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Files: 160-2-67 to 76

Citation: 2002 PSSRB 30



Canada Labour Code,  
Part II

Before the Public Service  
Staff Relations Board

BETWEEN

CAROLINE ROZON, MICHEL DESJARDINS, ANDRÉE GINGRAS, PATRICK GAMBINO,  
MICHELINE LAMOUREUX, LOUISE TREMBLAY, LORRAINE MELOCHE,  
NICOLE GUÉNETTE, DIANE DUHAIME AND PIERRE-YVES BÉLANGER

Complainants

and

TREASURY BOARD  
(Human Resources Development Canada)

Employer



RE: Complaint under section 133 of the Canada Labour Code

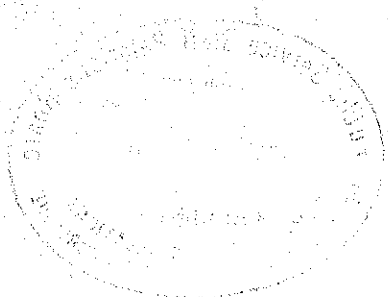
Before: Jean-Pierre Tessier, Board Member

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

For the Employer: Jennifer Champagne, Counsel

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Heard at Montréal, Quebec,  
January 21 and 22, 2002.



## DECISION

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[1] On September 18, 2001, Caroline Rozon and nine other work colleagues filed a complaint under subsection 133(1) of the *Canada Labour Code* (the "Code") against their employer, alleging that it had contravened the provisions of sections 124 and 147 of the Code.

*133. (1) An employee, or a person designated by an 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.*

*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 of time 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.*

[2] According to the complainants, the employer did not take the measures that were needed to ensure their safety and took disciplinary action against them because they refused to enter the workplace on August 15, 2001.

[3] At the hearing on January 21 and 22, 2002, the parties agreed to proceed with the case of Mr. Desjardins (Board file 160-2-68) and to apply the evidence that was introduced to the other complainants' files. This decision covers all of the files.

[4] The employer, for his part, alleged that this case concerned employees who, at the time of the events of August 2001, occupied designated positions. According to the employer, the penalties (two days' pay) were imposed because the employees who occupy designated positions within the meaning of section 78 of the *Public Service Staff Relations Act* did not report for work in the afternoon of August 15, 2001. In the case at bar, the employer's action was a disciplinary action penalizing the employees occupying designated positions for not reporting to work.

The facts

[5] Benoît Guérard testified for the employer. Mr. Guérard is the Director of Front-Line Service Delivery and, on August 15, he was in charge of the St-Jérôme Employment Insurance Office, because the new Director, Ms. Gendron, was on vacation.

[6] The witness explained that on August 15 more than thirty employees were at work. However, at 11:30 a.m., 21 employees left on their lunch hour and formed a picket line. On that day, in addition to 21 employees (with a right to strike), 13 employees occupying designated positions were also at work and left at lunchtime, between 11:30 a.m. and 1:00 p.m., to have their lunch. For most them the meal break was between 11:30 a.m. and 12:15 p.m. because at the time they had 45 minutes for lunch.

[7] One employee occupying a designated position remained inside the office and, at about 12:15 p.m., only two other employees in designated positions returned to the office after lunch. After that, only one other employee in a designated position, namely, Karine Sabourin (a replacement student) came into the office through another door. Ms. Sabourin had telephoned Mr. Guérard around 12:40 p.m. to say that there were pickets in front of the entrance (door 339), but Mr. Guérard recommended that she enter by another door, which she did.

[8] It should be explained that the office in question is located inside a shopping centre that has a number of shops in the front with restaurants and various businesses and offices in the rear. As appears from the photographs filed in evidence as Exhibit E-6, there are 12 entrance doors leading to the various businesses. Employment Insurance clients (Human Resources Development) can use the doors at the front of the centre to get to the middle of the mall and the Employment Insurance Office. They could also, as the employees generally did, take the rear door (door 339) or the next door on the right leading to the restaurants to reach the Employment Insurance Office.

