Date: 20100826

File: 560-02-59

Citation: 2010 PSLRB 94

Canada Labour Code

Before the Public Service Labour Relations Board

BETWEEN

CHRISTINE LAROCQUE

Complainant

and

TREASURY BOARD
(Department of Health)

Respondent

Indexed as
Larocque v. Treasury Board (Department of Health)

In the matter of a complaint made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: Steven B. Katkin, Board Member

For the Complainant: James Cameron, counsel

For the Respondent: Cécile LaBissonière, Treasury Board Secretariat

Decided on the basis of written submissions
filed May 21 and June 11 and 18, 2010.
(PSLRB Translation)

I. Complaint before the Board

[1] On December 30, 2008, Christine Larocque ("the complainant") was rejected on probation from her quality control officer position, classified at the AS-02 group and level, in the Health Products and Food Branch of the Department of Health ("the respondent").

[2] On May 11, 2009, the complainant filed a complaint under section 133 of the *Canada Labour Code,* R.S.C. 1985, c. L-2 ("the *Code"*), on the grounds that the respondent violated section 147 of the *Code*. The complaint was filed with the Public Service Labour Relations Board ("the Board") on May 13, 2009.

[3] On June 9, 2009, the respondent filed a preliminary objection on the grounds that the complaint was filed outside the 90-day limit provided under subsection 133(2) of the *Code* and that, because the *Code* does not provide the authority to extend that time limit, the Board does not have the authority to hear the complaint.

[4] On July 6, 2009, the complainant requested an extension of time for filing her complaint. The respondent objected.

[5] On April 30, 2010, the parties were informed that the matter of the time limit would be reviewed based on written arguments. The complainant filed her arguments with the Board on May 21, 2010. The respondent's arguments were filed on June 11, 2010 and the complainant's response on June 18, 2010.

II. Summary of the arguments

A. For the complainant

[6] The complainant disagreed with the respondent's objection that the *Code* does not grant the Board the discretionary authority to extend the time limit for filing a complaint under subsection 133(2).

[7] The complainant based her argument on the work of Graham J. Clarke in *Clarke's Canada Industrial Relations Board* (Aurora: Canada Law Book, 1999). Specifically, she referred to the author's following comments about subsection 133(2) of the *Code*:

. . .

> *Paragr. 133(2)*
> *Observation*
>
> *The 90 day time limit for complaints under this section used to be mandatory and the Board could not extend it. However, Bill C-19 (S.C. 1998, c. 26) amended the Code and gave the Board the discretion to extend statutory time limits. The Board will have to decide whether its new discretion becomes in effect a rubber stamp or whether only rare cases will justify the use of its new power to extend time limits.*
>
> *The application of this provision should now be carefully assessed because the Board did not previously have the authority to grant extensions.*
>
> . . .

On that point, she cited the Canada Industrial Relations Board (CIRB) decision *McTaggart v. Erb Transport Limited*, [2005] CIRB No. 325, in which the CIRB used its discretionary authority to extend the time limit prescribed by subsection 133(2).

[8] The complainant submitted that, when she was rejected on probation, she was not working due to illness and that she was not in a position to exercise her rights under the *Code* before May 2009. To that end, in her letter to the Board dated July 6, 2009, the complainant provided the following explanation:

> [Translation]
>
> . . .
>
> *The complainant was not working due to illness when she was dismissed. The work interruption was initially to last until February 1, 2009, but the complainant was not ready to return to work at that time and was not ready to exercise her rights under the* Code*. During that time, the complainant visited a psychologist once a week. It was not until May 2009 that the sessions were reduced to every two weeks and that she was ready to exercise her rights under the* Code*.*

[9] In addition, the complainant submitted that she believed that the time limit for filing a complaint under subsection 133(2) of the *Code* was 90 working days.

[10] The complainant submitted that she has been diligent in exercising her rights and that denying her request for an extension would be unfair because she has no other means to contest her dismissal.

[11] Finally, the complainant submitted that I should apply the necessary five criteria for the Board to exercise its discretionary authority stated in *Schenkman v. Treasury Board (Public Works and Government Services Canada),* 2004 PSSRB 1, recognizing that that decision concerned a grievance, not a complaint, under the *Code*.

B. For the respondent

[12] The respondent pointed out that the complainant was not entitled to file her complaint because, on the date it was filed, she was no longer an employee defined under section 3 of the *Code* as a "person employed by an employer." The respondent submitted that, on the day she was dismissed, December 30, 2008, the complainant ceased to be an employee under subsection 62(1) of the *Public Service Employment Act,* S.C. 2003, c. 22.

