



Court File No. A-45-22

FEDERAL COURT OF APPEAL

INGRID WATSON

Applicant

and

**CANADIAN UNION OF PUBLIC EMPLOYEES, AIR CANADA
COMPONENT and AIR CANADA**

Respondents

**NOTICE OF APPLICATION FOR JUDICIAL REVIEW UNDER sections 18.1
and 28 of the *Federal Courts Act*, RSC 1985, c F-7, and section 22(1) of the
Canada Labour Code, RSC 1985, c L-2**

TO THE RESPONDENTS:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court, 635 8 Avenue SW, Calgary, Alberta.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-

represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

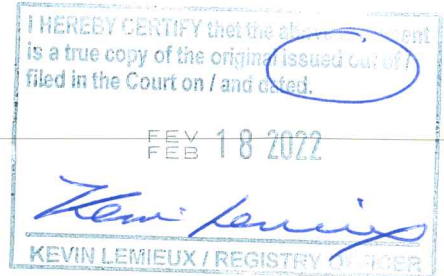
Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

(Date): Feb 18 2022

Issued by: ORIGINAL SIGNED BY
KEVIN LEMIEUX
NÉL'ORIGINAL
(Registry Office)

Address of local office: Canadian Occidental Tower
3rd Floor, 635 8th Avenue SW
Calgary, AB T2P 3M3



- TO: Canadian Union of Public Employees, Air Canada Component
- AND TO: Air Canada
- AND TO: Canada Industrial Relations Board
- AND TO: Attorney General of Canada

APPLICATION

This is an application for judicial review in respect of a decision of the Canada Industrial Relations Board issued on January 19, 2022 in the matter of the *Canada Labour Code (Part I - Industrial Relations)* and a complaint of unfair labour practice filed pursuant to section 97(1) thereof by Ingrid Watson, complainant, alleging violation of section 37 of the *Code* by Canadian Union of Public Employees, respondent; Air Canada, employer (CIRB File 035187-C; **CIRB Decision**).

The applicant makes application for:

1. Pursuant to Section 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7 (**FCA**), an Order which:
 - a. Declares the CIRB Decision invalid and finds that the Canadian Union of Public Employees, Air Canada Component (**CUPE**) failed to meet its duty of fair representation to the Applicant, Ingrid Watson (**Ms. Watson**);
 - b. In the alternative, sets aside the CIRB Decision and remits the Complaint back to the CIRB for determination, directing:
 - i. CIRB to order CUPE to forthwith produce all relevant and material records, including all materials and information provided to counsel in obtaining the Legal Opinions (as defined below);
 - ii. That an oral hearing take place before the CIRB including cross-examination of witnesses following completion of (i) above;
 - c. Awards Costs of this Application; and
 - d. Provides any further or other remedy that this Honourable Court sees fit.

The grounds for the application are:

Interested Parties

2. The Applicant, Ms. Watson is a member of the bargaining unit represented by CUPE and an Employee and Cabin Personnel of Air Canada Mainline (**Air Canada**).
3. A collective bargaining agreement is in force as between CUPE and Air Canada, dated April 1, 2015 (**CBA**). CUPE represents all members of the bargaining unit (**Members**) subject to the CBA. CUPE is Ms. Watson's exclusive, union representative, and responsible to her to bargain in good faith with Air Canada regarding, among other things, reasonable working conditions.
4. The CIRB is a statutory body, established by section 9 of the *Canada Labour Code*, RSC 1985, c L-2 (the **CLC**). Among other things, the CIRB's purpose is to hear and adjudicate disputes between unions and their members.

The Complaint

5. On November 1, 2021, Ms. Watson submitted a complaint (**Complaint**) to the CIRB pursuant to section 37 of the *CLC* on the basis that CUPE had violated its duty of fair representation (the **Duty**).
6. The basis for the Complaint was as follows:
 - a. Ms. Watson commenced employment with Air Canada, and joined CUPE membership, in February 1999. In 2013, Ms. Watson was seconded to a position with the CUPE as Chair to the Preferential Bidding System. She

has generally not worked, or taken on duties, as a flight attendant since that time. Since 2013, Ms. Watson has mainly worked from home.

- b. On August 25, 2021, Air Canada announced that it would implement a mandatory vaccination policy which would apply to all employees working for Air Canada, including the employees represented by CUPE and under the CBA. The policy was described in the news release, published by Air Canada, as follows:

Air Canada today said it has introduced a new health and safety policy...that makes it mandatory for all employees of the airline to be fully vaccinated against COVID-19 and to report their vaccination status as of October 30, 2021. [...]

Under the mandatory vaccination policy, testing will not be offered as an alternative... failure to be fully vaccinated by October 30, 2021 will have consequences up to and including unpaid leave or termination...