[9] Referring to Exhibit E-2 (a checklist of events), Mr. Guérard explained that, around 12:30 p.m., Pierre-Yves Bélanger and then Louise Tremblay called him from a cell phone to inform him that they could not get into the office because of the demonstrations. After that, all of the other employees occupying designated positions telephoned him, basically repeating the same message. Mr. Guérard replied that it was their responsibility and that there was access through other doors. Mr. Guérard also

emphasized that he was asked to call the police to which he answered that he did not think it was necessary.

[10] According to Mr. Guérard, the atmosphere between the strikers and the employees occupying designated positions seemed relaxed. The designated employees fraternized during the lunch hour and talked among themselves. Mr. Guérard added that, at the time, he was the strike coordinator for the employer and that the employees, including those occupying designated positions, had been informed of their duty to report to work in a memo, among other things, dated August 14, 2001 (on file). The memo did, in fact, state that, if necessary, the employer would ensure that employees would get through the picket line; however, this situation applied more in the morning, at the entrance, since the employer could not intervene at every moment to ensure that one or more employees could get in at noontime or during the day. Moreover, on August 14, his recommendation to a number of employees was that they should eat their lunch in the office. In this connection, Mr. Guérard explained that according to the guideline he had been given by the Strike Coordination Centre in Montréal, the employer was to ensure that the employees occupying designated positions could get into the workplace in the morning but he was not required to intervene at every moment during the day.

[11] Furthermore, Mr. Guérard, although he was not always at the back window where he could see the pickets, stated that things looked peaceful. Around 1:45 p.m., he left the building, but stayed near the door so that he could warn Johanne Chartrand, president of the union local, that the employees occupying designated positions had 10 minutes to come into work. All of the picketing employees and the employees occupying designated positions entered the workplace at about 3:00 p.m.

[12] In closing, Mr. Guérard mentioned that he had received a call from Mr. Desjardins telling him about the danger. Mr. Guérard explained that he told Mr. Desjardins that he might go out to look for the employees occupying designated positions but, in the end, he did not do so. He added that it was true that on August 22 and 29 and on September 7 and 10, for greater safety, the police had been there to ensure that employees occupying designated positions could enter the workplace in the morning, but they had never intervened at noontime.

[13] On behalf of the complainants, the first witness to be called was Johanne Chartrand, president of the union local. She explained that she had been on

vacation on August 15, but was on the scene to coordinate the demonstration. What she understood, and the employer was so informed, was that the demonstration (picketing) was to take place during the noon hour, and might last a little longer (45 minutes more) and that there would be no problem with letting in the employees occupying designated positions who had joined the pickets during their lunch hour.

[14] However, events did not proceed in that fashion and, at around 12:30 p.m., the pickets indicated by word and action that they wanted the employees to remain outside and the picketing to be extended. The pickets walked back and forth between door 339 and the door on the right towards the entrance to the restaurants.

[15] At approximately 1:10 p.m., when Mr. Guérard went out, Ms. Chartrand asked him to ensure the employees' safety; he answered that they should come into the workplace by themselves. Subsequently, she telephoned Mr. Guérard around 2:00 p.m. to ask him whether he was going to take disciplinary action. He answered that he would think about it, that it was possible. Consequently, Ms. Chartrand talked with the pickets and told them that their work colleagues, the employees occupying designated positions, might have some problems. They all decided to end the picketing and to enter the workplace at about 3:00 p.m.

[16] Subsequently, Mr. Desjardins substantially corroborated the facts; he added, however, that he felt threatened. It was true that other doors were free, but door 339 was the meeting point designated by the employer in the event of a strike.

[17] He explained that he was a member of the health and safety committee and he had telephoned Mr. Guérard in that capacity to inform him that he could not safely enter the workplace and he asked for police assistance or for the employer to come out. He understood in fact that Mr. Guérard might come out to look for him, but the latter did not come out as far as the picket.