[13] The respondent continued by submitting that, given that the 90-day time limit under subsection 133(2) of the *Code* was imperative, the Board did not have the authority to extend that time limit and added that, had the legislator desired to provide the Board the authority to grant extensions, it would have clearly so stipulated. The respondent cited as an example paragraph 61(*b*) of the *Public Service Labour Relations Board Regulations* ("the *Regulations*"), which provides that the Chairperson of the Board may grant extensions for certain time limits in the grievance process on application by a party, in the interests of fairness.

[14] The respondent submitted that *Schenkman* did not apply in this case because it concerned an extension for filing a grievance under the *Regulations*, the provisions of which do not apply under the *Code*.

[15] The respondent submitted that, even were the Board to decide that it had the authority to extend the time limit set out in subsection 133(2) of the *Code*, the complainant's explanations for being late filing her complaint were not convincing. The respondent pointed out that the complainant did not provide any medical evidence that her health prevented her from filing her complaint. The respondent added that, from the time she was rejected on probation, December 30, 2008, to the day she filed her complaint, the complainant contacted the respondent's labour relations unit and her union representative several times to ask questions about her file.

[16] With respect to the complainant's statement that she had no other means to contest her dismissal, the respondent stated that the complainant filed a grievance

against her rejection on probation, which she described as a termination for disciplinary reasons.

[17] With respect to *McTaggart*, the respondent submitted that that case involved the issue of determining when the complainant found out about the action or circumstances that had given rise to the complaint and not determining whether a complainant had 90 days to file a complaint.

C. Complainant's response

[18] The complainant contested the respondent's argument that she was no longer an employee as defined in section 3 of the *Code*. According to the complainant, the respondent's position would mean that any complaint filed by an "employee" under the *Code* would be dismissed *ab initio* because, after dismissal, he or she would no longer be an "employee." The complainant pointed out that that section 133 of the *Code* allows an employee to contest measures taken against him or her that violated section 147, and that dismissal is one of the stipulated measures. According to the complainant, it is obvious that the legislator intended to include dismissed employees in the definition of "employee."

[19] The complainant submitted that, regardless of whether *McTaggart* and *Schenkman* apply in this case, the respondent omitted considering the comments of Mr. Clarke, quoted earlier. According to the complainant, the issue is no longer whether the Board has the authority to extend the 90-day time limit but rather under what circumstances it may extend that limit.

III. Reasons

[20] I will begin by addressing the respondent's first argument, which is that the complainant was no longer an employee in the sense of section 3 of the *Code* and that, therefore, she was not entitled to file her complaint.

[21] Section 147 of the *Code* reads as follows:

> ***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 disciplinary 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.*

[22] Subsection 133(1) of the *Code* provides as follows:

> ***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.*

[23] Section 147 of the *Code* lists a series of measures that the employer is prohibited from imposing on its employees, including dismissal. For all those measures, the employer-employee link is broken only with a dismissal.

[24] When applied in connection with sections 147 and 133 of the *Code*, the term "employee" makes no explicit distinction between people who remain in the employer's employ and those who do not, such as people who have been dismissed. Thus, for the purpose of section 133, it seems apparent to me that the legislator intended to include dismissed employees in the definition of "employee" in section 3. I also agree with the complainant's argument that excluding dismissed employees from the definition of "employee" when reading those provisions would amount to *ab initio* rejections of their complaints and would thus deprive them of any recourse under section 133.

[25] I note that the former Public Service Staff Relations Board heard complaints filed under section 133 of the *Code* by dismissed employees (*Hutchinson and Treasury Board (Environment Canada),* PSSRB File No. 160-02-52 (19980114)); so did the Canada Labour Relations Board (CLRB), predecessor to the CIRB (*Navratil v. Canadian Stevedoring Co. Ltd.*, [1996] CLRB No. 1165; and *Greg Horril/Seller v. Garden Grove Produce Imports Ltd.,* [1995] CLRB No. 1120). Consequently, I believe that the

complainant was entitled to file a complaint under section 133 and that there is no basis for the respondent's argument.

[26] I will now address the argument of whether the Board has the authority to extend the time limit stipulated in subsection 133(2) of the *Code*. First, it is necessary to determine whether that time limit is imperative, and second, to determine whether the Board has the authority to extend it.