(the AC Press Release Policy).

- c. Pursuant to the AC Press Release Policy, employees were required to report their vaccination status by September 8, 2021.
- d. On September 9, 2021, employees who had not complied with the AC Press Release Policy were informed that they would be placed on unpaid leave for six months and would face termination of their employment.
- e. On or around September 10, 2021, Air Canada published its COVID-19 Vaccination Policy (**the Vaccine Policy**).

- f. Ms. Watson was unable to comply with the Vaccine Policy for numerous personal reasons. Ms. Watson also had and continues to have ongoing natural antibodies and resulting immunity from a prior COVID-19 infection in 2020.
 - g. Following the announcement of AC Press Release Policy and subsequently the Vaccine Policy, a group of employees (including Ms. Watson) wrote to CUPE and raised concerns with the Vaccine Policy and asked CUPE to act in response to the Vaccine Policy in order to protect their jobs and livelihoods.
 - h. Ms. Watson (through counsel) demanded that CUPE initiate a policy grievance pursuant to the CBA. CUPE responded that its position was that its Duty was met. CUPE did not communicate any details to Ms. Watson or other Members about anything done before or after the imposition of the Vaccine Policy.
7. Following the refusal by CUPE to initiate a policy grievance or provide any details to Ms. Watson or other Members, Ms. Watson filed the Complaint.
8. By way of the Complaint, Ms. Watson sought an order from the CIRB for, among other things:
- a. A declaration that CUPE was in breach of its Duty under section 37 of the Code;
 - b. A direction to CUPE to pursue a grievance of the Vaccine Policy; and
 - c. Directing that CUPE pay for the legal counsel chosen by Ms. Watson to provide a legal opinion on the Vaccine Policy and grieve or otherwise challenge the Vaccine Policy.

9. Ms. Watson requested an oral hearing respecting the Complaint.

10. On December 3, 2021, CUPE filed its response to the Complaint (**CUPE Response**). The CUPE Response attached:
 - a. A preliminary legal opinion dated August 19, 2021, from Michael Church of the law firm Caley Wray LLP regarding “whether the Government of Canada could impose a vaccine mandate on flight attendants working under collective agreements with Air Canada, Air Canada Rouge or Jazz.” (**Church Legal Opinion**); and
 - b. A legal opinion from Adrienne Lei of Dewart Gleason LLP dated August 31, 2021, which agreed with the Church Legal Opinion (together with the Church Legal Opinion, the **Legal Opinions**).

11. On December 10, 2021, Air Canada filed its response to the Complaint (**Air Canada Response**).

12. On December 20, 2021, Ms. Watson filed her reply to the CUPE Response and Air Canada Response (**Watson Reply**), through which she reiterated the relief sought by way of the Complaint and further sought:
 - a. Production of the materials and information provided to counsel in obtaining the Legal Opinions;
 - b. Appointment of a case management board member to ensure the parties were prepared for a hearing considering anticipated significant document disclosure.

The CIRB Decision

13. On January 19, 2022, the CIRB issued the CIRB Decision based on initial written submissions alone, without conducting an oral hearing and without ordering further production as requested by Ms. Watson.

Grounds of review

14. In making the CIRB Decision, the CIRB acted unreasonably in exercising its powers granted pursuant to the *CLC*.

15. Specifically, the CIRB:

a. Unreasonably refused to exercise its jurisdiction by:

i. Giving too much deference to CUPE when it failed to critically analyze the underlying decision of CUPE and the Legal Opinions in relation to the Vaccine Policy and, in particular, the timeline of CUPE's purported review of the Air Canada Policy and the rejection of Ms. Watson's concerns, and instead "rubber stamped" the decision;

ii. Only applying the standard of bad faith to the arguments raised by Ms. Watson that the failure of CUPE to respond was a breach, rather than considering whether it was also pre-determined and/or arbitrary.

b. Unreasonably failed to observe principles of natural justice and procedural fairness by:

i. Denying Ms. Watson's request for production of the materials

provided by CUPE to the lawyers who issued the Legal Opinions, while at the same time giving deference to CUPE's decision in relation to the Vaccine Policy which was based on those Legal Opinions;

- ii. Denying Ms. Watson's request for an Oral Hearing, which would have provided Ms. Watson with an opportunity to challenge by cross-examination the evidence relied upon by CUPE.