[18] According to Mr. Desjardins, it was possible that the employer, in this case, Mr. Guérard, might have figured that things were calm; however, this was not true, because Mr. Guérard did not hear what was being said on the picket line. He said he telephoned a number of times from a student's telephone and from the president of the union local's telephone.

[19] Pierre-Yves Bélanger and Nicole Guénette testified along the same lines. The pickets told them "that there was no way they were going in". Ms. Guénette said she wanted the employer to see what was happening and she mentioned that door 339 and possibly the other door on the right were visible from the office. They both telephoned Mr. Guérard to have the employer ensure their safety; they did not speak about a refusal to work.

[20] Subsequently, Ms. Gendron, the Office Director, was called to testify. She indicated that she was absent on the 15th, but on her return she had gathered the employees to make sure that everything would go smoothly in the future. With regard to the events of August 15, she said she would look into the situation and see what she could do.

[21] Another complainant, Lorraine Meloche, mentioned that she did not feel safe when she came back from lunch. She was close to Mr. Desjardins when he telephoned in his capacity as a member of the health and safety committee. She said she complained because she did not want to go through the same thing again at noontime, since she wanted to go home for lunch. She found it strange that the employer did not protect her at noon.

[22] The file showed that the president of the union local, in a letter dated August 16, 2001, asked for clarifications with respect to the fact that, at noon, the employees occupying designated positions were supposed to eat their lunch inside and that no police assistance was offered at noon on August 15.

[23] The file showed that, after entering the office on August 15 at 3:38 p.m., Mr. Desjardins sent the employer a complaint in writing advising it that he had not taken the steps that were required to ensure the employees' health and safety.

### Arguments

[24] The employer's argument focused on the fact that this is a complaint under the Code that the employer took disciplinary action against employees occupying designated positions because they refused to enter the workplace. Accordingly, there are two issues to be reviewed: first, was the right to refuse exercised and, second, was there a penalty imposed as a result? The employer answered both questions in the negative because, on the one hand, no one had mentioned a refusal to work and the

employer did not see any imminent danger and, on the other hand, this is a case of employees occupying designated positions who did not come into work and that is what was penalized by the employer.

[25] The complainants, for their part, reiterated that the Code did not impose any specific formula to be used by an employee when exercising his right to refuse. According to them, the picket line constituted a danger for the complainants and the fact that Mr. Desjardins telephoned the employer in his capacity as a member of the health and safety committee was indicative of a health and safety problem.

#### Reasons for Decision

[26] The case at bar does not involve a grievance with respect to the application of the collective agreement but is instead a complaint that the employer penalized some employees who exercised the right given to them by section 128 of the Code to refuse to work where there was danger to the employees.

*128. (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*

*(a) the use or operation of the machine or thing constitutes a danger to the employee or to another employee,*

*(b) a condition exists in the place that constitutes a danger to the employee, or*

*(c) the performance of the activity by the employee constitutes a danger to the employee or to another employee.*

[27] After reviewing the case law submitted and analysing the facts introduced in evidence, I agree that it is not necessary for an employee to use a specific form of words to indicate his refusal to work but, at the very least, he must make himself clear.

[28] It is true that Mr. Desjardins telephoned Mr. Guérard as a member of the health and safety committee but the purpose of the call was to demand the presence of the police or that the employer do something so that the employees occupying designated positions could enter their workplace. Mr. Desjardins never alleged a refusal to enter the workplace; on the contrary, he demanded entry into his workplace. As well, the



other complainants all telephoned Mr. Guérard in the context of a labour dispute, saying that there was picketing.

[29] I think it is important to look at the context where the employee voices his fears or states that there are obstacles preventing him from entering his workplace. There is a big difference between refusing to pass through an ice-covered doorway for fear of being injured and indicating that a picket line is blocking an entry.

