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Citation: 2020 FPSLREB 37

Federal Public Sector Labour Relations and Employment Board Act and *Canada Labour Code*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JOSEPH PEZZE

Complainant

and

TREASURY BOARD (DEPARTMENT OF NATURAL RESOURCES)

Respondent

Indexed as
Pezze v. Treasury Board (Department of Natural Resources)

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

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Amy Kishek, Public Service Alliance of Canada

For the Respondent: Philippe Giguère, counsel

Heard at Hamilton, Ontario,
March 4 to 5, 2020.

REASONS FOR DECISION

I. Summary

[1] Joseph Pezze ("the complainant") worked in a Natural Resources Canada ("the employer") facility in Hamilton, Ontario. He is a highly skilled mechanical technologist. He designs, builds, and operates machines and apparatus that the employer uses in its metallurgy labs and workshops.

[2] He discovered that a safety device used on a truck loading dock had been intentionally disabled. He reported the incident, took steps to have the device put back into proper operation, and took further steps, including an investigation and office training, to ensure that such a problem would not occur again in the workplace.

[3] Despite the employer having the safety device tested and returned to proper operation and identifying and speaking to the individual who, at least once, disabled the device, the complainant escalated his concerns. As was his right, he advocated for and obtained an investigation into the matter as well as safety training for staff. Later, he was overheard making a disparaging remark about management sweeping workplace safety under the rug.

[4] After he made the comments, the complainant was given a letter of reprimand (which was in his personnel file for two years and has since been destroyed). He then filed this complaint under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"), claiming that the letter of reprimand was a reprisal against him for his asserting his *Code* rights. He seeks moral vindication.

[5] Having reviewed all the evidence and listened to the parties' arguments, I note that the evidence shows that all parties involved in this matter acted in good faith to voice concerns and then to take action to ensure a safe workplace. And further, with respect to the complaint, I conclude that the letter of reprimand that arose from the complainant's remarks was not a reprisal. I dismiss the complaint.

[6] Employees in the public service enjoy far-reaching rights under the *Code* to ensure a safe workplace and to communicate related matters. However, the *Code* does not protect employees who make disparaging comments about management. Employees must always communicate and address colleagues and managers in a professional and respectful manner.

II. Background

[7] The parties jointly submitted that as I concluded in my decision in *Stiermann v. Treasury Board (Department of Industry)*, 2019 FPSLREB 52, I must consider three issues to determine whether s. 147 of the *Code* was breached. The issues originated in the decision of the former Public Service Labour Relations Board (PSLRB) in *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52 at para. 64, and are paraphrased as follows:

A. Did the complainant exercise his rights under the *Code* (s. 147)?
B. Did he suffer reprisals?
C. Were the reprisals of a disciplinary nature within the meaning of s. 147?
D. Is there a direct link between him exercising his rights and the actions taken against him?

[8] As the second and fourth components of the test are closely connected, I will address them together in my analysis.

[9] The relevant sections of the *Code* include the following:

> …
>
> ***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.*
>
> …
>
> ***147*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial penalty 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.*

III. Analysis

A. Did the complainant exercise his rights under the *Code* (s. 147)?

[10] Counsel for the employer stated that he would not contest this.

B. Did the complainant suffer reprisals of a disciplinary nature within the meaning of s. 147 of the *Code*?

[11] Counsel for the employer stated that this element of the test would not be contested but that the discipline (the letter of reprimand) was not linked in any way to the exercise of *Code* rights.

C. Did the complainant suffer a reprisal that was directly linked to him exercising his rights under the *Code*?

[12] The complainant's representative argued skillfully that, if in fact, the complainant said that his managers "sweep safety under the rug", it was taken out of context, and that more importantly, his comment was part of exercising his rights and part of his duty under the *Code* to advance and take steps to ensure workplace safety. She added that the evidence showed that the decision to issue a letter of reprimand was tainted by management's animosity towards the complainant's and his union's efforts to advocate for workplace safety.

