



ALRB Cite: Vijay Gulerya v. ATU
[1994] Alta. L.R.B.R. 495

**VIJAY GULERYA, Applicant and AMALGAMATED TRANSIT UNION, Respondent.
Board File: GE-01660. December 15, 1994.**

Deborah M. Howes, Vice-Chair, Mike Halpen and Ken Jones, Board Members

For the Applicant: John Gilmore

For the Respondent: Julien Landry, Randy Blood

Complaints - Timeliness - s. 15(1.1) - Complainant unaware of potential Labour Relations Code remedy until more than 90 days after alleged breach - Time limit running from date complainant aware of relevant event, not date complainant aware of remedy

Complaints - Timeliness - s. 15(1.1) - Board declining to dismiss complaint filed six months after alleged breach - Ninety-day time limit only giving Board discretion to refuse complaint - Not appropriate to dismiss complaint by unsophisticated complainant in absence of extreme delay or prejudice to litigation

Duty of fair representation - s. 151(1) - Complainant missing time limit for complaint after relying on incomplete legal advice - Board declining to dismiss complaint - Six-month delay neither extreme nor prejudicial.

The Complainant was dismissed from his position. He grieved his dismissal but the Union declined to proceed to arbitration. He received legal advice to sue his employer for wrongful dismissal. Only some five months after the Union's decision not to proceed did he learn that a wrongful dismissal action was barred and that the Union had a duty to fairly represent him in grievance proceedings. He filed a complaint under section 151 of the Code. The Union raised the preliminary objection that the complaint was made outside the 90-day time limit in s. 15(1.1) of the Code and that the Board should refuse to hear it.

The Board dismissed the objection. It rejected the Complainant's argument that the time limit only started to run from the time he was aware he had a potential remedy under the Code. The time limit runs from the time the Complainant is aware of the event said to be in violation of the Code. In this case the time limit commenced running when he learned the Union would not carry his grievance further. As a matter of discretion, however, the Board would not dismiss the complaint. The Complainant was

unsophisticated in labour relations matters and had relied upon incomplete legal advice. He should not be denied access to the Board's process unless the delay was extreme or the delay created prejudice to another party's ability to litigate the complaint. Six months delay was not extreme and no prejudice had been shown.

REASONS FOR DECISION

Deborah M. Howes, Vice-Chair:

On September 8, 1994 Mr. Vijay Gulerya filed a complaint against the Amalgamated Transit Union (the "ATU") alleging a breach of the duty of fair representation. Mr. Gulerya says the ATU refused to process his dismissal grievance to arbitration.

ATU raises a preliminary objection that the complaint is untimely, having been filed outside of the 90 days required by the s. 15(1.1) of the *Labour Relations Code* or by the Board's Rules of Procedure. They encourage the Board to dismiss the complaint as Mr. Gulerya's explanation of the delay should not persuade the Board to exercise its discretion to waive the time limits.

The parties argued only the timeliness of the complaint and this decision deals only with that preliminary objection.

I. The Facts

Mr. Gulerya worked 8 years for the City of Calgary in the Transit Department until his dismissal on November 17th, 1993. The stated reasons for dismissal included failure to report to work, diverse explanations about his absences, and continued lack of cooperation.

The ATU filed a grievance for Mr. Gulerya and represented him until March 8, 1994. By letter of February 11th, 1994 Mr. Randy Blood, Executive Vice-President of ATU, advised Mr. Gulerya of the ATU's intention to review his grievance at the next Executive Board meeting on March 3rd, 1994. The letter further provided:

The reason for this review, is to determine whether or not to proceed with your grievance. Should you wish to make [sic] presentation regarding this matter, time has been set aside for 11:00 A.M. that day.

Furthermore, the executive board recommendation as to whether or not to proceed with your grievance will be made at the regularly scheduled Union meeting of March 8th, 1994. The meetings are scheduled for 10:00 A.M. and 7:30 P.M. Should you wish to make presentation at these meetings, you may do so.

Mr. Gulerya attended the March 8th meeting at 10:00 am. We heard no evidence about the March 3rd meeting. He testified the executive made a recommendation not to proceed with his grievance. The membership voted and accepted the executive's recommendation. As a result, Mr. Gulerya said he knew on March 8th that the ATU would not be proceeding further with his grievance.

Near the end of March, Mr. Gulerya retained a lawyer to advise him on his dismissal. The lawyer provided him with a written opinion on March 30th.

The letter is notable for its silence on any matters concerning the collective agreement or grievance procedure. It suggests that a civil suit for wrongful dismissal may be available to Mr. Gulerya even though he was an employee covered by a collective agreement grievance procedure. This is directly contrary to the authoritative judgments of the Supreme Court of Canada in *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, (1986) 28 D.L.R. (4th) 1 and the Alberta Court of Appeal in *Oliva v. Strathcona Steel Mfg. Inc. et al.* (1986) 48 Alta. L.R. (2d) 193. The letter makes no mention of a possible claim against the union for breach of its duty of fair representation.