[27] Subsection 133(2) of the *Code* reads as follows in French:

> ***133.*** *(2) La plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant a eu connaissance — ou, selon le Conseil, aurait dû avoir connaissance — de l'acte ou des circonstances y ayant donné lieu.*

The English version reads as follows:

> ***133.*** *(2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*

[28] Section 11 of the *Interpretation Act*, R.S.C. 1970, c. I-23, states that the term *shall* is imperative. The French version of that provision expands further as follows:

> ***11.*** *L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. . . .*

Thus, I believe that the time limit stipulated in subsection 133(2) of the *Code* is imperative.

[29] Section 1 of the *Canada Industrial Relations Board Regulations, 2001,* SOR/2001-520, adopted under the *Code*, defines "day" as a calendar day. Therefore, the complainant filed her complaint outside the time limit, i.e., more than 90 calendar days after her dismissal. I must now determine whether I have the authority to extend that time limit.

[30] Both in her opening argument and in her rebuttal, the complainant relied on Mr. Clarke's comments about subsection 133(2) of the *Code* to the effect that the CIRB has the authority to extend the time limit in question. According to the complainant, Mr. Clarke's comments dispel any possible doubt about extending that limit. Given the

significance that the complainant attaches to those comments, they warrant further analysis.

[31] Bill C-19, to which Mr. Clarke and the complainant refer, was passed as *An Act to amend the Canada Labour Code (Part I) and the Corporations and Labour Unions Returns Act and to make consequential amendments to other Acts*, S.C. 1998, c. 26. Among other things, that *Act* created the CIRB and granted it new powers. In particular, under subsection 5(4) of that *Act*, the CIRB acquired the following new power:

> ***16.*** *The Board has, in relation to any proceeding before it, power:*
>
> . . .
>
> *(*m.1*) to extend the time limits set out in this Part for instituting a proceeding;*
>
> . . .

[32] The phrase "in this Part" in paragraph 16(*m.1*) of the *Code* refers to Part I, which deals with labour relations. That provision alone does not give the CIRB the power to extend the time limits set out in Part II (Occupational Health and Safety) of the *Code*, which includes subsection 133(2).

[33] The CIRB can exercise the powers granted by Part I of the *Code* for matters concerning Part II only under section 156 of Part II, which reads as follows:

> ***156.*** *(1) Despite subsection 14(1), the Chairperson or a Vice-Chairperson of the Board, or a member of the Board appointed under paragraph 9(2)(*e*), may dispose of any complaint made to the Board under this Part and, in relation to any complaint so made, that person*
>
> *(*a*) has all the powers, rights and privileges that are conferred on the Board by this Act other than the power to make regulations under section 15; and*
>
> *(*b*) is subject to all the obligations and limitations that are imposed on the Board by this Act.*
>
> *(2) The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part.*

The phrase "this Part" in subsection 156(1) refers to Part II of the *Code*.

[34] So far, Mr. Clarke's comments appear to support the complainant's argument about the Board's authority to extend the time limit stipulated in subsection 133(2) of the *Code*. However, it is important to note that his comments apply to the CIRB when he uses the term "Board." That term is defined in section 3 as the CIRB. Yet, given that the Board's authority is being addressed, the *Public Service Labour Relations Act*, S.C. 2003, c. 22 (*PSLRA*), must be consulted to complete this analysis.

[35] Part III of the *PSLRA* deals with occupational health and safety and the application of Part II of the *Code* to the public service. Subparagraph 240(*a*)(ii) of the *PSLRA* specifies that the term "Board" in Part II of the *Code* refers to the Public Service Labour Relations Board.

[36] Furthermore, paragraph 240(*b*) of the *PSLRA* stipulates the following:

> ***240.*** *Part II of the* Canada Labour Code *applies to and in respect of the public service and persons employed in it as if the public service were a federal work, undertaking or business referred to in that Part except that, for the purpose of that application,*
>
> , , ,
>
> *(*b*) section 156 of that Act does not apply in respect of the Public Service Labour Relations Board; and . . . .*

That provision could not be clearer. The legislator expressly denied the Board the authority to extend the time limits set out in Part II of the *Code*, an authority that it had granted the CIRB only a few years earlier.

[37] Consequently, I believe that the Board does not have the authority to extend the time limit for filing a complaint under subsection 133(2) of the *Code*. Given my conclusion, I cannot hear the complaint that the complainant filed outside the time limit. Under the circumstances, there is no basis to address the parties' other arguments.

[38] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

IV. Order

[39] I declare that the Board does not have the authority to extend the time limit set out in subsection 133(2) of the *Code.*

[40] I order this file closed.

August 26, 2010.

PSLRB Translation

Steven B. Katkin,
Board Member