequently, the employer has no authority to pay these expenses.

The employer pays the complainant's salary so that she may participate in meetings of the local safety and health committee. The employer's managers who participate in such meetings do not receive additional compensation.

In conclusion, there is no question of reimbursing the complainant since there has been no contravention of section 147 of the Code. The complainant's application must accordingly be dismissed.

...

[11] Finally, the complainant's reply reached the Board on March 18, 2005:

[TRANSLATION]

....

Based on the fact that Guy Oddo, Director, Eastern Region, called the meeting in question, it seems clear to us that the employer should defray the expenses since there is no indication to the contrary (Annex 1). My reference to managers in my initial submissions was an analogy, because if a manager had to travel to attend a safety and health committee meeting, do you think he would do so at his own expense, especially if he had to travel from Quebec City to Montréal?

It is still our contention that the refusal to defray Ms. Tanguay's expenses amounts to an action prohibited by section 147. The employer is prohibited from imposing a financial or other penalty on her. We stress the word "other". It is true that the Code is silent with respect to those particular expenses. However, where the employer calls a face-to-face meeting instead of using teleconferencing as was the practice, the least one can expect if employees are to participate on such committees is that they will not be required to pay out of their own pockets.

We repeat that the Board should order the employer to pay the expenses incurred by the worker in order to participate in the meeting on June 25, 2003.

...

Reasons

[12] The question that the parties were asked was aimed at determining whether section 147 of the *Canada Labour Code* had been contravened. The question was whether the actions complained of by Ms. Tanguay amount to a “financial or other penalty” or a “refusal to pay her remuneration” in respect of any period that the employee would, but for the exercise of the employee’s rights under this Part, have worked because the employee acted in accordance with this Part or sought the enforcement of any of the provisions of this Part (paragraph 147(c) of the *Code*).

[13] It should first be noted that being a representative on a local safety and health committee and participating on that committee constitutes an exercise of the employee’s rights of which the employee availed herself under the provisions of Part II of the *Canada Labour Code* and within the meaning of paragraph 147(c).

[14] Section 147 of the *Code* sets out four categories of prohibitions: no employer shall (1) dismiss, suspend, lay off or demote an employee; (2) impose a financial or other penalty on an employee; (3) refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee’s rights under this Part, have worked; or (4) take any disciplinary action against or threaten to take any such action against the employee.

[15] Subsections 135.1(10) and (11) of the *Canada Labour Code* provide that

(10) The members of a committee are entitled to take the time required, during their regular working hours,

(a) to attend meetings or to perform any of their other functions; and

(b) for the purposes of preparation and travel, as authorized by both chairpersons of the committee.

(11) A committee member shall be compensated by the employer for the functions described in paragraphs (10)(a) and (b), whether performed during or outside the member's regular working hours, at the member's regular rate of pay or premium rate of pay, as specified in the collective agreement or, if there is no collective agreement, in accordance with the employer's policy.

[16] Concerning the payment of remuneration for travel time, subsection 135.1(11) clearly refers to the total number of hours that the representative devotes to these

activities. Therefore, this includes the travel time already recognized in subsection 135.1(10). The representative's remuneration must accordingly be paid for all this time. A refusal to pay the remuneration for travel time would be a prohibition under the third category of section 147.

[17] The complainant is not claiming that this remuneration should be paid. Accordingly, I conclude that her remuneration was duly paid to her on March 30, 2004, as stated in her complaint, which was received at the Board on July 15, 2004.

[18] Concerning the expenses incurred while travelling, the provisions of the *Canada Labour Code* do not refer to the reimbursement of expenses such as kilometrage, parking and meals. This does not involve remuneration but rather the reimbursement of expenses. In this sense, it is not the same as the prohibition discussed in the preceding paragraphs. Reimbursement of expenses is not specified in section 147 of the *Code*, as the complainant acknowledges.

[19] Does the employer's refusal to make the reimbursement constitute a financial or other penalty? Gérard Dion's labour relations dictionary published by Les Presses de l'Université Laval (Québec 1986, 993 pages), defines "penalty" as a [TRANSLATION] "punishment or award to ensure the performance of an action" or a "punishment established or inflicted by a law or some authority to prevent a prohibited act." "Financial penalty" [peine pécuniaire] is defined in this work as a [TRANSLATION] "monetary penalty imposed on a person who has contravened a by-law or avoided an obligation."

[20] The rationale of section 147 of the *Code* is to ensure compliance with the provisions of Part II without reprisals. Dion (*supra*) defines "reprisals" as follows: [TRANSLATION] "action taken...to inflict a physical, economic or other disadvantage in response to an act carried out by another". Underlying the action, therefore, there must be an intention to harm. It is in this perspective that the PSSRB and the Canada Industrial Relations Board have always exercised their power of intervention.

[21] The complainant submits that, since the legislation recognizes that she has these duties and that these activities must be performed during working hours, all of the conditions that normally apply to the conditions of work, including the provisions on travel expenses, should apply.

[22] The second prohibition in section 147 includes any penalty other than financial. The complainant relies on this prohibition when she stresses that, in reality, she is the victim of a penalty. Since the employer called the meeting and chose to make the committee members travel rather than using telephone conferencing, it should pay the expenses as if it had called a meeting for work. According to her, employees cannot be asked to pay these costs out of their own pockets when they are required by the employer to travel for a work-related activity arising from a statutory duty. Thus, she concludes that, by the mere fact that such expenses are not reimbursed, there is a penalty. However, she did not allege or demonstrate that there was an intention on the employer's part to make reprisals.

[23] The employer submits that the refusal to pay these expenses does not amount to a penalty since the refusal was not a positive action on its part. However, the employer's inaction could also be a violation of section 147 of the *Code* and for this reason, the argument cannot be accepted. Moreover, it suggests that the employer does not have the statutory authority to make this payment from public funds. Unless there is clear wording in this sense, the statutory enactment must be interpreted restrictively.

[24] Accordingly, I find that the refusal to pay these expenses cannot be interpreted as a penalty for participating in the activities of the committee, since there is nothing in the record to indicate that the refusal was intentional on the employer's part. In other words, nothing shows that the employer chose to hold the meeting in Montréal, which would require travel, in order to punish participation in the meeting by wilfully causing expenses that it did not intend to pay. The complainant did not make this allegation. Instead, she argued that the employer's decision would lead to a lack of participation in committee meetings.

[25] Accordingly, there is no penalty or reprisal under section 147 of the *Code* related to participation in the safety and health committee meeting. Since the *Code* does not provide for the reimbursement of travel expenses, an adjudicator certainly cannot add to the legislation. The term "remuneration" is recognized in the field as meaning the amount of money paid for the work performed or a service rendered (see Dion (*supra*)).

[26] However, for the sake of good labour relations and to ensure the smooth operation of the safety and health committee, the employer should be prudent in its choice of meeting venues and give preference to conference calls or any arrangement that minimizes such costs for the participants, whether they be employees or managers.

[27] For these reasons, the Board makes the following order:

Order

[28] The complaint under section 133 of the *Canada Labour Code* is dismissed.

May 11, 2005.

**Sylvie Matteau,
Vice-Chairperson**

P.S.L.R.B. Translation