[13] Counsel for the employer argued that the letter of reprimand would not have been issued but for the complainant's utterance and that there was no link to his actions protected under the *Code*. He added that the letter was a reasonable corrective measure for what was unacceptably unprofessional and disrespectful behaviour. He said the letter was in no way tainted by the safety issues that the complainant pursued.

[14] The complainant testified about his very sincere efforts to advance workplace safety. His discovery that the safety device used for trucks to load and unload at the loading dock had been disabled caused him consternation. Not only did it make the loading dock unsafe, but also, he was concerned about the many other dangerous machines in the workplace if co-workers were disabling safety devices. He explained that he wanted to ensure that the device would not be disabled again and that the employer would make greater efforts to educate staff and try to ensure that such a problem would not arise again anywhere.

[15] Stuart Amey, the complainant's supervisor and the only other witness to appear at the hearing, agreed that the complainant was well known as being knowledgeable and sincerely concerned about workplace health and safety. He added that the complainant was also well respected for being highly skilled in his areas of expertise.

[16] The complainant testified to the following:

- He began his career with the employer in 1999 and has a total of 41 years of experience as a mechanical technologist.
- He has specialized training in workplace health and safety.
- When he found the safety mechanism on the loading dock disabled, he immediately restored it to working order and reported the matter to his manager, Mr. Amey, and to his health and safety coordinator.
- Despite his request, the matter of the loading dock safety mechanism was not on the next agenda of his group's workplace health and safety (WHS) committee.
- He told his WHS coordinator that it was fine to discuss it within their group but that all staff in the building needed to be included in the discussion.
- He heard nothing from management about the matter despite his repeated efforts to have it raised at the WHS committee.
- Finally, after reporting the problem in August, a training session was held in November to ensure that staff members were aware of the importance of the safety mechanism on the loading dock.
- Every week, he was told that management was dealing with the issue, but he did not know if the issue was closed.
- He told his WHS coordinator that it was fine to discuss the issue within their group but that he wanted the matter brought to the attention of all staff in the entire Hamilton operation to ensure that no one would tamper with or disable any safety devices, not just the loading dock device.
- He asked that it be put on the WPHSC agenda, but it was not, and furthermore, the matter disappeared from the safety action tracker list in October.
- He emailed the WHS committee's chairperson on October 21, 2015, to raise his concerns. He specifically stated, "[T]he reason that I am sending this email is to ask how things like this should be dealt with and that I am not acting inappropriately."
- The matter was brought to the attention of the Director General, who emailed the complainant on October 28, 2015. Among other things, he stated that the loading dock safety matter was placed on the action tracker on August 6, 2015, and that on August 13, 2015, management identified the person who had disabled the loading dock device. Together with the complainant, it discussed the importance of safety and of not disabling the safety device. The Director General also noted that on August 20, the matter was discussed at the group meeting, and that on September 8, Mr. Amey spoke to the person who had disabled the device. On September 16, the building owner had the device inspected. It was found in good working condition. This test result was shared with the working group at the weekly meeting on September 21. The item was then closed on the action tracker. The Director General then continued, stating that the complainant was consulted and was asked if he was satisfied with the results of the investigation and outcome. Reportedly, he replied that he was. The Director General continued, stating that he was a bit puzzled as to why after that, the complainant contacted the WHS committee's co-chairpersons and copied a union advisor, since it appears that the issue had been thoroughly looked into.
- Somewhat paradoxically, the complainant testified that he attended his weekly WHS meetings and that he heard nothing about the safety issue; but in fact, the issue was discussed at the September 21 committee meeting, at which it was reported that the safety device was inspected and found in good working order.
- The complainant also noted that the Director General had assured him that the matter was resolved but that he had not been kept in the loop and was not sure if in fact it had been dealt with properly.

