Date: 20030313

File: 160-34-79

Citation: 2003 PSSRB 23

Canada Labour Code,
Part II

Before the Public Service
Staff Relations Board

BETWEEN

ROBERT BOIVIN

Complainant

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

RE: Complaint under section 133 of the Canada Labour Code

Before: Joseph W. Potter, Vice-Chairperson

For the Complainant: Himself

For the Employer: Caroline Engmann, Counsel
Joseph K. Cheng, Counsel

Heard at Hamilton, Ontario,
November 5 to 7, 2002.

DECISION

[1] This is an interim decision with respect to the employer's submission that a complaint filed by Robert Boivin is untimely. As a consequence, the employer asserts that the Public Service Staff Relations Board (the Board) lacks jurisdiction to hear the matter.

[2] Mr. Boivin is an Information Technology Clerk with the Canada Customs and Revenue Agency (the employer) and is classified at the CR-04 level.

[3] On April 30, 2002, Mr. Boivin filed a complaint with the Board pursuant to paragraph 147(c) of Part II of the Canada Labour Code (the Code). This section of the Code states:

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

[4] On May 24, 2002, the employer responded to Mr. Boivin's complaint, stating, in part:

> *It is the Employer's position that the complaint is untimely, as it was not filed within the ninety-day limitation period prescribed by section 133(2) of the* Canada Labour Code.

[5] Subsection 133(2) of the Code states:

> *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.*

[6] An oral hearing was held from November 5 to 7, 2002, inclusive, with respect to the complaint. Again, the employer raised the issue of timeliness, but I reserved my

decision on that and proceeded to hear the merits of the complaint. As the parties did not have an opportunity to complete their case, a continuation was necessary. The employer requested that in the interim the parties make written submissions with respect to the timeliness issue. There was no objection from Mr. Boivin to that request; consequently, on November 15, 2002, the Board wrote to the parties and instructed them as to when their written submissions were to be made. Depending upon my decision on the issue of timeliness, the matter would then either be terminated or set down for continuation.

[7] The parties submitted their written arguments as requested and they are on file with the Board.

[8] There was no dispute with respect to the essential facts that led up to the complaint Mr. Boivin filed with the Board, and they can be summarized as follows.

[9] On October 2, 2001, Mr. Boivin filed a complaint with the employer pursuant to section 127.1 of the Code. The complaint alleged that the employer was not dealing in a timely manner with certain grievances Mr. Boivin had filed. He said this alleged shortcoming was injurious to his health and caused him stress.

[10] Section 127.1 of the Code states:

> ***127.1*** *(1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.*

[11] Following the filing of the October 2 complaint, management met with Mr. Boivin on October 9 to discuss concerns they had, following which they gave Mr. Boivin a “conditions of work” letter.

[12] According to the employer’s written submission, “… This letter set out management’s concerns and specified certain conditions of work for the complainant to follow.” (para. 14).

[13] After receiving this letter, Mr. Boivin exercised a right of refusal to work pursuant to Part II of the Code. The matter was investigated by a Health and Safety Officer at the Labour Program who found that there was no danger present at Mr. Boivin's work place. Mr. Boivin was told of this ruling on October 15, 2001.

[14] Management then met with Mr. Boivin on October 15, 2001 and requested he undergo a "fitness to work evaluation" from Health Canada in order to determine his fitness to continue to work. Mr. Boivin agreed to this request.

[15] On October 15, 2001, Mr. Boivin wrote to the employer and stated:

> *Please accept this as my complaint pursuant to subsection 147(1) of the Canada Labour Code Part II.*
>
> *…*
>
> *On Tuesday afternoon, October 9, 2001, a meeting took place to discuss my developing work plan …*
>
> *…*
>
> *There can be no doubt that this is a disciplinary action based upon its form and nature …*

[16] Mr. Boivin sent a copy of this letter to the Health and Safety Officer who investigated the initial complaint. Mr. Boivin was told that allegations of action taken against him in contravention of section 147 of the Code must be made to the Board.

[17] On October 16, Mr. Boivin attended at the Health Canada offices, and the following day Health Canada informed the employer that "Mr. Boivin is not fit for work at this time".

[18] The employer informed Mr. Boivin of this finding and placed him on sick leave commencing on October 18, 2001. This continued until November 17, 2001, at which time Mr. Boivin was placed on leave without pay.

[19] On April 30, 2002, Mr. Boivin filed his complaint with the Board.

[20] The employer alleges that Mr. Boivin had ninety days to file a complaint with the Board and these ninety days commenced when "… the complainant knew or reasonably ought to have known of the circumstances giving rise to the complaint" (paragraph 41 of the employer's written submission).

[21] The employer placed Mr. Boivin on leave without pay on November 17, 2001. This, the employer claimed, is the latest date from which the ninety-day limitation period would commence. Therefore, the limitation to file the complaint expired on February 15, 2002, according to the employer's submission (paragraph 66).

[22] Mr. Boivin's complaint was filed on April 30, 2002, and the employer submits this is out of time, in accordance with subsection 133(2) of the Code.