Mr. Gulerya said he gave his lawyer all the documents related to his grievance and told him the ATU was not proceeding with the grievance. He admitted though, he did not raise concerns about the ATU's conduct with his lawyer.

On the same date Mr. Gulerya's counsel wrote to the City of Calgary to obtain his reinstatement or damages in lieu of reasonable notice. On April 14th the City of Calgary rejected the attempt. They cited the collective agreement and ATU's withdrawal of the grievance on March 14th.

In a letter of April 29th, 1994 Mr. Gulerya's counsel informed him of the City's response and his further research. This letter indicates the courts may refuse to allow a wrongful dismissal suit, but suggests alternative court action to convince the courts to accept the suit based on a denial of natural justice in the grievance process. There continues to be no reference to s. 151 of the *Code* as the basis for questioning the ATU's processing of the grievance.

Mr. Gulerya testified he tried during the next few months to raise the necessary retainer but could not do so, and the suit did not proceed further. In addition, he said he was unhappy with the "lack of action" by his lawyer at the time. His concern about his dismissal did not recede however. He continued to explore other avenues of redress against the City of Calgary by talking to other City contacts of his and speaking to other individuals about his possible options.

Sometime in early August, 1994 Mr. Gulerya spoke to a new law firm about his file and learned he may have a remedy from the ATU. Until this time, Mr. Gulerya said he did not have any concerns with the ATU's representation of him; his concern was about his unjust dismissal by the City of Calgary. As a

result of this new advice, he determined to change lawyers. He set about obtaining his legal file so he could get other representation. Mr. Gulerya said the legal file contained his only copies of the relevant documents.

On August 17, 1994 he paid his outstanding account with the first lawyer and received his file which he took to the new lawyer. The complaint resulted. From March 8th Mr. Gulerya did not have any contact with the ATU about any concerns he had over their handling of his grievance. The complaint was the first notice to the ATU about his concerns.

II. Section 15(1.1)

Section 15(1.1) provides:

The Board may refuse to accept any complaint that is made more than 90 days after the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

Section 15(1.1) was proclaimed as part of the *Labour Boards Amalgamation Act* S.A. 1994 c. 19 on September 1st, 1994. Prior to September 1st, a similar provision appeared in the Board's Rules of Procedure, Rule 22(3) which read:

Unless the Board otherwise orders, the Director of Settlement may refuse to accept any complaint that is made more than ninety days after the date on which the complainant knew, or in the opinion of the Director of Settlement ought to have known, of the action or circumstances giving rise to the complaint.

Rule 22(3) was in effect from November, 1992 and was published in the Board's Rules of Procedure.

Mr. Gulerya's counsel urged us to find Mr. Gulerya's complaint timely. Mr. Gulerya could not be aware of the circumstances giving rise to the complaint until he became aware of the statutory provision on fair representation. Essentially, counsel argued that the time did not begin to run until three conditions were met. The complainant had to know he was wronged. He had to know the wrong was committed by the respondent. Finally, damages had to flow from the wrong. In support of his argument counsel advanced several court cases dealing with delayed awareness in assault cases. If the complaint is untimely, counsel urged us not to penalize Mr. Gulerya for the shortcomings of his first counsel who did not apparently advise him of all of his options within the required time frames.

Counsel for the ATU argued Mr. Gulerya did not have any concern with their representation of his grievance until the second lawyer created it in August. He suggested Mr. Gulerya's real concern was still with the City of Calgary. This complaint was merely another option to attempt to remedy his dismissal.

He further argued the circumstance or action giving rise to the complaint noted in s. 15(1.1) was not the action of becoming aware of s. 151. It had to be the decision of the ATU on March 8th not to proceed with his grievance. He urged us to find the complaint untimely.

Finally, counsel argued the ATU should not bear the risk of poor advice given to the complainant by his legal counsel. In support of this last position, the ATU provided several cases touching on the impact of the complainant having retained counsel during the process.

In our view, what triggers the 90 day time limit is awareness of the events said to be a violation of the *Code*, not awareness that the *Code* attaches legal consequences to those events. The interpretation suggested by Mr. Gulerya's counsel would negate the purpose of s. 15(1.1) as it could trigger a complaint from the time the complainant became aware of the possibility of the complaint process under the *Code*. Conceivably, not only months but years could pass in the meantime. We do not find that the Legislature contemplated such an open-ended result when it enacted s. 15(1.1).

The section focuses on the actions giving rise to a complaint. In cases such as this, the "action" is typically the union's communication to the member informing the member that the union will no longer proceed with the grievance. In some cases, the union does not clearly advise the member of its decision and the date, for purposes of the 90 day period, then revolves around when the complainant became aware or ought to have been aware by ordinary diligence of the union's decision not to proceed.

We find that Mr. Gulerya knew on March 8, 1994 that the ATU would not be proceeding with his grievance. He also knew all the relevant facts alleged in his complaint. He provided this information to his counsel in late March.

Accordingly, we find the time limits in this case began to run from March 8, 1994. The 90 days expire around June 8, 1994. The complaint was filed September 8, 1994. That makes Mr. Gulerya's complaint subject to the Board's discretion under s. 15(1.1).