- Despite being assured that the loading dock problem had been dealt with, the complainant remained concerned that the staff in the entire building needed safety training.
- The complainant noted that his efforts also resulted in a Hazardous Occurrence Investigation Report (HOIR) investigation and report (which on November 19, 2015, determined that the tampering with the loading dock safety device "was not an isolated event") and a WHS committee investigation and report, all of which recommended that all staff members receive WHS training.
- The complainant added that WHS is a life-and-death matter in his workplace and that if an accident occurred, it could be fatal. He expressed his opinion that after the August incident, the September report to the WHS committee was far too slow to appear. He noted that the *Code* requires immediate action when an unsafe workplace incident is reported.
- The complainant stated that he did not recall any meetings or discussions taking place with his supervisor, Mr. Amey, during the events at issue.

[17] When he was asked specifically about the alleged incident that gave rise to the letter of reprimand, the complainant testified that he did not remember the incident and that he could not say definitively that he did not utter the alleged phrase.

[18] The complainant's representative sought to table as an exhibit a 2019 Workplace Safety and Insurance Board report involving the complainant and Mr. Amey. Counsel for the employer objected on the grounds of relevance. He said that the report addressed matters that arose after the incidents that led to the issues before me. The complainant's representative explained that the report quoted witnesses in the investigation who stated that Mr. Amey harassed and was unfair to and made false statements about the complainant.

[19] I ruled the document inadmissible as the events referenced therein occurred quite some time after the incidents at issue before me and such evidence could effectively sway the case against the employer due to the significant prejudice arising from the hearsay.

[20] I stated that it was best that those persons who purportedly made the comments contained in the report be brought before this hearing in order for me to observe their damning testimony about Mr. Amey and to allow them to be cross examined by the respondent's counsel. I informed the complainant's representative that I would grant a recess if she wished to contact the individuals and seek their appearance or to request that I compel their attendance. She demurred on my offer.

[21] In cross-examination, the complainant confirmed that in fact, he did remember that several conversations arose from his initial report of the loading dock matter in

which employer representatives informed him of their follow-up steps to investigate and action the matter to ensure that the device was in good working order.

[22] The complainant initially stated that he did not recall saying that management swept WHS concerns under the rug. But when faced with his October 21 email, he acknowledged that he had written that incidents, such as the loading dock device being disabled, should be reported and made known to others as soon as possible, so that everyone may feel that such things do not go unnoticed or get swept under the rug.

[23] When in cross-examination, he was asked about his alleged statement in front of Mr. Amey that his managers swept WHS concerns under the rug, he replied that indeed, people in the workplace could feel that way, and that it had been fair for him to write that in his email.

[24] The employer's counsel called Mr. Amey to testify. He is a machinist by trade. He testified to the following:

- After the complainant reported that the loading dock safety device had been tampered with and disabled, Mr. Amey approached the other millwright who worked with the complainant, who promptly admitted to disabling it.
- He told the millwright not to do it again.
- He told the complainant (in August) that he had found the person responsible for disabling the device and that he had told the person not to do it again.
- He arranged for the building owner, who was responsible for the safety device, to inspect it to ensure that it was still functioning properly. The inspection occurred, and the device was found in good working order. He then shared this information with the complainant and other staff at a biweekly meeting in September.
- On September 20, he asked the complainant if he was satisfied with the results of the investigation and testing. He testified that the complainant replied that he was satisfied. Then, he had the issue removed from the WHS action tracker as he considered the matter closed;
- On November 2, he overheard the complainant state to three or four co-workers at the workplace that Roger and Stuart (the managers) sweep office safety concerns under the rug. He met with the complainant about it on November 18.
- After hearing the complainant's remarks, he consulted management and Human Resources and issued a formal letter of reprimand to the complainant on November 26, 2015, which included the following:

  > *This letter is in reference to our meeting of Nov 18, 2015 concerning the statement that health and safety concerns are being swept under the rug, which you were overheard saying on Nov 2, 2015.*
  >
  > *At the meeting we held on Nov 18, 2015, you stated that:*

