

Federal Court of Appeal



Cour d'appel fédérale

Date: 20230515

Docket: A-132-22

Citation: 2023 FCA 104

**CORAM: RIVOALEN J.A.
ROUSSEL J.A.
GOYETTE J.A.**

BETWEEN:

**NADINE PERRIN, AND OTHER MEMBERS
OF THE AIR CANADA COMPONENT OF
CANADIAN UNION OF PUBLIC
EMPLOYEES**

Applicants

and

**CANADIAN UNION OF PUBLIC
EMPLOYEES AND AIR CANADA**

Respondents

Heard by online video conference hosted by the Registry on May 15, 2023.
Judgment delivered from the Bench at Ottawa, Ontario, on May 15, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

ROUSSEL J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on May 15, 2023).

ROUSSEL J.A.

[1] The applicants seek judicial review of a decision of the Canada Industrial Relations Board dated May 20, 2022, dismissing their complaint against the Canadian Union of Public

Employees (Union), for breach of the duty of fair representation under section 37 of the *Canada Labour Code*, R.S.C., 1985, c. L-2.

[2] The applicants alleged in their complaint that the Union breached its duty by refusing to file a policy grievance challenging Air Canada's mandatory vaccination policy. The applicants are a group of flight attendants, pursers and service directors employed with Air Canada. Ms. Perrin was mandated to bring the complaint on their behalf.

[3] In its decision, the Board found that since the factual considerations and legal arguments raised in the complaint were substantially similar to those reviewed and addressed in its recently issued decision *Ingrid Watson v. Canadian Union of Public Employees*, 2022 CIRB 1002 [*Watson*], it could rely on its analysis and rationale. In *Watson*, it had concluded that the Union had not breached its duty of fair representation when it refused to file a policy grievance with respect to Air Canada's mandatory vaccination policy. The Board's decision has since been upheld by this Court in *Watson v. Canadian Union of Public Employees*, 2023 FCA 48 [*Watson FCA*].

[4] In their application to this Court, the applicants take issue with the Board referring to *Watson* as the basis for dismissing their complaint. They argue that their complaint differed from that of Ms. Watson as it was not only directed at the Union's refusal to pursue the policy grievance, but also at the Union's failure to file grievances against the disciplinary measures from the application of said policy. In omitting to address this argument, they say that the Board failed to engage with one of their arguments.

[5] The applicants agree that the Board's decision is reviewable on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 49 [*Vavilov*]; *Watson FCA* at para. 16; *Paris c. Syndicat des employés de Transports R.M.T. (Unifor-Québec)*, 2022 CAF 173 at para. 2 [*Paris*]).

[6] In its decision, the Board found that it could rely on its analysis in *Watson* because the applicants were in the same bargaining unit as Ms. Watson and represented by the same Union. The issues they raised with the Union regarding Air Canada's mandatory vaccination policy were essentially the same as those the Board had considered and addressed in *Watson*, and the Union's conduct and communications in this case were the same as those examined in Ms. Watson's complaint. The Board had also reviewed Ms. Perrin's communications to the Union in the *Watson* matter. The Board considered the allegations of the applicants but ultimately found that they had brought forward no new fact or argument that would cause it to come to a different conclusion than that reached in *Watson*.

[7] In our view, the distinction raised by the applicants regarding the Union's failure to contest the disciplinary consequences imposed on those refusing to be vaccinated is immaterial. The Board understood that disciplinary measures for non-compliance included economic consequences. It was also aware of the Union's position that it would review all disciplinary measures on a case-by-case basis and that an individual grievance had indeed been filed for Ms. Watson.

[8] We are also satisfied that the Board considered all of the other elements raised by counsel for the applicants at this hearing.

