



August 25, 2004

Directed to: Gilles J. Caron, The City of Edmonton Transportation and Streets - Rick Millican, The City of Edmonton Law Branch - Bryan Sarabin, Canadian Union of Public Employees - Linda Huebscher, Canadian Union of Public Employees, Local 30 - Richard Colwell

RE: A Duty of Fair Representation complaint under Section 153(1) of the Labour Relations Code brought by Gilles Caron affecting Canadian Union of Public Employees, Local 30, Richard Colwell and The City of Edmonton - Board File No. GE-04461

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[1] Pursuant to a complaint dated March 15, 2004, Giles Caron alleges the Canadian Union of Public Employees, Local 30 (the "Union") and Richard Colwell, one of the Union's business agents, breached the duty of fair representation owed to him under section 153 of the *Code*, by failing to properly represent him in relation to his grievance against The City of Edmonton (the "City") over its decision not to recommend him for seasonal recall in 2004.

[2] After responses to the complaint were received from the Union, on its own behalf and on behalf of Mr. Colwell, and from the City, and after Mr. Caron replied to those responses, the materials relating to the complaint were reviewed by a panel of the Board (Lucas, Basken, Kondro). The purpose of this review was to determine whether the case had sufficient merit to send it to a hearing or whether it should be summarily dismissed under section 16(4)(e) of the *Code*. This letter sets out our decision to summarily dismiss the complaint as being without merit.

Background

[3] Mr. Caron began employment with the City in 1996 as a temporary labourer and was recalled for summer employment in each year up to and including 2003, eventually attaining the status of a provisional employee. During most of this period of employment he was classified as a Labourer/Truck Driver III and worked in various areas of the Transportation and Streets Department.

[4] On or about November 7, 2003, Mr. Caron received an employee evaluation signed by his foreman and supervisor that indicated he would not be eligible for recall in 2004. The document outlines the reasons for this decision and, in the main, they relate to his inability to get along with his co-workers. The collective agreement provides that the recall of a provisional employee is subject to a satisfactory performance evaluation. It also provides that disputes arising from a failure to recall are to be processed in compliance with the dispute resolution process set out in the agreement with the final step being the formal review stage. The decision reached at that stage is final and binding on the parties.

[5] On November 10, 2003, the Union, on behalf of Mr. Caron, initiated the dispute resolution process relating to the City's decision not to recall Mr. Caron. When the first step in that process did not result in a satisfactory resolution of the matter the Union initiated a formal grievance to move the dispute to the formal

review stage. The decision reached at that stage, set out in the City's letter of February 23, 2004, concludes by upholding the previous decision not to recall Mr. Caron.

[6] This formal review stage letter decision sets out a summary of the reasons why management of the Transportation and Streets Department had decided not to recall him, including mention of a two day suspension in June 2003, a three day suspension in August 2003, his poor relationships with co-workers outlined in the last performance evaluation, and similar poor evaluations he received in prior years. As well, it outlines the substance of a number of statements made by the Union on behalf of Mr. Caron during the course of the formal review and, in addition, summarizes a number of comments personally made by Mr. Caron during the course of the proceedings.

[7] In his complaint of March 15th, Mr. Caron suggests the representations of the Union and Mr. Colwell were not fair, they were negligent in failing to elicit facts at the formal review meeting, they failed to have his steward at the meeting as had been requested by Mr. Caron, and they failed to explore with the City at this meeting other resolutions of his dispute as contemplated by the collective agreement. He also suggests the Union and Mr. Colwell, and many of his co-workers, discriminate against him because of his French-Canadian background.

Decision

[8] The difficulty we have with Mr. Caron's complaint is that most of his allegations are not supported by other documents on the file. In particular, the contents of the City's letter decision of February 23, 2004, indicates that many of the matters over which he now complains were raised and discussed at the meeting and that Mr. Caron himself was given the opportunity to raise any matters he thought would be of assistance. For example, some of the factual matters elicited at the meeting over which there was some doubt as to their accuracy were questioned by the Union but many relevant facts had been previously documented by the City in its dealings with Mr. Caron or had been accepted during the processing of prior disputes the Union had raised on his behalf. The letter decision also refers to alternative resolutions of the dispute that were raised by the Union but, obviously, were rejected. As for the allegation of the Union's refusal to have Mr. Caron's steward present at the meeting, the Union's grievance letter of December 4, 2003, asks that the steward be present at the meeting and requests the City to make the necessary arrangements. However, it appears that the steward later advised the Union he did not want to be involved and that he would not be a favourable witness for Mr. Caron.

Finally, with respect to his allegation the Union and Mr. Colwell discriminated against him, no factual basis is given in support of such a suggestion.

[9] The duty of fair representation described in section 153 relates to an employee's rights under the collective agreement. The principal features of this duty are described in the Board's Information Bulletin #18, which includes the following statement of the principal features of the duty by the Supreme Court of Canada:

- The exclusive power conferred on a union to act as spokesperson for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
- When...the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.

- This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and for the union on the other.
- The union's discretion must not be arbitrary, capricious, discriminatory or wrongful.
- The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility to the employee.

[10] In this case, the collective agreement contains restrictions on the processing of a complaint relating to the City's failure to recall a provisional employee. Such a complaint can only be taken through the consultation stage and the formal review stage of the dispute resolution process and not further. Accordingly this type of dispute cannot be submitted to arbitration. Here, the Union and Mr. Colwell responded promptly to Mr. Caron's request that the dispute resolution process be initiated with respect to City's decision not to recall him and with respect to the employee evaluation of November 7th. The letter dated December 4, 2003, issued by Mr. Caron's supervisor at the conclusion of the consultation stage of the dispute resolution process, as well as the letter of February 23rd issued upon the conclusion of the formal review stage, both indicate the Union raised all relevant issues in connection with Mr. Caron's dispute and grievance in its effort to cause the City to change its decision not to recall him. He himself had the opportunity at the formal review stage meeting to raise anything else he felt should be taken into account by the City that the Union may have overlooked or that he felt needed greater emphasis.

[11] The Union had assisted Mr. Caron with respect to the discipline imposed upon him by the City in June and August, 2003 and so was familiar with the incidents that had given rise to that discipline. When the problem over the evaluation of November 7th arose it had a number of meetings with him both before and during the dispute resolution meetings and also met with other employees who Mr. Caron thought might be favourable witnesses for him. In none of what has been presented to us do we find any failure on the part of the Union or Mr. Colwell to represent Mr. Caron in a fair and genuine manner or that would support a suggestion they were negligent or acted in bad faith in that representation or were in any sense hostile toward him.

[12] Accordingly, the duty of fair representation complaint against the Union and Mr. Colwell is dismissed for lack of merit.

Gerald A. Lucas, Q.C., Vice-Chair