> *I still disagree that I pointed out two other people. I did talk about health and safety, and I may have said swept the issue under the rug, but I never named anyone.*
>
> *Even if you did not name anyone in reference to this statement, I find this statement unacceptable. Firstly, by your own admission you were referring to the health and safety incident involving the loading dock truck latch that was resolved on Sept 21, 2015. On that date you were given the opportunity to let your supervisor know if you did not feel the issue was resolved and you chose not to. If you feel this is still an issue the proper steps would be to bring it back up to your supervisor, failing that to bring it to the WPHS committee. Talking to other employees about "health and safety issues being swept under the rug" not only undermines management's authority but also helps to create a poisoned work environment.*
>
> …
>
> *This letter constitutes a written letter of reprimand and is formal notice that you are not to spread rumours or treat anyone in a disrespectful manner….*

[25] Mr. Amey also testified that only a few weeks before the objectionable remarks were made, he spoke to the complainant about a work-hours problem as the complainant took frequent smoke breaks during working hours. He reminded the complainant that that time needed to be made up, to ensure he worked a full day. Mr. Amey testified that the complainant became verbally aggressive, that he was very upset about this matter, and that this verbal aggression resulted in the complainant receiving a verbal reprimand.

[26] Mr. Amey also testified that the referral of the loading dock safety issue to both the HOIR and the Workplace Health Safety Committee (WPHSC) was an acceptable part of the workplace health and safety process.

[27] In cross-examination, Mr. Amey confirmed that the complainant had escalated the loading dock safety device matter, and the fact that such devices were being disabled, to the WPHSC on October 21, 2015. He also acknowledged that another representative of the management team composed an email dated October 23, 2015, which stated in part that "Stuart [Amey] and I had not considered this [safety device at the loading dock] to be a major item… Joe's [the complainant's] letter contains several inaccurate statements that I intend to follow-up on with Joe …".

[28] In her closing argument, the complainant's representative noted the finding in *Chaney v. Auto Haulaway Inc.*, [2000] C.I.R.B.D. No. 1 (QL) in which the Canada

Industrial Relations Board states that even if the exercise of rights under the *Code* is only a proximate cause for discipline, then the employer should be found to have contravened the *Code*. In *Chaney*, the impugned action of the employer in disciplining the employee commenced immediately after the employee had blown the whistle. The managers testified that they were adamant that their disciplinary action was not influenced in any way by the efforts of Mr. Chaney to assert his *Code* rights.

[29] The complainant's representative summarized the relevant evidence. She submitted that Mr. Amey's reference to the complainant spreading rumours was false as the complainant sought to communicate with co-workers about the need for greater safety training. She also stated that he testified that he was not satisfied with the September report of the device being in good working order as he was concerned that greater office-wide safety awareness was required to avoid further problems of that type. She submitted that the discipline letter was based upon a false premise that the complainant was incorrect, in how it stated that the loading dock safety device issue had been closed on September 21. She argued that the matter was not closed then and was broader requiring office-wide training to address it properly.

[30] She noted that his first effort to have the matter placed with the WPHSC was unsuccessful. Furthermore, the noted communications among members of management showed their lack of concern for the issue and their displeasure with the complainant escalating the matter and referring it to his union representative.

[31] She submitted that management's comments and the letter of discipline, as it referred to what the complainant should have done to pursue the safety matter, are evidence of a tainted decision by management to discipline him, at least in part, in retribution for his legitimate efforts to exert his *Code* rights.

[32] The complainant relies upon the decision of this Board in *Babb v. Canada Revenue Agency*, 2008 PSLRB 38, where the Board noted that the complainant in that case, and as I find is the case with the complainant before me, was honest and dedicated to workplace health and safety and was acting out of a legitimate preoccupation of the importance of safety committee minutes being accurate, (at paragraph 56).

[33] The complainant also relied on the PSLRB's decision in *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40, in which both the tone and

content of management communications were found to be evidence of an anti-union animus as well as an intent to thwart the employee from exercising her *Code* rights. The PSLRB noted that the manager became frustrated with her efforts. Among other things, an email noted that she should not have looked for health and safety problems and that management should search for potential communications she was sending to her union, in case protected information was being transmitted without authorization. The PSLRB concluded that the professional standards investigation was launched at least in part due to her efforts to assert her *Code* rights.