[30] The case law has made it clear that, when references to danger are made during a labour dispute, it is well to take a cautious approach: *William Gallivan and Cape Breton Development Corporation and United Mine Workers of America* (1981), 45 di 180, [1982] 1 Can LRBR 241:

...

*An employee's right to refuse under section 82.1 [now section 128] must be used wisely and only in the true interests of safety. To abuse that right by coupling it to other interests such as to gain an advantage in collective bargaining will, in the long term, defeat the purpose and attainment of the goals of Part IV of the Code. Improved safety and reduction of health hazards in the workplace through consultation and co-operation cannot be accomplished in an air of mistrust and adversity. Any employee refusal which coincides with other labour relations conflicts will receive very close scrutiny from the Board.*

...

[31] In this case, it must be realized that, on August 15, the employer's representative, Mr. Guérard, was the only manager in the office and he was aware that there would be picketing on August 15. From inside the office, he saw some work colleagues talking to one another during the lunch hour; he did not see any violence and, in good faith, when contacted by the employees occupying designated positions, he told them to come into work, that there were other doors that were not blocked and there was no need to have the police come. What all these circumstances mean is that Mr. Guérard never thought there would be any risk of danger or that the employees occupying designated positions who telephoned him intended to exercise a right of refusal.

[32] In fact, the employees telephoned from the cell phones of the student who was there and the president of the union who was near the picket line. There was no police

assistance and, after Mr. Guérard explained to the president of the union that the designated employees had to come in, the line broke up and the picketers and employees occupying designated positions entered their workplace around 3:00 p.m.

[33] Considering that the majority of the complainants never referred to an exercise of their right of refusal under the Code and considering that the words spoken by Mr. Desjardins did not convince the employer that a right of refusal was involved and considering all the circumstances (few pickets and work colleagues), I find that the employer did not violate the Code. The complainants did not convince me that the penalties were imposed on them because they had availed themselves of the right given to them under section 128 of the Code to refuse to work in the case of danger. Similarly, the evidence shows me that the disciplinary action was taken by the employer in the context of a work relationship and the employer referred to the obligation on employees occupying a designated position to be at work. For these reasons, the complaints must be dismissed.

[34] I would like to add, however, that there is much confusion surrounding the events of August 15. Without determining that there was intimidation, verbal or otherwise, the employer's attitude should have been more proactive. I do not believe that the pre-established guideline prepared by the employer to the effect that, in anticipation of the strikes of summer 2001, the employer should ensure, if necessary, that employees occupying designated positions could enter the workplace in the morning but that the employer was not to intervene at noon was to be strictly applied to every case. In the case at bar, there was no picketing in the morning. The decision concerning the noon picketing was to be made without considering the guideline.

[35] Similarly, I believe that employees who work in an office located in a shopping centre with 12 entrance doors may find it more reassuring to report to the door assigned to them by the employer in the event of a strike. I believe that relationships in a labour relations context should become increasingly civilized and that the dialogue between employer and union before a strike should allow for agreeing on a meeting place for the employees. In my opinion, it would be reckless to tell an employee that he can come in by the twelfth door since only eleven of them are blocked by the strikers.

[36] I do not have to determine the grievance filed by the employees occupying designated positions. However, I would say in *obiter* that, in the circumstances, these

employees were caught in a bind, against their will to some extent, after meeting their colleagues during the lunch hour. While they may not rely on their own wrongdoing in respect of the hours lost during the day of August 15, their actions are not comparable to those of employees occupying designated positions who leave their duties to join an aggressive picket line set up since the morning.

[37] In this case, the penalty seems too severe to me but I have no jurisdiction to decide that matter in view of the fact that these are not grievances challenging the merits or the severity of the penalty but are rather complaints challenging the legality of the penalty on the grounds that an employer may not reprimand an employee because he has exercised a right under the Code, complaints dismissed by me earlier.

**Jean-Pierre Tessier,  
Board Member**

OTTAWA, March 12, 2002

PSSRB Translation