16. Furthermore, the CIRB Decision was unreasonable due to multiple errors of law, including:

- a. Concluding that CUPE did not have a duty to respond to inquiries from Members who were disproportionately affected by the Vaccine Policy when failing to do so prejudiced those Members;
- b. Concluding that CUPE's decision not to file a policy grievance in relation to the Vaccine Policy was not arbitrary, discriminatory or in bad faith when the decision:
 - i. Was made prior to the Vaccine Policy being released;
 - ii. Was based on the Legal Opinions; and
 - iii. Was purportedly made during a brief meeting in which it was one of a number of agenda items.
- c. Applying the principle of deference in such a way as to defer to CUPE to the point that the CIRB accepted the findings of CUPE without first testing those findings and the plausibility of the purported decision timeline or

providing Ms. Watson an opportunity to do so.

The CIRB refused to exercise its jurisdiction by “rubber stamping” the CUPE decision

17. In making the CIRB Decision, the CIRB failed to engage in the required analysis of CUPE conduct.
18. By erroneously relying upon legal principles providing for deference to a union’s decision-making process, the CIRB abdicated its obligation and jurisdiction to review the conduct of CUPE to determine if it was arbitrary, discriminatory, or done in bad faith. Even when required to give deference, courts and tribunals cannot shield a decision maker or union from accountability. The CIRB was required to engage in a robust review of CUPE’s conduct.
19. The CIRB Decision has none of the hallmarks evidencing a robust review of CUPE’s conduct that should have been undertaken to determine if CUPE met the Duty. The CIRB Decision is unreasonable in this regard in that it:
 - a. Fails to assess any considerations relied upon or alternatively ignored by CUPE in its Decision;
 - b. Summarily concludes that, because CUPE may not have had a duty to consult its Members broadly, CIRB is not required to review CUPE’s failure to respond to specific inquiries from disproportionately affected Members like Ms. Watson who were likely to be prejudiced as a result of CUPE’s failure to communicate; and
 - c. Abdicates the review of the Legal Opinions and circumstances surrounding obtaining each, despite their superficiality and the fact that the CIRB Decision notes the “complex issues at play”.

The CIRB failed to observe principles of natural justice and procedural fairness in respect of the Legal Opinions

20. As part of the Complaint and with further specificity by way of the Watson Reply, Ms. Watson requested production of the materials and information provided to counsel in obtaining the Legal Opinions.
21. CUPE did not object to production related to the Legal Opinions on the basis of privilege or otherwise. In any event, even if CUPE had objected, given its reliance on the Legal Opinions, privilege over the Legal Opinions was waived. Despite this fact, the CIRB did not consider or respond to Ms. Watson's request for further production, thereby denying Ms. Watson's right to make arguments before the CIRB respecting the validity of the Legal Opinions.
22. The CIRB's refusal to order further production was unreasonable and constituted a denial of procedural fairness given the reliance by CUPE on the Legal Opinions as a basis for its unwillingness to file a policy grievance relating to the Vaccine Policy and the significant concerns raised by Ms. Watson in relation to the Legal Opinions.
23. Specifically, the Legal Opinions:
 - a. Were issued following the AC Press Release Policy being issued and before the written Vaccine Policy was in effect and before the legislative authorities relied upon were drafted or presented;
 - b. Were directed towards the wrong issues; and
 - c. Based on the evidence provided by CUPE to the CIRB were never re-assessed or re-evaluated after the Vaccine Policy was released or the relevant laws were enacted.

The CIRB erred by concluding that CUPE did not have a duty to respond

24. The CIRB Decision also erroneously concluded that CUPE could ignore specific inquiries from disproportionately affected Members because it did not have an obligation to consult its Members broadly.
25. Given the severity of the impact of the Vaccine Policy on a significant subset of the Members, it was unreasonable for CUPE to ignore specific inquiries from those affected Members. The failure to respond or engage as outlined in the Complaint is distinct from consulting the Members broadly.
26. The failure to respond or engage also resulted in significant prejudice to the affected Members as:
 - a. They were denied the opportunity to provide further information to CUPE as it engaged in its decision-making process, or otherwise address factors CUPE was considering while deliberating; and
 - b. They faced loss of income and employment based on a decision of CUPE that did not address or likely even consider their specific concerns.

Request for Expedited Proceedings

27. Given the ongoing impact of the CIRB Decision on the Members, the Applicant hereby requests that this Honourable Court consider this Application on an expedited basis.

Request for Certified Record of Proceedings

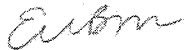
28. The applicant requests the Canada Industrial Relations Board to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Canada Industrial Relations Board to the applicant and to the Registry:

- a. Certified Record of the Proceedings in CIRB File 035187-C.

This application will be supported by the following material:

29. Affidavit of Ingrid Watson, to be filed with the Court.
30. The Certified Record of Proceedings, to be filed with the Court.
31. Such further and other materials as counsel for the Applicant may advise and this Honourable Court may permit.

February 17, 2022



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