[34] I distinguish *Martin-Ivie* on its facts as the evidence before me was in no way illustrative of a similar hostility or dislike of the complainant or his actions as was the case in *Martin-Ivie*. In the evidence before me, a senior manager wrote that management had not considered the loading dock problem a major item and that the Director General was puzzled as to why the WPHSC co-chairs and the union had been contacted, as he thought that the issue had been looked into quite thoroughly.

[35] I would have to add a significant gloss to those statements to arrive at the conclusion that they are evidence of anti-union animus or ill-will towards the complainant, thus justifying a finding that the letter of reprimand was tainted, as the complainant's representative argued.

[36] The complainant also relied upon *Grundie v. Treasury Board (Department of Human Resources and Skills Development)*, 2015 PSLREB 95, in which it was determined that the grievor in that case, who had pursued his duties in investigating a health-and-safety concern, had been investigated for 19 months. Therefore, he had a threat of discipline hanging over his head for an unduly long time. In addition, old matters were brought back to the table to be used as discipline in an unfair manner. I do not find the facts in *Grundie* sufficiently similar for that case to be helpful.

[37] And finally, the complainant's representative submitted that in fact he had discharged his duty under s. 126(1)(c) of the *Code* to communicate with other staff to ensure the health and safety of the employees likely to be affected by the employer's acts or omissions. She also argued that even if his comments about sweeping concerns under the rug are hyperbole, they were a protected communication under the *Code*.

[38] In the finale to her closing argument, the complainant's representative delivered a rhetorical flourish worthy of a much larger audience than the few of us gathered for

the hearing of this complaint. She passionately submitted that were the alleged injustice of the letter of reprimand (that has long since been removed from the complainant's personnel file) be allowed to stand, it would serve to chill all future worker efforts to speak out in advocacy of their hard-won rights under the *Code* to a safe workplace.

[39] I cannot agree with the complainant's assessment of what is at stake here.

[40] The case relied upon in argument before me that most closely resembles the facts at issue in the present matter arose in *Sousa-Dias v. Treasury Board (Canada Border Services Agency)*, 2017 PSLREB 62, and *Dias v. Canada (Attorney General)*, 2018 FCA 126. The complainant in that case exercised his rights under the *Code* to refuse work on grounds of safety concerns and was then required to attend a meeting with his manager despite his union representative not being available to attend. He refused to attend the meeting and then addressed his manager in an aggressive and disrespectful manner, for which he was disciplined.

[41] The PSLREB concluded that the complainant's lack of respect and unprofessional manner towards management was the cause of his discipline. In declining the complainant's application for judicial review of the decision, the Federal Court of Appeal noted the PSLREB's findings that the complainant had been aggressive towards his manager and that he had been disciplined for his lack of respect for management (at paragraph 10).

[42] I also note that the temporal coincidence or close proximity in time to an employee exerting rights under the *Code* to when discipline might have been imposed on the employee is not, on its own, proof of anything, as was noted in *Aker v. United Parcel Service Canada Ltd.*, 2009 CIRB 474 at para. 38, and *Walker v. Deputy Head (Department of the Environment and Climate Change)*, 2018 FPSLREB 78 at para. 621.

IV. Conclusion

[43] The evidence before me leads me to the same conclusion as in *Sousa-Dias*.

[44] The letter of discipline was issued to the complainant solely for his unprofessional and disrespectful comments about management. There was no link whatsoever to his legitimate efforts to exert his *Code* rights to a safe workplace. The emailed comments, in which management stated its opinion that it thought that the

matter of the loading dock safety device had been rectified and closed and asked rhetorically why the complainant escalated the issue and copied his emails to his union, are insufficient for me to find any discernable anti-union animus or hostility and bias towards the complainant that might have tainted the decision to discipline him for his second event of communicating in an unprofessional and disrespectful manner to his manager.

[45] Employees in the public service enjoy far-reaching rights under the *Code* to ensure a safe workplace and to communicate related matters. However, the *Code* does not protect employees who make disparaging comments about management. Employees must always communicate and address colleagues and managers in a professional and respectful manner.

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

(The Order appears on the next page)

V. Order

[47] I order the complaint dismissed.

April 14, 2020.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board