[23] In his reply, Mr. Boivin suggests the filing of his complaint should be regarded as being akin to a continuing grievance. At paragraphs 33 and 34 of Mr. Boivin's reply, he states:

> *[33] The violation that is alleged by the Complainant is that the Employer failed to pay remuneration in respect for the period I would have worked but for the fact that I complained under the Canada Labour Code concerning the working conditions, and based upon this complaint, I was asked to submit to a fitness for work evaluation which declared me unfit for work.*
>
> *[34] The very first violation of the Code occurred on 24 October, 2001, when the Employer failed to deposit the Complainant's pay through the direct deposit pay mechanism at the CCRA, based on the declaration that the Complainant was unfit for work. This violation would subsequently reoccur at every bi-weekly pay period until 18 November, 2002.*
>
> (Note: Quote excludes footnotes)

[24] The employer replied that this is not a continuing issue, but it was a one-time decision made by the employer on November 17, 2001. In support of this proposition, the employer cited a Supreme Court of Canada decision which dealt with the issue of a "continuing" wrong (*Upper Lakes Shipping Ltd. v. Sheehan,* [1979] 1 S.C.R. 902).

[25] Furthermore, the employer submitted that "… recurrence of damage will not make a grievance into a continuing grievance. Rather, what must be shown is that the party is in recurring breach of a duty." (paragraph 58). Numerous decisions were cited by the employer in support of this position.

[26] Was this a continuing action on the part of the employer? Firstly, I believe this case is distinguishable from the Supreme Court of Canada decision in *Upper Lakes Shipping* (supra) in a very fundamental way. The Supreme Court of Canada decision

dealt with a situation whereby "… The respondent employer dismissed the employee in 1964 …" (paragraph 52 of the employer's submission). Each request for reinstatement by the employee was met with refusal, and the employee grieved in 1973. The Supreme Court rejected the idea of it being a continuing wrong.

[27] In my view, the employee in *Upper Lakes Shipping* ceased to be an employee after the date of termination. Therefore, the employee/employer relationship was severed at that juncture; consequently, it would not be possible for the employer to continually violate the employee's rights. The individual was, quite simply, no longer an employee.

[28] As far as Mr. Boivin is concerned, he remained an employee, even though the employer placed him on leave without pay.

[29] In *Canadian Labour Arbitration*, Third Edition (Brown and Beatty) at section 2:3128, the authors discuss the issue of time limits, and continuing violations. They state in part:

> *Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. They may arise in such circumstances as … the non-payment of money … In any event, the test most commonly used in determining whether there is a continuing violation is the one derived from contract law, namely, that there must be a recurring breach of duty, and not merely recurring damages.*

[30] In the instant case, the employer has a duty to comply with section 147 of Part II of the Canada Labour Code, and Mr. Boivin alleges that the employer has failed to comply with this section. This failure, states Mr. Boivin, arises out of the fact he has been placed on leave without pay. Mr. Boivin submits that each and every time his pay cheque indicated he was on leave without pay, this is a recurring breach.

[31] I find I must concur with this. If the employer placed Mr. Boivin on leave without pay because he exercised his right under Part II of the Code by withdrawing his services, this <u>may</u> be a violation of the Code. If so, in my view, it is a continuing violation and the ninety-day time limit would go to remedy only.

[32] What is not determined in this decision is whether the employer's actions are in fact contrary to section 147 of the Code. The Board can determine that question only following the presentation of the evidence.

[33] Mr. Boivin also raised another issue in his written reply. At paragraphs 45 through to and including 47, Mr. Boivin writes:

> *[45] The Complainant filed for benefits from the Workplace Safety & Insurance Board (WSIB) on 18 October, 2001 through his family doctor. On 23 October, 2001 the Employer accepted his claim for WSIB benefits and granted the complainant an advance of 25 days sick leave based upon that claim.*
>
> *[46] The WSIB denied the Complainant's claim for benefits on 7 February, 2002. The Complainant is now required to repay the 25 days advanced to him on 23 October, 2002. The Complainant will not have been paid remuneration effective 22 October, 2001.*
>
> *[47] The Complainant submits that the 90 day limitation period for filing his complaint with the Board should commence on 7 February, 2002; being the date when WSIB ruled that he was ineligible for benefits. The RCMP External Review Committee (ERC), decided in* ERC 3300-97-008 (G-208) *and* ERC 3300-97-009 (G-210) *that the limitation period starts only when the member becomes aware that he or she is prejudiced by the decision. In this case, the Complainant had a reasonable expectation of receiving WSIB benefits, and absent of any evidence to the contrary, the length of time that it took to render a decision suggests that the matter was considered very carefully before a decision was rendered. The Complainant submits that he only became aware that he would be prejudiced by the decision that he was unfit for work on 7 February, 2002 and therefore his complaint is not untimely.*
>
> (Note: Quote excludes footnotes)

[34] The employer replied on January 30, 2003, objecting to the introduction of this date as being a relevant one for determining the timeliness issue. Counsel for the employer stated that this was a new issue. Additionally, the employer submits that this was a decision of the WSIB, not the employer.

[35] This is a new issue on which I have not heard any evidence. Given this, even if I were wrong in the ruling of its being a continuing complaint, I would still rule that an oral hearing should occur to enable presentation on this aspect of Mr. Boivin's claim.

[36] In light of the above, I direct the Board's Assistant Secretary, Operations, to contact the parties with a view to setting down a date for the continuation of the hearing into this matter.

Joseph W. Potter,
Vice-Chairperson.

OTTAWA, March 13, 2003.