III. Discretion

We turn then to the question of whether we should exercise our discretion to refuse to accept the complaint. The purpose of time lines such as this is to encourage the speedy resolution of disputes. Festering disputes can detrimentally impact the labour-management relationship. In addition, as time passes, evidence can become less available or reliable given fading recollections, unavailability of witnesses and the potential for disposal of documents. This affects the fairness of future hearings should the complaint succeed.

The wording of s. 15(1.1) gives the Board a discretion "to refuse to accept a complaint." The statutes in New Brunswick, Nova Scotia and the federal sector impose a 90 day limit on the filing of complaints.

Manitoba's statute contains a provision similar to s. 15(1.1) granting the Board a discretion to refuse to accept a complaint. Other labour boards, such as Ontario, deal with delay issues by analogy to the doctrine of laches.

In determining whether to exercise its discretion in a case involving an employee's complaint, the Board must balance the interests of the employee on the one hand and those of the union and the employer on the other. In the case involving an employee's complaint, the discretion should not be exercised unless the Board is satisfied that the union or employer would be prejudiced if the complaint proceeds on its merits. While the Board considers a number of factors when balancing the interests in a given case, each case is evaluated on its own merits.

A number of factors may be considered in assessing an employee's interests, including the nature of the grievance, the reasons for the delay and the remedy claimed in the complaint. As well, the Board takes into account when the complainant became aware of the alleged violation, the experience or sophistication of the complainant in labour relations matters, and whether the complainant has retained counsel. The Board also considers the actions of the employee during the delay period - has the employee continued to pursue the matter through other avenues or has the employee done nothing in the meantime?

On the other side, the Board considers the matters identifying prejudice to the employer or union. These include the amount of delay and the impact of the delay on the potential evidence. Has the passage of time impaired the union or employer's ability to bring key witnesses to testify, to produce documents or to otherwise have a fair hearing? The Board is also aware that the union and the employer seek closure of the matter and some finality in the resolution of disputes. In some cases, the passage of time alone may create a presumption of prejudice. Finally, we consider any other circumstances creating prejudice.

In this case, several relevant factors are readily determined as the parties did not dispute them. First, the delay is approximately three months after the stipulated 90 days. While six months is a significant time, we are not prepared to characterize it as extreme delay, especially where there are mitigating circumstances. Second, there was no suggestion that evidence will be difficult to produce or witnesses are no longer available either on the complaint or the merits of the grievance. Third, the grievance involves a dismissal of a long term employee. Fourth, the complainant seeks a Board order which, in part, would waive the time limits in the collective agreement and direct the grievance to arbitration.

We characterize Mr. Gulerya as inexperienced in labour relations matters, having had only limited participation in union matters. We are satisfied Mr. Gulerya first became aware of s. 151 and the possibility of filing a complaint against the ATU in August, 1994 when he sought a second legal opinion on his dismissal. We are also satisfied that until then Mr. Gulerya had not expressed any discontent with the ATU's handling of his grievance, however he did not stop pursuing his remedies against the City of Calgary.

These factors convince us not to exercise our discretion to refuse Mr. Gulerya's complaint. Neither the ATU nor the Employer raised any other matters which would identify any prejudice if the Board continues to process the complaint. There is no prejudice in a legal sense in just being exposed to a complaint or grievance that would otherwise be untimely. Nor is there prejudice in potential damages. Delay attributable to the complainant or the legal advice received can be accounted for either by the arbitrator or by the Board in mitigation of compensation payable if the grievance ultimately is heard and succeeds.

Mr. Gulerya gave two reasons for not filing his complaint sooner. First, he received no advice from the first lawyer except to sue the City, and second, he was not aware of s. 151 of the *Code* until he met with the second lawyer. Tied in with these reasons was his need to obtain the legal file containing his documents before he met with the second lawyer and his need to therefore raise the funds to pay his first legal bill before obtaining the file.

Mr. Gulerya said he relied upon the advice given to him by the counsel he retained. Here is an individual who may have been the victim of incomplete legal advice in an area with which he had no familiarity. Should he be held responsible for his counsel's advice? The ATU says he should, or alternatively, that they should not bear the risk of Mr. Gulerya obtaining incomplete legal advice. We disagree. We do not consider that simply consulting a lawyer should disentitle an employee from filing a duty of fair representation complaint after the time limit. It seems unfair to suggest that an employee who has received and relied upon incomplete legal advice should, as a matter of course, have to resort to other legal avenues when accepting the late complaint causes no obvious prejudice to the union or the employer.

The threshold level for an individual employee to access the Board's process should not be too restrictive. In our view, it does not advance the principles of labour relations to deny an employee access to the Board in the absence of any allegation or evidence of prejudice to the other parties. The facts of this case do not reveal prejudice nor do they convince us that finality of the issue is preferable in the circumstances. We are not prepared to foreclose the process and remedies available under the *Code*.

Accordingly, we dismiss the objection and direct that Mr. Gulerya's complaint proceed. Given the complaint involves a dismissal grievance, we direct the matter be set to a hearing within 45 days of this decision.