[9] In their written submissions, the applicants criticize the Union's failure to disclose to its members the second legal opinion obtained on the likelihood of success in challenging the vaccination policy through a grievance. They argue that the first opinion was obtained at a time when Air Canada had no concrete policy in place and was therefore speculative. They contend that the Board failed to consider this and therefore misinterpreted the facts and the law when it determined that the Union had complied with its obligation under section 37 of the Code by obtaining legal advice. They also submit that the Board failed to look at the Union's alleged failure to fairly represent them, namely, by ignoring them, refusing to answer their concerns, and sharing false information.

[10] The applicants have not identified any legal basis for the Union being required to provide them with copies of the second legal opinion nor have they demonstrated that the alleged deficiencies in legal advice would render the Board's findings unreasonable. This argument was addressed and dismissed in *Watson FCA* (at paras. 37-41). Moreover, contrary to the applicants' assertion, the Board did examine the Union's conduct. It found that the Union had communicated regularly with its membership regarding the implementation of the policy, and that it had turned its mind to the issues raised by the members, including those who disapproved of the policy for various reasons. The Board was not required to refer to every document in the record, to respond to every argument or to make an explicit finding on each element leading to its conclusion (*Vavilov* at paras. 91, 128; *Newfoundland and Labrador Nurses' Union v. Newfoundland and*

Labrador (Treasury Board), 2011 SCC 62 at para. 16). There is no basis for concluding that the Board ignored evidence or that it failed to grapple with any of the issues raised by the applicants.

[11] When the applicants asked the Board to consolidate their complaint with that of Ms. Watson, they recognized that their complaints were similar. In our view, they have not demonstrated that the Board's decision to apply the analysis and rationale in *Watson* was unreasonable. Having examined the record and the Board's reasons, we consider that the Board's decision is based on an internally coherent and rational chain of analysis that was justified in relation to the facts and law that constrained it (*Vavilov* at para. 85).

[12] Finally, we cannot agree with the applicants' argument that the Board breached procedural fairness in failing to grant them an oral hearing. They claim that the Board never considered the circumstances set out in their complaint justifying an oral hearing, namely that the complaint raised issues "of possible bad faith and personal motives behind the failure to act" and that the "credibility of the witnesses" would be an important part of the Board's evaluation.

[13] This Court has repeatedly held that the Board is not required to hold an oral hearing on every occasion that one is requested (*Paris* at para. 5; *Ducharme c. Air Transat A.T. Inc.*, 2021 CAF 34 at paras. 19, 21; *Wsáneć School Board v. British Columbia*, 2017 FCA 210 at para. 33; *Madrigga v. Teamsters Canada Rail Conference*, 2016 FCA 151 at paras. 26-28). Likewise, issues of credibility do not necessarily amount to exceptional circumstances requiring the Board to hold an oral hearing (*Watson FCA* at para. 51; *Paris* at para. 5). The Board's decision under

section 16.1 of the Code is entitled to considerable deference from this Court (*Watson FCA* at para 50; *Paris* at para. 5).

[14] When the Court reviews issues of procedural fairness, its role is to determine whether the proceedings were fair in all of the circumstances (*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras. 54-56). Here, the applicants filed a detailed complaint with extensive documentation totalling several hundred pages. They have not demonstrated how the failure to hold an oral hearing prevented them from presenting their complaint fully and fairly.

[15] During oral submissions, the applicants raised an additional breach of procedural fairness. They submit that the Board's process was unfair as they were not provided an opportunity to reply as was afforded to Ms. Watson. Notwithstanding that this is a new argument, we find that it has no merit. Based on the record and the responses provided by the applicants' counsel at this hearing, we are satisfied that there was no breach of procedural fairness.

[16] Despite counsel's able submissions, we will dismiss the application with costs.

“Sylvie E. Roussel”

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-132-22

STYLE OF CAUSE: NADINE PERRIN, AND OTHER
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EMPLOYEES AND AIR
CANADA

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ROUSSEL J.A.
GOYETTE J.A.

DELIVERED FROM THE BENCH BY: ROUSSEL J.A.

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